

**ADVISORY COMMITTEE
ON
CIVIL RULES**

**Washington, D.C.
November 7, 2017**

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November 7, 2017

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 - B. Report on the September meeting of the Judicial Conference of the United States
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3. **Information Item:** Legislation
 - A. Class-Action Legislation
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 - A. Rule 16: Role of Judges in Settlement
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8. **Information Item:** IAALS FLSA Initial Discovery Protocol
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	Judge A. Benjamin Goldgar <i>(Bankruptcy)</i>
Liaison for the Advisory Committee on Criminal Rules	Judge Amy J. St. Eve <i>(Standing)</i>
Liaisons for the Advisory Committee on Evidence Rules	Judge Jesse Furman <i>(Standing)</i>
	Judge Sara Lioi <i>(Civil)</i>
	Judge James C. Dever III <i>(Criminal)</i>

Advisory Committee on Civil Rules

Members	Position	District/Circuit	Start Date	End Date
John D. Bates Chair	D	Washington, DC	Member: Chair: 2015	---- 2018
John M. Barkett	ESQ	Florida	2012	2018
Robert Michael Dow, Jr.	D	Illinois (Northern)	2013	2019
Joan N. Ericksen	D	Minnesota	2015	2018
Parker C. Folse	ESQ	Washington	2012	2018
Sara E. Lioi	D	Ohio (Northern)	2016	2019
Scott M. Matheson, Jr.	C	Tenth Circuit	2012	2018
Brian Morris	D	Montana	2015	2018
David E. Nahmias	JUST	Georgia	2012	2018
Chad A. Readler*	DOJ	Washington DC		
Virginia A. Seitz	ESQ	Washington DC	2014	2020
Craig B. Shaffer	M	Colorado	2014	2020
A. Benjamin Spencer	ACAD	Virginia	2017	2020
Ariana J. Tadler	ESQ	New York	2017	2020
Edward H. Cooper Reporter	ACAD	Michigan	1992	Open
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TAB 1

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TAB 1A

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

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ATTENDANCE

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

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

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

The advisory committees were represented by their chairs and reporters:

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

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

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

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

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

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

Present to provide support to the Committee:

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

OPENING BUSINESS

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

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

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

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

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

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

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

APPROVAL OF THE MINUTES OF THE PREVIOUS MEETING

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

INTER-COMMITTEE COORDINATION

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

Electronic Service and Filing:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Stays of Execution:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Disclosure Rules:

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

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

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

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

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

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

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

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

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

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

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

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

*Redacting Personal Identifiers:
Bankruptcy Rule 9037*

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

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

Action Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Information Items

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

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

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

Action Items

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Information Items

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

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

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

Action Items

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

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

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

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

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

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

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

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

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

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

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

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

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

infra).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Information Items

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

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

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

Action Items

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

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

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

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

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

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

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

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

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

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

Information Items

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

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

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

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

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

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

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

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

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

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

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

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

Action Item

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

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

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

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

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

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

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

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

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

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

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

Information Items

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

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

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

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

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

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

LEGISLATIVE REPORT

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

CONCLUDING REMARKS

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

Respectfully submitted,

Rebecca A. Womeldorf
Secretary, Standing Committee

TAB 1B

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

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

1. Approve the proposed amendments to Appellate Rules 8, 11, 25, 26, 28.1, 29, 31, 39, and 41, and Forms 4 and 7, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.....pp. 2-7

2. a. Approve the proposed amendments to Bankruptcy Rules 3002.1, 5005, 7004, 7062, 8002, 8006, 8007, 8010, 8011, 8013, 8015, 8016, 8017, 8021, 8022, 9025, and new Rule 8018.1, and new Part VIII Appendix, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approve proposed revisions effective December 1, 2017 to Bankruptcy Official Forms 25A, 25B, 25C, 26 (renumbered respectively as 425A, 425B, 425C, and 426), 101, 309F, 309G, 309H, and 309I, and approve proposed revisions effective December 1, 2018 to Official Forms 417A and 417C, to govern all proceedings in bankruptcy cases commenced after the effective date and, insofar as just and practicable, all proceedings pending on the effective date pp. 10-21

3. Approve the proposed amendments to Civil Rules 5, 23, 62, and 65.1, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 24-29

4. Approve the proposed amendments to Criminal Rules 12.4, 45, and 49, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law..... pp. 31-35

<p>NOTICE NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.</p>
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The remainder of this report is submitted for the record and includes information on the following for the Judicial Conference:

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

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

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

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

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

<p>NOTICE NO RECOMMENDATIONS PRESENTED HEREIN REPRESENT THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.</p>
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FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

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

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

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

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

Rule 25 (Filing and Service)

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

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

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

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

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

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

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

Rule 26 (Computing and Extending Time)

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

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

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

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

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

Rule 29 (Brief of an Amicus Curiae)

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

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

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

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

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

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

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

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

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

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

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

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

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

Form 7 (Declaration of Inmate Filing)

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

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

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

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

Rules Approved for Publication and Comment

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

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

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

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

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

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

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

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

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

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

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

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

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

Information Items

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

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rules and Official Forms Recommended for Approval and Transmission

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

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

Rules and Official Forms Published for Comment in 2016

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Additional Amendments to Official Forms.

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

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

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

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

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

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

Conforming Changes Proposed without Publication

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation: That the Judicial Conference:

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

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

Rules and Official Form Approved for Publication and Comment

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

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

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

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

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

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

Rule 6007 (Abandonment or Disposition of Property)

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

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

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

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

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

FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

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

Rule 5 (Serving and Filing Pleadings and Other Papers)

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

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

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

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

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

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

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

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

Rule 23 (Class Actions)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Information Items

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

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

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

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

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

Social Security Disability Review Cases

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

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

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

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

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

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

Rule 12.4 (Disclosure Statement)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rules Approved for Publication and Comment

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

New Rule 16.1 (Pretrial Discovery Conference and Modification)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Information Item

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

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

FEDERAL RULES OF EVIDENCE

Rule Approved for Publication and Comment

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

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

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

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

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

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

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

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

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

Information Items

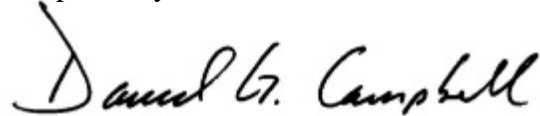
As part of its fall 2017 meeting, the advisory committee will host a symposium on Rule 702 and developments regarding expert testimony, including the challenges raised in the last few years to forensic expert evidence. The advisory committee is also seeking comments from stakeholders on the practical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

JUDICIARY STRATEGIC PLANNING

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

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

Respectfully submitted,



David G. Campbell, Chair

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

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

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

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

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

TAB 2

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 25, 2017

1 The Civil Rules Advisory Committee met at the Ella Hotel in
2 Austin, Texas on April 25, 2017. (The meeting was scheduled to
3 carry over to April 26, but all business was concluded by the end
4 of the day on April 25.) Participants included Judge John D. Bates,
5 Committee Chair, and Committee members John M. Barkett, Esq.;
6 Elizabeth Cabraser, Esq. (by telephone); Judge Robert Michael Dow,
7 Jr.; Judge Joan N. Ericksen; Parker C. Folse, Esq.; Professor
8 Robert H. Klonoff; Judge Sara Lioi; Judge Scott M. Matheson, Jr.;
9 Judge Brian Morris; Justice David E. Nahmias; Judge Solomon Oliver,
10 Jr.; Hon. Chad Readler; Virginia A. Seitz, Esq.; and Judge Craig B.
11 Shaffer. Professor Edward H. Cooper participated as Reporter, and
12 Professor Richard L. Marcus participated as Associate Reporter.
13 Judge David G. Campbell, Chair; Peter D. Keisler, Esq.; and
14 Professor Daniel R. Coquillette, Reporter (by telephone),
15 represented the Standing Committee. Judge A. Benjamin Goldgar
16 participated as liaison from the Bankruptcy Rules Committee. Laura
17 A. Briggs, Esq., the court-clerk representative, also participated.
18 The Department of Justice was further represented by Joshua
19 Gardner, Esq.. Rebecca A. Womeldorf, Esq., Lauren Gailey, Esq.,
20 Julie Wilson, Esq., and Shelly Cox represented the Administrative
21 Office. Dr. Emery G. Lee, and Dr. Tim Reagan, attended for the
22 Federal Judicial Center. Observers included Alex Dahl, Esq. (Lawyers
23 for Civil Justice); Professor Jordan Singer; Brittany Kauffman,
24 Esq. (IAALS); William T. Hangle, Esq. (ABA Litigation Section
25 liaison); Frank Sylvestri (American College of Trial Lawyers);
26 Robert Levy, Esq.; Henry Kelston, Esq.; Ariana Tadler, Esq.; John
27 Vail, Esq.; Susan H. Steinman, Esq.; and Brittany Schultz, Esq.

28 Judge Bates welcomed the Committee and observers to the
29 meeting. He noted that this is the last meeting for three members
30 whose second terms have expired – Elizabeth Cabraser, Robert
31 Klonoff, and Solomon Oliver. They have served the Committee well,
32 in the tradition of exemplary service. They will be missed. Judge
33 Bates also welcomed Acting Assistant Attorney General Readler to
34 his first meeting with the Committee.

35 Judge Bates noted that the draft Minutes for the January
36 Standing Committee meeting are included in the agenda materials.
37 The Standing Committee discussed the means of coordinating the work
38 of separate advisory committees when they address parallel issues.
39 Coordination can work well. The rules proposals published last
40 summer provide good examples. The Appellate Rules Committee worked
41 informally with the Civil Rules Committee in crafting the
42 provisions of proposed Civil Rule 23(e)(5) that address the roles
43 of the district court and the court of appeals when a request for
44 district-court approval to pay consideration to an objector is made
45 while an appeal is pending. A Subcommittee formed by the Appellate
46 and Civil Rules Committees and chaired by Judge Matheson worked to

47 coordinate revisions of Appellate Rule 8 in tandem with the
48 proposals to amend Civil Rules 62 and 65.1. Four advisory
49 committees have coordinated through their reporters, the Style
50 Consultants, and the Administrative Office as they have worked on
51 common issues on filing and service through the courts' CM/ECF
52 systems. The e-filing and e-service proposals will require
53 continued coordination as the advisory committees hold their spring
54 meetings.

55 *November 2016 Minutes*

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

59 *Legislative Report*

60 Julie Wilson presented the Legislative Report. She began by
61 directing attention to the summaries of pending bills that appear
62 in the agenda materials. There has been a flurry of activity in
63 February and March on several bills. Two, H.R. 985 and the Lawsuit
64 Abuse Reduction Act, have passed the House and have been sent to
65 the Senate.

66 H.R. 985 is the Fairness in Class Action Litigation and
67 Furthering Asbestos Claim Transparency Act of 2017. The bill
68 includes many provisions that affect class actions. Without
69 directly amending Rule 23, it would change class-action practice in
70 many ways, and the appeal provisions effectively amend Rule 23. It
71 also speaks directly to practice in Multidistrict Litigation cases,
72 and changes diversity jurisdiction requirements for cases removed
73 from state courts. Judge Bates and Judge Campbell submitted a
74 letter to leaders of the House and Senate Judiciary Committees
75 describing the importance of relying on the Rules Enabling Act to
76 address matters of procedure. The Administrative Office also
77 submitted a letter. Other Judicial Conference Committees are
78 interested in this legislation. The Federal-State Jurisdiction
79 Committee is charged with preparing a possible Judicial Conference
80 position on the legislation. It has not yet been decided whether
81 any position should be taken. Nothing has happened in the Senate.

82 Judge Bates noted that H.R. 985 has substantive provisions. It
83 also raises a "procedural" question about the role of the Rules
84 Enabling Act process in considering questions of the sort addressed
85 by the bill.

86 Judge Campbell stated that H.R. 985 went through the House
87 quickly. It has been in the Senate since early February. There is

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88 no word on when the Senate may address it. It would significantly
89 alter class-action practices, even without directly amending Rule
90 23. And some of the provisions that address Multidistrict
91 Litigation would be unworkable in practice. These procedural issues
92 should be addressed through the Rules Enabling Act process. He also
93 noted the changes in diversity litigation that would direct courts
94 in removal cases to sever diversity-destroying defendants and
95 remand to state courts as to them, retaining each diverse pair of
96 plaintiff and defendant.

97 The Lawsuit Abuse Reduction Act of 2017, H.R. 720 and S. 237,
98 is a bill familiar from several past sessions of Congress. It
99 passed the House in early March. It remains pending in the Senate.

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I
RULES PUBLISHED FOR COMMENT, AUGUST 2016

102 Judge Bates introduced the three action items on the agenda
103 arising from rules proposals published last August. Rules 5, 23,
104 62, and 65.1 would be amended. There were three hearings, including
105 a February hearing held by telephone. There were many helpful
106 written comments and useful testimony from some 30 witnesses. Most
107 of the comments and testimony addressed Rule 23. Judge Dow, who
108 chaired the Rule 23 Subcommittee, will present Rule 23 for action.

109

Rule 23

110 Judge Dow opened the Rule 23 discussion by describing the
111 Committee process as smooth. The summary of the hearings and
112 comments runs 62 pages long. The Subcommittee held two conference
113 calls after the conclusion of the comment period. The first
114 narrowed the issues; notes on that call are included in the agenda
115 materials. The second call pinned down the final issues. A few
116 changes were made in rule text words, and the Note was shortened a
117 bit.

118 Professor Marcus led the detailed discussion of the proposed
119 Rule 23 amendments. Very few changes have been made in the rule
120 text as published. In Rule 23(c)(2)(B), the new description of the
121 modes of service has been elaborated by adding a few words: "The
122 notice may be by one or more of the following: United States mail,
123 electronic means, or other appropriate means." The testimony and
124 comments showed surprising levels of interest in the modes of
125 notice. The added words reaffirm that the same modes of notice need
126 not be used in all cases, nor need notice be limited to a single
127 mode in a particular case. The idea is to encourage flexibility.
128 The value of flexibility is described in the proposed Committee
129 Note.

130 Proposed Rule 23(e)(2) addresses approval of a proposed
131 settlement. The published proposal added a few words to the present
132 rule: "If the proposal would bind class members under Rule 23(c)(3)
133 * * *." The Subcommittee recommends that these new words be
134 deleted. They were added to address expressed concerns that Rule
135 23(e)(2) might somehow be read to authorize certification of a
136 class for settlement purposes even though the requirements of Rule
137 23(a) and (b) are not met. The hearings, however, suggested that
138 adding these words may cause confusion. The Committee Note says
139 that any class certified for purposes of settlement must satisfy
140 subdivisions (a) and (b). It is better to delete the added words
141 from rule text.

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142 Various style changes are proposed. Subparagraph (e)(2)(D) is
143 changed to the active voice: "the proposal treats class members
144 equitably relative to each other." The tag line for paragraph
145 (e)(3) is changed by deleting "side": "Identification of ~~Side~~
146 Agreements." "Side" is a non-technical word commonly used, but not
147 included in the rule text.

148 Subparagraph (e)(5)(B) also should be changed. As published,
149 it addresses payment or other consideration "to an objector or
150 objector's counsel." The hearings offered illustrations of payments
151 made, not to objectors or their counsel, but to a nonprofit
152 organization set up to receive payment. So the rule text is
153 broadened by removing that limit: "no payment or other
154 consideration may be provided to an objector or objector's counsel
155 in connection with: * * *." A corresponding change is recommended
156 for the tag line.

157 Turning to the Committee Note, Professor Marcus began by
158 noting that the Note was revised to respond to the changes in the
159 rule text. It also has been shortened a bit "to delete repetition
160 that is not useful." In addition, parts that explore the genesis
161 and purpose of the amendments are deleted as no longer useful.

162 Professor Marcus concluded this introduction by observing that
163 it has been very useful to hear from the bar, but there was not
164 much controversy over the proposed changes.

165 Discussion began with two words in the draft Committee Note
166 for subdivision (e)(5)(B), appearing at line 376 on page 115 of the
167 agenda materials: some objectors "have sought to *exact tribute* to
168 withdraw their objections." "[E]xact tribute" seems harsh. The
169 Committee agreed that the thought will be better expressed by words
170 like this: "sought to obtain consideration for withdrawing their
171 objections * * *."

172 A separate question was raised about the use of "judgment" in
173 proposed item (e)(1)(B)(ii), which says that notice of a proposed
174 settlement must be directed if "justified by the parties' showing
175 that the court will likely be able to * * * (ii) certify the class
176 for purposes of *judgment* on the proposal." The judge who raised the
177 question said that he does not formally enter a judgment, but
178 instead enters an order. The order may simply rule on the proposal.
179 Discussion began by pointing to Rule 54(a), which states that a
180 "judgment" "includes a decree and any order from which an appeal
181 lies." A departure from the published proposal on this point should
182 be approached with caution. One point that was made in the comments
183 is that it is important to have a "judgment" as a support for an
184 injunction against duplicating litigation in other courts. And

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185 "judgment" also appears in subdivision (e)(5)(B), dealing with
186 payment for forgoing or undoing "an appeal from a *judgment*
187 approving" a proposed class settlement.

188 Discussion of "judgment" went on to observe that Rule 58(a)
189 requires entry of judgment on a separate document at the end of the
190 case. The purpose of Rule 58(a) is to set a clear starting time for
191 appeals. As "judgment" appears in the provision for notice of a
192 proposed settlement, it is important as a reminder that the court
193 should be confident that notice is justified by the prospect that
194 the proposed settlement will provide a suitable basis for
195 certifying a class and deciding the case after the notice provides
196 the opportunity to object or to opt out of a (b)(3) class. The
197 purpose is to focus attention on the need to justify the cost of
198 notice by the prospect that the eventual outcome will be final
199 disposition of the action by a judgment.

200 The discussion of "judgment" led to related questions about
201 the relationship between items (i) and (ii) in proposed (e)(1).
202 "[C]ertify the class" appears only in (ii), after (i) refers to
203 approving the proposed settlement. But certification is necessary
204 to approve the settlement. Why not put certification first? The
205 response looked to the evolution of practice. When Rule 23 was
206 dramatically revised in 1966, the drafters thought that the normal
207 sequence would be early certification, followed by much work, and
208 eventually a judgment. But the reality has come to be that most
209 class actions are resolved by settlement, and that in most class-
210 action settlements actual certification and approval of the
211 settlement occur simultaneously. Subdivision (e)(1) frames the
212 procedure for addressing this reality, in terms that depart from
213 the common tendency to talk of "preliminary approval" of a proposed
214 settlement.

215 Items (i) and (ii) reflect that the court certifies a class by
216 an order. The ultimate purpose is entry of judgment. If a class has
217 not already been certified when the parties approach the court with
218 a proposed settlement, certification and settlement become part of
219 a package. The settlement cannot be approved without certification,
220 and both certification and settlement require notice – usually
221 expensive notice – to the class. If the proposed settlement fails
222 to win approval, class certification for purposes of the settlement
223 also will fail. The Committee Note reflects this consequence by
224 reminding readers that positions taken for purposes of certifying
225 a class for a failed settlement should not be considered if class
226 certification is later sought for purposes of litigation.

227 There was a brief suggestion that some other word might
228 substitute for "judgment." Perhaps "order," or "decision"?

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229 The discussion of the relationship between items (i) and (ii)
230 in proposed (e)(1)(B) then took another turn. They might be read to
231 mean the same thing. (i) asks whether the court will likely be able
232 to "approve the proposal under Rule 23(e)(2)." Approving the
233 proposal includes certifying the proposed class. So what is
234 accomplished by "(ii) certify the class for purposes of judgment on
235 the proposal"? The first response was that approval of the
236 settlement is covered by subdivision (e)(2). "All that's happening
237 in (e)(1) is a forecast of what can be done later." Rule 58 "exists
238 on the side." No one brought up this question during the comment
239 period. All that (e)(1) does is to provide that notice is not
240 appropriate until the parties show that, after notice, the court
241 likely will be able to certify the class and approve the
242 settlement.

243 An alternative might be to combine (i) and (ii), although that
244 might reduce the emphasis: "showing that the court will likely be
245 able to certify the class and approve the proposal under Rule
246 23(e)(2)." This suggestion was echoed by a parallel suggestion to
247 retain the structure of (i) and (ii), but strike "for purposes of
248 judgment on the proposal" from (ii). "[F]or purposes of judgment on
249 the proposal" does not do any harm, but it says something that is
250 obvious without saying. Further discussion noted that perhaps it
251 makes sense to refer first to "certify the class," as (i), before
252 referring to approval of the proposed settlement. But care should
253 be taken to avoid backing into a structure that might be read to
254 create a separate settlement class-certification provision that the
255 Committee has resisted. Adequate care is taken, however, in the
256 Note discussion of subdivision (e)(1). The Note says specifically
257 that the ultimate decision to certify a class cannot be made until
258 the hearing on final approval of the settlement. The Note on
259 subdivision (e)(2), further, expressly says that certification must
260 be made under the standards of Rule 23(a) and (b).

261 One final question asked whether it would help to add one word
262 in (ii): "certify the class for purposes of entering judgment on
263 the proposal." Rule 58(a), however, seems to cover that.

264 This discussion concluded by unanimous agreement to retain (i)
265 and (ii) as published.

266 Consideration of the Rule 23 proposal concluded by discussing
267 the length of the Committee Note. It has been shortened during the
268 work that led to the published proposal, and the version
269 recommended for approval now is shorter still. But discussion of
270 the separate subdivisions at times becomes repetitive because the
271 interdependence of the subdivisions makes the same concerns
272 relevant at successive points. Occasionally almost identical

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273 language is repeated. Committee practice allows continuing
274 refinement of Committee Notes up to the time of submitting a
275 recommendation for adoption to the Standing Committee.

276 The Committee voted unanimously to recommend for adoption the
277 text of Rule 23 as revised, and also to approve the Committee Note
278 subject to editing by the Subcommittee and the Committee Chair.

279 *Rule 5*

280 Provisions for electronic filing were added to Rule 5 in 1993
281 and have gradually expanded as electronic communication systems
282 have become widespread and increasingly reliable. Provisions for
283 service by electronic means were added in 2001. The several
284 advisory committees have taken care to make the respective rules on
285 these matters as nearly identical as possible in light of
286 occasional differences in the circumstances that confront different
287 areas of procedure.

288 The proposal to amend Rule 5 published last August again
289 reflects careful attempts to coordinate with the proposals advanced
290 by the Appellate, Bankruptcy, and Criminal Rules Committees.
291 Coordination has continued as public comments and testimony have
292 shown opportunities to improve the published proposals.
293 Coordination is not yet complete, because other advisory committees
294 have yet to meet. The determinations made on Rule 5 will be subject
295 to adjustment to maintain consistency with the other sets of rules.
296 Matters of style can be adjusted without further Committee
297 consideration. Matters of substantive meaning may require
298 submission for Committee consideration and resolution by e-mail or
299 a conference call.

300 No changes are suggested for the text of Rule 5(b)(2)(E) as
301 published. The amended rule will provide for service by filing a
302 paper with the court's electronic-filing system. The present
303 provision in Rule 5(b)(3) that requires authorization by local rule
304 is abrogated in favor of this uniform national authorization.
305 Consent by the person served is not required. The amended rule
306 will, however, carry forward the requirement of written consent to
307 authorize service by other electronic means. It also carries
308 forward the provision in present Rule 5(b)(2)(E) that service
309 either by filing with the court, or by sending by other electronic
310 means consented to, is not effective if the filer or sender learns
311 that the paper did not reach the person to be served.

312 Concerns about the consequences of knowing that an attempted
313 transmission failed, however, have prompted preparation of a
314 proposed new paragraph for the Committee Note. The new paragraph

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315 describes the provision for learning that attempted service by
316 electronic means did not reach the person to be served and then
317 addresses the court's role. It says that the court is not
318 responsible for notifying a person who filed the paper with the
319 court's electronic-filing system that an attempted transmission by
320 the court's system failed. And it concludes with a reminder that a
321 filer who learns that the transmission failed is responsible for
322 making effective service.

323 The core proposed provisions for electronic filing appear in
324 Rule 5(d)(3)(A) and (B). No change is recommended in the published
325 proposals. Subparagraph (A) states the general requirement that a
326 person represented by an attorney must file electronically, unless
327 nonelectronic filing is allowed by the court for good cause or is
328 allowed or required by local rule. This provision reflects the
329 reality that in most districts electronic filing has effectively
330 been made mandatory. Subparagraph (B) states that a person not
331 represented by an attorney may file electronically only if allowed
332 by court order or by local rule, and may be required to file
333 electronically only by court order or by a local rule that includes
334 reasonable exceptions.

335 A witness who both submitted written comments and appeared at
336 a hearing suggested that pro se litigants should have the right to
337 choose to file electronically so long as they can meet the same
338 training standards that attorneys must meet to become registered
339 users. Important benefits would run both to the pro se party and to
340 the court and the other parties. Although other advisory committees
341 have not yet had their meetings, the consensus reflected in the
342 materials prepared for each advisory committee is that it is still
343 too early to move beyond case-specific permission or local rule
344 provisions.

345 Certificates of service have become the occasion for some
346 difficult drafting choices that remain to be resolved by uniform
347 provisions suitable for each set of rules. Most, perhaps all, of
348 the difficulty arises from the provision in Rule 5(d)(1) that
349 specified disclosure and discovery materials "must not be filed"
350 until they are used in the proceeding or the court directs filing.
351 The question is whether a certificate of service must be filed, or
352 even may be filed, before these materials are filed.

353 Present Rule 5(d)(1) says in the first sentence that any paper
354 after the complaint that is required to be served " – together with
355 a certificate of service – must be filed within a reasonable time
356 after service." The second sentence sets out the "must not be
357 filed" direction. Different readings are possible when confronting
358 a certificate of service for a paper that must not (yet) be filed.

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359 Perhaps the more persuasive reading is that the "together" tie of
360 filing the certificate with the paper means that the certificate
361 must be filed only when the paper is filed. The time for filing the
362 certificate, set as a reasonable time after service, however,
363 confuses the question: it could be argued that a reasonable time
364 after service is measured by how long it takes to file after
365 service, not by the lapse of time when filing does not occur until
366 completion of a reasonable time after service.

367 Whatever the present rule means, it is important to write a
368 good and clear provision into amended Rule 5. The published
369 proposal addressed the question in a new Rule 5(d)(1)(A) that also
370 addressed certificates for a paper filed with the court's
371 electronic-service system: "A certificate of service must be filed
372 within a reasonable time after service, but a notice of electronic
373 filing constitutes a certificate of service on any person served by
374 the court's electronic-filing system."

375 The transmutation of the Notice of Electronic Filing into a
376 certificate of service has come to seem indirect. In line with the
377 approach proposed by the Appellate Rules Committee, all advisory
378 committees have agreed that it is better to provide, as suggested
379 for a revised Rule 5(d)(1)(B), that "No certificate of service is
380 required when a paper is served by filing it with the court's
381 electronic-filing system."

382 The next step involves a paper served by means other than
383 filing with the court's electronic-filing system. The time for
384 filing a certificate of service can be set at a reasonable time
385 after service for any paper that must be filed within a reasonable
386 time after service. The problem of papers that must not be filed
387 within a reasonable time after service remains. The revised
388 provision prepared for the agenda materials addressed it in this
389 way: "When a paper is served by other means, a certificate of
390 service must be filed within a reasonable time after service or
391 filing, whichever is later." The idea was that if filing occurs
392 long enough after service as to be beyond a reasonable time to file
393 a certificate as measured from the time of service, the certificate
394 must be filed within a reasonable time after filing. It was
395 expected that ordinary practice would file the certificate along
396 with the paper. It also was intended that if a paper that must not
397 be filed until it is used never is filed, there is no obligation to
398 file a certificate of service. A reasonable time after filing is
399 later than a reasonable time after service, and never starts to run
400 when there is no filing.

401 The revised draft encountered stiff resistance. Much of the
402 difficulty seems unique to the Civil Rule provision directing that

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403 most disclosure and discovery materials must not be filed. It seems
404 likely that the other rules sets will be drafted to omit any
405 provision that addresses certificates of service for papers that,
406 at the outset, must not be filed. A new version worked out with the
407 Style Consultants reads, adding words that emerged from continuing
408 Committee discussion, like this:

409 **(d) (1) (B). Certificate of Service.** No certificate of
410 service is required when a paper is served by filing it
411 with the court's electronic-filing system. When a paper
412 that is required to¹ be served is served by other means:
413 (i) if the paper is filed, a certificate of service must be
414 included with it or filed within a reasonable time after
415 service; and
416 (ii) if the paper is not filed, a certificate of service need
417 not be filed unless filing is required by local rule or
418 court order.

419 Under proposed (d)(1)(A), most papers must be filed within a
420 reasonable time after service. (B)(i) then directs that the
421 certificate of service be filed with the paper or within a
422 reasonable time after service. If different parties are served at
423 different times, the reasonable time for filing the certificate of
424 service will be measured from the time of service on each. This
425 provision should suffice for the other sets of rules.

426 (B)(ii) addresses the paper that is not filed because
427 (d)(1)(A) says that it must not be filed. (ii) says that a
428 certificate of service need not be filed. But under (i), a
429 certificate of service must be filed when filing becomes authorized
430 because the paper is used in the action, or because the court
431 orders filing. The time for filing the certificate is, as directed
432 by (i), either with the filing or within a reasonable time after
433 service. (Here too, the proposed language encompasses a situation
434 in which a party is served after the paper has been served on other
435 parties and has been filed upon order or use in the action.)

¹ The Style Consultants used "must" here. Current Rule 5(d)(1) says "that is required to be served." The published proposal for 5(d)(1)(A) carries that forward. Unless we change to "must" in 5(d)(1)(A), parallelism dictates "is required" here.

Parallelism concerns are a bit confused. Rule 5(a)(1), which we have not addressed, begins "the following papers must be served." But when it comes to (C), it says "a discovery paper required to be served on a party."

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436 One more change is recommended for proposed Rule 5(d)(3)(C).
437 Present Rule 5(d)(3) provides that a local rule may allow papers to
438 be signed by electronic means. Displacing the local-rule provision
439 means adding a direct provision to Rule 5. The published proposal
440 was: "The user name and password of an attorney of record, together
441 with the attorney's name on a signature block, serves as the
442 attorney's signature." Comments on this proposal suggested some
443 confusion. The intent was that the user name and password used to
444 make the filing were not to appear on the paper, but the comments
445 expressed fear that the rule text might be read to require that
446 they appear. An additional concern was that evolving technology may
447 develop better means of regulating access than user names and
448 passwords – more general words should be used to accommodate this
449 possibility. And an attorney may not become an attorney of record
450 until the first filing – what then?

451 The reporters for the several advisory committees have reached
452 consensus on the version recommended in the agenda materials for
453 Rule 5(d)(3)(C):

454 (C) *Signing*. An authorized filing made through a person's
455 electronic-filing account, together with the person's
456 name on a signature block, constitutes the person's
457 signature.

458 Discussion began with a question prompted by the new Committee
459 Note language for Rule 5(b)(2)(E). How often does a court receive
460 a message bounced back from the intended recipient? The answer was
461 in two parts. Court systems come exquisitely close to 100% accuracy
462 in transmitting messages to the addresses provided. The problems
463 occur when a message bounces back because the address is not good.
464 Almost all of those returned messages have been sent to addresses
465 for secondary recipients – usually the address for the attorney of
466 record remains good, and the bad address is for a paralegal or
467 legal assistant.

468 Some puzzlement was expressed as to the original decision to
469 address learning that attempted service failed only with respect to
470 service by electronic means. Why should it be different if the
471 party making service learns that mail did not go through, that a
472 commercial carrier failed to deliver, that a paper left at a
473 person's home was not in fact turned over to the person, that a
474 misidentified person was served in place of the intended person?
475 The history is clear enough – the decision in 2001 to address
476 failed electronic service was prompted by the newness of this means
477 of communication and lingering fears about its reliability.
478 Failures of other means of service were left to the law as it was
479 and as it might develop without attempting to provide any guidance

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480 in rule text.

481 The question of filing certificates of service for papers that
482 must not be filed was addressed from a new perspective. Earlier
483 reporter-level discussions asked whether there is any reason to
484 file a certificate of service for a paper that is not filed. Some
485 indications were found that filing the certificate would only add
486 clutter to the file. But in Committee discussion a judge reported
487 that he wants to have the certificates in the file because they
488 provide a means of monitoring the progress of an action. District
489 of Arizona Local Rule 5.2 provides that a notice of service of
490 discovery materials must be filed within a reasonable time after
491 service. That is useful. A practicing lawyer noted that it also is
492 useful for all parties to know what is going on; Rule 5(a)(1)(C)
493 directs that a discovery paper that is required to be served on a
494 party must be served on all parties unless the court orders
495 otherwise, but a certificate on the docket provides useful
496 reassurance. Will the proposed rule language that a certificate of
497 service "need not be filed" when the paper is not filed prevent
498 filing voluntarily or as directed by court order or local rule? And
499 it is important to know whether the answer, whatever it proves to
500 be, will change the present rule.

501 Discussion reflected the ambiguity of the present rule that
502 requires a certificate of service to be filed together with the
503 paper, but directs that some papers must not be filed. It is
504 difficult to be confident whether a clear new rule will change the
505 present rule. So too, it is difficult to be confident about the
506 implications that might be drawn from "need not be filed" standing
507 alone. It might imply a right not to file. One response might be to
508 redraft the rule to require that a certificate of service be filed
509 within a reasonable time after service, whether or not the paper is
510 filed. But it was concluded that the rule need not go so far; some
511 courts may prefer that certificates not be filed for papers that
512 are served but not filed. The conclusion was that words should be
513 added to the Style Consultants' version as described above: "(ii)
514 if the paper is not filed, a certificate of service need not be
515 filed unless filing is required by local rule or court order.

516 A motion to recommend the proposed Rule 5 amendments for
517 adoption, as revised in the agenda book and in the discussion, was
518 approved by 13 votes, with one dissent.

519 *Rules 62, 65.1*

520 Judge Matheson, Chair of the joint Subcommittee formed with
521 the Appellate Rules Committee, reported on the published proposals
522 to amend Rules 62 and 65.1.

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523 Rule 62 governs district-court stays of execution and
524 proceedings to enforce a judgment. The published proposal revises
525 the automatic stay by extending it from 14 days to 30 days, and by
526 adding an express provision that the court may order otherwise. It
527 recognizes security in a form other than a bond. It provides that
528 security may be provided after judgment is entered, without waiting
529 for an appeal to be filed, and that "any party," not only an
530 appellant, may provide security. A single security can be provided
531 to govern post-judgment proceedings in the district court and to
532 continue throughout an appeal until issuance of the mandate on
533 appeal. The rule also is reorganized to make it easier to follow
534 the provisions directed to injunctions, receiverships, and
535 accountings in an action for patent infringement.

536 Rule 65.1 provides for proceedings against a surety or other
537 security provider. The proposed amendments were developed to
538 dovetail with proposed amendments to Appellate Rule 8(b). The only
539 issues that remain subject to further consideration are reconciling
540 the style choices made for the Appellate and Civil Rules.

541 Public comments were sparse. All expressed approval of the
542 proposals in general terms. No testimony addressed these rules
543 during the three public hearings.

544 Discussion began with a question pointing to the wording of
545 proposed Rule 62(b) stating that "a party *may* obtain a stay by
546 providing a bond or other security." Must a judge allow the stay?
547 This provision carries over from present Rule 62(d) - "the
548 appellant may obtain a stay * * *." The choice to carry it over was
549 deliberate. Earlier Rule 62 drafts included provisions recognizing
550 judicial discretion to deny a stay, to grant a stay without
551 security, and take still other actions. They were gradually
552 winnowed out in the face of continuing arguments that there should
553 be a nearly absolute right to obtain a stay on posting adequate
554 security. Carrying "may" forward will carry forward as well present
555 judicial interpretations, which seem to recognize some residual
556 authority to deny a stay in special circumstances even though full
557 security is offered.

558 The Committee voted unanimously to recommend proposed Rules 62
559 and 65.1 for adoption, subject to style reconciliation with the
560 Appellate Rules proposal and to editorial revisions of the
561 Committee Notes.

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563

II
ONGOING WORK: RULE 30(B)(6) SUBCOMMITTEE

564 Judge Bates introduced the Rule 30(b)(6) Subcommittee Report
565 as work that remains in a preliminary stage. The question brought
566 to the Committee by the Subcommittee is how to move forward.

567 Judge Ericksen introduced the Subcommittee Report by pointing
568 to the Memorandum on Rule 30(b)(6) prepared by Rules Law Clerk
569 Lauren Gailey, with assistance from Derek Webb. The Report shows
570 that the rule "creates a lot of work," as measured by the number of
571 cases that cite to it. "It is a focus of litigation."

572 The Report provides a ranking of possible new rule provisions,
573 moving from A+ through A, A-, and simple B. Professor Marcus
574 prepared the ranking after the last Subcommittee conference call.
575 The Subcommittee has not reviewed it. But it provides a good point
576 of departure in providing direction to the Subcommittee. What
577 should the Subcommittee do first?

578 Rule 30(b)(6) can be seen as a hybrid of interrogatories and
579 depositions. "It's a place where people release frustrations with
580 numerical limits in Rules 30, 31, and 33." This shows in the
581 continuing discussions of how to apply the Rule 30 limits of number
582 and duration to multiple-witness depositions under Rule 30(b)(6).

583 Supplementation of a witness's deposition testimony has been
584 a regular subject of discussion. The case law is pretty clear that
585 an answer can be supplemented. But people worry about it because
586 the Rule does not say it. "If we take away that worry, we may be
587 able to focus better on discovery of where in the organization an
588 inquiring party can find the desired information."

589 This first introduction prompted the observation that there is
590 a tension in what the Committee is hearing. "We hear it is a focus
591 of litigation." But in the Standing Committee, and here in this
592 Committee, judges say they do not see these problems. We need to
593 explore that. Judge Ericksen responded that "lawyers fight and
594 scream with each other, but are reluctant to take it to the court."
595 This observation led to an inquiry whether the many cases cited in
596 the research memorandum reflected mere mentions of Rule 30(b)(6),
597 or whether they involved actual disputes? Other Committee members
598 reported different numbers of cases citing to Rule 30(b)(6), citing
599 to the rule in conjunction with "dispute," or citing to the rule
600 with "dispute" in the same paragraph. Still different on-the-spot
601 e-search results were reported.

602 Professor Marcus described a new book that he has just read,

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603 Mark Kosieradzki, *30(b)(6): Deposing Corporations, Organizations*
604 *& the Government* (2017). It runs more than 500 pages, including
605 appendices. It reflects a point of view – "it's clear, and my side
606 wins." Pages 242-245 of the agenda materials reflect "a lot of
607 ideas that have been bouncing around."

608 The Subcommittee is still working on these ideas. It has not
609 yet reached firm conclusions. Some, for example the American
610 College of Trial Lawyers, tell us that reasonable lawyers can work
611 out the things that might have a default in rule text. But why
612 bother with new rule text when work-outs are common?

613 Looking to the most modest proposal, perhaps no one believes
614 it would hurt to say that lawyers should talk about Rule 30(b)(6)
615 depositions early in the litigation, although early discussions may
616 not prove helpful when the 30(b)(6) depositions come at a late
617 stage in discovery. So the only A+ ranking is awarded to the
618 possibility of adding Rule 30(b)(6) depositions as subjects for
619 possible provisions in a scheduling order and for discussion at the
620 Rule 26(f) conference.

621 What else might be useful? Is there a risk that adding
622 specific rule provisions will promote more disputes?

623 The A list begins with "judicial admissions," a topic that the
624 Rule 30(b)(6) book covers in three chapters. These questions
625 distinguish between giving a witness's deposition testimony the
626 effect of a judicial admission that cannot be contradicted by other
627 evidence and simply making it admissible in evidence against the
628 entity that named the witness to represent it at the deposition.
629 The next item on the A list is supplementation of the witness's
630 testimony, either as an obligation or as an opportunity. Then come
631 contention questions, attempts to use the witness to nail down the
632 legal positions taken by the entity that designated the witness;
633 objections to the "matters for examination" "specified with
634 reasonable particularity" in the notice, a matter now open only by
635 a motion for a protective order, and one that is made prominent in
636 the Rule 30(b)(6) book; and the durational limit questions noted
637 above.

638 The A- list begins with the practice of providing the witness
639 advance copies of exhibits that will be used as a subject of
640 examination; the Subcommittee has been reluctant to make this a
641 mandatory practice for fear of stimulating massive sets of
642 documents with a correspondingly massive obligation to prepare the
643 witness. Second is the possibility of requiring that notice of a
644 30(b)(6) deposition be provided a minimum period before the time
645 set for the deposition. The underlying concern is that, as compared

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646 to other depositions, these depositions require the entity to
647 gather information and train the witness to testify to it. Some
648 local rules have general provisions setting notice periods, but
649 there is little focused specifically on Rule 30(b)(6). The third A-
650 topic asks whether questioning should be limited to the matters
651 specified in the deposition notice. The witness designated by the
652 entity named as deponent may have independent knowledge of the
653 matters in dispute, and it is efficient to explore that knowledge
654 in a single "deposition." But there are risks that the individual
655 knowledge may be incomplete or simply wrong. Finding an all-purpose
656 approach is difficult. The final two questions are whether a means
657 should be found to channel into Rule 33 interrogatories inquiries
658 about the sources of information, both witnesses and documents, and
659 whether Rule 31 depositions on written questions might be developed
660 as a similar alternative.

661 The B list includes nine subjects: Advance notice of the
662 identity of the witnesses designated by the entity-deponent; second
663 depositions of the entity; limiting Rule 30(b)(6) to parties, even
664 though it may be useful as to nonparty entities; requiring
665 identification of documents used in preparing a witness to testify
666 for the entity; expanding initial disclosures to reduce the need
667 for 30(b)(6) depositions that seek to identify witnesses and
668 documents, a possibility being explored by the Initial Mandatory
669 Discovery pilot project; forbidding other discovery to duplicate
670 matters subject to a 30(b)(6) subpoena; making more stringent the
671 "reasonable particularity" designation of matters for examination,
672 or limiting the number of matters that can be listed; adding to
673 Rule 37(d) a specific reference to Rule 30(b)(6), although the Rule
674 30(b)(6) book says that courts find it there now; and adding a
675 specific reference to Rule 30(b)(6) to the provisions of Rule
676 37(c)(1) that impose consequences – most notably exclusion of
677 evidence not disclosed – for inadequate witness testimony.

678 Summing up the A, A-, and B lists, Professor Marcus suggested
679 that attempting to address this many topics, many of them in a
680 single rule, will indeed induce the "headaches" suggested by a
681 member of the Standing Committee when a similar list was discussed
682 last January.

683 Judge Bates suggested that these summaries of the list and
684 grading of potential topics set the stage for discussing which
685 subjects deserve further exploration.

686 A Subcommittee member identified himself as an advocate for
687 doing more than prompting discussion of Rule 30(b)(6) depositions
688 in scheduling conferences and Rule 26(f) conferences. "Unless you
689 have a very active judge, in a complex case people will not yet be

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690 able to anticipate what problems will arise" as discovery proceeds.
691 Subcommittee work has shown that there are problems that recur in
692 some types of civil litigation. And judges do not often see them.
693 This rule "is a time-consuming source of controversy in certain
694 kinds of litigation." Lawyers argue about the same issues in case
695 after case. Yes, they are worked out most of the time. "We can save
696 a lot of time and expense if we do it right." But we must do it
697 right. "We do not want a rule that will simply promote further
698 disputes." The conflicting pressures suggest a "less is more"
699 approach.

700 What issues most deserve close attention? "Judicial
701 admissions" is one. The case law may pretty much have it right. But
702 it is a lingering worry for many lawyers. It affects witness
703 preparation and objections.

704 Another issue is contention questions. At the deposition you
705 are not supposed to instruct the witness not to answer.

706 Yet another issue is questions that go beyond the scope of the
707 matters designated in the notice: this ties to the "binding" effect
708 of the answers. A distinction might be drawn by providing that a
709 witness's answers to questions beyond the scope of the notice are
710 not even admissible against the entity. A different line might be
711 drawn to questions that are within the scope of the notice when the
712 witness has not been adequately prepared to answer them.

713 Supplementation also might be usefully addressed. Allowing or
714 requiring supplementation creates a risk that witnesses will not be
715 prepared, and returning to the old "bandying" practice in which
716 each successive witness says that someone else knows the answer.

717 It may not be useful to adopt rule text to say whether
718 examination of each witness designated by an entity counts as a
719 separate deposition, or whether the one-day-of-7-hours limit
720 applies to each witness or to all of the designated witnesses
721 together.

722 For a while it seemed attractive to require a minimum advance
723 notice of the deposition, to be followed by a defined period for
724 objections, to be followed by a meet-and-confer. All of that
725 happens now in practice. People work it out. There is no real need
726 to address it in rule text.

727 Finally, it would be better to put aside all of the topics in
728 the "B" list.

729 Another member agreed that "judicial admissions is an

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730 interesting topic." It lies alongside the explicit Rule 36
731 provisions for obtaining binding admissions. The question is
732 different in addressing the effects of testimony by an entity's
733 designated witness at deposition. Any rule should be framed
734 carefully to guard against trespassing over the line that divides
735 substance from procedure.

736 A practicing lawyer reported a comment by the legal department
737 for a big company that seven hours is not enough time to complete
738 a Rule 30(b)(6) deposition when the entity designates a number of
739 witnesses. More generally, "we should continue our work." It may be
740 that the problems may be solved by case management in some cases.
741 But there also may be room for rule changes. In response to the
742 question asked by the American College of Trial Lawyers, rulemaking
743 can help. Adding explicit reminders of Rule 30(b)(6) to Rules 16(b)
744 and 26(f) will help. A recent case from the Northern District of
745 California is a worthy example. The notice listed 30 matters for
746 examination. The judge found that Rule 1, as amended, "favors
747 focus." Case management can help to cut out duplicative topics.
748 "There may be room for nudges that will prevent the infighting that
749 judges never see, or see only at times." Work should continue on
750 the A list topics.

751 A judge said that he had seen some Rule 30(b)(6) problems, but
752 in more than a decade and a half he could count the number on one
753 hand. He agreed that case management can get the lawyers to work on
754 the issues.

755 Another judge observed that he had never *ruled* on a Rule
756 30(b)(6) dispute - "we work through them on calls." Creating a
757 formal objection process might prove counterproductive by
758 entrenching a more formal dispute process requiring more formal
759 resolution.

760 A practicing lawyer noted that "we get objections now." The
761 available procedure is a motion for a protective order, which must
762 be preceded by a conference of the attorneys. Creating a formal
763 objection procedure could allow the deposition to go forward on
764 matters not embraced by the objections. Formalizing it will get
765 people talking, and will crystalize the dispute. But it must be
766 asked how much a formal process will slow things down, and what the
767 value will be. It is not clear whether a formal objection process
768 will slow things down as compared to current practice.

769 Judge Bates noted that the discussion had mostly involved
770 Subcommittee members, and urged other Committee members to address
771 the question whether the Subcommittee should move forward, and with
772 what focus.

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773 A judge said that, like the other judges, "I don't get many
774 issues," although that may be because he refers discovery disputes
775 to magistrate judges. Still, his colleagues do not see many Rule
776 30(b)(6) disputes. "It's a lawyer problem." And lawyers seem to
777 work out the problems. "But there may be clear guidance that will
778 help lawyers at the margin. The trick is to not write provisions
779 that increase disputes." To this end, it may be useful to seek
780 advice from lawyer groups that we have not yet heard from.

781 Another judge reported that he too does not see many 30(b)(6)
782 disputes. It is hard to figure out what the core problems are. Are
783 they not providing the right witnesses? Failing to prepare
784 witnesses properly? It would help to get lawyers to identify the
785 three or four worst problems, and to help think whether anything
786 can be done to improve the means of addressing them. Adding
787 30(b)(6) to the lists of topics that may be addressed in a
788 scheduling order, and to the subjects of a Rule 26(f) conference,
789 may help to get lawyers thinking about the issues. But it may be
790 that the most useful approach will be to foster best practices
791 rather than add to the rules.

792 Yet another judge stated that in 14 years on the bankruptcy
793 court he has never encountered a 30(b)(6) problem, nor has he heard
794 of them.

795 A fourth judge also has had very limited experience with the
796 possible problems. He suspects it will be best to focus on a couple
797 of broad issues.

798 Speaking as a practitioner, another Committee member suggested
799 that disputes arise during the deposition, presenting questions
800 that are hard for the lawyers to address in advance. Other issues
801 may emerge as the case goes on, before the deposition itself, but
802 again the scheduling conference and Rule 26(f) conference may come
803 too early to enable useful discussion. This thought was echoed by
804 another lawyer, who suggested that moving the discussion to the
805 beginning of an action could increase the number of disputes. You
806 do not know what the actual problems will be until you see and hear
807 them.

808 The immediate response was that Rule 30(b)(6) depositions may
809 come at the very beginning of an action. Lawyers who represent
810 individual employment discrimination plaintiffs use them as an
811 initial discovery tool. "It depends on the kind of case."

812 A judge said that these topics deserve further development in
813 the Subcommittee. It will be useful to "kill" the idea of binding
814 judicial admissions – it makes no sense to bind a party to things

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815 said by imperfect witnesses with imperfect memories. A rule can
816 properly provide that an answer is not an admission that cannot be
817 contradicted by other evidence. But in addressing other issues, it
818 will be important to avoid adding detailed rules that will provoke
819 disputes. And the last two items on the A- list – "substituting
820 interrogatories" and "Rule 31 alternative" – should be dropped.

821 Judge Ericksen reported that the Subcommittee will be helped
822 by knowing that the Committee supports continuing work. The
823 question of judicial admissions will be considered. The list of
824 topics will be studied to determine which should be dropped. Should
825 "contention" questions be kept on for more work? There is a
826 possibility of directing them to Rule 33 and Rule 36, perhaps by
827 new text in Rule 30(b)(6) that forbids a question of the sort
828 allowed by Rule 33(a)(2) as one that "asks for an opinion or
829 contention that relates to fact or the application of law to fact."

830 A judge followed up on this question by noting that lawyers
831 use contention questions as a catch-all, and usually work out the
832 disputes. They are concerned that answers to interrogatories may
833 not be as forthcoming as should be.

834 Judge Bates invited comments from observers.

835 An observer based her observations on many years in practice
836 and now as an in-house lawyer. "Rule 30(b)(6) is very expensive."
837 Often it takes days, even weeks, to prepare for a deposition that
838 takes one or two hours. It is not possible to overstate the time
839 required to prepare the witness. "The absence of case law does not
840 mean there is no problem." The notices often set out very broad
841 topics, going far back in time, and spread across all products, not
842 just the one in suit. "We object, file for protective orders, but
843 often are not successful." We work hard to address it in Rule 16
844 conferences, but that can be too early – the other side says that
845 they do not yet have our information, and cannot yet know what they
846 will have to seek through Rule 30(b)(6). Objections and attempts to
847 work through the objections often are met by a simple response: "We
848 want what we want." "Court rulings are not always satisfactory." As
849 to contention questions, they are often inappropriate. A witness
850 might be asked to state the basis for a limitations defense, a
851 question of law. Or the question might ask about vehicle
852 performance, a matter for an expert witness. And "we are getting
853 discovery on discovery" – questions about what documents were used
854 to prepare the witness, what documents were sought.

855 Another observer began with this: "There are people who abuse
856 it, but that does not mean the rule is broken." A scheduling
857 conference often is premature with respect to potential 30(b)(6)

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858 issues. If 30(b)(6) is added to list of topics in Rule 16(b), the
859 parties will focus on it more, but it may be irrelevant to actual
860 discovery. Rule 30(b)(6) "is one tool among many. It should be used
861 wisely." The parties should, under Rule 1, cooperate by giving
862 notice of the subjects they want to explore before discovery
863 actually begins. Rule 30(b)(6) should be used only to get
864 information that has not come forth by other means. An effective
865 means of addressing the issues that do arise as discovery proceeds
866 may be a meet-and-confer process triggered by a potential motion.

867 Yet another observer expressed concern that nothing be done to
868 vitiate the utility of Rule 30(b)(6). From a plaintiff's
869 perspective, it provides an opportunity to get by deposing one or
870 two witnesses information that otherwise would require seven or
871 eight depositions. Supplementation is appropriate when a witness
872 says something that is absolutely wrong. It is not clear whether
873 supplementation is otherwise useful.

874 Judge Bates concluded the discussion by noting that the
875 Subcommittee has learned that it should continue its work. The
876 Committee discussion will be helpful in focusing the work. There is
877 a clear caution that care should be taken to avoid unintended
878 consequences that generate more disputes than are avoided. Care
879 must be taken to avoid changes that move lawyers away from working
880 out their differences to taking them all to the court.

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881

Pilot Projects

882 Judge Bates described progress with the Expedited Procedures
883 Pilot Project and the Mandatory Initial Discovery Pilot Project.
884 The people working hard to complete supporting materials and to
885 promote the projects include Judge Grimm, a past member of this
886 Committee, Judge Campbell, Judge Shaffer, Laura Briggs, and Emery
887 Lee, as well as others. The supporting materials will include video
888 presentations available online to all those participating in a
889 project. The work that lies ahead is to recruit a sufficient number
890 of courts to provide a basis for strong empirical evaluation of the
891 projects. Even some Committee members have found it difficult to
892 persuade other judges on their courts that they should participate
893 in one of the projects.

894 Judge Campbell said that the Mandatory Initial Discovery
895 project has come further along than the Expedited Procedures
896 project. It will be launched in the District of Arizona on May 1.
897 The general order implementing it is very close to the pilot-
898 projects draft. A check list for lawyers has been prepared; Briggs,
899 Lee, and others have prepared model documents. Two introductory
900 videos are available on the district web site. One is prepared by
901 Judge Grimm. The other features Arizona state-court judges and
902 lawyers who explain how comparable disclosure requirements work in
903 Arizona courts and what does – and does not – work. The video shows
904 that they believe in the system. It seems likely that Arizona
905 disclosure practice explains why 73% of lawyers who litigate in
906 both Arizona state courts and Arizona federal courts prefer the
907 state courts; across the country, only 45% of lawyers who litigate
908 in both state and federal courts prefer state courts. The District
909 of Arizona is a good place to start the project because Arizona
910 lawyers have 25 years of experience with sweeping initial
911 disclosure requirements. The first months of the program will be
912 studied in September to determine whether adjustments should be
913 made. One price has been paid for starting the project – the
914 successful protocol for discovery in individual employment cases
915 had to be stopped because it is inconsistent with the project.

916 The Northern District of Illinois will start the Mandatory
917 Initial Discovery project for many judges on June 1. Both the
918 Eastern District of Pennsylvania and at least the Houston Division
919 of the Southern District of Texas are "in the works."

920 The Expedited Procedures project still needs some work. The
921 Eastern District of Kentucky is going to participate. Other courts
922 need to be found. It may not be launched before the end of the
923 year.

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924 The amendments that took effect in 2015 renewed the lesson
925 that many rules changes will be accepted only if they are supported
926 by hard facts. The hope is that the pilot projects will provide
927 support for rules that lead to greater initial disclosures and
928 still more widespread case management.

929 Emery Lee said that some time will be needed before we can
930 begin to measure the effects of either pilot project. Cases that
931 terminate early in the project period will not reflect the effects
932 of the project. Many cases that are affected by the project will
933 not conclude until some time after the formal project period
934 closes.

935 Strategies to attract participation were discussed briefly.
936 The standing order that establishes a project has been sent to
937 every court that has been approached. The videos that explain the
938 projects have not been; perhaps they should be used as part of the
939 recruiting effort. More courts are needed.

940 Judge Campbell noted that United States Attorneys Offices have
941 not been approached as such. The Department of Justice has
942 identified a couple of concerns with the Arizona Mandatory Initial
943 Disclosure project that can be addressed.

944 The final observations were that progress is being made, and
945 that the Committee on Court Administration and Case Management has
946 been helpful in promoting further progress.

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947 **III**
948 **SETTING AGENDA PRIORITIES**

949 Judge Bates introduced five sets of issues that vie for
950 priority on the Committee agenda. Each will demand a significant
951 amount of Committee time when it comes up, and some will require a
952 great deal of time. The question for discussion today is which of
953 these projects should be taken up first, recognizing that any
954 present assignment of priorities will remain vulnerable to new
955 topics that emerge while these projects are considered.

956 The five current projects involve two that are new, at least
957 on the current agenda, and three that have been on the agenda. The
958 two new projects are a request from the Administrative Conference
959 of the United States that new rules be developed for district-court
960 review of Social Security Disability Claims and a suggestion from
961 the American Bar Association that Rule 47 should be amended to
962 ensure greater opportunities for lawyer participation in the voir
963 dire examination of prospective jurors. The three projects already
964 on the agenda involve several aspects of the procedure for
965 demanding jury trial, the means of serving Rule 45 subpoenas, and
966 the offer-of-judgment provisions of Rule 68.

967 It is possible that one or another of these projects will be
968 withdrawn from the agenda as a result of the discussion. But it
969 seems likely that most will survive in some form, although perhaps
970 reduced and perhaps deferred indefinitely.

971 Each project will be explored separately. Discussion aimed at
972 assigning priorities will follow.

973 *Review of Social Security Disability Claims*

974 The Administrative Conference of the United States has made
975 this request:

976 The Judicial Conference, in consultation with Congress as
977 appropriate, should develop for the Supreme Court's
978 consideration a uniform set of procedural rules for cases
979 under the Social Security Act in which an individual
980 seeks district court review of a final decision of the
981 Commissioner of Social Security pursuant to 42 U.S.C. §
982 405(g). These rules would not apply to class actions or
983 to other cases that are outside the scope of the
984 rationale for the proposal.

985 Apart from a general suggestion that new rules should promote
986 efficiency and uniformity, four specific suggestions are made. The

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987 complaint should be "substantially equivalent to a notice of
988 appeal." A certified copy of the administrative record should be
989 the main component of the agency's answer. The claimant should be
990 required to file an opening merits brief, with a response by the
991 agency and appropriate subsequent proceedings should be provided.
992 The rules should set deadlines and page limits.

993 It seems clear that the request is to adopt the new rules
994 under the authority of the Rules Enabling Act, 28 U.S.C. § 2072.
995 Although less clear, and perhaps not an important element, it seems
996 to be a request to adopt the rules outside the Federal Rules of
997 Civil Procedure – there is an explicit suggestion that "the new
998 rules should be drafted to displace the Federal Rules *only* to the
999 extent that the distinctive nature of social security litigation
1000 justifies such separate treatment." This suggestion is illustrated
1001 by a footnote suggesting that the new rules could be embraced by
1002 adding to Civil Rule 81(a)(6) a provision that the Civil Rules
1003 govern proceedings under the new rules except to the extent that
1004 the new rules provide otherwise.

1005 Presentation of this proposal began with recognition that it
1006 must be treated with great respect because its source is the
1007 Administrative Conference. Respect is further entrenched by the
1008 support provided by a research paper authored by Jonah Gelbach and
1009 David Marcus. Important questions remain as to the process best
1010 fitted to developing any new rules that may prove appropriate, but
1011 those questions may be discussed after sketching the underlying
1012 administrative framework and the judicial review statute.

1013 Social Security disability claims, and claims under similar
1014 provisions for individual awards outside old-age benefits, begin
1015 with an administrative filing. If benefits are denied at the first
1016 administrative stage, review is provided at a second stage. If
1017 benefits are denied at that stage, review goes to an administrative
1018 law judge. The Social Security Administration has 1,300
1019 administrative law judges. The case load for each judge is
1020 enormous, looking for dispositions on the merits and after hearings
1021 in 500 to more than 600 cases a year. The administrative law judge
1022 has responsibilities that extend beyond the neutral umpire role
1023 familiar in our adversary system; the judge must somehow see to it
1024 that the record is developed to support an accurate determination.
1025 Once the administrative law judge makes an initial determination of
1026 how the claim should be decided, the case is assigned to a staff
1027 member to write an opinion. The administrative law judge then
1028 reviews the draft and makes any changes that are found appropriate.
1029 A disappointed claimant can then take an appeal within the
1030 administrative system.

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1031 Section 405(g) provides for district-court review of a final
1032 determination of the Commissioner of Social Security "by a civil
1033 action." It further directs that a certified copy of the record be
1034 filed "[a]s part of the Commissioner's answer." Characterizing
1035 review as a civil action brings the review proceeding squarely into
1036 the Civil Rules, but of itself does not preclude adoption of a
1037 separate set of review rules, particularly if they are integrated
1038 with the Civil Rules in some fashion.

1039 The purpose of establishing special Social Security review
1040 rules lies in experience with appeals. About 17,000 to 18,000
1041 actions for review are filed annually. By case count, they account
1042 for about 7% of the federal civil docket. In 15% of them, the
1043 Office of General Counsel determines that the final decision cannot
1044 be defended and voluntarily asks for remand for further
1045 administrative proceedings. Of the cases that remain, the national
1046 average is that about 45% are remanded. Remand rates, however, vary
1047 widely across the country. The lowest remand rates hover around
1048 20%, while the highest reach 70%. It is a fair question whether the
1049 procedures that bring the review to the point of decision are
1050 likely to have much effect on the remand rate, either in the
1051 overall national rate or in bringing the rates for different courts
1052 closer together. Other factors may account for the variability in
1053 outcomes, including speculation that there are differences in the
1054 quality of the dispositions reached in different regions of the
1055 Social Security Administration.

1056 Another source of different outcomes may lie in differences in
1057 the procedures adopted by district courts to provide review. Some
1058 treat the proceedings as appeals. Some invoke summary judgment
1059 procedures, reasoning that both summary judgment and administrative
1060 review involve judicial action on a paper record. The analogy to
1061 summary judgment is imperfect, however. On summary judgment, the
1062 court invokes directed verdict standards to determine whether a
1063 reasonable jury could come out either way, assuming that most
1064 credibility issues are resolved in favor of the nonmovant and
1065 further assuming all reasonable inferences in favor of the
1066 nonmovant. On administrative review the question is whether, using
1067 a "substantial evidence" test that is subtly different from the
1068 directed-verdict test, the actual administrative decision can be
1069 upheld. Beyond that point lie a large number of other procedural
1070 differences. Both lawyers representing the government and private
1071 practitioners that have regional or national practices may
1072 experience difficulties in adjusting to these differences.

1073 Against this background, the initial questions tie together.
1074 Is it suitable to invoke the Rules Enabling Act to address
1075 questions as substance-specific as these? The Committees have

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1076 traditionally been reluctant to invoke the authority to adopt
1077 "general rules of practice and procedure" to craft rules that apply
1078 only to specific substantive areas. One concern lies in the need to
1079 develop the detailed knowledge of the substantive law required to
1080 develop specific rules. General rules that rely on case-specific
1081 adaptation informed by the particular needs of a particular
1082 question as illuminated by the parties may work better. Another
1083 concern is that however neutral a rule is intended to be, it may be
1084 perceived as favoring one set of parties over other parties, and in
1085 turn may be thought to reflect a deliberate intent to "tilt the
1086 playing field." At the same time, there are separate rules for
1087 habeas corpus and § 2255 proceedings, and the Civil Rules have a
1088 set of Supplemental Rules for admiralty and civil forfeiture
1089 proceedings. And the nature of social security cases accounts for
1090 special limitations on remote access to electronic records in Rule
1091 5.2(c).

1092 One response to the concerns about substance-specific rules
1093 could be to adopt more general rules for review on an
1094 administrative record. The difficulty of taking this approach is
1095 underscored by the specific character of individual social security
1096 disability benefits cases described in the initial discussion. A
1097 great deal must be known to determine whether a generic set of
1098 rules for review on an administrative record can work well across
1099 the vast array of executive and other administrative agencies that
1100 may become involved in district-court review.

1101 If the Enabling Act process is employed, should it rely on the
1102 Civil Rules Committee as it is, drawing on experts in social
1103 security law and litigation as essential sources of advice, or
1104 should some means be found to bring one or more experts into a
1105 formal role in the process? Given the statutory direction that
1106 review is sought by way of a civil action, the Civil Rules
1107 Committee is the natural source of initial work, then to be
1108 considered by the Standing Committee and on through the normal
1109 process. But if it proves wise to structure the civil review action
1110 as essentially an appeal process, it may help to involve the
1111 Appellate Rules Committee in the work.

1112 Let it be assumed that any rules should be developed either
1113 within the Civil Rules or as an independent body that still is
1114 integrated with the Civil Rules. What form might they take?

1115 The first step is likely to require a sound understanding of
1116 the structure and procedures that lead to the final decision of the
1117 Commissioner that is the subject of review. It does not seem likely
1118 that rules governing district-court review procedure can do much to
1119 affect the administrative structure and operation. The standard of

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1120 review – "substantial evidence" – is set by statute. But knowing
1121 the origins of the cases that come to the courts may affect the
1122 choice between rules that are simple and limited or rules that are
1123 more complex and extensive.

1124 The second step will be to establish the basic character of
1125 the rules. The analogy to appeal procedures is obviously
1126 attractive. Guidance may even be sought in the Appellate Rules. But
1127 going in that direction does not automatically mean that review
1128 should be initiated by a paper that is as opaque as an Appellate
1129 Rule 3 notice of appeal. There is a real temptation to ask that the
1130 review be commenced by a paper that provides some indication of the
1131 claimant's arguments. On the other hand, little may be possible
1132 until the administrative record is filed with the answer as
1133 directed by § 405(g). If the "complaint" provides little
1134 information about the claimant's position, it may make sense to
1135 follow the Administrative Conference suggestion that the
1136 administrative record should be the "main component" of the answer.

1137 Once the review is launched, the reflex response will be to
1138 treat the claimant as a plaintiff or appellant, responsible for
1139 taking the lead in framing the arguments for reversal or remand. It
1140 may be that the ambiguous assignment of responsibilities to the
1141 administrative law judge might carry over to assign to the
1142 Commissioner the first responsibility for presenting arguments for
1143 affirmance. This alternative is likely to prove unattractive
1144 because it will be difficult, at least in some cases, to frame the
1145 argument that the final decision is supported by substantial
1146 evidence before the claimant has articulated the contrary
1147 arguments.

1148 Assuming that the claimant is to file the first brief on
1149 review, the analogy to appellate procedure suggests several
1150 correlative rules. A time must be set to file the brief. A later
1151 time must be set for the Commissioner's brief. Provision might well
1152 be made for a reply by the claimant. Whether to allow still further
1153 briefing would be considered in light of past experience with these
1154 review proceedings. Times must be set for each step. Page limits
1155 might be set, although some thought should be given to the
1156 possibility that leeway should be left for local rules that reflect
1157 local district circumstances. None of these provisions should be
1158 imported directly from the Appellate Rules without considering the
1159 ways in which a narrowly focused set of rules may justify specific
1160 practices better than those crafted for a wide variety of cases.

