

**COMMITTEE ON RULES OF
PRACTICE AND PROCEDURE**

**Washington, DC
June 25, 2019**

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**JUDICIAL CONFERENCE OF THE UNITED STATES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JUNE 25, 2019**

AGENDA

1. Opening Business

- A. Welcome and Opening Remarks – Judge David G. Campbell, Chair
- B. Status of Rules Amendments (p. 27)
 - Report on rules adopted by the Supreme Court in April 2019, and transmitted to Congress (potential effective date December 1, 2019)
- C. **ACTION:** The Committee will be asked to approve the minutes of the January 3, 2019 Committee meeting (p. 55)

2. Report of the Advisory Committee on Appellate Rules – Judge Michael A. Chagares, Chair (p. 77)

- A. **ACTION:** The Committee will be asked to recommend the following to the Judicial Conference for approval:
 - Proposed amendment to Rule 35 (En Banc Determination)
 - Proposed amendment to Rule 40 (Petition for Panel Rehearing)
- B. **ACTION:** The Committee will be asked to recommend the following be published for public comment:
 - Proposed amendment to Rule 3 (Appeal as of Right – How Taken)
 - Proposed amendment to Rule 42(b) (Voluntary Dismissal)
- C. Information items
 - Report on the comprehensive review and possible additional amendments to Rules 35 (En Banc Determination) and 40 (Petition for Panel Rehearing)
 - Rule 4 (Appeal as of Right – When Taken) and the *Hamer* decision
 - Departed judges and the *Yovino* decision
 - Privacy and the Railroad Retirement Act

3. **Report of the Advisory Committee on Bankruptcy Rules** – Judge Dennis Dow, Chair (p. 147)

A. **ACTION:** The Committee will be asked to recommend the following to the Judicial Conference for approval:

- Proposed amendments to Rules 2002 (Notices), 2004 (Examination), 2005 (Apprehension and Removal of Debtor to Attendance for Examination), 8012 (Corporate Disclosure Statements), 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), and 8021 (Costs)
- Proposed revision of Official Form 122A-1 (Chapter 7 Statement of Your Current Monthly Income).

B. **ACTION:** The Committee will be asked to recommend the following be published for public comment:

- Proposed amendments to Rules 3007 (Objections to Claims), 7007.1 (Corporate Ownership Statement), and 9036 (Notice and Service by Electronic Transmission).

C. Information items

- Bankruptcy Rules Restyling
- Director's Form 1340, Application for Unpaid Funds

4. **Report of the Advisory Committee on Civil Rules** – Judge John D. Bates, Chair (p. 223)

A. **ACTION:** The Committee will be asked to recommend the following to the Judicial Conference for approval:

- Proposed amendment to Rule 30(b)(6) (Deposition of an Organization)

B. **ACTION:** The Committee will be asked to recommend the following proposed amendments be published for public comment:

- Proposed amendment to Rule 7.1 (Disclosure Statement)

C. Information items

- Ongoing projects
 - Report on the work of the Subcommittee on Multidistrict Litigation
 - Report on the work of the Subcommittee on Social Security Disability Review Actions

- Update on items considered and either retained for further study or removed from the agenda
 - Appointment of joint Civil-Appellate subcommittee to consider the issue of appeal finality after consolidation and *Hall v. Hall*, 138 S. Ct. 1118 (2018)
 - Consideration of a suggestion that Rule 5.2(a) be amended to include actions for benefits under the Railroad Retirement Act
 - Consideration of ambiguity in Rule 4(c)(3) regarding service of process in *in forma pauperis* actions
 - Consideration of the Rule 73(b)(1) procedure for consenting to trial before a magistrate judge, in light of new information about CM/ECF systems

5. Report of the Advisory Committee on Criminal Rules – Judge Donald W. Molloy, Chair (p. 395)

Information items

- Rule 16 (Discovery and Inspection) – report on mini-conference regarding expert disclosures
- Update on items considered and either retained for further study or removed from the agenda
 - Consideration of a suggestion a suggestion to amend Rule 43(a) (Defendant’s Presence – When Required)
 - Consideration of a suggestion raising questions about Rule 40 (Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District)
 - Update on status of measures to protect cooperators

6. Report of the Advisory Committee on Evidence Rules – Judge Debra Ann Livingston, Chair (p. 423)

A. **ACTION:** The Committee will be asked to recommend the following to the Judicial Conference for approval:

- Proposed amendment to Rule 404(b) (Character Evidence; Other Crimes, Wrongs or Acts)

B. Information items

- Rule 702 (Testimony by Expert Witness) – report on status of potential amendments and exploration of ways to address issues with forensic expert evidence that do not involve rule amendments

- Rule 106 (Remainder of or Related Writings or Recorded Statements) – report on status of potential amendments
- Rule 615 (Excluding Witnesses) – report on continued study of a potential rule amendment

7. Other Committee Business

A. Electronic Filing Deadline (p. 469)

- The Committee will discuss a suggestion submitted by Judge Chagares that the Advisory Committees study whether the rules should be amended to roll back the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk’s office closes in the respective court’s time zone.

B. Legislative Update (p. 475)

C. Judiciary Strategic Planning (p. 481)

- **ACTION:** The Committee will be asked to discuss the extent to which the Committee’s strategic initiatives have achieved their desired outcomes and to delegate to the Chair the responsibility to report on the same to the Judiciary Planning Coordinator.
- **ACTION:** The Committee will provide feedback (if any) on the proposed approach for the update of the *Strategic Plan for the Federal Judiciary* that is to take place in 2020.

D. Public Input (p. 495)

- The Committee will discuss revised draft principles concerning public input during the Rules Enabling Act process.

E. Next Meeting – January 28, 2020 (Phoenix, AZ)

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

Chair, Standing Committee	<p>Honorable David G. Campbell United States District Court Sandra Day O'Connor United States Courthouse 401 West Washington Street, SPC 58 Phoenix, AZ 85003-2156</p>
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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.

Members	Position	District/Circuit	Start Date	End Date
David G. Campbell Chair	D	Arizona	Chair: 2016	2020
Jesse Furman	D	New York (Southern)	2016	2022
Daniel C. Girard	ESQ	California	2015	2021
Robert J. Giuffra, Jr.	ESQ	New York	2017	2020
Susan P. Graber	C	Ninth Circuit	2013	2019
Frank Mays Hull	C	Eleventh Circuit	2016	2022
William J. Kayatta, Jr.	C	First Circuit	2018	2021
Peter D. Keisler	ESQ	Washington, DC	2016	2022
William K. Kelley	ACAD	Indiana	2015	2021
Carolyn B. Kuhl	JUST	California	2017	2020
Jeffrey A. Rosen*	DOJ	Washington, DC	----	2019
Srikanth Srinivasan	C	DC Circuit	2017	2020
Amy J. St. Eve	C	Seventh Circuit	2013	2019
Catherine T. Struve Reporter	ACAD	Pennsylvania	2019	2023
Rebecca Womeldorf Secretary and Principal Staff				

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	Judge Pamela Pepper <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Bankruptcy Rules	Judge William J. Kayatta, Jr. <i>(Standing)</i>
Liaisons for the Advisory Committee on Civil Rules	Peter D. Keisler, Esq. <i>(Standing)</i>
	Judge A. Benjamin Goldgar <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Criminal Rules	Judge Jesse M. Furman <i>(Standing)</i>
Liaisons for the Advisory Committee on Evidence Rules	Judge Carolyn B. Kuhl <i>(Standing)</i>
	Judge Sara Lioi <i>(Civil)</i>
	Judge James C. Dever III <i>(Criminal)</i>

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<p>Molly T. Johnson, Esq. <i>(Bankruptcy Rules Committee)</i> Senior Research Associate</p>	<p>Dr. Emery G. Lee <i>(Civil Rules Committee)</i> Senior Research Associate</p>
<p>Timothy T. Lau, Esq. <i>(Evidence Rules Committee)</i> Research Associate</p>	<p>Tim Reagan, Esq. <i>(Rules of Practice & Procedure)</i> Senior Research Associate</p>

TAB 1

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TAB 1A

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Welcome and Opening Remarks

Item 1A will be an oral report.

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TAB 1B

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Effective December 1, 2018

REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to Supreme Court (Oct 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 8, 11, 39	Conformed the Appellate Rules to an amendment to Civil Rule 62(b) that eliminated the term “supersedeas bond” and makes plain an appellant may provide either “a bond or other security.”	CV 62, 65.1
AP 25	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service. [NOTE: in March 2018, the Standing Committee withdrew the proposed amendment to Appellate Rule 25(d)(1) that would eliminate the requirement of proof of service when a party files a paper using the court's electronic filing system.]	BK 5005, CV 5, CR 45, 49
AP 26	Technical, conforming changes.	AP 25
AP 28.1, 31	Amendments respond to the shortened time to file a reply brief effectuated by the elimination of the “three day rule.”	
AP 29	An exception added 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	Deleted the requirement in Question 12 for litigants to provide the last four digits of their social security numbers.	
AP Form 7	Technical, conforming change.	AP 25
BK 3002.1	Amendments (1) created flexibility regarding a notice of payment change for home equity lines of credit; (2) created a procedure for objecting to a notice of payment change; and (3) expanded 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	Amendments made as 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	Technical, conforming change to update cross-reference to Civil Rule 4.	CV 4
BK 7062, 8007, 8010, 8021, and 9025	Amendments to conform with 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)	Adds a provision to Rule 8002(a) similar to one in FRAP 4(a)(7) defining entry of judgment.	FRAP 4
BK 8002(b)	Conforms Rule 8002(b) to a 2016 amendment to FRAP 4(a)(4) concerning the timeliness of tolling motions.	FRAP 4

Revised June 2019

Effective December 1, 2018

REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to Supreme Court (Oct 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
BK 8002 (c), 8011, Official Forms 417A and 417C, Director's Form 4170	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). Conforming changes made to Official Forms 417A and 417C, and creation of Director's Form 4170 (Declaration of Inmate Filing).	FRAP 4, 25
BK 8006	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	Amendments to conform with the 2016 length limit amendments to FRAP 5, 21, 27, 35, and 40 (generally converting page limits to word limits).	FRAP 5, 21, 27, 35, and 40
BK 8017	Amendments to conform with the 2016 amendment to FRAP 29 that provided 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 authorized 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)	Authorizes 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.	
BK - Official Forms 411A and 411B	Reissued Director's Forms 4011A and 4011B as Official Forms 411A and 411B to conform to Bankruptcy Rule 9010(c). (Approved by Standing Committee at June 2018 meeting; approved by Judicial Conference at its September 2018 session.)	
CV 5	Amendments made as part of the inter-advisory committee project to develop coordinated rules for electronic filing and service.	

Revised June 2019

Effective December 1, 2018

REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to Supreme Court (Oct 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
CV 23	Amendments (1) 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; (2) 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); (3) 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; (4) updates Rule 23(c)(2) regarding individual notice in Rule 23(b)(3) class actions; (5) establishes procedures for dealing with class action objectors; refines standards for approval of proposed class settlements; and (6) 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	Amendments (1) extended the period of the automatic stay to 30 days; (2) clarified that a party may obtain a stay by posting a bond or other security; (3) eliminated reference to “supersedeas bond”; and (4) rearranged subsections.	AP 8, 11, 39
CV 65.1	Amendments made 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
CR 12.4	Amendments 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. Amendments to Rule 12.4(b) – the subdivision that specifies the time for filing disclosure statements – provides that disclosures must be made within 28 days after the defendant’s initial appearance; revised the rule to refer to “later” rather than “supplemental” filings; and revised the text for clarity and to parallel Civil Rule 7.1(b)(2).	

Revised June 2019

Effective December 1, 2018

REA History: no contrary action by Congress; adopted by Supreme Court and transmitted to Congress (Apr 2018); approved by Judicial Conference (Sept 2017) and transmitted to Supreme Court (Oct 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
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

Revised June 2019

Effective (no earlier than) December 1, 2019

Current Step in REA Process: adopted by Supreme Court and transmitted to Congress (Apr 2019)

REA History: transmitted to Supreme Court (Oct 2018); approved by Judicial Conference (Sept 2018); approved by Standing Committee (June 2018); approved by Advisory Committees (Spring 2018); published for public comment (unless otherwise noted, Aug 2017-Feb 2018); approved by Standing Committee for publication (June 2017)

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 3, 13	Changes the word "mail" to "send" or "sends" in both rules, although not in the second sentence of Rule 13.	
AP 26.1, 28, 32	Rule 26.1 would be amended to change the disclosure requirements, and Rules 28 and 32 are amended to change the term "corporate disclosure statement" to "disclosure statement" to match the wording used in proposed amended Rule 26.1.	
AP 25(d)(1)	Eliminates unnecessary proofs of service in light of electronic filing. (Published in 2016-2017.)	
AP 5.21, 26, 32, 39	Technical amendments to remove the term "proof of service." (Not published for comment.)	AP 25
BK 9036	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 serve or notice other persons by electronic means that the person consented to in writing. Related proposed amendments to Rule 2002(g) and Official Form 410 were not recommended for final approval by the Advisory Committee at its spring 2018 meeting.	
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.	

Revised June 2019

Effective (no earlier than) December 1, 2020

Current Step in REA Process: approved by Advisory Committees (Spring 2019)

REA History: published for public comment (unless otherwise noted, Aug 2018-Feb 2019); approved by Standing Committee for publication (unless otherwise noted, June 2018)

Rules	Summary of Proposal	Related or Coordinated Amendments
AP 35, 40	Proposed amendment clarifies that length limits apply to responses to petitions for rehearing plus minor wording changes.	
BK 2002	Proposed amendment would (i) require giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.	
BK 2004	Amends subdivision (c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.	CV 45
BK 2005	Unpublished. Replaces updates references to the Criminal Code that have been repealed.	
BK 8012	Conforms Bankruptcy Rule 8012 to proposed amendments to Appellate Rule 26.1 that were published in Aug 2017.	AP 26.1
BK 8013, 8015, and 8021	Unpublished. Eliminates or qualifies the term "proof of service" when documents are served through the court's electronic-filing system conforming to pending changes in 2019 to AP Rules 5, 21, 26, 32, and 39.	AP 5, 21, 26, 32, and 39.
CV 30	Proposed amendment to subdivision (b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, would require the parties to confer about the matters for examination before or promptly after the notice or subpoena is served. The amendment would also require that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify.	
EV 404	Proposed amendment to subdivision (b) would expand the prosecutor's notice obligations by (1) requiring the prosecutor to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose," (2) deleting the requirement that the prosecutor must disclose only the "general nature" of the bad act, and (3) deleting the requirement that the defendant must request notice. The proposed amendments also replace the phrase "crimes, wrongs, or other acts" with the original "other crimes, wrongs, or acts."	

Revised June 2019

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

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

- Federal Rules of Appellate Procedure pp. 2-4
- Federal Rules of Bankruptcy Procedure pp. 5-8
- Federal Rules of Civil Procedure pp. 8-10
- Federal Rules of Criminal Procedure..... pp. 11-12
- Federal Rules of Evidence pp. 12-15
- Other Matters pp. 15-16

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

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 or Committee) met on January 3, 2019. All members were present.

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

Also participating in the meeting were Professor Catherine T. Struve (by telephone), the Standing Committee's Reporter; Professor Daniel R. Coquillette, Professor Joseph Kimble, and Professor Bryan A. Garner, consultants to the Standing Committee; Rebecca A. Womeldorf, the Standing Committee's Secretary; Bridget Healy (by telephone), Scott Myers, and Julie Wilson, Rules Committee Staff Counsel; Ahmad Al Dajani, Law Clerk to the Standing Committee; Judge John S. Cooke, Director, and Dr. Tim Reagan, Senior Research Associate, of the Federal Judicial Center (FJC); and Judge Kent A. Jordan, member of the Advisory Committee on Civil

NOTICE

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Rules. Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Deputy Attorney General Rod J. Rosenstein.

In addition to its general business, including a review of the status of pending rules amendments in different stages of the Rules Enabling Act process, the Committee received and responded to reports from the five rules advisory committees and engaged in discussion of three information items.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no action items.

Information Items

Possible Amendment to Rule 3 – the Content of Notices of Appeal

At its fall 2018 meeting, the Advisory Committee continued discussion of possible amendments to clarify the content of notices of appeal under Rule 3. Some cases apply an *expressio unius* rationale to conclude that a notice of appeal that designates a final judgment plus one interlocutory order limits the appeal to that order. Other courts treat a notice of appeal that designates the final judgment as reaching all interlocutory orders that merged into the judgment, even if the notice of appeal also references a specific interlocutory order in addition to the judgment.

The Advisory Committee is considering whether Rule 3 should contain some statement of the merger rule – the rule that earlier interlocutory orders merge into the final judgment. The Advisory Committee is also considering whether the phrase “or part thereof” should be deleted from Rule 3(c)(1)(B)’s directive that an appellant “designate the judgment, order, or part thereof being appealed” because the phrase has been read to require the designation of each order sought to be reviewed. The Advisory Committee is mindful that any amendment to Rule 3 would

require an amendment to Form 1 (the form notice of appeal). Finally, as part of its consideration of Rule 3, the Advisory Committee is considering whether to address problems in appeals from orders denying reconsideration.

Proposal to Amend Rule 42(b) – Agreed Dismissals

The Advisory Committee is considering a proposal to amend Rule 42(b). The current rule provides that the circuit clerk “may” dismiss an appeal “if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that may be due.” Some have suggested that a dismissal in these circumstances should be mandatory. Prior to the 1998 restyling of the rules that intended no substantive change, Rule 42(b) used the word “shall” instead of “may” dismiss. Rule 42(b) also provides that “no mandate or other process may issue without a court order.” The Advisory Committee believes that the key distinction is between situations in which the parties seek nothing but a dismissal of the appeal, and situations in which the parties seek some judicial action in addition to dismissal.

Where the parties seek additional judicial action, the parties cannot control that judicial action. However, where the parties seek nothing but a simple dismissal of the appeal, mandatory dismissal might be appropriate, if not constitutionally compelled.

The Advisory Committee will continue to discuss whether the rule should mandate dismissal upon presentation to the clerk of an agreed dismissal request. If it decides to recommend that dismissal be made mandatory in some or all such circumstances, one approach would be simply to change the existing word “may” in Rule 42(b) to “must” or “will.” Another option would be to revise the rule more thoroughly to mirror Supreme Court Rule 46, which provides more detailed guidance than current Rule 42(b) on the appropriate treatment of dismissal agreements or motions, including the circumstances under which dismissal is mandatory.

Comprehensive Review of Rule 35 (En Banc Determination) and Rule 40 (Petition for Panel Rehearing)

The proposed amendments to Rules 35 and 40 that were published for public comment in August 2018 would create length limits for responses to petitions for rehearing. The consideration of those proposed changes prompted the Advisory Committee to consider the significant disparities between Rules 35 and 40. The disparities are traceable to the time when parties could petition for panel rehearing (covered by Rule 40) but could not petition for rehearing en banc (covered by Rule 35), although parties could “suggest” rehearing en banc. The Advisory Committee continues to consider different approaches to harmonize the two rules.

Given that many local rules address the relationship between panel rehearing and rehearing en banc, the Advisory Committee will consider whether there are local practices that should be adopted in Rules 35 and 40.

Counting of Votes by Departed Judges

Finally, the Advisory Committee has started considering how to handle the vote of a judge who leaves the bench, whether by death, resignation, impeachment, or expiration of a recess appointment. The question arises when an opinion has been drafted or a judge has voted in conference, and the judge leaves the bench before the opinion is filed by the court. This is a recurrent issue, and one treated differently across the circuits. One possibility is to amend Rule 36 to provide that an opinion may issue if it has been delivered to the clerk for filing before the judge leaves the bench. A subcommittee has been formed to consider this issue. The Committee recognizes that a case currently pending before the Supreme Court may affect this issue.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Advisory Committee on Bankruptcy Rules presented one action item for the Standing Committee regarding restyling of the Federal Rules of Bankruptcy Procedure, but no action is needed by the Judicial Conference at this time.

Information Items

Restyling of the Federal Rules of Bankruptcy Procedure

At its fall 2017 meeting, the Advisory Committee established a Restyling Subcommittee to consider restyling the Bankruptcy Rules to make them more easily understood and to make style and terminology consistent throughout the rules. The proposed project follows similar restyling of the Federal Rules of Appellate Procedure in 1998, the Federal Rules of Criminal Procedure in 2002, the Federal Rules of Civil Procedure in 2005, and the Federal Rules of Evidence in 2011. To inform its decision, the Restyling Subcommittee worked with the FJC and the Standing Committee's style consultants to solicit feedback from the bankruptcy community. A survey, along with a restyled version of Rule 4001(a) offered as an exemplar of the final product, was sent to all bankruptcy judges and clerks of court, as well as leaders of interested organizations. A link to the survey was also posted on the federal judiciary's website.

The FJC received and analyzed completed surveys from 307 respondents, including 142 bankruptcy judges, 40 bankruptcy clerks, 19 respondents from organizations, and 109 members of the public. Over two-thirds of all respondents in every category supported restyling of the Bankruptcy Rules. Some respondents expressed concern that restyling could introduce unintended consequences, and that project members should take great care to avoid changes in a rule's meaning. Given the positive response to the survey, the Restyling Subcommittee recommended going forward with the project, consistent with the unique features of the Bankruptcy Rules.

The Bankruptcy Rules have not previously been restyled because bankruptcy is particularly statute-driven, and many rules echo statutory language. Bankruptcy is a highly technical area of practice, and one particularly prone to terms of art as well as generally understood terms, concepts, and procedures. To ensure consistency and clarity in the revised rules, the Restyling Subcommittee recommended, and the Advisory Committee agreed, that the linkage between the Bankruptcy Code and the Bankruptcy Rules should presumptively be retained, even if application of restyling guidelines might arguably improve or simplify existing statutory language.

The Advisory Committee recommended that the Standing Committee authorize commencement of the restyling process with the understanding that the Advisory Committee retains authority to decide whether to recommend any restyled rule to the Standing Committee for publication and, ultimately, final approval. The Standing Committee discussed the considerable deference due to the Advisory Committee in restyling and accepted the Advisory Committee's recommendation, noting that final approval of the Advisory Committee's recommendation rests, as always, with the Standing Committee.

The Advisory Committee provided a tentative timeline for restyling the rules, which anticipates publishing the restyled rules for public comment in three batches beginning in August 2020 as follows:

Parts I and II of the Rules	August 2020 – February 2021
Parts III, IV, V, and VI of the Rules	August 2021 – February 2022
Parts VII, VIII, and IX of the Rules	August 2022 – February 2023

Although the Advisory Committee expects to restyle the rules in batches and obtain public comment on each group as it is restyled, none of the restyled rules would become effective until all groups have been approved. Absent delays and assuming approvals by the

Conference and the Supreme Court, and no contrary action by Congress, the full set of restyled rules would go into effect December 1, 2024. These dates are aspirational, however, and may change as the project develops.

Expansion of the Use of Electronic Noticing and Service

In August 2017, proposed amendments to two rules and one Official Form that were intended to expand the use of electronic noticing and service in the bankruptcy courts were published for public comment. Rule 2002(g) (Addressing Notices) would allow notices to be sent to email addresses designated on filed proofs of claims and proofs of interest, and Official Form 410 would be amended to add a checkbox for opting into email service and noticing. As published, the amendments to Rule 9036 (Notice or Service Generally) would allow clerks and parties to provide notices or serve most documents through the court's electronic-filing system on registered users of that system. It also would allow service or noticing on any person by any electronic means consented to in writing by that person.

In response to publication, several comments raised substantial issues about the proposed amendments. Those issues fall into three groups: (1) technological feasibility; (2) priorities if there are different email addresses for the same creditor; and (3) miscellaneous wording suggestions. Based on consideration of the comments and the logistics of implementing the proposed email opt-in procedure, the Advisory Committee voted at its spring 2018 meeting to hold back the amendments to Rule 2002(g) and Official Form 410, but to move forward with the amendments to Rule 9036, with minor revisions. The Standing Committee recommended and the Judicial Conference approved the proposed amendments to Rule 9036 in September 2018, and that revised rule is on track to go into effect December 1, 2019.

After the spring 2018 Advisory Committee meeting, the Committee on Court Administration and Case Management (CACM Committee) submitted a suggestion for a further

amendment to Rule 9036 that would require mandatory electronic service on most “high volume notice recipients,” a category that would initially be composed of entities that receive more than 100 court-generated paper notices from one or more courts in a calendar month. The CACM Committee’s suggestion built upon a 2015 suggestion submitted by the Administrative Office’s (AO) Bankruptcy Judges Advisory Group, the Bankruptcy Clerks Advisory Group, and the Bankruptcy Noticing Working Group. The prior suggestion was rejected as being inconsistent with § 342(e) and (f) of the Bankruptcy Code, which allow a chapter 7 or 13 creditor to insist upon receipt of notices at a particular physical address. The CACM Committee’s version of the proposed mandatory electronic service requirement would be “subject to the right to file a notice of address pursuant to § 342(e) or (f) of the Code.”

The CACM Committee strongly urged the adoption of the high-volume-notice-recipient program in order to achieve substantial savings. The AO has estimated that the savings could reach \$3 million or more a year.

The Advisory Committee’s Subcommittee on Business Issues is evaluating the CACM Committee’s suggestion as well as revisions to proposed Rule 2002(g) and Official Form 410 that address the concerns raised in the comments. The subcommittee hopes to present drafts for Advisory Committee review at its spring 2019 meeting.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules presented no action items.

Information Items

The Advisory Committee met on November 1, 2018. Discussion focused primarily on reports from two subcommittees tasked with long-term projects, as well as consideration of new suggestions related to expanding the scope of disclosure statements in Rule 7.1.

Multidistrict Litigation Subcommittee

Since November 2017, a subcommittee has been considering suggestions that specific rules be developed for multidistrict litigation (MDL) proceedings. Over the past year, the subcommittee has engaged in a substantial amount of fact gathering, in part with valuable assistance from the Judicial Panel on Multidistrict Litigation (JPML). The outreach has included participating in several conferences hosted by different constituencies, including transferee judges. The purpose of the fact gathering is to identify issues on which rules changes might focus. While the subcommittee's work remains in an early stage, the information gathered thus far has allowed it to identify six issues for consideration: (1) early procedures to winnow out unsupportable claims; (2) interlocutory appellate review; (3) formation and funding of plaintiff steering committees; (4) trial issues (e.g., bellwether trials); (5) settlement promotion, review, and approval; and (6) third party litigation funding. Going forward, the subcommittee will continue to gather information with the assistance of the JPML and the FJC.

Social Security Disability Review Subcommittee

As previously reported, a subcommittee has been formed to consider a suggestion by the Administrative Conference of the United States that the Judicial Conference develop uniform 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). With input from both claimant and government representatives, as well as the Advisory Committee and Standing Committee, the subcommittee developed draft rules to assist in focusing the discussion. While the subcommittee has not determined whether to recommend new rules, there is a growing consensus that the scope of any such rules would be limited to cases seeking review of a single administrative record, and would focus on pleading, briefing, and timing.

Disclosure Statements

Expanding the scope of the disclosure statements required by Civil Rule 7.1 and the analogous provisions in Appellate Rule 26.1, Bankruptcy Rule 8012, and Criminal Rule 12.4 has been the subject of several suggestions in recent years. The Advisory Committee has determined to move forward with a suggestion that it amend Rule 7.1 to include a nongovernmental corporation that seeks to intervene, a change that will parallel the proposed amendments to Appellate Rule 26.1 (approved by the Conference at its September 2018 session and forwarded to the Supreme Court on October 24, 2018) and Bankruptcy Rule 8012 (published for public comment on August 15, 2018). At its November 2018 meeting, the Advisory Committee also kept on its agenda a suggestion to address the problem of determining the citizenship of a limited liability company (or similar entity) in diversity cases by requiring that the names and citizenship of any member or owner of such an entity be disclosed.

Proposed Amendment to Rule 30(b)(6) Published for Public Comment

On August 15, 2018, a proposed amendment to Rule 30(b)(6), the rule that addresses deposition notices or subpoenas directed to an organization, was published for public comment. The proposed amendment requires the parties to confer about the number and descriptions of the matters for examination, and the identity of each witness the organization will designate to testify. The comment period closes on February 15, 2019. A public hearing was held in Phoenix, Arizona on January 4, 2019. Twenty-five witnesses presented testimony. A second hearing is scheduled to be held in Washington, DC on February 8, 2019. Fifty-five witnesses have asked to testify.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee on Criminal Rules presented no action items.

Information Items

The Advisory Committee met on October 24, 2018. A large portion of the meeting was devoted to discussion of the work of the Rule 16 Subcommittee. The Advisory Committee also determined to retain on its agenda a suggestion to amend Rule 43.

Expert Disclosures

As previously reported, the Advisory Committee added to its agenda two suggestions from district judges that pretrial disclosure of expert testimony in criminal cases under Rule 16 be expanded to more closely parallel the more robust expert disclosure requirements in Civil Rule 26. The Advisory Committee devoted a portion of its October 2018 meeting to a presentation by the Department of Justice on its development and implementation of new policies governing disclosure of forensic and non-forensic evidence.

The Rule 16 Subcommittee will consider whether an amendment is warranted and, if so, what features any recommended amendment should contain. To assist in its work, the subcommittee is planning to hold a mini-conference this spring. Participants will include prosecutors, private practitioners, and federal defenders.

Defendant's Presence at Plea and Sentencing

At its October 2018 meeting, the Advisory Committee created a subcommittee to consider the panel's suggestion in *United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018), that "it would be sensible" to amend Rule 43(a)'s requirement that the defendant must be physically present for the plea and sentencing.

Although the Advisory Committee has twice rejected suggestions that it expand the use of video conferencing for pleas or sentencing, members concluded the issue should be revisited

given the explicit invitation in *Bethea*. The subcommittee is tasked with assessing the need for a narrow exception to the requirement of physical presence, how such an exception could be defined, what safeguards would be necessary, including the procedures needed to ensure a knowing and intelligent waiver, and how to accommodate the right to counsel when the defendant and counsel are in different locations.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no action items.

Information Items

The Advisory Committee met on October 19, 2018. At that meeting, the Advisory Committee conducted a roundtable discussion with a panel of invited judges, practitioners, and academics regarding four agenda items, including two proposed amendments to Rule 702, proposed amendments to Rule 106, and proposed amendments to Rule 615. Each is discussed below. The roundtable discussion provided the Advisory Committee with helpful insight, background, and suggestions.

Possible Amendments to Rule 702

Addressing Forensics. The Advisory Committee has been exploring the appropriate response to the recent scientific studies regarding the potential unreliability of certain forensic evidence. A subcommittee was appointed to consider possible treatment of forensics, as well as the weight/admissibility question discussed below. After extensive discussion, the subcommittee concluded that it would be difficult to draft a new freestanding rule on forensic expert testimony because any such rule would have an inevitable and problematic overlap with Rule 702. Further, the subcommittee concluded it would not be advisable to set forth detailed requirements

regarding forensic evidence in rule text because substantial debate exists in the scientific community as to appropriate requirements.

The Advisory Committee agreed with the subcommittee’s recommendations and is considering ways other than rule changes to assist courts and litigants in meeting the challenges of forensic evidence. These include assisting the FJC with judicial education. The Advisory Committee continues to consider a proposal to amend Rule 702 to focus on one important aspect of expert testimony: the problem of overstating results (for example, by stating an opinion as having a “zero error rate” when that conclusion is not supportable by the methodology).

Admissibility/Weight. The Advisory Committee is also considering an amendment to Rule 702 that would address some courts’ apparent treatment of the Rule 702 requirements of sufficient basis and reliable application as questions of weight rather than admissibility, without finding that the proponent has met these admissibility factors by a preponderance of the evidence. Extensive case law research suggests confusion on whether courts should apply the admissibility requirements of a preponderance of evidence under Rule 104(a), or the lower standard of prima facie proof under Rule 104(b). Based on the roundtable discussion and other information, the Advisory Committee will continue to consider whether an amendment to Rule 702 is necessary to clarify that the court must find these admissibility requirements met by a preponderance of the evidence.

Possible Amendment to Rule 106

Over its last three meetings, the Advisory Committee has been 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 correct the misimpression. The Advisory Committee has focused on whether Rule 106 should be amended to provide: (1) that a

completing statement is admissible over a hearsay objection; (2) that the rule covers oral as well as written or recorded statements; and (3) more specific language about when the rule is triggered (i.e., by a “misleading” statement) and when a completing portion must be admitted (i.e., when it corrects the misleading impression). The roundtable discussion provided important input on these questions.

Possible Amendments to Rule 615

The Advisory Committee considered a suggestion to amend Rule 615, the rule on sequestering witnesses. The suggestion noted three concerns: (1) the rule provides no discretion for a court to deny a motion to sequester; (2) there is no timing requirement for when a party must invoke the rule, so it would be possible for a party to make a mid-trial request for exclusion of witnesses from the courtroom after some witnesses had already testified; and (3) there should be an explicit exemption from exclusion for expert witnesses to substitute for the current vague exemption for witnesses who are “essential to presenting the party’s claim or defense.” These proposed changes were raised at the roundtable discussion, and the Advisory Committee obtained valuable information, especially from the participating judges.

The Advisory Committee rejected the proposal to make sequestration discretionary. The mandatory nature of the rule was adopted because it is counsel, and not the court, that is likely to be aware of the risks of tailoring trial testimony. Also, discretion still exists in the rule given the exceptions to exclusion provided. Similarly, the Advisory Committee determined that the concerns regarding timing and an explicit exemption from exclusion for expert witnesses were not pervasive or significant issues.

In researching the operation of Rule 615, the Advisory Committee found another issue that has produced a conflict among the courts. The issue involves the scope of a Rule 615 order

and whether it applies only to exclude witnesses from the courtroom, as stated in the text of the rule, or extends outside the confines of the courtroom to prevent prospective witnesses from being advised of trial testimony. The Advisory Committee has agreed to further consider an amendment that would clarify the extent of an order under Rule 615.

Proposed Amendment to Rule 404(b) Published for Public Comment

On August 15, 2018, the Advisory Committee published for public comment a proposed amendment to Rule 404(b), the rule that addresses character evidence of other crimes, wrongs, or acts. The proposal would expand the prosecutor’s notice obligations by requiring that the prosecutor “articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose.” Three comments have been submitted thus far.

OTHER ITEMS

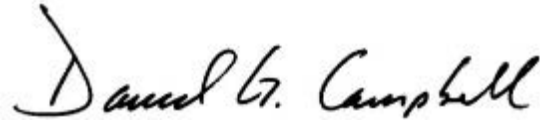
The Standing Committee’s agenda also included three information items. First, the Committee was briefed on the status of legislation introduced in the 115th Congress that would directly or effectively amend a federal rule of procedure.

Second, the Committee engaged in a discussion of whether to develop procedures for handling submissions outside the standard public comment period, including those addressed directly to the Standing Committee rather than to the relevant advisory committee. Based on that discussion, the Reporter to the Committee will draft proposed procedures to be discussed at the June 2019 meeting.

Third, Committee members were provided with materials summarizing the September 12, 2018 long-range planning meeting of Conference committee chairs and members of the Executive Committee, as well as the status of the strategic initiatives meant to support

implementation of the *Strategic Plan for the Federal Judiciary* that have been identified by each Judicial Conference committee.

Respectfully submitted,

A handwritten signature in black ink that reads "David G. Campbell". The signature is written in a cursive, slightly slanted style.

David G. Campbell, Chair

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

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MINUTES
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Meeting of January 3, 2019 | Phoenix, AZ

The Judicial Conference Committee on Rules of Practice and Procedure (“Standing Committee” or “Committee”) held its winter meeting in Phoenix, Arizona, on January 3, 2019. The following members participated in the meeting:

Judge David G. Campbell, Chair
Judge Jesse M. Furman
Daniel C. Girard, Esq.
Robert J. Giuffra, Jr., Esq.
Judge Susan P. Graber
Judge Frank Mays Hull
Judge William Kayatta, Jr.

Peter D. Keisler, Esq.
Professor William K. Kelley
Judge Carolyn B. Kuhl
Judge Amy St. Eve (by telephone)
Elizabeth J. Shapiro, Esq.¹
Judge Srikanth Srinivasan

The following attended on behalf of the Advisory Committees:

Advisory Committee on Appellate Rules
Judge Michael A. Chagares, Chair
Professor Edward Hartnett, Reporter

Advisory Committee on Bankruptcy Rules
Judge Dennis R. Dow, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Laura Bartell, Associate Reporter

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

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

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

Providing support to the Committee were:

Professor Catherine T. Struve (by telephone)
Reporter, Standing Committee
Rebecca A. Womeldorf
Secretary, Standing Committee
Professor Daniel R. Coquillette
Consultant, Standing Committee
Professor Bryan A. Garner
Style Consultant, Standing Committee
Professor Joseph Kimble
Style Consultant, Standing Committee
Ahmad Al Dajani
Law Clerk, Standing Committee

Rules Committee Staff
Bridget Healy (by telephone)
Scott Myers
Julie Wilson

Federal Judicial Center
John S. Cooke, Director
Dr. Tim Reagan, Senior Research Associate

¹ Elizabeth J. Shapiro, Deputy Director, Federal Programs Branch, Civil Division, represented the Department of Justice on behalf of the Honorable Rod J. Rosenstein, Deputy Attorney General.

OPENING BUSINESS

Judge Campbell called the meeting to order and welcomed everyone to Phoenix, Arizona. He recognized the newest member of the Standing Committee, Judge William J. Kayatta, Jr., who sits on the U.S. Court of Appeals for the First Circuit. An attorney for many years in Maine, Judge Kayatta served in various capacities with the Maine Bar and the American Bar Association. Judge Campbell next welcomed Judge Kent A. Jordan, a new member of the Advisory Committee on Civil Rules who sits on the U.S. Court of Appeals for the Third Circuit.

Judge Campbell also recognized participants who are serving in new capacities including: Judge Dennis Dow – who began his tenure as Chair of the Advisory Committee on Bankruptcy Rules last October; Director John Cooke – who recently replaced Judge Fogel as Director of the Federal Judicial Center (FJC); and Professor Catherine Struve, who became the Standing Committee’s Reporter as of the first of the year. Judge Campbell thanked Professor Dan Coquillette for his service as Reporter and announced that Professor Coquillette would continue to serve the Standing Committee in a consulting capacity. He presented a framed certificate of appreciation to Professor Coquillette on behalf of the Judicial Conference of the United States and signed by the Chief Justice.

Rebecca Womeldorf directed the Committee to the chart summarizing the status of proposed rules amendments at each stage of the Rules Enabling Act process. The chart includes three-and-a-half pages of rules that went into effect on December 1, 2018. Also included are changes (to the Appellate and Bankruptcy Rules) that continue the rules committees’ joint project of accommodating electronic filing and service. The Judicial Conference approved these rules in September 2018 and transmitted them to the Supreme Court the following month. The Court will consider the package and transmit any approved rules to Congress no later than May 1, 2019. Provided Congress takes no action, these rules will go into effect on December 1, 2019.

APPROVAL OF THE MINUTES FROM THE PREVIOUS MEETING

Upon motion by a member, seconded by another, and on a voice vote: **The Committee approved the minutes of the June 12, 2018 meeting.**

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Chagares and Professor Hartnett presented the report of the Advisory Committee on Appellate Rules, which last met on October 26, 2018, in Washington, DC. The Advisory Committee presented five information items.

Information Items

Rules 35 & 40 – Petitions for Panel and En Banc Rehearing, and Initial Hearing En Banc. At the June 2019 Standing Committee meeting, the Advisory Committee plans to seek the Standing Committee’s final approval to amend Rules 35 and 40. These amendments, which concern length

limits applicable to responses to a petition for rehearing, are currently published for public comment.

The Advisory Committee is also considering additional changes to Rules 35 and 40 aimed at reconciling discrepancies between the two rules. These discrepancies trace back to a time when parties could petition for panel rehearing but only “suggest” rehearing en banc. The Advisory Committee has identified three possible approaches that further revisions might take. One approach would be to align Rules 35 and 40 more closely with each other. A second approach would use Rule 21 (extraordinary writs) as a model for revising both Rules 35 and 40. A third approach would be to consolidate the provisions governing both types of rehearing (panel and en banc) in a revised Rule 40, leaving revised Rule 35 to cover only initial hearing en banc.

Rule 3 – Notices of Appeal and the Merger Rule. At the next Standing Committee meeting, the Advisory Committee will seek approval to publish amendments to Rule 3 for public comment. These amendments would address the relationship between the contents of the notice of appeal and the scope of the appeal. The Advisory Committee’s research revealed that when a notice of appeal from a final judgment also designates a specific interlocutory order, some courts (invoking the “*expressio unius*” canon) take the view that the additional specification limits the scope of appellate review to the designated interlocutory order.

Judge Chagares explained how the proposed amendments would address this issue. First, because the merger rule provides that interlocutory orders become appealable once they merge into a final judgment, adding the term “appealable” to Rule 3(c)(1)(B) would indicate that a party need only specify the judgment or order that grants an appellate court jurisdiction over the matter. Second, the amendments would add two rules of construction for notices of appeal. The first rule of construction rejects the *expressio unius* approach that some courts use to limit the scope of appellate review. The second clarifies, for purposes of civil appeals, that courts should construe a notice designating an order resolving all remaining claims as designating the final judgment, whether or not the final judgment is set out in a separate document.

Judge Chagares asked members of the Standing Committee for their views on two issues: whether the text of Rule 3 should explicitly discuss the merger rule, and whether removing the phrase “part thereof” from Rule 3(c)(1)(B) would help to avoid encouraging undue specificity in notices of appeal.

A judge member asked whether framing the proposals as rules of construction undermines their binding effect. Why say that additional specificity in the notice “must not be construed to limit” the notice’s scope rather than simply saying that such specificity “does not limit” the notice’s scope? Another participant asked whether such phrasing would remove an appellant’s ability to intentionally limit the scope of the appeal. Professor Hartnett agreed that the goal is not to foreclose intentional limitations, but rather to protect an appellant from *unintentionally* limiting the appeal’s scope through the inclusion of superfluous detail in the notice.

A judge member stated that courts should interpret the notice of appeal so as to bring up for review as much as possible; the parties’ appellate briefing suffices to narrow the issues. A different member noted that allowing appellants to curtail their appeal in the notice can conserve

resources for the parties because it alerts the opposing party to the narrowed scope of the appeal. The member expressed support for a rule change to displace the *expressio unius* approach, and also suggested that framing the amendments as rules of construction would leave an appellant with the option to limit the notice’s scope if the appellant desires.

The same member asked whether the Advisory Committee considered citing in the Committee Note the cases that the amendment would overrule. Professor Coquillette noted that citing cases in a Committee Note is a risky endeavor because case law continues to develop, and one cannot amend the Committee Note without a corresponding rule change. Sometimes, though, a Committee Note cites cases in order to illustrate the problems that a rule or amendment is addressing. Another judge member asked whether it might be worthwhile to incorporate the merger rule into the Rule 3 text. Judge Chagares explained that the Advisory Committee did not want to risk freezing the merger rule’s development by explicitly defining it in rule text.

A style consultant suggested revising the second rule of construction to use “is” rather than “must be construed as.” Judge Campbell asked whether the second rule of construction is inconsistent with Civil Rule 58 since it refers to “a designation of the final judgment” even in instances when Civil Rule 58 requires that the judgment be set out in a separate document and this requirement has been disregarded. Professor Cooper said that a court’s failure to enter a Civil Rule 58 judgment in a separate document does not defeat finality, and therefore, the clause’s directive to treat a reference to an order adjudicating all remaining claims as a reference to the final judgment is not a problem. He also remarked that the phrase “an appealable order” is fraught with the potential for confusion that could create a host of problems, and noted his support for referring to the merger rule without attempting to define it in the rule text. This approach, he suggested, would make clear that the merger rule applies without constraining its development.

Finally, Professor Coquillette reflected on a suggestion to reorder and renumber Rule 3’s subparts. He noted that renumbering a rule can raise practical legal research problems which is why the traditional practice has been to maintain the same numbering. Even when abrogating a rule, he observed, the practice is to state that the rule is abrogated rather than remove it and renumber the set. Professor Cooper recalled that, in restyling the Civil Rules, the rule makers made sure to leave untouched the “iconic” subdivision numbers – for example, Civil Rule 12(b)(6) – but Appellate Rule 3’s subdivisions, he suggested, were not in that “iconic” category.

Rule 42(b) – Voluntary Dismissals and Judicial Discretion. The Advisory Committee is considering whether granting voluntary dismissals should be mandatory under Rule 42(b). Rule 42(b) provides that the clerk “may” dismiss an appeal if the parties file a signed dismissal agreement. Under this formulation, attorneys have noted that they cannot guarantee their clients that the court will dismiss the appeal if the parties file a dismissal agreement. Judge Chagares noted that one argument in favor of mandating dismissals is that prior to restyling, Rule 42(b) stated that the clerk “shall” dismiss the appeal – a term that arguably did not leave the courts any discretion. On the other hand, some have argued that requiring a court to grant a stipulated dismissal when an opinion has already been prepared and is ready for filing would waste judicial resources.

A judge member expressed support for making the rule mandatory to provide clarity for the parties. Another judge member stated that it would be improper to allow a court to file an opinion once the dispute is no longer justiciable. But the member distinguished stipulated dismissals that do not require any further action by the court from those that do. Some types of cases – such as Fair Labor Standards Act cases – require court review of settlements. Where an action by the court is needed, such as a remand for the district court to review a proposed settlement, courts should have the discretion to decide whether to take the action proposed in the parties' agreement. But when no further action (other than dismissing the appeal) is needed, mandatory dismissal is appropriate.

A style consultant noted that the choice between mandatory and permissive terms is a substance issue, not a style issue. Professor Gibson pointed out that in Part VIII of the Bankruptcy Rules – a subset of the Bankruptcy Rules modeled after the Appellate Rules – Bankruptcy Rule 8023 mandates dismissal of an appeal to a district court or bankruptcy appellate panel if the parties file a signed dismissal agreement, specify allocation of costs, and pay any fees.

Potential Amendment to Rule 36 – Effect of Votes Cast by Former Judges. Also under consideration is an amendment to Rule 36 that would provide a uniform practice for handling votes cast by judges who depart the bench before an opinion is filed with the clerk's office. Judge Chagares noted that a case pending before the Supreme Court raises the issue, and the Advisory Committee will refrain from further action pending resolution of that case.

Other Matters Under Consideration. Judge Chagares noted that the Supreme Court's decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017), distinguished time limits imposed by rule from those imposed by statute. The Court characterized time limits set only by court-made rules as non-jurisdictional procedural limits. The Advisory Committee is considering whether this decision raises practical issues for the rules but will refrain from acting on any issues until the Court decides *Nutraceutical Corp. v. Lambert*, No. 17-1094, which asks the Court to address whether Civil Rule 23(f)'s 14-day deadline for filing a petition for permission to appeal is subject to equitable exceptions.

Finally, Judge Chagares noted that the Advisory Committee received a letter from the Committee on Court Administration and Case Management (CACM Committee) requesting that all Rules Committees ensure that the rules provide privacy safeguards in social security and immigration matters. The Advisory Committee concluded that this request did not require action to amend the Appellate Rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Dennis Dow and Professors Gibson and Bartell presented the report of the Advisory Committee on Bankruptcy Rules, which last met on September 13, 2018, in Washington, DC. The Advisory Committee sought approval of one action item and presented two information items.

Action Item

Restyling the Federal Rules of Bankruptcy Procedure. Professor Bartell reported the results of a spring 2018 survey that was both posted on the internet and sent to judges, court clerks, and stakeholder organizations. The survey responses revealed widespread support for restyling the Federal Rules of Bankruptcy Procedure to make them clearer and easier to understand. The Advisory Committee accordingly sought the Standing Committee's approval to begin the restyling process.

She explained that the unique nature of bankruptcy procedure means that restyling poses a risk of unintended consequences resulting from inadvertent changes to the substance of the rules. As a result, the Advisory Committee recommended that the restyling process go forward on the condition that the Advisory Committee, not the Style Consultants, retains final authority to recommend any modifications to the Standing Committee for final approval.

Judge Dow noted that the Advisory Committee, in collaboration with the Style Consultants, drafted a restyling protocol. The protocol outlines the timing, grouping, and phasing of the restyling process, identifies methods for tracking comments and revisions to the rules, and establishes policies to ensure that the style consultants can meaningfully participate in the restyling process.

The protocol also addresses the style consultants' concerns regarding the use of statutory terms. Judge Dow explained that statutory terms are used throughout the rules because the rules are closely tied to the Bankruptcy Code. That said, the Advisory Committee pledged not to reject a proposed change solely because existing language tracked statutory language, unless the change would have an adverse effect on daily bankruptcy practice.

The Style Consultants expressed their satisfaction with the restyling protocol that the Advisory Committee continues to develop. Judge Dow further noted that the Advisory Committee is not seeking the Standing Committee's approval of the draft protocol because it is subject to ongoing revisions.

Judge Campbell expressed his view that the Advisory Committee should have final say on what to recommend to the Standing Committee. He explained that the Standing Committee generally would not overrule the Advisory Committee's recommendations on matters of substance within bankruptcy expertise. That said, Judge Campbell noted that the Standing Committee retains its authority to review, discuss, and modify any recommendations made by the Advisory Committee. Judge Dow agreed with Judge Campbell's views on this issue.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the commencement of the effort to restyle the Federal Rules of Bankruptcy Procedure with the understanding that the Advisory Committee retains authority to decide whether to recommend any restyled rule to the Standing Committee for publication and, ultimately, final approval.**

Judge Campbell mentioned how helpful it had been to obtain the guidance of a number of current and former rulemaking colleagues who had participated in the restyling of other sets of rules. That guidance had stressed, inter alia, the desirability of keeping members of Congress apprised of the restyling project, and had suggested that this would be particularly important with respect to the Bankruptcy Rules. It was noted that, in contrast to the other sets of rules, the Rules Enabling Act framework does not provide that Bankruptcy Rules amendments supersede contrary statutory provisions.

Judge Campbell also suggested that a primer on bankruptcy law for the stylists and members of the Standing Committee might be helpful to the restyling process. A judge member noted that it would be helpful to have the primer before the next meeting at which restyled bankruptcy rules will be considered.

Information Items

Expansion of Electronic Notice and Service. Professor Gibson noted that the Advisory Committee has been considering ways to increase the use of electronic notice and service in bankruptcy courts. In addition to adversary proceedings, notice is often required in other aspects of a bankruptcy case, and notice by mail has proven costly for the judicial system as well as the parties. The Advisory Committee is considering ways to reduce costs (while still meeting the requirements of due process) by shifting to electronic noticing and service.

One suggestion from the CACM Committee is to mandate electronic notice for certain high-volume notice recipients. Professor Gibson explained that the Advisory Committee declined to act on an earlier version of this suggestion because the Bankruptcy Code provides some parties with the right to insist upon mail delivery at a particular mailing address. The current CACM Committee suggestion, however, explicitly recognizes that such parties retain the statutory right to opt for delivery at a stated physical address. Accordingly, the Advisory Committee is reexamining the idea and may have a proposal for publication this summer.

Suggested Amendment to Bankruptcy Official Form 113 – Chapter 13 National Plan. Another suggestion under consideration concerns instructions provided on the national form for chapter 13 plans. The form currently asks debtors to indicate whether the plan includes certain important provisions using two alternative checkbox answers to three questions on the front page. The instructions state that if the debtor marks the “Not Included” checkbox or marks both “Not Included” and “Included” checkboxes, then the relevant provision will not be effective.

The suggestion points out that the instructions do not address what happens if the debtor marks neither box. Professor Gibson explained that if one of the listed provisions is included in the plan, but the debtor fails to check the box stating that it is included in the plan, then the provision should be ineffective because the blank checkbox failed to alert creditors to the provision’s presence. She noted that while the Advisory Committee agrees with the suggestion, the form is relatively new. The Advisory Committee thus will defer proceeding with the proposed amendment in order to see whether experience under the new form and related rules suggests the need for additional adjustments.

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 last met on November 1, 2018, in Washington, DC. The Advisory Committee presented several information items, including reports on behalf of its Multidistrict Litigation (MDL) and Social Security Disability Review subcommittees.

Information Items

Rule 30(b)(6) – Deposition Notices or Subpoenas Directed to an Organization. Judge Bates reported that the Advisory Committee received comments regarding its proposed changes to Rule 30(b)(6), and twenty-five witnesses will testify on the matter at a hearing scheduled for January 4, 2019. The subcommittee will hold the hearing at the Sandra Day O'Connor United States Courthouse in Phoenix, Arizona.

Judge Bates noted that most comments focus on proposed language requiring the party taking the deposition and the organization to confer about the identity of the witness(es) the organization will designate to testify on behalf of the corporation. Some submissions raised concerns that this will cause an unwarranted intrusion into the corporation's prerogative to designate who will testify. The Advisory Committee looks forward to hearing further input from stakeholders regarding the matter.

Judge Campbell invited those at the meeting to attend the hearing.

Rule 73(b)(1) – Consent to Magistrate Judge. The Advisory Committee's Report details three issues that have been raised about the procedure for consenting to referral for trial before a magistrate judge. One issue – concerning a question of consent by late-added parties – has been set aside. Another issue – relating to the means for obtaining consent after an initial random referral of a case to a magistrate judge – is still being considered. A third issue relates to the lack of anonymity, under the CM/ECF system, concerning consents to trial before a magistrate judge.

Judge Bates explained that the CM/ECF system currently notifies the judge assigned to the case whenever a party files its individual consent. This automatic notification defeats the anonymity provision of Rule 73(b)(1) that allows a district judge or magistrate judge to be informed of a party's consent only if all parties consent. During its April 2019 meeting, the Advisory Committee will review options for preserving anonymity in this process.

Rule 7.1 – Disclosure Statements. Also under consideration are changes to Rule 7.1 that would require a non-governmental corporation that seeks to intervene to file a corporate disclosure statement. These changes parallel pending proposals to amend the Appellate and Bankruptcy Rules.

The Advisory Committee is also considering a proposal relating to the disclosure of the names and citizenship of members in a limited liability company (LLC) or similar entity. Judge

Bates explained that the citizenship of LLCs, partnerships, and similar entities depends on the citizenship of their members. As a result, disclosing the citizenship of an entity's members is necessary for determining the existence of a federal court's subject matter jurisdiction in diversity cases. But, Judge Bates noted, in some cases a member of a partnership or LLC is itself a partnership or an LLC. The Advisory Committee is considering the extent to which citizenship disclosures should extend up the chain of ownership in such cases. Judge Bates noted that, in considering whether to propose requiring additional disclosures, the Advisory Committee is taking into consideration the underlying reason for the disclosure. It is important to know whether the goal is to demonstrate the court's subject matter jurisdiction or to provide judges with information necessary to make recusal decisions.

A judge member noted that a rule alerting judges and parties to the necessity of pleading citizenship in diversity cases would be helpful, so long as it accounts for the variation in entity types. Judge Campbell agreed. He noted that standing orders are often used to remind parties pleading diversity jurisdiction that they need to take into consideration the citizenship of members in an LLC or partnership. He also noted that lawyers representing such entities often miss this crucial step.

Judge Bates noted, as well, a third type of disclosure issue that has come to the Advisory Committee's attention. This third issue has to do with third-party litigation funding (TPLF). Here a concern might be that judges need information concerning TPLF in order to know whether they have a recusal issue. Though it is very unlikely that judges would invest in well-known third-party litigation funders, the dynamic nature of the field raises the possibility that a company not known for engaging in such funding might in fact turn out to do so. Judge Bates noted that the Advisory Committee could look into the TPLF disclosure issue or could wait for practice to evolve further.

Judge Campbell suggested that the Advisory Committee might initially train its focus on the question of disclosures relevant to diversity jurisdiction, while also continuing to study TPLF. An inter-committee project on recusal-related disclosures, though, might not be warranted at this time.

Timing of Final Judgments in Cases Consolidated under Rule 42(a). Judge Bates said that the Advisory Committee has taken up consideration of the effect of consolidation under Civil Rule 42(a) on final judgment appeal jurisdiction. In *Hall v. Hall*, 138 S. Ct. 1118 (2018), the Supreme Court held that an individual case consolidated under Rule 42(a) maintains its independent character, such that a judgment resolving all claims as to all parties in that case is an appealable final judgment, regardless of whether proceedings are ongoing in the other consolidated cases. Chief Justice Roberts, writing for the Court, noted that the appropriate Rules Committees could address any practical problems resulting from this holding.

Professor Cooper noted that the salient rules are Rule 42(a), which provides for consolidation, and Rule 54(b), which governs the entry of a partial final judgment. In considering whether and how to amend these rules in light of *Hall v. Hall*, the goal should be to minimize the risk that parties to a consolidated case might unwittingly forfeit their appeal rights out of confusion as to the effect of the consolidation.

Judge Bates noted that a subcommittee would be formed to consider these matters and that the subcommittee would benefit from the involvement of Judges Jordan and Chagares.

MDL Subcommittee. Judge Bates stated that the MDL Subcommittee, chaired by Judge Dow, has consulted various stakeholders and narrowed the subjects on which it will consider possible rulemaking. While some advocate rulemaking to govern MDL proceedings others stress the need to retain judicial flexibility and innovation in this area. The subcommittee has yet to reach any conclusions.

There are six topics under the subcommittee's consideration. These are:

- 1) Early procedures to winnow out unsupportable claims;
- 2) Interlocutory appeals;
- 3) Formation and funding of plaintiffs' steering committees (PSCs);
- 4) Trial issues;
- 5) Settlement promotion and review; and
- 6) TPLF.

1) *Winnowing Unsupportable Claims.* Judge Bates noted that certain laws require companies to report claims made against them, including unsupportable claims made in MDLs. Judge Bates explained that a number of MDL judges currently winnow unsupportable claims by requiring the submission of plaintiff fact sheets. These sheets are specific to the MDL under consideration and lack uniformity. He also noted that using these sheets to eliminate unsupportable claims early in the proceeding is difficult and requires that the court and parties expend substantial time and effort. Other suggestions under consideration include expanded initial disclosure requirements, Rule 11 sanctions, master complaints, requiring each plaintiff in an MDL to pay a filing fee, and/or requiring early consideration of screening tools.

2) *Interlocutory Appellate Review.* Some stakeholders have asked the subcommittee to consider expanding the opportunities for interlocutory appellate review of orders addressing potentially outcome-determinative issues including, but not limited to, preemption and the admissibility of expert testimony under *Daubert*. Judge Bates noted that the scope of this problem is not yet apparent and that the input received by the subcommittee imparts a healthy skepticism regarding this topic.

The subcommittee needs further information to resolve crucial questions including, but not limited to, whether appellate review should be mandatory or discretionary, what role trial courts should have in certifying issues for appellate review, and how to determine which orders will be subject to interlocutory appellate review. If the subcommittee decides to move forward, Judge Bates explained that it would do so in coordination with the Advisory Committee on Appellate Rules.

A judge member expressed support for an interlocutory appeal mechanism, to the extent that the avenue currently provided by 28 U.S.C. § 1292(b) is inadequate. That said, the member opposed expedited review because the timing of appellate decision making is affected by many variables that are difficult to control. One such variable is determining which cases to delay in

exchange for expediting review of an MDL ruling. Judge Bates noted that not expediting the appeal would cause further delay, and that delay impairs the MDL's efficiency and harms the parties. Judge Campbell agreed, stating that each interlocutory appeal in an MDL could take several years to resolve, and that if more than one such appeal occurs they could add up to many years of delay. Another member observed that key rulings may occur at different stages of the litigation; perhaps it would be possible to identify a single time when an interlocutory appeal might bring such rulings up for review. A different member suggested that the parties could brief questions of timing, so as to inform the courts' determinations about the proper balance between the need for appellate review and the risk of delay.

Another member expressed strong support for interlocutory appeals in MDLs, reasoning that, by definition, MDLs are important. Legal issues such as preemption or failure to state a claim can give rise to critical rulings with huge settlement values. The goal, this member suggested, is to reach the right result. And some courts of appeals, he reported, have been known to refuse to take up an issue that the district court has certified for interlocutory review under 28 U.S.C. § 1292(b).

A judge member, citing his experience presiding over an MDL, expressed skepticism that the challenges of MDL management are susceptible to rulemaking reforms. MDL judges, he stressed, need flexibility because every MDL is different. He suggested that sorting issues into dispositive and non-dispositive categories would help the subcommittee determine which issues are suitable for interlocutory appellate review, and he noted that more use could be made of the Section 1292(b) mechanism.

3) *Plaintiff Steering Committees.* A member suggested that the subcommittee should consider providing guidance for the appointment of lead counsel and PSCs. It might be helpful to examine the lead-plaintiff-appointment provisions in the Private Securities Litigation Reform Act (PSLRA). By analogy to the PSLRA's rebuttable presumption in favor of appointing the plaintiff with largest financial interest, he suggested, perhaps there should be a presumption in favor of appointing the lawyer with the largest number of cases in the MDL. The member stated that if the judge appoints too many law firms to the PSC, this may increase the complexity and expense of managing the MDL.

A judge member disagreed with the proposed presumption in favor of appointing to the PSC the lawyer with the largest number of cases; such a presumption, he argued, could exacerbate the problem of unsupported claims. This member said that he would not oppose possible amendments to Civil Rules 16 and/or 26 to require early discussion of screening tools such as plaintiff fact sheets (though he is not sure that such amendments are necessary).

Another judge member suggested that California state-court practice with PSC selection may be instructive. In California, she explained, the plaintiffs' lawyers organize themselves, subject to court approval; this approach relies on the plaintiffs' bar's knowledge concerning which lawyers conduct themselves fairly.

4) *Trial Issues.* Judge Bates noted several trial issues that are currently being considered by the subcommittee. One issue is whether MDL judges should have the authority to require party

witnesses to appear at trial to testify live. Another issue is whether a transferee court should only hold bellwether trials with the consent of all parties.

5) *Settlement Promotion, Review, and Approval.* The subcommittee is also evaluating whether it could provide a structure for courts to review settlements in MDL proceedings. Judge Bates distinguished MDL settlements from class action settlements (which are subject to court review and approval under Civil Rule 23(e)): whereas each plaintiff in an MDL is represented by his or her own counsel and can consult that counsel about a settlement's advisability, that is not the case in a class action. The subcommittee is considering whether any aspects of MDL settlement are suitable topics for rulemaking, or whether other measures, such as updates to the Manual on Complex Litigation, would be more appropriate.

A judge member suggested that an apparent lack of interest from stakeholders does not provide a reason to drop the topic of settlement from the subcommittee's agenda. This member observed that the ALI's Principles of the Law of Aggregate Litigation reflect concern for the lack of voice that individual plaintiffs may have in nonclass aggregate settlements.

6) *TPLF.* TPLF is a growing field with varied subparts. Funders might finance the prosecution of a case by a plaintiffs' firm, might finance individual plaintiffs' claims, or might finance the defense of a lawsuit. Some funding arrangements may raise concerns about who has control over the litigation.

Judge Bates noted that the Advisory Committee is looking at this issue through the MDL prism, though it is not a discrete MDL issue. One approach would be to focus on what disclosures may be necessary for purposes of judges' assessment of recusal issues. A question facing the subcommittee is whether the scope of the disclosure should be limited to the fact of funding and identity of the funder, or should include terms of the finance agreement as well. Another question is whether discovery in this area should be permissible.

Professor Coquillette cautioned that these issues are closely interwoven with the laws regulating lawyers. For example, this past fall the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 484, "A Lawyer's Obligations When Clients Use Companies or Brokers to Finance the Lawyer's Fee." This opinion addresses the financing of individual plaintiffs' claims and explains that when the plaintiff's counsel becomes involved in such financing, a great many of the ABA's Model Rules of Professional Conduct come into play. Professor Coquillette said that the Rules Committees' last foray into areas affecting the rules of professional conduct united every state bar association against them.

Subcommittee on Social Security Disability Review. A suggestion from the Administrative Conference of the United States asked the Advisory Committee to create rules governing cases in which an individual seeks district court review of a final decision of the Commissioner of Social Security. A subcommittee, chaired by Judge Lioi, created to address this suggestion has not yet concluded its work. Judge Bates noted that the most significant issues arising in these cases concern considerable administrative delay within the Social Security Administration as well as variation among districts in both local practices and rates of remand. The Social Security

Administration strongly supports the proposal for national rules, while the Department of Justice appears neutral on this topic. Claimants' attorneys generally oppose the idea of national rules, but if such rules are to be adopted they have views on what the rules' content should be. There is a real question whether any proposed rules would reduce the government's staffing burdens. And there is a question whether reducing the government's staffing burdens is an appropriate goal for the rulemakers. Judge Bates further noted that whatever rules the subcommittee might recommend, if any, still need to be considered by the Advisory Committee.

Professor Cooper reported that the subcommittee is approaching consensus on what the rules would look like if they were to be proposed. The subcommittee currently envisions (for discussion purposes) a narrow set of rules focused on pleading, briefing, and timing. There is a lingering tension between two possible models for the pleading rules. One, patterned after the appellate process, would cast the complaint as a limited document with the simplicity of a notice of appeal and would provide that the government's answer is to consist of the administrative record. In this model, further particulars would develop during briefing. The other model would provide for additional detail in both the complaint and the answer. As to briefing, one question is whether the plaintiff should be required to submit a motion for the relief requested in the complaint along with the brief.

A judge member reported that magistrate judges in his district were concerned about a uniform rule because approaches vary depending on the facts and circumstances of the individual case – such as whether the plaintiff has a lawyer or not. These circumstances may affect the judge's approach to (for example) the order and timing of briefing. In this member's view, flexibility is necessary to ensure adequate representation for parties proceeding pro se. Participants observed that there are variations both across and within districts concerning the extent to which these cases are referred to magistrate judges.

Judge Bates noted that the subcommittee is close to reaching a recommendation whether to abandon the effort or move forward. It will continue to include various stakeholders in the process and will ask for feedback and suggestions.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Molloy and Professors Beale and King presented the report of the Advisory Committee on Criminal Rules, which met on October 10, 2018, in Nashville, Tennessee. The Advisory Committee presented five information items.

Information Items

Rule 16 – Expert Disclosures. The subcommittee, chaired by Judge Kethledge, is currently considering whether Rule 16 should be amended to expand pretrial discovery of expert testimony in criminal cases – a change that would bring Rule 16 closer to the more robust expert discovery requirements in Civil Rule 26. Judge Molloy announced plans for a mini-conference. This conference presents an opportunity for the Rule 16 Subcommittee to receive input from

prosecutors, private practitioners, and federal defenders around the country about whether an amendment is warranted and, if so, what its content should be.

Task Force on Protecting Cooperators. Judge Amy St. Eve provided an update on the progress of the task force. The task force's work is complete, and its reports and recommendations were finalized and delivered to Director Duff. These reports recommended practices to be implemented by the Bureau of Prisons (BOP) in ensuring the safety of cooperators. One recommendation asks the government to start tracking whether assaults on prisoners are related to the victim's status as a cooperator. The BOP wishes to avoid collecting this information within correctional institutions, so the information would instead be collected by the DOJ into an anonymized database that would be securely stored within the DOJ.

Another recommendation is that courts should store plea and sentencing documents in separate case subfolders with public access restricted to those physically present at the courthouse. Doing so allows the Clerk of Court to maintain an access log that would be useful in any investigations arising from retaliation against cooperators. Director Duff has referred this recommendation to the CACM Committee.

Judge Molloy noted that there continue to be concerns about the balance between protecting cooperators, on one hand, and government transparency and the public's right to information, on the other.

Rule 43(a) – Defendant's Presence at Plea and Sentencing. The Advisory Committee received a suggestion concerning the Rule 43(a) requirement that a defendant be physically present in court at plea and sentencing. In *United States v. Bethea*, 888 F.3d 864 (7th Cir. 2018), the Seventh Circuit vacated a judgment of conviction due to the district court's decision to conduct the plea and sentencing proceeding with the defendant appearing by videoconference; the defendant's serious health issues made him susceptible to injury from even limited physical contact. The Seventh Circuit determined that Rule 43(a) by its terms permits no exceptions to the requirement of physical presence in the courtroom at sentencing and suggested that "it would be sensible" to amend Rule 43(a). In considering whether to propose an explicit exception in the rule, the Advisory Committee is investigating the frequency with which such extenuating circumstances occur.

Time for Ruling on Habeas Motions (Suggestion 18-CR-D). The Advisory Committee received a suggestion to require that judges decide habeas motions within 60-90 days. Judge Molloy explained the Advisory Committee's view that this is more of a systemic problem resulting from the fact that habeas petitions and Section 2255 motions are exempt from the reporting requirements of the Civil Justice Reform Act (CJRA). The Advisory Committee discussed the impact of these delays and decided to refer the suggestion to the CACM Committee to evaluate whether this exemption from the CJRA's reporting requirements should be reconsidered.

Disclosure of Defendants' Full Name and Date of Birth. The Advisory Committee received a suggestion to revise applicable rules and the PACER search structure so that users could search PACER using a defendant's full name and/or date of birth. The suggestion argues that providing this search capacity would enable background screening services to perform their

functions accurately and efficiently. A similar suggestion was rejected in 2006, and the Advisory Committee likewise decided not to pursue the current proposal.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Livingston and Professor Capra delivered the report of the Advisory Committee on Evidence Rules, which last met on October 19, 2018, in Denver, Colorado. The Advisory Committee presented four information items.

Information Items

Rule 702 – Admission of Expert Testimony. A September 2016 report issued by the President’s Council of Advisors on Science and Technology contained a host of recommendations for federal agencies, DOJ, and the judiciary, relating to forensic sciences and improving the way forensic feature-comparison evidence is employed in trials. This prompted the Advisory Committee’s consideration of changes to Rule 702.

In fall 2017, the Advisory Committee held a conference on Rule 702 and forensic feature-comparison evidence. Subsequently a subcommittee was formed to study what the Advisory Committee might do to address concerns relating to forensic evidence; Judge Schroeder chairs the subcommittee. The subcommittee recommended against attempting to draft a freestanding rule governing forensic expert testimony, because such a rule would overlap problematically with Rule 702. The subcommittee also advised against trying to craft Rule or Note language setting out detailed requirements for forensic evidence, and it concluded that a “best practices manual” could not be issued as a formal product of the Advisory Committee. The Advisory Committee concurred in these assessments, but it will explore judicial education measures to undertake in collaboration with the FJC.

The subcommittee did suggest considering whether to amend Rule 702 to address the problem of expert witnesses overstating their conclusions, and the Advisory Committee is proceeding with that suggestion. A roundtable discussion held during the last Advisory Committee meeting asked for input from practitioners on an amendment that would target the overstatement problem. The debate produced a variety of diverging views among civil and criminal practitioners. As a result, the Advisory Committee is carefully weighing the effects such an amendment would have for expert evidence across the spectrum of legal practice.

Another amendment under consideration would emphasize that Rule 702’s admissibility requirements of sufficient basis and reliable application present Rule 104(a) questions that must be determined by the court using a preponderance standard.

One member raised a concern with the feasibility of creating a rule addressing the accuracy of expert opinion because it would be difficult to craft a rule that would tell experts how to present a test’s error rate. Judge Livingston explained that black-box studies provide an error rate associated with some types of expert evidence. She noted that studies had not considered every aspect of expert evidence, and it would be difficult to determine standards for evaluating expert opinions where the data are murky.

Judge Campbell noted that it is a real challenge to articulate in a rule what constitutes an overstated opinion, and the Advisory Committee is working on fleshing out its definition of the term “overstatement.” Another participant noted that the DOJ has been strongly opposed to such a rule and asked whether the DOJ changed its position. The DOJ’s representative noted that the word “overstatement” was fraught with confusion. She explained that the DOJ is working with the subcommittee to craft a rule addressing this issue. The DOJ is also implementing a set of internal directives, targeting overstatement, that regulate how Department scientists can phrase their opinions when testifying at trial.

Finally, Professor Capra noted that the Advisory Committee is considering several approaches, some of which were suggested by Judge Campbell. One suggestion is to state that experts may not overstate the conclusion that can be drawn from the methodology they employ. Another suggestion is to state that the expert’s conclusion should accurately relate the methods used. Articulating the standard in a rule remains a challenge that the Advisory Committee continues to study.

Rule 106 – The Rule of Completeness. Judge Livingston said that the Advisory Committee is considering a suggestion to amend Rule 106 to provide that oral statements, in addition to written or recorded statements, fall within the rule’s scope. Another change would provide that a completing statement is admissible under this Rule notwithstanding hearsay objections. Judge Livingston noted that this is not the first time the Advisory Committee has considered amending Rule 106, and it previously declined to act on a similar suggestion.

She also noted a few additional concerns including that a cure might have the unintended consequence of creating another hearsay exception permitting parties to introduce an out of court statement whenever a party can persuade the court that a statement should, in fairness, be considered given the admission of another statement. Another concern is that an amendment adding oral statements to Rule 106 risks disrupting the presentation of evidence with side litigation on whether a completing oral statement was actually made.

Proposed Amendment to Rule 404(b) – Bad-Act Evidence. Professor Capra stated that the Advisory Committee received two comments so far on the proposed amendment to Rule 404(b). The proposed amendment would require that prosecutors in a criminal case provide more notice of their intent to offer bad-act evidence and would require the notice to articulate support for the non-propensity purpose of the evidence. Professor Capra predicted that the Advisory Committee would replace the term ‘non-propensity’ with ‘non-character’ since ‘character’ is used throughout the rule.

Proposed Amendment to Rule 615 – Excluding Witnesses from Court. Professor Capra said that the Advisory Committee decided against acting on some suggestions, but other suggestions for amending Rule 615 remain pending. The Advisory Committee decided against acting on a suggestion proposing that the rule provide for judicial discretion in determining whether a witness should be excluded, reasoning that the purpose of exclusion is to prevent witnesses from tailoring their testimony according to what other witnesses testified. Accordingly, the parties are in the best position to determine whether a witness should be excluded. The

Advisory Committee also decided against acting on another suggestion concerning issues of timing and dealing with experts under this rule because case law research did not reveal any significant problems.

In studying these suggestions, however, the Advisory Committee came to consider a few other changes. The original purpose for excluding witnesses from trial was to prevent witnesses from tailoring their testimony according to the testimony of prior witnesses. However, technological developments have made mere exclusion from trial less than completely effective because the testimony of prior witnesses is now accessible beyond the courtroom. Professor Capra noted that most courts hold that a Rule 615 order extends to an excluded witness's access to trial testimony outside the courtroom. However, some courts have held that such orders do not extend beyond the courtroom unless the parties specifically ask the judge to extend the order. One change would clarify how courts should determine the extent of a Rule 615 order and provide judges with discretion to extend orders beyond the courtroom.

Judge Campbell asked whether a rule amendment would have the effect of overruling circuits who have held otherwise. Professor Capra said it would and, for this reason, the Advisory Committee is carefully considering this amendment.

Finally, Judge Campbell noted that the Advisory Committee at its October meeting considered but decided against recommending a rule that would provide a roadmap for impeachment and rehabilitation of witnesses, similar to a rule adopted by the State of Maryland.

OTHER COMMITTEE BUSINESS

Procedure for Handling Comments Made Outside the Ordinary Process. Professor Struve noted a recurring issue regarding public submissions outside the formal public comment period, including submissions addressed directly to the Standing Committee.

There are instances when the Standing Committee receives submissions that discuss a proposal that an advisory committee will be presenting at an upcoming Standing Committee meeting. The context might be a proposal of an amendment for publication, or it might be a proposal of an amendment for final approval after the public comment period has expired. It would be desirable to publish a policy for handling such comments.

Professor Struve asked Standing Committee members and other participants for feedback on the memo and tentative draft included in the agenda materials. One judge member observed that it is useful to be transparent about the process, but that it would be better to require off-cycle submitters to show cause why their input is off-cycle. Judge Campbell responded by pointing out proposed language in the agenda book that listed examples of reasons that might suffice to show such cause. The participant responded that it would be preferable to make more explicit that a person wishing to make an off-cycle submission must make a showing of why their submission is off-cycle. When the discussion later returned to the language in that paragraph, one participant observed that if someone at the last minute spots a glitch in a proposal, the rulemakers would want to take account of that insight. Professor Struve observed that the language in the agenda book did not account for that scenario. Another participant questioned that paragraph's use of the term

“extraordinary circumstances,” and pointed out that it is not extraordinary for a proposal’s language to be amended after the publication of the advisory committee’s agenda book. A participant wondered if “good cause” would be a better term than “extraordinary circumstances.” One participant argued that it would be better if the paragraph did not provide examples of instances that could justify an off-cycle submission.

Another thread in the discussion related to the norms for Committee members in settings where discussion turns to a matter that is currently before the Committee. A judge member asked what level of formality Committee members should undertake; when does a communication with an outsider to the Committee process trigger the constraints outlined in the materials (e.g., forwarding comments to the Standing Committee’s Secretary)? Professor Struve suggested distinguishing between communications made to a Committee member qua Committee member and communications that are part of a more general discussion (e.g., on a listserv or at a conference). Professor Coquillette observed that there is a distinction between someone lobbying a Committee member and someone engaging in a general discussion. Subsequently, a participant proposed defining the term “submission” in the proposed website language; such a definition, this participant suggested, could help to address this issue. Professor King noted that her practice, after receiving a comment on a rule amendment, was to provide the sender with a link to the rules committee website and to explain the submission process. She suggested that members can use this technique to educate the public on how to participate in the process.

Judge Campbell thanked participants for their input, which will be incorporated into any proposal put forward at the June meeting.

Legislative Report. Julie Wilson delivered the legislative report. She noted that the 116th Congress convened on January 3, 2019. Any legislation introduced in the last Congress will have to be reintroduced. The Rules Committee Staff will continue to monitor any legislation introduced that would directly or effectively amend the federal rules.

CONCLUDING REMARKS

Before adjourning the meeting, Judge Campbell thanked the Committee’s members and other attendees for their preparation and contributions to the discussion. The Committee will next meet on June 25, 2019, in Washington, DC. He reminded members that at this next meeting the Committee would resume its discussion (noted in the preceding section of these minutes) regarding submissions made outside the public comment period.

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 2

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TAB 2A

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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

DENNIS R. DOW
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 the Advisory Committee on Appellate Rules

DATE: May 31, 2019

I. Introduction

The Advisory Committee on the Appellate Rules met on Friday, April 5, 2019, in San Antonio, Texas. The draft minutes of that meeting are attached at Tab B.

It approved proposed amendments previously published for comment for which it seeks final approval. These proposed amendments, discussed in Part II of this report, relate to length limits for responses to petitions for rehearing (Rules 35 and 40).

The Committee also approved proposed amendments for which it seeks approval for publication. One group of proposed amendments relates to the contents of notices of appeal (Rules 3 and 6; Forms 1 and 2). Another proposed amendment deals with agreed dismissals (Rule 42). These are discussed in Part III of this report.

The Committee also considered several other items, removing one of them from its agenda. These items are discussed in Part IV of this report.

II. Action Item for Final Approval After Public Comment

The Committee seeks final approval for proposed amendments to Rules 35 and 40. These amendments were published for public comment in August 2018.

The proposed amendments to Rules 35 and 40 would create length limits applicable to responses to petitions for rehearing. Under the existing rules, there are length limits applicable to petitions for rehearing, but none for responses to those petitions. In addition, the proposed amendment would change the term “answer” in Rule 40 (which deals with petitions for panel rehearing) to the term “response,” making it consistent with Rule 35 (which deals with petitions for rehearing en banc).

There was only one comment submitted. That comment, submitted by Aderant Compulaw, agreed with the proposed amendment to Rule 40(a)(3), noting that “it will promote consistency and avoid confusion if Appellate Rule 35 and Appellate Rule 40 utilize the same terminology.”

The Committee seeks final approval for the proposed amendments as published.

Rule 35. En Banc Determination

* * * * *

(b) Petition for Hearing or Rehearing En Banc. A party may petition for a hearing or rehearing en banc.

* * * * *

(2) Except by the court’s permission:

(A) a petition for an en banc hearing or rehearing produced using a computer must not exceed 3,900 words; and

(B) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages.

* * * * *

(e) Response. No response may be filed to a petition for an en banc consideration unless the court orders a response. The length limits in Rule 35(b)(2) apply to a response.

* * * *

Committee Note

The amendment to Rule 35(e) clarifies that the length limits applicable to a petition for hearing or rehearing en banc also apply to a response to such a petition, if the court orders one.

Rule 40. Petition for Panel Rehearing

* * * * *

(a) **Time to File; Contents; ~~Answer~~Response; Action by the Court if Granted.**

* * * * *

(3) ~~Answer~~Response. Unless the court requests, no ~~answer~~response to a petition for panel rehearing is permitted. ~~But~~Ordinarily, rehearing will not be granted in the absence of such a request. If a response is requested, the requirements of Rule 40(b) apply to the response.

* * * * *

(b) **Form of Petition; Length.** The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Except by the court's permission:

(1) a petition for panel rehearing produced using a computer must not exceed 3,900 words; and

(2) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages.

Committee Note

The amendment to Rule 40(a)(3) clarifies that the provisions of Rule 40(b) regarding a petition for panel rehearing also apply to a response

to such a petition, if the court orders a response. The amendment also changes the language to refer to a “response,” rather than an “answer,” to make the terminology consistent with Rule 35; this change is intended to be stylistic only.

Appendix A to this report contains the text of the proposed amendments to Rules 35 and 40.

III. Action Items for Approval for Publication

The Committee seeks approval for publication of proposed amendments to Rules 3 and 6, Forms 1 and 2, and Rule 42.

A. Rule 3(c)—Contents of Notices of Appeal

The Committee has been considering a possible amendment to Rule 3, dealing with the contents of notices of appeal, since the fall of 2017 when a letter from Neal Katyal and Sean Marotta brought to the Committee’s attention a troubling line of cases in one circuit. That line of cases, using an *expressio unius rationale*, would treat a notice of appeal from a final judgment that mentioned one interlocutory order but not others as limiting the appeal to that order, rather than reaching all of the interlocutory orders that merged into the judgment.

Research conducted since that time has revealed that the problem is not confined to a single circuit, but instead that there is substantial confusion both across and within circuits. In addition to a number of decisions that used an *expressio unius rationale* like the one pointed to in the Katyal and Marotta letter, there are also numerous decisions that would treat a notice of appeal that designated an order that disposed of all remaining claims in a case as limited to the claims disposed of in that order.

Moreover, there have also been cases holding that an appeal that designates an order denying a motion for reconsideration does not bring up for review the underlying judgment sought to be reconsidered.

The Supreme Court has recently described filing a notice of appeal as “generally speaking, a simple, nonsubstantive act,” and observed that filing requirements for

notices of appeal “reflect that claims are . . . likely to be ill defined or unknown” at the time of filing. *Garza v. Idaho*, 139 S. Ct. 738, 745-46 (2019).

The Committee’s goal in proposing the amendments is fully in accord with *Garza*: to reduce the inadvertent loss of appellate rights caused by the phrasing of a notice of appeal.

Rule 3(c)(1)(B) currently requires that a notice of appeal “designate the judgment, order, or part thereof being appealed.” The judgment or order to be designated is the one serving as the basis of the court’s appellate jurisdiction and from which time limits are calculated. But some interpret this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court’s appellate jurisdiction and from which time limits are calculated—and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal.

The Committee considered various ways to make this point clearer. It settled on four interrelated changes to Rule 3(c)(1)(B). First, to highlight that the distinction between the ordinary case in which an appeal is taken from the final judgment from the less-common case in which an appeal is taken from some other order, the term “judgment” and the term “order” are separated into two subsections. Second, to clarify that the kind of order that is to be designated in the latter situation is one that can serve as the basis of the court’s appellate jurisdiction, the word “appealable” is added before the word “order.” Third, to clarify that the judgment or order to be designated is the one serving as the basis of the court’s appellate jurisdiction, the phrase “from which the appeal is taken” replaces the phrase “being appealed” and is placed after each of the two new subsections. Finally, the phrase “part thereof” is deleted because the Committee viewed this phrase as contributing to the problem.

The result would require the appellant to designate:

- (i) the judgment from which the appeal is taken, or
- (ii) the appealable order from which the appeal is taken.

Reflecting this subdivision of Rule 3(c)(1)(B), the Committee also proposes that Form 1 be replaced by Form 1A (dealing with an appeal from a final judgment) and Form 1B (dealing with an appeal from an appealable order), and that a conforming change be made to Form 2 (dealing with an appeal from the Tax Court).

The Committee considered an alternative that would have avoided adding the word “appealable” before the word “order,” and instead would have added the phrase “that supports appellate jurisdiction,” after the word “order.” It concluded that “appealable order” was clearer and more straightforward than “order that supports appellate jurisdiction.”

Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

The Committee considered writing the merger principle into the text of the Rule. But even though the general merger principle can be stated simply—an appeal from a final judgment permits review of all rulings that led up to the judgment—there are exceptions and complications to the general principle. Because of these exceptions and complications, as well as reluctance to stymie future developments, the Committee decided against attempting to codify the merger principle. Instead, the proposed amendment would call attention to the merger principle in the text of the Rule, by adding a new Rule 3(c)(4):

(4) The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

The Committee Note, however, would state the general merger rule.

To avoid the inadvertent loss of appellate rights where an appellant designates (1) an order that disposes of all remaining claims in a case, or (2) an order denying a motion for reconsideration, the proposed amendment would add a new Rule 3(c)(5):

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

- (A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or
- (B) an order described in Rule 4(a)(4)(A).

The phrasing of proposed subsection (A) draws on Civil Rule 54(b), while proposed subsection (B) relies on a cross-reference to the kinds of motions that restart the time for filing a notice of appeal.

The Committee wrestled with the question of whether to authorize an appellant to expressly limit the notice of appeal. On the one hand, in an adversary system, litigants shouldn't be required to appeal more than they choose, particularly in cases involving multiple claims and multiple parties. In addition, a single document may decide multiple motions, and include some decisions (such as granting a preliminary injunction) that are appealable and some decisions (such as setting a discovery schedule) that are not. On the other hand, any limiting work could be left to the briefs. Plus, more explicit attention in the Rules to the possibility of a limited notice of appeal might lead to strategic attempts to limit the jurisdiction of the court of appeals.

The Committee settled on language that did not speak of limiting the “appeal” or “scope of the appeal,” but instead on the following, to be added as a new subsection (6):

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of the appeal.

If these competing concerns were resolved the other way, the final clause—“specific designations do not limit the scope of the notice of the appeal”—could be added as a separate sentence to proposed new subsection (4).

A conforming amendment to Rule 6, which governs appeals in bankruptcy cases, would replace the cross-reference to “Form 1” with a cross-reference to “Forms 1A and 1B.” The Committee consulted with the Advisory Committee on the Bankruptcy Rules; no objection or other concern was raised.

The Committee also consulted with Chief Judge Maurice B. Foley of the Tax Court. He responded that neither the proposed amendments to Rule 3(c), nor the proposed amendments to Form 2 would create problems with appeals from the Tax Court.

Federal Rule of Appellate Procedure 3

* * *

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as “all plaintiffs,” “the defendants,” “the plaintiffs A, B, et al.,” or “all defendants except X”;

(B) designate:

(i) the judgment from which the appeal is taken, or

(ii) the appealable order from which the appeal is taken, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer’s spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.

(5) In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates:

(A) an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties; or

(B) an order described in Rule 4(a)(4)(A).

(6) An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.

~~(4)~~ (7) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(5) ~~(8)~~ Forms 1A and 1B in the Appendix of Forms are ~~is a~~ suggested forms of a notices of appeal.

* * *

Committee Note

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus and limit the issues on appeal.

Because the jurisdiction of the court of appeals is established by statute, an appeal can be taken only from those district court decisions from which Congress has authorized an appeal. In most instances, that is the final judgment, see, e.g., 28 U.S.C. §1291, but some other orders are considered final within the meaning of 28 U.S.C. §1291, and some interlocutory orders are themselves appealable. See, e.g., 28 U.S.C. §1292. Accordingly, Rule 3(c)(1) currently requires that the notice of appeal “designate the judgment, order, or part thereof being appealed.” The judgment or order to be designated is the one serving as the basis of the court’s appellate jurisdiction and from which time limits are calculated.

However, some have interpreted this language as an invitation, if not a requirement, to designate each and every order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court’s appellate jurisdiction and from which time limits are calculated—and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal. Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

In an effort to avoid the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of “(i) the judgment from which the appeal is taken, or (ii) the appealable order from which the appeal is taken”—and the phrase “or part thereof” is deleted. In most cases, because of the merger principle, it is appropriate to designate only the judgment. In other cases, particularly where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order.

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some particular order that the appellant wishes to challenge on appeal. A number of courts, using an *expressio unius* rationale, have held that such a designation of a particular order limits the scope of the notice of appeal to the particular order, and prevents the appellant from challenging other orders that would otherwise be reviewable, under the merger principle, on appeal from the final judgment. These decisions create a trap for the unwary.

However, there are circumstances in which an appellant may deliberately choose to limit the scope of the notice of appeal, and it is desirable to enable the appellant to convey this deliberate choice to the other parties.

To alert readers to the merger principle, a new provision is added to Rule 3(c): “The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.” The general merger rule can be stated simply: an appeal from a final judgment permits review of all rulings that led up to the judgment. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law.

To remove the trap for the unwary, while enabling deliberate limitations of the notice of appeal, another new provision is added to Rule 3(c):

“An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of the appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.”

A related problem arises when a case is decided by a series of orders, sometimes separated by a year or more. For example, some claims might be dismissed for failure to state a claim under F.R.Civ.P. 12(b)(6), and then, after a considerable period for discovery, summary judgment under F.R.Civ.P. 56 is granted in favor of the defendant on the remaining claims. That second order, because it resolves all of the remaining claims, is a final judgment, and an appeal from that final judgment confers jurisdiction to review the earlier 12(b)(6) dismissal. But if a notice of appeal describes the second order, not as a final judgment, but as an order granting summary judgment, some courts would limit appellate review to the summary judgment and refuse to consider a challenge to the earlier 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of F.R.Civ.P. 58, and enters both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designates the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier 12(b)(6) dismissal. This creates a trap for all but the most wary, because at the time that the district court issues

the order disposing of all remaining claims, a litigant may not know whether the district court will ever enter the separate document required by F.R.Civ.P. 58.

To remove this trap, a new provision is added to Rule 3(c): “In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under F.R.Civ.P. 58, if the notice designates . . . an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties.”

Frequently, a party who is aggrieved by a final judgment will make a motion in the district court instead of filing a notice of appeal. Rule 4(a)(4) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that designates only the order disposing of such a motion as limited to that order, rather than bringing the final judgment before the court of appeals for review. (Again, such an appeal might be brought before or after the judgment is set out in a separate document under F.R.Civ.P. 58.) To reduce the unintended loss of appellate rights in this situation, a new provision is added to Rule 3(c): “In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under F.R.Civ.P. 58, if the notice designates . . . an order described in Rule 4(a)(4)(A).” This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of

appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

These new provisions are added as Rules 3(c)(4), 3(c)(5), and 3(c)(6), with the existing Rules 3(c)(4) and 3(c)(5) renumbered. In addition, to reflect these changes to the Rule, Form 1 is replaced by Forms 1A and 1B, and Form 2 is amended.

Federal Rule of Appellate Procedure 6

* * *

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b), but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13–20, 22–23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to “Forms 1A and 1B in the Appendix of Forms” must be read as a reference to Form 5;

(C) when the appeal is from a bankruptcy appellate panel, “district court,” as used in any applicable rule, means “appellate panel”; and

(D) in Rule 12.1, “district court” includes a bankruptcy court or bankruptcy appellate panel.

* * *

Committee Note

The amendment replaces “Form 1” with “Forms 1A and 1B” to conform to the amendment to Rule 3(c).

Form 1A

Notice of Appeal to a Court of Appeals From a Judgment ~~or Order~~ of a District Court.

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff

v.

C.D., Defendant

Notice of Appeal

Notice is hereby given that ___(~~here~~ name all parties taking the appeal)___, (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the _____ Circuit (~~from the final judgment~~) (~~from an order (describing it)~~) entered in this action on the _____ day of _____, 20__.

(s) _____
Attorney for _____
Address: _____

[Note to inmate filers: If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 1B

Notice of Appeal to a Court of Appeals From a ~~Judgment or~~ an Appealable Order of a District Court.

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff

v.

C.D., Defendant

Notice of Appeal

Notice is hereby given that ___(here name all parties taking the appeal)___, (plaintiffs) (defendants) in the above named case,* hereby appeal to the United States Court of Appeals for the _____ Circuit (~~from the final judgment~~) (from an the order ___ (describing the order it)) entered in this action on the _____ day of _____, 20__.

(s) _____
Attorney for _____
Address: _____

[Note to inmate filers: If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.]

* See Rule 3(c) for permissible ways of identifying appellants.

Form 2

**Notice of Appeal to a Court of Appeals From a Decision of
the United States Tax Court**

UNITED STATES TAX COURT
Washington, D.C.

A.B., Petitioner

v.

Commissioner of Internal Revenue,
Respondent

Docket No. _____

Notice of Appeal

Notice is hereby given that _____ (~~here~~ name all parties taking the appeal¹) _____
~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit from (~~that part of~~) the
decision of this court entered in the above captioned proceeding on the _____ day of _____,
20__ (relating to _____).

(s) _____
Counsel for _____
Address: _____

¹ See Rule 3(c) for permissible ways of identifying appellants.

A. Rule 42(b)—Agreed Dismissals

The Committee proposes amending Rule 42(b) to require the circuit clerk to dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any court fees that are due. The current Rule gives a discretionary power to dismiss by using the word “may.” Prior to restyling, the word “may” was “shall”; the Committee now proposes replacing the word “may” with the word “must.” Mandatory dismissal is also the approach of Supreme Court Rule 46.

