United States District Court
Southern District of New York

To:	Hon. Jesse M. Furman, Chair, Pro Se Committee
From:	Maggie Malloy
Re:	Fed. R. Civ. P. 73's procedures for filing form for consenting to jurisdiction of a magistrate judge
Date:	February 15, 2018

How can Federal Rule of Civil Procedure 73 be revised so that district and magistrate judges are not informed of the parties' positions on consent to jurisdiction of the magistrate judge unless *all* parties have consented?

The statute on the jurisdiction and powers of United States magistrate judges requires that "[r]ules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent." 28 U.S.C. § 636(c)(1). Presumably to protect the voluntariness of consent, Federal Rule of Civil Procedure 73(b) instructs that the district or magistrate judge must not be informed of the parties' positions on consent unless "all parties have consented to the referral." But the Rule also states that the parties may *separately* file consent forms. (The Rule is quoted below.)

Documents filed with the court are filed using the court's electronic case filing system, and are thus immediately available to the district and magistrate judge assigned to the case. So a party filing a consent form using the ECF system is providing notice to the district judge and magistrate judge of the party's individual consent even if not all parties have consented, contrary to the intent of the statute and rule. The same is true if the clerk's office scans and dockets a consent form submitted by a pro se litigant.

The clerk's office has long struggled with how to deal with this situation. Parties, especially pro se parties, frequently sign and submit the consent forms with only their own signatures on them.[1] In the past, clerk's office staff have sometimes sent these individually signed consent forms to the district judge, with a memo (a "5(d) memo") stating that only one party signed the form. In one of these cases, the district judge memo-endorsed the 5(d) memo: "Counsel for Defendants must also agree and sign." In other cases, a pro se party's

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[1] The Eastern District has modified the AO-provided consent form to instruct litigants not to submit it unless all parties have signed it.

consent form has been scanned and docketed, consistent with the court's policy for pro se submissions. In one of those cases, the judge referenced in an opinion the fact that the pro se plaintiff had signed and filed a consent form, and that the judge's deputy had reached out several times to the defendant to see if the defendant was going to consent.

These cases show not only that judges are being informed about individual parties' positions on consent, contrary to the Rule, but also that the voluntariness of parties' consent may be compromised by this procedure.

This problem could be address by simply deleting the phrase "or separately" from the Rule:

> (b) Consent Procedure.
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> (1) *In General.* When a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent under 28 U.S.C. §636(c). To signify their consent, the parties must jointly ~~or separately~~ file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.
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> (2) *Reminding the Parties About Consenting.* A district judge, magistrate judge, or other court official may remind the parties of the magistrate judge's availability, but must also advise them that they are free to withhold consent without adverse substantive consequences.

The clerk's office would then be authorized to reject consent forms that were filed without the consent of all parties.

The relevant ECF event, [Consent to Jurisdiction by US Magistrate Judge](), should include a warning to filers (if it doesn't already) that the document should only be docketed if all parties have consented.