1161 The review rules might be expanded to address more detailed
1162 issues. The Administrative Conference recommends that there be no
1163 provisions for class actions, and that the rules should not apply

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1164 to "cases outside the scope of the rationale." It suggests
1165 provisions governing attorney fees, communication by electronic
1166 means, and "judicial extension practice". Work on these and other
1167 issues that will be raised will again require learning about the
1168 details of social security administration. It will be important to
1169 understand the scope of § 405(g) in attempting to define the
1170 categories of cases covered by the rules – why, for example, is it
1171 assumed that § 405(g) authorizes review by way of a class action?
1172 And why, if indeed the statute would establish jurisdiction, is a
1173 class action inappropriate if the ordinary Rule 23 requirements are
1174 met? Or, on a less intimidating scale, what is different about
1175 these cases that justifies departure from the procedures for
1176 awarding attorney fees set out in Rule 54(d)(2)?

1177 It will be important to explore the limits of useful detail.
1178 It seems likely that much will be better left to the Civil Rules.
1179 And imagination should not carry too far. As compared to appellate
1180 courts, for example, district courts regularly take evidence and
1181 decide questions of fact. And there may be some special fact
1182 questions that are not committed to agency competence. Imagine, for
1183 example, questions of improper behavior not reflected in the
1184 administrative record: bribery, supervisor pressure on the
1185 administrative judge corps to produce an acceptable rate of awards
1186 and denials, or ex parte communications. As intriguing as it might
1187 be to craft rules for such claims, the task likely should not be
1188 taken up.

1189 This initial presentation concluded with two observations. The
1190 Administrative Conference has made an important recommendation that
1191 must be taken seriously. Careful thought must be given to deciding
1192 whether the project should be undertaken. A commitment to explore
1193 the suggestion carefully, however, does not imply a commitment to
1194 develop new rules.

1195 Judge Bates summarized this initial presentation by a reminder
1196 that the present task is to determine what priority should be
1197 assigned to social-security review rules on the Committee agenda.
1198 If the project is taken up by this Committee, an early choice will
1199 be whether to adopt one rule or several more detailed rules, and
1200 whether to place them directly in the Civil Rules or to adopt a
1201 separate set of rules that are nonetheless integrated with the
1202 Civil Rules in some fashion. Every year brings many of these cases
1203 to the district courts. Around the country, different districts
1204 adopt quite different procedures for them. And there are wide
1205 variations in remand rates.

1206 Discussion began by asking how many districts have local rules
1207 that govern review practices. This question led to a more pointed

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1208 observation that in various settings there may be confusion whether
1209 proceedings that involve agencies should be initiated as a civil
1210 action by a Rule 3 complaint, or instead are some other sort of
1211 "proceeding" in the Rule 1 sense that is initiated by an
1212 application, petition, or motion. It will be important to explore
1213 other substantive areas that involve quasi-appellate review in the
1214 district courts.

1215 The next observation was that district courts may well follow
1216 different procedures for different areas of administrative review,
1217 or may instead have a single general review practice. There are
1218 variations among the districts. One variation is that in many
1219 districts, particularly for social security cases, magistrate
1220 judges are the first line of review.

1221 Judge Campbell encouraged the Committee to take up this
1222 project. This is a Civil Rules matter. The District of Arizona
1223 local rule for these cases is not long, showing that a good rule
1224 need not be long. He gets 20 to 30 of these cases every year. They
1225 always rely on a paper record. The records include many medical
1226 reports. One important element in the review is provided by
1227 specific rules, often rather detailed rules, that each circuit has
1228 developed to guide the administrative decision process. The Ninth
1229 Circuit has specific rules as to the standard of decision the
1230 administrative law judge must use when the treating expert's
1231 opinion is not contradicted, the standard when it is contradicted,
1232 and so on. These rules may require reversal for failure to
1233 articulate the reviewing circuit standard without considering
1234 whether substantial evidence supports the denial of benefits. If
1235 the administrative law judge does not say the right things in
1236 rejecting an expert opinion, "I have to treat the opinion as true."
1237 That leads to about a 50% reversal rate. But reversal rates vary
1238 across the Ninth Circuit, ranging from 28% in the District of
1239 Nevada to 69% in the Western District of Washington. There is
1240 reason to suspect that reversals often happen because
1241 administrative judges do not say what circuit rules require them to
1242 say.

1243 This observation led to the question whether the Rules
1244 Enabling Act process can address circuit decisions imposing rules
1245 that are closely bound up with the substance of social security law
1246 and the administrative procedures that implement that substance.
1247 This concern provides a specific illustration of the need to keep
1248 constantly in mind the challenges of creating procedural rules
1249 specific to a single substantive area.

1250 Another participant stated that the United States Attorney
1251 offices handle the vast majority of these cases. Two working groups

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1252 in the Department of Justice have studied the variations among the
1253 circuits. A "model" rule might be useful, if it is adaptable to
1254 local circumstances. But there is no real sense that these are
1255 issues that must be addressed.

1256 A judge reviewed some of the statistics provided in the
1257 Gelbach and Marcus paper describing the workload of the
1258 administrative law judges and the amount of time they can devote to
1259 any single case. These statistics "point to the Social Security
1260 Administration looking to its own structures and procedures." It
1261 will be hard to do much by rulemaking. "We do need to respect the
1262 request, but we need to look at a lot more than this report." And
1263 it may be important to look at practices on administrative review
1264 in many different settings for insights that may be important in
1265 considering this particular setting. This suggestion was seconded
1266 - we must look to what is happening in other substantive fields.

1267 Another participant asked how much variation there is among
1268 the circuits, and whether the variations will make it difficult to
1269 craft a single rule that makes sense across the board? Another
1270 participant turned this question around by asking whether the
1271 principal problem lies in the work of the Social Security
1272 Administration, not in variations in circuit law.

1273 A judge suggested that we should look for more specific local
1274 rules. The District of Minnesota aims at timelines and procedures
1275 that will reduce delay in getting benefits to a person who is
1276 entitled to them. (It was later noted that social security cases
1277 are reported separately for delays in disposition.)

1278 The local-rule inquiry may tie to the number of review cases
1279 that are brought to a district. Some courts have more than others,
1280 often because of differences in the size of the local population.

1281 A judge asked whether there is any sense of what proportion of
1282 claimants appear pro se - a pro se litigant may encounter
1283 difficulty with a separate set of rules. Two judges responded that
1284 most claimants in their districts have lawyers; one explained that
1285 fee provisions mean that the lawyer appears with essentially no
1286 cost to the claimant.

1287 A judge noted that there are separate rules for habeas corpus
1288 cases and for § 2255 proceedings and asked whether the issues
1289 surrounding substance-specific rules are different for those rules
1290 than they would be for social-security review rules.

1291 A lawyer member said that "it is difficult to say to the
1292 Administrative Conference that we do not want to look at this." So

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1293 where should we look? Should we look to administrative review more
1294 broadly? That would be more consistent with the "general rules"
1295 contemplated by the Enabling Act. But if there is no obstacle to
1296 prevent focusing on the specific setting of social-security review,
1297 it will be better to focus on that. "This seems to be a
1298 distinctive, even unique, set of issues." One obvious place to
1299 start will be with standards of review, or circuit rules that seem
1300 to combine approaches to review with dictates about practices that
1301 must be followed by administrative law judges to avoid reversal.
1302 How far do the circuits root their rules in statutory language? And
1303 we should determine whether the Administrative Conference is most
1304 concerned with establishing uniform rules, or whether it aims
1305 higher to get rules that are both uniform and good? Is the test of
1306 good defined only in terms of good dispositions in the district
1307 courts, or is it defined more broadly in hoping for procedures that
1308 will wash back to enhance administrative law judge dispositions?

1309 Several members joined in suggesting that it will be important
1310 to seek out associations of claimants' representatives if this
1311 project proceeds. The Committee will need expert advice from all
1312 perspectives. A number of organizations were quickly identified.

1313 Emery Lee reported that Gelbach and Marcus got some of their
1314 information from him. And they have a lot of data that might be
1315 shared for our study. And he has been involved with the
1316 Administrative Conference and the Social Security Administration.
1317 The Social Security Administration has a really impressive data
1318 processing system. There is a long-term effort to improve the
1319 entire Administration.

1320 Judge Bates concluded the discussion by suggesting that the
1321 Committee should look at these questions, beginning with efforts to
1322 gather more information. But decisions about priorities should be
1323 deferred until four more pending projects have been discussed.

1324 *Jury Trial Demands: Rules 38,39, and 81(c)(3)*

1325 Judge Bates introduced the questions raised by the rules that
1326 require an explicit demand by a party who wishes to enjoy the right
1327 to a jury trial.

1328 The question first came to the agenda in a narrow way. Until
1329 the Style Project changed a word in 2007, Rule 81(c)(3)(A) provided
1330 that a party need not demand a jury trial after a case is removed
1331 from state court if "state law *does not*" require a demand. "Does
1332 not" was understood to mean that a demand was excused only if state
1333 law does not require a demand at any time. Even then, the rule
1334 provided that a demand must be made if the court orders that a

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1335 demand may be made, and further provided that the court must so
1336 order at the request of a party. The Style project changed "does"
1337 to "did." That creates a seeming ambiguity: what does "did" mean if
1338 state law requires a demand at some point, but the case is removed
1339 to federal court before it reaches that point? Is a demand excused
1340 because state law did not require it to be made by the time of
1341 removal? Or is a demand required because, at the time of removal,
1342 current state law did require a demand, albeit at a later point in
1343 the case's progress toward trial?

1344 Early discussions of this question have been inconclusive.
1345 Discussion in the Standing Committee in June, 2016, also was
1346 inconclusive. But soon after the meeting, two members – then-Judge
1347 Gorsuch and Judge Graber – suggested that Rule 38 should be amended
1348 to delete the demand requirement. The new model would follow the
1349 lead of Criminal Rule 23(a), under which a jury trial is
1350 automatically provided in all cases that enjoy a constitutional or
1351 statutory right to jury trial. A jury trial would be bypassed only
1352 by express waiver by all parties; the Criminal Rule might be
1353 followed to require that the court approve the waiver. They wrote
1354 that this approach would produce more jury trials, create greater
1355 certainty, remove a trap for the unwary, and better honor the
1356 purposes of the Seventh Amendment.

1357 The Committee agreed last November that further research
1358 should be done. A starting point will be to attempt to dig deeper
1359 into the history of the 1938 decision to adopt a demand
1360 requirement, and to set the deadline early in the litigation. State
1361 practices also will be examined, recognizing that some states do
1362 not require a demand at any point and others put the time for a
1363 demand later, even much later, than the time set by Rule 38.

1364 Empirical questions also need to be researched. One is to
1365 determine how often a party who wants a jury trial fails to get one
1366 because it overlooked the need to make a timely demand and failed
1367 to persuade the court to accept an untimely demand under Rule
1368 39(b). That question may be difficult to answer. A separate
1369 question asks a different kind of practical-empirical question: Is
1370 it important to the court or the parties to know early in an action
1371 whether it is to be tried to a jury? Why?

1372 If the Criminal Rule model is to be followed, it will be
1373 useful to consider drafting issues that distinguish the Seventh
1374 Amendment from the Sixth Amendment. It is not always clear whether
1375 there is a Seventh Amendment (or statutory) right to jury trial, or
1376 on what issues. There should be some means to raise this question.
1377 Whether the means should be provided by express rule text is not
1378 yet clear. As part of that question, it may be useful to consider

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1379 whether it is appropriate to hold a jury trial in a case that does
1380 not involve a jury-trial right. Present Rule 39(c)(2) authorizes a
1381 jury trial with the same effect as if there is a right to jury
1382 trial, but only with the parties' consent. Should a no-demand-
1383 required rule address this issue?

1384 The right to jury trial is important and sensitive. These
1385 questions must be approached with caution.

1386 Discussion began with the empirical question: How often do
1387 people lose the right to jury trial? "Can there be a general, quick
1388 fix"? This is an important issue – jury trial is an important part
1389 of democracy. And there are all sorts of ways to address the issue.

1390 A judge supported this view, saying that part of the first
1391 step will be to explore the issue of inadvertent waiver. Another
1392 judge agreed that these questions are important philosophically,
1393 but empirical information is also important.

1394 Another member agreed that these questions may deserve
1395 consideration. Some state courts do not require a demand: does that
1396 create any problems? Pro se cases may become an issue. But there
1397 are reasons to ask whether amending Rule 38 would change much in
1398 practice.

1399 The other side of the practical question was asked again:
1400 Criminal Rule 23 means that the parties know from the beginning
1401 that there will be a jury trial. If an amended Rule 38 does not go
1402 that far, how important is it to set the time for demand early in
1403 the case? Can the time be pushed back, reducing the risk of
1404 inadvertent waiver, until a point not long before trial?

1405 Another part of the empirical question will be to determine
1406 what standards are employed under Rule 39(b) to excuse a failure to
1407 make a timely demand. If tardy demands are generally allowed, the
1408 case for amending Rule 38 may be weakened.

1409 *Rule 47: Jury Voir Dire*

1410 Judge Bates introduced the Rule 47 proposal that came from the
1411 American Bar Association. The proposal adheres to the ABA
1412 Principles for Juries and Jury Trials 11(B)(2), which provides that
1413 each party should have the opportunity to question jurors directly.
1414 The ABA proposal is supported by submissions from the American
1415 Board of Trial Advocates and the American Association for Justice.

1416 The proposal observes that federal judges generally allow less
1417 party participation in voir dire than is allowed in state courts.

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1418 Judge-directed questioning is challenged because judges know less
1419 about the case than the parties know, leaving them unable to think
1420 of questions that probe for potential biases relevant to that
1421 particular case. For the same reason, judges are unable to
1422 anticipate developments at trial that may trigger bias. The ABA
1423 also urges that when answering lawyers' questions jurors will be
1424 more forthcoming, more willing to acknowledge socially unacceptable
1425 things, than when answering a judge's questions. Possible
1426 difficulties are anticipated and refuted by arguing that lawyer
1427 participation will not cause significant delay, and that it should
1428 not be assumed that lawyers will abuse the opportunity.

1429 This question was considered by the Committee some time ago.
1430 In 1995 it published for comment a proposal very similar to the ABA
1431 proposal. The public comments divided along clear lines. Most
1432 lawyers supported the proposed rule. Judges were nearly unanimous
1433 in opposing it. Opposition was expressed by many judges who
1434 actually permit extensive lawyer participation – they believe that
1435 lawyer participation can be valuable, but that the judge must have
1436 an unlimited right to restrict or terminate lawyer participation as
1437 a means to protect against abuse. The Committee decided then to
1438 abandon the proposal. Rather than amend the rule, it concluded that
1439 judges should be better educated in the advantages of allowing
1440 lawyer participation subject to clear judicial control.

1441 The reactions seem to be the same today. It is not clear
1442 whether federal judges generally are more or less willing to permit
1443 lawyer participation in voir dire than they were in 1995. There is
1444 reason to suspect that more judges permit active lawyer
1445 participation today. But if indeed more judges do so, that could
1446 cut either way. It may show that there is little need to amend Rule
1447 47. Or it may show that Rule 47 should be amended to ensure that
1448 all judges permit practices that wide experience supports. It may
1449 be important to try to get better information on current practices.

1450 Discussion began with the observation that Criminal Rule 24(a)
1451 is closely similar to Rule 47.

1452 A lawyer member strongly favors the ABA proposal. His
1453 experience is that more federal judges have come to permit
1454 supplemental questioning by lawyers, but that not all do. Many
1455 trial lawyers believe that judge questions produce less useful
1456 information about how people think, about what prejudices they
1457 have. And some judges do not permit lawyer participation, or allow
1458 only a very short time for lawyer participation. Allowing
1459 supplemental questioning by the lawyers "would be a good start."

1460 Another lawyer asked what would be the standard of review

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1461 under a new rule when the judge limits lawyer participation? A
1462 judge answered that judges are inclined to allow lawyer
1463 participation "when it seems helpful, otherwise not." If the rule
1464 expands lawyers' rights, appeals will be taken to review rulings on
1465 what are reasonable questions. Minnesota state courts generate many
1466 opinions on what are reasonable questions that must be allowed.

1467 Another judge observed that his district has 30 judges and
1468 perhaps 20 different ways of regulating lawyer participation in
1469 voir dire. He allows supplemental questions. "One size may not fit
1470 all judges. There is a risk in losing my discretion." But it is
1471 useful to think further about this proposal.

1472 Another judge observed that he respects lawyers, "especially
1473 the experienced, good lawyers. Not all are like that." We need to
1474 learn more before going for more lawyer participation. If we can
1475 get questions from the lawyers up front, a combined procedure in
1476 which the judge goes first, supplemented by the lawyers, should
1477 work.

1478 Another judge noted that he gives lawyers a limited time to
1479 ask questions after he has finished. "I worry about giving lawyers
1480 and parties a right to conduct voir dire, especially in pro se
1481 cases."

1482 A state-court judge said that his state has a large body of
1483 law on this topic. The 1995 Committee Note referred to clear abuse
1484 of discretion. In his state, "we get a lot of issues for appeal."

1485 Another judge said that he asks questions, then allows lawyers
1486 to ask questions. "They're not very good at it," perhaps because
1487 earlier judges on his court did not give them a chance to get
1488 experience with it.

1489 Further discussion was deferred to the overall discussion of
1490 assigning agenda priorities.

1491 *Rule 45: Serving Subpoenas*

1492 Rule 45 directs that "serving a subpoena requires *delivering*
1493 *a copy to the named person.*" A majority of courts interpret this
1494 opaque language to mean that personal service is required. But a
1495 fair number of courts interpret it to allow delivery by mail, and
1496 some interpret it to allow delivery by mail if attempts at personal
1497 service fail. Occasionally a court has authorized other means of
1498 service.

1499 The proposal submitted to the Committee suggests that all of

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1500 the means allowed by Rule 4 to serve the summons and complaint
1501 should be allowed for service of a subpoena. The argument is
1502 straightforward: the consequences of complying with a subpoena are
1503 less than the consequences of being brought into an action as
1504 defendant who must participate in the full course of the litigation
1505 and is at risk of losing a judgment. The proposal would also
1506 authorize the court to direct service by means not contemplated by
1507 Rule 4.

1508 The reasons for expanding the modes of service are attractive.
1509 Personal service can be expensive. It can cause delay. And at times
1510 it may be physically dangerous. The analogy to Rule 4 has an
1511 initial appeal.

1512 In addition to the wish for less burdensome means of service,
1513 it is desirable to have a uniform national practice. If some courts
1514 permit service by mail, uniformity can be restored by permitting
1515 mail service generally or by prohibiting mail service generally.
1516 Whichever way, uniformity is attractive.

1517 There is much to be said for permitting service by mail; the
1518 rule might call for certified or registered mail, or might borrow
1519 from other rules a more general "any form of mail that requires a
1520 return receipt."

1521 Turning to the Rule 4 analogy, there also is much to be said
1522 for allowing "abode" service by leaving the subpoena with a person
1523 of suitable age and discretion who resides at the dwelling or usual
1524 place of abode of the person to be served.

1525 Allowing other means authorized by the court seems attractive,
1526 at least if there are reasons why personal service, mail, or abode
1527 service have failed.

1528 Still further expansions can be made. And it may prove
1529 attractive to distinguish between parties and nonparties. Serving
1530 a subpoena on a party by serving the party's attorney is
1531 attractive, particularly in an era that permits service by filing
1532 the subpoena with the court's electronic-filing system.

1533 Going all the way to incorporate all of Rule 4, on the other
1534 hand, raises potential problems. Careful thought would have to be
1535 given to serving a minor or incompetent person; serving a
1536 corporation, partnership, or association; serving the United States
1537 and its agencies, corporations, officers, or employees; or serving
1538 a state or local government. So too for service outside the United
1539 States.

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1540 Discussion began with the observation that Criminal Rule 17(d)
1541 is similar to Rule 45: "The server must deliver a copy of the
1542 subpoena to the witness * * *." This Committee should consult with
1543 the Criminal Rules Committee to determine their views on the value
1544 of expanding the means of service, either generally or as to
1545 criminal prosecutions in particular. And it would be useful to
1546 learn how "deliver" is interpreted in the Criminal Rule.

1547 The Bankruptcy Rules Committee also should be consulted.

1548 A lawyer member noted that the Committee considered this very
1549 set of questions a few years ago during the work that led to
1550 extensive amendments of Rule 45. The Committee decided then that
1551 there was not sufficient reason to amend the rule. Personal service
1552 was thought useful because it dramatically underscores the
1553 importance of compliance. There does not seem to have been any
1554 change of circumstances since then – the state of the law described
1555 in the proposal is the same as the law described in extensive
1556 research for the Discovery Subcommittee then. "This does not seem
1557 the most important thing we can do."

1558 *Rule 68*

1559 Judge Bates introduced the Rule 68 offer-of-judgment topic by
1560 noting that it has been the subject of broad proposals for
1561 reconsideration and expansion and also the subject of proposals
1562 that focus on one or another specific problems that have appeared
1563 in practice.

1564 The history of the Committee's work with Rule 68 was used to
1565 set the framework for the current discussion. Some observers have
1566 long lamented that Rule 68 does not seem to be used very much. They
1567 believe that it should be given greater bite. The purpose is not so
1568 much to increase the rate of settlements – it would be difficult to
1569 diminish the rate of cases that actually go to trial – as to
1570 promote earlier settlements. A common parallel theme is that the
1571 rule should be expanded to include offers by plaintiffs. Since
1572 plaintiffs generally are awarded "costs" if they win a judgment,
1573 the cost sanction seems inadequate to the purpose of encouraging a
1574 defendant to accept a Rule 68 offer for fear the plaintiff will win
1575 still more at trial. So these suggestions commonly urge that post-
1576 offer attorney fees should be awarded to a plaintiff who wins more
1577 than an offer that the defendant failed to accept. That proposition
1578 leads in turn to the proposal that if a plaintiff can be awarded
1579 attorney fees, fee awards also should be provided for a defendant
1580 when the plaintiff fails to win a judgment more favorable than a
1581 rejected offer made by the defendant.

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1582 Alongside these proposals to expand Rule 68 lie occasional
1583 arguments that Rule 68 should be abrogated. It is seen as largely
1584 useless because it is not much used. But it may be used more
1585 frequently by defendants in cases that involve a plaintiff's
1586 statutory right to attorney fees so long as the statute
1587 characterizes the fees as "costs." The Supreme Court decision
1588 establishing this reading of the Rule 68 provision that "the
1589 offeree must pay the costs incurred after the [more favorable]
1590 offer was made" is challenged as a "plain meaning" ruling that
1591 thwarts the plaintiff-favoring purpose of fee-shifting statutes.
1592 More generally, Rule 68 is challenged as a tool that enables
1593 defendants to take advantage of the risk aversion plaintiffs
1594 experience in the face of uncertain litigation outcomes.

1595 The Committee published proposed amendments in 1983. The
1596 vigorous controversy stirred by those proposals led to publication
1597 of quite different proposals in 1984. No further action was taken.
1598 The Committee came to the subject again in the 1990s. The model
1599 developed then worked from a proposal advanced by Judge William W
1600 Schwarzer. Both plaintiffs and defendants could make offers and
1601 counteroffers. A party could make successive offers. Attorney fees
1602 were provided as sanctions independent of statutory authority. But
1603 account was taken of the view that post-offer fees should be offset
1604 by the "benefit of the judgment": the difference between the
1605 rejected offer and the actual judgment was subtracted from the fee
1606 award. As one illustration, the plaintiff might reject an offer of
1607 \$50,000, and then win a judgment of \$30,000. The defendant may have
1608 incurred \$40,000 of attorney fees after the offer lapsed. The
1609 \$20,000 benefit of the judgment – \$30,000 subtracted from the
1610 \$50,000 offer – was subtracted from the \$40,000 post-offer fees to
1611 yield a fee award of \$20,000. A further concern for fairness led to
1612 an additional limit: the fee award could not exceed the amount of
1613 the judgment. In this illustration, the defendant's post-offer fees
1614 might have been \$80,000. Subtracting the \$20,000 benefit of the
1615 judgment would leave a fee award of \$60,000. Simply offsetting the
1616 \$30,000 judgment would leave the plaintiff liable for \$30,000 out-
1617 of-pocket. The rule prevented this result by denying any fee award
1618 greater than the judgment. And to afford equal treatment, the same
1619 cap applied for the benefit of a defendant who rejected a more
1620 favorable offer: the fee award was capped at the amount of the
1621 judgment for the plaintiff. Still further complications were added
1622 in accounting for contingent-fee arrangements, offers for specific
1623 relief, and other matters. The Committee eventually decided that
1624 the attempt to address so many foreseeable complications had
1625 generated a rule too complex for application. The project was
1626 abandoned without publishing any proposal.

1627 Many suggestions to revise Rule 68 have been made by bar

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1628 organizations and others over the years. Extensive materials
1629 describing many of them were supplied in an appendix to the agenda
1630 book. Many of them aim at broad revision. Some are more focused.
1631 Ten years ago the Second Circuit suggested that the Rule should be
1632 amended to provide guidance on the approach to evaluating
1633 differences between an offer of specific relief – commonly an
1634 injunction – and a judgment that does not incorporate all of the
1635 proposed relief but adds more besides. More recently, Judge Furman
1636 has pointed to a specific problem: The voluntary dismissal
1637 provisions of Rule 41(a)(1)(A), incorporated in Rule 41(a)(2), are
1638 "subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable
1639 federal statute." When a settlement requires court approval,
1640 voluntary dismissal cannot be used to sidestep the approval
1641 requirement. The Second Circuit has ruled, for example, that a
1642 requirement of court approval of a settlement is read into the text
1643 of the Fair Labor Standards Act. This requirement cannot be
1644 defeated by stipulating to dismissal. Rule 68 does not have any
1645 list of exceptions. So a question has appeared: can the parties
1646 agree to a settlement that requires court approval, and then avoid
1647 court scrutiny by making a formal Rule 68 offer that is accepted by
1648 the plaintiff? Rule 68(a) directs that on filing a rule 68 offer
1649 and notice of acceptance, "[t]he clerk must * * * enter judgment."
1650 Perhaps Rule 68 could be amended to address only this problem – the
1651 1983 proposal, for example, specifically excluded actions under
1652 Rules 23, 23.1, and 23.2 from Rule 68.

1653 The lessons to be learned from this history remain uncertain.
1654 Continually renewed interest in revising Rule 68 suggests there are
1655 strong reasons to take it up once again. Repeated failure to
1656 develop acceptable revisions, both in the carefully developed
1657 efforts and in brief reexaminations at sporadic intervals, suggests
1658 there are strong reasons to leave the rule where it lies. It causes
1659 some problems, but is not invoked so regularly as to cause much
1660 grief. Yet a third choice might be to recommend abrogation because
1661 Rule 68 has a real potential for untoward effects and because
1662 curing it seems beyond reach.

1663 The repeated suggestions for amendments caused the Committee
1664 to reopen Rule 68 in 2014, giving it an open space on the agenda.
1665 Further consideration will be scheduled when there is an
1666 opportunity for further research. There is a considerable
1667 literature about Rule 68. Many states have similar rules that
1668 nonetheless depart from Rule 68 in many directions. Careful review
1669 of the state rules may show models that can be successfully
1670 adopted.

1671 Discussion began with the observation that many states have
1672 offer provisions. The California provision is bilateral. Federal

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1673 courts have ruled that when a state rule provides for plaintiff
1674 offers, the state practice applies to state-law claims in federal
1675 court because Rule 68 is silent on the subject. But Rule 68 governs
1676 to the exclusion of state law as to defendant offers, because Rule
1677 68 does speak to that subject. One consequence of abrogating Rule
1678 68 could be that state rules are adopted for state-law claims in
1679 federal court. State rules, further, may suggest effective
1680 sanctions other than awards of attorney fees. California practice
1681 allows award of expert-witness fees, a sanction that has proved
1682 effective.

1683 The next observation was that Georgia has a new offer statute
1684 enacted as part of tort reform. It recognizes bilateral offers, and
1685 bilateral awards of attorney fees. "The effect has been chaotic."
1686 Offers are made early in an action, before either party has any
1687 well-developed sense of what discovery may show about the merits of
1688 the case. Even with early offers, there is little evidence that the
1689 rule has advanced the time of settlement. There have been lots of
1690 problems, and no benefit. And "getting rid of it presents its own
1691 set of issues."

1692 A lawyer member asked "how fast can I run away from this?
1693 Trying to do everything everyone wants will be a real headache."
1694 And a judge remarked that Rule 68 seems to be falling away.

1695 *Ranking Priorities*

1696 Judge Bates suggested that the time had come to consider
1697 ranking the priority of these five items: Review of social-security
1698 claims; the demand procedure for jury trial, both in removed
1699 actions and generally; lawyer participation in jury voir dire;
1700 service of Rule 45 subpoenas; and Rule 68 offers of judgment.

1701 The first advice addressed all five. The Committee should
1702 press ahead with the social-security review topic. The jury demand
1703 questions should begin with an attempt to learn how often parties
1704 suffer an inadvertent loss of a desired jury-trial right. As to
1705 voir dire, Rule 47 could be written as the ABA proposes, but the
1706 amendment would not change judges' behavior. Exploring subpoena-
1707 service questions should be coordinated with the Criminal rules
1708 Committee. There is not enough reason to reopen Rule 68 in general,
1709 but it would be interesting to see how other courts react to
1710 similar procedures. There is no need to act immediately.

1711 A lawyer member noted that courts divide on the availability
1712 of mail service for Rule 45 subpoenas. "There aren't that many
1713 cases." And some courts allow mail service only after attempting
1714 and failing to make personal service. The Committee should decide

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1715 what it wants. Perhaps the jury-demand question could be explored
1716 by addressing removal cases separately from the general Rule 38
1717 demand question.

1718 A judge suggested that the Committee should take up the
1719 social-security review question. For Rule 38, it should attempt to
1720 determine how often parties forfeit the right to jury trial for
1721 failure to make timely demand. The remaining Rule 45, 47, and 68
1722 questions should be put on a back burner.

1723 Another lawyer member agreed with the first suggestion that
1724 not much is likely to be accomplished by revising Rule 47. It will
1725 be useful to explore inadvertent loss of the right to jury trial by
1726 failing to make a timely demand. And the Committee should look to
1727 the social-security review questions.

1728 Emery Lee and Tim Reagan addressed the difficulty of
1729 undertaking empirical research into the inadvertent loss of jury
1730 rights. "Jury trials are rare to begin with." There may not be a
1731 Rule 39(b) request to excuse an unintentional waiver – it may be
1732 difficult to find docket entries that reflect the problem. Getting
1733 useful information may not be impossible, but it will be difficult.
1734 It might work to look at reported cases and work backward from
1735 them. A judge observed that anecdotal information is available, but
1736 it will be difficult to distinguish between accident and choice –
1737 a party that knowingly failed to make a timely demand may come to
1738 wish for a jury trial and plead for relief from what is
1739 characterized as an inadvertent oversight. A judge observed that in
1740 cases challenging the effectiveness of a demand she rules that it
1741 makes no difference whether the demand was entirely proper. Another
1742 judge said that he has had two cases in which pro se litigants
1743 failed to make a timely demand; he ruled that they had not lost the
1744 right to jury trial.

1745 A lawyer agreed that it is almost impossible to figure out how
1746 often there is an inadvertent forfeiture of jury trial. But he
1747 asked "why should the right be lost by failing to meet a deadline?
1748 It may be deep in the case before you figure out whether you want
1749 a jury."

1750 A lawyer member reported that a quick on-line search of Rule
1751 39(b) cases suggests a general approach: a belated jury demand
1752 should be granted unless there is good reason to deny it. Examples
1753 of reasons to deny may be long delay, disrupting the court
1754 schedule, or burden on the opposing party.

1755 A further caution was noted. If we expand the right to jury
1756 trial without demand, the rule should deal with the fact that many

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1757 contracts waive the right to demand a jury trial.

1758 Lauren Gailey reported that research has begun on these
1759 topics, including the history of the demand requirement, and Rule
1760 39(b). She noted that the Ninth circuit has a stringent test for
1761 granting relief under Rule 39(b). The research should be available
1762 soon.

1763 Judge Bates summarized the discussion of priorities. Social-
1764 security review issues lie at the top of the list. The work will
1765 move forward now. It may be that a way should be found to bring
1766 people familiar with these issues into the project.

1767 The jury demand questions will be pursued by finishing the
1768 research now under way in the Administrative Office. Empirical
1769 investigations also may be undertaken if a promising approach can
1770 be developed.

1771 The remaining three topics will be held aside for the time
1772 being. There is little enthusiasm for present renewal of the jury
1773 voir dire question. The Rule 45 subpoena question also will be on
1774 a back burner, recognizing that the question is manageable and that
1775 we likely will have to deal with it in the future as means of
1776 communication continue to develop. Short of more adventuresome
1777 approaches, a simple amendment to authorize service by mail may be
1778 considered. Rule 68 will not be reopened now, but developments in
1779 FLSA cases in the Second Circuit will be monitored.

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1780 **IV**
1781 **OTHER MATTERS**

1782 *Pre-Motion Conference: 17-CV-A*

1783 Judge Furman has suggested consideration of Rule
1784 16(b)(3)(B)(v). Rule 16(b)(3)(B) lists "permissive contents" for
1785 scheduling orders. The broadest potential amendment would change
1786 item (v) so that a scheduling order may:

1787 ~~direct that before moving for an order relating to~~
1788 ~~discovery making a motion,~~ the movant must request a
1789 conference with the court;

1790 This question was considered by the subcommittee that
1791 developed the package of case-management and discovery amendments
1792 that took effect on December 1, 2015. The subcommittee concluded
1793 that it would be better to encourage the pre-motion conference
1794 through Rule 16(b) in a modest way limited to discovery motions.
1795 Many judges require pre-motion conferences now, but many do not.
1796 The subcommittee was concerned that a more ambitious approach would
1797 meet substantial resistance.

1798 More recently, the Committee has added to the agenda a
1799 suggestion that the encouragement of pre-motion conferences should
1800 be expanded to include summary-judgment motions. The purpose of the
1801 conference would not be to deny the right to make the motion, but
1802 to help focus the motion and perhaps illuminate the reasons why a
1803 motion would not succeed.

1804 Judge Furman's suggestion would add to the list at least some
1805 motions to dismiss. A motion to dismiss for failure to state a
1806 claim is a leading candidate, along with similar motions for
1807 judgment on the pleadings or to strike. Motions going to subject-
1808 matter or personal jurisdiction could be added. Perhaps other
1809 categories could be included. But it does not seem likely that all
1810 motions should be included. Ex parte motions are an obvious
1811 example. So for many routine motions and some that are not so
1812 routine. What of a motion to amend a pleading? For leave to file a
1813 third-party complaint? To compel joinder of a new party?

1814 Discussion began with a reminder that not long ago a
1815 deliberate decision was made to limit the new provision to
1816 discovery motions. "Judges do it in different ways." Some require
1817 a conference before filing a motion for summary judgment. Others
1818 require a letter informing the court that a party is considering
1819 filing a motion – judges use the letter in different ways. Judge
1820 Furman himself does not have a pre-motion requirement.

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1821 The Committee concluded that these questions should be left to
1822 percolate and mature in practice. It is too early to reopen more
1823 detailed consideration.

1824 *The Patient Safety Act: 17-CV-B*

1825 The Patient Safety Act creates patient safety organizations.
1826 Health-care providers gather and provide information to patient
1827 safety organizations about events that harm patients. The Act
1828 defines and protects "patient safety work product."

1829 The suggestion is that a Civil Rule should be adopted to
1830 repeat, almost verbatim, the statute that protects against
1831 compulsory disclosure of information collected by a patient safety
1832 organization unless the information is identified, is not patient
1833 safety work product, and is not reasonably available from another
1834 source. The purpose is to provide notice of a statute that
1835 otherwise might be ignored in practice.

1836 The chief reason to bypass this proposal is that the Civil
1837 Rules should not be used to duplicate statutes. A related but
1838 subsidiary reason is that a provision in the Civil Rules would be
1839 incomplete – the statute extends its protection to discovery in
1840 federal, state, or local proceedings, whether civil, criminal, or
1841 administrative.

1842 Beyond that, it seems likely that patient safety organizations
1843 themselves are well aware of the statute. They can bring it to the
1844 attention of anyone who demands protected information.

1845 The Committee agreed that this topic should be removed from
1846 the agenda.

1847 *Letter of Supplemental Authorities: 16-CV-H*

1848 This suggestion builds on Appellate Rule 28(j), which allows
1849 a party to submit a letter to provide "pertinent and significant
1850 authorities" that have come to the party's attention after its
1851 brief has been filed or after oral argument. The proposal is that
1852 a comparable procedure should be established for the district
1853 courts, backed by personal experience with wide differences in the
1854 practices now followed.

1855 The analogy to appellate practice is not perfect. Appellate
1856 practice has a clear structure for scheduling the parties' briefs.
1857 District-court practice includes a wide variety of events that must
1858 be addressed by the court, and the Civil Rules do not establish any
1859 particular system of briefing or time schedules for presenting a

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1860 party's position. Immediate presentation and response are likely to
1861 be needed more frequently than in courts of appeals. Any attempt to
1862 establish a meaningful structure for submitting supplemental
1863 authorities might well depend on establishing a structure and time
1864 limits for presenting arguments in general.

1865 Discussion began with an appellate judge who, as the frequent
1866 recipient of Rule 28(j) letters, is skeptical about expanding the
1867 practice to the district courts. A district judge said that he has
1868 no "mechanism" for such submissions, and "I love them when they
1869 come in," but concluded that the time for a Civil Rule is not now.

1870 Another judge noted that the variety of motions confronting a
1871 district court, and the lack of a structure for briefing in the
1872 Civil Rules, weigh against exploring this suggestion further.

1873 The Committee agreed that this topic should be removed from
1874 the agenda.

1875 *Title VI, Puerto Rico Oversight Act: 16-CV-J*

1876 The Puerto Rico Oversight Act includes, as Title VI, a
1877 procedure for restructuring bond claims (including bank debt). An
1878 Oversight Board determines whether a "modification" qualifies. The
1879 issuer can apply to the District Court for Puerto Rico for an order
1880 approving a qualifying modification. The provisions for action by
1881 the district court are sketchy.

1882 The Act includes a Title III, with proceedings governed by the
1883 Bankruptcy Rules. The Bankruptcy Rules Committee has advised that
1884 the Bankruptcy Rules are not appropriate for Title VI proceedings.

1885 The suggestion is for adoption of a new Civil Rule 3.1. The
1886 suggestion arises from the provision in Title VI that the district
1887 court acts on an "application" by the issuer. Rule 3 directs that
1888 a civil action is commenced by filing a complaint. It is not clear
1889 what an "application" should include, but the proposal is that it
1890 is better to track the statute, so the new Rule 3.1 should direct
1891 that a civil action for relief under the Act "is commenced by
1892 filing an application for approval of a Qualifying Modification *
1893 * *."

1894 The puzzlement about Rule 3 reflects an issue that was
1895 addressed in the Style Project. At the time of the Project, Rule 1
1896 applied the Civil Rules to "all suits of a civil nature." It was
1897 amended to apply the Rules to "all civil actions and proceedings."
1898 Some proceedings are initiated by filing a petition or application,
1899 not a complaint. Whether a complaint is appropriate is a question

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1900 governed by the substantive law. What should be required of an
1901 "application" embodied in a particular substantive statute also
1902 should be shaped by the substantive law.

1903 Strong arguments counsel against undertaking to draft a new
1904 Rule 3.1. Proceedings under the Act can be brought in only one
1905 district court, the District Court for Puerto Rico. Suitable
1906 procedures should be tailored to the overall practices of that
1907 court, and to the substantive provisions of the Oversight Act. That
1908 court knows its own practices, and will come to know the
1909 substantive provisions of the Act, better than any other court or
1910 this Committee can know them. In addition, it will soon confront
1911 applications under the Act and must respond to them. Procedures
1912 must be developed now. A new Civil Rule, at least in the ordinary
1913 course, could not take effect before December 1, 2019, and that
1914 schedule might be ambitious in light of the need to become familiar
1915 with local procedures and the substance of the modification
1916 process.

1917 The Committee agreed that this topic should be removed from
1918 the agenda.

1919 *Disclaimer of Fear or Intimidation: 16-CV-G*

1920 This suggestion would add a rule "requiring a judge disclaim
1921 fear or intimidation influence the judgment being written." It
1922 draws from concern that a judge may be influenced by forces not
1923 perceived, such as use of a horn antenna with a microwave oven
1924 Magnetron as a beam-forming wireless energy device.

1925 The Committee agreed that this topic should be removed from
1926 the agenda.

1927 *"Nationwide Injunctions": 17-CV-E*

1928 This suggestion urges adoption of a new Rule 65(d)(3):

1929 (3) *Scope.* Every order granting an injunction and every
1930 restraining order must accord with the historical
1931 practice in federal courts in acting only for the
1932 protection of parties to the litigation and not
1933 otherwise enjoining or restraining conduct by the
1934 persons bound with respect to nonparties.

1935 Although the proposed rule ranges far wider, the supporting
1936 arguments are presented primarily through the draft of a
1937 forthcoming law review article. The article focuses on injunctions
1938 issued by a single district judge, or by a single circuit court,

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1939 that restrain enforcement of federal statutes, regulations, or
1940 official actions throughout the country.

1941 Examples are given of an injunction that restrained
1942 enforcement of an order by President Obama and another that
1943 restrained enforcement of an order by President Trump. The reasons
1944 advanced for prohibiting "nationwide" injunctions are partly
1945 conceptual and partly practical.

1946 On the practical side, it is urged that a single judge or
1947 circuit should not be able to bind the entire country by an order
1948 that may be wrong. The intrinsic risk of error is aggravated by the
1949 prospect of forum-shopping for favorable districts and circuits;
1950 the risk of conflicting injunctions; and "tension" with established
1951 doctrines that reject nonmutual issue preclusion against the
1952 government, establish important protective procedures when relief
1953 is sought on behalf of a nationwide class under Civil Rule
1954 23(b)(2), deny judgment-enforcement efforts by nonparties, and deny
1955 any stare decisis effect for district-court decisions.

1956 On the conceptual side, it is urged that the Judiciary Act of
1957 1789 limits federal equity remedies to traditional equity practice.
1958 Some adjustments must be made to reflect the fact that there was
1959 but a single Chancellor for all of England, while now there are
1960 many federal-judge chancellors. There also are extended arguments
1961 based on Article III justiciability concerns. Article III is seen
1962 to limit remedies as well as initial standing. It confers judicial
1963 power only to decide a case for a particular claimant. Once that
1964 controversy is decided, "there is no longer any case or controversy
1965 left for the court to resolve."

1966 This suggestion raises many questions. It is well argued. But
1967 the questions go beyond those that may properly be addressed by
1968 "general rules of practice and procedure" adopted under the Rules
1969 Enabling Act. Appropriate remedies are deeply embedded in the
1970 substantive law that justifies a remedy. If justiciability limits
1971 in Article III are involved, a rule on remedies would have to
1972 recognize, and perhaps attempt to define, those limits.

1973 Additional questions are posed by the broad generality of the
1974 proposed rule, which sweeps across all substantive areas.

1975 The Committee agreed that this topic should be removed from
1976 the agenda. It also agreed, however, that it will consider any
1977 suggestions that may be made by the Department of Justice to
1978 address concerns it may advance for possible rule provisions.

1979 *Rule 7.1: Supplemental Disclosure Statements*

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1980 Rule 7.1(b)(2) directs that a disclosure statement filed by a
1981 nongovernmental corporate party must be supplemented "if any
1982 required information changes."

1983 The disclosure provisions of the several sets of rules were
1984 adopted through joint deliberations aimed at producing uniform
1985 rules. Criminal Rule 12.4(b)(2) now requires a supplemental
1986 statement "upon any change in the information that the statement
1987 requires." The slight differences in style are immaterial.
1988 "[C]hange" in the Criminal Rule and "changes" in the Civil Rule
1989 bear the same meaning.

1990 The Criminal Rules Committee is considering an amendment of
1991 disclosure requirements as to an organizational victim under
1992 Criminal Rule 12.4(a)(2). In the course of its deliberations it has
1993 proposed an amendment of Rule 12.4(b)(2) to address the situation
1994 in which facts that existed at the time of an initial disclosure
1995 statement were not included because they were overlooked or not
1996 known. The underlying concern is that the present rule does not
1997 require a party to file a supplemental statement when it learns of
1998 facts that existed at the time of the initial statement because
1999 there is no "change" in the information.

2000 The question for the Civil Rules Committee comes in three
2001 parts.

2002 The first question is whether a supplemental disclosure
2003 statement should be required when a party learns of pre-existing
2004 facts that were not disclosed. The answer is clearly yes.

2005 The second question is whether the present rule text requires
2006 a supplemental statement. There is a compelling argument that it
2007 does. Even if the facts have not changed, information about them
2008 changes when a party becomes aware of them. The purpose of
2009 disclosure requires supplementation.

2010 The third question is whether to amend Rule 7.1(b)(2) even if
2011 it now provides the proper answer. One reason to amend would be
2012 that it is ambiguous. It does not seem likely that a court would
2013 accept the argument that a supplemental statement is not required.
2014 It seems likely that a rule amendment would not be pursued if the
2015 question had come in through the mailbox. But another reason to
2016 amend is to maintain uniformity with the Criminal Rules if the
2017 proposed amendment is recommended for adoption. The Appellate Rules
2018 Committee will soon consider adoption of an amendment to maintain
2019 uniformity with the Criminal Rule. If both committees seek to
2020 amend, it likely is better to amend Civil Rule 7.1(b)(2) as well.
2021 And it likely is better to adopt the language of the Criminal Rule

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2022 rather than engage in attempts to consider possibly better drafting
2023 for all three rules.

2024 The Committee agreed that uniformity is a sufficient reason to
2025 pursue amendment of Civil Rule 7.1(b)(2) if the other committees go
2026 ahead with proposed amendments. The amendment might be pursued in
2027 the ordinary course, with publication for comment this summer. But
2028 it seems appropriate to advise the Standing Committee that the
2029 amendment might be pursued without publication to keep it on track
2030 with the Criminal Rule. Publication and an opportunity to comment
2031 on the Criminal Rule may well suffice for the Civil Rule; there is
2032 little reason to suppose there are differences in the circumstances
2033 of criminal prosecutions and civil actions that justify different
2034 rules on this narrow question. That seems particularly so in light
2035 of the view that the amendment makes no change in meaning.

2036 If the Criminal and Appellate Rules Committees pursue
2037 amendment, the Rule 7.1(b)(2) question will be submitted to this
2038 Committee for consideration and voting by e-mail ballot.

2039 **NEXT MEETING**

2040 The next Committee meeting will be held in Washington, D.C.,
2041 on November 7, 2017.

2042 Respectfully submitted,

2043 Edward H. Cooper
Reporter

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TAB 3

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Pending Legislation
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Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017	H.R. 985 <i>Sponsor:</i> Goodlatte (R-VA) <i>Co-Sponsors:</i> Sessions (R-TX) Grothman (R-WI)	CV 23	<p>Bill Text (as amended and passed by the House, 3/9/17): https://www.congress.gov/115/bills/hr985/BILLS-115hr985eh.pdf</p> <p>Summary (authored by CRS): (Sec. [103]) This bill amends the federal judicial code to prohibit federal courts from certifying class actions unless:</p> <ul style="list-style-type: none"> • in a class action seeking monetary relief for personal injury or economic loss, each proposed class member suffered the same type and scope of injury as the named class representatives; • no class representatives or named plaintiffs are relatives of, present or former employees or clients of, or contractually related to class counsel; and • in a class action seeking monetary relief, the party seeking to maintain the class action demonstrates a reliable and administratively feasible mechanism for the court to determine whether putative class members fall within the class definition and for the distribution of any monetary relief directly to a substantial majority of class members. <p>The bill limits attorney's fees to a reasonable percentage of: (1) any payments received by class members, and (2) the value of any equitable relief.</p> <p>No attorney's fees based on monetary relief may: (1) be paid until distribution of the monetary recovery to class members has been completed, or (2) exceed the total amount distributed to and received by all class members.</p> <p>Class counsel must submit to the Federal Judicial Center and the Administrative Office of the U.S. Courts an accounting of the disbursement of funds paid by defendants in class action settlements. The Judicial Conference of the United States must use the accountings to prepare an annual summary for Congress and the public on how funds paid by defendants in class actions have been distributed to class members, class counsel, and other persons.</p> <p>A court's order that certifies a class with respect to particular issues must include a determination that the entirety of the cause of action from which the particular issues arise satisfies all the class certification prerequisites.</p>	<ul style="list-style-type: none"> • 3/13/17: Received in the Senate and referred to Judiciary Committee • 3/9/17: Passed House (220–201) • 3/7/17: Letter submitted by AO Director (sent to House Leadership) • 2/24/17: Letter submitted by AO Director (sent to leaders of both House and Senate Judiciary Committees; Rules Committees letter attached) • 2/15/17: Mark-up Session held (reported out of Committee 19–12) • 2/14/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 2/9/17: Introduced in the House

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Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			<p>A stay of discovery is required during the pendency of preliminary motions in class action proceedings (motions to transfer, dismiss, strike, or dispose of class allegations) unless the court finds upon the motion of a party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice.</p> <p>Class counsel must disclose any person or entity who has a contingent right to receive compensation from any settlement, judgment, or relief obtained in the action.</p> <p>Appeals courts must permit appeals from an order granting or denying class certification.</p> <p>(Sec. [104]) Federal courts must apply diversity of citizenship jurisdictional requirements to the claims of each plaintiff individually (as though each plaintiff were the sole plaintiff in the action) when deciding a motion to remand back to a state court a civil action in which: (1) two or more plaintiffs assert personal injury or wrongful death claims, (2) the action was removed from state court to federal court on the basis of a diversity of citizenship among the parties, and (3) a motion to remand is made on the ground that one or more defendants are citizens of the same state as one or more plaintiffs.</p> <p>A court must: (1) sever, and remand to state court, claims that do not satisfy the jurisdictional requirements; and (2) retain jurisdiction over claims that satisfy the diversity requirements.</p> <p>(Sec. [105]) In coordinated or consolidated pretrial proceedings for personal injury claims conducted by judges assigned by the judicial panel on multidistrict litigation, plaintiffs must: (1) submit medical records and other evidence for factual contentions regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury; and (2) receive not less than 80% of any monetary recovery. Trials may not be conducted in multidistrict litigation proceedings unless all parties consent to the specific case sought to be tried.</p> <p>Report: https://www.congress.gov/115/crpt/hrpt25/CRPT-115hrpt25.pdf</p>	

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Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Lawsuit Abuse Reduction Act of 2017	H.R. 720 <i>Sponsor:</i> Smith (R-TX) <i>Co-Sponsors:</i> Goodlatte (R-VA) Buck (R-CO) Franks (R-AZ) Farenthold (R-TX) Chabot (R-OH) Chaffetz (R-UT) Sessions (R-TX)	CV 11	<p>Bill Text (as passed by the House without amendment, 3/10/17): https://www.congress.gov/115/bills/hr720/BILLS-115hr720rfs.pdf</p> <p>Summary (authored by CRS): (Sec. 2) This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question.</p> <p>The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.</p> <p>Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence.</p> <p>Report: https://www.congress.gov/115/crpt/hrpt16/CRPT-115hrpt16.pdf</p>	<ul style="list-style-type: none"> • 3/13/17: Received in the Senate and referred to Judiciary Committee • 3/10/17: Passed House (230–188) • 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 1/30/17: Introduced in the House
	S. 237 <i>Sponsor:</i> Grassley (R-IA) <i>Co-Sponsor:</i> Rubio (R-FL)	CV 11	<p>Bill Text: https://www.congress.gov/115/bills/s237/BILLS-115s237is.pdf</p> <p>Summary (authored by CRS): This bill amends the sanctions provisions in Rule 11 of the Federal Rules of Civil Procedure to require the court to impose an appropriate sanction on any attorney, law firm, or party that has violated, or is responsible for the violation of, the rule with regard to representations to the court. Any sanction must compensate parties injured by the conduct in question.</p> <p>The bill removes a provision that prohibits filing a motion for sanctions if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets.</p>	<ul style="list-style-type: none"> • 2/1/17: Letter submitted by Rules Committees (sent to leaders of both House and Senate Judiciary Committees) • 1/30/17: Introduced in the Senate; referred to Judiciary Committee

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Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			<p>Courts may impose additional sanctions, including striking the pleadings, dismissing the suit, nonmonetary directives, or penalty payments if warranted for effective deterrence.</p> <p>Report: None.</p>	
Stopping Mass Hacking Act	<p>S. 406 <i>Sponsor:</i> Wyden (D-OR)</p> <p><i>Co-Sponsors:</i> Baldwin (D-WI) Daines (R-MT) Lee (R-UT) Rand (R-KY) Tester (D-MT)</p>	CR 41	<p>Bill Text: https://www.congress.gov/115/bills/s406/BILLS-115s406is.pdf</p> <p>Summary: (Sec. 2) "Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016."</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 2/16/17: Introduced in the Senate; referred to Judiciary Committee
	<p>H.R. 1110</p> <p><i>Sponsor:</i> Poe (R-TX)</p> <p><i>Co-Sponsors:</i> Amash (R-MI) Conyers (D-MI) DeFazio (D-OR) DelBene (D-WA) Lofgren (D-CA) Sensenbrenner (R-WI)</p>	CR 41	<p>Bill Text: https://www.congress.gov/115/bills/hr1110/BILLS-115hr1110ih.pdf</p> <p>(Sec. 2) "(a) In General.—Effective on the date of enactment of this Act, rule 41 of the Federal Rules of Criminal Procedure is amended to read as it read on November 30, 2016.</p> <p>(b) Applicability.—Notwithstanding the amendment made by subsection (a), for any warrant issued under rule 41 of the Federal Rules of Criminal Procedure during the period beginning on December 1, 2016, and ending on the date of enactment of this Act, such rule 41, as it was in effect on the date on which the warrant was issued, shall apply with respect to the warrant."</p> <p>Summary (authored by CRS): This bill repeals an amendment to rule 41 (Search and Seizure) of the Federal Rules of Criminal Procedure that took effect on December 1, 2016. The amendment allows a federal magistrate judge to issue a warrant to use remote access to search computers and seize electronically stored information located inside or outside that judge's district in specific circumstances.</p> <p>Report: None.</p>	<ul style="list-style-type: none"> • 3/6/17: Referred to Subcommittee on Crime, Terrorism, Homeland Security, and Investigations • 2/16/17: Introduced in the House; referred to Judiciary Committee

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Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
Back the Blue Act of 2017	S. 1134 <i>Sponsor:</i> Cornyn (R-TX) <i>Co-Sponsors:</i> Cruz (R-TX) Tillis (R-NC) Blunt (R-MO) Boozman (R-AR) Capito (R-WV) Daines (R-MT) Fischer (R-NE) Heller (R-NV) Perdue (R-GA) Portman (R-OH) Rubio (R-FL) Sullivan (R-AK) Strange (R-AL) Cassidy (R-LA) Barrasso (R-WY)	§ 2254 Rule 11	Bill Text: https://www.congress.gov/115/bills/s1134/BILLS-115s1134is.pdf Summary: Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code." Report: None.	<ul style="list-style-type: none"> 5/16/17: Introduced in the Senate; referred to Judiciary Committee
	H.R. 2437 <i>Sponsor:</i> Poe (R-TX) <i>Co-Sponsors:</i> Graves (R-LA) McCaul (R-TX) Smith (R-TX) Stivers (R-OH) Williams (R-TX)	§ 2254 Rule 11	Bill Text: https://www.congress.gov/115/bills/hr2437/BILLS-115hr2437ih.pdf Summary: Section 4 of the bill is titled "Limitation on Federal Habeas Relief for Murders of Law Enforcement Officers." It adds to § 2254 a new subdivision (j) that would apply to habeas petitions filed by a person in custody for a crime that involved the killing of a public safety officer or judge. Section 4 also amends Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts—the rule governing certificates of appealability and time to appeal—by adding the following language to the end of that Rule: "Rule 60(b)(6) of the Federal Rules of Civil Procedure shall not apply to a proceeding under these rules in a case that is described in section 2254(j) of title 28, United States Code."	<ul style="list-style-type: none"> 6/7/17: referred to Subcommittee on the Constitution and Civil Justice and Subcommittee on Crime, Terrorism, Homeland Security, and Investigations 5/16/17: Introduced in the House; referred to Judiciary Committee

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Name	Sponsor(s)/ Co-Sponsor(s)	Affected Rule	Text, Summary, and Committee Report	Actions
			Report: None.	

TAB 4

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Information Item: Proposed Amendments to Rules 5, 23, 62, & 65.1

Item 4 will be an oral report.

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5. Rule 30(b)(6) Subcommittee Report

The Rule 30(b)(6) Subcommittee has received a great deal of helpful information from the bar since the Austin meeting of the full Committee, and has narrowed its focus on the basis of this information. The amendment ideas it is bringing forward are presented below.

By way of background, at the Committee's November, 2016, meeting the Subcommittee presented a fairly long and fairly elaborate set of sketches of amendment provisions that might have added many specifics to Rule 30(b)(6) that are not now in the rule. These specifics were discussed by this Committee and presented as ideas under consideration at the Standing Committee's January, 2017, meeting.

At the Austin meeting, the Subcommittee presented a list of possible issues "ranked" by the Reporter in terms of potential utility as amendment concepts deserving further study. The discussion with the Committee in April focused on that list, and contributed to the Subcommittee's further "triage" of its list of possible amendment ideas.

After the Austin meeting, the Subcommittee developed a shorter list of possible amendment ideas and decided to invite comment from the bar on these ideas (and any other ideas that those who commented regarded as worthy of study). A copy of the resulting May 1, 2017, invitation is included as an Appendix to this agenda memo. As set forth in that invitation, the specific amendment ideas identified were:

(1) Inclusion of specific reference to Rule 30(b)(6) among the topics for discussion at the Rule 26(f) conference, and in the report to the court under Rule 16: Rule 26(f) already directs the parties to confer and deliver to the court their discovery plan. It specifies some things that should be in that plan but does not refer specifically to 30(b)(6) depositions. Specific reference to Rule 30(b)(6) might be added to both Rule 26(f) and Rule 16(b) or (c). Such a provision might be a catalyst for early attention and judicial oversight that could iron out difficulties that have emerged in practice under Rule 30(b)(6). There have been suggestions, however, that the Rule 26(f) conference comes too early in the case for the lawyers to speak with confidence about their Rule 30(b)(6) needs. But (in keeping with some local rules about cooperation in setting depositions) it could be that such early judicial involvement could forestall later disputes.

(2) Judicial admissions: It appears that the clear majority rule is that statements during a 30(b)(6) deposition are not judicial admissions in the sense that the organization is forbidden to offer evidence inconsistent with the answers of the Rule 30(b)(6) witness. Yet there

are repeated statements, including some in cases, that testimony by a Rule 30(b)(6) witness is "binding" on the organization. It may be that all these statements mean is that, under Fed. R. Evid. 801(d)(2)(C), this testimony is admissible over a hearsay objection. But it does appear that there is widespread concern that organizations will face arguments that the testimony offered is "binding" in the same way that an admission in a pleading or in response to a Rule 36 request for admissions forecloses admission of evidence about the subject matter. If so, that concern may fuel disputes about a variety of matters that would not generate disputes were the rule amended to make it clear that testimony at a Rule 30(b)(6) deposition is not a judicial admission. (At the same time, it might be affirmed that a finding that a party has failed to prepare its witness adequately could, under Rule 37(c)(1), justify foreclosing the use of evidence that should have been provided earlier.)

(3) Requiring and permitting supplementation of Rule 30(b)(6) testimony: In general, Rule 26(e) does not require supplementation of deposition testimony. But Rule 26(e)(2) directs that the deposition of an expert witness who is required to provide a report (a specially retained expert) must be supplemented. A similar provision could be added for 30(b)(6) deponents, perhaps specifying that the supplementation must be done in writing and providing that it is a ground for re-opening the deposition to explore the supplemental information. Concerns in the past have included the risk that the right to supplement would weaken the duty to prepare the witness.

(4) Forbidding contention questions in Rule 30(b)(6) depositions: Rule 33(a)(2) provides that "[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time." Interrogatory answers are usually composed by attorneys who have at least 30 days to prepare the answers, and Rule 33 nonetheless suggests that the answer date should sometimes be deferred. A spontaneous answer in a deposition seems quite different. It may be that questions of this sort are rarely if ever used in ordinary depositions, even with witnesses testifying from their personal knowledge. It might be that Rule 30(b)(6) should forbid asking such questions of the witness designated to testify about the organization's knowledge.

(5) Adding a provision for objections to Rule 30(b)(6): An explicit provision authorizing pre-deposition objections

by the organization could be added to the rule. One possibility would be a requirement like the one now in Rule 34(b) that objections be specific. Objections might, on analogy to Rule 45(d)(2)(B), excuse performance absent a court order. But that Rule 45 provision ordinarily applies to nonparties who must be subpoenaed. Presently, it may be that the only remedy for an organizational party is a motion for a protective order, which may be difficult to present before the scheduled date for the deposition. If making an objection excused the duty to comply absent court order, a rule could (also like Rule 34(b)) direct that the objecting party specify what it will provide despite the objection.

(6) Amending the rule to address the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions: Rule 30 has general limitations on number and duration of depositions, but they are not keyed to Rule 30(b)(6) depositions. Those depositions can complicate the application of the general rules because (a) multiple individuals may be designated by the organization, and (b) those individuals may also be subject to individual depositions in which they are not speaking for the organization. The Committee Notes accompanying those general limitations discuss the way such limitations should apply in the 30(b)(6) context (stating that one day should be allowed for each person designated, and that the 30(b)(6) deposition counts as one of the ten for the limit on number of depositions no matter how many people are designated to testify) but those statements in Committee Notes are not rules and those prescriptions may not be right. Ideally, such issues should be worked out between counsel. Is the absence of such rule provisions at present a source of disputes? Would the addition of specifics to the rule reduce or increase the number of disputes? If specifics would be a desirable addition to the rule, what should the specifics be?

In addition to inviting submission of comments, representatives of the Subcommittee attended and participated in two events focused on the rule:

May 5, 2017, meeting of the membership of Lawyers for Civil Justice in Washington, D.C.: This meeting included an "open mike" session about Rule 30(b)(6) involving presentations by members of the organization about their experiences with discovery under the rule.

July 21, 2017, meeting during annual convention of American Association for Justice in Boston, MA.: This meeting involved a roundtable discussion with approximately 30 members of AAJ with experience using the rule.

Both these meetings were extremely helpful in focusing and refining the Subcommittee's thoughts about the rule.

The invitation for comment produced over 100 written submissions. Many of them were very thorough and thoughtful. Altogether, the submissions provided an extremely valuable exploration of the positive and problematical aspects of practice under the rule. The submissions are all posted at www.uscourts.gov via the link for Archived Rules Suggestions. Many of them focused useful light on various amendment ideas listed in the invitation for comment. Some also addressed topics not listed in the invitation for comment. A summary of the comments received is included in this agenda book.

As a review of the comment summary reveals, there is pervasive concern among many members of the bar about practice under this rule. But it is harder to say that there is pervasive agreement about which are the most serious problems that have emerged in practice. Instead, to a significant extent there is something of a plaintiff/defendant divide. From what could be called the plaintiff perspective, there is a serious problem of inadequate preparation. Many comments therefore expressed concern that amendment ideas under consideration might worsen that problem. From what could be called the defense perspective, the largest problems were over-reaching uses of the rule and the risk of some sort of "gotcha" maneuvers. In addition, the very substantial cost of properly preparing a witness to testify for an organization was emphasized.

The call for comment asked that comments be submitted by Aug. 1. After that date, the Subcommittee resumed considering the amendment ideas on which it had sought comment. The Subcommittee met by conference call on Aug. 29, Sept. 19, and Sept. 26. Notes on each of those calls are included in this agenda book.

One recurrent point emerging from the comments was mentioned above -- a fairly vigorous disagreement about whether various of the proposed changes would do good or harm. Indeed, it seemed that several of the amendment ideas could excite a fairly fierce response in at least some segments of the bar.

On the other hand, another conclusion suggested by the comments was that under the current rule the parties often work out the details on which some of the rule proposals considered by the Subcommittee have focused. This existing reality seemed a good thing. Encouraging productive discussion to reach workable solutions seemed a more promising focus than attempting to design specifics for inclusion in the rule. Any specifics added to the rule might be exploited by some parties, and cases vary sufficiently that specifics suitable for one case might be inappropriate in another case.

After considerable discussion of ways a rule amendment could improve practice under the rule, the Subcommittee's attention initially focused on Rule 16(c) as a place to suggest consideration of Rule 30(b)(6) depositions and encourage the development of case-specific processes for their use. At the same time, there were also concerns that often such directions cannot be identified very early in the case, and that including them in pretrial orders before the issues clarify could cause problems.

A different idea emerged during the Subcommittee's discussions -- Why not add a directive to Rule 30(b)(6) itself requiring consultation about the pertinent specifics at the time the deposition is noticed? That way, one could encourage, perhaps mandate, the sort of problem-solving activity among counsel we have been told happens in many cases but sometimes does not occur. And that would seem to respond to a widely-shared view that encouraging such communication is desirable.

Eventually, the Subcommittee reached a consensus that this approach is preferable to adding reference to Rule 30(b)(6) depositions to Rule 16(b) or (c). Accordingly, it is presenting this 30(b)(6) option as its preferred approach at present, and seeks reactions from the full Committee about this choice. In conjunction with that request for reactions, it also presents the Rule 16(c) alternative it has discussed, but the Subcommittee has determined that the Rule 30(b)(6) approach looks more promising. That is another subject on which it invites comment from the full Committee.

In addition, the Subcommittee has considered whether it would be useful to add a reference to Rule 30(b)(6) depositions to Rule 26(f) to prompt discussion of those depositions at that early point in the case when that discussion would be productive. These various ideas are sketched below.

Rule 30(b)(6) approach

Rule 30. Depositions by Oral Examination

* * * * *

(b) NOTICE OF THE DEPOSITION;
OTHER FORMAL REQUIREMENTS

* * * * *

- (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. Before [or promptly after] giving the notice or serving a subpoena, the party must [should] in good faith confer [or attempt to confer] with the deponent about the number and description of 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. *
- * * * * *

DRAFT COMMITTEE NOTE

[Note: This draft assumes the brackets in the rule sketch above around "or promptly after" and "or attempt to confer" are removed. If they remain, or if those phrases are removed, the Note would need to be changed.]

Rule 30(b)(6) is amended to respond to problems that have emerged in some cases with depositions of organizations. The amendment is designed to prompt discussion about the scope and number of matters for examination.