To clarify the distinction between situations where dismissal is mandated by stipulation of the parties and other situations, the proposed amendment would subdivide Rule 42(b) and add appropriate subheadings.

The current Rule provides that “no mandate or other process may issue without a court order.” Modern readers find this phrasing cryptic, and it has produced some difficulty for circuit clerks who have taken to issuing orders in lieu of mandates when appeals are dismissed in order to make clear that jurisdiction over the case is being returned to the district court. Members of the Committee debated whether a mandate is necessary when, for example, an appeal from a preliminary injunction is dismissed. These problems are avoided by replacing this language and instead stating directly: “A court order is required for any relief beyond the mere dismissal of an appeal—including an order vacating an action of the district court or an administrative agency or remanding the case to either of them.”

The Committee considered requiring a “judicial order” or “action by a judge” rather than a “court order,” but opted for “court order” rather than upset the practice in the Ninth Circuit of delegating some dismissal power to mediators and the Appellate Commissioner.

The Committee also considered deleting the examples of orders beyond mere dismissals, but decided to include them because they were useful illustrations, particularly in light of the decision in *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 29 (1994) (holding that “mootness by reason of settlement does not justify vacatur of a judgment”).

To deal with some litigants who misunderstand the term “fees” to refer to attorney’s fees, the proposed amendment adds the word “court” before the word “fees.”

The Committee considered adding a provision dealing with situations where court approval of a settlement is required, but concluded that it was sufficient to state

in the Committee Note that the Rule does not affect any law that requires court approval of a settlement.

The Committee considered adding a provision dealing with petitions for review and applications to enforce agency orders, but concluded that it was sufficient to state in the Committee Note that Rule 20 makes Rule 42(b) applicable to petitions for review and applications to enforce an agency order and that “appeal” should be understood to include a petition for review or application to enforce an agency order.

Federal Rule of Appellate Procedure 42

* * *

(b) Dismissal in the Court of Appeals.

(1) Stipulated Dismissal. The circuit clerk ~~may~~ **must** dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any **court** fees that are due. ~~But no mandate or other process may issue without a court order.~~

(2) Appellant’s Motion to Dismiss. An appeal may be dismissed on the appellant’s motion on terms agreed to by the parties or fixed by the court.

(3) Other Relief. ~~A court order is required for any relief beyond the mere dismissal of an appeal—including an order vacating an action of the district court or an administrative agency or remanding the case to either of them.~~

Committee Note

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree. It also clarifies that the fees that must be paid are court fees, not attorney's fees. The Rule does not affect any law that requires court approval of a settlement.

The amendment replaces old terminology and clarifies that any relief beyond mere dismissal—including vacating or remanding—requires a court order.

Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. For Rule 42(b) to function in such cases, “appeal” should be understood to include a petition for review or application to enforce an agency order.

Appendix B to this report contains the text of the proposed amendments and the proposed Committee Notes to Rules 3, 6, and 42, as well as the proposed amendments to Forms 1 and 2.

IV. Information Items

The Committee continues its more comprehensive review of Rules 35 and 40, but is not inclined to make major changes, finding insufficient problems to warrant such changes. It considered, but rejected, a number of possible changes, including (1) revising Rule 35 to apply solely to initial hearing en banc and Rule 40 to apply to both kinds of rehearing; (2) revising Rules 35 and 40 to make them more parallel to each other, or parallel to Rule 21; (3) requiring a single petition rather than separate petitions for panel rehearing and rehearing en banc; and (4) adding to Rule 35 the statement in Rule 40 that a grant of rehearing is unlikely without a call for a response.

The Committee is now focused on the possibility of more modest changes that would largely clarify and codify widespread practices, particularly the ability of a panel to treat a petition for rehearing en banc as including a petition for panel rehearing in order to deal with problems with the panel decision that the panel agrees should be fixed. But the Committee is concerned about making clear what happens if a panel makes a change in response to a petition for rehearing en banc, and in particular making clear that a panel cannot block access to the full court.

The Committee had been examining the possibility of amending Rule 4(a)(5)(C), dealing with extensions of time to appeal, in light of the decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017). *Hamer* distinguished between the statutory time for appeal (which is jurisdictional) and more stringent time limits in the Federal Rules of Appellate Procedure (which are not jurisdictional). The Committee had tabled this question after the Supreme Court granted certiorari in *Nutraceutical Corp. v. Lambert*. Once the Court decided that case, the Committee reviewed that decision—which held that a mandatory claims-processing rule is not subject to equitable tolling, 139 S. Ct. 710 (2019)—and decided to take no action.

The Committee had also been considering a proposal to prescribe how courts of appeals handle the vote of a judge who leaves the bench. The Supreme Court has recently held, however, that a federal court cannot count the vote of a judge who dies before the decision was filed, noting that “federal judges are appointed for life, not for eternity.” *Yovino v. Rizo*, 139 S. Ct. 706, 710 (2019). Accordingly, the Committee agreed to remove this item from its docket.

The Committee has formed a subcommittee to examine a proposal by the General Counsel of the Railroad Retirement Board to extend equivalent privacy protections for Railroad Retirement Act benefit cases as those provided in Social Security cases. Action by the Appellate Rules Committee is appropriate because Railroad Retirement Act benefit cases do not come to the district court. But the Committee wishes to act comprehensively, and therefore will explore whether it might be appropriate to include benefit cases arising under other statutes, such as those dealing with Black Lung and Longshoremen.

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APPENDIX A

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

1 **Rule 35. En Banc Determination**

2 * * * * *

3 **(b) Petition for Hearing or Rehearing En Banc.** A party

4 may petition for a hearing or rehearing en banc.

5 * * * * *

6 (2) Except by the court's permission:

7 (A) a petition for an en banc hearing or rehearing

8 produced using a computer must not exceed

9 3,900 words; and

10 (B) a handwritten or typewritten petition for an

11 en banc hearing or rehearing must not

12 exceed 15 pages.

13 * * * * *

¹ New material is underlined in red; matter to be omitted is lined through.

2 FEDERAL RULES OF APPELLATE PROCEDURE

- 14 (e) **Response.** No response may be filed to a petition for
15 an en banc consideration unless the court orders a response.
16 The length limits in Rule 35(b)(2) apply to a response.

* * * * *

Committee Note

The amendment to Rule 35(e) clarifies that the length limits applicable to a petition for hearing or rehearing en banc also apply to a response to such a petition, if the court orders one.

Changes Made After Publication and Comment

No changes were made.

FEDERAL RULES OF APPELLATE PROCEDURE 3

1 **Rule 40. Petition for Panel Rehearing**

2 **(a) Time to File; Contents; ~~Answer~~Response; Action**
3 **by the Court if Granted.**

4 * * * * *

5 (3) ~~Answer~~Response. Unless the court requests, no
6 ~~answer~~response to a petition for panel rehearing is
7 permitted. ~~But~~Ordinarily, rehearing will not be
8 granted in the absence of such a request. If a
9 response is requested, the requirements of
10 Rule 40(b) apply to the response.

11 * * * * *

12 **(b) Form of Petition; Length.** The petition must comply
13 in form with Rule 32. Copies must be served and filed
14 as Rule 31 prescribes. Except by the court's
15 permission:

16 (1) a petition for panel rehearing produced using a
17 computer must not exceed 3,900 words; and

4 FEDERAL RULES OF APPELLATE PROCEDURE

- 18 (2) a handwritten or typewritten petition for panel
19 rehearing must not exceed 15 pages.

Committee Note

The amendment to Rule 40(a)(3) clarifies that the provisions of Rule 40(b) regarding a petition for panel rehearing also apply to a response to such a petition, if the court orders a response. The amendment also changes the language to refer to a “response,” rather than an “answer,” to make the terminology consistent with Rule 35; this change is intended to be stylistic only.

Changes Made After Publication and Comment

No changes were made.

Summary of Public Comment

AP-2018-0001. Aderant CompuLaw. Agreed with the proposed amendment. It will promote consistency and avoid confusion if Appellate Rule 35 and Appellate Rule 40 utilize the same terminology.

APPENDIX B

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF APPELLATE PROCEDURE¹**

1 **Rule 3. Appeal as of Right—How Taken**

2 * * * * *

3 **(c) Contents of the Notice of Appeal.**

4 (1) The notice of appeal must:

5 (A) specify the party or parties taking the
6 appeal by naming each one in the caption or
7 body of the notice, but an attorney
8 representing more than one party may
9 describe those parties with such terms as
10 “all plaintiffs,” “the defendants,” “the
11 plaintiffs A, B, et al.,” or “all defendants
12 except X”;

13 (B) designate:

¹ New material is underlined in red; matter to be omitted is lined through.

2 FEDERAL RULES OF APPELLATE PROCEDURE

- 1 (i) the judgment from which the
2 appeal is taken, or
3 (ii) the appealable order from which
4 the appeal is taken, ~~or part thereof~~
5 ~~being appealed~~; and
6 (C) name the court to which the appeal is taken.
7 (2) A pro se notice of appeal is considered filed on
8 behalf of the signer and the signer's spouse and
9 minor children (if they are parties), unless the
10 notice clearly indicates otherwise.
11 (3) In a class action, whether or not the class has
12 been certified, the notice of appeal is sufficient
13 if it names one person qualified to bring the
14 appeal as representative of the class.
15 (4) The notice of appeal encompasses all orders that
16 merge for purposes of appeal into the designated
17 judgment or appealable order. It is not necessary
18 to designate those orders in the notice of appeal.

FEDERAL RULES OF APPELLATE PROCEDURE

3

- 1 (5) In a civil case, a notice of appeal encompasses
2 the final judgment, whether or not that judgment
3 is set out in a separate document under Federal
4 Rule of Civil Procedure 58, if the notice
5 designates:
6 (A) an order that adjudicates all remaining
7 claims and the rights and liabilities of all
8 remaining parties; or
9 (B) an order described in Rule 4(a)(4)(A).
10 (6) An appellant may designate only part of a
11 judgment or appealable order by expressly
12 stating that the notice of appeal is so limited.
13 Without such an express statement, specific
14 designations do not limit the scope of the notice
15 of appeal.
16 ~~(4)~~ (7) An appeal must not be dismissed for
17 informality of form or title of the notice of
18 appeal, or for failure to name a party whose

4 FEDERAL RULES OF APPELLATE PROCEDURE

1 intent to appeal is otherwise clear from the
2 notice.

3 (5) ~~(8)~~ Forms 1A and 1B in the Appendix of Forms

4 are ~~is a~~ suggested forms of a ~~notices~~ of appeal.

* * * * *

Committee Note

The notice of appeal is supposed to be a simple document that provides notice that a party is appealing and invokes the jurisdiction of the court of appeals. It therefore must state who is appealing, what is being appealed, and to what court the appeal is being taken. It is the role of the briefs, not the notice of appeal, to focus and limit the issues on appeal.

Because the jurisdiction of the court of appeals is established by statute, an appeal can be taken only from those district court decisions from which Congress has authorized an appeal. In most instances, that is the final judgment, see, e.g., 28 U.S.C. §1291, but some other orders are considered final within the meaning of 28 U.S.C. §1291, and some interlocutory orders are themselves appealable. See, e.g., 28 U.S.C. §1292. Accordingly, Rule 3(c)(1) currently requires that the notice of appeal “designate the judgment, order, or part thereof being appealed.” The judgment or order to be designated is the one serving as the basis of the court’s appellate jurisdiction and from which time limits are calculated.

However, some have interpreted this language as an invitation, if not a requirement, to designate each and every

order of the district court that the appellant may wish to challenge on appeal. Such an interpretation overlooks a key distinction between the judgment or order on appeal—the one serving as the basis of the court’s appellate jurisdiction and from which time limits are calculated—and the various orders or decisions that may be reviewed on appeal because they merge into the judgment or order on appeal. Designation of the final judgment confers appellate jurisdiction over prior interlocutory orders that merge into the final judgment. The merger principle is a corollary of the final judgment rule: a party cannot appeal from most interlocutory orders, but must await final judgment, and only then obtain review of interlocutory orders on appeal from the final judgment.

In an effort to avoid the misconception that it is necessary or appropriate to designate each and every order of the district court that the appellant may wish to challenge on appeal, Rule 3(c)(1) is amended to require the designation of “(i) the judgment from which the appeal is taken, or (ii) the appealable order from which the appeal is taken”—and the phrase “or part thereof” is deleted. In most cases, because of the merger principle, it is appropriate to designate only the judgment. In other cases, particularly where an appeal from an interlocutory order is authorized, the notice of appeal must designate that appealable order.

Whether due to misunderstanding or a misguided attempt at caution, some notices of appeal designate both the judgment and some particular order that the appellant wishes to challenge on appeal. A number of courts, using an *expressio unius* rationale, have held that such a designation of a particular order limits the scope of the notice of appeal to the particular order, and prevents the appellant from challenging other orders that would otherwise be reviewable,

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under the merger principle, on appeal from the final judgment. These decisions create a trap for the unwary.

However, there are circumstances in which an appellant may deliberately choose to limit the scope of the notice of appeal, and it is desirable to enable the appellant to convey this deliberate choice to the other parties.

To alert readers to the merger principle, a new provision is added to Rule 3(c): “The notice of appeal encompasses all orders that merge for purposes of appeal into the designated judgment or appealable order. It is not necessary to designate those orders in the notice of appeal.” The general merger rule can be stated simply: an appeal from a final judgment permits review of all rulings that led up to the judgment. Because this general rule is subject to some exceptions and complications, the amendment does not attempt to codify the merger principle but instead leaves its details to case law.

To remove the trap for the unwary, while enabling deliberate limitations of the notice of appeal, another new provision is added to Rule 3(c): “An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of the appeal is so limited. Without such an express statement, specific designations do not limit the scope of the notice of appeal.”

A related problem arises when a case is decided by a series of orders, sometimes separated by a year or more. For example, some claims might be dismissed for failure to state a claim under F.R.Civ.P. 12(b)(6), and then, after a considerable period for discovery, summary judgment under F.R.Civ.P. 56 is granted in favor of the defendant on the remaining claims. That second order, because it resolves all of the remaining claims, is a final judgment, and an appeal

from that final judgment confers jurisdiction to review the earlier F.R.Civ.P. 12(b)(6) dismissal. But if a notice of appeal describes the second order, not as a final judgment, but as an order granting summary judgment, some courts would limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. Similarly, if the district court complies with the separate document requirement of F.R.Civ.P. 58, and enters both an order granting summary judgment as to the remaining claims and a separate document denying all relief, but the notice of appeal designates the order granting summary judgment rather than the separate document, some courts would likewise limit appellate review to the summary judgment and refuse to consider a challenge to the earlier F.R.Civ.P. 12(b)(6) dismissal. This creates a trap for all but the most wary, because at the time that the district court issues the order disposing of all remaining claims, a litigant may not know whether the district court will ever enter the separate document required by F.R.Civ.P. 58.

To remove this trap, a new provision is added to Rule 3(c): “In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order that adjudicates all remaining claims and the rights and liabilities of all remaining parties.”

Frequently, a party who is aggrieved by a final judgment will make a motion in the district court instead of filing a notice of appeal. Rule 4(a)(4) permits a party who makes certain motions to await disposition of those motions before appealing. But some courts treat a notice of appeal that designates only the order disposing of such a motion as limited to that order, rather than bringing the final judgment

8 FEDERAL RULES OF APPELLATE PROCEDURE

before the court of appeals for review. (Again, such an appeal might be brought before or after the judgment is set out in a separate document under F.R.Civ.P. 58.) To reduce the unintended loss of appellate rights in this situation, a new provision is added to Rule 3(c): “In a civil case, a notice of appeal encompasses the final judgment, whether or not that judgment is set out in a separate document under Federal Rule of Civil Procedure 58, if the notice designates . . . an order described in Rule 4(a)(4)(A).” This amendment does not alter the requirement of Rule 4(a)(4)(B)(ii) (requiring a notice of appeal or an amended notice of appeal if a party intends to challenge an order disposing of certain motions).

These new provisions are added as Rules 3(c)(4), 3(c)(5), and 3(c)(6), with the existing Rules 3(c)(4) and 3(c)(5) renumbered. In addition, to reflect these changes to the Rule, Form 1 is replaced by Forms 1A and 1B, and Form 2 is amended.

9 FEDERAL RULES OF APPELLATE PROCEDURE

1 **Rule 6. Appeal in a Bankruptcy Case**

2 * * * * *

3 **(b) Appeal From a Judgment, Order, or Decree of a**
4 **District Court or Bankruptcy Appellate Panel Exercising**
5 **Appellate Jurisdiction in a Bankruptcy Case.**

6 (1) **Applicability of Other Rules.** These rules apply
7 to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1)
8 from a final judgment, order, or decree of a district court or
9 bankruptcy appellate panel exercising appellate jurisdiction
10 under 28 U.S.C. § 158(a) or (b), but with these
11 qualifications:

12 (A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(c), 13–20,
13 22–23, and 24(b) do not apply;

14 (B) the reference in Rule 3(c) to “Forms 1A and
15 1B in the Appendix of Forms” must be read
16 as a reference to Form 5;

17 (C) when the appeal is from a bankruptcy
18 appellate panel, “district court,” as used in

10 FEDERAL RULES OF APPELLATE PROCEDURE

1 any applicable rule, means “appellate
2 panel”; and
3 (D) in Rule 12.1, “district court” includes a
4 bankruptcy court or bankruptcy appellate
5 panel.

* * * * *

Committee Note

The amendment replaces “Form 1” with “Forms 1A and 1B” to conform to the amendment to Rule 3(c).

11 FEDERAL RULES OF APPELLATE PROCEDURE

Form 1A

**Notice of Appeal to a Court of Appeals From a
Judgment ~~or Order~~ of a District Court.**

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff

v.

C.D., Defendant

Notice of Appeal

Notice is hereby given that ___(~~here~~ name all parties taking the appeal)___, (plaintiffs) (defendants) in the above named case,* ~~hereby~~ appeal to the United States Court of Appeals for the _____ Circuit (~~from the final judgment~~) (~~from an order (describing it)~~) entered in this action on the _____ day of _____, 20__.

(s) _____
Attorney for _____
Address: _____

[Note to inmate filers: *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.]*

* See Rule 3(c) for permissible ways of identifying appellants.

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Form 1B

**Notice of Appeal to a Court of Appeals From a
Judgment or an Appealable Order of a District Court.**

United States District Court for the _____
District of _____
File Number _____

A.B., Plaintiff

v.

C.D., Defendant

Notice of Appeal

Notice is hereby given that ___ (~~here~~ name all parties taking the appeal) ___, (plaintiffs) (defendants) in the above named case, * hereby appeal to the United States Court of Appeals for the _____ Circuit (~~from the final judgment~~) (from an the order ___ (describing the order it) _____) entered in this action on the _____ day of _____, 20__.

(s) _____
Attorney for _____
Address: _____

[Note to inmate filers: *If you are an inmate confined in an institution and you seek the timing benefit of Fed. R. App. P. 4(c)(1), complete Form 7 (Declaration of Inmate Filing) and file that declaration along with this Notice of Appeal.*]

* See Rule 3(c) for permissible ways of identifying appellants.

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Form 2

**Notice of Appeal to a Court of Appeals From a Decision
of
the United States Tax Court**

UNITED STATES TAX COURT
Washington, D.C.

A.B., Petitioner	
v.	Docket No. _____
Commissioner of Internal Revenue, Respondent	

Notice of Appeal

Notice is hereby given that _____ (~~here~~ name all parties taking the appeal²) _____ hereby appeal to the United States Court of Appeals for the _____ Circuit from ~~(that part of)~~ the decision of this court entered in the above captioned proceeding on the _____ day of _____, 20__ (relating to _____).

(s) _____
Counsel for _____
Address: _____

² See Rule 3(c) for permissible ways of identifying appellants.

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14 FEDERAL RULES OF APPELLATE PROCEDURE

1 **Rule 42. Voluntary Dismissal**

2 * * * * *

3 **(b) Dismissal in the Court of Appeals.**

4 **(1) Stipulated Dismissal.** The circuit clerk ~~may~~
5 must dismiss a docketed appeal if the parties file
6 a signed dismissal agreement specifying how
7 costs are to be paid and pay any court fees that
8 are due. ~~But no mandate or other process may~~
9 ~~issue without a court order.~~

10 **(2) Appellant's Motion to Dismiss.** An appeal may be
11 dismissed on the appellant's motion on terms
12 agreed to by the parties or fixed by the court.

13 **(3) Other Relief. A court order is required for any**
14 relief beyond the mere dismissal of an appeal—
15 including an order vacating an action of the
16 district court or an administrative agency or
17 remanding the case to either of them.

* * * * *

Committee Note

The amendment restores the requirement, in effect prior to the restyling of the Federal Rules of Appellate Procedure, that the circuit clerk dismiss an appeal if all parties so agree. It also clarifies that the fees that must be paid are court fees, not attorney’s fees. The Rule does not affect any law that requires court approval of a settlement.

The amendment replaces old terminology and clarifies that any relief beyond mere dismissal—including vacating or remanding—requires a court order.

Pursuant to Rule 20, Rule 42(b) applies to petitions for review and applications to enforce an agency order. For Rule 42(b) to function in such cases, “appeal” should be understood to include a petition for review or application to enforce an agency order.

TAB 2B

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Minutes of the Spring 2019 Meeting of the
Advisory Committee on the Appellate Rules

April 5, 2019

San Antonio, Texas

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 Friday, April 5, 2019, at 8:30 a.m., at the Hyatt Regency Riverwalk Hotel in San Antonio, Texas.

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, Christopher Landau, Judge Stephen Joseph Murphy III, Professor Stephen E. Sachs, Danielle Spinelli, and Judge Paul J. Watford. Solicitor General Noel Francisco was represented by Mark Freeman, Director of Appellate Staff, Department of Justice.

Also present were: Judge David G. Campbell, Chair, Standing Committee on the Rules of Practice and Procedure; Judge Frank Hull, Member, Standing Committee on the Rules of Practice and Procedure, and Liaison Member, 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; Patricia S. Dodszeit, Clerk of Court Representative, Advisory Committee on the Appellate Rules; Rebecca A. Womeldorf, Secretary, Standing Committee on the Rules of Practice and Procedure and Rules Committee Chief Counsel; Bridget M. Healy, Attorney Advisor, Rules Committee Staff (RCS); Shelly Cox, Administrative Analyst, RCS; Ahmed Al Dajani, Rules Law Clerk, RCS; Marie Leary, Senior Research Associate, Federal Judicial Center; and Professor Edward A. Hartnett, Reporter, Advisory Committee on the Appellate Rules.

Professor Catherine T. Struve, Reporter, Standing Committee on the Rules of Practice and Procedure, and Professor Daniel R. Coquillette, Consultant, Standing Committee on the Rules of Practice and Procedure, participated in the meeting by phone.

I. Introduction

Judge Chagares opened the meeting and greeted everyone, particularly Judge Paul Watford, a new member of the Committee. He thanked Rebecca Womeldorf, Shelly Cox, and the whole Rules team for organizing the meeting and the dinner the night before. He noted that while prior members of the Committee have gone on to become judges, a current member of the Committee, Chris Landau, has been

nominated to be ambassador to Mexico, an apparent first for the Committee. Mr. Landau stated that it has been a privilege to serve on this Committee and that he was happy that he was able to make this meeting. A judge member added that prior members of the Committee have also gone on to become Justices of the Supreme Court.

II. Report on Proposed Amendments Submitted to the Supreme Court

Judge Chagares reported that the proposed amendments to Rules 3, 5, 13, 21, 25, 26, 26.1, 28, 32, and 39 had been sent to the Supreme Court. These proposed amendments mostly reflect the move to electronic filing and the resulting reduced need for proof of service. In addition, the proposed amendment to Rule 26.1 changes the disclosure requirements of that Rule.

These proposed amendments appear to be on track to take effect on December 1, 2019. The agenda book (page 65) includes a list of pending legislation that would effectively amend the Federal Rules; none of the pending legislation targets a Federal Rule of Appellate Procedure.

III. Approval of the Minutes

The draft minutes of the October 26, 2018, Advisory Committee meeting were approved.

IV. Discussion of Matters Published for Public Comment

Proposed amendments to Rules 35 and 40, dealing with the length limits for responses to petitions for rehearing, were published for public comment. There has been only one comment submitted; that comment agreed with the proposed amendment to Rule 40(a)(3). By contrast, the proposed amendment to Civil Rule 30(b)(6) drew over 2000 comments.

Judge Chagares observed that he has also heard informally from judges who approved of these proposed amendments.

The Committee unanimously gave final approval of these proposed amendments for submission to the Standing Committee.

V. Discussion of Matters Before Subcommittees

A. Proposed Amendments to Rule 3 – Merger (06-AP-D)

Professor Sachs presented the subcommittee's report regarding Rule 3. (Agenda Book page 99). The style consultants commented on the proposal since the publication of the Agenda Book, and changes made in light of their suggestions are reflected in documents distributed at the meeting.

Professor Sachs noted that this issue regarding the content of the notice of appeal has been under consideration by the Committee for some time. The current rule calls for the designation of the judgment or order “being appealed,” which is ambiguous: does it refer to the judgment or order which can be the basis for moving the case up to the appellate court—the one serving as the basis of the court's appellate jurisdiction and from which time limits are calculated—or to the substantive issues to be reviewed by the appellate court? For example, an evidentiary ruling might be made along the way to a final judgment; the appeal is from the final judgment, but it may be that the evidentiary issue is the one sought to be reviewed.

This ambiguity leads some to list in the notice of appeal the rulings sought to be reviewed. Some courts use an *expressio unius rationale* and treat a notice of appeal from a final judgment that mentions one interlocutory order but not others as limiting the appeal to that order, rather than reaching all the interlocutory orders that merged into the judgment. A memo by the Rules Law Clerk showed splits within and across circuits.

In addition, Civil Rule 58 requires that a judgment be set out in a separate document. If that doesn't happen (and it doesn't always happen), the judgment is considered entered once 150 days have run from an order that resolves all remaining claims. If a notice of appeal designates the final order, some courts construe the notice of appeal as limited to the claims disposed of in that order, rather than reaching earlier orders that merge into the final judgment.

The proposed amendment to Rule 3(c)(1)(B) would replace the phrase “being appealed” with the phrase “from which the appeal is taken.” A new (c)(4) would refer to the merger rule and clarify that there is no need to include in the notice of appeal orders that merge into the designated judgment or order. A new (c)(6) would repudiate the *expressio unius rationale*. A new (c)(5)(A) would clarify that a notice of appeal that designates an order that disposes of all remaining claims in a case includes the final judgment.

The subcommittee decided to refer to the merger rule without describing it in the text of the Rule. The fear is getting something wrong in the description of the merger rule.

The subcommittee decided to delete the phrase “or part thereof” from Rule 3, because it is part of the problem. On the other hand, the subcommittee thought that it should be possible for an appellant to deliberately exclude some matters from the appeal.

The subcommittee left to the full Committee the question of whether to add the word “appealable” before the word “order” in proposed Rule 3(c)(1)(B)(ii). Is it confusing? How about the alternative—shown in option B—of adding the phrase “that supports appellate jurisdiction” after the word “order”?

When a party moves for reconsideration or for a new trial, that party can wait until that motion is decided and then appeal. But if the notice of appeal filed after the disposition of the motion designates only the order disposing of that motion, some courts will treat the notice of appeal as not including the underlying judgment. The proposed Rule 3(c)(5)(B) would avoid the accidental loss of appellate rights in these circumstances.

Option C shows a more significant restyling of Rule 3(c), reordering the provisions. There are advantages as well as disadvantages to this restructuring of the Rule.

Form 1 is replaced by Form 1A and Form 1B, in line with the changes to Rule 3(c)(1)(B).

A lawyer member asked if a pro se litigant who used Form 1B (which is designed for appeals from appealable orders) rather than Form 1A (which is designated for appeals from final judgments) when appealing from a final judgment would be okay. Professor Sachs said yes, if the litigant designated the final order.

Judge Chagares noted that the recent Supreme Court decision in *Garza v. Idaho*, 139 S. Ct. 738 (2019), emphasized that filing a notice of appeal is a simple non-substantive act; this proposed amendment is designed to bring that back.

A judge member stated that the committee had done excellent work and that he preferred Option A because it is clearest and most straightforward. Another judge member echoed support for Option A, particularly coupled with the changes to the forms.

Judge Chagares asked about cross appeals. Professor Sachs stated that they would be left as-is. He added that the proposed amendment also did not change the

requirement of Rule 4(a)(4)(A) that a party who intends to challenge an order disposing of certain post-judgment motions must file a notice of appeal or an amended notice of appeal.

The Reporter invited discussion of the question whether to delete the phrase “or part thereof.” A judge member inquired about cross appeals and whether there were any rules about them. Professor Sachs responded that the circumstances in which a cross appeal is required are left to caselaw. The Reporter added that Rule 4(a)(3) does not specifically refer to cross appeals, but instead simply empowers any party to file its own notice of appeal within 14 days after another party has filed a notice of appeal.

Mr. Freeman stated that the subcommittee had done fantastic work, but he was concerned whether the proposed subparagraph 6—which would enable a party to limit the appeal—would constrain a cross appeal. Professor Sachs responded that the current Rule permits a party to designate a “part thereof,” so there would be no change in this regard.

Mr. Freeman voiced concern that the proposed subparagraph 6 would give rise to new fights about whether an issue was beyond the scope of the notice of appeal and give rise to more caselaw on this question. The Reporter echoed Professor Sachs’ point about the existing Rule.

Mr. Freeman responded that he got the point in theory, but he was concerned how it would work in practice. He understood that the current Rule allows such a designation, and therefore parties could fight about the scope of the appeal. He nevertheless thought that the proposed subparagraph 6 would focus litigants’ attention on the issue, and therefore invite these fights.

A judge member suggested that people should have the opportunity to limit their appeals if they want. A lawyer member stated that Mr. Freeman’s point was well taken. While the existing Rule does allow for designation of a “part thereof,” the proposed subparagraph 6 would be more prominent and litigants would use it strategically. Perhaps there shouldn’t be any limiting done in the notice of appeal, leaving that to the briefs. A judge member wondered if the subparagraph was necessary, given the proposed deletion of the phrase “or part thereof.”

Mr. Freeman said that litigants will use subparagraph 6 strategically, trying to limit what can be considered on appeal. He pointed to practice under section 1292(b), where parties have litigated all the way to the Supreme Court whether the appeal reaches the entire order or only the particular question certified.

Professor Sachs argued for retaining proposed subparagraph 6. He imagined a single piece of paper that does six things, some of which are immediately appealable, and some that are not, such as granting a preliminary injunction and disposing of various other matters. An unlimited notice of appeal would invite fights about whether the district court retained jurisdiction regarding those other matters. Both parties might want to limit the appeal; this has to be balanced against the concern that increased attention that might be brought by proposed subparagraph 6 could increase strategic behavior.

A lawyer member noted the mission creep in this project. We fixed the original *expressio unius* problem, and then fixed the Forms. His initial thought was to simply delete “or part thereof,” but came around to the view that we have a litigant-directed process, and why should we force people to appeal who don’t want to?

Judge Chagares suggested that perhaps the notice of appeal should simply open the door, leaving any limitations to the briefs. A judge member suggested taking out subparagraph 6, but not “or part thereof.” Judge Campbell observed that doing so might not really kill the *expressio unius* approach. A different judge member suggested perhaps moving the last clause of proposed subparagraph (6)—“additional designations do not limit the scope of the appeal”—to proposed subparagraph (4).

Professor Sachs reiterated his concern that without something like subparagraph 6 an appeal from a preliminary injunction that was contained in the same order as a decision on a motion in limine could raise the possibility of divesting the district court of jurisdiction over the issues involved in the motion in limine. Mr. Freeman responded that appeals from such orders happen all the time without a problem.

The Reporter pointed to the example of cases involving multiple claims and multiple parties; the proposed subparagraph (6) leaves parties with the ability to appeal only with regard to some claims or some parties.

A lawyer member suggested that the notice of appeal should not be a means to strategically limit the jurisdiction of the court of appeals. A different lawyer member responded that “strategically limit” is not necessarily a negative, and that an appellant is the master of the appeal. A judge member added that if a party chooses to accept a decision, it is not a bad thing that a court lacks jurisdiction over an issue that the party doesn’t want the court to decide.

Mr. Freeman stated that, as the *Garza* decision explained, the notice of appeal is a simple document. Proposed subparagraph (6) risks giving it greater legal effect and building a body of law about what is within the scope of the appeal. Judge

Chagares suggested that the Committee Note say that the briefs are the place to focus the issues and remove both proposed subparagraph (6) and “or part thereof.”

Professor Sachs stated that there are three issues to consider. First, how much of a change in practice would be brought about by bringing attention to an option that litigants have today? Second, should litigants be able to limit the notice of appeal? Third, is estoppel enough to deal with the issue?

A lawyer member found himself on the fence. He doesn't especially like proposed subparagraph (6) and generally thinks simpler is better, but nevertheless thinks that it is important to have some mechanism to provide some assurance that a party can put something on the table without putting everything on the table. A judge member suggested that the briefs could do that, prompting the lawyer member to respond that the notice of appeal is jurisdictional while the brief is not. A different judge member stated that jurisdiction cannot be created or destroyed by rule. Professor Sachs stated that the statute requires a notice of appeal, and the Rules can specify the content of the notice of appeal.

A lawyer member stated that the phrase “may limit the appeal” is the problem. Professor Sachs suggested rephrasing: “An appellant may designate only part of a judgment or appealable order by expressly stating that the notice of appeal is so limited.”

A judge member asked about cross appeals, and Professor Sachs responded that this would leave unchanged the principles governing cross appeals.

Discussion then turned to the issue of whether the text of the Rule should state the merger rule, with one judge member noting that the proposed Rule invites the question, “which orders merge?” Judge Campbell suggested a brief explanation of the merger rule in the Committee Note. Judge Chagares observed that one reason to not state the merger rule in the text of the Rule is to avoid stunting its growth. A lawyer member observed that while the basic rule is simple, it's never as simple as that. Professor Sachs pointed to two of the curlicues: 1) can a litigant throw a final judgment to secure an appeal? and 2) what merges into an interlocutory order?

Ms. Womeldorf suggested replacing the word “includes” in the proposed subparagraph 4 with the word “encompasses.”

Professor Struve noted that there might be some impact on bankruptcy and tax appeals, and Professor Coquillet added that the proposed changes should not go out for publication prior to a cross-committee check. Judge Campbell instructed the Reporter to check with bankruptcy and tax before going to the Standing Committee and come back to this Committee only if needed.

Judge Chagares added that the Committee Note should state that the brief is the place to limit issues.

Mr. Freeman stated that the changes suggested in the discussion led to material improvement.

Judge Campbell added that the word “additional” in proposed subsection 6 should instead be “specific.”

A judge member suggested some changes would be necessary to the Committee Note to reflect these changes to the text. Judge Campbell observed that it is never a good idea to draft Committee Notes by committee. The Reporter will draft a revised Note and circulate it to the Committee by email.

The Committee unanimously approved the proposed Rule (as revised in accordance with the discussion) for submission to the Standing Committee with the recommendation that it be published for public comment.

B. Proposal to Amend Rule 42(b) – Agreed Dismissals (17-AP-G)

Christopher Landau presented the subcommittee’s report regarding a proposal to amend Rule 42(b). (Agenda Book page 119). The style consultants commented on the proposal since the publication of the Agenda Book, and changes made in light of their suggestions are reflected in documents distributed at the meeting.

Mr. Landau recounted that this matter came up because sometimes clients want to settle, but cannot be assured that the court of appeals will dismiss the appeal. That’s because the current Rule provides that the circuit clerk “may” dismiss an appeal “if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that may be due,” and some courts of appeals will refuse to dismiss. Prior to restyling, the “may” was “shall.”

There are two options presented. The first works from the existing Federal Rule of Appellate Procedure. The second works from the existing Supreme Court Rule. The differences between the two have narrowed, especially after incorporating suggestions from the style consultants.

A judge member spoke in support of the first option. Judge Chagares agreed, noting that one advantage of the Supreme Court variant was that it might be the path of least resistance, but that advantage was lost with the styling changes. Mr. Landau explained that there was more detail in the Supreme Court variant, but that such detail was not necessary in this Rule, because the Rule dealing with motions covers that detail.

The key change being proposed is changing the word “may” in Rule 42(b) to “must.” Second, the sentence dealing with a stipulated dismissal and the sentence dealing with an appellant’s motion to dismiss would be broken out into two separate subsections with headings to make the distinction between the two clearer.

The third proposed change is a bit trickier. The current Rule includes the cryptic prohibition that “no mandate” may issue without a court order. The proposed amendment would unpack that prohibition, and add a provision to deal with situations, such as class actions and the Tunney Act, that require court approval of settlements.

Finally, a new subsection would be added to deal with appeals from agency orders.

Judge Campbell asked about interlocutory appeals: if an interlocutory appeal is dismissed, is some court action required to remand the case to the district court? Ms. Dodszeit stated that no remand is necessary in that situation, and that the proposed language is okay from the perspective of Clerks. In some circumstances, Clerks have found it necessary to issue orders in lieu of mandates to make clear that jurisdiction is being returned to the district court. Mr. Freeman suggested that a mandate in the sense of returning a case to the district court would be necessary if an appeal from a preliminary injunction were dismissed. A lawyer member was not sure of this, because the appeal is simply being dismissed. An academic member pointed out that the proposal eliminates this problem by eliminating the phrase “no mandate.”

Judge Chagares noted the style change in proposed Rule 42(b)(3) from “judicial” to “court.” The Reporter explained that the Court of Appeals for the Ninth Circuit had some concerns about the proposed amendment because in that circuit mediators and the Appellate Commissioner are empowered to remand cases. Judge Campbell suggested that there was no distinction between court action and judicial action. An academic member voiced support for retaining the word “judicial” and leaving the Court of Appeals for the Ninth Circuit to rely on invoking Appellate Rule 2.

Mr. Freeman stated that the word “remand” was ambiguous; we usually think of appellate courts as affirming, reversing, or vacating. A lawyer member stated that we do not need any of the language after the dash, but a judge member spoke in favor of retaining the language after the dash. This judge member also suggested referring to “any relief beyond the mere dismissal of an appeal” rather than “any order”

A judge member asked about sanctions; a lawyer member responded that a court can impose sanctions even when it does not have jurisdiction over a case.

Judge Campbell suggested requiring “action by a judge” rather than “court action,” but a judge member responded that “court action” was needed so that the court can delegate. An academic member stated that he just learned last night about the Appellate Commissioner in the Ninth Circuit and did not want to put it in this Rule.

A lawyer member voiced concern about the sentence dealing with court approval of a settlement, noting that it may not be accurate to say that a court of appeals may approve the settlement or remand for the district court to consider whether to approve it. For example, a bankruptcy court may need to approve a settlement.

A different lawyer member suggested deleting all of subsection (b)(3) after the dash. The Reporter stated that in light of *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), it was useful to specifically mention that an order vacating a decision below required court action. The lawyer member suggested making that point in the Committee Note. An academic member thought that this was a helpful illustration and did not pose an *expressio unius* problem. Mr. Freeman suggested calling out *Bonner Mall* by referring to vacating, but not including any other example. A judge member liked including the reference to remand as an example of what is not a mere dismissal. This judge member also suggested adding “may consider whether to” before “approve the settlement or remand”

Mr. Freeman withdrew his suggestion about not including any other example, and suggested that the subtitle for subsection (b)(3) be changed from “Other Orders” to “Other Relief.” Judge Campbell suggested a corresponding change to the opening language of subsection (3): “A court order is required for any relief beyond”

In response to a concern raised by a judge member about how this would affect practice in the Ninth Circuit, Judge Campbell stated that the Court of Appeals could authorize its delegate to act.

An academic member suggested adding a provision that this Rule does not affect any law that requires court approval of a settlement, noting, in response to a question by Judge Campbell, that without it someone could argue that such laws were superseded by this Rule. Judge Campbell noted that this could be stated in the Committee Note.

Mr. Freeman then raised a concern about redundancy in connection with proposed Rule 42(c), which states that, for purposes of Rule 42(b), the term “appeal” includes a petition for review or an application to enforce an agency order. The Reporter explained that extraordinary writs such as mandamus were not included in

proposed Rule 42(c) because there is no equivalent in the section of the Rules dealing with extraordinary writs to Rule 20, which makes many Rules—including Rule 42—applicable to review and enforcement of agency orders. But while Rule 20 states that “appellant” includes a petitioner or applicant, and “appellee” includes a respondent, it does not state that “appeal” includes a petition for review or an application to enforce an agency order. Mr. Freeman did not think it necessary to add that provision and stated that some statutes style review of agency orders as appeals.

Judge Campbell suggested moving the proposed Rule 42(c) to the Committee Note, and a judge member suggested referring to Rule 20 in the Committee Note.

Mr. Freeman then raised a concern about the reference to “fees” in Rule 42(b)(1), noting that some litigants have taken the position that this includes attorney’s fees under the Equal Access to Justice Act. He suggested that the phrase “to the clerk” be inserted after the word “pay,” but agreed with another member’s suggestion that the word “court” be inserted before the word “fees,” instead.

The Committee unanimously approved the proposed Rule (as revised in accordance with the discussion) for submission to the Standing Committee with the recommendation that it be published for public comment.

Judge Chagares thanked Mr. Landau for raising this issue, noting that it demonstrated the virtue of having lawyers—not just judges—on the Committee.

C. Rules 35 and 40 – Comprehensive Review (18-AP-A)

The Reporter presented the subcommittee’s report regarding its ongoing review of Rules 35 and 40. (Agenda Book page 137). The style consultants commented on the proposal since the publication of the Agenda Book, and changes made in light of their suggestions are reflected in documents distributed at the meeting.

The subcommittee considered, but rejected, a number of options, including (1) revising Rule 35 to apply solely to initial hearing en banc and Rule 40 to apply to both kinds of rehearing; (2) revising Rules 35 and 40 to make them more parallel to each other, or parallel to Rule 21; (3) requiring a single petition rather than separate petitions for panel rehearing and rehearing en banc; and (4) adding to Rule 35 the statement in Rule 40 that a grant of rehearing is unlikely without a call for a response.

Instead, the subcommittee recommended more modest changes. It recommended adding three provisions to Rule 35: (1) if a judge on the panel requests, a petition for panel rehearing will be treated as a petition for rehearing en banc; (2) a petition for rehearing en banc may be treated by the panel as a petition for panel

rehearing; and (3) if the criteria for en banc review is not met, panel rehearing under Rule 40 may be available.

It also recommended adding to Rule 40 a provision echoing the first addition to Rule 35: if a judge on the panel requests, a petition for panel rehearing will be treated as a petition for rehearing en banc.

The Reporter then noted—speaking only for himself and not the subcommittee—that on further reflection, it might be appropriate to pare down the proposal still further and *not* provide that if a judge on the panel requests, a petition for panel rehearing will be treated as a petition for rehearing en banc. The concern is with judges on the panel, such as senior judges and visiting judges, who are not eligible to vote for rehearing en banc.

A judge member suggested cutting the provision permitting a panel to treat a petition for rehearing en banc as a petition for panel rehearing, voicing a concern about a panel cutting off the full court. The Reporter responded that the idea was not to let the panel cut off the full court, but rather to allow the panel to fix something on its own; he suggested adding the word “including” before the phrase “a petition for panel rehearing.”

An academic member suggested that the same approach could be taken to proposed Rule 35(a)(2) and the word “including” added there as well, stating that maybe visiting judges should be able to flag an issue for en banc consideration. A judge member noted that this would create an obligation to circulate the petition to the full court, which the academic member thought may be desirable.

A lawyer member stated that he was glad that the Committee was addressing this issue, that panel rehearing is generally thought of as a lesser included petition when one petitions for rehearing en banc, and that it is good to make that explicit in the Rule. The concern is what happens when the panel does make a change in response to a petition. Can the panel side-step the full court? There should be clarity about what happens next. Is rehearing en banc foreclosed? Can a petition for rehearing en banc be filed again? Sometimes a panel will say that there can be no further en banc. Mr. Freeman stated that this has happened to the Department of Justice.

A judge member stated that every judge on the court receives what the panel has done, that what can happen next is put in the orders, and a panel can't hijack a petition. Mr. Freeman responded that not every circuit does that. The Reporter noted that there are varying local rules on handling the relationship between petitions for rehearing en banc and panel rehearing.

A different judge member stated that the Rule should make clear that full en banc review is available after a panel treats a petition for en banc rehearing as a petition for panel rehearing.

Mr. Freeman asked why the Rule shouldn't provide that a petition for rehearing en banc is always treated as including a petition for panel rehearing. A lawyer member stated that panel rehearing is always a lesser included request. The Reporter stated that there are situations in which a petition for rehearing en banc would be appropriate, but not a petition for panel rehearing, such as when existing circuit precedent is clear and the petition asks the full court to overrule that precedent.

The subcommittee will report back again, taking into account this discussion.

VI. Update on Matters Being Held Awaiting Supreme Court Decisions

A. Rule 4(a)(5)(C) and the *Hamer* Decision (no # yet)

This matter was tabled at the last meeting pending the Supreme Court's decision in *Nutraceutical v. Lambert*, 139 S. Ct. 710 (2019).

The Reporter presented a discussion of that decision. (Agenda Book page 151). The Supreme Court held that a mandatory claims-processing rule is not subject to equitable tolling. It left open the possibility that the "unique circumstances" doctrine—which applies when a judge misleads the litigant in a situation where the litigant could have and likely would have complied if not misled by the judge—might be available. It also left open "whether an insurmountable impediment to filing timely might compel a different result." *Id.* at 717, n.7.

A lawyer member stated that he had initially thought that we needed to fix the Rule, but he was convinced that there is no need to do so, and now thinks we should leave well enough alone. An academic member stated that there was no need to deal with this, and the Committee agreed.

B. Departed Judges (18-AP-D)

Judge Chagares presented an update on a proposal to prescribe how courts of appeals handle the vote of a judge who leaves the bench. (Agenda Book page 165).

At the last meeting, a subcommittee was formed to deal with this matter if the Supreme Court denied certiorari in a pending case that presented the issue.

Since then, the Supreme Court granted certiorari and summarily reversed, holding that a federal court cannot count the vote of a judge who dies before the decision was filed, noting that “federal judges are appointed for life, not for eternity.” *Yovino v. Rizo*, 139 S. Ct. 706 (2019).

The Committee agreed to remove this item from its docket.

VII. Discussion of Recent Suggestion

Privacy in Railroad Retirement Act Benefit Cases (18-AP-E; 18-CV-EE)

Judge Chagares stated that the General Counsel of the Railroad Retirement Board had proposed equivalent privacy protections for Railroad Retirement Act benefit cases as those provided in Social Security cases. (Agenda Book page 167). As the recent Supreme Court decision in *BNSF v. Loos*, 139 S. Ct. 893 (2019), emphasized, there is a real similarity between the two statutes.

Civil Rule 5.2—which Appellate Rule 25(a)(5) piggybacks on for Social Security cases—does not apply to Railroad Retirement Act benefit cases. One possibility would be to amend Civil Rule 5.2, but Railroad Retirement Act benefit cases do not come to the district court. It is appropriate for this Committee to act on this proposal.

But we should do so comprehensively. It might be appropriate to include benefit cases arising under other statutes, such as those dealing with Black Lung and Longshoremen.

A subcommittee consisting of Judge Watford and Tom Byron was created.

A judge member asked about privacy protection in Board of Immigration Appeals cases. Judge Chagares responded that it is handled by incorporation of the Civil Rule.

VIII. New Business and Updates on Other Matters

Judge Campbell noted major projects in other Advisory Committees:

The Civil Rules Committee approved a modest change to Civil Rule 30(b)(6). It is also considering MDL rules: MDL cases comprise some 30 to 40% of the entire civil docket. The question is whether to maximize discretion in handling these cases or create Rules. Special Rules governing appeals in Social Security cases are also under consideration.

The Evidence Rules Committee is working on forensic expert evidence and Evidence Rule 702.

The Criminal Rules Committee is considering requiring greater disclosure of expert reports.

The Bankruptcy Committee is working on restyling.

Judge Chagares invited discussion of possible new matters for the Committee's consideration, and, in particular, matters that would promote the just, speedy, and inexpensive resolution of cases. None was immediately forthcoming.

Judge Chagares announced that his term was supposed to end, but that he had been asked to remain for another year and would do so.

IX. Adjournment

Judge Chagares again thanked Ms. Womeldorf and her team for organizing the dinner and the meeting, and the members of the Committee for their participation. He announced that the next meeting would be held on October 30, 2019, in Washington, DC.

The Committee adjourned at noon.

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TAB 3

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TAB 3A

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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

DENNIS R. DOW
BANKRUPTCY RULES

JOHN D. BATES
CIVIL RULES

DONALD W. MOLLOY
CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable Dennis R. Dow, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

DATE: May 30, 2019

I. Introduction

The Advisory Committee on Bankruptcy Rules met in San Antonio, Texas, on April 4, 2019. The draft minutes of that meeting are attached at Tab B.

At the meeting the Advisory Committee gave its final approval to the amendments to three rules that were published for comment last August. The amendments are to Rules 2002 (Notices), 2004 (Examination), and 8012 (Corporate Disclosure Statement). The Advisory Committee also approved without publication technical amendments to Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination) and Official Form 122A-1 (Chapter 7 Statement of Your Current Monthly Income). Finally, the Advisory Committee voted to seek publication for comment of amendments to Rules 7007.1 (Corporate Ownership Statement) and 9036 (Notice and Service by Electronic Transmission).

Part II of this report presents those action items along with two others that the Advisory Committee voted on at its fall 2018 meeting. At that earlier meeting, the Advisory Committee voted to seek final approval without publication of conforming, technical amendments to Rules 8012, 8013, and 8015 to remove or qualify references to “proof of service” and voted to seek publication of an amendment to Rule 3007 (Objections to Claims).

The action items are organized as follows:

A. Items for Final Approval

(A1) Rules published for comment in August 2018—

- Rule 2002;
- Rule 2004; and
- Rule 8012.

(A2) Approval without publication—

- Rule 2005;
- Rules 8013, 8015, and 8021; and
- Official Form 122A-1.

B. Items for Publication

- Rule 3007;
- Rule 7007.1; and
- Rule 9036.

Part III of this report presents two information items. The first concerns the status of the Bankruptcy Rules restyling project. The second information item discusses the Advisory Committee’s recommendation of a new Director’s Form for use in applying for the withdrawal of unclaimed funds collected in bankruptcy cases.

II. Action Items

A. Items for Final Approval

(A1) Rules published for comment in August 2018.

The Advisory Committee recommends that the Standing Committee approve and transmit to the Judicial Conference the proposed rule amendments that were published for public comment in August 2018 and are discussed below. Bankruptcy Appendix A includes the rules that are in this group.

Action Item 1. Rule 2002 (Notices). A package of amendments to Rule 2002 was published that would (i) require giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter

12 and chapter 13 cases, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

Three different subdivisions of the rule are affected.

- *Rule 2002(f)(7)* currently requires the clerk, or someone else designated by the clerk, to give notice to the debtor, all creditors, and indenture trustees of the “entry of an order confirming a chapter 9, 11, or 12 plan.” The amendment would include chapter 13 plans within this provision.
- *Rule 2002(h)* provides an exception to the general noticing requirements set forth in Rule 2002(a). Rule 2002(a) generally requires the clerk (or some other party as directed by the court) to give “the debtor, the trustee, all creditors and indenture trustees” at least 21 days’ notice of certain matters in bankruptcy cases. But Rule 2002(h) eliminates that requirement in chapter 7 cases with respect to creditors that fail to file a timely proof of claim. The amendment would make this exception also applicable to chapter 12 and 13 cases and would change the time provisions in the subdivision to conform to recent amendments to Rule 3002 setting deadlines for filing proofs of claim.
- *Rule 2002(k)* provides for transmitting notices under specified parts of Rule 2002 to the U.S. trustee, including notices under subdivision (b). Because the deadline for giving notice of the time for filing objections to confirmation of chapter 13 plans was recently moved from subdivision (b) to subdivision (a)(9), which currently is not specified in subdivision (k), the provision would be amended to include a reference to (a)(9) to ensure that the U.S. trustee continues to receive notice of this deadline.

Six sets of comments were submitted on one or more of these proposed amendments. Four of the comments (submitted by Danielle Young, Nancy Whaley, Ellie Bertwell of Aderant CompuLaw, and the National Association of Bankruptcy Trustees) included brief statements of support for the amendments.

Ryan Johnson, the clerk of the Bankruptcy Court for the Northern District of West Virginia, was generally supportive of the amendments, but he raised two additional points about Rule 2002(h). First, he said that in a chapter 13 case, the clerk’s noticing responsibilities should extend beyond the 70-day proof-of-claim deadline as stated in Rule 3002(c). The applicable deadline, he said, should include the additional 30 days afforded to a debtor or trustee to file a claim on behalf of a creditor under Rule 3004. He also stated that with respect to notices required by Rule 2002(a)(2) and (a)(3), Rule 2002(h) should require notice to creditors that were entitled to service of the noticed motion even if those entitled to service did not file a proof of claim.

The Bankruptcy Section of the Federal Bar Association, while supporting the other Rule 2002 amendments, questioned the need for including the entry of an order confirming a chapter 13 plan within the notice requirement of Rule 2002(f)(7). It noted that in the Bankruptcy Court for the Western District of Texas, the clerk already is responsible for “publishing the order confirming the plan through its Bankruptcy Noticing Center . . . [, and] [s]ervice is accomplished by first class mail and, where applicable, electronic mail.” As a result, the Section argued, “there appears to be little benefit requiring a notice of an order confirming plan that has already been served on parties in interest.”

After carefully considering the comments, the Advisory Committee voted unanimously to approve the amendments to Rule 2002 as published.

Action Item 2. Rule 2004 (Examination). Rule 2004 provides for the examination of debtors and other entities regarding a broad range of issues relevant to a bankruptcy case. Under subdivision (c) of the rule, the attendance of a witness and the production of documents may be compelled by means of a subpoena. The Business Law Section of the American Bar Association, on behalf of its Committee on Bankruptcy Court Structure and Insolvency Process, submitted a suggestion that Rule 2004(c) be amended to specifically impose a proportionality limitation on the scope of the production of documents and electronically stored information (“ESI”). The Advisory Committee discussed the suggestion at the fall 2017 and spring 2018 meetings. By a close vote, the Committee decided not to add a proportionality requirement to the rule, but it decided unanimously to propose amendments to Rule 2004(c) to refer specifically to electronically stored information and to harmonize its subpoena provisions with the current provisions of Civil Rule 45, which is made applicable in bankruptcy cases by Bankruptcy Rule 9016.

Three sets of comments were submitted in response to publication. The Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan commented that proportionality should be a factor that a bankruptcy judge has the discretion to consider in ruling on a request for production of documents and ESI in connection with a Bankruptcy Rule 2004 examination. It argued that in the bankruptcy context, where resources are already limited in many cases, the impact of having to produce all ESI, without consideration of proportionality, could significantly impact the likely success of a case.

The other two comments were supportive of the amendments as proposed. The National Association of Bankruptcy Trustees supported the inclusion of electronic records within the rule and the updating to conform to Rule 45 as promoting clarity of scope. The Federal Bar Association’s Bankruptcy Section supported the published changes to Rule 2004(c) and urged caution before imposing a proportionality requirement. It expressed concern that doing so would likely increase litigation.

The Advisory Committee unanimously approved the amendments to Rule 2004(c) as published. It saw no reason to revisit the question of proportionality since that issue had recently been carefully considered and rejected by the Advisory Committee.

Action Item 3. Rule 8012 (Corporate Disclosure Statement). Rule 8012 requires a nongovernmental corporate party to a bankruptcy appeal in the district court or bankruptcy appellate panel to file a statement identifying any parent corporation and any publicly held corporation that owns 10% or more of the party’s stock (or file a statement that there is no such corporation). It is modeled on FRAP 26.1. The Appellate Rules Committee proposed amendments to FRAP 26.1 that have been approved by Supreme Court, including one that is specific to bankruptcy appeals.

At the spring 2018 meeting, the Advisory Committee considered and approved for publication amendments to Rule 8012 that track the relevant amendments to FRAP 26.1. These amendments would add a new subdivision (b) to Rule 8012, addressing disclosure about the debtor. This subdivision would require the disclosure of the names of any debtors in the underlying

bankruptcy case that are not revealed by the caption of an appeal and, for any corporate debtors in the underlying bankruptcy case, the disclosure of the information required of corporations under subdivision (a) of the rule. Other amendments tracking FRAP 26.1 would add a provision to subdivision (a) requiring disclosure by corporations seeking to intervene in a bankruptcy appeal and would make stylistic changes to what would become subdivision (c), regarding supplemental disclosure statements.

Three comments were submitted in response to publication. All were supportive.

In light of the conforming nature of the amendments and the lack of any negative comment on them, the Advisory Committee gave them final approval. One member of the Advisory Committee expressed the need for additional amendments to the disclosure statement rules to extend the requirements to a broader range of entities. The Advisory Committee, however, concluded that any such expansion should be undertaken in coordination with the other advisory committees and should not hold up amendments that are designed to conform to amendments to FRAP 26.1 that are expected to go into effect on December 1 of this year.

(A2) Conforming or technical amendments proposed for approval without publication.

The Advisory Committee recommends that the Standing Committee approve and transmit to the Judicial Conference the proposed rule and form amendments that are discussed below. The rules and form as proposed for amendment are in Bankruptcy Appendix A.

Action Item 4. Rule 2005 (Apprehension and Removal of Debtor to Compel Attendance for Examination). Judge Brian Fenimore of the Bankruptcy Court for the Western District of Missouri brought to the attention of Judge Dennis R. Dow that Rule 2005(c) contains references to repealed provisions of the Criminal Code. Rule 2005(c) currently reads as follows:

(c) CONDITIONS OF RELEASE. In determining what conditions will reasonably assure attendance or obedience under subdivision (a) of this rule or appearance under subdivision (b) of this rule, the court shall be governed by the provisions and policies of title 18 U.S.C. § 3146(a) and (b).

Sections 3141 through 3151 of the Title 18 were repealed by the Bail Reform Act of 1984, Pub. L. No. 98-473, Title II, § 203(a), 98 Stat. 1979 (1984), and replaced by new provisions dealing with bail. The current version of 18 U.S.C. § 3146 deals not with conditions to assure attendance or appearance, but with penalties for failure to appear. The topic of conditions is addressed by 18 U.S.C. § 3142.

Although much of § 3142 is inapplicable to the subject of Rule 2005(c) (conditions designed to assure attendance for examination or appearance before the court), the easiest technical fix is that suggested by Judge Fenimore, which is simply replacing the reference to “§ 3146(a) and (b)” in Rule 2005(c) with a reference to “§ 3142.” The Advisory Committee voted unanimously to seek approval of this amendment without publication.

Action Item 5. Rules 8013 (Motions; Intervention), 8015 (Form and Length of Briefs; Form of Appendices and Other Papers), and 8021 (Costs). The Supreme Court has approved amendments to several Federal Rules of Appellate Procedure that are expected to go into effect in December of this year. The amendment to FRAP 25(d) would eliminate the requirement of proof of service for documents served through the court’s electronic-filing system. This amendment parallels the amendment to Bankruptcy Rule 8011(d) that went into effect last December. The other FRAP amendments—to FRAP 5, 21, 26, 32, and 39—would reflect this change by either eliminating or qualifying references to “proof of service” so as not to suggest that such a document is always required. Because the Part VIII Bankruptcy Rules in large part track the language of FRAP counterparts, the Advisory Committee voted to seek approval without publication of conforming changes to three bankruptcy appellate rules.

Rule 8015(g) (Items Excluded from Length), paralleling the amendments to FRAP 32(f), would be amended to eliminate the articles “a” and “the” before the items in a brief excluded in calculating a brief’s length. It would also be amended to delete “corporate” before “disclosure statement” to reflect the pending amendment to the title of Rule 8012.

Rule 8021(d) (Bill of Costs; Objections) would be amended to delete the reference to proof of service in order to maintain consistency with FRAP 39(d).

Rule 8013(a)(1) also refers to “proof of service.” It states that “[a] request for an order or other relief is made by filing a motion with the district or BAP clerk, with proof of service on the other parties to the appeal.” The corresponding FRAP provision (FRAP 27(a)) does not include the last phrase, so no amendment has been proposed to that rule. To take account of situations in which proof of service is not required, Rule 8013(a)(1) would be amended by ending the provision with “clerk,” thereby omitting the reference to proof of service. The circumstances under which proof of service would be required would then be governed by Rule 8011(d)(1) (only required for documents served other than through the court’s electronic-filing system).

Action Item 6. Official Form 122A-1 (Chapter 7 Statement of Your Current Monthly Income). A senior staff attorney who assists pro se debtors in the Bankruptcy Court for the Central District of California submitted a suggestion regarding one of the means test forms—Official Form 122A-1. He suggested that the instruction not to file Official Form 122A-2 if the debtor’s current monthly income multiplied by 12 is less than or equal to the applicable median family income should be repeated on the form. Currently that instruction appears after the signature and date lines, and the staff attorney suggested that it also be added to the end of line 14a. He said that many pro se debtors to whom line 14a applies fail to see the instruction under the signature and date and, as a result, unnecessarily spend time and effort completing Official Form 122A-2 (Chapter 7 Means Test Calculation).

The Advisory Committee agreed that the form should be amended as suggested. The current form was revised as part of the Forms Modernization Project in 2015. One of the main purposes of the project was to make the forms easier to understand, including by pro se parties. Amending line 14a as suggested would make that instruction parallel to the instruction on line 14b. Line 14b says to fill out Form 122A-2 under the described circumstances. The form also includes

a similar statement after the signature and date. Likewise, the equivalent form for chapter 13—Official Form 122C-1 (Chapter 13 Statement of Your Current Monthly and Calculation of Commitment Period)—includes an instruction not to fill out Form 122C-2 both at line 17a and after the signature and date. Adding to line 14a the statement not to fill out and file Form 122A-2 would add clarity to the form.

Because of the technical nature of the proposed amendment, the Advisory Committee requests that it be approved without publication.

B. Items for Publication

The Advisory Committee recommends that the following rule amendments be published for public comment in August 2019. The rules in this group appear in Bankruptcy Appendix B.

Action Item 7. Rule 3007 (Objections to Claims). Rule 3007(a)(2)(A)(ii) requires service of an objection to a claim “on an insured depository institution[] in the manner provided by Rule 7004(h).” An issue has been raised by bankruptcy judges as to whether “insured depository institution” under Rule 7004(h) includes credit unions as well as banks, a question that the Advisory Committee previously decided in the negative, and whether the meaning of “insured depository institution” is the same under Rule 3007(a)(2)(A)(ii) as under Rule 7004(h)

Rule 7004 governs service of a summons and complaint in adversary proceedings, and Rule 9014(b) makes Rule 7004 applicable to service of a motion initiating a contested matter. Rule 7004(b) provides generally for service by first class mail, in addition to the methods of service specified by Civil Rule 4(e)-(j). Rule 7004(b), however, is made subject to an exception set out in subdivision (h). The latter provision states:

(h) SERVICE OF PROCESS ON AN INSURED DEPOSITORY INSTITUTION. Service on an insured depository institution (as defined in section 3 of the Federal Deposit Insurance Act) in a contested matter or adversary proceeding shall be made by certified mail addressed to an officer of the institution unless—

- (1) the institution has appeared by its attorney, in which case the attorney shall be served by first class mail;
- (2) the court orders otherwise after service upon the institution by certified mail of notice of an application to permit service on the institution by first class mail sent to an officer of the institution designated by the institution; or
- (3) the institution has waived in writing its entitlement to service by certified mail by designating an officer to receive service.

Rule 7004(h) was enacted by Congress as part of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. Section 114 of that law declared that “Rule 7004 of the Federal Rules of Bankruptcy Procedure is amended” to add the text of new subdivision (h).

At the spring 2018 Advisory Committee meeting, the Committee concluded that Rule 7004(h) is not applicable to credit unions because, being insured by the National Credit Union Administration, credit unions do not fall within section 3 of the Federal Deposit Insurance Act.¹ The Committee also decided not to take further action on Suggestion 17-BK-E, which sought an expansion of Rule 7004(h) to include credit unions.

Because of the limited scope of Rule 7004(h), other rule provisions that require service in the manner provided “by Rule 7004” allow service by first class mail under Rule 7004(b) on credit unions. These rules include Rules 3012(b) (request for a determination of the amount of a secured claim in a chapter 12 or 13 plan), 4003(d) (avoidance of a lien on exempt property in a chapter 12 or 13 plan), 5009(d) (motion for an order declaring a lien satisfied and released), 9011(c)(1) (motion for sanctions), and 9014(b) (motion initiating a contested matter).

The 2017 amendments to Rule 3007 were intended to clarify that objections to claims are generally not required to be served in the manner provided by Rule 7004. Instead, those objections may be served on most claimants by mailing them to the person designated on the proof of claim. But that rule is subject to two exceptions. The one relevant here is set forth in subdivision (a)(2)(A)(ii). It provides that “insured depository institutions” must be served “in the manner provided by Rule 7004(h).” The Advisory Committee added that exception in an effort to comply with the legislative mandate in Rule 7004(h) that such institutions be served by certified mail in contested matters and adversary proceedings.²

The Advisory Committee now realizes that the promulgation of Rule 3007(a)(2)(A)(ii) failed to take account of the Bankruptcy Code definition of “insured depository institution.”³ The effect of that definition was not raised during the Advisory Committee’s lengthy consideration of the Rule 3007 amendments. The Code definition, which includes credit unions in addition to banks insured by the FDIC, is made applicable to the Bankruptcy Rules by Rule 9001. However, the Committee concluded that the definition does not change the scope of Rule 7004(h), because in the latter provision Congress expressly included a specific and narrower definition of insured depository institution—one defined in section 3 of the Federal Deposit Insurance Act. That specific reference in Rule 7004(h) overrides the more general definition in § 101(35). *See Radlax*

¹ Section 3 of the Federal Deposit Insurance Act, 12 U.S.C. § 1813(c)(2), provides, “The term ‘insured depository institution’ means any bank or savings association the deposits of which are insured by the Corporation pursuant to this chapter.” The “Corporation” is the Federal Deposit Insurance Corporation. *Id.* at § 1811(a).

² The other exception, not relevant here, is for service on the United States or any of its officers or directors. They must be served according to Rule 7004(b)(4) or (5).

³ Section 101(35) provides that the “term ‘insured depository institution’—(A) has the meaning given it in section 3(c)(2) of the Federal Deposit Insurance Act; and (B) includes an insured credit union (except in the case of paragraphs (21B) and (33A) of this subsection).”

Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645 (2012) (“[I]t is a commonplace of statutory construction that the specific governs the general.”).

The existence of a Code definition of insured depository institution does, however, affect the scope of Rule 3007(a)(2)(A)(ii). That provision does not say that service according to Rule 7004 is required; instead, it specifically requires service according to Rule 7004(h). And it applies to an “insured depository institution” without providing any special definition of that term. Accordingly, the § 101(35) definition applies, and credit unions are brought within the requirement that Rule 7004(h) service be made. That means that only under this one rule are credit unions required to receive service by certified mail.

At the spring meeting, the Advisory Committee considered whether Rule 3007(a)(2)(A)(ii) should be left as it is, thus requiring heightened service on credit unions in this one instance, or be revised so as to apply only to banks insured by the FDIC. The Committee voted unanimously to revise Rule 3007(a)(2)(A)(ii) to eliminate the inclusion of credit unions. The underlying intent of the Advisory Committee in proposing the amendments to Rule 3007 was to clarify that Rule 7004 service is generally not required for objections to claims. The exception in subdivision (a)(2)(A)(ii) was included based on the belief that it was required by the congressionally imposed requirement of Rule 7004(h); there was no intent, however, to expand the scope of that heightened service requirement. The Advisory Committee therefore requests that an amendment to Rule 3007(a)(2)(A)(ii) be published that limits its applicability to an insured depository institution as defined in section 3 of the Federal Deposit Insurance Act.

Action Item 8. Rule 7007.1 (Corporate Ownership Statement). Continuing the advisory committees’ efforts to conform the various disclosure-statement rules to the amendments made to FRAP 26.1, which are expected to go into effect in December, the Advisory Committee proposes for publication conforming amendments to Rule 7007.1. As is discussed under Action Item 3, the Standing Committee has published similar amendments to Rule 8012—the bankruptcy appellate disclosure-statement rule—and final approval of those amendments is being sought at this meeting. Rule 7007.1 requires corporate-ownership disclosure in the bankruptcy court and is proposed for amendment to parallel the relevant amendments to Civil Rule 7.1 that are being proposed. Like that rule, amended Rule 7007.1 would be made applicable to nongovernmental corporations seeking to intervene and would no longer require the submission of two copies of the statement.

Action Item 9. Rule 9036 (Notice and Service by Electronic Transmission). As we reported at the January Standing Committee meeting, the Advisory Committee has been considering possible rule and form amendments to increase the use of electronic notice and service in the bankruptcy courts. Part of the impetus for this project was a suggestion by the Committee on Court Administration and Case Management (“CACM”) that Rule 9036 be amended to provide for mandatory electronic service on “high volume notice recipients,” a category that would initially be composed of entities that each receive more than 100 court-generated paper notices from one or more courts in a calendar month. Judge Wm. Terrell Hodges, CACM chair, explained that the suggestion built upon a 2015 suggestion submitted by the Bankruptcy Judges Advisory Group, the Bankruptcy Clerks Advisory Group, and the Bankruptcy Noticing Working Group. The Advisory Committee had voted not to act on that suggestion for mandatory electronic service on high volume

notice recipients because it concluded that § 342(e) and (f) of the Bankruptcy Code allow a chapter 7 or 13 creditor to insist upon receipt of notices at a particular physical address. Judge Hodges explained that the current suggestion takes account of that concern by making the mandatory electronic noticing program “subject to the right to file a notice of address pursuant to § 342(e) or (f) of the Code.” CACM strongly urged the adoption of the high-volume-notice-recipient program in order to achieve judicial savings of \$3 million or more a year.

Members of a subcommittee worked with a member of the Bankruptcy Noticing Working Group, AO staff, and the chair of the CACM subcommittee that developed the suggestion in drafting the proposed amendments to Rule 9036. Those discussions were helpful in clarifying current noticing practices and understanding how those practices would be affected by proposed suggestions for expanding electronic noticing. Based on those discussions, the amendments to Rule 9036 were drafted to address electronic noticing and service by courts separately from noticing and service by parties. Doing so takes into account that courts have access to addresses registered with the Bankruptcy Noticing Center (“BNC”), while parties do not. The subcommittee also concluded that CACM’s proposed draft of amendments regarding the high-volume-notice-recipient program contained more detail than is needed in a procedural rule. Instead, the subcommittee proposed rule amendments that leave details about the operation of the program up to the AO and the BNC. As drafted, Rule 9036 would just recognize the existence of such a program and provide for service and noticing on its participants.

The Standing Committee in August 2017 published for public comment proposed amendments to Rule 2002(g) (Addressing Notices) that allowed notices to be sent to email addresses designated on filed proofs of claims and proofs of interest. Also published was a proposed amendment to Official Form 410 (Proof of Claim) that added a check box for opting into email service and noticing. It instructed the creditor to check the box “if you would like to receive all notices and papers by email rather than regular mail.” Based on its careful consideration of the comments and the logistics of implementing the proposed email opt-in procedure, the Advisory Committee decided to hold the amendments to Rule 2002(g) and Official Form 410 in abeyance.

At the spring meeting this year, the Advisory Committee discussed and approved the proposed amendments to Rule 9036 for publication. If the proposed amendments are published this summer, the amended rule would be on track to take effect on December 1, 2021. That is a date by which implementation of an opt-in system for electronic service and noticing—at an email address indicated on a proof of claim—also ought to be feasible. The amendments to Rule 2002(g)(1) and Official Form 410 that were published in 2017 could take effect then. They do not require further publication, although they may require some minor revisions in response to the earlier comments that were submitted.

III. Information Items

Information Item 1. Bankruptcy Rules Restyling. Restyling the bankruptcy rules is a large project, which will take a number of years to complete. The three style consultants began working on Parts I and II of the rules. They provided an initial draft of Part I to the reporters in mid-May, and the reporters have given the consultants comments on that draft. When the consultants respond to those comments and produce another draft, the Restyling Subcommittee

will consider it. The consultants will also be producing an initial draft of Part II soon, which will be handled in the same way. The current schedule contemplates that the first group of rules will be ready for publication in August 2020.

Meanwhile the Bankruptcy Rules Committee has been soliciting advice on best practices for restyling from the Civil Rules Committee, and it commissioned a report from Abigail Willie, a Supreme Court Fellow, on issues that restyling might present.

Because many Article III judges and others do not understand bankruptcy practice and language, Judge Marcia Krieger, chair of the Restyling Subcommittee, has developed a video program to help provide non-experts a primer on bankruptcy law. This will be shared with the Standing Committee and the style consultants.

Information Item 2. Director’s Form 1340 (Application for Unpaid Funds). The Committee on the Administration of the Bankruptcy System (the “Bankruptcy Committee”) submitted a suggestion, 19-BK-B, that the Advisory Committee adopt a Director’s Form containing a standard application for withdrawal of unclaimed funds, together with instructions and a proposed order either granting or denying the application. The proposed form was developed by an Unclaimed Funds Task Force established by the Bankruptcy Committee, comprising district and bankruptcy judges, clerks of court, and liaisons from the Bankruptcy Administrators program and the Executive Office for U.S. Trustees.

The Guide to Judiciary Policy, Vol. 13, Ch. 10, provides guidance to the courts on the appropriate documentation required to support a request for withdrawal of unclaimed funds. Although courts comply with the requirements of the Guide, each district tends to adopt its own form and instructions for such withdrawals. The lack of uniformity between districts increases costs, and creates a disincentive to creditors who operate in multiple jurisdictions to seeking withdrawal of unclaimed funds.

The Advisory Committee concluded that standard documentation would be appropriate and asked the AO to post a new Director’s Form 1340 for the application for the payment of unclaimed funds, with the instructions and forms of orders.

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APPENDIX A

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**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE¹**

1 **Rule 2002. Notices to Creditors, Equity Security**
2 **Holders, Administrators in Foreign**
3 **Proceedings, Persons Against Whom**
4 **Provisional Relief Is Sought in Ancillary**
5 **and Other Cross-Border Cases, United**
6 **States, and United States Trustee**

7 * * * * *

8 (f) OTHER NOTICES. Except as provided in
9 subdivision (l) of this rule, the clerk, or some other person as
10 the court may direct, shall give the debtor, all creditors, and
11 indenture trustees notice by mail of:

12 * * * * *

13 (7) entry of an order confirming a chapter 9, 11,
14 ~~or 12~~, or 13 plan;

¹ New material is underlined in red; matter to be omitted is lined through.

15

* * * * *

16

(h) NOTICES TO CREDITORS WHOSE

17

CLAIMS ARE FILED. ~~In a chapter 7 case, after 90 days~~

18

~~following the first date set for the meeting of creditors under~~

19

~~§ 341 of the Code,~~

20

(1) *Voluntary Case.* In a voluntary chapter 7

21

case, chapter 12 case, or chapter 13 case, after 70 days

22

following the order for relief under that chapter or the

23

date of the order converting the case to chapter 12 or

24

chapter 13, the court may direct that all notices required

25

by subdivision (a) of this rule be mailed only to:

26

• the debtor,

27

• the trustee,

28

• all indenture trustees,

29

• creditors that hold claims for which proofs of

30

claim have been filed, and

31

• creditors, if any, that are still permitted to file

32 claims because an extension was granted
33 under Rule 3002(c)(1) or (c)(2).

34 (2) Involuntary Case. In an involuntary chapter
35 7 case, after 90 days following the order for relief under
36 that chapter, the court may direct that all notices
37 required by subdivision (a) of this rule be mailed only
38 to:

- 39 • the debtor,
- 40 • the trustee,
- 41 • all indenture trustees,
- 42 • creditors that hold claims for which proofs of
43 claim have been filed, and
- 44 • creditors, if any, that are still permitted to file
45 claims ~~by reason of~~ because an extension was
46 granted ~~pursuant to~~ under Rule 3002(c)(1) or
47 (c)(2).

48 (3) Insufficient Assets. In a case where notice of

49 insufficient assets to pay a dividend has been given to
50 creditors ~~pursuant to~~under subdivision (e) of this rule,
51 after 90 days following the mailing of a notice of the
52 time for filing claims ~~pursuant to~~under
53 Rule 3002(c)(5), the court may direct that notices be
54 mailed only to the entities specified in the preceding
55 sentence.

56 * * * * *

57 (k) NOTICES TO UNITED STATES
58 TRUSTEES. Unless the case is a chapter 9 municipality
59 case or unless the United States trustee requests otherwise,
60 the clerk, or some other person as the court may direct, shall
61 transmit to the United States trustee notice of the matters
62 described in subdivisions (a)(2), (a)(3), (a)(4), (a)(8), (a)(9),
63 (b), (f)(1), (f)(2), (f)(4), (f)(6), (f)(7), (f)(8), and (q) of this
64 rule and notice of hearings on all applications for

65 compensation or reimbursement of expenses.

66 * * * * *

Committee Note

Subdivision (f) is amended to add cases under chapter 13 of the Bankruptcy Code to paragraph (7).

Subdivision (h) is amended to add cases under chapters 12 and 13 of the Bankruptcy Code and to conform the time periods in the subdivision to the respective deadlines for filing proofs of claim under Rule 3002(c).

Subdivision (k) is amended to add a reference to subdivision (a)(9) of this rule. This change corresponds to the relocation of the deadline for objecting to confirmation of a chapter 13 plan from subdivision (b) to subdivision (a)(9). The rule thereby continues to require transmittal of notice of that deadline to the United States trustee.

Changes Made After Publication and Comment

- No changes were made.

Summary of Public Comment

Ryan Johnson (Clerk, Bankr. N.D.W. Va.) (BK-2018-0002-0004) – Generally supports amendment to Rule 2002(h). It makes sound business sense and will reduce administrative costs. In a Chapter 13 case, however, the

clerk's noticing responsibilities under Fed. R. Bankr. P. 2002(a) and proposed Fed. R. Bankr. P. 2002(h) should extend beyond the 70-day proof of claim deadline as stated in Fed. R. Bankr. P. 3002(c). The applicable deadline should include the additional 30 days afforded to a debtor or trustee to file a claim on behalf of a creditor under Fed. R. Bankr. P. 3004. With regard to Rule 2002(a)(2), the proposed use, sale, or lease of property other than in the ordinary course of business, and Rule 2002(a)(3), the hearing on the approval of a compromise or settlement of a controversy, the list of entities in proposed Rule 2002(h) should include creditors that were entitled to service of the noticed motion even if those entitled to service did not file a proof of claim.

Danielle Young (BK-2018-0002-0005) – Proposed amendment to Rule 2002(f) is a great idea. Adding a Chapter 13 order would allow a more streamlined process for not only creditors but also for the courts. Also supports amendment to Rule 2002(h) and doesn't oppose the amendment to Rule 2002 (k).

Nancy Whaley (BK-2018-0002-0007) – Supports amendments to Rule 2002. Serving documents on non-participating parties serves no purpose and is extremely costly to all parties, especially the debtor. Strongly urges the passing of this amendment.

Ellie Bertwell, Aderant CompuLaw (BK-2018-0002-0009) – Supports the amendment to Rule 2002(k).

National Association of Bankruptcy Trustees (BK-2018-0002-0010) – Supports the amendment to Rule 2002(h) for the sake of economy and efficiency.

Federal Bar Association's Bankruptcy Section (BK-2018-0002-0011) – Questions whether there is a need to

include chapter 13 plans in Rule 2002(f)(7). In W.D. Tex. the clerk already is responsible for “publishing the order confirming the plan through its Bankruptcy Noticing Center (“BNC”). Service is accomplished by first class mail and, where applicable, electronic mail. As such, there appears to be little benefit requiring a notice of an order confirming plan that has already been served on parties in interest.” Section supports the amendment to Rule 2002(h) as a cost-saving matter.

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Rule 2004. Examination

* * * * *

(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTS OR ELECTRONICALLY STORED INFORMATION. The attendance of an entity for examination and for the production of documents or electronically stored information, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court ~~for the district in which the examination is to be held~~ where the case is pending if the attorney is admitted to practice in that court ~~or in the court in which the case is pending~~.

* * * * *

Committee Note

Subdivision (c) is amended in two respects. First, the provision now refers expressly to the production of electronically stored information, in addition to the production of documents. This change is an acknowledgment of the form in which information now commonly exists and the type of production that is frequently sought in connection with an examination under Rule 2004.

Second, subdivision (c) is amended to bring its subpoena provision into conformity with the current version of F.R. Civ. P. 45, which Rule 9016 makes applicable in bankruptcy cases. Under Rule 45, a subpoena always issues from the court where the action is pending, even for a deposition in another district, and an attorney admitted to practice in the issuing court may issue and sign it. In light of this procedure, a subpoena for a Rule 2004 examination is now properly issued from the court where the bankruptcy case is pending and by an attorney authorized to practice in that court, even if the examination is to occur in another district.

Changes Made After Publication and Comment

- No changes were made.

Summary of Public Comment

The Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan (BK-2018-0002-0008) – Proportionality should be a factor that a

bankruptcy judge has the discretion to consider in ruling on a request for production of documents and ESI in connection with a Bankruptcy Rule 2004 examination. In the bankruptcy context, where resources are already limited in many cases, the impact of having to produce all ESI, without consideration of proportionality, could significantly impact the likely success of a case. If proportionality is not added as a delineated and specific discretionary consideration to be utilized by the courts in evaluating a request for an examination under Bankruptcy Rule 2004, a court may mistakenly believe that it does not have the authority or the right to consider proportionality as part of addressing a request for examination under Bankruptcy Rule 2004.

The National Association of Bankruptcy Trustees (BK-2018-0002-0010) – The NABT supports the amendment for the sake of clarity of scope to include electronic records and uniformity with Rule 45.

Federal Bar Association’s Bankruptcy Section (BK-2018-0002-0011) – Supports the published changes to Rule 2004(c). It urges caution before imposing a proportionality requirement; doing so would likely increase litigation. The parties can adopt an ESI protocol without having the rule impose a proportionality standard.

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1 **Rule 8012. ~~Corporate Disclosure Statement~~**

2 (a) ~~WHO~~ ~~MUST~~ ~~FILE~~

3 NONGOVERNMENTAL CORPORATIONS. Any

4 nongovernmental ~~corporate party~~ corporation that is a party

5 to a proceeding appearing in the district court or BAP must

6 file a statement that identifies any parent corporation and any

7 publicly held corporation that owns 10% or more of its stock

8 or states that there is no such corporation. The same

9 requirement applies to a nongovernmental corporation that

10 seeks to intervene.

11 (b) DISCLOSURE ABOUT THE DEBTOR.

12 The debtor, the trustee, or, if neither is a party, the appellant

13 must file a statement that:

14 (1) identifies each debtor not named in the

15 caption; and

16 (2) for each debtor that is a corporation, discloses

17 the information required by Rule 8012(a).

18 ~~(b)~~(c) TIME TO FILE; SUPPLEMENTAL FILING. A

19 party ~~must file the~~ A Rule 8012 statement must:

20 (1) be filed with ~~its~~the principal brief or upon

21 filing a motion, response, petition, or answer in the

22 district court or BAP, whichever occurs first, unless a

23 local rule requires earlier filing;

24 (2) ~~Even if the statement has already been filed,~~

25 ~~the party's principal brief must~~ be included ~~include a~~

26 ~~statement~~ before the table of contents in the principal

27 brief; and

28 (3) ~~A party must supplement its statement~~ be

29 supplemented whenever the ~~required~~ information

30 required by Rule 8012 changes.

Committee Note

The rule is amended to conform to recent amendments to Fed. R. App. P. 26.1. Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene on appeal.

New subdivision (b) requires disclosure of the name of all of the debtors in the bankruptcy case. The names of the debtors are not always included in the caption of appeals. It also requires, for corporate debtors, disclosure of the same information required to be disclosed under subdivision (a).

Subdivision (c), previously subdivision (b), now applies to all the disclosure requirements in Rule 8012.

Changes Made After Publication and Comment

- No changes were made.

Summary of Public Comment

Ellie Bertwell, Aderant CompuLaw (BK-2018-0002-0009). Agrees that provisions of the Bankruptcy Rules generally should be consistent with the other Federal Rules. The revisions to Bankruptcy Rule 8012 would make this rule consistent with the pending amendment of Appellate Rule 26.1.

The National Association of Bankruptcy Trustees (BK-2018-0002-0010). Supports the amendment for the sake of uniformity with FRAP 26.1.

Bankruptcy Section of the Federal Bar Association (BK-2018-0002-0011). Supports the proposed amendment to Rule 8012 to conform it to FRAP 26.1.

1 **Rule 2005. Apprehension and Removal of Debtor to**
2 **Compel Attendance for Examination.**

3
4

* * * * *

5 (c) CONDITIONS OF RELEASE. In determining
6 what conditions will reasonably assure attendance or
7 obedience under subdivision (a) of this rule or appearance
8 under subdivision (b) of this rule, the court shall be governed
9 by the provisions and policies of title 18, U.S.C., § ~~3146(a)~~
10 ~~and (b)~~ 3142.

Committee Note

The rule is amended to replace the reference to 18 U.S.C. § 3146(a) and (b) with a reference to 18 U.S.C. § 3142. Sections 3141 through 3151 of Title 18 were repealed by the Bail Reform Act of 1984, Pub. L. No. 98-473, Title II, § 203(a), 98 Stat. 1979 (1984), and replaced by new provisions dealing with bail. The current version of 18 U.S.C. § 3146 deals not with conditions to assure attendance or appearance, but with penalties for failure to appear. The topic of conditions is in 18 U.S.C. § 3142.

Because this amendment is made merely to conform to a change in the citation of the statute referred to, final approval is sought without publication.

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1 **Rule 8013. Motions; Intervention**

2 (a) CONTENTS OF A MOTION; RESPONSE;
3 REPLY.

4 (1) *Request for Relief.* A request for an order
5 or other relief is made by filing a motion with the
6 district or BAP clerk, ~~with proof of service on the~~
7 ~~other parties to the appeal.~~

8 * * * * *

1

Committee Note

Subdivision (a)(1) is amended to delete the reference to proof of service. This change reflects the recent amendment to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court's electronic-filing system.

Because this amendment is made merely to conform to a change in the requirement for proof of service, final approval is sought without publication.

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1 **Rule 8015. Form and Length of Briefs; Form of**
2 **Appendices and Other Papers**

3
4

* * * * *

5 (g) ITEMS EXCLUDED FROM LENGTH. In
6 computing any length limit, headings, footnotes, and
7 quotations count toward the limit, but the following items do
8 not:

- 9 • ~~the~~ cover page;
- 10 • ~~a~~ corporate disclosure
11 statement under Rule 8012;
- 12 • ~~a~~ table of contents;
- 13 • ~~a~~ table of citations;
- 14 • ~~a~~ statement regarding oral
15 argument;
- 16 • ~~an~~ addendum containing
17 statutes, rules, or regulations;
- 18 • certificates of counsel;
- 19 • ~~the~~ signature block;
- 20 • ~~the~~ proof of service; and

21 • any item specifically
22 excluded by these rules or by
23 local rule.

24 * * * * *

Committee Note

The amendment to subdivision (g) is made to reflect recent amendments to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court’s electronic-filing system. Because each item listed in Rule 8015(g) will not always be required, the initial article is deleted. The word “corporate” is deleted before “disclosure statement” to reflect a concurrent change in the title of Rule 8012.

Because this amendment is made merely to conform to a change in the requirement for proof of service and the title of another rule, final approval is sought without publication.

1 **Rule 8021. Costs**

2 * * * * *

3 (d) BILL OF COSTS; OBJECTIONS. A party who
4 wants costs taxed must, within 14 days after entry of
5 judgment on appeal, file with the bankruptcy clerk, ~~with~~
6 ~~proof of service~~, and serve an itemized and verified bill of
7 costs, unless the bankruptcy court extends the time.

Committee Note

Subdivision (d) is amended to delete the reference to proof of service. This change reflects the recent amendment to Rule 8011(d) that eliminated the requirement of proof of service when filing and service are completed using a court's electronic-filing system.

Because this amendment is made merely to conform to a change in the requirement for proof of service, final approval is sought without publication.

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Fill in this information to identify your case:

Debtor 1 _____
 First Name Middle Name Last Name

Debtor 2 _____
 (Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: _____ District of _____
 (State)

Case number _____
 (If known)

Check one box only as directed in this form and in Form 122A-1Supp:

- 1. There is no presumption of abuse.
- 2. The calculation to determine if a presumption of abuse applies will be made under *Chapter 7 Means Test Calculation* (Official Form 122A-2).
- 3. The Means Test does not apply now because of qualified military service but it could apply later.

Check if this is an amended filing

Official Form 122A-1

Chapter 7 Statement of Your Current Monthly Income

12/19

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known). If you believe that you are exempted from a presumption of abuse because you do not have primarily consumer debts or because of qualifying military service, complete and file *Statement of Exemption from Presumption of Abuse Under § 707(b)(2)* (Official Form 122A-1Supp) with this form.

Part 1: Calculate Your Current Monthly Income

1. **What is your marital and filing status?** Check one only.

- Not married.** Fill out Column A, lines 2-11.
- Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-11.
- Married and your spouse is NOT filing with you. You and your spouse are:**
 - Living in the same household and are not legally separated.** Fill out both Columns A and B, lines 2-11.
 - Living separately or are legally separated.** Fill out Column A, lines 2-11; do not fill out Column B. By checking this box, you declare under penalty of perjury that you and your spouse are legally separated under nonbankruptcy law that applies or that you and your spouse are living apart for reasons that do not include evading the Means Test requirements. 11 U.S.C. § 707(b)(7)(B).

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write \$0 in the space.

	Column A Debtor 1	Column B Debtor 2 or non-filing spouse
2. Your gross wages, salary, tips, bonuses, overtime, and commissions (before all payroll deductions).	\$ _____	\$ _____
3. Alimony and maintenance payments. Do not include payments from a spouse if Column B is filled in.	\$ _____	\$ _____
4. All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support. Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Include regular contributions from a spouse only if Column B is not filled in. Do not include payments you listed on line 3.	\$ _____	\$ _____
5. Net income from operating a business, profession, or farm	Debtor 1	Debtor 2
	Gross receipts (before all deductions)	\$ _____ \$ _____
	Ordinary and necessary operating expenses	– \$ _____ – \$ _____
Net monthly income from a business, profession, or farm	\$ _____	\$ _____
6. Net income from rental and other real property	Debtor 1	Debtor 2
	Gross receipts (before all deductions)	\$ _____ \$ _____
	Ordinary and necessary operating expenses	– \$ _____ – \$ _____
Net monthly income from rental or other real property	\$ _____	\$ _____
7. Interest, dividends, and royalties	\$ _____	\$ _____

	Column A Debtor 1	Column B Debtor 2 or non-filing spouse
8. Unemployment compensation	\$ _____	\$ _____
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: ↓		
For you	\$ _____	
For your spouse	\$ _____	
9. Pension or retirement income. Do not include any amount received that was a benefit under the Social Security Act.	\$ _____	\$ _____
10. Income from all other sources not listed above. Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total below.		
_____	\$ _____	\$ _____
_____	\$ _____	\$ _____
Total amounts from separate pages, if any.	+ \$ _____	+ \$ _____
11. Calculate your total current monthly income. Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	\$ _____	\$ _____
	+	=
	\$ _____	\$ _____
		\$ _____
		Total current monthly income

Part 2: Determine Whether the Means Test Applies to You

- 12. Calculate your current monthly income for the year.** Follow these steps:
- 12a. Copy your total current monthly income from line 11. **Copy line 11 here →** \$ _____
- Multiply by 12 (the number of months in a year). x 12
- 12b. The result is your annual income for this part of the form. 12b. \$ _____
- 13. Calculate the median family income that applies to you.** Follow these steps:
- Fill in the state in which you live.
- Fill in the number of people in your household.
- Fill in the median family income for your state and size of household. 13. \$ _____
- To find a list of applicable median income amounts, go online using the link specified in the separate instructions for this form. This list may also be available at the bankruptcy clerk's office.
- 14. How do the lines compare?**
- 14a. Line 12b is less than or equal to line 13. On the top of page 1, check box 1, *There is no presumption of abuse.* Go to Part 3. Do NOT fill out or file Official Form 122A-2.
- 14b. Line 12b is more than line 13. On the top of page 1, check box 2, *The presumption of abuse is determined by Form 122A-2.* Go to Part 3 and fill out Form 122A-2.

Part 3: Sign Below

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

X _____
Signature of Debtor 1

Date _____
MM / DD / YYYY

X _____
Signature of Debtor 2

Date _____
MM / DD / YYYY

If you checked line 14a, do NOT fill out or file Form 122A-2.
If you checked line 14b, fill out Form 122A-2 and file it with this form.

Committee Note

The instruction on line 14a is amended to remind a debtor for whom there is no presumption of abuse that Official Form 122A-2 (*Chapter 7 Means Test Calculation*) should not be filled out or filed.

Because this amendment is made merely to repeat an existing instruction, final approval is sought without publication.

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APPENDIX B

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**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE¹**

For Publication for Public Comment

1 **Rule 3007. Objections to Claims**

2

3

(a) TIME AND MANNER OF SERVICE

4

* * * * *

5

(2) *Manner of Service.*

6

(A) The objection and notice shall be served

7

on a claimant by first-class mail to the person

8

most recently designated on the claimant's

9

original or amended proof of claim as the

10

person to receive notices, at the address so

11

indicated; and

12

* * * * *

¹ New material is underlined in red; matter to be omitted is lined through.

