

**ADVISORY COMMITTEE  
ON  
CIVIL RULES**

**Washington, DC  
November 3-4, 2016**



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## AGENDA

### Meeting and Hearing of the Advisory Committee on Civil Rules November 3-4, 2016

1. Opening Business
  - a. Proposed Amendments to Civil Rules 5, 23, 62, and 65.1 published in August, 2016: Hearings Scheduled November 3, 2016, Washington, D.C.; January 4, 2017, Phoenix, AZ; February 16, 2017, Dallas/Fort Worth, TX
  - b. Report on the June 2016 Meeting of the Committee on Rules of Practice and Procedure
  - c. Integrating Rule 4(m) Amendments
  - d. Report on the September 2016 Meeting of the Judicial Conference of the United States
  - e. Report on Continuing Education on the 2015 Discovery Amendments
2. ACTION ITEM: Approve Minutes of the April 2016 Meeting of the Advisory Committee on Civil Rules
3. Report of the Administrative Office
4. Information Item: Report of the Rule 30(b)(6) Subcommittee
5. Information Items: New and Carry-Over Proposals for Study
  - a. Jury Trial Demand: Rules 38, 39, and 81(c)(3)(A)
  - b. Redacting Improper Filings: Rule 5.2(i)
  - c. Service of Subpoenas: Rule 45(b)(1)
6. Information Item: Pilot Projects Subcommittee Report

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Members	Position	District/Circuit	Start Date	End Date
John D. Bates Chair	D DC	Washington, DC	Member: Chair: 2015	---- 2018
John M. Barkett	ESQ	Florida	2012	2017
Elizabeth J. Cabraser	ESQ	California	2010	2017
Robert Michael Dow, Jr.	D	Illinois (Northern)	2013	2019
Joan N. Ericksen	D	Minnesota	2015	2018
Parker C. Folse	ESQ	Washington	2012	2018
Robert Klonoff	ACAD	Oregon	2011	2017
Sara E. Lioi	D	Ohio (Northern)	2016	2019
Scott M. Matheson, Jr.	C	Tenth Circuit	2012	2018
Benjamin C. Mizer*	DOJ	Washington, DC	NA	NA
Brian Morris	D	Montana	2015	2018
David E. Nahmias	JUST	Georgia	2012	2018
Solomon Oliver, Jr.	D	Ohio (Northern)	2011	2017
Virginia A. Seitz	ESQ	District of Columbia	2014	2017
Craig B. Shaffer	M	Colorado	2014	2017
Edward H. Cooper Reporter	ACAD	Michigan	1992	Open
Richard Marcus Associate Reporter	ACAD	California	1996	Open

Principal Staff: Rebecca Womeldorf 202-502-1820

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<b>Liaison for the Advisory Committee on Bankruptcy Rules</b>	<b>Judge Susan P. Graber</b> <i>(Standing)</i>
<b>Liaisons for the Advisory Committee on Civil Rules</b>	<b>Judge A. Benjamin Goldgar</b> <i>(Bankruptcy)</i>  <b>Peter D. Keisler, Esq.</b> <i>(Standing)</i>
<b>Liaison for the Advisory Committee on Criminal Rules</b>	<b>Judge Amy J. St. Eve</b> <i>(Standing)</i>
<b>Liaisons for the Advisory Committee on Evidence Rules</b>	<b>Judge James C. Dever III</b> <i>(Criminal)</i>  <b>Judge Solomon Oliver, Jr.</b> <i>(Civil)</i>  <b>Judge Richard C. Wesley</b> <i>(Standing)</i>

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# TAB 1

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# TAB 1A

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1(a): RULES PUBLISHED FOR COMMENT, AUGUST 2016

Proposed amendments to Rules 5, 23, 62, and 65.1 were published for comment in August 2016. The first hearing on these proposals is scheduled for November 3, the first day of this meeting.

The Rules 5, 23, and 62 proposals approved for publication by the Standing Committee are essentially the same as the proposals recommended by this Committee to the Standing Committee. Minor changes were made in the wording of Rule 5(b)(2)(E) to conform to parallel proposals for other sets of rules.

The Rule 65.1 proposal was first advanced in discussion with the Standing Committee. The Appellate Rules Committee, working through a joint subcommittee with this Committee, undertook to propose changes to the Appellate Rules to parallel the proposed changes in Rule 62. One of the proposals would amend Appellate Rule 8(b) to reflect the proposed amendment of Rule 62(b) that allows a stay on "providing a bond or other security." Present Rule 8(b) governs proceedings against a "surety" "[i]f a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties \* \* \*." Present Rule 65.1 similarly governs proceedings against a "surety" when "security is given through a bond or other undertaking with one or more sureties." The Appellate Rules Committee concluded that it is not safe to rely on an interpretation of "surety" that would reach every nonparty that undertakes to provide security in a form other than a bond. One example is a letter of credit. They proposed amending Rule 8(b) to reach "other security providers."

Discussion in the Standing Committee concluded that it would be desirable to amend Rule 65.1 to parallel the proposed amendment of Appellate Rule 8(b). The published Rule 65.1 proposal adds "other security," "or other security providers," with variant shorter forms. The Standing Committee authorized publication of this proposal, subject to concurrence by this Committee. This Committee reviewed the proposal and, voting by electronic ballot, joined in the recommendation to publish.

Proposed Rule 65.1 and Committee Note are attached.

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1 **Rule 65.1. Proceedings Against a Surety or Other**  
2 **Security Provider**

3 Whenever these rules (including the Supplemental  
4 Rules for Admiralty or Maritime Claims and Asset  
5 Forfeiture Actions) require or allow a party to give security,  
6 and security is given through a bond, other security, or  
7 other undertaking, with one or more sureties or other  
8 security providers, each ~~surety~~provider submits to the  
9 court's jurisdiction and irrevocably appoints the court clerk  
10 as its agent for receiving service of any papers that affect  
11 its liability on the bond, ~~or~~ undertaking, or other security.  
12 The ~~surety's~~security provider's liability may be enforced  
13 on motion without an independent action. The motion and  
14 any notice that the court orders may be served on the court  
15 clerk, who must promptly mail a copy of each to every  
16 ~~surety~~security provider whose address is known.

### **Committee Note**

Rule 65.1 is amended to reflect the amendments of Rule 62. Rule 62 allows a party to obtain a stay of a judgment “by providing a bond or other security.” Limiting Rule 65.1 enforcement procedures to sureties might exclude use of those procedures against a security provider that is not a surety. All security providers are brought into Rule 65.1 by these amendments.

# TAB 1B

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**MINUTES**  
**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**  
Meeting of June 6, 2016 | Washington, D.C.

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**ATTENDANCE**

The Judicial Conference on Rules of Practice and Procedure held its fall meeting in Washington, D.C., on June 6, 2016. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair	Professor William K. Kelley
Associate Justice Brent E. Dickson	Judge Patrick J. Schiltz
Roy T. Englert, Jr., Esq.	Judge Amy St. Eve
Daniel C. Girard, Esq.	Judge Richard C. Wesley
Judge Neil M. Gorsuch	Judge Jack Zouhary
Judge Susan P. Graber	

The following attended on behalf of the advisory committees:

Advisory Committee on Appellate Rules – Judge Steven M. Colloton, Chair Professor Gregory E. Maggs, Reporter	Advisory Committee on Criminal Rules – Judge Donald W. Molloy, Chair Professor Sara Sun Beale, Reporter Professor Nancy J. King, Associate Reporter
Advisory Committee on Bankruptcy Rules – Judge Sandra Segal Ikuta, Chair Professor S. Elizabeth Gibson, Reporter Professor Michelle M. Harner, Associate Reporter	Advisory Committee on Evidence Rules – Judge William K. Sessions III, Chair Professor Daniel J. Capra, Reporter
Advisory Committee on Civil Rules – Judge John D. Bates, Chair Professor Edward H. Cooper, Reporter Professor Richard L. Marcus, Associate Reporter	

The Honorable Sally Quillian Yates, Deputy Attorney General, represented the Department of Justice, along with Diana Erbsen, Joshua Gardner, Elizabeth J. Shapiro, and Natalia Sorgente.

Other meeting attendees included: Judge David G. Campbell; Judge Robert M. Dow; Judge Paul W. Grimm; Sean Marlaire, staff to the Court Administration and Case Management Committee (CACM); Professor Bryan A. Garner, Style Consultant; Professor R. Joseph Kimble, Style Consultant; and Professor Joseph F. Spaniol, Jr., Consultant.

Providing support to the Committee:

Professor Daniel R. Coquillette	Reporter, Standing Committee
Rebecca A. Womeldorf	Secretary, Standing Committee
Julie Wilson	Attorney Advisor, RCSO
Scott Myers	Attorney Advisor, RCSO
Bridget M. Healy	Attorney Advisor, RCSO
Shelly Cox	Administrative Specialist
Hon. Jeremy D. Fogel	Director, FJC
Emery G. Lee	Senior Research Associate, FJC
Tim Reagan	Senior Research Associate, FJC
Derek A. Webb	Law Clerk, Standing Committee
Amelia G. Yowell	Supreme Court Fellow, AO

### INTRODUCTORY REMARKS

Judge Sutton called the meeting to order. He first acknowledged a number of imminent departures from the Standing Committee effective October 1, 2016: Justice Brent Dickson, Roy Englert, Judge Neil Gorsuch, and Judge Patrick Schiltz are ending their terms as members of the Standing Committee and Judge Steve Colloton is ending his term as Chair of the Appellate Rules Advisory Committee, a position that will be assumed by Judge Gorsuch. Judge Sutton offered remarks on the contributions each has made to the Committee over the years and warmly thanked them for their service.

Judge Sutton recognized three individuals for reaching milestones of service to the Committee. Rick Marcus has served for twenty years as the Associate Reporter to the Advisory Committee on Civil Rules. Dan Capra has served for twenty years as the Reporter to the Advisory Committee on Evidence Rules. And Joe Spaniol has served twenty-five years as a style consultant to the Standing Committee.

Finally, Dan Coquillette took a moment to thank Judge Sutton, whose tenure as Chair of the Standing Committee comes to an end October 1, 2016.

### APPROVAL OF THE MINUTES OF THE LAST MEETING

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee approved the minutes of the January 7, 2016 meeting.**

## VISIT OF CHIEF JUSTICE ROBERTS

Chief Justice Roberts and Jeffrey Minear, the Counselor to the Chief Justice, visited the Standing Committee. Chief Justice Roberts made some brief remarks. He thanked the members of the Committee for their service and acknowledged, as an alumnus of the Appellate Rules Committee himself, that such service could be a significant commitment of time. And he congratulated the Committee on the new discovery rules that went into effect on December 1, 2015, rule amendments he highlighted in his 2015 Year-End Report on the Federal Judiciary.

## REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Sessions and Professor Capra provided the report on behalf of the Advisory Committee on Evidence Rules, which met on April 29, 2016, in Washington, D.C. Judge Sessions presented two action items and a number of information items.

### *Action Items*

RULE 803(16) – The first matter for final approval was an amendment to Rule 803(16), the ancient documents exception to the hearsay rule, to limit its application to documents prepared before January 1, 1998. The version of Rule 803(16) published for comment would have eliminated the exception entirely. After hearing from many lawyers who continue to rely on the ancient documents exception, the Advisory Committee decided against eliminating the exception. Instead, the Advisory Committee revised its proposal to provide a cutoff date for the application of the exception. The Advisory Committee decided against leaving the exception in its current form because, unlike certain “ancient” hard copy documents, the retention of electronically-stored information beyond twenty years does not by itself suggest reliability. Judge Sessions acknowledged that any cutoff date will have a degree of arbitrariness, but also observed that electronically-stored information (known as “ESI”) first started to explode around 1998 and that the ancient documents exception itself set an arbitrary time period of twenty years for its applicability.

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed amendment to Rule 803(16), as amended after publication, for submission to the Judicial Conference for final approval.**

RULE 902 (13) & (14) – The second matter for final approval was an amendment to Rule 902 to add two new subdivisions ((13) and (14)) that would allow for the authentication of certain electronic evidence through certification by a qualified person without requiring that person to testify in person. The first provision would allow self-authentication of machine-generated information upon a submission of a certification prepared by a qualified person. The second provision would provide a similar certification procedure for a copy of data taken from an electronic device, medium, or file. The proposals for new Rules 902(13) and 902(14) would have the same effect as current Rules 902(11) and 902(12), which permit a foundation witness to establish the authenticity of business records by way of certification. One Committee member suggested providing instructions on the application of the rule with the inclusion of examples in the Committee Note. After discussion, Professor Capra agreed to do that.

Upon a motion by a member, seconded by another, and by voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 902 (13) and (14) for submission to the Judicial Conference for final approval.**

*Information Items*

Judge Sessions highlighted several information items on behalf of the Advisory Committee.

**GUIDE FOR AUTHENTICATING ELECTRONIC EVIDENCE** – The Standing Committee discussed the use and dissemination of the draft Guide for Authenticating Electronic Evidence. Written by Judge Grimm, Gregory Joseph, and Professor Capra, the manual would be for the use of the bench and bar and can be amended as necessary to keep pace with technological advances. The manual will be published by the Federal Judicial Center (FJC). The manual is not an official publication of the Advisory Committee itself. The members of the Standing Committee discussed the manual, noting its great value to judges and practitioners who regularly deal with the issue of authenticating electronic evidence, and expressed deep gratitude to its three authors for their work creating it and to the FJC for its assistance with publication.

**POSSIBLE AMENDMENTS TO THE NOTICE PROVISIONS IN THE EVIDENCE RULES** – The Advisory Committee has been considering ways to amend and make more uniform several notice provisions throughout the Federal Rules of Evidence. For the notice provision of Rule 807(b), the Residual Exception to the hearsay rule, the Advisory Committee is inclined to add a good cause exception to excuse lack of timely notice of the intent to offer statements covered under this exception. The Advisory Committee is also inclined to require that notice under 807(b) be written and not just oral. For the notice provision of Rule 404(b), the Advisory Committee is inclined to remove the requirement that the defendant in a criminal case must first specifically request that the government provide notice of their intent to offer evidence of previous crimes or other bad acts against the defendant. The Advisory Committee concluded that this requirement in Rule 404 was an unnecessary trap for the unwary lawyer and differs from most local rules. Finally, the Advisory Committee has concluded that the notice provisions in Rules 412, 413, 414, and 415 should not be changed through the Rules Enabling Act process as those rules were congressionally enacted and, in any event, are rarely used.

**RESIDUAL EXCEPTION: RULE 807** – Judge Sessions reported on the symposium held in connection with the Advisory Committee’s fall 2015 Chicago meeting regarding the potential elimination of the categorical hearsay exceptions (excited utterance, dying declaration, etc.) in favor of expanding the residual hearsay exception. The lawyers who testified before the Advisory Committee unanimously opposed the elimination of the hearsay exceptions. The Advisory Committee agrees that the exceptions should not be eliminated. But the Advisory Committee continues to consider expansion of the residual exception to allow the admission of reliable hearsay even absent “exceptional circumstances.” The Advisory Committee included a working draft of amended Rule 807 in the agenda materials. It is planning a symposium in the fall to continue to discuss possible amendments to Rule 807, to be held at Pepperdine School of Law.

**TESTIFYING WITNESS’S PRIOR INCONSISTENT STATEMENT: RULE 801(D)(1)(A)** – The Advisory Committee is considering an expansion beyond what Rule 801(d)(1)(A) currently allows, which

are prior inconsistent statements made under oath during a formal proceeding. The Advisory Committee has rejected the idea of expanding the rule to cover all prior inconsistent statements, but continues to consider inclusion of prior inconsistent statements that have been video recorded.

EXCITED UTTERANCES: RULE 803(2) – The Advisory Committee considered four separate proposals to amend or eliminate Rule 803(2) on the grounds that “excited utterances” are not necessarily reliable. It determined not to take up any of the suggestions given the impact on other rules, as well as an FJC report regarding various social science studies on Rule 803(2) which provided some empirical support for the proposition that immediacy and excitedness tend to guarantee reliability.

CONVERTING CATEGORICAL HEARSAY EXCEPTIONS INTO GUIDELINES – At the suggestion of Judge Milton Shadur, the Advisory Committee considered reconstituting the categorical hearsay exceptions as standards or guidelines rather than binding rules. The Advisory Committee ultimately decided against doing so.

CONSIDERATION OF A POSSIBLE AMENDMENT TO RULE 803(22) – At the suggestion of Judge Graber, the Advisory Committee considered eliminating two exceptions to Rule 803(22): convictions from nolo contendere pleas and misdemeanor convictions. The Advisory Committee concluded that retaining each of these exceptions was warranted.

RULE 704(B) – Similarly, the Advisory Committee determined not to proceed with suggestions to eliminate Rule 704(b) or to create a specific rule regarding electronic communication and hearsay.

IMPLICATIONS OF *CRAWFORD* – The Advisory 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 confront and cross-examine the declarant.

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

Judge Colloton and Professor Maggs provided the report on behalf of the Advisory Committee on Appellate Rules, which met on April 5, 2016, in Denver, Colorado. Judge Colloton advised that Judge Gorsuch will be the new chair of the Advisory Committee as of October 2016.

Judge Colloton reported that the Advisory Committee had four action items in the form of four sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

### *Action Items*

CONFORMING AMENDMENTS TO RULES 8, 11, AND 39(E)(3) – The first set of amendments recommended for publication were amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) to conform to the amendment to Rule of Civil Procedure 62 by revising any clauses that use the antiquated term “supersedeas bond.” The language would be changed to “bond or other

security” as appropriate in each of the rules. Judge Colloton noted that the Civil Rules Committee would discuss the amendment to Rule 62 later in the meeting. He added that the Style Consultants suggested a minor edit to proposed Rule 8(b) (adding the word “a” before “stipulation” on line 16) after the publication of the agenda book materials, and that the Advisory Committee accepted the edit. The Standing Committee discussed the phrase “surety or other security provider” and whether “security provider” contained within it the term “surety” and made minor edits to the proposed amendments.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed conforming amendments to Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3), contingent on the Standing Committee’s approval of the proposed amendment to Civil Rule 62 later in the meeting.**

LIMITATIONS ON THE FILING OF AMICUS BRIEFS BY PARTY CONSENT: RULE 29(A) – The proposed amendment to Rule 29(a) would allow a court to prohibit or strike the filing of an amicus brief based on party consent where the filing of the brief might cause a judge’s disqualification. This amendment would ensure that local rules that forbid the filing of an amicus brief when the filing could cause the recusal of one or more judges would be consistent with Rule 29(a). Professor Coquillette observed that, as important as preserving room for local rules may be, congressional committees in the past have responded to the proliferation of local rules by urging the Rules Committee to allow them only if they respond to distinctive geographic, demographic, or economic realities that prevail in the different circuits. Judge Colloton explained that this proposed amendment is particularly relevant to the rehearing en banc process which traditionally has been decentralized and subject to local variations. He further explained that the Advisory Committee discussed and rejected expanding the exception to other types of amicus filings. The Advisory Committee made minor stylistic edits to the proposed amended rule.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Rule 29(a).**

APPELLATE FORM 4 – Litigants seeking permission to proceed in forma pauperis are currently required by Appellate Form 4 to provide the last four digits of their Social Security number. Given the potential security and privacy concerns associated with Social Security numbers, and the consensus of the clerks of court that the last four digits of a Social Security number are not needed for any purpose, the Advisory Committee proposes to amend Form 4 by deleting this question.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved for publication for public comment the proposed amendment to Appellate Form 4.**

REVISION OF APPELLATE RULE 25 TO ADDRESS ELECTRONIC FILING, SIGNATURES, SERVICE, AND PROOF OF SERVICE – In conjunction with the publication of the proposed amendment to Civil Rule 5, and in an effort to achieve an optimal degree of uniformity, the Advisory Committee

proposes to amend Appellate Rule 25 to address electronic filing, signatures, service, and proof of service. The proposed revision generally requires all parties represented by counsel to file electronically. The Standing Committee discussed the use of “person” versus “party” throughout the proposed amended rule, as well as the use of these phrases in the companion Criminal and Civil Rules. One minor stylistic amendment was proposed. The Standing Committee decided to hold over the vote to approve publication of the proposed amendment to Rule 25 until the discussion regarding Civil Rule 5.

#### *Information Item*

Judge Colloton discussed whether Appellate Rules 26.1 and 29(c) should be amended to require additional disclosures to provide further information for judges in determining whether to recuse themselves. It is an issue that the Advisory Committee will consider at its fall meeting.

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

Judge Bates and Professors Cooper and Marcus provided the report on behalf of the Advisory Committee on Civil Rules, which met on April 14, 2016, in Palm Beach, Florida. The Advisory Committee had four action items in the form of three sets of proposed amendments to be published this upcoming summer and the pilot project proposal.

#### *Action Items*

**RULE 5** – The Advisory Committees for Civil, Appellate, Bankruptcy, and Criminal Rules have recently worked together to create uniform provisions for electronic filing and service across the four sets of rules to achieve an optimal degree of uniformity. Professor Cooper explained that the Advisory Committee for Criminal Rules wisely decided to create their own stand-alone rule, proposed Criminal Rule 49.

With regard to filing, the proposed amendment to Rule 5 requires a party represented by an attorney to file electronically unless nonelectronic filing is allowed by the court for good cause or is allowed or required by local rule. It allows unrepresented parties to file electronically if permitted by court order or local rule. And it provides that an unrepresented party may be required to file electronically only by court order or by a local rule that includes reasonable exceptions. Under the amended rule, a paper filed electronically would constitute a written paper for purposes of the rules.

With regard to service, the amended rule provides that a paper is served by sending it to a registered user by filing it with the court’s electronic filing system or by sending it by other electronic means if that person consents in writing. In addition, service is complete upon filing via the court’s electronic filing system. Rule 5(b)(3), which allows electronic service only if a local rule authorizes it, would be abrogated to avoid inconsistency with the amended rule.

The Standing Committee discussed the use of the terms “person” and “party” throughout Rule 5 and across other sets of rules and agreed to consider this issue further after the meeting.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed amendments to Civil Rule 5 for publication for public comment.**

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved for publication for public comment the proposed amendment to Appellate Rule 25 that conforms to the amended Civil Rule 5.**

RULE 23 – Judge Bates detailed six proposed changes to Rule 23, many of which concern settlements in class action lawsuits. Rule 23(c)(2)(B) extends notice consideration to a class proposed to be certified for settlement. Rule 23(e) applies the settlement procedural requirements to a class proposed to be certified for purposes of settlement. Rule 23(e)(1) spells out what information parties should give the courts prior to notice and under what circumstances courts should give notice to the parties. Rule 23(e)(2) lays out general standards for approval of the proposed settlement. Rule 23(e)(5) concerns class action objections, requiring objectors to state to whom the objection applies, requiring court approval for any payment for withdrawing an objection or dismissing an appeal, and providing that the indicative ruling procedure be used if an objector seeks approval of a payment for dismissing an appeal after the appeal has already been docketed. Finally, Rule 23(f) specifies that an order to give notice based on a likelihood of certification under Rule 23(e)(1) is not appealable and extends to 45 days the amount of time for an appeal if the United States is a party. Judge Robert Dow, the chair of the Rule 23 Subcommittee, explained the outreach efforts by the subcommittee and stated that many of the proposed changes would provide more flexibility for judges and practitioners. The Rule 23 Subcommittee, under Judge Dow’s leadership and with research support from Professor Marcus, has devoted years to generating these proposed amendments, organized multiple conferences around the country with class action practitioners, and considered many other possible amendments.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed package of amendments to Civil Rule 23 for publication for public comment.**

RULE 62 – Judge Bates reported that a subcommittee composed of members of the Appellate and Civil Rules Committees and chaired by Judge Scott Matheson laid the groundwork for amendments to Rule 62. The proposed amendment includes three changes to the rule. First, Rule 62(a) extends the automatic stay from 14 days to 30 days in order to eliminate the “gap” between the 14-day automatic stay and the 28 days allowed for various post-judgment motions. Second, it recognizes the court’s authority to dissolve the automatic stay or replace it with a court-ordered stay for a longer duration. Third, Rule 62(b) clarifies that security other than a bond may be posted. Another organizational change is a proposed new subsection (d) that would include language from current subsections (a) and (c). Judge Bates added that the word “automatic” would be removed from the heading of Rule 62(c) and that conforming edits will be made to the proposed rule to accommodate changes made to the companion Appellate Rules. Professor Cooper stated that Rule 65.1 would be conformed to Appellate Rules 8, 11, and 39 after the conclusion of the meeting.



Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the proposed amendments to Civil Rule 62 for publication for public comment. It also approved granting to the Civil Rules Advisory Committee the authority to make amendments to Rule 65.1 to conform it to Appellate Rules 8, 11, and 39 with the goal of seeking approval of the Standing Committee in time to publish them simultaneously in August 2016. Finally, with the amendment to Civil Rule 62 officially approved for publication, it also approved for publication the proposed amendments to Appellate Rules 8(a)(1)(B), 8(a)(2)(E), 8(b), 11(g), and 39(e)(3) which all conform to the amended Civil Rule 62.**

PILOT PROJECTS – Judge Campbell provided the report of the Pilot Projects Subcommittee, which included participants from the Standing Committee, CACM, and the FJC. The Subcommittee has collected and reviewed a lot of information, including working with focus groups of lawyers with experience with these types of discovery regimes. As a result of this work, the Advisory Committee seeks approval to forward the Mandatory Initial Discovery Pilot Project and Expedited Procedures Pilot Project to the Judicial Conference for approval. The first project would test a system of mandatory initial discovery requests to be adopted in each participating court. The second would test the effectiveness of court-wide adoption of practices that, under the current rules, have proved effective in reducing cost and delay.

Judge Campbell proceeded to detail each pilot project and asked for comments and suggestions on the proposals. For the first pilot project, Judge Campbell explained the proposed procedures. The Standing Committee then discussed whether or not all judges in a district would be required to participate in the pilot project, how to choose the districts that should participate, and how to measure the results of the pilot studies. Judge Bates noted the Advisory Committee's strong support of the project. Several Standing Committee members voiced their support as well.

For the second pilot project, many of the procedures are already available, and the purpose of the pilot project is to use education and training to achieve greater use of available procedures. Judge Campbell advised the Committee that CACM has created a case dashboard that will be available to judges via CM/ECF, and that judges will be able to use this tool to monitor the progress of their cases. The pilot would require a bench/bar meeting each year to monitor progress.

Upon motion, seconded by a member, and on a voice vote: **The Committee unanimously approved the recommendation to the Judicial Conference of the (i) Mandatory Initial Discovery Pilot Project and (ii) Expedited Procedures Pilot Project, with delegated authority for the Advisory Committee and the Pilot Projects Subcommittee to make refinements to the projects as discussed by the Committee.**

#### *Information Items*

EDUCATIONAL EFFORTS REGARDING 2015 CIVIL RULES PACKAGE – Judge Bates outlined some of the efforts undertaken by the Advisory Committee and the FJC to educate the bench and the bar about the 2015 discovery reforms of the Rules of Civil Procedure. Among other efforts, he mentioned the production of several short videos, a 90-minute webinar, plenary sessions at

workshops for district court judges and magistrate judges, segments on the discovery reforms at several circuit court conferences, and other programs sponsored by the American Bar Association.

Judge Bates advised that a subcommittee has been formed, chaired by Judge Ericksen, to consider possible amendments to Rule 30(b)(6). Professor Cooper stated that the Advisory Committee is considering amending Rule 81(c) in light of a concern that it may not adequately protect against forfeiture of the right to a jury trial after a case has been removed from state court.

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

Judge Molloy and Professors Beale and King provided the report for the Advisory Committee on Criminal Rules, which met on April 18, 2016, in Washington, D.C. He reported that the Advisory Committee had three action items in the form of three proposed amendments to be published this upcoming summer for which it sought the approval of the Standing Committee.

#### *Action Items*

RULE 49 – Judge Molloy explained the proposed new stand-alone rule governing electronic service and filing in criminal cases. The Advisory Committee determined to have a stand-alone rule for criminal cases rather than to continue the past practice of incorporating Civil Rule 5 by reference. The proposed amendments to Rule 49 track the general order of Civil Rule 5 rule and much of its language. Unlike the civil rule, Rule 49's discussion of electronic filing and service comes before nonelectronic filing and service in the new criminal rule. Both rules provide that an unrepresented party must file nonelectronically unless allowed to file electronically by court order or local rule. But one substantive difference between the two rules is that, under Civil Rule 5, an unrepresented party may be required to file electronically by court order or local rule. A second substantive difference is that all nonparties must file and serve nonelectronically in the absence of a contrary court order or local rule. This conforms to the current architecture of CM/ECF which only allows the government and the defendant to file electronically in a criminal case. Third, proposed Rule 49 contains language borrowed from Civil Rule 11(a) regarding signatures.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rules 49 for publication for public comment.**

RULE 45(C) – The proposed amendment to Rule 45(c) is a conforming amendment. It replaces the reference to Civil Rule 5 with a reference to Rule 49(a)(4)(C),(D), and (E).

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendment to Rules 45(c) for publication for public comment.**

RULE 12.4 – The proposed amendment to Rule 12.4, changes the required disclosures for statements under Rule 12.4 regarding organizational victims. It permits a court, upon the showing of good cause, to relieve the government of the burden of filing a statement identifying any organizational victim. The proposed amendments reflect changes to the Code of Judicial Conduct and require a party to file the Rule 12.4(a) statement within 28 days after the defendant’s initial appearance. The Standing Committee briefly discussed similar potential changes to the Appellate Rules regarding disclosure of organizational victims. And the Advisory Committee discussed removing the word “supplemental” from the title and body of Rule 12.4(b) in order to avoid potential confusion.

Upon motion, seconded by a member, and on a voice vote: **The Standing Committee unanimously approved the proposed amendments to Rule 12.4 for publication for public comment.**

#### *Information Items*

Judge Molloy reviewed several of the pending items under consideration by the Advisory Committee. The Cooperator Subcommittee continues to consider the problem of risk of harm to cooperating defendants and the kinds of procedural protections that might alleviate this problem. The Subcommittee includes representatives from the Advisory Committee, Standing Committee, CACM, and the Department of Justice. The Advisory Committee has formed subcommittees to consider suggested amendments to Criminal Rule 16 dealing with discovery in complex criminal cases and Rule 5 of the Rules Governing Section 2255 Proceedings regarding petitioner reply briefs. And in response to an op-ed by Judge Jon Newman, the Advisory Committee will consider the wisdom of reducing the number of peremptory challenges in federal trials.

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

Judge Sandra Ikuta and Professors Gibson and Harner presented the report on behalf of the Advisory Committee on Bankruptcy Rules, which met on March 31, 2016, in Denver, Colorado. The Advisory Committee had nine action items, and sought final approval for three of the items: Rule 1001; Rule 1006, and technical changes to certain official forms.

#### *Action Items*

RULE 1001 – The first item was a request for final approval of Rule 1001, dubbed the “civility rule” by Judge Ikuta, which was published in August 2015 to track changes to Civil Rule 1. Judge Ikuta explained that the Advisory Committee considered the comments submitted, but made no changes to the published version of the amended rule.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 1001 for submission to the Judicial Conference for final approval.**

RULE 1006 – The second item was a proposed change to Rule 1006(b), also published for comment in August 2015. The rule explains how a person filing a petition in bankruptcy can pay

the filing fee in installments, as allowed by statute. The proposed amendment clarified that courts may not refuse to accept petitions or summarily dismiss a case because the petitioner failed to make an initial installment payment at the time of filing (even if such a payment was required by local rule). Judge Ikuta said that the Advisory Committee considered the comments submitted, but made no changes to the published version of the amended rule.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 1006 for submission to the Judicial Conference for final approval.**

TECHNICAL CHANGES TO OFFICIAL FORMS – Judge Ikuta next described the Advisory Committee’s recommendation for retroactive approval of technical changes to nine official forms. She explained that the Judicial Conference at its March 2016 meeting approved a new process for making technical amendments to official bankruptcy forms. Under the new process, the Advisory Committee makes the technical changes, subject to retroactive approval by the Committee and report to the Judicial Conference. Judge Sutton thanked Judge Ikuta for developing the new streamlined approval process for technical changes to official bankruptcy forms.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed technical changes to Official Forms 106E/F, 119, 201, 206, 206E/F, 309A, 309I, 423, and 424, for submission to the Judicial Conference for final approval.**

Judge Ikuta reported that the Advisory Committee had six additional action items in the form of six sets of proposed amendments to be published this upcoming summer for which it sought the approval of the Committee.