Rule 30(b)(6) was added in 1970 to provide advantages both to organizational litigants and to those opposing them. For the organization, the rule was intended to relieve it of the burden of having many officers and employees deposed by an opponent uncertain which individual would be best suited to address relevant issues. For the noticing party, it was designed to curb the "bandying" that sometimes resulted when the organization's representatives disclaimed knowledge of facts clearly known by the organization.

The rule has proved valuable in a wide range of types of litigation, and it has not been substantively amended since 1970.

But in a significant number of cases there have been problems in depositions under the rule. Sometimes notices of deposition include a large number of matters for examination, or ill-defined matters for examination, that make preparation of a witness to testify difficult. In some cases, the organization seems not to have satisfied its obligation to prepare its designated witness adequately, leading to demands that it designate another witness and, in some instances, motions for sanctions.

This amendment is designed to respond to these problems by directing the noticing party to attempt to confer with the organization before or promptly after serving the notice or subpoena. Candid exchanges about discovery goals and organizational information structure may often reduce the difficulty of identifying the right person to testify and identifying the materials needed to prepare that person. Discussion of the number of topics may avoid unnecessary burdens; like all discovery, Rule 30(b)(6) depositions are subject to the proportionality requirement of Rule 26(b)(1).

The amended rule says that the party noticing the deposition must "in good faith confer or attempt to confer" with the deponent. It tracks the language of Rules 37(a)(1) and 37(d)(1)(B) regarding efforts to resolve discovery disputes before presenting a motion to the court. The rule's good-faith provision recognizes that the deponent also has an obligation to confer in good faith, which is consistent with Rule 1's directive that the parties employ these rules to achieve the objectives identified in Rule 1.

The amended rule directs that the conference occur either before or promptly after notice is given or a subpoena is served. If the conference occurs before service of the notice or subpoena, the noticing party should ordinarily provide a draft of the proposed list of matters for examination, making it clear that the list is subject to refinement during the required conference.

Rule 30(b)(1) requires that the party noticing a deposition "give reasonable written notice." In determining what is reasonable notice, it will be important to take account of the time needed to confer with the deponent if the conference does not occur before service of the notice or subpoena. More generally, because the case law recognizes a duty to prepare the designated witness to testify about the organization's knowledge, reasonable notice must ordinarily take account of the time needed for that preparation. And because the conference itself may clarify the issues to be addressed in the deposition, it may often be important to allow a reasonable time after the conference for the preparation of the witness.

The conference may also generate agreement about other

arrangements that would make the deposition more efficient and productive. One example might be an agreement that the organization identify the specific individuals who will testify and the topics on which they will testify before the deposition. Another measure that could reduce problems of witness preparation would be for the noticing party to provide at least some of the exhibits it intends to use during the deposition in advance, thereby alerting the organization to the topics for which the witness must be prepared.

When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f) conference may provide an occasion for beginning discussion of these topics. An amendment to Rule 26(f) notes that Rule 30(b)(6) depositions may be a suitable topic for discussion during that conference planning discovery. In some cases, discussion at the Rule 26(f) conference may itself satisfy the amendment's requirement that the noticing party confer with the deponent before noticing the deposition.

In appropriate cases, it may also be desirable to include reference to Rule 30(b)(6) depositions in the discovery plan submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference under Rule 16.

Reporter's comments

This is an effort to include in Rule 30(b)(6) the idea the Subcommittee discussed during conference calls. This rule provision is exactly where the parties should look when developing this sort of discovery.

In the rule sketch the phrase "or attempt to confer" is in brackets because there was uncertainty on the Subcommittee about whether it would be an appropriate part of a rule. As the draft Committee Note says, this provision would parallel a similar directive in Rule 37. There is a risk that a command to confer without this qualification might stymie depositions in some cases if the deponent simply refused to respond.

The rule sketch also has "or promptly after" in brackets. Initially the Subcommittee discussed requiring the conference before service of the notice or subpoena. The added phrase may contribute to a concrete discussion during the conference, because the parties will have the actual proposed matters before them. Moreover, with nonparty deponents it might be quite difficult to engage in a serious conference before service of a subpoena.

One thing that could be added to the rule would be a directive to discuss more than the number and definition of matters for examination. The draft Note offers some additional ideas, as well as suggesting that sometimes the parties may

profitably raise these matters in the Rule 26(f) conference. Unlike the Rule 16(c) proposal below (discussed by the Subcommittee on Sept. 19), this provision is not tied to any court order. Other possible topics for discussion could be added to the Note.

One obvious question is whether to use "must" or "should" in the rule. Using "must" may invite conflict; perhaps organizations will refuse to show up for the deposition or designate witnesses on the ground that the other side has not made a suitable effort to confer in advance. But using "should" might not seem like a real rule, because it is too indefinite.

The Note also suggests that discussion at the Rule 26(f) conference may provide an opportunity for beginning discussion of these issues, and could sometimes perhaps suffice to satisfy the conference requirement of this amendment to the rule. Perhaps that is an unwise inclusion because the Rule 26(f) conference usually occurs too soon for the parties to be able to discuss the 30(b)(6) deposition in a meaningful manner. But the NELA submissions suggest that in a significant proportion of cases in which 30(b)(6) depositions are important that is clear to one side at the outset. So an additional possibility is to point that up in Rule 26(f).

Another thought that may arise is whether all parties to the case are entitled to participate in the conference with the deponent. It may often be true that, even when the deponent is a party to the case, there are multiple other parties to the case. When the deponent is not a party, the amendment does not seem to require involving the other parties in the conference. And requiring participation of all the parties might create a risk of frustrating the conference requirement. But given the rule that a person be deposed only once, it could be desirable to insist that all parties be permitted to participate.

Rule 26(f) approach

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY

* * * * *

(2) *Conference Content; Parties' Responsibilities.* In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; consider the process and timing of [contemplated] depositions under Rule 30(b)(6); and develop a proposed discovery plan. * * * *

DRAFT COMMITTEE NOTE

Rule 30(b)(6) is amended to require that, before or promptly after noticing a deposition of an organization, the noticing party attempt in good faith to confer with the deponent about the number and description of the matters for examination. Rule 26(f) is amended to call attention during the early discovery-planning conference to the possibility of addressing those topics when the deponent is a party participating in the Rule 26(f) conference. Such a discussion might also address other aspects of the process for Rule 30(b)(6) depositions in the action. It may be desirable to include the arrangements for Rule 30(b)(6) depositions in the Rule 26(f)(2) report to the court and to suggest including appropriate provisions dealing with those depositions in an order entered under Rule 16.

Reporter's Comments

The Subcommittee's earlier discussion of amending Rule 26(f) focused on Rule 26(f)(3), on the discovery plan, because it was keyed to the idea of amending Rule 16(c). The Rule 16(c) approach is presented below, but it is not the approach recommended by the Subcommittee. With the shift toward an amendment in Rule 30(b)(6) itself, as above, it seems more sensible to refer to 30(b)(6) depositions in Rule 26(f)(2), without mandating inclusion in the discovery plan. The draft Committee Note to the 30(b)(6) amendment above calls attention to the possibility that its mandate can be satisfied by that discussion in some cases. It also contains comments on other topics for discussion that could sometimes be addressed during

the Rule 26(f) conference

Whether making this sort of amendment would serve a useful purpose could be debated. One reason for making the amendment would be to call the parties' attention to the requirements of amended Rule 30(b)(6) back at the time they are conferring about their discovery plan. That might be worth doing if they otherwise would not even think about the new required consultation before noticing a 30(b)(6) deposition until they get ready to do that and (hopefully) then read the amended rule and notice the new requirement.

Rule 16(c) approach

The Rule 16(c) approach below has been discussed by the Subcommittee, but it presently regards the Rule 30(b)(6) approach above (perhaps with the added Rule 26(f) idea) as more promising.

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(c) ATTENDANCE AND MATTERS FOR CONSIDERATION AT A PRETRIAL CONFERENCE.

* * * * *

(2) *Matters for Consideration.* At any pretrial conference, the court may consider and take appropriate action on the following matters:

* * * * *

(F) discovery:

(i) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 and Rules 29 through 37;

(ii) the process and timing for [contemplated] depositions under Rule 30(b)(6);

* * * * *

DRAFT COMMITTEE NOTE

Rule 16(c) is amended to call attention during the pretrial conference process to the potential value of addressing the timing of Rule 30(b)(6) depositions and establishing a process for handling them.

Rule 30(b)(6) was added in 1970 to provide advantages both to organizational litigants and to those opposing them. For the organization, the rule was intended to relieve it of the burden of having many officers and employees deposed by an opponent uncertain which individual would be best suited to address relevant issues. For the deposing party, it was designed to curb the "bandying" that sometimes resulted when the organization's representatives disclaimed knowledge of facts clearly known by the organization.

The rule has proved valuable in a wide range of types of

litigation, and it has not been substantively amended since 1970. But some recurrent problems have been reported with practice under the rule that provisions of a pretrial order might ameliorate. Although the rule directs that the party seeking discovery describe the matters for examination with "reasonable particularity," there have been instances in which responding organizations have found that the descriptions were overbroad or too general. From the perspective of the party seeking discovery, there have been instances in which the designated representative seemed inadequately prepared to respond regarding the matters listed for examination.

The goal of this amendment is to respond to these reported problems and to improve practice under the rule. Due to the broad range of cases in which such depositions occur, including specifics about their conduct in a rule that applies to all cases is not workable; case-by-case supervision is more appropriate. For example, in some cases a Rule 30(b)(6) deposition may be the first step in discovery, but often such depositions occur later in the discovery process. Accordingly, an early order providing specifics about the matters for examination or the selection of witnesses ordinarily would not be suitable under Rule 16(c).

Instead, what may prove valuable are provisions about the process and perhaps the expected timing for such depositions. The range of possible process issues is great. A provision calling for a minimum notice period may be valuable for an organization that must locate and prepare a witness to address the listed matters for examination. Another measure that may facilitate preparation of the witness is for the party seeking discovery to provide copies of some of the documents on which it wants to base its examination. It may be useful for the organization to be directed to identify in advance of the actual deposition the person or persons it will designate to testify on its behalf and the topics they will address.

Focusing particularly on the problems that have sometimes arisen in regard to these depositions, it may be useful to adopt a process for possible refinement of matters in the notice, and for resolving concerns that some witnesses may not be fully prepared to deal with some topics. The court may be able to fashion an appropriate process for resolving the specifics that arise in a the case before it. This amendment provides a method for doing that.

One method that may be valuable to provide by order for resolution of specific issues regarding Rule 30(b)(6) depositions by means short of a formal motion for a protective order or motion to compel. Orders under Rule 16(b)(3)(B)(v) that the parties request a conference with the court before filing a discovery motion might be a model for such a provision. But resort to the court should not occur unless and until the parties

have fully discussed the issues involved and tried to resolve them without involving the court. See Rule 37(a)(1) (certification that the moving party attempted to resolve the discovery dispute without court action).

Reporter's comments

Pursuing this approach if the Rule 30(b)(6) and 26(f) ideas suggested above are pursued would be a dubious proposition. The Committee Notes to both the Rule 30(b)(6) sketch and the Rule 26(f) sketch above suggest including something about 30(b)(6) depositions in the discovery-plan report to the court. It seems unlikely that courts would often bring the matter up themselves if the parties don't do that, so saying something in Rule 16(c) seems unnecessary.

Moreover, singling out Rule 30(b)(6) in the Rule 16 process may over-emphasize the importance of that rule. For decades Rule 34 has seemed the main target of objections. Though one could say that the Rule 16(b)(3)(B) references to E-Discovery issues, privilege waiver problems, and preservation concerns all focus mainly on Rule 34 matters, still that rule is not singled out in Rule 16.

The draft Committee Note above is a first effort to suggest appropriate things that might be included in such an order if this approach remains under consideration. No doubt it can be improved by suitable additions. It may also be improved by deletions. One idea that did not seem to fit easily into the Note is an emphasis on proportionality. That is important for all discovery, of course, but may be of particular importance regarding these depositions. In any event, such ideas could be included in a Committee Note to an amended Rule 30(b)(6) or 26(f).

APPENDIX -- MAY 1 INVITATION FOR COMMENT

Rule 30(b)(6) Subcommittee
Advisory Committee on Civil RulesInvitation for Comment on
Possible Issues Regarding Rule 30(b)(6)
May 1, 2017

The Advisory Committee on Civil Rules appointed a Rule 30(b)(6) Subcommittee in April, 2016, and it has begun work. The Advisory Committee spent considerable time looking at this rule about a decade ago, and eventually decided not to propose any amendments at that time. Since then, several bar groups have submitted thoughtful reports to the Committee about problems encountered by their members with the current operation of the rule. Other bar groups have provided submissions questioning the need or appropriateness of amending the rule. Material on these subjects can be found in the agenda book for the Advisory Committee's April 25-26, 2017, meeting at pp. 239-316. That agenda book is available at www.uscourts.gov.

Initial legal research by the Rules Committee Support Office (reported at pp. 249-65 of the agenda book) has cast some light on the concerns that have been raised. The Subcommittee has given initial consideration to a wide range of possible concerns. During the Committee's April 2017 meeting there was considerable discussion of these issues.

As part of its ongoing work, the Rule 30(b)(6) Subcommittee invites input about experience under the rule. Reports received so far indicate both that the rule is an important vehicle for gathering information from organizations in a significant number of cases, and that without it the risk of "bandying" would increase. Other reports indicate, however, that some lawyers may be asking the rule to bear more weight than it was meant to bear, and that some who use the rule impose extremely heavy burdens on opposing parties (and perhaps sometimes on nonparties as well).

Because the Subcommittee's work on the rule is at a preliminary stage, it is not possible presently to determine whether any actual rule amendments would be helpful and therefore warrant the careful drafting effort that would be necessary before any amendment could be formally proposed. For the present, the goal is to determine whether rule changes should be seriously considered, and to identify the topics or areas that offer the most promise that amendments would improve Rule 30(b)(6) practice while preserving its utility.

Based on discussions to date, including the discussion during the Advisory Committee's April 2017 meeting, the following

possibilities have been identified as potential rule-amendment ideas:

Inclusion of specific reference to Rule 30(b)(6) among the topics for discussion at the Rule 26(f) conference, and in the report to the court under Rule 16: Rule 26(f) already directs the parties to confer and deliver to the court their discovery plan. It specifies some things that should be in that plan but does not refer specifically to 30(b)(6) depositions. Specific reference to Rule 30(b)(6) might be added to both Rule 26(f) and Rule 16(b) or (c). Such a provision might be a catalyst for early attention and judicial oversight that could iron out difficulties that have emerged in practice under Rule 30(b)(6). There have been suggestions, however, that the Rule 26(f) conference comes too early in the case for the lawyers to speak with confidence about their Rule 30(b)(6) needs. But (in keeping with some local rules about cooperation in setting depositions) it could be that such early judicial involvement could forestall later disputes.

Judicial admissions: It appears that the clear majority rule is that statements during a 30(b)(6) deposition are not judicial admissions in the sense that the organization is forbidden to offer evidence inconsistent with the answers of the Rule 30(b)(6) witness. Yet there are repeated statements, including some in cases, that testimony by a Rule 30(b)(6) witness is "binding" on the organization. It may be that all these statements mean is that, under Fed. R. Evid. 801(d)(2)(C), this testimony is admissible over a hearsay objection. But it does appear that there is widespread concern that organizations will face arguments that the testimony offered is "binding" in the same way that an admission in a pleading or in response to a Rule 36 request for admissions forecloses admission of evidence about the subject matter. If so, that concern may fuel disputes about a variety of matters that would not generate disputes were the rule amended to make it clear that testimony at a Rule 30(b)(6) deposition is not a judicial admission. (At the same time, it might be affirmed that a finding that a party has failed to prepare its witness adequately could, under Rule 37(c)(1), justify foreclosing the use of evidence that should have been provided earlier.)

Requiring and permitting supplementation of Rule 30(b)(6) testimony: In general, Rule 26(e) does not require supplementation of deposition testimony. But Rule 26(e)(2) directs that the deposition of an expert witness who is required to provide a report (a specially retained expert) must be supplemented. A similar provision could be added for 30(b)(6) deponents, perhaps specifying that the supplementation must be done in writing and providing that it is a ground for re-opening the deposition to explore the supplemental information. Concerns in the past have included the risk that the right to supplement

would weaken the duty to prepare the witness.

Forbidding contention questions in Rule 30(b)(6) depositions: Rule 33(a)(2) provides that "[a]n interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time." Interrogatory answers are usually composed by attorneys who have at least 30 days to prepare the answers, and Rule 33 nonetheless suggests that the answer date should sometimes be deferred. A spontaneous answer in a deposition seems quite different. It may be that questions of this sort are rarely if ever used in ordinary depositions, even with witnesses testifying from their personal knowledge. It might be that Rule 30(b)(6) should forbid asking such questions of the witness designated to testify about the organization's knowledge.

Adding a provision for objections to Rule 30(b)(6): An explicit provision authorizing pre-deposition objections by the organization could be added to the rule. One possibility would be a requirement like the one now in Rule 34(b) that objections be specific. Objections might, on analogy to Rule 45(d)(2)(B), excuse performance absent a court order. But that Rule 45 provision ordinarily applies to nonparties who must be subpoenaed. Presently, it may be that the only remedy for an organizational party is a motion for a protective order, which may be difficult to present before the scheduled date for the deposition. If making an objection excused the duty to comply absent court order, a rule could (also like Rule 34(b)) direct that the objecting party specify what it will provide despite the objection.

Amending the rule to address the application of limits on the duration and number of depositions as applied to Rule 30(b)(6) depositions: Rule 30 has general limitations on number and duration of depositions, but they are not keyed to Rule 30(b)(6) depositions. Those depositions can complicate the application of the general rules because (a) multiple individuals may be designated by the organization, and (b) those individuals may also be subject to individual depositions in which they are not speaking for the organization. The Committee Notes accompanying those general limitations discuss the way such limitations should apply in the 30(b)(6) context (stating that one day should be allowed for each person designated, and that the 30(b)(6) deposition counts as one of the ten for the limit on number of depositions no matter how many people are designated to testify) but those statements in Committee Notes are not rules and those prescriptions may not be right. Ideally, such issues should be worked out between counsel. Is the absence of such rule provisions at present a source of disputes? Would the

addition of specifics to the rule reduce or increase the number of disputes? If specifics would be a desirable addition to the rule, what should the specifics be?

* * * * *

The foregoing listing does not include many other matters that the Subcommittee has discussed, or that the Advisory Committee considered when it studied Rule 30(b)(6) a decade ago. As emphasized above, it is consciously tentative and provided only to suggest some ideas that have been discussed and on which the Subcommittee seeks further guidance. For the present, a key focus is to evaluate the desirability of beginning serious study of any of the issues identified above. Drafting actual amendment proposals will involve much further work and will identify further issues. At the same time, the Subcommittee is aware that there may be reason to give serious consideration to a variety of other Rule 30(b)(6) topics, and it therefore invites interested parties to submit suggestions for additional issues that might deserve serious consideration.

Because this is an ongoing project, there is no formal time limit on submission of commentary about Rule 30(b)(6). But for the Subcommittee to receive maximum benefit from any submission, it would be most helpful if it were received no later than Aug. 1, 2017.

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**Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules
Conference Call
Sept. 26, 2017**

On Sept. 26, 2017, the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Judge Joan Ericksen (Chair of the Subcommittee), Judge John Bates (Chair of the Advisory Committee), John Barkett, Parker Folse, Prof. Edward Cooper (Reporter of the Advisory Committee) and Prof. Richard Marcus (Reporter of the Subcommittee).

The call began with the observation that we are "zeroing in" on recommending a change to Rule 30(b)(6).

An initial reaction was that the draft offered a choice between "must" and "should" in the new sentence in the rule. Experience suggests that "must" is better. Often the sort of exchange we are discussing occurs after service of the notice rather than before. Indeed, often notices are served with a cover letter saying that the matters for examination, timing and other specifics are "subject to discussion." Although the notice sets a time and provides a list, the thrust of the communication is that the noticing party is open to revising the specifics pursuant to an exchange with the named organization. So in a sense those specifics in the initial notice are "placeholders," and it is assumed there will be such a discussion.

Against that background, it is possible that making this sort of change would slow the process down. To command consultation before the notice is served may invite the deponent to object that an inadequate effort to consult was made in advance if the notice is served after an abortive "attempt" to confer. Moreover, consultation without a specific listing about what the noticing party wants to address would be a rather empty gesture. So having the notice served first gives the parties something specific to discuss.

Finally, there was a concern that this draft imposes a duty on the noticing party but no duty on the organization. Would it not be more even-handed to have bilateral obligations?

Another participant had a similar reaction. "I don't think you can say 'must attempt to confer.'" How would that apply to a nonparty? Saying that might invite rather than avoid disputes. Also, it's a good point that it would really be necessary to have something in writing to confer in a meaningful way. At least doing it after the notice is sent would provide that starting point.

A response was that Rule 37(a)(1) does say that a motion to compel "must include a certification that the movant has in good faith conferred or attempted to confer" to avoid the need for

court action. So there are other places in the rules where something a lot like "must confer or attempt to confer" already appears.

Another reaction was that the timing issue could be addressed by a slight change in the amendment proposal somewhat parallel to Rule 37(a):

Before or promptly after giving notice or serving a subpoena, the party must confer or attempt in good faith to confer with the deponent . . .

This formulation drew support. It could happen that the need for this deposition comes not long before the close of discovery. If so, serving the notice first to get the clock running could be very important.

Another idea suggested was to make submission of a draft of the proposed list of matters a prerequisite to holding the conference. That would give the parties something concrete to discuss, and would be consistent with the early Rule 34 requests added in the 2015 amendments. A reaction to that idea was that putting it into the rule could unduly complicate the rule, and that it would better be in the Note. Perhaps the way to do so in the Note might be along the following lines: "If the conference occurs before service of the notice or subpoena, it should ordinarily be accompanied by a draft of the proposed notice."

But the proposed amendment is really quite narrow, it was observed. Ordinarily, there are a number of other things that the parties talk about. For example, the noticing party always wants to know who the actual witnesses will be. That way, it is possible to prepare more effectively for the deposition. That way, it is also possible to address in advance the possibility of questioning beyond the matters in the notice if the person designated has knowledge about those other areas.

An initial summary of the discussion was that there were a number of possible points for refinement -- adding "before or after," imposing some obligation on the organization to respond to the effort and "come to the table," considering the propriety of imposing such an obligation on nonparties, whether "must attempt" is a workable rule formulation, and adding a "good faith" directive.

A more general admonition was that it would be best to "stay simple." The Subcommittee has in the past considered pretty elaborate rule provisions, and concluded that is not a promising way to go.

Another observation was that it would be good to conform the language as closely as possible with what's in Rule 37(a).

The nonparty problem was raised. Can we impose an obligation on a nonparty via Rule 30(b)(6)? True, it would be desirable if there were bilateral obligations, but in general the discovery rules impose obligations only on parties.

One reaction was that Rule 45 imposes what can be pretty hefty obligations on nonparties. Certainly a subpoena for a 30(b)(6) deposition can do that. It seems a small step to impose on the nonparty an obligation to confer in good faith about topics in a way that may considerably reduce the obligations resulting from the subpoena.

Another reaction was the locution "attempt in good faith to confer" implicitly contemplates some reciprocal obligation to act in good faith regarding conferring. There is an implied expectation of cooperation. And that's entirely consistent with the 2015 amendment to Rule 1.

At the same time, it will be important to be alert to the potential problem of obstruction by a recalcitrant organization. Keeping "attempt to confer" in the rule may provide a safety valve for that problem. The suggestion was that the phrase should be put in brackets for the full Committee meeting to invite discussion.

Another reaction was that it would be important to track the language of Rule 37. We are not adopting an objection procedure here, and a recalcitrant organization does not thereby gain an advantage or relieve itself of the obligation to do what Rule 30(b)(6) (or a subpoena) commands that it do. The goal is to provide a method by which the parties can clarify the specifics of those obligations.

Another reaction was that this modest addition to Rule 30(b)(6) ties in with the recent changes to Rule 26(b)(1) and Rule 1. As of the present, it is still not certain how those 2015 amendments will play out. But this amendment idea would fit well with them. Moreover, making this change to encourage communication should not invite the sort of diametrically opposed views we saw in the comments on the issues on which we invited comments during the summer.

The discussion shifted to whether, if the 30(b)(6) change looked most promising, it makes sense also to present the Rule 26(f) and 16(c) ideas contained in the memo for the conference call.

One reaction was "leave in the other things." It would be good to permit a full Committee discussion if any members have views on those alternatives.

A clarification was offered: The idea of the presentation

for this call was that the Rule 16(c) amendment would not be a useful addition if the 30(b)(6) amendment went forward. The utility of including a 26(f) change if the 30(b)(6) amendment went forward was less clear, however.

Another reaction was "put all three before the Committee." But that did not mean the Subcommittee could not make a recommendation. After discussion, the Subcommittee consensus was to recommend the 30(b)(6) change and recommend considering the addition of a small change to Rule 26(f). At the same time, it would be to say that the Rule 16(c) idea was included for completeness, but was not the approach the Subcommittee recommended.

A separate concern was raised: The three Committee Notes in the memo for the conference call seemed rather duplicative. Is that duplicaiton necessary? The reaction was that the contents of Committee Notes depend a great deal on what's in the amendment package. For example, if the main proposal is to adopt the Rule 30(b)(6) amendment, once that has been refined, that probably would permit a much abbreviated Rule 26(f) Note even if that amendment also goes forward. If possible, that Note would mainly invoke the 30(b)(6) amendment and its Note.

Another concern was raised about adding the Rule 26(f) rule change. How can that work if the deponent is a nonparty. Perhaps some discussion by the parties could in some case be useful, but the main objective of these amendment ideas is to address the burdens and concerns of the deponent. How can that work if the deponent is a nonparty and not at the table.

A footnote to that concern was offered: A similar issue could arise even if the nonparty is a named party. For example, if the 26(f) conference occurs before some defendants have been served, they would not be at the table either.

A reaction was that the Note to the 26(f) amendment might say something like "a contemplated Rule 30(b)(6) deposition of a party participating in the 26(f) conference." An alternative formulation might be: "If a Rule 30(b)(6) deposition is contemplated from an organizational party participating in the Rule 26(f) conference . . ."

The call concluded with the expectation that Prof. Marcus would attempt to redraft the amendment sketches along the lines discussed, and that they would be presented to the full Committee with a background explanation of the ideas considered and input received since the April meeting in Austin.

**Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules
Conference Call
Sept. 19, 2017**

On Sept. 19, 2017, the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Judge Joan Ericksen (Chair of the Subcommittee), Judge John Bates (Chair of the Advisory Committee), Judge Craig Shaffer, John Barkett, Parker Folse, and Prof. Richard Marcus (Reporter of the Subcommittee).

The call was introduced with the suggestion that the most promising idea included in Prof. Marcus's Sept. 10 memo on ideas for this call [attached to these notes as an Appendix] seems to be the idea of adding a reference to 30(b)(6) depositions to Rule 16(c). This could be a "soft change" that could be a basis for a Committee Note offering guidance on managing the Rule 30(b)(6) deposition process. It's worth noting that the 2015 amendments to the discovery rules are still pretty new. But it may be that there is a risk that this change will not have a sufficient effect because it does not appear in Rule 30(b)(6). As a starting point, however, the idea would be to amend Rule 16(c) and leave it at that.

Another participant reported having a similar reaction. But that raised the question whether the Subcommittee should also present the full Committee with the other ideas. Indeed, it might be a good idea to invite public comment on whether those other ideas should be added to the package. This member does not necessarily favor any of the additional ideas, but might favor keeping them alive for further discussion.

Two concerns were raised: First, it seems odd to single out one very specific form of discovery in Rule 16. Current Rule 16(c)(2)(F) invites the court to include in a pretrial order something regarding "discovery under Rule 26 through 37." That surely includes orders about depositions in general and 30(b)(6) depositions in particular. If we were drafting discovery rules from a clean slate, would there be a reason for singling out this one provision?

Second, are we comfortable turning a Committee Note into a "best practices manual"? The draft Note really does look like that.

A response was that other specifics are sometimes included in rules. For example, in 2006 Rule 26(f) was amended to direct discussion not only of issues regarding the discovery of electronically stored information but more particularly require that there be discussion of the form of production because that had emerged as a major concern. 30(b)(6) has stood out in recent years because there have been repeated reports of abusive behavior regarding discovery under that rule, and repeated

requests to the Advisory Committee that it devise rule amendments that solve these problems. As with form of production, then, this experience explains the decision to single out this form of discovery.

Regarding the "practice manual" Note, that sort of thing is not unprecedented. Limiting attention to discovery rules, there are other examples. Indeed, even some aspects of the 2015 amendment package could be characterized as providing guidance for practice. Whether such guidance has much impact on actual practice could be debated, however.

Another reaction was that a conclusion to be drawn from the comment received over the summer was that "we did not want to tinker with Rule 30(b)(6)." Ultimately the concerns we heard about were not amendable to a rule change, and trying to put some specifics into Rule 30(b)(6) itself might produce more contention without any significant benefits. The draft Committee Note offers a series of things to be attentive to -- "Here are ways to deal with problems that have come up in the past if it makes sense in this case." The reports we received from the comments over the summer show that people usually work these things out, and when that does not happen the solution is not a rule but having a judge more actively involved when needed. This thinking leads to the conclusion that a modest change to Rule 16(c) is the way to go.

On the question whether to preserve some of the other thoughts for discussion during a public comment period, a thought was that doing so might produce some of the same polarization that emerged from the commentary we received over the summer. "Both sides will say that we need to go farther than we have gone." Moreover, it was observed, we have gotten more than 100 comments already; we are not likely to hear much that is new by inviting more commentary on what we have already heard about.

An explanation on the public comment point was that unless alternative or additional ideas are included in the invitation for public comment there has to be republication for comment. So if there is a groundswell of support for one or more of these additional ideas we would have to postpone action for another year if the idea were not included in a public comment package as a possible amendment to the rules.

A response was that one thing both sides seemed to endorse was encouraging communication about issues raised by 30(b)(6) depositions. But maybe Rule 16(c)(3)(F) is not the right place. How about (G) -- that speaks of "identifying witnesses and documents." Could we add "including location of witnesses and documents under Rule 30(b)(6)" at that point?

One reaction to this idea was that (G) is really more about

getting ready for trial than discovery, which is the focus of (F). Another was that 30(b)(6) depositions are not just about the location of witnesses and documents.

Still, it was observed, it does look odd to have a subpart of (F) that is only about 30(b)(6) depositions.

Another member observed that it's rather difficult to fit this idea into Rule 16. Is that the right place?

A response was to look instead to Rule 26(g). It might be good to bring home to lawyers that their behavior in regard to 30(b)(6) depositions is subject to the same certifications that Rule 26(g) recognizes for other discovery. But the problem is that the rule is written to focus on an attorney's signature. That works for the notice of deposition. But there is no obvious analogy for the responding party.

Another response was that Rule 26(f) is the more logical place. Rule 26(g) presents the signature problem. Moreover, 26(f) focuses on what the lawyers should be thinking and talking about in regard to planning discovery. That's what we want to emphasize. Unless we emphasize it at that point, it is unlikely to find its way into a Rule 16 order.

That drew agreement from a judge: "Unless I raise Rule 30(b)(6), it never comes up. This would just get overlooked." That drew agreement -- judges are unlikely to raise this issue on their own unless the parties bring it up. Prof. Marcus's memo included on p. 5 a draft of a new provision in Rule 26(f) that could trigger attorney discussion of these issues and might lead to suggestions in the discovery plan that the judge could include in a Rule 16 order. "I don't see why this would trigger heartburn, and it could be helpful."

One reaction was that "that still highlights 30(b)(6) as different from other discovery." Do we think that's warranted?

One reaction was that "I'm comfortable with this idea. The goal is to get the parties talking."

A response to that was that singling out 30(b)(6) could be done without adding a new (F) simply by adding a reference to this form of discovery current (F), which asks about orders under Rule 26(c) or 16(b).

A related question arose: Will any of these approaches prompt concerns from the Standing Committee? One reaction was that they might. It seems that judges rarely see the problems we have heard about concerning 30(b)(6) depositions. But judges certainly see many disputes about other sorts of discovery. So a reasonable judicial attitude might be "Why are you so focused on

Rule 30(b)(6), which doesn't really seem to be a problem in my court?" Indeed, some members of the Standing Committee seemed to have a view like that during the January, 2017, meeting of that committee.

A reaction was that things have changed quite a lot since January, 2017. For one thing, what was before the Standing Committee at that time was a pretty elaborate series of possible rule-amendment ideas that would introduce many new specifics into Rule 30(b)(6). The "case management" alternative was at the back of that presentation. Since then, the Subcommittee has scaled back its amendment ideas considerably. Thus, the invitation for comment posted in May included a significantly more modest set of ideas.

A second point is that the May 1 invitation for comment prompted a very substantial response, confirming that there is a problem among lawyers even though it may rarely surface before judges. We received well over 100 comments without any sort of official invitation for comment. To the contrary, though the A.O. alerted some who had commented previously on the rule about the May 1 invitation for comment, the only other thing it did was to post the invitation on its website. Still we got over 100 comments, many of them quite thorough as well as being quite thoughtful. By way of contrast, it often happens that other advisory committees publish official proposed amendments for public comment and get far fewer comments. If there were a need to show that this is a major concern of the bar, this response seems to confirm it. So, compared to the situation in January, 2017, the current discussion is about something considerably less aggressive, and grounded on a very considerable body of commentary from the bar.

Discussion returned to the proper placement for a rule change. A new idea emerged: How about adding something near the beginning of Rule 30(b)(6) itself? The goal is to get the parties talking about these issues. How about adding a sentence like: "In advance of serving a notice of a deposition notice under Rule 30(b)(6), the parties must confer" about various specifics.

The first reaction was that this approach had positive features. A Committee Note to such a rule might reference Rule 26(f) or Rule 16(c). The verb might be "should" rather than "must" because making this mandatory might raise difficulties.

Another reaction was that, if this approach were used, the draft Committee Note for the Rule 16(c) sketch included in the memo for this call would probably need to be recast because it focuses on what the court may do rather than what the parties should do.

Another reaction was that such a provision might be more suitable chronologically. We have repeatedly heard that the Rule 26(f) conference is too early to address these issues.

A further reaction was that this is a good idea. We should prompt the parties to address these issues. We should also be cautious about directives to the court about Rule 16(c) orders.

The question how to proceed arose. It seemed that there were two basic ideas on the table -- something in Rule 16(c) or something in Rule 30(b)(6). Perhaps both ideas should be presented to the full Advisory Committee at its November meeting. Perhaps the Subcommittee could before that meeting resolve which it favored. It is not possible to say at present which course of action makes more sense since this new idea has not been drafted yet.

The solution was to schedule a further Subcommittee conference call. The date selected was **Tuesday, Sept. 26, at 5:45 p.m. Central (6:45 Eastern, 4:45 Mountain, and 3:45 Pacific)**. Before that time, Prof. Marcus should circulate a memo introducing the issues emerging from this conference call.

APPENDIX

MEMORANDUM

TO: Rule 30(b)(6) Subcommittee
 FROM: Rick Marcus
 RE: Amendment ideas
 DATE: Sept. 10, 2017

The Subcommittee is scheduled to have another conference call on Sept. 19, 2017. During the Aug. 29 conference call, discussion focused on a more limited set of possible amendment ideas than those identified in the May 1 invitation for comment.

This memo is designed to illustrate how some of those amendment ideas might look. It seeks also to suggest topics that might profitably be included in a Committee Note. This is far from being even a finished sketch of possible amendment ideas, but it is designed to assist the Subcommittee in evaluating what seem to be the most promising avenues for possible amendment ideas.

Rule 16(c)

There was considerable support for considering a change to Rule 16(c). Unlike Rule 16(b), there is no command aspect to this "laundry" list of topics that might be the focus of a Rule 16(b) order (even though Rule 16(b)(3)(B) is only about "permitted contents" of such an order). A Rule 16(b)(3)(B) amendment idea is provided below for completeness.

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(c) ATTENDANCE AND MATTERS FOR CONSIDERATION AT A PRETRIAL CONFERENCE.

* * * * *

(2) *Matters for Consideration.* At any pretrial conference, the court may consider and take appropriate action on the following matters:

* * * * *

(F) discovery:

(i) controlling and scheduling discovery, including orders affecting disclosures and discovery under Rule 26 through 37;

(ii) the process or timing for
[contemplated] depositions under Rule
30(b)(6);

* * * * *

DRAFT COMMITTEE NOTE

Rule 16(c) is amended to call attention during the pretrial conference process to the potential value of addressing the timing of Rule 30(b)(6) depositions and establishing a process for handling them.

Rule 30(b)(6) was added in 1970 to provide advantages both to organizational litigants and to those opposing them. For the organization, it was intended to relieve it of the burden of having many officers and employees deposed by an opponent uncertain which individual would be best suited to address relevant issues. For the organization's opponent, it was designed to curb the "bandying" that sometimes resulted when the organization's representatives disclaimed knowledge of facts clearly known by the organization.

The rule has proved valuable in a wide range of types of litigation, and it has not been substantively amended since 1970. But some recurrent problems have been reported with practice under the rule that provisions of a pretrial order might ameliorate. Although the rule directs that the party seeking discovery describe the matters for examination with "reasonable particularity," there have been instances in which responding organizations have found that the descriptions were overbroad or too general. From the perspective of the party seeking discovery, there have been instances in which the designated representative seemed inadequately prepared to respond regarding the matters listed for examination.

The goal of this amendment is to respond to these reported problems and to improve practice under the rule. Due to the broad range of cases in which such depositions occur, including specifics about their conduct in a rule that applies to all cases is not workable; case-by-case supervision is more appropriate. For example, in some cases a Rule 30(b)(6) deposition may be the first step in discovery, but often such depositions occur later in the discovery process. Accordingly, an early order providing specifics about the matters for examination or the selection of witnesses ordinarily would not be suitable under Rule 16(c).

Instead, what may prove valuable are provisions about the process and perhaps the expected timing for such depositions. The range of possible process issues is great. A provision calling for a minimum notice period may be valuable for an organization that must locate and prepare a witness to address

the listed matters for examination. Another measure that may facilitate preparation of the witness is for the party seeking discovery to provide copies of some of the documents on which it wants to base its examination. It may be useful for the organization to be directed to identify in advance of the actual deposition the person or persons it will designate to testify on its behalf and the topics they will address.

Focusing particularly on the problems that have sometimes arisen in regard to these depositions, it may be useful to adopt a process for possible refinement of matters in the notice, and for resolving concerns that some witnesses may not be fully prepared to deal with some topics. The court may be able to fashion an appropriate process for resolving the specifics that arise in a the case before it. This amendment provides a method for doing that.

One method that may be valuable to provide by order for resolution of specific issues regarding Rule 30(b)(6) depositions by means short of a formal motion for a protective order or motion to compel. Orders under Rule 16(b)(3)(B)(v) that the parties request a conference with the court before filing a discovery motion might be a model for such a provision. But resort to the court should not occur unless and until the parties have fully discussed the issues involved and tried to resolve them without involving the court. See Rule 37(a)(1) (certification that the moving party attempted to resolve the discovery dispute without court action).

Reporter's comments

This approach would be less aggressive than others that have been discussed. It could be combined with some sort of reminder in Rule 26(f) (suggested below) that the parties could consider whether to propose anything about 30(b)(6) depositions in their report to the court, and with a reference in Rule 36(b)(6) itself that calls attention to the possibility.

Nonetheless, singling out Rule 30(b)(6) in the Rule 16 process may over-emphasize that importance of that rule. For decades Rule 34 has seemed the main target of objections. Though one could say that the Rule 16(b)(3)(B) references to E-Discovery issues, privilege waiver problems, and preservation concerns all focus mainly on Rule 34 matters, still that rule is not singled out in Rule 16.

The draft Committee Note above is a first effort to suggest appropriate things that might be included in such an order. No doubt it can be improved by suitable additions. It may also be improved by deletions. One idea that did not seem to fit easily into the Note is an emphasis on proportionality. That is important for all discovery, of course, but may be of particular

importance regarding these depositions.

Rule 16(b)(3) alternative

As noted above, it seems worthwhile to look at a change to Rule 16(b)(3) instead of Rule 16(c), understanding that the initial inclination was in favor of the less "mandatory" approach of Rule 16(c):

Rule 16. Pretrial Conferences; Scheduling; Management

* * * * *

(b) SCHEDULING

* * * * *

(3) *Contents of the Order.*

* * * * *

(B) *Permitted contents.* The scheduling order may:

* * * * *

(vi) address the process or timing for [contemplated] depositions under Rule 30(b)(6);

(vii) set dates for pretrial conferences and for trial; and

(viii) include other appropriate matters.

Reporter's comments

This alternative is included only for discussion purposes. At least for those cases in which there is an early 30(b)(6) deposition, this placement may be more realistic. Consider, for example, an employment discrimination case. If the 30(b)(6) deposition is a very early piece of discovery for the plaintiff, it may be that no additional orders beyond the Rule 16(b) scheduling order will occur before that deposition happens. The placement within Rule 16(b)(3)(B) immediately follows the invitation to direct the parties to request a conference with the court before filing a discovery motion.

Probably a Committee Note very like the one presented above for a Rule 16(c) amendment could be fashioned for this amendment.

For the rest of this memorandum, it will be assumed for

cross-reference purposes that the Rule 16(c) route is the one the Subcommittee wants to follow. If it is not, the references to 16(c) could be changed to 16(b).

Rule 26(f) reminder

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY

* * * * *

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

* * * * *

(F) any orders the court should make under Rule 16(c)(2)(F)(ii) regarding the process or timing of [contemplated] depositions under Rule 30(b)(6); and

~~(G)~~ any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

DRAFT COMMITTEE NOTE

Rule 16(c) is amended to call attention to the possibility the court might include provisions for the process of handling Rule 30(b)(6) depositions in a pretrial order. This amendment to Rule 26(f) calls attention to that possibility.

Reporter's comments

Because this rule commands the parties to talk about all the things on the list, this may be too strong. On the other hand, unless the parties mention this possibility, it may be that the amendment to Rule 16(c) described above would not produce much change in practice. If that's so, it's not necessarily a bad thing; the rule change makes it clear that the parties have the tools, and the rules need not constantly prompt them to use the tools the rules provide.

Rule 30(b)(6) mention

Another idea that was discussed on Aug. 29 was finding a way to call attention in Rule 30(b)(6) to our ideas for judicial involvement. Although we may have all the provisions of all the

rules in mind all the time, many lawyers (and judges) may be more likely to look at the provision precisely applicable to their immediate problem. A reminder there could be useful. Perhaps the following would be useful:

Rule 30. Depositions by Oral Examination

* * * * *

(b) NOTICE OF THE DEPOSITION; OTHER FORMAL REQUIREMENTS

* * * * *

(6) *Notice or Subpoena Directed to an Organization.*
Subject to any order entered under Rule
16(c)(2)(F)(ii), in its notice or its subpoena, a
 party may name as a deponent * * * * *

DRAFT COMMITTEE NOTE

Rule 16(c) is amended to call attention to the possibility that provisions of a pretrial order might address the process for handling Rule 30(b)(6) depositions. This rule is amended to call the attention of the parties (and any nonparty subject to a subpoena) to such provisions if such an order has been entered.

Reporter's comments

There is hardly a need to say that the parties' conduct of the case must follow the orders the court entered in the case. But this could be a simple way of putting some reference to this possibility in Rule 30(b)(6) itself. It may be, however, that in any case where a party does not know that until it looks at the rule while preparing its notice to the organization it will be too late. On the other hand, that party may remember the next time, so awareness may spread gradually.

Rule 26(g) mention

There was also discussion about referring to 30(b)(6) depositions in Rule 26(g). That might be a way to emphasize the need to attend to proportionality considerations in regard to these potentially burdensome depositions. The idea would be to bring home to parties seeking discovery that their 30(b)(6) deposition notices are subject to the proportionality constraint. In addition, it could bring home to organizations that, by presenting witnesses for examination, they are certifying that the witnesses have been adequately prepared for the deposition. But at least with regard to the party seeking discovery, it seems that the proportionality rule already applies. With regard to the responding party, things may be less clear about a certification of adequate preparation.

A significant problem with saying that the organization's lawyer has certified full preparation is that Rule 26(g) is focused on the signature on a discovery document. When it was adopted in 1983, Rule 26(g) paralleled the changes that year to Rule 11, which also keyed on signatures. A signature is indeed a useful focus for the certification idea. Under Rule 11(b), the certification flows from the action of "presenting to the court a pleading, written motion, or other paper." Until 2000, discovery offered something of a parallel since discovery requests and responses were filed in court, and hence "presented to" the court. Since 2000, of course, they have not been filed.

Rule 26(g)(1) says that "every discovery request, response, or objection must be signed" by an attorney unless the party is unrepresented, and that the signature certifies that the discovery submission is legitimate. There seems no difficulty in applying Rule 26(g) to the party seeking discovery since the notice must be signed by the attorney seeking the deposition.

Since there is no rule-authorized procedure for objecting to a 30(b)(6) deposition notice, however, there is no particular occasion to submit a paper that warrants that a witness proffered under the rule has been adequately prepared. So the rule is arguably not a good fit for the obligation of the organization's lawyer.

Nonetheless, it does not appear that courts had difficulty finding authority to impose sanctions on responding parties who flout their duty to prepare a witness adequately to address the topics identified by the party seeking discovery. The problem we have heard about is not a lack of authority, but that courts are not willing enough to use that authority.

It may be that Rule 26(g) could be made more explicit about the consequences of objecting to a notice or presenting a witness, but that change does not readily fit into the rule:

(g) SIGNING DISCLOSURES AND DISCOVERY REQUESTS, RESPONSES, AND OBJECTIONS

(1) *Signature Required; Effect of Signature.*
Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response or objection, including those with respect to a deposition under Rule 30(b)(6), must be signed by at least one attorney of record in the attorney's own name -- or by the party personally, if unrepresented -- and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

* * * * *

This seems a rather clumsy addition since the existing language seems to include what's added. Moreover, since there is no formal objection process in the rules, it is not clear what is to be signed to trigger the certification. But such an amendment could support a Committee Note saying that the amendment emphasizes that the 26(g) certifications apply to 30(b)(6) depositions, in particular with regard to proportionality and witness preparation. But with regard to witness preparation, it could still be argued that there's really no paper of the sort addressed in the rule involved. Maybe "paper" includes email and texts, but that is not obvious. Even if that electronic communication is included, when the lawyer presents the witness on the day of the deposition as the one designated by the organization to provide its information on the designated topics, it is hard to think of that as comparable to signing a paper.

Another possible way of addressing 30(b)(6) depositions in Rule 26(g) might be to add a new 26(g)(4):

(4) Certifications regarding depositions under Rule 30(b)(6). Any notice of a deposition under Rule 30(b)(6) or response thereto, including designation of a witness, is subject to the certification requirements of Rule 26(g)(1) and the provisions of Rule 26(g)(3).

If adding something to Rule 26(g) goes forward, it might be accompanied by a Committee Note along the following lines:

DRAFT COMMITTEE NOTE

Rule 26(g) is amended to call attention to the obligations of the parties in handling Rule 30(b)(6) depositions. Rule 16(c) has been amended to call attention to the possibility of making provision for the process for arranging these depositions in pretrial orders, and Rule 26(f) has been amended to include them as a possible topic for the parties' report to the court about their discovery plan. Rule 30(b)(6) itself has been amended to call attention the possibility that the court has provided guidance on handling such depositions.

This amendment to Rule 26(g) removes any doubt about the obligations of the parties in their handling of Rule 30(b)(6) depositions. Particularly since the 2015 amendment to Rule 1, it should be clear that unjustified demands in Rule 30(b)(6) notices, and failures by responding parties to properly prepare their designated witnesses, can lead to action under Rule 26(g)(3).

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**Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules
Conference Call
Aug. 29, 2017**

On Aug. 29, 2017, the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Judge Joan Ericksen (Chair of the Subcommittee), Judge Craig Shaffer, John Barkett, Parker Folse, Virginia Seitz, Prof. Edward Cooper (Reporter of the Advisory Committee) and Prof. Richard Marcus (Reporter of the Subcommittee).

The call was introduced as an opportunity to reflect on the responses received to the Subcommittee's invitation for comment, and during the discussions of Rule 30(b)(6) organized by the Lawyers for Civil Justice and the American Association for Justice, both of which were attended by representatives of the Subcommittee.

An initial recognition was that the Subcommittee has benefitted greatly from the responsiveness of the bar on this subject. More than 100 written comments were received, and many of them reflected careful and thoughtful reflection on the topics before the Subcommittee.

This commentary demonstrates that the rule is an important discovery tool, and that the bandying concerns that led to adoption of the rule in 1970 continue to be genuine concerns. But at the same time, the commentary also demonstrates that many in the bar have found that the rule can be abused or disobeyed in ways that may prevent it from working or weaken its effectiveness. On occasion, too many topics may be designated or topics may be described in too general a manner to permit effective selection of a suitable witness and preparation for a 30(b)(6) deposition. The burdens of that preparation sometimes outweigh the importance of the information sought to the resolution of the case. On occasion, unprepared witnesses have been designated, frustrating the purpose of this form of discovery.

It was noted also that the 2015 amendments to the discovery rules may provide some relief from these problems. In particular, the emphasis on proportionality in amended Rule 26(b)(1) and on lawyer collaboration or cooperation in Rule 1 may foster an atmosphere of more responsible behavior in regard to 30(b)(6) depositions. But positive effects from this set of amendments will take time. So one consideration will be whether it is too early to try to devise further amendments focused on 30(b)(6) until the ongoing impact of the amendments is clearer.

Another starting point indicated by the commentary the Subcommittee has received is that various concerns about abuse of significant rule changes make it difficult to identify a rule-amendment idea that would not prompt vigorous opposition. Opposition to a sensible amendment is not a controlling consideration, but to be effective an amendment would probably

depend on support across the bar, and it is difficult to identify such an amendment at present.

Taking the judicial admissions issue as an example, one participant expressed the reaction that some comments seemed to imply that there was no possible ground for resisting the most vigorous application of the judicial admission concept to circumscribe corporations' clarification, supplementation, or modification of testimony during a 30(b)(6) deposition. Surely that sort of change to initial testimony is not always the result of an effort to subvert the 30(b)(6) process.

On the other hand, as persuasively pointed out in some bar group comments, it is not clear that there really is much of a "minority" position that needs correction, and it does seem that the rulings identified as supporting that minority view represent efforts to sanction organizations that did not comply with their duties to prepare their designated witnesses rather than rigid preclusion of any alternative evidence. As found by the research done by the Rules Committee Support Office, these are really sanctions decisions, not knee-jerk judicial admission decisions. Given this state of the case law under the current rule, changing the rule to forbid (or require) judicial admission treatment might lead to unintended consequences. Much as the issue may trouble many litigants, there seemed no clear way forward to address it through a rule amendment.

Another participant pointed to a bar group submission that seemed to steer a middle course rather than focus on what might be called partisan points. This submission sought to promote lawyer communication about the number and clarity of topics for examination, advance notice of the identity of the witnesses designated, and provision of some or most of the documents on which examination will focus in order to enable the witness to be fully prepared.

This bar group submission brought to mind a broader point -- perhaps the goal should be some method to engender a "forced dialogue" between counsel about 30(b)(6), with a fallback of reference to the judge should agreement between counsel prove impossible to achieve. Certainly something like that is permissible under the current rules. As some submissions have pointed out, nothing in Rule 26(f) or Rule 16 precludes discussion of 30(b)(6) depositions among counsel or attention to those depositions in the Rule 16 process before the court. "At the end of the day, the problems can be solved by the court under the current rules."

Commentary shows, however, that the problems are not always solved under the current rules. Perhaps there is a way to add something to Rule 26(f) or 16 that will prompt more thoughtful treatment of these issues and provide a basis for a Committee Note

enumerating best practices like advance communication about the definition of the topics and advance exchange of pertinent documents. Perhaps that would be premature at the time when the current rules require the initial 26(f) conference, but it might be good to require or prompt something like that conference before the 30(b)(6) notice goes out. In the same vein, some method for identifying objections in advance would be better than objections during the deposition itself.

A reaction was that in some courts the possibility of 30(b)(6) depositions does come up in the 26(f)/16 process. At least where there is a possibility of more than one such deposition, the court may ask the parties to develop a protocol to handle issues like the ones we have heard about in the commentary. Maybe amending Rule 16 to further that sort of activity would be helpful.

That prompted the suggestion that the best way to do so would be in Rule 16(c). Making a change to that rule would enable the Note to enumerate best practices that could be furthered by judicial oversight. More aggressive treatment -- such as a mandatory scheduling matter in Rule 16(b), for example -- could be too aggressive.

One reaction was that the vociferousness of the "horror stories" on both sides of the bar proves that there is an abundance of bad experiences on both sides. That suggests that a goal should be to figure out how to make Rule 1 and Rule 26(g) work, in part by alerting courts to the dangers of abuse of 30(b)(6) depositions by either side. That would mean that lawyers would know that courts are watching what they do, and accordingly that they will be less likely to push the limits.

Caution was offered -- even this change to Rule 16(c) could provoke a strong reaction. It would be important for a Committee Note to be very carefully worded.

The response was that there should be some method to deal constructively with both the problem of inadequate preparation of designated witnesses and the problem of overly numerous and overbroad topics. An analogy looking back nearly 50 years is the 1970 amendment to Rule 34, which removed the former requirement that there be a motion to compel production of documents. As it happened, that amendment came exactly at the time when photocopiers meant that Rule 34 requests reached a much larger amount of material. Needless to say, E-Discovery has presented volumes of material that far outstrip the 1970s concerns with photocopies. But the basic problem is that in some cases some lawyers seem to run amok. The goal should be to include in the Note needed guidance regarding what lawyers should seek and what judges should do (if needed).

Another caution was offered -- often it seems that the

Committee Notes are not actually read by many lawyers or judges. One example might be the Committee Note to the 2000 amendment to Rule 26(b)(1). A realistic evaluation of the actual effect of that change to the rule's scope of discovery was that, despite a Committee Note explaining that it was meant to curtail over-discovery, the rule change was ignored.

Another idea was offered -- perhaps the wisest course would be to make a minor change that could serve as a vehicle for a carefully worded Committee Note. It would also be desirable, if possible, to put something right where those using Rule 30(b)(6) must look to determine what it requires. There have been many amendments to Rule 26, so finding provisions directed to 30(b)(6) in that rule might be a challenge (and not get done). Could something be inserted into Rule 30(b)(6) regarding the application of Rule 1 and the proportionality limits of Rule 26(b)(1)?

Considering the possibility of amending Rule 16 or Rule 26(f) raised the question whether adding an explicit reference to 30(b)(6) would be redundant because the rules already authorize, perhaps invite, attention to it when considering all other discovery matters. That drew some examples of additions to highlight matters of concern -- the 2006 addition to those rules of references to discovery of electronically stored information and privilege waiver, and the 2015 addition of preservation to the list of concerns highlighted by those rules. So highlighting matters that present particular problems can be sensible even though not technically necessary to make the court's authority to deal with them clear.

But this approach might lead to a "horrid muddle." Already the use of 30(b)(6) is surely subject to the proportionality requirements of Rule 26(b)(1). In 2000, a redundant cross-reference to Rule 26(b)(2) (as it was then) was inserted into Rule 26(b)(1) to emphasize its importance. Inserting 30(b)(6) into Rule 16(c)(2) could be particularly clumsy. The logical place would be in Rule 16(c)(2)(F), which seems mainly about limiting the substance of discovery. But the current discussion of the wisdom of limiting any rule to the "process" to be employed in projected 30(b)(6) depositions and avoiding addressing the "content" of the depositions at an early point in the case would be problematical. Perhaps adding something to Rule 16(b)(3)(B) would be more appropriate.

It might be undesirable in many cases to focus on the court's order (which could readily become too detailed) but focus instead on the lawyers' interaction with each other. That might justify some reference in Rule 26(f). Although it may be true in many cases that the 26(f) conference occurs at a time when many specifics about a possible 30(b)(6) deposition are uncertain, the NELEA submissions emphasize that in many employment cases that deposition is the first (and sometimes only) piece of discovery.

At least in those cases, it seems quite appropriate to include attention to 30(b)(6) in the discussion of other discovery issues.

At the same time, it would not be desirable to insist that before any 30(b)(6) deposition is noticed there must be a new 26(f) conference. Something like the objection procedure might be a more satisfactory way to achieve that result. Then the lawyers would have to meet and confer before making a motion. That might come with a timetable -- a minimum of 28 days' notice of the deposition, and a requirement that objections be made within 14 days. That would be better than a rule inviting the court to enter an order at the outset prescribing what the parameters of the 30(b)(6) deposition must be.

A reaction to these thoughts was that as things now stand the kinds of issues we are discussing usually get worked out. That drew a reaction: "What is the price paid in terms of moving the case forward?" The answer was that "There is time being burned up." But what's the solution? A further reaction was that one reason there are so few motions for protective orders is that lawyers know judges will tell them to work these things out.

An overall reaction was offered: "I had high hopes for developing clear lines. But having seen the comments, I am concerned that trying to devise those might be more likely to heighten contentiousness." Another participant agreed. There is a substantial fund of bad experiences underlying the complaints of both sides -- unprepared witnesses and overly long topic lists. The key is that the parties realize that the judge will have her eyes on their behavior through this process.

Attention shifted to Rule 26(g). The view was offered that this rule seems likely to be a useful rule because the court can act on its own. There is no need for a motion; "If there is a 30(b)(6) problem, I could use this." Another participant agreed that Rule 26(g) could potentially be a source of useful authority. Perhaps tweaking 26(g) with a reference to 30(b)(6) would be a good idea.

One value of considering a change to Rule 26(g)(1)(B), it was suggested, is that it does not seem to encompass a 30(b)(6) deposition. That drew the reaction that lawyers are very sensitive about expanding sanctioning authority. But a new 26(g)(1)(C) might be added to highlight 30(b)(6). Adding something like that would not seem necessary, however, it was suggested, because Rule 26(b)(2)(C) already authorizes the court to act without a motion. Moreover, it seems from comments from the bar that the greater problem is alleged inattention from some judges rather than the lack of judicial authority to act. "It is hard to get the judge to do something the judge is not inclined to do." True, the 1983 addition of Rule 16(b)'s requirement of a scheduling order did seek to require judges to do something they had not always been doing,

but that is unusual.

A question arose: Is Rule 26(g)(1)(B) even applicable to a notice of a Rule 30(b)(6) deposition? Rule 26(g)(1)(B) speaks of a "discovery request." Does that include a 30(b)(6) notice? One response was that everyone agrees that a party that receives such a notice may move for a protective order. And Rule 26(c) says that a protective-order motion may be filed only by a party or person "from whom discovery is sought." Presumably the way discovery is sought is a "discovery request." Rule 37(d)(1)(A)(i) permits a motion for sanctions after a party fails to appear for a deposition, which has been held to include failure to produce a properly prepared witness for a 30(b)(6) deposition. Rule 37(a)(3)(B)(i) permits a motion to compel when a deponent "fails to answer a question asked under Rule 30." Though the wording is slightly different, it seemed that a 30(b)(6) notice is sufficiently a "discovery request" to come within Rule 26(g)(1)(B). This conclusion caused one participant to think that we should not give serious attention to an amendment to this rule.

An attempt to summarize the discussion during the conference call suggested that there seemed to be a few basic objectives. One was to get the parties to talk about the issues attending a 30(b)(6) deposition before going to the judge to get a ruling about it. It might be that some objection process like the one in Rules 33 and 34 would do that job. But there are serious concerns about the potential for abuse of the objection process.

A reaction was that it may be premature now to be attempting such a change. It's been less than two years since the 2015 amendments went into effect. Those changes to Rule 1 and Rule 26(b)(1) could go a long way toward addressing many of the issues we have been discussing. As with other significant rule changes, these changes have not immediately been embraced. Indeed, after they went into effect some courts still used the "reasonably lead to the discovery of admissible evidence" phrase that was removed by the amendments to describe the scope of discovery. But other decisions have correctly demonstrated that the rule changes do matter, and that process of adjustment is ongoing.

That led to the question "What's the most promising way to deal with these issues now in the rules?"

A response was that the thrust of change should be to raise consciousness about the valid issues that both sides have and also raise consciousness that judges are available to respond to those concerns. Whether that effort shows up in Rule 16, Rule 26(g), or Rule 30(b)(6) itself is not so significant.

Another participant agreed with this general approach, and stressed that it is likely important to highlight 30(b)(6) somewhere. Perhaps that should be in the Rule 16(c) "laundry list"

of topics. A possibility would be an addition to Rule 16(c)(2)(F). Another alternative could be in Rule 16(b)(3). That prompted the reaction that the beginning of (c)(2)(F) seems to focus on limiting 30(b)(6) depositions ("controlling and scheduling discovery"), which may not be the message we want to send.

Another participant suggested that the first focus should be on Rule 16(b) and (c), a fallback from that on Rule 26(f), and a fallback from that on Rule 26(g).

Another participant expressed a "pretty strong preference against" adding to Rule 16(b), and therefore in favor of Rule 16(c). Others agreed that Rule 16(c) seemed the safer place for such a provision.

A final idea was that any such addition to Rule 16 or Rule 26(f) might say something like "provisions/discussion regarding the timing and process for Rule 30(b)(6) depositions." That rule language could be a basis for a Note saying that ordinarily judicial action very early in the case ought not delve into such content details as the number of topics, the specificity of topics, the number of identity of designees, etc., but that early delineation of a process for dealing with these matters later in the case would be useful. An example of that sort of thing might be Rule 16(b)(3)(v), regarding including in the scheduling order a direction to the parties that they seek a conference with the court before filing a discovery motion.

For present purposes, Prof. Marcus was to attempt to draft a variety of alternatives for consideration during the next conference call. Tentatively, Sept. 19 at 11:30 a.m. Central time was selected as the date for the next conference call, subject to checking availability of Subcommittee members.

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SUMMARY OF 2017 30(b)(6) COMMENTS

On May 1, 2017, the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules invited comments on possible changes to that rule. This summary of those comments identifies comments by the name of the commenter and the designation assigned to the comment when it was posted in the Archived Rules Suggestions listing maintained by the Rules Committee Support Office. This summary is limited to comments submitted after May 1. Important submissions were received before that date, including no. 16-CV-K, submitted by the Lawyers for Civil Justice on Dec. 21, 2016, no. 17-CV-I, submitted by the National Employment Lawyers Association on March 20, 2017, and no. 17-CV-J, submitted by the American College of Trial Lawyers on March 28, 2017 (and incorporated by reference in its submission in July (17-CV-DDD)).

For simplicity's sake, the identification in this summary will be limited to the letters assigned to the comment. All those designations were preceded by 17-CV-, and it seemed unnecessary to repeat that each time.

The comments are presented in a topical manner, addressing the following topics:

- Overall
- Inclusion in Rules 26(f) and 16
- Judicial admissions
- Supplementation
- Forbidding contention questions
- Adding a provision for objections
- Addressing the application of limits in the rules on number of depositions and length of depositions
- Other matters

Overall

Nancy Reynolds (L): I have defended numerous 30(b)(6) depositions. These depositions should carry the status of any other deposition except for the designation in advance of the areas for inquiry and the duty of the deponent to prepare to answer questions about the designated area.

Timothy Patenode (M): Rule 30(b)(6) and its local state equivalent has been a pet peeve of mine for years. I saw a news report on the committee's work and thought I would comment. The origin of the rule was to provide an antidote to "bandying," but the actual practice has moved far beyond that. No advocate awaits bandying to take a 30(b)(6) deposition. I have received notices at the outset of oral discovery that list, as topics, almost every element and salient factual point in the case. "The rule is effectively used to force the corporation to marshall its evidence on those topics." I laud the proposals to make clear that testimony does not constitute a judicial admission and to foreclose contention questions and allow supplementation.

Craig Drummond (R): I oppose the proposed changes. They appear to be designed to protect corporate defendants, all to the detriment of the individual litigant. An individual is bound by what he says in a deposition. Through the great legal creation of the 30(b)(6) deposition, so is a corporation.

Jonathan Harling (S): These amendments are ill-advised and will ultimately hinder the judicial system. Trials are searches for the truth and these rules will allow litigants to obfuscate the truth.

Christian Gabroy (T): "30(b)(6) should be allowed to be binding testimony, to narrow the issues, and help streamline the process as allowed by FRCP 1. Please do not make it more difficult for Plaintiffs to gain such important testimony."

Lawyers for Civil Justice (U): The rule has improved the process for both sides, but must be revised to make sure that it continues to work for both sides. Although LCJ's corporate members are often defendants, they are plaintiffs as well. They do not only respond to discovery requests, they also seek discovery, including 30(b)(6) notices. Unfortunately, practice under the rule has not kept up with its promise to be advantageous to both sides. Because there is no consideration of these depositions in the Rule 26(f) process, the rule has become a catch-all for the kinds of disproportional demands, sudden deadlines, and "gotcha" games that have largely been removed from the other discovery rules. Too often the responding party is confronted with a Hobson's choice of attempting to comply with overbroad topics or filing a motion for a protective order, which could result in an even worse outcome including sanctions.

Jeff Scarborough (V): I strongly oppose such changes as they only make it even more difficult for Plaintiffs to obtain justice.

David Stradley (X): The proposed changes slant the discovery process in favor of corporate defendants. They should be rejected. The rule provides a powerful tool for an individual who is litigating against a corporation, especially where the litigation focuses on the corporation's conduct. The corporation frequently possesses most or all of the salient information needed to prove the claim. The rule was written to prevent abusive discovery avoidance by corporate parties. Amanda Mingo (Y) submitted identical comments.

McGinn, Carpenter, Montoya & Love (AA): Our firm uses Rule 30(b)(6) and our state's analogue as efficient tools to gather information from organizations on behalf of injured people. We oppose most or all of the proposed changes, and urge that the Committee keep in mind that without this rule an organizational party has an unfair advantage in litigation by virtue of the fact that it consists of multiple individuals. If a corporation is to be afforded the privileges of personhood, it should also be subject to the same responsibilities and rules that apply to individuals. When the corporation's lawyers depose an individual plaintiff, they can ask any question they want. But when the tables are turned, the individual plaintiff would be forced to sift through a maze of individuals within the entity to try to connect the dots to learn what the entity "knows," what the entity "believes" happened in the case, what the entity will "say" at trial through the agents and employees it selects to testify. This rule is the only tool that empowers a plaintiff to treat a legal entity just as it is treated in every other aspect of the law: as a person. But many of the changes under consideration would undermine the purposes of the rule, which include preventing bandying. They would severely prejudice individual and corporate plaintiffs alike, adding to the cost of litigation and making discovery a game of "blindman's buff." The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), and Ken Graham (NN).