13 (ii) if the objection is to a claim of
14 an insured depository institution as
15 defined in section 3 of the Federal
16 Deposit Insurance Act, in the manner
17 provided in Rule 7004(h).

18 * * * * *

Committee Note

Subdivision (a)(2)(A)(ii) is amended to clarify that the special service method required by Rule 7004(h) must be used for service of objections to claims only on insured depository institutions as defined in section 3 of the Federal Deposit Insurance Act, 12 U.S.C. § 1813. Rule 7004(h) was enacted by Congress as part of the Bankruptcy Reform Act of 1994. It applies only to insured depository institutions that are insured by the Federal Deposit Insurance Corporation and does not include credit unions, which are instead insured by the National Credit Union Administration. A credit union, therefore, may be served with an objection to a claim according to Rule 3007(a)(2)(A)—by first-class mail sent to the person designated for receipt of notice on the credit union’s proof of claim.

1 **Rule 7007.1. Corporate—Ownership Disclosure**
2 **Statement**

3
4 (a) REQUIRED DISCLOSURE. Any
5 nongovernmental corporation that is a party to an adversary
6 proceeding, other than the debtor, ~~or a governmental unit,~~
7 shall file ~~two copies of~~ a statement that identifies any parent
8 corporation and any publicly held corporation, ~~other than a~~
9 ~~governmental unit, that directly or indirectly~~ that owns 10%
10 or more of any class of the corporation's equity interests, its
11 stock or states that there ~~are no entities to report under this~~
12 ~~subdivision~~ is no such corporation. The same requirement
13 applies to a nongovernmental corporation that seeks to
14 intervene.

15 (b) TIME FOR FILING; SUPPLEMENTAL FILING.

16 ~~A party shall file the~~ The disclosure statement ~~shall: required~~
17 ~~under Rule 7007.1(a)~~

18 (1) be filed with ~~its~~ the corporation's first
19 appearance, pleading, motion, response, or other
20 request addressed to the court; and

21 (2) be supplemented whenever the
22 information required by this rule changes A
23 ~~party shall file a supplemental statement~~
24 ~~promptly upon any change in circumstances~~
25 ~~that this rule requires the party to identify or~~
26 ~~disclose.~~

Committee Note

The rule is amended to conform to recent amendments to Fed. R. Bankr. P. 8012, Fed. R. App. P. 26.1., and Fed. R. Civ. P. 7.1. Subdivision (a) is amended to encompass nongovernmental corporations that seek to intervene. Stylistic changes are made to subdivision (b) to reflect that some statements will be filed by nonparties seeking to intervene.

1 **Rule 9036. Notice and Service ~~Generally~~ by Electronic**
2 **Transmission**²
3

4 **(a) IN GENERAL. This rule applies** ~~W~~ whenever these
5 rules require or permit sending a notice or serving a paper by
6 mail or other means, ~~the clerk, or some other person as the~~
7 ~~court or these rules may direct, may send the notice to~~ or
8 serve the paper on

9 **(b) NOTICES FROM AND SERVICE BY THE**
10 **COURT.**

11 **(1) Registered Users. The clerk may send notice**
12 **to or serve** a registered user by filing **the notice or paper**
13 ~~it~~ with the court's electronic-filing system.

14 **(2) All Recipients. For any recipient, the clerk**
15 **may send notice or serve a paper** ~~Or it may be sent to~~
16 ~~any person by other~~ electronic means that the ~~person~~
17 **recipient** consented to in writing, **including by**

² The changes indicated are to the version of Rule 9036 that will take effect on December 1, 2019, assuming that Congress takes no action to the contrary.

18 designating an electronic address for receipt of notices
19 under Rule 2002(g)(1). But these exceptions apply:

20 (A) if the recipient has registered an
21 electronic address with the Administrative Office
22 of the United States Courts' bankruptcy-noticing
23 program, the clerk shall send the notice to or serve
24 the paper at that address; and

25 (B) if an entity has been designated by the
26 Director of the Administrative Office of the
27 United States Courts as a high-volume-paper-
28 notice recipient, the clerk may send the notice to
29 or serve the paper electronically at an address
30 designated by the Director, unless the entity has
31 designated an address under § 342(e) or (f) of the
32 Code.

33 (c) NOTICES FROM AND SERVICE BY AN
34 ENTITY. An entity may send notice or serve a paper in the

35 same manner that the clerk does under (b), excluding
36 (b)(2)(A) and (B).

37 (d) COMPLETING NOTICE OR SERVICE. ~~In either~~
38 ~~of these events,~~ Electronic service ~~or notice~~ or service is
39 complete upon filing or sending but is not effective if the
40 filer or sender receives notice that it did not reach the person
41 to be served.

42 (e) INAPPLICABILITY. This rule does not apply to
43 any ~~pleading or other~~ paper required to be served in
44 accordance with Rule 7004.

Committee Note

The rule is amended to take account of the Administrative Office of the United States Courts' program for providing notice to high-volume-paper-notice recipients. Under this program, when the Bankruptcy Noticing Center ("BNC") has sent by mail more than a designated number of notices in a calendar month (initially set at 100) from bankruptcy courts to an entity, the Director of the Administrative Office will notify the entity that it is a high-volume-paper-notice recipient. As such, this "threshold notice" will inform the entity that it must register an electronic address with the BNC. If, within a time specified in the threshold notice, a notified entity enrolls in Electronic Bankruptcy Noticing with the BNC, it will be sent notices electronically at the address maintained by the BNC upon a

start date determined by the Director. If a notified entity does not timely enroll in Electronic Bankruptcy Noticing, it will be informed that court-generated notices will be sent to an electronic address designated by the Director. Any designation by the Director, however, is subject to the entity's right under § 342(e) and (f) of the Code to designate an address at which it wishes to receive notices in chapter 7 and chapter 13 cases, including at its own electronic address that it registers with the BNC.

The rule is also reorganized to separate methods of electronic noticing and service available to courts from those available to parties. Both courts and parties may serve or provide notice to registered users of the court's electronic-filing system by filing documents with that system. Both courts and parties also may serve and provide notice to any entity by electronic means consented to in writing by the recipient. As a result of a contemporaneous amendment to Rule 2002(g)(1) and Official Form 410, this consent may be indicated by providing an electronic address for the receipt of notices on a proof of claim. Only courts may serve or give notice to an entity at an electronic address registered with the BNC as part of the Electronic Bankruptcy Noticing program, and any such address will supersede for court-generated notices an electronic address specified on a proof of claim.

The title of the rule is revised to more accurately reflect the rule's applicability to methods of electronic noticing and service. Rule 9036 does not preclude noticing and service by physical means otherwise authorized by the court or these rules.

TAB 3B

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of April 4, 2019
San Antonio, Texas.

The following members attended the meeting:

Bankruptcy Judge Dennis Dow, Chair
Circuit Judge Thomas Ambro (called in)
Bankruptcy Judge Stuart M. Bernstein
Bankruptcy Judge A. Benjamin Goldgar
Bankruptcy Judge Melvin S. Hoffman (called in)
David A. Hubbert, Esq.
District Judge Marcia S. Krieger
Thomas Moers Mayer, Esq.
Debra Miller, Chapter 13 trustee
District Judge Pamela Pepper
Jeremy L. Retherford, Esq.
Circuit Judge Amul R. Thapar (called in)
District Judge George Wu

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)
Professor Daniel Coquillette, consultant to the Standing Committee (called in)
Professor Catherine Struve, reporter to the Standing Committee (called in)
Circuit Judge Susan Graber, liaison to the Standing Committee
Bankruptcy Judge Mary Gorman
Bankruptcy Judge Marvin Isgur
Circuit Judge William J. Kayatta, Jr.
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
Ahmad Al Dajani, Administrative Office
Bridget Healy, Esq., Administrative Office
Scott Myers, Esq., Administrative Office
Nancy Whaley, National Association of Chapter 13 Trustees
Elizabeth Jones, Supreme Court fellow
Abigail Willie, Supreme Court fellow

Discussion Agenda

1. Greetings and introductions

Judge Dennis Dow welcomed the group. He introduced new members Jeremy Retherford and Judge George Wu, and Judge William Kayatta who will be the new liaison to Standing Committee, replacing Susan Graber. He also introduced Judge David Campbell, the chair of the Standing Committee, and Professor Daniel Coquillette, and Professor Catherine Struve, the consultant and reporter for the Standing Committee, who were participating by phone. He also introduced others attending the meeting.

2. Approval of minutes of Washington, D.C., September 17, 2018 meeting

The minutes were approved by motion and vote.

3. Oral reports on meetings of other committees

(A) January 3, 2019 Standing Committee meeting

Professor Elizabeth Gibson provided the report. The only bankruptcy action item on the agenda for the January 3 meeting was the Advisory Committee's request that the Standing Committee authorize the Advisory Committee to begin restyling the Federal Rules of Bankruptcy Procedure with the understanding that the final decision on whether to recommend to the Standing Committee that any change be made to a Federal Rule of Bankruptcy Procedure rests with the Advisory Committee. The Standing Committee approved that procedure. During the discussion it was noted that it is important to keep Congress apprised about the project. The Standing Committee expressed an interest in getting a primer on bankruptcy and perhaps sharing that with the style consultants.

The Standing Committee was also informed that the Advisory Committee was considering amendments to Rule 9036 to deal with high-volume notice recipients and might have a proposal for publication next summer. The Standing Committee was also informed that the Advisory Committee had approved an amendment to Form 113, (*Chapter 13 Plan*), but decided to defer proceeding with the proposed amendment in order to see whether experience under the new form and related rules suggests the need for additional adjustments.

(B) Oct. 26, 2018 Meeting of the Advisory Committee on Appellate Rules

Judge Pepper delivered the report. At the June 2019 Standing Committee meeting, the Appellate Rules Committee plans to seek the Standing Committee's final approval to amend Rules 35 and 40. These amendments, which concern length limits applicable to responses to a petition for rehearing, are currently published for public comment. The Appellate Rules Committee is also considering additional changes to Rules 35 and 40 aimed at reconciling discrepancies between the two rules. These discrepancies trace back to a time when parties could petition for panel rehearing but only "suggest" rehearing en banc.

At the next Standing Committee meeting, the Appellate Rules Committee will also seek approval to publish amendments to Rule 3 for public comment. These amendments would address the relationship between the contents of the notice of appeal and the scope of the appeal. The Appellate Rules Committee's research revealed that when a notice of appeal from a final judgment also designates a specific interlocutory order, some courts (invoking the "expressio unius" canon) take the view that the additional specification limits the scope of appellate review to the designated interlocutory order. The proposed rule would not limit the scope of appeal on this basis.

The Appellate Rules Committee is considering whether granting voluntary dismissals should be mandatory under Rule 42(b). Rule 42(b) provides that the clerk "may" dismiss an appeal if the parties file a signed dismissal agreement. The proposal before the Appellate Committee would make dismissal mandatory, but where an action by the court is needed, such as a remand for the district court to review a proposed settlement, courts would have the discretion to decline to take the action proposed in the parties' agreement.

The Appellate Rules Committee had been considering an amendment to Rule 36 that would provide a uniform practice for handling votes cast by judges who depart the bench before an opinion is filed with the clerk's office, but the Supreme Court's decision in *Yovino v. Rizo*, 139 S.Ct. 706 (Feb. 25, 2019), rendered that consideration unnecessary.

Finally, the Appellate Rules Committee had been considering whether the Supreme Court's decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017), which characterized time limits set only by court-made rules as non-jurisdictional procedural limits, raised practical issues for the rules, but the Supreme Court held in *Nutraceutical Corp. v. Lambert*, 139 S.Ct. 710 (Feb. 26, 2019), that the 14-day deadline for filing a petition for permission to appeal in Civil Rule 23(f) is not subject to equitable exceptions. As a result, no further consideration is necessary.

(C) Nov. 1, 2018 Meeting of the Advisory Committee on Civil Rules

Judge Benjamin Goldgar provided the report. A subcommittee of the Civil Rules Committee continues to study possible rules for multi-district litigation, including third-party funding of litigation. The Civil Rules Committee approved for transmission to the Standing Committee its published amendment to Rule 30(b)(6) after eliminating the requirement that parties confer about the identity of the witness to be deposed, and drafting a new Committee Note. The Civil Rules Committee approved for publication and comment an amendment to Rule 7.1(a) that parallels amendments to Bankruptcy Rule 8012 and Appellate Rule 26. The Civil Rules Committee and the Appellate Rules Committee have agreed to form a joint committee to consider the recent Supreme Court decision in *Hall v. Hall*, 138 S.Ct. 1118 (2018), in which the Court ruled that when originally independent cases are consolidated under Rule 42(a)(2), they remain separate actions for purposes of final-judgment appeal under 28 U.S.C. § 1291. Judge Goldgar pointed out that Rule 42 applies in bankruptcy cases, and Judge Bates, chair of the Civil Rules Committee, suggested that the Bankruptcy Rules Committee may be able to participate in the joint committee if it wishes to do so. Judge Goldgar volunteered to serve in that role, and the Advisory Committee accepted his offer.

(D) Dec.13-14, 2018 meeting of the Committee on the Administration of the
Bankruptcy System

Judge Mary Gorman provided the report. She reported on the major Unclaimed Funds Task Force work. One focus is to get the unclaimed funds to the persons to whom they belong. The court for the Eastern District of Virginia has developed an unclaimed funds locator, but there are some problems with that locator. There is no smart search feature, and no ability to search across all courts. The Administrative Office is devoting resources to updating the locator, and those improvements are near.

Another suggestion is to waive filing fees to reopen a case to dispose of unclaimed funds (if reopening the case is necessary). Another suggestion is not to charge a transfer fee if the claimant is a successor in interest seeking unclaimed funds, but the Task Force does not want to encourage claimants to wait until funds are unclaimed to avoid the transfer fee. The Task Force is also pursuing a legislative proposal to create a statute of limitations for unclaimed funds requests, which was approved by the Executive Committee of the Judicial Conference and may proceed to Congress.

Professor Struve asked whether the committee considered federalism concerns raised by the Unclaimed Funds Act. Judge Isgur said the problem is exacerbated by payment of secured creditors being paid through the trustees and asked the Bankruptcy Committee to look at the issue. Judge Gorman promised to relay these issues.

Subcommittee Reports and Other Action Items

4. Report by Appeals, Privacy, and Public Access Subcommittee

- (A) Recommendation and review of public comments concerning proposed amendments to Rule 8012 relating to corporate disclosure statement

Judge Ambro and Professor Gibson provided the report. Amendments to Rule 8012 were approved for publication at the spring 2018 meeting of the Advisory Committee to track the relevant amendments to FRAP 26.1. Among other changes, the amendments would modify subsection (a) to make the disclosure requirements applicable to corporations seeking to intervene. The proposed amendments were published in August 2018. Three comments were submitted concerning the amendments, and all were supportive. The Subcommittee therefore recommended that the Advisory Committee give final approval to the amendments.

Tom Mayer expressed the need for additional amendments to Rule 8012 to extend the disclosure requirements to a broader range of entities. The Subcommittee did not disagree but believes that any such expansion should be undertaken in coordination with the other advisory committees with comparable rules, and should not delay the pending amendments.

The Advisory Committee, by motion and vote, gave final approval to the amendments to Rule 8012.

- (B) Recommendation concerning suggestion 19-BK-A to amend Rules 3011 and 9006(b) regarding unclaimed funds

Judge Ambro and Professor Bartell provided the report. The Committee on the Administration of the Bankruptcy System made a suggestion requesting the Advisory Committee to recommend amendments to Federal Rule of Bankruptcy 3011 (and a conforming change to Rule 9006(b)) for the purpose of limiting the time for requesting withdrawal of unclaimed funds from the bankruptcy court to five years after publication of the list pursuant to Rule 3011 of all known names and addresses of the entities and the amounts that they are entitled to be paid. The Bankruptcy Committee also intends to seek an amendment to 11 U.S.C. § 347(a) to provide that unclaimed funds remain with the bankruptcy court for five years, and at the end of that period all parties (including any claimant entitled to those funds) would be barred from asserting any claim against them. The clerks of court would have no further obligations with respect to the funds after that time.

Section 347 of the Bankruptcy Code provides that ninety days after the final distribution in a chapter 7, 12, or 13 case, the trustee shall stop payment on any check remaining unpaid, pay any remaining property of the estate into the court for disposition under chapter 129 of the Judicial Code. Under 28 U.S.C. § 2041, moneys paid into the court are deposited with the Treasury, in the name and to the credit of such court. Withdrawal of such funds is governed by 28 U.S.C. § 2042, which requires a court order to withdraw those funds, and if the money remains on deposit for at least five years unclaimed by the person entitled to it, the money gets deposited with the Treasury in the name and to the credit of the United States. Section 2042 goes on to say:

“Any claimant entitled to any such money may, on petition to the court and upon notice to the United States attorney and full proof of the right thereto, obtain an order directing payment to him.”

Section 2042 clearly contemplates that such petitions may be filed more than five years after the money is deposited.

Under 28 U.S.C. § 2075, bankruptcy rules of procedure “shall not abridge, enlarge, or modify any substantive right.” The Subcommittee concluded that the proposed amendments are beyond the scope of the rule-making power of the Supreme Court, and therefore recommended no modification to the rules in response to this suggestion.

Since the memorandum of the Subcommittee was submitted to the Advisory Committee, the Unclaimed Funds Task Force of the Committee on the Administration of the Bankruptcy System sent a letter suggesting that the matter should be recommitted to the Subcommittee because the Subcommittee erred in its analysis. Professor Bartell discussed the points made in the supplemental letter.

Judge Gorman said that the Task Force had understood the Subcommittee to believe erroneously that substantive rights were created by Section 2042. Professor Bartell agreed that the phrase “created by Section 2042” in the memorandum to the Advisory Committee was inaccurate. It should have said “contemplated by Section 2042.” The substantive claim to funds is created by the bankruptcy distribution statutory scheme. The Subcommittee was polled, and all members continued to adhere to the recommendation previously made. The Advisory Committee, by motion and vote, approved the recommendation of the Subcommittee to take no action on the suggestion.

5. Report by the Business Subcommittee

- (A) Recommendation concerning suggestion 18-BK-D from CACM (Court Administration and Case Management) to expand electronic noticing with proposed amendment to Rule 9036; recommendation concerning proposed “opt-in”

Professor Gibson provided the report. Currently pending before the Supreme Court are amendments to Rule 9036 that would allow clerks and parties to provide notices or serve documents (other than those governed by Rule 7004) by means of the court’s electronic-filing system on registered users of that system. The rule would also allow service or noticing on any entity by any electronic means consented to in writing by that person. We anticipate that these amendments will go into effect in December.

Since the spring meeting, the Subcommittee has continued to consider whether to facilitate electronic notice and service by creating an opt-in procedure under which creditors could specify on proofs of claim that they wish to receive notices and service at an electronic address that they would provide on the form. In addition, the Committee on Court Administration and Case Management (CACM) submitted a suggestion (18-BK-D) that Rule 9036 be amended to provide for mandatory electronic service on “high volume notice recipients,” a category that would initially be composed of entities that each receive more than 100 court-generated paper notices from one or more bankruptcy courts in a calendar month

Working with AO staff and others involved with noticing issues, the Subcommittee is recommending for publication additional amendments to Rule 9036 that would provide for a high-volume-paper-notice recipient program. The following points were taken into account in drafting the proposed amendments:

- 1) Notice and service by the courts should be addressed separately from notice and service by parties. Courts have access to BNC; parties do not. The high-volume program would apply only to notice and service by courts.
- 2) The high volume program allows the recipient to sign up with BNC for electronic noticing and service. If they do not, the AO Director will designate an electronic address for them (through methods to be determined by the Director), but the recipient can designate a mailing address pursuant to § 342(e) and (f) of the Code that would prevail over the Director’s designation.

- 3) Registered users of CM/ECF (lawyers) can be required to receive notice and service through that system.
- 4) The working details of the high-volume program do not need to be spelled out in the rule, but the committee note gives a fuller explanation.
- 5) Consistent with amendments to Rule 8011 that went into effect last December, notice and service by electronic means (whether by parties or by the court) is complete upon filing or sending unless the filer or sender receives notice that the intended recipient did not receive it (e.g., receives a bounce-back).

The Subcommittee recommended that the draft and accompanying committee note contained in the agenda book be published for comment this summer.

Judge Isgur on behalf of CACM praised the draft and said it would save millions of dollars. There is a suggestion in CACM to have private parties contract with BNC using bankruptcy court data with BNC sharing the revenue. It is not clear whether that can happen, but CACM invites feedback.

Judge Pepper suggested that “send the paper” in line 20 be modified to “send the notice or serve the paper.” It was also suggested that the use of the word “it” in various lines (lines 9, 11, 27, 31, 33, 41) might be examined to see if references to “the notice or paper” would be better. Judge Campbell suggested moving lines 21-23 to the end of the paragraph and insert them after a new phrase reading “unless the entity has designated” These changes will be considered in connection with the restyling of the section prior to publication.

The Advisory Committee, by motion and vote, approved publication for comment of the draft amendments to Rule 9036 and accompanying committee note with the noted changes.

- (B) Recommendation and review of public comments concerning proposed amendments to Rule 2004 on examination of debtors and other entities

Professor Gibson provided the report. Amendments to Rule 2004(c) published for comment in August 2018 add references to “electronically stored information” and revise the subpoena requirements to conform to the current versions of Rule 9016 and Civil Rule 45. On two occasions the Advisory Committee considered acting on a suggestion of the Business Law Section of the American Bar Association, on behalf of its Committee on Bankruptcy Court Structure and Insolvency Process, that Rule 2004(c) be amended to include a proportionality requirement. At its fall meeting in 2017 the Advisory Committee voted, by a narrow margin, to

include such a requirement, but could not agree on its wording. The matter was sent back to subcommittee. At the Advisory Committee's meeting in spring 2018, it rejected, again by a narrow margin, a draft that incorporated such a requirement.

Three sets of comments were submitted in response to publication:

The Debtor/Creditor Rights Committee of the Business Law Section of the State Bar of Michigan (BK-2018-0002-0008) suggested that proportionality should be a factor that a bankruptcy judge has the discretion to consider in ruling on a request for production of documents and ESI in connection with a Bankruptcy Rule 2004 examination.

The National Association of Bankruptcy Trustees (BK-2018-0002-0010) supported the amendment.

Federal Bar Association's Bankruptcy Section (BK-2018-0002-0011) supported the published changes to Rule 2004(c), and urged caution before imposing a proportionality requirement.

Because a proposal close to the suggestion of the Michigan Bar committee has already been considered and rejected by the Advisory Committee, the Subcommittee recommended that the Advisory Committee grant final approval of the amendments to Rule 2004 as published.

The Advisory Committee, by motion and vote, gave final approval to the amendments to Rule 2004(c) and accompanying committee note as published.

- (C) Consider publication of amendment to Rule 7007.1 to parallel proposed amendment to Civil Rule 7.1 regarding requirements for intervenors

Professor Gibson noted that the Civil Rules Committee will be proposing for publication an amendment to Rule 7.1 to conform to pending amendments that have been proposed for Appellate Rule 26.1 and Bankruptcy Rule 8012, which also govern disclosure statements for purposes of recusal. The amendment would add a requirement for nongovernmental corporations that are seeking to intervene to file a disclosure statement. The proposed amendment to Rule 7007.1 which is included in the agenda book is consistent with the amendments to those other rules, with minor stylistic and substantive differences.

Although the amendment to Rule 7007.1 is just for the purpose of conforming to the parallel rules, the Subcommittee recommended that it be published for comment in August 2019 to keep it on the same track as the proposed amendment to Civil Rule 7.1.

As was true for the proposed amendments to Rule 8012, Tom Mayer expressed the view that additional changes are needed to Rule 7007.1 to extend the requirements to a broader range of entities. The Subcommittee continues to believe that any expansion should be undertaken in coordination with the other advisory committees and should not hold up the pending amendments.

Judge Goldgar said that at the Civil Rules Committee's meeting questions were raised about the requirement for duplicate copies in Civil Rule 7.1. It was agreed that the bankruptcy rule should conform to Civil Rule 7.1 so Rule 7007.1 should follow whatever the Civil Rules Committee does on that issue.

The Advisory Committee, by motion and vote, approved publication for comment of the draft amendments to Rule 7007.1 and accompanying committee note, as potentially amended to conform to Civil Rule 7.1.

6. Report by the Consumer Subcommittee

(A) Consider suggestion 14-BK-E (from National Bankruptcy Conference)

Professor Bartell provided the report. Suggestion 14-BK-E from Richard Levin on behalf of the National Bankruptcy Conference (NBC) has been pending for some time. The problems it addresses are (1) the difficulties imposed by Rule 7004(h)'s requirement that service on an insured depository institution in a contested matter or adversary proceeding be made by certified mail addressed to an officer of the institution (a provision implementing § 114 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106), and (2) that service on corporations or partnerships that are not insured depository institutions must be made pursuant to Rule 7004(b)(3) by first-class mail addressed to an "officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service."

The NBC proposed an amendment to Rule 3001 to require that a creditor identify on the proof of claim form the name and address of the person responsible for receiving notices under the Code. If the creditor were a corporation, the claimant would be required to list the name and address of an officer or agent for purposes of Rule 7004(b)(3). Additional modifications were proposed for insured depository institutions. The Subcommittee declined to approve any change

to Rule 3001 for three reasons. First, proof of claim forms are not required in most chapter 7 bankruptcies because there are no assets to distribute; so the rule change would not provide the information it seeks to provide in many cases. Second, conflicting addresses might be on file for a single creditor and that creates priority issues. Third, the proposal would not solve the problem it seeks to address because of likely changes in representatives of creditors over time.

The second proposal contained in 14-BK-E was a request that debtors' counsel have access to the BNC database, a suggestion that cannot be implemented, or alternatively an amendment to Rule 5003(e) that would allow creditors to file their addresses for providing notice under § 342(f) and the name and address of an officer to receive service of process. The register of addresses designated under § 342(f) would be kept by the clerk and be accessible by registered users of the court's electronic-filing system. The Subcommittee rejected this proposal because it would impose significant burdens on the clerks of court, and would create yet another potentially conflicting address for a creditor without resolving the priority dispute.

The third proposal made in 14-BK-E was to amend Rule 9036 to require large creditors (those who have filed or anticipate filing in the aggregate 100 or more proofs of claim in bankruptcy courts within any 12-month period) to register for the electronic-filing system in all bankruptcy courts in which they file proofs of claim and use that system for filing all documents and receiving all notices and service of process rather than by mail (other than pursuant to Rule 7004). The Business Subcommittee had this issue before it in the form of another proposal, 18-BK-D. Therefore, this Subcommittee did not address it.

The Subcommittee recommended no rule changes in response to Suggestion 14-BK-E. The Advisory Committee, on motion and vote, approved that recommendation.

(B) Recommendation and review of public comments concerning proposed amendments to Rule 2002

Professor Gibson provided the report. In August 2018 a package of amendments to Rule 2002 were published. These amendments would (i) require giving notice of the entry of an order confirming a chapter 13 plan, (ii) limit the need to provide notice to creditors that do not file timely proofs of claim in chapter 12 and chapter 13 cases and update time periods, and (iii) add a cross-reference in response to the relocation of the provision specifying the deadline for objecting to confirmation of a chapter 13 plan.

Six sets of comments were submitted on one or more of these proposed amendments. Four of the comments included brief statements of support for the amendments. Two other comments were generally supportive, but made additional suggestions. The Subcommittee

declined to make any changes in response to those suggestions, and recommended that the Advisory Committee give final approval to the amendments to Rule 2002 as published.

Judge Hoffman expressed concerned that a surrogate might file a claim on behalf of a creditor after thirty days, and the creditor would not get notices in the case. Because Rule 3004 requires notice to the creditor, it appears that the clerks' offices are adding the creditor back to the matrix after a claim is filed on its behalf, and so it will get notice. No change is needed to deal with that issue.

The Advisory Committee, by motion and vote, gave final approval to the amendments to Rule 2002 and accompanying committee note as published.

7. Report by the Forms Subcommittee

- (A) Recommendation concerning suggestion 18-BK-F to amend Official Form 122A-1

Professor Gibson provided the report. Christian Cooper, a senior staff attorney who assists pro se debtors in the Bankruptcy Court for the Central District of California, submitted a suggestion (18-BK-F) regarding one of the means test forms—Official Form 122A-1 (*Chapter 7 Statement of Your Current Monthly Income*). Mr. Cooper stated that many pro se debtors whose income does not trigger a presumption of abuse fail to see the instruction under the signature line on Form 122A-1 that they should not file Form 122A-2 (the means test calculation). He suggests that the instruction should also be added to the end of line 14a.

Amending line 14a as Mr. Cooper suggests would make that instruction parallel to the instruction on line 14b. Line 14b says to fill out Form 122A-2. The form also includes a similar statement after the signature and date. Likewise, the equivalent form for chapter 13—Official Form 122C-1 (*Chapter 13 Statement of Your Current Monthly and Calculation of Commitment Period*)—includes an instruction not to fill out Form 122C-2 both at line 17a and after the signature and date.

The Subcommittee agreed with the suggestion and recommended that the Advisory Committee propose such an amendment for final approval by the Standing Committee and Judicial Conference without publication. The Subcommittee concluded that the change is sufficiently minor that publication is not needed.

The Advisory Committee, upon motion and vote, agreed to propose the amendment and committee note for final approval by the Standing Committee and the Judicial Conference without publication.

(B) Recommendation concerning suggestion 19-BK-B to create a director's form Application for Unclaimed Funds

Professor Bartell provided the report. The Committee on the Administration of the Bankruptcy System (the "Bankruptcy Committee") submitted a suggestion, 19-BK-B, that the Advisory Committee adopt a Director's Form containing a standard application for withdrawal of unclaimed funds, together with instructions and a proposed order either granting or denying the application. The proposed form was developed by an Unclaimed Funds Task Force established by the Bankruptcy Committee, comprised of district and bankruptcy judges, clerks of court, and liaisons from the Bankruptcy Administrators program and the EOUST. Each district currently uses its own form for this purpose. The Subcommittee recommended that a uniform director's form be adopted, and (working with the AO) made some modifications to the form, application and proposed orders included in the original suggestion.

The Subcommittee recommended to the Advisory Committee that the AO be asked to post a new Director's Form for the application for the payment of unclaimed funds in the form, and with the instructions and forms of orders, included in the agenda book.

Professor Bartell noted that the Guide to Judiciary Policy is being revised with respect to guidance on unclaimed funds, but the revisions do not affect the recommendation.

There was discussion about whether the instructions should require use of the standard form of powers of attorney. The general consensus was not to require that explicitly. It would be up to the court to conclude that the power of attorney was sufficient.

The Advisory Committee, by motion and vote, asked the AO to post a new Director's Form in the form, and with the instructions and forms of orders, included in the agenda book.

8. Report by the Restyling Subcommittee

(A) Report on status of effort

Judge Marcia Krieger, chair of the Subcommittee, reported on the informal meeting of the Restyling Subcommittee over lunch. This is a large project, which will take a number of

years to complete. The three style consultants are working on Parts 1 and 2 of the rules. After the style consultants have all reviewed the proposals, they will send them to the reporters. When the reporters have a version that should be shared with the Restyling Subcommittee, it will be uploaded to a ShareFile program that allows everyone to see all drafts. Skype for Business will be used to allow the Subcommittee to see a working draft collaboratively while it discusses and makes changes. Judge Krieger thanked the AO and FJC for facilitating these technological mechanics.

Many Article III judges and others do not understand bankruptcy practice and language, so Judge Krieger has developed a video program to help provide non-experts a primer on bankruptcy law. This will be shared with the Standing Committee and the style consultants.

The reporters await the first group of rules from the style consultants.

Nothing has happened yet on keeping Congress apprised of the progress on restyling, but that will be pursued after the first group of restyled rules is produced.

Scott Myers reported that the current schedule contemplates the first group of rules would be ready for publication in August 2020. The Subcommittee will also keep a list of issues that are substantive in nature that require change, which can be made at the same time as the restyling or thereafter.

(B) Discussion of considerations with respect to restyling the Bankruptcy Rules

Abigail Willie, Supreme Court fellow, reported on her research on issues relating to restyling. The issue she researched was whether the restyling of any rule was interpreted to make a substantive change to the rules when the other committees undertook this process. She found no published case in which anyone argued that restyling effected a substantive change in the law.

She then looked at what other issues the Advisory Committee might want to consider in the restyling process. The issues she identified were flagging ambiguous words or phrases; use of auxiliary words like “shall” and “should;” use of intensifiers; elimination of redundant phrases; sacred phrases and terms of art; transactions costs; continuity; and protecting the substance of the rules when using plain language.

(C) Discussion of Civil Rules Restyling effort

Judge Lee H. Rosenthal, participating by telephone, discussed restyling of the civil rules. She said that it is possible to change style without changing substance. The good news is that restyling project was the best thing she did during her time on the rules committee – the benefits of the restyling are significant. There is no alternative to restyling.

The major challenge she foresees is that we are starting with the Code, which is not a model of good writing. She encourages lots of review at every stage – each review uncovers new issues. She recommends using footnotes to identify drafting decisions. Civil Rules used subcommittees for different sections. They did not publish until everything was completed.

She encouraged the Advisory Committee to enlist major bar organizations to help identify the concerns even before publication.

She emphasized that the Advisory Committee needs to make clear that jurisprudence of rules predating the restyling continues to be viable. Every restyled Civil Rule had a note that said that the amendments were intended to be stylistic only and make no substantive change.

She recommended resisting changes of numbers or subsections. The restyling subcommittee will have to consider to what extent we conform to other restyled rules or to the Code.

It is critical to keep Congress apprised of the work. The entire restyling project for the Civil Rules almost collapsed because the key Congressional players did not understand what was happening.

She closed by noting that the project will take longer than anticipated, and there will be mistakes, but it will be interesting and important. This is a major service to the constituents.

Information Items

9. Review of notice provisions in Rule 3002.1 and effect on Chapter 13 discharge where trustee payments through a plan are successfully completed, but direct payments by the debtor to a mortgagee are not current.

Elizabeth Jones, Supreme Court fellow, presented this issue. In a conduit district, where all payments are made through the trustee, everyone knows when there is a problem and the court is able to respond immediately, perhaps by dismissal if payments are not made. If all payments are made at the end of the plan period, the debtor gets a discharge. In a direct pay

district, if payments that are to be made outside of the plan are not made, no one knows about it until the Rule 3002.1 statement goes out and the recipient checks its records. At this point it is unclear that any action can be taken, and those debtors are treated differently from the debtor in a conduit district.

The Code does contemplate the direct payments are permitted pursuant to court order or a chapter 13 plan, but Ms. Jones suggested some changes that might be made to the rules to address the problem. She also suggested that changes could be made to require periodic reporting by the debtor on the status of direct payments, or a midterm audit could be required.

10. Consumer Subcommittee status report on consideration of suggestions 18-BK-G and 18-BK-H for amendments to Rule 3002.1 concerning home mortgage information

Elizabeth Gibson provided a report on the status. The idea is that chapter 13 debtors who are making current payments and cure payments should know whether they are current at the end of the case and the rule change would give them that information. A task force will be looking at these issues over the summer and may make a recommendation at the fall meeting.

11. Update on possible amendments to Rule 5005 in connection with pending amendments to Rule 9036

Ramona Elliot explained that the EOUST is looking at the pending amendments to Rule 9036 and their interplay with Rule 5005.

12. Future meetings

The fall 2019 meeting will be in Washington D.C. on September 26, 2019. The time and place of the spring 2020 meeting have not been set.

13. New Business

The Committee assigned to the Forms Subcommittee for its consideration suggestion 19-BK-C to amend Official Form 309A (and other versions of Form 309) to list addresses for the debtor for the previous three years.

14. Adjournment

The meeting was adjourned at 2:28 p.m.

Proposed Consent Agenda

The Chair and Reporters proposed the following items for study and consideration prior to the Advisory Committee's meeting. No objections were presented, and all recommendations were approved by acclamation at the meeting.

1. Consumer Subcommittee

- (A) Recommendation of no action regarding suggestion 18-BK-I (to require the debtor's attorney to mail the statement of intent to creditors) because the rules already impose a duty on the debtor to send the statement of intent to creditors
- (B) Recommendation for approval without publication of technical amendment to Rule 2005(c) to reflect statutory change

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TAB 4

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TAB 4A

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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

DENNIS R. DOW
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: June 4, 2019

Introduction

1
2 The Civil Rules Advisory Committee met in San Antonio, Texas, on April 2-3, 2019. The
3 draft minutes of that meeting are attached at Tab B.

4 The Committee has two action items to report. The first is a recommendation for adoption
5 of an amendment of Civil Rule 30(b)(6) that simplifies the proposal published for comment in
6 August 2018. The second is a recommendation to publish amendments of Civil Rule 7.1 that
7 conform it to pending amendments in Appellate Rule 26(a) and Bankruptcy Rule 8012(a), and also
8 call for disclosure of the names and citizenship of each person whose citizenship is attributed to a
9 party for purposes of determining diversity jurisdiction.

10 The information items that form the balance of this report begin with the work of two
11 subcommittees, the MDL Subcommittee and the Subcommittee for Social Security Disability

12 Review cases. Added subjects include the effect of consolidating originally independent actions on
13 finality for appeal; marshal service for an *in forma pauperis* plaintiff; party consent to trial before
14 a magistrate judge; and limiting remote access to court records in actions for benefits under the
15 Railroad Retirement Act.

16 **I. Action Items**

17 **A. For Final Approval: Rule 30(b)(6)**

18 The Rule 30(b)(6) amendment proposal published for public comment drew much attention.
19 Twenty-five witnesses appeared at the hearing in Phoenix and 55 at the hearing in Washington, DC.
20 Some 1780 written comments were submitted, about 1500 of them during the last week of public
21 comment. Summaries of the testimony and those written comments are included at Appendix A.

22 Having reviewed the public commentary and received the Subcommittee’s report and
23 recommendation, the Advisory Committee is bringing forward a modified version of the preliminary
24 draft amendments with the recommendation that it be forwarded to the Judicial Conference for
25 adoption. The Committee has concluded that an amendment requiring in all cases what many
26 commenters affirmed was best practice – conferring about the matters for examination in order to
27 improve the focus of the examination and preparation of the witness – would improve the rule.

28 The Advisory Committee also considered an alternative of proposing publication for public
29 comment of a revised amendment that would require the organization to identify the designated
30 witness or witnesses a specified time before the deposition, and also add a 30-day notice requirement
31 for 30(b)(6) depositions. It was agreed that any such revised proposal would require re-publication
32 and public comment. The importance of such additional disclosure and the risks that the information
33 might be misused were addressed. It was noted that good lawyers who testified during the hearings
34 said that they often would agree to identify their witness or witnesses in advance when confident that
35 this information would not be misused, but that several emphasized also that there were cases in
36 which they would not provide advance identification. Advisory Committee members expressed
37 uneasiness about overriding those decisions not to identify witnesses in advance. After extensive
38 discussion described in the minutes of its meeting, the Committee decided not to propose that the
39 Standing Committee direct publication of this alternative.

40 At the end of this section of the report are a version of the published preliminary draft
41 showing the changes made after public comment as well as a “clean” version of the amended rule
42 and Committee Note. This report explains the changes made to the proposal after the public
43 comment period.

44 Deleting the requirement to confer about witness identity: Very strong opposition to this
45 directive was expressed by many witnesses and in many comments. Witnesses emphasized that the
46 case law strongly supports the unilateral right of the organization to choose its witness, and asserted

47 that the requirement that the organization confer in “good faith” would undercut that case law.
48 Although the Committee Note said that the choice of the witness remained the sole prerogative of
49 the organization, that raised the question how it could then be the subject of a mandatory requirement
50 to confer in good faith.

51 It bears mention that there was limited public comment in favor of requiring the organization
52 to confer about witness identity from those who regularly use this rule to obtain information from
53 organizations. Some candidly acknowledged that they had no say in the organization’s choice of a
54 witness so long as the person selected was properly prepared to address the matters for examination
55 on the 30(b)(6) list.

56 Deleting “continue as necessary”: The preliminary draft directed that the conference not only
57 be in good faith but also that it “continue as necessary.” To a large extent, that provision was
58 included because the draft directed the parties to confer about the identity of the witness. Very often
59 the organization could not be expected to settle on a specific person to testify without first having
60 obtained a clear understanding of what matters were to be addressed. So there was a need for a rule
61 provision emphasizing that the amendment requires an iterative interaction in most instances. But
62 that need has lessened with deletion of the requirement to confer on witness identity.

63 Removal of this provision is not meant to say that the parties need never engage in an
64 iterative exchange about the matters for examination. Indeed, even though the conference is now
65 limited to the matters for examination it will often be fruitful for the parties to touch base more than
66 once with regard to the kinds of information available and the burdens of obtaining it. The revised
67 Committee Note makes this point.

68 Deleting the directive to confer about the “number and description of” the matters for
69 examination: The Advisory Committee did not propose adding to the rule a numerical limitation on
70 matters for examination, though it was urged to do so. But the preliminary draft did direct the parties
71 to discuss “the number” of matters.

72 The directive to discuss the number of matters in addition to conferring about the matters
73 themselves drew strong objections during the public comment period. The right focus, many said,
74 was on the matters themselves. Discussing an abstract number did not serve a productive purpose.
75 To the extent it might result in some sort of numerical limit, it might also encourage broader
76 descriptions so that the list of matters would be shorter. That seems out of step with both the
77 particularity direction in the rule and with a requirement to confer that is designed in significant part
78 to improve the focus of the listed matters and ensure that the organization understands exactly what
79 the noticing party is trying to find out. The Committee recommends removing “number of” from the
80 conference requirement.

81 The addition of the words “description of” seemed unnecessary; the basic objective ought
82 to be to confer about and refine the matters for examination.

83 Adding a reference to Rule 31(a)(4) depositions to the Committee Note. Rule 31(a)(4)
84 authorizes a deposition by written questions of an organization “in accordance with Rule 30(b)(6).”
85 It also requires that the noticing party’s questions and any questions any other parties wish the officer
86 to pose to the witness be served in advance. Although it has repeatedly been told about problems
87 with Rule 30(b)(6) depositions, the Advisory Committee has not been advised that there have been
88 any problems with this mode of obtaining testimony from organizations. And the advance exchange
89 of all questions to be asked would make a conference about the matters for examination superfluous.
90 Accordingly, a paragraph has been added at the end of the Committee Note to explain that the
91 conference requirement does not apply to a deposition under Rule 31(a)(4).

92 GAP Report: Having received public comment, the Advisory Committee
93 recommends that the proposed requirement to confer about witness identity be
94 removed, that the direction that the parties' conference “continue as necessary” be
95 deleted, and that the directive that the parties confer about the “number and
96 description of” the matters for examination be deleted, with the amendment requiring
97 only that the parties confer about the matters for examination.

98 AMENDMENT PROPOSED TO BE FORWARDED TO JUDICIAL CONFERENCE

99 **Rule 30. Depositions by Oral Examination**

100 * * * * *

101 (b) NOTICE OF THE DEPOSITION;
102 OTHER FORMAL REQUIREMENTS

103 * * * * *

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

119 * * * * *

120 DRAFT COMMITTEE NOTE

121 Rule 30(b)(6) is amended to respond to problems that have emerged in some cases.
122 Particular concerns raised have included overlong or ambiguously worded lists of matters for
123 examination and inadequately prepared witnesses. This amendment directs the serving party and the
124 named organization to confer before or promptly after the notice or subpoena is served, ~~and to~~
125 ~~continue conferring as necessary, regarding~~ about the number and description of matters for
126 examination ~~and the identity of persons who will testify.~~ At the same time, it may be productive to
127 ~~discuss other matters, such as having the serving party identify in advance of the deposition the~~
128 ~~documents it intends to use during the deposition, thereby facilitating deposition preparation.~~ The
129 amendment also requires that a subpoena notify a nonparty organization of its duty to confer and to
130 designate each person who will ~~one or more witnesses to~~ testify. It facilitates collaborative efforts
131 to achieve the proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1).

132 Candid exchanges about the purposes of the deposition and the discovery goals and
133 organization's information structure may clarify and focus the matters for examination, and enable
134 the organization to designate and to prepare an appropriate witness or witnesses, thereby avoiding
135 later disagreements reduce the difficulty of identifying the right person to testify and the materials
136 needed to prepare that person. Discussion of the number and description of topics may avoid
137 unnecessary burdens. Although the named organization ultimately has the right to select its
138 designees, discussion about the identity of persons to be designated to testify may avoid later
139 disputes. It may be productive also to discuss "process" issues, such as the timing and location of
140 the deposition, the number of witnesses and the matters on which each witness will testify, and any
141 other issue that might facilitate the efficiency and productivity of the deposition.

142 The amended rule directs that the parties confer either before or promptly after the notice or
143 subpoena is served. If they begin to confer before service, the discussion may be more productive
144 if the serving party provides a draft of the proposed list of matters for examination, which may then
145 be refined as the parties confer. ~~The rule recognizes that the process of conferring may will often be~~
146 ~~iterative, and that a single conference may not suffice. For example, the organization may be in a~~
147 ~~position to discuss the identity of the person or persons to testify only after the matters for~~
148 ~~examination have been delineated. Consistent with Rule 1, t~~The obligation is to confer in good faith
149 about the matters for examination, consistent with Rule 1, and but the amendment does not require
150 the parties to reach agreement. In some circumstances, it may be desirable to seek guidance from the
151 court. The duty to confer continues if needed to fulfill the requirement of good faith. But the
152 conference process must be completed a reasonable time before the deposition is scheduled to occur.

153 When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f)
154 conference may provide an occasion for beginning discussion of these topics. In appropriate cases,
155 it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery plan
156 submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference
157 under Rule 16.

158 Because a Rule 31 deposition relies on written questions rather than a description with
159 reasonable particularity of the matters for examination, the duty to confer about the matters for
160 examination does not apply when an organization is deposed under Rule 31(a)(4).

161 “Clean” Version

162 **Rule 30. Depositions by Oral Examination**

163 * * * * *

164
165 (b) NOTICE OF THE DEPOSITION;
166 OTHER FORMAL REQUIREMENTS

167 * * * * *

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

181 * * * * *

182 DRAFT COMMITTEE NOTE

183 Rule 30(b)(6) is amended to respond to problems that have emerged in some cases.
184 Particular concerns raised have included overlong or ambiguously worded lists of matters for
185 examination and inadequately prepared witnesses. This amendment directs the serving party and the
186 named organization to confer before or promptly after the notice or subpoena is served about the
187 matters for examination. The amendment also requires that a subpoena notify a nonparty
188 organization of its duty to confer and to designate each person who will testify. It facilitates
189 collaborative efforts to achieve the proportionality goals of the 2015 amendments to Rules 1 and
190 26(b)(1).

191 Candid exchanges about the purposes of the deposition and the organization’s information
192 structure may clarify and focus the matters for examination, and enable the organization to designate
193 and to prepare an appropriate witness or witnesses, thereby avoiding later disagreements. It may be
194 productive also to discuss “process” issues, such as the timing and location of the deposition, the

195 number of witnesses and the matters on which each witness will testify, and any other issue that
196 might facilitate the efficiency and productivity of the deposition.

197 The amended rule directs that the parties confer either before or promptly after the notice or
198 subpoena is served. If they begin to confer before service, the discussion may be more productive
199 if the serving party provides a draft of the proposed list of matters for examination, which may then
200 be refined as the parties confer. The process of conferring may be iterative. Consistent with Rule 1,
201 the obligation is to confer in good faith about the matters for examination, but the amendment does
202 not require the parties to reach agreement. In some circumstances, it may be desirable to seek
203 guidance from the court.

204 When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f)
205 conference may provide an occasion for beginning discussion of these topics. In appropriate cases,
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207 submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference
208 under Rule 16.

209 Because a Rule 31 deposition relies on written questions rather than a description with
210 reasonable particularity of the matters for examination, the duty to confer about the matters for
211 examination does not apply when an organization is deposed under Rule 31(a)(4).

212 **B. For Publication: Rule 7.1**

213 The Committee recommends publication for comment of proposals to amend Rule 7.1
214 regarding disclosure statements for two purposes. The first is to conform Rule 7.1 to pending
215 amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a). The second is to facilitate the
216 determination whether diversity jurisdiction is defeated by attribution of a nonparty’s citizenship to
217 a party.

218 Maintaining consistency in disclosure requirements among the sets of Enabling Act rules is
219 desirable. No reason has appeared to distinguish the Civil Rules from the Appellate and Bankruptcy
220 Rules regarding disclosure by a nongovernmental corporation that seeks to intervene. The proposed
221 amendment also deletes the direction to file two copies of the disclosure statement. Electronic court
222 dockets ensure that a judge who wants a paper copy can get it without burdening the clerk’s office
223 with extra pieces of paper. This amendment does not present any difficulties.

224 Finding a means to support confident determinations of diversity jurisdiction at the outset
225 of an action has always been important. Complete diversity is required for jurisdiction under
226 28 U.S.C. § 1332(a). Problems arise when a party takes on not only its own citizenship(s) but also
227 citizenships of nonparties that are attributed to the party. These problems have been much reduced
228 by the general rule that a corporation is a citizen of every state and foreign state by which it has been
229 incorporated and the state or foreign state where it has its principal place of business. But they have
230 been multiplied by the great popularity of organizing an enterprise as an LLC. An LLC party takes
231 on the citizenship of each of its owners. And if one of the owners is an LLC, all of the owners of that
232 LLC also pass through to the LLC party. Committee study of the LLC issues has shown that many
233 judges require the parties to provide detailed information about LLC citizenship. This practice serves
234 to ensure that diversity jurisdiction actually exists, a matter that is important in itself. It also protects
235 against the risk that a federal court’s substantial investment in a case will be lost by a belated
236 discovery – perhaps even on appeal – that there is no diversity.

237 Beyond LLC parties, many other parties take on the citizenships of their constituents. As
238 recognized by Rule 82, the Civil Rules play no role in defining the various forms of human
239 association that invoke attributed citizenships. The rule text simply invokes whatever rules are
240 developed around the enigmatic text of § 1332(a). The third paragraph of the Committee Note
241 emphasizes that disclosure extends to every attributed citizenship, no matter how the pass-through
242 being is characterized for other purposes.

243 These amendments are proposed for publication now despite the possibility that other
244 disclosure requirements may be recommended in the future. The MDL Subcommittee continues to
245 study third-party litigation funding (TPLF), including various proposals for disclosure. All that is
246 clear at the moment is that the underlying phenomena that might be characterized as third-party
247 funding are highly variable and often complex. They continue to evolve at a rapid pace as large third-
248 party funders expand dramatically. It seems clear that more study will be required to determine

249 whether a useful disclosure rule could be developed. Nor does it seem likely that the several advisory
250 committees will soon be in a position to frame possible expansions of disclosure requirements
251 designed to support better-informed recusal decisions.

252 The proposed Rule 7.1 amendments are presented first in over- and underlined form, and then
253 in a clean version:

254 **Rule 7.1. Disclosure Statement**

255 (a) WHO MUST FILE; CONTENTS.

256 (1) Nongovernmental Corporations. A nongovernmental corporate party or any
257 nongovernmental corporation that seeks to intervene must file ~~2 copies of~~ a
258 disclosure statement that:

259 (1A) identifies any parent corporation and any publicly held corporation owning 10%
260 or more of its stock; or

261 (2B) states that there is no such corporation.

262 (2) Parties in a Diversity Action. Unless the court orders otherwise, a party to an action in
263 which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) must file a
264 disclosure statement that names – and identifies the citizenship of – every individual
265 or entity whose citizenship is attributed to that party.

266 * * * *

267 Committee Note

268 Rule 7.1 is amended to require a disclosure statement by a nongovernmental corporation that
269 seeks to intervene. This amendment conforms Rule 7.1 to similar recent amendments to Appellate
270 Rule 26.1 and Bankruptcy Rule 8012(a).

271 Rule 7.1 is further amended to require a party to an action in which jurisdiction is based on
272 diversity under 28 U.S.C. § 1332(a) to disclose the citizenship of every individual or entity whose
273 citizenship is attributed to that party. Two examples of attributed citizenship are provided by §
274 1332(c)(1) and (2), addressing direct actions against liability insurers and actions that include as
275 parties a legal representative of the estate of a decedent, an infant, or an incompetent. Identifying
276 citizenship in such actions is not likely to be difficult, and ordinarily should be pleaded in the
277 complaint. But many examples of attributed citizenship arise from noncorporate entities that sue or
278 are sued as an entity. A familiar example is a limited liability company, which takes on the
279 citizenship of each of its owners. A party suing an LLC may not have all the information it needs to
280 adequately plead the LLC's citizenship. The same difficulty may arise with respect to many other
281 forms of noncorporate entities, some of them familiar – such as partnerships and limited partnerships
282 – and some of them more exotic, such as “joint ventures.” Pleading on information and belief is
283 acceptable at the pleading stage, but disclosure is necessary both to ensure that diversity jurisdiction

284 exists and to protect against the waste that may occur upon belated discovery of a
285 diversity-destroying citizenship. Disclosure is required by a plaintiff as well as all other parties.

286 What counts as an “entity” for purposes of Rule 7.1 is shaped by the need to determine
287 whether the court has diversity jurisdiction under § 1332(a). It does not matter whether a collection
288 of individuals is recognized as an entity for any other purpose, such as the capacity to sue or be sued
289 in a common name, or is treated as no more than a collection of individuals for all other purposes.
290 Every citizenship that is attributable to a party must be disclosed.

291 Discovery should not often be necessary after disclosures are made. But discovery may be
292 appropriate to test jurisdictional facts by inquiring into such matters as the completeness of a
293 disclosure’s list of persons or the accuracy of their described citizenships. This rule does not address
294 the questions that may arise when a party’s disclosure statement or discovery responses indicate that
295 the party cannot ascertain the citizenship of every individual or entity whose citizenship may be
296 attributed to it.

297 The rule recognizes that the court may limit the disclosure in appropriate circumstances.
298 Disclosure might be cut short when a party reveals a citizenship that defeats diversity jurisdiction.
299 Or the names of identified persons might be protected against disclosure to other parties when there
300 are substantial interests in privacy and when there is no apparent need to support discovery by other
301 parties that goes behind the disclosure.

302 “Clean” Version

303 **Rule 7.1. Disclosure Statement**

304 (a) WHO MUST FILE; CONTENTS.

305 (1) *Nongovernmental Corporations.* A nongovernmental corporate party or any
306 nongovernmental corporation that seeks to intervene must file a disclosure statement
307 that:

308 (A) identifies any parent corporation and any publicly held corporation owning 10%
309 or more of its stock; or

310 (B) states that there is no such corporation.

311 (2) *Parties in a Diversity Case.* Unless the court orders otherwise, a party to an action in
312 which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) must file a
313 disclosure statement that names – and identifies the citizenship of – every individual
314 or entity whose citizenship is attributed to that party.

315 **II. Information Items**

316 **A. MDL Subcommittee**

317 During its January 2019 meeting the Standing Committee extensively discussed the various
318 issues pending before the Advisory Committee’s MDL Subcommittee. Since that time,
319 representatives of the Subcommittee have attended a variety of events at which pertinent issues were
320 discussed.¹ The Subcommittee has also received very valuable information from the Judicial Panel
321 on Multidistrict Litigation. At the Subcommittee’s request, the Federal Judicial Center’s Research
322 Division investigated the use of plaintiff fact sheets (PFSs) and defendant fact sheets (DFSs) in
323 product liability MDL litigation. A copy of that report is included at Appendix B.

324 During the Advisory Committee’s April 2019 meeting, there was an extensive discussion of
325 the various issues on which the Subcommittee has focused. That discussion confirmed the
326 Subcommittee’s present inclination to focus primarily on four issues: (1) use of PFSs (and perhaps
327 DFSs) to organize MDL personal injury litigation and “jump start” discovery; (2) providing an
328 additional avenue for interlocutory appellate review of district court orders in MDL litigation; (3)
329 addressing the court’s role in relation to “global” settlement of multiple claims in MDL litigation;
330 and (4) third-party litigation funding. Those four issues are the main focus of this report.²

¹Those events have included and will include the following:

State-Federal Conference, Emory University Institute for Complex Litigation and Mass Claims, Feb.
28-March 1, 2019, Newport Beach, CA.

Conference on Dispute Resolution of Consumer Mass Disputes: Collective Redress Class Action
and ADR, University of Haifa, March 28-29, 2019, Haifa, Israel.

Lawyers for Civil Justice Membership Meeting, May 3, 2019, Washington, DC.

MDL Roundtable, Emory University Institute for Complex Litigation and Mass Claims, May 9-10,
2019, Boston, MA.

American Association for Justice Convention, July 27-30, 2019, San Diego, CA.

²The Subcommittee also has been examining two other issues that were included in the January 2019 presentation to the Standing Committee. Based on the Subcommittee’s examination of these issues and the discussion during the Advisory Committee’s April meeting, these issues appear less promising targets for rulemaking. They are:

Filing fees: 28 U.S.C. § 1914(a) requires that any party initiating a civil action pay a filing fee unless excused from doing so. There were suggestions that filings by multiple plaintiffs (joined under Rule 20) might mean that the per capita filing fee would be very low, and that insisting that each claimant pay a full filing fee could deter groundless claims. Investigation has revealed that in MDL personal injury proceedings individual filing fees are charged in the great majority of instances, perhaps due to orders in cases regarding “direct filing” in the MDL transferee district. To the extent the “Field of Dreams” problem of multitudes of groundless claims persists, then,

331 **1. PFS/DFS Practice**

332 The Subcommittee initially addressed this topic in response to concerns about large numbers
333 of unfounded claims that are included in large MDL mass tort proceedings. A number of submissions
334 urged that because there often are many such claims, their presence can distort the proceedings.
335 Accordingly, a rigorous early effort to identify and remove them might be warranted.³ This might
336 be called screening.

337 But insisting that transferee judges make claim screening the first order of business might
338 often intrude on the latitude that they need to manage the MDL litigations before them. And
339 prescribing by rule what should be required for such screening, and when it should occur, could
340 intrude further into management of the litigation.

341 The FJC research on PFS and DFS practice in product liability MDLs (included in Appendix
342 B) found PFS requirements in 81% of the MDLs with more than 100 actions, and 87% of the “mega”

addressing filing fees by rule amendment does not seem to provide an effective screen.

Master complaints: Master complaints may be used in MDL litigation as a case management tool or instead treated as superseding individual complaints, as the Supreme Court has recognized. *See Gelboim v. Bank of America Corp.*, 135 S. Ct. 897, 904 n.3 (2015). Proposals were made to add mention of master complaints to Rule 7, but the existing practice under the current rule indicates that there is no need to change the rule. To the extent the concern has been that some transferee judges resist Rule 12 challenges to master complaints or to individual complaints, that appears ordinarily to be a matter of case management, and a rule forbidding it might unduly limit the latitude the transferee court should have in managing the litigation.

³ To illustrate, the Fairness in Class Action Litigation Act of 2017, passed by the House of Representatives in the last Congress, included a provision adding a new subsection (i) to 28 U.S.C. § 1407, the multidistrict litigation statute:

ALLEGATIONS VERIFICATION – In any coordinated or consolidated pretrial proceedings conducted pursuant to subsection (b), counsel for a plaintiff asserting a claim seeking redress for personal injury whose civil action is assigned to or directly filed in the proceeding shall make a submission sufficient to demonstrate that there is evidentiary support (including but not limited to medical records) for the factual contentions in plaintiff’s complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of injury. The submission must be made within the first 45 days after the civil action is transferred to or directly filed in the proceedings. That deadline shall not be extended. Within 30 days after the submission deadline the judge or judges to whom the action is assigned shall enter an order determining whether the submission is sufficient and shall dismiss the action without prejudice if the submission is found to be insufficient. If a plaintiff in an action dismissed without prejudice fails to tender a sufficient submission within the following 30 days, the action shall be dismissed with prejudice.

343 proceedings with over 1,000 actions.⁴ This study also found that all the PFS requirements identified
344 included some common features:

345 Health records: information about general health, health issues related to the product in
346 issue, names of doctors and pharmacies, and information about denial of health insurance

347 Personal identifying information: names, addresses, and employment history

348 Litigation history: information about prior tort litigation, past bankruptcy, social security
349 claims, and workers' compensation claims

350 Many PFS orders also required medical or other types of releases. In 64% of the MDL product
351 liability matters with over 100 cases, there was also an order for a DFS, often designed to collect
352 information about plaintiffs already in the defendant's possession. In MDLs with over 1,000 actions,
353 DFS requirements appeared in 72% of the matters.

354 Another way of looking at this practice is that it is not really a screening method so much as
355 a useful way to "jump start" discovery in these massive proceedings and to permit the parties to
356 develop an "inventory" of the claims included. Thus, although the FJC found that PFS requirements
357 led to dismissal activities in a majority of the cases, it seems that such activity was often under
358 Rule 37(b)(2) or Rule 41(b), and focused more on failure of certain claimants to respond to orders
359 to complete a PFS than on the adequacy of the material so provided.

360 Whether viewed as screening devices or as case management methods, it could be that PFSs
361 (and perhaps DFSs) have become sufficiently pervasive to warrant inclusion in the Civil Rules. But
362 in considering such an addition to the rules one must ask whether rule provisions would be
363 unnecessary (because the practice is already widespread) or counter-productive (if there are good
364 reasons for not requiring such measures in the minority of large MDLs in which they are not used).
365 These issues continue to be studied by the MDL Subcommittee.

366 Rule 26(f)/16(b) approach: One alternative might be to try to develop something like the
367 Rule 26(f) planning conference and direct the parties in covered MDLs to confer and report to the
368 court about the utility and content of PFS and/or DFS requirements for the centralized cases.
369 Perhaps something like Rule 16(b) could be adopted to direct the court to develop a plan for
370 managing the MDL proceeding, including provision, if appropriate, for PFS requirements.

371 One potential difficulty with such an approach is that resolution of these issues might have
372 to be deferred until the transferee court has appointed leadership lawyers in the MDL proceeding.

⁴ Indeed, the JPML informed us that PFSs were used in all but two of the current mega proceedings, and that they would not have been useful in either of the two other proceedings in which they were not used.

373 Ordinarily, leadership from the Plaintiffs’ Steering Committee (PSC) would be expected to negotiate
374 such matters with defense counsel. And in some cases there may be a need for liaison counsel on
375 the defense side if there are numerous defendants. It is customary for transferee judges to appoint
376 such leadership lawyers in larger MDLs. Planning for things like the details of a PFS or DFS
377 probably would have to await such an appointment.

378 The fact that such appointments usually happen in larger MDLs suggests that adopting a rule
379 requiring the parties to confer after the Panel acts is unnecessary. Most MDL transferee judges
380 convene some sort of status or case management conference relatively promptly after centralization
381 occurs. One of the early pieces of business then is likely to be appointment of a leadership team for
382 the plaintiff side and, perhaps, also for the defense side.

383 Particularly in the larger MDLs, it seems likely that something like what a rule of this sort
384 might require is already happening. It seems that repeated management conferences already occur
385 in many MDLs without stimulus by a rule. If so, it is unclear why a rule should command transferee
386 judges or counsel to focus on a PFS or DFS in the small minority of large MDLs in which one is not
387 used. Moreover, the transferee judge has many issues to consider and address in early case
388 management of an MDL proceeding, and adding only the PFS/DFS issue in Rules 26(f) and 16(b)
389 may be problematic. But there is initial support for this approach from lawyers on both sides of the
390 “v.”

391 In part due to the likely need first to appoint leadership counsel, the timing for a 26(f) type
392 rule requirement might be tricky. Rule 26(f) itself is keyed to the date for the Rule 16(b) scheduling
393 conference, which in turn focuses on the time when a defendant has been served or has appeared in
394 the action. Given the multiplicity of actions involved in MDL proceedings, that trigger will not work.
395 Perhaps the entry of a Panel transfer order would be a suitable trigger. In addition, care would be
396 necessary in determining which MDLs should be covered by such a rule, a topic also treated below
397 in regard to rule provisions prescribing the contents of PFSs.

398 Rule prescription of use and contents of PFS: A more aggressive approach could stop well
399 short of proposed legislation quoted in footnote 3 above. If designed to “jump start” discovery, it
400 might be included in Rule 26(a)(1) or analogous to that initial disclosure requirement. Taking this
401 approach might raise a variety of issues:

402 What MDLs should be covered by a rule? The proposed statute quoted above would have
403 applied to “personal injury” actions. Looking at product liability MDL proceedings (including some
404 that were not personal injury cases), the FJC found that they ranged in number of cases from three
405 to over 40,000. That may suggest that one could limit such a rule to MDLs with more than a certain
406 number of actions. Looking to the FJC report, it seems that one could pick 1,000 cases as the cutoff,
407 or perhaps 100 cases. Alternatively, the cutoff could be set at a similar number of plaintiffs. Any
408 such number could be challenged as arbitrary, and there might also be uncertainty about counting
409 cases. Determining what would constitute “personal injury” could also prove challenging. For

410 example, in data breach litigation involving medical records, if emotional distress damages were
411 allowed on such a claim would that be a “personal injury” MDL? Perhaps “physical or emotional
412 injury” would be better.

413 Should a rule be limited to MDLs? There have been cases that involved more than 1,000
414 claimants but were not subject to an MDL order. *See, e.g., Avila v. Willits Environmental*
415 *Remediation Trust*, 653 F.3d 828 (9th Cir. 2011) (claims on behalf of over 1,000 present and former
416 residents of town for health problems resulting from exposure to toxics from a chrome plating
417 facility); *Acuna v. Brown & Root, Inc.*, 200 F.3d 335 (5th Cir. 2000) (tortious injury claims by over
418 600 people allegedly resulting from uranium mining activity). In both these cases, the district court
419 required plaintiffs to provide details as a matter of case management. Using a standard looking to
420 number of claimants might support applying a PFS requirement to cases not subject to a Panel order.
421 But since district courts appear to have authority under Rule 16 to impose such a requirement,
422 extending the rule beyond MDLs seems unnecessary. To date, there has been no argument in favor
423 of wider application.

424 Who should draft the PFS? Assuming a rule could not itself prescribe all the exact contents
425 of a PFS, it might assign initial responsibility for preparing one. Ultimately, a court order would
426 normally be required to implement the PFS requirement, but that does not mean the court should
427 draft the PFS. Instead, it seems more reasonable that counsel should develop a proposed PFS. But
428 as noted above, it may be that serious drafting of a PFS could not begin until the court appoints lead
429 counsel for the plaintiffs. And we heard complaints that drafting and agreeing to a PFS, which can
430 take eight months or more, is often part of the problem.

431 When should a rule direct that a PFS or DFS order be entered? The statutory proposal quoted
432 above would have mandated submission of required information within 45 days of transfer to or
433 direct filing within a covered MDL. But the FJC research showed that actual experience to date has
434 been that the average time from centralization to entry of a PFS order was 241 days (8 months).
435 Some took longer. And claimants would need time after that to provide the needed information once
436 the order is entered.

437 How is the PFS scheme to be enforced/policed? The proposed statutory provision quoted
438 above would have imposed on the court a duty to review each submission within 30 days. Even if
439 conceived principally as a screening device, such a requirement could impose a very heavy burden
440 on the court; perhaps a better method would be to authorize defendants to challenge the sufficiency
441 of individual PFSs. In some mass tort MDLs, a sort of show-cause method is used for this purpose.
442 Whether that should be considered more like a Rule 12(b) motion or a Rule 56 motion is not entirely
443 clear. To the extent this is considered mainly a “jump start” for discovery, perhaps a Rule 37 or Rule
444 41(b) model for enforcement would be the right choice.

445 An alternative approach – an initial “census”: Very recently, during the Emory Institute
446 roundtable on May 9-10, 2019, mentioned in footnote 1 above, another idea has emerged – that there

447 should be an initial “census” of the claims submitted in “mass” MDLs. This approach would call for
448 claimants to make a showing of exposure to the product or item involved in the litigation, and also
449 a showing that they have sustained an injury of the sort alleged in the proceeding. The exact contours
450 of this approach remain unclear, and it may be that it would not supplant the later use of a PFS for
451 those claims that satisfy the census requirements. The Subcommittee is seeking further information
452 on this new idea and expects to consider it as the process moves forward.

453 **2. Interlocutory Appellate Review**

454 The Advisory Committee has been urged to consider an aggressive rule provision ensuring
455 interlocutory appellate review of at least some orders in MDL mass tort proceedings.⁵ There have
456 been suggestions also that a rule provision mandate expedited treatment in the court of appeals for
457 such appeals. If the Civil Rules Advisory Committee pursues these ideas, it will need to coordinate
458 with the Appellate Rules Advisory Committee.

459 The Subcommittee is not focused on mandatory appellate review or requirements to expedite
460 review. Instead, it is more focused on something akin to Rule 23(f), which allows courts of appeals
461 to review orders denying or granting class certification but grants them discretion to decide whether
462 to allow interlocutory review.

463 An abiding question is whether there is any need to add a new appellate avenue since 28
464 U.S.C. § 1292(b) already permits district courts to certify orders for immediate review.⁶ As a matter
465 of theory, there might be reasons why the statutory requirements – “a controlling question of law”
466 on which there is a “substantial ground for difference of opinion” – might not be suitable for all
467 important orders in MDL mass tort litigations.

468 Section 1292(b) also says that the district court must certify that immediate review would
469 “materially advance the ultimate termination of the litigation,” which (at least in some circuits) might
470 by itself be a major obstacle to certifying an order for immediate review due to the delay resulting
471 from having to wait for a court of appeals ruling.

⁵ For example, the Fairness in Class Action Litigation Act passed by the House of Representatives during the last Congress would have added a new subsection to § 1407 providing as follows:

The Court of Appeals having jurisdiction over the transferee district shall permit an appeal to be taken from any order issued on the conduct of coordinated or consolidated pretrial proceedings conducted pursuant to subsection (b) provided that an immediate appeal from the order may materially advance the ultimate termination of the proceedings.

⁶ Review may also be available in some circumstances by mandamus or pursuant to Rule 54(b).

472 The Advisory Committee has received a very thorough study of actual experience with
473 § 1292(b) review in MDL mass tort litigations, and it does appear that such review occurs only
474 rarely. Whether the rarity of review results in significant part from the provisions of the statute
475 cannot easily be determined, however.

476 Finally, § 1292(b) gives the district court what amounts to a veto over immediate review.
477 In individual litigation, that seems warranted; unless the district court sees an advantage in
478 requesting immediate review, there would rarely be any reason to provide that opportunity. Arguably
479 things are different in MDLs, or at least in mass tort MDLs that sometimes include thousands of
480 cases.

481 Rule 23(f) does not give the district court a veto over petitions for review of class-
482 certification decisions. But in that instance, the order is often of central importance (inviting “death
483 knell” images for denial and grant of certification), and the courts of appeals have developed a
484 jurisprudence regarding the showing needed to raise serious doubts about the certification ruling
485 made by the district court.

486 Articulating a standard to determine whether to permit immediate review could present a
487 challenge. As noted above, the § 1292(b) standard – “materially advance the ultimate termination
488 of the litigation” – may not be ideal. One suggestion looks instead to a standard modeled on that for
489 direct appeals to the court of appeals in bankruptcy proceedings – “materially advance the progress
490 of the case or proceeding.” 28 U.S.C. § 158(d)(2)(A)(iii). Something along those lines might be
491 better adapted to this additional route to interlocutory review.

492 A related point is that nobody urges that immediate review be offered for every order.
493 Initially, the suggestion was to limit the opportunity for interlocutory review to certain issues such
494 as preemption rulings or *Daubert* rulings. A different idea is that review should be available only
495 when a significant number of cases (*e.g.*, 50 cases) would be affected, sometimes summarized as
496 asking whether an order is “cross-cutting.”

497 But whatever the standard, it would likely be inappropriate to expect the court of appeals to
498 apply it without a clear understanding of the district court's views. So some method of providing the
499 district court with a way to make its views known would likely be important to any serious rule
500 proposal.

501 At the Emory Institute conference on May 9-10, 2019, there was a thorough examination of
502 the need for greater access to interlocutory appellate review and the case for expanded review was
503 not convincingly made. That discussion did not lead to agreement, however, and it is expected that
504 proponents of expanded opportunities for review will make a revised proposal in the near future.

505 It is not clear, then, that any additional route to interlocutory review is warranted, but it does
506 appear that fashioning one would require considering the issues identified above.

507 **3. Settlement Review/PSC Supervision**

508 Rule 23 was dramatically revised in 1966, and the MDL statute came into being at about the
509 same time – 1968. As the Standing Committee knows, class action settlements have become
510 extremely important. That was evidently not apparent in 1966. Rule 23(e) did say that class actions
511 could not be dismissed or settled without court approval. Here is the entirety of the 1966 Committee
512 Note accompanying that rule provision: “Subdivision (e) requires approval of the court, after notice,
513 for the dismissal or compromise of any class action.”

514 Settlement has now emerged as a major concern in MDL litigation. By the late 1970s, barely
515 5% of cases centralized under § 1407 were remanded to the transferor districts. In some instances
516 that was because they were resolved by Rule 12 motions or Rule 56 motions in the transferee
517 districts. But in a great many instances, the low number of remands was because the MDL
518 proceedings were settled, often due to some sort of “global peace” arrangement. Sometimes those
519 arrangements included rather forceful inducements for plaintiffs to accept the overall deal.

520 The great importance of settlement in class actions produced legal rules governing judicial
521 approval of such settlements. At first, the various courts of appeals developed a general standard –
522 “fair, reasonable, and adequate” – to guide the judicial decision under Rule 23(e). In 2003, that
523 standard was written into the rule. Effective Dec. 1, 2018, Rule 23(e) was further amended to guide
524 district courts in evaluating proposed class-action settlements. These features are designed in part
525 to protect the interests of absent class members, and some courts say that judges have a “fiduciary”
526 duty to protect the interests of these persons when reviewing a proposed settlement.

527 MDL proceedings are different. Ordinarily, each claimant has a lawyer, and the claimant can
528 accept or reject a settlement. As in any other litigation, the judge has no role reviewing that
529 settlement, and cannot insist on the right to “approve” it. That general rule changes in class actions
530 only because unnamed class members are bound by the settlement. Section 1407 gives no similar
531 power to transferee judges to bind claimants to a deal they do not accept.

532 Although the foregoing is technically true, the actual conduct of at least some MDL
533 proceedings may seem to many claimants and their counsel to be a lot like class actions when it
534 comes to settlement. Often the court will appoint a Plaintiffs’ Steering Committee (PSC) and direct
535 that only those lawyers may conduct the litigation activities, including settlement negotiations.
536 Those settlement negotiations may produce a “take it or leave it” deal that lawyers with “inventories”
537 of MDL claimant clients are strongly urged to strongly recommend to their clients. The defendants,
538 seeking “global peace,” may refuse to settle unless all or almost all claimants sign up. The transferee
539 judge may play a prominent role in encouraging the global settlement. And there is often a special
540 master – appointed by and hence an extension of the court – who is intimately involved in shaping
541 the process and terms of the settlement.

542 One description of this sort of situation is that it is a “quasi class action.” Judges sometimes
543 use that term to support actions in MDL proceedings that resemble what they do in class actions,
544 such as limits on attorney fees. Those judges may also require that attorneys not in leadership
545 positions “contribute” a portion of their fees from settlements to a “common benefits fund” that can
546 later be used to fund awards to PSC members and other lead counsel for common benefit work done
547 to pursue the litigation. In class actions, such orders are guided by Rule 23(h).

548 Putting all of this together suggests that when judicial involvement is important (perhaps
549 critical) to global resolution in MDL mass tort proceedings there should also be some judicial
550 responsibility and authority to review the fairness of such a deal in a way like what Rule 23(e)
551 authorizes in class actions. In some MDL proceedings, class action treatment is actually used as a
552 vehicle for such a resolution, so Rule 23(e) does apply. Some have urged that the Subcommittee
553 focus on methods of ensuring fairness to MDL claimants, particularly when “inventories” of claims
554 are being settled. Assurances of fair distribution and valuation procedures like those encouraged by
555 Rule 23(e) could be valuable.

556 A possible rule-based way of providing such oversight could be to focus on the appointment
557 of leadership counsel such as the PSC. That seems to be a recurrent feature of MDL litigation, and
558 the criteria for selecting class counsel under Rule 23(g) seem pertinent also to selection of lawyers
559 to serve in this role. Often orders appointing such lawyers to leadership positions not only regulate
560 their responsibility to handle or assign to other lawyers such litigation functions as drafting
561 pleadings, conducting discovery, and making motions, but also authorize them to conduct settlement
562 negotiations, at least if those negotiations focus on settlement terms for claimants who are not direct
563 clients of attorneys appointed to leadership positions. Such a rule might also recognize that MDL
564 courts wield authority to regulate the fees of the lawyers so appointed, and of other lawyers who
565 benefit from the efforts of the lawyers so appointed.

566 As with other topics, the discussion at the May 9-10 Emory Institute conference was very
567 illuminating on this subject. But it did not show a widespread enthusiasm in the bar for new rules
568 addressing the settlement role of the MDL transferee judge.

569 There is reason to continue considering whether – as in class actions – firmer direction and
570 authority for the court in regard to settlement in MDL mass tort proceedings might be a goal worth
571 pursuing. Doing so through rules would present issues described above; not doing so would leave
572 the topic to “common law” development.

573 **4. Third-Party Litigation Funding**

574 The general topic of TPLF has received a great deal of attention. The Litigation Funding
575 Transparency Act of 2019, S. 471 (introduced on Feb. 13, 2019), includes a proposed amendment
576 to § 1407, adding a new subsection (g)(1) as follows:

577 In any coordinated or consolidated pretrial proceedings conducted pursuant
578 to this section, counsel for a party asserting a claim whose civil action is assigned to
579 or directly filed in the proceedings shall –

580 (A) disclose in writing to the court and all other parties the identity of
581 any commercial enterprise, other than the named parties or counsel, that has
582 a right to receive payment that is contingent on the receipt of monetary relief
583 in the civil action by settlement, judgment, or otherwise; and

584 (B) produce for inspecting and copying, except as otherwise stipulated
585 or ordered by the court, any agreement creating the contingent right.

586 The proposed legislation has a similar provision for disclosure of TPLF in “any class action,”
587 perhaps not limited to class actions in federal court.

588 The Advisory Committee has before it a proposal from the U.S. Chamber Institute for Legal
589 Reform (17-CV-O) calling for the addition to Rule 26(a)(1)(A) of an additional disclosure
590 requirement:

591 (v) for inspection and copying as under Rule 34, any agreement under which
592 any person, other than an attorney permitted to charge a contingent fee representing
593 a party, has a right to receive compensation that is contingent on, and sourced from,
594 any proceeds of the civil action by settlement, judgment or otherwise.

595 A similar proposed amendment to Rule 26(a) was considered by the Advisory Committee and not
596 acted upon in 2014.

597 There are differences between the rule proposal and the proposed legislation. One is that the
598 rule proposal is not limited to class actions or MDL proceedings. Another is that the legislation is
599 not limited to compensation “sourced from” proceeds of the litigation. A third is that the legislation
600 is limited to a “commercial enterprise,” while the rule proposal is broader (including, *e.g.*, relatives
601 of the plaintiff). A fourth is that the legislation explicitly states that the court may alter the
602 requirement to produce the agreement (though that would seem implicit in the rule-amendment
603 proposal).

604 The Advisory Committee continues to receive submissions in favor of, and opposing,
605 disclosure rule proposals. It seems that litigation funding is growing by leaps and bounds, and in
606 many different contexts. On the day after the Advisory Committee’s November meeting, George
607 Washington University Law Center organized a very informative program about TPLF attended by
608 most of the members of the Subcommittee. That program emphasized that there are at least two
609 discrete sorts of such funding, which might be called the “consumer” and the “commercial”
610 branches. The former may often involve loans to cover living expenses for plaintiffs awaiting

642 grounds for amending the rules. Others continue under study, but that does not mean actual rule
643 proposals will result. And (as with the Rule 23 work in the 2011-2014 period), it is quite possible
644 that if a package of rule amendment proposals results it will include topics not yet explored and not
645 include some that seem presently to warrant consideration.

646 **B. Social Security Disability Review**

647 The Social Security Disability Review Subcommittee continues to work toward a
648 determination whether new Civil Rules can improve the patchwork of procedures employed around
649 the country to resolve actions to review disability decisions under 42 U.S.C. § 405(g).

650 The Subcommittee has scheduled a meeting on June 20, 2019 with representatives of
651 claimants, the Social Security Administration, magistrate judges, and others who are familiar with
652 present practices. They will be asked to review a draft rule that has evolved in some ways from the
653 version that was included in the materials for the January Standing Committee meeting, but the
654 changes are designed only to achieve greater clarity. The review will serve several purposes. One
655 purpose of the meeting will be to accept advice on further drafting refinements. But the more
656 important purposes will be to determine how well the assumptions that underlie the draft coincide
657 with the realities of current practice, and to determine whether new rules based on realistic
658 assumptions will be a worthy improvement over present practice.

659 The Subcommittee hopes to have a recommendation whether to proceed further with a
660 disability review rule in time for the October Advisory Committee meeting.

661 **C. Rule 4(c)(3): *In forma pauperis* Service by the U.S. Marshals Service**

662 At the January 2019 meeting of the Standing Committee, Judge Jesse Furman raised
663 questions about the meaning of the Civil Rule 4(c)(3) provisions for service of process by a marshal
664 in cases brought by a plaintiff *in forma pauperis*. These questions are being explored with the U.S.
665 Marshals Service. Initial discussions show that practices vary from one district to another. The
666 Service would welcome greater national uniformity on some practices, but it is not clear whether
667 amending the Civil Rules can usefully do more than remove an apparent ambiguity in the rule text.

668 The questions described below have a place on the Civil Rules agenda but have not been
669 extensively considered.

670 Rule 4(c)(3) has its roots in 28 U.S.C. § 1915(d), which provides that when a plaintiff is
671 authorized to proceed *in forma pauperis*, “[t]he officers of the court shall issue and serve all process,
672 and perform all duties in such cases.” The statute does not limit the category of officers to marshals.
673 Apparently some clerks’ offices actively facilitate service in i.f.p. cases by issuing summons or
674 waivers of service.

675 The ambiguity in Rule 4(c)(3) goes back before it was restyled in 2007. The first sentence
676 says that “[a]t the plaintiff’s request,” the court may order service by a United States marshal. The
677 second sentence says “The court *must so order* if the plaintiff is authorized to proceed *in forma*
678 *pauperis* * * * or as a seaman.” These two sentences could be read together to mean that the court
679 must order service by a marshal only if the plaintiff has requested it. Or the second sentence could
680 be read independently to require the order whether or not the plaintiff has made a request. There is
681 some disarray in the cases that address this ambiguity. The ambiguity can be fixed – the question is
682 whether to say clearly that an i.f.p. plaintiff must move for a court order, or to say that the court must
683 enter the order automatically in every i.f.p. case. Instead, the rule could say that the marshal must
684 make service without a court order, changing the present practice that provides marshal service only
685 if the court so orders. As noted below, the marshals would not be likely to welcome that approach.

686 A second question is whether a marshal can request a waiver of service before undertaking
687 to make service. USMS Policy Directive 11.8 takes the position that an i.f.p. plaintiff cannot require
688 the marshal to request a waiver, but that the marshal can request a waiver if that seems useful to
689 avoid the costs of actual service, and can support a claim for the costs of service if the request is
690 refused. Sometimes a court order refers to sending waiver forms. The national office encourages
691 waivers, but in many circumstances it is easier just to make service. The potential advantage of
692 recovering the costs of service if waiver is refused is apparently reduced by a practice of not seeking
693 to recover. And the potential advantage of seeking waivers is reduced by the fact that many –
694 perhaps most – defendants in i.f.p. actions are government employees who do not execute waivers.
695 On the other hand, some districts have entered into agreements with state entities, such as a
696 department of corrections, to accept waivers of service issued by the clerk’s office.

697 These two questions may lead to further questions about the interplay between Rules 4(c)(1)
698 and (3). Rule 4(c)(1) says this: “The plaintiff is responsible for having the summons and complaint
699 served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person
700 who makes service.” The extent of an *in forma pauperis* plaintiff’s obligation to facilitate service
701 by a marshal is not clear from the face of the rule. In some measure the marshal expects the plaintiff
702 to provide information as to the defendant’s name and address by filling in those spaces on Form
703 USM-285, the form for “process receipt and return.” But some clerks’ offices fill out the form, and
704 often locate the defendant. Internet resources often facilitate the process of locating the defendant,
705 and there is case law that requires the marshal to make good faith efforts to locate the defendant and
706 make service.

707 A similar question arises from Rule 4(b), which provides that the plaintiff may present a
708 summons to the clerk for signature and seal. USMS Policy Directive 11.8 seems to indicate that the
709 clerk issues the summons “upon presentation by the plaintiff.” But in practice the clerk often acts
710 without presentation by the plaintiff.

711 There are real questions surrounding the extent to which Rule 4 might usefully be amended
712 to allocate responsibilities between i.f.p. plaintiffs and the marshal when the marshal is ordered to
713 make service.

714 The history of Rule 4 reflects abiding concerns about imposing duties to serve process on the
715 marshals. The Service would as soon be out of the business. One possibility might be to allow the
716 Service to subcontract the task to local police agencies or private process servers. If that practice is
717 consistent with § 1915(d), it might be available without amending Rule 4(c)(3) – the marshal is
718 making service, albeit through an agent. However that may be, the shape of any possible rule
719 amendments must be informed by these concerns. The Advisory Committee will consider whether
720 it needs to learn more about actual practices. It is too early to predict whether any amendments will
721 be proposed.

722 **D. Final Judgment in Consolidated Cases**

723 The Civil and Appellate Rules Committees have formed a Joint Subcommittee to consider
724 the opportunity to amend the rules – perhaps only the Civil Rules – to address the effect of
725 consolidating initially separate actions on the final judgment rule. *Hall v. Hall*, 138 S. Ct. 1118
726 (2018), established a clear rule that actions initially filed as separate actions retain their separate
727 identities for purposes of final judgment appeals, no matter how completely they have been
728 consolidated in the trial court. Complete disposition of all claims among all parties to what began
729 as a single case establishes finality for purposes of appeal under 28 U.S.C. § 1291.

730 The Joint Subcommittee has begun its deliberations with a conference call to discuss the best
731 approach to beginning its work. The opinion in *Hall v. Hall* concluded by suggesting that if “our
732 holding in this case were to give rise to practical problems for district courts and litigants, the
733 appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up
734 and recommend revisions accordingly.” Although something useful can be learned from the
735 divergent approaches taken in the courts of appeals before *Hall v. Hall*, this invitation suggests it will
736 be useful to assess experience with the newly established rule. The first step will be to determine
737 what means might be used to assess actual experience, and how much time should be allowed for
738 experience to develop before undertaking the inquiry. It may prove difficult to generate hard
739 empirical information, but the possibilities will be explored. If it can be developed, good empirical
740 information will inform the decision whether to recommend any rules amendments, and which of
741 several current rules sketches might be developed for that purpose.

742 **E. Rule 73(b)(1): Consent to Magistrate Judge Trial**

743 Rule 73(b)(1) was brought up for review by reports that the CM/ECF system automatically
744 sends to the district judge assigned to a case individual consents to trial before a magistrate judge.
745 That feature of the system disrupts the operation of the rule that “[a] district judge or magistrate
746 judge may be informed of a party’s response to the clerk’s notice only if all parties have consented
747 to the referral.”

748 No other ground to revisit Rule 73(b)(1) has been suggested. It would be better to correct the
749 workings of the CM/ECF system than to amend the rule. Initial advice was that it is not possible to
750 defeat the automatic notice feature. More recent advice, however, suggests that it may be feasible
751 to work around the system in a way that protects the anonymity of individual consents yet does not
752 impose undue burdens on the clerk’s office. Consideration of draft rule amendments has been
753 suspended pending further exploration of ways to work around the system.

754 **F. Railroad Retirement Act**

755 The General Counsel of the Railroad Retirement Board has suggested that court rules should
756 be amended to afford actions for Railroad Retirement Act disability benefits the same protections
757 against remote electronic access to court records as Civil Rule 5.2(c) and Appellate Rule 25(a)(5)
758 provide in actions to review social security decisions. The Appellate Rules Committee is taking the
759 lead because Railroad Retirement Act review lies in the courts of appeals, not the district courts. The
760 Civil Rules Committee will work with the Appellate Rules Committee if that proves appropriate.

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APPENDIX A

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Summary of Comments
Rule 30(b)(6)
2018-19

The following summarizes the testimony and written comments received regarding the preliminary draft of amendments to Rule 30(b)(6) during 2018-19. Each of the written comments was assigned a designation beginning CV-2018-0003- followed by the number assigned to that particular comment. Since the only designation that is specific to a given comment is the number after the material quoted above, only that number is included with the comments below.

In May, 2017, the Rule 30(b)(6) Subcommittee invited public comment on a variety of rule-amendment ideas it had under discussion. More than 100 comments were received during that period. After that, the Subcommittee decided to pursue only some of the ideas originally under discussion. A number of the witnesses and a number of the written comments summarized below urge that topics included in the 2017 invitation for comment be revived. The summary of those 2017 comments can be found at pp. 217-95 of the agenda book for the Advisory Committee's November 7, 2017, meeting. The summary of current comments about the topics considered in 2017 are in the final section of this summary.

The summary of written comments below begins with no. 125, and includes several that were submitted after the Advisory Committee voted to submit its proposal to the Standing Committee but before the formal beginning of the public comment period. The comments are summarized in numerical order, starting with the earliest. Therefore, comments 125 to 128 are items received before the Standing Committee approved publication and before the formal public comment period began.

During the last week of the public comment period, over 1,000 comments were received. Some of these comments were extremely brief, expressing only support or (more often) opposition to change (sometimes to changes not actually in the proposal). These comments seemed often to repeat points already made in other comments. This summary does not summarize all of these comments, but attempts to provide a report on the frequency of various points in them. Very often repetitive comments are summarized only in the overall assessment category even though it could be said that they also bear on topics addressed in depth in later parts of this summary.

The following summary is divided into the following sections:

Overall assessment

Requiring a conference about the number and description of the matters for examination
Requiring a conference about the identity of the person designated to testify
Requiring that the conference continue "as necessary"
Committee Note mention of identifying documents to be used during the deposition
Reviving amendment topics not included in Preliminary Draft

Overall assessment

Washington, DC Hearing

[The following listing of witnesses at the DC hearing is in alphabetical order rather than the order in which the witnesses testified.]

Lauren Barnes (testimony and no. 187): “The changes proposed by the Committee articulate the routine (and common sense) set of negotiations by counsel that already occur. Discussions to clarify topics and advance identification of the Rule 30(b)(6) witness or witnesses by both sides happen almost without exception” in my cases. These cases usually involve claims of antitrust violations or anticompetitive conduct by pharmaceutical manufacturers. The defendants are typically corporations, and the cases often involve multiple 30(b)(6) depositions.

Mark Behrens (International Association of Defense Counsel) (testimony and no. 174): Our members have a loud and clear message -- the rule is broken and needs fixing to deal with unfair and over-reaching practices of noticing parties. But it seems that the Committee’s interest in proposing an amendment may be driven by the assertion by some plaintiff counsel that some witnesses show up not fully prepared. We do not share this perspective. If it really is a problem, however, the Committee’s prescription is not a cure. Identification of the witness before the deposition will not fix the alleged preparation problem. All a rule can usefully do is to provide a framework for a reasonable meet and confer as to the “number and description” of the matters for examination and specify a process for when that process breaks down. Meeting and conferring is widely practiced and often beneficial, but simply mandating a conference, without more, will not address the problems that led the Committee to take up the rule. The amendment does not adequately specify what is to be discussed, or how to determine when the good faith requirement has been satisfied.

Paul Bland (Public Justice) (testimony and no. 172): The preservation of 30(b)(6) is essential to public interest litigation. It provides invaluable discovery about materials within the exclusive control of defendants in such cases. In each of our cases, the power of the rule depends in part on good faith cooperation instead of one size fits all limits and procedures. “We’ve seen firsthand the role Rule 30(b)(6) depositions play in a diverse range of litigation contexts where an individual with limited resources is trying to hold a larger, more powerful organization -- be it a corporation, a government agency, or a school district -- accountable.

Sharon Caffrey (Duane Morris) (testimony and no. 203): This rule has generated a lot of litigation across the country, but this amendment package will not make things better. The proposed amendments will be both ineffective and harmful. What lawyers need is specific guidance on how such depositions should be handled, such as an objection procedure, how much notice is required, and how they count toward the limit on number of depositions. “The problem is that the Rule does not give enough guidance to practitioners, such that disagreements between counsel must be resolved by courts, which are often inconsistent in their decisions.”

Megan Cacace: We have a national practice representing plaintiffs in housing cases and employment cases. We favor the amendments. They will promote efficiency.

Andrew Cooke (testimony and no 165): “Rule 30(b)(6) is misused by many attorneys due to its unusual lack of structure or guidance and its overly broad terms. When coupled with a judicial inclination for liberal, rather than proportional, discovery, responding parties confront extraordinary and disproportionate burdens. The present proposed rule change does nothing to remedy the flaws in the rule as it provides no structure or guidance for the use of the rule.”

Philippa Ellis (testimony and no. 359): From 30 years of representing defendants in products cases, I express concern that the proposed amendments may have the unintended consequence of creating a complex web of discovery disputes and increased costs, as well as wasting judicial resources. The rule provides an adequate method for resolving issues about 30(b)(6) as presently written.