Before focusing on these specific recommendations, however, Judge Ikuta first suggested that the Committee adopt a procedure for more systematically coordinating publication and approval of amendments that affect multiple rules across different advisory committees. The chair recommended that the Rules Committee Support Office lead the coordination effort over the next year and that the Committee then evaluate whether further refinement of the process is needed. Judge Ikuta next explained and sought approval for a package of conforming amendments:

RULE 5005(A)(2) – Judge Ikuta said that the proposed amendments to Rule 5005(a)(2) would make the rule consistent with the proposed amendment to Civil Rule 5(d)(3).

RULES 8002(C), 8011(A)(2)(C), OFFICIAL FORM 417A, RULE 8002(B), RULES 8013, 8015, 8016, 8022, OFFICIAL FORM 417C, PART VIII APPENDIX, AND RULE 8017 – Judge Ikuta next discussed proposed changes to Rules 8002(c), 8011(a)(2)(C), and Official Form 417A; Rule 8002(b) (regarding timeliness of tolling motions); Rules 8013, 8015, 8016, 8022, Official Form 417C, and Part VIII Appendix (regarding length limits), and Rule 8017 (regarding amicus filings). The rule and form changes were proposed to conform to pending and proposed changes to the Federal Rules of Appellate Procedure.

RULE 8002(A)(5) – The new subdivision (a)(5) to Rule 8002 includes a provision similar to FRAP 4(a)(7) specifying when a judgment or order is “entered” for purposes of appeal.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the package of conforming amendments to Rules 5005(a)(2), 8002(C), 8011(a)(2)(C), Official Form 417C, Part VIII Appendix, Rule 8017, and Rule 8002(a)(5) for publication for public comment.**

RULES 3015 AND 3015.1 – Judge Ikuta explained that the Advisory Committee published the first version of the plan form and nine related rule amendments in August 2013. The Advisory Committee received a lot of comments, made significant changes, and republished in 2014. During the second publication, the Advisory Committee again received many comments, including one comment signed by 144 bankruptcy judges who opposed a national official form for chapter 13 plans. Late in the second comment period, the Advisory Committee received a comment proposing that districts be allowed to opt out of the national plan if their local plan form met certain requirements. Many of the bankruptcy judges who opposed a national plan form supported the “opt-out” proposal.

At its fall 2015 meeting, the Advisory Committee approved the national plan form and related rule amendments, but voted to defer submitting those items for final approval pending further consideration of the opt-out proposal. The Advisory Committee reached out to bankruptcy interest groups, made refinements to the opt-out proposal, and received support from most interested parties, including many of the 144 opposing judges.

The proposed amendment to Rule 3015 and new Rule 3015.1 would implement the opt-out provision. Rule 3015 would require that the national chapter 13 plan form be used unless a district adopts a local district-wide form plan that complies with requirements set forth in proposed new Rule 3015.1. The Advisory Committee determined that a third publication period would allow for full vetting of the opt-out proposal, but it recommended a shortened three-month public comment period because of the narrow focus of the proposed change. To avoid confusion, the Advisory Committee recommended that opt-out rules be published in July 2016, a month earlier than the rules and forms to be published in August 2016.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendments to Rule 3015 and 3015.1 for publication for public comment.**

RULE 8006 – The Advisory Committee proposed to amend subdivision (c) of Rule 8006 to allow a bankruptcy court, bankruptcy appellate panel, or district court to file a statement in support of or against a direct appeal certification filed by the parties.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 8006 for publication for public comment.**

RULE 8018.1 – This new rule would help guide district courts in light of the Supreme Court’s *Stern v. Marshall* trilogy of cases (*Stern*, *Arkison* and *Wellness*). Proposed Rule 8018.1 would address a situation where the bankruptcy court has mistakenly decided a *Stern* claim by allowing the district court to treat the bankruptcy court’s erroneous final judgment as proposed findings of fact and conclusions of law to be decided de novo without having to remand the case to the bankruptcy court.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed Rule 8018.1 for publication for public comment.**

RULE 8023 – The proposed amendment to Rule 8023 would add a cross-reference to Rule 9019 to remind the parties that when they enter a settlement and move to dismiss an appeal, they may first need to obtain the bankruptcy court’s approval of the settlement first.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Rule 8023 for publication for public comment.**

OFFICIAL FORM 309F – Judge Ikuta said that the Advisory Committee recommended publication of amendments to five official bankruptcy forms. The first of the five forms was a proposed amendment to Official Form 309F. The form currently requires that a creditor who wants to assert that certain corporate and partnership debts are not dischargeable must file a complaint by a specific deadline. A recent district court decision evaluated the relevant statutory provisions and concluded that the form is incorrect and that no deadline should be imposed. The Advisory Committee agreed that the statute is ambiguous, and therefore proposed that Official Form 309F be amended to avoid taking a position.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Official Form 309F for publication for public comment.**

OFFICIAL FORMS 25A, 25B, 25C, AND 26 – Four forms, Official Forms 25A, 25B, 25C (the small business debtor forms), and 26 (Periodic Report Regarding Value, Operations, and Profitability) were renumbered as 425A, 425B, 425C and 426 to conform with the remainder of the Forms Modernization Project, and revised to be easier to understand and more consistent with the Bankruptcy Code.

Upon a motion by a member, seconded by another, and by voice vote: **The Committee unanimously approved the proposed amendment to Official Forms 25A, 25B, 25C, 26 for publication for public comment.**

### *Information Items*

Judge Ikuta, Professor Elizabeth Gibson, and Professor Michelle Harner discussed the Advisory Committee’s two information items. The first item was about the status of the Advisory Committee’s proposal to add a new subdivision (h) to Rule 9037 in response to a suggestion

from CACM. Judge Ikuta and Professor Gibson explained that although the Advisory Committee approved an amendment, it decided to delay its recommendation for publication until the Advisory Committees for Appellate, Criminal and Civil Rules can decide whether to add a similar procedure to their privacy rules. Professor Harner summarized the second information item regarding the Advisory Committee’s decision not to recommend any changes at this time to Rule 4003(c) in response to a suggestion.

### **REPORT OF THE ADMINISTRATIVE OFFICE**

STRATEGIC PLAN FOR THE FEDERAL JUDICIARY – Rebecca Womeldorf discussed the Executive Committee’s *Strategic Plan for the Federal Judiciary* which lays out various goals and priorities for the federal judiciary. She invited members to review this report and offer any input or feedback that they might have to her or Judge Sutton for inclusion in communications back to the Executive Committee.

LEGISLATIVE REPORT – There are bills currently pending in the House of Representatives and Senate intended to prevent proposed Criminal Rule 41 from becoming effective. Members of the Rules Committee have discussed this proposed rule with various members of Congress to respond to their concerns and explain the purpose and limited scope of the proposed rule.

### **CONCLUDING REMARKS**

Judge Sutton thanked the Reporters for all their impressive work and Rebecca Womeldorf and the Rules Committee Support Office for helping to coordinate the meeting. Professor Coquillette thanked Judge Sutton again for all of his work as Chair of the Standing Committee over the past four years. Judge Sutton concluded the meeting. The Standing Committee will next meet in Phoenix, Arizona, on January 3–4, 2017.

Respectfully submitted,

Rebecca A. Womeldorf  
Secretary, Standing Committee

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# TAB 1C

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1(c): INTEGRATING RULE 4(m) AMENDMENTS: 2015 ACTUAL, 2016 PROPOSED

An amendment of Rule 4(m) was published in 2014 to add Rule 4(h)(2) to the list of provisions exempted from the presumptive time limit for serving the summons and complaint. As published and throughout the process, including adoption by the Supreme Court, the rule text failed to include the amendment that became effective on December 1, 2015, adding service of notice under Rule 71.1(d)(3)(A) to the list of exemptions.

To make sure that Rule 71.1(d)(3)(A) retains its exemption if Congress approves the addition of Rule 4(h)(2) to the list, Judge Sutton has advised Congress that if it approves the current amendment Rule 71.1(d)(3)(A) will remain in the list of exemptions.

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

JEFFREY S. SUTTON  
CHAIR

REBECCA A. WOMELDORF  
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON  
APPELLATE RULES

SANDRA SEGAL IKUTA  
BANKRUPTCY RULES

JOHN D. BATES  
CIVIL RULES

DONALD W. MOLLOY  
CRIMINAL RULES

WILLIAM K. SESSIONS III  
EVIDENCE RULES

August 31, 2016

Hand-Delivered

Honorable Joseph R. Biden, Jr.  
President, United States Senate  
Washington, D.C. 20510

Dear Mr. President:

On April 28, 2016, the United States Supreme Court submitted to Congress the amendments to the Federal Rules of Civil Procedure that it adopted under Section 2072 of Title 28, United States Code. As the Rules Enabling Act provides, those amendments will become effective on December 1, 2016, unless otherwise provided by law.

I write regarding the pending amendment to Federal Rule of Civil Procedure 4(m), which adds a reference to “4(h)(2)” to the existing rule. It comes one year after another change to Rule 4(m) that became effective on December 1, 2015. Neither rule has generated any controversy or, for that matter, much interest. I write out of an abundance of caution to underscore the net effect of the two successive amendments to Rule 4(m) based on an inquiry from a law professor who raised a question about the interrelation of the two amendments.

Rule 4(m) addresses the time limit for service of a civil summons and lists certain types of service to which Rule 4(m) does not apply. Prior to 2015, the last clause of Rule 4(m) stated:

“This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).”

In 2015, Rule 4(m) was amended to add the following bolded phrase:

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

The 2016 proposed amendment to Rule 4(m), now pending before Congress, adds the following bolded language but does not mention the language added and approved in 2015:

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

The minor amendment to Rule 4(m) now pending before Congress does not purport to undo the 2015 amendment. It adds “4(h)(2)” but does not delete “or to service of a notice under Rule 71.1(d)(3)(A).” The “or to service...” phrase was not included at the beginning of the current Rules Enabling Act process because it had not yet been approved. Indeed, that change did not become effective until after the notice and comment period had ended and after the relevant rules committees and the Judicial Conference had approved the amendment adding 4(h)(2).

The materials forwarded to Congress on April 28, 2016, confirm the point. To delete text from an approved rule, the Rules Committee would have to go through the same Rules Enabling Act procedure it would have utilized if it had wanted to add text. To delete text, it would have to provide Congress with a redline version of the text showing the “strike through” of the deleted material. And it would explain the deletion in the Committee Note. Here we have done neither of those things. The redline version of the proposed 2016 amendment does not have a “strike through” of the language regarding Rule 71.1(d)(3)(A). And the Committee Note for the 2016 amendment explains the addition of “4(h)(2)” but does not mention any deletion of the Rule 71.1 language added in 2015.

Any potential confusion arises in part from the multi-year nature of the Rules Enabling Act process. We published for comment the addition of “4(h)(2)” at the same time that we sought approval of the addition of “Rule 71.1(d)(3)(A).” Because the Rule 71.1(d)(3)(A) language had not yet been formally approved, we could not include it in the text sent out for public comment as if it had been approved. After the Rule 71.1(d)(3)(A) language was approved, it would have made sense to update the language sent out for public comment and to include it in the latest submission to Congress. That realization has prompted us to make a change in our procedures. In the future, we will make sure that, when multiple proposals add different, complementary language to a particular rule and are submitted to Congress in close proximity to one another, each version contains the most up-to-date version of the proposed rule. But any omission this time does not change the net effect of the two valid amendments approved through the Rules Enabling Act process.

To conclude: if the current amended rule pending before Congress goes into effect on December 1, 2016, it henceforward will read:

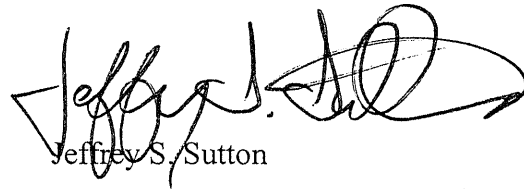
Honorable Joseph R. Biden, Jr.  
August 31, 2016  
Page 3

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

In other words, if the 2016 amendments are approved, both the 2015 and 2016 changes will be in effect.

Please feel free to contact me (614-849-0134) or Rebecca Womeldorf in the Rules Committee Support Office at the Administrative Office of the U.S. Courts (202-502-1355) if you have any questions.

Sincerely,



Jeffrey S. Sutton

JSS:jmf

cc: Scott S. Harris, Clerk of the Supreme Court of the United States  
James C. Duff, Director of the Administrative Office of the U.S. Courts

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August 31, 2016

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Dear Mr. Speaker:

On April 28, 2016, the United States Supreme Court submitted to Congress the amendments to the Federal Rules of Civil Procedure that it adopted under Section 2072 of Title 28, United States Code. As the Rules Enabling Act provides, those amendments will become effective on December 1, 2016, unless otherwise provided by law.

I write regarding the pending amendment to Federal Rule of Civil Procedure 4(m), which adds a reference to “4(h)(2)” to the existing rule. It comes one year after another change to Rule 4(m) that became effective on December 1, 2015. Neither rule has generated any controversy or, for that matter, much interest. I write out of an abundance of caution to underscore the net effect of the two successive amendments to Rule 4(m) based on an inquiry from a law professor who raised a question about the interrelation of the two amendments.

Rule 4(m) addresses the time limit for service of a civil summons and lists certain types of service to which Rule 4(m) does not apply. Prior to 2015, the last clause of Rule 4(m) stated:

“This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).”

In 2015, Rule 4(m) was amended to add the following bolded phrase:

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

The 2016 proposed amendment to Rule 4(m), now pending before Congress, adds the following bolded language but does not mention the language added and approved in 2015:

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

The minor amendment to Rule 4(m) now pending before Congress does not purport to undo the 2015 amendment. It adds “4(h)(2)” but does not delete “or to service of a notice under Rule 71.1(d)(3)(A).” The “or to service...” phrase was not included at the beginning of the current Rules Enabling Act process because it had not yet been approved. Indeed, that change did not become effective until after the notice and comment period had ended and after the relevant rules committees and the Judicial Conference had approved the amendment adding 4(h)(2).

The materials forwarded to Congress on April 28, 2016, confirm the point. To delete text from an approved rule, the Rules Committee would have to go through the same Rules Enabling Act procedure it would have utilized if it had wanted to add text. To delete text, it would have to provide Congress with a redline version of the text showing the “strike through” of the deleted material. And it would explain the deletion in the Committee Note. Here we have done neither of those things. The redline version of the proposed 2016 amendment does not have a “strike through” of the language regarding Rule 71.1(d)(3)(A). And the Committee Note for the 2016 amendment explains the addition of “4(h)(2)” but does not mention any deletion of the Rule 71.1 language added in 2015.

Any potential confusion arises in part from the multi-year nature of the Rules Enabling Act process. We published for comment the addition of “4(h)(2)” at the same time that we sought approval of the addition of “Rule 71.1(d)(3)(A).” Because the Rule 71.1(d)(3)(A) language had not yet been formally approved, we could not include it in the text sent out for public comment as if it had been approved. After the Rule 71.1(d)(3)(A) language was approved, it would have made sense to update the language sent out for public comment and to include it in the latest submission to Congress. That realization has prompted us to make a change in our procedures. In the future, we will make sure that, when multiple proposals add different, complementary language to a particular rule and are submitted to Congress in close proximity to one another, each version contains the most up-to-date version of the proposed rule. But any omission this time does not change the net effect of the two valid amendments approved through the Rules Enabling Act process.

To conclude: if the current amended rule pending before Congress goes into effect on December 1, 2016, it henceforward will read:

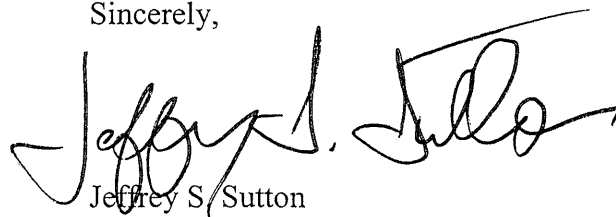
Honorable Paul D. Ryan  
August 31, 2016  
Page 3

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

In other words, if the 2016 amendments are approved, both the 2015 and 2016 changes will be in effect.

Please feel free to contact me (614-849-0134) or Rebecca Womeldorf in the Rules Committee Support Office at the Administrative Office of the U.S. Courts (202-502-1355) if you have any questions.

Sincerely,



Jeffrey S. Sutton

JSS:jmf

cc: Scott S. Harris, Clerk of the Supreme Court of the United States  
James C. Duff, Director of the Administrative Office of the U.S. Courts

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# TAB 2

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 14, 2016

1 The Civil Rules Advisory Committee met at the Tideline Hotel  
2 in Palm Beach, Florida, on April 14, 2016. (The meeting was  
3 scheduled to carry over to April 15, but all business was concluded  
4 by the end of the day on April 14.) Participants included Judge  
5 John D. Bates, Committee Chair, and Committee members John M.  
6 Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Robert Michael Dow,  
7 Jr.; Judge Joan M. Ericksen; Parker C. Folse, Esq. (by telephone);  
8 Professor Robert H. Klonoff; Judge Scott M. Matheson, Jr.; Hon.  
9 Benjamin C. Mizer; Judge Brian Morris; Judge Solomon Oliver, Jr.;  
10 Judge Gene E.K. Pratter; Virginia A. Seitz, Esq.; and Judge Craig  
11 B. Shaffer. Former Committee Chair Judge David G. Campbell and  
12 former member Judge Paul W. Grimm also participated by telephone.  
13 Professor Edward H. Cooper participated as Reporter, and Professor  
14 Richard L. Marcus participated as Associate Reporter. Judge Jeffrey  
15 S. Sutton, Chair, Judge Neil M. Gorsuch, liaison (by telephone),  
16 and Professor Daniel R. Coquillette, Reporter, represented the  
17 Standing Committee. Judge Arthur I. Harris participated as liaison  
18 from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the  
19 court-clerk representative, also participated. The Department of  
20 Justice was further represented by Joshua Gardner, Esq.. Rebecca A.  
21 Womeldorf, Esq., Derek Webb, Esq., and Julie Wilson, Esq.,  
22 represented the Administrative Office. Judge Jeremy Fogel and Emery  
23 G. Lee, Esq., attended for the Federal Judicial Center. Observers  
24 included Henry D. Fellows, Jr. (American College of Trial Lawyers);  
25 Joseph D. Garrison, Esq. (National Employment Lawyers Association);  
26 Alex Dahl, Esq. (Lawyers for Civil Justice); John K. Rabiej, Esq.  
27 (Duke Center for Judicial Studies); Natalia Sorgente (American  
28 Association for Justice); John Vail, Esq.; Valerie M. Nannery,  
29 Esq.; Henry Kelsen, Esq.; and Benjamin Robinson, Esq.

30 Judge Bates opened the meeting by welcoming everyone. He noted  
31 that Judge Pratter and Elizabeth Cabraser have completed serving  
32 their second terms and are due to rotate off the Committee. "We  
33 will miss you, but hope to see you frequently in the future." Judge  
34 Sutton also is completing his term as Chair of the Standing  
35 Committee, and Judge Harris is concluding his term with the  
36 Bankruptcy Rules Committee. They too will be missed.

37 Benjamin Mizer introduced Joshua Gardner, who will succeed Ted  
38 Hirt as a Department of Justice representative to the Committee.  
39 Gardner is a highly valued member of the Department, and makes time  
40 to teach civil procedure classes as an adjunct professor.

41 Judge Bates noted that the proposed amendments to Civil Rules  
42 4, 6, and 82 remain pending in the Supreme Court. On this front,  
43 "no news is good news." The Minutes for the January meeting of the

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44 Standing Committee are in the agenda book for this meeting. The  
45 package of six proposed amendments to Rule 23 that had advanced at  
46 the November meeting of this Committee was discussed. The Rule 23  
47 discussion also described the decision to defer action on the  
48 growing number of decisions grappling with "ascertainability" as a  
49 criterion for class certification and with the questions raised by  
50 different forms of "pick-off" strategies that defendants use in  
51 attempts to moot individual class representatives and thus defeat  
52 class certification. The Rule 62 stay-of-execution proposal also  
53 was discussed. Apart from specific rules proposals, the ongoing  
54 efforts to educate bench and bar on the December 1, 2015 package of  
55 amendments were described. These efforts are "important,  
56 essential." Discussion also included the continuing efforts to  
57 develop pilot projects to test reforms that do not yet seem ready  
58 to be adopted as national rules.

59 *November 2015 Minutes*

60 The draft minutes of the November 2015 Committee meeting were  
61 approved without dissent, subject to correction of typographical  
62 and similar errors.

63 *Legislative Report*

64 Rebecca Womeldorf reported that, apart from the bills noted at  
65 the November meeting, there appear to be no new legislative  
66 activities the Committee should be tracking.

67 *Rule 5*

68 The history of the Committee's work on the e-filing and e-  
69 service provisions of Rule 5 was recounted. A year ago the  
70 Committee voted to recommend publication of amendments to reflect  
71 the growing maturity of electronic filing and service. Moving in  
72 parallel, the Criminal Rules Committee began a more ambitious  
73 project. Criminal Rule 49 has invoked the Civil Rules provisions  
74 for filing and service. The Criminal Rules Committee began to  
75 consider the possibility of adopting a complete and independent  
76 rule of their own. This development counseled delay in the Civil  
77 Rules proposals. The e-filing and e-service provisions in the  
78 Appellate, Bankruptcy, Civil, and Criminal Rules were developed  
79 together. The value of adopting identical provisions in each set of  
80 rules is particularly high with respect to filing and service,  
81 although it is recognized that differences in the rules may be  
82 justified by differences in the characteristics of the cases  
83 covered by each set of rules. The plan to recommend publication in  
84 2015 was deferred.

85 The Criminal Rules Committee developed an independent Rule 49.

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86 The Subcommittee that developed the rule welcomed participation in  
87 their work and conference calls by representatives of the Civil  
88 Rules Committee. The Civil Rules provisions proposed now were  
89 substantially improved as a result of these discussions. The  
90 differences from the proposals developed a year ago are discussed  
91 with the description of the current proposals.

92 Although filing is covered by Rule 5(d), which comes after the  
93 service provisions of Rule 5(b) in the sequence of subdivisions, it  
94 is easier to begin discussion with filing, which is the act that  
95 leads to service.

96 Present Rule 5(d)(3) allows e-filing when allowed by local  
97 rule, and also provides that a local rule may require e-filing  
98 "only if reasonable exceptions are allowed." Almost all districts  
99 have responded to the great advantages of e-filing by making it  
100 mandatory by requiring consent in registering as a user of the  
101 court's system. Reflecting this reality and wisdom, proposed Rule  
102 5(d)(3) makes e-filing mandatory, except for filings "made by a  
103 person proceeding without an attorney."

104 Pro se litigants have presented more difficulty. Last year's  
105 draft also required e-filing by persons proceeding without an  
106 attorney, but directed that exceptions must be allowed for good  
107 cause and could be made by local rule. Work with the Criminal Rules  
108 Subcommittee led to a revision. The underlying concern is that many  
109 pro se litigants, particularly criminal defendants, may find it  
110 difficult or impossible to work successfully with the court's  
111 system. The current proposal allows e-filing by a person proceeding  
112 without an attorney "only if allowed by court order or by local  
113 rule." A further question is whether a pro se party may be required  
114 to engage in e-filing. Some courts have developed successful  
115 programs that require e-filing by prisoners. The programs work  
116 because staff at the prison convert the prisoners' papers into  
117 proper form and actually accomplish the filing. This provides real  
118 benefits to all parties, including the prisoners. The Criminal  
119 Rules Subcommittee, however, has been concerned that permitting a  
120 court to require e-filing might at times have the effect of denying  
121 access to court. Their concern with the potential provisions for  
122 Rule 5 arises from application of Rule 5 in proceedings governed by  
123 the Rules for habeas corpus and for § 2255 proceedings. Discussion  
124 of these issues led to agreement on a provision in proposed Rule  
125 5(d)(3)(B) that would allow the court to require e-filing by a pro  
126 se litigant only by order, "or by a local rule that allows  
127 reasonable exceptions."

128 e-Service is governed by present Rule 5(b)(2)(E) and (3).  
129 (b)(2)(E) allows service by electronic means "that the person  
130 consented to in writing." (b)(3) allows a party to "use" the

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131 court's electronic facilities if authorized by local rule. Most  
132 courts now exact consent as part of registering to use the court's  
133 system. Proposed Rule 5(b)(2)(E) reflects this practice by  
134 eliminating the requirement for consent as to service through the  
135 court's facilities. One of the benefits of consulting with the  
136 Criminal Rules Subcommittee has been to change the reference to  
137 "use" of the court's system. The filing party does not take any  
138 further steps to accomplish service – the system does that on its  
139 own. So the rule now provides for serving a paper by sending to a  
140 registered user "by filing it with the court's electronic filing  
141 system." Other means of e-service continue to require consent of  
142 the person to be served. The proposal advanced last year eliminated  
143 the requirement that the consent be in writing. The idea was that  
144 consent often is given, appropriately enough, by electronic  
145 communications. The Criminal Rules Subcommittee was uncomfortable  
146 with this relaxation. The current proposal carries forward the  
147 requirement that consent to e-service be in writing for all  
148 circumstances other than service by filing with the court.

149 The direct provision for service by e-filing with the court in  
150 proposed Rule 5(b)(2)(E) makes present Rule 5(b)(3) superfluous.  
151 The national rule will obviate any need for local rules authorizing  
152 service through the court's system. The proposals include  
153 abrogation of Rule 5(b)(3).

154 Finally, the recommendations carry forward the proposal to  
155 allow a Notice of Electronic Filing to serve as a certificate of  
156 service. Present Rule 5(d)(1) would be carried forward as  
157 subparagraph (A), which would direct filing without the present  
158 "together with a certificate of service." A new subparagraph (B)  
159 would require a certificate of service, but also provide that a  
160 Notice of Electronic Filing constitutes a certificate of service on  
161 any person served by filing with the court's electronic-filing  
162 system. It does not seem necessary to add to this provision a  
163 provision that would defeat reliance on a Notice of Electronic  
164 Filing if the serving party learns that the paper did not reach the  
165 person to be served. If it did not reach the person, there is no  
166 service to be covered by a certificate of service.

167 Discussion noted the continuing uncertainties about amending  
168 the provisions for e-filing and e-service without addressing the  
169 many parallel provisions that call for acts that are not filing or  
170 service. Many rules call for such acts as mailing, or delivering,  
171 or sending, or notifying. Similar words that appear less frequently  
172 include made, provide, transmit[ted] return, sequester, destroy,  
173 supplement, correct, and furnish. Rules also refer to things  
174 written or to writing, affidavit, declaration, document, deposit,  
175 application, and publication (together with newspaper). On  
176 reflection, it appears that the question of refitting these various

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177 provisions for the electronic era need not be confronted in  
178 conjunction with the Rule 5 proposals. Rule 5 provides a general  
179 directive for the many rules provisions that speak to serving and  
180 filing. It can safely be amended without interfering with the rules  
181 that govern acts that are similar but do not of themselves involve  
182 serving or filing.

183 It was noted that the parallel consideration of e-filing and  
184 e-service rules in the several advisory committees means that some  
185 work remains to be done in achieving as nearly identical drafting  
186 as possible, consistent with the differences in context that may  
187 justify some variations in substance. What appear to be style  
188 differences may in fact be differences in substance. It was agreed  
189 that the Committee Chair has authority to approve wording changes  
190 that resolve style differences as the several committees work to  
191 generate proposals to present to the Standing Committee in June. If  
192 some changes in substance seem called for, they likely will be of  
193 a sort that can be resolved by e-mail vote.

194 *Rule 62: Stays of Execution*

195 Judge Bates introduced the Rule 62 proposals by noting that  
196 this project has been developed as a joint effort with the  
197 Appellate Rules Committee. A Rule 62 Subcommittee chaired by Judge  
198 Matheson has developed earlier versions and the current proposal.

199 Judge Matheson noted that earlier Rule 62 proposals were  
200 discussed at the April 2015 and November 2015 meetings. The  
201 Subcommittee worked to revise and simplify the proposal in response  
202 to the concerns expressed at the November meeting. The Subcommittee  
203 reached consensus on the three changes that provided the initial  
204 impetus for taking on Rule 62. The proposal: (1) extends the  
205 automatic stay from 14 days to 30 days, and eliminates the "gap"  
206 between expiration of the stay on the 14th day and the express  
207 authority in Rule 62(b) to order a stay pending disposition of Rule  
208 50, 52, 56, or 60 motions made as late as 28 days after judgment is  
209 entered; (2) expressly recognizes that a single security can be  
210 posted to cover the period between expiration of the automatic stay  
211 and completion of all proceedings on appeal; and (3) expressly  
212 recognizes forms of security other than a bond.

213 Discussion in the Standing Committee in January focused on  
214 only one question: why is the automatic stay extended to 30 days  
215 rather than 28? The answer seemed to be accepted – it may be 28  
216 days before the parties know whether a motion that suspends appeal  
217 time will be made, and if appeal time is not suspended 30 days  
218 allows a brief interval to arrange security before expiration of  
219 the 30-day appeal time that governs most cases.

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220 After the Standing Committee meeting, the Subcommittee made  
221 one change in the proposed rule text, eliminating these words from  
222 proposed (b)(1): " \* \* \* a stay that remains in effect until a  
223 designated time[, which may be as late as issuance of the mandate  
224 on appeal,] \* \* \*." The Subcommittee concluded that it may be  
225 desirable to continue the stay beyond issuance of the mandate.  
226 There may be a petition for rehearing, or a petition for  
227 certiorari, or post-mandate proceedings in the court of appeals.  
228 And the Committee Note was shortened by nearly forty percent.

229 Discussion began with a question about proposed Rule 62(b)(1):  
230 "The court may at any time order a stay that remains in effect  
231 until a designated time, and may set appropriate terms for security  
232 or deny security." Present Rule 62 "does not mention a stay without  
233 a bond. It happens, but ordinarily only in extraordinary  
234 circumstances." If there is no intent to change present practice,  
235 something should be said to indicate that a stay without security  
236 is disfavored. And it might help to transpose proposed paragraph  
237 (2) with (1), so that the nearly automatic right to a stay on  
238 posting bond comes first. That would emphasize the importance of  
239 security.

240 Judge Matheson noted that earlier drafts had expressly  
241 recognized the court's authority to deny a stay for good cause, and  
242 to dissolve a previously issued stay. Those provisions were  
243 deleted, but that was because they would have enabled the court to  
244 defeat what has been seen as a nearly automatic right to obtain a  
245 stay on posting security. Proposed (b)(1) is all that remains. In  
246 a sense it carries over from the Committee's first recent  
247 encounter with Rule 62. Before the Time Project, the automatic stay  
248 lasted for 10 days and the post-judgment motions that may suspend  
249 appeal time had to be made within 10 days. The Time Project created  
250 the "gap" in present Rule 62 by extending the automatic stay only  
251 to 14 days, while extending the time for motions under Rules 50,  
252 52, and 59 to 28 days. A judge asked the Committee whether the  
253 court can order a stay after 14 days but before a post-judgment  
254 motion is made. The Committee concluded at the time that the court  
255 always has inherent power to control its own judgment, including  
256 authority to enter a stay during the "gap" without concern about  
257 any negative implications from the express authority to enter a  
258 stay pending disposition of a motion once the motion is actually  
259 made. The Subcommittee thought that proposed (b)(1) is a useful  
260 reflection of abiding inherent authority.