Christopher Beckstrom (BB): The proposed changes would be devastating to plaintiffs who already face disadvantages when facing down corporations and businesses who are negligent and cause injury. This rule provides an important mechanism during discovery to obtain testimony from a business entity that facilitates the entire litigation process and helps hold wrongdoers accountable. Please do not take the teeth out of this important rule.

James Ream (CC): The rule as it currently exists is only effective when the plaintiff attorney is completely devoted to getting the information, has prepared for hours, and has waded through decoy witnesses in order to find someone at the company who is willing to take responsibility as a spokesperson for the company. I have never found it easy to have a corporate representative appear and give testimony for the company. Anything that makes it more difficult simply denies justice to more people trying to get justice.

Bryant Crooks (DD): The rule is an invaluable part of the rules of civil procedure. The requesting party has the burden to draft the notice outlining the areas of testimony, and the responding party has the burden to designate persons to answer about those topics. The responding party's burden is what gives the rule its force and effect, which greatly reduces the number of depositions that otherwise would have to be taken. It also eliminates the "I don't know" response that would be otherwise run rampant were there no duty for the company to prepare its designated representatives to answer. I urge the Committee not to make any changes in this salutary rule. Any issues that arise are properly handled by the district judge. The courts have handled those disputes well since the rule went into effect.

Ryan Skiver (EE): I oppose most, if not all, of the suggested changes. Corporations and other entities are treated as "people," and they should have to respond to discovery just as other people do. I have found 30(b)(6) to be an efficient tool to gather information from corporations on behalf of injured people. It overcomes what would otherwise be an unfair advantage for the corporation, and enables the plaintiff to treat a corporation just it is treated in every other aspect of the law - as a person. Making these changes would severely prejudice individual and corporate plaintiffs alike, increase the cost of litigation, and make discovery drastically less effective, producing a "game of blindman's buff."

Bernard Solnik (HH): Any change to the rule that would weaken the ability of parties to obtain information from a corporate defendant and to rely on that information would be unfair to the parties and a disservice to our system of justice. Our system prevents corporations from ducking the truth about their actions and ducking their duties not to endanger or harm the rest of us. Corporations want the right to be a "person" and thus should have the responsibilities to answer questions the same way persons must.

Frederick Goldsmith (II): My firm represents both plaintiffs and defendants. I am concerned that each of the proposed changes to the rule can only be seen as an effort to improperly insulate corporate defendants and other large organizations from the consequences of their conduct, to weaken

the rights of litigants to discover information, and to tilt the playing field in favor of large corporations. As presently written, the rule is a wonderful tool to force a corporation to facilitate discovery of pertinent facts and documents, and of the identity of pertinent witnesses. Each of these proposed changes would weaken the rule.

Patrick Yancey (JJ): I concur with the comments of Frederick Goldsmith (II). The combination of Rules 30(b)(5) and (6) allows a party to get documents produced on certain subject matters/topic areas and to have the corporation designate a person who is best qualified to discuss both those documents and the topic areas. The corporation knows who that person is, and that person will know the subject and meaning of the documents. That person will speak the truth under oath for the corporation as to what is meant by those documents. Why should a corporate party be allowed to Monday morning quarterback its responses to its answers.

Ken Graham (NN): This is a back door effort to assist corporations avoid providing information vital to opposing parties attempting to prove their case or prepare to meet the corporation's defenses. The rule already requires that we give the corporation advance notice of the topics for the deposition, and it can choose the person to testify. In our experience, the only problem results from corporations intentionally naming witnesses who have no knowledge and have not been prepared. These amendments would encourage that sort of behavior by allowing the corporation to "hide the ball" until it has used discovery to force the other side to completely reveal its deposition strategy. The current rule provides the most efficient way for a party to obtain information through discovery from a corporation.

Ford & Cook (OO and PP -- duplicate submissions): The rule is an efficient way to gather information from corporations on behalf of injured people. The original purpose of the rule still applies today -- to prevent the corporation from having an unfair advantage because it involves multiple individuals. If a corporation is afforded the privileges of personhood, it should also be bound by the rules that apply to persons. When the lawyers for a corporation depose an individual plaintiff, they can ask any question they want. Without this rule, plaintiff would be forced to sift through a maze of individuals within the entity to try to connect the dots and learn the totality of what the entity knows, believes, and what it will say at trial through the witnesses it calls to testify. Many of the suggested changes would undermine the real purpose of the rule. We will be stuck again with a game of "blindman's buff."

Department of Justice (RR): The Department has considerable experience with the rule, both as a plaintiff and as a defendant.

Based on its unique perspective, the Department believes that the rule serves a useful and important purpose, but that it could benefit from improvements with regard to judicial admissions and contention questions. But we do not think that requiring discussion of 30(b)(6) depositions during the 26(f) meeting is a good idea.

Jeremy Bordelon (TT): I handle cases for plaintiffs seeking disability benefits, either through ERISA or individual insurance policies. In these cases, 30(b)(6) depositions are often taken to gather information about the insurance companies' practices. This information is crucial for the courts' understanding of the issues raised in these cases. But each of the proposed changes to the rule would improperly insulate corporate defendants from the consequences of their conduct and weaken the rights of litigants to discovery and further tilt the playing field to favor large corporate interests and harm those who would try to justly discover information and documents from corporations.

Michael Romano (UU): I have represented both plaintiffs and defendants in complex and non-complex litigation. I have also served as president of the West Virginia Association for Justice and as a member of the West Virginia Senate. "Discovery is the essence of civil litigation and the only path to a just outcome. Civil litigation also is one of the tenets of democracy keeping in check forces that would subvert our institutions." These proposed changes would improperly insulate parties from the consequences of bad faith discovery conduct, weaken the rights of litigants to discover relevant information and tilt the playing field in favor of corporate litigants that will play "hide the ball." The current rule is the best discovery tool for obtaining full and complete discovery responses. David Sims (XXX), Damon Ellis (QQQQ), and Laura Davis (GGGGG) submitted essentially identical comments [including typo].

Michael Merrick (VV): I represent individual employees in litigation about employment issues. I think that a number of the proposed changes would introduce costly and time-consuming motion practice about matters that the parties have been resolving without court intervention for years. Some would also encourage gamesmanship. Each is solicitous to the interest of organizational litigants at the expense of both individual litigants and judicial economy. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA), Charles Lamberton (BBB), Thomas Padgett (CCC), Mary Kelly (CCCC), and Bernard Layne (IIII) submitted very similar or identical comments.

Corey Walker (XX): Corporations want and receive the same constitutional rights as people do. A corporation acts as a single being and the rules, as is proper, address the deposition of a corporation. There is no need to substantively change the rule.

J.P. Kemp (ZZ): I strongly object to any changes to the rule, particularly of the sort identified in the invitation for comment. I can provide real life examples of my concerns if the committee would like to hear them. I primarily handle employment discrimination cases, representing plaintiffs. This rule is a vital tool to getting meaningful discovery in these types of cases. The defendant controls nearly all the information and we have found that interrogatories and requests for production are almost a waste of time. You receive almost nothing but objections and non-answers to written discovery in our cases. Initial disclosure are also treated as either a joke or a method to dump huge quantities of largely useless documents in which there may be one or two proverbial needles in a haystack. "But the 30(b)(6) deposition, now there is a useful tool to obtain discovery!!! Doing anything to make it less effective or more cumbersome to use would be a travesty."

Frank Silvestri, American College of Trial Lawyers (DDD and J): Our Federal Civil Procedure Committee does not believe that any amendments to Rule 30(b)(6) are warranted at this time. Several suggested amendments seek to codify answers to issues that reasonable counsel, mindful of their duty to cooperate, ought to be able to resolve. Particularly in light of the framework provided by the 2015 amendments to the discovery rules, we see no reason to modify Rule 30(b)(6) at this time.

Nitin Sud (EEE): I am a solo employment attorney, primarily representing individuals in wrongful termination litigation. The proposed changes to this rule would drastically impede the ability of attorneys representing individuals against corporations.

John Paul Truskett (FFF): We represent hundreds of clients and, over the years, thousands of people. Do not change 30(b)(6). If you do it will substantially impact our clients horribly.

Heather Leonard (GGG): I handle employment litigation for employees and employers. In almost every case I have handled, there has been a 30(b)(6) deposition. It is not unusual for the rule to be the only vehicle to obtain testimony about a company's defenses and/or the reasons for the actions at issue in the case. I fear that the suggested changes would hinder and burden litigation. Overall, they would encourage gamesmanship from the larger firms that have the time and resources to apply litigation strategies to delay, bog down, and spread thin counsel representing individuals.

Kevin Koelbel (HHH): Rather than provide for efficient discovery, the proposed changes provide an arsenal to corporate defendants to obfuscate and delay. They will create more problems than exist under the current practice.

Jonathan Feigenbaum (JJJ): In its current form, the rule works. The proposed changes will force courts to become micromanagers of discovery, and will elevate procedure over substance even more than the current situations. These changes are one-sided and favor defendants. [Several specific comments seem not to be directed to topics included in the invitation to comment.]

Robert Landry III (KKK): I am a plaintiff side employment lawyer. Organizational depositions are one of the key avenues to access information in my cases, which involve asymmetrical information because the defendant employer has much more information.

Wright Lindsey Jennings (MMM): We encourage the Subcommittee to continue its efforts to explore possible changes to the rule.

Richard Seymour (NNN): These are defense bar proposals to tilt the discovery rules further in their favor. Some of the proposals may have some merit, but some would largely gut the rule. Based on extensive experience as a mediator and arbitrator, I understand the concerns of organizational defendants about the burdens and risks of these depositions. Based on almost 49 years of practice, I can say that the rule as currently written is invaluable as a means of keeping discovery costs down, and assuring that discovery is proportional to the needs of the case. My experience is that defense counsel ordinarily contact me well in advance of the deposition to discuss the topics, and in the process to apprise me of how the defendant makes and stores its records. Our discussions can lead to rephrasing the topics to reduce the burden on the defendants and increase their utility to me. Indeed, these discussions often help to shape the entire remaining conduct of the case. What makes this process work is that the rule is well-balanced now, and presents no advantage to be gained by bad behavior.

Josh Eden (QQQ): The proposed changes to the rule will only aid corporations attempting to hide the ball. Corporations cannot be permitted to weasel out of being bound by the testimony of their employees. "DO NOT CHANGE IT!!!"

Dennis Murphy (RRR): Please do not change the rule. It helps reduce discovery costs considerably. Often there is no need for any additional discovery. Without the rule, individual litigants would have to take several other depositions to complete the process.

Jeffrey Pitman (SSS): "The current rule is fair for plaintiff and defendant. It strikes a fair balance. The proposed change would create imbalance and is unfair. It is a solution in search of a problem. It is not broke and doesn't

need to be 'fixed.' Just let it be."

Michael Quiat (TTT): "I am writing to express my dismay about the proposed changes to Rule 30(b)(6). It seems obvious that these changes would serve the interests of deep pocket corporate/institutional parties, to the great prejudice of the individual." The changes will provide new opportunities for corporate obfuscation.

Jeffrey Jones (UUU): I believe any change to 30(b)(6) that would weaken the ability of parties to obtain information from a corporate defendant would be unfair to the parties and a disservice to justice. Corporations want the right to be a "person" but also to avoid responsibility for their actions. Any change to the rule would allow them to slip, dodge and otherwise attempt to evade their responsibilities.

Robert Keehn (VVV): I have a lot of experience representing both plaintiffs and defendants. Though I have a relatively balanced experience, I see each of the proposed changes as an effort to improperly insulate corporate defendants from the consequences of their conduct.

Patrick Mause (WWW): Based on my experience defending (at a defense firm) and taking 30(b)(6) depositions as a plaintiff lawyer now, I believe the current rule works well. I worry that the proposed changes will undermine the rule's purpose and make it incredibly more difficult, if not impossible, for parties to obtain the facts they need. The changes would essentially make the rule toothless.

David Romano (YYY): I am opposed to any change to the rule that would limit its effectiveness. It is perhaps the only way to require an organization to provide sworn testimony about a subject about which another party has no idea who may have the needed information. I recognize that, too often, the notice is imprecise and too broad while the responding party plays hide and seek. But throwing out the baby with the wash is not the answer.

Dave Maxfield (ZZZ): I oppose the proposed changes because they will put corporate depositions on an unequal footing with individual fact depositions. These depositions can avoid significant expense for the parties and burden for the court in identifying persons with knowledge. Because the corporation has been granted the status of a "person," fairness dictates that this person be required to answer questions under oath.

Laurel Halbany (AAAA): The proposals to declare the testimony nonbinding or forbid contention questions would have the sole purpose of gutting the use of this rule.

George Wright Weeth (BBBB): The proposed changes are a

solution in search of a problem. The rule is functioning well. These suggestions by business interests would gut the rule and make it even more difficult to obtain a verdict against corporate defendants.

Product Liability Advisory Council (DDDD): Rule 30(b)(6) is unique in that it is directed only to organizations. As a result, its treatment of defendants and plaintiffs in product liability litigation is not equal. A corporate defendant must prepare to respond to all questions a plaintiff's attorney may ask, and if the designated representative is unable to answer, the corporation and its counsel are subject to sanctions. Plaintiffs do not face that risk because they will only be asked to respond to information within their personal knowledge. "This disparate treatment fails to provide equal protection under the law." In our experience, notices are often too general to provide necessary guidance, or so narrow and detailed that it is virtually impossible to comply with the notice.

Bowman and Brooke (EEEE): Our firm primarily defends product liability cases. In general, we support the Lawyers for Civil Justice submissions supporting adding 30(b)(6) to the 26(f) list of topics, and allowing supplementation of testimony. We also think that there should be a 30-day notice requirement.

Defense Research Institute (GGGG): 30(b)(6) has become a battleground rule that imposes disproportionate costs and burdens without providing commensurate benefits to the parties. Making changes is in keeping with the 2015 amendments to the discovery rules encouraging cooperation, proportionality, and case management. DRI supports the positions taken by Lawyers for Civil Justice. We urge that work continue on all the topics identified in the Subcommittee's invitation for comment, and also on a presumptive limit on the number of topics as well as a rule prohibiting a 30(b)(6) deposition on topics that have been the subject of a deposition for which a transcript is available.

National Employment Lawyers Ass'n Georgia (HHHH): Our members represent employees with claims against employers. The employers generally have custody of all or most of the potential evidence, so we often use 30(b)(6) depositions early in discovery as an efficient means of identifying the categories of documents and other evidence available for discovery. We fear that several of the amendment ideas identified in the invitation for comment would introduce costly and time-consuming motion practice to resolve issues that the parties now resolve without the need for court involvement. Overall, these proposals are too solicitous to the interests of organizational litigants. Adopting such changes would be a troubling departure for the Advisory Committee, which has worked to issue carefully-calibrated rule changes that do not favor one set of litigants over another. Columbia Legal Services (NNNN) submitted very similar comments.

Matt Davis (JJJJ): Individual plaintiffs already have a huge hill to climb in order to utilize their constitutional rights under the 7th Amendment to redress wrongdoing by corporate defendants. These changes are an attempt to allow corporations to hide key information that would otherwise come to light through discovery.

Ford Motor Co. (KKKK): Ford has found that 30(b)(6) depositions employed in a focused, reasonable and proportional manner are an efficient and effective discovery tool. But too often these depositions are not sought to uncover facts but used to pursue large numbers of vague or irrelevant topics. Sometimes litigants use them to take advantage of the spontaneous nature of depositions to surprise the deponent and capture unprepared, awkward, or confused statements on the record. Indeed, some of the comments submitted to the Subcommittee tout the use of surprise tactics in these depositions. "A corporate representative cannot possibly speak for the company on the basis of the information known or reasonably available if the noticing party's true intent is to question the witness about topics not identified in the notice." To provide the Subcommittee with details, Ford collected a sample of 52 representative notices it has received. These notices averaged 31 topics each, within one listing 129 topics. In 57% of the sample notices, more than 20 topics were listed, and 24% had more than 40. In 8% of the cases in the sample, plaintiffs served multiple 30(b)(6) notices. Often the topics are broad and broadly worded, and examples are provided in the submission.

Timothy Bailey (LLLL): 30(b)(6) depositions are often essential. Many of these amendment ideas would render the rule almost useless.

Jennifer Danish (PPPP): Each of these changes can only be seen as an effort to improperly insulate corporate defendants from the consequences of their conduct and weaken the rights of individuals to discover information.

State Bar of California Litigation Section Federal Courts Committee (TTTT): The problems prompting review of 30(b)(6) are real, and arise frequently. We do not believe they are unique to plaintiffs or defendants. We recommend that the Subcommittee move forward on durational and numerical limitations for these depositions, a procedure for objections, and the expectations of the witness and permitting supplementation.

National Employment Lawyers Ass'n -- Illinois (UUUU): One purpose of 30(b)(6) is to put individuals and corporations on a similar footing. We would add the following just before the last sentence of the current rule:

In all other respects, depositions under this sub-section

should be treated exactly the same as depositions of individuals taken under this Rule.

Many of the amendment ideas, however, are inconsistent with this principle. Treating corporations differently would be unwise, and "a probable violation of due process and equal protection."

Gray, Ritter & Graham, P.C. (VVVV): The rule functions as intended now, and there are very few disputes that cannot be resolved without court intervention. As plaintiff lawyers, we often agree to amend the notice if provided good reasons. Further, the deposition can often be done in stages, where one witness has been produced, and the parties may revisit how many are really needed. The rule already has sufficient protections for the responding entity.

Christine Webster (WWWW) [note -- mistakenly designated WWW, but there is already another WWW]: I make substantial use of 30(b)(6) in virtually every case I litigate. I believe the rule is working well as it is, and that no changes are needed.

Seyfarth Shaw (YYYY): We have experienced, firsthand, the significant burdens imposed by current practice under 30(b)(6). We support serious consideration of changes to the rule that would move this form of discovery closer to the cooperation and proportionality objectives of the 2015 amendments. Besides the ideas identified by the Subcommittee, we submit that there should be presumptive limits on the number of topics, and that there should be a minimum notice requirement and that the rules should include an objection process.

Potter Bolanos (ZZZZ): We find that 30(b)(6) is an essential tool in our employment litigation practice. In our experience, it is working well.

Leto Copeley (BBBBB): The rule provides a powerful tool for an individual who is litigating against a corporation. It was written to stop abusive discovery behavior by corporations. It has functioned to provide quicker discovery and cut down on discovery disputes. These changes would improperly strengthen the position of corporate litigants.

Clay Guise (HHHHH): The fact that many depositions occur without court involvement does not mean that the rules are "good enough." The lack of clarity and guidance in the rules favors the noticing party, which can serve a notice nearly any time before discovery closes and demand a designee regarding an unlimited number of topics. The problems worsen when there is not enough time to present a motion to the court. The corporation has no clear recourse under the rules when confronted with such a notice and faces a disproportionate burden.

Lord + Heinlein (IIIII): In our personal injury practice representing plaintiffs, our no. 1 challenge is to get information from corporations. Often, we are faced with a game of "hide the ball." 30(b)(6), as written and enforced, creates an efficient solution to this problem. This effectiveness serves judicial efficiency as well. We are very concerned that some of the proposals will reduce the organization's duty to prepare and could effectively gut the rule's effectiveness. In particular, we note that it is often desirable to have more than one 30(b)(6) deposition on different issues. The rule should not impede this efficient procedure.

John Beisner, U.S. Chamber Institute for Legal Reform (JJJJJ): The rule was originally adopted to deal with the problem of "bandying." But it has evolved into a one-sided weapon that can be abused by the interrogating party to the prejudice of the corporation. Reforms are in order. It is time to level the playing field for corporate and individual parties alike. The three changes that should go forward are adding this topic to the 26(f) conference, establishing a clear procedure for objections, and clarifying that statements made during these depositions are not judicial admissions.

Sherry Rozell (KKKKK): 30(b)(6) depositions present very different challenges for smaller local corporations and huge multi-national corporations. But several key amendments would help to create a smoother and more collaborative experience for all sorts of litigants. Some of these matters are on the Subcommittee's list, and others are not.

Spencer Pahlke (LLLLL): We represent injured plaintiffs and regularly use 30(b)(6). It plays an essential role in our efforts to gather information from organizational litigants. The proposed changes would slow litigation, increase motion practice, and open the door to unnecessary gamesmanship.

Maglio Christopher & Toale (MMMMM): Our practice is nationwide, focusing on complex litigation. We regularly use 30(b)(6) and its state equivalents, both taking and defending depositions. We believe the proposed changes are misguided and will result in significantly increased litigation and costs. The changes do not address the real problem, which is the unprepared witness. We urge the Committee to forgo changing the rule. But if it does proceed with changing the rule it should focus on the problem of witness preparation.

Henry Kelston (NNNNN): I am a partner at Milberg L.L.P., where we represent victims of corporate and other large-scale wrongdoing. We find that 30(b)(6) depositions are often the most effective route to the heart of discovery, enabling us to draft more targeted document requests, interrogatories, and identify essential witnesses for additional depositions. A review of the

Subcommittee's reports to the full Committee, and of the submissions in response to the call for comments, shows that there is not a compelling need to amend the rule at this time. Instead, the clear consensus seems to be that, though disputes of various sorts about 30(b)(6) depositions are common, the vast majority are resolved without the need to involve the court. There is no evidence that disputes about these depositions have become more frequent or virulent in recent years, even though discovery in general has grown in complexity. Moreover, there is a serious risk that some of the amendments under discussion could actually work at cross-purposes with making discovery more efficient and less expensive.

Michael Slack (PPPPP): The experience at our firm has been that Rule 30(b)(6) is the most effective discovery tool available to promote efficient discovery and deter discovery abuse. It is effective because it enforces accountability by its own terms. As a result, we rarely have to seek court intervention with depositions under the rule. The same cannot be said about the rules related to disclosures, requests for production and interrogatories. We have taken and defended 30(b)(6) depositions, and know both sides of the rule very well. We implore the committee not to relax the duty to prepare or dilute the binding-effect features of the rule. We frequently receive supplemental disclosures and document production from a corporate defendant immediately after a 30(b)(6) deposition request has been made. As a consequence, we frequently request subject areas which allow us to explore the effort made by the organization to search for and produce responsive documents or to identify previously undisclosed persons who may possess knowledge. The rule has proven to be beneficial in making discovery more focused and efficient. In particular, it has been effective in allowing us efficiently to learn about (1) organizational hierarchy and areas of responsibility; (2) post-occurrence investigations by the organization; (3) the existence of safer alternative designs; and (4) the lack of support for defenses raised in the answer. We are convinced the rule should be left alone.

Baron & Budd (QQQQQ): Disputes concerning 30(b)(6) depositions are rare, and we believe that the rule does not need a major overhaul. In fact, the rule is one of the most useful tools in civil litigation. Unlike written discovery, which can be of limited use due to objections and qualified responses, 30(b)(6) uniquely provides an opportunity to obtain oral testimony from an organization. At the outset of litigation, in particular, organizations frequently object to providing documents or other information that would make it easy to ascertain the identities of individual witnesses from whom relevant information can be obtained. The rule puts the obligation on the entity to identify individuals who can address the relevant topics. As a result, Rule 30(b)(6) depositions provide an early and efficient opportunity to obtain discovery on core issues.

American Association for Justice (SSSSS): AAJ stresses the importance of 30(b)(6) as an invaluable tool for plaintiffs litigating against corporate defendants. Without the rule, injured plaintiffs would face the all-too-frequent practices of many corporate defendants and their counsel, including bandying, delaying, and sometimes denying the right to seek legitimate discovery. The rule has worked well over time, streamlining discovery and ensuring that organizational parties provide an educated, prepared witness. Changing the rule in many of the ways under consideration would raise risks of returning to the days of bad practices that the rule banished. It certainly seems that the tenor of the ideas under study favors the interests of corporate defendants and is one-sided. It is important to recognize that, as currently written, the rule is the most efficient means for the discovery of relevant facts within a corporation's control. The proposed changes appear to favor corporations and to invite a return to the practices that the rule sought to end. Often corporate defendants have most or all of the relevant information. This rule enables plaintiffs to identify key sources of information as well as information about corporate policies and practices. When this Committee last looked at the rule more than ten years ago, it concluded in 2006 that although there were complaints about unprepared witnesses and overbroad topic descriptions, a rule change would not be an effective tool in solving these problems. The issues raised this time are "eerily reminiscent" of the ones examined a decade ago. The fact that this rule has remained unchanged over several reviews is evidence of its effectiveness. AAJ would suggest that it not be changed, or that if it is changed the amendments be incremental rather than aggressive.

Public Justice (TTTTT): In our view, most of the change ideas are not balanced, and they would create unequal obligations under the rules by favoring large corporations over individual litigants. They would also create inefficiencies and prompt satellite litigation. Except for the last item on the Subcommittee's list -- duration and number of depositions -- we think that these proposals should not move forward.

Mark Cohen (UUUUU): Organizations' statements in depositions should not be treated differently from those made by individual parties. All deponents have the ability to change the testimony through an errata sheet. This is adequate to protect the organization, as it is adequate for the individual litigant.

Inclusion in Rules 26(f) and 16

Nancy Reynolds (L): Most corporate-representative deposition notices are overbroad and onerous. I have successfully moved for protective orders to limit the scope. Some notices are intended as fishing expeditions to locate new theories for amended complaints. Others are intended to elicit lack of knowledge or information responses when plaintiff counsel knows the information is not typically known are retained in an industry. Opposing counsel refuses to accept this response and spends the next 15 pages of transcript attempting to elicit a lack of knowledge response to read to a jury. Then opposing counsel seeks sanctions for the witness not being prepared and requests that the area of inquiry be deemed admitted. This is a common occurrence.

Timothy Patenode (M): This is one of the committee's most effective suggestions. I think the 30(b)(6) deposition should be permitted only if so ordered by the court or agreed to by the parties during the 26(f) conference. This may seem extreme, but before a party can impose on another the duty of marshalling evidence and educating witnesses there should be a demonstration that the burden is warranted in the circumstances of the case. The circumstances that might justify going forward go beyond demonstrated bandying, such as asymmetrical discovery. An individual suing a corporation might properly use the rule to cost-effectively discover the case. But counsel could most profitably address these issues as part of the discovery conference.

Steve Caley (N): I have written two articles about the rule for the National Law Journal (in 2000 and 2011). I am opposed to adding the topic to the Rule 26(f) conference. That may be too early in the process for attorneys to have adequately and intelligently considered their 30(b)(6) needs. Moreover, requiring the parties to discuss this topic will prompt lawyers to make "knee jerk" demands, for fear of waiving the right to do a 30(b)(6) deposition if not raised at the conference. That could often be wasteful, because a 30(b)(6) deposition is not needed, and needed information can be obtained in other ways.

Lawyers for Civil Justice (U): Rule 30(b)(6) deserves to be treated as an important part of the discovery plan. Adding it to the list of 26(f) topics would be consistent with the thrust of the 2015 amendments to the discovery rules. Putting it on the list for all cases is warranted. Language along the following lines could be added to Rule 16(b)(3)(B), 16(c)(2) and Rule 26(f):

Include any agreements the parties reach for conducting Rule 30(b)(6) depositions, including as to the number and identification of anticipated topics, the anticipated number

of witnesses for those topics, anticipated objections to the topics, and the timing for objections to such topics, the scope of the deposition(s), the date, duration, and location for the deposition, and supplementation.

Jeff Scarborough (V): Having to incorporate a discussion/plan for 30(b)(6) depositions in the Rule 26 conference and discovery plan at the beginning of the case is senseless as Plaintiff has not yet had a chance to engage in discovery.

Barry Green (W): In most cases, a number of 30(b)(6) topics will be known at the outset of the case. However, in every case, additional topics for 30(b)(6) depositions are disclosed through discovery responses. Accordingly, either the proposed change should not be enacted because it could cut off important discovery, or it should be enacted with the express ability to include additional 30(b)(6) topics without the time and expense of requesting permission from the court.

David Stradley (X): Promoting cooperation during discovery is a laudable goal, but adding a requirement that the discovery plan address 30(b)(6) testimony substantially disadvantages parties who litigate against corporations. Corporations know who has information, where documents are stored, and the ease or difficulty attendant to accessing the important information. The other side lacks much or all of this information. The discovery conference occurs before even initial disclosure has occurred, so imposing a requirement that it address 30(b)(6) would require litigants to commit to a plan regarding specific depositions before receiving even the limited information provided in initial disclosures. In any event, in my experience counsel on both sides engage in substantial communication prior to 30(b)(6) depositions under current practice. The corporation nearly always objects to one or more topics, and we frequently attempt to modify topics to make them mutually agreeable. But this discussion usually occurs after initial written discovery, including document production, has been completed. At that point, both sides can intelligently discuss the parameters of a 30(b)(6) deposition. Amanda Wingo (Y) submitted identical comments.

McGinn, Carpenter, Montoya & Love (AA): Adding a reference to 30(b)(6) to Rule 26(f) would be the only specific reference in 26(f) to any discovery mechanism. [Note: Rule 26(f)(2) says the parties must "make or arrange for the disclosures required by Rule 26(a)(1)."] Requiring a party, in the earliest stage of a case, to commit to which depositions are needed would serve no purpose other than to unfairly restrict the party's ability to obtain deposition testimony at the time when the need for that testimony becomes apparent. At that point in the case, the plaintiff would be able to provide only a very broad and general

description of the types of topics 30(b)(6) depositions would explore. Inevitably, any dispute about a specific deposition would still have to be resolved later when the parties are aware of the specific matters noticed. If any amendment is proposed, it should be a simple addition to Rule 26(f)(3)(B), as follows:

* * * the subjects on which discovery may be needed, when discovery should be completed, whether the parties anticipate the need for any deposition noticed pursuant to Rule 30(b)(6), and whether discovery should be conducted in phases or be limited to or focused on particular issues * *

As far as amending Rule 16 is concerned, note that the rule already requires a scheduling order to limit the time to complete discovery. Placing further restrictions on 30(b)(6) depositions, particularly if a supplementation provision is added to the rule, would completely defeat the purpose of the rule. The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), and Ken Graham (NN).

Frederick Goldsmith (II): Although at first blush this may seem a good proposal, on further reflection it seems more an effort to give the corporate defendant a head's up of its opponent's litigation plans than to genuinely avoid later discovery disputes.

Patrick Yancey (JJ): This is not needed. At the initial stages of litigation, plaintiff will probably not know whether or not a 30(b)(6) deposition will be needed. To require a disclosure of a possible future use of a discovery method is not warranted. That would only provide the possibility for the corporation to object and lead to needless additional litigation in the court.

Ford & Cook (OO and PP -- duplicate submissions): This would be the only reference in 26(f) to a specific discovery mechanism. The rule does not require parties to provide in a discovery plan setting forth what specific topics the parties will inquire about through interrogatories, requests for production, or other types of depositions. Requiring a party to commit to which depositions are needed at the earliest stage of a case would serve no purpose other than to unfairly restrict the party's ability to obtain deposition testimony at a time when the need for that testimony becomes apparent. Inevitably, any dispute about a specific deposition would still have to be resolved later in the case when the parties are aware of the specific matters being noticed. If the plaintiff is subject to this limitation, the corporation should also be required to limit

its topics of inquiry so as to level the playing field. Litigation often takes unexpected turns, and requiring one side to limit its topics very early in the litigation will simply cause laundry lists to be developed which create busy work for lawyers. Regarding an amendment to Rule 16, if the rule allows supplementation of 30(b)(6) testimony after the Rule 16 deadline for this kind of deposition is unfair.

Department of Justice (RR): We do not believe that requiring discussion of 30(b)(6) depositions during the 26(f) meeting or in the report to the court under Rule 16 is advisable. We believe that such an amendment is not only impractical, but that it also may even lead to unintended, unhelpful consequences. For one thing, it risks raising 30(b)(6) issues too early in the pretrial process. The discovery plan must be submitted at least 21 days before a scheduling conference. Under Rule 16(b)(2), the court ordinarily must issue the scheduling order within the earlier of 90 days after any defendant has been served or 60 days after any defendant has appeared. Adding this to the list of topics for the 26(f) conference would mean that the parties must discuss such things as the topics for a 30(b)(6) deposition at the earliest stages of the litigation, before the parties even know whether such a deposition will be necessary and before the parties have engaged in meaningful document discovery. That sort of requirement may result in unnecessary or inefficient 30(b)(6) depositions, which is contrary to the rationale for considering amending the rule. Even though this approach should provide the court with broad flexibility in managing discovery, it likely would come too early to be effective. As currently drafted, Rules 26(f) and 16 are sufficiently flexible to enable discussion of 30(b)(6) discovery when that would be useful.

Jeremy Bordelon (TT): Realistically, the element of surprise can be important in discovery. Adding this topic to the 26(f) meeting seems fair on its face, but it would in practice give corporate defendants unnecessary advance notice of plaintiff's litigation plans.

Michael Romano (UU): On the surface, this change appears harmless, perhaps even helpful. However, the effectiveness of 30(b)(6) is somewhat grounded in not being sure if it is part of an opponent's litigation plans. While not telegraphing one's discovery strategy may not seem important to those who do not regularly try cases, it does shape the eventual completeness of an opponent's discovery responses.

Michael Merrick (VV): This suggestion seems to assume (a) that disputes are arising regarding 30(b)(6) depositions that cannot be resolved without court intervention, and (b) that such disputes arise early enough in a case to be addressed effectively at the 26(f) conference. We submit that neither assumption is correct. To the contrary, including 30(b)(6) depositions as a

topic for discussion at the 26(f) conference would undermine much of what makes the rule useful and threaten to create disputes that otherwise would not exist. We represent individuals with claims against large entities, which generally have custody of all or most of the potential evidence at the outset of a case. So we tend to be at a considerable disadvantage at that point in identifying key documents and witnesses. We therefore often use 30(b)(6) depositions early in discovery as an efficient means of identifying the categories of documents and other evidence that may be available for discovery. Acquiring this information early in a case creates additional efficiencies and enables us to tailor further discovery narrowly. Inclusion of 30(b)(6) depositions in the initial case planning discussions would threaten these efficiencies and risk grinding the discovery process to a halt by creating the opportunity for defendant to create disputes about a host of items, such as when and where the deposition will take place, the topics that will be covered, the timeframes at issue and whether follow-up depositions can be obtained. Under existing practice, these types of issues have been resolved by the parties themselves without any need for court involvement. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA), Charles Lamberton (BBB), Thomas Padget (CCC), Mary Kelly (CCCC), and Terrell Marshall (EEEE) submitted very similar or identical comments.

J.P. Kemp (ZZ): It appears that this suggestion is aimed at making it more difficult to get 30(b)(6) depositions. The implication is that if no 30(b)(6) depositions are discussed at the earliest part of the case, a party could be precluding from using this rule. This simply makes no sense. Very often until some preliminary discovery or investigation is done, it cannot be determined if the 30(b)(6) deposition will be needed (although it almost always is) or what its scope may be. Recall that, in many of the discrimination cases that I do, there is a 90-day window to bring suit after the EEOC has finished with the case. Sometimes clients don't make it to see me until there are just a few days or weeks until the time limit runs out. Frontloading discussion of 30(b)(6) does not seem to help anything.

Frank Silvestri, American College of Trial Lawyers (DDD and J): Counsel who anticipate problems in handling 30(b)(6) depositions are able to bring these issues up at the 26(f) conference and present them to the court if they are not resolved at the conference. No rule change is needed.

Nitin Sud (EEE): Adding this topic to the 26(f) discussion is unlikely to help. It is usually difficult to determine the potential scope of a 30(b)(6) deposition until after initial disclosures and initial written discovery. Regardless, however, I often reference the possibility of a 30(b)(6) deposition in the case management plan anyway.

Kevin Koelbel (HHH): Rule 30(b)(6) depositions have always been scheduled with reasonable notice in cooperation with opposing counsel. The need for and scope of potential 30(b)(6) depositions is always addressed at Rule 26 conferences.

Richard Seymour (NNN): This change would not produce positive results, at least insofar as it calls for including specifics on these depositions in the court's scheduling order. That could lead to the burden on the parties (and the court) of getting the order changed. Adding the topic to the 26(f) list would foreseeably create problems. There is no problem to be solved, and the default orientation should not be "more case management" to every discovery question.

Jonathan Gould (OOO): This is a solution in search of a problem. The 26(f) conference is generally too early to make any final decisions on 30(b)(6) depositions. All it could produce in most cases is a pro forma designation to preserve the opportunity for later use.

Tae Sture (PPP): This change would add to the time needed to prepare for the 26(f) conference, but it is difficult to see any advantage to adding it. The parties ordinarily discuss 30(b)(6) depositions separately at varying stages of liability discovery. Focusing only on employment litigation, it is clear that the timing and content of the 30(b)(6) depends hugely on the subject matter of the case. Usually, it is necessary first to do written discovery and then begin to fashion the topics for the 30(b)(6) deposition. So even though adding this provision would not necessarily prejudice either party, it would not produce benefits.

Michael Quiat (TTT): This idea is a recipe for strategic sandbagging by corporate defendants. Clearly such a mechanism will allow these defendants to learn more about plaintiff's strategy in discovery and permit these parties to orchestrate their responses accordingly.

Robert Keehn (VVV): This seems mainly to be an effort to give the corporate defendant a heads-up of its opponent's litigation plans rather than a genuine proposal to avoid later discovery disputes.

Patrick Mause (WWW): This would be almost entirely unworkable and unfair. You often do not know what topics will need to be included until well into the case, after you have gotten corporate documents. To get those documents typically requires a motion to compel because corporate defendants will rarely divulge any document without a court order. Moreover, it would require a party to essentially divulge his or her litigation strategy before any meaningful discovery has been allowed. Down the road, a corporate defendant will likely try to

bind the plaintiff to extraordinarily preliminary topics included in the Rule 16 case management plan. This would only give the corporation a heads-up on the plaintiff's litigation strategy.

David Sims (XXX): This conference occurs too early in the case, and it is impossible to imagine what 30(b)(6) depositions will be needed that early in the case. So the most the rule would achieve is to get parties to make a pro forma indication that would have little or no practical value.

George Wright Weeth (BBBB): The conference is too early; one must first send interrogatories and requests for production before deciding what 30(b)(6) topics to pursue.

Huie, Fernambucq & Stewart, LLP (FFFF): Particularly since the 2015 amendments, it is important that attention be focused on Rule 30(b)(6) at the outset to discourage wasteful pretrial activities. Too often, 30(b)(6) notices seek information already obtained through other discovery. For example, even though the defendant has already produced the actual test reports, a plaintiff may often notice a 30(b)(6) deposition to inquiring into the testing of the product. It should not be necessary for the defendant to spend the time and money to respond with regard to materials already in the requesting party's possession. Too often, there is no choice but filing a motion for a protective order, thereby burdening the court's docket and possibly disrupting the Rule 16 scheduling order. True, issues may arise later that were not foreseen, but a more robust conference between the parties early in the case and a more active role for the judge will help both sides set more reasonable expectations for discovery.

Matt Davis (JJJJ): This would not streamline discovery but instead lead to additional costly and time-consuming discovery disputes later in the process. 30(b)(6) depositions are usually taken only after initial disclosures and routine written discovery is conducted. Plaintiffs would have to speculate about the topics for these depositions, and will identify every possible topic to avoid the risk of losing the opportunity to take add a topic later. This change would also provide corporate defendants an unfair advantage by forcing plaintiff counsel to reveal trial strategy at the earliest stages of litigation.

Ford Motor Co. (KKKK): Adding 30(b)(6) to this early discussion will better establish appropriate expectations and frame the deposition needs of the case, as well as allowing the parties to vet their respective positions as to proposed areas of inquiry. The parties should discuss and identify the topics about which there will be inquiry. Advance notice about topics is essential to selecting the person to testify. This early discussion will also make the "reasonable particularity" provision in the current rule more workable, including a method

for supplementation. It would be important also to discuss the timing and staging of these depositions. "Rule 30(b)(6) depositions undertaken to learn certain core facts, obtain descriptions of key events, or identify individuals who participated in significant activities presumably should be conducted early within the discovery period. Rule 30(b)(6) depositions conducted later in the litigation lifecycle should focus on central disputes and issues not addressed by other discovery, rather than fundamental fact-finding." Also, the court should establish a limit on the number of topics to be explored in 30(b)(5) depositions. In Ford's experience, it is necessary to add this topic to Rule 26(f) because, when Ford has tried to raise it, too often courts respond by deferring the issue until notices are served and disputes arise.

Timothy Bailey (LLLL): I have never been a fan of the delay in moving a case forward occasioned by the 26(f) conference. These events are rarely more than mere formalities, but they delay productive discovery. Injecting 30(b)(6) into the agenda simply lengthens the process. It is not possible to discuss these issues meaningfully at that point. Sometimes formal written discovery provides responses that are sufficient to give me the company's position. "On the other hand, if I get responses which amount to nothing more than legal posturing, I know I am going to need to simply ask a company representative the same or similar questions by deposition. Again, that is not something I will want to discuss in a Rule 26 conference."

Brandon Baxter (MMMM): In my practice, 30(b)(6) depositions are taken near the end of fact discovery, when you know what is needed from an entity. That information usually comes from other discovery. The most that can be done early in the case is to state that a 30(b)(6) deposition will be likely.

Christina Stephenson (OOOO): I like the idea of inclusion of specific reference to these depositions in the 26(f) agenda. Early attention can help act as a catalyst for consideration of the various issues raised by such depositions.

Jennifer Danish (PPPP): This seems to be an effort to give a corporate defendant a head's up of its opponent's litigation plans rather than genuinely to avoid later disputes. I have found that some discovery and extensive preparation is necessary before I can prepare a detailed an appropriate 30(b)(6) notice. Early discussions are unlikely to be fruitful.

Frederick Gittes and Jeffrey Vardaro (SSSS): We often use the 26(f) process to bring preliminary problems to the attention of the court and establish the ground rules for the case right off the bat. But that process should be reserved for the most common and problematical issues. Otherwise the report will become burdensome and might also be used against parties in

problematic ways. Although 30(b)(6) depositions are sometimes early in the case, as a way to identify other witnesses and focus discovery, on other occasions this deposition is used to probe things that emerged through discovery. We have seen 26(f) reports used against a party who has failed to anticipate future developments in discovery, and expanding the topic list will broaden the risk of this sort of "estoppel." Moreover, it would only rarely be true that issues about these depositions would be ripe for resolution early in the case.

Hagens Berman Sobol Shapiro (XXXX): Our firm represents consumers, whistleblowers, and others in consumer fraud, antitrust, investment fraud, securities, employment, environmental and other personal injury cases. We both defend and take 30(b)(6) depositions regularly. We support the proposal to include a specific reference to 30(b)(6) among the topics for discussion during the 26(f) conference. Due to the size of the cases we litigate, we often discuss the scope of 30(b)(6) depositions with opposing counsel at an early stage. We propose that the rule be amended to require the parties to confer on the number and sequencing of these depositions. Such discussions could include whether those depositions will count as one deposition or multiple. In our experience, when the parties sharpen their pencils on these issues early in the case, they save time and resources down the line.

Potter Bolanos (ZZZZ): In our jurisdiction, the parties follow the practice of conferring about discovery issues, and there is only rarely occasion to raise 30(b)(6) issues before a judge. But we do not believe that adding the topic to the 26(f) list would make sense. The specific topics for such depositions vary from case to case, and typically can't be determined until some discovery is done. Until then, it would not be possible for the parties to have a meaningful discussion, and it would be a waste of the court's time to worry about these issues at that point.

Robert Rosati (AAAAA): I think it borders on fantasy to think that there will be early judicial attention to 30(b)(6) depositions. I have participated in hundreds of 26(f) conferences and normally address the list of witnesses I expect to want to depose, including 30(b)(6) depositions. I cannot recall any judge ever asking about my list of witnesses or being remotely interested in the list. My awareness of the 30(b)(6) needs of one case is likely to be very different from another case. Too often thinking about this topic up front would be a waste of time. I never take a 30(b)(6) deposition without first ending a draft of the notice with the areas of inquiry to opposing counsel. Rational and competent lawyers work out any issues that emerge.

Leto Copeley (BBBBB): Promoting cooperation during

discovery is laudable, but adding a requirement that 30(b)(6) depositions be discussed substantially disadvantages parties litigating against corporations. The discovery conference is just too early for the party to know everything that should be included. In any event, counsel normally engage in substantial communication prior to 30(b)(6) depositions under the current regime. The corporation nearly always objects to some topics, and we often attempt to modify topics to make them mutually agreeable. But this discussion occurs only after initial written discovery, including document production, has been completed.

Terrence Zic (CCCCC): The parties should be required to discuss the timing and service of 30(b)(6) notice during the 26(f) conference, and a deadline should be set in any scheduling order.

Clay Guise (HHHHH): The early discussion of discovery is one of the best ways to avoid later disputes. Although a number of commenters to the Subcommittee assert the 30(b)(6) depositions are not appropriate for discussion in the 26(f) conference, I disagree. It is true that a party may be reluctant to identify specific topics, agree to limitations on topics, or commit to the timing for taking 30(b)(6) depositions, but that is not always the case. In fact, the repeated statements about the importance of this discovery device shows that it should be included in the early planning.

John Beisner, U.S. Chamber Institute for Legal Reform (JJJJJ): 30(b)(6) depositions are a central aspect of discovery in many cases, but they are rarely discussed until late in the discovery process. Moreover, the discussions that eventually occur usually occur after the plaintiff has propounded a 30(b)(6) notice that calls for a deposition on numerous and poorly defined topics. At that point, the corporation faces a risk of sanctions unless it moves for a protective order or reaches agreement with plaintiff about how to proceed. The resulting rancorous motion practice could largely be obviated by fleshing out the timing, number, scope or location of these depositions at the outset. Adding these depositions as a topic of the conference and scheduling order would be consistent with the 2015 amendments, which are designed to prompt judges to engage in early and active case management. We endorse the language submitted by LCJ on July 5 as an addition to Rule 16 and 26(f) (quoted above).

Sherry Rozell (KKKKK): Making this change is especially important for complex cases involving large corporations. It is often difficult to identify persons and documents necessary for compliance with the now commonplace notices containing copious and in-depth topics and document demands served at or near the end of the discovery period. By outlining the parameters at the outset, the parties can conduct discovery with an eye toward potential 30(b)(6) issues that may be resolved in a way that

benefits all parties and without the need for motion practice. The rules should require that the parties set forth the timing, scope, and limitations for 30(b)(6) depositions at the beginning of the litigation, when meaningful collaboration can provide the most benefit.

Spencer Pahlke (LLLLL): It is impossible for plaintiffs to have a clear plan for 30(b)(6) depositions at the time of the 26(f) conference. Any discussion of these issues would have to be very preliminary and nonbinding. Anything more specific would place an unfair burden on the plaintiff.

Henry Kelston (NNNNN): The proposed addition of 30(b)(6) to the topics for discussion at the 26(f) conference might have some salutary effect, assuming that the intent is purely to flag the potential use of 30(b)(6) without the obligation to provide details of topics and duration, for that may be premature at that time. As other submissions have pointed out, in most cases the 26(f) conference occurs too early in the case for a detailed discussion of 30(b)(6) to occur. However, there may be situations in which the prospect of a 30(b)(6) deposition will provide added incentive for a corporate party to produce information on an expedited and less formal basis. We have found, for example, that some companies prefer to provide information about their data systems and document repositories voluntarily rather than prepare their IT personnel for a 30(b)(6) deposition. The inclusion of 30(b)(6) among the subjects for discussion early in the litigation may assist some litigants in reaching similar agreements.

American Association for Justice (SSSSS): Although AAJ does not believe that any amendment to the rule is warranted, discussing the potential need for a 30(b)(6) deposition early in the litigation without discussing the specifics of the depositions is a proposed amendment that AAJ could potentially support subject to wording and clarity in the corresponding Committee Note. Any such change should be designed to avoid slowing down necessary early discovery, and to warn against trying to get into specifics as to topics and scope of inquiry that cannot usefully be addressed so early in the case.

Judicial Admissions

Nancy Reynolds (L): Would testimony of a lay person be a binding admission? No. People can change their testimony if there are valid reasons to do so. Cross-examination and impeachment with deposition testimony are the standard mechanisms to address changed testimony. If it turns out that the person designated is not as knowledgeable as expected, the corporation should be allowed to designate another person for later deposition on that topic.

Joseph Sanderson (P): This point is frequently litigated, and in the head of trial often leads to erroneous rulings and unnecessary appeals. Codifying that testimony in a 30(b)(6) deposition is a statement of a party opponent but not "binding" unless so ordered under Rule 37 as a sanction for nondisclosure would be desirable.

Craig Drummond (R): Corporations should be bound by 30(b)(6) testimony just as individuals are bound by their testimony. Otherwise, the individual litigant cannot "hold" the corporation to what it has said. To have it otherwise could mean that corporations can continue to answer things vaguely with no real repercussions for gamesmanship.

Christian Gabroy (T): "Absolutely the testimony should be a judicial admission as this is binding testimony."

Jeff Scarborough (V): Absolutely the testimony should be judicial admission as this is an opportunity for plaintiff to establish binding testimony.

Barry Green (W): I oppose this change. The courts have been ruling more and more frequently with regard to a party's deposition answers that "a deposition is not a take-home examination" where answers can be changed. The proposed rule would allow corporations the ability to change their answers when individual parties cannot. I believe the rule should be amended to make it clear that corporations are not allowed to contradict the testimony of the person they provide at the deposition who is supposed to be their most knowledgeable person on that subject. That individual's answers should be judicial admissions.

McGinn, Carpenter, Montoya & Love (AA): In theory, an amendment that simply provides that 30(b)(6) testimony is not a judicial admission -- i.e., one that cannot be changed at trial -- would be acceptable. However, there is a danger that the rule would be interpreted to permit the type of sandbagging that Rule 30(b)(6) is intended to eliminate. The term "binding" means that the witness is speaking not as an individual but as the organization, and that the testimony should have the same consequences when used against the organization as testimony

would have against an individual. For example, the deposing party should be permitted to use the testimony in a summary judgment motion and the organization should not be permitted to respond with an affidavit contradicting that testimony, unless there is some change in circumstances that justifies the change in position. The binding effect of 30(b)(6) deposition testimony serves to motivate the organization to fully prepare its witnesses and deters sandbagging. The burden-shifting approach of *Rainey v. American Forest & Paper Ass'n*, 26 F.Supp. 2d 94 (D.D.C. 1998), is the right approach. To change the testimony, the organization must show that the new information was not known or reasonably available at the time of the deposition. The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), Ken Graham (NN), and Ford & Cook (OO and PP).

Bryant Crooks (DD): The rule should make clear that the testimony of a corporate representative is binding on the entity and define what that means. It should mean that if the corporation wants to amend its testimony it must show that the new evidence was not available at the time of the testimony, and provide the supplemental information a reasonable time in advance of trial. If the information could or should have been located earlier, the corporation should be denied leave to amend its answers and bound by the testimony given during the deposition. Any evidence contradicting the testimony should be excluded. This middle ground would protect the corporation against unfair treatment, but also punish a lax entity for failure to prepare its witnesses. In effect, it tracks the way an individual deponent is treated -- if such a witness does not supplement or amend deposition testimony prior to trial, then I can impeach with the prior deposition testimony. If the corporate witness spontaneously testifies differently at trial, the examining party should simply impeach with the corporation's prior testimony. This would offer a solution to the most common disputes I have encountered with 30(b)(6) practice.

Matthew Millea (GG): The rule was adopted to provide an efficient method of obtaining binding testimony from a large organization. The testimony must come from a witness who has been properly prepared to address the matters identified in the notice. The corporation must not be allowed to change the testimony of its designee, except in circumstances when it can demonstrate that there is new information that it could not have had at the time of the testimony. Otherwise, corporations will simply fail to provide the information. The right approach is to follow *Rainey v. American Forest & Paper Ass'n*, 26 F. Supp. 2d 82, 95 (D.D.C. 1998).

Frederick Goldsmith (II): Lawyers representing corporations have long known the significance of a Rule 30(b)(6) deposition and the consequences which attend witness testimony at such a deposition. That is the stimulus for them to prepare the witness well. Any effort to water down the rule so that the deponent's testimony carries less force can only be seen as an effort to tilt the playing field in corporations' favor. Jeremy Borden (TT) submitted identical comments.

Patrick Yancey (JJ): Simply stated, this concern is about the truth being told. When the person chosen as the person of authority on a particular subject for a corporation says the color white is white, then the color is white. There is no need to be concerned about the truth, even if it is detrimental to the corporation.

Department of Justice (RR): There is currently a split of authority on this question. The majority view is that the organization is not bound. See *U.S. v. Taylor*, 166 F.R.D. 356, 362 n.6 (M.D.N.C. 1996). Under this view, testimony given by a 30(b)(6) witness is like the testimony of any other witness, admissible but subject to contradiction by other evidence. See *A.I. Credit v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001). But there is a minority view that, by commissioning the designee as the voice of the organization, the organization cannot argue new or different facts that could have been included in the 30(b)(6) deposition. See *Rainey v. American Forest & Paper Ass'n*, 26 F.Supp.2d 94 (D.D.C. 1998). The Department believes that the majority view is the right solution, and it supports further consideration of a rule amendment that codifies the majority view.

Michael Romano (UU): This testimony should be binding, just as the testimony of an individual is binding. Of course, testimony can always be changed, but only upon a demonstration of a good faith basis for the prior erroneous response and a good faith explanation of the modification. The well-known consequences of changing prior testimony must remain, not only so that the need to fully prepare the witness remains, but also to conclusively narrow issues for trial, which can only be accomplished by binding answers from the corporation.

Michael Merrick (VV): We think that the question whether a corporation should be allowed to offer evidence inconsistent with its testimony should be decided by courts on a case-by-case basis. Although most courts recognize that 30(b)(6) testimony is no more "binding" than testimony of other witnesses, a different result is appropriate in some circumstances. Some courts have rejected affidavits presented at the summary-judgment stage that vary the deposition testimony, invoking the "sham affidavit" doctrine. Attempting to create a bright-line rule that applies in all situations has the potential to create confusion, and this

matter is best left to the courts to decide on a case-by-case basis. Alternatively, because this idea focuses on the interaction of the Civil Rules and the Evidence Rules, perhaps it would be appropriate to refer it to the Advisory Committee on Evidence Rules for its review and analysis before proceeding further. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA), Charles Lamberton (BBB), Thomas Padget (CCC), and Mary Kelly (CCCC) submitted very similar or identical comments.

J.P. Kemp (ZZ): If anything, the rule should be amended to make clear that the answers to questions at a 30(b)(6) deposition are indeed judicial admissions equivalent to those made in pleadings. My clients as individuals are certainly considered to have made judicial admissions in their depositions. The "sham affidavit" doctrine shows what happens when they try to stray from deposition testimony. Changing the rule to eliminate the binding effect of the testimony would gut the whole purpose of this rule. The corporation could easily avoid providing useful discovery, and would be almost encouraged to do so. "This is a horrendous idea that should be immediately scrapped." You could add an escape valve that would allow the corporation to move the court to be relieved of its admissions as under Rule 36, but the presumption should be that these are binding admissions unless such relief is granted.

Frank Silvestri, American College of Trial Lawyers (DDD and J): We do not favor an amendment addressing the judicial admissions issue. Although the Rainey case is cited as being a "minority position," there are no cases expressly holding that a 30(b)(6) witness's statements are judicial admissions. The current rule provides judicial discretion to decide whether or not to bind a deposed business to its testimony. To treat such testimony as a judicial admission in all instances is a bright-line rule that is too strict for these depositions. There are already remedies in place to punish bad actors and deter misleading or incomplete statements from 30(b)(6) witnesses. If testimony is later altered, it can be attacked through cross examination or impeachment, or simply utilized to demonstrate a lack of trustworthiness throughout the party's case in chief. If the altered testimony is flagrant, the court may impose sanctions under Rule 37(d). Moreover, it seems to us that the question how to treat 30(b)(6) testimony is not sufficiently unsettled to justify an amendment to the current rule. No court has declared 30(b)(6) testimony a judicial admission, so there is no widespread confusion that requires action from the Advisory Committee. We note that the NELA letter to Judge Bates on March 20, 2017, similarly urges a case-by-case approach to the handling of these matters. This flexibility allows better analysis by the courts.

Nitin Sud (EEE): There shouldn't be a bright-line rule, and it should be decided on a case-by-case basis. It is necessary to

bind a party to its answers, as otherwise the purpose of the deposition is defeated. But this does not need to be a "gotcha." The effect must be decided by the judge on a case-by-case basis.

Heather Leonard (GGG): In my practice, I have not encountered any problems on this topic. I fear a rule change would lead to gamesmanship. The rule in its current state allows courts to address this issue, when necessary, on a case-by-case basis.

Kevin Koelbel (HHH): Rule 30(b)(6) testimony should carry the same weight as any other deposition testimony. Similarly, post-deposition clarifications should abide the existing rule.

Jonathan Feigenbaum (JJJ): This change will lead to confusion over the weight that such testimony should be received in a particular instance. Time will be wasted fighting over so-called mixed issues of law and fact.

Wright Lindsey Jennings (MMM): A clear majority of courts have held that the organization is not bound by the designee's testimony. We believe this is the better rule, and that a change to the text of the rule that codifies that view should be considered.

Richard Seymour (NNN): It would be very useful to the parties and the courts to clarify the weight to be given to answers in a 30(b)(6) deposition. Case law is interesting, but it does not address the point of what the rule should say in order to make this discovery device as effective as it can be. And the FJC study found that much of the litigation over these depositions involves the effect of the testimony. I think the rule can be effective only if the answers have a strong binding effect, to a much greater extent than other evidence, so the entity has a strong interest in ensuring the accuracy of the information. Litigants rely on the answers given in these depositions to shape subsequent discovery requests. If the only effect is to immunize the answers against a hearsay objection that would give a license to corporations to provide misleading answers and hide the truth. But it would be proper for the corporation to seek consent of the plaintiff or leave of court to change the answer on an adequate showing that there was a diligent good-faith investigation, that they could not have obtained the added or accurate information earlier, and that they disclosed the added information at the earliest possible opportunity. Then there should be added discovery at the expense of the corporation. I have agreed to this solution in cases in which defense counsel contacted me and explained the problem.

Jonathan Gould (OOO): Some binding effect of the witness's testimony is necessary. Otherwise the rule would be worthless. Evidentiary admissions are usually what the courts have decided

are appropriate.

Tae Sture (PPP): I have never encountered this issue. And so far as I know, it's never been raised by members of the Indiana bar. Litigants merely treat 30(b)(6) statements as evidentiary statements, not judicial admissions. The litigants treat the sworn statements as binding upon the deponent, and not necessarily the corporation.

Michael Quiat (TTT): If the responses are not binding, that will dilute the impact of deposition testimony which is otherwise highly probative. Again, this advantages the corporations and disadvantages the individual.

Robert Keehn (VVV): Any attempt to water down the binding effect of deposition answers can only be seen as an effort by defense interests to tilt the playing field.

Patrick Mause (WWW): The 30(b)(6) depositions are essential to getting admissible evidence regarding the corporation's knowledge. If the corporate defendant elects to send an unprepared or deliberately evasive witness to the deposition, it should do so at its own peril. The proposed change would encourage gamesmanship.

David Sims (XXX): There must be some binding effect to the witness's testimony. Otherwise the rule will be worthless.

George Wright Weeth (BBBB): A primary reason for taking a deposition is to obtain judicial admissions. The corporate party should operate the same rules that apply to everyone else.

Timothy Bailey (LLLL): "This is absolutely shocking to me. Corporations and other organizations use these legal identities to escape personal responsibility." The jury is entitled to hear the corporation's actual position on matters of fact from an actual person. When the defendant is an individual, the person testifies. It should not be different for a corporation. If the corporation produces the right person, why shouldn't the jury be allowed to rely on what that person says? If this change is allowed, corporations will simply use their lawyers and paid experts to state their positions.

Brandon Baxter (MMMM): Most of the problems relating to "binding" testimony arise out of lack of proper preparation of the witness. That issue is often addressed in reported decisions, but is not addressed in this proposal. We should not encourage lack of preparation by explicitly sending the message that the answers are not "binding."

Christina Stephenson (OOOO): Statements during 30(b)(6) depositions should be considered judicial admissions, not merely

admissible hearsay. The organization should be forbidden to offer contrary evidence.

Hagans Berman Sobol Shapiro (XXXX): We are wary of an amendment that would reduce the effect of admissions made in testimony. Under the rule, an organization should be bound to a position it takes during a deposition. Although such statements may not always be tantamount to a "judicial admission," organizations may not disavow their testimony. If they are dissatisfied with the testimony, the solution for the company is to explain and explore these points through cross-examination, or the timely introduction of evidence that may contradict or expand the testimony. Allowing this change would encourage bandying.

Robert Rosati (AAAAA): This is a non-issue. Every appellate court that has addressed the issue has rejected the conclusion that the organization is forbidden to offer evidence inconsistent with the answers in the 30(b)(6) deposition. Making a rule change about this subject would only engender confusion given the state of the law.

John Beisner, U.S. Chamber Institute for Legal Reform (JJJJJ): A driving force behind that widespread use of 30(b)(6) depositions is the ability to force the entity to make binding admissions. Some corporate defendants have been barred from defeating a motion for summary judgment using evidence that conflicts with a prior 30(b)(6) deposition. Although other courts have properly recognized that corporations may offer divergent evidence, the high-stakes and costly nature of these disputes warrants taking a fresh look at this rule, and clarifying that the majority of courts are right about the "binding" effect -- it is admissible evidence but not a judicial admission.

Spencer Pahlke (LLLLL): Because plaintiffs rely on what they learn during discovery to build their case and prepare for trial, it is essential that 30(b)(6) testimony not be used as a tool for sandbagging. Both the judicial admissions and supplementation ideas could lead to exactly that. If an amendment is made regarding judicial admissions, it must also clarify that the testimony is "binding" and define clearly that this means the witness is speaking as the organization rather than as an individual. The testimony should bear on the organization in the same way as it would an individual party. If the organization wants to change its answer, it should bear the burden to provide that the information involved was not available at the time of the deposition.

American Association for Justice (SSSSS): Without a binding effect, answers in a 30(b)(6) deposition would be essentially meaningless. But that does not mean they are routinely found to be judicial admissions. To the contrary, no district courts or

courts of appeals expressly hold that the 30(b)(6) witness's statements are judicial admissions. AAJ has examined the 114 cases since 1991 that expressly address whether a statement in such a deposition is a judicial admission. The overwhelming majority of these cases recognize that, although it is binding, the testimony of a 30(b)(6) witness is not a judicial admission. In the handful of cases in which courts precluded corporate parties from offering evidence that contradicted the testimony of their 30(b)(6) witnesses, the courts' motivation was punitive, triggered by extreme and unusual evasive behavior. The existing case law shows that there is a common sense case-by-case approach to these issues that should not be disturbed by a change in the rule.

Public Justice (TTTTT): This amendment would be unnecessary and harmful. Presently, the issues it would address have been left to the courts to be decided on a case-by-case basis. That is as it should be. Most courts regard 30(b)(6) testimony as binding only in the sense that all deposition testimony is "binding." In some cases, courts have rejected declarations contradicting prior 30(b)(6) testimony using reasoning analogous to the "sham affidavit" rule. But those decisions were based on the court's conclusion that the organization had attempted improperly to thwart the objectives of the rule. "Courts are perfectly capable of determining when a statement given during a Rule 30(b)(6) deposition should be treated as a binding admission." Attempting to create a bright-line rule to apply in all situations would invite the very gamesmanship the rule seeks to avoid.

John H. Hickey (VVVVV): The testimony of an individual litigant is of course binding, or at least binding as a practical matter in the eyes of the fact finder. Courts have taken different positions on whether an admission in a corporate representative deposition is "binding" on the corporate party. The S.D. Fla., where I usually practice, has taken a "hybrid" approach. When the representative is unable to answer the question and the corporation fails to provide an adequate substitute, the corporation will be bound by the "I don't know" response. This precludes the corporation from offering contrary evidence at trial and prevents trial by ambush.

Massachusetts Academy of Trial Attorneys (AAAAA): The proposal to clarify whether testimony constitutes a judicial admission is unnecessary and invites confusion and additional wasted time. The current state of the law works well. Allowing parties the ability to disavow Rule 30(b)(6) testimony rather than "correct the record" through traditional cross-examination or introducing subsequent evidence undermines the value and dignity of the deposition as a discovery tool.

Supplementation

Nancy Reynolds (L): Supplementation should be permitted for corporate depositions just as it is for individual depositions. In both situations, if the supplementation is significant, a second deposition can be requested at the expense of the witness. Particularly if the deposition occurs early in the discovery process, it is likely that some information will not be known at the time of the deposition. "[I]t is a common tactic for plaintiffs to depose corporate representatives before the information is known to obtain lack of knowledge responses and display to a jury that the corporation did not care or doesn't know what it is doing or the like. I have moved to quash early corporate representative depositions because of the unfairness of such an approach."

Timothy Patenode (M): The reality is that if deadlines are tight, the corporation has few avenues to supplement or rebut the witness's testimony. This may be an appropriate result when bandying has occurred, but it seems prejudicial at an early stage of discovery.

Christian Gabroy (T): "There should be no supplementation rule as this will just add confusion and murky up testimony and allow a rewrite by counsel of the testimony."

Lawyers for Civil Justice (U): Supplementation should be allowed under the rule. 30(b)(6) depositions are taken at different times in different cases, and it is inevitable that new information will sometimes emerge. Allowing supplementation in such situations would further the truth-finding function. In a way, these depositions are like the deposition of retained expert, which is subject to the supplementation rule. "Any supplementation should be in written form accompanied by an affidavit explaining the reason for the additional information or explanation or, if the parties agree, through another means such as a supplemental deposition. The amendment should provide that any second deposition is limited to the subject matter of the supplement."

Jeff Scarborough (V): There should be no supplementation rule. Such a rule would just add confusion and murky up testimony and allow a rewrite by counsel of the testimony.

Barry Green (W): The proposed change would provide corporations with the ability to change testimony, when the parties do not have that ability. It would also render the deposition useless because all information given would be subject to change.

David Stradley (X): Adding this provision will "gut the preparation requirement." If corporations are not bound by their

testimony in the deposition, they will skimp on preparing their witnesses, if they prepare them at all. They will know that counsel can supplement the answers after hearing the specific questions. The committee may as well eliminate the 30(b)(6) deposition altogether. Amanda Mingo (Y) submitted identical comments.

McGinn, Carpenter, Montoya & Love (AA): Allowing the organization to supplement would potentially defeat the purpose of the rule by giving the organization the ability to wait until the end of discovery to disclose the full extent of its positions and knowledge while offering an inadequately prepared witness at the deposition. If supplementation is allowed at all, it should be allowed only when the same type of burden shifting process that should apply on the judicial admissions point is employed. The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), Ken Graham (NN), and Ford & Cook (OO and PP).