John Guttman (testimony and no. 173): I generally represent defendants, often in environmental and toxic tort cases. I find that 30(b)(6) depositions are routinely taken. “These depositions are very important and valuable to the parties. In many cases, Rule 30(b)(6) depositions streamline discovery.” But I think that the requirement that the parties discuss the identity of the person to testify will cause harm rather than help. And there should be a numerical limit on topics. Compare the ten-deposition limit. That has worked, and a limit here could work also. In general, in my practice the lawyers work things out. But there are some lawyers who go out of their way to create disputes. We need to focus our rules on the unreasonable attorneys. A limit of 25 depositions would be perfectly reasonable.

Toyja Kelley (President, Defense Research Institute) (testimony and no. 132): The suggested rule change should, in the main, be helpful to all litigants by imposing the duty to meet and confer concerning the number and description of matters for examination. This should help all parties clarify the scope of the deposition and allow better preparation by each side. But there is no framework for the discussion included in the proposed amendment.

Jennifer Klar (testimony and no. 175): My firm represents plaintiffs in housing, lending, employment, and public accommodations cases. I take a 30(b)(6) deposition in almost every case. They are very effective, and serve the goal of deciding cases on their merits. Taking a 30(b)(6) deposition regularly enables me to reduce the number of depositions needed in the case. In addition, in many cases, it reduces the burden of Rule 34 discovery because I can use a 30(b)(6) deposition to learn about the defendant’s information organization methods, and then tailor further discovery in a way to get me the information I need in a manner that does not unduly burden the defendant. The required conference codifies what we already do in my practice. “In almost every case, after serving a 30(b)(6) notice, I have a discussion with opposing counsel regarding the meaning of 30(b)(6) topics and the amount of time needed for the defendant to prepare.”

Mark Kozieradski (testimony and no. 192): As a plaintiff lawyer in cases involving nursing home negligence, I find that 30(b)(6) depositions are the single most effective tool for efficiently discovering information held by institutions. Using these depositions, my firm is able to narrow which facts are actually in dispute and identify the positions of the parties early in the litigation. These depositions have eliminated countless hours of attorney time and unnecessary delays, avoiding unnecessary motions. The major recurrent problem I see is that some organizations do not adequately prepare their witnesses. But that is not due to a problem with the rule; instead, it results from attorneys’ ignorance of the obligation under the rule to prepare the witness.

Altom Maglio: In my personal injury practice representing plaintiffs, 30(b)(6) levels the playing field. The vast majority of the time, the identity of the witness is disclosed.

Brad Marsh: This amendment will inject uncertainty into the rules. That allows lawyers to take advantage.

Michael Neff (testimony and no. 184): In my view, the single most important tool that the plaintiff’s counsel has to pursue the truth in an efficient and economical manner is the 30(b)(6) deposition. In one case, we did only a 30(b)(6) deposition with regard to a factual basis for liability, and the only other discovery was expert depositions and damages witnesses. We

obtained a \$9 million verdict.

Michael Nelson (testimony and no. 164): These amendments do not address the real problems with the current rule. We see frequent designation of hopelessly overbroad topics, and of purely legal conclusions or contentions that no lay witness should be required to address. The problem is that the rule lacks necessary guidelines, and this amendment does not provide them.

Terry O’Neill (National Employment Lawyers Assoc.) (testimony and no.144): We commend the Committee on the process that led to the proposals to amend the rule, and on the substance of the proposed amendment. In particular, the Subcommittee’s “road show,” which permitted input from a wide range of perspectives, resulted in a proposal that is well balanced in addressing concerns. This rule works well in practice and achieves the efficiencies it was intended to achieve.

Thomas Pirtle: I represent plaintiffs in drug and medical device cases. 30(b)(6) is working. Meet and confer is an excellent idea. I can’t remember a 30(b)(6) deposition when I didn’t know the identity of the witness in advance. Seven days notice of the identity is sufficient.

Thomas Regan (testimony and no. 199): Few experienced practitioners would disagree with the need for amending this rule. As currently written, it is divisive and far less explicit than other civil rules. The sheer frequency with which it is used begs for amendment and clarity. But the proposed changes to the rule will lead to gamesmanship and cause more disagreements than currently arise. In particular, the focus on the process of choosing a corporate witness will cause problems.

Terri Reiskin (Dykema Gossett) (testimony and no. 196): “The Firm opposes the proposed amendment to Fed. R. Civ. P. 30(b)(6) in its entirety and submits that if the Committee is to undertake the potentially disruptive step of amending the organizational deponent rule, it should do so in a manner that is scrupulously fair to plaintiffs and defendants, and addresses the very real problems the Rule raises, rather than creating new ones. The proposed amendment is a solution in search of a problem, and does nothing to address the real issues with the Rule.” The rule has not been amended for almost 50 years, while other discovery rules have been clarified significantly. It is time for that sort of comprehensive process for this rule as well. The open-ended nature of the current rule has led to many difficulties and produced thousands of decisions that specifics could avoid.

Ira Rheingold (National Assoc. of Consumer Advocates) (testimony and no. 149): Rule 30(b)(6) is the most important part of discovery for my cases. It’s really working well. The goal is to set up a system that gets people to work things out reasonably. The proposed amendment represents a reasonable change that will facilitate fact-finding and achieve efficiencies. The rule has proved effective and essential in consumer law cases since its adoption. There is a balance to be reached. The plaintiffs’ bar complains that corporate representatives too frequently show up at depositions only to claim ignorance as to matters on the topic list. The defense bar complains that far-reaching deposition notices require too much preparation. The proposed amendment’s conference requirement is well designed to reduce both these problems and be beneficial to both sides. A key problem in litigation of the sort we handle is information asymmetry. Usually, the corporation or government agency on the other side has sole knowledge of the events that give rise to the suit and its own practices in regard to such matters. That explains why plaintiffs’ notices may at first be quite broad. By conferring, parties can home in on the most relevant areas. This will assist the company in preparing for the deposition and in choosing the person to designate. All in all, this amendment package would effect only a minor change in practice. In some jurisdictions, the amendment would simply codify existing practice. But it is nonetheless worth doing. Indeed, the success similar directives have had in many places provides strong assurance these amendment will work smoothly. We do think that a couple of small changes are

in order. First, we think it would be valuable to say affirmatively that the burden still rests on the company to seek judicial relief if agreement cannot be reached. This could be done as follows in the draft Committee Note:

The duty to confer as necessary continues if needed to fulfill the requirement of good faith. But the conference process must be completed a reasonable time before the deposition is scheduled to occur. If the conference process fails to produce agreement between the parties, the recipient of the notice may move the court for a protective order under Rule 26.

In addition, the rule itself should say that the parties must confer on which witness will address which matter. This could be done with the addition of three words:

Before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person the organization will designate to testify on each matter.

Brittany Schultz (Ford Motor Co.) (testimony and no. 151): Ford opposes this amendment package because it does not address the long-standing problems with the rule. Ford submitted detailed comments on July 31, 2017, but the proposals it endorsed there are not in this package. Ford is deeply disappointed that the proposed amendment does not address procedural gaps in the rule, such as the absence of a specified objection procedure, or a means for addressing topics on which the company has only documentary information. As an illustration of the current problems, she received a notice with 150 topics. One of them was “all information Ford has about steering mechanisms” or something equally broad. A conference requirement without any specifics about how to resolve issues is not useful.

Michael Slack (testimony and no. 170): Representing plaintiffs in actions against airlines and multi-national manufacturers, I find 30(b)(6) to be the most efficient discovery device. It imposes accountability on corporate defendants. Among other things, due to the existence of this form of discovery corporations are less likely to be evasive in response to other forms of discovery because they know that a 30(b)(6) notice can follow evasive responses. An “I don’t know” response by a 30(b)(6) witness can be fatal, while an “I don’t know” response from an individual witness can undermine the utility of an ordinary deposition. In addition, 30(b)(6) is immeasurably better at identifying the most relevant individuals to be the focus of individual depositions.

Andrew Trask (testimony and no. 176): I speak from 20 years’ experience and also on the basis of research done for a book I’ve written on litigation tactics that is to be published by Cambridge University Press. These rule changes are likely to promote gamesmanship. Already noticing counsel seek to question witnesses about topics beyond the notice. A few of these questions may be natural follow-ups to information disclosed about the specified topics during the deposition, but many are designed to elicit what appears to be a corporate admission on a matter of legal interpretation, or commit the corporation to a hypothetical course of action. Similarly, although questioning the witness briefly about his or her specific position with the company may provide valid background information, it will often move beyond simple background information and spread into factual matters not encompassed within the topics specified.

Julie Yap (Seyfarth Shaw) (testimony and no. 188): Although Seyfarth Shaw supported the Committee’s decision to take a close look at this rule, it opposes these changes. They will not remedy the serious problems with the current rule, and could produce more difficulties. In particular, the directive to confer about the identity of the witness will likely lead to noticing

parties claiming they have standing to influence that selection.

Hassan Zavareei (testimony and no. 191): In my public interest practice, I find that 30(b)(6) depositions are an essential tool for eliciting crucial information regarding organizations' structure, leadership, policies, and practices. This information can be the groundwork for all later discovery in a case. In class actions, it can be critical to resolution of class certification.

Phoenix Hearing

John Griffin (testimony and written statement): No other country has a rule like this one. Over the years, it has made many friends and a few enemies. Although in general I adhere to the maxim "If it ain't broke, don't fix it," I favor the Committee's proposed amendments. I have used Rule 30(b)(6) often to very good effect, particularly in representing disabled candidates for employment with federal protective agencies such as the U.S. Marshalls Service. Without the tool provided by Rule 30(b)(6), these clients would have had no way to obtain critical information about the policies of the agencies about employing disabled workers. The tweaks and adjustments the Committee has proposed can make the rule work better.

Lisa LaConte: Mandating this conference will not solve the problems I see in my practice representing asbestos defendants. The rule provides no means to address an impasse in the conference, which is going to happen when both sides hold their ground. The draft lacks objective features that could address those impasses. I often see lists of 50, 75, or even 100 categories, often delving into the distant past. The rule should provide a framework that will resolve issues; conferring alone will not do that.

John Sutherland: I do not think that this package of amendments should be adopted. Instead, the Committee should continue work and enact meaningful proposals. The current package will lead to more problems than it will solve, and it threatens to frustrate the very purpose of the rule. When adopted in 1970, the rule was designed to lessen the burden on organizational litigants that otherwise would have to produce many individuals to testify. The current amendment would eviscerate that purpose. It will also encourage gamesmanship by the requesting party. In addition, it will increase the likelihood that a responding organization will have to produce multiple witnesses. Changes are needed to ensure that the commitment to proportionality is met. The current proposal contains no specifics to resolve impasses in the conference.

Nieves Bolanos (NELA): For those who represent plaintiffs in employment litigation, Rule 30(b)(6) is very important. Individual plaintiffs are at a clear disadvantage in knowing about corporate structures, etc. Using this rule, they can find out about the company's payroll system, organization of data, etc. This amendment proposal adopts existing best practices in handling this essential vehicle for gathering information. The current rule is working well, and in our practice in the Seventh Circuit the parties regularly meet and confer regarding discovery issues, including those specified in the proposed amendment. This has proved useful.

John Sundahl (Defense Lawyers Assoc. of Wyoming): We oppose the amendments. The amendments will likely create more litigation and confusion. They will spark unnecessarily contentious discovery battles that will end up in court. We urge the Committee to address the concerns raised in the written comment from Lawyers for Civil Justice. This amendment will not produce positive change. Already, the parties confer as needed in advance of 30(b)(6) depositions.

Lee Mickus (testimony and no. 141): These depositions generate disagreements at a particularly high rate, but the proposed amendments will do little to prevent such disputes. And

many courts already require such conferences and most practitioners will undertake these efforts. Since pre-deposition conferences already occur frequently, building this requirement into the rule itself cannot be expected to yield significant improvements in practice.

William Rossbach (testimony and written statement): I begin with the goals of Rule 1. Rule 30(b)(6) may be the most important and most effective rule in achieving the goals of Rule 1. With carefully drafted and focused descriptions of subject matters for the deposition and well qualified and prepared witnesses, much of the maligned “fishing expeditions” that written discovery so often entails can be limited and reduced. Likewise, many of the expensive and time-consuming fishing expedition depositions can be avoided. In one of my first cases, a single 30(b)(6) deposition provided a basis for achieving a settlement. When I learned of the initial ABA proposal for radical changes to the rule, I was deeply concerned.

Bradley Peterson (testimony and no. 138): I have often done CLE programs on 30(b)(6) depositions. I begin them by saying that I love trying cases, but that the worst part of trying cases is having the other side play the deposition in some prior case in which my client’s designated witness was poorly prepared. “Rule 30(b)(6) can be a highly-efficient, highly-effective discovery device. It provides parties in multi-million-dollar, high exposure cases with a significant tool that can be used in program litigation for years and years. “Unfortunately, the Rule gets abused - - used as a weapon to create discovery disputes that already over-worked courts often do not spend enough time trying to understand and fairly resolve, thus leading to sanctions and a resolution based on something other than the true facts, and justice.”

Jennie Anderson (testimony and no. 148): A majority of the defendants in the lawsuits brought by my firm are corporations. We know little about the structure of these companies. 30(b)(6) depositions are an efficient and effective means of gathering corporate information to lay a foundation for discovery during the remainder of the litigation. In class actions, class certification may depend on information generated by these depositions.

Keith McDaniel: This amendment will not help. The real need is to provide specifics on other topics. My experience is that invariably you get the 30(b)(6) notice after the individual witness depositions and before the expert depositions. What we really need is a definite minimum time for notice, and an objection procedure modeled on Rule 45.

A.J. de Bartolomeo (testimony and written statement): The Committee carefully and thoughtfully considered the various comments received about its initial focus and produced a balanced and fair procedure with evenly imposed obligations on all parties. This is a textbook example of “best practices” in rulemaking.

Donald Myles: The rule should not be touched or it should be completely redone.

Written comments

Brian King (130): These amendments will create further delay with no gains in efficiency. Presently, as a matter of practice, counsel usually propose dates for the deposition and agree on them. They also confer or file motions regarding the scope of the topics to be covered. But the amendment seems to impose a meet and confer requirement in every case, even those where counsel would likely have agreed to the deposition without needing a conference. Given the difficulties of scheduling conferences of counsel, this addition will add more delay in an era of shrinking dockets and ever-tighter discovery deadlines. Moreover, the timing is vague - - before or promptly after the notice. I oppose this new requirement, but if it is imposed it should be before the notice is served. In addition, the new requirement that a subpoena on a nonparty organization advise it of the duty to confer is unnecessary. As a practical matter, a nonparty organization served with a subpoena will reach out to the lawyer who sent the subpoena and

confer without the advice that the amendment calls for.

Mackin Johnson (131): I support the proposed amendment. It reflects how the employment bar works in Mississippi. I represent management in employment suits. I often receive 30(b)(6) notices with more than 50 topics, many of which can't be reasonably responded to by the same witness. Before filing any motions, I get on the phone with plaintiff's counsel and try to work through the notice and proposed witnesses. It is rare that a lawyer will not cooperate, but it will be helpful to have a rule that requires such cooperation.

Scott Silbert (134): The proposed amendment makes perfect sense with a non-party deponent. But as to parties to the litigation it is unnecessary. There is already a very workable solution with regard to existing parties. In every district in which I practice, there is a local rule mandating a conference about discovery disputes. The 30(b)(6) deposition is critical to creating a sensible discovery plan for the rest of the case. Imposing the conference requirement creates a tool the defense can use to make the taking of the deposition more difficult, and will tend to create rather than avoid roadblocks. "I can see the defense bar applauding such an amendment as it creates a substantial billing opportunity."

Michael Neff (135): "Changes are not needed in FRCP 30(b)(6)."

John Branum (136): "Please do not make it more difficult to get information from corporations. It is already hard enough as it is."

Richard Cook (137): Requiring a pre-deposition conference will do more harm than good. As a practical matter, conferences already occur if there is an issue on the scope or number of topics since the rules already require such a conference before a discovery motion is filed. This amendment will encourage counsel to raise issues and objections that otherwise might not have been raised. "Attorneys naturally want to feel that they are important and are not potted plants. If required to speak on a topic they will."

Michael Rosman (140): Rules that parties must "confer" in "good faith" are generally difficult to enforce. The enforcement of the particular requirement in this amendment is even more problematic because there is no obvious means of enforcement. The court can become involved only if somebody makes a motion, and Rule 37 independently requires efforts to avoid the need for court action.

Federal Magistrate Judges' Association (142): We generally support the concept of directing counsel to confer on these matters. We have observed that Rule 30(b)(6) deposition practice has become a contentious subject. Our only hesitation is whether the proposed amendment goes far enough. Assuming the amendment is approved, we respectfully suggest that, after a period of time, the Committee consider whether further amendments -- such as, for example, one imposing a presumptive limit on the number of matters for examination -- are warranted.

Paul Godfrey (152): On behalf of the Minnesota State Bar Association, I write to support the proposed amendments. If these amendments are adopted for the federal rule, our Association stands ready to petition our state supreme court to adopt a conforming amendment to the Minnesota Rules of Civil Procedure.

Gregory Antollino (167): The proposed amendment is overbroad. If there are problems the responding organization should be given notice that it should immediately confer with counsel for the noticing party. The burden to confer should be on the responding organization, not on the noticing party.

Palmer Vance (and 25 other past, present, or future Chairs of the ABA Section of Litigation) (180): The proposed change is helpful in requiring that the parties communicate in advance of a 30(b)(6) deposition, but it does not go far enough. As we have before, we urge that it be strengthened with language along the following lines:

If the parties cannot resolve material disagreements, they are encouraged to request a conference with the Court to obtain an early resolution of the matters.

Carmen Caruso (194): The amendment is not needed. Counsel acting in good faith can and do meet and confer without being ordered to do so. Counsel acting in bad faith tend to abuse meet and confer requirements and turn them into make-work. On balance, this amendment will be counter-productive.

Jonathan Feigenbaum (no. 204): These amendments will lead to slower movement of cases and more motion practice. It will invite further abuses by organizations as part of their litigation strategy. I spend most of my time litigating ERISA cases. For me, 30(b)(6) is extremely important because it provides meaningful discovery.

Amar Raval (205): There is no rational reason to change Rule 30(b)(6) unless the goal is to slow movement of cases. I thought the whole point of the 2015 amendments was to avoid that. But these changes will cause a whole new category of discovery disputes. I litigate ERISA cases, and this rule provides meaningful discovery and fairness for the individual.

Paul Wood (207): The proposed changes will help reduce disputes and reduce the need for court intervention.

Nicholas Ortiz (208): The proposed changes are unfair and will limit a party's ability to obtain full and fair discovery. They will make it easier for corporations to hide the truth.

American Association for Justice (209): "AAJ thanks the Advisory Committee for its work on drafting the Proposed Amendments and recognizes that the Committee carefully crafted the Amendments with regard to fairness for both plaintiff and defense interests." The changes impose new obligations on all parties, which is essential to maintaining a balance.

Victoria Katz (211): We agree with the proposed amendment, which appears to be a reasonably calculated response to address the problem it was meant to address.

John Ireland (212): The rule is very efficient and effective. I agree that meet and confer is a good idea. I hope that the amendment will fix the defendants' frequent hide the ball tactics by requiring that the identity of the witness be disclosed in advance. Having the name provided 7 to 14 days in advance is a good idea.

Eric Stravitz (213): I support the proposed changes to the rule, and the minor tweaks suggested by Public Justice.

U.S. Chamber Institute for Legal Reform (214): The business community strongly believes that this rule is ripe for reform. It has become a major sticking point in civil litigation. But the proposed amendment threatens to spawn a new form of "bandying" -- exploiting discussions related to the identity of corporate representatives to make corporate depositions more burdensome. Conferring about these depositions, in general, holds promise to reduce some areas of dispute, but the provision about the identity of the witness will not do that.

Dan Kozma (215): I fully support Public Justice's comments on the proposed amendments and oppose any restrictions on the rule which would make it more difficult to obtain

necessary information from corporations.

138 companies joining in LCJ comments (217): On behalf of 138 companies, we join in the Lawyers for Civil Justice comments. We strongly oppose the required conference about the identity of the witness. Saying that the company “ultimately” can choose its own witness is not sufficient to prevent abuse. And even though there are pressing problems with 30(b)(6) depositions, the amendment does nothing to cure them. The proposed amendments should be rejected.

Pamela Smith (218): I support the proposed changes. This rule makes the discovery process smoother and more efficient. It requires the company to identify the individual most knowledgeable about the topics in the notice, which makes discovery more effective. This process dramatically reduces guesswork about which person at the company can speak about the relevant issues. When I represented minority employees who were making discrimination claims against a large university, by using this rule I was able to elicit testimony about discrimination against other employees by the individual defendant, and concealment of evidence about his behavior. Had it not been for this rule, I likely would not have obtained this information.

Edward Zebersky (219): 30(b)(6) is one of the only ways a plaintiff can obtain detailed information concerning a corporation’s actions. The rule is fair and balanced. I am very concerned that the rule may become too narrow. If a numerical limit were imposed on topics, that would be harmful. The existing rule provides sufficient protection against overbroad topic designation.

Jennifer Lipinsky (220): Many attorneys already confer, so the proposed amendment would change little except to codify good conduct and perhaps make difficult cases easier to manage. Disclosure of the identity of the witness should be helpful in preparing for the deposition and ascertaining whether the witness will be able to answer questions. Limiting the number of topics will further complicate the process.

Nick Verderame (221): The current rule is a good rule that is fair and balanced. Adding a numerical limit on topics would hinder individuals to fully question corporations. The addition of attention to the identity of the witness is desirable, for it will allow for efficiency and transparency in the entire process.

Mark Kitrick (223): The meet and confer idea is helpful. Many issues and conflicts are resolved or reduced when lawyers discuss matters prior to major discovery. There is no downside to requiring such a conference. Adding the identity of the person is important, as it forces the people to focus on who really has the information relevant to the discovery. This sort of exchange should take place early in the case, before any discovery.

Kevin Powers (224): I join the NELA comments. We represent plaintiffs in employment discrimination cases. Almost always there is a substantial imbalance between the plaintiff’s resources and the defendant’s resources. 30(b)(6) plays an important role in allowing parties to cut through a mass of documents and vague accounts and find out what actually took place and the reasons behind the actions at issue. The proposed amendments will, in most instances, make litigation more efficient and less subject to gamesmanship.

Bruce Braley (227): I support the changes. The amendment requires candid discussions before the deposition to ensure that the parties are on the same page as to their expectations of what will be the focus of the deposition. Most federal judges presented with disputes about these depositions will inquire about how the parties tried to avoid disputes. This amendment will foster that sort of discussion.

Gregory Cusimano (228): I always make an effort to meet and confer when dealing with good attorneys. We are generally successful. I think it's a solid idea to require this behavior. Identifying the witness will be helpful and likely shorten depositions.

Patrick Malone (29): This is a common sense change that should be adopted. It's a shame we need a rule to require attorneys to talk to each other. But too often I have found only after the deposition has begun that there were "misunderstandings" about what I thought were plain English topics set out in my notice. Alternatively, some corporations' counsel will go directly to motion practice without any communication with me about clarifying or narrowing the topics. It's time to end the hide and seek games.

Jason Fagnano (230): I support the proposal. It will help ensure the witness is knowledgeable and prepared.

Richard Frischer (231): I support this amendment. I find the comprehensive meet and confer requirements in federal court helpful because the aim to quell disputes. Often the witness appears but does not understand the categories requested. Sometimes it's simply the wrong person. Working out these issues ahead of time saves all parties costs and leads to more meaningful depositions.

Graham Owens (Nat. Ass'n of Manufacturers) (233): The NAM applauds the decision to focus on this rule. But the proposed amendment does not solve the problems with the rule. Instead, without clear parameters and a reasonable process for resolving disputes, the proposed meet and confer requirement will incentivize abusive behavior. We urge that the proposal be withdrawn so that it can draft a new amendment that will add clarity, not ambiguity, to the 30(b)(6) process. Presently, noticing parties regularly abuse the rule, by submitting lengthy and overbroad lists and then pursue questioning about yet other topics during the depositions. They also use these depositions to try to pin the witnesses down on legal contentions. These depositions trap the corporation in an unwinnable situation, and leave it on an uneven playing field that should be evened by rule amendments. But the actual proposals will introduce new avenues for abusive behavior. The real problems are (a) that adequate preparation is impossible when there are no boundaries to overbroad lists or questioning; (b) the rule has become a back door for discovering legal contentions; (c) parties regularly use the depositions to obtain binding admissions rather than useful information; and (d) plaintiffs try to use the rule to create "super witnesses" who are to synthesize all facts and issues in a setting in which the witness is likely to misspeak inadvertently. In the face of these problems, the Committee's proposal misses the mark. In particular, it does not establish concrete rules for addressing party disputes, and it will create even greater room for disputes. We agree with the statement submitted by the International Association of Defense Counsel, and urge the Committee to put forth proposals that deal with the real problems under the rule.

Michael Warshauer (234): The proposed changes make sense. There can't be a meaningful numerical limit on topics as the parties can't possibly know what they don't know until the deposition is taken. Requiring parties to identify the witness prior to the deposition will allow the deposition to be conducted more efficiently. The meet and confer requirement will require both sides to explain their respective positions consistent with the process now in place for discovery disputes.

Walt Cubberly (235): I largely support the proposed amendments, including the identification requirement and the fact that it doesn't limit the topics for examination. The only misgiving I have is about the Committee Note suggestion that the serving party identify in advance of the deposition the documents it plans on using during the deposition.

Jay Henderson (236): The primary problem with these depositions is the tension between

an overly broad notice and an overly detailed notice. When the parties are genuinely acting in good faith, a meet and confer provision is beneficial. Unfortunately, corporate entities frequently use the broad v. narrow dilemma to thwart the intent of the rule.

Erin Campbell (237): As a lawyer representing plaintiffs on a contingency fee basis, I support the proposed amendment. In my practice, 30(b)(6) depositions often require expensive travel, and efficiency is very important. This amendment will improve the efficiency of these depositions. I see little downside for this amendment. The corporation learns a bit more about the questions – but on balance this is not a bad thing for the deposing party because it has a bigger interest in getting the questions answered than in any surprise advantage. Rule 30(b)(6) depositions are too valuable to waste on personal capacity questions.

Geoff Hamby (238): The proposed amendment is unnecessary and would lead to a slowdown of the discovery process. There is no need for this mandatory conference in the vast majority of cases. I average about one 30(b)(6) deposition per month, and I have yet to run into a situation where I believe that a meet and confer requirement would have led to a productive outcome. So adding this only delays the process. When the parties disagree about one of these depositions, requiring them to meet and confer is extremely unlikely to lead to a compromise.

Russell Abney (239): Meet and confer is always desirable, as it often allows the parties to resolve issues without wasting the court's time. I think the conference should occur before the notice or subpoena is served.

Ruben Honik (240): The proposed amendment is fair and balanced. Preserving its fairness requires retaining the requirement about the identity of the witness. There should be no numerical limits on the topics.

Julie Bickis (241): The proposed change is not necessary and has significant potential to be abused. The organization should not have to negotiate who is chooses to be the witness.

Brenda Fulmer (242): I believe the current rule is fair and balanced, and that the proposed changes are unnecessary. I am concerned about any change that would permit a defendant to avoid disclosing the identity of the witness before the deposition.

Kenneth Haynes (243): I believe adding the meet and confer requirement would be a desirable change. Too often I don't find out who will be testifying until the night before the deposition, and too frequently it turns out that the witness is not prepared. I think the meet and confer should occur before the deposition is noticed.

Maria Diamond (244): This is a very important rule, and the Committee made a balanced proposal. But the words "number and" should not be included. It could lead to arbitrary limits on the number of topics.

Karen Menzies (245): The meet and confer is the most effective avenue for ensuring as narrow as possible a deposition. It can also be helpful to the court in focusing matters.

Joseph Condeni (246): The current use of this rule is reasonable as a way to make defendants provide evidence. If the goal of our judicial system is "blind justice," then the present proposal to limit the scope and breadth of these depositions should be dismissed.

Frank Bailey (247): "The current 30(b)(6) is perfect and does not need change which would limit the scope of information obtained."

Ryan Babcock (248): The proposed changes are consistent with the intend of the rules as

a whole and should aid in the fair and just determination of disputes. The meet and confer process should help ensure that corporate representatives show up to the deposition prepared.

Robert Edwards (249): The proposed changes will not create problems for parties who approach discovery in good faith. I would be opposed, however, to any presumptive limitation on the number of topics.

Edward Grossi (250): I favor the proposed amendment because it will make the discovery process more efficient. But I oppose the additional changes proposed by groups that seek to limit discovery.

E. Craig Naue (251): “Please do not limit the number of issues that can be covered by 30(b)(6) subpoena or notices.”

Kevin Haynes (252): I would like the amendments to ensure that (1) the organization will identify the witness; (2) there is no limit on the number of matters to be explored; and (3) the organization must raise any objections well in advance of the deposition. Right now, we often learn the identity of the witness only on the day of the deposition, or the evening before. This can result in an unproductive deposition.

Mark Napier (254): Please do not limit the number of topics. If the number is limited, then plaintiff attorneys will be forced to make the topics more broad.

Eric Romano (255): I generally support the proposed rule change, as I think that if lawyers meet and confer that prompts professionalism and helps avoid disputes. But there should be no numerical limit on topics.

Richard Thalheim (256): The rule should not be fashioned to allow respondents to squabble and nit-pick the scope as too broad and then complain that specific topic descriptions exceed some artificial number.

Todd Romano (257): There are already procedures in place for companies to object and seek a protective order. The meet and confer requirement seems to be well-intentioned, but it is likely to invite the deposing counsel to disclose work-product privileged information by telegraphing his or her planned examination. That would enable the defending counsel to gain an unfair advantage by fishing for information.

Frank Butler (258): This rule does not need a change. There is no problem that needs solving.

John Tiwald (259): I fear that the meet and confer requirement raises a presumption that a 30(b)(6) notice’s content must be conferred, no matter how proper. This will be used to mean that every item must be negotiated, leading to a transactional approach. Previously we saw bluff objections, but now the rule will say these bluffs must be taken seriously. This will make 30(b)(6) depositions more complicated.

Daniel Karon (260): The proposed amendment supports the parties’ mutual search for truth by encouraging both sides to talk. That is the only way we can understand each other’s needs. Our clients require and deserve this proposed amendment, and I can’t remember ever seeing a more balanced and thoughtful one.

Mark Samson (261): I oppose the proposed change. The requirement of a meet and confer will tempt defendants to limit the examination by not agreeing to certain topics. This is a poster child for a solution in search of a problem.

Lisa White (262): The proposed amendment is sensible and probably will reduce gamesmanship. Advance notice of the identity of the witness will reduce the likelihood that a person without knowledge will be named.

Norman Siegel (263): This amendment furthers the purposes of Rule 1. The disputes that arise generally result from lack of mutual understanding as to the expectations of the parties. The amendment addresses this issue by facilitating a meet and confer session.

Gerry Goldsholle (264): The proposed amendment seems highly sensible and fair and balanced. But adding a ten-topic limit would be counter-productive.

Anthony Leone (265): The proposal is a good amendment, but a numerical limit would be a bad idea.

David Rodibaugh (266): I support the proposed amendment. All too often, due to lack of communication, 30(b)(6) depositions are needlessly prolonged. A mandatory conference will help streamline the process.

Jeffrey Mansell (267): I have rarely encountered an instance in which attorneys and witnesses were not cooperative and professional. I think that the proposed conference requirement may be unnecessary in most cases, but that it could be helpful in the event the court has to resolve a dispute. But the rule should not be changed further, to impose a limit on the number of topics.

David Stradley (268): I support the proposed amendment. 30(b)(6) notices frequently draw motions for protective orders. Only then does the meet and confer process begin. That wastes time. Although the amendment puts the burden of initiating the conference on the noticing party, it will introduce efficiencies.

Bert Utsey (269): I oppose the proposed change. This rule is the best way to discover corporate knowledge. The proposed changes reflect an effort to frustrate the free exchange of information. There should be no arbitrary limits on use of this rule.

Lauren Ellerman (270): I am concerned that the rule change inherently favors corporations. Please do not change the rule to limit the areas of direct inquiry.

Jonathan Freidin (271): The changes to 30(b)(6) will create an arbitrary limit on the number of topics, and support more stonewalling.

Erik Heninger (272): While I support the general premise of the proposed amendment, I emphatically oppose any effort to place artificial numerical limits on the number of topics.

Miranda Soucie (273): Creating presumptive limits on areas of inquiry creates a very real risk that corporations will claim that every notice is overbroad. Providing greater detail in the notice gives the corporation greater clarity on what it must prepare to address.

Mike Stag (274): While I agree that discussion about the notice is helpful, in my experience parties do this voluntarily. What concerns me most is the attempt to create an arbitrary limit on the number of topics. Why would one object to specificity?

Reza Davani (275): I have grave concerns about the language “confer in good faith about the number” being used to limit the number of topics in a notice. More specific descriptions are valuable.

Greg Yaffa (276): Meeting and conferring makes sense because it should provide clarity. But limiting the number of topics would frustrate the purpose of the rule.

Michael Kittleson (277): The proposed changes will serve only to put obstacles in the way of obtaining the truth from a corporation.

George Wise (278): 30(b)(6) is the one discovery tool that singularly forces accountability and promotes efficiency over alternative discovery options. It is of great value to plaintiffs.

Laura Johnson (279): Making significant changes to this rule that limit topics will allow corporations to avoid responsibility for their actions.

Bruce Greenberg (280): Meeting and conferring in advance will streamline these depositions by bringing to the surface early, rather than at the deposition itself, any disputes.

Warren Christian (281): I oppose limiting the areas of inquiry in these depositions. There are no restrictions in areas of inquiry from a corporation to an individual plaintiff, so why should there be limits favoring the corporation?

Michael Dampier (282): I do not support the rule changes. The current rule works fine, and there are enough rules, procedures, and meet and confers in place to handle any issue. This is just attempted “tampering” with the rule for no compelling benefit.

Washington Legal Foundation (283): While the current rule has many defects in need of fixing, the proposed change addresses none of them. The most glaring defect in the proposal is the extraordinary mandate that the parties confer on the identity of the witness. The additional required conference about the number and description of the matters for examination provides no meaningful guidance or direction on what precisely is to be discussed.

Carmaletta Henson (284): I represent the frailest of our population -- elderly residents of nursing homes. This rule provides a mechanism for my clients to gain relevant knowledge. My strong concern is that the amendment will in effect impose a presumptive limit on the number of matters of inquiry. In order to draft a notice that is not overly broad, I need to be very specific about matters such as staffing. Our courts already require that notices be drafted with painstaking specificity.

Jason Downs (285): I am opposed to the proposed change. It will almost assuredly increase discovery disputes. Corporations will claim that every notice is overbroad.

Nicholas Panagakis (286): I do not support any rule changes. The current rule is clear and unambiguous. The proposed change will complicate things needlessly.

William Carr (288): This rule is effective and used by many to streamline discovery. There is no need to put an arbitrary cap on the number of topics.

Michael Dampier (289): The one proposed rule change that needs commenting on is the egregious limit on the topics for examination. This serves no purpose except to prejudice the party seeking corporate information.

Joseph Bryant (290): Any change to the current rule would impede the claimant’s absolute right to seek information clearly relevant to discovery. This is another attempt by industry to hide its bad conduct.

Clay Mitchell (291): Amending this rule as described will only serve to require more depositions to be taken and will unfairly limit the scope of the deposition.

Adrian Mendiondo (292): The proposed change would give organizations additional tools to obstruct and delay discovery.

Frank Kerney (293): The proposed changes will create a logistical nightmare and increased litigation across the board.

Christopher Hinckley (294): Creating presumptive limits on areas of inquiry creates a very real risk that responding organizations will claim every notice is overbroad.

Anonymous Anonymous (295): Limiting the number of topics limits a party's ability to conduct discovery on relevant issues.

Harold Velez (296): The proposed changes will fuel the ever increasing costs of litigation. Almost all responses will draw an objection. Providing greater detail in requests risks the increase of claims that the notice goes beyond the presumptive limit on the number of topics.

Michael Hanna (297): I do not support the proposed amendment. It will lead to unnecessary limitations and greater litigation to clarify the notice.

Joseph Kopacz (298): The rule is very important to make sure witnesses are prepared and bring all required information to the deposition.

W. Doug Martin (299): I am against limiting the number of areas of inquiry.

Marc Semago (301): Leave the rule as it is. The meet and confer requirement will turn every 30(b)(6) notice into a fight over whether it is broad and burdensome. There is a backdoor attempt to limit the scope of discoverable information.

Henry Watkins (302): I do not support limiting the number of topics.

Steve Thompson (303): The proposed amendment seems noble and is something that most good attorneys attempt to do anyway. 30(b)(6) depositions are the only real way to find out the facts instead of relying on the selective culling by defense counsel. It is necessary to obtain information from a giant corporation.

Schuyler Brown (304): I believe that the proposed 30(b)(6) rule should not be changed as to limit the number of topics that I can question on.

Richard Bates (305): The proposed rule has the effect of supporting presumptive limits on the number of topics. This will force the noticing lawyer to broaden the topics, and lead to "overbroad" objections.

Joseph Rugg (306): Any arbitrary limitation on the number of topics would be unfair and prejudicial.

Jill Bollwerk (307): Although I think it is worthwhile to require a good faith conference before depositions, any efforts in limiting the number of topics could be very dangerous.

Jamison Shekter (308): Any proposed change to 30(b)(6) should not include a limit on the number of topics.

Ariston Johnson (309): Many attorneys who represent corporations object to every discovery request, because the burden of conferring and filing a motion will dissuade opposing counsel from pursuing the discovery. Currently, if counsel receive an overly burdensome notice they can pick up the phone and seek clarification. A rule change that requires that call would be a bad thing.

John Doyle (310): I support the current proposed amendment to reduce litigious motions. I am adamantly against any attempts to set a limit on the number of topics.

Darrell Kropog (311): These changes are bad. They will have the effect of creating presumptive limits of areas of inquiry. Organizations will claim that every request is overbroad.

Sarah Foster (312): The rule should not propose a meet and confer on the number of topics. That should be left to the noticing party or, if at issue, the court.

Stefano Portigliatti (313): Although a meet and confer requirement makes good sense, the issues that are typically handled in the meet and confer requirements of a motion for a protective order are sufficient. Limiting the number of topics may see a good way to reduce the scope of ridiculously burdensome requests, but it would result in litigants simply using fewer but broader topics.

Jeffrey Constantinos (314): This proposed amendment must not be adopted. The benefit of requiring the attorneys to confer does not outweigh the increased litigation that will result. It invites litigation about what was and was not addressed in the conference.

Corey Friedman (315): I am concerned that the proposed amendments may deplete judicial economy and hamper productive litigation. It appears to be an effort by the defense bar to shift neutral rules. Arbitrary limits on the number of topics should not be adopted.

Michael Shiver (316): Although this amendment is well intentioned, I fear it will create yet another delay in obtaining necessary discovery. By placing presumptive restrictions on the number of categories which can be sought, the rule would place a restriction upon the requesting party and shift the burden of demonstrating relevance.

Marc Edelman (317): I am opposed to the amendment. Creating a conferral requirement about the number and topics will create presumptive limitations that will subvert effective discovery.

Kyle McClain (318): The meet and confer addition is a reasonable change. Any limit on the number of topics would be unworkable.

Navah Spero (319): This is a bad idea, as it would greatly prejudice the party seeking to take the deposition. There is a constant back and forth in litigation about whether the topics are overly broad. The solution to that problem is to increase the number and make them more specific.

David Moffett (320): What started as a good proposal to meet and confer has the potential of limiting access to relevant information and becoming a new cottage industry of litigation. By creating presumptive limits on areas of inquiry there is a risk that responding organizations will claim ever notice is overbroad.

Ryan Roberts (321): I do not support the proposed change because it creates a mandator conference when one may not be necessary. It will increase legal fees and court involvement where these things are not needed. I have found that very few of my requests cause concern, and

in all instances when they did opposing counsel has conferred with me. I have never had a discovery hearing in court about a 30(b)(6) deposition.

Emily Joselson (322): I lend my voice to those who seek to have the rule go forward as proposed. I urge the Committee to resist adding any further language to the rule. I emphatically oppose any attempt to put artificial numerical limits on the number of topics.

A Daniel Vazquez (323): I am concerned about the chilling effect limiting the scope of 30(b)(6) depositions would have on the process of justice.

Lesley Clement (324): Any time lawyers meet and confer it is an opportunity to promote professionalism. Therefore, I support the proposed amendment. I oppose the proposal to put artificial numerical limits on the number of topics, however.

Amy Ferrera (325): The committee should reject the request to limit the number of topics.

Kristi Schubert (326): I strongly oppose any rule which would limit the number of topics. The provisions for the corporation to seek a protective order provide an adequate mechanism for it to avoid burden. The proposed requirement that the attorneys meet and confer about the number of topics provides further assurance that the corporation will not be unduly burdened.

Richard Kennedy (327): This amendment will impose additional burdens on attorneys and give rise to disputes about the number of topics. They potentially deprive injured persons and their families of vital information that only the corporations know about.

Neil Alger (328): The meet and confer proposal simply codifies a practice that most attorneys already employ. 30(b)(6) is essential to litigation, and as technology develops it will become more essential. The Committee should worry about the realities of practice for attorneys who do not handle billion dollar cases. Every dollar counts in most of my cases, and adding requirements can make waste.

Chris Gill (330): The committee should reject the request to limit the scope and number of matters for examination. This would allow defending corporations to hide the ball.

Wesley Laird (331): As a Plaintiff lawyer, I support the proposed change to require a conference. But I do not support any limitation on the number of topics.

Andrew Burnett (332): I am opposed to any presumptive limit on the scope of 30(b)(6) depositions.

Matthew Hitt (333): “This is a horrible idea.”

Matthew Christian (334): The proposed changes are appropriate and necessary. We already encounter significant delays with the current rule due to unprepared witnesses. Requiring advance identification of the person will help make the litigation more efficient.

Kurt Wolfram (335): “An artificial limit on the number of topics is a mistake. I urge amendment to exclude that portion of the proposed rule change.”

Jay Vaughn (336): I support the proposed amendment. A good faith conference reduces unnecessary motion practice. But I oppose any limits on the number of topics.

Shayla Reed (337): I think any time lawyers meet and confer it is a good opportunity to

promote professionalism. Therefore, I support the proposed amendment. But I emphatically oppose any limit on the number of topics.

Fred Buck (American College of Trial Lawyers) (338): The College believes that this amendment is not desirable, as it said in prior submissions in 2017 and 2018. Our members find that most 30(b)(6) notices are not objectionable and that when objections are made they are resolved informally through the meet and confer provisions of rules 26(c)(1) and 37(a)(1). Adding a mandatory meet and confer provision would create unneeded burdens on the parties and inject delay and additional cost.

J.T.Borah (339): I support the proposed amendment. But I am very concerned about any attempt to limit the number of topics.

Daniel Purtell (340): Any limit on the number of topics would be counter to the pursuit of justice.

Jason Wesoky (341): The duty to confer on 30(b)(6) topics already exists. Often the responding organization objects, leading to a hearing in which the judge resolves the matter. But conferral on the “number” of topics is dangerous and silly. Setting a limit on topics would fundamentally undermine the rule.

Rachel Alexis Fuerst (342): I believe that the proposed changes are sensible. But there should not be a limit on the number of topics.

Tom Paris (343): Limiting the topics will not lessen the rancor but instead cause weeks of briefing on motions. Yes, the parties should confer, but limiting the number of topics provides a weapon for obstruction of discovery.

Kari Jones Dulin (344): “I support the proposed amendment as written and oppose any artificial presumptive limitation on topics.”

Katie Curry (345): I support the proposed amendment as drafted. I oppose any attempt to limit the number of topics.

Dino Tangredi (346): I am opposed to the proposed amendments. The rules already have provisions to address alleged abuse of discovery. The nature of the case defines what is reasonable. One size does not fit all.

Sean Dormer (347): I support the proposed changes. We already make a practice of conferring about 30(b)(6) topics before issuing our notice, and we are often met with silence from the other side. The practice of ignoring letters asking to confer needs to stop.

Tim Edwards (348): Bad idea. Does nothing to decrease litigation costs. In fact, the result could be the opposite. The defense would use the conference to fish for information to better prepare the client for the deposition.

Paul Williams (349): I support the proposed amendments. I oppose any artificial limit on topics.

Jacob Jagdfeld (350): I oppose changing the rule to limit the number of topics.

H. Phillip Grossman (351): While I am for the proposed changes, I am against any arbitrary limits on the number of topics.

Garrett Blanchfield (352): I oppose the defense bar proposal for a numerical limitation in the rule. Rather than pick an arbitrary limit, the more practical approach would be for the parties to meet and confer about the appropriate number of topics.

Michael Ace (354): This rule change could limit needed discovery by imposing a limit on the number of topics.

A. Evan Lloyd (355): If these amendment are adopted it will encourage gamesmanship. Creating presumptive limits on areas of inquiry will lead organizations to claim that every notice is overbroad.

Ben Yeroushalmi (356): While ensuring good faith meet and confer efforts is worthy of support, I am cautious about the unnecessary obstacles that are sure to arise from placing limits on the number of topics.

Randi McGinn (357): I write to oppose nay presumptive limitation of areas of inquiry. I support the proposed amendment as written, because meeting and conferring is never a bad idea.

Jeffrey Stowman (358): I support the proposal as written. The meet and confer requirement potentially will reduce inadequately prepared witnesses. But a presumptive limit on topics would hinder the discovery process

Michelle DeLong (360): I support the amendment as written. I oppose arbitrary limits on topics.

John Romano (361): The meet and confer provisions make sense, but I oppose artificial limits on topics.

Barton Keyes (362): The amendment is unnecessary. Parties already have meet and confer obligations under the rules. Adding this idea to this rule will suggest that it is somehow different. Any changes to this rule would actually lead to increased motion activity and delay.

Brian Hetner (363): I support the amendment as drafted, as it may facilitate definition of the matters for examination. But I oppose any limits on the number of topics.

Morgan Gaynor (364): The amendment is unnecessary at best, because there are already sufficient safeguards. Corporate representative depositions are essential to level the playing field. Limiting these depositions in the manner proposed will not make litigation more efficient. It would create additional incentives to hide the ball.

Alan Casper (365): I rely on this rule. I am therefore dismayed by the proposal to limit the number of topics that can be listed.

Patrick Murphy (366): Many of the changes suggested hold promise, but a presumptive limit on topics is arbitrary and will make other discovery more time consuming.

Robert Orant (367): Providing greater detail in a 30(b)(6) notice gives the organization greater clarity to prepare. If there is a presumptive limit on topics, they will have to be broader.

Gregory Wetzel (368): I favor the meet and confer idea. I oppose any sort of limitation on the number of topics.

Christian Gabroy (369): Requiring advance notice of witnesses makes formal what already occurs in most cases. But in general the same rules should apply in 30(b)(6) depositions

as in others.

Robert Ransom (370): It is already customary to confer with opposing counsel about the topics to be covered. It is also customary for opposing counsel to engage in seemingly unending objections to the notice. Frustratingly, defense counsel regularly refuse to comply rather than filing a motion for a protective order, saying that I have to file a motion to compel. In my experience, this is part of the overall strategy to make it as difficult as possible to obtain needed information. An amendment to the rule which makes it even harder to obtain information will be a step in the wrong direction.

William Compton (371): “I am opposed to any limit on the categories of inquiry that can be designated in a Rule 30(b)(6) deposition notice.”

Kurt Maahs (372): I support the meet and confer requirement. I do not support limiting the number of topics.

Bret Gainsford (373): The existing rule works fine. The proposed change will only add unnecessary delay and costs.

Andrew Hagensbush (374): I do not support the rule change. It would make it more difficult to obtain information from corporations by limiting the scope of questions and topics.

Scott Webre (375): I oppose the amendment. Revising the rule as proposed would substantially reduce the effectiveness of this tool in challenging corporate positions.

Sumeet Kaul (376): By creating presumptive limits on areas of inquiry there is a very real risk that responding organizations will claim every notice is overbroad. It is often difficult to get information from a corporation. This amendment will make it harder.

Mixcoatl Mierra-Rosette (377): I support the change. But I also oppose any restriction on the number of topics.

Michael Sievers (378): I urge that you adopt the amendment as written and reject calls to adopt numerical limits on the topics.

Joshua Molandes (379): I do not support the language which refers to the “number” of matters. The deposition is time-limited, which sufficiently protects the witness.

Michael Holoman (380): There should not be any limit on the number of topics. Lawyers are not abusing the rule.

Brian Wojtalewicz (381): The proposed change to meet and confer is fine, but an arbitrary limit on the number of matters is very dangerous.

Edmund Schmidt (382): The rule works well and requires no revision. We need it to gain information from wealthy corporations.

Carl Lopez (383): I oppose any limitation on the areas of inquiry. That will lead to an objection that every request is overbroad.

Chris Kuhlman (384): I oppose the amendment. Federal civil litigation is increasingly bogged down in paperwork. This promotes gamesmanship. With corporate defendants, scheduling discovery can turn into a prolonged game of cat and mouse. The meet and confer requirement will enable them to play the game even longer.

Maria Sperando (385): I support the proposed change because meeting and conferring will be useful for both sides. But I am strongly opposed to numerical limitations on the topics.

John Branum (386): “I do not believe that the rules should be changed with regard to corporate representative depositions. I oppose those changes.”

Justin May (387): I am opposed to putting any limit on the number of topics. Corporate defendants are upset that they have to spend money to produce relevant documents, but changing the rule to suit them is not fair to plaintiffs.

Fletcher Handley (388): I do not support any limitations on use of this important tool for individual litigants.

Daniel Talbot (389): I support the proposed change and oppose any other changes, especially placing a limit on the number of topics.

Virginia Buchanan (390): I oppose the amendment. It imposes additional constraints, which will hurt plaintiffs. Having to meet and confer will presumptively limit the areas of inquiry. Defendants will routinely interpose objections. The defense bar is well organized and can offer some horror stories, but the ordinary reality is that this rule is very effective.

Charles Watkins (391): I oppose the changes as unnecessary and potentially confusing to litigants. Rule 37 already has a sufficient requirement to meet and confer.

Scott Smith (392): I oppose the proposed amendments because they would limit access to relevant information and create more litigation through motion practice. By creating presumptive limits on areas of inquiry, the amendment will enable organizations to claim every notice is overbroad.

Matthew Winter (393): I oppose the proposals that would limit the number of topics. I support the change to identify the witness. This will help to ensure that the right individual will testify.

Scott Wolleson (394): I oppose any predetermined limitation on the number or scope of topics.

James Biggart (395): The proposed amendment to limit the number of topics will result in more depositions and greater expense for all parties. The meet and confer is a good idea.

Jim Buxton (396): I support the proposed amendment. But placing a limit on the number of topics will create a litigation nightmare.

James Neal (397): In theory conferring is a good idea. But in practice it will lead to more fictitious litigation. If you begin limiting the scope and breadth of these depositions, you will only provide greater opportunity for objections and obstruction.

William Tilton (398): I oppose further changes to this rule. There is no substitute for this rule. Please do not change it.

Karen Allen (399): The proposal is good as written; meeting and conferring promotes professionalism. But numerical limits would be a bad idea.

Quentin Urquhart (400): I strongly oppose a requirement that the corporation disclose the identity of the witness. The organization should have the sole right to pick its representative.

Jordan Lebovitz (401): I think meet and confer is a fantastic idea and is most practical. But there is no reason to limit the number of topics.

Rob Schenk (402): Limiting the number of matters would hinder the utility of this rule for my clients.

Brandon Baxter (403): Requiring a conference is a good idea. But imposing a limit on the number of topics is a bad idea.

Troy Chandler (404): I support the proposal. In particular, I support disclosure of the identity of the witness before the deposition. I oppose a limit on the number of topics.

Michael Sabbeth (405): The duty to confer on the topics already exists. The responding corporations regularly object to topics and that leads to a conference and sometimes a hearing before the judge. But conferring about the “number” of topics is dangerous and silly. Judges are already trapping lawyers with the bogus argument that a notice has “too many” topics. The committee cannot endorse this idea.

Randall Poerschke (406): If you are going to limit the topics for 30(b)(6) depositions, then you must also limit the number for all other depositions. The limit on the number of topics should be REJECTED.

Lee Cope (407): The meet and confer amendment is a good idea. But imposing a limit on the number of topics is a bad idea.

Ellen McCarthy (408): Adding a meet and confer requirement makes good sense. What does not make sense is limiting what can be accomplished in a deposition.

Daniel Inscore (409): I support the meet and confer requirement. I am opposed to any limitation on the number of topics.

Scott Link (410): I oppose the proposed change to limit the topics of inquiry. I am always open to meeting and conferring, but I do not want to have to show my hole cards.

George Gray (411): I do not support changing the rule to limit the number of topics.

Thomas Fuller (412): Our rules already have adequate provisions to protect against oppressive discovery. A limit on the number of topics is not needed.

JC Powell (413): If changes are made that limit the breadth of the rule, that will enable corporations to take advantage and defeat the purpose of discovery.

James Coogan (414): This rule is vital to parties litigating against corporations. The companies seek to conceal, confuse, and even destroy information. Please do not take any actions that will curtail the utility of this rule.

JoDee Nell (415): Identical with no. 405 (Michael Sabbeth).

Jeffrey Mehalic (416): This change will enable corporations to challenge every notice on the ground that it exceeds the permitted number of items. That would be harmful.

Smanatha Flores (417): There should be no numerical limit on topics. Identifying the witness is helpful to all. Identifying the documents to be used in advance of the deposition is harmful.

Madeleine Simmons (418): Limiting the number of topics will cut against precise topic descriptions and harm those suing corporations.

Blake Ringsmuth (419): The proposed amendments make discovery much more efficient. Knowing the identity of the witness allows preparation and questioning to be more concise and less costly. The same is true of the requirement to meet and confer.

Nancy Iler (420): Identical with no. 405 (Michael Sabbeth).

Robert Kerpsack (421): I favor adding a meet and confer requirement. I oppose any attempt to limit the number of topics.

Adam Russell (422): I support the amendment as proposed, but oppose any limitation on the number of topics.

Thomas Shlosman (423): Limiting the number of topics will limit the utility of the rule.

Christopher McKinner (424): I support the proposed change. I oppose any artificial limits on the number of topics.

Thomas Murphy (Massachusetts Academy of Trial Attorneys) (425): The Academy opposes these changes. Imposing a meet and confer requirement would be inefficient because, early on, the plaintiff has not had a chance to engage in meaningful discovery. This change will undermine the goals of Rule 1.

Danny Ellis (426): The proposed meet and confer will only bog the case down. There can be an unending back and forth trying to “work out” the differences. It allows a party inclined to delay a perfect way to do that.

Michael Chaloupka (427): I support the proposed meet and confer. I already do this. I am adamantly opposed to any limit on the number of topics.

Jessica Dean (428): This rule is important, and often corporations fight fiercely to avoid providing information.

M. Justin Lusko (429): I oppose any amendment that would limit the number of topics.

Peter Kraus (430): The suggestion that the rule be changes to remove the requirement to identify witnesses will gut the effectiveness of these depositions. I urge this committee not to make such a change.

Eric Penn (431): I favor the meet and confer requirement so long as it is clear that there is no presumptive limit on the number of topics. Greater specificity in topic descriptions is more important than the sheer number.

James O’Brien (432): The current rule has robust protections against abusive deposition practices. A numerical limit on the topics would add nothing to the existing protections. I encourage the committee to reject the proposed numerical limit on topics.

John Dady (433): I support the amendment proposal and oppose any limits on the number of topics. The best way for the witness to prepare is to have a detailed list of topics. If the number were limited, the topics necessarily would be described more generally.

Hans Leibensberger (434): Any time lawyers meet and confer it is an opportunity to

promote professionalism. But I strongly oppose numerical limits on the topics.

Scott Frost (435): Rule 30(b)(6) is the last tool plaintiffs have to fend off obstructionist corporate defendants and their counsel. The abuse of Rules 33 and 34 is so prevalent that the rules almost serve no purpose.

Matt Young (436): I oppose this change. It would only make depositions more burdensome and increase the costs of an already costly process.

Richard Eddington (437): I strongly oppose limiting the number of topics. That would lead to discovery abuse.

Rachel Leonard (438): The amendment as written serves the desired purpose. Any further limitation of topics thwarts the intention of this rule.

Neil Nazareth (439): The draft language about meeting and conferring is important so the parties communicate about the topics and potentially streamline the areas to be discussed at the deposition. In my practice, I routinely do this. The number of topics should not be limited.

Joseph Musso (440): I endorse the meet and confer idea. We do that already and it is a desirable practice. But I strongly oppose any limit on the number of topics. As a nursing home abuse attorney, I fight gamesmanship every day. Presumptive topic limits are a tool that will tip an already uneven playing field further against our nation's institutionalized elderly.

David Jostad (441): This rule is critical to obtain information from corporations and government. Modifying the rule in any way which limits access to relevant information (in particular limits on the number of topics) would inevitably be construed as establishing presumptive limits. I oppose that.

Jeff Paradowski (442): I favor the meet and confer requirement but not any presumptive limits on the number of topics.

Taylor Cunningham (443): I oppose the proposed amendment. It will not remedy any issues presented by the rule in its current form. Placing a presumptive limit on the topics is arbitrary, and could lead to the need for more depositions.

Casey Gartland (444): I oppose the proposed changes as they will likely lead to the necessity of taking more depositions and cost litigants more time and money.

Peter Everett (445): The rule should not be constricted in any way. In its absence, corporate parties can stonewall and obfuscate. I oppose the proposed meet and confer impediment, as it simply allows corporations to delay depositions. Under no circumstances should the number of topics be limited.

David Wiley (447): As a lawyer who represents individual workers in employment cases, I support this change. Identifying the witness can help, so this seems a good change to me. I strongly discourage any other modification because it invites satellite litigation and could undermine the original purpose of the rule.

Nathan Wittman (448): The proposed change is unlikely to yield the kind of results its proponents seem to expect. The meet and confer language is likely to be used to create a cottage industry of litigation activity designed to obfuscate, stall, and frustrate a litigant's access to the "voice" for the corporate entity.

Thomas Conlin (449): I write to oppose a limit on the number of topics. The right number varies widely.

Kevin Liles (450): I oppose the meet and confer impediment because we see enough stonewalling already, and this addition would enable parties to delay things even longer. Under no circumstances should the topics be limited numerically.

Joseph Fried (451): Because this amendment will make things worse, I must strongly oppose the amendment and the efforts to suggest even further limitations (e.g., arbitrary limitation on the number of requests).

Charles Murray (452): The meet and confer provision is important and worthwhile. Our experience is that it works. If the rule is changed to give corporate counsel more power to reduce the ability to use this tool, the corporate parties will have the upper hand in litigation.

Richard Hricik (453): The proposed amendment, as written, is a reasonable and sensible change. Arbitrarily limiting the number of topics would create needless obstacles.

Ingrid Evans (454): I represent elderly patients against nursing home corporations. We need this rule to work. Efficiency is served when the parties are transparent about identifying the witness and the topics to be covered in advance.

John Hickey (455): LIMITATIONS ON THE NUMBER OF DESIGNATIONS ARE A BAD IDEA.

Derek Larwick (456): Changing 30(b)(6) to limit the number of topics is ridiculous. This is just one more attempt by corporate defendants to avoid having to produce evidence.

Steven Goldberg (457): I oppose the onerous meet and confer requirement, as it is just another impediment to conducting discovery and another way corporate parties can delay depositions. Under no circumstances should the number of topics be limited.

Mike Milligan (458): The Committee should be mindful of the adverse effect upon small businesses that will result from the proposed limit on the number of topics.

John Harris (459): “I do not support limitations on their use, as the Judges already have the ability to control the number and scope of inquiry to those that are relevant to the issues of the case.”

J. Antonio Tramontana (460): I oppose the proposed changes. They will enable corporations to “hide the ball.”

Ralph Blasier (461): “The proposed amendment seem to impede plaintiffs’ discovery in favor of defendants. Why do this?”

Matthew Saint (462): I support the proposed changes as written and oppose any presumptive limits on topics.

Timothy Hummel (463): I strongly oppose the proposed amendment. It offers nothing of value to increase the efficiency or fairness of the litigation process. Meet and confer is already a requirement before presenting a discovery dispute to the court. Putting arbitrary limits on the number of topics would be even worse.

Grant Kuvin (464): I oppose any changes to 30(b)(6). The proposed changes will only

increase the amount and cost of litigation and require multiple depositions. Creating more hurdles and red tape is a bad idea.

Sergio Rufo (465): This rule is the last tool for fending off obstructionist corporate defendants and their counsel. The mandatory meet and confer requirement would only benefit the defense by delaying the process.

Magali Sunderland (466): As currently written, the rule is neutral. To limit it in any way, even by adding a meet and confer, would largely favor only business interests and marginalize an individual's access to justice. The rule should not be amended. It should be implemented as written.

Shelly Greco (467): I concur with adding a conference on who will serve as corporate representative on each topic. I oppose any limitation on the number of topics.

Walt Auvil (448): I write to support the draft changes and to oppose suggestions that a numerical cap be placed on the number of topics. This rule is the most effective tool in the civil procedure tool kit, which allows parties to eliminate areas of controversy early in the litigation and focus discovery only on the areas that are disputed.

Robert Roe (469): I support the proposed rule change. Both sides in litigation benefit when the witness is knowledgeable and qualified to discuss the matters relevant to the case. Limits on the number of topics are unnecessary.

Beverly Carson (470): Amending this rule to limit the number of topics will result in undue delay and greater cost.

Mark Millen (471): These proposed changes are terrible. This will create satellite litigation around entity depositions. The defense bar is attempting to create more and more obstacles to basic discovery. The changes will allow corporations to play even more games in discovery.

Raymond Mullman (472): I am against the proposed changes, particularly limiting the number of topics. Corporations will claim every notice is vague and overly broad. Then, when given greater specificity, they will claim the numerical limit has been exceeded. Providing more detail in the notice gives the organization greater clarity for what needs to be prepared.

Nicholas Maxwell (474): I support the proposed rule changes as written and reject the notion that additional revision to the rule is necessary. The rule is now fair and balanced. There should be no limitation on the number of topics.

Pressley Henningsen (475): A rule that requires to talk through their disagreements before engaging the court makes sense in today's electronic age. But limiting the number of topics makes no sense.

Anthony Ellis (476): Meet and confer requirements, like the one in this amendment, are a good step towards managing this process. From the plaintiff's side, we often find it impossible to draft topics in a manner that is narrowly tailored without having access to some information about the organization. Good faith conferring can bridge this gap, to the advantage of both sides. However, any effort to limit the number of topics would ignore the complex realities of modern litigation.

Jed Nolan (477): What started as a good proposal to meet and confer about the notice has the potential of limiting access to relevant information and becoming a new cottage industry in

litigation. Imposing numerical limits on notices will invite corporations to object to every notice as overbroad.

Krzysztof Sobczak (479): I support the proposed changes as written and would make it even stronger, with presumptive sanctions to be issued if the deponent fails to appear prepared after having engaged in the conference. I oppose any other changes that would impose artificial or presumptive limits on the number of topics.

Jason DePauw (480): I see no need to change this rule. If there is a dispute about the number of scope of the items in the notice, the parties must meet and confer before a motion proceeding. These changes appear to create a new limit on the number of matters of inquiry and limit the scope of the matters of inquiry. But because the language is so vague, it is unclear what the limit is and it is likely that a court will read the language to impose a new artificial limit on the number of matters of inquiry. The requirement to confer about the identity of the person to be designated appears to change the requirement that the corporation must identify the person from mandatory to permissive. This is unacceptable because the deposing party must know the designee's identity in order to adequately prepare for the deposition and cut out needless background matters of inquiry.

Chase Brockstedt (481): I support this proposed rule change as written and oppose any other changes, especially those that would place artificial presumptive limitations on topics.

Kenneth LaBore (483): Corporations try to hide and obfuscate. A meet and confer requirement is welcome. But any arbitrary limit on the number of topics would impede needed discovery.

Todd Bialous (484): Limiting the number of topics in a 30(b)(6) deposition is impractical and can lead to obstructive abuses.

Andrew Horowitz (485): I support the proposed amendment as written and oppose other changes to this rule, especially any that would impose artificial presumptive limits on the number of topics or enable corporate deponents to hid the identity of their deponents until the day of the deposition.

Corey Walker (486): Imposing a limit on the number of topics would further allow corporations to dodge discovery. They could force plaintiffs to take several depositions to find out what now can be learned in a corporate deposition. Corporations do not have to limit the number of topics they can pursue in depositions of plaintiffs.

Russell Guest (487): I support the proposed amendments as drafted. The obligation to confer is of great significance when obstructionism is often the strategy. Naming the designee is clearly helpful in reducing the confusing of what designee will ultimately testify.

Conrad Meis (485): If the rule could be changed to effectively limit the number of issue created by a party to a suit, then it might make sense to similarly limit the number of topics subject to discovery. We can't, and it doesn't.

Robert Bruner (489): The amendment codifies the existing practice of good attorneys on both sides. Adding limitations on topics or areas as suggested by some will further close the door of the courthouse to individuals.

Andrew Delaney (490): Limits on the number of subjects are not supported by practice nor necessary. There are no such limitations for individual depositions.

Dustin Bergman (491): I oppose these amendments. This is an unnecessary change that will undoubtedly lead to additional discovery disputes and further delay.

Brendan Faulkner (492): “Rule 30(b)(6) is the great equalizer. It would be a travesty if it were limited or watered down as has been proposed. A trial is supposed to be a search for the truth, and should be decided by what facts are revealed, not which facts are concealed.”

Kent Winingham (493): It is critical that 30(b)(6) be maintained to serve the purpose it so efficiently serves -- allowing clarity in notices so that an appropriate designee may be identified. Limiting the number of topics will limit the ability to use the rule.

Robert Curran (494): I oppose the proposed rule change. It is impossible to determine a reasonable limit on every type of suit in a vacuum. Any such predetermined number would be an injustice in some cases. There is no need for an artificial limit on the number of topics.

Thomas Dillon (495): Limiting topics in 30(b)(6) depositions would result in a significant advantage to defendants and make litigation less fair to plaintiffs.

Ashley Hadler (496): I support the proposed rule change as written but adamantly oppose any further limitation on the scope or number of topics.

David O’Brien (497): I support the proposed meet and confer requirement, but oppose any change limiting the number of topics.

Sean Stokes (498): 30(b)(6) depositions are vital to the search for the truth. Cases calling for such practice are often complex. An arbitrary limit of the number of topics would unnecessarily hinder the ability of litigants to get to the core issues in a given case.

Kyle Kosleracki (499): While 30(b)(6) as now written is not broken, I find the proposed rule quite balanced, and believe that the identification of witnesses could streamline the process further. I oppose, however, any presumptive limit on the number of topics.

Chandrika Srinivasan (500): I support the proposed amendments as written. However, I oppose any presumptive limitation on the number of topics.

Requiring a conference about the number
and description of the matters for examination

Washington, DC Hearing

Keith Altman: The meet and confer idea is important. People are often wrong about what the other side actually wants. 30(b)(6) is a basic tool, and I need to use it to find out how the company is organized. If there has been an increase in the use of 30(b)(6) depositions, one reason for the last decade has been the impact of Twombly and Iqbal. Setting a numerical limit on topics is not a good idea. Any number would disregard some cases. The fact that there is a numerical limit for interrogatories is not significant. There's a big difference between interrogatories and these sorts of depositions. Setting the number at 10 would definitely limit me. A key problem is that some people are not reasonable. The right way to do this is to start thinking about it at the 26(f) conference.

Leslie Barnes (testimony and no.187): I think this amendment codifies best practices. I handle class actions in which often my clients are businesses, so I am on both sides of the 30(b)(6) depositions. We on the plaintiff side do not want to waste time in discovery. We try to tailor our topics to what we need, but that can mean that there are more of them than somebody who was vaguer would have. And counting them can be a difficulty. For example, a recent case had 26 topics, but one could say that because there were sub-topics there were really 49. The number of topics depends on the case.

Paul Bland (Public Justice) (testimony and no. 172): The duty to confer about the number of topics should be removed. Conferring about the substance of the topics, not the *number* of topics, is what should be required. Imposing a duty to confer about the number of topics suggests that the parties have to agree to a set number, somehow separate from what the topics are. That will generate disputes about how to count the topics as well as inviting broad topic definitions. Moreover, during a 30(b)(6) deposition, a party may learn about another topic that it needs to ask questions about. We worry, however, that organizations may employ the conference process as a delaying tactic. We think the Committee Note should clarify that the duty can be satisfied in some cases with a single conference or a series of discussions, and confirm that the duty to confer is not an excuse to slow down the discovery process and take more time to respond to a 30(b)(6) deposition notice.

Edward Blizzard (testimony and no. 179): I support disclosure of the identity of the witness. Conferring about that is not important to me in my plaintiff practice. Giving notice seven days before the deposition would be reasonable.

Mark Chalos (Tennessee Trial Lawyers Ass'n) (testimony and no. 190): Limiting the number of topics to be covered in a deposition would be unfair and lead to inefficiencies. But requiring 30 days notice of the deposition would not ordinarily be a problem.

Susannah Chester-Schindler (testimony and no. 186): The Committee Note about identifying the documents to be used during the deposition seems superfluous. The vast majority of attorneys on both sides bring courtesy copies of all documents to the deposition. A preliminary production seems unnecessary, and could be somewhat burdensome on smaller firms whose attorneys have limited "bandwidth," as it were. In general, the meet and confer requirement is in keeping with the rules. The 26(f) meeting is the time to create a framework for addressing issues as they arise in the case. But at that stage in the litigation it is rare to be able to get into the substantive issues involved because it's too early. To illustrate, we may need to start with a 30(b)(6) deposition regarding the defendant's information setup. Only after that can we frame further discovery, and that further discovery may show that we need a 30(b)(6) on other topics.

William Conroy: My overall experience with 30(b)(6) depositions in defense of catastrophic injury cases is positive. But sometimes things come off the tracks. Conferral is good. I want to avoid discovery motions.

Jennifer Klar (testimony and no. 175): In my plaintiff-side practice, what this rule requires is what we already do. I have conference with opposing counsel, and have often clarified topics, edited topics, or removed topics. These discussions also often lead to agreements to address different topics on different days.

Mark Kozieradski (testimony and no. 192): I oppose adding this requirement to the rules because the defense will use it as an occasion to delay discovery. “It creates an unwarranted presumption that the notice’s requests are defective, [which will] incentivize the responding entity and its attorney to treat valid matters for examination” as a focus for “transactional negotiation.” “Everything will be subjected to compromise. I am very concerned about anything that suggests that the number of topics is somehow to be limited.”

Chad Lieberman (testimony and no. 178): Lawyers always confer about the scope and timing of the 30(b)(6) deposition. But what is missing is more about how the matters to be discussed should be handled during this conference. Provisions regarding the notice required, etc., would be valuable. Rule 37 does not provide a suitable alternative; although it does have a meet and confer requirement, that requirement arises in a different context and has an overtone of discovery violations. Similarly, issues about the preparation of the witness are invariably post-deposition matters. “I have never encountered an issue regarding the adequacy of a 30(b)(6) witness’s preparation.”

Tobias Milrood (AAJ) (testimony and no. 185): AAJ opposes any proposal for a presumptive limit on the number of topics. The words “number and” should be removed from the rule’s directive that the parties confer. Having such a provision in the rule will lead to broad designations and multiple 30(b)(6) depositions. It may be that requiring a conference about the topics will provide a foundation for motions for sanctions when the witness is not prepared to address the topics. Otherwise, the company might be able to say “We did not know what the plaintiff wanted.”

Terry O’Neill (National Employment Lawyers Assoc.) (testimony and no. 144): Experienced counsel already confer about the topics to be covered when that is needed, but adding this to the rule is a good idea because making it an explicit requirement will ultimately reduce disputes and promote efficiency. In our experience, the “horror story” of a 100-topic deposition notice are a very rare exception. We have rarely encountered disputes about the number of topics listed. Imposition of a bright-line rule about number would only encourage counsel to make each topic broader.

Michael Neff (testimony and no. 184): I am opposed to any required conferral. There should be no limit on the number of topics. If necessary, topics problems can be worked out without a rule.

Bruce Parker (testimony and no. 145): As a practical matter, counsel currently confer on the matters for examination. Consequently, aside from generating more expense to a process that is already too expensive, current practice will not materially change under a mandate to meet and confer on this issue.

Jonathan Redgrave: Conferring about the topics is a good thing. But when there is a dispute, you need judicial input. So the rule should go further and provide a vehicle for that input.

Terri Reiskin (Dykema Gossett) (testimony and no. 196): The meet and confer requirement duplicates existing federal dispute resolution mechanisms and provides no useful resolution process or remedy for the kinds of disputes that arise regarding 30(b)(6) depositions. The real difficulty is that the district courts disagree about how one is to present the court with issues that arise; some insist that the corporation file a motion for a protective order, while others require that the deposition go forward and then entertain motions to compel.

Greg Schuck: We do confer on the topics. The best way to do that is before the notice even goes out.

Brittany Schultz (Ford Motor Co.) (testimony and no. 151): This amendment will not produce meaningful change. This is already common practice. Ford voluntarily engages in such conferences, and also recognizes that many district courts direct that the parties must meet and confer before a 30(b)(6) dispute will become ripe for court attention. So adopting this requirement will not change or improve practice. There may be a small body of practitioners who do not know about these practices, but that small number do not make this addition to the rule worthwhile.

Patrick Seyferth (testimony and no. 182): I oppose the requirement to confer about the topics “in good faith.” True, that is sometimes done now, but this amendment will therefore affect only the cases in which it would not happen under the current rule. Requiring a meet and confer when it would not occur promotes disputes. If we are to be required to meet and confer, the rule should also provide a “mechanized” approach for bringing disagreements before the court.

Donald Slavik (testimony and no. 146): My standard practice is to confer in advance about the topics for examination. I would rather know up front what subjects I’ve listed that the producing party objects to, or if the party cannot provide a witness who has knowledge that is relevant. If there is a disagreement about the subjects for the deposition, I’d rather bring it to the attention of the judge before taking testimony so that we can prevent having to bring it up afterwards. I’ve had the experience of a witness declining to respond on a subject contained in the notice, with no forewarning by opposing counsel, resulting in the need for another deposition. The amendment should ensure that the parties are jointly responsible for communicating with each other in advance to avoid such problems. But a focus on the “number” of topics is fraught with problems. That really depends on the nature of the case. Every case is different. “I’ve had first-hand experience in this with automobile mass tort and class action litigation. Limiting or negotiating how many areas that can be asked about in deposition will lead to more, not fewer, discovery motions brought before the Court.”

Andrew Trask (testimony and no. 176): When we receive a 30(b)(6) notice I call opposing counsel and try to work things out. I describe what we can provide. In about 80% of the cases, that resolves things. After that is resolved, we decide who the witness or witnesses will be.

Palmer Vance (on behalf of around 20 past and present leaders of the ABA Section of Litigation, submitting views as individuals): The current proposal is an improvement. But it would be more of an improvement if it included a dispute resolution mechanism. For that reason, we think that the rule should say that if the parties cannot agree they are encouraged to seek a judicial resolution. Perhaps “encouraged” would be an odd word to use in a rule; perhaps the idea could be added to the Committee Note. Another idea worth considering would be to say in the rule that every seven hours of 30(b)(6) deposition could count as one deposition toward the limit of ten.

Christine Webber: The right time for the conference the proposed amendment seeks is when the amendment directs. Saying that this must be addressed at the 26(f) conference won't work.

Hassan Zavareei (testimony and no. 191): The requirement that the parties confer on the number of topics for the deposition will unnecessarily create conflict. The number should not be an abstract quantity, but depend on the specifics of the case. The right thing to talk about is the specific topics, not an abstract number. When there really are too many topics, defense counsel will make motions. And that leads to a conference under Rule 37(a).

Terrence Zic (testimony and no. 147): Typically we see 30 to 100 matters in the notice. Recently I got a notice with 177 matters listed. On that one we are still in the meet and confer process. In another case in Baltimore, at the end of the discovery period we got a 30(b)(6) notice with hundreds of items that went way beyond the products involved in the case. Yes, we do meet and confer regarding scope of the topics, but that can lead to an impasse.

Phoenix Hearing

John Griffin (testimony and written statement): I think advance communication about the topics to be covered is useful. I want to know in advance of the deposition if my opponent has concerns about the topics listed in the notice. Whether it is useful to include the number of topics in this discussion is not so clear. That is more granulated than the designation of the topics to be covered, and could invite bandying over something that would not otherwise provoke a fight.

Sandra Ezell: Representing corporate clients, I have handled hundreds of 30(b)(6) depositions. I support the concept of requiring advance discussion of the matters for examination. It would be valuable to have the documents that will be used during the deposition identified.

William Rossbach (testimony and written statement): This amendment attempts to find a solution to the one real problem with these depositions -- underprepared or unprepared witnesses. I recognize that lawyers often criticize meet and confer requirements. In my experience, the problem is not with the need to meet and confer, but with the lack of real diligence and good faith on the part of some counsel to make a meaningful effort to resolve any disputes. I think it would be good to add, either in the rule or the Note, that there could be a written report to the court when the meet and confer process did not resolve all differences, so that the court could then become involved.

Patrick Fowler: Having a conference in advance about the topics is a good idea. Particularly if there are a lot of topics, I usually do that. Even if the rule does not require discussion also of the identity of the witness, it will probably be important that the conference be iterative.

Bradley Peterson (testimony and no. 138): Meeting and conferring has long been a best practice that I advocate and follow when trying to understand the scope of the notice. I have seen notices that list as many as 149 separate topics. It is not unusual in "ordinary" cases to see a list of 20 to 60 topics. This is too much. If the company must proceed in the face of such notices, it must at least have unfettered latitude in selecting the person to represent it in the deposition.

Bina Ghanaat: The solution to unprepared witnesses is to ensure early discussion of the topics to be covered. It should be included in Rule 26(f) and Rule 16.

Phillip Willman (DRI): The amendment is laudable in requiring good faith conferring about the topic list.

A.J. de Bartolomeo (testimony and written statement): The rule should say that the conference ought to include the “number of” matters for examination. What the parties should be focused on is the description of the matters. Focusing instead on how many there are is not helpful. And mentioning it in the rule could give undue importance to this issue. In any event, it would be easy to manipulate the number of topics, encouraging the use of broad rather than rifle-shot topics.

Francis McDonald: I am not concerned about the meet and confer requirement. We do that already, with regard to the topics.

Michael Denton: Proportionality is the way to deal with the 140 topic notice. Sometimes plaintiff attorneys don’t know what to list in advance. And given the number of corporate transitions and takeovers, sometimes involving new names, a conference would be a valuable way to clear the air.

Written comments

Kenneth Reilly (126): There should be transparency and fairness in practice under Rule 30(b)(6). Certain benefits may result from the proposal that the parties be required to confer in good faith before the deposition occurs. The portion of the draft amendment that calls for conferring about the number and description of the matters for examination is progressive and may be widely supported by corporate litigants. Requiring the noticing party to identify topics for examination in a meet and confer in advance of the deposition will greatly streamline the process for corporate litigants to identify the most qualified witness. It will also help thwart needless and costly litigation about the number of topics for examination.

American Tort Reform Assoc. (128): The idea of requiring the parties to meet and confer in “good faith” when a party seeks to depose a corporation is a good one. It has the potential to avoid unnecessary burdens and reduce the difficulty of identifying the right person to testify. But (as set forth below) we strongly disagree with the requirement that the identity of the person to testify.

Richard Broussard (143): To avoid confusion, the mandated conference should take place after the notice or subpoena is served. That does not prevent pre-notice conferences, but where conferences are mandated there should be an objective document about which to confer. In addition, a more specific directive should be provided about when to confer, such as a number of days prior to the production of the witness or a number of days after the notice is served. This will reduce dilatory tactics.

Jonathan Hoffman (168): I cannot recall an occasion in the last 30 years in which a party noticed a deposition without first calling, emailing, or sending a letter proposing depositions and possible dates. If there is to be a required conferral process, it should be the same for all forms of discovery. And if conferring is required, why not include the other parties, not only the noticed company and the noticing party?

Brooks Kushman (171): Our firm is the largest intellectual property law firm in the state of Michigan. It has procured over 15,000 patents over the last 35 years. We oppose this proposal because it will undermine widespread efforts to control litigation costs for defendants in patent cases. Patent litigation is extremely expensive. As a consequence, many district courts have patent local rules that defer discovery until plaintiff regarding specifics of its claim. Only with this information can the infringement claim be evaluated, and only with this information can

the defendant determine how to respond to a 30(b)(6) deposition. But the rules permit plaintiff to serve a 30(b)(6) deposition notice as soon as the 26(f) conference has concluded. As the Advisory Committee has already recognized, the 26(f) conference usually happens too early in the litigation for there to be an effective discussion of 30(b)(6) depositions. Upsetting the carefully-designed sequence of litigation under the local patent rules of many districts is undesirable.

Federal Civil Procedure Section Council of the Illinois State Bar (193): We think that any agreements reached through the conference should be disclosed to all other parties to the litigation. In addition, we think that a time limit be added to the rule change, somewhat as follows:

Before or promptly after the notice or subpoena is served, but no later than [X] days prior to the date set for the deposition, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters for examination.

Sam Cannon (195): The proposed requirement that the parties meet and confer regarding the matters for examination is a fine addition to the rule. Most experienced litigators already do this. My practice is to send a draft notice to opposing counsel and then discuss any modifications that need to be made. Once we have an agreement, we serve the notice formally. On the other hand, limiting the number of topics would be counterproductive. The conference process works best when the topics are as narrow as possible. Any limit on the number of topics will lead to broader topic descriptions.

Andrew Lucchetti (197): The conference requirement should call for early contact; otherwise attorneys may use it to delay matters. A numerical limitation on topics will prompt attorneys to use broader descriptions. The rule already requires reasonable particularity.

Dan Mordarski (198): I oppose any limitation on the number of topics. Rule 26 already directs that discovery be proportional. Given that, it would be inappropriate to place an arbitrary limit in Rule 30. In many cases, multiple 30(b)(6) depositions are required.

Mark Napier (201): This rule can be very useful, but a limit in the rule on the number of topics would be harmful.

John Hickey (202): I represent plaintiffs in personal injury cases. Placing a limit on the number of topics in the rule would be a bad idea. Corporate entities often complain that the designations are too broad and general. In order to avoid a broad and general designation of topics, and instead to be specific and narrow, one needs to list more topics.

Jonathan Feigenbaum (no. 204): When I notice a 30(b)(6) deposition, I confer with the recipient's attorney. We can work through issues that the recipient sometimes raises. I often take an early 30(b)(6) deposition about electronic storage systems. I find that organizations often proffer an underprepared deponent who can't answer my questions.

Mark Boyle (216): My firm tries to meet and confer about potential 30(b)(6) depositions during the parties' Rule 26(f) conference, or in an early Rule 16 pretrial conference. That allows for these issues to be considered early in the case and permits input and direction from the court. This approach allows the parties to establish appropriate expectations. But sometimes our adversaries are not willing to engage in this early planning. We often find that in those cases we encounter notices that include a burdensome number of topics or seek to duplicate topics already covered in depositions of individual witnesses. What we need is a clear mechanism for addressing faulty notices and obtaining a court ruling on them. This should be accompanied by

an express numerical limit on topics.

Jessica Ibert (226): In my practice, I typically meet and confer with opposing counsel when drafting a 30(b)(6) notice before it is finalized and served. This amendment would codify professional behavior that is already taking place, and perhaps make difficult cases easier to manage. I think it's best to have this conference before the notice is served.

Joseph Hunt (Department of Justice) (646): DOJ believes that the new mandatory meet and confer requirement is unnecessary given that Rule 26(c) and 37 already impose a meet and confer requirement before bringing a dispute concerning a Rule 30(b)(6) deposition to court. It is not apparent how imposing an additional meet and confer requirement would be beneficial. Moreover, there is no indication what are the consequences of failure to meet and confer. The proposed amendment would likely lead to additional collateral litigation.

Requiring a conference about the identity of
the person designated to testify

Washington, DC Hearing

Keith Altman: The identity of the witness is very important. It may be that this person has been deposed many times before. That's valuable information and it can also make the current deposition more efficient. It is very unusual for the company to designate somebody who independently has information about the topics listed, however.

Leslie Barnes (testimony and no. 187): When I am representing the company, I always disclose the identity of the witness. Sometimes the other side won't when I'm taking the deposition, however. That does not mean that I am keen on conferring about it; I don't get a say in who the other side designates. It can happen, however, that I will call up opposing counsel and ask why this witness was selected. For example, if the witness is mentioned in only 13 documents among the two million produced I am concerned.

Mark Behrens (International Association of Defense Counsel) (testimony and no. 174): Our members say that disclosing the identity of the person designated in advance will enable plaintiff attorneys to weaponize the rule. Disclosure of the identity of the person will not, however, solve alleged problems of poor preparation of witnesses. That is dependent on preparation, not on the identity of the witness. Although the Committee Note clarifies that the amendment is not meant to undercut the organization's right to choose its representative, even requiring conferral about the identity of the person is problematic. Instead of promoting cooperation, this proposal will lead to disagreements and increase litigation costs. Some plaintiff counsel will actually try to block the choice of witnesses known to be effective representatives of the organization, in hopes that weaker alternative witnesses will have to be used instead. And a substitute requirement that the organization identify the person selected in advance (without any requirement that it confer about that choice) is also problematic. That would be an improvement over the current proposed requirement of good faith conferring about the choice, for it would not suggest that the noticing party has a legitimate role in making that choice. But it would create its own set of problems. For one thing, some plaintiff counsel could "weaponize" the rule by conducting social media research to question the witness about his or her background and engage in personal attacks. Except for very basic background information, such inquiry is not appropriate in a 30(b)(6) deposition. "What comes next: the resume, CV, an attempt to learn the rationale as to why the person was selected?" There is good case law saying that the name of the witness is irrelevant because the organization is the actual witness. Requiring advance identification could shift the focus of the deposition to the individual rather than the organization. Moreover, if the organization has to switch witnesses for some reason, that switch could generate new discovery fights. "We appreciate that many defendants do identify their client's spokesperson in advance of a deposition. Our concern is with a rigid 'one size fits all' requirement. The decision to disclose the identity of the witness may depend on whether a particular plaintiffs' counsel has a reputation for cooperation or gamesmanship. The timing of any disclosure may vary for practical reasons."

Richard Benenson: Instructing the parties to confer about the identity of the witness will create more problems than it will solve. It is presently well understood that the noticing party has no say in the selection of the witness. Indeed, that's the only area regarding 30(b)(6) depositions in which I have never encountered disputes from the defense side. I have seen a barrage of personal questions result when the identity is disclosed in advance. Opposing counsel will work the database and find all documents mentioning the witness, whether or not they have anything to do with the listed topics.

Paul Bland (Public Justice) (testimony and no. 172): The duty to confer about the identity of the witness should stay in the rule. Under current practice, parties that receive a 30(b)(6) notice generally inform the noticing party about the identity of the witness. This common practice should be codified in the rule because it helps ensure the organization is choosing an appropriate witness. With this requirement, the parties can work together to ensure the organization provides a well-prepared witness.

Megan Cacace: Knowing in advance who the organization intends to designate to testify helps identify misunderstandings about what we are trying to learn. For example, suppose our objective is to do an early 30(b)(6) deposition to learn about the defendant's information systems. This is a way we can tailor our further discovery to avoid unnecessary burdens on the defendant. But for that purpose, we need to talk to a person familiar with the defendant's information systems. If we learn that the defendant intends instead to designate the regional manager of HR, we need to clarify what we're after. Making these things clear in the conference does not imply that we have some sort of "veto" over the organization's choice of a designee. But an important opportunity to avoid later complications is lost if we don't have a chance to clear things up before the deposition begins. In addition, when we know who will be testifying we can tailor our questioning to examples that bear on the experience of this person. Furthermore, advance notice serves efficiency interests when it turns out we will also want to do an individual deposition of the designated person; that enables us to "double up" and accomplish two objectives at once.

Sharon Caffrey (Duane Morris) (testimony and no. 203): This requirement should not be adopted. To the extent the amendment is intended to change the existing rule that the organization has the right to pick its representative, the amendment is grossly unfair. To the extent it leaves the organization's right intact, it makes no sense to require that the organization confer about something that is subject to its sole discretion. For example, in one recent product liability case plaintiffs sought to pierce the corporate veil. The corporation selected a corporate officer and in-house counsel to testify. Allowing plaintiff's counsel to press for a particular deponent, say a mid-level plant manager, would have made it impossible to prepare the witness adequately. Understanding the intricacies of the corporate structure and form of a multi-national corporation is outside the understanding of most lay witnesses. A recent deposition regarding a Rule 12(b)(2) personal jurisdiction motion illustrates the problems. We met with plaintiff's counsel before the deposition and he agreed not to ask about anything except the issues raised by our motion to dismiss. But as soon as the deposition started, the lawyer launched into unrelated topics. What we need is meaningful guidance about how to present these sorts of problems to the court. They can arise in ordinary depositions, but they are particularly difficult in 30(b)(6) depositions. In a regular deposition, the witness speaks from personal knowledge. In this sort of deposition, that's not enough. The problem is that, in cases like the recent personal jurisdiction deposition, we don't get an order implementing our agreement. And we can't readily instruct the witness not to answer questions that go beyond the topic list.

Mark Chalos (Tennessee Trial Lawyers Ass'n) (testimony and nos. 190 and 206): Disclosing the identity of the designated witness in advance of the deposition promotes efficiency and is consistent with the spirit of the rules. I have heard objections to the idea, but no good reason for refusing to identify the person in advance. With corporate websites, we can be much better aware of the role of this person in the organization and streamline the deposition. That could often save an hour of blind inductive questioning during a deposition. Conferring about the identity of the person is not as important as knowing who will appear in advance. Sometimes this can lead to a "hybrid" deposition, in which the person testifies in part on behalf of the corporation regarding the topics in the notice, and also testifies as an individual about matters within the witness's personal knowledge. It may be that this "individual" testimony will be admissible against the corporation over a hearsay objection if the subject matter is within the witness's scope of employment (see Fed. R. Evid. 801(d)(2)(D)), but that is not certain.

Susannah Chester-Schindler (testimony and no. 186): Knowing the identity of the witness is critical in conducting an efficient deposition. This is true in all types of cases. I usually get the identity of the witness as a result of the meet and confer about the 30(b)(6) deposition.

William Conroy: I do not identify the witness. I have had bad experiences and found that it leads to lots of mischief. I find that there is no clear line between testimony about the listed topics and other things that the witness may also know about. When the witness has already been deposed as a 30(b)(6) representative of the company, sometimes I will disclose that. Sometimes that can avoid the need for another deposition altogether. But I worry about other situations and a rule directive. It's not invariably a cause of mischief, but it can be.

Alex Dahl (Lawyers for Civil Justice) (testimony and no. 129): The radical mandate to confer about witness selection would upset well-settled law and spark contentious discovery battles for the courts to decide. The case law is now clear that the choice of the witness rests exclusively with the organization. Whether or not the Committee so intended, this amendment would inevitably be seen as an invitation to break with this well-settled law and require instead that there be a give-and-take exchange about who would testify. The Committee Note qualifies the entity's right with the qualifier "ultimately" and further invites this interpretation. The collateral litigation about this question will impose costs on the parties and the courts.

Philippa Ellis (testimony and no. 359): I oppose the provision about identity of the witness. The selection of the witness is difficult. The deposition can be an ordeal for the witness. I had one person actually quit the company to escape the obligation to testify as its 30(b)(6) witness. The number or identity of designated witnesses can also change up to the day of the deposition. The current rule works for addressing these challenges. What we need are 30 days' notice of the deposition so we can go about picking the person or persons in an orderly manner. Rather than providing that, these amendments call for prompt consultation with the other side, and thereby threaten to usurp the organization's right to pick its own representative. I'm not in favor of a requirement to identify the witness before the deposition. If I have to change the person, do we need to meet and confer again? Perhaps the rule should say "encourage" meeting and conferring rather than saying that the parties "must" confer.

John Guttman (testimony and no. 173): Meet and confer requirements are a good thing, particularly in regard to discovery. They frequently narrow and eliminate disputes. In this instance, however, a mandatory conference would have exactly the opposite effect. The party producing the witness is bound by that witness's testimony in a way that is not true of any other witness. "In every case, each party noticing a 30(b)(6) deposition would want the producing party to put forth witnesses who would offer testimony that helps the noticing party." Inevitably, this will lead to situations in which the noticing party will claim that the noticed party has not conferred in a meaningful way because it has not agreed to pick the person the noticing party wants.

Jill Jacobson (Husqvarna Prof. Prods, Inc.): Identifying the witness is superfluous. Providing that in advance leads to conflating the 30(b)(6) deposition with 30(b)(1) deposition issues. Providing the witness's identity in advance will be harmful because it will shift focus to the individual from the company. Even if there are multiple designees addressing different topics in the notice, the identity of each one and advance notice about which topics each will address is irrelevant.

Toyja Kelley (President, Defense Research Institute) (testimony and no. 132): Though the requirement to discuss the topics is desirable, the requirement to discuss the identity of the witness is not. This is a new and unwarranted duty for the organization. Imposing it in every case is unwise. Once the scope of the actual subjects is known (due to the conference) the duty

to designate the right person is usually easily met and seldom of concern. After all, the designation is about the organization's knowledge, not the personal knowledge of the person designated. Compelling the organization to confer in good faith about the identity implies that the noticing party has some legitimate role in the selection of that person, which contradicts the rule's clear recognition that this is the organization's call. If the noticing party wants testimony from a specific person, it can notice a deposition of that person, but that is not a 30(b)(6) organizational deposition. Under the current rule, I sometimes disclose the identity of the witness in advance. That is a strategic choice. But I have found that doing so too often changes the scope of the deposition, which goes beyond the topic list for which we were preparing the witness. What we need is a comprehensive framework for resolving issues in regard to these depositions.