261 This observation was met by a counter-observation: Is the  
262 proposed rule simply an attempt to codify existing practice? If so,  
263 should it recognize the cases that say that only extraordinary  
264 circumstances justify a stay without security? The need to be clear  
265 about the relationship with present practice was pointed out from

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266 a different perspective. The Committee Note says that proposed  
267 subdivisions (c) and (d) consolidate the present provisions for  
268 stays in actions for an injunction or receivership, and for a  
269 judgment or order that directs an accounting in an action for  
270 patent infringement. Does that imply that some changes in present  
271 practice are embodied in proposed subdivision (b), as they are in  
272 proposed subdivision (a)? The response was that proposed  
273 subdivision (b)(2) clearly incorporates several changes over  
274 practice under the supersedeas bond provisions of present Rule  
275 62(d). Under the proposed rule, a party may obtain a stay by bond  
276 at any time after judgment enters, without waiting for an appeal to  
277 be taken. The new rule would expressly recognize a single security  
278 for the duration of post-judgment proceedings in the district court  
279 and all proceedings on appeal. It would expressly recognize forms  
280 of security other than a bond. So too, the automatic stay is  
281 extended, and the court is given express power to "order  
282 otherwise." The decision not to change the meaning of the present  
283 provisions that would be consolidated in proposed Rule 62(c) and  
284 (d) does not carry any implications, either way, as to proposed  
285 Rule 62(b)(1).

286 Judge Matheson asked whether, if a standard for denying a stay  
287 is to be written into rule text, it should be "good cause" or  
288 "extraordinary circumstances." Some uncertainty was expressed about  
289 what standard might be written in. "Extraordinary circumstances"  
290 may be too narrow.

291 A Committee member asked what experience the district-judge  
292 members have with these questions. The answers were that judges  
293 seldom encounter questions about stays of execution. One judge  
294 suggested that because questions seldom arise, judges will read the  
295 rule text carefully when a question does arise. It is important  
296 that the rule text say exactly what the rule means. A similar  
297 suggestion was that it would be better to resist any temptation to  
298 supplement rule text with more focused advice in the Committee  
299 Note. The Committee should decide on the proper approach and embody  
300 it in the rule text.

301 Proposed Rule 62(b)(1) will be further considered by the  
302 Subcommittee, consulting with Judge Gorsuch as liaison from the  
303 Standing Committee, with the purpose of reaching consensus on a  
304 proposal that can be advanced to the Standing Committee in June as  
305 a recommendation for publication. If changes are made that require  
306 approval by this Committee, Committee approval will be sought by  
307 electronic discussion and vote.

308 *Rule 23*

309 Judge Dow introduced the Rule 23 Subcommittee report. The

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310 Subcommittee continued to work hard on the package of six proposals  
311 that was presented for consideration at the November Committee  
312 meeting. Much of the work focused on the approach to objectors, and  
313 particularly on paying objectors to forgo or abandon appeals.  
314 Working in consultation with representatives of the Appellate Rules  
315 Committee, the drafts that would have included amendments of  
316 Appellate Rule 42 have been abandoned. The current proposal would  
317 amend only Civil Rule 23(e). In addition, a seventh proposal has  
318 been added. This proposal would revise the Rule 23(f) amendment to  
319 include a 45-day period to seek permission for an interlocutory  
320 appeal when the United States is a party. It was developed with the  
321 Department of Justice, and had not advanced far enough to be  
322 presented at the November meeting.

323 The rule texts shown in the agenda materials, pp. 96-99,  
324 have been reviewed by the style consultants. Only a few differences  
325 of opinion remain.

326 Notice. Two of the proposed amendments involve Rule 23(c)(2)(B).  
327 The first reflects a common practice that, without the amendment,  
328 may seem to be unauthorized. When a class has not yet been  
329 certified, it has become routine to address a proposal to certify  
330 a class and approve a settlement by giving "preliminary"  
331 certification and sending out a notice that, in a (b)(3) class,  
332 includes a deadline for requesting exclusion, as well as notice of  
333 the right to appear and to object. The so-called preliminary  
334 certification is not really certification. Certification occurs  
335 only on final approval of the settlement and the class covered by  
336 the settlement. This amendment would expand the notice provision to  
337 include an order "ordering notice under Rule 23(e)(1) to a class  
338 proposed to be certified for purposes of settlement under Rule  
339 23(b)(3)." That makes it clear that an opt-out deadline is properly  
340 set by this notice. Generally, settlement agreements call for an  
341 opt-out period that expires before actual certification with final  
342 approval of the settlement.

343 The second change in Rule 23(c)(2)(B) is to address the means  
344 of notice. The Subcommittee worked diligently in negotiating the  
345 words and sequence of words. The Note explains that the choice of  
346 means of notice is a holistic, flexible concept. Different sorts of  
347 class members may react differently to different media. A rough  
348 illustration is provided by the quip that a class of people who are  
349 of an age to need hearing aids respond by reading first-class mail,  
350 and trashing e-mail. A class of younger people who wear ear buds,  
351 not hearing aids, trash postal mail and read e-mail. The Note  
352 emphasizes that no one form of notice is given primacy over other  
353 forms. The Note further emphasizes the need for care in developing  
354 the form and content of the notice.

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355 Discussion began by expressing discomfort with the direction  
356 that notice "must" include individual notice to all members who can  
357 be identified through reasonable effort. The proposal carries  
358 forward the language of the present rule, but there is a continuing  
359 tension between "must" and the softer requirement that notice only  
360 be the best that is practicable under the circumstances. A  
361 determination of practicability entails a measure of discretion.  
362 Part of the tension arises from the insistence of the style  
363 consultants that the single sentence drafted by the Subcommittee  
364 was too long: "the best notice that is practicable under the  
365 circumstances, - by United States mail, electronic means, or other  
366 appropriate means - including individual notice to all members who  
367 can be identified through reasonable effort."

368 Further discussion reflected widespread agreement that "the  
369 best notice that is practicable under the circumstances" and  
370 "reasonable effort" establish a measure of discretion that may be  
371 thwarted by the two-sentence structure that, in a second stand-  
372 alone sentence, says that "the notice must include individual  
373 notice to all members who can be identified through reasonable  
374 effort." The style change seems to approach a substantive change.  
375 It will be better to draft with only one "must," so as to emphasize  
376 what is the best practicable notice. That approach will avoid any  
377 unintended intrusion on the process by which courts elaborate on  
378 the meaning of "practicable" and "reasonable."

379 One suggested remedy was to delete from rule text the  
380 references to examples of means - "United States mail, electronic  
381 means, or other appropriate means." The examples could be left to  
382 the Committee Note. But that would strain the practice that bars  
383 Note advice that is not supported by a change in rule text.

384 As to the choice of means, it was noted that some comments  
385 have suggested that careful analysis of actual responses in many  
386 cases shows that postal mail usually works better than electronic  
387 notice. The Committee Note may benefit from some revision. But e-  
388 mail notice is happening now, and it may help to provide official  
389 authority for it.

390 The drafting question was resolved by adopting this  
391 suggestion:

392 \* \* \* the court must direct to class members the best  
393 notice that is practicable under the circumstances,  
394 including individual notice to all members who can be  
395 identified through reasonable effort. The notice may be  
396 by United States mail, electronic means[, ] or other  
397 appropriate means.

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398 As revised, the Committee approved recommendation of this  
399 proposal for Standing Committee approval to publish this summer.

400 Frontloading. Proposed Rule 23(e)(1)(A) focuses on ensuring that  
401 the court is provided ample information to support the  
402 determination whether to send out notice of a proposed settlement  
403 to a proposed class. The underlying concern is that the parties to  
404 a proposed settlement may join in seeking what has been  
405 inaccurately called preliminary certification and notice without  
406 providing the court much of the information that bears on final  
407 review and approval of the settlement. If important information  
408 comes to light only after the notice stage and at the final-  
409 approval stage, there is a risk that the settlement will not  
410 withstand close scrutiny. The results are costly, including a  
411 second round of notice to a perhaps disillusioned class if the  
412 action persists through a second attempt to settle and certify.

413 Early drafting efforts included a long list of categories of  
414 information the proponents of settlement must provide to the court.  
415 The list has been shortened to more general comments in the  
416 Committee Note. The rule text also has been changed to clarify that  
417 it is not the court's responsibility to elicit the required  
418 information from the parties, rather it is the parties that have  
419 the duty to provide the information to the court.

420 The idea is transparency and efficiency. The information,  
421 initially required to support the court's determination whether to  
422 send notice, also supports the functions of the notice itself. It  
423 enables members to make better-informed decisions whether to opt  
424 out, and whether to object. Good information may show there is no  
425 reason to object. Or it may show that there is reason to object,  
426 and provide the support necessary to make a cogent objection.

427 The Subcommittee discussed at length the question whether the  
428 rule text should direct the parties to submit all information that  
429 will bear on the ultimate decision whether to certify the class  
430 proposed by the settlement and approve the settlement. The  
431 difficulty is that the objection process may identify a need for  
432 more information. And in any event, the parties may not appreciate  
433 the potential value of some of the information they have. It would  
434 be too rigid to prohibit submission at the final-approval stage of  
435 any information the parties had at the time of seeking approval of  
436 notice to the class. But at the same time, it is important that the  
437 parties not hold back useful information that they have. Alan  
438 Morrison has suggested that the Note should say something like  
439 this: "Ordinarily, the proponents of the settlement should provide  
440 the court with all the available supporting materials they intend  
441 to submit at the time they seek notice to the class, which would  
442 make this information available to class members." The Committee

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443 agreed that the Subcommittee should consider this suggestion and,  
444 if it is adopted, determine the final wording.

445 An important difference remains between the Subcommittee and  
446 the style consultants. The information required by (e)(1)(A) is to  
447 support a determination, not findings, that notice should be given  
448 to the class. The Subcommittee draft requires "sufficient"  
449 information to enable these determinations. The style consultants  
450 prefer "enough" information. If they are right that "enough" and  
451 "sufficient" carry exactly the same meaning, why worry about the  
452 choice? But, it was quipped, "we think 'enough' is insufficient."

453 "Sufficient" found broad support. A quick Google search found  
454 British authority for different meanings for "enough" and  
455 "sufficient." It was suggested that "sufficient" is qualitative,  
456 while "enough" is quantitative. "Sufficiency," moreover, is a  
457 concept used widely in the law, particularly in addressing such  
458 matters as the sufficiency of evidence.

459 The outcome was to transpose the two words: "~~sufficient~~  
460 information sufficient to enable" the court's determination whether  
461 to send notice. This form better underscores the link between  
462 information and determination, and creates a structure that will  
463 not work with "enough." The Committee believes that this question  
464 goes to the substance of the provision, not style alone.

465 A different question was raised. Proposed Rule 23 (e)(1)(B)  
466 speaks of showing that the court will likely be able to approve the  
467 proposed settlement "under Rule 23(e)(2)," and "certify the class  
468 for purposes of judgment on the proposal." (e)(2) does not say  
469 anything about certification beyond the beginning: "If the proposal  
470 would bind class members \* \* \*." That might be read to authorize  
471 creation of a settlement class that does not meet the tests of  
472 subdivision (b)(1), (2), or (3). The proposed Committee Note, at p.  
473 102, line 131, repeats the focus on the likelihood the court will  
474 be able to certify a class, but does not pin it down.

475 The Subcommittee agreed that, having discussed the possibility  
476 of recommending a new "(b)(4)" category of class action, it had  
477 decided not to pursue that possibility. One possibility would be to  
478 amend the Committee Note to amplify the reference to certifying a  
479 class: "likely will be able, after the final hearing, to certify  
480 the class under the standards of Rule 23(a) and (b)." That leaves  
481 the question whether this approach relies on the Note to clarify  
482 something that should be expressed in rule text. Perhaps something  
483 could be done in (e)(1)(B)(ii), though it is not clear what -  
484 "certify the class under Rule 23(a) and (b) for purposes of  
485 judgment on the proposal" might do it.

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486 It was pointed out that the provision for notice of a proposed  
487 settlement applies not only when a class has not yet been certified  
488 but also when a class has been certified before a settlement  
489 proposal is submitted. This dual character is reflected in  
490 (e)(1)(B)(ii)'s reference to the likely prospect that the court  
491 will, at the end of the notice and objection period, be able to  
492 certify a class not yet certified. The purpose of the proposal is  
493 to ensure the legitimacy of the common practice of sending out  
494 notice before a class is certified. There are two steps. Settlement  
495 cannot happen without certifying a class. But the common habit has  
496 been to refer to the act that launches notice and, in a (b)(3)  
497 class, the opt-out period, as preliminary certification. That led  
498 to attempts to win permission for interlocutory appeal under Rule  
499 23(f), most prominently seen in the NFL concussion litigation.  
500 Perhaps the Committee Note should say something, but there is no  
501 apparent problem in the rule language.

502 One possible remedy might be to expand the tag line for Rule  
503 23(e)(2): "Approval of the proposal and certification of the class  
504 [for settlement purposes]." But that might be misleading, since  
505 (e)(2) does not refer to certification criteria.

506 It was observed again that when a class has not already been  
507 certified, the court does not certify a class in approving notice  
508 under (e)(1). Certification comes only as part of approving the  
509 settlement after considering the criteria established by (e)(2).  
510 Certification of the class and approval of the settlement are  
511 interdependent. The settlement defines the class. The court  
512 approves both or neither; it cannot redefine the class and then  
513 approve a settlement developed for a different class. Not, at  
514 least, without acceptance by the proponents and repeating the  
515 notice process for the newly defined class.

516 A resolution was proposed: Add a reference to Rule 23(c)(3) to  
517 (e)(2): "If the proposal would bind class members under Rule  
518 23(c)(3), the court may approve it only \* \* \*." This was approved,  
519 with "latitude to adjust" if the Subcommittee finds adjustment  
520 advisable. Corresponding language in the Committee Note might read  
521 something like this, adding on p. 103, somewhere around line 122:  
522 "Approval under Rule 23(e)(2) is required only when class members  
523 would be bound under Rule 23(c)(3). Accordingly, in addition to  
524 evaluating the proposal itself, the court must determine whether  
525 the class may be certified under the standards of Rule 23(a) and  
526 (b)."

527 The proposed Rule 23(e)(2) criteria for approving a proposed  
528 settlement were discussed briefly. They are essentially the same as  
529 the draft discussed at the November meeting. They seek to distill  
530 the many factors expressed in varying terms by the circuits, often

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531 carrying forward with lists established thirty years ago, or even  
532 earlier. Tag lines have been added for the paragraphs at the  
533 suggestion of the style consultants.

534 The Committee approved a recommendation that the Standing  
535 Committee approve proposed Rule 23(e)(1) and (2) for publication  
536 this summer.

537 Objectors. In all the many encounters with bar groups and at the  
538 miniconference last fall, there was virtually unanimous agreement  
539 that something should be done to address the problem of "bad"  
540 objectors. The problem is posed by the objector who files an open-  
541 ended objection, often copied verbatim from routine objections  
542 filed in other cases, then "lies low," saying almost nothing, and  
543 – after the objection is denied – files a notice of appeal. The  
544 business model is to create, at low cost, an opportunity to seek  
545 advantage, commonly payment, by exploiting the cost and delay  
546 generated by an appeal.

547 Part of the Rule 23(e)(5) proposal addresses the problem of  
548 routine objections by requiring that the objection state whether it  
549 applies only to the objector, to a specific subset of the class, or  
550 to the entire class. It also directs that the objection state with  
551 specificity the grounds for the objection. The Committee Note says  
552 that failure to meet these requirements supports denial of the  
553 objection.

554 Another part of the proposal deletes the requirement in  
555 present Rule 23(e)(5) that the court approve withdrawal of an  
556 objection. There are many good-faith withdrawals. Objections often  
557 are made without a full understanding of the terms of the  
558 settlement, much less the conflicting pressures that drove the  
559 parties to their proposed agreement. Requiring court approval in  
560 such common circumstances is unnecessary.

561 At the same time, proposed Rule 23(e)(5)(B) deals with payment  
562 "in connection with" forgoing or withdrawing an objection, or  
563 forgoing, dismissing, or abandoning an appeal from a judgment  
564 approving the proposed settlement. No payment or other  
565 consideration may be provided unless the court approves. The  
566 expectation is that this approach will destroy the "business model"  
567 of making unsupported objections, followed by a threat to appeal  
568 the inevitable denial. A court is not likely to approve payment  
569 simply for forgoing or withdrawing an appeal. Imagine a request to  
570 be paid to withdraw an appeal because it is frivolous and risks  
571 sanctions for a frivolous appeal. Or a contrasting request to  
572 approve payment to the objector, not to the class, for withdrawing  
573 a forceful objection that has a strong prospect of winning reversal  
574 for the class or a subclass. Approval will be warranted only for

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575 other reasons that connect to withdrawal of the objection. An  
576 agreement with the proponents of the settlement and judgment to  
577 modify the settlement for the benefit of the class, for example,  
578 will require court approval of the new settlement and judgment and  
579 may well justify payment to the now successful objector. Or an  
580 objector or objector's counsel may, as the Committee Note observes,  
581 deserve payment for even an unsuccessful objection that illuminates  
582 the competing concerns that bear on the settlement and makes the  
583 court confident in its judgment that the settlement can be  
584 approved.

585 The requirement that the district court approve any payment or  
586 compensation for forgoing, dismissing, or abandoning an appeal  
587 raises obvious questions about the allocation of authority between  
588 district court and court of appeals if an appeal is actually taken.  
589 Before a notice of appeal is filed, the district court has clear  
590 jurisdiction to consider and rule on a motion for approval. If it  
591 rules before an appeal is taken, its ruling can be reviewed as part  
592 of a single appeal. The Subcommittee has decided not to attempt to  
593 resolve the question whether a pre-appeal motion suspends the time  
594 to appeal. Something may well turn on the nature of the motion. If  
595 it is framed as a motion for attorney fees, it fits into a well-  
596 established model. If it is for payment to the objector, matters  
597 may be more uncertain – it may be something as simple as an  
598 argument that the objector should be fit into one subclass rather  
599 than another, or that the objector's proofs of injury have been  
600 dealt with improperly.

601 After the agenda materials were prepared, the Subcommittee  
602 continued to work on the relationship between the district court  
603 and the court of appeals. It continued to put aside the question of  
604 appeal time. But it did develop a new proposed Rule 23(e)(5)(C) to  
605 address the potential for overlapping jurisdiction when a motion to  
606 approve payment is not made, or is made but not resolved, before an  
607 appeal is docketed. The proposal is designed to be self-contained,  
608 operating without any need to amend the dismissal provisions in  
609 Appellate Rule 42. "The question is who has the case." The  
610 proposal, as it evolved in the Subcommittee, reads:

611 (C) Procedure for Approval After Appeal. If approval  
612 under Rule 23(e)(5)(B) has not been obtained before  
613 an appeal is docketed in the court of appeals, the  
614 procedure of Rule 62.1 applies while the appeal  
615 remains pending.

616 Invoking the indicative ruling procedure of Rule 62.1 facilitates  
617 communication between the courts. The district court retains  
618 authority to deny the motion without seeking a remand. It is  
619 expected that very few motions will be made simply "for" approval

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620 of payment, and that denial will be the almost inevitable fate of  
621 any motion actually made. But if the motion raises grounds that  
622 would lead the district court either to grant the motion or to want  
623 more time to consider the motion if that fits with the progress of  
624 the case on appeal, the court of appeals has authority to remand  
625 for that purpose.

626 Representatives of the Appellate Rules Committee have endorsed  
627 this approach in preference to the more elaborate earlier drafts  
628 that would amend Appellate Rule 42.

629 The first comment was that it is extraordinary that it took so  
630 long to reach such a sensible resolution.

631 The next reaction asked how this proposal relates to waiver.  
632 If an objector fails to make an objection with the specificity  
633 required by proposed Rule 23(e)(5)(A), for example, can the appeal  
634 request permission to amend the objection? Isn't this governed by  
635 the usual rule that you must stand by the record made in the  
636 district court? And to be characterized as procedural forfeiture,  
637 not intentional waiver? The purpose of (e)(5)(A) is to get a useful  
638 objection; an objection without explanation does not help the  
639 court's evaluation of the proposed settlement. Pro se objectors  
640 often fail to make helpful objections. So a simple objection that  
641 the settlement "is not fair" is little help if it does not explain  
642 the unfairness. At the same time, the proposed Committee Note  
643 recognizes the need to understand that an objector proceeding  
644 without counsel cannot be expected to adhere to technical legal  
645 standards. The Note also states something that was considered for  
646 rule text, but withdrawn as not necessary: failure to state an  
647 objection with specificity can be a basis for denying the  
648 objection. That, and forfeiture of the opportunity to supply  
649 specificity on appeal, is a standard consequence of failure to  
650 comply with a "must" procedural requirement. The courts of appeals  
651 can work through these questions as they routinely do with  
652 procedural forfeiture. Forfeiture, after all, can be forgiven, most  
653 likely for clear error. It is not the same as intentional waiver.

654 The Committee approved a recommendation that the Standing  
655 Committee approve publication of proposed Rule 23(e)(5) this  
656 summer.

657 Interlocutory appeals. The proposals would amend Rule 23(f) in two  
658 ways.

659 The first amendment adds language making it clear that a court  
660 of appeals may not permit appeal "from an order under Rule  
661 23(e)(1)." This question was discussed earlier. The Rule 23(e)(1)  
662 provisions regulating notice to the class of a proposed settlement

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663 and class certification are only that – approval, or refusal to  
664 approve, notice to the class. Despite the common practice that has  
665 called this notice procedure preliminary certification, it is not  
666 certification. There is no sufficient reason to allow even  
667 discretionary appeal at this point.

668 The Committee accepted this feature without further  
669 discussion.

670 The second amendment of Rule 23(f) extends the time to file a  
671 petition for permission to appeal to 45 days "if any party is the  
672 United States" or variously described agencies or officers or  
673 employees of the United States. The expanded appeal time is  
674 available to all parties, not only the United States. This  
675 provision was suggested by the Department of Justice. As with other  
676 provisions in the rules that allow the United States more time to  
677 act than other parties are allowed, this provision recognizes the  
678 painstaking process that the Department follows in deciding whether  
679 to appeal, a process that includes consultation with other  
680 government agencies that often have their own elaborate internal  
681 review procedures.

682 Justice Nahmias reacted to this proposal by a message to Judge  
683 Dow asking whether state governments should be accorded the same  
684 favorable treatment. Often state attorneys general follow similarly  
685 elaborate procedures in deciding whether to appeal. A participant  
686 noted that he had been a state solicitor general, and that indeed  
687 his state has elaborate internal procedures. At the same time, he  
688 noted that the state procedures were not as time-consuming as the  
689 Department of Justice procedures.

690 This question prompted the suggestion that perhaps states  
691 should receive the same advantages as the United States. But this  
692 question arises at several points in the rules, often in provisions  
693 allowing extra time for action by the United States. The appeal  
694 time provisions in Appellate Rule 4 are a familiar example, as well  
695 as the added time to answer in Rule 12. And at least on occasion,  
696 the states are accorded the same favorable treatment as the United  
697 States. Appellate Rule 29 allows both the United States and a state  
698 to file an amicus brief without first winning permission. It may be  
699 that these questions of parity deserve consideration as a separate  
700 project. There might be some issues of line drawing. If states get  
701 favorable treatment, what of state subdivisions? Actions against  
702 state or local officials asserting individual liability? Should  
703 large private organizations be allowed to claim equally complex  
704 internal procedures – and if so, how large?

705 The concluding observation was that extending favorable  
706 treatment to the United States will leave states where they are

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707 now. The amendment will not disadvantage them; it only fails to  
708 provide a new advantage. Nor need it be decided whether the time  
709 set by a court rule, such as Rule 23(f), is subject to extension in  
710 a way that a statute-based time period cannot be.

711 A separate question was framed by a sentence appearing in  
712 brackets in the draft Committee Note at p. 107, lines 408-409 of  
713 the agenda book. This sentence suggested that the 45-day time  
714 should also apply in "an action involving a United States  
715 corporation." There are not many "United States corporation[s]."  
716 Brief comments for the Department of Justice led to the conclusion  
717 that this sentence should be deleted.

718 The Class Action Fairness Act came into the discussion with a  
719 question whether any of the Rule 23 proposals might run afoul of  
720 statutory requirements. CAFA provides an independent set of rules  
721 that must be satisfied. It has provisions relating to settlement,  
722 including notice to state officials of proposed settlements. But  
723 nothing in the proposed amendments is incompatible with CAFA.  
724 Courts can fully comply with statutory requirements in implementing  
725 Rule 23.

726 The Committee voted to recommend proposed Rule 23(f) to the  
727 Standing Committee to approve for publication this summer.

728 Ongoing Questions. The Subcommittee has put aside for the time  
729 being some of the proposals it has studied, often at length.

730 "Pick-off" offers raise one set of questions, addressed by a  
731 number of drafts that illustrate different possible approaches. The  
732 questions arise as defendants seek to defeat class certification by  
733 acting to moot the claims of individual would-be representatives.  
734 The problem commonly arises before class certification, and often  
735 before a motion for certification. One reason for deferring action  
736 was anticipation of the Supreme Court's decision in the Campbell-  
737 Ewald case. The decision has been made, and the Subcommittee has  
738 been tracking early reactions in the courts. It is more difficult  
739 to track responses by defendants. One recent district-court opinion  
740 deals with an effort to moot a class representative by attempting  
741 to make a Rule 67 deposit in court of full individual relief. The  
742 attempt was rejected as outside the purposes of Rule 67. Other  
743 attempts are being made to bring mooting money into court,  
744 responding to the part of the Campbell-Ewald opinion that left this  
745 question open, and to the separate opinions suggesting that  
746 mootness might be manufactured in this way. The question whether to  
747 propose Rule 23 amendments remains under consideration.

748 Consideration of offers that seek to moot individual  
749 representatives has led also to discussion of the possibility that

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750 Rule 23 should be amended by adopting explicit provisions for  
751 substituting new representatives when the original representatives  
752 fail. The rule could be narrow. One example of a narrow rule would  
753 be one that addresses only the effects of involuntary mooted by  
754 defense acts that afford complete individual relief. A broad rule  
755 could reach all circumstances in which loss of one or more  
756 representatives make it desirable or necessary to find  
757 replacements.

758 Discussion of substitute representatives began with the  
759 observation that it can be prejudicial to the defendant when class  
760 representatives pull out late in the game. An illustration was  
761 offered of a case in which a former employee sought injunctive  
762 relief on behalf of a class. He retired. He could not benefit from  
763 injunctive relief that would benefit only current employees. The  
764 plaintiffs sought to amend the complaint to substitute a new  
765 representative. But they acted after expiration of the time for  
766 amendments allowed by the scheduling order. And they had not been  
767 diligent, since the impending retirement was well known. "It would  
768 have been different if the representative had been hit by a bus,"  
769 an unforeseeable event that could justify amending the scheduling  
770 order.

771 A different anecdote was offered by a judge who asked about  
772 the size of a proposed payment for services by the representative  
773 plaintiff. The response was that the representative deserved extra  
774 because he had rejected a pick-off offer.

775 It was asked whether judges understand now that they have  
776 authority to allow substitution of representatives. An observer  
777 suggested that it would be good to adopt an explicit substitution  
778 rule. A representative seeks to assume a trust duty to act on  
779 behalf of others. And after a class is certified, a set of trust  
780 beneficiaries is established. It would help to have an affirmative  
781 statement in the rule that recognizes substitution of trustees.

782 The Committee agreed that the Subcommittee should continue to  
783 consider the advantages of adopting an express rule to confirm, and  
784 perhaps regularize, existing practices for substituting  
785 representatives.

786 Finally, the Subcommittee continues to consider the questions  
787 raised by the growing number of decisions that grapple with the  
788 question whether "ascertainability" is a useful concept in deciding  
789 whether to certify a class. The decisions remain in some disarray.  
790 But the question is being actively developed by the courts.  
791 Continuing development may show either that the courts have reached  
792 something like consensus, or that problems remain that can be  
793 profitably addressed by new rule provisions.

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794 The Committee thanked the Subcommittee for its long, devoted,  
795 and successful work.

796 *Pilot Projects*

797 Judge Bates introduced the work on pilot projects by noting  
798 that the work is being advanced by a Subcommittee that includes  
799 both present and former members of this Committee and the Standing  
800 Committee. Judge Campbell, former chair of this Committee, chairs  
801 the Subcommittee. Other members include Judge Sutton, Judge Bates,  
802 Judge Grimm (a former member of this Committee), Judge Gorsuch,  
803 Judge St. Eve, John Barkett, Parker Folse, Virginia Seitz, and  
804 Edward Cooper. Judge Martinez has joined the Subcommittee work as  
805 liaison from the Committee on Court Administration and Case  
806 Management.

807 Judge Campbell began presenting the Subcommittee's work by  
808 noting that the purpose of pilot projects is to advance  
809 improvements in civil litigation by testing proposals that, without  
810 successful implementation in actual practice, seem too  
811 adventuresome to adopt all at once in the national rules.

812 The Subcommittee has held a number of conference calls since  
813 this Committee discussed pilot projects last November. Two projects  
814 have come to occupy the Subcommittee: Expanded initial disclosures  
815 in the form of mandatory early discovery requests, and expedited  
816 procedures.

817 Mandatory Initial Discovery. The mandatory early discovery project  
818 draws support from many sources, including innovative federal  
819 courts and pilot projects in ten states. The Subcommittee held  
820 focus-group discussions by telephone with groups of lawyers and  
821 judges from Arizona and Colorado, states that have developed  
822 enhanced initial disclosures. Another conference call was held with  
823 lawyers from Ontario and British Columbia to learn about initial  
824 disclosures in Canada. "People who work under these disclosure  
825 systems like them better than the Federal Rules of Civil  
826 Procedure."

827 The draft presented in the agenda materials has been  
828 considered by the Case Management Subcommittee of the Committee on  
829 Court Administration and Case Management. They have reflected on  
830 the draft in a thoughtful letter that will be considered as the  
831 work goes forward.

832 Judge Grimm took the lead in drafting the initial discovery  
833 rule.

834 Mandatory initial discovery would be implemented by standing

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835 order in a participating court. The order would make participation  
836 mandatory, excepting for cases exempted from initial disclosures by  
837 Rule 26(a)(1)(B), patent cases governed by local rule, and  
838 multidistrict litigation cases. Because the initial discovery  
839 requests defined by the order include all the information covered  
840 by Rule 26(a)(1), separate disclosures under Rule 26(a)(1) are not  
841 required.

842 The Standing Order includes Instructions to the Parties.  
843 Responses are required within the times set by the order, even if  
844 a party has not fully investigated the case. But reasonable inquiry  
845 is required, the party itself must sign the responses under oath,  
846 and the attorney must sign under Rule 26(g).

847 The discovery responses must include facts relevant to the  
848 parties' claims or defenses, whether favorable or unfavorable. This  
849 goes well beyond initial disclosures under Rule 26(a)(1), which go  
850 only to witnesses and documents a party "may use." The Committee on  
851 Court Administration and Case Management may raise the question  
852 whether the requirement to respond with unfavorable information  
853 will discourage lawyers from making careful inquiries. Experience  
854 in Arizona, Colorado, and Canada suggests lawyers will not be  
855 discouraged.

856 The time for filing answers, counterclaims, crossclaims, and  
857 replies is not tolled by a pending motion to dismiss or other  
858 preliminary motion. This provision provoked extensive discussion  
859 within the Subcommittee. An answer is needed to frame the issues.  
860 Suspending the time to answer would either defer the time to  
861 respond to the discovery requests or lead to responses that might  
862 be too narrow, broader than needed for the case, or both. The  
863 Subcommittee will consider whether to add a provision that allows  
864 the court to suspend the time to respond, whether for "good cause"  
865 or on a more focused basis.

866 The times to respond are subject to two exceptions. If the  
867 parties agree that no party will undertake any discovery, no  
868 initial discovery responses need be filed. And initial responses  
869 may be deferred, one time, for 30 days if the parties certify that  
870 they are seeking to settle and have a good-faith belief that the  
871 dispute will be resolved within 30 days of the due date for their  
872 responses.

873 Responses, and supplemental responses, must be filed with the  
874 court. The purpose of this requirement is to enable the court to  
875 review the responses before the initial conference.

876 The initial requests impose a continuing duty to supplement  
877 the initial responses in a timely manner, with a final deadline.

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878 The draft sets the time at 90 days before trial. The Court  
879 Administration and Case Management Committee has suggested that it  
880 may be better to tie the deadline to the final pretrial conference.  
881 Later discussion recognized that the final pretrial conference may  
882 indeed be the better time to choose.

883 The parties are directed to discuss the mandatory initial  
884 discovery responses at the Rule 26(f) conference, to seek to  
885 resolve any limitations they have made or will make, to report to  
886 the court, and to include in the report the resolution of  
887 limitations invoked by either party and unresolved limitations or  
888 other discovery issues.