Frederick Goldsmith (II): This proposal smells like an opportunity for corporations who did not like how the deposition turned out to get a do-over. This wrecks of another attempt by defense interests to change the rule to strengthen their hand. Jeremy Bordelon (TT) submitted identical comments.

Patrick Yancey (JJ): When the person most familiar with Safety Rule Y of a corporation comes into the deposition and tells us and the world that the purpose and meaning of Rule Y is Z, then we and the court should be able to rely on what is supposed to be truthful testimony. The corporation should not have any need to "amend" the authoritative person's answers.

Michael Romano (UU): This would create an opportunity for corporations to change prior testimony without a good faith explanation. That would blunt the effectiveness of the 30(b)(6) deposition. Many depositions adjourn with requests for additional information, but permitting supplementation by rule may create the unintended result of "sandbagging" at the deposition, knowing that relevant information can be provided up until the close of discovery. As things stand under the current rule, courts expect an explanation supporting the change, and usually permit the opposing party to test the altered testimony by further deposition.

Michael Merrick (VV): This change would encourage intentionally failing to prepare witnesses or introducing sham testimony. Courts routinely strike sham affidavits, but allowing supplementation would permit 30(b)(6) witnesses to say "I don't know. I will need to review our records" instead of answering.

That would make the deposition a largely empty exercise. Moreover, this change would only benefit organizational defendants, and would create serious inequities without any recognizable benefit. Rule 26(e) does not require supplementation of deposition testimony. Efforts to supplement by a plaintiff would be subject to a motion to strike and/or impeachment at trial. It is therefore difficult to understand why organizational parties would be allowed or required to freely supplement, while leaving individual plaintiffs subject to the existing, harsher rule. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA), Charles Lamberton (BBB), Thomas Padget (CCC), and Mary Kelly (CCCC) submitted very similar or identical comments.

J.P. Kemp (ZZ): This change would gut the rule. The witness would be coached to testify to a lack of knowledge about all the pertinent facts so that later the attorney could answer all the questions in writing in ways that are evasive and seek to hide the truth.

Nitin Sud (EEE): Allowing the deponent to supplement will result in a complete waste of time and promote gaming of the process.

Heather Leonard (GGG): The proposed change would encourage wasteful forms of gamesmanship, such as intentionally failing to prepare witnesses or introducing sham testimony.

Jonathan Feigenbaum (JJJ): Allowing supplementation will create "do-overs" and a one-sided chance to entities to avoid binding statements when the testimony does not come out as hoped for. Individuals don't have this opportunity.

Robert Landry III (KKK): Allowing supplementation would encourage wasteful forms of gamesmanship, such as failing to prepare witnesses or introducing sham testimony. This change would only benefit organizational defendants. If a plaintiff sought to change her prior testimony, the new "testimony" would be subject to a motion to strike or impeachment at trial. A corporation already has the advantage of selecting the witness, and it can choose the most knowledgeable. So it would doubly unfair then to allow these witnesses to decline to provide responsive, complete testimony.

Richard Seymour (NNN): The solution to the judicial admissions issue outlined above should apply here also. Good-faith mistakes or omissions should be subject to correction based on a showing of full deposition preparation and the impossibility of obtaining the supplemental information earlier.

Jonathan Gould (OOO): Supplementation should be allowed only as to new facts not reasonably within the party's possession

at the time of the deposition. Otherwise, it would lead to "I'll get back to you" answers.

Tae Sture (PPP): I oppose this change because it would open the door even further to gamesmanship. I have too often been confronted by defense counsel "supplementing" defendant's document production just a few days before the deposition even though the documents have clearly been in defendant's possession for a long time. The result was a postponed deposition. This would happen a lot more often.

Michael Quiat (TTT): This is a bad idea. I have personally confronted insurance company attempts to "correct" transcripts which were otherwise detrimental to their litigation interests. Providing a formal mechanism for doing this would be a disaster.

Robert Keehn (VVV): This is a terrible idea. It provides a "do-over" opportunity for corporations who do not like how things turned out at a Rule 30(b)(6) deposition.

Patrick Mause (WWW): This is a terrible idea. It would invite corporations to completely rewrite testimony after the attorneys get ahold of the transcript would invite gamesmanship. Companies would deliberately present unprepared witnesses, and then "supplement" their testimony with attorney argument. If this is adopted, the committee might just as well eliminate 30(b)(6) in its entirety.

David Sims (XXX): This would invite failure to prepare the witness and sham testimony. Contradictory testimony by a plaintiff would be subject to a motion to strike under the "sham affidavit" doctrine, or impeachment at trial. A corporate defendant already has the advantage of choosing the witness, and allowing lawyers to "supplement" the witness's testimony later would be unfair. Allowing in additional evidence should be limited to new facts not reasonably within the party's possession at the time of the deposition.

George Wright Weeth (BBBB): This would simply open the door to more evasive answers during the deposition, after which the lawyer can answer the questions.

National Employment Lawyers Ass'n Georgia (HHHH): We oppose this idea, for it would encourage gamesmanship. Courts routinely strike sham affidavits, but allowing supplementation would permit the 30(b)(6) witness to say "I don't know. I will need to review our records." That would transform the deposition into an empty exercise. Because the change would benefit only organizational litigants, this would create serious inequities without any recognizable benefit. If a plaintiff changes her deposition testimony, there can be a motion to strike or impeachment at trial. It is therefore difficult to understand why

organizational litigants would be allowed to that without cost.

Timothy Bailey (LLLL): "This proposed changes is more than shocking. It is an invitation to obstruction and deceit." The efforts to prepare the witness will be downgraded. Counsel will, in effect, be able to testify. Testimony will never be final.

Christina Stephenson (OOOO): This should not be allowed because it would take away any incentive to prepare the witness adequately. In my experience, even the most sophisticated attorneys do not know what is required in terms of preparing a witness for these depositions.

Glen Shults (RRRR): This is unnecessary and would be inequitable. Because the notice identifies the topic for examination, the witness has the opportunity to prepare to address those subjects. Allowing supplementation could undermine the basic purpose of the deposition. The deposition would become a risk-free exercise for corporate counsel, because problematical testimony can be "cleaned up" later. Other witnesses do not have this right even though they do not get advance notice of the topics for examination.

Frederick Gittes and Jeffrey Vardaro (SSSS): This proposal (and the one for formal objections) would move farther away from the normal deposition model. Ideally, the 30(b)(6) deposition should be a way to simplify the discovery process. But the proposals would make this deposition more different from an ordinary deposition. Our individual plaintiffs know that if they "mess up" during their depositions they may confront "sham affidavit" arguments, the striking of their corrections, or at least impeachment. The idea of allowing automatic supplementation of a 30(b)(6) transcript that has been reviewed and signed would mean that the corporate designee is less bound. That makes no sense. Adoption this rule change (and the objection one) would also multiply the number of motions before the court.

State Bar of California Litigation Section Federal Courts Committee (TTTT): Adding a provision similar to Rule 26(e)(2) for 30(b)(6) depositions, perhaps specifying that the supplementation must be done in writing and providing a ground for re-opening the deposition to explore the additional information, may be helpful.

Christine Webster (WWWW) [note -- mistakenly designated WWW, but there is already another WWW]: This change would substantially undermine the usefulness of the rule because there would be little incentive to prepare. It would also be grossly one-sided.

Hagens Berman Sobol Shapiro (XXXX): This would be an

invitation to mischief. But the rule should not forbid correction when (1) at the time of the deposition, the organization did not know, or could not have known, the information sought to be added, (2) fact discovery has not yet closed, and (3) the witness may be re-called.

Potter Bolanos (ZZZZ): 30(b)(6) witnesses are not like retained experts. They are the hand-picked mouthpieces for parties. This change would invite corporations not to prepare their witnesses, and make the playing field uneven since the individual witness cannot supplement.

Robert Rosati (AAAAA): A retained expert is different from a 30(b)(6) witness. The expert must prepare a report, and if the witness is going to provide other opinions the report must be supplemented. A 30(b)(6) witness can, like any other witness, change form or substance of answers given pursuant to Rule 30(e). If that happens, the court can order the deposition reopened. The big problem in 30(b)(6) depositions is that the company does not adequately prepare the witness. The courts know how to address this problem by imposing sanctions. There is no need to amend the rule, and an amendment might be interpreted by some as virtually an invitation to perjury.

Maglio Christopher & Toale (MMMMM): Allowing supplementation would exacerbate one of the biggest problems with such depositions: the "I don't know" or evasive witness. Depending on the drafting this change could completely eliminate the utility of 30(b)(6) depositions to narrow issues for trial. The already difficult task of obtaining remedies from the trial court for this sort of behavior would likely be undermined or effectively eliminated. Instead, "I don't know," combined with "We'll get back to you" would be the new norm.

American Association for Justice (SSSSS): Adding a supplementation provision would be devastating to plaintiffs and would defeat the purpose of the rule. It would effectively extinguish the duty of corporate defendants to prepare a witness properly to testify. The "I'll get back to you" response could readily become the new norm. The utility of these depositions depends on the binding effect of the answers given. Without that, there is very little reason to take the deposition at all. Deponents already have a right under Rule 30(e)(1)(B) to make changes in form or substance to the recording or transcript of the deposition and provide the reasons for making the changes within 30 days of the taking of the deposition. The rules already permit timely changes to be made without leaving the deposition open indefinitely, which would render it useless. No other rule allows a deposition witness to rewrite her testimony without consequence. Although it has been suggested that supplementation here is like supplementation of the deposition of a retained expert witness, the situations are not analogous. The

expert is required to make a written report, and the supplementation requirement is closely tied to that report requirement. There is no similar report requirement with regard to a 30(b)(6) witness.

Public Justice (TTTTT): We strongly oppose this idea. It would undermine the core goals of the rule and unfairly advantage organizational litigants over individuals. An individual who tried to change deposition testimony via supplementation would be subject to impeachment or a motion to strike. But corporations would have carte blanche to do so. In practice now, all party deponents face potentially serious legal consequences for failure to prepare for their depositions. And individual plaintiffs often have much less experience preparing for and testifying in depositions than corporations, particularly hand-picked 30(b)(6) witnesses. Making this change would also add to the courts' workload by generating more motion practice.

John H. Hickey (VVVVV): The only case law applicable to the idea of supplementation is the law of errata sheets, which are meant only to correct a scrivener's error in the record. If the changes add or significantly change testimony, the deposing party can with leave of court retake the deposition. This rule should suffice. Any additional provision would unfairly expand the ability of the corporate party to avoid committing to a position. That would serve only to increase the time and costs of litigation.

Massachusetts Academy of Trial Attorneys (AAAAA): Making this change would undermine the function and effectiveness of the deposition. It would invite organizations to be less precise during a deposition, safe in the knowledge that they have a blanket opportunity to revisit the issue in written form at a later date. An organization's ability to supplement deposition testimony should be tied to narrow circumstances.

Forbidding contention questions

Timothy Patenode (M): A rule change may not be adequate. A contention question is in the eye of the beholder. No advocate will want to instruct a witness not to answer on this ground, or to suspend a deposition to get a ruling.

Steve Caley (N): Given that the witness is testifying on behalf of the corporation, I think that contention questions are appropriate, provided that the 30(b)(6) notice explicitly gives notice that the witness will be asked contention questions and identifies, at least generally, the subjects of those questions.

Craig Drummond (R): Contention questions should be allowed. If a party wants to make an objection, that is fine, but the witness must answer. This attempt to "forbid" such questions appears to be just one more attempt to allow the corporate party to game the 30(b)(6) deposition. "Shouldn't a party be able to get an actual answer about an issue from a corporate defendant prior to trial? We all know that written discovery through interrogatories and Requests for Admissions are mainly a joke that are riddled full of objections and vague answers. Often, the only time to nail a corporate party down [is] to use gamesmanship at a 30(b)(6)."

Christian Gabroy (T): "There should be no forbidding of contention questions because facts need to be addressed so as to formulate what defendant considers defenses, etc."

Lawyers for Civil Justice (U): These depositions are designed to "discover facts." The rule should forbid contention questions. At present, it permits what are in effect oral contention interrogatories that require witnesses to such things as "state all support and theories" for myriad contentions in a complex case. Not only is this an almost impossible challenge, it also threatens the attorney-client privilege as it probes into attorney/client communications. Therefore, the rule should forbid contention questions to non-lawyer witnesses, or inquiries into materials reviewed in preparation for the deposition.

Jeff Scarborough (V): Contention questions should not be forbidden because all facts need to be addressed, including facts in support of defendant's defenses.

Barry Green (W): This is another effort to prevent the designated witness's testimony from binding the corporation. The rules already contain a procedure for dealing with this issue. The attorney for the deponent can object to the question, but the question must be answered. The corporation can then move the court to allow amendment of the answer because the question is a contention question.

David Stradley (X): The rule helps balance the lack of information that defendants are required to provide in their pleadings. Under Rule 8, there is no consensus that a defendant is required to plead facts in support of its affirmative defenses. Accordingly, a plaintiff can face a raft of affirmative defenses, yet be utterly in the dark as the factual basis for these defenses. Rule 30 allows a plaintiff to question the defendant as to the factual basis of its affirmative defenses. The proposed change would prevent plaintiff from learning the factual basis of a corporation's affirmative defenses. Such questions are vital to efficient discovery and trial preparation. Counsel can easily toss an affirmative defense into an answer, especially where he does not have plea facts in support of that defense. Preparing a witness to support such a defense is quite another kettle of fish. Amanda Mingo (Y) submitted identical comments.

McGinn, Carpenter, Montoya & Love (AA): This rule change would confer special rights on corporations that already have the advantage of knowing in advance what topics will be explored during a deposition. There is no prohibition in Rule 30 against asking an individual about her contentions or opinions, and ordinary witnesses are routinely asked these types of questions in depositions. The concern that a "spontaneous answer in a deposition seems quite different" from an interrogatory answer that the answering party has 30 days to prepare has no merit. A typical 30(b)(6) deposition involves the same 30-day period because of requests for documents. Prohibiting contention questions would only serve to allow a corporate defendant to polish its testimony through its attorneys and to save its contentions for trial, where the opposing party would have no prior testimony with which to impeach. Individual deponents are not afforded this luxury, and organizational deponents should not be afforded it either. The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), Ken Graham (NN), and Ford & Cook (OO and PP).

Bryant Crooks (DD): Contention questions are very important and should be maintained. A corporation can request an individual person to answer what she contends and factual basis or support they have for contending it. There is no reason this should suddenly become unfair when asked of a corporate party. Indeed, the sophisticated corporation is likely better equipped to respond to such a question.

Frederick Goldsmith (II): Organizational defendants often hide behind boilerplate affirmative defenses. The ability to ask contention-related questions is an important tool in flushing out whether the entity actually has any facts or documents to support

its defenses. Litigants are entitled to know before trial what the other side's case is. Jeremy Bordelon (TT) submitted identical comments.

Patrick Yancey (JJ): Why should a plaintiff not be permitted to ask the corporation a contention question such as "If employee John Doe who is required to comply with safety Rule Y either did not or did not do A, B and C to comply with Safety Rule Y, isn't it true that he violated Safety Rule Y?" The corporation does not need 30 days to sit down and craft some obscuring response to this question. Permitting it to do so will only lengthen the time it takes to get to the truth.

Department of Justice (RR): The Department has had the experience of being subject to 30(b)(6) depositions that seek the United States' views about legal theories or legal opinions, particularly in cases where the United States is a plaintiff in litigation. This practice raises substantial privilege concerns. A rule amendment that distinguishes between factual contentions, on the one hand, and legal opinions or legal theories, on the other, would be worth further consideration.

Michael Romano (UU): Making this change would create a risk of "trial by ambush." Corporations often hide evidence behind affirmative defenses, and contention questions are often the only way to flush out the grounds for these defenses.

Michael Merrick (VV): This change would unfairly impose a discovery restriction on individual litigants, but not on organizational parties. It is true that there is much more time to respond to contention interrogatories, but corporate defendants often ask plaintiffs numerous contention questions during their depositions. For example: "What support do you have for your claim that you suffered discrimination?" Allowing this sort of question to be asked of plaintiffs but not defendants would unfairly tilt the scales in favor of one side. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA), Charles Lamberton (BBB), Thomas Padget (CCC), Robert Landry (KKK), Walt Auvil (LLL), Tae Sture (PPP), and Mary Kelly (CCCC) submitted very similar or identical comments.

J.P. Kemp (ZZ): "Oh my god!! This is over the top bad." An example is provided by the Farragher/Ellerth defense. Suppose the defendant invokes this defense in its answer. The 30(b)(6) notice lists as a topic: "The factual bases for Defendant's 27th affirmative defense in which it claims to have investigated and taken prompt remedial action." This is a "contention question," beyond a doubt. Why shouldn't the plaintiff employee's counsel be allowed to ask questions about this? The defendant has raised an affirmative defense that is diametrically opposed to Plaintiff's theory of the case. Should the defendant be able to hide behind its pleading and provide no

facts in sworn testimony about what investigation it contends to have done and what prompt remedial action it claims to have taken?

Frank Silvestri, American College of Trial Lawyers (DDD and J): We do not favor making a change to the rule on this issue. There are very few reported decisions on this issue. Those that limit contention inquiries or topics do not establish a blanket exclusion. In fact, many of the cases deal with efforts to depose counsel, or to invade the work product protection to the extent that only counsel could answer the questions in the notice. We agree that the deposition should be limited to factual matters, we do not think the rule needs to have a blanket exemption that might stymie efforts to obtain the factual underpinning of the complaint, answer or counterclaim. If the topics are properly framed to obtain facts, that should be acceptable.

Nitin Sud (EEE): "You have to be kidding me. Such questions are permissible for individuals being deposed, and are often the basis of the high percentage of pro-employer decisions. Companies often assert a plethora of affirmative defenses. They should be able to back them up at a deposition."

Heather Leonard (GGG): This change would create a double standard for parties. It is common for contention questions to be posed to individual parties. To immunize corporate defendants against such questions would unfairly impose a discovery restriction on individuals.

Robert Landry III (KKK): This change would unfairly impose a discovery restriction on individual litigants. Corporate defendants often ask plaintiffs numerous contention questions.

Wright Lindsey Jennings (MMM): The practice of using 30(b)(6) depositions to seek the views of a corporation regarding legal theories or legal opinions should be forbidden. The purpose of these depositions is discovery of factual matters known to the entity. Allowing questions about legal theories threatens to invade the attorney-client privilege. Putting corporate designees, who are usually not lawyers, on the spot with such questions should be prohibited.

Richard Seymour (NNN): Contention questions can be subdivided usefully into legal and factual contention questions. Mixed questions of law and fact can be regarded as legal questions. An amendment should disallow legal contention questions and allow factual contention questions. Interrogatories can be used for legal contention questions. It seems to me an abuse of the 30(b)(6) deposition to ask such questions. Perhaps that would mean only a lawyer could be designated as a witness. In addition, allowing such questions

would often lead to a game of "gotcha." How can jurors evaluate answers to these sorts of questions? If this sort of questioning were allowed, would that lead to cross-examining counsel on their briefs? But factual contentions are an entirely different matter. If 48 years of practicing law has taught me anything, it is the critical nature of finding out how the other side sees the facts, and what the other side's factual contentions really are.

Jonathan Gould (OOO): Fact contention questions are totally appropriate in a 30(b)(6) deposition. Legal contentions should probably be excluded.

Michael Quiat (TTT): I frankly think this is silly. "Anyone who has done any serious litigation over time recognizes that frequently pleadings, prepared by lawyers, have dubious evidentiary support. To suggest that those areas are beyond the pale of contention questions serves no practical function and can severely prejudice a party legitimately seeking areas of probative evidence."

Robert Keehn (VVV): The opportunity to ask contention-related questions is an extremely important tool in flushing out whether the entity actually has any facts or documents to support its defenses, as opposed to simply hiding behind a multitude of boilerplate affirmative defenses.

Patrick Mause (WWW): If a corporate defendant is going to file an answer with 25 affirmative defenses and then serve evasive interrogatory responses, the only opportunity to obtain a corporate admission is at a 30(b)(6) deposition. The spontaneity of the witness's response is a feature of the rule, not a flaw. I disagree, as well, with the idea that contention-type questions are rarely used in depositions of other witnesses.

David Sims (XXX): Defendants typically ask contention questions during depositions, and to deny plaintiffs that opportunity unfairly tilts the scales.

George Wright Weeth (BBBB): Fact contention questions are totally appropriate in a 30(b)(6) deposition and should not be restricted.

National Employment Lawyers Ass'n Georgia (HHHH): This would unfairly provide for different treatment of organizational litigants and individual plaintiffs. Corporate defendants often ask plaintiffs numerous contention questions during depositions. Columbia Legal Services (NNNN) submitted very similar comments.

Ford Motor Co. (KKKK): Ford has observed that the most common contention questions address its affirmative defenses or its assessment of the claim asserted. 30(b)(6) topics seeking to explore legal theories or evaluate the application of facts to

specific claims and defenses are particularly unsuitable for these depositions. Addressing legal theories requires involvement of counsel, and often legal theories evolve during the course of a case, and can be finalized only after the close of discovery. Trying to channel all the pertinent information through a single witness, particularly early in the case, presents a situation ripe for confusion. Contention questions during 30(b)(6) depositions usually amount to little more than gamesmanship seeking to generate awkward moments on videotape. Interrogatory answers are a better way to get at such matters.

Timothy Bailey (LLLL): Isn't litigation all about contentions? With individual litigants, contention questions are fair game. Why can't corporations state their contentions also? Counsel for a corporation should have the same duty to prepare the witness as counsel for an individual.

Brandon Baxter (MMMM): The ability to obtain spontaneous answers in cross-examination is one of the keys to obtaining unvarnished truth. The topics have already been provided to the entity. Questions about motives or opinions are commonplace in depositions, and they should not be limited.

Christina Stephenson (OOOO): Contention questions should not be forbidden, but the company might be allowed to answer in writing so long as the answer is provided within the time allowed for interrogatory answers and without the requesting attorney having to submit a separate request for the information.

Jennifer Danish (PPPP): Corporations often hide behind boilerplate affirmative defenses. Contention questions are an important tool to flush out whether the company really has any facts or documents to support its defenses. We are entitled to know before trial what the other side's case is.

Glen Shults (RRRR): This would leave the playing field between corporations and individual litigants even more tilted than it already is. Defense counsel can ask plaintiffs contention questions, even though those are often very challenging for plaintiffs with limited educations. I see no reason why a hand-picked witness, fully prepared by counsel, can't be asked similar questions. Contention interrogatories are a poor substitute.

Christine Webster (WWWW) [note -- mistakenly designated WWW, but there is already another WWW]: I have found 30(b)(6) depositions addressing the bases for a defendant's claim to have acted in "good faith" or to identify what defendant contends was a legitimate non-discriminatory reason for an employment decision to be the most effective means of discovery on those issues. No defendant has seriously objected to such inquiries.

Potter Bolanos (ZZZZ): The Subcommittee is wrong that contention questions are rarely used in individual depositions. They are frequently used. It would be wrong to deny plaintiffs a similar opportunity to explore the contentions of their corporate opponents.

Robert Rosati (AAAAA): Contention questions are clearly improper in a deposition of any kind. Numerous federal cases recognize that contention questions are improper legal questions, not factual questions. In my experience, competent counsel do not ask contention questions in 30(b)(6) or other deposition. Competent counsel representing the witness do not allow their clients to answer such questions.

Leto Copeley (BBBBB): It makes no sense to eliminate questions designed to help a party learn the factual bases of a corporation's affirmative defenses.

Sherry Rozell (KKKKK): The rule should be amended to prohibit questioning that requires the deponent to express opinions or contentions that relate to legal issues, such as the corporation's beliefs or positions as to the contentions in the suit. Applying law to the facts in this way often forces the deponent, generally not a lawyer, to analyze complex legal and factual positions and commit the organization to a legal position in the case. Questioning regarding a party's theories in the case is better left to contention interrogatories. This is particularly true in instances in which the witness's answers are considered binding on the corporation.

Spencer Pahlke (LLLLL): There is inherently a gray area in determining what is and is not a contention question. Often questions straddle the line between basic facts and facts supporting a contention. Adopting a rule that bars questions one attorney construes as contention questions will dramatically increase the number of instructions not to answer at deposition, thereby provoking more motion practice. So if a rule change is adopted, it should also say that this is not a ground for instructing a witness not to answer.

Maglio Christopher & Toale (MMMMM): This idea runs completely counter to any efforts to increase the speed and efficiency of litigation. Together with requests for admissions, "contention" questions are the best tools to narrow issues for trial and thus eliminate the need for discovery on those topics. "Contention" questions are utilized in almost every party deposition. Giving organizations a special immunity to answering such questions makes no sense. Moreover, what constitutes a contention question is often a complicated analysis with a large body of case law developed over years to delineate which avenues of questioning are permissible and which are not. A rule change would certainly serve to complicate the situation.

American Association for Justice (SSSSS): The appropriateness of a contention question can only be determined on a case-by-case basis. Barring all "contention" questions would be too broad. Consider, for example, inquiries about the factual basis for affirmative defenses a corporation has included in its answer. Clearing up which affirmative defenses actually call for further attention is a key service 30(b)(6) depositions can provide. As with other proposals, this one would multiply the burden of motions on the court, which would have to make the context-controlled decision whether the question should be allowed.

Public Justice (TTTTT): We also strongly oppose this idea. Although it is true that there is much more time to respond to contention interrogatories, corporate defendants often ask individual plaintiffs contention questions during their depositions. Allowing these questions to be asked of plaintiffs but not corporate defendants has no principled justification. Moreover, allowing these questions streamlines the litigation and is good for both sides. By helping to define and refine the issues in controversy, these questions help the parties cut to the chase. Finally, trying to define forbidden "contention" questions would prove very difficult.

John H. Hickey (VVVVV): This proposal would limit the ability of litigants to get to the real contested issues in the case. The apex doctrine properly limits the ability of litigants to depose the top officers of a corporation. But directing that lower level witnesses chosen by the corporation cannot be asked its position could in a sense might cut against the apex doctrine by making it necessary to question those top officers to determine the corporation's position. Moreover, the rule would create an asymmetry because corporations could ask individual litigants contention questions but would be immune to them.

Adding a provision for objections

Timothy Patenode (M): This would be a useful change. Indeed, I've always thought the right to object was implicit in the rules.

Steve Caley (N): I strongly favor this change. 30(b)(6) depositions are frequently objectionable as burdensome, harassing, or irrelevant. Permitting a party to serve written objections, rather than have to make a motion for a protective order, will force the noticing party to take a realistic look at the topics and will provide a mechanism for parties to resolve such disputes informally.

Joseph Sanderson (P): I support this change. The practice of allowing pre-deposition objections to 30(b)(6) topics is common in modern practice because it is more efficient and avoids the expense of wasted motions for protective orders. Indeed, the rule should require pre-deposition objections, in particular objections to the scope of the topics. The rule should provide that such objections are waived unless raised before the deposition begins.

Christian Gabroy (T): "There should be no objection rule provision, which will just waste court time and excuse valid points."

Lawyers for Civil Justice (U): The rule should establish a clear procedure for objecting to the notice. These depositions by their nature generate controversy. Preparing a witness to provide all the organization's information can impose an enormous burden on the organization. That burden can be justified if the information is actually important to the case, but that is not always so. When the topics are not defined with "reasonable particularity" the process of preparation can become almost impossible. Presently, different district courts have endorsed different procedures for handling these problems. Some say that the only vehicle is a motion for a protective order, requiring that the matter be raised before the deposition begins. Other courts find motions for protective orders generally improper, and some even say they are not available at all for overbreadth or relevance objections. Rule 30(b)(6) should be amended to include a provision like the one in Rule 45(d)(2) for subpoenas, with an early deadline for objections and clear consequences for failure to do so. This should come with a 30-day notice requirement for these depositions.

Jeff Scarborough (V): There should be no objection provisions. They would waste the court's time and act only as a roadblock to a successful deposition.

Barry Green (W): This addition would be ripe for abuse. If

it is adopted, it should require that objections be specific, and impose a mandatory sanction for frivolous objections.

David Stradley (X): Making this change would be "the greatest step backward in civil discovery in my career." Scheduling 30(b)(6) depositions is frequently an exercise in futility already. In the past, I have provided a draft notice along with a request for dates. Almost universally, my request goes unanswered. I follow up, but am again greeted with silence, weeks of silence. So I now begin by serving the actual notice, with a letter offering to work with opposing counsel as to the date, time, and place of the deposition, but also say that we will go forward at the time noticed unless an agreement can be reached. Even following this procedure, it can take weeks to get a deposition scheduled. Making the suggested change would slow things even more. That would allow corporations to stall without moving for a protective order, while individual litigants must move for a protective order. This way, every 30(b)(6) deposition would be preceded by a motion to compel. [Note: In regard to adding 30(b)(6) to the 26(f) list of topics, this comment also includes the following: "[I]n my experience at least, counsel on both sides engage in substantial communication prior to 30(b)(6) depositions under current practice. The corporation nearly always objects to one or more topics, and we frequently attempt to modify topics to make them mutually agreeable." Amanda Mingo (Y) submitted identical comments.

McGinn, Carpenter, Montoya & Love (AA): Making this change would slow down litigation by permitting an organizational party to obstruct the discovery process in a way that individual parties cannot. A plaintiff does not have the benefit of being notified in advance what topics will be explored in a deposition and cannot object to questioning in advance. Allowing the corporation to receive special treatment by using the noticed topics as a basis for objections would give those organizations an unfair advantage. The most efficient way for parties to address questioning that exceeds the boundaries of relevance is through objections to deposition designations at the time of trial, just like with other witnesses. Pre-deposition objections would inevitably result in delays and motion practice over the permissible scope of a 30(b)(6) deposition. The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), Ken Graham (NN) and Ford & Cook (OO and PP).

Bryant Crooks (DD): The rule should make it clear that unless the responding party obtains a protective order it must attend and testify. Merely moving for a protective order should not be enough. It might be a good idea also to place a specific

time limit on making such a protective-order motion a specified time before the deposition. Failure to abide this rule should be an automatic ground for sanctions, just like failure to attend a deposition by an individual litigant.

Frederick Goldsmith (II): Allowing objections to take the place of a protective order motion will invite the kind of mischief that lawyers have long faced from obstructive and baseless objections to interrogatories and Rule 34 requests.

Patrick Yancey (JJ): This is not needed. There is already a procedure for the corporation to protect itself -- a motion for a protective order.

Michael Romano (UU): Making this change will only invite mischief by corporations. It is easy to envision a plethora of objections, only to find the Rule 30(b)(6) representative unprepared to respond to any area of inquiry to which an objection has been lodged. Those objections would have to be resolved prior to the deposition. The time-tested requirement of objecting to a question to preserve the record remains the best method to protect all parties. If a request is too burdensome, the right measure is a motion for a protective order, and it must be filed and heard before the deposition.

Michael Merrick (VV): The 30(b)(6) deposition is often the first deposition taken in a case. Encouraging formal objections would create more motion practice at the start of the discovery process, with resulting delays. Specifying that the responding party must indicate what it will provide (as under Rule 34) would do little to resolve this issue. To the contrary, that would require that a party sit for multiple depositions -- one on the topics it has agreed to address, and a second after the court rules on the objections at the inevitable motion to compel. These types of inefficiencies can be avoided by leaving the rule as it is now written. More generally, this proposal runs counter to the recent amendment to Rule 1 and to the overall direction of the Committee's approach to discovery in recent years. It would surely increase the workload of overworked federal judges. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA), Charles Lamberton (BBB), Thomas Padget (CCC), Robert Landry (KKK), Walt Auvil (LLL), and Mary Kelly (CCCC) submitted identical or very similar comments.

J.P. Kemp (ZZ): This change would simply jam up the process and put the onus on the person seeking the discovery to have to prove it is necessary. It puts the inmates in charge of the asylum. If the party to be deposed truly believes that a topic is objectionable, it should move for a protective order on an emergency basis. Even better, have the courts deal with these issues on conference calls.

Frank Silvestri, American College of Trial Lawyers (DDD and J): We do not favor a provision on objections. The only procedure the courts recognize now for objections is a motion for a protective order. We believe that the protective-order paradigm operates sufficiently well and that no amendment is warranted. To introduce the suggested right to object would likely lead to heightened pre-deposition wrangling.

Nitin Sud (EEE): This would delay the discovery process and probably require additional depositions or other discovery. Usually the parties discuss the topics in advance and any concerns are addressed at that time.

Heather Leonard (GGG): This would create a situation in which companies would feel obligated to object to almost every topic out of an abundance of caution to avoid waiver of an objection. That, in turn, would generate more motion practice. All of this runs counter to the spirit of Rule 1.

Jonathan Feigenbaum (JJJ): A formal objection process will lead to more and more delays. It will also require judges to expend their time to resolve disputes over more and more procedural matters rather than on the substance of the dispute.

Wright Lindsey Jennings (MMM): The lack of a procedure for objecting to the list of topics in a 30(b)(6) deposition notice creates uncertainty, and a very real possibility of sanctions against the entity. The Subcommittee should consider a procedure for objection to specific topics, to the number of topics, to the reasonable particularity of the topics. After objections are made, the parties should be required to meet and confer as they must for other discovery disputes, and the party seeking the deposition should have the burden of justifying the requests. In keeping with this proposal, there should also be a minimum time for noticing such a deposition. This procedure might lead to more motion practice before the deposition, but it would reduce the post-deposition motion practice.

Richard Seymour (NNN): This proposal should not be pursued. The unstated assertion is that it's too difficult to get a protective order motion heard, but in every court in the country there is a method for getting a needed ruling on an emergency basis. The only ones favoring this idea are the law professors, for abstract reasons that neither practicing lawyers nor judges endorse. Moreover, allowing objections would encourage game-playing.

Jonathan Gould (OOO): This is another solution in search of a problem. The procedures in place for protective orders are sufficient now.

Tae Sture (PPP): I oppose this idea. Corporate defendants

have far more resources available to litigate. Defense counsel, as they zealously represent their clients, will routinely object, much as they do in answering interrogatories. It is far easier to raise a spurious objection than to mount a response.

Michael Quiat (TTT): This is not a sound idea. This would be used by well-financed litigants to "smoke out areas of questioning before the witness is under oath and forced to respond." It will also unnecessarily limit the scope of questions.

Robert Keehn (VVV): Making this change will invite the kind of obstructive conduct individual litigants have long faced. "The last thing our profession needs is another avenue for defense lawyers to assert ridiculous objections to discovery."

Patrick Mause (WWW): Corporate parties already object enough to impede the collection and presentation of evidence. In my experience, when 30(b)(6) topics are served defendants often object on numerous grounds anyway as part of the pre-motion "meet and confer," and the parties often end up having to take the issue to the court anyway. The last thing we need is to give corporate defendants more tools to obstruct discovery.

David Sims (XXX): Defense counsel will routinely object to a 30(b)(6) deposition, much like what they do in response to other discovery. Allowing a pre-deposition objection will only add to the time and expense in the process. If this change is made, the courts are going to face even more discovery disputes.

George Wright Weeth (BBBB): This would unnecessarily delay discovery and add another opportunity for motion practice by the defense. It is unlikely the court will deal with objections before the deposition, leading to adjournment of the deposition.

Product Liability Advisory Council (DDDD): Unlike Rules 33, 34, or 45, Rule 30(b)(6) is silent on objections. Recipients should be permitted to formally object to the written notices. Objections should be made with specificity. The requesting party should be required to meet and confer with the respondent on the objections before presenting the issue to the judge or before an answer covered by specific objections must be given. This process would help ensure control over the number of topics that may be served in such a notice the number of hours the witness must testify. The company should not be required to obtain a protective order.

Bowman and Brooke (EEEE): Providing corporations with the opportunity to object will would be an important protection.

Huie, Fernambucq & Stewart, LLP (FFFF): Because Rule 30 is the only discovery method without an objection procedure, we

often see it used as a sword. For example, depositions are often scheduled at a time known to be unworkable. Particularly under 30(b)(6), the noticing party often takes the position that the company must present a fully prepared witness unless the court issues a protective order. Thus, the current setup actually promotes adversarial posturing. Rule 45 provides a good template for 30(b)(6). This will prompt plaintiffs to take greater care to tailor their requests narrowly. It will also incentivize more robust meet-and-confer sessions before the notice goes out. It will also reduce motion practice before the court.

National Employment Lawyers Ass'n Georgia (HHHH):

Encouraging more objections would create more motion practice for the court. Requiring the objecting party to produce a witness to address the topics not objected to would require the party to sit for multiple depositions. These inefficiencies can be avoided by leaving the rule as it stands. There is no showing that the few protective-order motions that have been filed have been resolved in an incorrect manner. Adding this provision would cut against the overall direction of the Advisory Committee in recent years, seeking to reduce expense and judicial workload. Columbia Legal Services (NNNN) submitted very similar comments.

Ford Motor Co. (KKKK): The lack of direction about objections creates a procedural ambiguity that deepens disagreement between parties and has even led some courts to refuse to address objections until after the deposition has been concluded. Other discovery devices that direct a corporate party to scour its resources, such as Rule 34 and 45, establish official procedures for objecting. Adopting a similar procedure for 30(b)(6) would end the current confusion on the subject. Moreover, the failure of the noticing party to describe the topics with reasonable particularity puts the responding party in the impossible position of having to prepare a witness to testify with only an opaque notion of the questions that will be asked. For example, Ford's sample of notices includes such topics as "Ford's safety philosophy for its customers" and "Discuss crashworthiness." Ford finds that propounding parties often do not want to focus the issues. Some topics are so vast in scope that they offend against proportionality principles. Consider, for example: "Ford's historical knowledge of safety belt buckle performance in rollovers." Moreover, Ford often receives 30(b)(6) notices that seek "discovery on discovery," such as: "Ford Motor Company's document retention policies." Ford has found that the lack of a recognized objection process makes the meet-and-confer process less productive, because the propounding party seems to feel less concerned about possible court intervention. Some courts will not even consider a protective-order motion before the deposition, but proceeding with the deposition and objecting can burden the court with phone calls seeking court resolution. That sort of on-the-spot ruling creates risks of sanctions if the objection is overruled, or that

the witness must return for further testimony about subjects not foreseen in preparation.

Timothy Bailey (LLLL): The motion for a protective order covers the same ground. This change would merely shift the burden required to go to court. That is a bad idea.

Christina Stephenson (OOOO): There should be a provision for pre-deposition objections, requiring that they be specific. The deposition should go forward on all other issues. The party taking the deposition should have the option of moving to compel answers to questions not answered based on objections.

State Bar of California Litigation Section Federal Courts Committee (TTTT): We support consideration of an addition to the rule of an explicit provision for written objections that may be served in advance of the deposition. Many 30(b)(6) notices are broad and can require extensive research and preparation. A simple and efficient mechanism to raise these concerns, short of a motion for a protective order, would be helpful. One thing that might be included would be a requirement like the one now in Rule 34(b) that the objecting party specify what it will provide despite the objection. However, concerns about objections halting or delaying depositions are real, as well as disputes over requirements to move to compel or for a protective order before or after the deposition begins.

Gray, Ritter & Graham, P.C. (VVVV): Rule 34(b)'s objection provision is not a good comparison. That applies to all parties. An objection provision in 30(b)(6) would protect only organizational litigants. To even the discovery scale, it would be necessary to devise a method for the plaintiff to peremptorily limit questioning at his or her deposition. Adding a provision like the one proposed would delay and increase the costs of litigation. We do not believe it's too difficult for the defense to seek a protective order if informal resolution is not possible. That has certainly not been our experience.

Christine Webster (WWWW) [note -- mistakenly designated WWW, but there is already another WWW]: This is not needed and would be harmful. It is common for a producing party to raise objections in advance of the deposition, but those objections do not block the deposition from going forward. Nearly always, by the time the deposition is completed, there are no disputes remaining for a court to address. In those cases where there continue to be disputes, the testimony provided in the deposition gives context that provides a sounder basis for resolving the disputes.

Hagens Berman Sobol Shapiro (XXXX): We strongly oppose any amendment that would excuse a party's attendance at a deposition when the party lodges an objection to the notice.

Seyfarth Shaw (YYYY): In its current form, the rule does not say how objections should be handled, and district courts have created or endorsed different avenues for a party to protect itself. Some courts say that only a protective-order motion will suffice, and that unless such an order is granted the party noticed may be subject to sanctions for failure to comply fully. Other courts refuse to entertain 30(b)(6) issues before the deposition occurs, usually allowing the responding party to object in advance and refuse to provide the material objected to, leaving issues to the motion-to-compel stage. Moreover, courts often disagree about whether "undue burden or expense" is the same as "overly broad/unduly burdensome," creating an asymmetry between potential objections and grounds for a protective order.

Seyfarth Shaw (YYYY): The rule should adopt an objection and motion to compel procedure like that in Rule 45. Rule 45 requires that objections be submitted in 14 days, which affords time to resolve them before the deposition if that must be 30 days from notice. This would also allow the deposition to go forward on the unobjectionable topics. Moreover, it is likely that the objection process would often led to a resolution by the parties without involvement from the court.

Potter Bolanos (ZZZZ): This change would make absolutely no sense. Corporations already make objections before the deposition and we meet and confer in an effort to clarify the scope and resolve the issues. Even when the objections are not resolved this way, they are often mooted by the actual deposition. Under the change proposal described in the invitation for comment, responding parties would have an incentive to object to delay the deposition. But requiring them to provide their objections in advance -- without requiring a court ruling on those objections -- so that the parties can confer in preparation for the deposition, might make 30(b)(6) depositions more efficient.

Robert Rosati (AAAAA): In reality this is a common practice. The rule does not have to be amended to authorize it.

Terrence Zic (CCCCC): The burden should not be on the party responding to the notice to quickly file a motion for a protective order. The noticing party can take weeks, or months, to draft a notice with scores of potentially overly broad and unduly burdensome matters for examination. A 30-day notice period would provide some opportunity to meet and confer. A right to object should be added; having to make a motion is too much to ask on short notice.

Clay Guise (HHHHH): There should be clear procedures in the rule for resolving disputes. In some courts a protective-order motion is necessary. Others take the opposite view.

John Beisner, U.S. Chamber Institute for Legal Reform (JJJJJ): There is presently no formal procedure for the responding corporation to object to the scope of the topic list or otherwise. But the topic lists are often hotly contested. Courts have diverged on what is meant by "reasonable particularity." There are also disputes about what counts as corporation knowledge, particularly when the corporation has no person on staff who is familiar with events that occurred long ago. Even the courts that are most stringent about the corporation's duty to prepare recognize that there can be instances when it simply does not possess knowledge about some subjects. Corporate deposition notices increasingly precipitate these sorts of disputes. These burdensome and costly disputes could be avoided by a formal objection procedure. Like LCJ, we believe that Rule 45 is a useful model for such a procedure. It places the burden on the party that served the subpoena to move to compel and relieves the nonparty of any obligation to comply absent a court order. Applying this approach to 30(b)(6) depositions of parties would facilitate resolution of certain disputes that now lead to protective-order motions. At a minimum, adding such a procedure would solve the problem created by uncertainty about how to proceed under the current rule. In this way, "corporations would no longer have to face the Hobson's choice of complying with an improper or overreaching deposition notice or mounting a pre-deposition challenge and risking draconian sanctions."

Sherry Rozell (KKKKK): Standardizing the practice for objections would promote consistency within the rules, and provide the parties with a procedure for addressing these matters. The rule should enable the parties to proceed with the agreeable topics while seeking to resolve those in dispute. Rule 45 could serve as a model.

Spencer Pahlke (LLLLL): The relevance of a particular line of questioning often becomes evident only through the context provided by the deposition setting. Allowing a party to object to a line of questioning before the deposition begins will only create yet another hurdle to getting depositions on calendar and completed. It will also make the actual deposition much more cumbersome, with parties spending time arguing about what the parameters of their pre-deposition objections were.

Henry Kelston (NNNNN): A new procedure permitting formal written objections to 30(b)(6) notices would result in objections being served in response to virtually every deposition notice, as they are in response to every set of document requests and interrogatories. Written objections would then lead to motion practice -- and protracted delay -- far more often than responding parties now move for a protective order. And adding this would be unnecessary. Nobody seriously claims that the absence of a rule provision prevents a company's counsel from

contesting the proposed date or list of topics in a 30(b)(6) notice. The amendment would only lead to less cooperation, more delay, and more expense.

American Association for Justice (SSSSS): Such a change would mark a dramatic departure from current practice and would stall discovery. It would create more pre-trial motions practice and create more disputes requiring judicial involvement. Judges, in turn, will not only have more motions to decide, they would have to decide those motions without proper context. There will surely be many baseless objections, often boilerplate in nature. Often an early 30(b)(6) deposition will enable plaintiff to identify which files contain relevant information. Allowing objections to stall such early depositions of the organization would stall other discovery. In class actions, 30(b)(6) depositions are often the only discovery needed for plaintiffs to support class certification motions, some thing that Rule 23 says should be resolved early in the case. So allowing objections could hamstring a court trying to comply with Rule 23. The amendment idea seems to be based on a flawed notion about current practice. True, Rule 45 has an objection provision with regard to document production. But that is designed to protect nonparty witnesses against burdens. The situation of a corporate defendant is materially different. No other litigant has a similar right to block a deposition, and corporations should not get this special right.

Public Justice (TTTTT): We strongly oppose this amendment idea. It is one of the most potentially disruptive changes currently on the table. It would make discovery far more cumbersome, and slow things dramatically right from the outset. A 30(b)(6) depositions is often the first deposition taken in the case, so a formal objection process would cause delay from the beginning of discovery. Nearly every 30(b)(6) deposition would be preceded by objections and a motion to compel. This would de facto place the burden of persuasion on the party seeking discovery. Discovery would come to a standstill. If the 30(b)(6) notice is truly objectionable, the responding party can file a motion for a protective order. There has been no showing that the courts are overburdened by such motions at present. Only the most compelling circumstances would support creating new mechanisms to allow lawyers to fight about discovery. This mechanism would create motion practice without solving an actual problem.

John H. Hickey (VVVVV): This proposal would serve only to engender more motion practice and delay. If the noticed party truly is unable to educate any witness on an issue, the representative or counsel can say so on the record at the deposition. There can, of course, be issues about whether the corporate party has properly prepared the witness. But there is a well-developed body of law on that obligation. This proposal

is a remedy in search of a problem.

Massachusetts Academy of Trial Attorneys (AAAAAA): Making this change would not be helpful to the process. Plaintiffs already have an information disadvantage during discovery. This proposed change would amplify the imbalance by laying the burden of obtaining a court order compelling attendance on the noticing party. It would do nothing to streamline the process and likely result in more protracted litigation.

Addressing application of limits
on number and duration of depositions

Nancy Reynolds (L): In my experience, when a corporation is deposed, the deposition is considered one deposition. If the corporation wants to designate 20 people in response to the notice, it may do so, but it remains the deposition of one corporation. I have designated up to 12 employees to respond because I wanted the most knowledgeable people answering questions. The duration for each witness's deposition was 7 hours because it was the corporation that opted for numerous deponents.

Timothy Patenode (M): There is a common strategy of taking an early 30(b)(6) deposition, and then noticing up depositions for the same individuals that testified in the 30(b)(6) deposition, giving the interrogator two bites at the apple.

Steve Caley (N): I think this is a good idea, as it will provide certainty with respect to these issues and, in turn, reduce motion practice. I agree with the Committee Notes that a 30(b)(6) deposition should count as only one deposition, no matter how many people are designated. I strongly disagree with the view that the examining party should be entitled to seven hours of questioning for each person designated. 30(b)(6) notices may include dozens of topics on disparate subjects, requiring a corporation to designate many individuals. To give the interrogator the right to question each of them for seven hours would effectively nullify the rules' limitation on number of depositions. To retain the seven-hour rule for the entire deposition will force the questioner to focus on what is truly material.

Joseph Sanderson (P): 30(b)(6) depositions are generally much more efficient ways of getting discovery than noticing multiple individual depositions. There is a risk that parties will try to game the system by trying to cram as many topics as possible into a single day. The rules should explicitly state that (1) a 30(b)(6) deposition may last seven hours for each person designated, with time freely granted for additional time when needed, and (2) for purposes of the ten-deposition limit a 30(b)(6) deposition is one deposition regardless of the number of people designated.

Christian Gabroy (T): "There should be no limitation on duration. There can be multiple individuals designated, and costs increase."

Lawyers for Civil Justice (U): The rule should define presumptive limits on in order to improve communication, cooperation, and case management. The present situation is anomalous because presumptive limits apply to several other

important discovery tools.

(1) Number of topics: Too often, Rule 30(b)(6) notices are overloaded with dozens of topics. (A footnote cites cases involving 80 to 220 topics.) Responding to such sprawling lists requires the responding party to investigate all factual aspects of each topic. There should be a limit of ten topics.

(2) Scope of topics: The rule should also require that topics be reasonable in scope and proportional to the needs of the case. But some courts interpret the rule's directive that the topics be defined with "reasonable particularity" as requiring only that the notice "describe topics with enough specificity to enable the responding party to designate and prepare one or more deponents." These sorts of lists frequently lead to rancorous disputes.

(3) Numerical limit on deposition hours: Based on the Committee Note to the 2000 addition of a seven-hour limit to depositions, many courts allow multiple 30(b)(6) depositions on the ground that the seven-hour clock "resets" each time a different corporate designee takes the witness chair. This approach has the perverse effect of penalizing organizations that designate multiple witnesses, thereby incentivizing the use of a single witness. In many cases, however, both sides would benefit from designation of additional witnesses.

Barry Green (W): This proposed change has some merit, but should not be limited to 30(b)(6) depositions. Whatever limitations are imposed should be applicable to all depositions to prevent discovery abuse.

David Stradley (X): The Committee Notes to the current rules contain the right answer. The deposing part should get one day of deposition time for each person designated, and the 30(b)(6) deposition counts as a single deposition toward the ten-deposition limit. If each day were counted as a separate deposition, corporations could use up their opponents' deposition days by designating multiple individuals unnecessarily. Similarly, if the 30(b)(6) deposition were limited to a single day, without regard to the number of designees, the corporation could eat up all the time by designating multiple witnesses, requiring deposing counsel to explore the background of each of them. Amanda Mingo (Y) submitted identical comments.

McGinn, Carpenter, Montoya & Love (AA): If an amendment is made on this subject, it should codify what now appears in the Committee Notes. One day should be allowed for each person designated, but the 30(b)(6) deposition counts for only one of the ten permitted each side. Otherwise, the corporation might simply designate 10 witnesses in response to a 30(b)(6) notice

and argue that the deposing party is prohibited from taking any more depositions. The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), Ken Graham (NN), and Ford & Cook (OO and PP).

Bryant Crooks (DD): The rule should make clear that a 30(b)(6) deposition counts as only one for purposes of the ten-deposition limit.

Frederick Goldsmith (II): This change will only invite mischief. The corporation can designate a gaggle of witnesses and they argue that the other side has already used up all ten of its depositions. Jeremy Bordelon (TT) submitted identical comments.

Patrick Yancey (JJ): There is no need to amend the rules to limit either the duration or the number of depositions needed under 30(b)(6). If the corporation chooses to designate many witnesses, than the other side needs to be able to take their depositions.

Michael Romano (UU): In my twenty years of practice, I have never encountered an issue about these matters. As with any deposition, the rule against redundancy protects litigants from unnecessary or excessive depositions.

Michael Merrick (VV): We have found that a full day is usually permitted for each 30(b)(6) witness, and it is rare for disputes to arise on this topic. If they do, they can be worked out without court intervention. It is important to note that the corporation is in control of how many individuals to put forward. If on limited the time that could be spent with given individuals, that could prevent some topics from being thoroughly explored, leading to additional fact depositions. This set of issues is not currently a source of disputes that the parties cannot resolve, and should not be the focus of rule changes. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA) Charles Lamberton (BBB), Thomas Padget (CCC), Robert Landry (KKK), and Mary Kelly (CCCC) submitted very similar or identical comments.

J.P. Kemp (ZZ): This is typically not a big problem. In my district the rule is that the 30(b)(6) counts as one deposition no matter how many people are designated, and that each person may be questioned for seven hours. To change this would permit and encourage game playing.

Frank Silvestri, American College of Trial Lawyers (DDD and J): Attempting to definitively answer these questions by amending the rule would essentially put the cart before the

horse. Practicing attorneys generally understand that the "one bite at the apple" rule applies to 30(b)(6) depositions. One well-drafted notice therefore counts as one single, separate, seven-hour deposition, no matter how many witnesses the corporation involves. The current framework is sufficient to encourage a logical resolution of the problem.

Nitin Sud (EEE): This has never been an issue. There is no problem that needs to be fixed.

Kevin Koelbel (HHH): The number of 30(b)(6) depositions should be left to the discretion of the trial judge, who can set appropriate limits at the Rule 26 conference.

Richard Seymour (NNN): We must not allow organizations to play "keep away" by exhausting the plaintiff's supply of ten depositions through its practices in designated 30(b)(6) witnesses. To reduce the seven hours for each witness's deposition would reinforce the tendency of some lawyers to "play out the clock" with lengthy speaking objections. The recommendations of the Committee Note should be inserted into the rule. "I cannot count the number of times I have had to point out this Note to plaintiffs' or defense counsel, resulting in a change of position." The Notes are just not that prominent, and by now the 2000 Note (where the provision is found) is buried behind the Notes for several further sets of amendments.

Jonathan Gould (OOO): The rule should make clear that 30(b)(6) witnesses should be counted as only one of the ten depositions. Otherwise a party could circumvent the rules by designating several witnesses to deprive the other side of enough depositions to prepare.

Tae Sture (PPP): Giving the corporate defendant the ability to use up plaintiff's depositions by designating lots of witnesses is wrong. Plaintiffs are constrained by costs; they will not "run up the clock" with excessive deposition practice.

Robert Keehn (VVV): This change would only invite mischief by the organization, which would argue that its opponent's permissible number of depositions has been exhausted by the gaggle of people it has designated.

Patrick Mause (WWW): A Rule 30(b)(6) deposition should count as one deposition to avoid game-playing by the corporation. Saying that these issues should be worked out between counsel is a pleasant thought but highly unrealistic. Counsel for large corporations do not always play nice.

David Sims (XXX): I am opposed to any separate limitation on 30(b)(6) depositions. The current rule is adequate. If the corporation can eat up plaintiff's depositions by designating

lots of people, it will.

George Wright Weeth (BBBB): Each plaintiff is a person who counts as a separate depositions. Corporate defendants should also be counted as one person. Allowing the company to curtail the other side's use of deposition by designating lots of witnesses is not fair.

Product Liability Advisory Council (DDDD): A potential limitation to guard against overbroad notices would be a limit on deposition hours. Although Rule 30 says a deposition must not be longer than seven hours, often courts have allowed multiple 30(b)(6) depositions, each lasting seven hours.

National Employment Lawyers Ass'n Georgia (HHHH): Our experience is that most jurisdictions allow a full day of deposition for each designee. Disputes that cannot be worked out between the parties on this subject are rare. Limiting the time that can be spent with a witness could impair the ability to get to all needed topics. Columbia Legal Services)NNNN submitted very similar comments.

Brandon Baxter (MMMM): This is not currently an issue. The Committee Notes have it right.

Christina Stephenson (OOOO): There is no principled reason there should be limits on the number of 30(b)(6) depositions. These depositions are governed by topics, not by amount of time or number, because multiple people may be designated. This has not caused disputes I have observed.

State Bar of California Litigation Section Federal Courts Committee (TTTT): Although not all of our members agree on whether a 30(b)(6) deposition should be considered one deposition for the ten-deposition limit, or whether a full seven hours should be allowed for each designated individual, we do agree that further guidance in the rules would eliminate potential disagreements and accompanying cost and delay. Parties often dispute whether the limitation on number of depositions of a witness should preclude a second deposition of an organization on different topics. An early 30(b)(6) deposition is a useful way to find out what sources of information exist and learn about technologies and record-keeping practices of an adverse party. Later depositions are likely prompted by testimony and other discovery occurring later. Both early and later depositions may be appropriate in a given case. Accordingly, clarity about whether more than one 30(b)(6) deposition may be taken, and the timing of such depositions, would be desirable.

National Employment Lawyers Ass'n -- Illinois (UUUU): We believe the Committee Note statements about the handling of these matters should be elevated to the rule.

Gray, Ritter & Graham, P.C. (VVVV): We fully agree that this should be worked out by counsel. Our experience has not suggested any significant problem in doing that.

Christine Webster (WWWW) [note -- mistakenly designated WWW, but there is already another WWW]: The Committee Notes establish satisfactory guidance. Operating in a plaintiff-side contingency practice, I have zero interest in taking unnecessary depositions. When a defendant designates a large number of witnesses, I find that those with a few topics may be deposed for an hour or two. When witnesses are designated to cover more, or more significant topics, a full day is necessary. I have not found these issues difficult to resolve with opposing counsel.

Potter Bolanos (ZZZZ): The rule should be amended to make explicit that the 30(b)(6) deposition is one deposition.

Robert Rosati (AAAAA): In my experience, counsel understand that a 30(b)(6) deposition counts as one, and the absence of a rule provision is not important.

Leto Copeley (BBBBB): This proposed change would be an open invitation to abuses by corporations. Right now, the deposing party gets one day of deposition for each person designated, and the 30(b)(6) deposition is a single deposition. To change this rule would invite gamesmanship.

Spencer Pahlke (LLLLL): If the Subcommittee addresses these issues by amendment, it should codifying what is now in the Committee Notes. Any deviation from these guidelines will lead to gamesmanship.

American Association for Justice (SSSSS): Parties frequently agree on these matters and, if they do not, a judge familiar with the specifics of the particular litigation can best determine what is appropriate.

Public Justice (TTTTT): We agree that some clarification in this regard would be useful. We think the ten-deposition limit should be amended to exclude 30(b)(6) and expert depositions from the count. So the rule should be rewritten to say that the limit is ten depositions, exclusive of 30(b)(6) depositions and expert depositions. In addition, the current prohibition of a second deposition of a deponent should be rewritten to exclude 30(b)(6) deponents. Multiple 30(b)(6) depositions of the same party are often needed and desirable. "[A] plaintiff has a dilemma in deciding whether to take an initial corporate deposition to help narrow the scope of discovery and of the issues -- a type of deposition that serves the purpose of both fact-finding and efficiency. A plaintiff does not know at the beginning of a case whether a court will allow one or more later substantive 30(b)(6) depositions."

John H. Hickey (VVVVV): The rules should be amended to say that the limit on number of depositions does not apply to 30(b)(6) deponents. Certainly the corporation's decision to designate multiple witnesses should not eat up the plaintiff's right to take ten depositions. And the time limits should not apply to 30(b)(6) depositions either. These are depositions to eliminate issues, and can be crucial to a case. There should be no time limit on that.

Other matters

Nancy Reynolds (L): Exceeding the scope of the topics listed in the notice is often an issue. We make it very clear on the record that the area of questioning is outside the scope, and that the deponent is not speaking on behalf of the corporation. Motions in limine address any attempts to use the responses about undesignated topics at trial.

Joseph Sanderson (P): The submission offers several additional ideas:

(1) The rule should provide for expedited pre-deposition ruling on motions to compel. There should be a notice period of 28 days for these depositions, and objections should be due 14 days prior to the scheduled date for the deposition. Any motion to compel or for a protective order could then be due 7 days before the deposition.

(2) The rule should provide special protections for nonparties subpoenaed to provide information. The Advisory Committee Notes should be amended to state that "information known are reasonably available to the organization" includes information which it could reasonably obtain from persons or entities under its control.

(3) Because the limit on number of interrogatories prompts parties to ask about matters that could more efficiently be responded to in writing than in an oral deposition, the rule should be amended to state that a 30(b)(6) notice may include questions for which written answers are sought.

(4) Regarding nonparty depositions using subpoena, the rules should explicitly permit 30(b)(6) depositions of nonparties via subpoena, and clarify that a single subpoena can list separate dates for production of documents and the deposition itself.

(5) The rule should be amended to clarify that it applies to unincorporated businesses. Even a one-person corporation is covered, but unincorporated sole proprietorships (still common in some states) may not. The rule should be amended to state that an "entity" includes unincorporated businesses.

Lawyers for Civil Justice (U): LCJ had two additional proposals:

(1) The rule should allow for a written response when the organization has no knowledge on a particular topic. This sort of problem is common when the litigation is about something that occurred in the distant past. Presently, an

organization faces the threat of sanctions if it fails to produce a prepared witness despite the fact that the witness adds nothing to the information contained in the documents. This is pointless. The rule should be amended along the following lines:

An organization receiving a Rule 30(b)(6) deposition notice may respond to the notice, or individual topics contained therein, by providing a written response in lieu of presenting a witness if the responding entity certifies that the written response provides the responsive information reasonably available to the organization and no further information would be provided at a deposition. The written response may include a production of documents, tangible materials or electronically stored information.

Such a rule should clarify that the organization is not required to obtain knowledge it does not have at the time of the deposition notice by seeking out and interviewing former employees.

(2) The rule should prohibit redundant depositions. Duplicative depositions are wasteful. One way this waste can occur is that when a relevant employee has testified as fact witness, he or she is then called upon to testify a second time pursuant to a 30(b)(6) notice. Such notices often identify topics on which fact witnesses have already testified. In complex product liability litigation, this problem can be even more significant. The current situation means that the same witness can be deposed repeatedly in different cases. One defendant's regulatory witness was deposed seven different times, always concerning the same issues and documents. The rule should be amended to exclude matters for examination that have been covered in prior depositions, and should include a new process for objections in order to avoid such duplication.

Barry Green (W): Another topic that could be addressed is the problem with deposing 30(b)(6) witnesses who are also fact witnesses. In many states like New Mexico, it often turns out that an LLC is comprised of one or two members who are also fact witnesses. In keeping with the idea of limiting depositions and their duration, trying to determine whether the witness is being questioned as a fact witness or as a corporate witness is difficult. The actual solution seems to be separate depositions, but the rule should clearly state that all questions must be answered subject to objection unless a privilege is invoked.

National Federation of Independent Business (Z): NFIB is a nonprofit association with more than 300,000 members across the country. Unlike large corporations, its members do not employ

staffs of lawyers and accountants. More than half its members have five or fewer employees. When they are served with subpoenas these businesses need time to find and consult a lawyer. There should be a reasonable period of time for nonparties to find and consult counsel before responding to the subpoena. A nonparty business should have the ability to raise objections to the subpoena before the deposition, with the burden on the party seeking the deposition to seek a court order rather than imposing on the nonparty small business the burden of moving for a protective order. We propose that something like the following be added to the rule:

A nonparty organization shall have a reasonable time to engage and consult an attorney prior to responding to the subpoena. A nonparty organization shall notify the party issuing the subpoena if the organization objects to the subpoena's description of the matters for examination on the ground of privilege, lack of reasonable particularity, or exceeding the scope of discovery and may decline to present deponents to testify on the matters to which the objection applies unless otherwise directed by the court at the instance of the party issuing the subpoena.

Jonathan Feigenbaum (JJJ): Proposals to require a minimum notice procedure or impose a numerical limit on topics for the deposition would be counterproductive. Requiring parties to provide the exhibits in advance will prompt parties to list an excessive number of exhibits. There is no need to state that the examination must be limited to the topics listed.

Wright Lindsey Jennings (MMM): Though the Subcommittee's invitation to comment does not mention it, we believe that the "reasonable particularity" standard in the rule should be re-examined. In our experience, parties often designate topics that are so broad as to defy any reasonable effort to prepare a witness on them. More focused topics make the process of preparing the witness simpler, and increase the likelihood that the party taking the deposition will get answers to the questions it asks.

Product Liability Advisory Council (DDDD): There should be a limit on the number of topics permitting in order to allow the corporation to focus on the real issues in dispute rather than being burdened with researching topics that are not relevant.

Bowman and Brooke (EEEE): Rule 30(b)(6) notices should be expressly subject to the scope of discovery defined by Rule 26(b)(1), including the principles of proportionality. There should be a presumptive limit on the number of topics that can be included, and an express acknowledgement that depositions may not be necessary where other evidence exists, either through written discovery or due to prior depositions on the same topic or of the

same witness.

Huie, Fernambucg & Stewart, LLP (FFFF): Too often plaintiff attorneys insist that we disclose the materials relied upon by the witness to prepare or chosen by an attorney to prepare the witness. This kind of question is almost universal. The lack of any protection in Rule 30(b)(6) comparable to Rule 26(b)(3) is a glaring hole that must be filled. Proper preparation requires the company's lawyer to select documents from the larger production already made in the case in order to focus the preparation and concentrate on the areas pertinent to the list of topics for the deposition. Without this protection, attorneys and witnesses have to review every document produced in the case, which is wasteful and contrary to Rule 1.

Ford Motor Co. (KKKK): There should be a safe harbor of companies that have information only in documentary form with regard to certain topics. For example, Ford received a notice in 2015 asking for manufacturers of replacement parts during the period 1955-79. Companies often do not have employees with actual knowledge about such matters, so the only information they have is in documents. The person designated cannot do more than repeat what is in the documents, and if there are discrepancies between the documents the witness cannot reconcile them. The language proposed by LCJ in its July 7 comments would address this problem. Another problem that should be solved is repetitive discovery regarding a topic already covered in a 30(b)(6) deposition. Once an issue has been so addressed in discovery, that should be presumptively sufficient. Ford finds that it is subjected to repeat 30(b)(6) inquiries in copycat litigation, and believes that these duplicative discovery efforts merely increase the cost it bears and give the questioning attorney an opportunity to grandstand. Instead, a party should be allowed to satisfy a 30(b)(6) notice by providing the transcript of the deposition already taken in a different case. If the propounding party insists on going forward after receipt of the transcript, there should be a presumption that it will bear the costs for the company of the deposition.

State Bar of California Litigation Section Federal Courts Committee (TTTT): A rule inviting the noticing party to provide the witness with the exhibits to be used in advance of the deposition is a technique that could focus the responding party in a way that is better than the current provision that requires merely a description of the matters upon which the organization may be examined. Putting it in the rule tells the parties they get the advantage of greater particularity by taking this step. Another provision that could be useful would a rule provision addressing the problem of questions on matters no specified in the notice.

Seyfarth Shaw (YYYY): The rule should require 30 days

notice, which would provide time to prepare for the deposition and eliminate motion practice about whether sufficient notice has been given. The rule should also include a presumptive limit on the number of topics that can be included. Under the current rule, the noticing party has no incentive to leave off lesser topics. But the investigatory burden of each topic may be heavy, and the absence of a numerical limit undermines proportionality in the use of this device. In keeping with the goals of the 2015 amendments, the rule should also state that the topics must be reasonable in scope and proportional to the needs of the case.