Jessica Kennedy (McDonald Toole Wiggins) (testimony and no. 133): It is settled law that the organization has sole responsibility for selecting the witness who will testify on its behalf. Shifting to a "shared responsibility" regime removes the clarity of established law and will expand collateral litigation. The Committee Note says that making this change will facilitate "identifying the right person to testify," implying that this decision no longer rests with entirely with the organization.

Sterling Kidd: I oppose a requirement that the company identify the witness in advance. Requiring the company to confer about who will speak for it is not just. The fact that the Committee Note says the company has the right to chose whoever it wants will not prevent the use of this requirement as a way of giving the noticing party a say in that choice. Practitioners do not read the Committee Notes, so they won't make a difference. Even telling the other side who will testify in advance implies that the other side gets a say in who that will be. Then the other side can made a motion for relief from the court to require the company to pick the person the noticing party wants designated. Moreover, with a small company it may be difficult or impossible to make a call until right before the deposition. Even two days before the deposition it still may be uncertain who will testify. My biggest concern is that plaintiff's counsel will do research on the individual and turn this into an individual deposition.

Mark Kozieradski (testimony and no. 192): I support a requirement that the organization disclose the identity of each person designated to testify. Knowing when an institution will produce multiple designees improves the organization of the questioning. Knowing who will testify about which topics enables the examiner to prepare and organize the documents and categories of questions into an efficient outline.

Craig Leslie: When I was a younger lawyer, I would identify the witness in advance. But I have seen a parade of horrors, such as inquiry into the witness's personal finances. In mass torts, when the witness has previously testified as a 30(b)(6) witness, I may share the transcript of the prior testimony with plaintiff counsel.

Chad Lieberman (testimony and no. 178): I find the identity of the corporate witness to be irrelevant because the witness is the company. But if the conference requirement means give and take, that implicitly chips away at the right of the organization to pick the witness.

Altom Maglio (testimony and no. 183): I represent individuals who often sue corporations. A recurrent problem for some is to show that the person "speaking for" the corporation can bind the corporation. "The only time when it is unequivocal that an employee is speaking on behalf of the corporation is with a 30(b)(6) deposition. Therefore, 30(b)(6) depositions are extremely important to obtaining justice in any litigation involving corporations." One of the most common problems I have encountered is that the designated person cannot or won't speak for the corporation, even on noticed topics. "Codifying in the rule the standard practice of identifying the designated witness in advance helps alert the noticing party when a

problematic representative selection is made and makes the meet and confer process more fruitful.”

Brad Marsh: This amendment will inject uncertainty about whether the organization has a free choice who is to represent it at the deposition. Presently the identity of the witness is never a matter of dispute, but this amendment will make it a new focus of dispute. Choosing the right person is a tough job for the defendant, and giving the plaintiff a say in that choice simply makes it tougher without producing good results. I do usually provide the name of the witness two or three days before the deposition. But what if the witness gets ill? Then changing the witness will produce more problems. Note language recognizing that the organization can change designees when necessary due to such developments will not solve the problems.

Tobias Milrood (AAJ) (testimony and no. 185): A fair and balanced rule must include attention to the identity of the witness who will be testifying. At least, that should provide for advance notice on the identity of the witness. This will ensure that the witness is properly prepared to testify on the designated topics. Retaining a provision regarding the identity of the witness is essential to avoid unfair treatment of plaintiffs, as compared with defendants. Without this provision, the amendment creates new burdens for plaintiffs while allowing corporations to further control litigation and the pretrial discovery process.

Michael Neff (testimony and no. 184): As a plaintiff lawyer, I see no reason to add a meeting regarding the identity of the witnesses. Instead, just require the defendant to identify the witnesses at least two weeks before the deposition. Requiring disclosure of the identity of the witnesses is important to give time for the plaintiff’s lawyer to do adequate preparation. I know that some defense counsel object this will lead to investigation of social media information about the witness. So what? The defense always does that with regard to the plaintiff. I also noted that Bradley Peterson, a witness in the Phoenix hearing, said that in selecting a witness for his corporate clients, he would focus on the witness’s qualifications, personal knowledge and experience, and prior experience testifying. Well, that’s important to me also in getting ready for the deposition. I should be able to do my own homework.

Michael Nelson (testimony and no. 164): Requiring advance notice by the corporation of its designee or conferring about that will not deal with the problems under the rule or avoid disputes. Instead, it will add another layer of potential disputes. If the witness is not adequately prepared, the organization will face sanctions, and it will also must live with the answers given by an unprepared witness. Usually the identity is provided, but we don’t need a rule for that. And often you think you have the right person, but then further preparation shows that somebody else should be designated.

Michael Neff (testimony and no. 184): From the plaintiff’s perspective, knowing the identity of the witness in advance is critical. It allows us to save time. As a plaintiff’s lawyer working on a contingency, that’s very important to me. We should have ten days to two weeks. Then we can check out individual documents in our database. We can use that to impeach the witness.

Mary Novachek (Bowman and Brooke) (testimony and no. 169): Requiring the parties to confer about the identity of the witness is contrary to settled law and would create confusion and burden, giving rise to new litigation issues for the courts to resolve. This amendment would work a sea change in the current law on these depositions. Noticing parties will claim that the amendment means that they have a role to play in selection of the witness. Mandating discursion about why a certain person is designated to represent the corporation simply adds to the already heavy burdens of preparing for these depositions. Without a doubt, noticing parties would use the amended rule to increase pressure on corporations to extract settlements. The current Committee Note language saying that the organization “ultimately” has the right to choose the

witness does not solve the problem. The word “ultimately” indicates that the requesting party will have some level of involvement in the choice. These problems are exacerbated by the requirement that the conference occur “promptly.” Often in the high stakes litigation we handle the 30(b)(6) notices are sent out months in advance of the eventual deposition. From the corporation’s standpoint, preparation of the initially selected witness may indicate that a different person would be a better choice. Does that require a new round of conferring? Even advance notice of the identity can raise problems. It’s important to appreciate the human toll that 30(b)(6) can inflict on the designated person. For example, in a case involving the location of the fuel tank in a vehicle, the witness was an engineer involved in the design of the vehicle. The engineer had been deposed again and again. The depositions became a war of endurance. Plaintiff attorneys repeatedly abused the witness. I’ve seen designated witnesses have heart attacks, leave the company to avoid having to testify, etc. This is stark evidence of this human toll. It’s particularly difficult in the 30(b)(6) context (compared to a 30(b)(1) deposition) because the witness can’t say “I don’t know.” It’s true that Rule 30 says I can instruct the witness not to answer in order to permit me to apply to the court for relief, but that is not sufficient protection against this abuse.

Terri O’Neill (National Employment Lawyers Assoc.) (testimony and no. 144): Requiring advance notice of the identity of the witness makes sense. It is not a “radical mandate,” as suggested by LCJ. Making the practice of giving notice mandatory will eliminate gamesmanship in situations where parties refuse to identify witnesses, hindering counsel’s ability to adequately prepare and making the deposition longer and more costly. Of course, the company will retain control over the witnesses provided. But advance discussion should help avoid later disputes.

Bruce Parker (testimony and no. 145): The selection of the witness is one area of practice that does not routinely cause disputes. It has been abundantly clear that the corporation has the sole right to select the witness. Indeed, the draft Committee Note acknowledges as much. Is the idea that the corporation does not really have sole authority to make this choice? As attorney for the company, I regard my choice to be a matter of work product, and my reasons are also. How can I discuss that with the other side “in good faith” without permitting the invasion of the attorney-client privilege or work product? Am I required to provide that information to the other side? Consider the following scenarios:

Scenario #1: Noticing counsel demands to know who was considered as designees. The rationale offered for this demand is that meaningful discussion can’t occur without this information. Of course, it’s true that the company’s lawyer has ordinarily developed a list of possible witnesses, and then given careful consideration to each of them. This is like the process that counsel goes through in deciding which expert witness to use. That is core work product. Should counsel nonetheless be required to answer questions about how the selection was made? The same sort of problem arises if noticing counsel asks why others under consideration were not selected to be the designated witness. If requesting party files a motion seeking to compel answers to these questions, the company’s lawyer may find himself or herself in front of a judge asking why one person was selected rather than another. This is not dependent on a showing that the person counsel designated is unprepared to answer questions on the designated topics.

Scenario #2: Assume that the other side has already taken the depositions of several company personnel involved in the matters at issue. In some depositions, the witnesses have demonstrated poor witness skills. So the company’s lawyer would not want to choose them for the 30(b)(6) deposition. But for much the same reason, noticing counsel will want these people acting as the company’s representative in the 30(b)(6) deposition. So noticing counsel will argue that this choice is improper,

pointing to the individual depositions to show that these witnesses are best qualified to testify and try to persuade the court to insist on their acting as the company's spokesperson at the 30(b)(6) deposition.

Disclosure of the identity of the witness is a different thing. I do a lot of work in MDL litigation, and often that sort of disclosure is required by the MDL judge. I will share the identity of the person if I know that opposing counsel is professional. But too often that will lead to a personal attack on the designee. Focus on the Committee Note to the 2010 amendments regarding communications between counsel and the retained expert witness; that shows the importance of guarding against intrusion into that sort of communication.

Virginia Bondurant Price: Practices vary on disclosing the identity of the witness in advance, and which topics each witness will address if there's more than one witness. A problem is that when there is a need to substitute a different person the identification issue can complicate things. If the notice requirement applied shortly before the deposition, say three days, that might be acceptable, particularly if there were also a recognition that sometimes things come up that require substitution of a different witness.

Thomas Regan (testimony and no. 199): Imposing this requirement is a radical mandate that can only lead to disagreement and gamesmanship. If the selection of the witness is, in the end, entirely up to defense counsel, what purpose is there in requiring that it be the subject of conference? That requirement will be leveraged by the noticing party. Even if there is an agreement due to the conference about the person to be designated, that will not prevent a later dispute about whether the selected person was adequately prepared for the deposition. Even a requirement that the witness be identified after unilateral choice by the corporation would create risks. In general, research into the background of a witness could validly be used to reveal bias. But in a 30(b)(6) deposition the person designated is there to answer questions on behalf of the company, so the particular witness selected is really not important if the witness is adequately prepared. Some suggest that the bad actors are outliers, but that is not my experience. Identifying the witness in advance does nothing more than trigger an inquiry into the person's past, such as the DWI arrest when he was a teenager, or where he lives. As a result, I will provide the identity only with lawyers I know to be of a high caliber. When there will be multiple witnesses, I've told the opposing lawyer which witness will address which topic, but not provided the personal identity of the various witnesses.

Jonathan Redgrave: Requiring a conference about the identity of the witness is the wrong way to go. It will not deal with whether the witness is adequately prepared. Whether it's a good idea to provide the witness's identity in advance is a mixed bag. Sometimes case management orders so require. Disclosure for efficiency is a good thing.

Terri Reiskin (Dykema Gossett) (testimony and no. 196): The organization's right to pick the witness lies at the heart of this rule. Until now, this issue has not produced many disputes, while other issues have been litigated thousands of times. This amendment would introduce a new focus for dispute. The amendment would give the noticing party an unwarranted advantage.

Ira Rheingold (National Assoc. of Consumer Advocates) (testimony and no. 149): The identification requirement will help to reduce the frequency of bandying. By requiring open and frank discussion about the witness or witnesses the organization plans to designate, the proposed amendment undoubtedly will help ensure that the representatives ultimately designated will be "the right person to testify."

Sherry Rozell: The requirement to confer about the identity of the witness will diminish the right of the company to pick its represent. The identity of the witness is completely within

the company's purview. I sometimes do disclose, perhaps half the time. It really depends on the case. In my most recent 30(b)(6) deposition I did disclose a couple of days before. But we may not know who the witness will be until shortly before the deposition occurs. Making this the subject of a meet and confer discussion will produce disputes. I often have extensive exchanges with the plaintiff's counsel about the topics, but the identity of the witness has never come up at that point. We can't decide who we should designate until we are clear on the topics.

Greg Schuck: I often represent small companies. Requiring them to identify the witness in advance will be a burden. Often we don't know who it will be until shortly before the deposition. I've seen bad results from advance identification. Divorce records, pictures of the witness's house -- all sorts of things can come up. Telling the other side how many people will be showing up does not give me pause, however.

Brittany Schultz (Ford Motor Co.) (testimony and no. 151): This new discovery obligation should not be enacted. It will foster more disagreements between the parties. "[T]he propounding party often knows exactly whom they want to answer questions on behalf of the organization -- the weak link who cannot withstand the pressure of interrogation. The propounding party will fight for this deponent, citing prior testimony demonstrating subject matter knowledge and direct personal involvement with the matters at issue. For the noticing party, selection of the Rule 30(b)(6) witness is often not a search for information, but instead a search for a powerful sound bite that can impact the opening statement." The entire idea of requiring discussion of the identity of the witness should be rejected. A company should not be required to suffer interference from its litigation opponent in determining who will speak for it. Ford has already encountered intransigence on this subject. For example, in *Ash v. Ford Motor Co.*, 2008 WL 1745545 (N.D. Miss., April 11, 2008), plaintiff counsel unsuccessfully attempted to force Ford to designate the witness plaintiff counsel wanted instead of the one Ford selected. "In another recent matter, the requesting party's counsel outright refused to depose the individual being offered as Ford's 30(b)(6) witness without any meaningful explanations or rationale."

Patrick Seyferth (testimony and no. 182): This amendment is a solution in search of a problem. The problem if the unprepared witness is very rare. Implementing this meet and confer requirement will unfairly burden the corporation's practical ability to select its more capable witness. Doing that is no simple task, for it involves finding a person who can be both educated about the topics in issue and able to explain the company's position about those topics. The amendment's requirement that we discuss the selection with opposing counsel in effect gives opposing counsel as seat at the table, and that upsets the careful balance reflected in the current rule. The requirement in the amendment will lead to demands by noticing parties that the company explain how it decided on a given witness, and also that it hurry that choice. As a practical matter, these demands will undercut the company's long-established right to select the person it wants to speak for it. Actually, that selection has not in the past led to conflict. And a meet and confer requirement is usually limited to situations when there is an existing dispute. So this invites a dispute on a topic that has not previously produced disputes. Certainly it would be unfair for the company to be bound by the testimony of a person selected by the opposing party.

Donald Slavik (testimony and no. 146): Including the identity of the witness as a subject for the conference is a good idea. Requiring identification in advance permits me to determine whether this person is likely to have at least some first-hand knowledge of the subject matter. I can also find out whether the proposed witnesses have testified in the past in a similar matter and, if so, to attempt to collect the transcripts of that testimony. By reading those transcripts, I can better prepare to conduct the examination in the current case. I have not seen the sorts of personal attacks on the witness that others have described.

Michael Slack (testimony and no. 170): Usually we get the names of the witnesses about seven days before the deposition. Sometimes it turns out that we also want an individual

deposition of that person, and we try to fold that into the deposition for efficiency's sake.

Andrew Trask (testimony and no. 176): Ordinarily we do not identify the witness in advance. If there is a likelihood that the person will also be deposed as an individual, we often do disclose.

Christine Webber: Knowing who will be the witness saves time. For example, in my employment cases on the plaintiff side, there may be many, many different documents with the same basic content. Using one that this witness sent or received can speed up the deposition, but to do that I need to know in advance. I am told who the witness will be in 90% of my cases.

Julie Yap (testimony and no. 188): I oppose any requirement to confer about the identification of the witness. I do usually provide the name of the witness. But in one case opposing counsel spent hours on questions that went beyond the notice. It was difficult to instruct the witness not to answer. Despite this experience, I will still provide the identity in advance for efficiency.

Hassan Zavareei (testimony and no. 191): Requiring the disclosure of the identity of the witness or witnesses before the deposition is a good change. With this information, the noticing party may be able to simply confirm the witness's background, experience, and position before quickly moving on to more substantive topics. Relatedly, this information may enable the noticing party to limit its inquiry to the topics and documents that are most essential. This requirement would also blunt some tactics some corporations attempt. For one thing, the noticing party needs to know if multiple witnesses are designated so that it can direct its questions toward the person designated for specific topics. Corporations may often designate witnesses that lack knowledge of the relevant subject matter in order to cause delay and put financial pressure on under-resourced plaintiffs. The failure to disclose in advance leads to longer and less effective depositions. The opponents of this provision wrongly argue that noticing parties will use the amendment to block witnesses they perceive as particularly effective corporate representatives. That's not so; the amendment recognizes that the company has the right to choose its own representative. If the word "ultimately" in the Committee Note causes problems in this regard, we suggest that it be removed.

Terrence Zic (testimony and no. 147): Adding the requirement that the parties confer about the identity of the witness will increase the volume of discovery disputes and use up valuable judicial resources. These results will occur because noticing parties will claim that they have the right to request the witnesses they want, and companies will be unable to make sensible and careful choices on the spot during the conference. To say that the choice of the witness is "ultimately" the company's choice suggests that it is also a fit matter for the noticing party to influence. It would be inherently unfair to permit the opposing party to pick the person who officially speaks for the company, as a 30(b)(6) witness does. Moreover, given that this conference is simultaneously addressing the topics to be covered, the company will be required in essence to guess who would be a suitable witness on those topics. Some courts may construe the amendment as requiring that the company disclose the identity early in the conference, when these specifics remain uncertain. Even a requirement to identify the witness in advance will cause problems. I've only been asked to do that a couple of times. I surely can't choose a witness until I am clear on the topics to be addressed. What if the witness needs to be changed? That will produce additional disputes. And nobody can legitimately complain that my witnesses are not adequately prepared.

Phoenix Hearing

John Griffin (testimony and written comments): The rule would be improved by directing that the organization identify the person who will testify before the day of the

deposition. The Texas experience is informative. Rather than requiring a conference about the identity of the person or persons designated, Tex. Rule 119.2(b)(1) says that the organization must designate the witness a reasonable time before the deposition. In Texas, “designate” is interpreted as meaning that the organization must provide the noticing party with the name and title of the person who will testify. This Texas rule has worked all right in practice, so much so that there is only one Texas case even discussing the operation of the rule.

Sandra Ezell: The identity of the witness is irrelevant and should not be a mandated subject of discussion. Even if the designated person was copied on a document, that is not what the witness is there for. The organization does not have to take account of the job duties of the person designated in selecting the person to designate. Indeed, in representing corporate defendants I often find that there is nobody who knows about the topics the other side wants to explore. We never provide the name of the person designated in advance of the deposition. We don’t refuse to reveal the name, but nobody has ever asked for the identity of the person who will testify.

John Sutherland: This proposal will turn existing case law on its head. The case law is clear that the organization gets to choose the person who will testify. The requesting party has no role in making that choice. The party doing discovery can take the deposition of any person it wants under Rule 30(b)(1), so this amendment is confusing and cumulative of the existing rule. In my practice the identity of the person who will testify is not disclosed in advance. The identity of the witness is irrelevant. It won’t affect the documents to be used in the deposition. The identity of the person should not affect the preparation by the requesting party. Often I don’t know, even seven days before the deposition, who I will use. I may learn that I need to substitute somebody else, or add another person. Rule 30(b)(1) exists to permit the requesting party to follow up with any specific individuals it wants to depose.

Nieves Bolanos (NELA): Obtaining advance notice of the identity of the witness is a practical necessity. In our experience, responsible counsel provide this information as a matter of course. Making this practice mandatory would eliminate wasteful gamesmanship. Of course, the organization retains ultimate control over the choice of the witness, but advance discussion will avoid later disputes. Knowing who will testify in advance also assists counsel in assessing what personal knowledge the witness will have. If a 30(b)(6) witness is also a regular witness, the parties can discuss how to structure the examination to ensure that the witness will not be required to attend multiple depositions. We have been able to reach agreements in the past that avoid such duplicative depositions. But this amendment does not give the plaintiff control over who the defendant designates to testify; that is up to the defendant. If the company retracts its initial designation, we would not follow up with an individual notice of that person. And we do not think that the organization is obliged to disclose its tactical considerations in selecting the person it chooses.

Mark Kenney: Requiring the advance identification of witnesses is an existential question for organizational litigants. I do not provide advance notice of who I will present. Making us confer about that means that we have to have a robust discussion. I have a variety of important considerations in mind when I am choosing my witnesses. I should not have to disclose those to the other side. That invades my opinion work product at a very basic level. In addition, the other side will use the information to comb through social media and other sources to bring up during the deposition. This should be avoided. Just as a general matter, a 30(b)(6) deposition should not focus on the individual. It’s about the organization itself. True, the Note says the organization retains the power to choose, but making it a mandatory subject of “good faith” discussion undercuts the purpose of this rule. The concern with unprepared witnesses does not provide a reason for making this change to the rule. In any event, that is a de minimis problem. Judges come down with a hammer when the corporate witness is not prepared.

John Sundahl (Defense Lawyers Assoc. of Wyoming): This is a radical departure from established law. The rule on its face says that the organization is to designate the person to testify. “The need to preserve this absolute right is fundamental to jurisprudence because the person selected as the witness binds the organization. To allow the opponent to have input and dispute the name of the person(s) who will speak for the organization compromises the due process right of the organization to be heard with its own witnesses in a meaningful manner.” It will be taken as mandating a give-and-take with each party having the right to reject the choice of the other side. The draft Committee Note appears to encourage that result by asserting that the parties’ exchanges will facilitate “identifying the right person to testify.” Opening the door to negotiation about which witness is designated will invite tactical abuse. Aggressive lawyers will use the rule to block or challenge organizational witnesses perceived to be the most experienced, articulate and effective representatives for the organization. Does this amendment require the organization to designate the “most knowledgeable” person? It would help if the Committee Note were iron clad on the right of the organization to make its own choice. Sometimes the parties do talk about these matters already, but that shows that the rule is working fine as written now, and the proposed change could produce harmful consequences. Good lawyers are doing what they should now, and bad lawyers will abuse the additional provisions.

Lee Mickus (testimony and no. 141): This provision offers no meaningful benefit and will encourage more disputes. It imposes a new discovery obligation that has never before been recognized, and will create the opportunity for the litigants to disagree and make motions, in turn requiring that the court get involved. It may lead in some instances to a noticing party insisting that the rule now gives it a right to insist on designation of a particular person. It also can produce confusion about the capacity in which the witness is speaking because the person selected by the noticing party also has personal information. Even mandating only that the identity be disclosed in advance is not desirable because the noticing party is likely to use that information to its advantage. For example, it may prepare to ambush the witness who is prepared to address issues on the topics list, but instead faces questions about his or her personal knowledge on other topics instead. The organization cannot readily stop such questioning because some courts permit questioning on other relevant matters when the witness has such knowledge. It is highly unusual in my practice for the identity of the person to be disclosed before the deposition. On those occasion when that has occurred, the deposition has become confused. The noticing party will exploit social media and transcripts of prior testimony by the witness. So although disclosure does sometimes happen, that does not mean that the noticing party finds it more difficult to complain that the witness is not adequately prepared. Revealing the identity of the witness in advance will not meaningfully help with the problem of witness preparation. The way to do that is to introduce an objection procedure like the one in Rule 45 so that the overbroad topic lists can be narrowed. But this conference procedure would create new conflicts or generate more motions. Usually counsel can work things out when there are objections. The best idea is to work these topics into Rules 26(f) and 16(b).

Bradley Smith: Experience on the defense side shows that a requirement to discuss, or even only to reveal, the identity of the witness is a bad idea. One example is a case in which, two days before the deposition, he found that the witness was not appropriate. He had to get another person to drive to San Francisco to testify. He wanted to make sure that the questions in the deposition were answered. The identity of the witness is not important to that. He can count on the fingers of one hand the number of cases in which the plaintiff has cared who would show up. And where it is important, it may be because the plaintiff can misuse this information. In another case, shortly before the deposition he found that the chief engineer of his client would not be the right person to present. This new obligation would enable the other side to argue “He pulled the chief engineer the day before the deposition.” In another case, he provided the name of the witness, and plaintiff counsel said “I won’t take that deposition. I know what he’ll say.”

William Rossbach (testimony and written statement): I strongly urge the Committee to

maintain the requirement that the identity of the witness be a subject of conference. Identification of the witness or witnesses in advance facilitates the depositions and greatly reduces the time spent taking the deposition. Opponents of this requirement provide no good, principled reason why disclosing the name of the witness should not be required. That disclosure eliminates time wasted during the deposition that could be used instead to get at the substance of the matters at issue. It also helps assure that the witness designated is appropriate and qualified to testify on the particular matters. I can't recall a single 30(b)(6) deposition in which I've been involved in which the identity of the witness was unknown to the noticing party until the deposition began. I do not think this will blur the line between a 30(b)(1) deposition and a 30(b)(6) deposition. To the extent one can inquire into both organizational knowledge and the personal knowledge of the witness, that makes the deposition more efficient. When you are preparing for a deposition, the identity of the person testifying is hardly irrelevant. There may be hundreds of thousands of documents, and you can use that name to focus on the ones this person is familiar with.

Patrick Fowler: Adopting a requirement to discuss the identity of the witness will have unintended and undesirable consequences. We will end up with hybrid 30(b)(6)/30(b)(1) depositions. I will have to object repeatedly that questions are outside the scope of the notice and that any answer is not on behalf of the organization. In my experience, it is unusual for the plaintiff lawyer to ask the identity of the person designated in advance. But when it has come up, it has proved problematical in some cases. It is particularly difficult if there are 95 topics. On the other hand, with opposing counsel I've worked with before it has proved helpful to identify the witness in advance.

Gary Culbreath: Requiring discussion of the identity of the witness is a solution in search of a problem. For example, in a recent case involving a subpoena on a nonparty, the noticing attorney said "You're going to have Mr. Smith testify, aren't you?" Do I have to answer that? To do so might make me reveal my attorney work product. Why do I have to reveal why I do or do not want to designate Mr. Smith?

Michael Carey: Meeting and conferring in advance of the deposition may be the right idea, but including the identity of the witness among the mandatory subjects is flawed. Compare the expert designation requirements of Rule 26(a)(2). That is important because this is the person who will be testifying at trial, but there certainly is no requirement to discuss the choice of an expert with the other side. In the 30(b)(6) setting, we are not talking about somebody will be testifying before the jury. At a minimum, this will be read as requiring advance identification of the witness. And the preliminary draft even suggests that this should be discussed before the formal topic list is served. This will add costs in every case.

Bradley Peterson (testimony and no. 138): Adding the identity of the witness to the list of required topics is a mistake. That must be in the sole province of the company. In making the choice of a representative or representatives, the company and its attorney must consider a variety of factors. In part, that choice is affected by the hearsay provisions of Fed. R. Evid. 801 and 802. If the testimony is of a party, its officer, director, or managing agent, it is admissible under Rule 32. This means that the selection of the representative is a delicate task that must be the sole preserve of the company. To allow the noticing party to have any role in the choice of that person conflicts with the rule. That person will be the "face of the company." The company will have to live with that "face" in this litigation and, potentially, in future litigations. As a consequence, as the company's lawyer I must consider a wide variety of concerns, such as the witness's personal qualifications and knowledge of the matters in dispute, the witness's prior experience testifying, the witness's ability to be educated about topics beyond his or her personal knowledge, whether designating this person will be harmful to the company because the witness is needed to do other work due to his or her responsibilities at the company. Consider a situation in which the noticing party urges that a specific person be the designee. A requirement such as

the one in the draft amendment could raise many issues. Here are some illustrations:

- Should the company have to publicly disclose its concerns about having this individual serve as its representative?
- Will sharing information avoid having this employee deposed or simply invite more notices of deposition?
- If the noticing party or court chooses the representative, but the witness fails to give knowledgeable testimony despite the company's best efforts to prepare the witness, will that deposition nevertheless be admissible against the company?
- Will the company be sanctioned for not giving knowledgeable answers about the proper topics when the noticing party chose the witness?

The range of discovery disputes that could arise under this proposed amendment surely includes myriad other things, but even this list suggests the shoals in prospect.

Jennie Anderson (testimony and no. 148): It is efficient for the parties to be transparent about the witness or witnesses, and which topics will be addressed by which witness if there is more than one witness. In one case involving an international price fixing claim, candid communications with the company's counsel about who would testify about which topics vastly improved the process. Knowing the identity of the witnesses allowed for better preparation and planning. I was able to cover each witness's background and experience quickly and confirm the topics for inquiry with this witness, permitting me to move into those topics efficiently. Advance disclosure can also make scheduling easier, sometimes permitting scheduling more than one witness on a day. I always ask to be told in advance who will be testifying, and don't think opposing counsel has ever refused. I do expect that I can cross examine the witness about his or her personal knowledge even if that testimony is not in a representative capacity. I see no real downside to advance identification and discussion during the meet and confer session.

Bina Ghanaat: The "problem" with identifying the witness does not exist. The identity of the specific person to testify is irrelevant. I handle asbestos defense. If the designated person has previously testified on the topics scheduled for this deposition, I will offer the prior transcript as a substitute for new testimony in this case.

Keith McDaniel: One time I did identify the witness in advance. The result was that we wasted time on social media activities of this person. I have since been asked again. But I have refused to reveal the identity until the topics are worked out.

Phillip Willman (DRI): I oppose including the identity of the witness as a topic. For example, suppose I have to substitute somebody else two days before the deposition. How does advance notice then help?

A.J. de Bartolomeo (testimony and written statement): Conferring in good faith about the identity of the witness will facilitate efficiency and economy. It will help avoid disputes that too often arise when the witness cannot answer questions on the listed topics. I think it would be helpful for the rule or the Note to include the idea that the discussion of the identity includes the witness's qualifications to speak competently on the topics for testimony. Without this additional information, the discussion may be meaningless. At the same time, it may be best to remove the word "ultimate" from the Committee Note acknowledgement that the organization chooses the witness. Opponents argue that the amendment would undercut the organization's right to choose its representative. The including of "ultimately" in the Note may give some color to that argument. In fact, the proposed amendment does not do what the opponents say it will do. Taking out that word could make that clearer. I do not want to inject myself into the company's selection of the witness. But if it turns out that the person selected is a person I would want to depose individually as well, that can aid efficiency. If that happens, I can prepare differently.

Amir Nassihi: In California there is an objective standard (person most qualified) to determine who should testify for the company. 30(b)(6) does not prescribe such a standard. The California procedure does not lead to disputatious discussion of who will be designated, but the current federal proposal will create problems. If the person originally designated is withdrawn, that will immediately bring forth a notice for the individual deposition of that person. This change will inject a whole new source of conflict. In fact, I often do notify the other side who will be testifying. But there are at least two opposing counsel with whom I would not disclose based on prior experience with them. I also urge that the Committee look at the standing order of Judge Donato (N.D. Cal.) as a model.

Donald Myles: I will often reveal the identity of the witness. In smaller cases, we will identify the witness shortly before the deposition. In those cases, the plaintiff and defense bar cooperate. But making this mandatory will make this a game for a minority of lawyers.

Francis McDonald: Requiring discussion of the identity of the witness is more controversial than discussion of the topics. A lot of times I don't even get asked about this. Opposing counsel may not know about how 30(b)(6) works. If providing the identity were required by the rule, it would be problematical unless it were only 24 to 48 hours of notice. Otherwise, there would be a potential for misuse.

Michael Denton: I think it's important for me to know the identity of the witness. Often I can combine an individual deposition with the organizational one. The goal is to keep it to one trip for the deposition instead of two. "If they want to dig up information about Jim Bob, go ahead."

Written Comments

International Assoc. of Defense Counsel (125): We strongly urge the Standing Committee not to publish the preliminary draft amendment that the Advisory Committee approved. The requirement that the parties discuss the identity of the witness is highly problematic. It would direct an unprecedented and unfair role for the noticing party in selecting the organization's witness. If the identity of the witness must be identified, moreover, noticing counsel will use the information to gain a litigation advantage. For example, if the person selected has a reputation for connecting well with juries, the noticing counsel may seek to replace that person with a less effective deponent. In addition, the organization may be hampered in its right to replace the initially selected witness. All of this will lead to disputes and generate motion practice. Requiring that the matter be resolved at a meet and confer session would also place an unfair burden on the organization, which would not be able to fully vet the selection. This possibility results in part from the amendment's statement that the conference should "continue as necessary." A perceived delay in designating a witness might be characterized as violating the "good faith" requirement of the amendment.

Kenneth Reilly (126): Though the discussion of the topics may yield benefits, the addition of a requirement that the organization discuss the identity of the witness invites mischief and improperly imposes an affirmative new discovery obligation on corporate litigants. Should the parties' efforts at this newly required obligation fail because the noticing party disagrees with the corporate litigant's choice of a witness, motion practice will surely ensue. "I have litigated against counsel who will use this opportunity to litigate over witness choice and demand that the court give some sort of credence to the noticing party's position on who is the appropriate witness. Some will even argue that the amendment means that the noticing party is entitled to an equal voice in the choice. But established case law under the current rule shows that the organization has an absolute right to select its representative." Moreover, the timing is impossible because the amendment says that the witness must be identified during the conference. But the corporation must have a clear fix on the matters to be covered before

selecting the person to testify. That cannot happen simultaneously.

Victor Schwartz (127): I urge the Standing Committee not to publish the 30(b)(6) amendment proposal forwarded by the Advisory Committee. The requirement to discuss the identity of the witness will invite unfair and unprecedented participation by noticing counsel in the organization's selection of the witness that serves as its representative. Noticing counsel will likely contend that the amendment affords them some measure of input as to which person should be designated. If this argument were accepted by courts, it would undermine the organization's discretion to pick its own representative. Noticing counsel will be incentivized to use this opportunity to obtain a litigation advantage.

American Tort Reform Assoc. (128): We urge the Standing Committee not to publish the amendment proposal that the organization be required to confer in good faith about the identity of the witness. The requirement to discuss the identity of the witness creates a serious potential problem. It could be interpreted to require the corporation to identify each person who will testify on each matter during the conference when the specifics about the matters are first discussed. Making an "on the spot" decision about that issue is asking too much. The selection of the witness must wait until the topics for examination are fully understood. Insisting that this decision be made on the spot would deprive the corporation of its long-recognized right to make the choice in a deliberate manner. "[T]he experience of ATRA members is that some plaintiffs' counsel will work to urge courts to interpret the amended Rule 30(b)(6) language as requiring the organization to consider the plaintiff's proffered deponent within the organization as part of the parties' 'good faith' requirement."

Sean Domnick (139): Far too often, the corporation designates someone who is not knowledgeable about the topics to be discussed and has done little or no work to gain that knowledge. Thus, the timely disclosure of the identity of the designated witness will help the parties ensure that the right person with the right knowledge is presented. It allows for better preparation and results in a better use of time for all involved.

Michael Rosman (140): There is no rule that requires the responding party to disclose the identity of the witness or witnesses. So what precisely constitutes "good faith conferral" about this topic? Suppose the organization's attorney says "I have three people in mind for the depositions, but my choice will depend on their schedules that week." Is that a "good faith" conference? If not, why not? And if so, what good has this conference obligation done? The rule should either explicitly require the entity to disclose the person or skip the obligation to confer about the identity of the witness.

Richard Broussard (143): Frequently corporate defendants will designate witnesses who have little or no knowledge concerning the matter set out in the notice. Occasionally that designated witness will be an attorney specifically retained for the purpose of responding knowledgeable to the notice. This even occurs when there are corporate employees directly involved in handling the subject matters that are noticed. Requiring a conference concerning the identity of witnesses will allow deposing attorneys to call to the attention of the court obstructive activities before travelling to distant locations to be presented with obstruction and no discovery.

Robert Mullins (150): I oppose the proposed amendments. They will make Rule 30(b)(6) more vulnerable to abuse than it currently is. "In my experience, the adversaries of corporate defendants attempt to maximize recovery by finding ways to criticize a corporate defendant's handling of discovery." For example, in 30(b)(6) depositions the noticing attorney may keep asking the witness if anyone at the company is better equipped to discuss the listed matters than he or she is, but not get to asking the witness about the matters themselves. I would expect the conference requirement to work out the same way. I believe the choice of the person to testify for the company draws on my legal analysis, and that I should not be required to "meet

and confer” with the other side about that analytical process. This will lead to requests for the court to intervene in the selection before the designated witness has even testified and been tested on the topics listed.

Defense Lawyers Ass’n of Wyoming (160): We oppose the proposed amendment, which undercuts the right of the organization to designate its witness. This will be an invitation to tactical abuse by noticing parties. It will inflame tensions among the attorneys and add to the judicial workload.

Timothy Domin (161): Allowing an opposing party a say in who speaks for the company is unreasonable. If the company picks somebody who is ignorant, that will be detrimental to the company. If the opposing party wants to take the deposition of a specific witness, it can subpoena that witness.

Gordon Arnold (162): A corporation should be the sole party to choose its representative. Allowing the other side to have a say will expand collateral litigation.

Bryan Stevens (163): Allowing the noticing party a role in choosing the witness will be an invitation to break with the well-settled rule that the company can pick its witness.

John Lovett (166): If the noticing party has input into the selection of the witness, the company is no longer free to choose its own voice. The amendment will lead to efforts to obtain discovery of the reason a given witness was selected.

Federal Civil Procedure Section Council of the Illinois State Bar (193): This requirement to confer would interfere with the right of the organization to select its witness. On occasion, it is necessary to change the deponent on short notice because of the changing evidentiary needs of the case or because of the retirement, dismissal, death, or illness of the contemplated deponent. The organization needs flexibility to deal with such issues. In any event, this discussion is not useful to the noticing party, which is primarily interested in the number of witnesses and the topics each witness will address. So we propose that the amendment focus on the number of witnesses and the topics each will address.

Dan Mordarski (198): I support this change. For most ethical lawyers, this is not a problem, and it regularly is done. My experience is that when opposing counsel won’t disclose the identity of the witness in advance, it often turns out that the witness is not adequately prepared. There is no good reason for keeping the identity of the witness a secret.

John Hickey (202): I represent plaintiffs in personal injury cases. I take 30(b)(6) depositions in every case. This is a common sense requirement. The corporation knows who it will designate weeks in advance. It has sent that witness documents and its lawyers have had many conversations with that witness. It only makes sense that the party divulge early on the full name and title of the person or persons it is producing and to indicate on which designations that person will be testifying. As a practical matter, this information can speed up the deposition’s treatment of background material about the witness.

American Association for Justice (209): A rule change requiring that the identity of the witness be addressed in advance is likely to prevent a party from abusing the 30(b)(6) process. Disclosure of the identity who will testify must be included to achieve balance and fairness. In our experience, corporations wait until the last minute to disclose who their witnesses are, which prevents adequate preparation by the noticing party. Although the noticing party does not have a say in who the witness will be, it is helpful to be able to ascertain basic information about the deponent, such as the witness’s background and position in the company. Nothing in the amendment suggests that the noticing party has any authority to designate who will be the

witness. Unless the identity of the witness remains in the rule, AAJ believes that the rule would no longer be balanced. Instead, the amendments would tip the scale in favor of corporate defendants.

Michael Boorman (210): Requiring conferral about the identity of the representative would be a big step in the wrong direction. The rule focuses on the corporation's information, not the personal identity of the individual delivering that information. No legitimate needs will be served by allowing the deposing party to intrude on the choice of that representative. But adding a requirement to confer about that will increase wrangling, disputes, and motion practice.

U.S. Chamber Institute for Legal Reform (214): The required conference about the identity of the witness is a bad idea. It will lead to a new type of bandying, as the requesting party can manipulate discussions about the "identity" of the witness by adding deposition topics in an effort to obtain more depositions and -- by extension -- more deponents. This will effectively precipitate the kind of bandying that the rule was supposed to eliminate. The practical problems for corporations will be severe, as it takes time to pick a witness, after the question what the topics will be is cleared up. This requirement will produce more disputes. But the proposal says that the conference must occur "before or promptly after the notice or subpoena is served." That is unrealistic. It imposes a stringent time requirement that will not work.

Mark Boyle (216): The requirement to confer about the identity of the witness will produce problems for both plaintiffs and defendants. The noticing party has no right to reject the person selected by the company to represent it. But the amendment would embolden noticing lawyers to try to block or challenge selected organizational witnesses. This will be tempting when the witness is known to be experienced at testifying. Often the list of topics exceeds the limit on interrogatories, making the selection of a witness or witnesses very difficult. The change will also produce waste as the parties argue about the identity of the witness. We already have to hold multiple meet and confer sessions to clarify the topic list.

Nicholas Gerson (222): I represent personal injury plaintiffs. I strongly urge the committee to require the corporation to identify the corporate designee. Many times, corporations do not designate a witness for all areas of inquiry. We are then forced to re-notice a second deposition. Requiring q corporation to identify the witness prior to the deposition would eliminate this surprise tactic. We would know in advance who would be testifying and for what areas. Corporations are entitled to know the identity of all witnesses in advance. They should not be afforded a strategic advantage in regard to these depositions.

Vess Miller (225): We represent both individuals and businesses. We believe that identifying the witnesses in advance of 30(b)(6) depositions will promote efficiency. Knowing the identity of the proposed designee may prevent the unfortunate but common situation in which the chosen designees lacks the appropriate knowledge. The noticing party is often left in the position of having to repetitively ask the designee "Who would be the person most knowledgeable to testify regarding this topic?" This increases the expense for all parties. If the person is identified in advance, that will enable all parties to raise concerns. It can also reduce the number of depositions if the designated person will also be an individual witness.

Jessica Ibert (226): Requiring the organization to identify who will testify would be helpful. It would allow me to better prepare for the deposition, and make the deposition more efficient. I could better tailor my questions to the person actually before me.

Melissa Kruegel (232): The disclosure of the identity of the designee would be extremely helpful in the preparation of the deposition. Often, I do not know the name or position of the individual I am going to depose until only a few minutes before the start of the deposition. This is done to place me at a disadvantage.

Walt Cubberly (235): In my experience, the requirement to identify the witness merely makes explicit what is already implicit federal practice. Opposing counsel has always shared with me -- well in advance of the examination -- the identity of the person or persons to be presented and the topics each will address. Often they do this because the person will be testifying in two capacities, and they refuse to put him up twice. I have always accepted this arrangement without objection. It is always helpful to know in advance the person I am going to be deposing. It allows me to better prepare for the deposition, knowing which corporate documents the person had a part in either creating or receiving. It also allows me to do some preliminary background research, which makes things go faster at the deposition. I fully support the explicit requirement that the corporation identify whom it will be presenting.

Jay Henderson (236): Knowing the identity of the deponent would be helpful. That said, we must keep in mind that the 30(b)(6) witness's personal background and knowledge are technically irrelevant since the witness is really just a spokesperson for the entity.

Erin Campbell (237): "In my experience, resolving questions about the matters for examination and the corporation's representatives in advance reduces the length of the deposition, improves the quality of the answers, and greatly improves the likelihood that the witness will actually be prepared to answer questions on the noticed topics."

Russell Abney (239): Knowing which witness will be testifying on behalf of the corporation would allow a much more efficient preparation and execution of the deposition. With this information, I can use exhibits that the witness will recognize. There is no reason for the defendant not to be upfront about who the witness will be so that everyone can be informed and prepared. It also avoids situations where the designated witness is totally unfamiliar with the designated topics.

Maria Diamond (244): A good faith meet and confer requirement as to the identity of the witness will promote efficiency. Knowing the identity of the witness in advance is very helpful to proper preparation. Some have objected that this will intrude on the entity's choice of its witness. The proposal does no such thing. If the word "ultimately" in the Note is a basis for that concern, it could be removed.

Karen Menzies (245): Identification of the witness ahead of time helps focus the deposition preparation and lessens the risk that there will be a need for a supplemental deposition.

Ryan Babcock (248): Discussion regarding the identity of the witness should aid in the discovery process. While the ultimate responsibility of naming a representative will still rest with the corporation, disclosure of that person and requiring a good faith discussion regarding the proposed representative's ability to speak for the corporation is a reasonable requirement that will tend to encourage that the representative is prepared and knowledgeable.

Matthew Christ (253): Requiring the disclosure of the identity of the individual designated would assist in the preparation of the deposition. Too often, the opposing party does not provide the identity of the deponent until shortly before the deposition, which hinders adequate preparation for the deposition.

John Tiwald (259): The identity of the witness should be disclosed. But insisting that it be the subject of a conference creates problems. In our experience, identity is often disclosed voluntarily. That enables us to be better prepared for the deposition. Making identity the subject of transactional negotiation will not further the preparation process and could generate further disputes.

Joshua Kersey (287): Knowing the identity of the person to be deposed ahead of time would be helpful and would make the deposition more efficient.

Jonathan Kerr (300): Advance disclosure of the identity of the witness would help in preparing for the deposition and to ascertain that the person designated is able to answer questions.

Emily Jeffcott (329): The proposed change makes sense. It can eliminate disputes about the appropriateness of the person selected and allow all parties to be better prepared.

Fred Buck (American College of Trial Lawyers) (338): The College believes that this requirement suggests a significant and unnecessary change in the organization's obligations that will increase delay and expense with no enhancement of practice under this rule. Although the minutes of the Standing Committee's meeting and the Committee Note say that the choice is ultimately up to the organization, we view the inclusion of this language mandating discussion of the identity of the witnesses to be designated as a suggestion that the noticing party has a right to participate in selecting the designees. This poses the very real possibility of disagreements between the parties and involvement of the court on issues relating to the identity of the witness. Directing that the organization to confer in "good faith" about its choice is not a positive development.

Rachel Alexis Fuerst (342): Requiring advance notice of the identity of the witness would allow the deposition to be more efficient. Requiring that this be a subject of conference is reasonable also.

J. Michael Goldberg (353): Identifying the witness can only promote judicial economy and the policy goals of discovery. Defendants often designate witnesses with little knowledge of the matters or inquiry, wasting time and money. Requiring timely identification of the witnesses will minimize gamesmanship and abuse in discovery and allow the examining attorney to fine tune his or her examination and avoid wasting time.

Scott Frost (435): Not requiring that the witness be named allows defense counsel to play games and does not lead to advantage on either side. It is important to know who you are going to depose to properly prepare.

Neil Nazareth (439): Disclosure of the identity of the witness prior to the deposition is important because it causes both sides to consider the deponent's specialization within the corporation, and whether the witness will be able to adequately testify as to each and every topic.

Ingrid Evans (454): In many cases, a corporate defendant will designate different witnesses for different topics. Knowing who is going to testify allows plaintiff attorneys like us to move quickly through preliminary questions and into the substantive matters. With advance knowledge, we can schedule more efficiently. Sometimes we can schedule three witnesses on discreet topics in a single day. We applaud the Committee Note that recognizes that the company has sole authority in picking the witness. The goal is to reduce surprises.

Michael Bradley (473): Disclosing the identity of witnesses in advance of depositions promotes efficiency and is consistent with the letter and spirit of the rules. It imposes no significant burden on the entity. I suggest that the amendment be clarified to say that the identity of the witness must be disclosed reasonably in advance of the deposition.

Marc Weingarten (482): I support the proposed amendment to the rule. I oppose not requiring that the identity of the witness be disclosed in advance of the deposition. Such pre-deposition disclosure enables research to be conducted in advance of the deposition in order to

make the deposition itself more efficient and productive.

Sherman Joyce (American Tort Reform Ass'n) (503): ATRA opposes any requirement that parties confer about the identity of the persons to be designated to testify. The amendment implies that the noticing party has a legitimate say in which person the organization chooses. Plaintiff's counsel will urge courts to give them some say in the selection of the person. Moreover, that choice can't be made until the precise topics for testimony have been fleshed out. Plaintiff counsel will contend that the corporation is bound by the choice it suggested during the conference. ATRA also does not see any benefit from a requirement to identify the witnesses who will testify in advance. The identity of the witness is simply irrelevant because the focus is on the knowledge of the corporation, not the individual.

Joseph Hunt (Department of Justice) (646): DOJ believes that the requirement to confer about the identity of the witness will result in additional discovery disputes. The noticing party has no say in the designation and preparation of an organization's designee, so no useful function would be served by adding this requirement to the rule. Although it is true that in practice the organization often provides some notice about the identity of the designee before the deposition, any such notice usually occurs close in time to the deposition. The responding party in the course of diligent preparation efforts may not determine the appropriate designee until well into the process.

Requiring that the conference continue “as necessary”

Washington, DC Hearing

Mark Chalos (Tennessee Trial Lawyers Ass’n) (testimony and nos. 190 and 206): The explicit statement in the Committee Note that the parties have an ongoing obligation to meet and confer, but that the process must be completed in a reasonable time, promotes efficient resolution of disputes.

Alex Dahl (Lawyers for Civil Justice) (testimony and no. 129): Requiring a conference to be “continuing as necessary” will add new uncertainty to the rule and invite more gamesmanship. There will be one party who feels that more conferencing is necessary while the other side will be equally convinced that the obligation has been satisfied. Practitioners won’t know what is expected under the rule, and some will seek sanctions for the “unreasonable” behavior of the other side. This sort of outcome is especially likely in the context of a brand new duty like this conference requirement.

Philippa Ellis (testimony and no. 359): Adding the phrase “and continuing as necessary” does not resolve the concerns I have about intruding into the organization’s right to pick its own witness. The change in the rule is certain to produce protracted discovery disputes.

Tobias Milrood (AAJ) (testimony and no. 185): AAJ recommends that the “before or promptly after” phrase be moved to end of the sentence:

~~Before or promptly after the notice or subpoena is served, and continuing as necessary, t~~ The serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person the organization will designate to testify on each matter before or after the notice or subpoena is served, and continue conferring as necessary.

Terri O’Neill (National Employment Lawyers Assoc.) (testimony and no. 144): We agree that the amendment clarifies that the new meet and confer process will be ongoing, if necessary. As the Committee Note explains, that does not mean that the parties must reach agreement on any particular topic. But this directive is in keeping with the spirit of Rule 1.

Thomas Regan (testimony and no. 199): Having more than one conference may lead to a more efficient process. Choosing the witness ordinarily must await clarification of the topics, which should be the first order of business. Trying to resolve everything in one conference would usually not work. But the “continuing if necessary” language lacks any clear delineation of when the good faith duty to confer ceases, an issue that largely results from the new requirement to confer about the identity of the witness designation. This language could be leveraged by inexperienced or exploitive counsel to interfere with the process. We recommend that the language say that the requirement to confer continues until either agreement or an impasse is reached as to the categories of inquiry, or when the witness is selected by the corporation’s counsel, which should end the process of conferring.

Phoenix Hearing

Lisa LaConte: Mandating this meet and confer session is a new requirement that will create an infinite loop in asbestos defense litigation of the sort I handle on the defense side.

Nieves Bolanos (NELA): We agree with the proposal to adopt an ongoing duty to confer. This is in keeping with the spirit of the rules. Our experience is that the most serious and recurrent problem is with unprepared witnesses, and we think that the conference contemplated

by this amendment will give the parties an opportunity to ensure that the witness is an appropriate designee and thus that the preparation problem will be minimized.

John Sundahl (Defense Lawyers Assoc. of Wyoming): The proposal imposes a duty to confer as “continuing as necessary.” This additional requirement invites further disputes. Who decides when the additional duty to confer becomes “necessary”? If one of the parties is unhappy with the results of this conference, does it have a right to seek discovery sanctions for prematurely terminating the duty to confer?

Patrick Fowler: Having a conference in advance about the topics is a good idea. Particularly if there are a lot of topics, I usually do that. Even if the rule does not require discussion also of the identity of the witness, it will probably be important that it be iterative.

Written comments

Michael Bradley (473): The Committee Note saying that the parties have an ongoing obligation to meet and confer, but that the process must be completed within a reasonable time, promotes efficient resolution of disputes. I support this language in the Committee Note.

Committee Note mention of identifying documents
to be used during the deposition

Washington, DC Hearing

Jennifer Klar (testimony and no. 175): Requiring advance production of all exhibits would impose unnecessary work on both sides. The noticing party would feel it necessary to over-designate. Look at the length of lists of exhibits to be used at trial, as compared to the number actually offered in evidence.

Terri O'Neill (National Employment Lawyers Assoc.) (testimony and no. 144): We believe the Committee should consider removing the sentence in the Committee Note referring to providing documents to the company in advance. This will merely result in counsel over-disclosing exhibits and it “could effectively turn what should be a cross-examination into a mere live version of interrogatories.” This raises a risk of reading into the rule a requirement of providing such advance notice of exhibits that the Committee examined and discarded.

Phoenix hearing

Sandra Ezell: It would be valuable to have the documents that will be used during the deposition identified. The 30(b)(6) deposition should be used to locate information about discrete topics. This can be done without discussion of the identity of the witness because the identity of the person designated is irrelevant in this setting.

Nieves Bolanos (NELA): We believe the Committee should consider removing this comment about advance identification of documents. Such a requirement would cause counsel to over-disclose numerous possible exhibits out of an abundance of caution and worry that it “could effectively turn what should be a cross-examination into a mere live version of interrogatories.” As a practical matter, the reality is that documents are sometimes produced very near to, or even on the day of the deposition. Such a requirement would bar use of such documents when their relevance becomes clear only as the testimony proceeds. Putting this possibility into the Note raises the risk that the amendment will be read as requiring such advance notice.

William Rossbach (testimony and written statement): I try to notify the other side what documents I will be using. Talking about what documents will be used is a good idea. But it is critical to have flexibility. Unanticipated things come up that involve documents in a way not appreciated before the deposition.

Bradley Peterson (testimony and written comment no. 138): Sometimes the notice asks for production of the documents used to prepare the witness. When I receive one of those, in the meet and confer session we already do hold I ask the noticing attorney to provide any documents that may be used in the deposition. Often the opposing attorney refuses this request on the basis of work product, apparently hoping to “surprise” the witness. Yet the noticing party insists that I should provide the documents I used to prepare the witness. I think my selection of documents is work product. Some courts, however, have not upheld this objection, but some of them nonetheless enable the noticing attorney to employ surprise in this way. The protection of work product in this context should be recognized in the rule. In addition, given the purpose of the deposition to identify company information rather than surprise the witness, the rule should require identification of all such documents that will be used. Perhaps it would then be permissible to direct that the company also identify the documents used to prepare the witness.

Written comments

Walt Cubberly (235): I disagree with the comment in the Committee Note speculating that “the serving party [may need to] identify in advance of the deposition the documents it intends to use during the deposition.” The idea that the party would be required, in advance, to share with the other side what documents it was panning on using during the deposition would revolutionize deposition practice. It would hinder the ability of a party to impeach witnesses. It would allow counsel for the organization to help the organization craft testimony in a way that would be inimical to discovering the truth, and it would prohibit the party taking the deposition from following new leads developed during the course of the deposition. I strongly disagree with this offhand aside in the Note.

Jay Henderson (236): It would be worthwhile for the parties to confer, and the serving party may enhance this process by offering to disclose document it may use during the examination. But this disclosure should not be compulsory.

Reviving amendment topics not included
in Preliminary Draft

Washington, DC Hearing

Lauren Barnes (testimony and no. 187): “Arbitrary, one size fits all limitations on the number of topics, how they will be treated, and how and when notices must be service and negotiated serve no efficient purpose and may instead simply result in more trips to the court over issues that can and should be negotiated by counsel. What is appropriate in the [very large] cases I pursue may make no sense for many other cases.”

Mark Behrens (International Association of Defense Counsel) (testimony and no. 174): The Committee should adopt other ideas that are not included in the current amendment package: (1) set forth a clear notice requirement; (2) establish a clear objection procedure; (3) identify presumptive limits on the number of deposition topics; (4) clarify how 30(b)(6) depositions should be counted toward the ten-deposition limit and the one-day time limit; (5) permit a written response that an organization has no information on a given topic; and (6) prohibit contention questions; and (7) forbid inquiry into what materials the witness reviewed to prepare for the deposition. These may be said to constitute one size fits all solutions, but they fit enough cases to make them important. The absence of those limits has enabled some lawyers to weaponize the rule.

Paul Bland (Public Justice) (testimony and no. 172): We strongly oppose rule provisions imposing specific limits on 30(b)(6) depositions. In particular, we see no advantage and many drawbacks in (1) an objection procedure; (2) a uniform notice period; and (3) a limit on the number of topics.

Edward Blizzard (testimony and no. 179): I am here to respond to comments made by Tim Pratt, former general counsel of Boston Scientific, during the Phoenix hearing. Mr. Pratt made some assertions about the pelvic mesh litigation in which Boston Scientific was a defendant. I was on the Plaintiffs’ Steering Committee in that MDL litigation. That was a unique litigation, with more than 26,000 plaintiffs suing Boston Scientific in federal court, and many additional plaintiffs suing in state courts. The litigation involved 13 BSC products, and the court ordered 200 individual cases to complete discovery for trial. In that litigation, BSC moved to quash or for a protective order against our 30(b)(6) notices. Among other things, it urged that the deposition be limited as to products and that it be quashed as to topics on which individual BSC employees had testified. The magistrate judge’s ten-page order is attached to my submission. She denied BSC’s motion to quash and rejected its burden arguments. She also directed it to designate prior individual testimony that it would adopt as its own testimony with regard to matters it said had already been explored. The experience in MDL 2326 does not support Mr. Pratt’s contention that the Committee should impose specific limitations applicable in all cases. To the contrary, MDL 2326 illustrates the need for flexibility in determining what is appropriate in a given case.

Susannah Chester-Schindler (testimony and no. 186): “While the addition of a numerical limitation on the matters may seem efficient at first blush, in practice the limitation will necessarily be arbitrary and may trigger additional unnecessary motions practice.”

Andrew Cooke (testimony and no. 165): What is really needed is to add the following to the rule: (1) a right to object; (2) authority for a party that has already given ten or more depositions on the same subject to submit prior 30(b)(6) transcripts in lieu of further 30(b)(6) depositions; (3) limiting such depositions to seven hours; (4) limiting the number of topics; (5) including cost-shifting for depositions that seek extraordinary discovery beyond the primary structure of the rule; and (6) making clear the supplementation is allowed. As the rule is

currently structured, it imposes too much burden on the responding entity. In addition, there is a split among courts on whether one should raise these issues before the deposition with a protective-order motion or after the deposition with a motion to compel. The lack of structure in the current rule prevents meaningful conferences, and presumptive limits and an objection procedure would provide that structure. Numerical limits work with interrogatories, and they can work here also. This subject should be added to the Rule 16 list of topics to address in the scheduling order. Having a limit leads to more careful drafting of the discovery requests.

Alex Dahl (Lawyers for Civil Justice) (testimony and no. 129): These proposed amendments will not deal with the real problems the Committee has identified in 30(b)(6) practice. So we urge that the Committee return to the drawing board and draft meaningful amendments that will do the needed job. The basic problem is that the present rule does not provide a real framework for the lawyers to reach agreements on the questions that arise over and over. The needed amendments, therefore, are (1) a numerical limit on topics for discussion; (2) an objection procedure that permits the organization to prevent proceeding into improper areas without court supervision; (3) a clear minimum notice requirement; (4) clarification of the application of the existing limits on the number of depositions and the duration of a single deposition in the 30(b)(6) context; and (5) explicitly forbidding contention questions during a 30(b)(6) deposition. Numerical limits have worked well with other discovery devices such as interrogatories. “Unlimited” is the wrong limit, but it’s what we have right now. 25 might be best as a starting point. “Presumptive limits are a rulewriter’s tool.” They are not a penalty, but a guide. They serve the interests of proportionality.

Peter Fazio: I represent defendants in products cases. There are cases in which we need multiple depositions. I had a case against Donald Slavik (also testifying today) and it involved ten corporate deposition and 31 individual depositions. I think you should go back to the drawing board and reconsider a numerical limit. If you impose a numerical limit the lawyers will respond and deal with it. A starting point might be 25. Then the lawyers can confer and come up with a good system for the case. If the court will pay attention, this can work.

Toyja Kelley (President, Defense Research Institute) (testimony and no. 132): In 2017, DRI identified additional measures that should be included in the rule. These include: (1) amendments to Rule 16 and 26(f) calling for early discussion of 30(b)(6) depositions; (2) amending Rule 26(e) to permit supplementation of testimony; (3) amending the rule to provide a mechanism for making and resolving objections; (4) providing a presumptive limit of ten topics; (5) an amendment permitting the organization to certify that it has no knowledge beyond what is in its documents, which would mean that no deposition is required; (6) an amendment directing that no deposition is required on topics on which have already been the subject of deposition testimony; and (7) an amendment prohibiting contention questions in 30(b)(6) depositions.

Jessica Kennedy (McDonald Toole Wiggins) (testimony and no. 133): What is really needed is that some specifics be added to the rule. The rule now requires that the corporate representative be adequately prepared, but that is possible only if there is a limitation in the rule on the number of topics. I suggest that the limit be eight topics. In addition, the topics should be consistent with the nature of discovery that has already occurred and not seek to interject new areas of inquiry that were not previously the subject of inquiry by less burdensome means. In addition, a 30(b)(6) deposition should not duplicate depositions of those with personal knowledge on the subject. The rule should also include a provision for objections to the topics on the noticing party’s list. The rule should also explicitly recognize that the organization is only required to provide information within its possession, custody, or control. It therefore should not be required to obtain information from non-party subsidiaries, parent companies, or foreign entities outside the subpoena power of the court. In addition, discovery about the preparation of the witness should be declared off limits on grounds of privilege. The limit on number of topics

should be ten. Even if these topics are defined broadly, the company will be better able to prepare the witness than in true now with many, many more topics. Such a limit should not necessarily lead to motions to expand in every case. We try to reach agreement at the Rule 26(f) meeting, and having a limit encourages conversation. To illustrate, I brought along examples of recent 30(b)(6) notices with as many as 263 topics. One simply asks that the company provide a witness to address every allegation in the complaint. The cases in which these depositions produce the most problems are product cases, as revealed by a Westlaw search.

Jennifer Klar (testimony and no. 175): The arguments for adding particulars to the rule should be rejected. The objection idea would lead to long delays in discovery, which would essentially be stayed until the court ruled on objections. The idea of a deadline for taking a 30(b)(6) deposition should not be adopted; sometimes it is appropriate to take a 30(b)(6) deposition at the end of discovery. A ban on contention questions would not be appropriate. It would treat corporations differently from other litigants. And since the corporation has the absolute right to select the person who testifies, one should expect the chosen witness to be the person best qualified to answer for its contentions.

Chad Lieberman (testimony and no. 178): What we need is a presumptive limit on the number of topics. 15 is a number that might work. Having that before them will help the parties focus. My experience indicates that 15 is a sufficient number. In larger class actions, the parties may need to go beyond. More generally, the problem is that the rule does not provide a framework for 30(b)(6) disputes. We need a baseline. Then the judge would have guidance on when to grant a protective order.

Terri O'Neill (National Employment Lawyers Assoc.) (testimony and no. 144): We believe that the public comment period should not be used to disinter proposals that the Committee has already considered and discarded for good reason. Nonetheless, some are urging that the Committee return to those ideas. But because these matters have arisen again, some comment is in order.

- (1) A formal objection procedure would be counter-productive. In discussing the topics for the deposition, the parties may tailor them in a way that makes the deposition more efficient. But as reported cases have noted, the rule does not include a formal objection procedure like the Rule 45 objection procedure. In part, that is because any issue that arises at a 30(b)(6) deposition about specific topics or questions is much easier for the court to evaluate in the context of the actual deposition rather than in the abstract.
- (2) A uniform 30-day notice requirement is too inflexible. There is no reason to wait 30 days after the mandated conference occurs. Professional counsel will always discuss depositions dates with opposing counsel and seek a mutually agreeable time for the deposition. To have a rigid 30-day rule for only one type of deposition is not warranted.
- (3) A strict numerical limitation on the number of topics is artificial and unproductive. There is no such limit on Rule 34 requests. Imposing one here will merely encourage use of broader topics. It is simply not true that it is “common” for a notice to include 60 or 100 topics.
- (4) The current rule that a 30(b)(6) deposition counts as one, but that fully seven hours are permitted as to each person designated, should be maintained. A corporation could game the system by designating many witnesses. Plaintiffs have no incentive to draw out the discovery process. As things stand now, witnesses with few topics can be finished in an hour or two. The noticing party should not have to accommodate the tactical decision by the company to designate a large number of witnesses.

(5) Contention questions should not be banned. Corporate defendants frequently ask plaintiffs in employment cases contention questions like “What support do you have for your claim that you suffered discrimination.” To say the plaintiff may not ask the same sort of questions of the person hand-picked by the company to testify is one-sided. Moreover, such a prohibition would lead to frequent disputes about what is a contention question.

Virginia Bondurant Price: A specific number in the rule would be a useful starting point for discussions with opposing counsel. It would not be a straightjacket. Presently I often get outlandish numbers of topics, and sometimes have to move for a protective order.

Patrick Regan: Presumptive limits are problematical since there are so many different types of cases. Sometimes ten would do, and in other cases fifty are needed. Having a specific limit will lead to motions in court. We should not legislate for the “lunatic fringes.”

Thomas Regan (testimony and no. 199): The rule needs changing, but not the changes proposed by the Committee. Instead, what are needed are: (1) a clear notice requirement; (2) clear specification of how the limits that apply to other depositions in terms of overall number of depositions and duration of deposition should apply in 30(b)(6) settings; (3) questions about the material reviewed in advance of the deposition should be forbidden; (4) there should be a procedure for the corporation to indicate that it lacks information on given topics, relieving it of the duty to produce a witness.

Terri Reiskin (testimony and no. 196): Having a number helps move the discussion with opposing counsel forward. For example, the rules now set a limit of ten depositions. At the start of the case, that provides a baseline for discussing what is appropriate to that case. As things stand now, 30(b)(6) depositions often are used as an end run around numerical limits on interrogatories. Another subject on which the rules should provide guidance is whether the one deposition per witness rule applies to the company. If there is one 30(b)(6) deposition, does that mean there cannot be another. Beyond that, the proper application of the ten-deposition and seven-hours limits in the 30(b)(6) context should be made clear. The present reality is terribly inefficient. I think that the 26(f) conference is the right time to start thinking about these issues, and discussing them. Maybe fairly specific guidance can be included in the Rule 16(b) scheduling order.

Brittany Schultz (Ford Motor Co.) (testimony and no. 151): The Committee should reconsider making substantial amendments that would provide guidance and address functional deficiencies in the current rule. That is what Ford proposed in July, 2017. But that is not what the Committee has done. In particular, there should be a defined procedure for objecting to the notice, and also for situations in which the company has only documentary information about a given topic.

Patrick Seyferth (testimony and no. 182): The real need is for an objection procedure. Presently, practitioners are confronted by diverging case law; some courts require a motion for a protective order before the depositions, while others insist that the matter be raised by a motion to compel after the deposition.

Michael Slack (testimony and no. 170): I do sometimes list over than 30 topics. I suppose I could come up with a sensible number for aviation cases, which are the kind of cases I do.

Michael Slavik (testimony and no. 146): A strict numerical limit would be counter-productive. For example, I recently noticed a deposition with 47 topics. But they were essentially 47 very specific questions. With them in hand, the witness was able to finish the

deposition very expeditiously.

Christine Webber: An across the board limit on the number of topics would not be helpful. For example, in a recent employment discrimination action I had ten to fifteen topics for each of a large number of plant locations.

Michael Weston: We need presumptive limits in the rules where they do not appear. For example, Rule 36 has no such limits, and I have seen cases with 200 to 300 such requests. What we need is a framework to resolve or avoid impasses. Setting a number sets an expectation. In complex cases, we agree to increase the number. A motion regarding the number of topics could happen before the deposition. In addition, it would be good to have a clear time limit. I get 50 to 60 topics in every one of my cases.

Julie Yap (Seyfarth Shaw) (testimony and no. 188): Instead of proceeding with the proposed amendments, the Committee should provide amendments that address the real problems under the current rule. There should be a minimum 30-day notice period. There should be a numerical limit on topics, no higher than ten. The rule should provide that the topics must be reasonable in scope and proportional to the case. These depositions should be subject to the seven-hour limit that applies to other depositions. There should be a recognized objection process. Having 70+ topics makes it almost impossible to prepare the witness on all of them.

Phoenix Hearing

Lisa LaConte: The rule should have an objection procedure that makes further responses unnecessary once an objection is served. It is true that Rule 30 does not authorize such an objection and failure to respond with other depositions, but the obligations and burden of a 30(b)(6) deposition are different.

James McCrystal (Defense Research Institute) (testimony and written testimony from Troya Kelley): This amendment package is deficient because it does not include specifics on the number of topics or on the length of the deposition. We have for years had specifics in the deposition and interrogatory rules about the number and duration of depositions and the number of interrogatories. Those specific limitations were positive improvements. But there is nothing in the current amendment package that corresponds to those beneficial specifics. The 2015 proportionality amendments call for such specifics. It is important to guide practice under Rule 30(b)(6) with specifics of that sort. Specifically, DRI favors the following

- Amending Rules 16 and 26(f) to include Rule 30(b)(6) in the 26(f) conference and submission to the court under Rule 16
- Amending Rule 30(b)(6) to allow supplementation of testimony at the deposition
- Amending Rule 30(b)(6) to provide a method of making and resolving objections to the notice before the deposition
- Amending Rule 30(b)(6) to permit an organization to certify that it possesses no knowledge beyond what is contained in documents and directing that in those circumstances no deposition is required
- Amending Rule 30(b)(6) to provide that a deposition of the organization is not required on topics that have been the subject of individual depositions already
- Amending Rule 30(b)(6) to forbid contention questions

Although some of these concerns are mentioned in the Committee Note, which is helpful, the better course would be to amend the rule to address these matters specifically. DRI also supports the positions in the written comment from Lawyers for Civil Justice (no. 129).

John Sutherland: Instead of pursuing the current package of amendments to the rule, the

Committee should adopt more practical solutions:

(1) The rule should provide a method for objecting. Because the rule does not now have such a procedure, it can be used as a sword as if it were a legitimate discovery tool. For example, it is not uncommon for a requesting party to unilaterally schedule a deposition on a date and time that is not available or does not allow sufficient time to properly prepare and present a witness. Because the rule lacks a reasonable objection procedure, the requesting party takes the position that the company must appear with a prepared witness or file a motion for a protective order. Rule 45 is a model for a solution. It provides that service of an objection within 14 days means that the deposition will not go forward until and unless the requesting party obtains a court order to proceed. Adopting this procedure will cause requesting parties to take more care in specifying topics for examination.

(2) The rule should contain a provision that protects attorney work product and attorney-client communications. The most troubling aspect of 30(b)(6) depositions is that the requesting party usually insists that the materials relied upon by the witness to prepare for the deposition or chosen by an attorney to prepare the witness be subject to disclosure. The lack of any discernible protection of this type of material is a glaring hole that must be filled in Rule 30(b)(6).

Nieves Bolanos (NELA): We commend the Committee for its careful consideration of a variety of perspectives on the rule before it announced its proposed amendments, and for not including some that had been proposed. Adding arbitrary numerical limits on use of this discovery device would be counterproductive. For example, a presumptive cap on the number of topics would encourage counsel to broaden the definition of each topic and make it more difficult to prepare for the deposition. We are aware that there have been notices with as many as 100 topics, but such examples are in our experience anomalous. Our firm recognizes that serving such a notice would prompt intractable disputes. We carefully tailor the number and description of topics, both because we do not want to engender costly disputes and because we expect judges to limit overly broad requests. Often we litigate against public entities, and it is then absolutely essential to learn about their systems.

William Rossbach (testimony and written statement): The proposals that were made by the ABA organization to limit the number of topics, make the testimony not binding, allowing after-the-fact changes and supplementation by counsel, and prohibiting contention questions, would have eviscerated the rule and made it effectively useless in achieving the goals of Rule 1. These proposals would not have addressed any significant problem with the rule and were entirely one-sided. The real problem is that too often the organization does not adequately prepare the witness. Though that may sometimes result from notices that fail to describe the matters with reasonable particularity, the changes proposed by the ABA group would not deal with that problem in a helpful way. The proposed amendment avoids the mistakes proposed by the ABA group.

Gary Culbreath: 30(b)(6) depositions can be a trap for the unwary. The current rule lacks specifics that should be added. This would provide procedural guidance. The current amendment, however, will invite more litigation rather than avoiding it. One important protection would be an objection feature like the one in Rule 45 for subpoenas. In the District of South Carolina, the judges usually won't allow the deposition to go forward on grounds objected to until the objection is resolved by the court. Having a meet and confer session should be optional with the attorneys. In South Carolina, some judges convene a meet and confer session with the court to address such matters.

Bradley Peterson (testimony and no. 138): Rather than pursue the current amendment proposal, it would be better instead to amend the rule to add the following: (1) a minimum notice period; (2) an objection procedure; (3) a presumptive limit on the number of topics; (4) a bar on questioning the representative on topics outside the list; and (5) specifics on duration of the deposition and counting towards the presumptive limit of ten depositions if more than one person is designated.

Jennie Anderson (testimony and no. 148): The Committee was right not to impose a specific limitation on the number of topics. Rigid limits like that would undermine some of the efficiency of this rule. It would lead to broader designations, complicating and delaying the depositions. The more specific the designating party can be, the more effective the deposition.

Tim Pratt (President of LCJ): The real need is for specifics in the rule. With Boston Scientific, he found that 30(b)(6) depositions might include 18 topics with 50 subparts. It has happened that a witness who testified for four days as a designated 30(b)(6) witness then had to testify two more days as an individual witness. The current proposal simply institutionalizes the existing practice without meaningful guidelines. There should be a clear limit on the number of topics. Judges say they can't determine what is a "reasonable" number of topics; we need a number. For example, if the presumptive limit is ten, you have a starting point. I don't believe there is really a problem with unprepared witnesses, separate from the problem of overbroad and overly numerous topics. But companies really don't want to go to the judge on such issues. And absent that there is no incentive for plaintiff lawyers to be reasonable.

Phillip Willman (DRI): What we really need is a clear minimum notice time, an objection process, and a requirement that 30(b)(6) be discussed in the 26(f) conference and covered in the 16(b) order. Only with a national rule will there be national uniformity on these matters.

A.J. de Bartolomeo (testimony and written testimony): I would not have a problem with a 30-day notice period for these depositions. But I do take strong issue with the inclusion of reference to the number of topics in the draft.

Written comments

Sean Domnick (139): Efforts to limit the number of 30(b)(6) depositions in a one size fits all sort of way will inhibit the ability of parties to gather information. Federal judges and magistrates are more than capable of addressing the particular needs of each case without arbitrary limitations being placed upon their discretion.

Federal Magistrate Judges' Association (142): We generally support the concept of directing counsel to confer on these matters. We have observed that Rule 30(b)(6) deposition practice has become a contentious subject. Our only hesitation is whether the proposed amendment goes far enough. Assuming the amendment is approved, we respectfully suggest that, after a period of time, the Committee consider whether further amendments -- such as, for example, one imposing a presumptive limit on the number of matters for examination -- are warranted.

Richard Broussard (143): There should be no numerical limit on the deposition topics. The differences among cases make such a limit counterproductive. Regarding other proposals made by LCJ, they are blatant strategic efforts to impede reasonable discovery. Prohibiting inquiry into what the witnesses have reviewed in preparation for testifying is only designed to prevent needed discovery. That is the way to determine whether the corporation complied with its duty to prepare the witness.

Jonathan Hoffman (168): These amendments do not deal with the real problems we encounter today. They do not offer a solution of the problem of a company without knowledge on specific topics. That is more likely now because statutes of limitations have been extended, and companies are more frequently acquired by other corporations. In addition, there are problems when the designated witness is also a fact witness, but that is not addressed.

Palmer Vance (and 25 other past, present, or future Chairs of the ABA Section of Litigation) (180): The rules should be amended to follow the New Jersey rule recently adopted (N.J. Rules of Court, Rule 4:104-3(a)(2)) for complex cases. That rule provides that every seven hours of testimony of an entity representative counts as one deposition toward the overall deposition limit. We have not researched the rules in other states' courts. This approach has the virtue of enabling the noticing attorney decide how much time to spend, so to avoid being "charged" with a second deposition.

Jonathan Feigenbaum (no. 204): Allowing supplementation of 30(b)(6) deposition answers will encourage sandbagging, which is already a problem with intransigent defense tactics. Prohibiting contention questions when the witness is an organization but not when it's an individual (like my clients) is an unfair idea. Making it easy to object and hamstringing the deposition will feed into defense delay strategies.

Amar Raval (205): Formalizing an objection process will simply lead to more motions being filed. Some insurance companies will stonewall everything as part of their litigation "strategy." This is perfectly designed for that tactic.

U.S. Chamber Institute for Legal Reform (214): The rule does not provide a formal procedure for objecting to a notice. Instead, the only mechanism is a motion for a protective order. Some courts require that the order be sought before the deposition occurs, but others are not willing to entertain the motions until after the deposition has occurred. A better approach can be built on the Rule 45 model -- that an objection halts the deposition until the court rules on the objection. The rule should also specify that 30(b)(6) testimony does not constitute a judicial admission.

MEMORANDUM

TO: Professor Richard Marcus
FROM: Lauren Lee
RE: Federal Rules of Civil Procedure Rule 30b6

I favor conferring but oppose numerical limits.

Patrick M. Regan (502)	Thomas Sims (605)
James Cook (510)	Jacob Lowenthal (606)
Michael Vogelsang (515)	Jennifer Lawrence (610)
Daniel Cragg (516)	Richard Plattner (611)
A John Arenz (518)	Michael McGlamry (612)
Daniel Cragg (516)	Michael Cruise (614)
Jeremy Flachs (519)	Ken Pearson (620)
Richard Allen (521)	Jeff Bouma (621)
Steven Zoni (523)	Matthew Fogelman (629)
Eric Iverson (524)	Nimish Desai (634)
Will Nefzger (526)	Anne Gilday Judge (640)
Paul Kelley (528)	Lindsay Lawrence (643)
Emily Thomas (530)	Emily Hubbard (644)
Kirk Laughlin (532)	Patrick Beirne (645)
Frank Piscitelli (539)	Robert Sparks (648)
John Fabry (544)	Alison Kennamer (649)
Joshua Geist (549)	Brian Sanford (652)
Justin Sanders (550)	Jon Hollan (657)
Anthony Irpino (551)	Taylor Sorrels (660)
Eugene Brooks (553)	Michael Shepard (661)
Gary Schaaf (557)	Rob Astorino Jr (662)
Beverly Bove (558)	Ben DuBose (664)
S. Burgess Williams (560)	Samuel Iola (667)
Teresa McClain (561)	Sharon Zinns (668)
Ben Lebsack (565)	Paul Stewart Abney (669)
Tony Colyer (566)	Jose Becerra (670)
Michael Schafer (574)	Jason Beale (671)
Richard Cornfeld (576)	Richard Kaudy (672)
Sean McDonough (582)	Stewart Matthews (674)
Patrick Yancey (584)	Matthew Donohue (676)
James Keim (588)	Erika O' Donnell (677)
Sam Badawi (592)	Jonathan Ruckdeschel (678)
Florence Murray (594)	Michael McCann (679)
Avery Halfon (596)	Matt McGill (681)
Gretchen Lipman (598)	Kurt Zaner (682)
Joshua Christian (600)	Michael Patronella (683)
Renee Rubish (602)	Caryn Papantonakis (685)
Stephen Tiger (603)	Jonathan Armour (687)

Darron Berquist (690)
Patrick Wigle (692)
Alina Gregory (693)
Jessica Schlatter (694)
Leslie Cronen (696)
Donald Blydenburgh (697)
Benjamin Flicker (698)
Jennifer Foote (699)
Charles Branham (700)
Kyla Cole (701)
Jerome Prather (702)
Galen Trine-McMahan (703)
Z. Stephen Horvat (704)
Dusti Harvey (705)
Roger Turgeon (706)
David Webster (708)
Tom Henson (709)
Benjamin Adams (710)
Scott Britton-Mehlisch (712)
Kevin Paul (714)
Scott Armitage (715)
Christopher Placitella (716)
Marsha Kazarosian (719)
David Boohaker (723)
James Hetu (725)
Matthew McLeod (726)
Benjamin Schmickle (727)
William Zook (728)
Megan Roper (729)
Case Dam (730)
Steven Aroesty (734)
Evan Cole (737)
Stewart Davis (738)
Stephanie Gold (739)
Barrett Naman (743)
Kevin Berry (744)
M Cristina Sanchez (745)
David Cannella (747)
Nicholas Nighswander (749)
Mary-Ann Leon (754)
John Theil (757)
Nathaniel Mudd (758)
Patrick Malone (763)
Timothy Garvey (764)
Sarah Gilson (766)
Mark Bratt (771)
Travis Harper (772)
Andrew Cioffi (774)
Dan Stack (775)
Joseph Garrison (777)
Erin Hergenrother (778)
Robert McEvoy (779)
Lucas Garrett (780)
Katie McGregor (781)
Paul Gatto (782)
Sophie Zavaglia (783)
Seth Cardeli (785)
Stefan Feidler (788)
John Nowakowski (789)
D'Arcy Rapp (790)
Joseph Cirilano (792)
Daniel Wood (798)
Nathaniel Falda (799)
Christopher Bryant (800)
Nina Windsor (801)
Cara Wall (802)
Theile McVey (803)
Allison Aoki (804)
Lisa Conserve (806)
Richard Shallcross (808)
Amy Heins (810)
Paul Lees (831)
Thomas Howard (832)
Thomas Taylor (839)
Margaret Samadi (843)
Chad Alexander (848)
Michael Patrick (857)
Gabriel Zambrano (858)
Glenn McGovern (859)
Dennis Bottone (868)
Jude Bratman (875)
Mark (877)
Brian Mohs (879)
Daniel Henderson (885)
Jeffrey Williams (887)
David Larson (889)
Thomas Chumbley (891)
Shane Prince (892)
League Creech (898)
Austin Crosby (901)
Abby Resnick-Parigian (902)
Robert King (903)

Stephan Mashel (904)	Emanuel Turnbull (1193)
John Taussig (907)	Seamus Culhane (1195)
Steven Langer (908)	Rebecca (1230)
Katherine Barrett Wiik (909)	Tim Stevenson (1255)
Michael Karst (912)	Paul Merry (1260)
John Burke (919)	Phillip Chupik (1264)
Marianne LeBlanc (921)	Joseph D'Aversa (1273)
Adam Kehrli (925)	Todd Matthews (1277)
Regina Poserina (927)	James Fitzgerald (1285)
Jill Kanatzar (929)	Margaret Strickland (1288 & 1295)
Lucas Baker (932)	Christina Hagen (1302)
Mark Prince (940)	David Arbogast (1307)
Avi Kumin (946)	Robert McKnight (1323)
Thomas Meyers (948)	Mark Biddison (1328)
Michael Ryan (949)	Gavriela Bogin-Farber (1334)
Seth Bernanke (954)	Mark Hammons (1336)
Michael Scimone (957)	Neil Solomon (1339)
David Bolt (965)	Deborah Mains (1349)
Benjamin Folkman (967)	Jocelyn Larkin (1352)
Grahame Holmes (968)	Rhonda Maloney (1374)
Brent Johnson (970)	Leonard Bates (1380)
Wesley Phillips (971)	Ryan Harrell (1383)
Jonathan Halperin (972)	James Sanford (1390)
Jeffrey Marion (974)	Michael Bigos (1400)
Robert Haslam (978)	Roger Mandel (1403)
S Lee Patton (983)	Jill Zwagerman (1437)
George Garrow (985)	Clayton Thompson (1443)
Jonathan Karon (988)	Rachel Boyd (1444)
Elizabeth Cabraser (989)	Timothy Manchin (1446)
Edward Airhart (990)	Lauren Barnes (1458)
Nathan Berger (991)	Taylor Downs (1459)
Cheryl Trine (997)	James Campbell (1461)
Robert Beatty-Walters (1022)	Joseph Garcia (1465)
Casey Brown (1025)	Michele Cybulski (1487)
Joshua Davis (1042)	Joseph Gates (1492)
Lisa Barley (1060)	Elizabeth Eiland (1503)
Marc Willick (1061)	Michael Patrick (1506)
David Sugerman (1063)	Graham Esdale (1509)
William Leonard (1087)	Shannon Pennock (1524)
Lucas Watson (1131)	Emily Acosta (1541)
Michael Donahue (1139)	Roy Thibodaux (1555)
Virginia Hardwich (1154)	Jeff Crollard (1562)
Frederick Longer (1161)	Robert Garcin (1563)
Michael Merrick (1177)	Jerome F. O'Neil (1572)
Ty Hyderally (1184)	Archie Grubb (1575)
Stephen DeNittis (1186)	Amy Brogioli (1579)

Tina Wolfson (1580)
Susanne Thompson (1592)
Laurel Li Harris (1594)
Leslie Anne Taylor (1595)
Paul Simmons (1603)
Hunter Swain (1614)
Rian Butler (1620)
Ryan Toomey (1622)
Sydney Abdallah (1623)
Stefani Preston (1624)
Jono Young (1626)
Brendan McQuaid (1638)
Michael Cupero (1639)
Marnie McGoldrick (1640)
Chelsea Cates (1643)
Donald Slavik (1644)
Tyler Watkins (1646)
Peggy Rensberger (1648)
Joseph Bates (1654)
Andrew Rogers (1657)
Branson Rogers (1665)

Douglas Stevick (1673)
Patrick Mause (1676)
Daniel Price (1681)
Christopher Hood (1689)
Devonna Joy (1690)
Jennifer Danish (1701)
Traci Buschner (1705)
Shaun Peck (1716)
Michael Greenspan (1717)
Mike Arias (1719)
John Gear (1729)
Katherine Harvey-Lee (1731)
William Rossbach (1736)
Robert O'Hare (1738)
Navan Ward Jr. (1767)
Brian Sullivan (1771)
Sommer Luther (1777)
John Beisner (1779)

I am neutral on conferring (or does not mention about conferring)
but oppose numerical limits.