889 As a safeguard, the instructions provide that responses do not  
890 constitute an admission that information is relevant, authentic, or  
891 admissible.

892 Rule 37(c)(1) sanctions are invoked.

893 The mandatory initial discovery requests themselves follow  
894 these instructions in the Standing Order.

895 The first category describes all persons who have discoverable  
896 information, and a fair description of the nature of the  
897 information.

898 The second category describes all persons who have given  
899 written or recorded statements, attaching a copy of the statement  
900 when possible, but recognizing that production is not required if  
901 the party asserts privilege or work-product protection.

902 The third category requires a list of documents, ESI, and  
903 tangible things or land, "whether or not in your possession,  
904 custody, or control, that you believe may be relevant to any  
905 party's claims or defenses." If the volume of materials makes  
906 individual listing impracticable, similar documents or ESI may be  
907 grouped into specific categories that are described with  
908 particularity. A responding party "may" produce the documents, or  
909 make them available for inspection, instead of listing them.

910 The fourth category requires a statement of the facts relevant  
911 to each of the responding party's claims or defenses, and of the  
912 legal theories on which each claim or defense is based.

913 The fifth category requires a computation of each category of  
914 damages, and a description or production of underlying documents or  
915 other evidentiary material.

916 The sixth category requires a description of "any insurance or

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917 other agreement under which an insurance business or other person  
918 or entity may be liable to satisfy all or part of a possible  
919 judgment in the action or to indemnify or reimburse a party."

920 The seventh provision authorizes a party who believes that  
921 responses in categories three, five, or six are deficient to  
922 request more detailed or thorough responses.

923 The Standing Order has separate provisions governing the means  
924 of providing hard-copy documents and ESI.

925 Hard-copy documents must be produced as they are kept in the  
926 ordinary course of business.

927 When ESI comes into play, the parties must promptly confer and  
928 attempt to agree on such matters as requirements and limits on  
929 production, disclosure, and production; appropriate searches,  
930 including custodians and search terms "or other use of technology  
931 assisted review"; and the form for production. Disputes must be  
932 presented to the court in a single joint motion, or, if the court  
933 directs, a conference call with the court. The motion must include  
934 the parties' positions and separate certifications by counsel under  
935 Rule 26(g). Absent agreement of the parties or court order, ESI  
936 identified in the initial discovery responses must be produced  
937 within 40 days after serving the response. Absent agreement,  
938 production must be in the form requested by the receiving party; if  
939 no form is requested, production may be in a reasonably usable form  
940 that will enable the receiving party to have the same ability as  
941 the producing party to access, search, and display the ESI.

942 Finally, the Subcommittee has begun work on a User's Manual to  
943 help pilot judges implement the project. It will cover such  
944 familiar practices as early initial case-management conferences,  
945 reluctance to extend the times for initial discovery responses, and  
946 prompt resolution of discovery disputes.

947 Judge Grimm added that the Subcommittee also had considered an  
948 extensive amount of information about experience with initial  
949 disclosures under the Civil Justice Reform Act. It also reviewed  
950 experience with the initial disclosure requirement first adopted in  
951 1993, a more extensive form than the watered-down version adopted  
952 in 2000. Further help was found in the 1997 conference at Boston  
953 College Law School with lawyers, judges, and professors. In  
954 addition to Arizona and Colorado, a number of other state  
955 disclosure provisions were studied. "This was a comprehensive  
956 approach to what can be found."

957 Judge Sutton asked what the Standing Committee will be asked  
958 to approve. This proposal is more developed than the proposals for

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959 earlier pilot projects have been. But there will have to be  
960 refinements along the way to implementation. That is the ordinary  
961 course of development. The goal will be to ask the Standing  
962 Committee to approve the pilot conceptually, while presenting as  
963 many of the details as can be managed. Judge Bates agreed that  
964 "refinements are inevitable."

965 Discussion began with a practicing lawyer's observation that  
966 he had been skeptical about the ability of lawyers to find ways to  
967 avoid the requirement in the 1993 rule that unfavorable information  
968 be disclosed. But this pilot is worth doing. "Let's 'go big' with  
969 something that has a potential to make major changes in the speed  
970 and efficiency of federal litigation." The discussions with the  
971 groups in Arizona and Colorado, and the lawyers in Canada, provided  
972 persuasive evidence that this can work. "They live and work with  
973 many of these ideas. And they find the ideas not only workable, but  
974 welcome." The proposal results from intense effort to learn from  
975 actual experience. The effort will continue through the time of  
976 seeking approval from the Judicial Conference in September, and on  
977 to the stage of actual implementation.

978 This view was seconded by "a veteran of 1993." The 1993 rule  
979 failed because the Committee did not work closely enough with the  
980 bar, and was not able to provide persuasive evidence that the  
981 required disclosures could work. A pilot will provide the data to  
982 support broader disclosure innovations.

983 An initial question observed that much of the conversation  
984 refers to this project as involving initial disclosure. But the  
985 standing order refers to "requests": does the duty to respond  
986 depend on having a party promulgate actual discovery requests? The  
987 answer is that the pilot's standing order adopts a set of mandatory  
988 initial discovery requests. The requests are addressed to all  
989 parties, and must be responded to in the same way as ordinary  
990 discovery requests under Rules 33 and 34.

991 Thinking about implementation of the pilot project has assumed  
992 that it should be adopted only in districts that can ensure  
993 participation by all judges in the district. That may make it  
994 impossible to launch the project in any large district, but it  
995 seems important to involve a large district or two. Discussion of  
996 this question began with the observation that the pilot project  
997 embodies great ideas, but that it will be easier to "sell" them if  
998 they can be tested in large districts. At the same time, it is not  
999 realistic to expect that all judges in a large district will be  
1000 willing to sign on, even in the face of significant peer pressure  
1001 from other judges. A separate question asked whether there might be  
1002 some advantage of being able to compare outcomes in cases assigned  
1003 to participating and nonparticipating judges in the ordinary

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1004 random-assignment practices of the district. Emery Lee responded  
1005 that there could be an advantage, but that the balance between  
1006 advantage and disadvantage would depend on the judges in the two  
1007 pools. This prompted the observation that there is reason to be  
1008 concerned about self-selection into or out of pilot projects. A  
1009 judge suggested that participation in the pilot "should not be  
1010 terribly onerous." It may be better to leave the program as one  
1011 that expects unanimity, understanding that a pilot district might  
1012 allow a judge to opt out for individual reasons. Another judge  
1013 thought that his court could achieve near-unanimity: "Judges on my  
1014 court take pride in what they do." Several members agreed that the  
1015 project should not be changed by, for example, adopting an explicit  
1016 80% threshold. Perhaps it is better to leave it as a preference for  
1017 districts in which all judges participate in the pilot, recognizing  
1018 that the need to enlist one or more large districts may lead to  
1019 negotiation. One approach would be to design the project to say  
1020 that all judges "should," not "must" participate. A judge noted  
1021 that success will depend on willingness and eagerness to  
1022 participate. In his relatively small district, "our senior judges  
1023 are not eager."

1024 A more difficult question is raised by recognition of the  
1025 possibility that some sort of exception should be adopted that  
1026 allows a court to suspend the time to answer when there is a motion  
1027 to dismiss. "In my district we get many well-considered motions to  
1028 dismiss." They can pretty much be identified on filing. A lot of  
1029 them are government cases. Another big set involve "200-page" pro  
1030 se complaints that will require much work to answer. This  
1031 observation was supported by the Department of Justice. The goal of  
1032 speedy development of the case is important, but many motions to  
1033 dismiss address cases that should not be in court at all. If the  
1034 case is subject to dismissal on sovereign-immunity grounds, for  
1035 instance, the government should be spared the work of answering and  
1036 disclosing. In other cases, the claim may challenge a statute on  
1037 its face, pretermittting any occasion for disclosure or discovery –  
1038 why not invoke the ordinary rule that suspends the time to answer?  
1039 A judge offered a different example: "Many cases have meritorious  
1040 but flexible motions to dismiss." A diversity complaint, for  
1041 example, may allege only the principal place of business of an LLC  
1042 party. The citizenship of the LLC members needs to be identified to  
1043 determine whether there is diversity jurisdiction. Further time is  
1044 needed to decide the motion. Yet another judge observed that  
1045 setting the time to respond to the initial mandatory requests at 30  
1046 days after the answer can enable action on the motion to dismiss.

1047 A further suggestion was that there are solid arguments on  
1048 both sides of the question whether a pleading answer should be  
1049 required before the court acts on a motion to dismiss. "The  
1050 usefulness of responses turns to a significant degree on the

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1051 parties' ability to understand the issues." But if the time to  
1052 answer is deferred pending disposition of a motion to dismiss, it  
1053 may be difficult to devise a suitable trigger for the duty to  
1054 respond to the initial mandatory requests. And if the duty to  
1055 respond is always deferred until after a ruling on a motion to  
1056 dismiss, the result may be to encourage motions to dismiss.

1057 A judge agreed that further thought is needed, particularly  
1058 for jurisdictional motions and cases in which the government is a  
1059 party. But he noted that he has conferences that focus both on  
1060 motions and the merits. "If there is too much possibility of  
1061 deferring the time to answer, we may suffer."

1062 A lawyer member suggested that the line could be drawn at  
1063 motions arguing that the defendant cannot be called on to respond  
1064 in this court. These motions would go to questions like personal  
1065 jurisdiction and subject-matter jurisdiction. They would not  
1066 include motions that go to the substance of the claim.

1067 Another troubling example was offered: a claim of official  
1068 immunity may be raised by motion to dismiss. Elaborate practices  
1069 have grown up from the perception that one function of the immunity  
1070 is to protect the individual defendant from the burdens of  
1071 discovery as well as the burden of trial.

1072 An analogy was suggested in the variable practices that have  
1073 grown up around the question whether discovery should be allowed to  
1074 proceed while a motion to dismiss remains under consideration.

1075 A judge offered "total support" for the project, recognizing  
1076 that further refinements are inevitable. One part of the issues  
1077 raised by motions to dismiss might be addressed through the timing  
1078 of ESI production, which may be the most onerous part of the  
1079 initial mandatory discovery responses. The draft recognizes that  
1080 ESI production can be deferred by the court or party agreement.

1081 Judge Campbell agreed that this question deserves further  
1082 thought.

1083 Model orders provided another subject for discussion. A judge  
1084 suggested that some judges, including open-minded innovators, would  
1085 resist model orders because they think their own procedures work  
1086 better. They may hesitate to buy into a full set of model orders.  
1087 But Emery Lee said that model orders will be needed for research  
1088 purposes. And Judge Campbell thought that the good idea of  
1089 developing model orders could be pursued by looking for standard  
1090 practices in Arizona and other states with expansive pretrial  
1091 disclosures.

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1092 The Committee approved a motion to carry the initial mandatory  
1093 discovery pilot project program forward to the Standing Committee  
1094 for approval for submission to the Judicial Conference in  
1095 September. The Committee recognizes that the Subcommittee will  
1096 continue its deliberations and make further refinements in its  
1097 recommendations.

1098 Expedited Procedures. Judge Campbell introduced the expedited  
1099 procedures pilot project by observing that it rests on principles  
1100 that have been proved in many courts, by many judges, and in many  
1101 cases. The project is designed not to test new procedures, but to  
1102 change judicial culture.

1103 The project has three parts: The procedural components; means  
1104 of measuring progress in pilot courts; and training.

1105 These practices provide the components of the pilot: (1)  
1106 prompt case-management conferences in every case; (2) firm caps on  
1107 the time allocated for discovery, to be set by the court at the  
1108 conference and to be extended no more than once, and only for good  
1109 cause and on a showing of diligence by the parties; (3) prompt  
1110 resolution of discovery disputes by telephone conferences; (4)  
1111 decisions on all dispositive motions within 60 days after the reply  
1112 brief is filed; and (5) setting and holding firm trial dates.

1113 The metrics to be measured are these: (1) if it can be  
1114 measured, the level of compliance with the practices embodied in  
1115 the pilot; (2) trial dates in 90% of civil cases set within 14  
1116 months of case filing, and within 18 months in the remaining 10% of  
1117 cases; and (3) a 25% reduction in the number of categories of cases  
1118 in the district "dashboard" that are decided more slowly than the  
1119 national average, bringing the court closer to the norm. (The  
1120 "dashboard" is a tool developed for use by the Committee on Court  
1121 Administration and Case Management. It measures disposition times  
1122 in all 94 districts across many different categories of cases. Each  
1123 district's experience in each category is compared to the national  
1124 average. The dashboard is described in the article by Donna  
1125 Stienstra set out as an exhibit to the Pilot Projects report. The  
1126 chief judge of each district got a copy of that district's  
1127 dashboard last September.)

1128 Training and collaboration will have these components: (1) an  
1129 initial one-day training session by the FJC, followed by additional  
1130 FJC training every six months, or possibly every year; (2)  
1131 quarterly meetings by judges in the pilot district to discuss best  
1132 practices, what is working and what is not working, leading to  
1133 refinements of case-processing methods to meet the pilot goals; (3)  
1134 making judges from outside the district available as resources  
1135 during the quarterly district conferences; (4) at least one bench-

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1136 bar conference a year to talk with lawyers about how well the pilot  
1137 is working; and (5) a 3-year period for the pilot.

1138 This pilot "has a lot of moving parts, but not as many as the  
1139 mandatory initial disclosure pilot."

1140 Judge Fogel and Emery Lee responded to a question about the  
1141 likely reaction of pilot-district judges to exploring individual  
1142 disposition times. They answered that in many settings researchers  
1143 are wary of compiling individual-judge statistics because many  
1144 judges are sensitive to these matters. But the problem is reduced  
1145 in a pilot project because the districts volunteer. They also  
1146 pointed out that it will be necessary to compile a lot of pre-pilot  
1147 data to compare to experience under the pilot. "The CACM-FJC model  
1148 helps." At the same, the question whether individual judges'  
1149 "dashboards" would become part of the public data must be  
1150 approached with caution and sensitivity.

1151 Judge Fogel also noted that it is important to avoid the  
1152 problem of eager volunteers. The FJC has a very positive reaction  
1153 to the pilot. It will be useful to engage in a project designed to  
1154 see what happens with a training program.

1155 It was noted that Judge Walton, writing for the CACM Case  
1156 Management Subcommittee, raised questions regarding the deadline  
1157 for decisions on dispositive motions. "[T]here are some practical  
1158 considerations that may make compliance" difficult. Individual  
1159 calendar and trial schedules may interfere. Supplemental briefing  
1160 may be required after the reply brief. And added time may be  
1161 required in cases that deserve extensive written decisions because  
1162 of novel or unsettled issues of law or extensive summary-judgment  
1163 records. The deadline might be extended to 90 days. Or it could be  
1164 framed as a target time for disposing of a designated fraction of  
1165 dispositive motions in all cases. Or it could be framed in  
1166 aspirational terms, as "should" rather than "must."

1167 The trial-date target also was questioned. Perhaps it is not  
1168 ambitious enough – even today, a large proportion of all cases are  
1169 resolved in 14 months or less.

1170 The Committee adopted a recommendation that the Standing  
1171 Committee approve the Expedited Procedures pilot project for  
1172 submission to the Judicial Conference in September. As with the  
1173 initial mandatory discovery pilot, it will be recognized that  
1174 approval of the concept will entail further work by the  
1175 Subcommittee, at times in conjunction with the FJC, the Committee  
1176 on Court Administration and Case Management, and perhaps others.

1177 *Other Proposals*

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1178 Several other proposals are presented by the agenda materials.  
1179 Some have carried over from earlier meetings. Others respond to new  
1180 suggestions for study. Each came on for discussion.

1181 RULE 5.2: REDACTING PROTECTED INFORMATION

1182 Rule 5.2 requires redaction from paper and electronic filings  
1183 of specified items of private information. It was initially adopted  
1184 in conjunction with Appellate Rule 25(a)(5), Bankruptcy Rule 9037,  
1185 and Criminal Rule 49.1. It has seemed important to achieve as much  
1186 uniformity among these four rules as proves compatible with the  
1187 different settings in which each operates.

1188 The Committee on Court Administration and Case Management  
1189 referred to the Bankruptcy Rules Committee a problem that seems to  
1190 arise with special frequency in bankruptcy filings. Bankruptcy  
1191 courts are receiving creditors' requests to redact previously filed  
1192 documents that include material that the privacy rules forbid.  
1193 These requests may involve thousands of documents filed in numerous  
1194 courts. The immediate question was whether Bankruptcy Rule 9037  
1195 should be amended to include an express procedure for moving to  
1196 redact previously filed documents. The prospect that different  
1197 bankruptcy courts may become involved with the same questions  
1198 arising from simultaneous filings suggests a particular need for a  
1199 nationally uniform procedure, even if satisfactory but variable  
1200 procedures might be crafted by each court acting alone.

1201 The Bankruptcy Rules Committee has responded by creating a  
1202 draft Rule 9037(h) that would establish a specific procedure for a  
1203 motion to redact. The central feature of the procedure is a copy of  
1204 the filing that is identical to the paper on file with the court  
1205 except that it redacts the protected information. The court would  
1206 be required to "promptly" restrict public access both to the motion  
1207 and the paper on file. The restriction would last until the ruling  
1208 on the motion, and beyond if the motion is granted. Public access  
1209 would be restored if the motion is denied.

1210 Judge Harris explained that bankruptcy courts receive hundreds  
1211 of thousands of proofs of claim. "The volume is great." Redaction  
1212 of information filed in violation of the rules is not as good as  
1213 initial compliance. But there is good reason to have a uniform  
1214 redaction procedure. If the court cannot restrict access until  
1215 redaction is actually accomplished, the motion to redact may itself  
1216 draw searches for the private information. The proposed Rule  
1217 9037(h) relies on the assumption that the CM/ECF system can  
1218 immediately restrict access when a motion to redact is filed. If  
1219 not, the motion just makes things worse.

1220 Judge Sutton asked whether the Bankruptcy Rules Committee "is

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1221 in a rush to publish." Judge Harris answered that the Committee is  
1222 ready to wait so that all advisory committees can come together on  
1223 uniform language.

1224 Clerk-liaison Briggs noted that "we get a lot of improper  
1225 failures to comply with Rule 5.2. We have an established procedure  
1226 that immediately denies access."

1227 Further discussion confirmed the wisdom of the Bankruptcy  
1228 Rules Committee's willingness to defer publication of their draft  
1229 Rule 9037(h) pending work in the other committees. "One train is  
1230 pretty far ahead of the others." Waiting for parallel development  
1231 and publication will provide a better opportunity for uniformity.

1232 One possible outcome might be that the Administrative Office  
1233 and other bodies could develop procedures that automatically  
1234 respond to the filing of a motion to redact by closing off public  
1235 access to the paper addressed by the motion. If that could be done,  
1236 there might be no need for a new set of rules provisions. But the  
1237 work should continue, recognizing that this happy outcome may not  
1238 come to pass.

1239 RULE 30(b)(6): 16-CV-A

1240 Members of the council and Federal Practice Task Force of the  
1241 ABA Section of Litigation, acting in their individual capacities,  
1242 submitted a lengthy examination of problems encountered in practice  
1243 under Rule 30(b)(6). Rule 30(b)(6) allows a party to depose an  
1244 entity, whether a party or not a party, on topics designated in the  
1245 notice. The entity is required to designate one or more witnesses  
1246 to testify on its behalf, providing "information known or  
1247 reasonably available to the organization."

1248 The idea that there are problems in implementing Rule 30(b)(6)  
1249 is not new to the Committee. Extensive work was done in 2006 in  
1250 response to proposals made by a Committee of the New York State Bar  
1251 Association. The topic was considered again in 2013 in response to  
1252 proposals made by the New York City Bar. Each time, the Committee  
1253 concluded that there is little opportunity to adopt new rule text  
1254 that would provide effective remedies for problems that are often  
1255 case-specific and that often reflect deliberate efforts to subvert  
1256 or misuse the Rule 30(b)(6) process.

1257 Many of the present proposals involve issues that were  
1258 considered in the earlier work. One example is that Rule 30(b)(6)  
1259 does not require the entity to designate as a witness the "most  
1260 knowledgeable person." Another example is questions that go beyond  
1261 the topics listed in the notice. Questions addressing a party's  
1262 contentions in the litigation are yet another example.

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1263           The question is whether the Committee should take up these  
1264 questions in response to this third expression of anguish from a  
1265 third respected bar group. The request, rather than urge specific  
1266 answers, is that the Committee "undertake a review of the Rule and  
1267 the case law developed under it with the goal of resolving  
1268 conflicts among the courts, reducing litigation on its  
1269 requirements, and improving practice \* \* \*." It is clear that Rule  
1270 30(b)(6) "continues to be a source of unhappiness." On the other  
1271 hand, to paraphrase Justice Jackson, there is a risk that pulling  
1272 one misshapen stone out of the grotesque structure may disrupt a  
1273 careful balance. So "many litigants find Rule 30(b)(6) an extremely  
1274 important tool to discover important information. Others find it an  
1275 enormous pain."

1276           Discussion began by noting that three important groups have  
1277 now suggested the need to attempt improvements.

1278           Committee members could not, on the spot, identify any clear  
1279 circuit splits on the meaning or administration of Rule 30(b)(6).  
1280 It may be helpful to explore this question.

1281           It was noted that it is difficult to impose sanctions for not  
1282 providing the most knowledgeable person.

1283           It also was noted that there is an acute problem of producing  
1284 witnesses who are not prepared.

1285           So it was observed that the rule should be enforceable, and  
1286 adding complications will make enforcement more difficult.

1287           A lawyer member said that he confronts problems with Rule  
1288 30(b)(6) "constantly, all over the country, and even in sister  
1289 cases. The Rule is constantly a source of controversy. Proper  
1290 preparation issues will never go away." The recurring issues of  
1291 interpretation and application show that as hard as it may be to  
1292 make the Rule better, we should feel an obligation to address these  
1293 issues. The problems are not going away. Another look would be  
1294 useful.

1295           Full agreement was expressed with this view.

1296           A judge observed that the 2015 discovery amendments raise the  
1297 prospect that proportionality may become a factor in administering  
1298 Rule 30(b)(6). It might help to confront this integration head-on  
1299 as part of a Rule 30(b)(6) project.

1300           It was agreed that Rule 30(b)(6) should move to the active  
1301 agenda. Judge Bates will appoint a subcommittee to address the  
1302 problems.

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1303 RULE 81(c)(3): 15-CV-A

1304 This item was carried forward from the agenda for the November  
1305 2015 meeting.

1306 The question was framed by 15-CV-A as a potential misstep in  
1307 the 2007 Style Project. The question is best understood in the full  
1308 frame of Rule 81(c).

1309 Rule 81(c) begins with (c)(1): "These rules apply to a civil  
1310 action after it is removed from a state court." Applying the rules  
1311 is important – a federal court could not function well with state  
1312 procedure, it would be awkward to attempt to blend state procedure  
1313 with federal procedure, and the very purpose of removal may be to  
1314 seek application of federal procedure.

1315 Rule 81(c)(3) provides special treatment for the procedure for  
1316 demanding jury trial. It begins with a clear proposition in (3)(A):  
1317 a party who expressly demanded a jury trial before removal in  
1318 accordance with state procedure need not renew the demand after  
1319 removal.

1320 A second clear step is provided by Rule 81(c)(3)(B): if all  
1321 necessary pleadings have been served at the time of removal, a jury  
1322 trial demand must be served within 14 days, measured for the  
1323 removing party from the time of filing the notice of removal and  
1324 measured for any other party from the time it is served with a  
1325 notice of removal. This provision avoids the problem that otherwise  
1326 would arise in applying the requirement of Rule 38(b)(1) that a  
1327 jury demand be served no later than 14 days after serving the last  
1328 pleading directed to the issue.

1329 The third obvious circumstance departs from the premise of  
1330 Rule 81(c)(3)(B): All necessary pleadings have not been served at  
1331 the time of removal. Subject to the remaining two variations, it  
1332 seems safe to rely on Rule 81(c)(1): Rule 38 applies after removal.

1333 The fourth circumstance arises when state law does not require  
1334 a demand for jury trial at any time. Up to the time of the Style  
1335 Project, this circumstance was clearly addressed by Rule  
1336 81(c)(3)(A): "If the state law **does** not require an express demand  
1337 for jury trial, a party need not make one after removal unless the  
1338 court orders the parties to do so within a specified time. The  
1339 court must so order at a party's request and may so order on its  
1340 own." The direction was clear. The underlying policy is to balance  
1341 competing interests. There is a fear that a party may rely after  
1342 removal on familiar state procedure – absent this excuse, the right  
1343 to jury trial could be lost for failure to file a timely demand  
1344 under Rule 38 after removal. At the same time, the importance of

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1345 establishing whether the case is to be set for jury trial reflected  
1346 in Rule 38 is recognized by providing that the court can protect  
1347 itself by an order setting a time to demand a jury trial, and by  
1348 further providing that a party can protect its interest by a  
1349 request that the court must honor by setting a time for a demand.

1350 The Style Project changed "does," the word highlighted above,  
1351 to "did." That change opens the possibility of a new meaning for  
1352 this fifth circumstance: "[D]id not require an express demand"  
1353 could be read to excuse any need to demand a jury trial when state  
1354 law does require an express demand, but sets the time for the  
1355 demand at a point after the time the case was removed. The question  
1356 was raised by a lawyer in a case that was removed from a court in  
1357 a state that allows a demand to be made not later than entry of the  
1358 order first setting the case for trial. The court ruled, in keeping  
1359 with the Style Project direction, that the change from "does" to  
1360 "did" was intended to be purely stylistic. The exception that  
1361 excuses any demand applies only if state law does not require an  
1362 express demand for jury trial at any point.

1363 The question put by 15-CV-A can be stated in narrow terms:  
1364 Should the Style Project change be undone, changing "did" back to  
1365 "does"? That would avoid the risk that "did" will be read by others  
1366 to mean that a jury demand is not required after removal if,  
1367 although state procedure does require an express demand, the time  
1368 set for the demand in state court occurs at a point after removal.  
1369 There is at least some ground to expect that the ambiguous "did"  
1370 may cause some other lawyers to misunderstand what apparently was  
1371 intended to be a mere style improvement.

1372 A broader question is whether a party should be excused from  
1373 making a jury demand if, although a demand is required both by Rule  
1374 38 and by state procedure, state procedure sets the time for making  
1375 the demand after the time the case is removed. It is difficult to  
1376 find persuasive reasons for dispensing with the demand in such  
1377 circumstances. And there is much to be said for applying Rule 38 in  
1378 the federal court rather than invoking state practice.

1379 A still broader question is whether it is time to reconsider  
1380 the provision that excuses the need for any jury demand when a case  
1381 is removed from a state that does not require a demand. Both the  
1382 court and the other parties find it important to know early in the  
1383 case whether it is to be tried to a jury. Present Rule 81(c)(3)(A)  
1384 recognizes this value in the provision that allows the court to  
1385 require a demand, and that directs that the court must require a  
1386 demand if a party asks it to do so. In effect this rule transfers  
1387 the burden of establishing whether the case is to be tried to a  
1388 jury from a party who wants jury trial to the court and the other  
1389 parties. The evident purpose is to protect against loss of jury

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1390 trial by a party that does not familiarize itself with federal  
1391 procedure even after a case is removed to federal court. It may be  
1392 that the time has come to insist on compliance with Rule 38 after  
1393 removal, just as the other rules apply after removal.

1394 Discussion began with the question whether it would be useful  
1395 to change "did" back to "does" now, holding open for later work the  
1396 question whether to reconsider this provision. Two judges responded  
1397 that it is important to know, as early as possible, whether a case  
1398 is to be tried to a jury. Rather than approach the question in two  
1399 phases, it will better to consider it all at once.

1400 The Committee agreed to study the sketch of a simplified Rule  
1401 81(c)(3) presented in the agenda materials:

1402 (3) *Demand for a Jury Trial*. Rule 38(b) governs a demand for  
1403 jury trial unless, before removal, a party expressly  
1404 demanded a jury trial in accordance with state law. If  
1405 all necessary pleadings have been served at the time of  
1406 removal, a party entitled to a jury trial under Rule 38  
1407 must be given one<sup>1</sup> if the party serves a demand within 14  
1408 days after:

1409 (A) it files a notice of removal, or  
1410 (B) it is served with a notice of removal filed by  
1411 another party.

1412 <sup>1</sup> This version simply tracks the current rule. It might  
1413 be shortened: "If all necessary pleadings have been  
1414 served at the time of removal, a demand must be  
1415 served within 14 days after the party \* \* \*."

1416 If there is some discomfort with the 14-day deadline, it could  
1417 be set at 21 days.

1418 15-CV-EE: FOUR SUGGESTIONS

1419 Social Security Numbers: Rule 5.2 allows a filing to include the  
1420 last four digits of a social security number. The suggestion is  
1421 that the last four digits can be used to reconstruct a full number  
1422 for any number issued before the last few years. This risk was  
1423 known at the time Rule 5.2 and the parallel provisions in other  
1424 rules were adopted. The decision to allow the last four digits to  
1425 be filed was made deliberately in response to the special need to  
1426 have the last four digits in bankruptcy filings and the desire to  
1427 have parallel provisions in all the rules. The Committee concluded  
1428 that Rule 5.2 should not be amended unless another advisory  
1429 committee believes the question should be studied further.

1430 Forma pauperis affidavits: This suggestion is that an affidavit  
1431 stating a person's assets filed to support an application to

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1432 proceed in forma pauperis should be protected by requiring filing  
1433 under seal and ex parte review. Other parties could be allowed  
1434 access for good cause and subject to a protective order. Unsealing  
1435 could be allowed in redacted form. The purpose is to protect  
1436 privacy. Committee discussion recognized the privacy interest, but  
1437 concluded that the proposal should be put aside. Ex parte  
1438 consideration would make difficult problems for institutional  
1439 defendants that confront a party who frequently files forma  
1440 pauperis actions. Requiring long-term preservation of sealed papers  
1441 is not desirable. Sealing is itself a nuisance. Recognizing forma  
1442 pauperis status expends a public resource, conferring a public  
1443 benefit. And the interest in privacy concern may be lessened by the  
1444 experience that "no one has any interest" in most i.f.p. filings.  
1445 The Committee voted to close consideration of this suggestion.

1446 Copies of Unpublished Authorities: This proposal is drawn verbatim  
1447 from Local Rule 7.2, E.D. & S.D.N.Y. The rule, in some detail,  
1448 requires a lawyer to provide a pro se party with a copy of cases  
1449 and other authorities cited by the lawyer or by the court if the  
1450 authority is unpublished or is reported exclusively on computerized  
1451 databases. Discussion reflected agreement that this practice can be  
1452 a good thing. Some judges do it without benefit of a local rule.  
1453 But not all do, and it cannot be assumed that all lawyers do it. A  
1454 lawyer will supply the court with a truly inaccessible authority,  
1455 and that may entail providing it to other parties. And even large  
1456 institutions may not have ready access to everything that is out  
1457 there. The committee agreed that although this local rule is an  
1458 attractive idea, it is not an idea that should be embodied in a  
1459 national rule. The practice might prove worthy of a place on the  
1460 agendas of judicial training programs.

1461 Pro se e-filing: This suggestion is addressed by the proposals for  
1462 e-filing and e-service discussed earlier in the meeting.

1463 PLEADING STANDARDS: 15-CV-GG

1464 This suggestion is that Rule 8(a)(2) and the appendix of forms  
1465 that was abrogated on December 1, 2015 "are so misleading as to be  
1466 plain error." The underlying proposition is that although the  
1467 Supreme Court wrote its Twombly and Iqbal opinions as  
1468 interpretations of Rule 8(a)(2), anyone who relies on the rule text  
1469 will be grievously misled as to contemporary federal pleading  
1470 standards. The question thus is whether the time has come to take  
1471 on a project to consider whether the pleading standards that have  
1472 evolved in the last nine years should be addressed by more explicit  
1473 rule language. The project would attempt to discern whether there  
1474 is any standard that can be articulated in rule language, and make  
1475 one of at least three broad choices: confirm present practice;  
1476 heighten pleading standards beyond what courts have developed in

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1477 response to the Supreme Court's opinions; or reduce pleading  
1478 standards to establish some more forgiving form of "notice  
1479 pleading." The Committee has considered this question repeatedly.  
1480 Brief discussion concluded that it is not yet time to undertake a  
1481 project on general pleading standards.