Robert Rosati (AAAAA): I know that the Subcommittee has a "B" list and offer the following reactions to it:

1. I always attach exhibits to the deposition notice and integrate the exhibits with the areas of inquiry. If you want the deposition to be effective, you have to tell the witness what the areas of inquiry are. If you don't provide the exhibits, it is much more likely that the witness will not be properly prepared.
2. A minimum notice requirement is unnecessary, assuming competent counsel who coordinate the timing with each other.
3. Forbidding questioning beyond the topic list is meaningless. The standard 30(b)(6) notice will include: "I will ask the witness or witnesses about their personal knowledge of the facts of the case outside the areas of inquiry addressed in the balance of this deposition notice."
4. Substituting interrogatories for live testimony may work, and perhaps a deposition on written questions. But a Rule 31 deposition works only in very narrow circumstances.
5. Advance notice of the identity of the witnesses would be helpful.
6. The rule does not presently prohibit a second deposition of the organization.
7. Limiting 30(b)(6) to parties would be a bad idea. I use 30(b)(6) with nonparties because the alternative would often involve deposing a lot of nonparty employees.
8. I can't imagine how identifying the documents reviewed by the witness in preparation would benefit anyone.
9. Expanding initial disclosure would not obviate any problems with 30(b)(6).
10. Attempting to forbid "duplication" would be a bad idea. This would tempt a party to offer false testimony in a

30(b)(6) deposition and then try to prevent depositions of its employees.

11. Limiting the number of areas of inquiry would not be a good idea. The requirement of reasonable particularity is sufficient. Placing a numerical cap on the topic areas prompts parties to be more vague or general.

Terrence Zic (CCCCC): There should be a presumptive limit on the number of matters for examination, and the rule should require detailed specificity and proportionality with regard to the matters. As counsel for a major defendant in asbestos litigation, I often confront 30 to 50 matters for examination. Sometimes the time frame is enormous. One recent notice (attached as an exhibit) listed 54 matters, the last of which asked us to produce a witness to testify with regard to any factual basis for which the defendant was contesting the authenticity of 900 documents identified by plaintiff. Other changes should be made:

1. The rule should also include a 30-day notice period. Notices are often sent out late in the discovery process.
2. Further depositions should not be allowed on matters already covered in a 30(b)(6) deposition.
3. The rule should state that the witness is not required to respond with regard to matters not listed in the notice. An instruction not to answer risks sanctions under Rule 30(d).
4. The Federal Rules of Evidence should be amended to permit admissibility of affirmative testimony provided by the witness. Otherwise, counsel may object to admissibility on the ground that the witness lacked personal knowledge.

Thomas Sims (DDDDD): The only change to the rule that should be considered is to confirm that one may take more than one 30(b)(6) deposition. For example, in one case we took one such deposition regarding organizational structure and a second one regarding electronically stored information.

McDonald Toole Wiggins, P.A. (FFFFF): Our firm has defended countless 30(b)(6) depositions on behalf of numerous multi-national and national corporations. We favor the following changes:

1. The rule should limit the number of topics and the duration of the deposition. All too often the notice is voluminous and vague, as well as duplicating prior discovery. The deposition should, in its entirety, be limited to one day of seven hours.

2. Parties should not be foreclosed from seeking additional 30(b)(6) depositions, with leave of court, if they encounter new issues.

3. The scope of the notice should be expressly limited to information within the company's possession, custody or control. It should be forbidden to use the notice to obtain information from non-party subsidiaries, parent companies or foreign entities outside the subpoena power of the court.

4. Work product protection should be explicitly recognized with regard to the documents used to prepare the witness. The courts have not resolved this issue consistently, and for corporations with litigation pending nationwide that is a significant problem.

5. There should be a reasonable minimum notice period -- 30 or 45 days. The court's scheduling order should address this question.

Clay Guise (HHHHH): The rule should include a presumptive limit on the number of topics and on the length of the deposition.

Sherry Rozell (KKKKK): We believe there are additional measures that would improve the functioning of 30(b)(6) depositions:

1. There should be a minimum notice period, which would be better than the current rule's requirement of a "reasonable" period. We suggest 30 days.

2. The rule should require that the parties schedule these depositions at a mutually agreeable time and date. This would boost cooperation.

3. The rule should define a specific number of sufficiently detailed topics that may be included in the notice. We re routinely presented with notices that contain 20 to 30 far-reaching topics about all aspects of the case. Often several of these should be sought through written discovery. By placing a limit of 10 topics, the Subcommittee could improve practice. (Five topics should suffice in many cases.)

4. When discovery of the relevant information has already occurred, such as by interrogatory, the rule should prevent duplicative discovery.

5. The rule should expressly prohibit questioning about materials reviewed in preparation for the deposition. This is necessary to protect the integrity of the litigation

process.

Maglio Christopher & Toale (MMMMM): We believe the rule should be left alone. But if the Committee elects to proceed with an amendment, the focus should be on the "I don't know" response. The time, expense, and uncertainty of obtaining a remedy from the judiciary for this behavior often means that this tactic succeeds. Courts often feel that the most they can do is order a second deposition. That sort of order is inadequate, increases costs, and wastes time. The second deposition is likely to be fruitless also. We believe that the remedy is to direct that what the corporation does not know at deposition it cannot know at trial, somewhat like the judicial admission issue raised by the Subcommittee. That result should be written into the rule for the "I don't know" answer.

Henry Kelston (NNNNN): If and when the Committee does consider amending 30(b)(6), I urge that a provision be added stating that more than one deposition of the entity may be noticed where circumstances warrant. It is unrealistic to expect that an early 30(b)(6) deposition to include every topic on which an examination of the company may be needed. Unless more than one may be had, counsel can be forced into a difficult choice -- forgo an early deposition that may simplify and clarify the remaining discovery, or draft a very broad notice to preserve topics for possible later depositions.

Baron & Budd (QQQQQ): There is one issue that occasionally arises which could be addressed in an amendment. There is a split in authority about whether more than one 30(b)(6) deposition is permitted without leave of court. If the rule is to be changed, we suggest that it should be made clear that Rule 30(a)(2)(A)(ii) does not apply to 30(b)(6) depositions, and that multiple depositions of the same party organization can be taken. Among other things, such a change would mean that parties opposing organizational litigants can safely be precise and focused in their topic definitions, knowing that they don't have to cover everything in one omnibus deposition.

American Association for Justice (SSSSS): AAJ suggests that the rule should be fortified with language emphasizing the obligation of the defenant to provide a witness who is properly prepared. The rule could incentivize such preparation by identifying specific sanctions that are triggered by a failure to prepare. In addition, the rules could be clarified to state that the "one deposition only" provision of Rule 30(a) does not apply to organizational depositions. A plaintiff who wants to take an early deposition of the corporation to get the lay of the land for purposes of discovery should not be prevented from taking a later organizational deposition about important specific topics in the case. One solution would be to amend Rule 30(a)(2)(A)(ii) to state that it does not apply to 30(b)(6) deponents.

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6. Review of Social Security Disability Claims: 17-CV-D

1 The Administrative Conference of the United States has
2 submitted a proposal that rules be adopted to govern individual
3 actions for district-court review of final decisions of the
4 Commissioner of Social Security. The proposal deserves the
5 prompt and serious consideration owing to the Administrative
6 Conference. A subcommittee has been appointed to carry the
7 initial burden. The Subcommittee, having met with knowledgeable
8 people, will provide an oral report on its initial work to the
9 Committee.

10 The Administrative Conference proposal is set out below.
11 The Committee's initial consideration is described in the
12 following summary of the proposal in this Committee's Report to
13 last June's meeting of the Standing Committee. The Standing
14 Committee resolved the question about initial responsibility for
15 acting on the proposal by determining that this Committee should
16 address the question through the framework of the Civil Rules.

17 42 U.S.C. § 405(g) provides that an individual may obtain
18 review of a final decision of the Commissioner of Social
19 Security "by a civil action." Every year brings 17,000 to
20 18,000 of these review cases to the district courts. They
21 account for approximately 7% of all civil filings. The national
22 average remand rate is about 45%, a figure that includes rates
23 as low as 20% in some districts and as high as 70% in others.
24 Different districts employ a wide range of disparate procedures
25 in deciding these actions.

26 The Administrative Conference of the United States,
27 supported by admirably detailed work by Professors Jonah Gelbach
28 and David Marcus, has submitted this proposal:

29 The Judicial Conference, in consultation with Congress
30 as appropriate, should develop for the Supreme Court's
31 consideration a uniform set of procedural rules for
32 cases under the Social Security Act in which an
33 individual seeks district court review of a final
34 administrative decision of the Commissioner of Social
35 Security pursuant to 42 U.S.C. § 405(g). These rules
36 would not apply to class actions or to other cases
37 that are outside the scope of the rationale for the
38 proposal.

39 The proposal seems to contemplate action through the Rules
40 Enabling Act. The suggestion of "consultation with Congress as

41 appropriate" need not detract from that conclusion. Acting
42 through the Enabling Act should involve at least the Judicial
43 Conference and the Standing Committee and, as determined by the
44 Standing Committee, the Civil Rules Committee. Section 405(g)
45 review proceedings are civil actions. They are lodged in the
46 district courts. The Civil Rules Committee has initial
47 responsibility to study and to advise about rules for civil
48 actions in the district courts. That holds whether in the end
49 it seems better to adopt an independent set of review rules that
50 are linked to the Civil Rules, instead to place the review rules
51 directly in the Civil Rules, or even to recommend no action.
52 Looking to the Civil Rules Committee also is indicated by the
53 need to integrate with at least some provisions of the Civil
54 Rules and with the overall modes of managing district-court
55 dockets. In the end, it may be that any new rules will bear
56 some resemblance to the Appellate Rules. The Appellate and
57 Civil Rules Committees often work together, and can be expected
58 to do so as proves useful in this project.

59 Any proposal to adopt rules specific to a particular
60 substantive area must overcome well-founded reluctance.
61 Detailed substantive knowledge may be required. In the setting
62 of Social Security claims it also may be necessary to develop
63 comprehensive knowledge of the ways in which the Social Security
64 Administration and its lawyers interact in review proceedings
65 with other government lawyers and claimants. There also is a
66 risk that even rules that manage to strike a sound balance
67 between competing interests will be perceived to favor one set
68 of interests over another – one or two specialists, indeed, may
69 believe that the other set of interests is favored. Yet respect
70 for the Administrative Conference suggests that this proposal
71 deserves further work. It may prove possible to develop a
72 uniform national procedure that benefits claimants, the
73 government, and the courts.

74 If this task is taken on, it will be important to think
75 about the means of gathering information necessary to do it
76 well. Powerful institutional concerns counsel against such
77 extraordinary measures as adding specialist members to the
78 Advisory Committee or to a subcommittee. Those concerns are
79 deepened by the prospect that it would not be enough to rely on
80 one, or two, or three specialists. Some other means are likely
81 to prove more appropriate. A rather widespread request
82 addressed to professional groups, and perhaps to identifiable
83 individuals, might prove a useful beginning. Experience with
84 such requests has worked for projects focused on more
85 traditional Civil Rules subjects, and might work here. So too,

86 "miniconferences," although expensive, have proved quite
87 helpful. The only caution is that more than one miniconference
88 might be needed to test proposals as they advance through
89 successive stages.

90 The Committee has concluded that work on this proposal
91 should begin now. The outcome may be a decision to put the task
92 aside. It may be to develop a separate set of rules, with
93 cross-incorporations between the separate set and the Civil
94 Rules. Or it may be to develop a relatively short rule, or a
95 few rules, lodged in the Civil Rules. The task will not be
96 easy. The further it is pursued, the greater the expenditure of
97 Committee resources.

98 The draft April Minutes reflect the Committee discussion.
99 One issue that will have to be assessed is whether rules of the
100 type suggested by the Administrative Conference – either as a
101 separate set of rules or as part of the Civil Rules – will
102 address the concerns focused by the Administrative Conference,
103 particularly the high or divergent remand rates. The part of
104 the April agenda that stimulated this discussion is set out here
105 to give some sense of the issues as they first appear:

106 Unique, subject-specific, and intricate questions
107 are raised by 17-CV-D, a submission by the
108 Administrative Conference of the United States "for
109 the consideration of the Judicial Conference of the
110 United States." The Administrative Conference
111 "recommends that the Judicial Conference 'develop
112 special procedural rules for cases under the Social
113 Security Act in which an individual seeks district
114 court review of a final administrative decision of the
115 Commissioner of Social Security pursuant to 42 U.S.C.
116 § 405(g).'"

117 *Civil Rules or Something Else?*

118 Two threshold issues intertwine. One is a
119 potential ambiguity about the choice between stand-
120 alone "special procedural rules" and adopting new and
121 specialized Federal Rules of Civil Procedure. The
122 other is whether the initial burden of developing
123 either sort of specialized rules should be borne by
124 the Civil Rules Committee, by the Civil Rules
125 Committee as enlarged for this purpose by members well
126 versed in Social Security review issues, by a new

127 advisory committee, or by the Standing Committee
128 itself with some other means of seeking advice.

129 Some uncertainty as to the nature of the special
130 procedural rules springs from the recommendation's
131 repeated references to special rules. In addition,
132 there is a clear statement that many of the Civil
133 Rules have no useful role to play in fashioning the
134 means of appellate review on the administrative
135 record. In the end, the recommendation is that:

136 The Judicial Conference, in consultation
137 with Congress as appropriate, should develop
138 for the Supreme Court's consideration a
139 uniform set of procedural rules for cases
140 under the Social Security Act in which an
141 individual seeks district court review of a
142 final administrative decision of the
143 Commissioner of Social Security pursuant to
144 42 U.S.C. § 405(g). These rules would not
145 apply to class actions or to other cases
146 that are outside the scope of the rationale
147 for the proposal.

148 Setting aside for now the suggestion of
149 consultation with Congress in developing Enabling Act
150 Rules, the recommendation is compatible with adoption
151 of a separate set of rules, akin to such models as the
152 Habeas Corpus rules, or with adoption of new Civil
153 Rules. Nor should the choice be deemed foreclosed by
154 the study on which the recommendation is based.
155 Professors Jonah Gelbach and David Marcus prepared for
156 the Administrative Conference "A Study of Social
157 Security Litigation in the Federal Courts" (July 28,
158 2016). The Study explicitly recommends "enabling
159 legislation to clarify the U.S. Supreme Court's
160 authority to promulgate procedural rules for social
161 security litigation," with appointment of a social
162 security rules advisory committee. Study, p. 148. The
163 Study recognizes that the Enabling Act likely
164 authorizes specific rules for social security appeals
165 now, but prefers stand-alone rules because many Civil
166 Rules are not suited to review on an administrative
167 record. Something as simple as originating review by
168 filing a complaint, Rule 3, is thought inappropriate,
169 as are the general rules for pleading, discovery, and
170 summary judgment. The poor fit of these rules with

171 administrative review in turn has meant a riot of
172 wildly disparate practices across district courts,
173 many of them poorly suited to the task. All that need
174 be done with the Civil Rules is to add to Rule 81(a) a
175 new paragraph excluding cases governed by the new
176 social-security review rules. Study, pp. 148-152.

177 The Study approaches the recommendations for
178 review rules by establishing a richly detailed
179 foundation in the structure and operation of the
180 administrative proceedings that precede review in a
181 district court. The details will command close
182 attention when it comes time to begin framing specific
183 review rules. They present a compelling picture of a
184 system that, both in size and character, is quite
185 unlike other administrative adjudications that come on
186 for review either in a district court or in a court of
187 appeals. One challenge will be to determine whether
188 the many unique characteristics of this system will,
189 in the end, have a significant bearing on the best
190 procedures for review. One example is provided by
191 requests for voluntary remand. Office of General
192 Counsel staff "typically requests voluntary remand in
193 about 15% of appeals annually" when they conclude that
194 a case "cannot be defended." Study p. 31. Given the
195 workloads involved, it would be good to adopt a review
196 procedure that facilitates this practice. But it may
197 be that this purpose can be served by rules that look
198 a lot like the Appellate Rules for circuit-court
199 review on an administrative record.

200 The Study also provides information about the
201 outcomes on review. Part III, pp. 44-80, explores the
202 statistic that "federal courts ruled for disability
203 claimants in 45% of the 18,193 appeals they decided in
204 FY 2014 * * *." Part IV, pp. 81-126, explores
205 variations in the remand rate across the district
206 courts. The lowest rate of remand is 20.8% in one
207 district; the highest is 70.6%. There is a
208 significant clustering of remand rates among the
209 district courts as aligned by circuit, and – perhaps
210 surprisingly – a significant sameness among different
211 judges in any single district. Without venturing any
212 firm diagnosis, one hypothesis offered for further
213 study is that there is a significant variation in the
214 quality of the work done in different regions of the
215 Social Security Administration. It does not seem

216 likely that court rules for review can be framed with
217 a purpose to address the remand rate directly. Section
218 405(g) establishes the familiar "substantial evidence"
219 standard of review. But it may be that addressing the
220 cacophony of local practices by establishing a uniform
221 and good review procedure will have some impact on the
222 quality of review decisions.

223 It is useful to begin work on these questions in
224 the Civil Rules Committee, with advice from the
225 Appellate Rules Committee as seems helpful. Although
226 no firm answer can be given now, it seems likely that
227 some provisions of the Civil Rules will remain useful.
228 Explicit provisions for default, entry of judgment,
229 motions to alter or amend, perhaps stays, reliance on
230 magistrate judges, Rules 77 through 79 on conducting
231 business, motions, and records, and yet others are
232 examples. In addition, § 405(g) provides that an
233 individual may obtain review of the Commissioner's
234 "final decision" "by a civil action" filed in a
235 district court. If it is to be a civil action, and if
236 it is right that some aspects of the civil action are
237 usefully governed by the general Civil Rules,
238 integration of the special review procedures with the
239 Civil Rules may be accomplished better within the body
240 of the Civil Rules as a whole rather than by making an
241 exception – most likely in Rule 81(a) – that excludes
242 application of the Civil Rules from matters governed
243 by the potential RULES FOR REVIEW OF INDIVIDUAL BENEFIT
244 DECISIONS UNDER 42 U.S.C. § 405(g).

245 Beginning initial consideration in the Civil
246 Rules Committee need not imply a commitment to
247 complete the task. A great deal must be learned,
248 although the Gelbach and Marcus Study provides an
249 outstanding point of departure. One way to begin the
250 task is to wonder about the models that might be used
251 to frame a new review procedure.

252 The model advanced by the Administrative
253 Conference adopts the direct analogy to administrative
254 review as an appeal procedure. Review would be
255 initiated by a "complaint" that is "substantially
256 equivalent to a notice of appeal." (Remember that §
257 405(g) directs that review be sought by a "civil
258 action" "commenced" within 60 days; Rule 3 directs
259 that a civil action be commenced by filing a

260 complaint.) The next step is modeled on the provision
261 in § 405(g) that "[a]s part of the Commissioner's
262 answer the Commissioner of Social Security shall file
263 a certified copy of the transcript of the record
264 including the evidence upon which the findings and
265 decision complained of are based." This is translated
266 as a direction that the Commissioner "file a certified
267 copy of the administrative record as the main
268 component of its answer." The case would then be
269 developed by the claimant's opening brief, the
270 agency's response, and "appropriate subsequent
271 proceedings and the filing of appropriate responses
272 consistent with * * * § 405(g) and the appellate
273 nature of the proceedings." Appropriate deadlines and
274 page limits would be added. And there would be "other
275 rules" that promote efficiency and uniformity,
276 "without favoring one class of litigants over another
277 or impacting substantive rights."

278 The appeal model is the obvious starting point.
279 What counts is framing the issues clearly through
280 submissions that bring together each point of
281 agreement and each point of argument. As compared to
282 an ordinary civil action that launches a new dispute,
283 social security review comes at the end of an
284 elaborate and multi-stage administrative and then
285 adjudicatory procedure. There is little lost by a
286 procedure that does not, at the time of complaint and
287 answer, afford any idea of what the issues will be.
288 Channeling the parties into a process that enables (or
289 forces) them into a record-focused framing of the
290 dispute suffices. The deadlines, word-count, and any
291 like formal constraints can be shaped for the peculiar
292 needs of this setting.

293 One question could be whether the benefits of
294 this model should be generalized by adopting rules for
295 all proceedings for review on an agency record, not
296 for individual Social Security disputes alone. There
297 may be reason for caution. The sheer number of Social
298 Security review cases dwarfs all other district-court
299 administrative review cases – there are something on
300 the order of 18,000 social security review cases a
301 year. The special character of the underlying claims
302 and the distinctive administrative structure and
303 operations also may be reasons to confine new rules to
304 social security cases, as recommended by the

305 Administrative Conference. In addition, § 405(g)
306 specifies part of the procedure for review. Review is
307 obtained "by a civil action." "As part of the
308 Commissioner's answer the Commissioner of Social
309 Security shall file a certified copy of the transcript
310 of the record including the evidence upon which the
311 findings and decision complained of are based." There
312 is a specific provision limiting review of
313 administrative decisions based on failure to submit
314 proof in conformity with regulations. The court may
315 affirm, modify, or reverse, with or without remand. It
316 may remand for taking new evidence. And there is a
317 special procedure for remanding on motion by the
318 Commissioner.

319 A second question might be whether it would be
320 simpler to adopt a Civil Rule that concisely absorbs
321 by reference the Appellate Rules for administrative
322 review. The answer may be that it would be more
323 complicated, not simpler. The Study suggests
324 different timing for briefing that responds to the
325 special character of social-security review, and
326 different word counts for briefs. Other parts of the
327 Appellate Rules might also benefit from adaptation.
328 These problems could be met by adopting special
329 social-security review rules into the Appellate Rules,
330 to be incorporated into the Civil Rules by simple
331 cross-reference, but it seems better to use the Civil
332 Rules to govern district-court proceedings. No one
333 enjoys the process of beginning with a Civil Rule that
334 directs attention elsewhere.

335 A different possibility would be to create a new
336 procedure specifically tailored for administrative
337 review in a district court. Although there may be
338 rare exceptions, in the overwhelming majority of cases
339 review is confined to the administrative record. The
340 court does not decide the facts, and does not decide
341 whether there are genuine disputes as to the facts.
342 The only question is whether, in the standard phrase,
343 the administrative decision is supported by
344 substantial evidence on the record considered as a
345 whole. If there is substantial evidence, the
346 administrative decision is affirmed. If not, the
347 administrative decision is set aside; if further
348 proceedings are appropriate, the case is remanded to
349 the agency. Because taking evidence is not part of the

350 review, and for want of any obvious alternative in the
351 Civil Rules, Professors Gelbach and Marcus report that
352 many districts adapt summary-judgment procedures to
353 decide social-security review cases. But they also
354 find that this model is ill-suited. Many of the
355 incidents of summary-judgment procedure, designed to
356 determine whether there is a genuine dispute as to any
357 material fact, are inapposite.

358 As with a Civil Rule based on analogy to the
359 Appellate Rules, a new Civil Rule for review on an
360 administrative record could be limited to Social
361 Security review cases or made more general. Although
362 there is likely to be a common core of provisions,
363 caution may suggest limiting any new rule to Social
364 Security cases, at least for the time being. The
365 "civil action" specified by the statute might as well
366 be commenced by filing a "complaint." The statute
367 ensures that the administrative record is supplied as
368 part of the answer. The rule could provide for a
369 claimant's motion to reverse and for a Commissioner's
370 motion to affirm. Or it might provide that the
371 complaint itself operates as a motion to reverse, to
372 be met by a request to affirm in the answer or a
373 motion by the Commissioner to remand under the
374 statutory provision for remand.

375 The obvious danger in adopting a rule for a
376 specific statutory framework is that the statute may
377 be amended. The time required to amend the rule might
378 leave a substantial period of confusion.

379 Discussion should begin with the broad questions:
380 Where should new rules be lodged, and who should have
381 primary initial responsibility for developing them.
382 Thoughtful answers, carefully deliberated, are
383 required. A request from the Administrative
384 Conference should stimulate immediate study. It will
385 be good to begin with at least an initial sense of
386 direction.

387 *Next Steps*

388 The immediate question, then, is what direction to take in
389 developing this complex set of questions for further work. It
390 may be wise to defer the choice between stand-alone rules and
391 new Civil Rules. That choice will be affected by the shape of

392 any rules that may be proposed, and would be mooted if the
393 decision is not to adopt any rules. The question could not be
394 deferred if it were found useful to create a new advisory
395 committee within the Enabling Act structure, but the Standing
396 Committee has directed that the work begin in the Civil Rules
397 Committee. A subcommittee has been formed to lead the work.

398 It is important to begin gathering information from people
399 with as many perspectives as can be found, both within the
400 Social Security Administration and beyond. Local rules for
401 these cases will be consulted as potential models for national
402 rules. Help also may be found in a model national rule prepared
403 by the Social Security Administration; a copy is attached below.
404 A Subcommittee meeting on November 6 will include presentations
405 from several relevant perspectives (e.g., Social Security
406 Administration, plaintiffs' bar, ACUS). A key focus of the
407 meeting will be understanding how Civil Rules amendments would
408 likely address the delay and remand-rate problems that lie at
409 the core of ACUS's concerns. Another will be the extent to
410 which disparate practices in the district courts impose
411 significant burdens on the Social Security Administration. An
412 oral report on that meeting will be presented to the full
413 Committee to help guide future steps.

TAB 6B

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Supreme Court of the United States
Washington, D. C. 20543

COUNSELOR TO
THE CHIEF JUSTICE

* Appropriate
Handling

February 10, 2017

Matthew Lee Wiener
Vice Chairman and Executive Director
Administrative Conference
of the United States
1120 20th Street, N.W., Suite 706 South
Washington, D.C. 20036

Dear Mr. Weiner:

I am writing in response to your letter of January 13, 2017, submitting the Administrative Conference's recommendation that the Judicial Conference "develop special procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)."

By copy of this letter, I am forwarding the Administrative Conference's recommendation to James C. Duff, Director of the Administrative Office of the U.S. Courts and Judicial Conference Secretary, and to the Honorable David G. Campbell, U.S. District Judge and Chair of the Judicial Conference's Committee on Rules of Practice and Procedure.

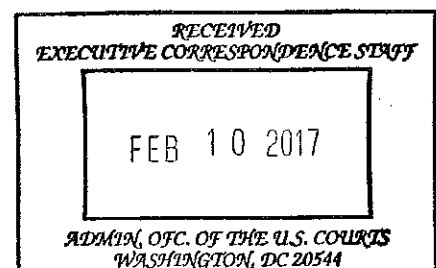
Thank you for your letter and for the analysis supplied on behalf of the Administrative Conference.

Sincerely,



Jeffrey P. Minear

Attachment



cc: ✓ Director James C. Duff
Hon. David G. Campbell
Ms. Jill C. Sayenga
Professor Ronald M. Levin
Ms. Shawne McGibbon
Mr. Reeve T. Bull
Ms. Gisselle Bourns
Mr. Daniel J. Sheffner



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

January 13, 2017

Mr. Jeffrey Minear
Counselor to the Chief Justice
Supreme Court of the United States
1 First Street N.E.
Washington, DC 20543

Dear Mr. Minear:

I respectfully submit for the consideration of the Judicial Conference of the United States Recommendation 2016-3, *Special Procedural Rules for Social Security Litigation in District Court*, 81 Fed. Reg. 94,312 (Dec. 23, 2016), of the Administrative Conference of the United States. It recommends that the Judicial Conference “develop special procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).”

The Administrative Conference’s staff will be pleased to provide any assistance that the Judicial Conference may request in its consideration of the recommendation.

With my best.

Sincerely yours,

Matthew Lee Wiener
Vice Chairman and Executive Director

cc: Ms. Jill C. Sayenga
Professor Ronald M. Levin
Ms. Shawne McGibbon
Mr. Reeve T. Bull
Ms. Gisselle Bourns
Mr. Daniel J. Sheffner



Administrative Conference Recommendation 2016-3

**Special Procedural Rules for Social Security Litigation
in District Court**

Adopted December 13, 2016

The Administrative Conference recommends that the Judicial Conference of the United States develop special procedural rules for cases under the Social Security Act¹ in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). The Rules Enabling Act delegates authority to the United States Supreme Court (acting initially through the Judicial Conference) to prescribe procedural rules for the lower federal courts.² The Act does not require that procedural rules be trans-substantive (that is, be the same for all types of cases), although the Federal Rules of Civil Procedure (Federal Rules) have generally been so drafted. Rule 81 of the Federal Rules excepts certain specialized proceedings from the Rules' general procedural governing scheme.³ In the case of social security litigation in the federal courts, several factors warrant an additional set of exceptions. These factors include the extraordinary volume of social security litigation, the Federal Rules' failure to account for numerous procedural issues that arise due to the appellate nature of the litigation, and the costs imposed on parties by the various local rules fashioned to fill those procedural gaps.⁴

* * *

¹ 42 U.S.C. § 301 *et seq.* (2012).

² *See* 28 U.S.C. § 2072(a) (2012).

³ FED. R. CIV. P. 81(a); *see also* FED. R. CIV. P. 71.1–73 (“Special Proceedings”).

⁴ This recommendation is based on a portion of the extensive report prepared for the Administrative Conference by its independent consultants, Jonah Gelbach of the University of Pennsylvania Law School and David Marcus of the



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The Social Security Administration (SSA) administers the Social Security Disability Insurance program and the Supplemental Security Income program, two of the largest disability programs in the United States. An individual who fails to obtain disability benefits under either of these programs, after proceeding through SSA's extensive administrative adjudication system, may appeal the agency's decision to a federal district court.⁵ In reviewing SSA's decision, the district court's inquiry is typically based on the administrative record developed by the agency.

District courts face exceptional challenges in social security litigation. Although institutionally oriented towards resolving cases in which they serve as the initial adjudicators, the federal district courts act as appellate tribunals in their review of disability decisions. That fact alone does not make these cases unique; appeals of agency actions generally go to district courts unless a statute expressly provides for direct review of an agency's actions by a court of appeals.⁶ However, social security appeals comprise approximately seven percent of district courts' dockets, generating substantially more litigation for district courts than any other type of appeal from a federal administrative agency. The high volume of social security cases in the federal courts is in no small part a result of the enormous magnitude of the social security disability program. The program, which is administered nationally, annually receives millions of applications for benefits. The magnitude of this judicial caseload suggests that a specialized approach in this area could bring about economies of scale that probably could not be achieved in other subject areas.

The Federal Rules were designed for cases litigated in the first instance, not for those reviewing, on an appellate basis, agency adjudicative decisions. Consequently, the Federal Rules fail to account for a variety of procedural issues that arise when a disability case is appealed to district court. For example, the Rules require the parties to file a complaint and an answer. Because a social security case is in substance an appellate proceeding, the case could more

University of Arizona Rogers College of Law. *See* Jonah Gelbach & David Marcus, A Study of Social Security Litigation in the Federal Courts 127–42, 148–59 (July 28, 2016) (report to the Admin. Conf. of the U.S.).

⁵ 42 U.S.C. § 405(g) (2012).

⁶ *See* *Watts v. Sec. & Exch. Comm'n*, 482 F.3d 501, 505 (D.C. Cir. 2007).



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sensibly be initiated through a simple document akin to a notice of appeal or a petition for review. Moreover, although 42 U.S.C. § 405(g) provides that the certified record should be filed as “part of” the government’s answer, there is no functional need at that stage for the government to file anything more than the record. In addition, the lack of congruence between the structure of the Rules and the nature of the proceeding has led to uncertainty about the type of motions that litigants should file in order to get their cases resolved on the merits. In some districts, for instance, the agency files the certified transcript of administrative proceedings instead of an answer, whereas other districts require the agency to file an answer. In still other districts, claimants must file motions for summary judgment to have their case adjudicated on the merits,⁷ whereas such motions are considered “not appropriate” in others.⁸

Social security disability litigation is not the only type of specialized litigation district courts regularly review in an appellate capacity. District courts entertain an equivalent number of habeas corpus petitions,⁹ as well as numerous appeals from bankruptcy courts. But habeas and bankruptcy appeals are governed by specially crafted, national rules that address those cases’ specific issues.¹⁰ No particularized set of rules, however, accounts for the procedural gaps left by the Federal Rules in social security appeals.

When specialized litigation with unique procedural needs lacks a tailored set of national procedural rules for its governance, districts and even individual judges have to craft their own. This is precisely what has happened with social security litigation. The Federal Rules do exempt disability cases from the initial disclosure requirements of Rule 26, and limit electronic access of

⁷ See, e.g., E.D. Mo. L.R. 56-9.02; Order Setting Schedule, *Donvan-Terris v. Colvin*, Civ. No. 14-5125 (E.D. Wash. April 8, 2015); E.D. Mo. L.R. 56-9.02.

⁸ See, e.g., S.D. Iowa Local R. 56(i).

⁹ During the twelve months that ended on September 30, 2014, the district courts received 19,185 “general” habeas corpus petitions and 19,146 social security appeals. Table C-2A, U.S. District Courts—Civil Cases Commenced, by Nature of the Suit, During the 12-Month Periods Ending September 30, 2009 Through 2014, at 3–4.

¹⁰ See R. GOVERNING § 2254 CASES U.S. DIST. CTS. 1–12; FED. R. BANKR. P. 1001–9037.



nonparties to filings in social security cases,¹¹ but, otherwise, they include no specialized procedures. As a result, numerous local rules, district-wide orders, and individual case management orders, addressing a multitude of issues at every stage in a social security case, have proliferated. Whether the agency must answer a complaint, what sort of merits briefs the parties are required to file, whether oral arguments are held, and the answers to a host of other questions differ considerably from district to district and, sometimes, judge to judge. Such local variations have not burgeoned in other subject areas in which district courts serve as appellate tribunals; this fact reflects the district courts' own recognition that social security cases pose distinctive challenges.

Many of the local rules and orders fashioned to fill the procedural gaps left by the Federal Rules generate inefficiencies and impose costs on claimants and SSA. For example, simultaneous briefing—the practice in some districts that requires both parties to file cross motions for resolution of the merits and to respond to each other's briefs in simultaneously filed responses—effectively doubles the number of briefs the parties must file. Some judges employ a related practice whereby the *agency* is required to file the opening brief.¹² Because social security complaints are generally form complaints containing little specificity, courts that employ this practice (known as “affirmative briefing”) essentially reverse the positions of the parties, leaving to the agency the task of defining the issues on appeal. The questionable nature of some of these local variations may be attributable in part to the fact that they can be imposed without observance of procedures that would assure sufficient deliberation and opportunities for public feedback. Proposed amendments to the Federal Rules must go through several steps, each of which requires public input. So-called “general orders” and judge-specific orders, on the other hand, can be issued by a district or individual judge with very little process.

The disability program is a national program that is intended to be administered in a uniform fashion, yet procedural localism raises the possibility that like cases will not be treated

¹¹ FED. R. CIV. P. 26(a)(1)(B)(i); FED. R. CIV. P. 5.2(c).

¹² See, e.g., Standing Order Gov. Dev. of Soc. Sec. Cases Assigned to Judge Conrad (W.D. Va. Jan. 1, 2005); Briefing Schedule, *Barnes v. Colvin*, Civ. No 14-482 (S.D. Tex. Sept. 3, 2014), at 1–2.



alike. Burdensome procedures adopted by some districts or judges, such as simultaneous briefing schedules, can increase delays and litigation costs for some claimants, while leaving other similarly situated claimants free from bearing those costs. Further, many of the attorneys who litigate social security cases—agency lawyers and claimants’ representatives alike—maintain regional or even national practices. Localism, however, makes it difficult for those lawyers to economize their resources by, for instance, forcing them to refashion even successful arguments in order to fit several different courts’ unique page-limits or formatting requirements.

Procedural variation can thus impose a substantial burden on SSA as it attempts to administer a national program and can result in arbitrary delays and uneven costs for disability claimants appealing benefit denials. SSA and claimants would benefit from a set of uniform rules that recognize the appellate nature of disability cases. Indeed, several districts already treat disability cases as appeals.¹³ Many of these districts provide, for example, for the use of merits briefs instead of motions or for the filing of the certified administrative record in lieu of an answer.

The Supreme Court has recognized that the exercise of rulemaking power to craft specialized procedural rules for particular areas of litigation can be appropriate under the Rules Enabling Act.¹⁴ Yet, in recommending the creation of special procedural rules for social security disability and related litigation, the Administrative Conference is cognizant that the Judicial Conference has in the past been hesitant about amending the Federal Rules to incorporate provisions pertaining to particular substantive areas of the law. That hesitation has been driven, at least in part, by reluctance to recommend changes that would give rise to the appearance, or even the reality, of using the Federal Rules to advance substantive ends, such as heightened pleading standards that would disfavor litigants in particular subject areas. The proposals offered

¹³ See, e.g., General Order 05-15, *In re* Soc. Sec. Cases, Actions Seeking Rev. of the Comm’r of Soc. Sec.’s Final Dec. Denying an App. for Benefits (W.D. Wash. June 1, 2015); Standing Order, *In re* Actions Seek. Rev. of the Comm’r of Soc. Sec.’s Final Decs. Denying Soc. Sec. Benefits (W.D. NY Sept. 5, 2013); Standing Order for Disp. of Soc. Sec. App. (W.D. La. Sept. 2, 1994); E.D. Mo. L.R. 9.02; D. Ariz. L.R. 16.1; N.D. Oh. L.R. 16.3.I.

¹⁴ See *Harris v. Nelson*, 394 U.S. 286, 300 n.7 (1969) (inviting the Advisory Committee on Civil Rules to draft procedural rules for habeas corpus litigation).



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herein have very different purposes. Indeed, the Administrative Conference believes that rules promulgated pursuant to this recommendation should not favor one class of litigants over another or otherwise bear on substantive rights. Instead, this recommendation endorses the adoption of rules that would promote efficiency and uniformity in the procedural management of social security disability and related litigation, to the benefit of both claimants and the agency.¹⁵ Such a commitment to neutrality would also serve to dampen any apprehensions that the proposed rules would violate the Rules Enabling Act's proscription of rules that would "abridge, enlarge, or modify any substantive right."¹⁶ Rules consistent with these criteria could potentially address a variety of topics, including setting appropriate deadlines for filing petitions for attorneys' fees, or establishing judicial extension practices, or perhaps authorizing the use of telephone, videoconference, or other telecommunication technologies. In developing such rules, the Judicial Conference may wish to consult existing appellate procedural schemes, such as the Federal Rules of Appellate Procedure and the Rules of Practice and Procedure of the United States Court of Appeals for Veterans Claims.

The Administrative Conference believes that a special set of procedural rules could bring much needed uniformity to social security disability and related litigation. In routine cases, page limits, deadlines, briefing schedules, and other procedural requirements should be uniform to ensure effective procedural management. At the same time, the new rules should be drafted to displace the Federal Rules *only* to the extent that the distinctive nature of social security litigation justifies such separate treatment.¹⁷ In this way, the drafters can avoid the promulgation

¹⁵ This recommendation is the latest in a line of Conference recommendations focused on improving the procedures used in social security cases. *See, e.g.*, Recommendation 90-4, Social Security Disability Program Appeals Process: Supplementary Recommendation, 55 Fed. Reg. 34,213 (June 8, 1990); Recommendation 87-7, A New Role for the Social Security Appeals Council, 52 Fed. Reg. 49,143 (Dec. 30, 1987); Recommendation 78-2, Procedures for Determining Social Security Disability Claims, 43 Fed. Reg. 27,508 (June 26, 1978).

¹⁶ 28 U.S.C. § 2072(b) (2012).

¹⁷ *See* FED. R. CIV. P. 81(a)(6) ("[The Federal Rules], to the extent applicable, govern proceedings under [certain designated] laws, except as those laws provide other procedures.").



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of a special procedural regime that sacrifices flexibility and efficiency for uniformity in certain cases.

The research that served as the foundation for this report focused on social security disability litigation commenced under 42 U.S.C. § 405(g). Section 405(g) also authorizes district court review of SSA old age and survivors benefits decisions, as well as other actions related to benefits. Because such non-disability appeals do not differ procedurally from disability cases in any meaningful way,¹⁸ it is the Conference's belief that this recommendation should apply, subject to the exceptions discussed below, to all cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).

The Conference recognizes that some cases might be brought under § 405(g) that would fall outside the rationale for the proposed new rules. This could include class actions and other broad challenges to program administration, such as challenges to the constitutionality or validity of statutory and regulatory requirements, or similar broad challenges to agency policies and procedures. In these cases, the usual deadlines and page limits could be too confining. By citing these examples, the Conference does not intend to preclude other exclusions. The task of precisely defining the cases covered by any new rules would be worked out by the committee that drafts the rules, after additional research and more of an opportunity for public comment on the scope of the rules than has been possible for the Conference. It may also be necessary to include specific rules explaining the procedure for the exclusion of appropriate cases.

RECOMMENDATION

1. The Judicial Conference, in consultation with Congress as appropriate, should develop for the Supreme Court's consideration a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final

¹⁸ Further, they only constitute about four percent of total social security cases appealed to district courts annually. See Table C-2A, U.S. District Courts—Civil Cases Commenced, by Nature of the Suit, During the 12-Month Periods Ending September 30, 2009 Through 2014, at 4.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g). These rules would not apply to class actions or to other cases that are outside the scope of the rationale for the proposal.

2. Examples of rules that should be promulgated include:
 - a. A rule providing that a claimant's complaint filed under 42 U.S.C. § 405(g) be substantially equivalent to a notice of appeal;
 - b. A rule requiring the agency to file a certified copy of the administrative record as the main component of its answer;
 - c. A rule or rules requiring the claimant to file an opening merits brief to which the agency would respond, and providing for appropriate subsequent proceedings and the filing of appropriate responses consistent with 42 U.S.C. § 405(g) and the appellate nature of the proceedings;
 - d. A rule or rules setting deadlines and page limits as appropriate; and
 - e. Other rules that may promote efficiency and uniformity in social security disability and related litigation, without favoring one class of litigants over another or impacting substantive rights.

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§ 405. Evidence, procedure, and certification for payments

Effective: November 2, 2015

* * * * *

(g) Judicial review

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and, in any case in which the Commissioner has not made a decision fully favorable to the individual, a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

* * * * *

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1 **Rules for District Court Review of a Final Administrative Decision**
2 **of the Commissioner of Social Security**
3

- 4 1. *Scope.* These Rules shall apply to actions under the Social Security Act brought by an
5 individual Plaintiff seeking district court review of a final administrative decision of the
6 Commissioner of Social Security (Defendant) pursuant to 42 U.S.C. § 405(g). These
7 Rules shall also apply to a claim brought under other sections of the Social Security Act
8 that incorporate the judicial review procedures in 42 U.S.C. § 405(g) by reference.¹ These
9 Rules shall not apply to any other action, for example (1) actions that include claims
10 against the Commissioner of Social Security in addition to, or other than, those brought
11 pursuant to 42 U.S.C. § 405(g); (2) actions that include multiple plaintiffs or a class
12 action; or (3) actions that include defendants other than the Commissioner of Social
13 Security.²
14
- 15 2. *Commencing an action.* To commence an action under 42 U.S.C. § 405(g) to review a
16 final administrative decision of Defendant, Plaintiff shall file with the court a petition for
17 review, and the court’s Case Management and Electronic Case Files (CM/ECF) system
18 will generate a notice of suit to the Social Security Administration’s Office of the General
19 Counsel.
20
- 21 a. *Service of petition for review.*³ Unless otherwise ordered, no service of initial
22 process (i.e., summons and complaint) is required. Defendant shall treat
23 notification of suit through the CM/ECF system as proper service, but nothing in
24 these Rules shall be deemed to be a waiver of service under the Federal Rules of
25 Civil Procedure.
26
- 27 b. *Contents and form of petition for review.*⁴ Use of the model “Petition for Review
28 of Social Security Administration Decision” that appears at Appendix A is
29 strongly encouraged. If the model is not used, the petition must be in substantially
30 the same form and include the same content as the model. The petition for review
31 must not include any attachments or evidence, nor may it include argument or
32 allegations as to the substance of the administrative decision that is the subject of
33 the petition.

¹ Each of these provisions incorporates 42 U.S.C. § 405(g) by reference: 42 U.S.C. §§ 1009(b), 1383(c)(3), and 1395w-114(a)(3)(B)(iv)(III).

² See, e.g., General Order #18(B) (N.D.N.Y.); L.Civ.R. 9.1(a) (D.N.J.); Amended General Order 04-15 (W.D. Wash.).

³ See, e.g., General Order #18(B) (N.D.N.Y.); NDIL LR 4(b) (N.D. Ill.); Amended General Order 04-15 (W.D. Wash.); GO-17-10 (N.D. Okla.); see also CDIL-LR 8.1(C) (C.D. Ill.) (with respect to plaintiffs proceeding in forma pauperis but requiring traditional service on Attorney General).

⁴ See, e.g., Local Rule 3 (D. Me.); W.D. Va. Gen. R. 4(b)(1) (W.D. Va.); LR 9.2 (E.D. La.); Local Civil Rule 9(b) (M.D. La.); Form re Appeal of Social Security Administration Decision (W.D. La.); Procedures In Social Security Disability Appeals (a) (E.D. Wis.); N.D. Ind. L.R. 7-3(a) (for pro se plaintiffs); Local Rule 83.6(b) (D. Wyo.).

34
35 3. *Defendant's response to Plaintiff's petition for review*

- 36
37 a. *Filing and service of Defendant's response.* Within 60 days⁵ after receiving
38 notification of suit through the court's CM/ECF system, Defendant must file with
39 the court and serve on Plaintiff either:
40
41 i. a dispositive motion⁶ (see Rule 5(b) of these Rules); or
42
43 ii. a certified copy of the transcript of the administrative record (transcript),
44 which shall be deemed an answer to Plaintiff's petition for review.⁷ If an
45 electronic copy of the transcript is available, no separate paper copy shall
46 be required. In any filings before the court, all page references to the
47 transcript shall be to the transcript page number and not to the docket page
48 number created by the CM/ECF system upon filing the transcript.
49
50 b. *Redaction.*⁸ The transcript and all other filings are exempt from any redaction
51 requirements.
52
53 c. *Defects.*⁹ If a party discovers a material omission from, improper submission
54 within, or other similar defect in the transcript, the party must promptly notify the
55 court and the opposing party. When appropriate, Defendant will file a
56 supplemental or amended certified copy of the transcript, and the briefing
57 deadlines set out in Rule 4(b) of these Rules will be calculated from the filing of
58 the supplemental or amended transcript. If the omission or other defect cannot be
59 cured by filing a supplemental or amended transcript within 60 days from the date
60 the court is notified, Defendant will file a motion to remand in accordance with
61 Rule 5(c) of these Rules.
62

63 4. *Briefing requirements*

- 64
65 a. *No separate motion or proposed order/judgment.* The briefs identified below shall
66 not be accompanied by a separate motion or proposed order or judgment.¹⁰

⁵ See, e.g., L.R. 9(a)(1) (D. Vt.); L.Civ.R. 9.1(c) (D.N.J.); LR Civ P 9.02 (N.D.W. Va.).

⁶ See, e.g., General Order #18(C) (N.D.N.Y.); LR Civ P 9.5(a) (S.D.W. Va.).

⁷ See, e.g., Administrative Order 2015-05 (E.D.N.Y.); Standing Order M10-468 (S.D.N.Y.); Administrative Order 2006-1 (D. Md.); Procedures In Social Security Disability Appeals (a) (E.D. Wis.); S.D. Ohio Civ. R. 8.1 (S.D. Ohio); LR 8.1(b) (N.D. Ill.); N.D. Ind. L.R. 7-3(a); GO-16-09 (N.D. Okla.); Local Rule 83.6(b) (D. Wyo.).

⁸ See, e.g., LR Civ P 9.3(c) (S.D.W. Va.).

⁹ See, e.g., LR Civ P 9.3(e) (S.D.W. Va.); Local Rule 9.1(c)(1) (W.D. Mo.); D. Kan. Rule 83.7.1(b)(2) (D. Kan.).

¹⁰ See, e.g., LR 16.4(a) (N.D. Ill.).

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b. *Deadlines and content of briefs*

- i. *Plaintiff's opening brief.* Plaintiff shall file and serve on Defendant an opening brief, which shall be titled "Plaintiff's Opening Brief," within 60 days¹¹ of service of the transcript.
 1. Plaintiff's opening brief may, but need not, include a table of contents, a table of citations,¹² and a statement of the facts relevant to the issues raised in the brief. If Plaintiff includes a statement of facts, it must include citations supporting each assertion.¹³
 2. Plaintiff's opening brief shall set out, on page one, the relief requested and the errors alleged. The rest of the brief shall contain separate headings for each argument and the related arguments and errors alleged underneath each heading.¹⁴
 3. Absent exceptional circumstances, a request for remand under sentence six of 42 U.S.C. § 405(g) shall be made in (and supporting evidence shall be submitted with) Plaintiff's opening brief.
- ii. *Defendant's response brief.* Defendant shall file and serve on Plaintiff a response brief, which shall be titled "Defendant's Response Brief," within 60 days¹⁵ of service of Plaintiff's opening brief. Defendant's response brief may, but need not, include a table of contents, a table of authorities,¹⁶ and a statement of facts.¹⁷ If Defendant includes a statement of facts, it must include citations supporting each assertion. The omission of a

¹¹ See, e.g., L.R. 9(a)(2) (D. Vt.); Administrative Order 2015-05 (E.D.N.Y.); Standing Order M10-468 (S.D.N.Y.); L.R.Civ.P. 5.5(b) (W.D.N.Y.).

¹² See, e.g., LR Civ P 9.4(b) (S.D.W. Va.).

¹³ See, e.g., General Order #18(C)(1)(b) (N.D.N.Y.); LR 83.40.4(b) (M.D. Pa.); Social Security Briefing Order (3), 3:16MC198 (W.D.N.C.); General Order No. 2015-05 (2)(c) (D. Neb.); LRCiv 16.1(a)(3) (D. Ariz.).

¹⁴ See, e.g., General Order #18(C)(1)(c) (N.D.N.Y.); General Order 13-7 (3)(b) (E.D. Ky.); Administrative Order No. 10-074 (W.D. Mich.); General Order No. 2015-05 (2)(d) (D. Neb.); LRCiv 16.1(a)(4) (D. Ariz.).

¹⁵ See, e.g., L.R. 9(a)(3) (D. Vt.); Administrative Order 2015-05 (E.D.N.Y.); Standing Order M10-468 (S.D.N.Y.); L.R.Civ.P. 5.5(b) (W.D.N.Y.).

¹⁶ See, e.g., LR Civ P 9.4(b) (S.D.W. Va.).

¹⁷ See, e.g., General Order #18(C)(2) (N.D.N.Y.); L.Civ.R. 9.1(e)(6) (D.N.J.); LR 83.40.5 (M.D. Pa.); Standing Order for Disposition of Social Security Appeals (Sept. 2, 1994, W.D. La.); LRCiv 16.1(b) (D. Ariz.).

95 statement of facts shall not be deemed an admission of the accuracy or
96 completeness of any statement of facts in Plaintiff’s opening brief.
97

98 iii. *Reply briefs*
99

100 1. Plaintiff may file and serve on Defendant a reply brief, which shall
101 be titled “Plaintiff’s Reply to Defendant’s Response Brief,” within
102 15 days¹⁸ of service of Defendant’s response brief. Plaintiff’s reply
103 brief must be limited to responding to Defendant’s brief and shall
104 not raise new issues.¹⁹
105

106 2. Upon leave of court, Defendant may file and serve on Plaintiff a
107 surreply brief, which shall be titled “Defendant’s Reply to
108 Plaintiff’s Reply Brief,” within 15 days of service of Plaintiff’s
109 reply brief, if any.
110

111 iv. *Citations and exhibits.* All arguments must include citations to the
112 transcript and to the relevant legal authority for each argument.²⁰
113 Materials, including unpublished cases or agency policies, that are
114 publically available, including through online resources such as Westlaw
115 or Lexis, need not be attached as exhibits.²¹
116

117 c. *Page limits*
118

119 i. Unless the court grants a motion for leave to exceed these page limits,
120 opening and response briefs shall not exceed 15 double-spaced pages²² in
121 Times New Roman 12-point font with one-inch margins, and reply briefs,
122 if any, shall not exceed 10 double-spaced pages²³ in Times New Roman
123 12-point font with one-inch margins.
124

¹⁸ See, e.g., L.Civ.R. 9.1(e)(3) (D.N.J.); S.D. Ohio Civ. R. 8.1(b) (S.D. Ohio); LRCiv 16.1(d) (D. Ariz.).

¹⁹ See, e.g., Social Security Briefing Order (6), 3:16MC198 (W.D.N.C.); General Order No. 2015-05 (4) (D. Neb.); DUCivR 7-4(b)(1)(C) (Utah).

²⁰ See, e.g., General Order #18(C) (N.D.N.Y.); LR 83.40.4 (M.D. Pa.); LR Civ P 9.02(g) (N.D.W. Va.); LR Civ P 9.4(b) (S.D.W. Va.); Standing Order for Disposition of Social Security Appeals (Sept. 2, 1994, W.D. La.); General Order 13-7 (3)(c) (E.D. Ky.); Standing Order Number 4 (S.D. Ala.).

²¹ Cf. Standing Order Number 4 (S.D. Ala.).

²² See, e.g., LR 83.40.7 (M.D. Pa.); LR Civ P 9.02(e) (N.D.W. Va.); General Order 13-7 (1) (E.D. Ky.); E.D.Mo. L.R. 56 – 9.02 (E.D. Mo.); Standing Order Number 4 (S.D. Ala.).

²³ See, e.g., Social Security Procedural Order (4) (D. Mass.); LR 83.40.7 (M.D. Pa.); LR Civ P 9.4(b) (S.D.W. Va.); E.D.Mo. L.R. 56 – 9.02 (E.D. Mo.); DUCivR 7-4(b)(2) (Utah).

125 ii. Parties must obtain leave of the court to exceed these page limits. A
126 motion for leave to exceed the page limits must include a statement of the
127 reasons additional pages are needed and specify the number required. The
128 court will grant such requests only for a showing of exceptional
129 circumstances that justify the need to exceed the specified page limits.²⁴ If
130 the court grants such a request for Plaintiff's opening brief, Defendant will
131 automatically receive the same page-length enlargement for the response
132 brief.
133

134 d. *Failure to comply.* The court shall, on its own initiative or upon the motion of
135 either party, strike any brief that does not comply with this rule. If the court
136 strikes a brief, the party whose brief was struck must, within seven days, refile a
137 brief that complies with the court's order and these Rules.
138

139 5. *Motion practice*

140
141 a. *Extensions of time.* On request, the court shall grant a 30-day extension of the
142 deadline to file Defendant's response to Plaintiff's petition for review and of
143 either party's first briefing deadline.²⁵ Any other extension requests may be
144 granted at the court's discretion. If the court grants an extension of time for any
145 brief or motion under these Rules, the opposing party will automatically receive
146 an extension of the same amount of time to file a responsive brief or motion.²⁶ A
147 party may request an extension at any time, including on the original due date.
148

149 b. *Dispositive motions prior to filing the transcript.*²⁷ Within the time to file and
150 serve Defendant's response to Plaintiff's petition for review, Defendant may file
151 and serve on Plaintiff a dispositive motion in accordance with the Federal Rules
152 of Civil Procedure. Plaintiff may respond within 30 days of service of
153 Defendant's motion. If the court denies such a motion, Defendant must file the
154 transcript in accordance with Rule 3(a)(ii) of these Rules within 60 days of such
155 denial.
156

157 c. *Motions for remand.*²⁸ If Defendant files a motion for remand for further
158 administrative action, Defendant must serve the motion on Plaintiff and state
159 whether Plaintiff consents to the remand. If Plaintiff has not given consent,

²⁴ See, e.g., DUCivR 7-4(b)(2) (Utah); Administrative Order No. 10-074 (W.D. Mich.).

²⁵ See, e.g., Local Civil Rule 9.3 (M.D. Ga.); D.Ak. L.R. 16.3(d).

²⁶ See, e.g., LR Civ P 9.02(f) (N.D.W. Va.).

²⁷ See, e.g., General Order #18(C) (N.D.N.Y.); LR Civ P 9.3(a), 9.5(a)(1) (S.D.W. Va.).

²⁸ See, e.g., W.D. Va. Gen. R. 4(c)(4) (W.D. Va.); see also General Order #18(C) (N.D.N.Y.); LR Civ P 9.5(a) (S.D.W. Va.); LR 4000-6 (D. Or.).

160 Plaintiff must file a reply with the grounds for objection within 15 days of service
161 of Defendant’s motion, or the court will assume that Plaintiff consents to remand.
162 Any deadlines pending when such a motion is filed will be held in abeyance while
163 the court considers the motion and reply, if any.
164

165 6. *Fees and costs*
166

167 a. *Petitions for attorney’s fees and expenses under the Equal Access to Justice Act*
168 *(EAJA), 28 U.S.C. § 2412*
169

170 i. Petitions for fees and expenses under the EAJA are governed by the
171 requirements and procedures set forth in that Act.²⁹ Unless stipulated, a
172 petition for fees and expenses under 28 U.S.C. § 2412(d) shall not be filed
173 before the judgment at issue is final and not appealable (i.e., a petition not
174 agreed upon shall not be filed before the 61st day after entry of judgment).
175 Unless stipulated, the court will strike any premature petition as
176 improperly filed.
177

178 ii. Defendant must file any objection to a petition for fees and expenses under
179 the EAJA within 30 days of service of the petition. If Defendant does not
180 object, no response is required.
181

182 b. *Requests for costs under 28 U.S.C. §§ 1920 and 2412(a)*. Requests for costs under
183 28 U.S.C §§ 1920 and 2412(a) must be separately itemized from attorney’s fees
184 and expenses sought under 28 U.S.C. § 2412(d).
185

186 c. *Petitions for attorney’s fees under 42 U.S.C. § 406(b)*
187

188 i. *Timing of petition.*³⁰ Plaintiff’s counsel may file a petition for attorney’s
189 fees under 42 U.S.C. § 406(b) no later than 60 days after the date of the
190 final notice of award sent to Plaintiff’s counsel of record at the conclusion
191 of Defendant’s past-due benefit calculation stating the amount withheld
192 for attorney’s fees. The court will assume that counsel representing
193 Plaintiff in federal court received any notice of award as of the same date
194 that Plaintiff received the notice, unless counsel establishes otherwise.
195

196 ii. *Service of petition.* Plaintiff’s counsel must serve a petition for fees on
197 Defendant and must attest that counsel has informed Plaintiff of the
198 request.

²⁹ See, e.g., LR Civ P 9.6 (S.D.W. Va.); LCivR 54.2(a) (W.D. Mich.).

³⁰ See, e.g., LR 4000-8 (D. Or.) (providing for 60 days); Local Civil Rule 7.1(d) (E.D.N.C.) (65 days); Local Civ. Rule 83.VII.07(A) (D.S.C.) (60 days); see also LR Civ P 9.6 (S.D.W. Va.) (motion must be filed “promptly”); S.D. Ohio Civ. R. 54.2(b) (45 days); LCivR 54.2(a) (W.D. Mich.) (35 days); LR 54.2 (E.D. Mich.) (14 days); LR 7.2(e) (D. Minn.) (30 days); Order No. 6:12-MC-124-ORL-22 (M.D. Fla.) (30 days).

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iii. *Contents of petition.*³¹ The petition for fees must include:

1. a copy of the final notice of award showing the amount of retroactive benefits payable to Plaintiff (and to any auxiliaries, if applicable), including the amount withheld for attorney’s fees, and, if the date that counsel received the notice is different from the date provided on the notice, evidence of the date counsel received the notice;
2. an itemization of the time expended by counsel representing Plaintiff in federal court, including a statement as to the effective hourly rate (as calculated by dividing the total amount requested by the number of hours expended);
3. a copy of any fee agreement between Plaintiff and counsel;
4. statements as to whether counsel:
 - a. has sought, or intends to seek, fees under 42 U.S.C. § 406(a) for work performed on behalf of Plaintiff at the administrative level;
 - b. is aware of any other representative who has sought, or who may intend to seek, fees under 42 U.S.C. § 406(a);
 - c. was awarded attorney’s fees under the EAJA in connection with the case and, if so, the amount of such fees; and
 - d. will return the lesser of the EAJA and 42 U.S.C. § 406(b) awards to Plaintiff upon receipt of the 42 U.S.C. § 406(b) fee award.
5. any other information the court would reasonably need to assess the petition.

iv. *Response.*³² Defendant may file a response within 30 days of service of the petition, but such response is not required.

³¹ See, e.g., Local Civ. Rule 83.VII.07(B) (D.S.C.); LCivR 54.2(b)(iii) (W.D. Mich.); LR 54.2 (E.D. Mich.); LR 4000-8 (D. Or.).

³² See, e.g., Local Civ. Rule 83.VII.07(C) (D.S.C.); LCivR 54.2(v) (W.D. Mich.); Order No. 6:12-MC-124-ORL-22 (M.D. Fla.).

238 7. *Conferences, discovery, alternate dispute resolution, oral argument, and written orders*
239 *and judgments*

- 240
- 241 a. Actions subject to these Rules are exempt from any pre-trial conference
242 procedures, including requirements that parties meet and confer about the issues
243 in the case, discuss settlement, or prepare joint briefs or joint statements of facts.
244
- 245 b. Discovery is not permitted in actions covered by these Rules.³³
246
- 247 c. Actions subject to these Rules, including related attorney fee matters, are not
248 eligible for alternative dispute resolution such as arbitration or mediation.
249
- 250 d. The court will decide actions subject to these Rules on the pleadings and briefs
251 without oral argument, unless the court determines that the facts and legal
252 arguments are not adequately presented in the briefs and transcript or that oral
253 argument will significantly aid the decisional process.³⁴ If oral argument is held,
254 counsel for either party shall be permitted, upon request, to appear via telephone
255 or, if available, video conference.³⁵
256
- 257 e. In every case, the court shall issue a written order setting forth the basis for its
258 decision and, where judgment is entered, a separate judgment. If the court orders
259 remand, the court shall specify whether the remand is pursuant to sentence four or
260 sentence six of 42 U.S.C. § 405(g).
261

262 8. *Other rules*

- 263
- 264 a. Any procedural issues not addressed by these Rules continue to be governed by
265 the Federal Rules of Civil Procedure.
266
- 267 b. The provisions of these Rules take precedence over the provisions of any other
268 local rule in conflict.³⁶

³³ See, e.g., LR Civ P 9.3(d) (S.D.W. Va.).

³⁴ See, e.g., General Order #18(C) (N.D.N.Y.); L.Civ.R. 9.1(f) (D.N.J.); LR Civ P 9.8 (S.D.W. Va.); Social Security Briefing Order (7), 3:16MC198 (W.D.N.C.); W.D. Va. Gen. R. 3(c)(2) (W.D. Va.); Procedures In Social Security Disability Appeals (d) (E.D. Wis.); LR 7.2(c)(2) (D. Minn.); Local Rule 9.1(d)(1) (W.D. Mo.); General Order No. 2015-05 (6) (D. Neb.); LRCiv 16.1(e) (D. Ariz.); Civil L.R. 16-5 (N.D. Cal.); D. Kan. Rule 83.7.1(d) (D. Kan.); Local Rule 83.6(c) (D. Wyo.).

³⁵ See, e.g., W.D. Va. Gen. R. 3(c)(2) (W.D. Va.).

³⁶ See, e.g., LR Civ P 9.9 (S.D.W. Va.); Local Rule 9.1(e) (W.D. Mo.).

270

271

IN THE UNITED STATES DISTRICT COURT

272

FOR THE _____

273

274

_____,)

275

)

276

Plaintiff,*)

277

)

278

v.)

Civil Action No. _____

279

)

280

_____,)

281

Commissioner of Social Security,)

282

)

283

Defendant.)

284

Petition for Review of Social Security Administration Decision

285

286

287

1. Plaintiff's name* is: _____.

288

Plaintiff also uses or has used the following other name(s) (if applicable):

289

_____.

290

Plaintiff lives in _____ (name of State),

291

in _____ (name of city or town),

292

in _____ County.

293

294

2. The last four digits of the social security number of Plaintiff (and of the person on whose behalf Plaintiff is bringing this petition, or of the relevant wage earner, as applicable) are

295

296

_____.

297

3. Defendant is the Commissioner of Social Security.

298

299

4. Plaintiff is bringing this action under section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), to review a final decision of the Commissioner of Social Security as to a claim (or claims) under:

300

301

302

(check the box that applies)

303

title II (for claims relating to a period of disability and disability insurance benefits),

304

title XVI (for claims relating to supplemental security income),

305

both title II and title XVI, or

306

other title(s)

307

of the Social Security Act. Plaintiff has exhausted all administrative remedies. An ALJ issued a decision on _____. (If applicable) The Appeals

308

309

* If Plaintiff is filing this case on behalf of someone else, include that other person's full name as well, unless the other person is under age 18, in which case, use that other person's initials and include, in paragraph 2, the last four digits of the minor's social security number.

310 Council denied Plaintiff's request for review or granted Plaintiff's request for review and
311 issued a decision on _____.

312
313 5. Plaintiff disagrees with the decision in this case because it is not supported by substantial
314 evidence or contains errors of law.

315
316 6. Plaintiff asks that the Commissioner's final decision be reviewed and set aside and that
317 the case be remanded for a new hearing and decision, modified, or reversed for a
318 calculation of benefits, and for any other relief as the Court deems appropriate.

319
320 Date: _____

321
322 If Plaintiff is unrepresented:

323
324 Signature: _____

325
326 Printed name: _____

327
328 Plaintiff's address: _____

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330 _____

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332 Plaintiff's telephone: _____

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334 Plaintiff's email address: _____

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336

337 If Plaintiff is represented:

338
339 Name of attorney: _____

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341 Attorney's address: _____

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345 Attorney's telephone: _____

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347 Attorney's fax: _____

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349 Attorney's email address: _____

TAB 7

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TAB 7A

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7A. Rule 16: Role of Judges in Settlement

1 This item comes to the agenda in the form of a law review
2 article by Ellen E. Deason, *Beyond "Managerial Judges":*
3 *Appropriate Roles in Settlement*, 78 Ohio St.L.J. 73 (2017).

4 The article addresses the overlap of functions when a judge
5 assigned to a case for pretrial and trial also becomes involved
6 in promoting settlement. It offers an exhaustive survey of
7 legal literature and an array of social-science literature.
8 Competing points of view are presented clearly and fairly. It
9 provides an excellent foundation for considering possible rules
10 to regulate the combination of adjudication and settlement
11 functions in a single judge, if the topic is to be explored
12 further.