James Fitzsimmons (513)	Melanie Schmickle (776)
Jeff Warncke (525)	N Novack (791)
Rafael Velzquez-Villares (529)	Frederick Rispoli (793)
Michal Shinnar (531)	Caela Baker (805)
Zev Antell (534)	W. Kelly Lundrigan (809)
Eileen Kroll (536)	Matthew Turner (813)
Eashaan Vajpeyi (540)	Jessica Mallett (837)
Timothy Mcilwain (542)	Camy Francis (838)
Robert Lewis (543)	Danial Laird (860)
Peter Whelan (554)	Aaron Brown (866)
Thomas Strelka (562)	Samuel Elswick (869)
Blake Dickson (575)	Kara Harp (874)
Natalia Blaskovich (577)	Laura Castagna (883)
Henry Minitier (578)	Gregory Whitley (888)
Linda Strelka (579)	Ben miller (897)
Matthew Nace (580)	Mark Abramowitz (910)
Marc Diller (583)	Sarah Nason (930)
Kevin Kruse (586)	Jonathan Meyers (952)
Ray Gallo (591)	Philip Miller (963)
Simina Vourlis (593)	Raeann Warner (982)
Thomas Pleasant (599)	Josiah Corrigan (987)
Chris Nidel (601)	Dan Talmadge (1003)
Douglas Hartnett (607)	Shawn Miller (1008)
William Lawson (619)	Zachariah Parry (1024)
Anthony Bribresco (623)	Thomas Henderson (1028)
Shane Smith (637)	Michael Jewell (1045)
Richard Hay (638)	Matthew Holycross (1052)
Anthony Olson (654)	Joseph Lovretovich (1091)
David Rash (665)	Peter Goldstein (1129)
Laura Browne (675)	Jennifer Tobin (1155)
Kasie Braswell (680)	Jennifer Vorih (1173)
Michael Bahr (688)	Corinne Cundiff (1223)
Lindsey Cheek (717)	David Terry (1259)
Kelly Parry (718)	Robert Linton (1261)
Patrick DiBenedetto (720)	Joanne D'Alcomo (1303)
Lorraine Parker (721)	Lisa Sahli (1309)
Sarah London (722)	Jory Ruggiero (1376)
John McCabe (731)	Randy Hood (1564)
Cody Roberson (732)	Alexander Ackel (1694)
Benno Ashrafi (733)	Patrick Ardis (1708)
Matt Morris (735)	Delana Sanders (1728)
Timothy Scott (767)	

**I oppose a requirement to confer because the rule is good as it is/changes are unnecessary
and oppose numerical limits.**

Laura Schultes (501)	Lindsay Cordes (741)
Martin Kardon (505)	Saul Gruber (742)
Amanda Condon (506)	David Hoey (746)
Bruce Whitman (507)	Michael Bonamarte (748)
Karen Evans (511)	John Steffan (750)
Michael Galpern (512)	Peter Giglione (751)
George Chronic (514)	Sanford Horowitz (755)
Ben Davis (520)	Brian Dretke (759)
Paul Maxon (533)	Stephen Seach (765)
Peter Grenier (535)	Thomas Henson Jr (773)
Caleb Rannow (537)	Stephen Held (784)
Daniel Clayton (541)	Michael Gianantonio (786)
Terry Grimes (546)	Jeffrey Adams (787)
Brian Butler (547)	Karen Shanks (795)
Henry Queener (552)	Mark Hanson (797)
Charles Williams (556)	Laura Mullins (807)
Wesley Nakajima (569)	Brad Stark (811)
Ronald Livingston (571)	Ronald Barczak (812)
Michael Peacock (597)	Sean Gambogi (819)
Render Freeman (626)	Stacy Stennes (820)
John Leighton (659)	Nicole Lundrigan (823)
Feliz Rael (538)	Jason Whittemore (824)
H David Kelly (548)	Teresa Arnold-Simmons (825)
Gary Poliakoff (555)	Richard Davis (826)
Lawrence S. Lapidus (559)	Henry Courtney (827)
Martell Harris (563)	Product Liability Advisory Council (828) <i>*concurrs with limits*</i>
Dennis Currell (567)	Glenna Francis (830)
Paul Ivie (568)	Heather Mullman (833)
James Donovan (572)	Neil Anthony (834)
Matt Schultz (581)	Alan Wagner (840)
Allan Siegel (585)	Mark Bringardner (841)
Rebekah McKinney (587)	Susan Ramsey (842)
Joshua Mankoff (589)	Michael Mann (844)
Ilana Waxman (604)	Patrick Powers (845)
Shana De Caro (613)	David Hollander (846)
Joel Bryant (618)	Jon Moore (847)
David Woodruff (627)	John Leighton (849)
Michael Ganson (635)	Heather Barnes (851)
Joel Smith (655)	Lyle Bosket (852)
Douglas Cannon (684)	Kim Valentine (853)
Robert Cowan (695)	Allegra Carpenter (854)
John Morrissey (707)	David Diamond (855)
Kenny Harrell (740)	

John Fischbach (856)
Sara Courtney Baigorri (861)
Winston Bouk (863)
Matthew Creech (865)
Carlin Phillips (867)
Debra Nelson (871)
Joseph Bilotta (872)
Ray Brady (873)
Ed Daniel (878)
Jeff Helms (880)
Daniel Goldfaden (882)
Spencer Payne (886)
Chester Tennyson (890)
Elizabeth Beall (894)
John Felder (895)
Neil O'Donnell (896)
Robert Langer (899)
Michael Scinta (905)
Neil O'Donnell (916)
Thomas Foley Jr (917)
Denise Jarman (918)
Michael Van Berkomp (920)
Ruben Krisztal (922)
Jeremiah Fues (923)
James Morgan (924)
Neil O'Donnell (928)
Mitchell Chubb (931)
Scott Voorhees (933)
Scott Goldberg (934)
Paul McCarten (935)
Michael Foley (936)
James Curry (941)
Francis Dorrity (944)
Margaret Farley (947)
Thomas Thistle (950)
Stephen Curtice (951)
Brent Bigger (956)
Angel Mae Webby-Zola (958)
Michael A. Brusca (959)
Shane Newlands (960)
J Gregory Webb (964)
Matthew Morgan (969)
Christopher Bilecki (976)
Jason Ohliger (980)
J Steele Olmstead (981)
Michael Warshaw (984)
Steven Schepps (992)
R Saitz (993)
Lara Johnson (994)
Warner Mendenhall (995)
Ronald Wilcox (996)
Glenn Katon (998)
Patricia Willner (1000)
Lawence Jones (1001)
Gregg Neal (1002)
Ingrid Halstrom (1004)
Byron Warnken (1005)
Rip Andrews (1007)
Don Corson (1009)
Lisa Carper (1010)
Steve Seal (1011)
Andreas Bodmeier (1012)
Matthew Holland (1013)
Robert Cartwright Jr (1014)
Carla Aikens (1015)
Shane Kadlec (1016)
Eric Blank (1017)
Brook Hammond (1018)
Thomas Melville (1019)
Charles Bracewell (1020)
Jerald Block (1021)
Michael Crew (1023)
Stephen Norman (1026)
Anthony Chiosso (1029)
Marc Silverman (1030)
Matthew Granda (1032)
Rochelle Harding-Roed (1034)
John Joyce (1036)
Anthony Garza Vale (1037)
Jennifer Miller (1039)
Robert Ammons (1043)
Jim Wilkerson (1044)
Stan Johnson (1046)
Quinn Kuranz (1047)
Kara Rahimi (1048)
Joseph Pierry (1049)
Gordon Leech (1053)
Quinton Spencer (1054)
Cody Thornton (1055)
Daniel Buttram (1056)
Dylan Hooper (1057)
R Michael Shickich (1059)

Eric Gillin (1062)
Ronnie Cromer (1064)
Richard Budden (1065)
Vernon Sumwalt (1066)
Lincoln Sieler (1067)
Tina Stupasky (1068)
Stephen Voorhees (1071)
Kevin Coluccio (1072)
Wayne Mitchell (1074)
Kristine Keala (1077)
Sharon Cousineau (1078)
Marcus Vaden (1081)
Joseph Gillespie (1082)
John Barton (1083)
Jon Friedman (1084)
Gabriel Harvis (1089)
Robert Weppner (1090)
Jared Anderson (1092)
Matthew Hale (1093)
Kyle Moore (1094)
Richard Watson (1095)
William Kaetz (1096)
Mark Englehart (1098)
Isabel Cole (1099)
Sarah Silberger (1101)
David White (1102)
James Conroy II (1104)
David Nauheim (1105)
Mary Pool (1107)
Spencer Pahlke (1108)
John Xydakis (1109)
Ryan Hamilton (1110)
Chris Bataille (1111)
Daniel Malis (1112)
Mark Larson (1113)
Carl Varady (1114)
Christopher Burk (1115)
Sara Peters (1116)
Catherine O'Donnell (1117)
Michael O'Donnell (1119)
John Camillus (1120)
Jeffrey Rubin (1121)
William Ritchey (1122)
James Sellers (1123)
Tobias Cole (1124)
Benjamin Hall (1125)
Michael Stevens (1126)
Rhett Fraser (1130)
Michael Guilford (1132)
Louie Cook (1133)
Steven Margolis (1134)
Shammara Henderson (1135)
Radi Dennis (1136)
Gregory Pascale (1138)
Austin Watts (1140)
Stephen Lewis (1141)
Douglas Patrick (1145)
Omar Malik (1146)
Daryl Christopher (1149)
Peter Riley (1150)
David Sheller (1151)
Sara Ellen Hutchinson (1153)
David Crough (1156)
Karesa Rovnan (1157)
Jenny Marashi (1158)
Benjamin L Hall Jr (1163)
Remy Green (1164)
Brenton (1168)
Scott Lucas (1169)
Kenneth Hall (1170)
Stephen Shea (1171)
Nathan Anderson (1176)
Nathan Severson (1178)
Rhonda Hood (1179)
Daniel Goodwin (1180)
Christian Bagin (1183)
Joseph McClelland (1185)
Forrest Buffington (1187)
April Ferrebee (1188)
Ryan Ballard (1189)
Michael Carin (1190)
Carolyn Kubitschek (1194)
Koby Kirkland (1196)
Scott Murphy (1197)
Chris Hammons (1198)
Chelsea Edwards (1199)
Craig Marchiando (1200)
Paul Tershel (1202)
Mary Hashemi (1204)
Tad Thomas (1205)
Ralph Petty (1207)
Robert Quackenbush (1208)

Jane Clark (1209)	Isaac Ruiz (1276)
John Abaray (1210)	Jeff Tuttle (1278)
Kenneth Kinney (1211)	John May (1279)
Seth Lehrman (1212)	Daniel Cairns (1280)
Kevin Dillon (1214)	Thomas Foley (1281)
Ronald Burda (1215)	Sam Elder (1282)
Gregory Milne (1216)	Egan Kilbane (1283)
Timothy Lenahan (1217)	Robert Bohm (1284)
Yitzchak Zelman (1219)	Matthew Wurdeman (1286)
Kevin Quinn (1220)	Richard Hitz (1287)
Bobby Martin (1221)	Elizabeth McLafferty (1289)
Michael Woerner (1222)	Joe Moore (1290)
Chris Mills (1224)	Daniel McLafferty (1291)
William Marshall (1225)	Joel Hanson (1292)
Brock Duke (1226)	Heather Cover (1294)
Whitney Judkins (1227)	Ben Cox (1296)
Michael Mosher (1228)	Kate Denner (1297)
Patrick Kang (1229)	Thomas Domonoske (1298)
Ruby Aliment (1234)	Devin Robinson (1299)
Michael Bardrick (1235)	Charles Holliday (1300)
Robert Landry (1237)	Kris Zucconi (1301)
David B Rankin (1238)	Patrick MacDonald (1306)
Roy Comer (1239)	Kevin Ambler (1308)
David Foster (1240)	John Parisi (1311)
Ryan Dreveskracht (1241)	Eric Renner (1312)
Tariq Chaudhri (1242)	Barry Nace (1313)
Marlena Grundy (1243)	Joseph Backer (1314)
John Powell (1244)	Sean Akari (1315)
Andrew Brodie (1245)	Douglas Williams (1316)
George Quesada (1246)	David Heller (1318)
Leonard Stephens (1247)	Hart Green (1319)
Jessica Scales (1248)	Catherine Clark (1321)
Anne Vankirk (1249)	Sean DuBois (1324)
Jeffrey Clause (1251)	Aubrie Hicks (1326)
Scott Wilson (1252)	Charles Steinberg (1327)
Kay Teague (1262)	Mercedes Donchez (1329)
Bryan Johnson (1263)	Ryan Earl (1330)
Emily McCarty (1265)	Stephen Nordyke (1335)
Sarah Jane Hunt (1266)	Laurel Halbany (1338)
Michael Walker (1267)	Daniel Edelman (1342)
Dylan Kilpatric (1268)	Virginia Price (1343)
Julie Celum Garrigue (1269)	Richard Lane (1344)
Ann Deutscher (1270)	Jared Hartman (1345)
Scott Blair (1272)	Robert Stempler (1346)
Michael Mohlman (1274)	Steven Howard (1347)
Jarrod Takah (1275)	Mary Fons (1348)

Heather Jones (1350)
Don Bauermeister (1353)
McKean Evans (1355)
Christopher Love (1356)
Katherine Butler (1357)
Jeff Scott Olson (1359)
R.E. Chips Portales (1360)
Paul Bullman (1364)
Mark Clausen (1365)
Ryan Peterson (1366)
James Peterson (1367)
Casey Nash (1369)
Dante Trevisani (1370)
Grace Jun (1373)
Julia Yoo (1378)
Youssef Hammoud (1381)
Lauren Freidenberg (1382)
Charles Morgan (1387)
Joe Di Bartolomeo (1388)
David Holub (1389)
Ian Bratlie (1391)
Sean Laird (1392)
Ilan Wexler (1393)
Kimball Jones (1394)
Amil Minora (1397)
Patrick McArdle (1398)
Todd Young (1399)
Jim Lyons (1402)
Daniel Libbey (1404)
David Marco (1405)
Mike Godbe (1406)
Allen Arnold (1407)
James Michel (1410)
Kaelyn Steinkraus (1411)
Corey McGaha (1412)
David Trujillo (1413)
Matt Norris (1415)
Ronald Angerer (1418)
Andre Verdun (1419)
Duran Keller (1420)
Richard Feferman (1421)
Tyler Holyfield (1424)
Douglas Johnson (1425)
Kevin Foley (1426)
Arthur Csillag (1429)
Kelly Anderson (1430)
Justin Kahn (1431)
Deirdre O'Connor (1434)
Michael Doyel (1436)
Alexandria Parrish (1439)
Bob Semnar (1440)
C. Michael Bee (1441)
Ronda Kelso (1442)
Jason Orndoff (1447)
Andrew Hay (1448)
Steven Kazan (1450)
Nick Wooten (1451)
Ryan Duplechin (1452)
Charles Robinowitz (1454)
Joseph VanZandt (1455)
Herbert Hofmann (1456)
Deborah Raymond (1457)
David Benson (1462)
Sami Thalji (1463)
Deborah DeMack (1464)
James Beard (1466)
David Mann (1467)
Joel Grist (1468)
Ian Kalmanowitz (1469)
Omar Sulaiman (1470)
Michael Goldstein (1473)
Benjamin Locklar (1479)
Eudoxie Dickey (1480)
Mary Morris (1488)
Brian Brazier (1491)
Karl Dickhaus (1493)
Eric Artrip (1495)
Mike Bee (1496)
Douglas Clark Jr. (1501)
Alana Weatherstone (1504)
Charles Reese (1505)
Angel Diaz (1507)
Amy Davis (1508)
Lawrence Serbin (1510)
Wendy Fleishman (1514)
Sean Malcolm (1517)
Tiffany Yiatras (1518)
Brian Matisse (1520)
Noah Rich (1521)
Roy Willey (1523)
David Rosenbaum (1525)
Ronald Kaplan (1526)

Meghan Quinlivan (1527)
Brad Sherman (1529)
Catherine Eranthe (1530)
Mike Cone (1532)
Frederick Schlosser (1536)
Paola Pearson (1537)
Jeremy Vishno (1538)
David Romano (1540)
Kenneth Segal (1542)
Kevin Chavez (1544)
Jeff Buncher (1545)
Joseph Kolar (1546)
J. Edward Kim (1547)
Thomas helm (1548)
Michael Quinn (1550)
Michael Block (1551)
Kelly Schulz (1552)
James Rosemergy (1554)
Mark Smith (1556)
Douglas Chabot (1557)
Chase Molchin (1559)
Sarah McEahern (1561)
Jeff Mueller (1566)
Forrest Jackson (1567)
Howard Manis (1569)
Richard Manger (1571)
Daniel Buba (1576)
Keith Frankl (1578)
Kristopher Torres (1581)
Tara Milliff (1582)
Camille Godwin (1583)
Lindsay Halm (1586)
Kathryn Anderson (1587)
Colleen Libbey (1588)
F Emmet Ciccone (1590)
Charles Hall (1591)
Glenn Gulick (1593)
Osler Peterson (1596)
Gary Poliakoff (1597)
G. Bryan Ulmer (1598)
Larry Jones (1599)
Bryan Pope (1600)
Gerald Waltman (1601)
Gregory Malush (1602)
Coleen Libbey (1604)
Ivan Lopez Ventura (1606)
Sara Neil Stribling (1608)
Frank Burge (1609)
Alan Robertson (1610)
Monique Olivier (1611)
C Artim (1612)
Richard Dillenburg (1613)
Aaron DeShaw (1615)
Jamie Goldstein (1616)
Gene Cullan (1617)
Rhett Francisco (1618)
Jon Mann (1619)
John Risvold (1621)
Peter Bowman (1625)
Gary Hazelton (1627)
Dennis O'Berry (1628)
Brandon Chase (1629)
Kelly Reed (1633)
Kelly Albers (1634)
Stephen Roach (1635)
Paul Mahoney (1637)
Molly Greenblatt (1647)
Greg Funfsinn (1649)
Marco Mercaldo (1655)
Joe Kelly (1661)
Eric Hertz (1662)
Adam Resmini (1663)
Phyllis Eddins (1664)
Jeffrey Galliher (1666)
Jonathan Jamieson (1667)
Douglas Fagan (1668)
Linda Commons (1670)
Brian Leonard (1671)
Paul Banker (1674)
Robert Michael Flynn (1677)
John Munoz (1678)
M. Stewart Ryan (1679)
Eric Awerkamp (1680)
Elizabeth Finizio (1685)
Blake Vance (1692)
Mollie McGraw (1693)
Donald Burke (1696)
Christian Schreiber (1697)
Claude Wyle (1698)
Randal LeNeave (1700)
Burke Smith (1707)
Simon Forgette (1709)

David Cluff (1710)
Robert Allenby (1711)
Jon Lee (1712)
Charles Meltmar (1713)
Colin Simpson (1714)
Sarah Swatosh (1718)
Thomas Myers (1720)
Adam Strauss (1721)
Jackson Pahlke (1722)
John Ksajikian (1723)
Laraclay Parker (1724)
Samantha Copeland (1725)
Luther Amundson (1727)
Michael Lewis (1733)
Shep Williams (1734)
Benjamin Crittenden (1735)
John Donohue (1739)
Joseph Koplín (1741)
Michael Phelps (1743)

Paul Albright (1745)
Bryce Bell (1747)
Robert Ferguson (1749)
Emily Peacock (1751)
Jennifer Hoekstra (1752)
Robert Underwood (1753)
Michele Henry (1754)
Daphne Saddler (1755)
Benjamin Cloward (1757)
Bob Edwards (1759)
Matthew Ghio (1761)
Adrian Sak (1762)
Rachel Solow (1766)
U.A. Lewis (1769)
Mark Rouse (1772)
William Smith (1773)
Michael Gunzburg (1774)
Vicente Barraza (1775)
Christina Henry (1776)

I oppose a requirement to confer because it will create more disputes and litigation/defendant will use it to stall and oppose numerical limits.

American Tort Reform Association (503)	Duggy Reagan (711)
Sergio Rufo (504)	Bart Baumstark (713)
Erin Jewell (508)	Todd Barnes (724)
William Harty (509)	Thomas Malone (736)
Jay Renneisen (517)	Joseph Tunstall (752)
Nicholas Woodfield (522)	Tara King (753)
Taylor Lacy (527)	Joel Franklin (756)
John Kirtley (545)	Andrew Wainwright (760)
Sarah Emery (564)	Juliet Keene (761)
Lawrence Knapp (570)	Natalie Sharp (762)
Lincoln Wright (573)	Thomas Murphy (768)
Michael S. Dampier (590)	Philip Mullins (769)
Nicholas Carlin (595)	Kelly Battley (770)
Kurt Holzer (608)	Paul Robinson (794)
Amy Woodward (609)	Turner Rouse (796)
Brett Powers (615)	Henry Lindler (814)
W. Whitney Seals (617)	Christopher Paulos (815)
Grant Lawson (622)	Rachael Gilmer (816)
Dennis Murray (624)	William Ruiz (817)
Kristin Karbowski (625)	Daniel Francis (821)
John Chambless (628)	Sean Cole (822)
Bernard Solnik (630)	Kenneth Mitchell (829)
William Robins (631)	Luke Dalton (835)
Matt Feller (632)	James Smith (836)
Daniel Laurence (633)	Matthew Sullivan (850)
Peter Lynch (636)	Kenneth Levinson (862)
Soha Saiyed (639)	Margaret Battersby (864)
Victoria Schall (641)	Hugh McCormick (870)
David Wulff (642)	David Wendel (876)
DOJ (646)	Nathan Finch (881)
Nancy Winschel (650)	Michael Schwarz (884)
Jacques Williams (651)	Ronnie Crosby (893)
Kevin Weis (653)	Gary Marts (900)
Ann Wilson/ Motor & Equipment Manufacturers Association (656)	Eric Richardson (906)
Justin Owen (658)	David Tyler (911)
Aaron Whaley (663)	Andrew Nadzam (913)
Lindsay Lien Rinholen (666)	Christian Patno (915)
James Piel (673)	David Ybarra (926)
Robert Kisselburgh (686)	Scott Smith (937)
Spencer Reiss (689)	Sean FitzPatrick (938)
Jake Eisenstein (691)	Allyson Romani (939)
	John Henderson (942)
	Marc Berman (943)

Stephen Burg (945)	Steve Conley (1152)
Olivia Kronenberg (953)	Andrew Clarke (1159)
Jeffrey Pollack (955)	Paul Schlemmer (1162)
Henry Salas (961)	Matt Stapleton (1165)
Clarke Sturge (962)	Scott Korenbaum (1166)
Douglas Fees (966)	Robyn Buckley (1167)
William Jungbauer (973)	Kevin Hinkle (1172)
Craig Leslie (975)	John Roper (1174)
Francisco Rodriguez (977)	Joel Strauss (1175)
Sherry Rozell (979)	Peter Silva (1181)
Charles Haake (986)	Aaron Swift (1182)
Jeffrey Bakst (999)	Brian Crockett (1191)
Mark Baumkel (1006)	Warren Astbury (1192)
Tim Mott (1027)	Paul Klehm (1201)
Sam Boyd (1031)	John Shook (1203)
William McGaha (1033)	Bruce Stern (1206)
John Whitaker (1035)	Thomas Vesper (1213)
Kiernan McAlpine (1038)	John McCraw (1218)
Geoffrey Bryan (1040)	Victoria Herring (1231)
Wayne Parsons (1041)	Kevin Costello (1232)
Laura Ozak (1050)	Jamed Bartimus (1233)
Joshua Watson (1051)	Robert Hill (1236)
David Chami (1058)	Michael Charbonneau (1250)
Allan Brain (1069)	Kevin Jones (1253)
Kevin Williams (1070)	Kelsey Marquard (1254)
Corey Suda (1073)	Christopher Finney (1256)
Harry McGrath (1075)	Lance Sears (1257)
Molly Clark (1076)	Denise Bradshaw (1258)
Edward Ciarimboli (1079)	Christopher Graver (1271)
Gregory Fellerman (1080)	TJ Massey (1293)
Michael Starkman (1085)	Broke Timmer (1304)
Kenneth Morris (1086)	William Thayer (1305)
Crystal Rutherford (1088)	George Kokkines (1310)
Charles Pekor (1097)	Charles Head (1317)
Erin Christison (1100)	Rhonda Wilson (1320)
Julianne Germinder (1103)	Alexander Melin (1322)
Brad Evans (1106)	Christopher Nickson (1325)
Mark Joseph Kenney (1118)	Amanda Allen (1331)
William Cummings (1127)	Joe Ervin (1332)
Michael Pence (1128)	Peter Barry (1333)
Casey Lott (1137)	Alina Mooradian (1337)
Steven Kantor (1142)	Billy Howard (1340)
Timothy Kittle (1143)	Steven Malek (1341)
Laura Yaeger (1144)	S. Virginia Price (1343)
T David Apodaca (1147)	Bonnie Favor (1351)
Landis Curry (1148)	Jocelyn Larkin (1352)

Gus Centrone (1354)
Michael McDonald (1358)
Malcom MacGregor (1361)
John Sly (1362)
Shelley Stangler (1363)
Sonya Edwards (1368)
Beth Davis (1371)
Alexander Trueblood (1372)
Rochelle Gumapac (1375)
Andrew Gross (1377)
Sandra Harrah (1379)
Stephen Skinner (1384)
Benjamin Donahue (1385)
Lee Dawn Daniel (1386)
Gregory Zeuthen (1395)
J. Carter Thompson Jr. (1396)
Mari Perczak (1401)
Noah Peters (1408)
Penny Cauley (1409)
Kirk Miller (1414)
Majdi Hijazin (1416)
Chris Miltenberger (1317)
Albert Dahm (1422)
Rex Anderson (1423)
Heather Leonard (1427)
John Nelson (1428)
Terrence Nealon, Jr. (1432)
Russel Dombrow (1433)
Bethany Hilbert (1435)
Michael Heineman (1438)
Michael Reiter (1445)
James Swartz (1449)
Morgan Adams (1453)
Dawn McCraw (1460)
Max Meyers (1471)
Kevin O'Brien (1472)
Nick Naiser (1474)
Drew Ashby (1475)
John MacLellan (1476)
Marcus Berg (1477)
Chris Roy (1478)
John Restaino (1481)
Richard Newsome (1482)
M. Raymond Hatcher (1483)
Richard Johnston (1484)
David Bernstein (1485)
Jeffrey Floyd (1486)
Ronald Truman (1489)
Breanne Cope (1490)
Michael Sowinski (1494)
Elizabeth Larrick (1497)
Robert Clements (1498)
Richard Russo (1499)
Nelson Boyle (1500)
Matthew Vance (1502)
David Damick (1511)
Brandon Beagley (1512)
Jeff Burns (1513)
Scott Shipman (1515)
Christopher Hill (1516)
Scott Stinson (1519)
John Rosenthal (1522)
Craig Schlappizzi (1528)
Jean Martin (1531)
Jeff Gaddy (1533)
Lauren Bryne (1534)
Martin Summe (1535)
Paul Byrd (1539)
Melissa Wischerath (1543)
Glenn Kadish (1549)
Martin Meyers (1553)
Jeffrey Liggio (1558)
Andrew Young (1560)
Susan Rotkis (1565)
Chris Dandurand (1568)
Shelley Sanford (1570)
Jeremiah M. Hodges (1573)
Mark Lehman (1574)
Matthew Millea (1577)
Stan Friedman (1584)
Joanne Faulkner (1585)
Conor McLaughlin (1589) **concurrs with limits**
Cortney LeNeave (1605)
Joseph Saylor (1607)
Frank Burge (1609)
Chadwick Meyers (1630)
Bina Ghanaat (1631)
Elizabeth Brancart (1636)
John Patrick Murphy (1641)
Jackie Sharp (1642)
George Hester (1645)
Scott Rodgers (1650)

Anonymous (1651)	Kenneth Sigelman (1732)
Philip Goldberg (1652)	Misty Borland (1737)
Jonah Flynn (1653)	Jeremy Romoser (1740)
N Dean Nasser, Jr. (1656)	Francis Petro (1742)
James Gigax (1658)	Michael Wirtz (1744)
Sean McConnell (1659)	Maridith Ramsey (1746)
Nicholas Teeples (1660)	Patrick Mangan (1748)
Jerold Matayoshi (1669)	Stephen Van Gassbeck (1750)
Jack Zinda (1672)	Melissa Mosier (1756)
Dean Maglione (1675)	Breean Walas (1758)
John Murray (1682)	Johnathan Leavitt (1760)
Michael McReynolds (1683)	Charles Jackson (1763)
David Ledyard (1684)	Nia Killebrew (1764)
Thomas Burnett (1686)	Ashton Dennis (1765)
Brad Kendall (1687)	Elizabeth Calora (1768)
Jason Ibey (1688)	Michael Sandoval (1770)
Daniel Stuart (1691)	Melissa Huelsman (1778)
Lawrence Kahn (1695)	Christian Singewald (1780)
Bruce Sherman (1699)	
Ryan Brennan (1702)	
Jack Edwards (1703)	
Stuart Fagan (1704)	
S. Taylor Chaney (1706)	
Jay Krulewitch (1715)	
Abbas Kazerounian (1726)	
Mark Rodgers (1730)	

APPENDIX B

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Plaintiff Fact Sheets in Multidistrict Litigation:
Products Liability Proceedings 2008–2018

Prepared for the Judicial Conference Advisory Committee on Civil Rules

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Federal Judicial Center

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Executive Summary

The Judicial Conference Advisory Committee on Rules of Civil Procedure (Committee) is currently considering various proposals to amend the Federal Rules of Civil Procedure to address the management of multidistrict litigation (MDL) proceedings. To inform its deliberations, the Committee requested that the Federal Judicial Center conduct research regarding MDL transferee courts' use of plaintiff fact sheets (PFS) and related case management tools. This report summarizes results of that research as of February 2019. Key findings include:

- PFS were ordered in 57% of the MDL litigation proceedings covered by the study (N = 116)
- PFS were more commonly ordered in the larger proceedings covered by the study. PFS were ordered in 87% of proceedings with more than 1,000 actions.
- The average time from centralization date to the date of the PFS order was 8.2 months, and the median time was 6.1 months.
- In just over half of proceedings in which PFS were ordered, 55%, there was docket evidence of activity to dismiss actions for failure to file substantially complete PFS.
- Plaintiff profile forms were ordered in 18% of proceedings covered by the study, generally in proceedings with large number of actions.
- Defendant fact sheets were ordered in 42% of proceedings covered by the study, also generally in proceedings with large numbers of actions.
- Short-form complaints were ordered in 34% of proceedings covered by the study, almost always in proceedings with more than 100 actions.

Background

For purposes of this report, plaintiff fact sheets (PFS) are standardized questionnaires that serve the same function as interrogatories and requests for production. As outlined in this report, PFS are often ordered in multidistrict litigation (MDL) proceedings with large numbers of plaintiffs. The term “plaintiff fact sheet” itself is commonly used in MDL proceedings and is generally used to distinguish PFS from other case management tools available to transferee judges.

PFS should not be confused with *Lone Pine* orders. *Lone Pine* orders are a case-management tool requiring production by the plaintiff of an expert affidavit identifying case-specific evidence of causation.¹ They differ from PFS in that PFS do not require submission of case-specific, sworn expert evidence. PFS and *Lone Pine* orders are not mutually exclusive—a *Lone Pine* order may issue at a later stage of an MDL proceeding, for example, to assist in evaluating remaining plaintiff claims after a settlement of other claims.² But they are distinct tools that serve different purposes in managing cases.

This report does not provide information about the use of *Lone Pine* orders. The PFS covered by this report were examined to determine whether the forms required plaintiffs to submit sworn statements or expert testimony as part of the PFS process. The general information required in the PFS included:

- health records (*e.g.*, general health, health issues related to the product, names of doctors, pharmacies, and denial of health insurance);
- personal identifying information (*e.g.*, names, addresses, education, and employment); and
- litigation history (*e.g.*, prior tort litigation, past bankruptcy, social security claims, and workers’ compensation claims).

All the PFS required these types of information, and many of them included other categories of litigation-specific questions. They also frequently required medical or other types of releases. In addition, ten included questions regarding third-party litigation funding of plaintiff claims. None of the PFS covered in this report required expert testimony or sworn statements to be submitted as part of the PFS process. So, even though in some instances the line between a PFS order and a *Lone Pine* order may be indistinct, the orders discussed in this report do not represent such instances.

This report covers the incidence of PFS, plaintiff profile forms (PPF), defendant fact sheets (DFS), and short-form complaints (SFC) in a subset of MDL proceedings. The report also addresses the amendment of PFS and dismissal of cases for failure to submit substantially complete PFS.

¹ See, *e.g.*, *In re: Digitek Prods. Liab. Litig.*, 264 F.R.D. 249, 255 (S.D.W. Va. 2010).

² See *In re: Vioxx Prods. Liab. Litig.*, 388 Fed. Appx. 391, 397 (5th Cir. 2010).

Study Design

In its discussion of PFS, the Judicial Conference Advisory Committee on Rules of Civil Procedure (Committee) tends to focus on large MDL proceedings typically involving personal injury claims. For this reason, Federal Judicial Center (FJC) researchers collected data from proceedings centralized 2008–2018 (through October) categorized as products liability proceedings as well as two very large non-products liability proceedings (N=116).³ The number of studied proceedings centralized each year of the study period varied from 6 to 17. The average size of these proceedings (for closed proceedings, at the closing of the proceeding; for total actions in open proceedings, as of October 2018) was 2,640 actions. The largest proceeding as of October 2018 was 40,533 actions; the smallest, 3 actions.⁴ FJC researchers examined the case management orders in these proceedings for orders establishing a PFS process and related orders.

Plaintiff fact sheets and plaintiff profile forms

PFS were ordered in 66 (57%) of the 116 MDL proceedings examined. As anticipated, PFS were more commonly ordered in larger proceedings. PFS were ordered in 81% of proceedings with more than 100 actions (59 out of 73). The corresponding figure for proceedings with fewer than 100 actions was 16%. PFS were ordered in 87% of “mega” proceedings (more than 1,000 actions) (34 out of 39). (Moreover, PPF were ordered in 3 of the 5 mega proceedings without PFS orders.)

The average time from centralization date to the date of the PFS order was 241 days, or 8.0 months (N=65).⁵ The median time was 187 days, or 6.1 months.

PPF were ordered in 21 proceedings (18% of all proceedings). As the term is generally used in orders, “plaintiff profile forms” are questionnaires, less extensive than PFS, ordered by the court. PPF appear to be less common than PFS. PPF were ordered in addition to PFS in 14 proceedings and in lieu of PFS in 7 proceedings. All PPF orders were in proceedings with more than 100 actions, and two-thirds of them (14, or 67%) were in mega proceedings.

Defendant fact sheets

DFS were ordered in 49 of the proceedings examined, 42%, with one proceeding planning a DFS for the future. DFS are questionnaires ordered by the court to collect information about plaintiffs that is in the defendant’s possession or, in some instances, to collect information about defendants.

As with PFS, DFS were more commonly ordered in large proceedings. In proceedings with more than 100 actions (N=73), DFS were ordered in 47 proceedings, 64%. The corresponding figure

³ *In re: Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, and In re: E.I. Du Pont De Nemours & Co. C-8 Pers. Inj. Litig.*, MDL No. 2433.

⁴ *In re: Ethicon, Inc., Pelvic Repair Syst. Prods. Liab. Litig.*, MDL No. 2652, and *In re: Saturn L-Series Timing Chain Prod. Liab. Litig.*, MDL No. 1920, respectively.

⁵ One PFS did not have a docket entry.

for proceedings with fewer than 100 actions was 5%, with one fact sheet expected in the future. DFS were ordered in 72% of mega proceedings (28 out of 39).

The average time from centralization date to DFS order date was 315 days, or 10.5 months (N=49). The median time was 222 days, or 7.4 months. In many proceedings, one case management order directs the filing of both PFS and DFS.

Questionnaire development and amendment

The process by which PFS, PPF, and DFS are developed varies from proceeding to proceeding. Typically, however, a questionnaire is negotiated by the parties and then submitted to the court for its approval.

PFS were amended by a subsequent order in 21 proceedings (32% of proceedings with PFS). In 10 proceedings, PFS orders were amended a second time (15%). These counts do not include orders merely extending the deadline for the filing of PFS but involve changes to the PFS or related release forms.

DFS amendments were less common. DFS were amended by subsequent order in 11 of the 49 proceedings with DFS, 22%.

Dismissals of cases based on PFS

The Committee's interest in PFS is, in part, motivated by the role PFS may play in winnowing unsupported claims in large MDL proceedings. The potential screening functions of PFS are beyond the scope of this report. However, of the 66 proceedings with a PFS process, a majority (36, or 55%) included evidence (including show cause orders) of activity to dismiss cases when substantially complete PFS had not been filed.

There is no shortage of legal authority for dismissal of individual actions for failure to submit substantially complete PFS in a timely manner. Motions to dismiss actions for failing to submit completed PFS can rely, for example, on Federal Rule of Civil Procedure 41(b) (dismissal for failure to prosecute or comply with court order) or Federal Rule of Civil Procedure 37(b)(2) (dismissal for failure to comply with a discovery order). Circuit law determines the factors that a district court considers in deciding whether to dismiss in these circumstances, and the factual circumstances in the cases vary. But transferee courts have, at times, dismissed individual actions with prejudice for failure to comply with PFS obligations imposed by court order.⁶

⁶ See, e.g., *In re: General Motors LLC Ignition Switch Litig.*, 2017 WL 9772106, at *1 (S.D.N.Y. June 16, 2017) (“[T]he Court finds that dismissal with prejudice is the appropriate sanction for Plaintiff’s continued failure to submit PFSs as required by [court order].”); *In re: Lipitor (Atorvastatin Calcium) Mktg., Sales Prac. and Prods. Liab. Litig.*, 2015 WL 12844447, at *2 (D.S.C. June 19, 2015) (“The information requested should be readily available to Plaintiffs and Plaintiffs bear the responsibility for their failure to adequately supply such information. Plaintiffs have failed to provide such information despite multiple warnings from the Court . . .”).

Short-form complaints

Short form complaints (SFC) are another case-management tool sometimes employed in large MDL proceedings in conjunction with PFS. Following the filing of a master complaint, SFC may be ordered for direct-file cases in the proceeding. SFC typically require party-identifying information, a statement that the short form complaint adopts and incorporates allegations from the master complaint, a statement of appropriate venue, a checklist of counts from the master complaint adopted by the plaintiff, specific case facts regarding injuries, a jury demand, and a prayer for relief.

SFC were ordered in 34% of proceedings (40). SFC were more commonly ordered in larger proceedings. In proceedings with more than 100 actions, SFC were ordered in 39 proceedings (53%). SFC were almost never ordered in proceedings with fewer than 100 actions. In mega proceedings, SFC were ordered in 25 proceedings (64%).

Table 1 shows how often PFS and SFC were ordered together for the proceedings in which information about both was available. PFS were ordered in a fair number of proceedings without a corresponding SFC, and in a plurality of proceedings, neither was ordered.

Table 1

		SFC		
		Yes	No	Total
PFS	Yes	35	29	64
	No	4	41	45
	Total	39	70	109

Information about both PFS and SFC was available for 70 proceedings with more than 100 actions (see Table 2). For these proceedings, PFS were ordered more than 80% of the time, and almost half of the time, the court ordered both PFS and SFC. To put this in slightly different terms, in proceedings with more than 100 actions, when courts ordered PFS, they ordered SFC 60% of the time.

Table 2

		SFC		
		Yes	No	Total
PFS	Yes	34	23	57
	No	4	9	13
	Total	38	32	70

Conclusion

In 116 products liability proceedings centralized between 2008 and October of 2018, PFS were ordered in 57% of all proceedings and in 87% of proceedings with more than 1,000 total actions. PFS are typically ordered within 8 months of centralization of the proceeding, requiring plaintiffs to submit information including medical history and medical and other releases. Information about third party litigation financing was required in 10 of the 66 PFS. DFS were required in 49 proceedings, always in conjunction with PFS or PPF. In 55% of proceedings in which PFS were ordered, there was some docket activity related to dismissal of cases for failure to submit substantially complete forms. SFC were typically ordered in large proceedings in conjunction with PFS.

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TAB 4B

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 2-3, 2019

1 The Civil Rules Advisory Committee met in San Antonio, Texas,
2 on April 2 and 3, 2019. Participants included Judge John D. Bates,
3 Committee Chair, and Committee members Judge Jennifer C. Boal;
4 Judge Robert Michael Dow, Jr.; Judge Joan N. Ericksen; Hon. Joseph
5 H. Hunt; Judge Kent A. Jordan; Justice Thomas R. Lee; Judge Sara
6 Lioi; Judge Brian Morris; Judge Robin L. Rosenberg; Virginia A.
7 Seitz, Esq.; Joseph M. Sellers, Esq.; Professor A. Benjamin
8 Spencer; Ariana J. Tadler, Esq.; and Helen E. Witt, Esq.
9 Professor Edward H. Cooper participated as Reporter, and
10 Professor Richard L. Marcus participated as Associate Reporter.
11 Judge David G. Campbell, Chair; Professor Catherine T. Struve,
12 Reporter (by telephone); Professor Daniel R. Coquillet, Esq.,
13 Consultant (by telephone); and Peter D. Keisler, Esq., represented
14 the Standing Committee. Judge A. Benjamin Goldgar participated as
15 liaison from the Bankruptcy Rules Committee. Laura A. Briggs,
16 Esq., the court-clerk representative, also participated. The
17 Department of Justice was further represented by Joshua Gardner,
18 Esq.. Rebecca A. Womeldorf, Esq., Julie Wilson, Esq., and Ahmad Al
19 Dajani, Esq., represented the Administrative Office. Dr. Emery G.
20 Lee attended for the Federal Judicial Center. Observers included
21 Jennie Lee Anderson, Esq.; John Beisner, Esq.; Amy Brogioli, Esq.
22 (AAJ); Fred Buck, Esq. (American College of Trial Lawyers);
23 Danielle Cutrona, Esq. (Burford Capital); Alexander Dahl,
24 Esq. (Lawyers for Civil Justice); Joseph Garrison, Esq. (NELA);
25 William T. Hangle, Esq. (ABA Litigation Section liaison); Brittany
26 Kauffman, Esq. (IAALS); Robert Levy, Esq. (Exxon Mobil); Ellen
27 Relkin, Esq.; Jerome Scanlan, Esq. (EEOC); Professor Jordan Singer;
28 Brittany Schultz, Esq. (Ford Motor Co.); Susan H. Steinman, Esq.
29 (AAJ).

30 Judge Bates welcomed all participants and reported that there
31 was a good discussion of Multidistrict Litigation issues at the
32 January meeting of the Standing Committee. There were no "Rules
33 matters" discussed at the March meeting of the Judicial Conference.

34 Judge Bates further reported that amendments of Rules 5, 23,
35 62, and 65.1 took effect as scheduled on December 1, 2018. Some of
36 these changes are significant, especially the changes in Rule 23.
37 The Committee will monitor implementation of these rules as
38 practice develops.

39 *November 2018 Minutes*

40 The draft Minutes for the November 1, 2018 Committee meeting
41 were approved without dissent, subject to correction of
42 typographical and similar errors.

43

Legislative Report

44 Julie Wilson presented the legislative report. The agenda
45 materials list three bills that would amend the Civil Rules, either
46 directly or effectively. Some of the topics are familiar from
47 earlier Congresses, including disclosure of third-party litigation
48 funding agreements and prohibitions on "nationwide" injunctions. A
49 third bill would amend Rule 23 to add a requirement for class
50 certification that the class does not allege misclassification of
51 employees as independent contractors.

52 In addition to these bills, a bill on minimum-diversity
53 jurisdiction has been introduced. No action has yet been taken on
54 it.

55

Rule 30(b)(6)

56 Judge Bates introduced the Rule 30(b)(6) Subcommittee Report
57 by suggesting that it probably will prove to be the major item for
58 discussion at this meeting. The proposal to require a conference of
59 the noticing party and the deponent about a Rule 30(b)(6)
60 deposition of an organization was published last August. Hearings
61 were held this January and February, drawing some 80 witnesses.
62 Reporter Marcus records a count of 1,780 written comments; many of
63 the comments were repetitive – they did not reflect 1,780 different
64 viewpoints.

65 The Subcommittee has recommended revisions of the published
66 proposal in response to the testimony and comments. They recommend
67 that the amended rule continue to require a conference about the
68 matters for examination. But they also recommend deleting the
69 proposed requirement to confer about the identity of the witnesses
70 to appear for the organization, and to delete the requirement to
71 confer about the number of matters for examination. Related changes
72 also are recommended.

73 The Subcommittee also advances, without a recommendation
74 either way, an alternative that would add a requirement that 30-
75 days notice be given of a Rule 30(b)(6) deposition, and that some
76 number of days before the deposition the organization name the
77 witnesses who will appear.

78 Judge Ericksen delivered the Rule 30(b)(6) Subcommittee
79 Report. She began by noting that "the hearings were very helpful."
80 They, and the written comments, led the Subcommittee to recommend
81 revisions of the published draft. The Subcommittee is unanimously
82 behind the recommended revisions. They are solid. With these
83 revisions, the Subcommittee recommends that the Committee recommend
84 adoption of the proposal. It also presents two possible alternative

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85 additions for consideration, without recommendation.

86 The most "vociferous" comments addressed the published
87 proposal's requirement that the conference include discussion of
88 the identity of the persons who would appear as witnesses for the
89 organization. Everyone agrees that the organization retains sole
90 discretion to designate who its witnesses will be. What, then, is
91 the point of conferring? There also was some concern that knowing
92 the identity of the witnesses would lead to the misuse of social
93 media research to turn the deposition into a personal deposition,
94 not an organization deposition.

95 The testimony and comments also expressed concern about
96 requiring discussion of the number of matters for examination. Many
97 suggested that if the number of matters described for examination
98 is reduced, the matters will be described with greater breadth.
99 Broad descriptions, even if not vague, make it difficult to focus
100 witness preparation and to conduct the deposition without
101 disagreements. The Subcommittee long since abandoned any idea of
102 prescribing a numerical limit on the number of matters for
103 examination. Requiring discussion of the number could lead some
104 lawyers to assert an implied right to limit the number.

105 Withdrawal of the requirement to confer about the identity of
106 the witnesses led to a recommendation to withdraw the words that
107 the parties confer, "continuing as necessary." Those words were
108 inserted because it was recognized that an organization cannot
109 determine who its witnesses will be until it knows what the matters
110 for examination will be. They are no longer needed for this
111 purpose, and could become an occasion for mischief. To be sure,
112 conferring still may need to be continued in stages to satisfy the
113 good-faith requirement, but a careful balance is needed when adding
114 possible points for strategic posturing. The constant precept to do
115 no harm supports deletion of "continuing as necessary."

116 Judge Ericksen went on to describe the two alternatives
117 presented by the Subcommittee without recommendation. They grow out
118 of deliberations about the withdrawn recommendation to require
119 discussion of the identity of the witnesses to be designated by the
120 organization. Rather than discuss identity, the organization could
121 be required to name them at some interval before the time
122 designated for the deposition. To make this work, it seems
123 necessary to set a minimum notice period. The alternative draft
124 therefore would add a requirement that the notice of a
125 Rule 30(b)(6) deposition be given at least 30 days before the
126 designated time. The time for the organization to name the
127 designated witnesses could be 7, or 5, or 3 days before the
128 deposition – those alternatives are offered as illustrations
129 without suggesting a choice among them. One important reason for

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130 identifying the designated witnesses is that the organization may
131 designate more than one, assigning them to different matters for
132 examination. The party taking the deposition should know what
133 matters will be addressed by each witness as it prepares to depose
134 them. Alternative 2A reacts to the fears that advance notice of
135 witness names will foster misuse by requiring that the organization
136 specify, without naming them, which witness will address which
137 matters for examination.

138 The Subcommittee believes that if either version of
139 Alternative 2 comes to be recommended, it should be published for
140 comment. Much testimony and many comments addressed the advantages
141 and disadvantages of requiring that the organization's witnesses be
142 named in advance, perhaps in such detail that the Committee would
143 not likely learn anything more by republication. But there has been
144 no opportunity to address the advance notice requirements.

145 Professor Marcus added the suggestion that it might be better
146 to defer discussing the number of days set for the notice
147 provisions until there is at least a tentative Committee position
148 on Alternatives 2 and 2A.

149 Judge Bates expressed the Committee's thanks to
150 Judge Ericksen, Professor Marcus, and the Subcommittee. He noted
151 that some comments have been addressed to the Subcommittee Report
152 as it appears in the agenda book for this meeting. Lawyers for
153 Civil Justice supports adoption of the revised proposal, adding a
154 30-day notice requirement but not adding a requirement that
155 witnesses be named before the deposition. They urge that
156 republication would not be required. Several organizations support
157 Alternative 2, requiring the organization to name its designated
158 witnesses before the deposition, and supporting the 7-day period.

159 Judge Bates also noted that the limited advance allocation of
160 unnamed witnesses to different matters for examination set out in
161 Alternative 2A might, by example, discourage organizations that now
162 name witnesses in advance from continuing to do so. Several
163 comments have said that the best practice of the best lawyers now
164 provides names in advance. It would be unwise to discourage it.
165 Resistance to advance naming of witnesses arises from distrust of
166 the not-so-good lawyers who may misuse the names for social media
167 research that supports efforts to convert the occasion from an
168 organization deposition into a personal deposition of the witness.

169 Judge Bates also suggested that the prospect of republication
170 should not deter consideration of the advance-naming proposal. The
171 Committee should generate the best rule possible. The notice
172 provisions might well require republication. If so, so be it. The
173 fear of bad practices that seek to convert the deposition to a

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174 personal deposition are offset by the advantages of advance
175 identification. Among the advantages are those that arise when the
176 same witness has previously testified for the organization on the
177 same matters – the transcript may be available to support better
178 focus in taking the deposition, and it may be possible to select
179 documents shown to be familiar to the witness.

180 Members of the Subcommittee then provided further views.

181 One Subcommittee member was “not a proponent of
182 Alternative 2.” Naming the witness might lead to gamesmanship.
183 Questions may be prepared that seek the witness’s personal
184 information, not information the organization has had an
185 opportunity to prepare the witness to understand and relate
186 accurately. The questions may elicit “I don’t know” responses,
187 creating a false appearance of inadequate preparation.

188 Another Subcommittee member offered some support for requiring
189 advance notice of witness names. Without this requirement, the
190 direction to confer about the matters for examination “is pretty
191 weak sauce.” The fear that requiring advance notice will deter
192 lawyers from continuing their present best practices – for example
193 by shortening the period of advance notice down to the required
194 minimum – seems overdrawn. The less we require, the more room there
195 will remain for controversy about the desirable more.

196 Still another Subcommittee member said that Subcommittee
197 discussions had been robust. “Concerns were expressed on both sides
198 of the ‘v.’” about requiring advance notice of witness names. The
199 purpose of discovery is to provide information for the efficient
200 and just resolution of litigation. Advance disclosure of witness
201 identities can advance that goal. Yes, there is an opportunity to
202 abuse social media information and bleeding over into making it an
203 individual deposition. But good lawyers can handle these extreme
204 situations when they occur. The alternative that would simply
205 allocate unidentified witnesses to different subsets of the matters
206 for examination is interesting, but it does not add enough – it
207 does not advance preparation for inquiring into each matter.

208 A Committee member began the all-Committee discussion by
209 suggesting that the rule should be guided by, and should reinforce,
210 best practices. Testimony at the February hearing revealed that
211 some lawyers are reluctant to reveal witness identity in advance.
212 “That gave me pause.” But identification – not conferring about it
213 – is a good thing. “Social media are part of how we live today.”
214 Abusive questioning can be managed. And advance identification can
215 be useful if the witness has testified for the organization on
216 other occasions. “I support Alternative 2.”

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217 Another Committee member "inclined" toward the revised version
218 of the published proposal. "Rule 30(b)(6) is a unique tool to get
219 information from an organization." It is not designed to get
220 individual knowledge. "The overlap between corporate and personal
221 is a problem now," creating problems in sorting out what is
222 "binding" on the organization. And forgoing a requirement of
223 advance naming can lead to desirable trading – for example, an
224 agreement to provide names in advance in return for identification
225 of the documents that will be used in examining the witness. We
226 should be careful to not get in the way of current best practices.

227 This initial discussion was punctuated by a reminder that if
228 Alternative 2 is approved, it will be for republication. If views
229 continue to be divided, republication will provide an opportunity
230 to gather more information.

231 The 30-day notice provision won support as something that
232 could be added to the original proposal. "You need it to prepare
233 the witness." Judge Ericksen responded that this view had been
234 expressed by many organizations. But the Subcommittee is not
235 recommending it. The 30-day notice provision was inserted in
236 Alternatives 2 and 2A – remember that the Subcommittee advanced
237 them for discussion without making any recommendation – because it
238 seemed a necessary support for a provision requiring disclosure of
239 witness names at any interval before the time for the deposition.

240 Another Committee member offered support for Alternative 2.
241 The downside that advance identification of the organization's
242 witness will lead to social media searches for personal information
243 does not seem much entrenched by advance notice. Millennial lawyers
244 can undertake a comprehensive search even if the witness is
245 identified only at the moment the deposition begins. Even for the
246 Subcommittee's recommended revision of the published rule, the
247 draft Committee Note, p. 105, lines 193-194 of the agenda
248 materials, suggests that it may be productive to discuss at the
249 conference the numbers of witnesses and the matters on which they
250 will testify. Is this a tentative backdoor approach to embracing
251 Alternative 2?

252 Judge Ericksen responded that "the mandated conference could
253 include lots of things. We hear of many things that are discussed
254 now." Professor Marcus added that there is a legitimate concern
255 about "legislating by Committee Note," but this is a pretty soft
256 sentence. It says only that "it may be productive" to discuss a few
257 suggested topics. It does not support any argument that there is a
258 right to confer about them. These responses were accepted as fair.

259 The Department of Justice does not favor identification of
260 witnesses before the deposition. The organization is the deponent,

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261 not the individual. The deposition is not about the individual
262 witness. Better practice is to have the parties frame the matters
263 for examination, but not to name the witnesses.

264 A Committee member went to the Notes on the February 22
265 Subcommittee conference call, pointing to lines 692-694 at page 120
266 of the agenda materials. That sentence observed that it might be
267 useful to add to the Committee Note for the recommended amendment
268 a statement about the value of specifying which topics the various
269 witnesses would address as part of the conference about the matters
270 for examination. There are concerns about the need to change
271 witnesses at the last minute before the deposition, and about
272 misuse of the fruits of social media research, but why not at least
273 suggest in the Committee Note that it may be helpful to discuss
274 which matters which witness will address? The response was that
275 this suggestion in fact appears in the draft note, p. 105 at line
276 194. But the rejoinder was that at this point the Note might refer
277 to discussing the identity of the witnesses. Another Committee
278 member agreed – if it is best practice to discuss the identity of
279 witnesses, why not refer to it in the Note?

280 The characterization of best practice was questioned. The
281 hearings and comments repeatedly emphasized that the best lawyers
282 regard discussion of witness identity as the best practice “when
283 they choose to do it.” It is the best practice in the right
284 circumstances. “We should not strip professional judgment out of
285 what is best practice.” It would not be the end of the world to
286 adopt Alternative 2 and require advance notification of witness
287 identity, but that is not the same as hinting that best practice,
288 even if not rule text, requires discussion of witness identity. We
289 should remember that the possibility of requiring advance naming of
290 witnesses arose during the January hearing as Committee members
291 raised it as one possible response to the difficulties of requiring
292 that the conference include discussion of identity. Another
293 Committee member noted that advance identification of witnesses was
294 not included among the many proposed Rule 30(b)(6) amendments that
295 the Subcommittee considered and rejected, as described beginning at
296 line 738 of page 121 of the agenda materials. It is a new-found
297 issue. Yet another Committee member agreed. Advance identification
298 of witnesses arose as an alternative to the many protests about
299 requiring discussion of witness identity.

300 Broader doubts were raised about recommending any
301 Rule 30(b)(6) amendments at all. There is a good bit of anecdotal
302 information about problems in some cases, but it is not clear that
303 this is enough to support any amendments. The revised proposal
304 recommended by the Subcommittee could lead to gamesmanship. The
305 proposed rule text direction to confer about the matters for
306 examination does not embrace all of the six things the Committee

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307 Note recommends for discussion. The rule does not require
308 discussion of those things. They should be put into rule text, or
309 removed from the Note.

310 These doubts expanded to consider the discussion of "good
311 faith" in the draft Note. Even after deleting "continuing as
312 necessary" from the proposed rule text, the Note says that a single
313 conference may not suffice. It also says that agreement is not
314 required. So what does good faith require – when can it be
315 established without reaching agreement? The Note seems to suggest
316 that if the parties fail to agree, they should ask the court for
317 guidance. Why not rely on Rule 26(c) without revising
318 Rule 30(b)(6)? A motion for a protective order must be preceded by
319 conferring or attempting to confer in good faith, accomplishing the
320 same purpose – a conference among those affected.

321 Judge Ericksen agreed that the Note does speak to matters not
322 included in the rule text. But the Note provides insight into what
323 can be accomplished in conferring about the matters for
324 examination, and to encourage it. "It's hard to convey the breadth
325 of what can be ironed out" by conferring. And requiring a
326 conference is useful – witnesses have told us that they attempt to
327 initiate discussion of the matters for examination and are
328 rebuffed.

329 Professor Marcus noted that generalized discussions of what
330 constitutes "good faith" are always possible. But good-faith
331 conferring is already required in other discovery rules, see
332 Rule 26(c) and 37(a)(1), and has worked. We can give examples of
333 good practices in the Committee Note, even if some of them extend
334 beyond the obligation to discuss in good faith the matters for
335 examination. This is not legislating by Committee Note, but simply
336 offering observations about what might happen during the
337 conference. It is better to discuss things in advance than during
338 a partially failed deposition.

339 Professor Coquillet agreed that a Committee Note cannot add
340 to, or withdraw from, the rule text. But this draft Note does not
341 run afoul of that precept.

342 This discussion led to the suggestion that perhaps the
343 Committee Note should add to the second paragraph that appears on
344 p. 105 the express statement that appears in the third paragraph,
345 recognizing that the opportunity to discuss does not imply any
346 obligation to agree.

347 Moving back to the recommended rule text, it was noted that
348 the Federal Magistrate Judges' comment on the published proposal
349 observed that Rule 30(b)(6) raises issues that are often litigated.

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350 They think that a rule will help – indeed they support the
351 published proposal that requires conferring about the choice of
352 witnesses.

353 A different perspective on the recommended rule text was
354 offered. The MDL Subcommittee continually encounters the question
355 whether any MDL-specific rules should be detailed or general. The
356 need to preserve wide margins of discretion is often expressed. The
357 recommended revision of the published proposal is more open-ended
358 than the Alternative 2 requirement to name witnesses in advance of
359 the deposition, and to give at least 30 days notice of the
360 deposition. These concerns suggest that it is safer to stick with
361 the less aggressive changes in Alternative 1.

362 More hesitating support was offered for Alternative 2. The
363 argument that it will promote gamesmanship does not seem persuasive
364 at first. But caution is warranted by the observation that naming
365 the witnesses before the deposition date is the best practice only
366 in the right circumstances. Still, there are obvious advantages in
367 advance naming.

368 A counter concern was offered. It often happens that just
369 before the deposition “you realize the first chosen witness won’t
370 work.” If you change to a different witness, the noticing party
371 will take that as a signal to take a personal deposition of the
372 first-named witness. That is not harmless – the withdrawn witness
373 may have no personal knowledge, but have been instructed in
374 organization knowledge to some uncertain extent and with uncertain
375 results. When subjected to an individual deposition, the witness
376 may get it garbled, confusing a distorted version of organization
377 information with personal knowledge. Beyond that, Rule 26(c)
378 already includes an obligation to confer, or to attempt to confer.
379 And the recommended proposal does not state any consequences for
380 failing to agree.

381 The concern about the last-minute need to change witnesses was
382 addressed by asking whether the risk would be reduced by adopting
383 a brief period for providing the names. Perhaps the 3-day
384 alternative in the draft, or even less – 2 days, or even 1.

385 The distinction between deposing the organization and a
386 personal deposition of the same witness was noted again. The two
387 should not be conflated, even when the witness is a fact witness as
388 well as an organization’s designated witness. The confusion can be
389 aggravated when the witness is named in advance. The confusion can
390 be dispelled in part by scheduling back-to-back depositions, one
391 confined to deposing the organization through the individual and
392 the other to deposing the individual, but the lines are not always
393 observed.

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394 A Committee member suggested that requiring that witnesses be
395 named in advance would inevitably draw the parties into discussing
396 who the witness should be. The noticing party will say that it is
397 the wrong person, we need to discuss the choice. There is an
398 argument that requiring advance naming is a step back toward
399 requiring the parties to confer about the choice.

400 Another member agreed that requiring names can lead to talking
401 about the choice, but Alternative 2 does not require the
402 organization to confer. The organization has the prerogative to
403 refuse to discuss its choice. Professor Marcus observed that the
404 sequence of steps appears clear enough, but something still more
405 explicit could be added to the Note: First, there must be at least
406 30 days notice. Then, before or promptly after the notice, the
407 parties must confer about the matters for examination. Then, having
408 settled the matters for examination however well the conference
409 permits, the organization chooses its witness or witnesses and
410 names them at the required interval before the deposition.

411 Discussion returned to the question whether Rule 30(b)(6)
412 should be amended at all. A judge said that "this may be the most
413 used, most valuable discovery tool. It is used in almost every
414 case. We do not want to weaken it." The Committee studied it
415 intensely twelve years ago. The complaints, then as now, went to
416 both sides. Organizations protested that there were too many
417 possible matters for examination. Deposing parties complained that
418 organization witnesses were not adequately prepared. The best
419 lawyers confer before the deposition now, and the most we think we
420 can do by amending the rule is to require them to confer. But
421 requiring them to confer has a potential to solve a lot of the
422 problems. "This will not cause the structure to fail." Disputes
423 happen at depositions now, and will continue to occur no matter
424 what.

425 The same judge added that experience with 30(b)(6)
426 depositions, although some years ago, suggests that it is not
427 necessary to know the name of the organization's witness. The
428 inquiring party has a lot of information from documents. The
429 questions can be asked no matter who the witness is. And there are
430 potential downsides in requiring advance notice of witness names.
431 But if the Committee finds substantial reasons to inquire further,
432 it may be wise to go ahead and republish for comments on witness
433 naming.

434 Another judge agreed with these thoughts. And yet another
435 agreed. Advance naming may upset the balance of what good lawyers
436 do now. Experience as a judge shows frequent encounters with
437 disagreements about the number of matters for examination, but none
438 about the identity of the organization's witnesses.

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439 A different Committee member thought these observations by
440 three judges make sense. But the problem remains with the draft
441 Committee Note for the revised proposal. It seems to expand on what
442 good faith means for discussing issues beyond defining the matters
443 for examination, and to encourage parties to ask the court for
444 guidance.

445 Another Committee member suggested that a value of conferring
446 about the matters for examination is often to reduce the number. A
447 party can agree to provide the requested information in documents,
448 suggesting that there will be no need for a witness if the
449 inquiring party is satisfied by the documents. As to identifying
450 the organization's witnesses, there have been cases where my
451 colleagues refuse to provide names as a bargaining tactic to seek
452 tradeoffs. "Gamesmanship happens on both sides." But we would like
453 for more lawyers to follow best practices, and that can be
454 encouraged by establishing them in rule text.

455 A different judge said that the rule should retain the meet-
456 and-confer requirement. And it is desirable to provide a Committee
457 Note that, in the very beginning, suggests discussion of other
458 topics. The draft Note discussion of good faith, appearing at p.
459 106 of the agenda materials, "accomplishes a lot." But what about
460 the sentence that suggests the parties seek guidance from the court
461 if they reach an impasse?

462 Professor Marcus responded that the suggestion about seeking
463 guidance from the court is a suggestion, not a command. It responds
464 to many comments that the rule does not provide any means to
465 resolve disputes when the parties do not reach agreement. A related
466 suggestion appears in the next-to-final paragraph of the draft
467 note, noting that when the parties anticipate the need for
468 Rule 30(b)(6) depositions they may be able to begin planning during
469 the Rule 26(f) conference and in Rule 16 pretrial conferences. All
470 of these suggestions are aimed at avoiding combative positions –
471 "Give me what I want or I'll make a motion." The open-ended
472 suggestion to seek guidance reflects the practice of many judges to
473 entertain discovery disputes without requiring a formal motion. A
474 judge noted that the note does not tell lawyers they have to go to
475 the court, and, even without this sentence, they know they can seek
476 the court's help. The same observation was extended to the
477 suggestions in the preceding Note paragraph about other matters the
478 parties may find appropriate for discussion.

479 Judge Ericksen added that many magistrate judges and district
480 judges who do discovery disputes report that they like to be
481 available by phone to facilitate discussions without the formality
482 of a motion.

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483 William Hanglely reminded the Committee that the letter from
484 active members of the ABA Litigation Section that launched the
485 current Rule 30(b)(6) project noted that the Civil Rules do not
486 provide for anything short of motion practice to resolve disputes.
487 They asked for language like the Note draft, suggesting that the
488 parties "confer" with the court. He further noted that some courts
489 will rule against objections by a party that has not sought a
490 protective order. Counsel often suggest that moving for a
491 protective order is the only way to resolve disputes. "That's a
492 wasteful way of doing it." He added that it is a mistake to think
493 that organizations want to provide a witness whose response is "I
494 do not know." That means another deposition. "We want to produce
495 the most knowledgeable person."

496 An observer noted that the proposed rule applies to nonparty
497 organizations as well as party organizations. It imposes
498 obligations akin to Rule 45 obligations to produce documents, but
499 it lacks the safety valve remedies in Rule 45(d)(1)(B).
500 Protections are not provided even for nonparties that are not
501 within the jurisdiction of the court where the action is pending.
502 The misuse of social media research when a witness is named in
503 advance is an issue, but so is the ability of the inquiring lawyer
504 to go to the networks of lawyers to find out about the witness's
505 testimony in other cases and use it to shape the deposition.

506 The drafting of this sentence in the proposed rule text was
507 questioned: "A subpoena must advise a nonparty organization of its
508 duty to make this designation and to confer with the serving
509 party." It might be better if the provisions were flipped: "its
510 duty to confer with the serving party and to designate each person
511 who will testify." A different suggestion was to simplify it: "must
512 advise a nonparty organization of these duties." This was resisted
513 by suggesting that it is better to revise current rule text as
514 little as possible, and that "these duties" may not be sufficiently
515 specific. It was agreed that the rule text should spell out the
516 duties, that this is not a point where brevity is a virtue.

517 Discussion returned to the question whether either alternative
518 version calling for advance notice of witness names should go
519 forward. Experience suggests that there are fewer disputes when
520 people exchange more information. Perhaps further advice should be
521 sought, as from the Federal Magistrate Judges rules committee?

522 Judge Bates suggested that the discussion had moved to a point
523 to support a decision whether to approve the revised Rule 30(b)(6)
524 recommended by the Subcommittee. The draft Committee Note need not
525 be included in the vote. If the proposal is approved, voting can
526 turn to the alternatives that would require advance notice of
527 witness identity, or at least assignment of unnamed witnesses to

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528 particular matters for examination. All of the Subcommittee
529 recommended amendment is included in the alternatives, so this path
530 avoids the prospect of approving an alternative and then gutting
531 it. But it does not make sense to approve a recommendation that the
532 Subcommittee proposed amendment be adopted, and also to approve
533 publication for comment of an alternative. Only one proposal for
534 adoption should be made, whether now or after a year's delay for
535 republication.

536 A motion to recommend adoption of the Subcommittee's proposed
537 amended Rule 30(b)(6), with the style revision noted above, was
538 approved, 12 votes for and 2 votes against.

539 Discussion of Alternatives 2 and 2A began with the suggestion
540 that if republication is approved, the Committee need not choose
541 between the bracketed alternatives that would require 7, or 5, or
542 only 3 days' notice of witness names. Committee practice has
543 included publication of proposals with bracketed alternatives, or
544 even with complete alternative provisions, as a means of
545 stimulating comments on issues that seem likely to benefit from
546 further discussion. A Committee member added that absent any
547 opportunity to address the time for naming or allocating witnesses
548 in comments on the published proposal, it would be a mistake for
549 the Committee to attempt to choose a single time period in a
550 republished proposal. A suggestion to narrow the focus by
551 publishing with only 7- or 3-day alternatives was met by a decision
552 to set out all three alternative periods in brackets.

553 A motion to approve publication of Alternative 2, including
554 30-day notice of a Rule 30(b)(6) deposition, advance naming of
555 organization witnesses, and alternative naming times of 7, 5, or 3
556 days failed, 6 votes for and 9 votes against.

557 A motion to approve publication of Alternative 2A, including
558 notice periods similar to Alternative 2, but requiring only advance
559 designation of which matters for examination would be addressed by
560 which unnamed witnesses failed, 2 votes for and 13 votes against.

561 The first day's discussion of Rule 30(b)(6) concluded with
562 these votes. The questions raised by discussion of the draft
563 Committee Note were carried forward for consideration on the next
564 day of such revisions as might be prepared by the Subcommittee in
565 overnight deliberations.

566 Deliberations on the Committee Note resumed the next day.
567 Judge Ericksen thanked Judge Goldgar for style suggestions. The
568 revised draft retained the substance of the second paragraph, but
569 with style improvements. The third paragraph was revised to make it
570 clear that it does not suggest there is an obligation to confer

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571 about anything other than the matters for examination.

572 Further style changes were suggested and accepted: "and enable
573 the ~~responding party~~ organization to identify designate and * * *.

574 The next suggestion was to recognize the value of discussing
575 witness identity: "It may be productive also to discuss * * * the
576 number and identity of witnesses * * *." This suggestion was
577 resisted, in part by offering an analogy to the changes in rule
578 text. The published rule required discussion of the identity of
579 each person the organization will designate to testify, and also
580 discussion of the number of matters for examination. Both of these
581 requirements were deleted from the amendments recommended for
582 adoption. The references to each in the published Committee Note
583 have been deleted. It would be a mistake to bring back a suggestion
584 to discuss witness identity, even though it is a suggestion, not a
585 command. Strong agreement was offered – bringing this back to the
586 Note would seem to retract the revision of the rule text.

587 The proponent responded that the suggestion is only precatory.
588 And the comments showed that discussing the number of topics can be
589 counterproductive. Efforts to reduce the number lead to
590 increasingly broad and vague descriptions of the matters for
591 examination. Many comments showed that witness identity is often
592 discussed to good effect. A Note suggestion that it may be helpful
593 to discuss witness identity is not likely to add much to the burden
594 of conferring. Putting this in the Note does not imply a suggestion
595 to discuss the number of matters for examination. Another
596 participant agreed that there is no known tendency to interpret a
597 Committee Note discussion of one topic to imply anything about a
598 matter not discussed, much less to draw the implication from a
599 decision to withdraw a provision that appeared in the rule text
600 published for comment. The proponent added that courts do cite
601 Committee deliberations in interpreting rules.

602 Adding "and identity" of the witnesses was resisted. It would
603 move back toward the published rule and Note that drew 1,780
604 comments, mostly negative on the requirement to confer about
605 witness identity. Some comments said that this should not be in the
606 Note. Another member agreed with this view. The rule text proposed
607 for adoption does not impose a duty to discuss witness identity.
608 Adding it to the Note might generate disputes. Another participant
609 added that Committee Notes should not, and do not, give advice on
610 how to practice law.

611 Discussion continued with a question whether it would be wise
612 to delete the entire sentence that enumerates issues that might be
613 discussed. One member answered that it is useful to encourage the
614 good practices identified in the public comments. Another suggested

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615 that "We're giving useful advice, based on the public comment
616 process, not telling people how to practice law." Yet another
617 member agreed generally, but opposed adding a suggestion to discuss
618 witness identity. Discussing witness identity was removed from the
619 published rule text for good reasons. A prompt in the Committee
620 Note is not needed to enable discussion of witness identity by
621 parties who wish to do so. The proponent rejoined that the
622 discussion can be productive, and it is useful to remind the
623 parties of its value.

624 A different part of the draft Committee Note was addressed by
625 asking what it means to advise about seeking guidance from the
626 court if the discussion reaches "an impasse." Professor Marcus
627 replied that this sentence reflects a hope that the parties and the
628 court will have used Rule 16 to establish a procedure for resolving
629 discovery disputes. We could leave it to Rule 26(c) protective-
630 order practice, "or to trying to iron it out as a deposition mess."
631 A reminder in the Note can help. The many suggestions in the 2018
632 Committee Note for amended Rule 23 provide a useful illustration.

633 Judge Ericksen added that this Note sentence relates to the
634 inability to agree about the matters for examination.

635 Another Committee member observed that lawyers know they can
636 seek the court's guidance on discovery disputes. This sentence
637 comes close to telling lawyers how to practice law.

638 The suggestion to strike the entire sentence illustrating
639 issues that it might be productive to discuss was renewed, along
640 with a suggestion to delete the sentence on seeking court guidance
641 when an impasse is reached. Lawyers will react to these
642 observations in the Note, arguing that the Note says they should
643 discuss these things but they do not want to.

644 Another participant observed that "impasse" means "can't move
645 forward." It is the organization that will want to take disputes to
646 the court, not the noticing party.

647 Judge Ericksen noted that there had been a lot of pressure to
648 add an express objection procedure to Rule 30(b)(6). Many judges
649 will not hear a dispute about the matters for examination without
650 a Rule 26(c) motion for a protective order. Another participant
651 noted that the comments sought some uniform method for resolving
652 disputes. Some courts refuse to entertain Rule 26(c) motions before
653 the deposition, insisting that disputes be brought to the court
654 only as problems arise during the course of the deposition. The
655 Subcommittee considered adopting an objection procedure and decided
656 not to. The duty to confer expedites the process by starting with
657 the conference that would have to precede any Rule 26(c) motion.

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658 Doubts about the "impasse" sentence were expressed in other
659 terms. One question asked whether it adds anything of value.
660 Another observation suggested that it may hint that there *is* an
661 objection procedure, and will encourage arguments to the court that
662 a party is not conferring in good faith.

663 This discussion led to a suggestion to delete the Note
664 statement that the obligation to confer in good faith "does not
665 require the parties to reach agreement."

666 The participant who first asked about the meaning of "impasse"
667 said that the discussion showed that this sentence can be useful to
668 suggest that difficulties can be brought to the court by means
669 short of a formal motion. They might be raised in a status
670 conference, or by other means.

671 Attention turned to this Note sentence: "The duty to confer
672 continues if needed to fulfill the requirement of good faith."
673 Professor Marcus noted that good-faith conferring requirements
674 appear in Rule 26(c) and Rule 37(a)(1). "Walking out of the room
675 does raise an issue of good faith." The purpose of requiring a
676 conference could be defeated by an approach that automatically
677 accepts "once is enough." But it was rejoined that an earlier
678 sentence already says that the process of conferring may often be
679 iterative. Judge Ericksen agreed to delete the "continued as
680 needed" sentence.

681 Style suggestions were accepted, adding two words to the list
682 of things it might be productive to discuss: "the number of
683 witnesses and the matters on which each witness will testify * *
684 *." Another accepted suggestion was "The process of discussion will
685 may often be iterative."

686 The Committee moved to voting on the Committee Note.

687 The first paragraph was accepted without a formal vote.

688 Adding "the" before matters on which each witness will testify
689 was approved by vote, 10 for and 3 against.

690 Adding a suggestion to discuss the identity of witnesses was
691 rejected by vote, 2 for and 11 against.

692 The Note language suggesting that it might be productive to
693 discuss "the documents the noticing party intends to use during the
694 deposition," not earlier discussed, was challenged. Many comments
695 opposed this practice as interfering with work-product protections.
696 A motion to delete this suggestion was adopted by vote, 8 for and
697 5 against.

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698 Another part of a sentence was challenged: "The process of
699 conferring will often be iterative, and a single conference may not
700 suffice." A motion to delete the "single conference" clause was
701 adopted by vote, 12 for and 1 against.

702 The sentence stating that the amendment does not require the
703 parties to reach agreement was examined next. A Committee member
704 urged that it is important to say there is no obligation to agree.
705 And a suggestion to combine this statement with the next sentence
706 about seeking guidance from the court was resisted on the ground
707 that a single sentence would discourage efforts to work things out
708 in favor of running to the court. A motion was made to reorganize
709 the sentence to read: "Consistent with Rule 1, the obligation is to
710 confer in good faith about the matters for examination, but the
711 amendment does not require the parties to reach agreement." The
712 motion was adopted, 10 for and 3 against.

713 A motion was made to revise the "impasse" sentence to read:
714 "In some circumstances, it may be desirable to seek guidance from
715 the court." The motion was adopted, 8 for and 5 against.

716 A motion to strike the Note sentence stating that "The duty to
717 confer continues if needed to fulfill the requirement of good
718 faith" was adopted, 11 for and 1 against. (The Subcommittee Report
719 recommendation to delete the preceding sentence from the Committee
720 Note as published was accepted without discussion. This sentence
721 read: "But the conference process must be completed a reasonable
722 time before the deposition is scheduled to occur.")

723 A motion to adopt the final two paragraphs of the draft
724 Committee Note was adopted, 13 for and 0 against.

725 *MDL Subcommittee Report*

726 Judge Bates introduced the MDL Subcommittee Report. The
727 Subcommittee has been hard at work. It has gathered a lot of
728 information, especially from the Judicial Panel on Multidistrict
729 Litigation. It remains an open question whether it will be useful
730 to propose any MDL-specific rules. The overall number of MDL
731 proceedings may be declining. More importantly, the problems seem
732 to be concentrated in the "mega-MDLs" that aggregate thousands and
733 tens of thousands of cases. Drafting rules that distinguish the
734 many smaller MDLs might prove difficult. And it seems clear that
735 any rules must take care to preserve the creative flexibility that
736 has generated sound procedures for the often unique circumstances
737 of particular MDL proceedings.

738 Judge Dow delivered the Subcommittee Report. The Report
739 provides an overview of the Subcommittee's work. Subcommittee

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740 members have attended many MDL-focused events, and will attend
741 still more. Special appreciation is due to the Judicial Panel on
742 Multidistrict Litigation, Judge Vance, and the JPML's Panel
743 Executive Ms. Duncan for their help. Emery Lee and the FJC research
744 division also have provided great help. Still, the November
745 Committee meeting pointed to the need to gather more information.
746 Is there a problem? Are there potential rule-based solutions?

747 In approaching these questions, it is important to remember
748 that multidistrict proceedings are created under the aegis of a
749 statute, 28 U.S.C. § 1407. And the statute is implemented by the
750 Judicial Panel. The Panel has an active approach to educating MDL
751 judges, and a vastly improved web site that provides guidance on
752 many questions.

753 The Subcommittee is focusing on a small number of MDL
754 proceedings, but they are the large proceedings that, taken
755 together, include a large fraction of the total number of cases
756 pending in federal courts at any moment.

757 The Subcommittee has framed a list of six topics for current
758 attention. The list is not fixed. New topics may emerge as the work
759 proceeds. And some may soon be dropped.

760 Four topics have come to the center of current work:

761 Early vetting of individual cases in an MDL to weed out those
762 that have no shadow of merit has been sought by many defendants. A
763 group of plaintiff and defense lawyers has been working with the
764 Emory Law School Institute for Complex Litigation to frame a
765 proposal on this issue. There seems to be some measure of agreement
766 that there is a problem with unfounded individual cases, but not so
767 much agreement on the prospect of finding a solution in a court
768 rule.

769 Opportunities for interlocutory appellate review have been
770 sought, again primarily by defendants. The earlier proposals sought
771 to establish categories of appeals as a matter of right, with no
772 input from the MDL court and directing speedy decision of the
773 appeal. Each of those features has been challenged vigorously. But
774 there still may be room for some expansion of appeal opportunities.

775 Settlement review has been urged on the ground that at least
776 in the MDLs that include a great many cases settlement negotiations
777 come to resemble class actions but without the protective features
778 built into Rule 23. The fear is that plaintiffs represented by
779 lawyers who do not participate in the centralized steering
780 committee structure are not afforded a genuine opportunity for
781 meaningful individual settlement negotiations. One approach might

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782 be to make the court responsible for some supervision of the
783 plaintiffs steering committee. Another might seek review by some
784 form of independent entity. As it is, some MDL judges become very
785 much involved in settlement terms.

786 Third-party litigation funding has generated many proposals
787 for disclosure. Comments have been coming in on a regular and
788 continuing basis. The November 2 conference at George Washington
789 Law School provided a lot of information. "It's complicated." Local
790 rules are popping up. And there seem to be many MDL judges who are
791 not even aware of the phenomenon of third-party funding or of its
792 existence in their cases. The Subcommittee may undertake a survey
793 of MDL judges this summer through the FJC. If a survey is made,
794 pointed questions about third-party funding will be included.

795 Professor Marcus added that two other subjects round out the
796 top-six list. Filing fees and "master complaints" have been the
797 subjects of many comments. But this kind of thing can change, and
798 so the list of topics changes. Perhaps these two should be put
799 aside. More generally, it is important to continue to ask what are
800 the significant problems in MDL practice, and what a rule solution
801 might look like.

802 Screening Claims: Discussion turned first to the question whether
803 a rule might be devised to encourage early screening of individual
804 claims. Defendants urge a "field of dreams" problem: creating an
805 MDL proceeding invites filing claims without any investigation of
806 possible merit. Pejorative terms are used, speaking of "1-800-call-
807 a-lawyer" operations and a "get a name, file a claim" approach. The
808 perception is that in an MDL, "everyone gets paid." These concerns
809 are reflected in H.R. 985, introduced in the last Congress. Its
810 provisions required plaintiffs to disclose a great deal of
811 information within 45 days after an action is transferred to the
812 MDL court or directly filed there; required the judge to determine
813 the sufficiency of each submission within 30 days, and to dismiss
814 without prejudice if the submission is insufficient; and required
815 the judge to dismiss with prejudice if a sufficient submission was
816 not filed within 30 days after the dismissal without prejudice.

817 Courts have adopted various means of developing information
818 about individual claims that go beyond fact-pleading minimums. One
819 common device is the plaintiff fact sheet. Plaintiff profiles are
820 similar. Defendant fact sheets may be required. Many questions
821 arise: should plaintiff fact sheets, for example, be required in
822 all MDL proceedings, or only some? Who drafts the PFS? How early in
823 the proceeding should a PFS requirement be imposed? And what should
824 be done with them?

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825 Emery Lee reported that the FJC has studied the frequency of
826 PFS orders, along with plaintiff profiles, DFS orders, and short-
827 form complaints. Their report is included in the agenda materials
828 at page 229. The study included 39 mega proceedings over its
829 entire period, with about 25 pending at any one time. The FJC
830 reviewed all case-management orders in them. The plaintiff fact
831 sheets "tend to be pretty similar." They were ordered in many mega
832 proceedings; the frequency of requiring fact sheets increased as
833 the number of cases in the MDL increased. The study did not reveal
834 whatever reasons may have led to not using PFSs in the proceedings
835 that did not use them. Plaintiff profiles tend to be briefer than
836 fact sheets. Both devices should be distinguished from "Lone Pine"
837 orders. All include information about using the product and injury.
838 But only Lone Pine orders require showing expert opinion evidence
839 on causation. Some plaintiff fact sheets included questions about
840 third-party funding.

841 It is not clear who starts the PFS process. Usually the form
842 is negotiated by the parties and submitted to the judge for
843 approval. The median time from centralization to entry of the PFS
844 order was 6.2 months, the average 8 months.

845 A judge suggested that plaintiff fact sheets are not screening
846 techniques that serve to knock out frivolous claims. They give the
847 defendant basic information, to prepare an inventory of types of
848 cases. Dismissals are entered for failing to comply with the order
849 to file a PFS, not for failure to provide enough to support a
850 claim. Another judge observed that there still may be a connection
851 – failure to file a fact sheet may reflect an inability to provide
852 the required information. A plaintiff who never used a challenged
853 product may not be willing to provide details of when it was used.

854 Another participant thought that fact sheets have been used to
855 weed out frivolous claims. In an era of television advertising for
856 clients, the fact sheet helps to ensure the lawyer has some contact
857 with the client, has taken a look at the case. Some of the clients
858 do not have any connection to the events in suit. It is not a Lone
859 Pine order, but it is screening of a sort.

860 Professor Marcus suggested that concern about screening
861 individual claims should be modulated by asking whether it is
862 important to undertake this screening at an early stage of the MDL
863 proceeding. Screening "is early discovery-disclosure that helps
864 move the case along." It may fold into other discovery. Fact sheets
865 are used differently in different MDLs. They may reduce the over-
866 supply of claims, but it is not clear that screening the fact
867 sheets is the first thing that should occupy the MDL court's
868 attention. As an alternative, a rule might encourage a process
869 similar to the Rule 26(f) discovery conference, urging the parties

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870 to confer about questionable claims to sharpen the issues.

871 Defendant fact sheets also are frequently used. They often
872 include information about the defendant. But they also often
873 include information the defendant has about the plaintiff.

874 Judge Dow noted that it is important to preserve flexibility.
875 An MDL judge may find it important to focus on things other than
876 screening individual claims.

877 Another Committee member observed that the concerns with
878 screening seem to be driven by a small number of mega-MDLs. MDL
879 judges frequently argue against rules that might tie their hands.
880 How can we fashion rules that do not affect cases where screening
881 is not needed? Is it better to leave these questions to be handled
882 by standing orders, the Manual for Complex Litigation, or guidance
883 by the Judicial Panel? A different Committee member echoed these
884 questions: Can one size fit all MDLs? Can mega-MDLs be
885 distinguished? "How are MDL judges educated"?

886 A judge responded that the JPML web site provides great
887 guidance. So does the annual conference of MDL judges. "New MDL
888 judges are not left to their own."

889 Judge Dow emphasized that the critical point is that these
890 concerns arise in a small fraction of all MDL proceedings. But
891 there may be a need. The question is whether we can frame a rule
892 that helps in the cases where help is needed without interfering
893 with the more general run of MDL proceedings.

894 A Committee member suggested that the need is to ensure that
895 an MDL is managed by responsible groups of attorneys on both sides.
896 Rule-based solutions may be hard to find.

897 Another Committee member suggested that devising rules might,
898 by being available to all, make it possible to expand the number of
899 lawyers participating in MDL proceedings beyond the in-group of
900 present practice.

901 Dr. Lee also noted that large mass-tort MDLs tend to resolve
902 by aggregate settlements because they are not suitable for
903 certification of a settlement class under Rule 23. Smaller MDLs
904 with fewer cases tend to be resolved through Rule 23.

905 Interlocutory Appeals: Judge Dow observed that expanding
906 opportunities for interlocutory appellate review of MDL court
907 rulings cannot be accomplished by best practice guides, provisions
908 in the Manual for Complex Litigation, or like endeavors. A court
909 rule or legislation are the only available means.

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910 Professor Marcus began by pointing to the appeal provision in
911 H.R. 985. That provision directed that the court of appeals "shall
912 permit" an appeal from any order in an MDL proceeding, "provided
913 that an immediate appeal from the order may materially advance the
914 ultimate termination of the proceeding." Wherever this provision
915 may lie on a spectrum from complete discretion to a right to
916 appeal, the Subcommittee has not thought to create opportunities
917 for appeal as a matter of right.

918 It may be that appeals by permission of the district court
919 under § 1292(b) suffice to the needs of MDL proceedings. But
920 questions are raised about the MDL judge's absolute veto – the
921 court of appeals cannot grant permission if the district court has
922 not. Questions also are raised about the risk that each of the
923 three criteria set out in § 1292(b) can raise undesirable
924 obstacles. The district court must state that there is "a
925 controlling question of law" "as to which there is substantial
926 ground for difference of opinion" "and that an immediate appeal
927 from the order may materially advance the ultimate termination of
928 the litigation." John Beisner undertook a comprehensive review of
929 § 1292(b) appeals in MDL proceedings that shows quite infrequent
930 use.

931 If an attempt is made to draft an appeal rule, it must address
932 such questions as the role of the MDL court: is it necessary that
933 the MDL court approve the appeal? If not, should the MDL court have
934 a means to offer advice to the court of appeals about the potential
935 costs and benefits of an immediate appeal? Should appeals be
936 available only from defined categories of orders? Should the court
937 of appeals have wide-open, certiorari-like discretion?

938 A judge posed the first question: Should any proposal for
939 interlocutory appeals include a requirement that the court of
940 appeals decide the appeal quickly? This judge ruled on a preemption
941 question in an MDL. Immediate appellate review might have been
942 helpful. But local circuit experience showed that the earliest a
943 decision might be had would be two years. That much delay was too
944 much to contemplate, so no § 1292(b) appeal was certified. It is
945 difficult to craft a rule that requires prompt appellate decision,
946 but some limit on the time for appellate decision should be linked
947 to any new appeal opportunity.

948 The need to provide for prompt decision on appeal prompted the
949 question whether the prospect of a 2-year or even longer delay may
950 be peculiar to a single circuit? In another circuit, decision
951 within three to nine months is routine. It was pointed out that the
952 Ninth Circuit encounters 14,000 cases a year; decision in a few
953 months would be hard to accomplish. And about one-third of all MDLs
954 are in the Ninth Circuit.

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955 Judge Sutton, former chair of the Standing Committee, has
956 urged that lawyers should ask for expedited disposition of appeals
957 in class actions or MDL proceedings. But discussion in the Standing
958 Committee has shown reluctance about mandating prompt disposition.
959 Yet a rule might encourage consideration of the prospect of a
960 speedy or delayed decision as a factor in deciding whether to
961 permit an appeal. And lawyers themselves could cooperate in
962 expediting the appeal briefing schedule. But in the Ninth Circuit,
963 argument is likely to be had 18 months after briefing.

964 A judge suggested that § 1292(b) is not effective because of
965 concern that the time taken to reach an appellate decision defeats
966 the element that asks whether an appeal will materially advance the
967 ultimate termination of the litigation. Rule 23(f) does not have
968 any comparable factor, but leaves the decision whether to permit
969 appeal to the discretion of the court of appeals. There is a
970 natural inclination to grant permission "only when it looks good."
971 But it would help to provide an opportunity for the district court
972 to weigh in on the decision whether to permit an appeal. A rule
973 mandate for expeditious decision, however, will run into serious
974 problems. One concern is delaying the decision in other cases – for
975 example an appeal by someone who will remain in prison until the
976 appeal is decided.

977 The prospect of addressing delay on appeal was considered
978 further. Would an appeal rule apply to all MDL proceedings? Only
979 some? Only to some identified categories of orders?

980 Beyond these concerns, it was agreed that any consideration of
981 a rule creating new appeal opportunities would have to be developed
982 in cooperation with the Appellate Rules Committee.

983 Discussion turned to asking why § 1292(b) is not much used in
984 MDL proceedings. The Beisner report does not clearly show whether
985 the criteria that limit § 1292(b) appeals are an obstacle.
986 Attempting to find out much more by an FJC study would likely be
987 difficult – example, how would you find whether lawyers considered
988 asking for permission to appeal and why they decided not to? Is
989 there perhaps some parallel in the use of § 1292(b) for appeals in
990 class actions before Rule 23(f) was adopted? The one-time "death
991 knell" version of final-judgment appeals from orders denying class
992 certification, and even "reverse death-knell" appeals from orders
993 granting certification was recalled; some courts of appeals liked
994 this opportunity for appeals before the Supreme Court rejected the
995 doctrine. Mandamus has always been available, but is used
996 sparingly.

997 An observer identified herself as engaging in practice for
998 plaintiffs in medical device cases. A year to appellate decision is

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999 the best that could be hoped for. Many plaintiffs are elderly. Some
1000 will die while the appeal is pending. Any provision for an
1001 automatic right of interlocutory appeal would be undesirable. New
1002 York state courts provide frequent interlocutory appeals, and cases
1003 there can drag out through eight to ten years of appeals.

1004 A Committee member asked whether a permissive interlocutory
1005 rule could be entirely open-ended, providing certiorari-like
1006 discretion? Rule 23(f) is like that. So for the question whether an
1007 appeal would stay proceedings in the MDL court – like § 1292(b) and
1008 Rule 23(f), a new appeal provision could explicitly provide that an
1009 appeal does not stay proceedings in the MDL court unless the
1010 district judge or the court of appeals orders a stay.

1011 Settlement Review: Professor Marcus suggested that the authors of
1012 § 1407 were not thinking about settlement in MDL proceedings. The
1013 statute is contemporary with the 1966 Rule 23 amendments; the 1966
1014 Committee Note suggests a lack of serious concern with settlement
1015 because it simply echoes the 1966 rule text. Since then,
1016 “settlement has become a big deal.” MDL practice has not developed
1017 in the way Rule 23(e) has. The conceptual reason is that settlement
1018 of some cases in an MDL proceeding does not bind other cases –
1019 every plaintiff remains free to settle, or not settle, on
1020 individual terms. Each plaintiff, moreover, has an individual
1021 lawyer. There are no rules for review by the MDL judge, unless
1022 class certification is chosen as the vehicle for settlement. But
1023 some MDL judges become involved in framing a global settlement. A
1024 rule might provide for review by way of building on rule provisions
1025 for appointing and reviewing the activities of a plaintiffs
1026 steering committee. Some judges refer to MDL proceedings as quasi-
1027 class actions; an MDL rule might build on the Rule 23(g) model for
1028 appointing class counsel.

1029 Judge Dow noted that the MDL proceedings he has been assigned
1030 have involved 30 or fewer individual actions. But a recent
1031 conference of judges and special masters in mega-MDL proceedings
1032 reflected concern that the end-game settlement process may at times
1033 be unfair to groups of inventory plaintiffs. Some judges have been
1034 supervising settlements in ways that may not be supported by formal
1035 authority. If pressed, they may find authority in their obligation
1036 to police the ethical behavior of the lawyers that appear before
1037 them. They are concerned that settlements should be equitable as to
1038 similarly situated plaintiffs. There is a concern that individual
1039 plaintiffs may be only “sort of” represented by their individual
1040 lawyers.

1041 Another judge with experience in a mega-MDL had the same sense
1042 of the situation. Mega-MDL judges agree that an MDL proceeding is
1043 not of itself a class action governed by Rule 23, “but it may feel

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1044 like a class action to plaintiffs and lawyers not on the steering
1045 committee." The large number of client-attorney relationships is a
1046 thicket that may be difficult to penetrate. "We know that lawyers
1047 on the steering committee and lawyers not on the committee will not
1048 agree on distributing a common fund." Settlement review should be
1049 studied. But when there is a stipulation to dismiss an individual
1050 action in an MDL, "I do not inquire further."

1051 Still another judge reported on a mega-MDL that is approaching
1052 the fourth and final bellwether trial. The parties have been told
1053 that after that last bellwether all cases that remain unsettled
1054 will be remanded for trial. That surprised the lawyers on the
1055 steering committee. They had expected the cases would linger on to
1056 settle. One immediate reaction was a flurry to add more cases to
1057 the MDL, some 2,000 of them. The defendants have retained a
1058 separate law firm to negotiate individual case settlements, not
1059 only with lawyers on the steering committee but with all other
1060 attorneys. The negotiations produce settlement terms sheets that
1061 set out the terms of settlement, with sliding scales of payment
1062 depending on which version of the product was used. Each plaintiff
1063 lawyer has six months in which to deal with each client to see
1064 about settling. The plaintiffs' lawyers are acting in good faith.
1065 They do not seem to be forcing settlements, nor to be giving some
1066 clients better deals than others. They tell their clients they are
1067 prepared to try the cases if they are remanded without settlement.

1068 The question returned: The form of MDL proceedings that do not
1069 lead to class certification is that each constituent action remains
1070 an individual action. It is not clear how far that concept matches
1071 reality. "We need to know more." But a response suggested that it
1072 is not clear whether this is a matter for an Enabling Act rule. And
1073 a reminder was provided that as an MDL proceeding appears to be
1074 winding down toward the time for remand the parties may negotiate
1075 disposition by winning certification of a settlement class.

1076 The same themes reappeared in further discussion. Some MDL
1077 judges take a much more active approach than others in promoting
1078 settlement. There may be a tension between an MDL judge asking to
1079 be included in the loop of settlement and the view that, absent
1080 class treatment, the judge cannot do more. But every judge asks to
1081 be informed – the judge is on the spot if the settlement does not
1082 seem fair. Still, it will be hard to frame a rule if there is
1083 uncertainty about the judge's authority.

1084 The judge's role in appointing lead counsel or committees for
1085 plaintiffs, and perhaps also for defendants, was again pointed to
1086 as a source of authority. Responsibility for appointing leadership
1087 includes responsibility to supervise the leaders' discharge of
1088 their appointed authority.

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1089 Still, it was asked how a judge would enforce a negative
1090 review of a settlement proposed by a plaintiffs steering committee?
1091 The view of some MDL judges that they have an obligation to review
1092 the responsible performance of professional duties was repeated.
1093 But if unprofessional conduct is found, is the judge obliged to do
1094 something more than reject the settlement? Or is it enough that
1095 judges expect to be listened to? And heard?

1096 A related question asked what is the authority for ordering
1097 bellwether trials as a device that may promote settlement? The
1098 answer is consent. One judge reported that in a mega-MDL the
1099 lawyers asked for bellwether trials. They provided written consents
1100 from plaintiffs and defendants. Following the announcement that
1101 unsettled cases would be remanded after the last bellwether trial,
1102 the lawyers asked for a six-month delay, but did not ask for review
1103 of individual settlements. Time will be given to delay remand of
1104 cases covered by settlement terms sheets presented to the court.
1105 Other cases will be remanded on a regular basis. This process is
1106 designed only to give time for individual settlements. And when an
1107 individual plaintiff and defendant appear and announce that they
1108 have settled their case, "how am I to review it"?

1109 A similar view was expressed. MDL judges at the annual
1110 conference seemed to want not to be involved in non-class
1111 settlements. There are too many cases. But a judge can encourage
1112 settlement. And the judges at the conference seemed to pretty much
1113 agree that it would not be a good idea to adopt a rule that either
1114 encourages or limits involvement in settlement.

1115 A Committee member asked whether a bellwether trial is more an
1116 arbitration than an exercise of jurisdiction, even though it yields
1117 a final and binding judgment? Discussion responded that there
1118 should be federal subject-matter jurisdiction for every case in the
1119 MDL; that cannot be waived. Although the MDL court cannot use
1120 § 1404 to transfer constituent actions to itself for trial,
1121 personal jurisdiction and venue objections can be waived. Pretrial
1122 proceedings authorized by § 1407 enable the MDL court to resolve
1123 the merits by ruling on motions to dismiss for failure to state a
1124 claim, or for summary judgment. Trial provides a more complete
1125 procedure for deciding the merits.

1126 Third-party Litigation Funding: Professor Marcus opened this topic
1127 by noting that third-party litigation funding is a very interesting
1128 topic. It involves increasingly large amounts of money, and is
1129 growing rapidly. What might be counted as third-party funding, and
1130 where it may be going, remains unclear. It does not appear to play
1131 a distinctive role in MDL litigation as compared to other forms of
1132 litigation, although prominent examples have occurred in the NFL
1133 concussion MDL and in the national opioids MDL. In other forms,

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1134 there seem to be real distinctions between a \$5,000,000 nonrecourse
1135 funding for a patent action and an advance of living expenses to an
1136 individual personal injury plaintiff. There is great interest in
1137 this topic, but it is not clear whether this Committee should be
1138 interested in considering possible rules, whether for MDL
1139 proceedings or more generally.

1140 Judge Bates seconded the observation that third-party funding
1141 is not unique to MDL proceedings. Indeed it may be more prevalent
1142 elsewhere.

1143 A Committee member focused on the several submissions that
1144 urge disclosure of third-party funding. Rule 7.1 requires
1145 disclosure for the purpose of informing the court of issues that
1146 bear on recusal. Why should third-party funding be any different?
1147 The survey prepared for the Committee by Patrick Tighe suggested
1148 that 24 districts and six circuits have local rules that seem to
1149 point toward disclosure of third-party funding. And this is not an
1150 issue limited to MDL proceedings.

1151 Professor Marcus agreed that support for recusal decisions is
1152 one reason for disclosure. But that purpose can be served by
1153 disclosing the fact of funding and the identity of the funder.
1154 Those who urge disclosure want more than that. They argue an
1155 analogy to the disclosure of liability insurance. But difficult
1156 distinctions need to be drawn. There is no proposal that law firms
1157 should be required to disclose a general line of credit extended to
1158 the firm on regular commercial terms. Nor has it been argued that
1159 disclosure need be made of an uncle's undertaking to pay the rent
1160 until a plaintiff's case has been resolved.

1161 Judge Dow noted that the analogy to liability insurance is
1162 advanced by suggesting that the defendant (and perhaps the judge)
1163 needs to know who is controlling the litigation. And the research
1164 on local district and circuit rules will be updated.

1165 Another judge reported hearing that it has become common
1166 practice to ask about third-party funding in discovery. Plaintiffs
1167 commonly respond by saying that they have funding, and will not say
1168 anything more. And defendants can respond by taking the question to
1169 the court. One task will be to determine whether a common-law of
1170 discovery is already being developed. That in itself may be a
1171 reason to leave the way open for practice to evolve through
1172 discovery and local rules.