1482 RULE 6(d) AND "MAKING" DISCLOSURES

1483 This suggestion arises from the need to read carefully through  
1484 the provisions of Rules 26(a)(2)(D)(2) and 26(a)(3)(B) in relation  
1485 to Rule 6(d). Rule 6(d) provides an additional three days to act  
1486 after service is made by specified means when the time to act is  
1487 set "after service" ["after being served" as the rule may soon be  
1488 amended]. The provisions in Rule 26 direct that disclosure of a  
1489 rebuttal expert be "made" within 30 days after the other party's  
1490 disclosure, and that objections to pretrial disclosures be made  
1491 within 14 days after the disclosures "are made." The concern is  
1492 that although these provisions set times that run from the time a  
1493 disclosure is "made," not the time it is served, some unwary  
1494 readers may overlook the distinction and rely on Rule 6(d). The  
1495 Committee concluded that this suggestion should be closed.

1496 15-CV-JJ: PRO SE E-FILING

1497 This suggestion urges that pro se litigants be allowed to use  
1498 e-filing. As with 15-CV-EE, noted above, this topic is addressed by  
1499 the pending proposals to amend Rule 5.

1500 THIRD-PARTY LITIGATION FINANCING: 15-CV-KK

1501 This suggestion follows up an earlier submission that the  
1502 Committee should act to require disclosure of third-party financing  
1503 arrangements. It provides additional information about developments  
1504 in this area, including materials reflecting interest in Congress.  
1505 But it does not urge immediate action. Instead, it urges the  
1506 Committee "to take steps soon to achieve greater transparency about  
1507 the growing use of TPLF in federal court litigation." Discussion  
1508 noted that "this is a hot topic in the MDL world." It was noted  
1509 that third-party funding raises difficult questions of professional  
1510 responsibility. The Committee decided, as it had earlier, that this  
1511 topic should remain open on the agenda without seeking to develop  
1512 any proposed rules now.

1513 RULE 4: SERVICE ON INDIVIDUAL FEDERAL EMPLOYEES: 15-CV-LL

1514 This suggestion says that it can prove difficult to effect  
1515 service on a federal employee who is made an individual defendant.  
1516 Locating a home address can be hard, particularly as to those whose  
1517 permanent address is outside the District of Columbia. It is not

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1518 clear whether service can be made by leaving a copy of the summons  
1519 and complaint at the defendant's place of federal work, in the  
1520 manner authorized by Rule 5(b)(2)(B)(i) for service of papers after  
1521 the summons and complaint. Two amendments are suggested:  
1522 authorizing service by leaving the summons and complaint at the  
1523 defendant's place of work, or requiring the agency that employs the  
1524 defendant to disclose a residence address. Discussion began by  
1525 observing that the Enabling Act may not authorize a rule directing  
1526 a federal agency to disclose an employee's address. It also was  
1527 noted that similar problems can arise in attempting to serve state  
1528 and local government employees. The Department of Justice thinks  
1529 that service by leaving at the defendant's place of work is a bad  
1530 idea. The Committee concluded that although there may be real  
1531 problems in making service in some circumstances, they cannot be  
1532 profitably addressed by amending Rule 4. This suggestion is closed.

1533 15-CV-NN: MINIDISCOVERY AND PROMPT TRIAL

1534 This suggestion by Judge Michael Baylson, a former Committee  
1535 member, proposes a new rule for "Mini Discovery and Prompt Trial."  
1536 The rule would expand initial disclosure of documents, require  
1537 responses to interrogatories within 14 days, limit depositions  
1538 among the parties to 4 per side at no more than 4 hours each, allow  
1539 third-party discovery only on showing good cause, allow no more  
1540 than 10 requests for admissions, and set the period for discovery  
1541 (including expert reports) at 90 days. Motions for summary judgment  
1542 would be permitted only for good cause, defined as potentially  
1543 meritorious legal issues, and not for insufficiency of the  
1544 evidence. Discussion noted that a rule amendment would be required  
1545 to authorize a court to forbid filing a motion for summary  
1546 judgment, although a court can require a pre-motion conference to  
1547 discuss the matter. Judge Pratter observed that Judge Baylson is a  
1548 persuasive advocate for this proposal. It was suggested that judges  
1549 should be encouraged to experiment along these lines. But it was  
1550 concluded that it would be premature to consider rulemaking now.  
1551 There is a big overlap between this proposal and the practices that  
1552 will be explored in the two pilot projects approved by the  
1553 Committee in earlier actions.

1554 15-CV-00: TIME STAMPS, SEALS, ACCESS FOR VISUALLY IMPAIRED

1555 This set of suggestions addresses several issues that do not  
1556 lend themselves to resolution by court rule. The concern that  
1557 improvements are needed in access to courts for the visually  
1558 impaired is particularly sympathetic. Emery Lee will investigate  
1559 whether PACER is accessible.

1560 RULE 58: SEPARATE DOCUMENT

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1561 Judge Pratter brought to the Committee's attention a Third  
1562 Circuit decision that found an appeal timely only because judgment  
1563 had not been entered on a separate document. The catch was that the  
1564 dismissal order included a footnote that set out the district  
1565 court's "opinion." The ruling that the appeal was timely reflects  
1566 many other applications of Rule 58. The separate document  
1567 requirement was added to Rule 58 to establish a bright-line point  
1568 to start the running of appeal time. It has been interpreted to  
1569 deny separate-document status to very brief orders that provide  
1570 even minimal explanation in addition to a direction for judgment.  
1571 For many years the result was that appeal time – and the time for  
1572 post-judgment motions – never began to run in cases that were  
1573 finally resolved without entry of judgment on an appropriately  
1574 "separate" document. This problem was resolved by amendments made  
1575 to Rule 58 in 2002. Rule 58(c) now provides that when entry of  
1576 judgment on a separate document is required, judgment is entered on  
1577 the later of two events: when it is set out in a separate document,  
1578 or 150 days after it is entered in the civil docket.

1579 Judge Pratter said that judges on her court have the desirable  
1580 practice of providing brief explanations for judgments that do not  
1581 warrant formal opinions. But that means that if a judge  
1582 inadvertently fails to enter a still briefer separate document,  
1583 appeal time expands from 30 days to 180 days (150 days plus 30  
1584 days). Is this desirable? The summary of the work done in 2002, and  
1585 repeated by the Appellate Rules Committee in 2008, shows deliberate  
1586 choices carefully made in creating and maintaining the present  
1587 structure. Rather than reconsider these choices now, perhaps the  
1588 Committee can find a mechanism that will foster compliance with the  
1589 separate-document requirement.

1590 Discussion suggested that the problem is not in the rule. "We  
1591 simply need to do it better." The courtroom deputy clerk should be  
1592 educated in the responsibility to ensure entry of judgment on a  
1593 separate document whenever the court intends a final judgment. Some  
1594 circuits have managed educational efforts that have been  
1595 successful, at least in immediate effect.

1596 This agenda item was closed.

Respectfully Submitted

Edward H. Cooper  
Reporter

June 9, 2016

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# TAB 3

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Report of the Administrative Office

Item 3 will be an oral report.

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#### 4: RULE 30(b)(6) SUBCOMMITTEE REPORT

During its April 2016 meeting, the Committee decided that a further examination of Rule 30(b)(6) was warranted. Around ten years ago, the Committee spent a considerable amount of time and energy examining a variety of Rule 30(b)(6) issues identified by bar group submissions about practice under that rule. This review process included outreach to a number of bar groups about the rule that produced a variety of thoughtful submissions.

After considerable discussion by the Discovery Subcommittee and the full Committee, the decision a decade ago was not to proceed seriously to consider changes to the rule. Although there was a possibility that the rule might sometimes be exploited in inappropriate ways, there were also concerns that it was intentionally broad in order to defeat other sorts of inappropriate behavior. Put differently, the rule contained a mixture of provisions that, together, seemed to work reasonably well. Changing some of them might upset the balance.

Despite that conclusion a decade ago, there have been repeated reports since then that abuse of the rule or difficulties in using it warrant further focus on 30(b)(6). In 2013, the Committee on Federal Courts of the New York City Bar Association submitted a proposal to provide a minimum notice period and add other protections with regard to 30(b)(6) depositions, but the Committee then decided not to pursue these ideas, in part because it had recently made a relatively thorough study of the rule.

Early in 2016, the leadership of the ABA Section of Litigation submitted a proposal that the Committee make a thorough study of the rule. This submission (16-CV-A) is included in the agenda book and was before the Committee during its April 2016 meeting. It identified a wide range of issues that might call for serious consideration of a rule amendment, although it also noted as to some that the current rule language seemed about as good as could be devised.

Since the April 2016 full Committee meeting, a Rule 30(b)(6) Subcommittee has been appointed. It has begun initial discussions of the issues examined a decade ago and the more recent submissions from the leadership of the ABA Section of Litigation and the New York City Bar Association. It met by conference call on Sept. 1 and Sept. 15. Notes of those conference calls are included in the agenda book.

During its first conference call, the Subcommittee had before it a list of approximately 16 different issues raised from various sources about practice under Rule 30(b)(6). This list, largely drawn from the ABA submission, included:

- (1) Directing that the person or persons designated to testify have personal knowledge of the matters on which

examination would focus, similar to the "most knowledgeable person" requirement under the practice of some states;

- (2) Providing for objections to the notice and suspending the obligation to respond if objections are served;
- (3) Limiting the number of matters on which examination may be sought;
- (4) Specifying in the rule the way in which the existing limits on number of depositions and duration of depositions should be applied to Rule 30(b)(6) depositions;
- (5) Forbidding questioning beyond the matters listed in the notice, or providing that questioning beyond the topics listed would count as a separate deposition for purposes of the ten-deposition limit;
- (6) Clarifying the current requirement that the list of matters for examination identify them with "reasonable particularity";
- (7) Forbidding contention questions during 30(b)(6) depositions;
- (8) Clarifying in the rule the "binding effect" of answers given, and whether they constitute judicial admissions;
- (9) Providing in the rule a method for an organization to indicate that it has no knowledge on one or more matters slated for examination, and a way of dealing with such problems;
- (10) Treating nonparty organizations differently;
- (11) Providing in the rule whether an additional 30(b)(6) examination of an entity is permitted, and how such an additional deposition should be counted toward the ten-deposition limit already in the rules;
- (12) Providing in the rule that work product protections apply in 30(b)(6) depositions;
- (13) Making the duty to prepare the witness or witnesses clearer in the rule;
- (14) Providing a duty to supplement the testimony of a 30(b)(6) witness;
- (15) Providing in the rule that the organization must identify in advance the person or persons it is designating and, if more than one person is designated,

also indicate the subjects on which each would testify;  
and

- (16) Providing in the rule whether 30(b)(6) depositions must occur early or late in the litigation.

During the Subcommittee's first conference call, there was some consensus that most or all these points had some validity. But it also seemed that many might not warrant a rule provision or that a rule provision could raise difficulties. In addition, at least one additional idea emerged -- directing that the party taking the deposition provide the documents on which examination would focus some period of time before the deposition was to occur. This procedure could ensure that the witness would be prepared to answer questions about the documents in a way that a list of matters for examination might not.

More generally, the Subcommittee's first conference call produced some consensus on the view that it could be sensible to construct a rule provision that enumerated a variety of topics for this specialized variety of deposition, rather than simply relying on the general provisions of the rules. As an analogy, Rule 45 has a relatively complete set of directives for nonparty depositions. Perhaps a "stand alone" approach to 30(b)(6) depositions would be warranted as well.

Another idea that emerged during the first conference call was that 30(b)(6) depositions are largely substitutes for interrogatories seeking to identify witnesses with pertinent information and obtain general background information on various subjects. If so, perhaps the question of nonparty 30(b)(6) depositions could be re-examined, since interrogatories presently cannot be directed to nonparties. Perhaps the solution might be to create a vehicle for directing written questions to nonparties about the identity and location of documents, electronically stored information, and witnesses. Alternatively, perhaps nonparty depositions should be limited to identifying the location of material discoverable under Rule 34 and identifying witnesses. Perhaps a variation of a Rule 31 deposition on written questions would do the job.

Before the second conference call, a rough sketch of a possible "stand alone" rule was circulated, with specific provisions dealing with many of the matters identified above. One reaction to that composite sketch was that it prompted an overwhelming "oh my God" sort of reaction. Another was that many of the sketches addressed issues that might better not be addressed in a rule, or that should be addressed differently in a rule if the rule provided for them.

At the same time, there was uneasiness about how best to obtain input from the full Committee on these issues. It was emphasized that the Subcommittee's consideration of these issues has so far been both preliminary and tentative. The concreteness

of even rule sketches might be misconstrued to suggest that the Subcommittee had reached at least a tentative decision that these sketches were promising initial drafts of rule amendments. Any such conclusion would misconstrue the extent of consideration so far. But concrete sketches are often the best way to elicit informative feedback.

Accordingly, although this memorandum presents initial sketches of possible rule amendment ideas, it should be clear from the outset that **the Subcommittee has reached no conclusion, even a tentative one, about whether any topic on its discussion list, much less any rule sketch, warrants serious consideration as an amendment idea. It is seeking reactions from the full Committee on the specific topics and on the question whether a "stand alone" or "case management" approach seems promising.**

Discussion during the two conference calls also identified several topics on which research would be informative. It is hoped that the Rules Law Clerk will be able to provide assistance on these topics. The topics identified so far are:

- (1) A literature search for articles, principally in the practicing bar literature, on current Rule 30(b)(6) practice. Although some efforts to glean such information were undertaken a dozen years ago, a more current search seems likely to provide useful information. The focus on practitioner literature rather than law review treatments recognizes that the primary concerns identified so far are about practical problems with 30(b)(6) depositions, not theoretical issues.
- (2) A review of local rules to determine whether they contain special provisions for 30(b)(6) depositions. If there are such local rules, they might either indicate what problems have already been identified in rules, or serve as models for possible national rulemaking. If possible, a collection of standing orders on the subject from individual judges could be similarly informative. The Subcommittee has already reviewed one such order (from Judge James Donato, N.D. Cal.), which sets a limit of 10 matters, specifies the duration of the deposition of each person designated, addresses the question of the deposition of the witness in an individual capacity, and specifies that 30(b)(6) testimony is never a judicial admission.
- (3) Research on the current case law about the "judicial admissions" aspect of Rule 30(b)(6) testimony. A decade ago, it appeared that cases seeming to invoke a judicial admissions attitude really were using it as a sanction (like that authorized by Rule 37(c)(1)) regarding use of information not disclosed in the



deposition.

It is not presently clear what this research will show. So in addition to the reasons mentioned above about why the Subcommittee is tentative at present about any possible amendment to the rule, it must be emphasized that **the Subcommittee will not be able to reach consensus on the wisest way forward until it is able to consider the results of the research efforts identified above.** Any guidance Committee members can provide -- particularly as to local rules or standing orders related to 30(b)(6) depositions -- would be greatly appreciated.

Accordingly, this memorandum presents sketches solely for the purpose of eliciting reactions and input from the full Committee. It begins with the "stand alone" idea that emerged from the Subcommittee's initial conference calls. That sketch contains a number of specific provisions that the Subcommittee has not had time to discuss. A review of the conference call notes for the Sept. 15 call shows which issues the Subcommittee has addressed, and that as to those issues there were significant concerns about various provisions, as well as on the overall question whether creating such a stand alone rule would be a wise direction to pursue.

The various provisions included in the sketch below are followed by notes offering some observations about them and identifying some initial questions they might raise if the Subcommittee proceeds to consider them seriously. The Subcommittee invites reactions on those specifics from the Committee, in addition to reactions to the overall idea of a stand alone treatment of these depositions. It could be that some specifics should be added to the current rule, but that others should not be included, although they might merit mention in a Committee Note attending a rule amendment addressing some specifics.

As an alternative, the Subcommittee also presents a sketch below of what might be called a "case management" approach to these issues. That would include fewer or no specifics, but could serve as a basis for a Committee Note focusing on some points that the rule does not address.

Overall, it must be emphasized that the Subcommittee's tentative initial discussions of these issues does not imply any commitment to proceed with any particular rule change ideas.

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

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

### **(6) Notice or Subpoena Directed to an Organization.**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Alternative One*

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

*Alternative Two*

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

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

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

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

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

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

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

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

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

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

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

(E) Designation of persons to testify.

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

**(3) Discovery Plan.** A discovery plan must state the parties' views and proposals on:

**(A)** what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

**(B)** the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

**(C)** any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

**(D)** any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order;

**(E)** any issues about [contemplated] Rule 30(b)(6) depositions, including \_\_\_\_\_;

**~~(F)~~** what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

**(G)** any other orders that the court should issue under

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

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

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

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

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

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

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

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

**(vii)** \* \* \* \* \*

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

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# TAB 4B

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Notes of Conference Call  
Rule 30(b)(6) Subcommittee  
Sept. 15, 2016

On Sept. 15, 2016, the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Judge Joan Ericksen (Chair of the Subcommittee), Judge John Bates (Chair, Advisory Committee), Judge Brian Morris, Judge Craig Shaffer, John Barkett, Parker Folse, Prof. Edward Cooper (Reporter to the Advisory Committee), and Prof. Richard Marcus (Reporter to the Subcommittee).

The call was introduced with the idea that the question whether a "stand alone" rule should be retained within Rule 30 or truly stand alone, perhaps in a new Rule 30.1, could be deferred for the time being. That met with approval. The draft circulated since the last conference call captured ideas from that call and provided a basis for discussion during this call.

One thought was that it might later make sense to consider whether this sort of deposition could only be required of parties, not nonparty organizations. To the extent this deposition opportunity results from deficiencies in the use of interrogatories to get the kind of information that should be sought in 30(b)(6) depositions, it is worth noting that interrogatories can't be sent to nonparties. Maybe the same should go for this type of deposition. That would not prevent subpoenas for nonparty documents.

The goal of today's call is to get some sense of the Subcommittee's attitude on the big issues presented. Relatively soon it will be necessary to determine what to present to the full Committee in November, and how to present it.

One reaction was that it might not be best to present the sketches before the Subcommittee, as opposed to descriptive material on the topics addressed in the sketches. That might make the whole thing more manageable; otherwise the rest of the Advisory Committee might feel overwhelmed by this material, or conclude that the Subcommittee was resolved on proceeding with a rule proposal along these lines when it has not reached any such conclusion. Perhaps it would be best to turn these ideas into questions.

At the same time, it was emphasized that the very concreteness of the sketches may support a full Committee discussion in a way that general ideas or questions might not. It would be important to emphasize from the outset that the Subcommittee has not resolved that any rule changes are needed. Indeed, around a decade ago the full Committee spent a considerable amount of time examining the rule and decided eventually not to make any changes in it.

Discussion turned to the specifics in the new sketch of a

stand alone rule.

(A) Notice period: The question was raised whether 30(b)(6) depositions are such distinctive events that, unlike other depositions, there should be a minimum notice period specified in the rule. For all other depositions, "reasonable" notice would suffice. Is it always true that a specific period is necessary for a 30(b)(6) deposition? Some of them may be relatively straightforward.

A reaction was that this is the only sort of deposition for which the rules command preparation. True, careful preparation is desirable and usually will occur for all depositions. But in terms of what the rules provide, it could be explained that a specific notice period recognizes that unique feature of this sort of deposition.

Another reaction was that the structure of the rest of the provisions of the sketch seems to call for some sort of minimal notice period. It provides a set period of time to object, and also requires the party taking the deposition to provide copies of all exhibits to be used. Then it directs the organization to notify that party who will be appearing for it. All those things have to be done in set time periods, so an overall notice period seems necessary.

(C) objection procedure: This provision was introduced as providing a way to object and prescribing the consequences of making an objection. That prompted the reaction that in one district the local rules say there is 14 days to object. A suggestion emerged: Would it not be desirable to find out whether many districts have local rules setting times for deposition notices, or special rules for 30(b)(6) depositions? That might be among the pieces of information a literature search by the Rules Law Clerk could provide.

Another question was whether it was important for the rule to provide a method for objecting. One reaction was that "In my district, the lawyers do not seem to have difficulty doing that."

The question was raised why this did not simply allow "reasonable" notice of the deposition and the objection before the deposition occurred. The question prompted an analogy to the Rule 45 procedure. Under Rule 45(d)(2)(B), when a subpoena seeks production of documents, the objection must be made within 14 days of service of the subpoena or before the time set for the deposition, whichever is sooner. So there can be uncertainty about these periods, since the objections might be required sooner.

Another observation was that the sketch includes a bracketed provision that after objection the testimony occurs only as directed by court order, which must "protect the organization against disproportionate burden or expense resulting from



compliance." Is that qualification necessary? Couldn't that come in the Notes rather than the rule? The proportionality requirement is already in the rules and applies to all discovery.

Another issue with the objection procedure was whether it makes sense that an objection to one matter in the notice stops the entire deposition from proceeding. That is what happens under Rule 45(d)(2)(B). The assumption from there may be that the principal focus of a nonparty subpoena is on the documents. Indeed, Rule 45(d)(2)(A) says an appearance is not required when documents are sought. Rule 30(b)(6) depositions of parties may be significantly different. Should a rule instead provide that the examination proceed as to other matters, with only the objected-to matter subject to court order?

(D) disclosure of exhibits: An initial reaction was that this would be a big change. It resembles something that comes up at trial -- an order that all exhibits that will be used in direct testimony be served in advance. That comes even when there should already be an exhibit list. But the general assumption is that cross examination is different, and that exhibits to be used on cross need not be provided in advance. With cross, the element of surprise is important. How does that apply in 30(b)(6) depositions? They seem to include elements of both direct and cross. On the one hand, they often involve simple fact-gathering. But on the other hand, they also may often involve examination more akin to cross. What do we really want of these depositions?

One reaction is that a special requirement only for these depositions seems odd in some ways. Do districts have special rules for 30(b)(6) depositions? The notes on the first conference call reference the San Juan Dupont Plaza First Circuit decision, but that seems to have applied a disclosure-of-exhibits requirement to all depositions, not just 30(b)(6) depositions. If such a provision is presented to the full Committee in November, that will surely be among the questions raised.

An alternative way of proceeding was suggested: The rule could say that the notice may include copies of documents on which the witness will be examined. That way, the rule would not preclude examination on additional documents, but the notice could ensure that the organization was aware that the witness would need to be able to address the documents included with the notice.

Another caution about the sketch was that the "must provide" aspect could produce a huge collection of documents. Sometimes the final pretrial disclosures have 700 exhibits for trial just to make certain that everything that might be used is included, and then only 40 or 50 are actually used. Such a notice would not be useful.

A reaction to this discussion was that there is a lot of

gamesmanship in relation to 30(b)(6) depositions. It sometimes seems that they are tools for gotcha arguments. But the possibility of some provision about advance provision of exhibits must stay on the list of topics for discussion.

(E) designation of persons to testify: An initial question was about the use of reference to "information known or reasonably available to the organization" in (i). Should that instead be to "facts"? One of the things raised by the ABA submission and other bar groups has been that this sort of deposition should not go beyond identifying sources of information. That may also bear on (F), on questioning beyond the matters in the notice. It is not clear what the right wording would be for a rule, but the basic idea is that the deposition is mainly to prepare for targeted information gathering.

A possibility would be to put "facts" into the draft in brackets. But it is worth noting that the provision in the sketch is drawn from the current rule. In a way this concern resembles the relatively recent change to Rule 26(a)(2)(B)(ii), when "facts or data" was substituted for "data and other information" considered by the witness. The latter phrase was felt to invite probing into all communications between the expert and the witness, including even opinion work product.

A reaction to this comparison was that the problem with experts seems different. Another reaction was that the only circumstance that comes to mind as involving important concerns is when the organization designates an attorney to be the witness. Saying "fact" would deal with work product issues in that sort of situation.

A caution was offered: Be careful about switching to "facts." The scope of discovery under Rule 26(b)(1) focuses on "information." We should hesitate before changing to "facts" here. Another possibility suggested was "matter." But that word is used in 30(b)(6) to describe what must be included in the notice -- "the matters for examination." To use "matters" here also could easily be confusing.

It was noted as well that "information" appears in (E)(iv) and (E)(v).

Attention shifted to (E)(v) on situations in which the organization is unable to locate information on a matter on the list for examination. Counsel may insist on going forward with a deposition when the organization proposes using interrogatories or other methods as superior. That problem arises in actual practice. A reaction was that Rule 26(b)(2)(C) provides a solution; it says that one may seek relief in court if there is a less burdensome way to get the same information. So maybe (v) is not needed, if the solution is elsewhere in the rules.

Another issue arose: If (v) is retained, does that mean there can be no questioning about the subject, or even how much effort was made to find responsive information? Do you just have to take the other side's word for it that information could not be located, and that a sufficient effort was made to find the information? Right now, it happens all the time that there is inquiry about the efforts made to obtain responsive information.

Another reaction was that the provision says that there can be a motion to compel. What does that compel? Is such an order necessary to permit examination about the efforts made? Could the court order the organization to gather information without first being informed about the efforts already made to locate responsive information?

Another reaction was "Shouldn't it always be o.k. to inquire about preparation of the witness and efforts to procure responsive information?" A response was "Sure, you can ask about that."

This drew a suggestion that another way to address these concerns could be requiring advance notice that information was not available on certain matters on the list, perhaps with a specification of the efforts made to obtain the information. Then the examining party would be on notice of the problem and in a position to probe the efforts made.

Another reaction was that (C) addresses objections to the notice; maybe that is the right way to handle this problem. That can be an objection. But there would still be the issue of inquiry during the deposition about the efforts to locate responsive information.

Attention shifted to (E)(iii) on advance notice regarding the identity of the person or persons who will testify. Will this work? The reaction was that "This is common. It's a two-way street. This would not be viewed as a radical change." But if the person designated is also a fact witness, limiting questioning to the designated matters (as suggested by (F)) might create difficulties.

Regarding (E)(iv), on certifying under Rule 26(g) that the witness was prepared to address the specified matters, a problem emerged: Often you think that you've adequately prepared the person, but the questioning eventually gets to something the witness does not know. In a sense this is a feature of the "reasonable particularity" provision in the current rule, but when the question is very specific the witness may not be sure. On the other hand, it would be valuable to keep this idea in the sketch going forward. There will be a reaction, and that reaction will inform us about how to proceed.

A different concern emerged about (iv): Having a sanction provision added is troubling. The goal should be to encourage

cooperating and communication, not seeking sanctions. Rule 26(g)(3) speaks of sanctions. Can't we speak instead of remedies? Wouldn't it be better for the rule to say that the witness must be produced a second time if unable to answer on the first occasion?

(F) questioning beyond matters designated: The first reaction was that this would be a "very significant addition." Most published opinions are about adequate preparation, and in a way they may often be about whether the questioning goes beyond the noticed matters and the organization takes the position that the questioning goes beyond the notice. Moreover, if the principle is that the deposition must not stray beyond the notice, that could cause other problems and waste the parties and the witness's time. If the witness has personal knowledge, doesn't it make sense to get that on the spot? But then it's like any other deposition.

A different reaction was that such a rule invites an even longer list of topics. If those are the only things one may ask about, one must be careful to include everything that might be important. A reaction to that concern was "This happens already."

Another possible concern was that such a rule provision might be invoked against questions designed to test the credibility of the witness. And testing credibility should be o.k.

(H) judicial admissions: An initial reaction to this provision was that it would be useful to determine whether it is different from the case law in any circuit. A rule change can change existing case law, but we should go into that with open eyes.

#### How to proceed from here

As time for the call was running short, discussion shifted to the best way to proceed from this point. There was further discussion of whether to provide only general topics or more concrete sketches of possible rule provisions to stimulate discussion during the November meeting of the full Committee.

One way of proceeding was with fervent caveats that the Subcommittee has only begun its discussion of these difficult topics and has not reached any conclusions on whether any rule change proposals are appropriate, much less what they should be if they are appropriate.

It was noted that, after November, the full Committee will probably be occupied mainly with the public comment process on the package published in August, particularly the class action rule. The full Committee got a brief introduction to the 30(b)(6) issues during its April meeting. So it is probably not

asking too much for them to absorb the very tentative specifics we have been discussing.

At the same time, it might be very helpful were the Subcommittee to hold another conference call before the November meeting. Ultimately, the Subcommittee should be making recommendations to the full Committee, and it should approach the November meeting with an eye to what guidance it wants from the full Committee.

But getting the specifics out into the agenda book may pay dividends beyond full Committee reactions. Some bar groups and others monitor what the Committee is discussing, and formal or informal reactions may be forthcoming and helpful. All members of the full Committee might then be sensitized to the issues raised and alert to whether they encounter experiences pertinent to our work.

In conclusion, the idea going forward is to recognize that we are at a very early stage, and also that there are many sides to the issues we have identified. The Rule 23 Subcommittee, for example, had a very different set of issues during its first major report to the full Committee in March 2012 from the list that eventually became the current preliminary draft of proposed amendments. These things evolve.

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Notes of Conference Call  
Rule 30(b)(6) Subcommittee  
Sept. 1, 2016

On Sept. 1, 2016, the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Judge Joan Ericksen (Chair of the Subcommittee), Judge Brian Morris, Judge Craig Shaffer, John Barkett, Parker Folse, Virginia Seitz, Prof. Edward Cooper (Reporter to the Advisory Committee), Prof. Richard Marcus (Reporter to the Subcommittee) and Derek Webb (Rules Law Clerk).

The call was introduced as offering an occasion for exploring the ideas that have been suggested for changing Rule 30(b)(6) and exchanging views about the most significant problems encountered under that rule. The reality is that bar groups have repeatedly urged the Advisory Committee to pursue amendments to the rule to respond to problems they have portrayed as serious. A decade ago, the Committee gave serious and extended consideration to a variety of these concerns, but concluded that it did not then seem that amendments would resolve various problems, and also worried that amendments might themselves produce problems. But reports of serious problems continue to come in.

The members of this Subcommittee all expressed an interest in focusing on the rule and perhaps revisiting some of the issues not acted upon a decade ago. In advance of the meeting, Prof. Marcus circulated a memorandum listing about 16 possible issues that had emerged through recent submissions to the Committee or from a review of the study done a decade ago. In addition, he circulated a considerable body of material generated during that work done a decade ago as background for the current work. But the Subcommittee had not itself discussed the issues that seemed most pressing, a process this conference call could begin.

A first reaction was that one idea would be to consider some sort of requirement that the party noticing the deposition provide to the other parties (particularly the organization providing the testimony) a list or copies of all documents or electronically stored information that would be the subject of examination during the deposition. Some courts have standing orders directing that such materials be provided. The documents can both assist the responding organization in knowing what information is sought, and assist it in selecting the best representative to provide that information.

The example of *In re San Juan DuPont Plaza Hotel Fire Litigation*, 859 F.2d 1007 (1st Cir. 1988), was cited. In that massive litigation, the district court ordered a deposition protocol requiring that any party taking a deposition provide a list of exhibits to be used during the deposition five days before the deposition was to begin. In this case, it was anticipated that around 2,000 depositions might be taken. The

Plaintiffs Steering Committee obtained appellate review of this order, urging that it intruded on work product protections.

The First Circuit held that the order was "not a discovery order of the genre to which we are accustomed" because it did not resolve disputes about production of information. *Id.* at 1012. Instead, it focused on "the systemic needs of the litigation," and could be justified under "the court's newly-augmented authority to control and manage the litigation and the course of discovery." *Id.* at 1013, citing Rules 16 and 26(f). And that made all the difference (*id.* at 1015):

When case management, rather than conventional discovery, becomes the hammer which bangs against the work product anvil, logic demands that the district judge must be given greater latitude than provided by the routine striking of the need/hardship balance [under Rule 26(b)(3)(A)(ii)].

Perhaps the time has come to write something like the protocol adopted for this exceptional case into the rules, at least for 30(b)(6) depositions. There are many reasons to favor such a method in that setting. It would help avoid the "I don't know" response. It would provide useful direction to the responding organization about whom to select to testify.