13 This topic is presented now to invite discussion. The
14 question is whether it should be developed further, and whether
15 there is a prospect of meaningful rulemaking that warrants
16 additional examination of this issue? This question is in part
17 empirical: how often do federal judges press for settlement in
18 ways that go beyond the bounds that might be set by a formal
19 rule? And it is in part pragmatic – how effective would a
20 formal rule be in restraining the activities it attempts to
21 prevent?

22 The specific proposal, pp. 139, 140-144, is that Rule 16 be
23 amended to impose "a structural separation of neutral
24 functions." A judge could serve as a "settlement neutral," but
25 not in a case assigned to the judge "for management and
26 adjudication." The rule would apply in both bench and jury
27 trials. An exception could be made for consent, but only if the
28 suggestion comes "entirely at the initiative of the parties."
29 And the rule should prohibit settlement judges and mediators
30 from reporting settlement communications to the assigned judge.

31 Other parts of the article contemplate that the judge
32 assigned to the case could urge the parties to consider
33 settlement and suggest local-rule or other ADR procedure.

34 Three major concerns are identified in combining the
35 functions of assigned judge and settlement neutral.

36 The inherent force of settlement guidance offered by a
37 judge is enhanced if the judge is assigned to the case for all
38 purposes, affecting the parties in ways that are characterized
39 as coercion. No matter how vigorously a judge insists that

40 guidance, suggestions, and evaluations are offered just to help,
41 not to pressure, the parties and counsel may reach agreements
42 framed by fear of displeasing the judge.

43 A judge can function effectively in promoting settlement
44 only by gathering information that would not be presented in
45 pretrial or trial. The information may be presented in ex parte
46 discussions that remain unknown to other parties, and may remain
47 uncountered. It is difficult, if not impossible, to mentally
48 sequester the inadmissible and often untested information from
49 the judicial functions of pretrial management and decision on
50 the merits.

51 Parties may react to these concerns by being less
52 forthright in discussing the case with an assigned judge. For
53 that reason a settlement judge or mediator may promote better,
54 and perhaps more, settlements.

55 The article also notes arguments that support an active
56 settlement role for the assigned judge, particularly at pp. 107-
57 108. The assigned judge begins the settlement task with more
58 information about the case, particularly if there has been
59 significant activity in the case before settlement is promoted.
60 And the parties may at times feel that the assigned judge's
61 involvement is more like having a "day in court." Elsewhere, it
62 is recognized that an assigned judge may be able to speak reason
63 to parties who remain unreasonably intransigent despite
64 cautionary advice from their lawyers.

65 A separate practical concern may be that it might prove
66 difficult to trade off the role of settlement neutral to another
67 judge on a court that has only a small number of judges.

68 The abstract arguments supporting an active settlement role
69 for the assigned judge are supplemented by exploring the
70 variations in practice that remain today. Some assigned judges
71 continue to participate in pursuing settlement. Some impose
72 tight limits of self-restraint. Others become more deeply
73 involved. Local district rules likewise vary. Efforts to limit
74 assigned judge participation through the ABA Model Code of
75 Judicial Conduct and the Code of Conduct for United States
76 Judges have come to essentially the same place: a judge may
77 encourage parties to settle, but should not coerce any party to
78 surrender the right to judicial decision. The Code also permits
79 a federal judge, with the parties' consent, to confer separately
80 with the parties and their counsel in an effort to mediate or
81 settle pending matters.

82 Overall, the arguments in a long familiar debate are
83 presented clearly and cogently. The immediate question is
84 whether to explore further the ultimate recommendation to adopt
85 a rule that prohibits an assigned judge from also assuming the
86 role of a settlement neutral. At least three further questions
87 are wrapped up in this question: Is a flat prohibition the
88 wisest course to follow? If not, is it possible to draft a more
89 nuanced rule that will effect significant improvement on the
90 present array of disparate practices? And if a good rule can be
91 drafted, can it be presented in a way that will subdue
92 predictable resistance from many judges who now combine the
93 roles of assigned judge and settlement neutral, and believe they
94 are advancing the just, speedy, and inexpensive determination of
95 their cases?

96 Criminal Rule 11(c)(1) provides what might seem a
97 reasonably clear model for a flat prohibition:

98 An attorney for the government and the defendant's
99 attorney, or the defendant when proceeding pro se, may
100 discuss and reach a plea agreement. The court must
101 not participate in these discussions.

102 The very context of the prohibition, however, shows that it is
103 not like civil practice. The Civil Rules do not, and need not,
104 recognize the parties' freedom to discuss and settle. Private
105 settlement is vastly different from a guilty plea.¹ Rule 16,
106 further, has long recognized a role for the judge. The current
107 version is Rule 16(c)(2)(I): "the court may consider and take
108 appropriate action on * * * (I) settling the case and using
109 special procedures to assist in resolving the dispute when
110 authorized by statute or local rule." Rule 26(f), further,
111 directs that in their conference the parties must consider the
112 possibilities for promptly settling or resolving the case.

113 Nor does Professor Deason suggest removing the assigned
114 judge from any role with respect to settlement. As part of case
115 management, the assigned judge should remain free to guide the

¹ The Committee Note for the 2002 Criminal Rules amendments states that the Committee had considered the question whether Rule 11(c)(1)(A) permits a judge who does not take the plea to serve as a facilitator in reaching a plea agreement. It decided to leave the rule as it is, with the understanding that inaction was not intended to approve or disapprove the decisions that permit that practice. That cautious approach clearly signals the difference from civil practice.

116 parties toward the process of settlement. Urging the parties to
117 explore settlement through a neutral process, including a
118 process that intimately involves a different judge of the same
119 court, is accepted as a legitimate, indeed important, part of
120 case management.

121 Once it is accepted that the assigned judge has a
122 legitimate role to play in managing the parties' engagement in
123 the settlement process, the challenge will be to draft rule
124 language that sets boundaries that make sense and that are clear
125 enough to be effective. Some guidance may be found in the
126 underlying concerns. The rule should provide that the assigned
127 judge may not learn from any source information about the case
128 or the parties' positions that does not emerge in managing the
129 case outside the settlement process. That provision will guard
130 against the judge's involuntary, subconscious consideration of
131 information that is not admissible for decision. It should
132 encourage the parties to be as forthcoming as they ever will be
133 in settlement, particularly mediation. The rule also should
134 protect against coercion. The assigned judge should be free to
135 remind the parties of whatever local rules apply to ADR. Beyond
136 that, it is likely useful to provide that the parties can
137 consent to enlisting the assigned judge as a settlement neutral.
138 The risk of coerced consent can be reduced by a provision
139 similar to the Rule 73(b)(1) procedure for consenting to trial
140 before a magistrate judge. This protection would be most
141 effective if it provides that, in every case, the clerk must
142 notify the parties of the opportunity to have the assigned judge
143 participate as a settlement neutral; absent consent of all
144 parties, the assigned judge cannot serve as a settlement
145 neutral. (An exception to the "every case" aspect could be made
146 to accommodate judges who do not want to play this role even
147 with party consent.) To be complete, a rule likely should
148 prohibit a motion by any party, or all parties together. Only
149 unanimous consent through the clerk's confidential process would
150 do.

151 Crafting all of that into Rule 16 will be no easy chore.
152 Complicated rules create familiar risks of misunderstanding and
153 misapplication. Keeping complication even close to the limits
154 of feasibility can easily set prohibitions that are undesirable.

155 At the outset, one must ask whether this is an example of a
156 solution in search of a problem. Many, indeed perhaps most,
157 judges might say that they already carefully maintain the
158 separation this article advocates, by avoiding substantive
159 involvement in settlement in cases assigned to them. If that is

160 so, then is there a need for rulemaking on this subject? And
161 even if there may be a need to look further into this, another
162 question remains. The tensions arising from participation by
163 the assigned judge in promoting settlement are familiar.
164 Persuasive arguments for limiting an assigned judge's
165 involvement are met by strong arguments supporting involvement.
166 These tensions will not easily yield to resolution even by an
167 admirably crafted law review article. Does the prospect of
168 meaningful rulemaking warrant pursuing these questions now, or
169 in the near future?

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TAB 7B

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**7B. Rule 26(a)(1)(A): Disclosure of Third-Party Litigation
Financing: 17-CV-O, 17-CV-XXXXX, 17-CV-YYYYY, 17-CV-BBBBBB**

1 This proposal would amend Rule 26(a)(1)(A) by adding a new
2 item (v) to require initial disclosure:

3 (v) for inspection and copying as
4 under Rule 34, any agreement under which any
5 person, other than an attorney permitted to
6 charge a contingent fee representing a
7 party, has a right to receive compensation
8 that is contingent on, and sourced from, any
9 proceeds of the civil action, by settlement,
10 judgment or otherwise.

11 The proposal, advanced by the U.S. Chamber Institute for
12 Legal Reform and 29 other organizations, comes to the Committee
13 for the third time. The materials that described it for the
14 October 30-31, 2014, meeting, and the Minutes of the Committee
15 discussion, are attached. Several Committee members suggested
16 that action would be premature, and the Committee "decided not
17 to act on these issues now." The suggestion returned as 15-CV-
18 KK, which provided additional information but, rather than urge
19 immediate action, urged the Committee to take steps soon. The
20 Minutes for the April 14, 2016 meeting reflect brief discussion
21 and a Committee decision "that this topic should remain open on
22 the agenda without seeking to develop any proposed rules now."

23 The proponents now advance the 2014 proposal for immediate
24 action, with arguments that the use of third-party litigation
25 funding (TPLF) is expanding and that automatic disclosure of
26 funding agreements is needed to enable courts to address a
27 variety of perceived problems. Two detailed responses have been
28 received from enterprises engaged in providing litigation
29 funding: Burford, 17-CV-XXXXX, and Bentham, 17-CV-YYYYY. A
30 third response, 17-CV-BBBBBB, focusing specifically on
31 professional-responsibility issues, has been submitted by two
32 law professors who were deeply involved with the ABA Ethics
33 20/20 working group on litigation funding. One of them serves
34 as outside ethics counsel to Burford, the other to Bentham, but
35 they submit their comments in their individual capacities,
36 without outside review and without compensation.

37 These notes supplement the materials from 2014 by sketching
38 the ways in which the current submissions illuminate the reasons
39 that counsel against immediate action. The need for action may

40 overcome the cautions, but the need to understand the underlying
41 phenomena is manifest.

42 The new submissions dramatically illustrate the range of
43 information that will be needed if any project is to be
44 undertaken. There is a great deal to learn. And it will be
45 difficult to learn it with confident accuracy. The submissions
46 reflect some dispute whether funding is expanding, and whether
47 funding practices are still developing, but there is reason to
48 suspect that the field will continue to evolve. One minor
49 illustration is uncertainty whether "crowdfunding" is more than
50 a trivial presence. Compare the Chamber's submission, p. 9,
51 with Burford's response, pp. 5-6.

52 Perhaps the most elusive questions go to the motives for
53 urging disclosure. The expressed motives are attractive: third-
54 party funding transfers control from a party's attorney to the
55 funder, augments costs and delay, interferes with proportional
56 discovery, impedes prompt and reasonable settlements, entails
57 violations of confidentiality and work-product protection,
58 creates incentives for unethical conduct by counsel, deprives
59 judges of information needed for recusal, and is a particular
60 threat to adequate representation of a plaintiff class. Not
61 surprisingly, the responses quarrel with each of these concerns
62 and, having rejected them, suggest other motives for seeking a
63 disclosure rule. Some of these other motives are characterized
64 as seeking untoward strategic advantage in individual actions.
65 Another suggestion is that the proponents of disclosure hope
66 that a large number of disclosures will reveal isolated
67 illustrations of overreaching that can be used as anecdotes in a
68 campaign to regulate or even forbid third-party funding. That
69 suggestion need not be explored now. It is enough to describe
70 the competing arguments about functional need and strategic
71 impact.

72 What follows is not an attempt to resolve the many
73 disagreements shown in the proposal and the responses. The
74 purpose instead is to illustrate the depth of the disagreements
75 and the breadth of the information that must be gathered to
76 resolve them. The difficulty of the judgments that will remain
77 to be made after the information is gathered will be apparent
78 from the description of the disagreements themselves.

79 *Definition*

80 The language of the proposed rule bears on identifying the
81 practices that might be explored and then addressed by a rule.

82 It looks to "any agreement under which any person * * * has a
83 right to receive compensation that is contingent on, and sourced
84 from, any proceeds of the civil action * * *." The Chamber
85 Institute submission defines TPLF as "the practice of investors
86 buying an interest in the outcome of a lawsuit, often in part to
87 (a) allow a plaintiff to 'cash out' of all or part of its
88 interest in a claim, (b) allow plaintiffs' counsel to be paid up
89 front for their prosecution of a claim, or (c) provide a
90 plaintiff with money to litigate its claims." The proposed rule
91 language does seem to include (a), assignment of all or part of
92 a plaintiff's claim. It also could reach the assignment or
93 subrogation provisions of many insurance programs, such as a
94 health insurer's right to recoup medical-care benefits from a
95 tort recovery. At least a case-specific loan to counsel that is
96 to be repaid from fees, in whole or in part, also seems to be
97 covered. Other arrangements, loosely described, shade away from
98 these. A lender may invest in a portfolio of claims litigated by
99 a single firm. Or a lender may simply extend general credit to a
100 firm, perhaps secured by future income streams. These and other
101 arrangements that might fall within the proposed language
102 present questions quite different from the core third-party
103 funding of an individual action that is the focus of the
104 proposal. The two professors assert, 17-CV-BBBBBB at p. 8, that
105 funders "transact directly with clients, not the clients'
106 attorneys," but parts of the ensuing discussion seem to describe
107 arrangements with attorneys. The problems of focus and suitable
108 drafting can be put aside, however, until there is a better
109 understanding of the core model.

110 *Champerty and Maintenance*

111 The submissions reflect disagreement about the survival of
112 common-law prohibitions of champerty and maintenance. It
113 appears that at least some vestiges survive in at least some
114 states. But it also is clear that views have changed in many
115 states. Proponents of third-party funding urge that far from
116 fomenting ill-founded or otherwise unnecessary litigation,
117 funding provides a desirable means of supporting litigation of
118 strong claims by plaintiffs who otherwise could not afford to
119 litigate effectively, or at all. This uncertainty does not much
120 bear on the present task. No one is asking the Committee to
121 establish or abolish rules about champerty and maintenance –
122 such disagreements as emerge about the adequacy of Rules 11,
123 26(b), and 37, and 28 U.S.C. § 1927, are expressed only as
124 bearing on the need for disclosure. Nor is it suggested that
125 disclosure is needed to flush out arrangements that might

126 violate some federal common law of champerty and maintenance.
127 State law is the focus of these exchanges.

128 For now, it does not seem necessary to explore further the
129 relationship between third-party funding and whatever survives
130 of champerty and maintenance doctrine. Memories of the old
131 doctrine may spur an instinctive distaste for this burgeoning
132 development in litigation. It is important to put aside any
133 such instincts in favor of open-minded inquiry. No one is
134 asking for court rules that revive or further diminish the
135 doctrine.

136 *The Insurance Disclosure Analogy*

137 The proponents of disclosure rely extensively on analogy to
138 the duty under Rule 26(a)(1)(A)(iv) to disclose "any insurance
139 agreement under which an insurance business may be liable to
140 satisfy all or part of a possible judgment in the action or to
141 indemnify or reimburse for payments made to satisfy the
142 judgment." The argument is that turnabout is fair play. If a
143 defendant must disclose insurance coverage that enhances a
144 plaintiff's prospect of actually collecting a judgment, so a
145 plaintiff must disclose third-party financing that enhances the
146 plaintiff's ability to litigate and to withstand settlement
147 offers that are made reasonable only by the plaintiff's
148 inability to finance the litigation from internal sources. The
149 analogy may be expanded by arguing that insurance coverage is no
150 more relevant to any party's claim or defense than is third-
151 party funding. Nor is it information that can be useful in
152 leading to admissible information. Disclosure of insurance is
153 required as a means of redressing imbalances in bargaining that
154 result from private information.

155 The analogy is weak. Insurance disclosure is exactly that
156 – it applies only to an insurance agreement with an "insurance
157 business." It does not extend to any other form of
158 indemnification. Nor does it extend to a party's other assets,
159 not even loans or the right to secure a loan. Although the 1970
160 Committee Note to the rule allowing discovery does not say so
161 expressly, the best explanation is that liability insurance is a
162 special social, economic, and legal institution. In many
163 settings legal rights have practical meaning only because of
164 insurance. Enabling a party seeking to pursue a claim to learn
165 about this distinctive asset is a desirable aspect of spreading
166 inevitable losses, particularly in advancing settlements based
167 on a realistic appraisal of the chance to collect a judgment.

168 It may be that different arguments can be made for the
169 social or litigating utility of disclosing third-party funding
170 agreements. But they are different arguments that must be made
171 and appraised independently. Funders argue that disclosure
172 would violate "financial privacy"; the counter is that
173 disclosure of liability insurance is not a significant invasion
174 of privacy (unless high limits hint at substantial private
175 assets worth protecting), and funding is no different. Funders
176 also argue that a plaintiff may find other means of financing
177 litigation that are not reached by the proposed disclosure,
178 including contingent- or conditional-fee representation and
179 simple loans. Most of the arguments, pro and con, go in
180 directions that offer no real analogy to disclosure of insurance
181 coverage.

182 *Funder Control of Litigation*

183 Much of the debate focuses on the fear that third-party
184 funders will exert undue control over the litigation, whether by
185 the express terms of the funding agreement or otherwise. One
186 major focus is influence on settlement, noted below. The more
187 general concern is that funder influence will displace counsel's
188 duties of loyalty and confidentiality. The proposal and
189 responses reflect opposing views of reality in these dimensions.
190 The proposal, pp. 16-18, offers illustrations that begin with
191 Bentham's "best practices" guide that notes the importance of
192 including in the funding agreement terms that address the extent
193 to which the funder is permitted to manage litigation expenses,
194 and entitled to notice of settlement opportunities and an
195 opportunity to participate. Examples are provided, including a
196 funder's condition that a certain law firm be employed, that it
197 approve experts, and have the right "to attend as an observer at
198 internal meetings." Bentham responds, p. 11, that its
199 suggestion that the funding agreement should address control is
200 only that - "Bentham's funding agreements expressly provide that
201 it does not have control over the litigation or settlement."
202 The two professors, 17-CV-BBBBBB at pp. 5-7, echo this view.
203 Nothing in third-party funding arrangements with "reputable
204 commercial financing firms" weakens the client's control over
205 her attorney. There is no need for disclosure "because there is
206 nothing to discover." Financers protect their investments not
207 by asserting control but by "extensive due diligence and
208 transactional structures that do not interfere with the lawyer-
209 client relationship."

210 Apart from "control," a funder may exert an influence that
211 is for better or worse. The Burford response, p. 16, puts it

212 like this: Because funders are repeat players, working through
213 their own experienced litigators, "many litigation funding
214 clients expect and appreciate input from their funder about
215 litigation strategy. In fact, this expertise is part of the
216 reason funding clients choose to work with litigation funders –
217 it is part of a funder's value-added."

218 These examples offer the barest hint of the volumes of
219 information that should inform an appraisal of the role third-
220 party funders play in individual actions. There are likely to
221 be many roles, some benign and some perhaps questionable. Then
222 all of that needs to be tied to the question whether disclosure
223 of the terms of funding agreements might lead to better
224 agreements and better practice.

225 *Settlement*

226 Concerns about funder control lead inevitably to control or
227 influence over settlement. The Chamber, pp. 18-19, argues that
228 funding can delay and distort settlement. Repayment terms may
229 maximize the funder's take of the first dollars, deterring
230 reasonable settlements – a plaintiff who wants to net \$X now has
231 to get a higher gross than if it were paying a straight risk
232 premium for funding. There is a more general concern that the
233 funder, acting in its own interests, may insist on an early and
234 inadequate settlement or may press for rejecting an early and
235 reasonable settlement. These concerns are tied to disclosure by
236 suggesting that disclosure will enable courts to structure
237 protective settlement protocols, for example by requiring the
238 funder to attend any mediation.

239 The funders argue that they want to incentivize plaintiffs
240 to accept reasonable settlement offers. Settlement is better
241 than risking trial. Funders, they say, avoid terms that will
242 encourage a plaintiff to take an unreasonable position – they
243 conservatively value claims and structure transactions to
244 encourage early resolution. They urge that funding arrangements
245 encourage defendants to settle on reasonable, practicable, and
246 fair terms. And the two professors in 17-CV-BBBBBB "advise our
247 clients in the third-party funding industry that attempting to
248 exercise any control over settlement would raise concerns for
249 both the lawyers of the funded party and any court reviewing the
250 enforceability of the contract."

251 The analogy to insurance disclosure remains uncertain, but
252 the Committee Note to the 1970 provision for insurance discovery
253 suggested that information about insurance would encourage

254 settlement in some cases, and make it more difficult in others.
255 At least until more is known, it may be reasonable to surmise
256 that the same divergent effects will follow funding disclosure.

257 *Impact on Parties' Strategies*

258 The battle over disclosure reflects deep, although often
259 tacit, concerns about the impact of disclosure on the parties'
260 strategic behavior. At times the overt discussion extends
261 beyond discussing the analogy to insurance disclosure, shared
262 control, and influences on settlement.

263 Three strategic effects are described in the Bentham
264 response. First, defendants will follow up on an initial
265 disclosure by seeking more information by means that include
266 discovery from the funder and from other funders the plaintiff
267 may have approached. That will lead to increased motion
268 practice. Second, disclosure will encourage harassing motions
269 based on unfounded claims of ethical violations; in extreme
270 cases, disclosure may prompt tactical motions to disqualify the
271 judge. Third, defendants want disclosure "to better evaluate
272 litigation strategies that are resource-based, rather than
273 merits-based."

274 It seems safe to assume that funding disclosure – including
275 the implied disclosure that there is no funding agreement when
276 none is disclosed – will influence party strategy in many cases.
277 In some cases the influence may be powerful. This assumption
278 may be supported by the fervor of those who are pressing for
279 disclosure. But it remains uncertain how to predict, evaluate,
280 and balance the competing and offsetting effects. Absent
281 disclosure, a defendant may guess the plaintiff and the
282 plaintiff's attorney will rely on their own resources, or that
283 there is some third-party funding. The guess may be based on
284 the nature of the litigation, the identity of the plaintiff, and
285 past experience with the plaintiff's lawyer. With disclosure,
286 the defendant may conclude that it can take advantage of limited
287 funding, or that expansive funding counsels economical
288 litigation and reasonable settlement. The calculations may
289 become complicated, at times so complicated as to impair the
290 interests of all parties.

291 *Unethical Conduct*

292 The concern about a funder's control of litigation
293 decisions shades into concern about influence short of control.
294 Much of the focus is on the attorney's potential conflicts of

295 interest, and the related duty of vigorous representation. The
296 Chamber, pp. 10-11, adds a specific concern for class actions.
297 Ties of class counsel to a third-party funder may, it suggests,
298 lead to denial of certification for fears about the adequacy of
299 representation. A similar concern is reflected in the class-
300 action provisions in H.R.985, a bill for fairness in class-
301 action litigation that has been passed in the House. Section
302 103 would add a new 28 U.S.C. § 1722:

303 In any class action, class counsel shall promptly
304 disclose in writing to the court and all other parties
305 the identity of any person or entity, other than a
306 class member or class counsel of record, who has a
307 contingent right to receive compensation from any
308 settlement, judgment, or other relief obtained in the
309 action.

310 (This provision, requiring disclosure only of the identity of a
311 person with a contingent right to compensation, is narrower than
312 the proposal to require disclosure of the agreement in 17-CV-0.)

313 An additional concern is that the terms of a funding
314 arrangement may run afoul of professional responsibility rules
315 that prohibit fee splitting. It seems likely that this concern
316 is strongly affected by the particular terms of the funding
317 agreement. An agreement to repay only out of attorney fees
318 would look much different from an agreement that the plaintiff
319 is to repay out of the judgment. It is less clear how third-
320 party funding repayment terms bear on the concerns that shape
321 rules against fee splitting. Four pages of 71-CV-BBBBBB, pp. 7-
322 11, argue that a blanket disclosure rule "is unsuited to" the
323 "kind of highly fact-specific, rule-of-reason analysis" required
324 for arrangements that may verge on fee splitting. But
325 disclosure may discourage arrangements that veer toward
326 prohibited splitting and enable enforcement when an arrangement
327 crosses the lines of professional responsibility. The
328 importance of enlisting defendants to protect plaintiffs from
329 improper arrangements by plaintiffs' attorneys returns
330 discussion to an unclear area.

331 *Recusal*

332 Disclosure is advanced as an important means of protecting
333 judges against participation in cases that, unknown to them, are
334 financed by funders who have a disqualifying relationship to the
335 judge.

336 The funders respond that such relationships are unlikely.
337 Judges should routinely avoid investing in entities that offer
338 third-party funding. Nor, they say, is it important to ensure
339 that the judge does not have friendly or family relationships
340 with someone who, unknown to the judge, is involved with the
341 funder. This response does not address the appearance of
342 impropriety.

343 A more telling response is the suggestion that if it is
344 important to provide information that bears on recusal, the only
345 required information is identification of a third-party funder.
346 There is no need to know the terms of the funding agreement.

347 *Confidentiality and Work Product*

348 Disclosure is opposed as a threat to confidentiality,
349 privilege, and work-product protection.

350 It seems inevitable that case-specific negotiations between
351 a potential third-party funder and a plaintiff's attorney will
352 involve a great deal of information about the case that is
353 protected by confidentiality, work-product, and privilege.
354 There are compelling reasons to conclude that sharing
355 information for this purpose does not waive any of these
356 protections.

357 Mandatory disclosure of a funding agreement might disclose
358 protected information. That would depend on the terms of the
359 agreement. No information has been provided to shed light on
360 actual funding-agreement terms, much less the possible practice
361 of embedding protected information in agreements. It seems
362 likely that adoption of disclosure would exert a powerful force
363 for sanitizing the agreements. Redaction would remain possible,
364 although it would mean additional work and might generate
365 satellite litigation over the redactions.

Proportionality

366 The recent renewed emphasis on proportionality is advanced
367 as a reason to reject disclosure. The direct burden of
368 disclosure should be minuscule, apart from whatever effects
369 disclosure might have on working out the terms of the funding
370 agreement. Still, it is possible to rely on the factor that
371 looks to "the importance of the discovery in resolving the
372 issues" by falling back on the argument that the funding
373 agreement is not relevant to "any party's claim or defense."
374 Even then, it remains difficult to see disclosure itself as a

375 significant element in cost or delay. It is the other effects
376 of disclosure that should be debated.

377 A different factor in the proportionality analysis is also
378 advanced. This is "the parties' resources." Third-party
379 funders seem concerned that a court might allow more extensive
380 discovery when it knows that extensive funding is available. If
381 the court concludes that the discovery may advance a just
382 determination of the action, the availability of third-party
383 funding may become a social benefit no matter whether the
384 discovery advances or impairs the plaintiff's prospect of
385 recovery. An extended version of this concern seems to be that
386 a court will look not only to the funding made available by the
387 agreement but also to the funder's overall resources, blithely
388 treating the funder as a party or attributing the funder's
389 resources to the party regardless of the limits in the funding
390 agreement.

391 An inevitable related concern is that mandatory disclosure
392 will generate satellite litigation about the adequacy of the
393 disclosure and, as noted above, lead to further attempts to
394 discover more information about the funding arrangement, its
395 origins, and perhaps ongoing implementation of the agreement.

396 *Frivolous Litigation*

397 The Chamber argues in general terms, p. 8, that funding
398 "can be expected to increase the filing of ill-considered
399 cases." It adds an example of funding used to support an
400 advertising campaign to recruit thousands of claimants in a
401 claim-bundling enterprise.

402 The funders address the concern that funding may encourage
403 and prolong frivolous litigation in direct terms. They have
404 powerful incentives to invest only in strong cases. Bentham, pp.
405 8-9, states that it rejects 95% of the cases it considers.
406 Their success with their funding investments suggests they are
407 not funding frivolous claims. Indeed there is an argument that
408 funding enterprises deter weak actions because their negative
409 evaluations discourage attorneys and clients from pursuing
410 claims they could fund with their own resources.

411 The effect of disclosure on funding frivolous litigation is
412 unclear. A case is not made more or less frivolous by the
413 source of funding. It may even be that at times a third-party
414 investment will lend an aura of initially neutral evaluation

415 that encourages second thoughts about what might seem ill-
416 founded litigation.

417 *State Law and Federal Judges*

418 17-CV-BBBBBB argues two related points. Initially,
419 regulation of professional responsibility is a matter for state
420 bar authorities, not for courts. The inherent power courts
421 exercise in such matters as policing conflicts of interest is
422 something separate, "exercised for the purpose of protecting the
423 integrity of the adversarial system and the litigation process,
424 insofar as it affects the rights of the parties to a pending
425 proceeding."

426 A related point is that automatic disclosure in all cases
427 will involve federal courts in difficult issues: courts
428 "recognize that even in their own jurisdiction the enforcement
429 of the obligations of attorneys in connection with financing
430 litigation involves unsettled ethical principles which they are
431 not equipped to evaluate." This is pointless because "we do not
432 see any evidence * * * that third party funding is causing
433 lawyers to act in violation of their own states' ethical
434 obligations."

435 *Recommendation*

436 The Committee considered these questions in 2014. The
437 proponents and opponents of disclosure disagree about the extent
438 to which the amount and extent of third-party funding has
439 expanded. Possible developments in the terms of funding
440 arrangements are equally uncertain, in part because not much was
441 known in 2014. It may well be that the best course is to
442 continue to defer Committee action until it can be known whether
443 there has been meaningful change that justifies more active
444 consideration.

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June 1, 2017

Ms. Rebecca A. Womeldorf
Secretary of the Committee on Rules of Practice and
Procedure of the Administrative Office of the United
States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Renewed Proposal to Amend Fed. R. Civ. P.
26(a)(1)(A)

Dear Ms. Womeldorf:

On behalf of the U.S. Chamber Institute for Legal Reform, the Advanced Medical Technology Association, the American Insurance Association, the American Tort Reform Association, the Association of Defense Trial Attorneys, DRI – *The Voice of the Defense Bar*, the Federation of Defense & Corporate Counsel, the Financial Services Roundtable, the Insurance Information Institute, the International Association of Defense Counsel, Lawyers for Civil Justice, the National Association of Mutual Insurance Companies, the National Association of Wholesaler-Distributors, the National Retail Federation, the Pharmaceutical Research and Manufacturers of America, the Product Liability Advisory Council, the Property Casualty Insurers Association of America, the Small Business & Entrepreneurship Council, the U.S. Chamber of Commerce, the Michigan Chamber of Commerce, the State Chamber of Oklahoma, the Pennsylvania Chamber of Business and Industry, the South Carolina Chamber of Commerce, the Virginia Chamber of Commerce, Wisconsin Manufacturers & Commerce, the Las Vegas Metro Chamber of Commerce, the Florida Justice Reform Institute, the Louisiana Lawsuit Abuse Watch, the South Carolina Civil Justice Coalition, and the Texas Civil Justice League,¹ we are writing to renew the proposal for amending the Federal Rules of Civil Procedure to require the disclosure of third-party litigation funding (“TPLF”) arrangements in any civil action filed in federal court.

TPLF is the practice of investors buying an interest in the outcome of a lawsuit, often in part to (a) allow a plaintiff to “cash out” of all or part of its interest in a claim, (b) allow plaintiffs’ counsel to be paid up front for their prosecution of a claim, or (c) provide a plaintiff with money to litigate its claims. Absent robust

¹ Descriptions of each of the aforementioned organizations are attached as Appendix A.

disclosure requirements, TPLF will continue to operate in the shadows, concealing from the court and other parties in each case the identity of what is effectively a real party in interest that may be steering a plaintiff's litigation strategy and settlement decisions. The lack of transparency may also conceal serious conflicts of interest, as TPLF entities may be either publicly traded companies or companies supported by investment funds whose individual stakeholders may include judges, attorneys, or jurors.

To address these concerns, several of the aforementioned organizations submitted a proposal in 2014 that would have added to the list of required "initial disclosures" in the existing provision of Rule 26(a)(1)(A) a requirement that "a party must, without awaiting a discovery request, provide to the other parties . . . for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise."²

While the Committee ultimately opted not to proceed with formal consideration of the proposal at that time, it indicated it would continue monitoring TPLF and its usage in the federal courts. Since that time, there have been several relevant noteworthy developments, including new evidence of the rapid expansion of TPLF usage in the United States, the diversification of funding methods in a manner that is likely to fuel further expansion of the practice, and several specific episodes revealing significant problems with TPLF – all of which underscore the need for robust disclosure requirements.

I. The Rapid Growth Of TPLF

Expansion of TPLF in the United States. A principal reason the Committee cited for not pursuing the TPLF disclosure proposal in 2014 was its belief that there was uncertainty about the frequency with which TPLF was being used in U.S. litigation. In a very real sense, this objection served to underscore the need for greater transparency on this subject because the dearth of meaningful data regarding TPLF usage stems largely from the lack of disclosure. Since there is no standing duty to reveal TPLF arrangements, the presence of litigation funding in a case comes to light only rarely, usually as a result of discovery (in the limited circumstances it has been permitted) or disputes between parties and a funder.

² The full text of the proposed amendment is attached as Appendix B.

The reality is that since 2014, TPLF usage has increased substantially.³ One of the largest funders in the United States, Burford Capital Limited (“Burford”), recently announced record income, profits, cash receipts and new investment commitments in a March 2017 press release.⁴ Specifically, Burford announced a net after-tax profit of \$115.1 million in 2016, representing a 75% increase from the profit realized in 2015.⁵ In addition, Burford’s income increased by 59% to a record \$163.4 million, which was fueled in large part by a 60% increase in income from litigation-related investments.⁶ Further, Burford announced robust organic cash generation facilitated by investment recoveries of \$216 million.⁷ And the expansion of Burford has culminated in record investment commitments of \$378 million, which marks an 83% increase from 2015.⁸ These strong economic figures by Burford were announced on the heels of its acquisition of Chicago-based Gerchen Keller Capital LLC, another large U.S. funder. Burford spent \$160 million to buy Gerchen Keller – its largest rival⁹ – which in early 2016 reported more than \$1.4 billion in assets.¹⁰ The combination of the two funders “result[ed] in purchase power of about \$2.5 billion or more (with Burford at about \$1 billion and Gerchen Keller at about \$1.4 or \$1.5 billion).”¹¹

³ Henry Meier, *Litigation Costs Go Third Party*, Los Angeles Business Journal, July 4, 2016 (“[TPLF] industry growth has been rapid.”); Matthew Fechik & Amy G. Pasacreta, *United States: Litigation Finance: A Brief History Of A Growing Industry*, Mondaq, Apr. 4, 2016 (“[TPLF] firms now invest about \$1 billion a year, and the industry seems to be growing.”).

⁴ *Burford Capital Delivers 75% Growth in Full Year 2016 Profit*, Mar. 14, 2017, <http://www.burfordcapital.com/newsroom/burford-capital-delivers-75-growth-full-year-2016-profit/>.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ Roy Strom, *With Profits Up 75 Percent, Burford’s Results Reveal Evolving Litigation Funding Industry*, Mar. 14, 2017, *The American Lawyer*, <http://www.americanlawyer.com/id=1202781274593/With-Profits-Up-75-Percent-Burfords-Results-Reveal-Evolving-Litigation-Funding-Industry>.

¹⁰ Julie Triedman, *Topping \$1 Billion Mark, Big Litigation Funder Gets Bigger*, *The Am Law Daily*, Jan. 6, 2016, <http://www.americanlawyer.com/id=1202746351295/Topping-1-Billion-Mark-Big-Litigation-Funder-Gets-Bigger?slreturn=20160006110304>.

¹¹ *Burford Acquires Gerchen Keller: What is Going on?*, Fulbrook Capital Management, LLC, Dec. 20, 2016, <http://www.fulbrookmanagement.com/burford-acquires-gerchen-keller-what-is-going-on/>.

Burford's strong economic figures are a microcosm of the broader TPLF industry.¹² Indeed, a number of other major TPLF companies have likewise experienced significant expansion over the past several years. For example:

- Bentham IMF – the U.S. arm of IMF Bentham Limited, one of the largest litigation funding companies in the world – reported a 109% increase in total income in 2016 and recently announced a new \$200 million litigation finance vehicle focused solely on funding U.S. cases and matters.¹³ Bentham also recently announced that it would be opening its fourth office in the United States.¹⁴
- Therium Group Holdings, another funder, announced in April 2016 that it had secured \$300 million to invest in commercial litigation financing (“the largest ever single investment in the litigation funding sector, globally”) and that it would be launching operations in the United States in light of increased demand for litigation funding by law firms and businesses.¹⁵
- Longford Capital Management LP, which was founded in 2014 and invests in contract, antitrust and other claims, raised \$56.5 million for its first fund.¹⁶ The litigation funder experienced significant economic growth in its initial venture, obtaining returns in the “**70-90 percent range**.”¹⁷ Further, the privately held capital fund, now headed by a former Morgan Stanley executive, recently announced

¹² Strom, *supra* note 9.

¹³ IMF Bentham Final Report, June 30, 2016, <https://www.imf.com.au/docs/default-source/site-documents/annual-report-30-june-2016>; *Commercial Litigation Funder Bentham IMF Expands into Houston, Hiring Top Local Talent*, PR Newswire, Feb. 24, 2017, <http://www.prnewswire.com/news-releases/commercial-litigation-funder-bentham-imf-expands-into-houston-hiring-top-local-talent-300413392.html>.

¹⁴ PR Newswire, *supra* note 13.

¹⁵ *Therium Launches in U.S. to Meet Increasing Industry Demand for Litigation Funding*, Yahoo Finance: Business Wire, Apr. 19, 2016, <http://finance.yahoo.com/news/therium-launches-u-meet-increasing-110300761.html>.

¹⁶ Julie Triedman, *The Big Players in the Litigation Funding Arena*, *The American Lawyer*, Dec. 30, 2015.

¹⁷ Lynne Marek, *Chicago Investment Firm Looks To Attract \$250 Million for Second Fund*, *Crains Chi. Bus.*, Feb. 27, 2017, <http://www.chicagobusiness.com/article/20170227/NEWS01/170229913/chicago-investment-firm-looks-to-attract-250-million-for-second-fund>.

that it has raised more than double that for its sophomore fund – a staggering \$118.47 million.¹⁸

- In 2016, Lake Whillans Litigation Finance LLC expanded by opening an office in Palo Alto to continue its work with Silicon Valley-based companies and corporate counsel.¹⁹ Established in 2013, the company has already deployed more than \$50 million in active capital.²⁰
- Harbour Litigation Funding, which operates across the globe, including in the United States, recently announced that it has over £400m of capital commitments.²¹ In 2016, this funder expanded its global team by more than 40%.²²
- Vannin Capital, another international funder, recently announced the appointment of Jeffery Commission to serve as senior counsel in Washington, D.C. According to a company press release, “this appointment represents the latest expansion of Vannin’s fast-growing business[.]”²³

Expansion of TPLF in the United States has also been fueled by growing activity in the arena by private hedge funds.²⁴ For example, RD Legal Capital, a New Jersey-based hedge fund, invested in a \$1.8 billion uncollected judgment against the Iranian central bank, while New York-based Elliott Management Corp. helped fund a lawsuit by Stan Lee Media Inc. against Walt Disney Co. regarding

¹⁸ *Id.*; S.E.C. Form D, Longford Capital Management, Mar. 9, 2017, https://www.sec.gov/Archives/edgar/data/1699903/000169990317000001/xslFormDX01/primary_doc.xml.

¹⁹ *Litigation Finance Leader Lake Whillans Expands, Opening Palo Alto Office*, PR Newswire, Mar. 3, 2016, <http://www.prnewswire.com/news-releases/litigation-finance-leader-lake-whillans-expands-opening-palo-alto-office-300230623.html>.

²⁰ *Id.*

²¹ Harbour Litigation Funding, <https://www.harbourlitigationfunding.com/about-us/our-funds/>.

²² *Id.*

²³ *Vannin Capital Expansion Continues*, Jan. 19, 2016, <http://vannin.com/press/article/156/2016-01-19/vannin-capital-expansion-continues>.

²⁴ See Thomas Brom, *How Litigation Funding Upsets the Justice Marketplace*, California Lawyer, June 2015.

popular comic-book characters created by Stan Lee.²⁵ And EJP Capital (based in Arlington, Va.) has raised hundreds of millions of dollars to invest in mass tort lawsuits, including transvaginal mesh and Risperdal litigation.²⁶ The hedge fund reportedly is targeting “class-action injury lawsuits” at “hefty interest rates,” with the loans to be repaid by law firms “as they earn fees from settlements and judgments.”²⁷

Another driving force behind the TPLF industry’s expansion is the increasing use of TPLF by law firms.²⁸ According to one partner at a prominent law firm, “[m]y experience with funders is, all I’ve seen is growth.”²⁹ Indeed, a recent survey conducted by Burford shows that TPLF is becoming more popular among large law firms in the United States.³⁰ The survey found that 28% of private practice lawyers say their firms have used TPLF directly, a four-fold increase since 2013.³¹ Consistent with these findings, Burford recently asserted that it “has worked with 75 of the Am Law 100 and last year lent \$100 million and \$50 million to two global law firms, respectively, to finance their litigation departments.”³²

Another recent survey published by TPLF company Lake Whillans produced similar results.³³ According to the survey, the strongest motivation for using TPLF was the lack of funds/legal fees and hedging risk of litigation, respectively.³⁴

²⁵ *Id.*

²⁶ See Rob Copeland, *Hedge-Fund Manager’s Next Frontier: Lawsuits*, Wall Street Journal, Mar. 9, 2015, <http://www.wsj.com/articles/hedge-fund-managers-next-frontier-lawsuits-1425940706>.

²⁷ *Id.*

²⁸ Julie Triedman, *Arms Race: Law Firms and the Litigation Funding Boom*, The American Lawyer, Dec. 30, 2015, <http://www.americanlawyer.com/id=1202745121381/Arms-Race-Law-Firms-and-the-Litigation-Funding-Boom>.

²⁹ *Id.* (quoting Reed Oslan).

³⁰ Julie Triedman, *Big Law Warms Up to Litigation Funding, Burford Survey Finds*, The Am Law Daily, May 3, 2016.

³¹ *Burford’s Latest Research Shows Explosive Growth and Ongoing Evolution of Litigation Finance*, Burford Blog, May 3, 2016.

³² Strom, *supra* note 9.

³³ *Litigation Finance, the Litigators Perspective*, <http://lakewhillans.com/research/litigation-finance-the-litigators-perspective/>.

³⁴ *Id.*

Notably, in-house counsel were the only category describing TPLF “[a]s a means to fund operating expenses” in significant numbers, at 25%.³⁵

In sum, there has been a dramatic expansion of TPLF over the last few years.³⁶ The scope of TPLF in U.S. civil litigation has reached a point such that the Committee should formally consider our proposal to require the disclosure of TPLF arrangements in all civil actions filed in federal court.

Changes in Funding Methods/Applications. TPLF companies are also expanding the ways in which they invest in litigation and the types of litigation they are willing to fund, driving the pervasiveness of TPLF and increasing the likelihood that it will encourage the filing of spurious lawsuits. Traditionally, TPLF firms invested solely in individual cases that went through their own vetting process. But recently, some of these firms have begun investing in portfolios of cases at certain law firms “based on their existing track record” and “the types of cases they handle.”³⁷ In 2015, Bentham invested \$30 million into such funding deals with seven different law firms.³⁸ That investment covered more than 60 cases in intellectual property, insurance coverage, entertainment, health care, contracts and other areas.³⁹

Burford has also embraced the portfolio approach to TPLF. In 2015, about 50% of Burford’s capital was in case portfolios.⁴⁰ Burford continued this trend in 2016, pouring an unprecedented \$100 million into a portfolio of cases at one large

³⁵ *Id.*

³⁶ Brom, *supra* note 24 (“By all accounts third-party funding . . . is spreading rapidly.”).

³⁷ Sara Randazzo, *Litigation Funding Pioneer Hits a Roadblock*, Wall Street Journal, Nov. 23, 2015, <http://blogs.wsj.com/law/2015/11/23/litigation-funding-pioneer-hits-a-roadblock/>. “Consider Pierce Sergenian, a six-lawyer trial boutique started by” former lawyers from “the litigation powerhouse Quinn Emanuel Urquhart & Sullivan,” which “afford[s] to handle the 10 cases it has on board . . . by selling a separate interest in the potential recoveries to a financier[.]” Paul Barrett, *The Business of Litigation Finance Is Booming*, Bloomberg Businessweek, May 30, 2017. “The financing of Pierce Sergenian marks the first time that a law firm and funder have gone public about the existence of such a portfolio-investment arrangement.” *Id.*

³⁸ *Id.*

³⁹ See Andrew Strickler, *Litigation Funding Industry Deepening Law Firm Ties*, Law 360, Nov. 16, 2015, <http://www.law360.com/articles/727348/litigation-funding-industry-deepening-law-firm-ties>.

⁴⁰ Julie Triedman, *Arms Race*, *supra* note 28.

global law firm that Burford refuses to name.⁴¹ One of the most notable findings of the Burford survey discussed above confirms the growing popularity of portfolio-based TPLF: “About as many lawyers said they had experience with portfolio financing in 2016 (9 percent) as had experience with single case financing, the most commonly understood form of third-party funding, in 2013 (7 percent).”⁴²

Because the portfolio strategy by definition involves funding a larger and broader array of cases, it can be expected to increase the filing of ill-considered cases. Indeed, recent experience in the mass-tort arena revealed that TPLF is being used in large product liability litigation where lawyers amass as many “faceless clients as possible” without adequately investigating the merit of the claims.⁴³ A lawsuit brought by a former plaintiffs’ law firm employee in connection with the use of TPLF in litigation involving allegedly defective mesh products summarized the business model employed by the law firm:

(i) borrow as much money as possible; (ii) buy as many television ads and/or faceless clients as possible; (iii) wait on real lawyers somewhere to establish liability against somebody for something; (iv) use those faceless clients to borrow even more money or buy even more cases; (v) hire attorneys to settle the cases for whatever they can get; (vi) take a plump 40% of the settlement from the thousands and thousands of people its lawyers never met or had any interest in meeting; and (vii) lather, rinse, and repeat.⁴⁴

As one article explained, the TPLF company’s “investment in a claims-bundling firm, known not for trial work but for multimillion-dollar TV blitzes aimed at potential mass tort claimants, was a far cry from the funder’s usual customers: companies with big business disputes for their Am Law 200 firms.”⁴⁵ Indeed, the use of TPLF to aid personal injury firms in aggregating “faceless” claims contradicts

⁴¹ Julie Triedman, *Burford Boasts Big Year, Invests \$100M in Law Firm Portfolio*, The Am Law Daily, Mar. 23, 2016.

⁴² *Burford’s Latest Research Shows Explosive Growth and Ongoing Evolution of Litigation Finance*, Burford Blog, May 3, 2016.

⁴³ David Yates, “*Mass Tort Warehouse*” Fires Fund Officer to Avoid Paying Millions for Acquiring 14,000 Mesh Claims, *Suit Alleges*, SE Texas Record, Oct. 10, 2015, <http://setexasrecord.com/stories/510642299-mass-tort-warehouse-fires-fund-officer-to-avoid-paying-him-millions-for-acquiring-14-000-mesh-claims-suit-alleges>.

⁴⁴ Compl. ¶ 76, *Shenaq v. Akin*, No. 2015-57942 (Dist. Ct. Harris County, Tex., filed Sept. 29, 2015).

⁴⁵ Julie Triedman, *Arms Race*, *supra* note 28.

the representations of some funders that they rigorously assess each case investment and would never finance frivolous or dubious claims.

TPLF has also taken center stage at a growing number of startup companies that seek to raise funding for lawsuits via online marketplaces.⁴⁶ The usual course has been for TPLF entities to collect money from investors that they would in turn use to buy interests in a collection of cases of the fund's choosing. LexShares and Trial Funder Inc., however, are attracting investors, commercial plaintiffs, and plaintiffs' firms to their online marketplaces. Accredited investors are able to shop among individual cases and contribute as little as \$2,500 in the hopes of reaping an eventual profit when a matter settles or produces a favorable judgment. Unlike traditional third-party litigation finance firms, these new startup companies solicit investments using a crowdfunding-like model, which allows ordinary accredited investors to choose among cases vetted by the company. Thus far, LexShares has raised approximately \$5.5 million for 15 cases, including a legal malpractice lawsuit filed by an athletic association, a breach-of-contract lawsuit and a handful of product-liability cases brought against Fortune 500 companies.⁴⁷ Trial Funder's experience has been similar, with it earmarking substantial sums for personal-injury cases.⁴⁸

At bottom, not only has TPLF become a more prominent facet of civil litigation in the United States, but it has also been accompanied by sophisticated changes in funding methods that will likely accelerate its growth.

II. The Need For Disclosure Of TPLF

Third-party litigation funding raises a host of legal and ethical issues that provide a compelling need for mandatory disclosure. The funding agreements may violate state champerty and maintenance laws, as well as ethical canons, and they often distort the traditional adversarial system of civil justice. Absent a robust disclosure requirement, plaintiffs will continue to utilize TPLF – in some situations, illegally – undetected and unchecked. Indeed, the rapid growth of TPLF in the United States over the past several years demonstrates that such agreements are used extensively without notice to the court or opposing party.

⁴⁶ Sara Randazzo, *Litigation Funding Moves into Mainstream*, Wall Street Journal, Aug. 4, 2016.

⁴⁷ *Id.*

⁴⁸ *Id.*

In recognition of this fact, at least one federal district court – the U.S. District Court for the Northern District of California – has adopted its own TPLF disclosure requirement. Recently, that court added to its “Standing Order For All Judges” a provision requiring that “in any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim.”⁴⁹ That action was taken in the immediate aftermath of a panel discussion at the court’s annual judicial conference during which TPLF industry representatives took the position that their investments in class actions and other litigation should not be disclosed. As one attorney who studies the litigation funding industry explained, the Northern District of California rule is “really a harbinger and a signal that courts . . . need to consider the presence of third-party financiers in a lawsuit and consider their role.”⁵⁰ Indeed, published reports indicate that the U.S. District Court for the Eastern District of Texas may also be considering a disclosure rule.⁵¹

Importantly, a TPLF disclosure requirement would be consistent with federal courts’ interest in safeguarding legitimate, ethical civil litigation practices. Federal courts have long allowed defendants to utilize discovery tools to uncover unethical conduct by plaintiffs that could affect the case at hand.⁵² Indeed, as one court

⁴⁹ Standing Order for all Judges of the Northern District of California, Contents of Joint Case Management Statement, § 19 (Jan. 2017).

⁵⁰ Ben Hancock, *New Litigation Funding Rule Seen as “Harbinger” for Shadowy Industry*, The Recorder, Jan. 25, 2017, <http://www.legaltechnews.com/id=120277609784/New-Litigation-Funding-Rule-Seen-as-Harbinger-for-Shadowy-Industry?mcode=1202617583589&curindex=58&slreturn=20170228111023>.

⁵¹ See Ben Hancock, *Bentham Hires Yetter Coleman Partner as It Expands to Texas*, Texas Lawyer, Feb. 21, 2017, <http://www.texaslawyer.com/id=1202779591965/Bentham-Hires-Yetter-Coleman-Partner-as-It-Expands-to-Texas?slreturn=20170228084913> (“After the [Northern District of California] disclosure rule was announced, Ron Clark, chief judge of the Eastern District of Texas, told Texas Lawyer that jurists in his division may follow the Northern District of California’s lead and consider similar measures.”).

⁵² See, e.g., *Parrot v. Wilson*, 707 F.2d 1262, 1271, n.20 (11th Cir. 1983) (affirming trial court’s order requiring the production of interview tapes that had been secretly recorded by an attorney; “Disclosure is clearly an appropriate remedy when the evidence sought was *generated* directly by the attorney’s misconduct.”); *Baker v. Masco Builder Cabinet Grp., Inc.*, 2010 U.S. Dist. LEXIS 104018, at *11-12 (D.S.D. Sept. 27, 2010) (“Courts have also allowed defendants to inquire into alleged misconduct of plaintiffs’ counsel because such misconduct may result in the denial of class certification.”); *Stavrides v. Mellon Nat’l Bank & Tr. Co.*, 60 F.R.D. 634 (W.D. Pa. 1973) (granting defendant’s motion to compel answers to deposition questions granted because the possible ethical misconduct on the part of plaintiff’s attorneys in a class action could lead to denial of class certification).

explained in requiring the disclosure of consulting agreements securing the cooperation of a previously hostile witness, courts have an obligation to ensure that litigants' or their attorneys' "conduct does not *erode the integrity of the adversary process*."⁵³ In that case, the defendants in a complex environmental litigation entered into various consulting agreements with a former officer of one of the companies and sought to shield the contracts under the work-product doctrine. According to the district court, those agreements "were designed to overcome the hostility between [the former officer] and [one of the defendants] resulting from the dispute over the circumstances of [the former officer's] departure from [the company] in 1979[.]"⁵⁴ In addition, the consulting agreements were tantamount to "purchas[ing] [the former officer's] cooperation in the instant case[.]"⁵⁵ Finding that "the conduct of [defendants] and their counsel in relation to [the former officer] ha[d] threatened to undermine the integrity of the adversary process in th[e] case," the district court ordered the production of the consulting agreements.⁵⁶

The same logic supports the disclosure of TPLF arrangements at the outset of civil lawsuits. As set forth more fully below, a mandatory TPLF disclosure requirement is critical to the "integrity of the adversary process" because these arrangements threaten core ethical and legal principles that undergird our civil justice system.

TPLF May Violate the Common Law Doctrine of Champerty. Champerty is a centuries-old legal doctrine that prohibits someone from funding litigation in which he or she is not a party. It is intended to prevent courts from becoming trading floors where people buy and sell lawsuits based on their perceived merit. Although the TPLF industry has promoted the view that this doctrine has become a "dead letter,"⁵⁷ recent state and federal court decisions have given renewed vitality to champerty principles, particularly in the TPLF arena.

One recent Pennsylvania appellate decision is illustrative. In *WFIC, LLC v. Labarre*,⁵⁸ an attorney entered into a contingency-fee agreement with his client under

⁵³ *New York v. Solvent Chem. Co.*, 166 F.R.D. 284, 289-90 (W.D.N.Y. 1996).

⁵⁴ *Id.* at 289.

⁵⁵ *Id.* at 289-90.

⁵⁶ *Id.* at 289.

⁵⁷ *Litigation Finance Is not Champerty, Maintenance or Barratry*, Burford Capital, July 30, 2013, <http://www.burfordcapital.com/blog/litigation-finance-not-champerty-maintenance-barratry/>.

⁵⁸ No. 1985 EDA 2015, 2016 WL 4769436, at *5 (Pa. Super. Ct. Sept. 13, 2016).

which a TPLF company that had loaned money to pursue the litigation matter would be paid out of counsel's expected fees. In the course of sorting out a dispute among creditors about which entity should have priority in the distribution of available assets, the appellate court concluded that counsel's agreement to pay the funder out of his fees was champertous under Pennsylvania law because the investors were unrelated parties lacking a legitimate interest in the lawsuit. The court thus found the agreement invalid and unenforceable, making clear that "champerty remains a viable defense in Pennsylvania."⁵⁹

These issues were also at play in *Justinian Capital SPC v. WestLB AG*,⁶⁰ a case decided by New York's highest court. There, DPAG (a German bank) bought notes from defendant WestLB that subsequently lost substantial value. DPAG wanted to sue West LB for fraud and malfeasance, but feared adverse reactions by German regulators. As a result, DPAG agreed to provide the notes to plaintiff Justinian Capital (a Cayman Islands company) so that it could sue West LB – and it did so. However, the defendant argued, and the New York Court of Appeals agreed, that such an acquisition was champertous. This was so, the court reasoned, "because Justinian did not pay the purchase price or have a binding and bona fide obligation to pay the purchase price of the Notes independent of the successful outcome of the lawsuit[.]"⁶¹

And in *Maslowski v. Prospect Funding Partners LLC*, the Minnesota Court of Appeals refused to enforce a New York forum-selection clause in a funding agreement on the ground that it was effectuated to evade "Minnesota's local interest against champerty."⁶² The Minnesota Court of Appeals explained that "in this particular case, the decision whether the parties' agreement violates Minnesota's policy against champerty has the potential to expose personal-injury actions in Minnesota to the negative effects of champerty. Given that potential, Minnesota has a strong local interest in applying its prohibition against champerty in this case."⁶³

A federal court decision published earlier this year has also made clear that champerty is not a moribund concept. In *In re DesignLine Corporation*,⁶⁴ a

⁵⁹ *Id.*

⁶⁰ 65 N.E.3d 1253 (N.Y. 2016).

⁶¹ *Id.* at 1259.

⁶² 2017 Minn. App. LEXIS 26, at *22 (Minn. Ct. App. Feb. 13, 2017).

⁶³ *Id.* at *22-23.

⁶⁴ 2017 Bankr. LEXIS 182, at *1 (U.S. Bankr. W.D.N.C. Jan. 20, 2017).

bankruptcy case, the trustee proposed to “sell” several adversarial proceedings to a litigation funder in order to obtain an advance on litigation expenses. In exchange, the funder would receive a substantial interest in the remaining proceeds of those actions, as well as the right of “input into future decisions” and the “power to cut off funding.”⁶⁵ The opponents objected, contending that the agreements contravened North Carolina law because the funding company would exercise significant control over the litigation. The federal court agreed, placing great emphasis on the funder’s “power of the purse” – i.e., the “ultimate power to cut off funding.”⁶⁶ In light of this substantial control over the litigation by a party not otherwise interested in the lawsuit, the court found the agreements to be champertous under North Carolina law.

Each of the aforementioned champerty cases arose out of disputes between the funder and a funded party or person involved in the funding arrangement. But if a party is being sued pursuant to an illegal (champertous) funding arrangement, the defendant has a right to know and presumably would have standing to challenge such an agreement as champertous under the applicable state law. After all, “[t]he general purpose of the law against champerty and maintenance is to prevent officious intermeddlers from stirring up strife and contention by vexatious or speculative litigation which would disturb the peace of society, lead to corrupt practices, and pervert the remedial process of the law.”⁶⁷ Each of these deleterious consequences has the potential to aggrieve a defendant being sued pursuant to a TPLF arrangement, including, for example, by deterring reasonable settlements or needlessly prolonging litigation, as elaborated in greater detail *infra*. Without a disclosure requirement, plaintiffs will continue to enter into TPLF agreements in the shadows, concealing potential and fundamental violations of state champerty law.

TPLF May Violate Ethical Rules Prohibiting Sharing Of Attorney Fees With Nonlawyers. Another troubling ethical implication of TPLF is the tendency of some lawyers who enter into TPLF arrangements to share their legal fees with the funder. Model Rule 5.4(a) prohibits an attorney or law firm from sharing legal fees with a nonlawyer except in limited circumstances.⁶⁸ “As stated in the comments to Rule 5.4, this prohibition is intended to ‘protect the lawyer’s professional independence of judgment.’”⁶⁹ “Fee splitting is [also] viewed as running the risk of

⁶⁵ *Id.* at *10.

⁶⁶ *Id.* at *17.

⁶⁷ *Id.* at *11-12 (internal quotation marks and citation omitted).

⁶⁸ Model Rules of Prof’l Conduct, R.5.4(a).

⁶⁹ Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268, 1291-1292 (2011) (quoting Model Rules of Prof’l Conduct R. 5.4 cmt. (2003)).

granting nonlawyers control over the practice of law or potentially enabling lay persons to practice law without authorization.”⁷⁰ While “[f]unders may . . . insist upon contracting directly with the client in order to circumvent the prohibition,”⁷¹ some of them are ignoring this blackletter principle. This is becoming more apparent in class actions, in which plaintiffs’ counsel are securing funding by promising to share their fees (if awarded any) with the funder to pay it back.

For example, in *Gbarabe v. Chevron Corp.*,⁷² plaintiffs commenced a putative class action arising out of an explosion on an oil drilling rig off the coast of Nigeria. Under the agreement entered into by plaintiffs’ counsel and the funder, counsel agreed that the funder would be repaid its \$1.7 million investment in the case by way of a “success fee” of six times that amount (\$10.2 million), to be paid from attorneys’ fees – *plus* 2% of the total amount recovered by the putative class members.⁷³ Thus, apparently without their knowledge or approval, putative class members will have to hand over part of their recovery to the litigation funder. These sorts of provisions blur the line separating lawyers from nonlawyers and undermine the sacrosanct attorney-client relationship that is at the core of our civil justice system.

TPLF Creates The Possibility Of Conflicts Of Interest Among The Plaintiff, The Attorney, And The Funder. “Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”⁷⁴ Indeed, attorneys owe their clients a fiduciary duty of allegiance – mandated by the rules of ethics – which requires them to put the interests of their client above their own, and to avoid even the appearance of impropriety.⁷⁵ However, an attorney that has contracted directly with a funding company may have contractual duties to it that are separate from – and, perhaps, inconsistent with – the attorney’s professional duties to his or her client.⁷⁶ Moreover, because both third-party funders and attorneys are repeat players in the litigation market, it can be expected that relationships among them will

⁷⁰ *Id.*

⁷¹ Jasminka Kalajdzic, Peter Cashman & Alana Longmoore, *supra* note 3.

⁷² *Gbarabe v. Chevron Corp.*, 2016 U.S. Dist. LEXIS 103594, at *6 (N.D. Cal. Aug. 5, 2016).

⁷³ Litigation Funding Agreement (“*Gbarabe* Litigation Funding Agreement”), § 1.1, *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, Dkt. No. 1864 (N.D. Cal. filed Sept. 16, 2016).

⁷⁴ Model Rules of Prof’l Conduct, R. 1.7 cmt. [1].

⁷⁵ *Id.*

⁷⁶ *See, e.g., id.*, R. 1.7(a) (providing that a “concurrent conflict of interest exists where” “there is a significant risk that the representation . . . will be materially limited by the lawyer’s responsibilities to . . . a third person”).

develop over time. Attorneys can be expected to “steer” clients to favored financing firms, even if the client’s particular circumstances suggest a different firm may be more appropriate, and *vice versa*.

Further, litigation financing arrangements raise confidentiality concerns insofar as they require plaintiffs to disclose privileged information to the financier. In order to evaluate a plaintiff’s claim and determine whether and on what terms to finance the case, a litigation financing company generally will ask to evaluate confidential, and possibly privileged, information belonging to the plaintiff. If the plaintiff elects to provide the information to the financing company, any privilege protecting it likely would be waived. Attorneys advising a client at the outset of a case may be reluctant to provide the client full and candid advice in writing, knowing that any communications could be viewed by the funder as part of its diligence, and then would be available to the opposing party in discovery.

In short, interjection of a financially interested third party into the adversarial calculus threatens to interfere with fundamental duties owed by the attorney to his or her client. This unseemly dynamic raises the possibility that the attorney’s professional judgment will be guided by the pecuniary interest of the entity bankrolling the litigation rather than the client’s own interest.

TPLF Raises The Possibility Of Judicial Conflicts Of Interest. In addition, to threatening the attorney-client relationship, TPLF arrangements also pose a risk of conflicts of interest between the judge and the parties to the litigation. The Federal Rules of Civil Procedure already require nongovernmental corporate entities to disclose “any parent corporation and any publicly held corporation owning 10 percent or more of its stock.”⁷⁷ The purpose of this rule is to provide judges with information necessary to determine whether they have a conflict of interest in adjudicating a case.⁷⁸ “As some TPLF entities are multibillion- and multimillion-dollar publicly traded entities, requiring disclosure of their role will allow judges to determine whether they have a conflict of interest in administering a case. And for privately held TPLF entities, the web of personal relationships judges have could be impacted as well, leading to unintentional appearances of impropriety.”⁷⁹

⁷⁷ Fed. R. Civ. P. 7.1(a)(1).

⁷⁸ Fed. R. Civ. P. 7.1 Advisory Comm. Notes, 2002 adoption (“The information required by Rule 7.1(a) reflects the ‘financial interest’ standard of Canon 3C(1)(c) of the Code of Conduct for United States Judges.”).

⁷⁹ Tripp Haston, *The Missing Key to 3rd-Party Litigation Funding*, Law360, Feb. 7, 2017.

A prime example of this problem arose during a racketeering suit in the United States arising out of misconduct by Steven Donziger, who had helped secure an \$18.2 billion judgment against Chevron Corporation on behalf of Ecuadorians allegedly harmed by the company’s drilling practices.⁸⁰ During a deposition in that proceeding, Donziger was asked to identify the company that had helped finance the underlying suit against Chevron.⁸¹ Upon being ordered to answer the question by the special master assigned to the case, Donziger disclosed that the funder was in fact Burford Capital.⁸² The special master then disclosed that he was former co-counsel with the founder of Burford, who at one time sent the special master a brochure about funding one of Burford’s cases.⁸³ The special master also disclosed that he was friends with Burford’s former general counsel.⁸⁴ The special master did not recuse himself from the racketeering litigation, and the parties did not insist that he do so.⁸⁵ Nonetheless, as the special master recognized, the deposition “prove[d] . . . that it is imperative for lawyers to insist that clients disclose who the investors are.”⁸⁶

“The Donziger deposition demonstrates how frequently conflicts of interest may arise as a result of third-party funding.”⁸⁷ “Without disclosure,” courts will “be subject to unknown conflicts of interest,”⁸⁸ depriving the parties of their right to a fair and neutral tribunal. “Requiring routine TPLF disclosure” in all civil cases “will ensure courts are conflict-free”⁸⁹ – which is essential to the proper functioning of our civil justice system.

Funder Control Over Litigation. Another serious issue implicated by TPLF agreements is the threat they pose to the plaintiff’s right to control his or her own claim. TPLF companies frequently dismiss such concerns by baldly asserting that they do ***not*** control litigation strategy. But Bentham’s own 2017 “best practices”

⁸⁰ Jennifer A. Trusz, *Full Disclosure? Conflicts of Interest Arising from Third-Party Funding in International Commercial Arbitration*, 101 *Geo. L.J.* 1649, 1658 (2013).

⁸¹ *Id.* at 1650.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* (internal quotation marks and citation omitted).

⁸⁷ *Id.*

⁸⁸ Haston, *supra* note 79.