1173 Individual Filing Fees: The inquiry into individual filing fees was
1174 prompted by suggestions that individual fees were often shirked for
1175 multi-plaintiff proceedings, and that individual fees should be
1176 required for every plaintiff as a means of encouraging lawyers to

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1177 be more careful in filing.

1178 Emery Lee reported on an FJC study of filing fees. The study
1179 has been facilitated by an origin code that since 2016 identifies
1180 direct-filed cases that includes a line for fee status. The study
1181 is not complete because the new code is not uniformly used by all
1182 MDL courts. But in the proceedings that were studied, filing fees
1183 were paid in about 99% of the direct-filed cases.

1184 Professor Marcus added that filing fees are governed by
1185 statute. Rule 20 allows multiple plaintiffs to join in a single
1186 action. Some suggestions look to Rule 21 as authority to sever
1187 plaintiffs into separate proceedings so as to increase the number
1188 of fees. But there is no information to suggest that a rule
1189 addressing filing fees would have much effect in reducing unfounded
1190 filings.

1191 Further discussion found agreement that MDL judges
1192 overwhelmingly require individual filing fees for each action in
1193 the MDL. It was agreed that if anything, this is a matter to be
1194 addressed by a guide to best practices, not by an Enabling Act
1195 rule.

1196 Master Complaints: Professor Marcus stated that master complaints
1197 have been used to manage large aggregations. A master complaint
1198 does not supersede the complaints in individual actions unless it
1199 is intended to do so. So long as the master complaint is used only
1200 as a convenient management tool, complete disposition of any single
1201 action in an MDL proceeding establishes a final judgment that must
1202 be appealed then or never. But if a master complaint supersedes
1203 individual complaints, dismissal of some claims set out in the
1204 master complaint may not of itself establish finality even if some
1205 plaintiffs have individually pleaded only the claims that were
1206 dismissed. The effect of acting on parts of a master complaint on
1207 appeal jurisdiction remains uncertain.

1208 A master complaint may be adopted when the MDL court finds it
1209 would not be useful to focus on individual complaints. It can be a
1210 management tool to focus on some issues first. Preemption, for
1211 example, can be a common issue that transcends myriad issues that
1212 might be framed by individual complaints.

1213 Emery Lee noted that short-form complaints built around a
1214 master complaint are often used, especially for direct-filed cases.
1215 They include forms to check which claims in the master complaint
1216 are asserted by an individual plaintiff, and call for some
1217 additional plaintiff-specific information.

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1218 Further discussion noted that a master complaint allows
1219 consolidated filings, and can be a huge time-saver for the clerk's
1220 office. But multiple motions to dismiss may be entertained in
1221 smaller-scale MDLs.

1222 A judge reported that in a mega-MDL the parties stipulated to
1223 a master complaint. Each direct-filing plaintiff pays a filing fee,
1224 checks the boxes, and adds some individual information. The short-
1225 form complaints are not subject to motions to dismiss.

1226 A judge asked whether it would be useful to add a reference to
1227 master complaints to the Rule 7 list of pleadings that are allowed.
1228 Discussion suggested that it would not provide any appreciable
1229 benefit as a stand-alone rule for MDL proceedings. And it might be
1230 difficult to explain proper use of a master complaint. Courts are
1231 using them now, successfully. Why run the risk of undue
1232 complications?

1233 The Committee agreed that the Subcommittee can remove master
1234 complaints from the list of subjects for active study. But this
1235 and all other subjects can be brought back if reason appears.

1236 Judge Bates noted the Committee's thanks to Judge Dow, the MDL
1237 Subcommittee, and Professor Marcus for their fine work.

1238 *Rule 73(b)(1)*

1239 The agenda materials include draft amendments to the
1240 Rule 73(b)(1) procedure for obtaining the parties' consent to trial
1241 before a magistrate judge. The impetus for the proposal arose from
1242 a feature of the CM/ECF system that automatically sends individual
1243 consents to the judge as they are filed. That feature undermines
1244 the promise of anonymity that underlies Rule 73 and the statutory
1245 direction that rules of court for referring civil matters to a
1246 magistrate judge shall include procedures to protect the
1247 voluntariness of consents.

1248 Initial reports were that there is no way to thwart this
1249 automatic feature of the CM/ECF system. But recent information
1250 suggests that it may, after all, prove possible to design a
1251 procedure that, without imposing undue burdens on the clerk's
1252 office, continues to allow separate filings of consent that do not
1253 come to the attention of either magistrate or district judges
1254 unless all parties file consents.

1255 There is no apparent reason to revise Rule 73(b)(1) if it
1256 continues to be feasible to allow each party to separately file a
1257 consent to magistrate judge jurisdiction. And carrying the rule
1258 forward without amendment may avoid the need to consider other

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1259 possible issues that have not been raised on any front but that
1260 arise when amendments are considered.

1261 This topic will be deferred pending examination of the
1262 opportunities to adjust operation of the CM/ECF system.

1263 *Rule 7.1 Disclosure*

1264 Discussion began by noting four different proposals to expand
1265 the disclosures required by Rule 7.1.

1266 Disclosure of third-party financing arrangements is being
1267 studied by the MDL Subcommittee. The questions are not unique to
1268 MDL proceedings. Indeed, as discussed with the MDL Subcommittee
1269 report, the questions arise in many different categories of
1270 litigation. The MDL Subcommittee will continue its work.

1271 The MDL discussion at this meeting also touched on the
1272 original reason for adopting Rule 7.1. It is designed to elicit
1273 information relevant to recusal decisions. That topic is common to
1274 at least the Appellate, Bankruptcy, Civil, and Criminal Rules. The
1275 original initial disclosure rules were framed by a joint
1276 subcommittee of all the advisory committees. Any revisions aimed at
1277 informing recusal decisions should be considered by a like process.
1278 There have been occasional indications that it might be useful to
1279 initiate the inquiry. Discussion at the January Standing Committee
1280 meeting as part of the MDL rules discussion, however, suggested
1281 that the time has not yet come.

1282 One of the two disclosure topics that remain is straight-
1283 forward. An amendment of Appellate Rule 26.1 is on track to take
1284 effect this December 1. A parallel amendment of Bankruptcy
1285 Rule 8012(a) was published last summer and seems to be on track for
1286 a recommendation to adopt. These amendments can be illustrated by
1287 the parallel amendment that would conform Rule 7.1 to them:

1288 **Rule 7.1. Disclosure Statement**

1289 **(a) Who Must File.** A nongovernmental corporate party and a
1290 nongovernmental corporation that seeks to intervene must file
1291 2 copies of a disclosure statement that * * *."

1292 It is desirable to have uniform provisions in all three rules.
1293 The Appellate and Bankruptcy rules amendments have been tested by
1294 the public comment process and there is little reason to believe
1295 that civil actions present different considerations that warrant
1296 distinctive treatment. The case for adopting this parallel
1297 amendment is so strong that it might be recommended for adoption
1298 without publication. But there is no apparent urgency about

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1299 establishing uniformity, and it is possible that public comment
1300 might reveal reasons to reconsider. It seems better to recommend
1301 publication of the amendment for comment.

1302 A separate question is whether the rule should continue to
1303 require 2 copies of the disclosure statement. Electronic docket
1304 practices were not uniformly established when Rule 7.1 was adopted.
1305 The copy was thought useful as a means of facilitating distribution
1306 to the judge assigned to the case. But there have been repeated
1307 indications that electronic docket practices have evolved to a
1308 point that makes the "2 copies" requirement superfluous. Does it
1309 mean that the party must send the same disclosure twice by the same
1310 electronic means?

1311 Discussion noted that some judges like to have paper copies of
1312 many different sorts of filings. But the rules do not require that
1313 two copies of other filings be provided. And a judge can make
1314 arrangements to have printed copies of whatever electronic filings
1315 the judge wishes to have on paper. A judge's judicial assistant can
1316 also make sure that all disclosure statements are provided to the
1317 judge as soon as they are filed.

1318 The Committee agreed that this proposed amendment should
1319 delete the 2-copies requirement.

1320 The final disclosure question was raised by Judge Thomas
1321 Zilly. He suggests mandatory initial "disclosure of the names and
1322 citizenship of any member or owner of an LLC, trust, or similar
1323 entity." His suggestion was inspired by experience with a case that
1324 went through a 10-day trial. On appeal the court of appeals
1325 remanded for a determination whether the citizenship of four LLC
1326 parties satisfied the complete diversity requirement for diversity
1327 jurisdiction.

1328 The risk that diversity jurisdiction may not exist arises from
1329 the rule that an LLC is a citizen of every state of every owner's
1330 citizenship. If an owner is itself an LLC, the owner's citizenships
1331 are determined by the citizenships of its owners. The opportunities
1332 to defeat diversity by finding common citizenship between even one
1333 plaintiff and one defendant are manifest. The problem arises with
1334 respect both to plaintiff LLCs and defendant LLCs. And the problem
1335 is aggravated by the broad proliferation of LLCs and the secrecy
1336 that often shrouds information about LLC members. A plaintiff's
1337 attempts to satisfy the Rule 8(a)(1) obligation to plead a short
1338 and plain statement of the grounds for the court's jurisdiction may
1339 well fall short. It is easily possible that a plaintiff may not
1340 even be entirely sure of its own citizenship. Pleading the
1341 citizenship of a defendant LLC may be well beyond the plaintiff's
1342 ability.

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1343 LLC parties are only one part of the problem. Many other
1344 entities or quasi-entities take on the citizenship of their
1345 participants for the determination of complete diversity.
1346 Partnerships, limited partnerships, at least some labor unions,
1347 trusts, "joint ventures" created in various ways, foreign-law
1348 entities, and still others provide examples. Any attempt to write
1349 an all-inclusive catalog into a court rule would fall short, and
1350 might inadvertently test the rule that Enabling Act rules cannot
1351 expand or limit subject-matter jurisdiction.

1352 The difficulty of enumeration prompted preparation of a
1353 generic draft for the agenda materials. The draft would recast
1354 present Rule 7.1(a) into two paragraphs. The first paragraph would
1355 be present Rule 7.1(a), as it would be amended by the addition of
1356 the intervenor provision described above. The second paragraph
1357 would require a disclosure statement as follows:

1358 (2) A party to an action in which jurisdiction is based on
1359 diversity under 28 U.S.C. § 1332(a) must file a
1360 disclosure statement that identifies the citizenship of
1361 every person whose citizenship is attributed to that
1362 party.

1363 This incorporation of § 1332(a) includes the provisions of
1364 § 1332(c) that define the citizenship of an insurer sued in a
1365 direct action and the citizenship of the legal representative of an
1366 estate, an infant, or an incompetent. It should not create problems
1367 for diversity jurisdiction under the Class Action Fairness Act,
1368 § 1332(d), since that jurisdiction depends on minimal diversity,
1369 not the general complete diversity rule. It might be noted,
1370 however, that § 1332(d)(10) includes a distinctive definition of
1371 citizenship for an unincorporated association. And it seems likely
1372 that courts will bypass the potential complexities of determining
1373 the citizenship of class members for purposes of § 1332(d)(3) and
1374 (4) provisions when more than one-third but less than two-thirds of
1375 class members and the primary defendants are citizens of the state
1376 in which the action was filed, or greater than two-thirds of class
1377 members are citizens of the state where the action was originally
1378 filed, etc.

1379 Judge Bates opened the discussion by noting that he had had an
1380 action to enforce a California diversity judgment. It became
1381 apparent that the California court in fact did not have diversity
1382 jurisdiction. That led to questions about the consequences for
1383 enforcing the judgment, an issue not addressed by the proposed
1384 amendment. The proposal seems fairly direct.

1385 Another judge stated that "this is serious. It does come up."
1386 Like it or not, the rule for determining the citizenship of an LLC

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1387 has been settled by the Supreme Court. Perhaps the rule should be
1388 reconsidered, but that is not a question for the Committee or lower
1389 courts. There are many LLCs. Many of the people involved with them
1390 hope for privacy. It is possible that a person wishing to discover
1391 the ownership of an LLC might file a purported diversity action
1392 simply for the purpose of disclosing the ownership. We should
1393 provide discretion for the court to protect anonymity of the
1394 information.

1395 This observation suggested a question about the proposed rule
1396 draft. All the draft would require is a statement identifying
1397 citizenships; it does not require naming the persons whose
1398 citizenships are attributed to the party. But perhaps the text
1399 should be "a disclosure statement that names and identifies the
1400 citizenship of every person * * *." Or, if that is not done, the
1401 Committee Note could underscore the point that the rule text does
1402 not require identifying the persons by name.

1403 The discussion continued by pointing out that an LLC might
1404 decide not to challenge jurisdiction because it prefers not to
1405 reveal its owners, or instead because it prefers to be in federal
1406 court although disclosing all of its citizenships would defeat
1407 diversity.

1408 Another possibility would be to provide for disclosure in
1409 camera. That would put the court in a position to work with the
1410 issue, without always defeating privacy interests.

1411 A rule, or the Committee Note, might point out that a
1412 plaintiff may plead citizenships for diversity jurisdiction "on
1413 information and belief" as to other parties.

1414 A judge pointed out that for a long time she was the only
1415 judge on her court who refused to accept a simple pleading that
1416 "the defendant is an LLC whose principal place of business is in
1417 Wisconsin." She has a standard order for cases in which citizenship
1418 is pleaded on information and belief, and another order where the
1419 allegations are plainly incomplete. An opportunity to disclose in
1420 chambers is provided. These orders issue routinely in three or four
1421 cases every month. It is useful to have a disclosure provision in
1422 the rules.

1423 Another judge agreed that these citizenship questions should
1424 be raised at the beginning of an action. "Privacy is important,
1425 however."

1426 The question whether the rule should include an "unless
1427 otherwise ordered" provision was addressed by asking whether this
1428 qualification should be expressed in rule text or in the Committee

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1429 Note.

1430 Another judge agreed on the need for disclosure. Judges are
1431 engaged in this process now. And the problem arises not only from
1432 LLCs. The same problem can arise with partnerships, and can go down
1433 several levels.

1434 A judge suggested an alternative approach. He has an order
1435 that directs the parties to discuss diversity citizenship in the
1436 Rule 26(f) conference. He often finds that lawyers do not know a
1437 party's citizenship or have not made the inquiry.

1438 A judge observed that the draft Committee Note does not tell
1439 a plaintiff what to do in the complaint when it does not know the
1440 defendant's citizenship. A judge responded that the Committee Note
1441 might say that pleading on information and belief suffices.

1442 The same two judges suggested that it would be enough to draft
1443 the rule to require only identification of a party's attributed
1444 citizenships, and to comment in the Committee Note that the
1445 disclosure requirement does not extend to the names of the persons
1446 whose citizenships are identified.

1447 Two other judges asked what should be done when a defendant
1448 wants to challenge diversity jurisdiction. The draft rule text
1449 requires the plaintiff as well as other parties to disclose all of
1450 its citizenships, but a defendant may not trust the disclosure.
1451 Discovery should be available to probe behind the disclosure, just
1452 as it is available to explore other matters bearing on a
1453 determination of subject-matter jurisdiction that cannot rest on
1454 the pleadings alone. Another judge agreed. Courts manage discovery.
1455 But the Committee Note should reiterate that disclosures that
1456 identify citizenship need not also name the persons whose
1457 citizenship is attributed to the party.

1458 In moving toward a vote on the Rule 7.1 proposals, it was
1459 agreed that a vote on rule text could be made on the basis of the
1460 ongoing discussion. If rule text is approved with a recommendation
1461 for publication, the draft Committee Note can be revised to reflect
1462 the discussion and submitted to the Committee for voting by e-mail
1463 messaging.

1464 A question about rule text asked whether a requirement to
1465 "identify the citizenship of every person" might be read to imply
1466 a duty to disclose names as well as citizenship. One approach might
1467 be to change the language to "states the citizenship." A similar
1468 suggestion was that the rule text should require disclosure of the
1469 "states of citizenship."

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1470 A judge responded that "there are parent LLCs. I want them
1471 named."

1472 A different judge suggested that it is appropriate to empower
1473 the judge to protect the identity of even first-tier participants
1474 in an LLC party. It might suffice to recognize this power in the
1475 Committee Note. If you need to know, you can get it in discovery.
1476 But it might be wise to anchor this authority in rule text by
1477 introducing paragraph (2) with "Unless otherwise ordered by the
1478 court." This was accepted as sufficient to the needs of the unusual
1479 case.

1480 The question of naming the persons whose citizenship is
1481 disclosed returned. "An LLC is an amalgamation of people. Anonymity
1482 should be the exception."

1483 This discussion led to proposals that the rule text should
1484 read:

1485 (2) Unless otherwise ordered by the court, a party to an
1486 action in which jurisdiction is based on diversity under
1487 28 U.S.C. § 1332(a) must file a disclosure statement that
1488 names – and identifies the citizenship of – every person
1489 whose citizenship is attributed to that party.

1490 The Committee Note can build on the "otherwise ordered" clause
1491 to say that the court can limit disclosure of names by a protective
1492 order.

1493 A question was addressed to "person": does it include
1494 artificial entities, for example an LLC that is an owner of an LLC
1495 party? The answer was that rule style conventions use "person" to
1496 include any form of entity.

1497 An observer suggested that there may be great difficulties in
1498 unraveling all of the citizenships that are attributed to a party.
1499 There are exotic forms of organization that may include many people
1500 holding interests in multiple and overlapping layers. He had an
1501 experience with such an organization, and after much discovery was
1502 able to show citizenships that defeated diversity jurisdiction.
1503 This lament was accepted by observing that the complications arise
1504 from the rules that measure diversity jurisdiction. The accepted
1505 rules are that the parties cannot waive or forfeit subject-matter
1506 jurisdiction questions. And the court has an obligation to ensure
1507 that it has subject-matter jurisdiction in every case. As
1508 complicated as the search for citizenships may become, the value of
1509 initial disclosure at the beginning of the action is important. So
1510 all that is needed is to search far enough to find one citizenship
1511 that defeats complete diversity. The obligation to search is

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1512 imposed alike on parties who wish to invoke diversity jurisdiction
1513 and on those who wish to defeat it.

1514 A Committee member observed that the rule text limits the
1515 obligation to disclose to the persons whose citizenship is
1516 attributed to the disclosing party.

1517 A motion to recommend publication of the amendment of Rule
1518 7.1(a)(1) set out at page 285, lines 1864-1865, striking the "2
1519 copies of" provision and including disclosure by a nongovernmental
1520 corporation that seeks to intervene was approved, 13 yes and 0 no.

1521 A motion was made to begin the addition of new Rule 7.1(a)(2)
1522 set out at lines 1869-1871 with "Unless otherwise ordered by the
1523 court." The motion included addition of "names" before
1524 "identifies." (This addition was styled to read: "statement that
1525 names - and identifies the citizenship of - every person * * *."
1526 The motion was approved, 13 for and 0 against.

1527 The Committee Note will be revised to reflect this discussion
1528 and the amended rule text. The revised Committee Note will be
1529 circulated to the Committee for an e-mail vote.

1530 *Social Security Review Subcommittee Report*

1531 Judge Lioi delivered the Report of the Social Security Review
1532 Subcommittee. The early drafts that divided the potential
1533 provisions among three rules have been revised to include all
1534 provisions in a single rule. The draft included in the agenda
1535 materials is tentatively framed as new Rule 71.2. Representatives
1536 of the Social Security Administration, the National Organization of
1537 Social Security Claimants Representatives, and the American
1538 Association for Justice attended the November 1 Committee meeting
1539 and provided helpful comments on the Committee discussion of the
1540 draft rules included in the November agenda materials.

1541 The Subcommittee has met by a series of conference calls since
1542 the November Committee meeting. A small working group held a series
1543 of conference calls to deliberate detailed questions of drafting.
1544 Those calls were very successful, but many issues remain open for
1545 further consideration.

1546 The next step, apart from at least one Subcommittee meeting by
1547 conference call, will be to hold a conference on June 20. The
1548 conference will bring together representatives of the organizations
1549 that have provided advice in the past. It also will ask for
1550 participation by the Department of Justice and a representative of
1551 the Federal Magistrate Judges rules committee. Professor David
1552 Marcus, one of the authors of the study prepared for the

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1553 Administrative Conference of the United States, will be there. The
1554 first meeting with representatives of these groups before the
1555 November 2017 meeting provided a lively exchange of views. Bringing
1556 them together again, with augmented forces, is likely to provide
1557 the same benefits. It remains possible that separate meetings may
1558 be arranged with some of these groups, but nothing definite has
1559 been planned.

1560 The draft rule in the agenda materials is likely to be revised
1561 further before it is distributed to participants in the June 20
1562 conference.

1563 The Subcommittee's first objective is to pursue development of
1564 an illustrative draft that will provide a foundation for deciding
1565 whether to recommend that the Committee work to develop a draft
1566 that can be published for comment. The recommendation may be that
1567 repeated exploration of the potential pitfalls shows that the
1568 potential advantages of adopting a good and uniform national rule
1569 are not sufficient to justify an excursion into a rule that is
1570 specific to a particular substantive topic.

1571 *Final Judgment Appeals in Consolidated Cases*

1572 The Committee decided at the November 2018 meeting that it
1573 should consider the possibility of developing Civil Rules to revise
1574 the ruling about final-judgment appeals after cases that began as
1575 separate actions are consolidated in the district court. In *Hall v.*
1576 *Hall*, 138 S.Ct. 1118 (2018), the Court ruled that each originally
1577 separate action remains separate for purposes of final-judgment
1578 appeals under 28 U.S.C. § 1291. Disposition of all claims among all
1579 parties in an initially separate action is a final judgment. At the
1580 same time, the Court suggested that the Enabling Act provides the
1581 appropriate process for revising the final-judgment rule.

1582 Judge Bates announced that this question will be considered by
1583 a joint subcommittee drawn from the Civil Rules and Appellate Rules
1584 Committees. Subcommittee members will be Judges Bybee, Jordan, and
1585 Rosenberg, and Professor Spencer. Professors Cooper and Hartnett
1586 will serve as reporters.

1587 Initial sketches illustrate possible approaches that would
1588 revise Rule 42 and Rule 54(b). The object is to achieve two goals.
1589 One goal is to take advantage of the district court's opportunity
1590 to act as "dispatcher," determining whether an immediate appeal is
1591 desirable after weighing the several competing interests that
1592 affect continuing proceedings in the district court, the parties'
1593 interests in achieving repose and executing the judgment, and the
1594 best use of appellate court resources. The other goal is to
1595 maintain a bright-line approach that protects against loss of the

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1596 right to appeal by inadvertent failure to recognize that a final
1597 judgment has entered.

1598 Judge Goldgar noted that Civil Rule 42 applies in bankruptcy,
1599 and that the Bankruptcy Rules Committee will be interested in this
1600 subject. Judge Bates said that the Bankruptcy Rules Committee can
1601 participate if it wishes.

1602 *Railroad Retirement Act*

1603 The General Counsel of the Railroad Retirement Board has
1604 suggested that Rule 5.2(c) should be amended to include actions for
1605 benefits under the Railroad Retirement Act in the categories of
1606 cases that allow only limited remote electronic access to court
1607 files. The records in these cases include the same kinds of
1608 personal information as the records in social security cases. But
1609 it is not clear whether Rule 5.2(c) is the appropriate rule to
1610 address this question. Actions for review are filed in a court of
1611 appeals. Appellate Rule 25(a)(5) could be amended to the same
1612 effect. The Appellate Rules Committee is considering this question.
1613 If they conclude that the best course is to amend Rule 25(a)(5)
1614 without a parallel amendment to Rule 5.2(c), their advice will be
1615 a great help to this Committee.

1616 *Rule 4(c)(3): Serving Process in Forma Pauperis Actions*

1617 Judge Furman, a member of the Standing Committee, has raised
1618 questions about Rule 4(c)(3).

1619 28 U.S.C. § 1915(d) provides that when a plaintiff is
1620 authorized to proceed in forma pauperis, "[t]he officers of the
1621 court shall issue and serve all process, and perform all duties in
1622 such cases."

1623 Rule 4(c)(3) comprises two sentences. The first says that
1624 "[a]t the plaintiff's request," the court may order service by a
1625 United States marshal. The second says "The court *must so order* if
1626 the plaintiff is authorized to proceed in forma pauperis * * * or
1627 as a seaman." Different interpretations of this rule by different
1628 courts show a potential ambiguity: does "must so order" refer back
1629 only to ordering service by a marshal, or does it also include the
1630 predicate requirement that the plaintiff request service by a
1631 marshal? This ambiguity appeared in rule text, although in
1632 different form, before Rule 4(c)(3) was restyled in 2007.

1633 A related question is raised by the position taken by at least
1634 some marshal's offices that they cannot request waiver of service
1635 under Rule 4(d).

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1636 Additional questions surround these direct questions.
1637 Rule 4(b) provides that the plaintiff may present a summons to the
1638 clerk for signature and seal. Rule 4(c)(1) provides that "[t]he
1639 plaintiff is responsible for having the summons and complaint
1640 served within the time allowed by Rule 4(m)." An immediate question
1641 is whether Rule 4(c)(1) bears on interpreting Rule 4(c)(3) – if the
1642 plaintiff is responsible for service, that could imply that the
1643 plaintiff is responsible for requesting service by the marshal.
1644 Beyond that, questions arise as to the plaintiff's responsibility
1645 to assist the marshal in making service: need the plaintiff, for
1646 example, provide an address where service can be made? And is it
1647 plausible to suppose that a marshal's failure to effect timely
1648 service within Rule 4(m) limits should be attributed to the
1649 plaintiff without an automatic extension of time under the "good
1650 cause" provision?

1651 Brief discussion reflected that one court automatically orders
1652 the marshal to effect service when i.f.p. status is granted. And
1653 waivers of service are routinely accepted when service is to be
1654 made on any of the local governmental institutions that have agreed
1655 to blanket waivers of service.

1656 The next step will be to work with the Marshals Service to
1657 discover whether they indeed have uniform practices around the
1658 country, what variations in practice may exist, what practical
1659 concerns they have, what reasons might prompt a refusal to take the
1660 seemingly easy step of requesting waivers – do they think Rule 4(d)
1661 does not authorize it?, and any additional information that may
1662 inform further consideration of the Rule 4(c) issues.

1663 *Rules 25, 35: 18-CV-Z*

1664 Judge Bates reported that the questions raised about Rules 25
1665 and 35 in 18-CV-Z appear to rest on misreading these rules.

1666 The Committee voted to remove this matter from the agenda.

1667 *IAALS Initial Discovery Protocols*

1668 Judge Bates noted that IAALS has adopted a third set of
1669 initial discovery protocols. This one covers First-Party Property
1670 Damage Cases Arising From Disasters. It follows in the wake of the
1671 earlier protocols for Employment Cases Alleging Adverse Action and
1672 Fair Labor Standards Act cases. It was developed by a similar
1673 careful process involving plaintiff and defense lawyers, federal
1674 government lawyers, and guided by an experienced federal judge and
1675 an experienced state judge. Some courts have high numbers of these
1676 cases. The protocols are very well done. They will be helpful to
1677 the judiciary. IAALS is to be commended.

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1678 Another judge observed that an arbitration association has
1679 adopted the employment protocols and finds them very helpful.

1680 *Initial Discovery Pilot Project*

1681 Judge Campbell reported that the mandatory initial discovery
1682 pilot project is approaching the end of its second year in the
1683 District of Arizona. It has been smooth. Emery Lee is sending out
1684 a survey for closed cases, and is generating data from the docket.
1685 The project will end in May 2020, and in June 2020 in the Northern
1686 District of Illinois. "We should have good data." Two years of
1687 implementation has yielded a number of cases that have reached the
1688 summary-judgment or trial stage. Those cases provide a test of
1689 success, and so far there have been few problems arising from
1690 motions to exclude evidence for failure to provide it by initial
1691 discovery.

1692 Judge Dow said that experience in the Northern District of
1693 Illinois has been similar to the experience in Arizona. The court
1694 has come to recognize a judge's discretion to not require that
1695 discovery go forward pending a motion to dismiss. The project seems
1696 to be going smoothly.

1697 Emery Lee reported that in a week or two the FJC expects to
1698 complete the fourth round of closed-case surveys. "It's going
1699 pretty well."

1700 Judge Bates closed the meeting by thanking all Committee
1701 members for their great work.

1702 The next meeting will be in Washington, D.C., on October 29.

Respectfully submitted,

Edward H. Cooper
Reporter

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TAB 5

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TAB 5A

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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

DENNIS DOW
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: May 31, 2019

I. Introduction

The Advisory Committee on Criminal Rules met on May 7, 2019, in Alexandria, Virginia. The draft minutes of that meeting are attached at Tab B. There are no action items. This report discusses the following information items:

- The Committee's decision not to move forward with a suggestion that it amend Rule 43 to permit the court to sentence or take a guilty plea by video conference;
- The Committee's decision not to move forward with a suggestion that it amend and clarify Rules 40 (arrest for violating conditions of release set in another district);
- The Committee's mini-conference considering suggestions that Rule 16 be amended to provide additional pretrial discovery concerning the testimony of expert witnesses; and

- Updates received by the Committee concerning the work of the Task Force on Cooperators and recent decisions concerning Rules 6 (disclosure of historically significant grand jury materials) and Rule 12 (standard for reviewing untimely claims).

II. Rule 43

A Subcommittee was previously appointed to consider the suggestion in the opinion in *United States v. Bethea*, 888 F.3d 864, 868 (7th Cir. 2018), that “it would be sensible” to amend Rule 43(a)’s requirement that the defendant must be physically present for the plea and sentence. On two recent occasions, the Committee has rejected suggestions that it expand the use of video conferencing for pleas or sentencing but members concluded that it would be appropriate to revisit the issue with this case in mind. In *Bethea*, the defendant’s many health problems made it extremely difficult and for him to come to the courtroom, and given his susceptibility to broken bones, doing so might have been dangerous for him. But even in such an exceptional case, and even at the defendant’s request, the panel in *Bethea* concluded, “the plain language of Rule 43 requires all parties to be present for a defendant’s plea” and “a defendant cannot consent to a plea via video conference.” *Id.* at 867. Committee members emphasized that physical presence is extraordinarily important at plea and sentencing proceedings, but they also recognized that *Bethea* was a very compelling case. On the other hand, members wondered if the case might be a one-off, since practical accommodations at the request of the defendant – with the agreement of the government and the court – have been made in such rare situations, obviating the need for an amendment. Judge Molloy concluded that the issue warranted further study by a subcommittee.

At the May meeting, the Subcommittee, chaired by Judge Denise Page Hood, recommended that the Committee not pursue an amendment to allow video conferencing to be used for plea and sentencing proceedings. The Subcommittee acknowledged that there are, and will continue to be, cases in which health problems make it difficult or impossible for a defendant to appear in court to enter a plea or be sentenced, and that Rule 43 does not presently allow the use of video conferencing in such cases (though that is less clear for sentencing than for plea proceedings). Nonetheless, it recommended against amending the rule for three principal reasons. First, and most important, the Subcommittee reaffirmed the importance of direct face-to-face contact between the judge and a defendant who is entering a plea or being sentenced. Second, there are options – other than amending the rules – to allow a case to move forward despite serious health concerns. These options include, for example, reducing the criminal charge to a misdemeanor (where video conferencing is permissible under Rule 43), transferring the case to another district to avoid the need for a gravely ill defendant to travel, and entering a plea agreement containing both a specific sentence under Rule 11(c)(1)(C) and an appeal waiver. Moreover, the Subcommittee thought that plain error analysis might be applicable in a case like *Bethea*, allowing the appellate court to affirm a conviction and sentence of a defendant who agreed to (and perhaps sought) to plead and be sentenced by video conference. Thus there are many other ways to avoid reversing convictions or sentences as a result of agreed-upon solutions to this problem. Third, the Subcommittee was concerned that there would inevitably be constant pressure on defendants and parties from judges to expand any exception to the requirement of physical presence at plea or

sentence. Accordingly, the Subcommittee concluded that at this time no change in Rule 43 is warranted.

Members agreed with the Subcommittee's analysis and discussed additional input from a Texas border district whose judges strongly supported the use of video conferencing for pleas and or sentencing. Judge Campbell explained that Chief Judge Lee Rosenthal, one of the Texas judges who urged the Committee to permit video conferencing, has a unique problem. Because her district has thousands of § 1326 defendants (charged with illegal reentry) and hundreds of miles between courts, either the judge must travel or the marshals have to transport people between courts. These are generally cases with quick resolutions and relatively small sentences, so they probably present the strongest argument in favor of implementing a video conferencing arrangement. However, the Committee agreed with Judge Campbell's view that it would be undesirable to open the door to video conferencing for these critical procedures. One of the hardest things district judges do is face the defendant and look him in the eye to deliver a sentence. It brings a seriousness and a soberness to the process that is important, even though it is hard, and even though some judges have to travel to do it.

After extended discussion, the Committee unanimously agreed with the Subcommittee's recommendation to make no change in Rule 43 at this time.

III. Rule 40

The Committee discussed a new suggestion from Magistrate Judge Patricia Barksdale (MDFL) that it consider amending Rule 40, which governs the procedures for arrest for violations of conditions of release set in another district. Although the Rule could benefit from clarification, the Committee concluded that the issues raised by Judge Barksdale arise relatively infrequently, are being handled appropriately, and thus do not warrant an amendment at this time.

Judge Barksdale expressed concern that several aspects of the Rule are not clear. As she explained, the questions of concern arise in the following scenario:

District A places a defendant on pretrial release under conditions, and – with the permission of District A – the defendant moves to District B, which agrees to supervise the defendant. While in District B, defendant commits an alleged violation of release conditions. District A issues a warrant for Defendant's arrest. Based on that warrant, Defendant is arrested in District B and brought immediately to a Magistrate Judge in District B.

Judge Barksdale's questions arise from the interaction of Rule 40 with 18 U.S.C. § 3148(b) and Rule 5(c)(3) in the scenario above. Section 3148(b) governs the procedure for revocation of pretrial release, and as generally understood it provides that the revocation proceedings will ordinarily take place in District A and be heard by the judicial officer who ordered the release.

Judge Bruce McGiverin greatly assisted the Committee in understanding the issues by sharing his own experience and by consulting widely among the community of magistrate judges.

There is general consensus that at least two aspects of Rule 40 are not clear. First, Rule 40(d) says to apply the procedures in Rule 5 “as applicable.” Determining which parts of Rule 5(c)(3) apply requires a careful analysis of Rule 5(c)(3), and it may generate some differences of opinion. The second area of possible confusion concerns Rule 40(c), which seems to allow the magistrate judge in the arresting district to alter the release order that was issued by the magistrate judge in the prosecuting district. There is a possible conflict between that and 18 U.S.C. § 3148(b), which appears to require the defendant to be brought back to the prosecuting district and would also severely limit whatever could be done by the magistrate judge in the arresting district. This raises the question is what (if anything) Rule 40(c) applies to, and what it allows the magistrate judge in the arresting district to do.

After discussing the ambiguities in Rule 40 and in 18 U.S.C. § 3148(b), the Committee turned to the question whether revising the rule to clarify it was warranted. Although the rule could benefit from clarification, the Committee agreed with Judge Campbell’s observation that many rules could benefit from clarification, but the Rules Committees must be selective. Given the relative infrequency with which this scenario arises, and the fact that the courts have generally handled the cases that do arise without significant problems, the Committee decided to take no action at this time.

IV. Rule 16 Mini-Conference

Judge Kethledge, Chair of the Rule 16 Subcommittee, reported on the mini-conference on the discovery of expert reports and testimony. The Committee had received proposals to amend Rule 16 so that it more closely follows Civil Rule 26 in the disclosures regarding expert witnesses. There was a very strong group of participants, including six or seven defense practitioners, and five or six representatives from the Department of Justice. Most had significant personal experience with these issues and had worked with experts. The discussion was broken down into two parts. First, participants were asked to identify any concerns or problems they saw with the current rule, and second, they were asked to provide suggestions to improve the rule. There was a very candid and vigorous exchange.

The defense side identified two problems with the rule. First, Rule 16 has no timing requirement. Practitioners reported they sometimes received summaries of expert testimony a week or the night before trial, which significantly impaired their ability to prepare for trial. Second, they said that they do not receive disclosures in sufficient detail to allow them to prepare to cross examine the witness. In contrast, the Department of Justice representatives stated that they were unaware of problems with the rule. Judge Kethledge thought that there were significant variations among the districts, and from AUSA to AUSA. If so, reforms might be needed to improve discovery from weaker performers, so that the defense can adequately prepare for trial.

When discussion turned to possible solutions on the issues of timing and completeness of expert discovery, Judge Kethledge reported that the participants made significant progress in identifying some common ground that would guide the Subcommittee. The Subcommittee came away from the mini-conference with concrete suggestions for language that would address both issues.

Department of Justice representatives said that framing the problems in terms of timing and sufficiency of the notice was very helpful. It was useful to know that the practitioners were not seeking changes regarding forensic evidence, overstatement by expert witnesses, or information about the expert's credentials. The lack of precise framing explained, at least to some degree, why the Department personnel who focused on these other issues were not aware of problems with disclosure relating to expert witnesses. The Department's representatives expressed willingness to work with the Committee to develop language that would both address the timing and sufficiency of disclosures regarding expert testimony and be acceptable to the broad community of federal prosecutors. They also committed to working with Committee member and Federal Defender Donna Elm to develop training materials for federal prosecutors.

Judge Kethledge said his goal was for the Subcommittee to bring a proposed amendment to the Committee's September meeting.

V. Updates

The reporters provided oral updates on recent cases interpreting Rules 6 and 12, which were of interest because the courts drew heavily on Committee minutes and reports. There are now circuit splits concerning both rules. These updates were informational only. There has been no proposal to amend either rule.

The reporters described one circuit split on the question whether the district courts have inherent authority outside of Rule 6 to permit disclosure of historically significant grand jury materials. In 2001, the Committee had declined to pursue a proposal by Attorney General Eric Holder to amend Rule 6 to provide procedures for the disclosure of "archival" grand jury materials. The proposal would have allowed disclosure if (1) materials met multiple criteria, (2) disclosure would not materially prejudice any living person or impede any investigation, and (3) no other public interest required continued secrecy. Since only a small number of cases had raised the issue and precedent in some circuits had permitted disclosure in exceptional circumstances, the Committee declined to pursue an amendment.

The other circuit split described by the reporters concerned the standard for appellate review of untimely claims under Rule 12. When the Committee undertook revisions to Rule 12 prompted by the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), it recognized but did not resolve the issue.

The use of the Committee's reports and minutes by litigants and courts in these cases led to a useful discussion of what Committee materials are public and how the minutes are prepared, as well as the role of Committee Notes.

The Committee also received an update from Judge Kaplan, chair of the Task Force on Protecting Cooperators as well as the Criminal Rules Committee's Cooperator Subcommittee. Judge Kaplan reminded the Committee that the Task Force had delivered its report to Director James Duff in two parts. The first concerned potential procedural changes within the Bureau of Prisons. Although there have been some delays, the Department is going forward with the recommendations. Judge Amy St. Eve is working with the Department on these issues. The second part involved changes to Case Management/Electronic Case Files (CM/ECF) that would make information from which individuals could infer who was cooperating less readily available. There is a real tension between protecting the lives and well-being of cooperators on the one hand and ensuring transparency and accountability on the other hand. Director Duff referred this part of the report to the Committee on Court Administration and Case Management (CACM Committee) last spring. Significant work must be done to the CM/ECF system to implement the Task Force's recommendations. Although there is no specific time line now, it is also moving forward. As a result, the CACM Committee has requested that the Committee continue to defer consideration of draft Rule 49.2 (which addresses access to cooperation information through PACER).

TAB 5B

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ADVISORY COMMITTEE ON CRIMINAL RULES
MINUTES (DRAFT)
May 7, 2019 | Alexandria, VA

I. Attendance and Preliminary Matters.

Judge Donald W. Molloy, Chair
Judge James C. Dever
Donna Lee Elm, Esq.
Judge Gary S. Feinerman
Judge Michael J. Garcia
James N. Hatten, Esq.
Judge Denise Page Hood
Judge Lewis A. Kaplan
Professor Orin S. Kerr
Judge Raymond M. Kethledge
Judge Bruce McGiverin (by telephone)
Susan Robinson, Esq.
Jonathan Wroblewski, Esq.
Judge David G. Campbell, Chair, Standing Committee
Judge Jesse Furman, Standing Committee
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Professor Cathie Struve, Reporter, Standing Committee (by telephone)
Professor Daniel R. Coquillette, Consultant, Standing Committee

And the following persons were present to support the Committee:

Rebecca A. Womeldorf, Chief Counsel, Rules Committee Staff
Julie Wilson, Esq., Counsel, Rules Committee Staff
Ahmad Al Dajani, Esq., Law Clerk, Standing Committee
Laural L. Hooper, Federal Judicial Center
Shelly Cox, Rules Committee Staff

Judge Molloy called the meeting to order and introduced two new members: Judge Jesse Furman, the new Liaison from the Standing Committee, and Judge Michael Garcia from the New York Court of Appeals (attending in person for the first time). Judge Molloy was pleased to report that when his own term expires this year, Judge Kethledge will be taking over as chair of the Criminal Rules Committee.

The Committee unanimously approved minutes of the October 2018 meeting subject to typographical corrections brought to the reporters' attention.

Ms. Womeldorf reported on the progress of Rules amendments. The Criminal Rules Committee had no action items at the last Standing Committee or Judicial Conference Meetings, and there are no rules out for public comment from this Committee presently. New Rule 16.1 was officially adopted by the Supreme Court and will become law if there is no contrary action by Congress.

II. Cooperators Report.

Judge Molloy asked Judge Kaplan to report on the activities of the Task Force on Protecting Cooperators. Judge Kaplan reminded the Committee that the Task Force delivered its report to Director Duff in two parts. The first was about potential procedural changes within the Bureau of Prisons (BOP), but the meeting to discuss implementation was cancelled because the BOP director resigned. The Department is going forward with the recommendations, and Judge St. Eve says they are moving things along. The second part involved changes to CM/ECF that would make less readily available information from which individuals could infer who was cooperating. There is a real tension between protecting the lives and well-being of cooperators on the one hand and on the other hand ensuring transparency and accountability. Director Duff referred this part of the report to CACM last spring. Unfortunately, it is not as simple to implement as the Task Force had hoped, and a great deal has to be done to CM/ECF system. There is no specific time line now, but it is moving forward.

Mr. Wroblewski said it had been a pleasure working with the Task Force. The Department received the recommendations, and he and Judge St. Eve speak regularly about them. With the Director and the Deputy Attorney General the Department reviewed all of the recommendations to see what we could do. Most are underway. For example, there has been a change in the internal regulations regarding discipline. The Department is now receiving data from the Sentencing Commission, which is creating the data base that was called for. The most difficult recommendation to implement is putting a secure room in every BOP facility where inmates can review documents that would be contraband if possessed individually. The logistical and challenges will require some time. The Judicial Conference Criminal Law Committee created a subcommittee to handle BOP issues, which meets every time the Criminal Law Committee is meeting. Their next meeting is June 5. Judge St. Eve, the Director of BOP, the General Counsel and others will be there. So it is moving ahead.

Professor Beale asked if Rule 49.2 (a rule that would address access to cooperation information through PACER) was still on hold, as CACM had previously requested. Judge Kaplan responded that it is still on hold.

III. Rule 43.

Judge Molloy asked Judge Hood to present the report of the Subcommittee on Rule 43. He noted that he had appointed the Subcommittee in response to a Seventh Circuit decision, and charged it to look into modifying the rules of presence at pleas and sentencing. He praised the reporters for their memo on the topic. After a lengthy phone conference, the Subcommittee concluded there was no need to change the rule. Judge Molloy noted that at a meeting of the Judicial Conference earlier this year, judges in larger districts in border states urged the Committee to change the rule, citing improved technology. There are judges, particularly in Texas, who do not want to travel to take pleas or sentence. Judge Molloy noted that the Subcommittee was consulted about whether there should be another conference call given this new input. The Subcommittee decided not to revisit its decision.

Judge Hood began by thanking the Subcommittee members and pointing out the discussion among Committee members about this topic in the minutes from the last meeting. She reported that the Subcommittee had reviewed the case law on whether the defendant and the judge had to be present at the plea and the sentence, and the Committee's own consideration of this issue in the past. The general consensus was that it was very important for both the defendant and the judge to be present at both the plea and the sentence, and that an amendment was not warranted. When Judge Molloy related the remarks that he had received from judges who praised the technology and said that video conferencing would really help in their districts, we polled the Subcommittee to ask if the members wanted to reconsider. They did not wish to do so. The Subcommittee recommends no change to the current rule.

Professor Beale summarized the reporters' memo, stating that the requirement in Rule 43 that the defendant be present is very clear at the plea stage, though a little less clear at the sentencing stage. Courts have read the sentencing provision narrowly in light of legislative history, so there may be a little better argument that video conferencing is currently allowed at the sentencing stage if the defendant has gone to trial or been present at the plea. But Rule 43 does require physical presence, and the Committee has discussed why physical presence is so important. If you've been in a courtroom, you know the physical presence of both the judge and defendant makes a huge difference. There were discussions at our earlier meeting about how the judge might be able to smell liquor, to see what the defendant's hands were doing, and so forth. Some of the defense lawyers emphasized that anything that separates the defendant from the court is a bad idea. The plea is the big waiver of all constitutional trial-related rights, and sentencing is the most human things that judges do. After discussing all of the policy arguments, the Subcommittee recommended no change in the rule.

The memo also discusses workarounds. Many members thought that Bethea (involving a defendant whose bones would break if he traveled) was a sympathetic case for which there should be a solution. The reporters' memo discusses some workarounds for these exceptional

situations. But the Subcommittee did not think the rules should be changed for a small number of cases because of concerns about the slippery slope and the need to maintain that line as a policy matter. Professor Beale noted that the feedback from the Texas judges who want to use video technology could be seen as an example of the slippery slope concern. If we made an exception from the requirement of physical presence for this one situation, there would be pressure to do it in more and more cases.

The reporters' memo described various ways to deal with the rare compelling case, including reducing the charge down to a misdemeanor, using a DPA, or a Rule 11(c)(1)(C) plea with a certain sentence and an appeal waiver. The memo also includes a discussion of whether the procedure in *Betha* was indeed a fatal error, or plain error analysis would have allowed the case to be affirmed.

Professor King agreed and reiterated that there are two main reasons that the Subcommittee is recommending that no action be taken at this time. First, there will be constant pressure on defendants and parties from judges to expand any exception to the requirement of physical presence at plea or sentence. Second, there are many other ways to avoid reversing convictions and sentences as a result of agreed-upon solutions to this problem. So the Subcommittee decided that at this time changes would not be warranted.

Professor Beale noted that the Committee's own records reflect that pressure from judges. Judge Walter renewed his request to sentence remotely, and the judges in one Texas district want to use video conferencing to avoid frequent travel.

Although there will be very, very, seriously ill people in the system, there are other ways to deal with that problem. Judge Hood referred to the pages of the report referring to the workarounds. She observed that there may be some problems with particular solutions in certain cases (such as a defendant who does not wish his case to be transferred). Even so, the workarounds have been effective in some cases when a defendant is too ill to come to court.

Judge Campbell noted his high regard for Judge Lee Rosenthal, who was one of the judges who urged the Committee to reconsider this issue. She has a unique problem, because her district has thousands of § 1326 defendants (charged with illegal reentry) and hundreds of miles between courts. So either the judges must travel, or the marshals have to transport many people to the judges. (Judge Campbell noted his court has some of the same problems in Arizona, but not to the same extent.) The resolutions in those cases are quick and they produce relatively small sentences. So those cases probably present the strongest argument you could make for allowing video conferencing. Judge Campbell's view (and he suspected the view of the Standing Committee as well), is the same as this Committee: we just do not want to open that door. One of the hardest things district judges do is face the defendant and look him in the eye as we sentence him. We should have to do that. It brings a seriousness and a soberness to the process

that is good even though it is hard, and even though some judges have to travel to do it. So Judge Campbell did not see any issues with the Subcommittee's recommendation, and he foresaw no pushback from the Standing Committee. He said he really does think this is a door we want to keep closed because of the benefits of in-person pleas and sentences.

A member noted that the workarounds should be effective, supported the Subcommittee's recommendation, and expressed concern that any change just for border districts would raise equal protection issues.

Another member agreed with decision not to amend the rule, but raised a mild cautionary note on the workaround of an appellate waiver in the plea agreement. In Chicago, there is an exception for the sentence and the validity of the plea agreement that is not waived. There is some authority that even in cases where the appeal of the sentence is waived, a defendant is not allowed to waive the validity of the plea agreement. So it is conceivable that in some jurisdictions this particular workaround would not be foolproof. That said, he agreed with the comments not to amend the rule. Judge Molloy also noted the Supreme Court's recent opinion in *Garza*, finding it was a violation of the Sixth Amendment right to effective assistance for counsel not to file an appeal even though there was an appeal waiver.

Judge Molloy asked if anyone on the Committee disagreed with the Subcommittee's recommendation. Receiving no response, he stated that the record will show the matter has been seriously considered and the Committee has elected not to alter the rule. He noted he would get in touch with the judges and let them know of the Committee's decision.

III. Rule 40.

Judge Molloy turned to the suggestion to amend Rule 40, and he asked Judge McGiverin to brief the Committee on the issue.

Judge McGiverin apologized for participating by phone due to his father's health. He noted the reporters' memo provides all the background. Generally, this issue arises when a defendant on pretrial release is supervised in a different district (District B) than the prosecuting district (District A), and is brought before the magistrate judge in District B because the defendant has allegedly violated the conditions of release. There is general consensus among the magistrates consulted and the reporters that the rule is not clear in at least two regards.

First, Rule 40(d) says to apply the procedures in Rule 5 "as applicable." This raises the issue of what parts of Rule 5(c)(3) actually apply. The issue can be resolved by careful analysis, but there are some differences of opinion arising from the lack of clarity.

The other area of possible confusion concerns Rule 40(c), which seems to allow the magistrate judge in the arresting district to alter the release order that was issued by the

magistrate judge in the prosecuting district. There is a possible conflict between that and 18 U.S.C. § 3148(b), which appears to require the defendant to be brought back to the prosecuting district and would also severely limit whatever could be done by the magistrate judge in the arresting district. So the question is what (if anything) does Rule 40(c) apply to, and what does it allow the magistrate judge in the arresting district to do. Does it allow for an order of temporary detention? For release pending final revocation hearing in the prosecuting district?

The final point is that this situation rarely arises. But it does from time to time, and practically every magistrate judge that Judge McGiverin consulted thought the rule is unclear and probably could be clarified pretty easily.

Professor Beale noted the report speaks for itself on the specific issue that Judge Barksdale raised. And as explained in footnote 1, it is not entirely clear what the statute requires. Neither the rule or statute is a model of clarity. So what should be done where? Would it be desirable for the judge in District B to have more authority to do more things? Some judges have read it as allowing for some greater authority. Judge Miller, who served on the Committee that restyled Rule 40, thought that it allowed for a different balance of authority. And in addition to the question how much should be done in District B, the arresting district, there is the issue of whether these technical questions could be answered more clearly in the rule. So there are both technical questions and policy questions which presumably we would consider if we took up Rule 40. The Committee would need to come to its own determination about whether the statute would allow more to be done in District B.

Professor Beale acknowledged that Judge McGiverin was incredibly helpful, and that his advice reflected not only his individual experience, but also input from the many court personnel and other magistrates judges he consulted. There was agreement that this is not a big problem, and it is not urgent. However, people did say the rule was not clear, so each judge has to figure out how to interpret the “as applicable” language. Because these questions arise infrequently, judges end up reinventing the wheel. So even though it is not a big problem, it would be nice to fix.

Judge McGiverin agreed. The situation doesn’t arise very often, and Rule 40 really doesn’t help that much. In his cases, he provides more process to defendants than the rule requires. There is a difference of opinion as to what the magistrate judge in District B is allowed to do, and he thought it possible that they are allowed to do more than his reading of the statute. Some magistrate judges believe they have the authority to temporarily release the defendant pending the revocation hearing in the prosecution district, for example. Rule 40 could be revised to parallel Rule 32.1, which specifies the procedures for revoking or modifying supervised release rather than providing a cross reference to other rules, so that the magistrate judge could look at one Rule and know what to do.

Judge Molloy asked for views on whether the Committee should take up these issues.

One member said this situation doesn't come up that much, so we do not need to do anything. But the fix might be simple if we chose to do something.

Another member agreed it doesn't come up that much, though the frequency depends on whether there are multiple districts and on the distances between courts. This member often deals with defendants who were prosecuted in a neighboring district that is right next door. If the probation officer asks for an arrest warrant, it will not be months before he goes back to the prosecuting district. He will be there the next day. The member thought the rule and statute are sufficiently clear that when it does come up, it seems straightforward. It is theoretically possible, if an absconder violates, to have a detention hearing in one district where the magistrate orders the person released. If that happened, the AUSA would seek a stay, probably get it, and the next morning that person would be brought to the prosecuting district to have a hearing about compliance. So at the end of the day we don't need to change the rule.

Another member agreed the situation is not common, but thought it was more complicated. One of the questions is what the reference to the detention order is. The member looked up § 3142 referring to detention for appearance, but there is nothing prohibiting the judge in District B to alter or amend. So it is more complicated, but it doesn't come up much.

Several additional members agreed that this is not enough of a problem to address at this time. One suggested that perhaps the conditions of the release order allowing defendants to be supervised in a different district could set forth what happens if they are picked up for a violation. That is perhaps something the courts could do. In practical terms, what happens now is that the defendant appears before a magistrate judge, and then they ship him back where the proceedings occur.

One member expressed a different view, emphasizing that the Committee is being asked clarify the rule, not change process or policy. This would be an easy fix. When there is a relatively easy fix, and there is a rule with significant ambiguities, the member thought it might be responsible for the Committee to address those.

Professor Coquillette remarked that he agreed with the majority. Fiddling with rules puts a burden on the bar to keep track of what we are doing. Unless there is a real reason to do something, he favored a conservative approach.

Judge Campbell added that every Rules committee could identify an example of a rule that could be clarified. But there is a cost to amending rules too often, and we do get complaints when they are amended too often. So unless there is a real need on the ground to solve a problem, it is best for the committees not to try to achieve every clarification that they could in the rules.

Judge Molloy decided there was no need to send this to a subcommittee, and Judge Kethledge agreed.

IV. Rule 16

Judge Kethledge, Chair of the Subcommittee on Rule 16, reported on the mini-conference on the discovery of expert reports and testimony that had been held the day before the Committee's meeting. The Committee had received proposals to amend Rule 16 so that it more closely follows Civil Rule 26 in the disclosures for expert witnesses. The Department of Justice has been adamantly opposed to that suggestion. The Committee had asked the Department at the last meeting to give us a proposal that they could live with. They've had some intervening events that made it hard for them to do that, including the government shutdown and the changeover of the deputy attorney general, so they did not have a proposal at the mini-conference. We had a very strong group present, including six or seven defense practitioners and five or six people from the DOJ. The defense practitioners and most of the Department of Justice people had significant personal experience with these issues and had worked with experts. We broke the discussion down into two parts: (1) what concerns or problems do you see with the current rule, and (2) what suggestions do you have to improve the rule. It was a very candid and vigorous exchange. It was a very impressive group that came and gave us their thoughts.

The defense participants identified two principal problems with the rule. First, Rule 16 has no timing requirement. It says only that a summary must be provided. Some practitioners described receiving summaries a week or even the night before trial if the government decided at the last minute to use a witness. This obviously impairs the ability of the defense to prepare for trial. Second, the government don't include sufficient detail. One example was a statement that the expert had examined the cell phone, had extracted data and would opine that it shows the defendant is guilty. The defense participants felt the summaries they were receiving were too conclusory and vague to allow them to prepare to cross examine the witness. The Department of Justice representatives, in contrast, said they claimed they have not heard of any problems with the rule, though they talk regularly with defenders. They said these issues are not litigated, and there are not relevant appellate decisions. (As an aside, Judge Kethledge noted that as a court of appeals judge he did not find the absence of appellate decisions indicative of anything relevant here.) The Department's representatives did not sense any problem.

Judge Kethledge noted his impression that there are significant variations among districts. Andrew Goldsmith has done a salutary job of training in the 93 districts and made good progress, but still there is a lot of variation on when an individual AUSA is providing a summary and what that summary says. And people procrastinate. Other things with deadlines are addressed first, and things with no deadline tend to be pushed farther back and produced closer to the time of trial. Notwithstanding good practices in some places, there was variation. He also noted Judge

Campbell had made a helpful comment informally, which was that we have to write rules for the weaker performers. The stronger ones seem to have pretty good practices. But the weaker ones are doing this really conclusory name, rank, and serial number type of summary. There is a sense that we need to reform the rule to bring that performance up to the level to allow defense counsel to prepare adequately for trial

When the discussion turned to suggestions about how to address the problems, we made significant progress. Everyone had different perspectives or concerns, but everyone was working toward the best practice for the interests of justice. We got to the point where there was a willingness and open mindedness to acknowledge fair points on both sides. Judge Kethledge outlined his sense of the common ground. On timing, there are two paths. First, there was interest in saying that the summaries need to be produced within 45 days of trial. That date could be adjusted for good cause by the district court, but the default would be 45 days out to provide the summary. Alternatively, we also talked about a different formulation – “sufficiently ahead of trial to allow defense counsel to adequately to prepare” – borrowed from a pending amendment to Rule 404(b). That is more flexible, and there was a sense that it would eliminate a bunch of for good cause shown motions that would routinely be filed by the government. There seem to be some approval of that from both sides.

As to the content of the summaries, Judge Kethledge thought Mr. Goldsmith had said he would be ok with adopting a statement from Rule 26 that the summary must be “complete statement” of the experts opinion. Part of the defense complaint was that the experts testify beyond the scope of the summary. For example, one defense attorney described a case where the defense was told a witness would be testifying about the way things happen in the drug trade. But at trial, the witness started talking about the usage of drugs and what drug users do. The topic of usage had not been not disclosed before trial, so the witness was going beyond the scope of what had been disclosed. A complete statement requirement could address that problem. The government could potentially supplement later. Expert testimony is sometimes under development or fluid up until the time of trial. But the statement ought to be complete at least as to the time of production, and if an expert’s opinion changes you have to produce the changes sufficiently in advance of trial so the defense counsel can prepare. Some things not controversial at all: providing the qualifications of the expert and a list of the expert’s prior testimony for the previous four years (both of which are in Civil Rule 26). Recalling his days in practice, Judge Kethledge said that when he cross examined experts he found that to be enormously useful. It is a very powerful tool for truth. Some experts will say anything anytime, and if you can reveal that in a cheerful way in front of a jury it gives them a very useful perspective on that expert.

Judge Kethledge said the mini-conference had produced something that the Subcommittee could incorporate into proposed language. His goal is bring a proposed amendment for Rule 16 for expert disclosures to the full Committee for a vote in September.

Mr. Wroblewski said he thought the mini-conference was helpful, and a credit to everyone involved. It was a very civil discussion that shed a lot of light on the issues. The big success for him is that it helped define the problem. The Department came to the mini-conference saying there was no problem because the problem had not been clearly defined. The mini-conference revealed that defense lawyers agree this is not a problem about forensics or expert overstatement. If you broaden discovery you are not going to address overstatement. It is not about knowing the qualifications of the expert. It is not about prior testimony, although you may want to have a list anyway. It also revealed tremendous confusion about the line between lay and expert opinion testimony, but that is not about discovery. The problem defined as he heard it was timing and sufficiency of the notice. It was a major success to come to agreement about a definition of the problem.

The discussion also revealed that, given the practicalities of criminal practice across the wide range of cases that are in federal criminal justice system, the solution cannot be one size fits all. It is tempting to want to put a number of days before trial. But there are cases that live within the 70-day Speedy Trial Act (though not most of them), and our rules must be adapted to fit those cases. If we had a rule requiring notice 45 days before trial, experts would have to be identified immediately for most cases that would eventually end up in guilty pleas, resulting in unnecessary costs. At the same time he agreed with Judge Kethledge that improvements can be made, and the Department will support those improvements. Judge Kaplan and Professor Capra's suggestions about timing was something he thought the Department will be able to support. Getting rules regarding sufficiency will be hard. When you look at the Civil Rule 26 and the language about opinions and bases, will "complete" opinion make a big difference? He was not sure, and he anticipated that if it were circulated among U.S. Attorneys around the country that there would be significant concern about knowing what that means. It would be very helpful to emphasize that those opinions can be supplemented beyond the initial disclosure.

Mr. Wroblewski anticipated that the Department would have training this year with Andrew Goldsmith and Donna Elm, and it will be required training for every one of the 6000 prosecutors around the country. He said Mr. Goldsmith is committed to doing that. Since 2010 every Justice Department prosecutor has been required to go through 2-4 hours of discovery training every year. Mr. Goldsmith does most of that, and he is committed to working with Ms. Elm to make sure this issue is addressed.

Finally, Mr. Wroblewski noted the very interesting discussion about reciprocity, and that the rule can and should include reciprocity. He noted one of the really candid things that came out at the mini-conference was that a rule change on this point will not matter. Despite the rules that currently require pretrial disclosure to the government of a scientific report that is going to be used by the defense in their case and chief, the defense bar believes that they don't have to disclose that until minutes before the person takes the stand. That is the Department's experience about reciprocity. It is in the rule currently, and as we make changes, it should be left

in. But the candid view of the defense attorneys was it doesn't matter. They are not going to turn over anything any earlier than they absolutely have to.

Judge Molloy credited Judge Campbell with suggesting the mini-conference approach, which has really helped identify the real problems and narrow the scope of what the Rules Committees are being asked to do. There were two proposals provided to the participants, and the one submitted by a former member of this committee might be grounds for starting. DOJ is going to make some effort given change in administration to try and get on board with something acceptable to them. The plan to get it on the agenda for September is good.

Professor Beale added that some of the defense participants explained the special difficulties faced by CJA lawyers who learn belatedly that an expert will be presented, or that an expert's testimony will go into another area. It takes 30 days for a CJA lawyer to get approval to hire an expert. Then they have to find and hire the expert. If it is a short timeline it will be more expensive to hire the expert, and if you are someplace like West Virginia where the experts may not be available locally, that is an even greater problem. So having people from different practice areas was extremely helpful, and going forward we will be able to draw on those folks and others. She also thanked everyone who helped us identify these experts. We absolutely needed them in the room.

Judge Campbell said that as he listened to these stories of last-minute disclosures or very vague disclosures, he was asking himself where are the judges in these cases? But what the defense attorneys then said made sense. If they try to go to the judge for help, there is nothing they can point to in the rule to say this is late, or that they don't have time to respond. So it would be helpful to have something in the rule, even if we don't have a hard date, to have something like the 404(b) language that says it has to be sufficiently ahead of trial to give the defense a fair opportunity to meet the evidence. Then the defense has something in the rule they can go to the judge with. They can say there is no way I have a fair opportunity to meet the evidence because I just got this last week and trial starts next week. It was also pointed out that Rule 16 has some pretty good remedy provisions. But again, if there is nothing in the rule to show a violation you can point to, it is hard for a judge to use those remedies. If there is some requirement for a fair opportunity that has clearly been denied, then the judge can look to Rule 16 and ask should I grant a continuance? Or should I deny the expert? When the potential for such remedies becomes real, then everybody has a better incentive to comply with the rule and maybe some of the weaker players will do better. The training the DOJ is doing is terrific. But we have learned over the years with the rules process that the trickle-down effect takes a while to get to the lawyers that are not going to be attentive to their duties, and if there are real consequences in the rule for that behavior it will help.

A member said he wanted to share the sense of relative optimism from the mini-conference. There seemed to be a lot of consensus as to fact patterns that were bad. Judge

Kethledge had a great comment: it seemed like we were really grappling with what's the best legal rule to respond to this, rather than disagreeing about what was a good situation and what was a bad situation. So this seems to be an issue on which we can make a lot of progress, and he was optimistic that we will.

Another member said he thought this was a tremendously important thing to do. The variety of experts testifying in criminal cases in the last few years is mind boggling: experts on Al-Qaeda; trace DNA when there is more than one contributor to sample; cell site location technology; spoliation of electronically stored information; the genesis through metadata of testimony about authorship of documents; and the economics of college basketball. It is really important to have the material well in advance of trial both to prepare to cross examine and to get their own expert and prepare. Without something in the rule, the defense is really in a pickle. This member's preference is to pick a number of days, and to say unless otherwise ordered. That will give the judge plenty of discretion to alter that obligation, but gives incentive to go to the judge early and get control of the issue. Also, the word "complete" is very important. Civil practitioners know what the report is supposed to look like. If you leave "complete" out you are asking people to do something nobody would dream of doing on the civil side. He also disagreed, based on his experience, with the assertion that nobody on the defense side pays any attention to the reciprocity obligation.

Professor King drew attention to an interesting suggestion by defense participants that if there is going to be reciprocity it should be limited to responsive experts, i.e., experts on topics the government said its experts would address. Reciprocity, they suggested, should not extend to experts on other topics that the defense is keeping in their back pocket depending upon how the trial goes. There was a difference of opinion in the room about whether those experts should be or are disclosed. Also, in many districts, judicial orders did require disclosure of defense experts a certain number of days after the disclosure of government experts.

A member agreed that was an important point. He explained that about 20 years ago in the UK, there was a proposed change that the prosecution had to disclose to the defense anything that could be helpful to the defense and undermine the government's cases. The defense had the option of producing a statement of defense, laying out the defense case, what part is disputed and why. The carrot was the disclosure. Knowing the defense case, government knew better how to disclose. When it was proposed the defense bar fought it, seeing it as the end of fairness and the right to remain silent. A defense barrister friend told the member that after 16 years he had learned these concerns were completely wrong, and the change had been a great boon to defense practice. By laying it out for the government, they got much better disclosures from the government.

Another member added that there was a real disagreement on whether the rule should require a signed report unless the court orders or parties agree otherwise. He saw the issues as

timing, adequacy, reciprocity, and whether the report should have to be signed. He invited those with thoughts on this to share those thoughts with members of the Subcommittee.

A member noted the mini-conference was helpful and added that Rule 16(c) already allows supplementation/continuing duty to disclose. He had been surprised to hear some of the scenarios laid out by the defense attorneys with vague and inadequate disclosures. The member thought those disclosures would have violated (a)(1)(G) as now written. Perhaps adding the word the “complete” would emphasize that requirement and reduce the instances of the violation of the current rule.

With regard to signing reports, Judge Kethledge noted that he thought the government had agreed that at least in some cases the AUSA could draft the complete statement and have the expert review, approve, and sign it. The DOJ argued that the experts have their own language and standards and code of how they do things, and that no AUSA can do that. But the experts are going to be testifying, and if it is a complete statement, it should be couched in the same terms they are actually going to testify. If you have to do it anyway, why can't the person review and sign. Judge Kethledge recalled that Mr. Goldsmith had said that might make sense. That might be a way to make these less expensive for the government.

Mr. Wroblewski responded that forensics has become a very highly regulated industry, and rightly so because of genuine concern about methodologies. The problem lies in the words used, so the industry is moving to “uniform language.” This is reviewed by the analyst and supervisors in the lab and follows certain language and protocols. If that is what is needed, then the report with the precise language has to be turned over already. The concern is that we have to go back and work through the regulatory rules within the lab. They may or may not sign it. This would be a different summary and would have to work through the regulatory process. They would not want to sign a new document.

Professor King added that she heard defense participants explain that they considered the report and the disclosure to be two different things. The report relates “this is what we did.” What they need is “what we will say.” They are different documents. They cover different things.

Mr. Wroblewski stated that for forensics those reports are all turned over. He was not sure that is true with other experts, such as an expert on Al-Qaeda. The experts are basing their expertise on years of study, knowledge, and books. He was not sure what gets turned over beyond the two paragraph statement: here is the opinion I'm going to give, and here are my qualifications and experience.

Judge Kethledge noted that the signature doesn't have a disclosure function, it is more for impeachment at trial. So it is not important for preparation at trial.

V. Case update relating to amendments previously considered by the Committee.

Judge Molloy asked the reporters to present updates on recent interpretations of Rules 6 and 12.

A. Rule 6. Professor Beale reviewed the Committee's past consideration of a suggestion to amend Rule 6 to address disclosure of historically significant grand jury materials. The suggestion, from Attorney General Holder, proposed that Rule 6(e) be amended to provide a procedure for a district court to order the disclosure of archival grand jury records, upon motion with notice and hearing. The proposed rule defined "archival" records as having exceptional historic importance and involving the relevant files had been closed at least thirty years. It allowed disclosure if the court found no living person would be materially prejudiced by disclosure or prejudice could be prevented by redactions or other reasonable steps, the disclosure would not impede any other investigation, and no other reason existed why the public interest requires continued secrecy. The proposal was prompted by cases in which district courts, in response to requests from historians and others, had granted access to historically significant grand jury records decades after the investigation. For example, requests were made in the Alger Hiss case and the Nixon case. In this Committee, a subcommittee chaired by Judge Keenan recommended that no amendment be made, based on its determination that the courts were doing fine with this issue without a specific provision in the rule. There were very few such cases, and there was authority in some circuits that allowed courts to exercise their discretion to release historical information in exceptional circumstances. The Committee agreed with the subcommittee, and reported its decision not to proceed to the Standing Committee where it ended.

Professor Beale explained that although there is no pending proposal to revisit this, the Committee might be interested in knowing that the situation has changed somewhat. There is now a circuit split on this issue, with two decisions in the past few months, each with dissents. The Eleventh Circuit upheld disclosure of the grand jury records of an investigation of a mass lynching from 1946, citing circuit precedent allowing the court inherent authority. The court's opinion included copies of this Committee's materials as support for the presence of narrowly circumscribed inherent authority outside of Rule 6. In April, the DC Circuit disagreed in a case about a 1957 investigation of the disappearance of a critic of a Puerto Rican official, and ruled there is no such inherent authority, and courts cannot contravene the rule. It affirmed the denial of disclosure. A judge who is now on the Standing Committee dissented. Professor Beale noted this was an update, and not a proposal to consider an amendment. It had been a stable area, but it is no longer.

A member commented that the inherent authority issue appears to be an issue of the substantive federal authority of the courts, rather than a procedural issue that we could clear up if

the courts disagree. Professor Beale noted that one argument that has come up in these cases is whether the rule was intended to occupy the field. The member responded that if it is actually part of the inherent federal judicial power, then the Committee has no authority to limit it.

Judge Campbell commented that when the Civil Rules Committee amended Rule 37(e), concerning spoliation, it intended to eliminate side litigation and included a comment stating the intent of the rule was to occupy the field and eliminate inherent authority. But the first judge to construe the rule held that the rule could not do that, and the court still had inherent authority. So even if we try, we might not be successful.

B. Standard for reviewing untimely claims under Rule 12. Professor King reviewed the Committee's consideration of amendments to Rule 12, eventually ending up in a 2014 amendment to that rule. She noted the amendment made several improvements, but wanted to draw the Committee's attention to one circuit split the amendment had not resolved. Before the amendment, courts disagreed upon the standard of review that applied when a party raised for the first time on appeal an issue that should have been raised before trial under Rule 12. Some courts had held that appellate courts should apply good cause, others held they should apply plain error under Rule 52, others applied both, or either. This difference of opinion persisted after the rule change. She reviewed recent cases in which a court of appeals panel had pointed to the text of the amendment, the committee note, and the minutes of this Committee, claiming the Committee took their respective view.

The current cases serve as a reminder that the documents we create are sometimes used by courts as evidence of meaning, particularly when there is ongoing disagreement. The most recent decisions on Rule 6 and Rule 12 rely on different parts of this Committee's records. A member asked if there was a proposal to amend Rule 12 before the Committee. The reporters clarified there was no proposal, that these decisions regarding Rule 6 and Rule 12 are examples of how the courts are using the work of this Committee.

In response to a member's question how the minutes are created and if there is a recording, the reporters explained that they prepare the minutes of each meeting working from an audio recording. After approval by this Committee, those minutes are posted on the uscourts.gov website. This is part of the legislative history of the Committee's work, so it is very important to correct the minutes if you believe they are not accurate.

Ms. Womeldorf noted that the recordings are for the convenience of the reporters. They are not maintained as part of the historical record. The quality also varies. Sometimes you can make out what is said, and sometimes you can't. The historical record includes everything that ends up in the agenda books, the minutes after they are approved, and anything circulated to a quorum of the membership.

Professor Beale explained that subcommittee memos and the rule drafts the subcommittees consider are not normally part of the formal record. Those are not circulated to a quorum on the Committee and are not public. But if they are added to the agenda book for the full committee as helpful explanation – which they often are – they become part of the formal record.

Professor Coquillette added that even the committee notes, which we all agree are very important, are not approved by Congress. The text of the rule itself is the ultimate authoritative statement. That is one of the reasons why it is so important that nothing in the notes detract or add to the text of the rule.

Ms. Womeldorf noted that while the committee notes do go to the Supreme Court, the orders of the Court adopting the rules do not include the notes. The Court pays close attention to the notes, and there have been instances where there have been questions back about committee notes. But they are not part of what the Court orders.

After reminding the Committee that the next meeting is in Philadelphia on September 24, 2019, Judge Molloy adjourned the meeting.

TAB 6

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TAB 6A

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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

DENNIS R. DOW
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: May 30, 2019

I. Introduction

The Advisory Committee on Evidence Rules (the “Committee”) met on May 3, 2019, in Washington, D.C. At the meeting the Committee discussed ongoing projects involving possible amendments to Rules 106, 404(b), 615, and 702.

The Committee made the following determinations at the meeting:

- It unanimously approved the proposed amendment to Rule 404(b) and is submitting it to the Standing Committee for final approval.
- It agreed to continue its consideration of possible amendments to Rule 106.
- It agreed to continue its consideration of a possible amendment to Rule 615.

- It agreed to continue its consideration of possible amendments to Rule 702 and also to explore ways to address problems regarding forensic expert evidence that might not involve rule amendments.

A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report. The amendment to Rule 404(b) proposed as an action item can also be found as an attachment to this Report.

II. Action Item

A. Proposed Amendment to Rule 404(b), for Final Approval

The Committee has been monitoring significant developments in the case law on Rule 404(b), governing admissibility of other crimes, wrongs, or acts. Several Circuit courts have suggested that the rule needs to be more carefully applied and have set forth criteria for that more careful application. The focus has been on three areas:

- 1) Requiring the prosecutor not only to articulate a proper purpose but to explain how the bad act evidence proves that purpose without relying on a propensity inference.
- 2) Limiting admissibility of bad acts offered to prove intent or knowledge where the defendant has not actively contested those elements.
- 3) Limiting the “inextricably intertwined” doctrine, under which bad act evidence is not covered by Rule 404(b) because it proves a fact that is inextricably intertwined with the charged crime.

Over several meetings, the Committee considered a number of textual changes to address these case law developments. At its April, 2018 meeting the Committee determined that it would not propose substantive amendments to Rule 404(b) to accord with the developing case law, because they would make the Rule more complex without rendering substantial improvement. Thus, any attempt to define “inextricably intertwined” is unlikely to do any better than the courts are already doing, because each case is fact-sensitive, and line-drawing between “other” acts and acts charged will always be indeterminate. Further, any attempt to codify an “active dispute” raises questions about how “active” a dispute would have to be, and is a matter better addressed by balancing probative value and prejudicial effect. Finally, an attempt to require the court to establish the probative value of a bad act by a chain of inferences that did not involve propensity would add substantial complexity, while ignoring that in some cases, a bad act is legitimately offered for a proper purpose but is nonetheless bound up with a propensity inference --- an example would be use of the well-known “doctrine of chances” to prove the unlikelihood that two unusual acts could have both been accidental.

The Committee also considered a proposal to provide a more protective balancing test for bad acts offered against defendants in criminal cases: that the probative value must outweigh the prejudicial effect. While this proposal would have the virtue of flexibility and would rely on the traditional discretion that courts have in this area, the Committee determined that it would result in too much exclusion of important, probative evidence.

The Committee did recognize, however, that important protection for defendants in criminal cases could be promoted by expanding the prosecutor's notice obligations under Rule 404(b). The Department of Justice proffered language that would require the prosecutor to "articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." In addition, the Committee determined that the current requirement that the prosecutor must disclose only the "general nature" of the bad act should be deleted, in light of the prosecution's expanded notice obligations under the DOJ proposal. And the Committee easily determined that the existing requirement that the defendant request notice was an unnecessary impediment and should be deleted.

Finally, the Committee determined that the restyled phrase "crimes, wrongs, or other acts" should be restored to its original form: "other crimes, wrongs, or acts." This would clarify that Rule 404(b) applies to other acts and not the acts charged.

The proposal to amend Rule 404(b), focusing mainly on a fortified notice requirement in criminal cases, was released for public comment in August, 2018. The public comment was sparse, but largely affirmative. At its May, 2019 meeting, the Committee considered the public comments, as well as comments made at the Standing Committee meeting of June, 2018. The Committee made minor changes to the proposal as issued for public comment --- the most important change being that the term "non-propensity purpose" in the text was changed to "permitted purpose."

The Committee unanimously approved proposed amendments to the notice provision of Rule 404(b), and the textual clarification of "other" crimes, wrongs, or acts. The Committee recommends that these proposed changes, and the accompanying Committee Note, be approved by the Standing Committee and referred to the Judicial Conference.

The proposed amendments to Rule 404(b) ---as well as the Committee Note, the summary of public comment, and the GAP report --- are attached to this Report.

III. Information Items

A. 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 create a misimpression about the

statement, then the opponent may require admission of a completing statement that would correct the misimpression. 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 Committee is continuing to consider various alternatives for an amendment to Rule 106. One option is to clarify that the completing statement should be admissible over a hearsay objection because it is properly offered to provide context to the initially proffered statement. Another option is to state that the hearsay rule should not bar the completing statement, but that it should be up to the court to determine whether it is admissible for context or more broadly as proof of a fact. The final consideration will be whether to allow unrecorded statements to be admissible for completion, or rather to leave it to parties to convince courts to admit such statements under other principles, such as the court's power under Rule 611(a) to exercise control over evidence.

B. Possible Amendment to Rule 615

The Committee is considering problems raised in the case law and in practice regarding the scope of a Rule 615 order: does it apply only to exclude witnesses from the courtroom (as stated in the text of the rule) or can it extend outside the confines of the courtroom to prevent prospective witnesses from obtaining or being provided trial testimony? Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of court, but other courts have read the rule as it is written. The Committee has been considering an amendment that would clarify the extent of an order under Rule 615. Committee members have noted that where parties can be held in contempt for violating a court order, some clarification of the operation of sequestration outside the actual trial setting itself could be helpful. The Committee's investigation of this problem is consistent with its ongoing efforts to ensure that the Evidence Rules are keeping up with technological advancement, given the increasing witness access to information about testimony through news, social media, or daily transcripts.

At its Spring, 2019 meeting, the Committee resolved that if a change is to be made to Rule 615, it should provide that a court order that extends beyond courtroom exclusion would be discretionary, not mandatory. One issue that the Committee still has to work through is how an amendment will treat preparation of excluded witnesses by trial counsel.

C. Forensic Expert Testimony, Rule 702, and *Daubert*.

The Committee has been exploring how to respond to the recent challenges to and developments regarding forensic expert evidence since its Symposium on forensics and *Daubert* held at Boston College School of Law in October, 2017. A Subcommittee on Rule 702 was appointed to consider possible treatment of forensics, as well as the weight/admissibility question discussed below. The Subcommittee, after extensive discussion, recommended against certain courses of action. The Subcommittee found that: 1. It would be difficult to draft a freestanding rule

on forensic expert testimony, because any such amendment would have an inevitable and problematic overlap with Rule 702; 2) It would not be advisable to set forth detailed requirements for forensic evidence either in text or Committee Note because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate; and 3) It would not be advisable to publish a “best practices manual” for forensic evidence because such a manual could not be issued formally by the Committee, and would involve the same science-based controversy of what standards are appropriate.

The Committee agreed with these suggestions by the Rule 702 Subcommittee. But the Subcommittee did express interest in considering an amendment to Rule 702 that would focus on one important aspect of forensic (and other) expert testimony --- the problem of overstating results (for example, by stating an opinion as having a “zero error rate”, where that conclusion is not supportable by the methodology). The Committee has heard extensively from DOJ on the efforts it is now employing to regulate the testimony of its forensic experts. The Committee continues to consider a possible amendment on overstatement of expert opinions.

In addition, the Committee, led by the Subcommittee’s efforts, is considering other ways to provide assistance to courts and litigants in meeting the challenges of forensic evidence. These include assisting the Federal Judicial Center in judicial education. In this regard, the Committee is holding a miniconference on October 25, 2019 at Vanderbilt Law School. The Committee has invited seven judges who have recently dealt with *Daubert* issues in complex cases. The goal of the miniconference is to determine “best practices” for managing *Daubert* issues. The result will be a publication that will be distributed to federal judges and practitioners.

D. *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 Spring, 2019 Meeting

The draft of the minutes of the Committee's Spring, 2019 meeting is attached to this report at Tab B. These minutes have not yet been approved by the Committee.

APPENDIX

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**PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE¹**

1 **Rule 404. Character Evidence; Other Crimes, Wrongs**
2 **or ~~Other~~ Acts**

3 * * * * *

4 **(b) Other Crimes, Wrongs, or ~~Other~~ Acts.**

5 (1) *Prohibited Uses.* Evidence of a any other crime,
6 wrong, or ~~other~~ act is not admissible to prove a person's
7 character in order to show that on a particular occasion
8 the person acted in accordance with the character.

9 (2) *Permitted Uses; ~~Notice in a Criminal Case.~~* This
10 evidence may be admissible for another purpose, such
11 as proving motive, opportunity, intent, preparation,
12 plan, knowledge, identity, absence of mistake, or lack
13 of accident. ~~On request by a defendant in a criminal~~
14 ~~case, the prosecutor must:~~

¹ New material is underlined in red; matter to be omitted is lined through.

2 FEDERAL RULES OF EVIDENCE

- 1 (3) Notice in a Criminal Case. In a criminal case, the
2 prosecutor must:
- 3 (A) provide reasonable notice ~~of the general nature~~ of any
4 such evidence that the prosecutor intends to offer at
5 trial, so that the defendant has a fair opportunity to meet
6 it; and
- 7 (B) articulate in the notice the permitted purpose for which
8 the prosecutor intends to offer the evidence and the
9 reasoning that supports the purpose; and
- 10 (C) do so in writing before trial— or in any form during
11 trial if the court, for good cause, excuses lack of pretrial
12 notice.

Committee Note

Rule 404(b) has been amended principally to impose additional notice requirements on the prosecution in a criminal case. In addition, clarifications have been made to the text and headings.

The notice provision has been changed in a number of respects:

- The prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the

FEDERAL RULES OF EVIDENCE

3

evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose. The earlier requirement that the prosecution provide notice of only the “general nature” of the evidence was understood by some courts to permit the government to satisfy the notice obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose. This amendment makes clear what notice is required.

- The pretrial notice must be in writing—which requirement is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.
- Notice must be provided before trial in such time as to allow the defendant a fair opportunity to meet the evidence, unless the court excuses that requirement upon a showing of good cause. See Rules 609(b), 807, and 902(11). Advance notice of Rule 404(b) evidence is important so that the parties and the court have adequate opportunity to assess the evidence, the purpose for which it is offered, and whether the requirements of Rule 403 have been satisfied—even in cases in which a final determination as to the admissibility of the evidence must await trial. When notice is provided during trial after a finding of good cause, the court may need to consider protective measures to assure that the opponent is not prejudiced. See, e.g., *United States v. Lopez-Gutierrez*, 83 F.3d 1235 (10th Cir. 1996) (notice

FEDERAL RULES OF EVIDENCE

given at trial due to good cause; the trial court properly made the witness available to the defendant before the bad act evidence was introduced); *United States v. Perez-Tosta*, 36 F.3d 1552 (11th Cir. 1994) (defendant was granted five days to prepare after notice was given, upon good cause, just before voir dire).

- The good cause exception applies not only to the timing of the notice as a whole but also to the timing of the obligations to articulate a non-propensity purpose and the reasoning supporting that purpose. A good cause exception for the timing of the articulation requirements is necessary because in some cases an additional permissible purpose for the evidence may not become clear until just before, or even during, trial.
- Finally, the amendment eliminates the requirement that the defendant must make a request before notice is provided. That requirement is not found in any other notice provision in the Federal Rules of Evidence. It has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, many local rules require the government to provide notice of Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is provided when the government moves *in limine* for an advance ruling on the admissibility of Rule 404(b) evidence. The request requirement has thus outlived any usefulness it may once have had.

FEDERAL RULES OF EVIDENCE

5

As to the textual clarifications, the word “other” is restored to the location it held before restyling in 2011, to confirm that Rule 404(b) applies to crimes, wrongs and acts “other” than those at issue in the case; and the headings are changed accordingly. No substantive change is intended.

Changes Made After Publication and Comment

The Committee changed “non-propensity” purpose to “permitted” purpose in the text. Also, the provision on notice was changed to clarify that the “fair opportunity” requirement applies to notice given at trial after a finding of good cause. And two clarifications to the operation of the good cause exception were added to the Committee Note.

Summary of Public Comment

EV-2018-0004-0003. Donald Wilkerson, NA. Addresses the change from “crimes, wrongs or other acts” back to “other crimes, wrongs or acts.” He argues that the change “would allow a prosecutor to argue, otherwise inappropriately, that, evidence, any evidence, of the crime charged is admissible to prove the defendant’s bad character and that he acted in accordance with that bad character when he committed the crime charged.”

EV-2018-0004-0004. Ann Paiewonsky, Paiewonsky Law Firm, PLLC. Argues that “[t]here is nothing in this amended rule that imposes a right and an obligation that defendant receive a fair opportunity to meet the evidence when it is first presented during trial” because the fair opportunity to meet the evidence language “only addresses notice before trial, not during trial.”

EV-2018-0004-0006. The Federal Magistrate Judge’s Association. Generally supports the proposed amendment. It has some concern about the lack of “specificity” in the requirement that disclosure be made sufficiently ahead of trial to give the defendant a fair opportunity to meet the evidence. It notes that some courts have standing orders that notice must be provided 7 to 14 days before trial and that the “such orders are helpful.” The Association suggests that “after the rule as proposed has been in effect for a period of time, the committee might consider whether a further amendment, setting a presumptive specific amount of time in advance of trial by which the required disclosures must be made, is warranted.”

EV-2018-0004-0007. The Federal Courts Committee of the Association of the Bar of the City of New York. States that the Advisory Committee’s attention to Rule 404(b) is “welcome” and supports the proposed changes. The Federal Courts Committee believes that the articulation requirement in the notice provision will result in “more thoughtful and better reasoned evidentiary arguments” and that by requiring the government to articulate a valid, non-character purpose, “improper admission of Rule 404(b) evidence should become less frequent.” It suggests, however, two further changes to Rule 404(b): 1) an amendment to “clarify that if a defendant agrees to concede a particular issue or element within the rubric of the rule, then the district court should give weight to this concession when deciding whether to prohibit the admission of Rule 404(b) on that issue or element”; and 2) an amendment that would expressly state that Rule 404(b) applies in civil cases, and that would extend the existing notice requirement to civil cases.

TAB 6B

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Advisory Committee on Evidence Rules
Minutes of the Meeting of May 3, 2019 (Draft)
Thurgood Marshall Federal Judiciary Building
Washington D.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on May 3, 2019 at the Thurgood Marshall Federal Judiciary Building in Washington D.C.

The following members of the Committee were present:

Hon. Debra A. Livingston, Chair
Hon. James P. Bassett
Hon. Shelly D. Dick (by phone)
Hon. J. Thomas Marten
Hon. Thomas D. Schroeder
Daniel P. Collins, Esq.
Traci L. Lovitt, Esq.
Kathryn N. Nester, Esq., Federal Public Defender
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. David G. Campbell, Chair of the Committee on Rules of Practice and Procedure
Hon. Carolyn B. Kuhl, Liaison from the Standing Committee
Hon. James C. Dever III, Liaison from the Criminal Rules Committee
Professor Daniel R. Coquillette, Consultant to the Standing Committee
Professor Catherine T. Struve, Reporter to the Standing Committee (by phone)
Professor Daniel J. Capra, Reporter to the Committee
Professor Liesa L. Richter, Academic Consultant to the Committee
Timothy Lau, Esq., Federal Judicial Center
Joe Cecil, Esq., Federal Judicial Center
Ted Hunt, Esq., Department of Justice
Andrew Goldsmith, Esq., Department of Justice
Rebecca A. Womeldorf, Esq., Secretary, Standing Committee; Rules Committee Chief Counsel
Bridget M. Healy, Esq., Counsel, Rules Committee Staff
Shelly Cox, Administrative Analyst, Committee on Rules of Practice and Procedure
Ahmad M. Al Dajani, Esq., Rules Committee Law Clerk
Lieutenant Colonel Adam Kazin, Joint Service Committee on Military Justice
Sri Kuehnlenz, Esq., American College of Trial Lawyers
Mark Cohen, Esq. American College of Trial Lawyers
Richard Cavanaugh, National Institute of Standards & Technology
Amy Brogioli, American Association for Justice
Abigail Dodd, Shell Oil Company
Caroline Nester

I. Opening Business

Announcements

The Chair opened the meeting by welcoming Judge Kuhl, who is the new liaison from the Standing Committee. The Chair noted Judge Kuhl's extensive service both on the bench and in the private sector and thanked her for providing invaluable assistance to the Committee. The Chair also congratulated Kathy Nester on her appointment as Executive Director of the Federal Defender's office in San Diego, and welcomed both Ted Hunt and Andrew Goldsmith from the Department of Justice.

Approval of Minutes

A motion was made to approve the minutes of the October 19, 2018 Advisory Committee meeting at the University of Denver Sturm College of Law. The motion was seconded and approved by the full Committee.

II. Proposed Amendment to Rule 404(b)

The Chair first directed the Committee's attention to the proposed amendment to Rule 404(b). The proposed amendment was approved by the Committee at its spring, 2018 meeting and recommended for publication for public comment. At its June, 2018 meeting, the Standing Committee unanimously adopted the Committee's recommendation and the proposed amendments were issued for public comment on August 15, 2018. The public comment period closed on February 15, 2019. The Chair asked the Reporter to walk the Committee through the public comment and final considerations with respect to the proposed amendment to Rule 404(b).

The Reporter explained that the proposed amendment would alter the notice requirement applicable to criminal cases in Rule 404(b) and that it would return the modifier "other" to its pre-restyling position before the language "crimes, wrongs or acts" in the heading and subheading of the Rule. He noted that the public comment on the proposed changes was sparse, but affirmative. He outlined three possible alterations to the proposed amendment and Committee Note in light of the public comment and comments received concerning the amendment at the Standing Committee.

First, the Reporter informed the Committee that a Standing Committee member had questioned the use of the terminology "non-propensity purpose" in the text of proposed Rule 404(b)(3)(B) and suggested the use of the term "non-character purpose" instead. Although non-propensity terminology is regularly used by the courts in describing the prosecution's obligations in admitting Rule 404(b) evidence, the Reporter explained that the terms "propensity" and "non-propensity" do not appear in Rules 404 or 405. Because of this and because "non-character" would appear to be a non-substantive change, the Reporter recommended making a change to the term "non-propensity" in the amended provision.

The Committee then discussed the optimal terminology for the articulation requirement contained in Rule 404(b)(3)(B), debating the merits of the terms “non-character purpose,” “proper purpose,” and “permitted purpose” as alternatives to “non-propensity purpose.” Some Committee members were concerned that the term “non-character purpose” failed to capture the intent of the rule to forbid proof of *conduct* through character. Others were concerned that the term “proper” could be interpreted expansively. The Committee agreed that some modifier of the term “purpose” was necessary in the text of the Rule and ultimately voted unanimously to change “non-propensity purpose” in proposed Rule 404(b)(3)(B) to “permitted purpose.” The term “permitted purpose” is contained in the heading of existing Rule 404(b)(2) and captures the intent of the amended provision to require the prosecution to articulate a purpose for evidence of a criminal defendant’s other crimes, wrongs, or acts that does not run afoul of Rule 404(b)(1) and that complies with Rule 404(b)(2).

In light of its decision to change the text of subsection (b)(3)(B) from “non-propensity purpose” to “permitted purpose,” the Committee also discussed whether to change the references to a “non-propensity purpose” in the first bullet point of the proposed Committee Note discussing Rule 404(b)(3)(B) to conform to the textual change. The Committee unanimously voted to retain the term “non-propensity purpose” in the first bullet to the Committee Note notwithstanding the decision to remove the term from the rule text because the term “non-propensity” conforms to the cases and captures the intent of the amendment to avoid an inference of conduct from character.

Second, the Reporter summarized a public comment by Ann Paiewonsky, Esq. expressing concern that the amended rule fails to create a right for a criminal defendant to receive a fair opportunity to meet Rule 404(b) evidence when it is first presented at trial (upon a showing of good cause). The fair opportunity language in the text of the amendment as issued for public comment is tied to notice *before* trial and not to notice given during trial pursuant to the good cause exception. The Reporter noted two potential options the Committee could consider to address this concern and that either or both could quite easily be implemented. The Reporter first noted that the language in the text of proposed Rule 404(b)(3) regarding the need to provide a defendant with a fair opportunity to meet Rule 404(b) evidence could be moved up from subsection (b)(3)(C) of the Rule to subsection (b)(3)(A) so that it explicitly applies to all notice (pre-trial and during trial). In addition to that textual change, or as an alternative to it, the Reporter explained that the Committee could add language to the Committee Note regarding the need for a court to consider protective measures designed to allow a fair opportunity to respond to evidence presented at trial without pre-trial notice for good cause. The Reporter reminded the Committee that similar language was recently included in the Committee Note to amended Rule 807 that could be utilized in the note to amended Rule 404(b).