Another participant observed that a recurring problem with 30(b)(6) depositions is determining how to incorporate proportionality principles in this setting. Ten years ago or more, one would usually not see lists of more than ten topics to be addressed, but those lists seem to have ballooned. Often the topics seem to overlap. This trend points up the need for more judicial oversight up front.

Another participant reacted to the long list of ideas enumerated in the background memo for the call by saying that "Only a small number did not seem worth investigating." These issues are pretty important. For example, it would be very valuable to provide a mechanism for objecting. Perhaps that ties in with proportionality; our recent amendment to Rule 26(b)(1) tries to make clear in the Committee Note that often the responding party must be the source of information about the asserted burden of compliance. That surely is true in the 30(b)(6) context.

Another practical consideration is to provide advance notice of the identity of the actual persons to testify, and specifics on which designated topics they will address. Similarly, providing more specifics by rule on how these depositions are handled in relation to the ten-deposition rule and the limitation of any given deposition to one day of seven hours would be welcome.

At the same time, we need to be aware that it could prove difficult to address these sorts of matters in definite or



precise rule language. The reality, however, is that the current uncertainty means that a lot of time, money and energy are chewed up fighting about these things.

This observation drew the reaction that one might say the problem is that 30(b)(6) itself does not provide specifics on these sorts of things, and that one must refer to other provisions in the rules to obtain direction about these matters. That idea suggested a comparison -- when Rule 45 was under consideration several years ago, some suggested that it was so long because it was a "stand alone" rule that provided specifics on a wide variety of things rather than leaving those for regulation by other rules. Perhaps 30(b)(6) should move in that direction. Perhaps that expansion of the rule would mean that it should be moved out of Rule 30 and made a stand-alone rule, perhaps a new Rule 30.1.

Whatever the cause, it was noted, the reality is that there is a lot of gamesmanship under the current rule. The party serving the notice of deposition wants to be as comprehensive as possible. The responding party therefore confronts a considerable burden because it risks being bound by the deposition answers in the sense of being precluded from using undisclosed evidence later in the case. That leads the responding party to be overly cautious.

An example was offered: In a recent environmental contamination action, the claim was against a company, and focused on activities in the 1970s. By the time the litigation began, nobody was around who had been there when the events in question occurred. Nonetheless, the opposing party was insisting that 30(b)(6) compelled the company to produce somebody to answer questions about what had happened decades ago. It might turn out that the only way to do this would be to select a person to review the documents from the 1970s and testify more or less as follows: "Here's what I found in these documents; that's all we know now."

Another participant reacted that the rule can seem to require a party to respond by presenting a person with knowledge even though it does not actually have anyone who knows about the matters in issue. It's not clear from the rule how that should be handled, although the rule is limited to "information known or reasonably available to the organization."

A related problem can be the "inchoate" definition of the topics on which testimony is sought. Without a clear picture of the topics that will be the focus of the questioning, there's a significant risk that a party will produce a representative who does not know about some of the things the noticing party says during the deposition that it wants to explore. Another participant noted that this may be one of the reasons why adequacy of preparation is frequently litigated.

Another set of problems is the recurrent effort to use the 30(b)(6) deposition to lock the organization down to its contentions. "I always see contention-related questions." Under Rule 33, those are permitted, but a deposition is a qualitatively different setting. Indeed, Rule 33 recognizes on its face that the court can defer answers until late in the litigation. Should 30(b)(6) provide an end run around that sort of thing?

Another participant observed that "I see topic lists that include the Moon and the stars." Particularly in the era of greater concern with proportionality, shouldn't the rules constrain that sort of thing. Why not say that Rule 26(g) applies to these discovery forays? One response was that Rule 26(g)(1)(B) probably does apply by its own terms, since it applies to virtually all discovery requests and responses. Indeed, to provide a specific reference in 26(g) to 30(b)(6) might suggest a negative implication -- that the rule does not apply to other discovery efforts that are not specifically mentioned.

Another reaction was that this point suggests that there should be something in 30(b)(6) itself to provide a variety of specifics like the Rule 26(g) constraint, the proper handling of the ten-deposition limit, the possibility of a second deposition of the same organization. That sort of invocation of other rules would be in keeping with the recent additions of cross-references to Rule 26(b)(1) (as amended in 2015) inserted in Rules 33 and 34.

This idea drew support: It would be helpful to have explicit procedures in Rule 30(b)(6) for such things as the notice period required, an objection procedure that suspends the duty to proceed with the deposition pending a meet and confer session (and possible motion proceeding), the identification of witnesses, and other matters. It would be good to "lay the groundwork" in advance. Where needed, the assistance of the court could be enlisted up front.

That drew the reaction from a judge that "I do that routinely. But I don't know how often that happens in other courts." The usual method in this court is that the Rule 16(b) scheduling order establishes a deadline for 30(b)(6) depositions, and also requires that the parties consult with the judge if they are unable to work out the details of these depositions among themselves. Otherwise, the court is not involved until a post-hoc motion proceeding, which is more costly and usually involves hardened positions of the parties.

A reaction was that there is "no uniformity" about such things in different courts.

Another reaction from a judge was that it is unclear whether a rule can really cover such details. Scheduling orders can be tailored to the specifics of the case involved; even if there is

considerable consistency for a given judge, there must still be a need to tailor in a significant number of cases. In this judge's district, it seemed that sometimes responding parties engaged in "hide the ball" tactics. Meanwhile, it also seemed that some plaintiffs came in with lists of 77 topics for their 30(b)(6) depositions. Particularly when they frequently litigate against the same corporate entities, it sometimes seems that these lawyers are simply trying to learn as much as they can about the corporation, whether or not the requested information is really needed for this particular case.

Another reaction was that special provisions for 30(b)(6) depositions seem worth considering because it is unique among depositions in requiring preparation from the witness. True, it is usually a very good idea to prepare any witness fully before a deposition. But the rules do not require that, and witnesses cannot be sanctioned (though they may be impeached) for being unable to answer many questions due to lack of preparation.

Another thought was that "It could be important to include specifics in Rule 30(b)(6). Many lawyers do not read all the way through Rule 26, and never get to Rule 26(g). A cross-reference could be helpful."

#### Next steps

The discussion shifted to the question where to go from here.

Literature and case law search: One project that seems a useful effort would be to determine what the professional literature has said about the positives or negatives of 30(b)(6) practice since the last intense examination by the Committee a decade ago. Hopefully, the Rules Law Clerk will be able to assist on this effort. The goal is not to find traditional law review treatments of the subject, but rather to ferret out what the practicing bar is saying. For this purpose, for example, CLE materials on the rule might be of considerable value; if members encounter them it would be helpful to send something about those to the Chair and Prof. Marcus.

At the same time, some case law research would probably be helpful. A starting point on that sort of thing probably can be found in the ABA submission earlier this year. On such topics as the proper handling of the ten-deposition rule, the one day of seven hours rule, and the rule against a second deposition of a person that has already been deposed, it would be useful to know if there is a real conflict in the cases. Obviously all those limits can be altered in given cases, and one would hope the lawyers would be sensible and cooperative in designing working through the details among themselves. But despite the recent amendment to Rule 1, it seems unwise to assume that this harmony will simply happen.

Further sketches: Another idea for the present is to try to embody some of the ideas discussed during this call in possible rule sketches suitable for discussion in a follow-up conference call. Sketches of concrete rule amendments often produce more fruitful discussions than more general ideas. The long list of issues listed in the memo for the current call really is not focused on the sorts of case-management attitudes emphasized during the call. So something additional seems important for moving forward.

A variety of observations were offered: One reaction was that the simplest way would be to try to ensure that the lawyers will come to the judge early if they cannot work these things out among themselves. Another reaction regarding limits on deposition duration keyed to topics is that it might provide an incentive to list a lot of topics to justify a longer deposition. And saying that there is a limited time for each topic could also cause practical difficulties in determining when the questioner has shifted from one topic to another. In short, "solutions" might present difficulties of their own. Another example is that time divisions are difficult if there are several parties that want to question the witness. How is the available time divided up? Perhaps these are things that specific rules cannot productively address. But promoting advance discussion is likely to be better than leaving all these things up in the air until the deposition begins.

A specific question arose -- Nobody has mentioned the supplementation requirement during the call. A decade ago, the absence of any specific supplementation requirement for 30(b)(6) depositions was noted, but the idea that it be added to Rule 26(e) was challenged on the ground that it would offer organizations an easy out -- "I'll get back to you on that." Should it again be considered? A response was that this could be tricky. Rule 37(c)(1) has considerable teeth where material is not provided when it should have been, or at least in a supplemental production. Another reaction was that this "dovetails" with the consequence of failure to provide during the 30(b)(6) deposition; when that is treated as a judicial admission that consequence should spur supplemental production without the need for another rule provision. But the "judicial admission" cases seem mostly to turn out to be 37(c)(1) (or perhaps Rule 37(d)(1) cases treating the failure to prepare as a failure to appear) cases in which the premise is failure to prepare the witness, and it seems unlikely that many judges would really embrace the strong form of a judicial admission analysis.

#### Outreach to bar groups

A final topic mentioned briefly was that another effort to obtain bar groups' reactions might be productive in the future, but not in the near future. For the present, a literature search and targeted case law investigation could assist the Subcommittee as it moves forward. At the November meeting of the full

Committee, it will probably be valuable to present the members with an array of ideas to elicit their reactions and thoughts. At the same time, it will be important some time for the Subcommittee to begin a triage effort. Eventually, if it concludes certain ideas are worthy of serious consideration for amending the rule, the Subcommittee will likely be in a position to report also that other ideas originally identified seemed on examination not sufficiently promising to be brought forward.

Outreach to bar groups probably should not include any issues that the Subcommittee has concluded do not hold promise. So it would not be productive now. Of course, solicited groups are free to volunteer any amendment ideas they have, but the point for current purposes is that the Subcommittee will need to finish a good deal more work before it is in a position to decide (a) whether bar group outreach would be a good idea, and (b) what topics the bar groups should be invited to address.

#### Immediate Efforts

For the present, the goal will be to convene another conference call, ideally by Sept. 15, to give further thought to the matters discussed in today's call. Before that call, Prof. Marcus will try to develop some discussion sketches of rule changes that might serve the purposes discussed during today's call.

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16-CV-A

January 26, 2016

Hon. John D. Bates, Senior Judge  
Chair, Advisory Committee on Civil Rules  
US District Court, District of Columbia  
E. Barrett Prettyman U.S. Ctse.  
333 Constitution Avenue N.W.  
Washington, DC 20001

**Re: ABA Section of Litigation Federal Practice Task Force Report on  
Rule 30(b)(6) Depositions of Organizations**

Dear Judge Bates:

We, the undersigned members of the Council and Federal Practice Task Force of the ABA Section of Litigation, in our individual capacities only, urge the Advisory Committee on Civil Rules to undertake a review of Federal Rules and Procedure 30(b)(6) and 45 with respect to the depositions of organizations.

The Task Force undertook a review of the 45 year-old Rule 30(b)(6), case law interpreting it, and current practice under the Rule. It identified a number of issues upon which courts interpret the Rule differently, it identified other issues upon which the Note suggests solutions which may no longer be the best approach, and it further identified areas upon which practice under the Rule may be improved. The Task Force's Report is enclosed.

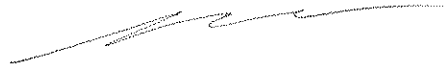
Accordingly, we respectfully request that the Advisory Committee on Civil Rules undertake a review of the Rule and the case law developed under it with the goals of resolving conflicts among the courts, reducing litigation on its requirements, and improving practice under the Rule, particularly in light of the purposes and text of the 2015 Amendments to the Federal Rules.

The ABA Section of Litigation, through its Liaison to the Advisory Committee and its Federal Practice Task Force, remains available to assist the Advisory Committee in any way the Advisory Committee believes it could be helpful.

Honorable John D. Bates  
January 26, 2016  
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We continue to appreciate the tireless efforts of the Advisory Committee to improve our rules and hope to continue to be a positive voice in its ongoing efforts to improve federal practice under the Rules, to improve our court system, and to improve access to justice for all.

Respectfully yours,



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Enclosure



**ABA SECTION OF LITIGATION FEDERAL PRACTICE TASK FORCE  
REPORT ON RULE 30(b)(6) DEPOSITIONS OF ORGANIZATIONS**

**INTRODUCTION**

The ABA Section of Litigation Federal Practice Task Force undertook a review of current practices with respect to deposing an organization under Rule 30(b)(6). Rule 30(b)(6) depositions have been the subject of frequent well-attended CLE programs at ABA Section of Litigation Section Annual Conferences,<sup>1</sup> demonstrating that not only has there been much interest in the subject, but that there is much confusion on the Rule's requirements. There is also much litigation over how to interpret those requirements. Moreover, our review has enabled us to conclude that there are many issues upon which courts disagree as to the Rule's existing requirements, there are other issues upon which the Advisory Committee Notes suggest a solution which practice has demonstrated may be no longer the best approach, and there are other areas upon which practice under the Rule may be improved. Accordingly, we recommend that the Advisory Committee on Civil Rules undertake a review of the Rule and the case law developed under it with the goal of resolving conflicts among the courts, reducing litigation on its requirements, and improving practice under the Rule, particularly in light of the purposes and text of the 2015 amendments to the Federal Rules.

**BACKGROUND**

Federal Rule of Civil Procedure 30(b)(6) allows a party to depose an organization through one or more witnesses designated by that organization. Adopted in 1970, it essentially

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<sup>1</sup> These programs were accompanied by excellent papers which provided some of the source material for this report. See Michael R. Gordon and Claudia De Palma, *Practice Tips and Developments in Handling 30(b)(6) Depositions*, Prepared for ABA Section of Litigation Section Annual Conference, April 2014; David Cannella, *Can I Get a Witness? 30(b)(6) overview, plus pitfalls, practical tips and consequences*, Prepared for ABA Section of Litigation Section Annual Conference, April 2015.

has remained unchanged for more than 45 years.<sup>2</sup> It was adopted to curb the practice of “bandying” where organizations would produce one deponent after another, each disclaiming knowledge of information that someone in the organization almost certainly knew. 1970 Advisory Committee Note.

The Rule in its current form provides as follows:

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

This report will address areas of confusion under the Rule, areas where courts have divided on the Rule’s requirements, and areas for suggested improvement.

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<sup>2</sup> Amendments in 1971 extended the practice to taking the deposition of a non-party organization by subpoena. The Note was amended in 1993 to address how to apply the 10 deposition numerical limit, suggesting a deposition under Rule 30(b)(6) should be treated as a single deposition, even though more than one person may be designated to testify. In 2000, with the introduction of the durational limit of one day of seven hours for any deposition, the Note was again amended to indicate “for the purposes of this durational limit, the deposition of each person designated under Rule 30(b)(6) should be considered a separate deposition.” Finally, the style amendments were adopted in 2007, along with adding “or other entity” to the list of the types of organizations that may be named, to include limited liability companies and other forms of organization.

## SUBSTANTIVE PROVISIONS

### A. Knowledge.

The Rule by its terms permits a party to notice the deposition of an organization setting forth “with reasonable particularity” the matters for examination. The named organization must then designate the one or more persons who will testify about information known or reasonably available to the organization.

Contrary to the understanding of many practitioners who seek the production of the most knowledgeable person on a given subject, the Rule does not require the organization to produce the “most knowledgeable” person on a given subject or even a person with any first-hand knowledge. *QBE Ins. Corp. v. Jorda Enters.*, 277 F.R.D. 676, 688 (S.D. Fla. 2012); *Crawford v. Franklin Credit Mgmt. Corp.*, 261 F.R.D. 34, 38 (S.D.N.Y. 2009); *Rodriguez v. Pataki*, 293 F. Supp. 2d 305, 311 (S.D.N.Y. 2003). The witness must be prepared to testify about the matters described in the notice known to the organization or reasonably available to it and must consent to testify on behalf of the organization.

The Task Force considered whether there should be some preference expressed, if not in the Rule, but in the Note, for the production of a witness with first-hand knowledge if such person is available. (The Report separately addresses below the situation where there exists no one at the organization with any knowledge or reasonably available to it on the designated subjects.) Such a preference might mitigate the problem presented in *Sciarretta v. Lincoln Nat'l Life Ins.*, 778 F.3d 1205 (11th Cir. 2015), where an outside expert was spoon-fed one side of the story and could not answer any sensitive questions that the organization wished to avoid answering. We concluded that despite such potential problems, which in that case were appropriately addressed with sanctions, maximum flexibility should remain with the entity’s

choice of witnesses since it will be bound by that testimony. It may choose to designate a witness who has knowledge on 5 of 6 topics and educate that witness on the 6th so that the deposition can be efficiently concluded. It may wish to designate a mid-level officer who is educated on the topics for the deposition to protect privileged communications that could be at risk by producing a more senior officer with more direct first-hand knowledge, who also has access to privileged communications. It may also choose to produce a person who will make a better witness. Since the organization will be bound by the witness's testimony, it should retain maximum flexibility as to who it may choose to designate.

**B. Objections.**

Presently, the Rule contains no procedure to object to a Rule 30(b)(6) deposition notice. There is no procedure to object to the scope or breadth of the topics (which are required to be described with “reasonable particularity”), to the number of topics, or to whether a witness should be produced at all. The cases make clear that the only procedure recognized by the courts to object for any of the above reasons is to move for a protective order. *See, e.g., Lykins v. Certaineed Corp.*, 555 Fed. Appx. 791, 796-98 (10<sup>th</sup> Cir. 2014); *Pioche Mines Consol. Inc. v. Dolman*, 333 F.2d 257, 269 (9th Cir. 1964); *Bearch Mart, Inc. v. L&L Wings, Inc.*, 302 F.R.D. 396, 406 (E.D.N.C. 2014); *International Brotherhood of Teamsters v. Frontier Airlines, Inc.*, No. 11-cv-02007-MSK-KLM, 2013 U.S. Dist. LEXIS 22986, at \*19 (D. Colo. Feb. 19, 2013); *Fernandez v. Penske Truck Leasing Co.*, No. 2:12-cv-00295-JCM-GWF, 2013 U.S. Dist. LEXIS 14786, at \*6 (D. Nev. Feb. 1, 2013). *EEOC v. Thurston Motor Lines, Inc.*, 124 F.R.D. 110, 114 (M.D.N.C. 1989). Some courts even require a protective order to be obtained before the date scheduled for the deposition to excuse appearing, *Pioche Mines Consol. Inc.*, 333 F.2d at 269, unless the district court has a local rule staying the deposition until the motion can be decided.

*Id.*, *See, e.g., Peterson v. DaimlerChrysler Corp.*, No. 06-cv-0108, 2007 WL 2391151, at \*5 (D. Utah Aug. 17, 2007). The Committee on Federal Courts of the Association of the Bar of the City of New York suggested a remedy of a minimum notice period at least for 30(b)(6) depositions of non-parties, and an automatic stay upon the filing of a motion for a protective order. Letter from Marilyn C. Kunstler, Chair, Comm. On Fed. Courts Association of the Bar the City of New York, Sec'y, Comm. on Rules of Practice and Procedure (Apr. 3, 2013), *available at* <http://www2.nycbar.org/pdf/report/uploads/20072455-LetteronProposedAmendmenttoRule45reSubpoenasforRule30b6Depos.pdf>. We believe this proposed remedy does not go far enough.

While the burden on non-parties certainly needs to be appropriately addressed, we believe that an objection procedure, similar to that envisioned by Rule 45 with respect to documents, is appropriate for all Rule 30(b)(6) depositions. Lawyers may object to the number of topics, their relevance, whether they are set forth with reasonable particularity, to the place specified for the deposition, or for other reasons. After a meet and confer, the burden should be on the person seeking to take the deposition to justify the appropriateness of the notice and the topics by moving to compel.

In practice, our experience informs us that practitioners do in fact object to topics, their breadth and their particularity, and compromises are in fact sometimes reached. *See International Brotherhood of Teamsters v. Frontier Airlines, Inc.*, 2013 U.S. Dist. LEXIS at \*20. But there is no uniformity in this approach, and neither the Rule nor the case law recognize such a procedure. *But see Fernandez*, 2013 U.S. Dist. LEXIS 14786, at \*7 (excusing nonappearance on the ground that notice was not proper and an objection letter was sent in advance of return date).

A rule setting forth an objection procedure may wish to set a minimum time for noticing a 30(b)(6) deposition (28 days for example) with a required period for objections (14 days before the return date), of course subject to alteration by stipulation or court order. The procedure may also incorporate a requirement for the responding party to indicate who will be testifying on its behalf and on what topics, and how many witnesses it will designate.<sup>3</sup> The Rule could also set forth a meet and confer requirement and an award of costs and attorneys' fees if motion practice is then required.

**C. Number of Topics.**

Another area that is not addressed in the Rule and that has generated motion practice is in the number of topics specified for a Rule 30(b)(6) deposition. In *QBE Ins. Corp.*, a seminal case on Rule 30(b)(6) requirements, the court found nothing improper in the designation of 47 topics. 277 F.R.D. at 699. In *Heartland Surgical Specialty Hosp. v. Midwest Div., Inc.*, No. 05-2164-MLB-DWB, 2007 U.S. Dist. LEXIS 26552, at \*6 (D. Kan. Apr. 9, 2007), the court upheld 55 separate topics. *Banks v. Office of the Senate Sergeant-At-Arms* approved a notice with 35 topics, but directed the parties to develop new topics because some were intrinsically overbroad. 222 F.R.D. 7, 18 (D.D.C. 2004). In *Collins v. Experian Info. Solutions Inc.*, No. 2:11-cv-938-AKK (N.D. Ala. May 9, 2012), the court addressed a motion for a protective order challenging 38 of 71 topics. The court reviewed each of the categories and sustained objections to 31.

A number of our Task Force members consider specifying a voluminous list of topics to be an abuse of the Rule. The organization has a duty to prepare a witness on each topic and if

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<sup>3</sup> The New York Commercial Division recently revised its Rule 11-d and 11-f, effective December 1, 2015, to more closely model Fed. R. Civ. P. 30(b)(6). It requires the responding party to designate one or more persons not later than 10 days before the deposition. If subjects are set forth in the notice and a particular person is requested to testify on behalf of an entity on these subjects, the responding party may also designate a different witness if done so 10 days before the scheduled deposition.

the presumption is that a 30(b)(6) notice counts as one deposition, presumably to be completed in a 7-hour day (if a single witness is presented), it may seem hardly possible to address numerous, far-reaching and varied topics in the suggested time period. Some feel that a reasonable number of topics, set forth with “reasonable particularity” should not exceed 10 without court approval.

Others feel that setting forth topics with “reasonable particularity” requires a certain amount of precision and the greater the number of topics, the more directed the witness preparation can be. Another way to address the problem is to indicate that if more than 10 topics are designated, for each 10 topics, the notice should count as an additional deposition toward the presumptive limit of 10 depositions.

A number of cases focus on the duty to prepare witnesses for a 30(b)(6) deposition and the consequences that occur when the witness is not adequately prepared or responds “I don’t know.”<sup>4</sup> One thing clear from these cases is that there is a considerable duty to prepare witnesses that goes beyond that required for an ordinary fact witness. During these cost-sensitive times when many lawyers are required to strictly budget costs of each deposition, any litigation budget can be destroyed by the efforts required to properly prepare witnesses for 30(b)(6) depositions, particularly when there is a great number of topics specified. With the goal of the 2015 Rule revisions to reduce costs of discovery, some consideration should be given to the situation where an abusive number of topics is presented. A proposed solution in the next section may go a long way to control potential abuses.

#### **D. Number of Witnesses.**

The Advisory Committee Note, amended at two different times, suggests solutions for how the Rule 30(b)(6) notice counts toward the presumptive limit of 10 depositions and the 7-

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<sup>4</sup> Later in this report we address the extent to which an “I don’t know” answer can be later contradicted.

hour single-day presumptive time limit. The Note adopted in 1993 suggests the notice counts as a single deposition no matter how many witnesses are needed, and the Note adopted in 2000 suggests that the questioner can have up to 7 hours for each witness designated. *Sabre v. First Dominion Capital, L.L.C.*, No. 01 CIV 2145 BSJ HBP, 2001 U.S. Dist. LEXIS 20637 (S.D.N.Y. Dec. 10, 2001) at \*1. There appears something inconsistent and inadequate with those solutions.

The Task Force believes that solutions suggested by the Advisory Committee, at two different times in reaction to two different rule changes, may no longer be the fairest result. If a notice covers four topics, which can easily be covered in one 7-hour day, and three topics can be addressed by one witness and the fourth topic by a second, why does it make a difference how many witnesses are needed to cover the topics? Without exceptional circumstances, logic would dictate that the depositions of both witnesses be covered in a single day. Similarly, if multiple witnesses are needed on a multiplicity of topics, if each witness will be questioned for a seven-hour day, there seems to be no reason not to count each 7-hour deposition as a separate deposition. To the extent questioning of separate witnesses will be allowed to cover more than one day, each witness should be counted as a separate deposition.

Thus, we recommend that time be the governing factor in determining how many depositions are taken. Thus, if the topics can be addressed by one witness, a single deposition in a seven-hour day would be the norm. The same should be true if a second witness is needed for a minor topic that can also be addressed in a single day.<sup>5</sup> If multiple witnesses are needed for substantial areas, unless the parties agree otherwise, then generally there should be seven hours

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<sup>5</sup> The New York Commercial Rule 11-d, effective December 1, 2015, counts multiple witnesses as a single deposition, but requires the deposition to be completed in a single 7-hour day, unless the parties agree to extend it, or the Court grants an extension, which shall be freely granted.



for each, with each seven-hour day counted as a separate deposition. Similarly, if a single witness is produced but so many topics are noticed that 7 hours does not suffice, and the parties agree to continue beyond the day, the continuation should count as an additional deposition. We would expect the parties to discuss and work out these issues after the witnesses are designated under the objection procedure followed by the meet and confer that we propose.

**E. Questioning Beyond the Topics.**

A related question that arises is whether a 30(b)(6) witness will be allowed to be questioned beyond the topics listed? If so, what is the binding impact of such testimony, and how will those questions count toward the seven-hour limit, and how many depositions are expended toward the 10 deposition limit?

Most courts will allow a 30(b)(6) witness to be questioned beyond the confines of the topics listed in the notice. *Am. Gen. Life Ins. Co. v. Billard*, No. C10-1012, 2010 U.S. Dist. LEXIS 114961, at \*12 (N.D. Iowa Oct. 28, 2010); *Crawford*, 261 F.R.D. at 38; *Philbrick v. eNom Inc.*, 593 F. Supp. 2d 352, 363 (D.N.H. 2009); *Falchenberg v. NY State Dep't of Educ.*, 642 F. Supp. 2d 156, 164 (S.D.N.Y. 2008), *aff'd*, 338 Fed. Appx. 11 (2d Cir. 2009); *FCC v. Mizuho Medy Co.*, 257 F.R.D. 679, 682 (S.D. Cal. 2009); *Eng-Hatcher v. Sprint Nextel Corp.*, No. 07 Civ. 7350 (BSJ)(KNF), 2008 U.S. Dist. LEXIS 67052, at \*14, \*16 (S.D.N.Y. Aug. 28, 2008); *UniRAM Tech., Inc. v. Monolithic Sys. Tech., Inc.*, No. C 04-1268 VRW (MEJ), 2007 U.S. Dist. LEXIS 24869 (N.D. Cal. Mar. 23, 2007); *Bracco Diagnostics Inc. v. Amersham Health Inc.*, No. 03-6025 (SRC), 2005 U.S. Dist. LEXIS 26854, at \*5-7 (D.N.J. 2005); *Cabot Corp. v. Yamulla Enters.*, 194 F.R.D. 499, 500 (M.D. Pa. 2000); *Detoy v. City & County of S.F.*, 196 F.R.D. 362, 366-67 (N.D. Cal. 2000); *Overseas Private Inv. Corp. v. Mandelbaum*, 185 F.R.D. 67, 68 (D.D.C. 1999); *Edison Corp. v. Secaucus Town*, 17 N.J. Tax 178, 182 (Tax Ct.

1998); *King v. Pratt & Whitney*, 161 F.R.D. 475, 476 (S.D. Fla. 1995). Several courts have said no. *Bilek v. Am. Home Mortg. Servicing*, No. 07 C 4147, 2010 U.S. Dist. LEXIS 80041, at \*6 (N.D. Ill. Aug. 9, 2010); *Paparelli v. Prudential Ins. Co.*, 108 F.R.D. 727, 729-30 (D. Mass. 1985). Those that allow questioning beyond the notice appear to treat the answers not as binding on the organization, but as ordinary 30(b)(1) answers of any fact witness. *Falchenberg*, 642 F. Supp. 2d at 164; *King*, 161 F.R.D. at 476.

To the extent that an organizational witness is questioned beyond the list of topics, to what extent should an objection or notation on the record<sup>6</sup> that the questioning strayed beyond the specified topics be required so that the questioner can withdraw or revise the question if so desired, and if not, so that all parties will be aware that the answer will not bind the organization? In addition, how should those questions be counted toward the seven-hour and single deposition guideposts?

Our Task Force believes that a practical approach should be followed. Questioning should be permitted beyond the scope of the notice if it will avoid the need to recall the witness and the questioning can be completed in a single day. If there is a desire to take the witness's deposition on a different set of topics for which the answers are not binding on the organization, the witness should be able to be recalled as a fact witness with a separate notice but should be questioned on different subjects. The 30(b)(6) organizational witness versus 30(b)(1) fact witness distinction should not be used as an excuse to question a single witness on the organization topics for 14 hours without court permission.

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<sup>6</sup> Some suggest that noting on the record that the questioning strayed beyond the topics is not in fact an objection, for which the grounds are limited, because the person defending the deposition is not attempting to preclude the testimony but simply noting that the evidential impact is different.

As to the need for objections or statement on the record when questions stray beyond the subjects listed in the notice, better practice seems to require that such objections or noting be made. *Whiting v. Hogan*, No. 12-CV-08039-PHX-GMS, 2013 U.S. Dist. LEXIS 35381, at \*37 (D. Ariz. Mar. 14, 2013) (stating that deponent’s counsel “may note on the record that answers to questions beyond the scope of the Rule 30(b)(6) designation are not intended as the answers of the designating party and do not bind the designating party”); *Detoy*, 196 F.R.D. at 367 (“If Defendants have objections to . . . questions outside the scope of the 30(b)(6) designation . . . counsel shall state the objection on the record and the witness shall answer the question, to the best of the witness’s ability.”). An objection or noting will enable the questioner to restate the question to fall within the scope of topics so that the transcript results in “binding” testimony, the parties may be able to resolve disputes as to whether the questions are within the scope, and all parties may be appropriately guided by the impact of the answers to such questions. But the real question is must an objection be made when the deposition rule only requires objections to the form of the question that can be corrected, not to the substance of the questions? Practitioners on the Task Force have different views on this question.

**F. Reasonable Particularity.**

We have found that there is much litigation over the detail needed in the required designation of topics. The Rule requires topics to be described with “reasonable particularity.” Some courts have described the standard as “painstaking specificity.” *Burke v. Glanz*, No. 11-CV-720-JED-PJC, 2013 U.S. Dist. LEXIS 120818, at \*4 (N.D. Okla. Aug. 26, 2013); *Health Grades Inc. v. MDX Med. Inc.*, No. 11-cv-00520-PAB-BNB, 2013 U.S. Dist. LEXIS 59271, at \*8-9 (D. Colo. Apr. 25, 2013); *Whiting*, 2013 U.S. Dist. LEXIS 35381, at \*34; *Kelly v. Provident Life & Accident Ins. Co.*, No. 1:09-cv-00070-jgm, 2010 U.S. Dist. LEXIS 134623, at \*5 (D. Vt.

Dec. 20, 2010); *McBride v. Medicalodges Inc.*, 250 F.R.D. 581, 584 (D. Kan. 2008); *EEOC v. Thorman & Wright Corp.*, 243 F.R.D. 421, 426 (D. Kan. 2007); *Sprint Comm'ns v. Theglobe.com Inc.*, 236 F.R.D. 524, 528 (D. Kan. 2006); *Prokosch v. Catalina Lighting Inc.*, 193 F.R.D. 633, 638 (D. Minn. 2000). Other courts have clarified that references to “painstaking specificity” do not alter or heighten the standard expressed in the rule – reasonable particularity. *Espy v. Information Techs, Inc.*, No. 08-2211-EFM-DWB, 2010 U.S. Dist. LEXIS 36594, at \*4 (D. Kan. Apr. 13, 2010).

Courts have warned that an overly broad Rule 30(b)(6) notice “subjects the noticed party to an impossible task,” because where it is not possible to “identify the outer limits of the areas of inquiry noticed, compliant designation is not feasible.” *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000). Thus, “[l]isting several categories and stating that the inquiry may extend beyond the enumerated topics defeats the purpose of having any topics at all.” *Tri-State Hosp. Supply Corp. v. United States*, 226 F.R.D. 118, 125 (D.D.C. 2005).<sup>7</sup>

We have considered whether a different standard of specificity should be set forth. The standard should result in topics that contain enough detail to guide the organization as the subjects for which witnesses must be prepared and to avoid being blindsided. We could not articulate a better standard and believe the “reasonable particularity” standard appears sufficient for the task.

#### **G. Contention Depositions.**

Can Rule 30(b)(6) depositions be used to obtain opinions and subjective beliefs of an organization or as contention depositions? Courts are split. *Compare Radian Asset Assurance*

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<sup>7</sup> Courts have rejected the use of catchall phrases such as “including but not limited”, or “any other matters relevant to this case.” *Alexander v. FBI*, 188 F.R.D. 111, 120-21 (D.D.C. 1998).

*Inc. v. Coll. of the Christian Bros. of N.M.*, 273 F.R.D. 689, 691-92 (D.N.M. 2011) (contention depositions proper), *Great Am Ins. Co. of N.Y. v. Vegas Constr. Co.*, 251 F.R.D. 534, 539 (D. Nev. 2008) (deposition may explore corporation's position, beliefs and opinions), and *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996) (stating that Rule 30(b)(6) permits questioning on not only facts but subjective beliefs and opinions of the corporation), with *SEC v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) (rejecting 30(b)(6) contention topics on the ground that they are invasive of attorney work product doctrine). Courts have also found improper topics focusing on discovery responses, *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1329 (8th Cir. 1986); *Smithkline Beecham Corp. v. Apotex Corp.*, No. 98 C 3952, 2000 U.S. Dist. LEXIS 667, at \*27-32 (N.D. Ill. Jan. 21, 2000); *McGarrah v. Bayfront Med. Ctr. Inc.*, 889 S. 2d 923, 926 (Fla. Dist. Ct. App. 2004), factual basis of defenses, *Krasney v. Nationwide Mut. Ins. Co.*, No. 3:06 CV 1164 (JBA), 2007 U.S. Dist. LEXIS 90876, at \*9-10 (D. Conn. Dec. 11, 2007); *In re Indep. Serv. Orgs. Antitrust Litig.*, 168 F.R.D. 651, 654 (D. Kan. 1996) (stating that the company has a right to get the factual basis but not through a 30(b)(6) deposition); *Northup v. Acken*, 865 So. 2d 1267, 1272 (Fla. 2004), and information obtainable from other sources, such as a request for production of documents. *Smithkline Beecham Corp.*, 2000 U.S. Dist. LEXIS 6687, at \*27-32 (denying a 30(b)(6) deposition on certain topics because the information could be obtained through less intrusive means).

The Task Force believes 30(b)(6) depositions should be confined to factual matters and not permitted to extend to contentions, defenses, opinions or legal interpretations. The purpose of such depositions is to establish facts available to the organization. We believe the purpose is undermined if witnesses are required to address legal theories, contentions, etc. Such questions have a great potential to invade the work product doctrine and constitute an abuse of the

purposes for which the rule was established. To the extent discovery of a party's contentions should be permitted at all, there are other discovery devices for this purpose.

**H. Evidentiary Value – Contradicting Answers.**

May an answer at a Rule 30(b)(6) deposition be contradicted by the organization at trial or on summary judgment, to what extent, and under what circumstances? Will such answers be treated like judicial admissions or like ordinary deposition testimony that may be theoretically (but not practically) subject to contradiction on summary judgment or trial?

The purpose of a Rule 30(b)(6) deposition “is to create testimony that will bind the corporation.” *Sanders v. Circle & Corp.*, 137 F.R.D. 292, 294 (D. Ariz. 1991) (citing *GTE Products Corp. v. Gee*, 115 F.R.D. 67, 68 (D. Mass 1987)); *Resolution Trust Corp. v. Farmer*, 1994 U.S. Dist. LEXIS 8755, \*5 (E.D. Pa. June 23, 1994). See also *Starlight Int'l, Inc. v. Herlihy*, 186 F.R.D. 626, 638 (D. Kan. 1999); *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C 1996). Although the testimony is binding, the majority view is that such testimony does not constitute a judicial admission – which is not only binding, but cannot be contradicted by the party at trial or on appeal of the same case. *Industrial Hard Chrome, Ltd. V. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000). Instead such testimony “is evidence which, like any other deposition testimony, can be contradicted and used for impeachment purposes.” *Id.* See also *State Farm Mut. Auto. Ins. Co. v. New Horizon, Inc.*, No. 03-6516, 2008 U.S. Dist. LEXIS 37571 (E.D. Pa. May 7, 2008); *Weiss v. Union Cent. Life Ins. Co.*, 28 Fed. Appx. 87, 89 (2d Cir. N.Y. 2002); *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7<sup>th</sup> Cir. 2001); *R&B Appliance Parts, Inc. v. Amana Co.*, 258 F.3d 783, 786 (8<sup>th</sup> Cir. 2001); *Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corp.*, 441 F. Supp. 2d 695, 723 n.17 (M.D. Pa. 2006); *A&E Prods. Group, L.P. v. Mainetti USA, Inc.*, No. 01 CV 10820, 2004 U.S. Dist. LEXIS 2904, at \*19

(S.D.N.Y. Feb. 25, 2004); *Med. Serr. Grap., Inc. v. Lesso, Inc.*, 45 F. Supp. 2d 1237, 1254 (D. Kan. 1999); *W.R. Grace & Co. v. Viscase Corp.*, No-90-5383, 1991 U.S. Dist. LEXIS 14651, at \*4-\*5 (N.D. Ill. Oct. 15, 1991). Some cases however do not permit contradiction. *See e.g., Hyde v. Stanley Tools*, 107 F. Supp. 2d 992, 993 (E.D. La. 2000); *Rainey v. American Forest & Paper Ass'n.*, 26 F. Supp. 2d 82, 94-5 (D.D.C. 1998) (testimony is binding and no contraction may be subsequently introduced).<sup>8</sup>

Some on the Task Force believe that the majority rule is the appropriate one, and that Rule 30(b)(6) testimony should be treated like any other deposition testimony. While it is binding as an admission, it may be later explained or supplemented. If the purpose is to obtain the testimony of the organization, once obtained, it should be treated as an admission by the organization – the witness, like the testimony of any other witness. While failure to adequately

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<sup>8</sup> A related issue upon which courts are divided, but is not limited to Rule 30(b)(6) depositions, is the extent to which a witness can change a deposition answer substantively under Rule 30(e) giving a witness 30 days to review the transcript. Rule 30(e) also provides “if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.” This rule has been read somewhat narrowly by certain courts, which had held that Rule 30(e) does not:

allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take home examination.

*Greenway v. Int'l Paper Co.*, 144 F.R.D. 322, 325 (W.D. La. 1992). Other courts, however, have construed Rule 30(e) as permitting substantive changes as long as the deponent timely provides an explanation for each change. *See, e.g., Innovative Mktg. & Tech. L.L.C. v. Norm Thompson Outfitters, Inc.*, 171 F.R.D. 203, 205 (W.D. Tex. 1997); *Podell v. Citicorp Diners Club, Inc.*, 914 F. Supp. 1025, 1034 (S.D.N.Y. 1996) (after plaintiff changed deposition testimony on material matter, ruling that Rule 30(e) allows deponent to make changes in deposition even if changes contradict the original answers and reasons for changes unconvincing). The Seventh Circuit has taken a middle-ground approach, allowing substantive changes provided that they do not contradict the original testimony. *Thorn v. Sundstrand Aerospace Corp.*, 207 F.3d 383, 389 (7th Cir. 2000).

prepare will not be a good explanation, there seems to be no good reason to give such testimony judicial admission status. But similar to fact witnesses trying to contradict deposition admissions in opposing summary judgment, we would expect courts to be very reluctant to permit subsequent explanations to defeat summary judgment sought based upon such admissions.

Others believe a higher standard should be required to contradict admissions made during a Rule 30(b)(6) deposition, and all envision participation by the court in its supervisory role so that all parties will be aware of how such efforts will be treated at trial. Some feel the higher standard should be akin to asking the court for permission to withdraw an admission made under Rule 36. These members believe that even if the court grants relief, the original testimony would of course be admissible along with the new testimony and the explanation of why it has changed.

#### **I. Organizations Without Knowledge**

Courts have struggled with the right approach to the situation where the organization has no present employee with knowledge of designated subjects or to which the information is not reasonably unavailable to it. As an initial matter, the fact that employees with the knowledge have left the organization will not relieve the organization of the obligation to prepare. Organizations are required to review prior deposition testimony, documents, deposition exhibits and interview former employees so it can be in a position to produce an educated witness to speak for the organization. *Harris v. New Jersey*, 259 F.R.D. 89, 92 (D.N.J. 2007); *Calzaturificio S.C.A.R.P.A., s.p.a. v. Fabiano Shoe Co.*, 201 F.R.D. 33, 38-39 (D. Mass. 2001); *Bank of New York v. Meridien Biao Bank Tanz.*, 171 F.R.D. 135, 151 (S.D.N.Y. 1997); *United States v. Taylor*, 166 F.R.D. 356, 361-62 (M.D.N.C. 1996).



But the Rule contains a limitation. It requires the designated persons to testify about information “known or reasonably available to the organization.” *Dravo Corp. v. Liberty Mut. Inc. Co.*, 164 F.R.D. 70, 76 (D. Neb. 1995).

Courts have struggled with situations when the information may not be reasonably available to the organization. The organization may have filed for bankruptcy protection and a trustee receives a notice when the company has no employees. Prior employees may not be willing to talk with the trustee or current counsel for the organization. There may be criminal investigations pending and all knowledgeable witnesses may have taken the Fifth Amendment. Or as in the case of *QBE Insurance Corp.*, an insurer subrogee who paid out a claim and was pursuing a recovery for what it paid, found itself in a position where its insured refused to cooperate with it and provide the needed information. Some courts have found that an organization cannot be subject to Rule 37 sanctions if it does not know the answer on a subject after diligent inquiry. *Black Horse Lane Assoc., LP v. Dow Chemical Corp.*, 228 F.3d 275 (3d Cir. 2000); *Resohlon Trust Corp. v. S. Union Co.*, 985 F.2d 196, 197-8 (5<sup>th</sup> Cir. 1993). Others have applied sanctions and addressed the issue as a failure to properly prepare, or when the information was not available applied “consequences,” such as barring the presentation of any information at trial on the issue, not as a sanction but as a natural result of a failure to make the information available in discovery. *QBE Ins. Corp.*, 277 F.R.D at 681, 698-9.

The Task Force believes that the Rule should be amended to set forth a procedure to address the situation where a witness is truly not available to the organization on a given subject. Along with a procedure for setting forth objections, the Rule could provide an opportunity to state in writing in response to the Notice that there is no witness with knowledge of the information reasonably available to it, setting forth the circumstances, and stating why another

witness cannot be sufficiently prepared. A requirement of the present Rule is that the witness designated by the organization must also “consent to testimony on its behalf.” If there is not a knowledgeable person willing to testify on its behalf (usually a former employee) and not a current employee who can be educated, there should be in place a mechanism for the responding party to so state. As an alternative, the response could designate what documents or persons possess the relevant information and where the persons or documents may be found, if not reasonably available to the organization. By proceeding in this manner, a court may be able to address the situation in advance of a futile deposition leading to allegations of a failure to prepare, requests for sanctions, etc.

Consequences should appropriately flow from such an election but they should not be punitive. If a party identifies a knowledgeable witness who will not cooperate with it, or identifies a source of documents not within its custody or control, the organization should not be barred from subsequently presenting that witness testimony, or such documents, obtained through subsequent subpoena or other discovery. The problem however is a thorny one crying out for a mechanism to resolve it beyond case by case litigation.

**J. Rule 30(b)(6) Depositions of Non-Parties by Subpoena under Rule 45**

Rule 45 addressing subpoenas to non-parties recognizes that undue burden and expense should not be imposed on non-parties. The Rule, recently amended, continues to recognize the distinction between parties and non-parties. A witness may only be compelled to give testimony within the District in which the witness is served or within the 100 mile territorial limitation. Rule 45 contains a procedure for a non-party to object to the production of documents, placing the burden on the party seeking the documents to undergo the expense of a motion, if an accommodation cannot be reached. Non-parties, as stated, are protected against “undue burden.”

But the Rule does not similarly protect Rule 30(b)(6) depositions of the organization sought through subpoena.

Rule 30(b)(6) itself tersely addresses the organizational deposition of a non-party: “A subpoena must advise a nonparty organization of its duty to make this designation.” While Rule 45 seeks to protect non-parties from “undue burden or expense” and a non-party may object to subpoenas to produce documents, the Rule contains no ability for the subpoenaed organization to object to topics or to the production of a witness at all.

What if the only knowledgeable witness is a person beyond the 100 mile limit? To what extent may a party circumvent the 100 mile limit by asking for the Rule 30(b)(6) deposition of a non-party organization by subpoena with knowledge that the only witness with knowledge is beyond the subpoena power? Must the organization interview that witness and prepare a witness within the territorial limit with the knowledge of the witness beyond the reach of a subpoena? At least one court, appropriately in our view, has said no. In *Wultz v. Bank of China*, 293 F.R.D. 677, 680 (S.D.N.Y. 2013), the court found that the subpoenaed party need not produce a witness located beyond the 100-mile territorial boundary and by extension, need not educate a witness on topics upon which only employees located outside that limit have knowledge.

The same court also found that there is not the same burden to prepare witnesses when the organization sought to be deposed is a non-party. The court found the Rule 45 requirement to protect non-parties from “undue burden” lessens the burden of preparation imposed upon parties. *Id.* at 680.

The Committee on Federal Courts of the Association of the Bar of the City of New York proposed in 2013 that greater protections for Rule 30(b)(6) should be a given to non-parties. It recommended a minimum notice period (21 days), an explanation of the need for the testimony,

and an automatic stay of such deposition if a motion for a protective order were filed by the non-party.

The Task Force believes these protections are warranted but not sufficient. We have already recommended a procedure for objections to apply to all requests for Rule 30(b)(6) depositions. At a minimum, such a procedure should apply to non-parties subjected to Rule 30(b)(6) organizational depositions by subpoena. Moreover, the burden of asking for an order compelling the deposition should be on the party seeking the deposition, rather than on the non-party to seek a protective order, in the same manner as Rule 45 requires with respect to the production of documents. In addition, protection for the 100-mile territorial limit should apply and be recognized in a rule tailored for Rule 30(b)(6) depositions through subpoena. Moreover, we agree that the burden to prepare witnesses should be consistent with the limitation to protect third parties from undue burden and expense. Thus, we recommend the Rule 45 also be amended to address the separate problems applicable to Rule 30(b)(6) deposition notices to non-parties through a Rule 45 subpoena.<sup>9</sup>

#### **K. Multiple Organization Depositions**

Since leave of court is required to take a second deposition of the same witness, is leave of court required if the examiner seeks to serve a second Rule 30(b)(6) notice on an organization

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<sup>9</sup> Members of the ABA Section of Litigation Council and its Federal Practice Task Force previously recommended that the amendments to Rule 45 include a recognition of a duty to inform adverse parties when documents are received pursuant to subpoena, in addition to the requirement to serve a copy of a subpoena for documents on all parties. Our experience indicated that the explicit requirement would avoid problems litigators experience when documents are produced weeks or months after a subpoena return date, a prevalent occurrence. For some inexplicable reason the Advisory Committee declined to incorporate that requirement (presumably on the assumption that such documents are routinely made available). That lack of such a requirement in the Rule continues to cause problems. *See* *Petrie v. Elec. Game Card, Inc.*, 761 F.3d 959, 967 n. 9 (9th Cir. 2014). If Rule 45 is amended to address Rule 30(b)(6) depositions, and even if it is not, we strongly recommend that this deficiency be corrected.

on different topics? Again courts have not answered this question in the same way. First, as an initial matter, to proceed a second time on the same topics should certainly require leave of court. Some cases require leave of court even if the topics sought to be inquired into are different. *See, e.g., Ameristar Jet Charter Inc. v. Signal Composites Inc.*, 244 F.3d 189 (1st Cir. 2001); *Terry v. Unified Gov't of Wyandotte Co.*, 2011 U.S. Dist. LEXIS 20581, at \*11 (D. Kan. 2011); *State Farm Mutual Auto. Ins. Co. v. New Horizon Inc.*, 254 F.R.D. 227 (E.D. Pa. 2008). At least one court says leave of court in that situation is not required. *See Quality Aero Tech. v. Telemetrie Elektronik*, 212 F.R.D. 313, 319 (E.D.N.C. 2002); *See* 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE §2104, at 14 (3d ed. 2010). *Wright and Miller* suggests a second deposition should be permitted (without leave of court) if the topics are different but it certainly would count as a second deposition. It also suggests a different result in the case of a subpoena upon a non-party, who should not be unduly burdened. *See* 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE §2104 (3d ed. 2010).

The Task Force believes court permission should not be required for a second deposition of the organization on different topics (if they are truly different topics and not efforts to redepose the witness on some areas previously covered), subject to the organization's right to move for a protective order to prevent abuse. The new discovery rules aimed at controlling costs and focusing on staged or iterative discovery make it appropriate in certain cases to limit topics to certain core issues, to be followed at a later time with more expansive questioning on other topics, if necessary. In these circumstances, each deposition would count as a separate deposition.

**L. Discovery of Preparation**

A frequent question that arises at all depositions is: “what did you do to prepare for this deposition?” It inevitably invokes a work product objection to the extent it seeks to explore conversations with counsel and even when it seeks to explore what documents were reviewed, particularly when the review was directed by counsel. Courts are split. *Compare Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985) (documents reviewed invokes work product when counsel selected documents for review by client); *with N. Natural Gas Co. v. Approximately 9117.53 Acres*, 289 F.R.D. 644 (D. Kan. 2013) (selection process not protected).

Since the extent of preparation of a 30(b)(6) witness is a proper area of inquiry, the Task Force believes that counsel should have some latitude to explore the extent to which a witness was properly prepared. Work product and privilege objections should still have a place when it comes to discussions with counsel, except when such discussions provide the basis for the education of the witness and the facts that are sought to be conveyed. We believe requiring a comprehensive listing of the documents reviewed in preparation for a deposition, particularly when the selection was made by counsel, does properly invoke protected work product. Nevertheless, a questioner who shows a witness particular documents can certainly inquire of the witness whether the witness is familiar with the document and when it was last reviewed.

**CONCLUSION**

It is clear that over the last 45 years, Rule 30(b)(6) practice has resulted in not only much confusion among practitioners as to what it requires, but also the development of many issues upon which courts have been divided. We recommend that the Advisory Committee on Civil Rules undertake a thorough review of the Rule and conflicting case law and resolve all issues

upon which courts have divided on the interpretation of the Rule. Throughout this Report we have recommended solutions on areas where courts have been divided.

We have also recommended changes to the Rule that we believe will improve practice in taking organizational depositions. These recommendations will reduce overall litigation cost by providing mechanisms to resolve issues that frequently arise before time is needlessly spent posturing at the actual deposition with the witness present. These include mechanisms for (1) providing for an objection procedure to set forth objections to the number, scope and particularity of topics listed; (2) to identify the witness or witnesses to be produced; and (3) to address the situation when there is not a witness who has knowledge of the topics requested or who can be educated. The recommendations also include a specific provision to protect organization non-parties whose 30(b)(6) deposition is sought to be obtained by subpoena. The recommendations further seek to reconcile an apparent inconsistency in the Note that provides that the organizational deposition counts as one deposition toward the ten deposition limit regardless of how many topics are listed and how many witnesses are designated, but that each designated witness may be separately deposed for seven hours. By adopting these proposed improvements and resolving the numerous conflicts, we believe practice will be greatly improved, greater certainty will be achieved, and time and expense will be greatly reduced in deposing organizations.

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5(a): JURY TRIAL DEMAND: RULES 38, 39, AND 81(c)(3)(A)

The Report to the June meeting of the Standing Committee opened up discussion of the Rule 81(c)(3) provisions for demanding a jury trial in an action removed from state court. The discussion was inconclusive. Immediately after the meeting, Judge Gorsuch and Judge Graber advanced a proposal that:

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

Their proposal, 16-CV-F, is attached.

The proposal raises a complex set of questions, some empirical, some conceptual, and some that are both empirical and conceptual. The Rules Committee Support Office has undertaken to organize the first stage of research. At least the following questions will be addressed:

(1) Why was Rule 38 first adopted as a demand procedure?

(2) Why was the time for demand set early? (The 1937 Committee Note observes that Rules 38 and 39 "make definite provision for claim and waiver of jury trial, following the method used in many American states and in England and the British Dominions." This observation is followed by descriptions of rules and statutes that cover a range from early to as late as "when the case is called for assignment.") Were there then, or are there now, concerns beyond proper case scheduling? (The Committee Note cites an article by Professor Fleming James, who was a "research assistant" for the Committee, *Trial by Jury and the New Federal Rules of Civil Procedure*, 45 Yale L.J. 1022 (1936). The demand question is discussed at pp. 1044-1049. The discussion includes hints of strategic advantage, but focuses on concerns that seem more nearly administrative.)

(3) How often does a party who wants a jury trial fail to get one for failure to make a timely demand and for failure to make or win a motion to excuse the "waiver" imposed by Rule 38(d)? The research will include case law, anecdotal reports, academic analysis, and available empirical evidence.

(4) Are there relevant local federal rules?

(5) What can be learned from the wide variety of state rules and experience under them?

Other questions can be imagined, but if useful answers can be found to these questions, they will provide a strong foundation for the central issues: Does the demand procedure that

has been in place for 78 years cause a significant number of forfeitures? If it does, are there competing values that justify the sacrifice of Seventh Amendment or other rights to jury trial?

## MEMORANDUM

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

FROM: Judges Neil Gorsuch and Susan Graber

DATE: June 13, 2016

RE: Jury Trials in Civil Cases

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

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

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

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

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



# TAB 5B

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5(b): REDACTING IMPROPER FILINGS: RULE 5.2(i)

Rule 5.2 was adopted in 2007 as part of an all-committees effort to protect "an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial account number." Easy access to electronic court files provided the impetus.

Inevitably, some filings include more than the permitted last four digits of the numbers, year of birth, or initials of a minor. Apparently the nature of bankruptcy practice provides frequent opportunities for such mishaps. The Committee on Court Administration and Case Management suggested that the Bankruptcy Rules Committee consider amendments to Bankruptcy Rule 9037 to address reports that bankruptcy courts are receiving creditors' requests to redact previously filed documents, sometimes involving thousands of documents filed in numerous courts.

The Bankruptcy Rules Committee has taken the lead in drafting a new Rule 9037(h) that would establish an explicit procedure for redacting a previously filed document. They were prepared to publish their proposal for comment in August, 2016, but deferred so the other advisory committees could consider the wisdom of amending their own rules.

Continuing exchanges with the Bankruptcy Rules Committee have greatly reduced the number of differences between draft Rule 9037(h) and the draft Civil Rule 5.2(i) that is set out below. Some differences, identified in the footnotes, remain.

This draft Rule 5.2(i) is presented for discussion of these questions:

(1) Is there an independent need to add a new subdivision to Rule 5.2 spelling out a redaction procedure? Or does the question arise so infrequently in civil practice that the courts and parties can be relied upon to craft suitable procedures when the need does arise?

(2) Even if there does not seem to be a need to amend Rule 5.2, is it desirable to amend it, and the parallel provisions in the other rules, in order to maintain the uniformity that was sought in the beginning? Negative inferences might be drawn from differences in the rules texts, and there is little risk that unintended consequences will flow from amending Rule 5.2.

The Criminal Rules Committee remains uncertain whether there is an independent need to amend Criminal Rule 49.1, and whether the issues that confront the Bankruptcy Courts are sufficiently distinctive to supersede any interest in uniformity. But they are not opposed to considering amendments that would parallel Bankruptcy Rule 9037(h) and, if it is proposed, Civil Rule 5.2(i).

Appellate Rule 25(a)(5) adopts the Bankruptcy, Civil, and Criminal Rules for appeals in cases that they governed in the district court, invokes Criminal Rule 49.1 when an extraordinary writ is sought in a criminal case, and adopts Civil Rule 5.2 for all other proceedings. The Appellate Rules Committee is content to await the results of deliberations in the other advisory committees.

Perhaps the interest in maintaining uniformity justifies a recommendation to publish a new Rule 5.2(i) even if the possible intrinsic advantages seem relatively small.

(3) If a new Rule 5.2(i) is to be proposed, one delicate task will remain. The instinct for uniformity collides with entrenched drafting preferences. Accommodation works well up to a point. Beyond that point, many style preferences should be surrendered to the value of uniformity. This task can be managed during the interval before the spring meetings.

### **Rule 5.2. Privacy Protection for Filings Made with the Court**

\* \* \* \* \*

1 (i) MOTION TO REDACT A PREVIOUSLY FILED DOCUMENT.

2 (1) *Content of the Motion; Service.* Unless the court  
3 orders otherwise, a person<sup>1</sup> that seeks to redact  
4 from a previously filed document information that  
5 is protected under Rule 5.2(a)<sup>2</sup> must file a motion  
6 to redact [under seal]<sup>3</sup>. The movant must:

---

<sup>1</sup> Draft Bankruptcy Rule 9037(h) uses "entity" because the Bankruptcy Code definition of "person" does not include a governmental unit. "Entity" does. But "entity" is a poor fit for a natural person. "Person" as used in the Civil Rules regularly includes all sorts of entities.

<sup>2</sup> The Bankruptcy Rule is "subdivision (a)" rather than the equivalent of "Rule 5.2(a)." The Civil Rules style has tended to use the full Rule designation even for cross-references within a single rule – many illustrations are provided by Rule 26(b). Some take the hard-line view that rules users should learn the distinctions between Rule, Subdivision, Paragraph, Subparagraph, and Item. The meaning of "subdivision (a)" should be apparent. But probably it is better to adhere to the Civil Rules convention.

<sup>3</sup> The Bankruptcy Rule omits "under seal," reasoning that "CM/ECF can be programmed to restrict access automatically to any document titled 'motion to redact.'" That should be verified –

- 7 (A) attach a copy of the previously filed  
8 document, showing the proposed redactions;  
9 (B) include the docket number of the previously  
10 filed document;<sup>4</sup> and  
11 (C) unless the court orders otherwise, serve the  
12 motion on all parties<sup>5</sup> and any person<sup>6</sup> whose  
13 identifying information is to be redacted.  
14 (2) *Restricting Public Access to the Unredacted*  
15 *Document.*<sup>7</sup> [When the motion is filed,]<sup>8</sup> the court<sup>9</sup>

---

the bankruptcy courts have a long history of e-filing and may be ahead of the general civil docket in such matters. Apart from that, it seems likely that some motions to redact will not have the appropriate caption.

So long as the motion is effectively sealed, the lag between filing the motion and an order "promptly" denying public access to the original document in the court's public files may not be worrisome. But it might be asked whether CM/ECF could also be programmed to deny access to the original. If that could be done, across the board for all courts, there may be less reason to adopt new rule provisions.

<sup>4</sup> Do we need this? If a copy of the original is attached to the motion, both the motion itself and the copy should display the docket number, or – as seems likely? – the proof-of-claim number.

<sup>5</sup> The Bankruptcy Rule includes a long list of bankruptcy characters that does not fit the Civil Rules context.

The Bankruptcy Rule also includes the "filer of the unredacted document." Is there a risk that "parties" does not capture that?

<sup>6</sup> The Bankruptcy Rule is: "any individual whose personal identifying information is to be redacted." For the Civil Rule, "person" seems to work better. Rule 5.2(a)(4) requires redacting a "financial account number." An entity that does not qualify as an "individual" may have a financial account with a financial-account number that should have been redacted.

<sup>7</sup> The tag for the Bankruptcy Rule is "Restricting Public Access to the Unredacted Document." If the Civil Rule text uses "deny" public access, rather than "restrict," "Denying" may be better; see note 10 below.

<sup>8</sup> The Bankruptcy Rule begins: "The court must promptly restrict public access." The direction to act promptly reflects a

16 must:  
17 (A) [promptly] [restrict][deny]<sup>10</sup> public access to  
18 the motion and the unredacted document:  
19 (i) pending a ruling on the motion, and  
20 (ii) if the motion is granted, until a  
21 further court order;<sup>11</sup> and  
22 (B) [restore public access][lift the restrictions]  
if the motion is denied.<sup>12</sup>

---

concern that the motion itself may point out the existence and public availability of the unredacted document in the court file.

Having considered the question, the Bankruptcy Rules Committee has decided to retain "promptly." But during the Style Project the Civil Rules Committee was continually reminded that directions that a court must act promptly, or immediately, or whatever, begin to seem like the often-conflicting docket priority directions of earlier and unlamented days. A direction that the court must deny public access when the motion is filed, moreover, seems to imply prompt action. Perhaps it is enough to rely on the movant to request prompt action to deny access, omitting the bracketed "[promptly]."

If "promptly" is retained, it may be better to delete "when the motion is filed."

<sup>9</sup> Bankruptcy remains undecided whether it should be "the court" or "the clerk" who is directed to restrict public access. It would be nice to have a cross-rules convention. When the "court" is named, does that always exclude action by the clerk? Or should "court" be read to include all personnel and systems at the courthouse? If instead the rule says "clerk," is there any real risk that it would be read to forbid action by a judge? Compare Rule 5(d)(2): (A) provides for filing with "the clerk," while (B) provides for filing with "a judge."

<sup>10</sup> The Bankruptcy Rule uses "restrict," a word consistent with allowing some public access. "Deny" is more positive, and seems better unless we find circumstances in which public access should be allowed while the motion remains pending.

<sup>11</sup> "until a further court order," taken from the Bankruptcy Rules draft, probably works as well as the earlier draft Rule 5.2: "until the court amends or vacates the order."

<sup>12</sup> The Bankruptcy Rule includes a final sentence: "If the court denies the motion [if the motion is denied], the restrictions must be lifted, unless the court orders otherwise." It may not be necessary to add the provision for denial of the motion. Under (A), the document is protected pending the ruling,

COMMITTEE NOTE

1           Subdivision (i) is new. It is adopted to reflect the  
2 parallel adoption of new Bankruptcy Rule 9037(h) [and Criminal  
3 Rule 49.1(\_)]. Subdivision (i) differs from Rule 9037(h) in some  
4 details that reflect differences from the circumstances that may  
5 arise in bankruptcy filings.

6           Any person may file a motion to redact a filed document to  
7 delete information protected by Rule 5.2(a).

8           The motion must attach a copy of the previously filed  
9 document that includes the docket number and is identical to the  
10 filed document except for the redactions.

11           A single motion may relate to one or more unredacted  
12 documents. But if the proposed redactions involve different  
13 documents it may be better to file separate motions, particularly  
14 if different types of protected information are involved. If many  
15 documents are involved, the court may adopt a different procedure  
16 under the authority to "order otherwise."

17           Because the motion itself may call attention to the  
18 unredacted document, the court should act as promptly as possible  
19 to deny public access pending its ruling. The movant may assist  
20 the court by invoking whatever means are compatible with the  
21 court's electronic and paper filing procedures.

22           If the motion is granted, the redacted document should be  
23 placed on the docket, and public access to the unredacted  
24 document should remain restricted. If the court denies the  
25 motion, generally the restriction on public access to the  
26 document should be lifted.

27           This procedure does not affect [the availability of] any  
28 remedies that a person whose personal identifiers are exposed may  
29 have against the person that filed the unredacted document.

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and that's all. The restriction dissolves unless the ruling grants the motion. But there may be some risk that the restriction will carry forward by sheer inertia – that seems to be the fate of a fair share of sealed documents.

This draft shows one way to include a direction to lift the restrictions if the motion is denied. Better drafting can be crafted if the provision seems useful. The Bankruptcy Rules Committee has voted to retain it.