Members of the Committee expressed a preference for moving the “fair opportunity” language up to subsection (b)(3)(A) of the amended Rule to clarify in the operative text that the right applies to all notice. In addition, Committee members supported including language in the Committee Note (consistent with the language employed in the note to amended Rule 807) regarding protective measures to allow defendants to respond to Rule 404(b) evidence first presented during trial. Judge Campbell suggested eliminating the specific reference to a continuance in the Committee Note with respect to protective measures to avoid any implication

that a continuance is always necessary as a protective measure. The Department of Justice representative questioned whether adding any language to the Committee note regarding protective measures for the defendant was necessary given that courts are already taking steps to protect defendants in good cause circumstances.

The Chair questioned the citation of cases in the proposed Committee Note regarding protective measures for the defendant and queried whether this citation of case law represented a departure from prior Committee policy or practice prohibiting or discouraging citations. The Reporter suggested that there was no Committee policy prohibiting the citation of cases and noted that a member of the Standing Committee at its last meeting had inquired as to why there weren't *more* case citations in the Committee notes. Although concerns have been expressed in the past about citation to cases that have the potential to be overturned, the Reporter suggested that cases used in the notes to illustrate the intended operation of an amended rule are appropriate because the amended rule essentially codifies the case and ameliorates any concern about overruling. The Reporter suggested that citations to the cases regarding protective measures for a defendant faced with Rule 404(b) evidence for the first time at trial are necessary to clarify that the amendment to the notice provision is not intended to change the existing law in this respect. The former Reporter for the Standing Committee agreed with the Reporter that there is no existing ban on the citation of cases. He opined that it is problematic for a Committee Note to rely on a case for the authority supporting a rule due to the risk of overruling, but that a citation that illustrates the intended operation of a rule is acceptable.

Following this discussion, the Committee unanimously voted to move the "fair opportunity" language from subsection (b)(3)(C) of amended Rule 404 to subsection (b)(3)(A) and to include language in the Committee Note regarding a court's need to consider protective measures for a defendant when pre-trial notice is excused for good cause. The Committee also unanimously agreed that the express reference to a continuance should be omitted from the Committee Note regarding protective measures accompanying the amendment.

Finally, the Reporter noted a suggestion for a minor adjustment to language of the bullet point in the proposed Committee Note with respect to excusing the pretrial obligation to articulate the reasoning supporting the admissibility of Rule 404(b) evidence. The change would clarify that the duty to articulate such reasoning *at trial* when the evidence is proffered is not excused. The Committee agreed that a clarification would be helpful and unanimously voted to change the bullet point to read:

- ÿ The good cause exception applies not only to the timing of the notice as a whole but also to the timing of the obligations to articulate a non-propensity purpose and the reasoning supporting that purpose. A good cause exception for *the timing of* the articulation requirements is necessary because in some cases an additional permissible purpose for the evidence may not become clear until just before, or even during, trial.

With these minor changes, the Committee voted unanimously to recommend to the Standing Committee that it give final approval to the proposed amendments to Rule 404(b) and the accompanying Committee Note.

III. Rule 106

The Chair next opened up the discussion of a potential amendment to Federal Rule of Evidence 106, noting that the Committee had explored several possible amendment alternatives at its recent meetings. Specifically, the Committee had explored whether to amend Rule 106 to eliminate a hearsay objection to a completing statement (either by making the completing portion admissible for its truth or for context). In addition, the Committee had looked at the possibility of including oral statements within Rule 106, which currently covers only written or recorded statements. Finally, the Committee had considered the idea of changing the standard for completion under Rule 106 from “fairness” to require completion only when the initial presentation was found to be “misleading” --- at the suggestion of the Department of Justice. The Chair noted that the Reporter had prepared in the agenda materials several potential alternative draft amendments to Rule 106 dealing with all the possible permutations that were available to the Committee.

To start the discussion, the Chair explained that DOJ had, the day before the meeting, withdrawn its suggestion of adding language to the text of Rule 106 that would allow completion only if the statement offered by the proponent is “misleading”. The DOJ representative explained that the Department had proposed the “misleading” standard as a means of avoiding a potential overcorrection that would allow completion under Rule 106 too often – the intent behind the “misleading” language was to clarify that completion should be necessary only in rare cases. The problem with utilizing “misleading” language as a predicate for Rule 106 completion, however, is that there are ethical reporting obligations for DOJ lawyers. A finding by a judge that a DOJ lawyer had introduced “misleading” evidence would trigger formal reporting of misconduct every time the rule was invoked. Therefore, although DOJ had no formal proposal about new terminology for an amended Rule 106, DOJ no longer supported a change from “fairness” to “misleading” in any amendment proposal.

The Chair also noted that she had provided three sets of Advisory Committee Minutes from meetings in 2002-2003 in which potential amendments to Rule 106 were discussed. She noted that the Committee had voted unanimously against adding oral statements to Rule 106 at those meetings and had considered, but rejected, the possibility of amending Rule 106 to make clear that it trumps all other evidentiary objections (not only hearsay objections). She stated that the Committee in 2003 had considered potential amendments to Rule 106 as part of a broader review of all evidentiary rules and had determined that an amendment was not justified at that time. She emphasized that some recent cases, including those brought to the Committee’s attention by Judge Grimm, had suggested some contemporary issues in the application of the Rule and that the Committee was not bound by the determinations of the 2002-2003 Committee. She, therefore, suggested that there was reason for the Committee to continue its consideration of Rule 106.

The Chair next noted that New Hampshire had recently amended its counterpart to Rule 106 to include oral statements and that the Reporter had asked Judge Bassett for any guidance he might have with respect to the New Hampshire experience with completion of oral statements. Judge Bassett reported that the New Hampshire provision was amended in 2017 and that it gives parties a right to introduce completing oral statements when fairness so requires. Judge Bassett sent emails to all New Hampshire trial judges, as well as to Supreme Court Justices who had been trial judges and/or practitioners, to solicit their experience with the completion of oral statements at trial. According to Judge Bassett, the common response was that the issue of completing with oral statements does not come up often and presents no trial difficulties. One of Judge Bassett's colleagues prosecuted the New Hampshire case from which the completion right emanates. He noted that completion of oral statements had been available in New Hampshire for 20-30 years and was only recently codified in the 2017 amendment to the New Hampshire Evidence Rules. He stated that judges overwhelmingly reported that the rule caused no issues, that completion of oral statements created a credibility issue, not an admissibility concern, and that the rule was considered very workable and non-contentious.

Judge Kuhl also reported on the California experience with completion, having consulted colleagues and trial judges in California. She noted that California has adopted the common law version of completeness, which deals with the hearsay issue by allowing completing hearsay – not so much as an exception to the hearsay rule, but rather on an “opening the door,” fairness basis. She noted that oral statements are included in the completion right. According to Judge Kuhl's California colleagues, the completion issue does arise with regularity, but there has been no difficulty in applying the completion doctrine at the trial level. She noted that the California rule is phrased very broadly and does not limit completion to statements made by the same person. She contended that there are many circumstances where the context for one person's statement is very important and it may be necessary to admit statements of another to which a declarant was responding. The Reporter noted a case in a memorandum by Professor Richter, in which the statement of an attorney was necessary to fairly complete a statement by a deponent. Judge Kuhl concluded that the California rule trusts trial judges to regulate such uses and has posed no difficulties.

The Chair informed the Committee that she had taken a deep dive into the Rule 106 case law and had found the topic sufficiently complicated that she had one of her clerks conduct some research, and had made notes on the subject --- which she circulated to the Committee, and to the Reporter, at the meeting. The Chair noted that California had codified the rule of completion in its full common law form. According to the United States Supreme Court in the *Beech Aircraft* case, Rule 106 only partially codified the common law. She noted that federal courts and academics had determined that the common law of completion persists in the face of the partial codification in Rule 106. The Chair explained that the Supreme Court in the *Beech* case had not found it necessary to apply Rule 106 on the facts of that case because the common law of completeness required completion in that circumstance. She pointed out a footnote in *Beech* suggesting that the completing letter could be admitted notwithstanding the hearsay rule, but that also indicated that the remainder could be admitted for context (and not for its truth). She further noted that the bulk of the federal courts have applied Rule 611(a) to admit oral statements when found necessary to complete. According to the Chair, there would be no need to consider an amendment to Rule 106

without the question about hearsay use of completing statements. She expressed two principal worries about adding oral statements to Rule 106: 1) most states follow the Federal Rules of Evidence and would have to decide whether and how to react to an amendment to Rule 106 that added oral statements; and 2) the bulk of the federal courts use Rule 611(a) to accomplish completion of oral statements already, making a potentially disruptive amendment largely unnecessary. The Chair also noted that efforts to narrow the completion of oral statements within an amended rule, perhaps by limiting completion to statements by the “same speaker,” could be unduly restrictive and could limit the flexibility of trial judges in dealing with oral statements. She opined that it might be best to find a way to address the hearsay issue without adding oral statements to Rule 106.

The Reporter noted real problems with the current use of Rule 611(a) and the common law to govern the completion of oral statements. He contended that a trial lawyer’s first move might not be to look to Rule 611(a) (which deals with the trial court’s authority to control the “mode and order” of examining witnesses and presenting evidence) or to consult the “common law.” The fundamental point of the Evidence Rules is to give litigants a uniform set of evidentiary provisions they may consult quickly to determine the admissibility of a particular piece of evidence. *Beech Aircraft* notwithstanding, in theory, there are no “common law rules of evidence” following promulgation of the Federal Rules of Evidence. At best, the absence of express coverage of completion of oral statements within Rule 106 constitutes a trap for the unwary judge or litigant who is not an evidence professor with the necessary knowledge to consult Rule 611(a) or the common law. The current state of affairs – with one rule that covers written/recorded statements, another that does not expressly deal with completion but that has been applied to allow completion of oral statements in some jurisdictions, and governing principles in uncodified common law – presents a messy state of affairs for judges and litigants. Amending Rule 106 could address all outstanding issues and bring governance of them all within a single user-friendly provision.

The Federal Public Defender agreed with the Reporter’s concerns about the existing Rule and added that failure to deal with the hearsay question creates significant pressure for a criminal defendant to take the stand to attempt to rebut an incomplete presentation of his statements by the government. Another Committee member suggested that the Committee may want to treat oral statements separately from written/recorded statements. In particular, he suggested that the Committee might want to consider language that makes the standard for completing oral statements tighter or more restrictive than the standard for completing written/recorded statements. One alternative would be the language in the Texas provision that limits completion to statements “necessary” to explain portions already introduced.

The Reporter noted that the existing “fairness” standard already limits completion and that the case law interpreting the “fairness” standard already applies a quite restrictive approach – requiring that the initial portion of the statement be misleading or distorted without introduction of the remainder. So in his view a different, stricter test for oral statements was unwarranted. The Committee member suggested that he was concerned that protections in the case law may be inadequate and that the textual term “fairness” could be too broad and that the Committee should consider tighter text if it extends the completion right to oral statements. The Academic Consultant interjected that Rules 410(b), 502(a), and Federal Rule of Civil Procedure 32(a)(6) all utilize the

same “fairness” language found in Rule 106, so altering the language in Rule 106 could have collateral consequences for the interpretation of those provisions. The Reporter agreed that changing the triggering language in Rule 106 could have collateral effects that the Committee would need to consider. He reiterated that the interpretation of the “fairness” standard was already very strict and expressed confidence that an amendment dealing with the separate hearsay and oral statement issues would not broaden the well-accepted understanding of that language.

The Chair then noted decisions like the Sixth Circuit *Adams* decision, in which the panel held that the completing statements ought to have been admitted in fairness to the defendant, but that those statements were inadmissible hearsay and could, therefore, not complete. According to the Chair, rulings that completing statements are needed for fairness, but yet are inadmissible, are mistaken. Completing statements necessary for fairness should at least be admissible for context. She opined that it is not entirely clear from a review of the cases that *do* admit otherwise inadmissible completing hearsay whether it is being admitted for its truth or merely for its non-hearsay contextual value. Although some courts are clearly admitting completing statements for their truth, some are not necessarily going that far. The Chair circulated, at the meeting, some hypotheticals she had created in which litigants might not need or be entitled to having completing statements admitted for their truth. She suggested some potential language for an amendment to Rule 106 that would fix the mistaken exclusion of fairly completing statements without directly resolving the question of whether completing statements are admissible for their truth or merely for context. For example, an amendment might provide that “Written or recorded statements need not be independently admissible pursuant to the rule against hearsay when introduced pursuant to this rule.” One Committee member inquired whether such language *would* admit a completing statement for its truth. The Chair responded that the proposed language was one possible option that would purposely remain ambiguous as to the basis for admission. In some cases, the trial court might admit a completing statement for its truth and in others, the court could admit it for non-hearsay context only. Another option would be to draft an amendment that specifically distinguishes when a completing statement is admissible for its truth and when it is not.

A Committee member opined that any amendment should resolve the basis for admitting completing statements, arguing that lawyers need to know whether they can argue the truth of the statement to the jury. That said, the Committee member was concerned that allowing completion to serve as a complete waiver of hearsay rules could extend further than the Committee intends. He questioned why the Committee shouldn’t consider an amendment to Rule 801(d)(2)(A) dealing with party opponent statements, to the extent that the hearsay problem under Rule 106 is driven entirely by the one-way limitation on that hearsay exception that the government is able to use to present partial statements of a criminal defendant. The Reporter noted concerns with tinkering with the Rule 801 hearsay provisions, and also noted that such an amendment would be an incomplete remedy in any event. In cases where the *government* needs to complete an against-interest statement of a third party -- offered by a defendant because it tends to exonerate him --with another statement by the same third party that is *not* against the speaker’s interest because it implicates the defendant, the government would need relief from the hearsay rule to complete pursuant to Rule 106 as well. The Reporter pointed the Committee to the *Woolbright* case cited in the agenda materials as an example of this situation. An amendment limited to Rule 801(d)(2)(A) would not reach situations like this one.

The Reporter for the Advisory Committee queried whether an amendment that simply made clear that the hearsay rule would pose “no obstacle” to completion would be sufficient to inform parties of the operation of the rule, leaving it to trial judge discretion to determine whether the completing statement could be used for its truth on a case by case basis. The Chair reiterated that if the rule were to specify the effect of the completing statement, she would favor admissibility for non-hearsay context only, but noted that specifying effect would limit the trial judge and that an amendment preserving discretion might be superior. Another Committee member noted that an amendment simply stating that the hearsay rule is no bar to completion would solve the problems presented by courts that deny needed completion on the basis of the hearsay rule.

Judge Campbell queried whether an amendment stating that the hearsay rule posed no obstacle to completion would, by definition, allow admission of completing statements for their truth. The Reporter noted that a drafting alternative expressly providing that a completing statement could be admitted for “context only” might be adopted to avoid that result if the Committee wanted to avoid admissibility for truth. That said, the Reporter noted that there are some circumstances in which the completing statement ought to be admissible for its truth. If, for example, a defendant admits to having owned a gun used in a crime, but claims to have sold it months before the commission of the crime in the same statement, the government should not be able to admit the statement of ownership for its truth to suggest that the defendant admitted owning the weapon, while the completing statement about the sale is admitted only for “context.” Moreover, use for context only would require a difficult-to-follow jury instruction --- a consequence that the Committee has sought to avoid.

The DOJ representative questioned the Reporter about the hypothetical statement of gun ownership, positing that the government might have a witness who can testify that the defendant still owned the gun at the time of the crime and perhaps a Facebook post of a picture of the defendant with the gun near in time. She questioned why the defendant’s false exculpatory claim that he sold the gun should be admitted for its truth when the government’s suggestion that he owned the gun at the time was not misleading or unfair based on this other evidence. She questioned why the defendant should be free to create a misimpression about his gun ownership and suggested that allowing use of his own statement for its truth would admit unreliable self-serving hearsay. Judge Campbell responded that the government would, of course, be free to present the witness and the Facebook post showing the defendant’s gun ownership, but that Rule 106 prevents the government from creating a false impression *about the defendant’s statement* – not about his gun ownership in general, but about the fact that he admitted it (which the government suggests he did by introducing his partial statement). The introduction of the rest of the statement would be designed to prevent the misimpression about what exactly the defendant admitted.

Another Committee member suggested that allowing use of the completing statement for context only, with an appropriate limiting instruction, would be perfectly suited to this type of circumstance. Although limiting instructions may seem difficult to articulate, he opined that in practice they work well and that juries can comprehend and follow them. Another member of the Committee agreed, noting that trial judges routinely allow completion with an appropriate limiting instruction and that the issue causes few problems and never makes its way to the appellate level.

Another Committee member suggested that an amendment to Rule 106 might provide that the completing statement could “be admitted for context unless the court rules otherwise.” The Chair offered the possibility of an amendment allowing completing statements to be admitted for context only “unless another hearsay doctrine permits otherwise.” The Reporter expressed concern that a “for context only” amendment would be too limiting, particularly in a situation where one party has offered a partial statement for its truth in a misleading way. Admitting a completing statement also for its truth would be necessary to level the playing field and right the wrong. He also noted that allowing for context admission “unless otherwise permitted by the hearsay rule” would be superfluous because that would simply restate the operation of the existing rules to exclude hearsay unless a hearsay exception permits otherwise. Another Committee member suggested that allowing a completing statement to come in “for context or otherwise” might preserve trial judge flexibility on the point.

Judge Kuhl raised the language in one of the draft amendment alternatives limiting completion of oral statements to those in which the “contents are not substantially disputed.” She suggested that this limitation might be ambiguous – it could refer to whether the oral statement was “uttered” at all or to whether the substance or content of the oral statement is considered “true.” In any event, she suggested that the jury should determine such questions and opined that any amendment to Rule 106 should not incorporate that limitation. The Reporter agreed with Judge Kuhl, noting that this limiting language was raised at the Denver symposium last October, but opining that the trial judge should retain discretion about proper completion of oral statements if the Committee decided to add them to Rule 106’s coverage. If the Committee votes to exclude oral statements altogether, that issue will be moot, but if oral statements are included, the Reporter suggested dropping that language. Committee members unanimously agreed that the proposed language about the contents of oral statements not being substantially in dispute should be dropped in the event that the Committee proceeds with an amendment to Rule 106 that includes oral statements.

Another Committee member suggested that the Committee should do as little to Rule 106 as possible. He suggested that the big problem with the rule is the hearsay issue and that it comes up a lot at trial, particularly with regard to statements in depositions. Rather than rewriting the rule and tinkering with the language, he suggested that the Committee should fix this targeted problem.

The Chair then suggested that it might simplify the drafting process to make a decision with respect to the inclusion of oral statements in Rule 106, and she asked for a straw vote of Committee members who would rather *not* include oral statements in any potential amendment. Three Committee members voted against including oral statements, but four Committee members voted to continue discussing the possibility of adding oral statements to an amended Rule 106. The Chair then inquired whether the Committee was interested in narrowing the discussion of the completion of oral statements to those made by the same declarant. The Federal Defender expressed concern that such a limitation might be too narrow, particularly in connection with an interrogation where the context of a question asked by one declarant might be necessary to complete and make sense of an answer given by another. She noted that the question might change the entire meaning of the response given. The Reporter noted that Judge O’Malley expressed concern about limiting completion to the statements made by the same declarant at the Denver conference as well. No

Committee member spoke in favor of retaining the limitation that the initial statement and the completing statement must be made by the same person.

Another Committee member noted that many federal courts are allowing completion of oral statements and that the same practice seems to be working well in states like New Hampshire that expressly include oral statements in their rule of completion. He expressed a desire to fully understand the concerns of Committee members who have reservations about including oral statements in Rule 106. The Chair suggested that California and other states had adopted a broad common law approach to completion, but that the Federal Rules had only partially codified the concept. Another Committee member suggested that in states like New Hampshire, where oral statements are expressly included, they have at least arguably tightened the standard for granting completion in the first place. He suggested that the Rule 106 “fairness” language would need tightening if it were extended to oral statements. Another Committee member noted that the New Hampshire rule has a separate subsection (b) applicable to oral statements. The Reporter stated that the Committee could consider a provision drafted like the New Hampshire rule with distinct subsections for written/recorded statements and oral statements, but that to have separate standards for oral statements would be confusing and unworkable. Another Committee member opined that federal practice on completion largely works well, but that it is working well *in spite* of the Rules on the subject. Trial judges consult the rulebook in deciding what to allow and lawyers don’t cite to the common law of evidence. He opined that it is odd that oral statements are regulated between the cracks of the Rules as it were.

The Chair again expressed reservations about codifying the approach to oral statements, suggesting that California’s practice with respect to completion appeared to be narrower than the language of its rule, while the federal practice with respect to completion is broader than the language of Rule 106. Attempting to codify the completion doctrine in its entirety could open a can of worms and may not be worth it because most federal courts utilize Rule 611(a) to deal with oral statements when the need arises. Judge Kuhl confirmed the Chair’s characterization of California law, explaining that the completion rule does not open the door to an opponent’s entire case notwithstanding the broad language of the rule and that California courts treat the concept very much as one of proportionality. Judge Kuhl expressed confusion about the use of the common law to allow completion of oral statements in the federal system in light of the doctrine of *expressio unius est exclusio alterius*. It seems that lawyers would need to refer to case law to determine whether Rule 106 is supplemented by the common law.

The DOJ representative questioned why the Committee would tinker with Rule 106, suggesting that trial judges ably handle these issues regularly under the existing provision. She expressed concern that the addition of oral statements would cause time consuming mini-trials over whether a completing statement was actually made and that expanding the rule could broaden the interpretation of the “fairness” justifying completion. She noted that the Committee should resolve a circuit split if there is one, but that it should not start rewriting the rule and should leave it untouched to the extent possible because lawyers are accustomed to using the rule on their feet in court every day. The Reporter responded that the DOJ’s argument about stability was undermined by the fact that lawyers and judges trying to use the completion “rule” on the fly at trial now need to apply a combination of Rule 106, Rule 611(a) (and the case law applying it to completion of

oral statements), and the Supreme Court's decision in *Beech Aircraft* to fully master the rules on completion. That is hardly a user-friendly system.

The Chair then asked for a straw poll as to whether an amendment adding oral statements should be limited along the lines of the New Hampshire rule to help clarify drafting for the fall Committee meeting. Six Committee members agreed that a rule similar to the New Hampshire provision regarding oral statements should be explored.

The Federal Defender expressed concern about an amendment with varying standards applicable to written/recorded versus oral statements. Simply adding oral statements to existing Rule 106 seems less disruptive because it allows trial judges to continue doing what they are doing now. Creating varying subsections with differing standards becomes a new rule entirely. She disagreed that there is any genuine concern about mini-trials over oral statements, suggesting that it takes about 10 seconds to argue and resolve such an objection in practice. She suggested that the discussions reveal that everyone wants the rule to be administered fairly and that there are some circuits where fairness is being defeated by the interpretation being given to Rule 106. She advocated a unitary approach to drafting an amendment that would simply add oral statements to the current standard.

The Chair responded that trial judges might think we have a completely new rule and let everything in if the Committee were to enact a broad California approach. Conversely, if the Committee adds oral statements and creates limits on their use to complete, that may undermine the flexibility courts currently have in operating under Rule 611(a). If the Committee were to adopt an amendment that seeks to "fully" codify the doctrine of completion, it might fundamentally alter the existing practice in federal court.

Judge Campbell noted that the Chair's notes on Rule 106 show that oral statements are allowed to complete in seven circuits. He inquired whether there are circuits that do *not* allow completion of oral statements under Rule 611(a). The Chair responded that the Reporter had cited the *Gibson* case that says that there should not be completion of oral statements in dicta only, but that she could not find any other cases holding that there could not be completion with oral statements. The Reporter pointed out that he had cited four circuits on page 17 of his agenda memorandum on Rule 106 that have case law stating broadly that oral statements are not allowed to complete. In particular, he noted cases out of the Fourth, Ninth and Eleventh Circuits refusing to allow completion of oral statements, including a 2005 opinion out of the Eleventh Circuit --- and while there is contrary authority in some of those circuits, that only shows that there is confusion in the courts about the admissibility of oral statements. The Chair suggested that the federal decisions on completion become confused over time and that the Committee should resolve conflicts that are deep and serious. She suggested that there is a real conflict with respect to the issue of completion with otherwise inadmissible hearsay, but that she is not sure that one truly exists with respect to completion of oral statements.

A Committee member asked whether the Committee could propose an amendment simply dropping the modifier "written or recorded" from the existing Rule 106 (or conversely adding the modifier "oral") and whether that would do violence to the existing completion practice. The

Reporter noted that some additional revision would be necessary to address the hearsay issue, but that would be an option with respect to the oral statements issue. The Committee member queried what downside there would be to simply adding oral statements to the language of Rule 106; if courts are already allowing completion of oral statements, what negative impact would there be in having the Rule match the common law practice? The Chair suggested that the original common law approach to completion (as enacted in California) was very broad and that codifying that original common law approach to completion would alter existing federal practice. The Reporter responded that the real question is not whether to codify the original common law practice on completion, but rather whether adding the term “oral” to existing Rule 106 would do violence to the current federal practice. He suggested it would not and that the Committee has previously acted to codify case law, such as the amendment to Rule 801(d)(2)(E) to capture the holding in *Bourjaily*, to avoid forcing litigants to consult case law to ascertain the proper approach to a particular rule.

The Chair suggested that the discussion had produced two approaches to oral statements for the Committee to consider: 1) a narrowed approach to the completion of oral statements that tightens the standard for their use and 2) a simple addition of the term “oral” to the language of the existing Rule.

The Reporter promised to prepare additional drafting alternatives for the fall meeting based upon the Committee’s discussion. With respect to oral statements, the Committee could consider a draft like the New Hampshire rule with a possibly stricter standard for completion that applies only to oral statements. In the alternative, the Committee could consider the minimalist approach that would simply add the term “oral” (or remove the words “written or recorded”) from the existing Rule. With respect to the hearsay issue, the Committee could consider the “context-only” approach to admissibility, as well as the Chair’s proposal to draft in a way that elides the hearsay issue by providing that the hearsay rule “presents no obstacle” to completion.

The Chair suggested language that would make a statement admissible to complete “whether or not admissible under the hearsay rule if necessary for context.” The Reporter noted that the language of the context-only alternative in the agenda materials was very similar to that, but that he continued to think it was unfair for the proponent to get to use a partial statement in a misleading way *for its truth*, but to limit the adversary to non-hearsay use only for the completing portion of the statement. He stated that he would try to include a drafting alternative that gives the trial judge discretion over whether to allow use of a completing statement for its truth. He noted that the consensus of the Committee was to eliminate the language in some of the existing drafts that would require a completing statement to be made by the “same person” and that would allow completion of oral statements only if they are not “substantially disputed.” The Chair noted that she also sensed agreement to stay with the existing “fairness” language with respect to the completion of written and recorded statements and to tighten the standard, if at all, with respect to oral statements only.

IV. Rule 615

The Reporter introduced the discussion of Rule 615, noting that Judge Woodcock had originally brought the possibility of an amendment to the Committee’s attention. Judge Woodcock

noted concerns about the mandatory nature of sequestration upon request, about the timing of a request for sequestration, and about the application of sequestration to expert witnesses. After carefully considering each of these concerns, the Committee determined that an amendment to Rule 615 was not necessary to address them. In studying Rule 615, however, the Committee encountered a conflict with respect to the scope of a court's Rule 615 sequestration order that may create important notice issues for lawyers and witnesses. Trial judges frequently invoke "the Rule" in a case without further discussion or explanation. At a minimum, such an order means that trial witnesses (if not exempt from sequestration under Rule 615) must leave the courtroom. But such an order remains vague with respect to excluded witnesses learning about testimony through other means, such as conversations with other witnesses, daily transcripts, or online or other news outlets. In most circuits, such an order means that witnesses are barred from obtaining or being provided trial testimony; but in the 1st Circuit, such an order *only* prevents witnesses from being present in the courtroom. Thus, there is a conflict in the circuits about the scope of a Rule 615 order. Ambiguity concerning the scope of a sequestration order could create a notice problem in the event that a court seeks to impose consequences for the violation of that order.

The Reporter provided two potential approaches to amending Rule 615 to deal with this conflict that were set forth in the Reporter's agenda materials on page 13 of the memo concerning Rule 615. First, the Committee could propose a discretionary rule, expressly noting the trial judge's authority to extend sequestration beyond the courtroom doors to communications and interactions outside the courtroom, but requiring the judge to specify any limits beyond exclusion from the courtroom in a Rule 615 order. Alternatively, the Committee could draft a mandatory amendment that automatically extends sequestration protections beyond the courtroom and defines the scope of a Rule 615 order to provide clear notice of what is prohibited. The Reporter noted that the Committee needed to decide whether the Rule 615 conflict is worth continuing to explore and, if so, whether any potential amendment should be discretionary or mandatory.

In thinking about a mandatory versus discretionary provision, Judge Campbell asked whether there would ever be circumstances where a trial judge would exclude witnesses from the courtroom during testimony, but would *want* to allow them to communicate or read about that testimony outside the courtroom. If there are not circumstances where the judge would want to allow that, there seems to be no reason to draft a discretionary rule. In drafting a mandatory rule, Judge Campbell pointed out that the draft language in the agenda materials on page 15 of the Reporter's memo regarding Rule 615 that would prohibit witnesses from "obtaining or being provided trial testimony" might need to be expanded to capture witnesses who unwittingly go on the internet and encounter information about trial testimony. These witnesses haven't been provided a transcript or "obtained" testimony so to speak, but they have "learned about testimony" in a manner that is incompatible with the principle of sequestration. The Reporter agreed that any amendment should cover both witnesses being provided testimony, such as through a transcript or summary, as well as witnesses learning about testimony through other means, such as through the news.

Another Committee member noted the routine efforts to prevent jurors from consulting information outside the courtroom and jurors' routine, sometimes unwitting, violation of these requests. This Committee member expressed concern about witnesses unwittingly violating any expanded version of Rule 615 and the importance of drafting a provision that is very clear about

what is prohibited. The Chair characterized the Rule 615 case law as presenting a tiny circuit conflict, noting that only a single circuit interprets Rule 615 orders literally to prevent witnesses from being physically present in the courtroom *only* and that all other circuits are fairly nebulous about the scope of Rule 615 orders. She noted that commentators have expressed reservations about how far Rule 615 burdens should extend beyond the courtroom. Sometimes, trials are very long, witnesses live in the same house or work in the same place. Forbidding internet access to witnesses for a long period of time in this day and age is quite onerous. She inquired of the trial judges present as to how much they regulate witness conduct outside the courtroom and whether they think that an amendment to Rule 615 would be helpful.

One trial judge suggested that lawyers don't ask for specific protections outside the courtroom and that judges assume that witnesses follow the rule. Judge Campbell noted his longstanding practice of asking lawyers at the pre-trial conference whether they intended to invoke "the rule" without specifying precisely the confines of the limitation beyond the courtroom. In his circuit, invoking "the rule" means that witnesses may not learn about testimony outside the courtroom and he is now more careful in advising lawyers about the conduct that is prohibited. The Reporter suggested that trial judges are all over the map as to how specific they are about conduct that is prohibited, meaning that there is a problem with respect to notice for witnesses who can be brought in for violating "the rule." Another judge questioned whether it would make sense to allow the parties to opt out of a sequestration provision that prevents all witnesses from learning of testimony. For example, if both sides wanted their experts to be acquainted with the trial testimony, it might make sense to allow them the ability to limit the application of "the rule" by consent. A draft amendment might be limited by the words "unless the parties agree otherwise" to accomplish this result.

Rules Committee Chief Counsel, Rebecca Womeldorf, asked whether an amendment that extended sequestration protections beyond the courtroom would prevent a lawyer from prepping a witness with a transcript. The Reporter noted that the Advisory Committee's draft note to Rule 615 cites the *Rhynes* case from the Fourth Circuit holding that the sequestration protections do not apply to lawyers preparing witnesses. The former Reporter to the Standing Committee suggested that the Committee should adopt language in a Committee Note that avoids case citations and instead expressly states that the amended rule "should not be interpreted to prevent witnesses from talking to trial counsel."

A Committee member queried whether trial counsel may reveal the testimony of other witnesses in preparing a witness to take the stand. The Reporter responded that that was what the *Rhynes* case held. The Committee member suggested that it would be ill-advised to draft an amendment to Rule 615 that appears on its face to prohibit lawyers from revealing trial testimony to witnesses, only to take it back in the Committee Note. The Reporter noted the option of incorporating the trial counsel limitation into rule text. The Rule could exempt "conversations with trial counsel" or include a subsection providing that "the Rule does not apply to lawyers preparing witnesses to testify." Another Committee member described the facts involved in the *Rhynes* case in which the trial judge excluded a defense witness in a criminal trial due to counsel's discussion of testimony with him in preparation for his testimony. The *en banc* opinion held that the prohibition on communication of testimony does not extend to lawyers in this context

(notwithstanding the fact that Rule 615 doesn't support that limit on the sequestration right). Another Committee member inquired whether that means that witnesses have a right to learn of other witnesses' testimony through counsel. The Reporter explained that the case law supports lawyers' ability to prepare witnesses to testify unhampered by restrictions on what they may communicate. Another Committee member noted that the remedy for such witness preparation should be cross-examination by the adversary about such communications, but that trial counsel rarely ask those questions of a witness.

The DOJ representative questioned the use of the word "learn" in the draft of a mandatory rule included in the agenda materials on page 15 of the Reporter's memo. She expressed concern that a witness might accidentally violate such a rule by unwittingly "learning" about trial testimony. The Reporter responded that the term "learn" in subsection (a)(i) of the draft would not punish a witness who accidentally learns of testimony outside of court because that subsection only regulates physical exclusion from the courtroom to prevent witnesses from learning of trial testimony. Subsection (a)(ii) would regulate out of court conduct and is not so broadly worded as it prevents witnesses "from obtaining or being provided trial testimony." The DOJ representative noted that creating airtight exceptions to sequestration rules limits the discretion of the trial judge to craft orders tailored to individual cases. The Reporter pointed out that the "exceptions" to sequestration that are enumerated in the Rule are already in the existing provision and that the Committee is not considering altering those.

The Chair noted that trial judges do possess significant discretion to determine the control necessary beyond the courtroom in a given case under the existing rule. The limits on outside interaction may need to be modest in some cases and more onerous in others. She noted that an amendment might cut back on a trial judge's ability to exercise that discretion if it attempts to spell out specific prohibitions. She further noted that trial judges report that jurors routinely violate prohibitions on their exposure outside the courtroom and that it would be unwise for the Committee to propose rules so onerous that no one will follow them in practice. The Reporter responded that the critical issue was to make Rule 615 clear about its reach, whatever that reach may be. While a mandatory provision (prohibiting outside exposure to testimony) may be preferable, a discretionary provision that affords flexibility as to scope may also be acceptable as long as it forces trial judges to consider and clarify the meaning and scope of sequestration orders they enter.

Committee members, after this discussion, generally agreed with the proposition that if an amendment to Rule 615 were to be proposed, it should contain a discretionary rather than mandatory provision for regulating prospective witnesses outside the courtroom.

Another Committee member inquired about the importance of the sequestration rule, asking whether there are any studies to support the notion that witnesses will tailor their testimony to one another if they are privy to it. The Reporter responded that Wigmore characterized sequestration as second only to cross-examination as a tool for securing accurate outcomes. Although there are no formal studies of which the Reporter was aware, criminal defendants who are present in the courtroom throughout trial as an exception to sequestration have often been accused of tailoring their testimony and prosecutors routinely point this fact out to juries. Most importantly, the

Reporter explained that if the sequestration right is retained in the Rules, it needs to be clear in its scope.

Another Committee member asked whether other Circuits had adopted the lawyer-preparation exception found in *Rhynes* that seems to undermine Rule 615, noting that it would seem troubling to craft an exclusionary rule about outside communication of testimony if the prohibition is undermined by that case law. Another Committee member suggested that the Committee follow up on the reach of the *Rhynes* decision for the next meeting to understand more fully the limits and context of that decision. The Committee's choice would seem to be to push back on the *Rhynes* holding or to codify it in an amended Rule 615. The Committee member advocated exploring the issue further as part of due diligence on the subject. Another Committee member noted that the *Rhynes* case involved a pretty unique set of facts in which a defense witness was accused by another witness of being involved in the charged conspiracy shortly before taking the stand. The defense lawyer had to ask the accused witness about his involvement before deciding whether to put him on the stand. The Committee should consider whether the appellate court's holding prohibiting the trial judge from excluding the defense witness on the basis of his preparation in that case necessarily means that *any* lawyer may tell *any* witness about other trial testimony in the course of preparing her to testify. The Reporter agreed that he would research the case law on the issue of lawyers conveying trial testimony in the course of witness preparation for the fall meeting.

The discussion concluded with the Committee deciding to consider a discretionary provision for the fall meeting and resolving to explore in detail the case law surrounding sequestration and lawyer-witness preparation.

V. Rule 702

The Chair opened the afternoon session by introducing a discussion of Rule 702. She first explained that the Committee would not be asked for any substantive vote on any rule amendment at the meeting, because such a vote was premature. She reminded the Committee that the topic of Rule 702 was brought to the Committee by the PCAST recommendation that the Committee draft a "best practices" manual or adopt a modified Committee Note regarding forensic feature comparison methods. She also reminded the Committee that PCAST was not the first to focus on Rule 702, explaining that the National Academy of Sciences also focused on the Committee Note to Rule 702 in its 2009 report, expressing concern about the application of experience-based expertise to forensic evidence. She also reminded the Committee that it had hosted a symposium on forensic evidence and Rule 702 at Boston College in 2017 and that Judge Schroeder had, thereafter, agreed to chair a subcommittee to study Rule 702 and forensic evidence. After study and recommendations by the subcommittee, the Committee determined that a free-standing evidence rule on "forensic evidence" would be ill-advised and that both an "amendment" to a Committee note and a "best practices manual" were outside the charter of the Committee. Thereafter, the Committee continued to study the possibility of amending Rule 702 itself to clarify the trial judge's obligation to decide reliability pursuant to Rule 104(a) prior to admitting expert testimony. In addition, the Committee continued to explore the possibility of an amendment to

Rule 702 that would require the trial judge to regulate an expert's "overstatement" of the conclusions that may reliably be drawn from the principles and methods employed by the expert.

At its Denver symposium in fall 2018, the Committee heard from panelists about potential effects on expert testimony outside of the forensic arena were the Committee to pursue amendments to Rule 702, which is an all-purpose rule that controls admissibility of a wide range of expert opinion testimony. The Chair noted that all of the judges at the Denver symposium raised questions about amending Rule 702, suggesting that it was functioning properly in its current form. She reminded the Committee that the discussion at the Denver symposium had been captured in an issue of the *Fordham Law Review* and encouraged everyone to read the transcript and absorb the commentary that the Committee received there. After the symposium, the Committee determined that it would focus on the possibility of an amendment to Rule 702 that would limit "overstatement" by expert witnesses. The Chair noted that the Reporter had prepared two potential alternative drafts of an amendment to Rule 702 to deal with overstatement that were included in the agenda materials. Finally, the Chair noted that the Committee would hear from additional judges concerning a possible amendment to Rule 702 at its upcoming fall 2019 meeting, at which point the Committee could decide how best to proceed. In the meantime, the Chair noted that the DOJ had circulated additional documentation to the Committee concerning its efforts to regulate overstatement in forensic testimony and that the Department wished to share its position concerning Rule 702 with the Committee.

The DOJ representative first noted that she had circulated a written response to the Reporter's case digest and apologized for pulling a wrong case and characterizing it as not about expert testimony at all. She further noted that her analysis of the case digest reveals a fundamental disagreement between DOJ and the Reporter about what constitutes "overstatement" by an expert in the forensic context. She found that many of the cited cases involved appropriate "source identification" testimony and that the Reporter equates "source identification" with testimony that there is a "match" and on this point they simply do not have a meeting of the minds. She then introduced Ted Hunt, the DOJ's expert in forensic evidence to describe DOJ initiatives with respect to forensic expert testimony.

Mr. Hunt began by telling the Committee that his sole focus is on expert forensic testimony and that he is fully immersed in the issues being considered by the Committee. He has witnessed a complete sea-change in forensics over the past 5-6 years. Forensic analysts have re-conceptualized what they do and DOJ has been collaborating with them to draft standards that reflect accurately what they do. He noted that this process takes time and is still evolving. Accordingly, he suggested that the federal cases in the Reporter's case digest do not fully reflect the progress that has been made in the past few years. He noted that the DOJ has implemented a uniform testimony monitoring program, and has developed testimonial standards for fourteen disciplines, with three more in development to address some of the more controversial methods discussed in the PCAST Report. Mr. Hunt suggested that it was difficult to observe the vast change that had taken place without following the subject on a daily basis but that there had been a steep decline after 2009 in the sometimes injudicious statements made by experts in the past. He also emphasized the efforts of outside expert organizations that are bringing hundreds of experienced professionals together to improve forensic evidence standards. Mr. Hunt suggested that the fruits

of all of these labors were just beginning to manifest and that any potential amendment to the evidence rules should be tabled to allow time for these efforts to be fully realized. He suggested that any amendment to Rule 702 would be designed to address problems “that have left the building.”

Mr. Hunt further emphasized that significant efforts were being made alongside the National Institute of Standards and Technology (NIST) to build empirical support into many forensic methods. For example, he noted that enormous work was ongoing to create an empirical basis for fingerprint evidence. He explained that most of the time, forensic practitioners are getting their analysis right, with very few false positives or negatives identified in their work. Importantly, these forensic examiners are not providing speculative opinions, but rather are providing reliable source identifications based upon past successful source identifications. He explained that these federal forensic examiners have successfully made thousands of correct source identifications or they would not be qualified to testify. Mr. Hunt conceded that these source identifications are inductive opinions that are not infallible. Still, he emphasized that the recipe for success in the forensic arena is to allow DOJ, alongside outside groups, to continue making strides and to avoid a rule change to react to testimony that was being given five or six years ago.

One Committee member inquired whether the uniform language requirements apply only to federal expert witnesses. Mr. Hunt responded that they are directed to the federal examiners only, but that federal prosecutors may not make certain statements at trial. For example, prosecutors may not ask any expert witness for an opinion “to a reasonable degree of certainty.” Mr. Hunt noted that the DOJ was making a pitch to get state laboratories to incorporate the DOJ uniform language. There is, of course, no jurisdiction for the DOJ to force state labs to adopt federal requirements, but DOJ does have leverage over the federal prosecutors who may present the testimony of state analysts at trial and many states are voluntarily adopting the protocols.

The Reporter asked Mr. Hunt about recent cases like one in a Pennsylvania state court in which a bitemark examiner was allowed to give expert opinion testimony in a capital case. Mr. Hunt replied that the DOJ does not present bitemark evidence and that he is not aware of any lab with a bitemark examiner on staff. Any experts of this nature are coming out of private practice. Mr. Hunt suggested that even those private examiners could no longer claim infallibility because forensics got into trouble generally with quantitative sounding qualitative statements. He opined that forensic experts are being forced by judges to give testimony that is more modest.

The Federal Defender queried whether the DOJ was tracking and reviewing forensic testimony given in every single federal case nationwide. She expressed concern that some criminal defendants may be adversely impacted in the meantime if this is an edict or initiative that will take time to trickle down to the trial level. Mr. Hunt replied that the DOJ was engaging in “testimony monitoring” in ongoing cases, noting a 2017 case in which the testimony monitoring caught a nuanced defect in the testimony of a new DNA technician with respect to the expressed likelihood ratio. The prosecutor was notified of the error --- after trial but prior to sentencing --- to convey it to the court to allow correction if it was deemed material. Mr. Hunt claimed that the FBI is catching unwarranted claims by forensic experts in “real time,” either in person or by transcript review within 30 days.

The Reporter asked Mr. Hunt how often state lab technicians testify in federal court and how often trial judges direct them to testify “to a reasonable degree of certainty.” Mr. Hunt could not specify how many state examiners testify in federal court, but noted that there were only 9 federal examiners involved in the cases included in the Reporter’s case digest. He reiterated that federal prosecutors may not use the terminology “reasonable degree of certainty” and that it appears that trial judges are insisting on that verbiage when it appears. A Committee member offered that, in 11 years of presiding over criminal trials, the only federal expert witnesses he had seen in his courtroom were cell tower technology experts and that all others came from state laboratories (that would not be governed by DOJ uniform language protocols). Another Committee member agreed that the state laboratories do all the drug identification, although he suggested that there is rarely a dispute about drug identification.

Judge Dever, the Liaison from the Criminal Rules Committee informed the Committee that Criminal Rules was planning to host a mini-conference on May 6, 2019 to explore disclosure obligations for expert reports in criminal cases. He noted the vast difference between disclosure obligations with respect to expert materials under Rule 16 of the Criminal Rules and under Rule 26 of the Civil Rules. He explained that the Criminal Rules Committee was exploring the possibility of strengthening the disclosure obligations in criminal cases to make them more analogous to disclosure on the civil side. He noted that the discovery issue may intersect with the concern over admissibility and invited Committee members to share any thoughts they might have in anticipation of the mini-conference concerning discovery of expert materials in criminal cases.

Dr. Lau of the FJC asked the DOJ representatives about two sentences in the memo that the DOJ circulated to the Committee prior to the meeting, in which it is stated that:

“[A]n examiner is not claiming that the questioned mark or impression is unique or that he or she can individualize it to the exclusion of all *other* questioned marks or impressions. Instead, an examiner’s ‘source identification’ conclusion is a knowledge, skill, and experience-based decision that the evidence provides sufficiently strong support in favor of the same-source proposition to conclude that, in his or her expert opinion, the questioned mark or impression came from the same source as the known mark or impression.”

Dr. Lau suggested that “source identification” is a term of art and questioned whether it is consistent to say that there is “strong support” for a source identification *without* making a claim about other possible sources. The Reporter noted that the question is whether the jury can understand such a distinction.

Mr. Hunt replied that an examiner’s source identification is not speculative and is supported by an examiner’s training and testing proving that he or she can successfully source identify. This is not to say that the examiner is infallible, but rather that he or she has a proven track record that makes the opinion reliable. Judge Campbell queried how an examiner logically could state that a mark came from a particular defendant without saying it *didn’t* come from another person. Mr. Hunt replied that the examiner’s testimony was based upon an inductive inference that gives us confidence in a certain result and that an examiner’s claim would be made

in a qualified way (albeit within the context of testimony about a “source identification”). He explained that feature comparison examiners are akin to the engineer accepted in *Kumho Tire*; they are not improperly claiming to base their opinions on science and instead rely upon a proven track record that shows they are probably right – which is all that Rule 702 requires. Judge Campbell asked whether the DOJ uniform language guidelines tell an expert how to respond to certain cross-examination questions. For example, Judge Campbell queried how a federal feature comparison expert would be required to respond to a cross question such as “Do you admit this print could have been made by any of 200 other people?” Judge Campbell suggested that it would seem very damaging for a forensic expert to answer that question in the affirmative, but suggested that the expert would be purporting to exclude others if they answered in the negative. Mr. Hunt acknowledged that there are not specific cross-examination guidelines, but reiterated that federal examiners may not claim infallibility or suggest a “zero error rate.” Mr. Hunt argued that defense attorneys have access to the DOJ documents on uniform language and may, on cross, force the expert to admit all the limitations on his testimony outlined in those documents.

Another Committee member expressed similar confusion about the DOJ characterization of “source identification.” While this Committee member understood the expert’s inability to claim infallibility, he expressed confusion about how the DOJ testimony allowed for a “source identification” without “individualizing” the opinion. He emphasized the logical inability to identify one source *without excluding other sources*. Mr. Hunt once again stated that, based upon an examiner’s training and experience, there is sufficient evidence to make a source identification. The Committee member clarified that the question is the nature of the examiner’s claim or proposition during trial testimony (rather than its basis). Mr. Hunt noted that examiners throw out contaminated or degraded evidence and will not draw an inference about source identification without extremely strong compatibility. He stated that DOJ fully admits that its examiners are drawing inferences about feature comparison but that this is acceptable so long as the examiners are clear that this is what they are doing.

Joe Cecil, who arrived during the course of the afternoon session, expressed continuing concerns about the DOJ uniform language. (Dr. Cecil worked on the PCAST report and is heading the project for the FJC’s revised manual on forensic evidence.) Consistent with many of the questions by Committee members, Mr. Cecil stated that the source identification language has implications for the exclusion of others. Mr. Cecil explained that the American Association for the Advancement of Science (AAAS) sent a letter to DOJ requesting a change in the source identification language because there is no basis for testimony by an examiner that this particular sample belongs to that individual defendant. Mr. Cecil suggested that the DOJ was engaged in rhetorical chicanery in attempting to distinguish “source identification” and “individualization.” He expressed concern the DOJ was taking common language and assigning it a meaning not used in the everyday common parlance with which jurors are familiar. Mr. Hunt responded that the AAAS report on fingerprint analysis suggested that an examiner may testify that a particular ridge feature is “rare” even if he has no basis for saying *how rare*. Similarly, Mr. Hunt suggested that an examiner may testify that there is strong support for a source identification even if he cannot say exactly *how strong*. Mr. Cecil disagreed, suggesting that examiners are telling juries that a particular fingerprint belongs to a particular defendant. Mr. Hunt contended that examiners may draw an inference about source identification so long as they do not claim it is “scientific.” He

emphasized that forensic feature comparison testimony is experience-based. Mr. Cecil responded that when an expert takes the stand and testifies for example that a particular defendant left a particular fingerprint, the examiner is making a scientific claim. Mr. Hunt stated that he and Mr. Cecil simply disagree, noting that Rule 702 “doesn’t play favorites” and places testimony based upon knowledge, skill, and experience on equal footing with scientific testimony.

The Chair remarked that the exchange between Mr. Cecil and Mr. Hunt related directly to the issues the Committee has been wrestling with regarding whether feature comparison methods, like fingerprinting, need black box studies supporting them to justify their presentation in court. She clarified that the PCAST report did not recommend that federal investigators cease relying on fingerprint evidence. Rather, it was concerned with the manner in which such evidence was being presented in court. Mr. Cecil agreed that PCAST was concerned about the way that fingerprint evidence was being presented in court in criminal cases. Mr. Hunt noted that there were black box studies for fingerprint evidence and toolmark evidence that yielded a 1% error rate. A Committee member noted that the low error rate in black box studies shows that there is skill behind these feature comparison methodologies that allows them to distinguish and identify marks and impressions, even if the premise of exclusion is not quantified. Still, the Committee member expressed concern about DOJ language claiming to make a “source identification” without excluding other sources. Even if the black box studies show that these examiners are likely right, this specific claim seems logically inconsistent.

The Federal Defender expressed appreciation for the DOJ’s efforts to fix injustice that has happened in the past and congratulated the Department on its laudable work to self-police with respect to forensic evidence. That said, she suggested that there is an inherent conflict of interest in allowing experts to be regulated by the entity that benefits from their testimony. She noted that Rule 702 makes the trial judge the gatekeeper – not the experts themselves. While she was very supportive of the efforts to perform testimony review, she opined that such review *after the fact* could not serve as an effective safety net without a rule carefully regulating admissibility on the front end. She noted that effective gatekeeping by the trial judge was the key to the *Daubert* standard.

The Chair suggested that the Committee should discuss the drafting options for an amendment to Rule 702 to see if they could facilitate gatekeeping. She pointed the Committee to potential drafting alternatives on pages 25 and 28 of the Reporter’s memo on Rule 702 in the agenda materials that both seek to resolve the problem of expert overstatement. She noted that the first alternative would seek to strengthen the relationship between the expert’s methodology and opinion by affirmatively requiring that the testimony be “limited to the opinions that may reasonably be drawn from the reliable application of the [expert’s] principles and methods.” The second would seek to handle the concern with a prohibition, allowing an expert to provide an opinion so long as she “does not overstate the opinions that result from the expert’s reliable application of the principles and methods.” The Chair raised the question of which formulation might be more effective and easier to comprehend. She questioned whether the prohibition on “overstatement” could have unintended consequences in areas like valuation, favoring or permitting *understatement* of value. The Reporter suggested that this should not be a concern because an “overstatement” amendment would be geared toward an expert’s level of confidence

in his or her opinion and would not affect valuation opinions per se. The Chair noted a First Circuit opinion in which a mechanical engineer opined that a fuel management system was “defective” based upon a visual inspection of it, the fact that it smoked when the engine was started, and the fact that a removed spark plug was covered in soot. The First Circuit found this opinion admissible based upon the engineer’s experience. The Chair questioned how an amendment to Rule 702 to prohibit overstatement would affect cases like this one. The Reporter suggested that such an amendment would prevent an engineer like the one in the First Circuit case from stating that he was “100% positive” the fuel system was defective, but would not otherwise change the result. The Reporter noted that an experience-based opinion like the one described might be subject to attack for lacking sufficient basis under existing requirements of Rule 702.

Another Committee member suggested that he would strongly prefer the drafting alternative that is phrased as a prohibition on overstatement. He expressed concern that the affirmative drafting alternative might suggest that a trial judge should evaluate the correctness of an expert opinion and not only its reliability. Judge Campbell expressed concern that a prohibition on overstatement would require a trial judge to focus too closely on the exact words used by an expert during testimony. It could require judges to start scripting confidence for experts and would be subject to numerous objections. He suggested that the affirmative drafting alternative that focuses more on an expert’s basis than his or her word choice would be preferable. Another Committee member noted that the Supreme Court’s *Joiner* opinion sought to regulate the circumstance in which there was too great a gap between an expert’s methodology and opinion. The Reporter explained that the 2000 amendment to Rule 702 included subsection (d) to address that problem and that an amendment that simply restated that existing requirement would be duplicative and so ill-advised.

The DOJ representative opined that the overstatement proposals would not add value to the Rule and that Rule 702 already contains everything a trial judge needs to perform effective gatekeeping. She suggested that an amendment would simply be an excuse to add unnecessary language to the Committee Note to address perceived problems with forensic feature comparison testimony. She also expressed concerns about trial judges micromanaging the precise language used by testifying experts and stressed the significance of the DOJ initiatives to strengthen forensic testimony. Another Committee member remarked that an overstatement amendment would not be limited to forensic experts and that it could be used to limit a treating physician’s ability to report a diagnosis as “extremely likely.”

Another Committee member opined that the solution to the overstatement problem is solid cross-examination during which the adversary calls an expert to task for going too far. This Committee member expressed concern about drafting a rule to deal with an issue that should be handled by competent counsel under existing conditions. He expressed a preference for no amendment to Rule 702, but suggested that the drafting alternative phrased as a prohibition might be superior if it were expressly directed to the expert’s “degree of certainty” concerning an opinion. Mr. Hunt expressed concern about attempting to police an expert’s degree of confidence, suggesting that there is an important distinction between an expert’s personal degree of confidence about an opinion and what science can prove. Another Committee member agreed with the idea that the adversary system should deal with overstatement through cross-examination. He noted

that the role of the trial judge is to exercise gatekeeping and to determine whether opinion testimony gets past the threshold of admissibility, but that the form in which it is presented should thereafter be left to the adversary system. He expressed concern that an amendment would put too much responsibility on the Rules and not enough on the lawyers.

The Reporter acknowledged these concerns, but suggested that they proved too much. On the theory that the adversary system should take care of these issues, the Rule could freely admit *all* expert testimony and leave it to the lawyers to discredit it. But the key to *Daubert* is that cross-examination alone is ineffective in revealing nuanced defects in expert opinion testimony and that the trial judge must act as a gatekeeper to ensure that unreliable opinions don't get to the jury in the first place. A Committee member agreed, but opined that Rule 702's existing regulation of reliability was sufficient to address these concerns and reiterated that an amendment to regulate the precise words to be used by expert witnesses would take regulation a step too far.

The Reporter noted some irony in the discussion given that some participants suggested that the existing Rule 702 *already* gives the trial judge sufficient authority to regulate overstatement, while others suggested that overstatement regulation would be a *new* limit that is beyond the reach of the trial judge. He suggested that it would seem impossible to have it both ways. The Chair summarized the concerns of Committee members that the first affirmative drafting alternative could create more work for trial judges without accomplishing anything to the extent that the reliable application of methodology is already required by Rule 702. She suggested that the second prohibitive drafting alternative could be considered new, but might require a trial judge to micromanage language and may not work effectively outside the arena of forensic expert testimony. The Reporter noted that he had given a recent presentation to the Lawyers for Civil Justice concerning problems with expert testimony on the civil side and that civil defense lawyers also sought additional regulation of overstatement, outside the arena of forensic evidence. He stated that the question for the Committee should be whether the trial judge should be monitoring overstated testimony by experts consistent with their other *Daubert* gatekeeping obligations. He noted the possibility that a lawyer can cross-examine thoroughly without removing the impact of overstatement on lay jurors, as was evidenced by expert testimony on hair identification --- as to which the DOJ has recognized that its experts overstated their conclusions in hundreds of cases of convicted defendants.

The Federal Defender offered that Rule 702 does not currently address the problem of experts overstating their conclusions and that respected scientists are telling the Committee that this is a big problem in connection with forensic feature comparison testimony in particular. She suggested that an amendment to Rule 702 regulating overstatement will not require trial judges to parse words or script testimony; instead, it will alert the trial judge to pay attention to this problem. Without an amendment, trial judges will not be attuned to this concern because the existing provisions of Rule 702 do not cover it. Another Committee member clarified that he was not advocating the abrogation of the gatekeeping role in *Daubert* by any means, but that he remained concerned that an overstatement amendment would lead to trial judges editing expert testimony as a practical matter.

Judge Campbell proposed another potential drafting alternative for an amendment to Rule 702 that would prevent an expert from “claiming a degree of confidence in an opinion that cannot be drawn from the principles and methods.” The Reporter responded that an emphasis on “degree of confidence” was promising and that he would prepare that language as a drafting alternative for the next meeting.

The Chair raised the issue of medical experts’ longstanding practice of testifying to “a reasonable degree of medical certainty” and noted that the draft Committee Note to an amended Rule 702 would suggest the retirement of that verbiage. Judge Schroeder, Chair of the Rule 702 subcommittee, explained that he had a law clerk conduct some research into this issue. He found that the “reasonable degree of certainty” language originated in 1916 in the context of future damages in a medical malpractice case. By 1960, he noted that 22 states had adopted the verbiage. And by 1970, the terminology appeared in the case law of 48 states. He noted that the draft Advisory Committee note to a Rule 702 amendment proscribes such terminology “unless required by applicable law” to account for situations in which federal courts are handling diversity cases arising in states with such terminology. He directed the Committee’s attention to a law review article dealing with such issues entitled *When Daubert Gets Erie* and pointed out the different approaches to the issue taken by courts, depending upon whether they characterize the question as one of witness competency or admissibility. He further noted that states often adopt Federal Evidence Rules and suggested that a change in the federal approach to “reasonable degree of certainty” may have an effect on state practice as well. He concluded that the issue of state law requirements of opinions to a “reasonable degree of certainty” was one the Committee should investigate more deeply in deciding how to proceed with Rule 702. Judge Kuhl expressed concern about the portion of the draft Advisory Committee note proscribing use of “reasonable degree of certainty” language to the extent that it suggests that some state standards of causation are irrational and to the extent that it might cause litigants to seek federal court in such cases. The Reporter responded that the draft Committee note regarding the “reasonable degree of certainty” language was limited, and should be limited, to the forensics context.

Another Committee member inquired whether any state evidence rules had added provisions to regulate expert overstatement. The Reporter promised to check on any state counterparts that might seek to regulate overstatement and to follow up with the Committee at the next meeting. The Reporter thanked Mr. Hunt for attending the meeting on behalf of the DOJ and thanked the DOJ for being so helpful throughout the process of considering a change to Rule 702. He also thanked Joe Cecil for attending and for offering his valuable perspective on the issue.

The Chair reiterated that there would be no vote taken on the Rule 702 issue at this meeting and promised that the Committee would hear from another round of judges at its fall 2019 meeting. Until then, she suggested that Committee members should think about whether the time is ripe for an amendment or whether postponement to allow forensic standards to develop is the better course.

VI. Closing Matters

The Chair thanked everyone for their contributions and noted that the fall meeting of the Committee will be held on October 25, 2019 at Vanderbilt University in Nashville, TN. The meeting was adjourned.

Respectfully Submitted,

Daniel J. Capra
Liesa L. Richter

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MEMORANDUM

TO: Rebecca Womeldorf
Secretary, Committee on Rules of Practice and Procedure

FROM: Hon. Michael A. Chagares, U.S.C.J.
Chair, Advisory Committee on the Appellate Rules

DATE: June 3, 2019

RE: Proposal – Study Regarding Rolling Back the Electronic Filing Deadline from Midnight

I respectfully propose that a study be conducted by the Advisory Committees on the Appellate, Bankruptcy, Civil, and Criminal rules as to whether the rules should be amended to roll back the current midnight electronic filing deadline to an earlier time in the day, such as when the clerk’s office closes in the respective court’s time zone. The prospects of improved attorney and staff quality of life, convenience to judges, and fairness underlie this proposal.

Background

Electronic filing has many advantages, including flexibility, convenience, and cost savings. The advent of electronic filing led to the Appellate, Bankruptcy, Civil, and Criminal rules to be amended to include the following definition affecting the filing deadline:

“Last Day” Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court’s time zone; and

(B) for filing by other means, when the clerk’s office is scheduled to close.

Fed. R. Bankr. P. 9006(a)(4); Fed. R. Civ. P. 6(a)(4); Fed. R. Crim. P. 45(a)(4). See Fed. R. App. P. 26(a)(4) (incorporating the identical language). As a result, the rules provide for two distinct filing deadlines that depend upon whether the filing is accomplished electronically or not.

Reasons Driving the Proposal for a Study

Under the current rules, the virtual courthouse is generally open each day until midnight. As a consequence, attorneys, paralegals, and staff frequently work until midnight to complete and file briefs and other documents. This is in stark contrast to the former practice and procedure, where hard copies of filings had to arrive at the clerk’s office before the door closed, which was (and is) in the late afternoon.

It may be that the midnight deadline has negatively impacted the quality of life of many, taking these people away from their families and friends as well as from valuable non-legal pursuits. Working until midnight to finalize and file papers may result in greater profits for some, and just extra working hours for others. The same may be said of the opposition, who may be waiting for those papers to appear on the docket. But can or should the rules of procedure encourage a better quality of life for people involved in representing others (or themselves)? These are vexing questions worthy of consideration in my view.

As you know, I have been considering this proposal for some time. Only this past weekend I learned that the United States District Court for the District of Delaware in 2014 and the Supreme Court of Delaware in July 2018 rolled their electronic deadlines back — the District Court until 6:00 p.m. and the Supreme Court until 5:00 p.m. Notably, the Supreme Court of Delaware adopted the recommendations of a Delaware Bar report titled *Shaping Delaware's Competitive Edge: A Report to the Delaware Judiciary on Improving the Quality of Lawyering in Delaware* (the “Delaware Bar Report”) and found at:

<https://courts.delaware.gov/forms/download.aspx?id=105958>. The Delaware Bar Report memorialized a careful study of members of the Delaware bar and may be instructive in considering my proposal. It focused largely on attorney and staff quality of life, observing for instance that “[w]hen it is simply the result of the human tendency to delay until any deadline, especially on the part of those who do not bear the worst consequences of delay [that is, people who are not “more junior lawyers and support staff”], what can result is a dispiriting and unnecessary requirement for litigators and support staff to routinely be in the office late at night to file papers that could have been filed during the business day.” Delaware Bar Report 26-27. Accordingly, studying the effects of an earlier filing deadline on attorney (especially younger attorney) and staff quality of life would seem to be a worthwhile endeavor.

Another reason for a study is that it may shed light on the impact of late-night filings on the courts and the possible benefits of an earlier electronic filing deadline to judges. For instance, many District Judges and Magistrate Judges receive an email after midnight each night that provide them notice of docket activities (NDAs) or notice of electronic filings (NEFs) in their cases from the preceding day. NDAs or NEFs received after midnight may not do judges a lot of good. It may be that an earlier filing deadline would allow judges the opportunity to scan the electronic filings to determine whether any matters require immediate action.

Still another reason for the study involves fairness. This raises a couple of concerns. Maintaining a level playing field for advocates and parties is one concern. For example, pro se litigants are not permitted in some jurisdictions (or may be unable to use) the electronic filing system. Electronic filers may then be afforded the advantage of many more hours than their pro se counterparts to prepare and file papers. Another example involves large law firms that have night staffs versus small law firms and solo practitioners that might be forced to bear the expense of overtime or find new personnel to assist on a late-night filing. A second concern involves the possibility of adversaries “sandbagging” each other with unnecessary late-night filings to deprive each other from hours (perhaps until the morning) that could be used to formulate a response to such filings. Indeed, the Delaware Bar Report noted “[s]everal lawyers admitted to us that when

counsel . . . had filed briefs against them at midnight that they had responded by ‘holding’ briefs for filing until midnight themselves as a response, even when their brief was done.” Delaware Bar Report 33-34.¹

A study should also thoroughly consider the potential problems that might be associated with an earlier electronic filing deadline. These problems may include how attorneys who are occupied in court or at a deposition during the day and attorneys working with counsel in other time zones are supposed to draft and file their papers timely if they do not have until midnight. Further, a criticism addressed by the Delaware Bar was that an earlier deadline “will not change the practice of law, which is a 24-hour job, and it will result in more work on the previous day.” Delaware Bar Report 25.

Like other potential changes to the status quo, the notion of rolling back the time in which an advocate may electronically file will certainly be opposed by many in the bar. Indeed, the Delaware Bar Report recounts that the large majority of attorneys polled did not support changing the time to file electronically. Groups that did support the change (at least informally), however, were the Delaware Women Chancery Lawyers and the Delaware State Bar Association’s Women and the Law Section. Delaware Bar Report 17, 18. In addition, the United States District Court for the District of Delaware — a pilot district of sorts — has four and one-half years of experience with its earlier deadline for electronic filing. I spoke with Chief Judge Leonard Stark, who confirmed that the attorneys in that district appear to be satisfied with the earlier electronic filing deadline, and that the judges in that district have received no complaints about the deadline. See Delaware Bar Report 10 (quoting the statement of the Delaware Chapter of the Federal Bar Association president that the District Court order rolling back the electronic filing deadline “has provided a healthier work-life balance” and that the order “has been well received and we have heard positive feedback from clients, Delaware counsel, and counsel from across the country.”). A study may well consider the Delaware experience.

Sketches of a Rule Change

If the deadline for electronic filing is rolled back, what time would be appropriate? I do not propose a specific time, but I do suggest this would be an area to study if the committees are inclined to consider changes. The Delaware Bar Report, relying upon local daycare closing times, recommended a 5:00 p.m. deadline, and that deadline was adopted by the Delaware Supreme Court. Delaware Bar Report 32. If a time-specific approach was embraced in the federal rules, then the current <(A) for electronic filing, at midnight in the court’s time zone> could be changed to <(A) for electronic filing, at ___ p.m. in the court’s time zone>. Another

¹ The Delaware Bar Report also concluded that an earlier deadline would improve the quality of electronic court filings. Delaware Bar Report 32-33, 39-40. Reasons proffered for this conclusion include that late evening electronic filing “does not promote the submission of carefully considered and edited filings,” id. at 32, and that quality “is improved when lawyers can bring to their professional duties the freshness of body, mind, and spirit that a fulfilling personal and family life enable,” id. at 39-40.

approach that has the benefit of simplicity is setting a uniform time for all filings. So, under that approach, the rules could be changed to something such as:

“Last Day” Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends, for either electronic filing or for filing by other means, when the clerk’s office is scheduled to close.

This sketch incorporates most of the language of the current rules. Note that both sketches retain the important language that leaves open the possibility that an alternate deadline may be set by statute, local rule, or court order. Of course, the above sketches are merely for possible discussion and there are certainly other options. Committee notes, if a change is made, might include the acknowledgment that the amendment would not affect the deadlines to file initial pleadings or notices of appeal.

* * * * *

Thank you for considering this proposal. As always, I will be pleased to assist the rules committees in any way.

TAB 7B

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Pending Legislation that Would Directly or Effectively Amend the Federal Rules
116th Congress

Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Protect the Gig Economy Act of 2019	H.R. 76 <i>Sponsor:</i> Biggs (R-AZ)	CV 23	Bill Text: https://www.congress.gov/116/bills/hr76/BILLS-116hr76ih.pdf Summary (authored by CRS): This bill amends Rule 23 of the Federal Rules of Civil Procedure to expand the preliminary requirements for class certification in a class action lawsuit to include a new requirement that the claim does not allege misclassification of employees as independent contractors. Report: None.	<ul style="list-style-type: none"> • 1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Civil Justice
Injunctive Authority Clarification Act of 2019	H.R. 77 <i>Sponsor:</i> Biggs (R-AZ)	CV	Bill Text: https://www.congress.gov/116/bills/hr77/BILLS-116hr77ih.pdf Summary (authored by CRS): This bill prohibits federal courts from issuing injunctive orders that bar enforcement of a federal law or policy against a nonparty, unless the nonparty is represented by a party in a class action lawsuit. Report: None.	<ul style="list-style-type: none"> • 1/3/19: Introduced in the House; referred to the Judiciary Committee's Subcommittee on Crime, Terrorism, and Homeland Security
Litigation Funding Transparency Act of 2019	S. 471 <i>Sponsor:</i> Grassley (R-IA) <i>Co-Sponsors:</i> Cornyn (R-TX) Sasse (R-NE) Tillis (R-NC)	CV 23	Bill Text: https://www.congress.gov/116/bills/s471/BILLS-116s471is.pdf Summary: Requires disclosure and oversight of TPLF agreements in MDL's and in "any class action." Report: None.	<ul style="list-style-type: none"> • 2/13/19: Introduced in the Senate; referred to Judiciary Committee

**Pending Legislation that Would Directly or Effectively Amend the Federal Rules
116th Congress**

<p>Due Process Protections Act</p>	<p>S. 1380</p> <p><i>Sponsor:</i> Sullivan (R-AK)</p> <p><i>Co-Sponsor:</i> Durbin (D-IL)</p>	<p>CR 5</p>	<p>Bill Text: https://www.congress.gov/116/bills/s1380/BILLS-116s1380is.pdf</p> <p>Summary: This bill would amend Criminal Rule 5 (Initial Appearance) by:</p> <ol style="list-style-type: none"> 1. redesignating subsection (f) as subsection (g); and 2. inserting after subsection (e) the following: “(f) Reminder Of Prosecutorial Obligation. - - (1) IN GENERAL. -- In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law. (2) FORMATION OF ORDER. -- Each judicial council in which a district court is located shall promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate.” <p>Report: None.</p>	<ul style="list-style-type: none"> • 5/8/19: Introduced in the Senate; referred to Judiciary Committee
<p>Assessing Monetary Influence in the Courts of the United States Act (AMICUS Act)</p>	<p>S. 1411</p> <p><i>Sponsor:</i> Whitehouse (D-RI)</p> <p><i>Co-Sponsors:</i> Blumenthal (D-CT) Hirono (D-HI)</p>	<p>AP 29</p>	<p>Bill Text: https://www.congress.gov/116/bills/s1411/BILLS-116s1411is.pdf</p> <p>Summary: In part, the legislation would require certain amicus curiae to disclose whether counsel for a party authored the brief in whole or in part and whether a party or a party's counsel made a monetary contribution intended to fund the preparation or submission of the brief.</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 5/9/19: Introduced in the Senate; referred to Judiciary Committee

**Pending Legislation that Would Directly or Effectively Amend the Federal Rules
116th Congress**

<p>Back the Blue Act of 2019</p>	<p>S. 1480</p> <p><i>Sponsor:</i> Cornyn (R-TX)</p> <p><i>Co-Sponsors:</i> Barrasso (R-WY) Blackburn (R-TN) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Cassidy (R-LA) Cruz (R-TX) Daines (R-MT) Fischer (R-NE) Hyde-Smith (R-MS) Isakson (R-GA) Perdue (R-GA) Portman (R-OH) Roberts (R-KS) Rubio (R-FL) Tillis (R-NC)</p>	<p>§ 2254 Rule 11</p>	<p>Bill Text: https://www.congress.gov/116/bills/s1480/BILLS-116s1480is.pdf</p> <p>Summary: Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge.</p> <p>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."</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 5/15/19: Introduced in the Senate; referred to Judiciary Committee
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TAB 7C

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Action Item: Judiciary Strategic Planning

The *Strategic Plan for the Federal Judiciary*, first approved by the Judicial Conference in September 2010 and updated in September 2015, identifies strategies and goals to address judiciary trends, issues, challenges, and opportunities (JCUS-SEP 10, pp. 5-6; JCUS-SEP 15, pp. 5-6). The approach to planning approved by the Conference in September 2010 calls for a review of the *Strategic Plan* every five years. Appended to this memorandum is a one-page summary of the *Strategic Plan* as updated in 2015, including the Judiciary's identified core values, strategic issues, and priorities.

The Conference's approach to strategic planning (as depicted below) calls for committees of the Judicial Conference to integrate the *Strategic Plan* into committee planning and policy development activities (JCUS-SEP 10, pp. 5-6). The primary means for the integration of the *Strategic Plan* into committee planning and policy development activities has been the alignment of committee efforts with the plan's strategies and goals. Committees have achieved this alignment by identifying projects and studies that relate to the strategies and goals of the *Strategic Plan*.

Chief Judge Carl E. Stewart, Judiciary Planning Coordinator, has asked each Conference committee, including the Standing Committee, to do two things: (1) report on its efforts to implement the strategies and goals of the current *Strategic Plan*; (2) provide any ideas and suggestions for the approach that the Judicial Conference and its committees should follow in updating the *Strategic Plan* for 2020. Judge Stewart's requests relate to two stages of the judiciary's planning process shown above – the measurement or assessment of progress, and the refinement of the planning approach. Judge Stewart has requested this Committee's updates and comments, if any, by July 2, 2019.



Assessment of the Implementation of the *Strategic Plan for the Federal Judiciary*

In 2011, the Standing Committee identified the following eight ongoing initiatives that supported the *Strategic Plan*:

- Implementing the 2010 Civil Litigation Conference
- Evaluating the Rules Governing Prosecutors' Disclosure Obligations
- Evaluating the Impact of Technological Advances
- Bankruptcy Forms Modernization Project
- Examining Amendments to Address Redaction and Sealing of Appellate Filings
- Analyzing and Promoting Recent Rules Amendments
- Improving the Public's Understanding of the Federal Judiciary
- Preserving the Judiciary's Core Values

The last three of these identified initiatives – Analyzing and Promoting Recent Rules Amendments, Improving the Public's Understanding of the Federal Judiciary, and Preserving the Judiciary's Core Values – are inherent in the ongoing work of the rules committees and their charge to prescribe rules of practice and procedure through a deliberative, collaborative, and public process established by Congress in the Rules Enabling Act, 28 U.S.C. §§ 2071-2077. In a real sense, all undertakings of the rules committees promote one or more of these initiatives. Even so, as part of the ongoing strategic planning process, the Standing Committee has provided periodic updates to the Judiciary's Planning Coordinator on the status of rules proposals that align with the specific initiatives identified above. The most recent update provided by Judge Campbell on behalf of the Standing Committee and dated July 23, 2018, is appended to this memorandum. Given that prior updates have reported comprehensively on the status of the previously-identified initiatives, the final assessment requested by July 2, 2019, will provide updates on the pilot projects and various rules amendments as referenced in the July 23, 2018 update. The July 2, 2019 final assessment will also highlight two developments related to initiatives previously reported as complete. First, the Advisory Committee on Criminal Rules is again Evaluating the Rules Governing Prosecutors' Disclosure Obligations in connection with suggestions to broaden criminal discovery obligations under Rule 16. Second, for reasons similar to the initiative to undertake the Bankruptcy Forms Modernization Project, the Advisory Committee on Bankruptcy Rules has undertaken a multi-year project to restyle the Bankruptcy Rules.

This Committee's various reports will be used along with the reports of other committees to assess the judiciary's implementation of the *Strategic Plan* and to inform the update of the *Strategic Plan* for 2020.

Recommendation: That the Committee discuss the extent to which the Committee’s strategic initiatives have achieved their desired outcomes and delegate to the Chair the responsibility to report on the same to the Judiciary Planning Coordinator.

Update to the *Strategic Plan for the Federal Judiciary*

In addition to the integration of the *Strategic Plan* into committee planning and policy-making activities, the Judicial Conference’s approach to strategic planning also calls for a review of the plan every five years (JCUS-SEP 10, p. 6). At its August 2019 meeting, the Executive Committee will consider an approach to the update of the *Strategic Plan*. Judge Stewart has requested that each committee provide any ideas and suggestions regarding the proposed approach to updating the *Strategic Plan* to him by July 2, 2019.

Recommendation: That the Committee discuss any ideas or suggestions regarding updating the *Strategic Plan* for 2020 and delegate to the Chair the responsibility to report any ideas or suggestions to the Judiciary Planning Coordinator.

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

CHAIRS OF ADVISORY COMMITTEES

DAVID G. CAMPBELL
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DONALD W. MOLLOY
CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

July 23, 2018

The Honorable Carl E. Stewart
Chief Judge
United States Court of Appeals
United States Court House
300 Fannin Street, Room 5226
Shreveport, LA 71101

Dear Judge Stewart:

On behalf of the Committee on Rules of Practice and Procedure (“Standing Committee”), I am responding to your request for an update on the rules committees’ progress in implementing initiatives in support of the *Strategic Plan for the Federal Judiciary*.

In June 2012, the Standing Committee identified the following eight ongoing initiatives that supported the *Strategic Plan*:

- Implementing the 2010 Civil Litigation Conference
- Evaluating the Rules Governing Prosecutors’ Disclosure Obligations
- Evaluating the Impact of Technological Advances
- Bankruptcy Forms Modernization Project
- Examining Amendments to Address Redaction and Sealing of Appellate Filings
- Analyzing and Promoting Recent Rules Amendments
- Improving the Public’s Understanding of the Federal Judiciary
- Preserving the Judiciary’s Core Values

The Standing Committee has since provided periodic assessments of the progress on these initiatives. Three of the initiatives—Analyzing and Promoting Recent Rules Amendments, Improving the Public’s Understanding of the Federal Judiciary, and Preserving the Judiciary’s Core Values—are inherent in the ongoing work of the rules committees and their charge to

prescribe rules of practice and procedure through a deliberative, collaborative, and public process established by Congress in the Rules Enabling Act, 28 U.S.C. § 2071, *et seq.* Accordingly, we do not provide specific updates on these matters.

As previously reported, work on three of the eight initiatives has concluded: (1) Evaluating the Rules Governing Prosecutors' Disclosure Obligations; (2) Examining Amendments to Address Redaction and Sealing of Appellate Filings; and (3) the Advisory Committee on Bankruptcy Rules' Forms Modernization Project.

The Committee's July 5, 2017 progress report to the strategic planning coordinator identified ongoing committee work in support of the remaining two initiatives -- Implementing the 2010 Civil Litigation Conference and Evaluating the Impact of Technological Advances. The July 5, 2017 letter captures most of the ongoing work, so we use this letter simply to provide updates.

Ongoing Implementation of the 2010 Civil Litigation Conference: Pilot Projects

The Standing Committee continues to work with the Advisory Committee on Civil Rules ("Civil Rules Committee") in implementing the results of a conference on civil litigation that was held at Duke University School of Law in May 2010 ("2010 Conference"). The 2010 Conference brought together more than seventy moderators, panelists, and speakers with a goal of identifying ways to improve federal civil litigation. The purpose of this initiative is to improve federal civil litigation by implementing ideas that emerged from the Conference, specifically: rules amendments, education of the bench and bar, and the development and implementation of pilot projects. The primary desired outcome of this initiative is to determine whether clarifying certain rules, particularly those governing discovery rights and obligations and the sanctions for failing to meet these obligations, would reduce costs and delays in civil litigation, and, if so, to propose amendments to the rules to achieve those clarifications. A related desired outcome is to determine whether rule changes would make judges more effective case managers, better able to tailor motions, discovery, and other pretrial work to what is proportional in each case, and, if so, to propose those rule changes.

A package of amendments (to Civil Rules 1, 4, 16, 26, 30, 31, 33, 34, and 37) designed to reduce the costs and delays in civil litigation, increase realistic access to the courts, and further the goals of Rule 1 "to secure the just, speedy, and inexpensive determination of every action and proceeding" took effect on December 1, 2015. The Civil Rules Committee engaged in a nationwide educational effort and partnered with the Federal Judicial Center ("FJC") to develop and present materials to the bench and bar. The Civil Rules Committee continues to monitor response to the rules package to determine whether the rules are having the desired effect and whether additional changes are warranted.

Pilot projects are one method of determining the desirability of additional rules changes. The Chief Justice noted in his 2016 Year End Report that the Civil Rules Committee has

developed two pilot projects “to test several promising case management techniques aimed at reducing the costs of discovery”: The Mandatory Initial Discovery Pilot (“MIDP”) and the Expedited Procedures Pilot (“EPP”). The Judicial Conference approved both pilot projects at its September 2016 session.

The MIDP seeks to measure whether court-ordered, robust, mandatory discovery that must be produced before traditional discovery is undertaken will reduce the cost, burden, and delay in civil litigation. Under the MIDP, a party must produce information relevant to the claims and defenses raised in the pleadings, regardless of whether the party intends to use the information in its case, including information that is both favorable and unfavorable to the party. Two districts are participating in the MIDP—Arizona and Northern Illinois. The MIDP took effect in the District of Arizona on May 1, 2017, and more than 1,800 cases are proceeding under the pilot program. The Northern District of Illinois launched the MIDP on June 1, 2017, and about 75% of new cases filed in the district since then are in the pilot. The FJC has data on 5,000 plus cases between the two districts. The project is expected to run for three years. If the MIDP results in a measurable reduction of cost, burden and delay, the Civil Rules Committee will consider proposing amendments to the civil rules to adopt mandatory initial discovery in civil cases.

The EPP is designed to expand practices already employed successfully by some judges and thereby promote a change in judicial culture by confirming the benefits of active management of civil cases. The chief features are: (1) holding a scheduling conference and issuing a scheduling order as soon as practicable, but not later than the earlier of 90 days after any defendant is served or 60 days after any defendant appears; (2) setting a definite period for discovery of no more than 180 days and allowing no more than one extension, only for good cause; (3) informal and expeditious disposition of discovery disputes; (4) ruling on dispositive motions within 60 days of the reply brief; and (5) setting a firm trial date that can be changed only for exceptional circumstances. The aim is to have 90% of civil cases set for trial within 14 months, with the remaining 10% set within 18 months. Currently, the Civil Rules Committee is seeking districts to participate in the EPP. The FJC is studying data on the longstanding differentiated procedure employed by the Northern District of Ohio, where experience suggests that assigning cases to tracks works relatively well.

Evaluating the Impact of Technological Advances

The Standing Committee continues to work with the five rules advisory committees to assess the impact of technology on federal litigation and to identify ways to take advantage of technological advances.

This is an ongoing initiative, the original purpose of which was to work with the Advisory Committee on Criminal Rules (“Criminal Rules Committee”) to identify ways in which technology can be used to make the preparation and development of criminal cases more

efficient, without approaching constitutional limits or sacrificing the important role of in-person appearances and communications. It has evolved into an ongoing study and assessment by the rules committees regarding amendments necessitated or prompted by technological advances. The original purpose of this initiative was achieved by the promulgation of a package of amendments to the criminal rules that took effect on December 1, 2011.

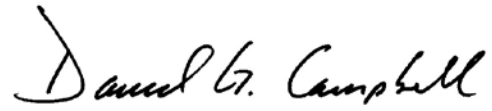
This initiative has evolved to encompass other technology-related rules amendments such as the coordinated effort among the rules committees to identify rules changes made necessary by changes in technology and to develop rules proposals to reflect the reality of technology. This work has been achieved in phases and continues. Coordinated rule amendments eliminating the “3-day rule” in each set of national rules to account for the widespread use of electronic service went into effect on December 1, 2016. Coordinated “e-rules” for electronic filing, service, and notice by all the rules committees were published for public comment in August 2016, subsequently approved by the rules committees at their spring 2017 meetings and by the Standing Committee at its June 2017 meeting, approved by the Judicial Conference at its September 2017 session, and most recently by the Supreme Court in April 2018. The resulting proposed amendments to Appellate Rule 25, Bankruptcy Rule 5005, Civil Rule 5, and Criminal Rule 49, along with a conforming amendment to Criminal Rule 45(c), are now pending before Congress, and will take effect on December 1, 2018 absent contrary action by Congress.

Another rule change prompted by the realities of technology—specifically electronically stored information—is a proposed new criminal rule to address disclosures and discovery in criminal cases. The proposal 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. A subcommittee of the Criminal Rules Committee concluded that the original proposal was too broad, but that a narrower amendment might be warranted. A mini-conference was held in Washington, D.C. on February 7, 2017 to obtain feedback on the threshold question of whether an amendment is warranted, gather input about the problems an amendment might address, and receive focused comments and critiques of specific proposals. Participants included criminal defense attorneys from both large and small firms, public defenders, prosecutors, Department of Justice attorneys, discovery experts, and judges. The subcommittee then drafted a proposed new Rule 16.1, which focuses on the process, manner, and timing of pretrial disclosures, particularly with ESI in mind. The Criminal Rules Committee and the Standing Committee approved proposed new Rule 16.1 for publication for public comment in August 2017. The Criminal Rules Committee subsequently approved a revised version of Rule 16.1 at its spring meeting which was in turn approved by the Standing Committee at its June 12, 2018 meeting. Proposed Rule 16.1 will come before the Judicial Conference in September.

Please do not hesitate to contact me if you have any questions.

The Honorable Carl E. Stewart
July 23, 2018
Page 5

Sincerely,

A handwritten signature in black ink that reads "David G. Campbell". The signature is written in a cursive style with a large, prominent initial 'D'.

David G. Campbell

cc: Brian Lynch

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STRATEGIC PLAN FOR THE FEDERAL JUDICIARY September 2015

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.

CORE VALUES

Rule of Law: legal predictability, continuity, and coherence; reasoned decisions made through publicly visible processes and based faithfully on the law	Accountability: stringent standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; effective and efficient use of resources
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
Judicial Independence: the ability to render justice without fear that decisions may threaten tenure, compensation, or security; sufficient structural autonomy for the judiciary as an equal branch of government in matters of internal governance and management	Service: commitment to the faithful discharge of official duties; allegiance to the Constitution and laws of the United States; dedication to meeting the needs of jurors, court users, and the public in a timely and effective manner

STRATEGIC ISSUES

1. Providing Justice	5. Enhancing Access to the Judicial Process
2. The Effective and Efficient Management of Public Resources	6. The Judiciary's relationships with the Other Branches of Government
3. The Judiciary Workforce of the Future	7. Enhancing Public Understanding, Trust, and Confidence
4. Harnessing Technology's Potential	

PRIORITIES¹

Strategy 1.1: Pursue improvements in the delivery of justice on a nationwide basis	Goal 3.2b: Development of programs and special initiatives that will allow the judiciary to remain an employer of choice while enabling employees to strive to reach their full potential
Strategy 1.3: Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary values	Goal 4.1d: Refine and update security patches to ensure the confidentiality, integrity, and availability of judiciary-related records and information
Strategy 2.1: Allocate and manage resources more efficiently and effectively	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
Strategy 4.1: Harness the potential of technology to identify and meet the needs of court users for information, service, and access to the courts	Core Value: Accountability: stringent standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; effective and efficient use of resources

¹ Most of these strategies and goals have been identified as priorities since 2011, with Goal 4.1d added in February 2016. At its February 2018 meeting, the Executive Committee determined to add the Strategic Plan's core value of accountability and Goal 3.2b to the four strategies and two goals that were previously identified as priorities.

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Revised Draft Principles Concerning Public Input During the Rules Enabling Act Process

Draft of Possible Language for Posting on the Rules Committee Website:

The language could be provided via a link added to the existing list of resources “About the Rulemaking Process,” currently at <http://www.uscourts.gov/rules-policies> :

About the Rulemaking Process

- Laws and Procedures Governing the Work of the Rules Committees
- How the Rulemaking Process Works
- How to Suggest a Change to Federal Court Rules and Forms
- [How to Submit Input on a Pending Proposal](#)
- Committee Membership and Selection
- Open Meetings and Hearings of the Rules Committee
- Permitted Changes to Official Bankruptcy Forms

The new “How to Submit Input” link could link to a web page that said, for example:

How to Submit Input on a Pending Proposal

Public input is an integral part of the rulemaking process. Public input helps participants in that process assess the need for, and likely effect of, proposed changes to the rules. To the extent possible, the process centralizes public input in the formal six-month window of time that occurs when a proposal is published for comment. (See [How the Rulemaking Process Works](#).) During that window, comments are submitted via regulations.gov, and the notice publishing proposals for comment provides a link to the dedicated web page created for that purpose. For more detail on proposals published for comment, click [here](#). A definition of relevant terms is found at the end of this webpage.

When to Provide Input

Submitting a comment during the formal comment period ensures that the reporter for the relevant advisory committee can incorporate your input into the summary of public comments that will inform the advisory committee’s discussion of whether to proceed with a proposed rule change. The formal comment period is the standard, and the encouraged, mode for public input on pending proposals. Public input may also be solicited outside the formal comment period (whether through informal requests for public input, mini-conferences, conference calls with interested groups, or otherwise); a recent example was a request for public input on whether to restyle the Bankruptcy Rules. But the standard method for soliciting public input is the formal comment period.

Sometimes, however, a person or group wishes to provide input to the advisory committee outside the formal comment period window. There is no guarantee that a submission outside the formal comment window will be considered by the advisory committee, but efforts may be made to take account of such submissions as the opportunity permits. To provide the best chance that a submission will receive consideration, it should be presented while there is still an adequate opportunity for the advisory

committee to benefit from the submission in its deliberations at the relevant advisory committee meeting.

How to Provide Input

While submissions should be timed to permit consideration by the relevant advisory committee, they should not be presented directly to that committee or its members or reporter(s). Instead, submissions should be addressed to the Secretary of the Committee on Rules of Practice and Procedure (“Standing Committee”). A submission presented outside a formal comment period can be sent to the email or mail address shown below; the Secretary will then docket the submission and forward it to the appropriate advisory committee. Submissions should not be presented directly to any other participant in the rulemaking process, and if a submission is presented to another such participant, it will be forwarded to the Secretary for processing.¹ This procedure is designed to ensure the orderly and transparent consideration of committee business.

Consideration, in the First Instance, by the Advisory Committee

As explained above, the goal of seeking public comment is to permit that comment to inform the relevant advisory committee’s development of proposals. By statute, Congress has tasked the Standing Committee with reviewing the recommendations and proposals made by the advisory committees. See 28 U.S.C. § 2073(b). Submissions should therefore be presented at a time when the advisory committee can address them in its deliberations.

For this reason, submissions intended for consideration in the first instance by the Standing Committee are disfavored.

Submissions directed to the Standing Committee regarding an advisory committee’s decision to recommend a rule amendment for publication ordinarily will not be considered by the Standing Committee in determining whether to proceed with publication. Instead, if the Standing Committee decides to publish the proposed rule, the submission will be treated as a comment and docketed on regulations.gov once the official comment period opens. In the meantime, the submission will also be shared with the chair of the relevant advisory committee.

Similarly, except for good cause shown, submissions directed to the Standing Committee regarding an advisory committee’s decision to recommend a rule for final approval following publication will not be considered by the Standing Committee. Such good cause is expected to be rare, and one who makes such a submission should state the circumstances that the submitter argues establish good cause for the

¹ *This idea is included to help avoid situations in which an interested entity lobbies an individual committee member. It is, though, important not to sweep too broadly. The draft now defines “submission” as “an unsolicited communication that is designed to provide input to one or more participants in the rulemaking process in their capacity as such.” The adjective “unsolicited” excludes any instances of solicited input, such as comments provided at a mini-conference sponsored by a rulemaking committee. And because “submission” includes only communications designed to provide input to rulemakers in their capacities as such, the term would not encompass observations addressed to a general audience on weblogs, at academic conferences, or the like.*

submission's lateness. If good cause is not shown, the submission will be treated as a new suggestion and forwarded to the relevant advisory committee for consideration.

All submissions and comments will be maintained by the Administrative Office of the Courts and will be available to the public. At the discretion of a committee's chair, submissions and comments may be reproduced in full, referenced, or summarized in a committee's agenda book; for the reasons noted above, typically this would occur, if at all, in the agenda book for a meeting of an advisory committee.

Submit Input on a Pending Proposal

If the proposal is currently published for comment, please see the instructions available [here](#). Otherwise, submit your input as follows:

By Email: RulesCommittee_Secretary@ao.uscourts.gov (link sends e-mail)

By Mail:

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Relevant Definitions

As used on this webpage, "public" means persons and entities outside the decisionmaking structure set by the Rules Enabling Act. See 28 U.S.C. §§ 2072 - 2075. This website page uses the broad term "input" to encompass any feedback from the public directed toward a matter that is under rulemaking consideration. "Input" includes: (1) formal comments; (2) informal comments; and (3) submissions. This webpage generally uses the term "comment" to refer to input provided as part of the formal comment process on a published proposal; as explained above, comments are submitted via regulations.gov, and the notice publishing proposals for comment provides a link to the dedicated web page created for that purpose. An "informal comment," by contrast, would be input received outside the formal comment process but in response to a request by a rulemaking committee. As explained above, informal requests for public input may include mini-conferences, conference calls with interested groups, or requests for written informal comment. In contrast, the webpage uses the term "submission" to refer to an unsolicited communication from a member of the public that is designed to provide input to one or more participants in the rulemaking process in their capacity as such; as explained above, submissions should be addressed to the Secretary of the Standing Committee rather than other rulemaking participants.