Uniformity may require that "unless the court orders otherwise" be added to the rule text. But it is difficult to believe that a court will deny the motion without further opportunity to seek redaction if the unredacted document in fact includes protected information.

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# TAB 5C

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5(c): SERVICE OF SUBPOENAS: RULE 45(b)(1)

Agenda Item 16-CV-B, submitted by the State Bar of Michigan Committee on United States Courts, suggests that Rule 45(b)(1) be amended to authorize service of a subpoena in accordance with Rule 4(e), (f), (g), (h), (i), or (j), "or by alternate means expressly authorized by the Court."

Present Rule 45(b)(1) requires "delivering" the subpoena: "Serving a subpoena requires delivering a copy to the named person \* \* \*." "Delivery" is not defined.

The proposal says that the majority view is that Rule 45(b) requires service by personal delivery, as if it read "delivering a copy to the named person personally." A minority view allows service by mail, at least if the subpoena is actually delivered. A hybrid view would allow service by mail if diligent attempts at personal service fail. The proposal supports incorporation of Rule 4 modes of service by suggesting that there is no reason why service of a subpoena should be more difficult than service of the summons and complaint that initiate an action and put the defendant at risk of liability.

Rule 45 was amended extensively in 2013. The Discovery Subcommittee and the Advisory Committee considered the question whether the modes of service should be expanded. The discussion was supported by a memorandum prepared by Andrea Kuperman, the Rules Law Clerk.<sup>1</sup> The division in court decisions is described in terms similar to 16-CV-B, although it is noted that in addition to mail, other modes of service have been occasionally recognized, such as "abode" service, service on an agent, service by commercial carrier, and acknowledgment of receipt.

The question was discussed briefly in Committee meetings, and at somewhat greater length by the Discovery Subcommittee. In-hand service was supported as "a dramatic event to signal the importance of the subpoena." But support also was expressed for invoking Rule 4 service methods. In the end, the Subcommittee concluded that no change was needed. In 2010 the Committee decided not to pursue the matter further. The March Minutes are succinct:

No Change: Two issues seem ready to be put aside without further work. One is whether Rule 45 should require personal, in-hand service of a subpoena. As compared to Rule 4 methods of service, the issue seems to be a theoretical point, "not a real problem." When service is on a nonparty, "the drama of personal service may be useful."

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<sup>1</sup> The memorandum is included in the agenda book for the April 20-21, 2009 meeting, at p. 274. Service of subpoenas is explored at pp. 281-286.

An initial question is whether the methods for serving discovery subpoenas might be different from the methods for trial subpoenas.

A related question is whether distinctions might be drawn between parties and nonparties. For discovery, Rule 37(d) provides ample incentives for a party to respond even if a subpoena is not served. But a subpoena still may be useful. Nonparties may be closely tied to a party or may have no stake in the litigation.

Service by mail offers the attraction of efficiency – both speedy and inexpensive – and seems reasonably secure if a return receipt is required. But a nonparty that has no interest in the litigation may find it easier to shrug off a subpoena delivered by a postal worker than one delivered by a process server.

Looking to the methods provided by Rule 4, as suggested by 16-CV-B, has obvious attractions. For individuals, Rule 4(e) allows service by means authorized by state law, by "abode" service, and by serving an agent. It may be that each of these means are equally appropriate for a subpoena. Other means also might be considered, such as "office" service, cf. Rule 5(b)(2)(B)(i).

Focus on Rule 4 would require separate evaluation of the other categories of defendants it addresses, and of the distinction between parties and nonparties. Rule 4(g) addresses service on a minor or incompetent person – what might be appropriate distinctions for serving a subpoena? Rule 4(h) addresses service on a corporation, partnership, or association – will it work as it is for subpoenas? Rule 4(i), for serving the United States and its agencies, corporations, officers, or employees, raises similar questions. So too for Rule 4(j)(2) for serving a state or local government.

Rules 4(f) for serving an individual abroad, 4(h)(2) for serving a corporation abroad, and 4(j)(1) for serving a foreign state, present special problems that will require careful thought. Rule 45(b)(2) now allows service at any place within the United States, while 45(b)(3) incorporates 28 U.S.C. § 1783 for serving a United States national or resident who is in a foreign country. Going beyond those limits will be a complicated task.

The analogy to Rule 4 also raises the question whether Rule 45 might include an express provision for accepting service. The Rule 4(d) waiver process does not seem a likely model, in part because 30 days to return a waiver seems a long time for either a discovery or a trial subpoena, and in part because it may seem inappropriate to require a nonparty to pay the cost of service after refusing to waive service. But it might be useful to encourage acceptance of service. The rule might look to any means consented to in writing, with a Committee Note observation that the subpoena could be sent with an acceptance form.

This brief sketch frames the question: Has the time come, now or in the near future, to return to these issues? There is some disagreement in the cases. The majority view that "delivering" requires personal service seems to rest primarily on interpretation of the word. The importance of a dramatic event – in-hand service – to capture the attention does not seem to have been emphasized, although it may be assumed. "Delivering" could easily be read to include actual delivery by mail as well, but this interpretation seems to have been rejected without suggesting a functional explanation. The more difficult task of reading "delivering" to embrace some parts of Rule 4 seems to have been undertaken only rarely. In the abstract, there is a worthy question whether useful improvements might be made in the methods for serving subpoenas.

But many questions seem interesting and even useful when considered in the abstract. This question has been considered recently and put aside. Perhaps it should be left for now where it lies.

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**SUBMITTED ELECTRONICALLY**

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Committee on Rules of Practice and Procedure  
 Administrative Office of the United States Courts  
 One Columbus Circle, NE  
 Washington, DC 20544

306 Townsend Street  
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 Lansing, MI  
 48933-2012

RE: **Proposed Amendment to Federal Rule of Civil Procedure 45(b)(1)**

To the Committee:

The State Bar of Michigan Committee on United States Courts (“Committee”) respectfully submits the following proposed amendment to FRCP 45(b)(1) for consideration:

**(b) Service.**

***(1) By whom and How; Tendering Fees.***

- (A) Any person who is at least 18 years old and not a party may serve a subpoena.
- (B) A subpoena shall be effectively served if it is served in accordance with Rule 4, section (e), (f), (g), (h), (i), or (j), as applicable to the particular subpoenaed person, or by alternate means expressly authorized by the Court.
- (C) If the subpoena requires that person’s attendance, tendering the fees for 1 day’s attendance and mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

For service of a subpoena to be effective, the current Rule “requires delivering a copy to the named person.” “Delivering,” however, is nowhere defined or clarified in the Rule. As discussed in detail in the accompanying memorandum, this ambiguity has led to piecemeal and inconsistent interpretations of the Rule by the courts and, concomitantly, to a large volume of motion practice relating to the service of discovery and trial subpoenas. This has led, in turn, to substantial delays in the progress of litigation and to unnecessary added costs of litigation, as well as to additional burden on the courts’ dockets.

The proposed amendment to Rule 45(b)(1) brings the requirements for effective service of a subpoena in line with the requirements for service of process under Rule 4. The rationale for this change is also explained in detail in the accompanying memorandum, but of critical importance is the principle that service of a discovery subpoena should not be more difficult or restrictive than service of the summons and complaint, given the obviously heightened potential liability to which a defendant in a lawsuit is subjected.

The Committee is a standing committee of the State Bar of Michigan comprised of seventeen members appointed by the President of the State Bar of Michigan. Its mission is to make recommendations concerning the administration, organization, and operation of the United States Courts for the purpose of securing the effective administration of justice. The Committee's members are federal judges, clerks of the court, and attorneys who work in and are familiar with the federal court system.

The State Bar of Michigan has authorized the Committee to submit these comments to the Committee on Rules of Practice and Procedure. This Federal Civil Rule amendment proposal represents the position of the Committee on the United States Courts and shall not be considered a position of the State Bar of Michigan.

Thank you for your consideration, and please feel free to contact the Committee with any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jan Meir Geht', with a large, sweeping flourish extending to the right.

Jan Meir Geht  
Chair, Committee on United States Courts

Attachment

PC: U.S. Courts Committee:  
Thaddeus E. Morgan, Member  
Michael W. Puerner, Member  
Peter M. Falkenstein, Advisor



**PROPOSAL TO REVISE FED. R. CIV. P. 45(b)(1)  
TO CLARIFY ACCEPTABLE METHODS OF SERVING  
A SUBPOENA ON A NON-PARTY WITNESS**

***I. Background:***

Rule 45(b)(1) of the Federal Rules of Civil Procedure (the “Rule”), relating to service of a subpoena, provides in relevant part:

Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person . . . .

(Underscore added.) Nowhere, however, does the Federal Rules clarify what constitutes effective “delivery” to the subpoenaed party, be it an entity or an individual. In contrast, other provisions of the Federal Rules specify in greater detail what methods of service of documents are acceptable. *See, e.g.*, Rule 4(e) and (f), specifying acceptable methods of service of a summons and complaint on an individual or a corporate entity; *see also* Rule 5(b), specifying acceptable methods of serving pleadings and other papers on all parties.

The failure of the Federal Rules to define “delivering” in Rule 45(b) has led to inconsistent rulings from Circuit to Circuit and from District to District as to what constitutes effective service of a subpoena. Moreover, this uncertainty as to the requirements for service plagues both litigation counsel for the parties and in-house or outside counsel for subpoenaed non-parties as to how to serve a subpoena and how to respond to the ostensible “service.” This uncertainty has led to vast inefficiencies and delays in federal litigation, as (i) subpoenas are regularly challenged by objections and motions to quash, based on uncertainty as to the effectiveness of service; (ii) counsel seeking to serve a subpoena often has to move for an order permitting alternate methods of service; and (iii) discovery and trial schedules are often delayed, as motions relating solely to the effectiveness of service of a subpoena are briefed and heard.

Ultimately, it is often several months before the validity of service of the subpoena is upheld or, if it is deemed ineffective, re-service can be effected. In addition to delaying litigation unnecessarily, the confusion as to methods for serving a subpoena drives up the costs of litigation and unduly burdens court dockets with motions related to a procedural issue that can be better clarified by a revision to the Rule. Based on the clear problem currently plaguing our federal system and the analysis of the issues as addressed below, the Committee proposes to amend Rule 45(b)(1) in the manner attached as Exhibit 1 to this memorandum.

***II. The Split Among Courts in Setting Forth Acceptable Methods of “Delivering” a Subpoena to a Non-Party Witness***

A majority of courts have adopted the position that “delivering” a subpoena requires personal service. *See, e.g., OceanFirst Bank v. Hartford Fire Ins. Co.*, 794 F. Supp. 2d 752,

753 (E.D. Mich. 2011) (“The Sixth Circuit has not addressed whether Rule 45 requires personal service; however, the Fifth, Ninth, and D.C. Circuits have held that personal service is required.”) citing *Robertson v. Dennis (In re Dennis)*, 330 F.3d 696, 705 (5th Cir. 2003); *Chima v. United States Dep’t of Defense*, 23 Fed. App’x. 721, 724 (9th Cir. 2001); *FTC v. Copmagnie De Saint-Gobain-Pon-A-Mousson*, 636 F.2d 1300, 1312-13 (D.C. Cir. 1980). “A majority of lower also have held that Rule 45 requires personal service.” *OceanFirst Bank*, 794 F. Supp. 2d at 753 (numerous citations omitted).

“There is no consensus on that point, however. A number of courts ‘have permitted service by certified mail and other means if the method of service is made in a manner designed to reasonably insure actual receipt of the subpoena by the witness.’” *Id.* For example, the court in *Doe v. Hersemann*, 155 F.R.D. 630 (N.D. Ind. 1994), held that service of a subpoena via certified mail is sufficient under Rule 45, particularly when the subpoenaed party does not deny actual receipt. In adopting and further clarifying that position, a Maryland district court subsequently explained:

The courts that have embraced the minority position have in common a willingness to acknowledge that Rule 45 itself does not expressly require personal in-hand service, and a practical appreciation for the fact that the obvious purpose of Rule 45(b) is to mandate effective notice to the subpoenaed party, rather than slavishly adhere to one particular type of service.

*Hall v. Sullivan*, 229 F.R.D. 501, 504 (D. Md. 2005). Building upon the reasoning in *Doe v. Hersemann*, the *Hall* court continued:

Nothing in the language of the rule suggests in-hand personal service is required to effectuate “delivery,” or that service by certified mail is *verboten*. The *plain* language of the rule requires only that the subpoena be delivered to the person served by a qualified person. Delivery connotes simply “the act by which the *res* or substance thereof is placed within the actual . . . possession or control of another.”

*Id.* Furthermore,

In further support of its conclusion that personal, in-hand service is not required by rule 45, the *Doe* court looked to Rule 4(e)(1), which addresses the type of service required for a summons and complaint. . . . Rule 4(e)(1), in relevant part, states that “service may be effected by delivering a copy of the summons and of the complaint to the individual *personally* . . . (emphasis added). . . . [W]hen the drafters of the Federal Rules wanted to require “personal service” of a pleading or paper, they were capable of doing so unambiguously. . . . [T]o read the word “personally” into Rule 45 would render the use of “personally” in Rule 4(e)(1) “pure surplusage,” a practice not advocated.

*Id.* citing *Doe v. Hersemann*, 155 F.R.D. at 631. A growing number of courts have thus adopted the position that service by means other than personal service is permitted, if designed to

reasonably give notice of the subpoena to the subpoenaed party, or where the subpoenaed party acknowledges receipt of the subpoena. Such means may include service by certified mail, first class U.S. mail, delivery to non-party's office, or delivery to non-party via Federal Express as well as non-party's counsel. *See, e.g. Green v. Baca*, 2005 WL 283361 at \*5 n.1 (C.D. Cal. Jan. 31, 2005) (unpublished opinion) (permitting service by leaving subpoena at witnesses' offices); *Cordius Trust v. Kummerfeld*, 2000 WL 10268 at \*2 (S.D. N.Y. Jan. 3, 2000) (unpublished opinion) (permitting service by certified mail); *Windsor v. Martindale*, 175 F.R.D. 665 (D. Colo. 1997) (service by certified mail sufficient); *Codrington v. Anheuser-Busch, Inc.*, 1999 WL 1043861 at \*1-2 (M.D. Fla. Oct. 15, 1999) (unpublished opinion) (permitting service by first class U.S. mail); *Western Resources, Inc. v. Union Pacific R. Co.*, 2002 WL 1822432 at \*1-2 (D. Kan. July 23, 2002) (unpublished opinion) (permitting service via Federal Express with a signature release waiver and upon non-party's counsel); *OceanFirst Bank*, 794 F. Supp. 2d at 754 (E.D. Mich. 2011) (first-class mail accompanied by posting at known residence sufficient)(in dictum). And, certainly, in any case in which the subpoenaed party or its counsel contacts the attorney for the subpoenaing party to acknowledge receipt, but also to object to the method of service, the service will be deemed effective. *See, e.g., Ott v. City of Milwaukee*, 274 F.R.D. 238, 241-42 (E.D. Wis. 2011); *Jorden v. Steven J. Glass, MD*, 2010 WL 3023347 at \*4 n.1 (D.N.J. July 23, 2010) (unpublished opinion).

Other courts have staked out a middle ground between the most restrictive majority view requiring personal service, and the most permissive minority view, authorizing a variety of alternate methods of service. This middle ground is essentially a hybrid position, adopting the majority view as the default position, but permitting alternative methods of service upon motion to the court; but only upon a showing that diligent efforts to personally serve the subpoena have failed. *See, e.g., OceanFirst Bank*, 794 F. Supp. 2d at 754:

“Courts that have sanctioned alternative means of service under Rule 45 often have done so only after the party requesting the accommodation diligently attempted to effectuate personal service.” (Citation omitted.) . . . The Court is persuaded by and adopts the reasoning of the courts that interpret Rule 45 to allow service of a subpoena by alternate means once the party seeking evidence demonstrates an inability to effectuate service after a diligent effort. The alternate means must be reasonably calculated to achieve actual delivery. (Citations omitted.)

The *OceanFirst* court then noted that “[m]ailing by first-class mail to the actual address of the intended recipient generally will suffice, (citation omitted), especially when the mailing is accompanied by posting at the known address of the prospective witness.” *Id.* *See also Bland v. Fairfax County, Va.*, 275 F.R.D. 466, 471-72 (E.D. Va. 2011) (permitting service “where [subpoenaed] witnesses agreed to testify, actually received the at-issue subpoenas in advance of trial, and the non-personal service was effected by means reasonably sure to complete delivery.”).

Thus, the current judicial landscape comprises three wholly different interpretations of what constitutes effective delivery of a subpoena under Rule 45 – (i) the majority view, requiring personal service; (ii) the growing minority view, authorizing a variety of alternate means of service; and (iii) the hybrid view, authorizing alternate service only upon motion and a showing

that diligent attempts at personal service have been unavailing. As illustrated by the large number of opinions devoted to this issue, valuable resources are being wasted in trying to interpret a rule that could be easily clarified and settled by an amendment to Rule 45(b).

### ***III. Evaluating the Various Approaches***

In evaluating the various approaches taken by the courts, the Committee has taken into account the evolving views as to the purpose of the Federal Rules, as exemplified by the Duke Conference of 2010, along with amendments to the Federal Rules emanating from that conference. The Duke Conference examined problems in federal civil litigation, particularly excessive costs and delay and the adequacy of the Federal Rules of Civil Procedure to address them. As emphasized in the aftermath of the Duke Conference, and exemplified by the amendment to Rule 1: the Rules will be “construed, administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.” The Committee thus views the various approaches to Rule 45(b)(1) with a critical focus on whether each promotes the just, speedy, and inexpensive determination of the action.

With respect to Rule 45(b)(1) in particular, the Committee also is cognizant of the overview taken by the respected treatise Moore’s Federal Practice, as summarized in *Hall v. Sullivan*, 229 F.R.D. at 505:

Moore’s Federal Practice provides insight into the position of the courts following the minority rule that personal service . . . is not required by Rule 45:

- (1) The actual language of the rule does not require personal service;
- (2) As Rule 4(e) demonstrates, the drafters of the Federal Rules knew how to require personal service when they wanted it;
- (3) The cases holding that personal service is required by Rule 45 do not provide meaningful analysis, but instead, simply quote the rule; and
- (4) There is absolutely no policy distinction that would justify permitting “lesser” forms of service for a summons and a complaint – which actually commence a lawsuit – but not for a subpoena. [Moore’s Federal Practice – Civil ¶ 45.03(b)(1).]

This last reason is the most persuasive. It is illogical to permit a person to be brought into a lawsuit, with all its attendant risks of personal liability, on less than personal service, but to require personal service of a discovery or trial subpoena. The objective should be to ensure fair notice to the person summoned and an opportunity to challenge the subpoena, without unnecessarily imposing on the party seeking the discovery an unnecessarily cumbersome or expensive service requirement.

#### **A. The Majority Approach (Personal Service Requirement).**

The Committee views the majority approach, requiring personal service of a discovery or trial subpoena to be inefficient, overly restrictive, and not justified by sound policy. As noted in

Moore's Federal Practice, nothing in Rule 45 itself requires personal service – the requirement is simply a gloss on the rule, manufactured by the courts themselves. Thus, this approach is more restrictive than the actual language of the rule requires.

It also is illogical from a policy perspective. Subjecting an individual or a company to a lawsuit should clearly require the most effective forms of notice, given the liability to which the putative defendant may be subjected. And Rule 4, while taking this into account, provides for a variety of acceptable means for service of the summons and complaint. It makes no sense to sharply narrow the acceptable methods of service of a discovery or trial subpoena, where the risk to the subpoenaed party is not nearly as great as that of a putative defendant.

Finally, the majority approach does not serve the goals of the speedy and inexpensive determination of litigation. Attempts to personally serve a subpoena, particularly where the subject may wish to avoid service, can be extremely time consuming and drive up litigation costs. And, where personal service cannot be obtained at all, the goal of a “just determination” of the litigation is ill-served, as material witnesses may never be examined and critical documents may never be produced.

Therefore, the Committee finds that the majority approach is the least appropriate of the approaches currently taken by the courts.

#### **B. The Hybrid Approach (Alternate Service Upon Motion After Diligent Personal Service Attempts Fail)**

The hybrid approach, permitting various alternate methods of service, but only upon motion to the court and a showing that diligent attempts at personal service have failed, is an improvement upon the majority approach in one regard – it better promotes the “just determination” of the litigation by ultimately permitting less restrictive service methods; thereby increasing the likelihood that material witnesses and documents will ultimately be made available to the litigants. This is accomplished via the discretion of the court, upon motion, to authorize alternate methods of service.

The hybrid approach, however, in no way promotes the “speedy and inexpensive determination” of the litigation. Parties attempting to serve a subpoena are still required to go through the motions of diligently trying to personally serve the subpoena, thereby incurring the same costs and delays inherent in the majority approach. Moreover, once those attempts fail, the serving party must suffer the expense of filing a motion with the court and, if successful, then following through on the alternate means of service authorized by the court. The delays inherent in this approach are onerous, particularly where discovery deadlines or a trial date are looming. It can often be two months or more from the time a party recognizes that it cannot effect personal service until the time it is able to obtain an order for substitute service via motion, and then effect service through alternative means.

Neither does the hybrid approach serve legitimate policy concerns any better than the majority approach. There is no more basis in Rule 45 itself, or the policy relating to service of various documents as discussed in Moore's, that would justify establishing a default position of

first requiring attempts at personal service, than would justify only permitting personal service. By taking a position that is highly congruous with the majority approach – that one *must* attempt personal service of a subpoena – the hybrid approach stands on equally shaky policy footing as the majority approach.

For the reasons stated, the Committee concludes that the hybrid approach does not adequately serve the goals of the Federal Rules.

### **C. The Minority Approach (Permitting Methods of Service Designed to Reasonably Insure Actual Notice to the Subpoenaed Party)**

Moore’s Federal Practice recognizes that sound policy compels the conclusion that the methods of service authorized for service of a subpoena should be no more restrictive than those authorized for service of a summons and complaint. Courts adopting the minority approach have explicitly or implicitly agreed.

Expansion of the acceptable methods of service of a subpoena to those encompassed by Rule 4 will certainly promote the just determination of litigation by making it most likely that material witnesses and documents will become available to the litigants, as it will be more difficult for a recalcitrant witness to dodge service. The speedy and inexpensive determination of litigation will also be served dramatically, as litigants will no longer be required, as under the hybrid approach, to make numerous attempts at personal service, and then to file costly and time consuming motions to obtain an order for substitute service. In sum, under the minority approach, all of the same methods of service that are available under the hybrid approach only after lengthy and costly delays, will be available to the parties immediately.

For these reasons, the Committee concludes that the minority approach best serves all of the interests set forth as goals for the administration of justice under the Federal Rules, including the interests of the Courts, the counsel for the parties, the counsel for non-parties who are subject to subpoenas, and, of course, the parties themselves. Further, when coupled with the courts’ inherent discretion to authorize alternate methods of service, the minority approach comes as close as possible to serving the stated goals of the Federal Rules.

### ***IV. The Committee’s Recommendation***

The Committee Recommends amending Rule 45(b)(1) by striking all of the current language in that subsection and inserting instead the language annexed to this proposal as **Exhibit 1**. The Committee recognizes that among the courts adopting the minority approach there is not absolute congruity, as there have been authorized a variety of different means of service. The Committee concludes that in order to provide a consistent and clearly understandable protocol for service of subpoenas, a rule for service that is congruent with Rule 4 of the Federal Rules makes the most sense. Additionally, the proposed rule makes clear that the Court’s inherent discretion to provide for alternate methods of service when necessary and appropriate is preserved.

Submitted by,

/s/ Peter M. Falkenstein  
/s/ Thaddeus E. Morgan  
/s/ Michael W. Puerner

Date: January 12, 2016

## **EXHIBIT 1**

Rule 45(b)(1) of the Federal Rules of Civil Procedure is amended by deleting the language of the current rule and inserting the language below as the substitute rule:

**(b) Service.**

**(1) *By Whom and How; Tendering fees.***

- (A) Any person who is at least 18 years old and not a party may serve a subpoena.
- (B) A subpoena shall be effectively served if it is served in accordance with Rule 4, section (e), (f), (g), (h), (i), or (j), as applicable to the particular subpoenaed person, or by alternate means expressly authorized by the Court.
- (C) If the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.



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## 6: REPORT OF THE SUBCOMMITTEE ON PILOT PROJECTS

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

The goal of the EPP is to expand practices employed successfully by some judges and thereby promote a change in culture among federal judges generally by confirming the benefits of active management of civil cases through the use of the existing rules of civil procedure. The chief features of the EPP are: that judges hold prompt case management conferences with the parties within the time permitted by Rule 16(b)(2); that judges place firm caps on the amount of time allowed for discovery, not to be extended more than once and only for good cause; that judges adopt procedures for the prompt, informal resolution of discovery disputes (by telephone conference, if possible) as encouraged by Rule 16(b)(3)(B)(v); that judges decide dispositive motions within a specific period after the filing of the reply brief; and that judges set and maintain firm trial dates. The overarching design of the EPP is to reach the target objective of having 90% of civil cases set for trial within 14 months of either the filing of the case or the time any defendant has been served or has appeared—and within 18 months for the remaining 10%.

The Subcommittee has held numerous planning calls to refine the contours of the EPP. One issue that has not yet been resolved is whether the “trigger” for measuring the 14/18 month

targets should be the filing of the lawsuit (the easiest to measure) or the earlier of the service of any defendant or the appearance of any party. The latter trigger may make more sense, as even the most diligent judge cannot begin the active management of a case until at least one defendant has been served or appeared. The Subcommittee also is in the process of finalizing its recommendations regarding the length of the discovery period to be allowed. Analysis of civil filings across the federal courts reflects that most often discovery lasts between 120-180 days, but the Subcommittee realizes that some cases may require more time to complete discovery.

The Subcommittee is of the view that EPP pilot judges should have flexibility in determining exactly how to informally resolve most discovery disputes, so long as they do so without the delay and expense associated with formal briefing. One issue that has prompted a good deal of discussion by the Subcommittee is the time within which EPP judges must resolve dispositive motions. Various periods of time have been considered: 60 days from the filing of the reply memorandum; 60 days from the date of any oral argument; 90 days from the filing of the reply. While the Subcommittee recognizes that a short deadline for ruling on dispositive motions may deter some districts (especially those with large civil dockets) from participating, it believes that a 60-day deadline from the filing of the reply is usually a sufficient amount of time for judges to rule, and that a longer deadline would jeopardize meeting the 14/18 month trial targets. Finally, the Subcommittee believes that EPP judges should have flexibility to determine the point at which to set a firm trial date in their civil cases (for example: when the initial scheduling order is issued; when discovery is complete; when dispositive motions have been filed; or when dispositive motions have been decided), so long as the trial date is within the 14/18 month target.

The Subcommittee expects to finalize its recommendations regarding the details of the EPP before the end of October. Thereafter, a “user’s manual” will be developed to give guidance to EPP judges, and model forms and orders as well as other educational materials will need to be developed before the EPP is ready for implementation in the first quarter of 2017.

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

The details of the MIDP have been set out in a proposed standing order that will be issued in the pilot courts, as well as a “user’s manual” that supplements the standing order. The current draft MIDP is attached. Some features of the MIDP are: the mandatory initial discovery (“MID”) will supersede the initial disclosures otherwise required by Rule 26(a)(1); the parties may not opt out; favorable as well as unfavorable information must be produced; responses must be filed with the court, so that it may monitor and enforce compliance; and the court will discuss

the MID with the parties at the Rule 16(b)(2) case management conference, and resolve any disputes regarding compliance.

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

As with the EPP, the Subcommittee will be developing a standing order and educational materials to assist participating judges. These will include a “user’s manual.”

The Subcommittee is drawing to the close of its efforts to specify the details of the EPP and the MIDP, and its efforts will now be directed to the recruitment of district courts to participate. By the end of 2016, the Subcommittee hopes to have 5 to 10 districts of various sizes from diverse parts of the country that are willing to participate in each pilot, and then to begin implementation of the pilots in the first quarter of 2017. Each pilot will last for a period of three years. A draft letter explaining the two pilots has been prepared to be sent to chief judges of districts interested in participating, and Subcommittee members already have made initial contact with approximately 10 districts that have expressed an interest in participating in one of the pilots.

The Subcommittee hopes that the Advisory Committee will provide further feedback that may be helpful as the details of the EPP and MIDP are finalized, and that members of the Committee will themselves reach out to districts that might be willing to participate, or make the



Subcommittee aware of such districts. Thus far, the Subcommittee has been advised that the following districts have expressed some degree of interest in one or both of the pilots: E.D. Ky.; E.D. Pa.; W.D. Mi.; S.D. Oh.; D. Az.; N.D. Il.; S.D. Tx.; E.D. La.; N.D. Tx.; and D. Mt.

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## MANDATORY INITIAL DISCOVERY PILOT PROJECT

### Standing Order

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

#### **A. Instructions to Parties.**

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

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

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

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

5. Initial responses to these mandatory discovery requests shall be filed with the Court on the date when they are served; provided, that voluminous attachments need not be filed, nor are parties required to file documents that are produced in lieu of identification pursuant to paragraphs (B) (3), (5), or (6) below. Supplemental responses shall be filed with the Court if they are served prior to the scheduling conference held under Rule 16(b), but any later supplemental responses need not be filed, although the party serving the supplemental response shall file a notice with the Court that a supplemental response has been served.

6. The duty of mandatory initial discovery set forth in this Order is a continuing duty, and each party must serve supplemental responses when new or additional information is discovered or revealed. A party must serve such supplemental responses in a timely manner, but in any event no later than 30 days after the information is discovered by or revealed to the party. If new information is revealed in a written discovery response or a deposition in a manner that

reasonably informs all parties of the information, the information need not be presented in a supplemental response.

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

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

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

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

## **B. Mandatory Initial Discovery Requests.**

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

2. State the names and, if known, the addresses and telephone numbers of all persons who you believe have given written or recorded statements relevant to any party's claims or defenses. Unless you assert a privilege or work product protection against disclosure under applicable law, attach a copy of each such statement if it is in your possession, custody, or control. If not in your possession, custody, or control, state the name and, if known, the address and telephone number of each person who you believe has custody of a copy.

3. List the documents, electronically stored information ("ESI"), tangible things, land, or other property known by you to exist, whether or not in your possession, custody or control, that you believe may be relevant to any party's claims or defenses. To the extent the volume of any such materials makes listing them individually impracticable, you may group

similar documents or ESI into categories and describe the specific categories with particularity. Include in your response the names and, if known, the addresses and telephone numbers of the custodians of the documents, ESI, or tangible things, land, or other property that are not in your possession, custody, or control. For documents and tangible things in your possession, custody, or control, you may produce them with your response, or make them available for inspection on the date of the response, instead of listing them. Production of ESI will occur in accordance with paragraph (C)(2) below.

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

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

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

7. A party receiving the list described in Paragraph 3, the description of materials identified in Paragraph 5, or a description of agreements referred to in Paragraph 6 may request more detailed or thorough responses to these mandatory discovery requests if it believes the responses are deficient. When the court has authorized further discovery, a party may also serve requests pursuant to Rule 34 to inspect, copy, test, or sample any or all of the listed or described items to the extent not already produced in response to these mandatory discovery requests, or to enter onto designated land or other property identified or described.

**C. Disclosure of Hard-Copy Documents and ESI.**

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

2. *ESI.*



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

- i. requirements and limits on the preservation, disclosure, and production of ESI;
- ii. appropriate ESI searches, including custodians and search terms, or other use of technology assisted review;
- iii. the form in which the ESI will be produced.

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

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

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

### **Instructions for Pilot Courts**

Pilot judges should hold initial case management conferences under Rule 16(b) within the time specified in Rule 16(b)(2). Judges should discuss with the parties their compliance with the mandatory discovery obligations set forth in the Standing Order, resolve any disputes, and set a date for full and complete supplementation of responses.

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

Judges should make themselves available for prompt resolution of discovery disputes. It is recommended that judges require parties to contact the Court for a pre-motion conference, as

identified in Rule 16(b)(3)(B)(v), before filing discovery motions. If discovery motions are necessary, they should be resolved promptly.

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

DRAFT