⁸⁹ *Id.*

guide contemplates robust control by funders. Specifically, it notes the importance of setting forth specific terms in litigation funding agreements that address the extent to which the TPLF entity is permitted to: “[m]anage a litigant’s litigation expenses”; “[r]eceive notice of and provide input on any settlement demand and/or offer, and any response”; and participate in settlement decisions.⁹⁰

A prime example of substantial funder control was the elaborate funding agreement utilized by Burford in the Chevron litigation discussed above. Specifically, the funding agreement at issue in that case “provide[d] control to the Funders” through the “installment of ‘Nominated Lawyers’” – lawyers “selected by the Claimants with the *Funder’s approval*.”⁹¹ The law firm of Patton Boggs LLP had been selected to serve in that capacity, and the execution of engagement agreements between the claimants and Patton Boggs, “a firm with close ties to the Funder, [was] a condition precedent to the funding.”⁹² “In addition to exerting control, it [was] clear that the Nominated Lawyers, who among other things control[led] the purse strings and serve[d] as monitors, supervise[d] the costs and course of the litigation.”⁹³

More recent examples show that other TPLF companies are employing litigation-control tactics similar to those set forth in Bentham’s best practices guide. One illustrative example is *Gbarabe v. Chevron Corp.*, the putative class action previously discussed.⁹⁴ The funding agreement in *Gbarabe* contains several key provisions that suggest the funder’s desire to influence the course of the litigation. Specifically, the agreement refers to a “Project Plan” for the litigation developed by counsel and the funder with restrictions on counsel deviation, particularly with respect to hiring only identified experts.⁹⁵ The agreement expressly prohibits the lawyers from engaging any co-counsel or experts “without [the funder’s] prior written consent[.]”⁹⁶ Further, the agreement requires that counsel “give reasonable notice of and permit [the funder] where reasonably practicable, to attend as an

⁹⁰ Bentham IMF, Code of Best Practices (Jan. 2017), <https://www.benthamimf.ca/newsroom/bentham-publications/2017/01/08/bentham-imf-code-of-best-practices-jan-2017>.

⁹¹ Maya Steinitz, *The Litigation Finance Contract*, 54 Wm. & Mary L. Rev. 455, 472 (2012) (emphasis added).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Gbarabe*, 2016 U.S. Dist. LEXIS 103594, at *6.

⁹⁵ *Gbarabe* Litigation Funding Agreement, §§ 1.1, 10.1.

⁹⁶ *Id.* § 10.1.

observer at internal meetings, which include meetings with experts, and send an observer to any mediation or hearing relating to the Claim.”⁹⁷

These kinds of provisions vest the funder with substantial control over key litigation decisions. Realistically, if a plaintiff’s lawyer is being paid by the investor, it will be difficult to resist that pressure. Even when the TPLF provider’s efforts to control a plaintiff’s case are not overt, the existence of TPLF funding naturally subordinates the plaintiff’s own interests in the resolution of the litigation to the interests of the TPLF investor. Absent concrete disclosure requirements, TPLF will continue to reduce a justice system designed to adjudicate cases on their merits to a litigation system effectively controlled by third parties interested solely in profit.

Third-Party Funding Undermines Settlement Efforts. Another troubling dynamic of TPLF is that it can delay and distort the settlement process. A party that must pay a TPLF entity a percentage of the proceeds of any recovery may be inclined to reject what might otherwise be a fair settlement offer in the hopes of securing a larger sum of money. In other words, the party will seek extra money to make up at least some of the amount (likely substantial) that will have to be paid to the TPLF entity. Further, some TPLF agreements that have become public reveal that TPLF entities often structure their agreements to maximize their take of the first dollars of any recovery, thereby deterring reasonable settlements. In fact, in the first empirical study of the effects of TPLF, researchers in Australia (where TPLF is also prevalent) found that increased litigation funding was “associated with slower case processing, larger backlogs, and increased spending by the courts.”⁹⁸

The most notorious example of this problem was the funding agreement at issue in the Chevron Ecuador litigation discussed above. The investment agreement included a “waterfall” repayment provision, which provided for a heightened percentage of recovery on the first dollars of any award.⁹⁹ Under the agreement, Burford would receive approximately 5.5% of any award, or about \$55 million, on any amount starting at \$1 billion. But, if the plaintiffs settled for less than \$1 billion, the investor’s percentage would actually go up.

⁹⁷ *Id.* § 10.2.4.

⁹⁸ Daniel Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding* (January 2012), at 27, www.law.upenn.edu/cf/faculty/dabrams/workingpapers/MarketforJustice.pdf.

⁹⁹ *See* Funding Agreement Between Treca Financial Solutions and Claimants, *Chevron Corp. v. Donziger*, No. 11-cv-0691 (S.D.N.Y.), Docket No. 356, Ex. B

The disclosure of TPLF agreements will facilitate more accurate and realistic settlement negotiations between the parties. Further, it will allow courts to structure settlement protocols with greater potential to succeed. For example, if a litigation funder controls settlement decisions (in whole or in part), the court may wish to require that funder to attend any mediation. Absent disclosure, the funder's presence as a player in the settlement process likely will remain hidden.

Proportionality And Cost Shifting. Under the Federal Rules of Civil Procedure, federal courts sometimes need to consider the resources of the parties to the litigation. For example, in every federal case, courts must determine the scope of permissible discovery under Rule 26. Rule 26(b)(1) states that the scope of discovery shall be “proportional to the needs of the case, considering . . . *the parties’ resources* . . . [and] whether the burden or expense of the proposed discovery outweighs its likely benefit.”¹⁰⁰ When a TPLF entity invests money to acquire an outcome-contingent right to proceeds in a case, it for all practical purposes becomes a real party in interest: the TPLF investor pays to prosecute the case; it presumably is involved in strategic decision-making; it presumably communicates with attorneys; and it often stands to collect a substantial share of any recovery.

Moreover, unlike an average plaintiff, a TPLF entity's business purpose is to raise funds to prosecute and profit from litigation. Thus, the existence of a TPLF agreement to fund litigation is relevant to the proportionality element of the scope of discovery. TPLF companies are well-heeled strangers to a case who willingly buy into the litigation hoping to profit from its successful prosecution. For the purposes of the resources element of the proportionality requirement contained in Rule 26(b)(1), any TPLF company that has bought a stake in a case should be considered as part of the “parties’ resources.” It should not be allowed to hide in the shadows behind a relatively impecunious plaintiff.

Similarly, since a funder is effectively a real party in interest, it should bear responsibility (to the same degree as any other party) in the event there is wrongdoing and a corresponding imposition of sanctions or costs. Rule 11 prohibits the filing of frivolous lawsuits and provides a mechanism for imposing “an appropriate sanction on any attorney, law firm, or party that violate[s] the rule[.]”¹⁰¹ Similarly, Rule 37 authorizes the imposition of sanctions on parties and attorneys who engage in misconduct with regard to discovery.¹⁰² The disclosure of TPLF

¹⁰⁰ Fed. R. Civ. P. 26(b)(1) (emphasis added).

¹⁰¹ Fed. R. Civ. P. 11(c)(1).

¹⁰² Fed. R. Civ. P. 37.

arrangements would be important information to have on the record in the event that a court determines it should impose sanctions or other costs under Rule 11, Rule 37 or any comparable provision.

For example, in *Abu-Ghazaleh v. Chaul*, a Florida state appeals court held that TPLF funders (an individual and company) that controlled the litigation qualified as a party to the lawsuit and therefore became liable for the defendant's attorneys' fees and costs.¹⁰³ The state statute at issue in that case specifically authorized the levy of attorneys' fees on the plaintiff where the claim advanced was "without substantial fact or legal support."¹⁰⁴ The court found that the plaintiff's claim was bereft of such legal or factual support. The court then determined that the TPLF providers were liable for the attorneys' fees because they were essentially a "party" to the litigation (and the named plaintiff was financially unable to pay such fees, which is often the case). The court reached this conclusion by scrutinizing the agreement entered into by the plaintiff and the TPLF providers, which provided that the funders were to receive 18.33% of any award the plaintiffs received and gave them "final say over any settlement agreements proposed to the plaintiffs."¹⁰⁵ As evidenced by *Abu-Ghazaleh*, if courts are put on notice that a third party is financing the underlying litigation, they will be in a much better position to determine how to impose sanctions or other costs, if such costs are warranted in a given case.

Third-Party Financing In Class And Mass Actions. TPLF has not been limited to individual actions. Instead, it has expanded into the class and mass action realm. For example, "class actions make up a significant portion of the cases that [Bay Area-based Law Finance Group] invests in."¹⁰⁶ "Other firms, like New York-based Counsel Financial, also market themselves as offering various kinds of financing to class-action plaintiffs['] attorneys."¹⁰⁷ The need for robust TPLF disclosure requirements is most acute in this context because aggregate litigation already involves little, if any, control by the plaintiffs. In a large consumer class action, the average plaintiff often has only a small amount at stake. The "representative" plaintiffs in such cases tend to be friends, neighbors or even employees of the attorney bringing the suit. As a result, the lawyers fully control the

¹⁰³ See *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 693-94 (Fla. Ct. App. 2009).

¹⁰⁴ *Id.* at 694.

¹⁰⁵ *Id.*

¹⁰⁶ Hancock, *New Litigation Funding Rule Seen as "Harbinger" for Shadowy Industry*, *supra* note 50.

¹⁰⁷ *Id.*

cases instead of the people they supposedly represent. The concerns raised by such an arrangement are all the more glaring when the person driving the litigation is not even a lawyer with fiduciary obligations to the supposed clients or the court. After all, an individual can always complain to her lawyer or the court about the conduct of a funding company, but in a class action, there are often no interested plaintiffs. Thus, the funding company can effectively run the litigation with no check on its actions, underscoring the need for disclosure at the outset of a putative class or mass action.

In addition, the contemplated disclosures are relevant to evaluating Fed. R. Civ. P. 23(a)(4)'s adequacy-of-representation prerequisite for class treatment. Indeed, Judge Susan Illston recently recognized that point in *Gbarabe*, granting the defendant's motion to compel the disclosure of the funding agreement in that putative class action.¹⁰⁸ As the court explained, the "funding agreement is relevant to the adequacy [of representation] determination [required for class certification] and should be produced to [the] defendant."¹⁰⁹ The court's reasoning proved well-founded. The funding agreement provided that the lawyers shall endeavor to "recover the *maximum possible* Contingency Fee,"¹¹⁰ a requirement that may conflict with class member interests. Further, and as previously discussed, the agreement provided for a sharing of fees between plaintiffs' counsel and the funder – unbeknownst to the absent class members.

In sum, adding a funder to the class action fray would further dilute any influence the named plaintiffs have on the prosecution of their lawsuit, undermining their adequacy of representation under Rule 23(a)(4). As noted above, the Northern District of California recently promulgated a "standing order" requirement that TPLF be disclosed in all class actions and representative cases, providing an important precedent for making the practice more transparent.¹¹¹ And the Fairness in Class Action Litigation Act recently passed by the U.S. House of Representatives contains a similar provision that would apply to all class actions filed in federal courts nationwide.¹¹²

¹⁰⁸ *Gbarabe*, 2016 U.S. Dist. LEXIS 103594, at *6.

¹⁰⁹ *Id.*

¹¹⁰ *Gbarabe* Litigation Funding Agreement, ¶ 3.1.3 (emphasis added).

¹¹¹ <https://www.cand.uscourts.gov/news/210>.

¹¹² <https://www.congress.gov/bill/115th-congress/house-bill/985/actions?q=%7B%22search%22%3A%5B%22fairness+in+class+action+litigation%22%5D%7D>.

Disclosure Would Create Parity Of Financial Disclosure. One of the most frequently invoked lines of attack against mandatory TPLF disclosure requirements is that they unfairly single out TPLF companies while not requiring defendants to disclose their sources of financing. This criticism is misdirected because it ignores the unique aspect of TPLF – that a funder voluntarily decides to invest in litigation in the hopes of sharing in any profit. Our proposed amendment is narrowly targeted at this type of recourse investment – i.e., at those who have “invested” in litigation – in that there is a contingent interest in the outcome of the case. It is these types of contingent investments that are most likely to give rise to conflicts of interest and disputes over control of key litigation decisions in individual cases, as borne out by recent examples.

Moreover, requiring TPLF agreements to be disclosed at the outset of litigation would bring plaintiffs’ Rule 26 disclosure obligations in line with those of defendants, who are already obligated to disclose information pertaining to their financial wherewithal. For corporate defendants, securities laws require substantial disclosure about litigation, including the amounts of reserves taken to finance or resolve litigation. Further, Rule 26 already requires the disclosure of insurance coverage, including insurance that will pay for the defense.¹¹³ As explained in the Advisory Committee Notes accompanying the insurance provision, “[d]isclosure of insurance coverage . . . enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation.”¹¹⁴ As previously discussed, this same rationale supports mandatory disclosure of TPLF arrangements, which can inform settlement negotiations.

As with insurance agreements, TPLF arrangements would be subject to the proviso that the contracts be automatically disclosed “[e]xcept . . . as . . . ordered by the court.”¹¹⁵ In other words, while the plain language of Rule 26 provides that certain items (like insurance agreements) must be disclosed as a matter course, a court nonetheless has the authority to rule otherwise under the facts of a given case. Further, Rule 26(c) expressly provides that a “court may, for good cause, issue an order to protect a party or person from . . . oppression or undue burden . . . including

¹¹³ See Fed. R. Civ. P. 26(a)(1)(A)(iv).

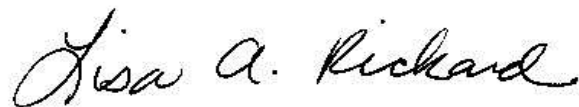
¹¹⁴ Fed. R. Civ. P. 26, Advisory Comm. Notes, 1970 amendment.

¹¹⁵ Fed. R. Civ. P. 26(a)(1)(A) (“Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties . . .”).

... forbidding [] disclosure or discovery.”¹¹⁶ Accordingly, in the event a TPLF agreement contains confidential information, a plaintiff could move for a protective order seeking to immunize that information from disclosure. The court would then review the agreement *in camera* and determine whether the information is in fact confidential and whether portions of the agreement should be redacted.

For all of the foregoing reasons, we once again urge the Committee to consider adoption of the attached proposed amendment to Fed. R. Civ. P. 26(a)(1)(A). The Advisory Committee’s examination of this proposal is greatly appreciated.

Sincerely,



Lisa A. Rickard
President
U.S. Chamber Institute for Legal Reform

Advanced Medical Technology Association

American Insurance Association

American Tort Reform Association

Association of Defense Trial Attorneys

DRI – *The Voice of the Defense Bar*

Federation of Defense & Corporate Counsel

Financial Services Roundtable

Insurance Information Institute

International Association of Defense Counsel

¹¹⁶ Fed. R. Civ. P. 26(c)(1)(A).

Lawyers for Civil Justice

National Association of Mutual Insurance
Companies

National Association of Wholesaler-
Distributors

National Retail Federation

Pharmaceutical Research and Manufacturers of
America

Product Liability Advisory Council

Property Casualty Insurers Association of
America

Small Business & Entrepreneurship Council

U.S. Chamber of Commerce

Michigan Chamber of Commerce

Pennsylvania Chamber of Business and
Industry

State Chamber of Oklahoma

South Carolina Chamber of Commerce

Virginia Chamber of Commerce

Wisconsin Manufacturers & Commerce

Las Vegas Metro Chamber of Commerce

Florida Justice Reform Institute

Louisiana Lawsuit Abuse Watch

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June 1, 2017
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South Carolina Civil Justice Coalition

Texas Civil Justice League

APPENDIX A – SUMMARY OF SIGNATORY ORGANIZATIONS

- **U.S. Chamber Institute for Legal Reform.** The U.S. Chamber Institute for Legal Reform (“ILR”) is an affiliate of the U.S. Chamber of Commerce dedicated to making our nation’s civil legal system simpler, faster, and fairer for all participants. The U.S. Chamber of Commerce is the world’s largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America’s free enterprise system.
- **Advanced Medical Technology Association.** The Advanced Medical Technology Association (“AdvaMed”) is the world’s largest trade association of medical device manufacturers. AdvaMed advocates on a global basis for the highest ethical standards, timely patient access to safe and effective products, and economic policies that reward value creation. AdvaMed seeks to advance medical technology to promote healthier lives and healthier economies around the world. AdvaMed’s members range from the largest to smallest medical technology companies doing business in the United States. These companies produce medical devices, diagnostic products and health information systems.
- **American Insurance Association.** Celebrating its 150th year in 2016, the American Insurance Association (“AIA”) is the leading property-casualty insurance trade organization, representing approximately 320 insurers that write more than \$125 billion in premiums each year. AIA member companies offer all types of property - casualty insurance, including personal and commercial auto insurance, commercial property and liability coverage, specialty, workers’ compensation, homeowners' insurance, medical malpractice coverage, and product liability insurance.
- **American Tort Reform Association.** The American Tort Reform Association (“ATRA”) is the only national organization exclusively dedicated to reforming the civil justice system. The organization is a nationwide network of state-based liability reform coalitions backed by 135,000 grassroots supporters. ATRA’s membership is diverse and includes nonprofits, small and large companies, as well as state and national trade, business, and professional associations.
- **Association of Defense Trial Attorneys.** The Association of Defense Trial Attorneys (“ADTA”) is a select group of diverse and experienced civil defense trial attorneys whose mission is to improve their practices through collegial

relationships, educational programs, and business referral opportunities, while maintaining the highest standards of professionalism and ethics. Membership in the ADTA is exclusive and limited to one “prime” member in any city with population less than one million.

- **DRI – *The Voice of the Defense Bar*.** DRI is the largest international membership organization of attorneys defending the interests of business and individuals in civil litigation. DRI provides its members with various educational and other tools that help defense practitioners deliver high-quality, balanced and excellent service to their clients and corporations. DRI’s network consists of over 22,000 defense practitioners and corporate counsel.
- **Federation of Defense & Corporate Counsel.** The Federation of Defense & Corporate Counsel (“Federation”) was founded seventy-five years ago as an international defense organization dedicated to the principles of knowledge, justice, and fellowship. Members include: (1) practicing lawyers actively engaged in the private practice of law who devote a substantial amount of their professional time to the representation of insurance companies, associations or other corporations, or others, in the defense of civil litigation and have been a member of the bar for at least eight years; or (2) corporate counsel and other executives engaged in the administration or defense of claims or for insurance companies, associations, or corporations who have national, regional or company-wide responsibility for a company of greater than local significance.
- **Financial Services Roundtable.** Financial Services Roundtable (“FSR”) is the leading advocacy organization for America’s financial services industry. With a 100-year tradition of service and accomplishment, FSR is a dynamic, forward-looking association advocating for the top financial services companies, keeping them informed on the vital policy and regulatory matters that impact their business. FSR members include the leading banking, insurance, asset management, finance and credit card companies in America. We are financing the American economy — creating jobs, expanding businesses, securing homes, businesses and retirement, insuring growth and building consumer confidence.
- **Insurance Information Institute.** The Insurance Information Institute (“I.I.I.”) seeks to improve public understanding of insurance – i.e., what it does and how it works. I.I.I. is recognized by the media, governments, regulatory organizations, universities and the public as a primary source of information, analysis and referral concerning insurance. The organization’s members consist of both large

and small insurance companies doing business in the United States, as well as various universities and the Connecticut General Assembly.

- **International Association of Defense Counsel.** Established in 1920, the International Association of Defense Counsel (“IADC”) advocates legal reform and professional development. IADC’s activities benefit its approximately 2,500 members and their clients, as well as the civil justice system and the legal profession. IADC’s membership consists of partners in large and small law firms, senior counsel in corporate law departments, and corporate and insurance executives. Members represent the largest corporations around the world, including the majority of companies listed in the FORTUNE 500.
- **Lawyers for Civil Justice.** Lawyers for Civil Justice (“LCJ”) is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 29 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.
- **National Association of Mutual Insurance Companies.** The National Association of Mutual Insurance Companies (“NAMIC”) is the largest property/casualty insurance trade association with more than 1,400 member companies serving more than 170 million auto, home, and business policyholders. NAMIC promotes public policy solutions that benefit insurance policyholders and the NAMIC member companies that it represents. NAMIC member companies write nearly \$230 billion in annual premiums, and have 54 percent of homeowners, 43 percent of automobile, and 32 percent of the business insurance markets. Membership in NAMIC is not restricted to mutual insurance companies and is open to stock insurance companies, reinsurance companies and industry vendor companies.
- **National Association of Wholesaler-Distributors.** The National Association of Wholesaler-Distributors (“NAW”) is a federation of wholesale distribution associations. NAW works with academia and the distribution consulting community to advance the state of knowledge in wholesale distribution. It also represents the wholesale distribution industry before Congress, the White House, and the judiciary on issues that affect the industry’s various lines of trade. NAW

members represent all lines of trade and include some of the largest wholesaler-distributors in the United States.

- **National Retail Federation.** The National Retail Federation (“NRF”) advances the interests of the retail industry through advocacy, communications and education. NRF is the world’s largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries. Retail is the nation’s largest private sector employer, supporting one in four U.S. jobs – 42 million working Americans.
- **Pharmaceutical Research and Manufacturers of America.** The Pharmaceutical Research and Manufacturers of America (“PhRMA”) represents the country’s leading biopharmaceutical research companies. PhRMA’s mission is to conduct effective advocacy for public policies that encourage the discovery of important, new medications for patients by biopharmaceutical research companies. PhRMA members, which include some of the largest pharmaceutical companies in the United States, invest billions in the research and development of innovative medicines that enable patients to live longer, healthier and more productive lives.
- **Product Liability Advisory Council.** Formed in 1983, the Product Liability Advisory Council (“PLAC”) is a non-profit association that analyzes and shapes the common law of product liability and complex litigation. PLAC’s mission is to help members successfully manage every link in the liability chain—from product design to manufacture to distribution through sale to end-users, and on to post-sale responsibilities. PLAC is comprised of more than 100 leading product manufacturers and 350 of the most elite product liability defense attorneys operating in the United States and abroad.
- **Property Casualty Insurers Association of America.** Property Casualty Insurers Association of America (“PCI”) is the property casualty industry’s most effective and diverse trade association. PCI represents nearly 1,000 member companies in a truly member-driven organization. PCI’s purpose is to advocate its members’ public policy positions in all 50 states and on Capitol Hill, and to keep its members current on the information that is critical to their businesses. Legislators and regulators depend on PCI as a source of accurate, data-driven information. Not spin. Not one-sided messages. Just solid insight about how

proposed legislation or regulation will affect our industry and the business community.

- **Small Business & Entrepreneurship Council.** The Small Business and Entrepreneurship Council (“SBE Council”) is a 501c(4) advocacy, research and education organization dedicated to protecting small business and promoting entrepreneurship. SBE Council educates elected officials, policymakers, business leaders and the public about key policies that enable business start-up and growth. SBE Council’s members include entrepreneurs and small business owners.
- **U.S. Chamber of Commerce.** The U.S. Chamber of Commerce (“Chamber”) is the world’s largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America’s free enterprise system.
- **Michigan Chamber of Commerce.** The Michigan Chamber of Commerce (“Michigan Chamber”) encompasses approximately 6,600 member employers, trade associations and local chambers of commerce of every size and type in all 83 counties of the state. The Michigan Chamber’s mission is to promote conditions favorable to job creation and business success in Michigan. Michigan Chamber member businesses provide jobs to 1.5 million residents. One of every 2.6 employees in Michigan works for a Chamber member firm.
- **State Chamber of Oklahoma.** Representing more than 1,500 Oklahoma businesses and 350,000 employees, the State Chamber of Oklahoma has been the state’s leading advocate for business since 1926. The organization’s mission is to advance public policies that promote Oklahoma businesses and employees.
- **Pennsylvania Chamber of Business and Industry.** Founded in 1916, the Pennsylvania Chamber of Business and Industry (“Pennsylvania Chamber”) has served as “The Statewide Voice of Business™” by advocating public policies that expand private sector job creation and lead to a more prosperous Pennsylvania for all its citizens. The Pennsylvania Chamber is the largest business association in Pennsylvania, which consists of more than 9,400 member businesses of all sizes and industry sectors throughout the state—from sole proprietors to Fortune 100 companies—representing nearly 50 percent of the private workforce in the Commonwealth.

- **South Carolina Chamber of Commerce.** The South Carolina Chamber of Commerce (“South Carolina Chamber”) is the leading statewide organization championing a favorable business climate for South Carolina companies and employees. Its mission is to strategically create and advance a thriving, free-market environment where South Carolina businesses can prosper. The South Carolina Chamber represents its members, which include both small and large companies, by assisting them with legislative advocacy and tracking, marketing, connecting and expanding their bottom line.
- **Virginia Chamber of Commerce.** The Virginia Chamber of Commerce (“Virginia Chamber”) is the leading non-partisan business advocacy organization in the Commonwealth. Working in the legislative, regulatory, civic and judicial arenas at the state and federal level, the Virginia Chamber seeks to promote long-term economic growth in the Commonwealth. The Virginia Chamber’s members include 25,000 Virginia companies, ranging from small businesses to Fortune 500 companies.
- **Wisconsin Manufacturers and Commerce.** Wisconsin Manufacturers and Commerce (“WMC”) is the state chamber of commerce, the state manufacturers’ association and the state safety council. Founded in 1911, WMC is Wisconsin’s leading business association dedicated to making Wisconsin the most competitive state in the nation. The association has nearly 3,800 members that include both large and small manufacturers, service companies, local chambers of commerce and specialized trade associations.
- **Las Vegas Metro Chamber of Commerce.** The Las Vegas Metro Chamber of Commerce (“Las Vegas Chamber”) is the largest business organization in Nevada. Founded in the early days of Las Vegas, the Las Vegas Chamber has effectively protected and strengthened the Southern Nevada business community, helping its member businesses grow and thrive and providing a voice for those businesses in local, state and federal government. The Las Vegas Chamber has thousands of member businesses from nearly every industry, representing more than 200,000 people.
- **Florida Justice Reform Institute.** The Florida Justice Reform Institute (“FJRI”) is Florida’s leading organization of concerned citizens, business owners, business leaders, doctors, and lawyers who are working towards the common goal of promoting predictability and personal responsibility in Florida’s civil justice system. FJRI’s mission is to fight wasteful civil litigation through

legislation, promote fair and equitable legal practices, and provide information about the state of civil justice in Florida. To facilitate these goals, FJRI employs research and advocacy in support of meaningful tort reform legislation.

- **Louisiana Lawsuit Abuse Watch.** The Louisiana Lawsuit Abuse Watch (“LLAW”) is a local non-partisan, nonprofit, citizen watchdog group dedicated to stopping lawsuit abuse that hurts Louisiana’s families and threatens local businesses and jobs. Using community outreach, public education and grassroots advocacy, LLAW raises awareness about the costs and consequences of lawsuit abuse and urges elected officials to advance more balance, fairness and common sense to Louisiana’s civil justice system. Since it was formed in 2007, LLAW has grown to nearly 6,000 supporters across the state, representing small business owners, health care providers, taxpayers, workers and their families.
- **South Carolina Civil Justice Coalition.** The South Carolina Civil Justice Coalition (“SCCJC”) serves as the united voice for the business community on tort and workers’ compensation issues; coordinating lobbying, legal, grassroots and public relations activities. Since 2003, SCCJC has been working to improve the legal climate in South Carolina and reduce the number and types of frivolous lawsuits brought against small, medium and large businesses who provide jobs and the many goods and services for South Carolina’s citizens.
- **Texas Civil Justice League.** Founded in 1986, the Texas Civil Justice League (“TCJL”) advocates for a fair and balanced judicial system in Texas. The Austin-based group is the oldest and largest state legal reform organization in the nation, with membership comprised of corporate businesses, law firms, professional and trade associations, health care providers and individual citizens.

APPENDIX B – PROPOSED AMENDED RULE

The amended Fed. R. Civ. P. 26(a)(1)(A) would read as follows, with the new proposed language in underscore and deletions in ~~strikethrough~~:

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; ~~and~~

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment; and

(v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.

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17-CV-XXXXX

September 1, 2017

Ms. Rebecca A. Womeldorf
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

RE: Response to Renewed Proposal to Amend Fed. R. Civ. P. 26(a)(1)(A)

Dear Ms. Womeldorf:

Burford Capital LLC¹—the largest provider of commercial litigation finance in the United States—writes in response to the letter of June 1, 2017 (the “2017 Letter”), submitted by the U.S. Chamber Institute for Legal Reform and other pro-defendant special interest groups (collectively the “Chamber”). Having failed to persuade the Advisory Committee on Civil Rules (the “Committee”) in 2014, the Chamber once again urges the Committee to amend Federal Rule of Civil Procedure 26 to “require the disclosure of third-party litigation funding arrangements in any civil action filed in federal court.”² The Chamber’s proposed amendment is word-for-word identical to its 2014 proposal—it suffers from the same defects, and it deserves the same treatment.

Not only is the Chamber’s proposed amendment the same as its previous effort, but the Chamber’s 2017 Letter is largely a carbon copy of its April 9, 2014 letter to the Committee (the “2014 Letter”). The Chamber proffers the same arguments as before: that litigation finance inherently “conceal[s]” conflicts of interest, that it scuttles settlement efforts, and that initial disclosure of litigation finance agreements is necessary to facilitate fairer cost-shifting and proportionality between parties.³ Those arguments are simply wrong, and they are no more persuasive today than they were three years ago.

In 2014, the Committee’s reporter pushed back against each of the Chamber’s arguments for its dramatic change to the Rule, stating that “[a]n attempt to craft rules now would be premature.”⁴ The reporter recognized that “a disclosure regime that applies in every case except those exempted by Rule 26(a)(1)(B) might seem far too broad to address the concern[s] raised.”⁵ Indeed, many of the supposed problems—such as ethical conflicts of interest—generally are not “for trial courts to take the lead” in policing.⁶ Moreover, “authorizing discovery of [third-party

¹ Burford Capital LLC is the U.S. operating subsidiary of Burford Capital Limited, a London Stock Exchange-listed company that engages in a variety of legal finance businesses globally.

² 2017 Letter at 1.

³ See generally 2017 Letter; 2014 Letter.

⁴ Hon. David G. Campbell, *Memorandum re: Report of Advisory Committee on Civil Rules* at 4 (Dec 2, 2014).

⁵ Advisory Committee on Civil Rules, Rule 26(a)(1)(A): Reporter’s Memorandum & Suggestion 14-CV-B at 10 (Oct. 30-31, 2014) (“Reporter’s Mem.”).

⁶ *Id.* at 7.
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litigation funding (“TPLF”)] arrangements might differ substantially from the authorization given in 1970 for discovery of insurance agreements.”⁷ And “[w]hether initial disclosure of TPLF arrangements is useful to deciding cost-bearing issues is uncertain.”⁸

The minutes of the Committee’s October 30, 2014 meeting highlight the multitude of concerns its members had with amending Rule 26.⁹ For example, one “judge expressed doubts about the need for disclosure. He routinely requires the person with settlement authority to be present at conferences; ‘I can get the information I need.’”¹⁰ “Another judge agreed that the proposal is premature. We do not yet know enough about the many kinds of financing arrangements to be able to make rules.”¹¹ And another “judge agreed that courts [already] have the tools to get the information needed to rule on discovery issues, and to order appearance by a person with settlement authority, and so on.”¹² Ultimately, the Committee decided that “third-party financing practices are in a formative stage. They are being examined by others . . . [w]e should not act now.”¹³

In 2016, the Committee again declined to take action on the Chamber’s renewed proposal. The Committee acknowledged the Chamber’s “suggestion follow[ing] up an earlier submission that the Committee should act to require disclosure of third-party financing arrangements.”¹⁴ However, “[t]he Committee decided, as it had earlier, that this topic should remain open on the agenda without seeking to develop any proposed rules now.”¹⁵

Nothing has changed since last year to justify revisiting the Committee’s decision. Just as was true in 2016 and in 2014, numerous courts have recognized that litigation funding puts parties on an even footing, rather than allowing defendants to distort litigation outcomes through superior financial resources. Indeed, the Chamber’s policy arguments ignore overwhelming evidence of the benefits provided by litigation finance, repeatedly make factual assertions with no support, and mischaracterize aberrant cases as reflecting prevailing trends without disclosing the multitude of countervailing authorities. Moreover, the Chamber’s proposal is fundamentally discriminatory, as it ignores the reality that there are many third-party financial stakeholders in complex civil litigation, of which specialty litigation finance providers are only a small subset. The civil justice system manages well the interests of parties and third-party financial stakeholders under its current rules. There is no basis for singling out one particular type of economic interest in litigation without undertaking a complete reformulation of how federal courts address disclosure of *all* economic interests in litigation outcomes.

It is not hard to understand why the Chamber, in the face of all evidence to the contrary, has recycled its 2014 proposal. Simply put, the Chamber and its allies are longstanding foes of civil litigation. They do not stand for a level playing field; rather, they are bare-knuckled players who seek to obtain strategic and tactical advantage for their constituents, and they spend many millions of dollars every year in pursuit of those efforts. Indeed, the Chamber makes no secret of

⁷ *Id.* at 5.

⁸ *Id.* at 9.

⁹ Minutes of Advisory Committee on Civil Rules at 13 (Oct. 30, 2014) (“Oct. 2014 Minutes”).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 14.

¹³ *Id.*

¹⁴ Minutes of Advisory Committee on Civil Rules at 35 (Apr. 14, 2016) (“Apr. 2016 Minutes”).

¹⁵ *Id.*
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its outright contempt for the U.S. litigation system. Lisa A. Rickard, the President of the Chamber's Institute for Legal Reform—the author of the 2017 Letter—recently proclaimed: “Our litigation machine is more grotesque than good design, more destructive than productive. Essentially, it is more monster than machine.”¹⁶ Moreover, the Chamber and its fellow signatories to the 2017 Letter are trade groups that lobby for—and are funded by—corporate defendants.¹⁷ In the name of so-called “litigation reform,” these groups actively seek to restrict plaintiffs’ access to the civil justice system. It is abundantly clear that the Chamber and its fellow signatories’ interests would be best served by amending Rule 26 to frustrate plaintiffs’ access to capital, thus foreclosing opportunities for plaintiffs to pay the ever-increasing costs associated with complex litigation. The 2017 Letter should be analyzed with its drafters’ motivations in mind.

Further confirming the political nature of its proposal, the Chamber makes no effort to define or properly contextualize litigation finance, or what it calls “TPLF.” There is a long history in the United States of parties to litigation seeking outside financing from a diversity of sources. For example, parties that cannot afford or do not wish to pay their legal fees and expenses out of pocket: (1) regularly turn to law firms that work on contingency or conditional fee arrangements; (2) approach banks, private funds, or other financial institutions to secure loans, debt, or equity instruments; (3) secure financing in the form of risk-avoidance instruments from insurance companies; or (4) for the last decade or so, work with specialist providers of litigation finance. All of these sources of outside financing—contingent fee law firms, banks, insurers, and specialists—could be considered “third-party financing,” and there is no basis for choosing among them for differential treatment. A bank’s security interest in the proceeds of a litigation claim is no different from a litigation finance firm’s security interest in the proceeds of that same claim. As discussed further below, Burford’s business encompasses numerous approaches to litigation finance—just as do the businesses of many major banks and financial institutions. None of those approaches warrant amending Rule 26.

In short, and for the reasons further set forth below, the Chamber’s proposal does not merit submission for public comment or any further attention by the Committee.

I. No Material Developments Warrant Reconsidering The Committee’s 2014 Decision

The Chamber contends that “there have been several relevant noteworthy developments”¹⁸ since 2014 that merit reconsideration of its old proposal. Not so. The Chamber overstates the “rapid growth” of litigation finance since 2014. And it fails in its effort to use one limited disclosure rule adopted by one federal court in the class-action context as evidence of some broader trend toward requiring initial disclosure of litigation finance agreements.¹⁹

¹⁶ Remarks of Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform, at the Litigation Machine, 17th Annual Legal Reform Summit (Oct. 26, 2016), <http://www.instituteforlegalreform.com/legal-reform-summit/2016-speaker-showcase>.

¹⁷ See, e.g., Amanda Bronstad, *For Plaintiffs Bar, Talking on J&J Means Battling a Shadow Foe*, Nat’l L.J., Aug. 18, 2017, <http://www.nationallawjournal.com/id=1202795963299/For-Plaintiffs-Bar-Taking-on-JJ-Means-Battling-a-Shadow-Foe>; Resp. in Opp’n to Mot. for Leave to File Brief as *Amicus Curiae* of the Chamber of Commerce at 6 (chart), *DirectTV, LLC v. Cordoba*, No. 17-90020 (11th Cir. Aug. 19, 2017), <https://static.reuters.com/resources/media/editorial/20170821/directtvvcordoba--excludechamberbrief.pdf>.

¹⁸ 2017 Letter at 2.

¹⁹ See *id.* at 2-7.
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The Chamber Overstates the “Rapid Growth” of Litigation Finance. The Chamber posits that “there has been a dramatic expansion of TPLF over the last few years.”²⁰ Thus, according to the Chamber, “[t]he scope of TPLF in U.S. civil litigation has reached a point such that” the Federal Rules of Civil Procedure must be amended to “require the disclosure of TPLF arrangements in all civil actions filed in federal court.”²¹ Even if the Chamber had its facts right (which it does not), the conclusion it posits does not follow naturally from those facts. Saying that “more plaintiffs are borrowing from Citibank to pay their legal fees” would not justify a new regime mandating Rule 26 disclosure of all Citibank borrowers. So too here. That the use of litigation finance is increasing does not itself support imposing a broad new litigation finance disclosure requirement governing every piece of civil litigation in the federal courts.

To support its position, the Chamber cites the increase in revenues realized by litigation finance firms, the increasing use of litigation finance by law firms, and the decision by some litigation finance firms to employ a portfolio strategy for their investments.²² We laud the increased use of litigation finance by law firms and their clients—including some of the same Fortune 500 companies that the Chamber purports to represent. We also are pleased to note the increasing acceptance of litigation finance by courts. But the growth of litigation finance firms is a misleading indicator of the role of the litigation finance industry in modern civil litigation. Today, just as in 2014, litigation funding arrangements make up a very small percentage of the total spending on litigation in the United States. In 2015, the market for U.S. legal services was estimated at \$437 billion.²³ Of that \$437 billion, litigation was estimated to make up roughly one-third of legal services activity,²⁴ or approximately \$144 billion. (These numbers, of course, exclude damages and only include money spent on lawyers.) In 2016, Burford, the world’s leading provider of litigation finance, committed \$378 million of new capital to litigation finance investments globally—not just in the United States.²⁵ While proud of this achievement and the growth it represents for our clients, employees, and shareholders, we note that the portion of this investment committed to U.S. litigation represents less than 0.25% of annual U.S. legal spending on litigation.

Moreover, the Chamber mistakenly equates the growth of specialized litigation finance companies such as Burford with an increase in the amount of capital provided by third parties to fund litigation. In fact, there is no evidence that firms such as Burford are providing *new* capital that previously was not contributed by third parties to litigation efforts, as opposed to simply professionalizing and institutionalizing historical channels for obtaining outside resources. In the past, companies in need of capital to fund operations (including litigation) have relied on numerous sources of third-party funding, including loans from traditional banks and other lenders. Burford merely provides a specialized alternative to those traditional sources of capital. Unlike traditional banks, however, Burford brings to bear extensive litigation expertise—including numerous former litigators—that makes it better able to evaluate the merits of potential

²⁰ *Id.* at 7.

²¹ *Id.*

²² *Id.* at 2-9.

²³ Thomson Reuters, *How Big is the U.S. Legal Services Market* (2015), <http://legalexecutiveinstitute.com/wp-content/uploads/2016/01/How-Big-is-the-US-Legal-Services-Market.pdf>.

²⁴ The Center for the Study of the Legal Profession at the Georgetown University Law Center, *2015 Report on the State of the Legal Market* at 3, <http://www.law.georgetown.edu/academics/centers-institutes/legal-profession/upload/FINAL-Report-1-7-15.pdf>.

²⁵ Burford Capital LLC, 2016 Annual Report at 3, <http://www.burfordcapital.com/wp-content/uploads/2017/03/>

claims prior to committing capital. The growth of litigation finance *firms* does not necessarily equate to the growth of *litigation finance*, but rather indicates increased specialization and professionalization, which benefits clients as well as the civil justice system as a whole.

The Chamber Exaggerates the Impact of Portfolio Investing. The Chamber asserts that portfolio investing “driv[es] the pervasiveness of TPLF and increas[es] the likelihood that it will encourage the filing of spurious lawsuits.”²⁶ The Chamber provides no evidence to support its assertion. And its assertion makes no sense. As a business matter, whether Burford invests in a single matter or a portfolio of matters, it is interested only in funding meritorious lawsuits. As one commentator put it:

Critics argue that because TPLF providers fund many cases and thus are able to distribute risk across their portfolio of investments, the risks associated with funding a single claim are negligible. They claim this higher risk appetite combined with providers’ single-minded pursuit of a return on capital contributes to increased frivolous litigation. This argument does not stand on firm ground, however. *TPLF providers are indeed interested in earning a handsome return on capital, but this incentivizes TPLF providers only to advance money to plaintiffs with meritorious claims. In the words of one of the largest providers in today’s industry, “[f]unding meritless suits is a sure way to lose money.”* TPLF providers in the commercial context conduct significant due diligence before moving forward with an investment because they offer substantial nonrecourse investments. TPLF providers assess a number of factors including the type and strength of a case, jurisdiction, evidence, potential damages, settlement prospects, and expertise of counsel.²⁷

The Chamber further misleadingly implies that portfolio investing is focused on mass tort cases, but that is just wrong.²⁸ Law firms and businesses of all types and sizes utilize portfolio financing arrangements. The Chamber offers a single example of a law firm ex-employee complaining about one law firm’s reliance on third-party capital to fund marketing expenses.²⁹ But in the Chamber’s own words, that case is a “far cry” from the “usual customers” for litigation finance: “companies with big business disputes for their Am Law 200 firms.”³⁰ The Committee’s decisions should not be governed by anomalous cases.

The Chamber Exaggerates the Impact of Crowdfunding. Despite the Chamber’s effort to exaggerate their significance, crowdfunding and other online funding marketplaces do not have a meaningful market share in the industry. Indeed, the only two examples given by the Chamber—LexShares and Trial Funder—have raised a mere \$5.5 million and \$100,000, respectively (with TrialFunder stating that it *hopes* to raise another \$5 million in the future).³¹ Crowdfunding companies should not be lumped together with mainstream litigation finance firms such as Burford. Crowdfunding companies remain such a trivial presence, moreover, that

²⁶ 2017 Letter at 7.

²⁷ David R. Glickman, *Embracing Third-Party Litigation Finance*, 43 Fla. St. U. L. Rev. 1043, 1058-59 (2016) (emphasis added; footnotes omitted).

²⁸ See 2017 Letter at 7.

²⁹ See *id.* at 8.

³⁰ *Id.*

³¹ Sara Bandazzo, *Litigation Funding Moves into Mainstream*, Wall St. J., Aug. 4, 2016.

they do not warrant any meaningful consideration by the Committee, much less a broad rule warranting mandatory initial disclosure of litigation finance agreements in all federal civil cases.

No Federal Court Requires Blanket Disclosure of Litigation Finance. The Chamber asserts that since 2014, “at least one federal district court—the U.S. District Court for the Northern District of California—has adopted its own TPLF disclosure requirement.”³² But that disclosure requirement, which is limited to the class-action context,³³ is hardly equivalent to a blanket disclosure requirement for all civil cases under Rule 26. Indeed, the U.S. District Court for the Northern District of California specifically declined to implement a broad disclosure requirement akin to what the Chamber proposes here. In 2016, the court proposed its own revision to Civil Local Rule 3-15 that would have required disclosure of litigation funders in all cases.³⁴ But the court scrapped its proposed revision³⁵ in favor of limiting disclosure to solely class action lawsuits, as discussed above.³⁶

Notably, the Chamber itself acknowledges that discovery of litigation finance—as opposed to more onerous, mandatory disclosure—has been permitted only in “limited circumstances” or in “disputes between parties and a funder.”³⁷ No federal court, either before or after 2014, has required mandatory disclosure of litigation finance agreements on a scale equivalent to the Chamber’s proposal. In fact, *nothing* has occurred since 2014 to justify revisiting the Committee’s decision. None of the “relevant noteworthy” developments cited by the Chamber are any more “relevant” or “noteworthy” than they were when the Chamber first posited them to the Committee in 2014. We respectfully submit that the Committee should leave the issue “open on the agenda without seeking to develop any proposed rules now,” just as it did last year.³⁸

II. The Federal Rules Were Not Designed To Address The Issues Raised By The Chamber

The Federal Rules were not designed to address many of the policy arguments raised by the Chamber, which are unpersuasive in any event. The Rules “govern the procedure in all civil actions and proceedings in the United States district courts . . . to secure the just, speedy, and inexpensive determination of every action and proceeding.”³⁹ Paragraphs (a)(1)(A)(i) through (iv) of Rule 26, in particular, were adopted to ensure early disclosure of “four types of information that have been customarily secured early in litigation through formal discovery.”⁴⁰ Rule 26 was not adopted to require transparency for transparency’s sake. Nor was it designed to

³² 2017 Letter at 10.

³³ See Standing Order for All Judges of the Northern District of California - Contents of Joint Case Management Statement at 2 (eff. Jan. 17, 2017) http://www.cand.uscourts.gov/filelibrary/373/Standing_Order_All_Judges_1.17.2017.pdf (“N.D. Cal. Standing Order”) (“In any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim.”).

³⁴ See U.S. District Court for the Northern District of California, *Draft Revision of Civil Local Rule 3-15*, <https://www.cand.uscourts.gov/news/23>.

³⁵ See U.S. District Court for the Northern District of California, *Notice Regarding Civil Local Rule 3-15*, <https://www.cand.uscourts.gov/news/210>.

³⁶ See *supra* note 33.

³⁷ 2017 Letter at 2.

³⁸ Apr. 2016 Minutes at 35.

³⁹ Fed. R. Civ. P. 1.

⁴⁰ Fed. R. Civ. P. 26(a)(1) advisory committee’s note to 1993 amendment (renumbered as part of the 2007

facilitate the application of various state laws raised by the Chamber's letter (*i.e.*, champerty and maintenance doctrines) or to help enforce lawyers' ethical duties, which are traditionally the province of state courts and state bar associations. Moreover, litigation finance does not constitute champerty or maintenance and is consistent with state professional responsibility rules.

The Initial Disclosure Rules Were Adopted to Improve Efficiency, Not to Increase the Overall Scope of Disclosure. The 1993 Amendments to the Civil Rules added the provisions that make up current Rule 26(a)(1)(A) in an effort to achieve “savings in time and expense.”⁴¹ The scope of initial disclosure was designed not to be comprehensive or overly burdensome to the parties, but to eliminate the need for formal discovery requests to receive “certain basic information” about the claims and damages alleged.⁴² Later amendments reinforce this point. In 2000, for example, the scopes of the witness and document subdivisions were narrowed to just those a party “may use to support its claims or defenses.”⁴³ As explained in further detail below, it strains credulity for the Chamber to imply that a litigation funding agreement is “needed in most cases to prepare for trial or make an informed decision about settlement.”⁴⁴ Moreover, courts regularly exclude litigation funding agreements on the basis that they are both *per se* irrelevant and generally subject to protection from discovery.⁴⁵ The Chamber's proposal attempts to obtain through an initial disclosure what it cannot through normal discovery; that drastically broad expansion is entirely inconsistent with the Committee's original purpose for enacting Rule 26(a).

Rule 26 Should Not Be Amended to Assist a Small Minority of State Courts in Applying Largely Abandoned Champerty and Maintenance Doctrines. The Chamber asserts that “disclosure of TPLF arrangements at the outset of civil lawsuits” is necessary because “recent state and federal court decisions have given renewed vitality to champerty principles, particularly in the TPLF arena.”⁴⁶ But the Chamber's description of the case law is misleading. As the Ninth Circuit has explained, champerty and maintenance are dying doctrines: “The consistent trend across the country is toward limiting, not expanding, champerty's reach.”⁴⁷ Indeed, many states never adopted laws relating to champerty and maintenance, viewing them as

⁴¹ Fed. R. Civ. P. 26(a) advisory committee's note to 1993 amendment.

⁴² *Id.*

⁴³ Fed. R. Civ. P. 26(a)(1) advisory committee's note to 2000 amendment.

⁴⁴ Fed. R. Civ. P. 26(a) advisory committee's note to 1993 amendment.

⁴⁵ See *Kaplan v. S.A.C. Capital Advisors, L.P.*, No. 12-cv-9350, 2015 WL 5730101, at *3-5 (S.D.N.Y. Sept. 10, 2015); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 742 (N.D. Ill. 2014).

⁴⁶ 2017 Letter at 11.

⁴⁷ *Del Webb Communities, Inc. v. Partington*, 652 F.3d 1145, 1156 (9th Cir. 2011); see also *Miller UK Ltd.*, 17 F. Supp. 3d at 727 (“[O]ver the centuries, maintenance and champerty have been narrowed to a filament.”); *id.* (“The Massachusetts and South Carolina Supreme Courts have recognized that the champerty doctrine is no longer needed to protect against the evils once feared, such as speculation in lawsuits, the bringing of frivolous lawsuits, or financial overreaching by a party of superior bargaining position because there are now other devices that more effectively accomplish these ends.”); *In re Complete Retreats, LLC*, No. 06-50245, 2011 WL 1434579, at *2-3 (Bankr. D. Conn. Apr. 14, 2011) (“[T]he common law doctrines of champerty and maintenance as applied to civil actions have never been adopted in [Connecticut], and the only test is whether a particular transaction is against public policy.’ . . . Issues to consider when determine [sic] whether a funding agreement offends public policy include whether the non-party funder: instigated the litigation; is required to consent to settlement of the litigation; has control of the direction of litigation; and, is a predatory lender taking advantage of an unwary plaintiff.”); *Osprey, Inc. v. Cabana Ltd. P’ship*, 532 S.E.2d 269, 279 (S.C. 2000) (holding that doctrine “no longer is required to prevent the evils traditionally associated with” it).

relics of feudal English law.⁴⁸ Thus, the “decline of champerty . . . is symptomatic of a fundamental change in society’s view of litigation—from a social ill . . . to a socially useful way to resolve disputes.”⁴⁹ Likewise, litigation finance is wholly consistent with sound public policy because it enables an underfunded plaintiff with meritorious claims to pursue those claims.⁵⁰

Even in those few states where the champerty and maintenance doctrines remain, litigation finance arrangements have been held not to violate them—and Rule 26 would be a wholly inappropriate vehicle to police parties’ financial arrangements in any event. Champerty requires the assignment of a claim to a third party who carries on the litigation in the claimant’s absence.⁵¹ Litigants who use third-party capital do not assign their claims to the capital provider, but instead continue to litigate those claims on their own behalf.⁵² As courts have repeatedly recognized, “an outsider’s involvement in a lawsuit does not constitute champerty or maintenance merely because the outsider provides financial assistance to a litigant and shares in the recovery.”⁵³ Thus, numerous courts across the country have held that litigation finance agreements are not champertous.⁵⁴

⁴⁸ See Max Radin, *Maintenance by Champerty*, 24 Cal. L. Rev. 48, 67-68 (1935); see also *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 275-76 (2008) (recounting demise of feudal prohibition of the assignment of causes of action, as “the ‘objection of maintenance’ yielded to ‘the modern commercial spirit’”) (quoting James Barr Ames, *Lectures on Legal History* at 214 (1913)); *Abbott Ford, Inc. v. Superior Court*, 741 P.2d 124, 141 n.26 (Cal. 1987); *Currence v. Ralphsnyder*, 151 S.E. 700, 702 (W.Va. 1929); *Strahan v. Haynes*, 262 P. 995, 997 (Ariz. 1928); *Merchants’ Protective Ass’n v. Jacobsen*, 127 P. 315, 318 (Idaho 1912); *Van Gieson v. Magoon*, 20 Haw. 146, 149 (1910); *Schomp v. Schenck*, 40 N.J.L. 195, 202-04 (1878); *Bentinck v. Franklin*, 38 Tex. 458, 472-73 (1873); Stephen Gillers, *Waiting for Good Dough: Litigation Funding Comes to Law*, 43 Akron L. Rev. 677, 688 & n.92 (2010) (noting Ohio’s statutory abolition of the doctrine) (citing Ohio Rev. Code Ann. § 1349.55 (2008)); *Wright v. Meek*, 3 Greene 472, 482 (Iowa 1852) (holding that “[i]n this country there is but little or no necessity for enforcing the doctrine of champerty.”).

⁴⁹ *Saladini v. Righellis*, 687 N.E.2d 1224, 1226 (Mass. 1997).

⁵⁰ As the President of the Supreme Court of the United Kingdom observed, “the public policy rationale regarding maintenance and champerty has turned full circle”—whereas “protect[ing] the poor and weak from exploitation by the rich and powerful” originally supported the doctrines, now the very same policy “positively . . . support[s] the development of litigation funding as a means of securing effective access to justice.” Lord David Neuberger, *Annual Lecture: From Barretery, Maintenance, and Champerty to Litigation Funding* at 14, 21 (May 8, 2013), <http://www.supremecourt.uk/docs/speech-130508.pdf>.

⁵¹ See *Del Webb*, 652 F.3d at 1153.

⁵² See *Charge Injection Techs., Inc. v. E.I. DuPont De Nemours & Co.*, No. 07C-12-134-JRJ, 2016 WL 937400, at *4 (Del. Super. Ct. Mar. 9, 2016) (“The record before the Court demonstrates that [plaintiff] is the bona fide owner of the claims in this litigation, and Burford has no right to maintain this action. In this case, there was no assignment. Neither the FPA nor the Security Agreement assigns ownership of [plaintiff]’s claims against [defendant] to Burford.”) (footnote omitted).

⁵³ *Del Webb*, 652 F.3d at 1157 (citing *Odell v. Legal Bucks, LLC*, 665 S.E.2d 767, 775 (N.C. Ct. App. 2008)).

⁵⁴ See, e.g., *Petersen Energia Inversora, S.A.U. v. Argentine Republic*, No. 15-cv-2739, 2016 WL 4735367, at *9 (S.D.N.Y. Sept. 9, 2016) (“Here, the facts sufficient to establish a champertous assignment are not clear from the face of the Complaint. . . . The relevant agreement, which is incorporated by reference in the Complaint, states that, ‘[t]he parties agree that nothing in this Agreement shall be interpreted to constitute an assignment . . . of the Claims,’ and that [plaintiff] retains an interest in the outcome of the case.”) (citation omitted); *Miller UK Ltd.*, 17 F. Supp. 3d at 726 (“[E]xacting standards in champerty statutes in other states have been found to be a barrier to the proscription of litigation funding contracts.”); *In re Complete Retreats, LLC*, 2011 WL 1434579, at *3 (litigation finance agreement was not champertous); *Charge Injection Techs., Inc.*, 2016 WL 937400, at *3-6 (finding Burford’s litigation funding agreement did not violate Delaware champerty law).

Maintenance requires “officious intermeddling”—improperly stirring up meritless litigation out of malice or other illegitimate motives.⁵⁵ Courts have further defined “officious intermeddling” as, for example, “offering unnecessary and unwanted advice or services; meddlesome, esp. in a highhanded or overbearing way,”⁵⁶ “the act of one improperly, and for the purpose of stirring up litigation and strife, encouraging others either to bring an action or to defend a suit which they have no right to make,”⁵⁷ “stirring up strife and continuing litigation,”⁵⁸ or “offer[ing] unwanted advice or otherwise attempt[ing] to control the litigation for the purpose of stirring up strife or continuing a frivolous lawsuit.”⁵⁹ All of those definitions make clear that, in the litigation finance context, a funder does not officiously intermeddle; a funder agrees to provide capital to a funding recipient so that the *recipient* can litigate its *legitimate* claims. Indeed, litigation finance providers have every incentive to avoid “stirring up strife or continuing a frivolous lawsuit”—if the funded party loses, the funder loses its investment.

Even to the extent there could be any claim of champerty, moreover, most jurisdictions have held that a defendant does not have standing to raise it—which makes the Chamber’s focus on the issue all the more peculiar.⁶⁰ Champerty and maintenance have traditionally been understood as violations by the party providing assistance, not by the party receiving it. Those doctrines are not designed to punish a party with a valid legal claim that seeks help in vindicating its legal rights.⁶¹ Thus, contrary to the Chamber’s suggestion, a defendant generally does not “have standing to challenge such an agreement as champertous under the applicable state law,” and therefore also has no right to disclosure of whether such an arrangement exists.⁶²

The four cases that the Chamber cites do not indicate any trend toward state-law prohibition of third-party litigation funding. The Chamber cites *WFIC, LLC v. LaBarre*, 148 A.3d 812 (Pa. Super. Ct. 2016), but to our knowledge, *WFIC* is alone among state-court cases in holding that loaning funds to assist a litigant in pursuing valid claims constitutes champerty even without an assignment of claims to the lender. As explained above, most other courts have rejected that conclusion. But even *WFIC* makes clear that, “[u]nder Pennsylvania law, if an assignment is champertous, it is invalid”; it nowhere suggests that champerty is an affirmative defense to a plaintiff’s claims on the merits.⁶³ It certainly is not appropriate for the Committee

⁵⁵ See *Miller UK Ltd.*, 17 F. Supp. 3d at 725 (“Officiousness is synonymous with meddlesomeness and can be described as volunteering one’s services where they are neither asked for nor needed.”).

⁵⁶ *Kraft v. Mason*, 668 So. 2d 679, 682 (Fla. Dist. Ct. App. 1996) (quoting *Webster’s New World Dictionary* at 988 (2d ed. 1986)).

⁵⁷ *Id.*

⁵⁸ *Oliver v. Bynum*, 592 S.E.2d 707, 711 (N.C. Ct. App. 2004).

⁵⁹ *Osprey, Inc. v. Cabana Ltd. P’ship*, 532 S.E.2d 269, 278 (S.C. 2000).

⁶⁰ See *Miller UK Ltd.*, 17 F. Supp. 3d at 726 (“Not surprisingly, the few state courts that have held funding agreements champertous under their state statutes have only done so in the context of a suit by the parties to the contract seeking its enforcement. That is obviously not the situation here.”) (citation omitted).

⁶¹ See, e.g., *In re Emerging Commc’ns, Inc. S’holders Litig.*, No. CIV.A. 16415, 2004 WL 1305745, at *29 (Del. Ch. May 3, 2004) (“Champerty cannot be charged against one with an interest in the matter in controversy.”); *Drake v. Northwest Nat’l Gas Co.*, 165 A.2d 452, 454 (Del. Ch. 1960) (finding no champerty when the “claimant is the bona fide owner of the claim in litigation”); *Arcoria v. RCC Assocs., Inc.*, No. K13L-06-058 RBY, 2014 WL 620361, at *3 (Del. Super. Ct. Jan. 8, 2014) (holding that because “[p]laintiff has a direct legal interest in the subject matter of this litigation,” his “causes of action are not tainted with champerty and maintenance”); *Hannigan v. Italo Petroleum Corp. of Am.*, 178 A. 589, 592 (Del. Super. Ct. 1935) (similar); *Gibson v. Gillespie*, 152 A. 589, 593 (Del. Super. Ct. 1928) (similar).

⁶² 2017 Letter at 13.

⁶³ *WFIC, LLC v. LaBarre*, 148 A.3d at 819.
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to adopt a broad disclosure requirement to facilitate the enforcement of one state’s idiosyncratic champerty law, if indeed *WFIC* is even a proper statement of that one state’s law.

The Chamber’s three remaining cases likewise do not suggest increasing application of the champerty or maintenance doctrine to litigation finance:

Maslowski v. Prospect Funding Partners LLC, 890 N.W.2d 756 (Minn. Ct. App. 2017), review denied (May 16, 2017), did not apply the champerty doctrine to third-party litigation funding. It merely invalidated a forum-selection clause that would have had the effect of evading Minnesota’s champerty law. Minnesota is among the minority of states to continue to recognize a prohibition on champerty,⁶⁴ and this case is simply an affirmation of an existing rule.

Justinian Capital SPC v. WestLB AG, 65 N.E.3d 1253 (N.Y. 2016), did not involve anything like an ordinary commercial third-party litigation funding arrangement. Instead, a purchaser of poorly performing notes wanted to sue the issuer of those notes, but wanted to do so in secret.⁶⁵ The purchaser of the notes sold the notes to a third party, who then sued the note issuer.⁶⁶ As commentators have recognized,⁶⁷ the case has highly unusual facts; thus, it should not be considered relevant in deciding whether the Committee should require disclosure of litigation finance agreements. Far more relevant than *Justinian* is New York’s champerty statute, which provides an explicit safe harbor for the purchase of litigation claims for more than \$500,000.⁶⁸ The statute explicitly permits sophisticated commercial litigation funding arrangements used by Burford and other litigation funding providers. Indeed, “New York has long been a leading commercial center, and our statutes and jurisprudence have . . . greatly enhanced New York’s leadership as the center of commercial litigation.”⁶⁹ Thus, “[t]he safe harbor was enacted to exempt large-scale commercial transactions in New York’s debt-trading markets from the champerty statute” because “participants in commercial transactions and the debt markets [such as litigation funders] are sophisticated investors who structure complex transactions.”⁷⁰ The *Justinian* court went out of its way to confine its holding to the very specific facts of that case, which did not involve litigation finance.

Finally, *In re DesignLine Corp.*, 565 B.R. 341 (Bankr. W.D.N.C. 2017), is not on point. As an initial matter, it is a bankruptcy case, governed not by the Federal Rules of Civil Procedure but by the Federal Rules of Bankruptcy Procedure. Because of the special considerations applicable to bankruptcy cases, those rules already require increased levels of disclosure generally (and not merely as to litigation finance) and approval by the court to protect creditors.⁷¹ The funding agreement in that case was found champertous because the agreement

⁶⁴ See *Johnson v. Wright*, 682 N.W.2d 671 (Minn. Ct. App. 2004).

⁶⁵ *Justinian*, 65 N.E.3d at 1254-55

⁶⁶ *Id.*

⁶⁷ See, e.g., Debt Collection/Champerty, 24 Bus. Torts Rep. 355, 357 (2012) (“While other courts had rejected allegations of champerty in similar cases, the facts at bar appeared to be unique, the court believed.”); Nathan Crystal, *Litigation Finance: An Overview of Issues and Current Developments (Part i)* at 13, S.C. Law (May 2017) (“While the case at first blush seems to be adverse to litigation funding, the opposite is actually the case.”).

⁶⁸ Notably, the New York champerty statute contains a safe harbor exempting from its application “any assignment, purchase or transfer . . . having an aggregate purchase price of at least five hundred thousand dollars.” N.Y. Judiciary Law § 489(2).

⁶⁹ *Justinian*, 65 N.E.3d at 1258.

⁷⁰ *Id.*

⁷¹ See Fed. R. Bankr. P. 2019, Advisory Committee on Civil Rules | November 7, 2017

gave the funder an unusual amount of control over the litigation.⁷² The court noted the funder’s “power of the purse” because “[t]he trustee would not receive all funds up front to use in her sole discretion. Instead, she must go back to [the funder] on a quarterly basis and ask [the funder] to open its wallet. In each instance, [the funder] is given an opportunity to weigh whether its involvement continues to be a profitable endeavor and whether continued funding is in its, rather than the debtors’ creditors’, best interest. If not, [the funder] may decline to make additional advances.”⁷³ Once again, the result in that case was driven by the parties’ highly unusual arrangement, and not any broader condemnation of third-party litigation funding arrangements.

Litigation Finance Does Not Violate Lawyers’ Ethical Duties, Which Are Not the Province of Rule 26 in Any Event. The Chamber argues that litigation finance encourages violations of the rule against sharing attorneys’ fees with nonlawyers, and violations of lawyers’ duties of loyalty and confidentiality to their clients.⁷⁴ To begin with, and contrary to the Chamber’s unsupported assertions, litigation finance arrangements are fully consistent with the rules of professional ethics for lawyers. Furthermore, the disclosure requirements of the Federal Rules are not the proper place to police violations of attorney ethics rules, and such violations do not give rise to any cognizable defense on the part of the defendant in federal litigation. By analogy, the rules of professional responsibility of every state prohibit lawyers from representing two clients where there is a concurrent conflict of interest. But the Federal Rules have never been amended to require disclosure of such conflicts, since the enforcement of those rules is a matter for the state bar authorities and not the federal courts.

First, the Chamber alleges that litigation funders and counsel using litigation funding are “ignoring” the principle prohibiting lawyers from sharing legal fees with non-lawyers.⁷⁵ But the Chamber cites no support for that assertion. In the lone case the Chamber cites—*Gbarabe v. Chevron Corp.*—the district court *did not even mention* the funding agreement, much less suggest it was unlawful, in denying class certification.⁷⁶ While it is true that some forms of litigation finance involve providing funds to attorneys, who in turn repay the funder out of the attorneys’ proceeds from a successful litigation, that arrangement is not the type of “fee splitting” that is prohibited by Model Rule of Professional Conduct Rule 5.4 any more than an arrangement whereby a law firm took out a line of credit from Citibank and agreed to repay Citibank using the proceeds of the law firm’s client engagements. Not surprisingly, leading legal ethicists have concluded that litigation funding does not implicate the concerns addressed by Rule 5.4.⁷⁷

Second, the Chamber alleges that litigation finance may result in attorneys breaching their duties of loyalty and confidentiality to their clients.⁷⁸ Again, putting aside a litigation defendant’s lack of standing to enforce such a duty against a plaintiff’s attorney, the Chamber offers no evidence that breaches of the duty of loyalty have actually occurred—only theoretical arguments that they “may” occur. And regarding confidentiality, quite contrary to the Chamber’s assertion, courts have consistently held that third-party funders are entitled to benefit

⁷² See *In re DesignLine Corp.*, 565 B.R. at 348-49.

⁷³ *Id.* at 348.

⁷⁴ See 2017 Letter at 13-16.

⁷⁵ *Id.* at 14.

⁷⁶ See *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2017 WL 956628 (N.D. Cal. Mar. 13, 2017).

⁷⁷ See, e.g., Anthony J. Sebok, *Unmatured Attorneys’ Fees and Capital Formation in Legal Markets*, Forthcoming 2018 U. Ill. L. Rev. at 14 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2956538.

⁷⁸ See 2017 Letter at 14-15.
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from work-product protection.⁷⁹ The Chamber’s speculative and incorrect suggestions are insufficient to warrant a broad change in the Federal Rules.

III. The Proposed Amendment Is Not Supported By Other Aspects Of The Federal Rules

The Proposed Rule Is Not Warranted as an Extension of Rule 7.1. The Chamber argues that the proposed rule is an appropriate extension of Rule 7.1, which requires that a “nongovernmental corporate party” disclose “any parent corporation and any publicly held corporation owning 10% or more of its stock.”⁸⁰ But the origins of Rule 7.1 stand in stark contrast to the situation here: Rule 7.1 was adopted because of a number of prominent “news reports of cases in which judges ha[d] inadvertently failed to disqualify themselves because of a failure to connect with financial information that requires disqualification.”⁸¹ According to the Committee, “[t]here [had] been two recent waves of embarrassing publicity about inadvertent failures to recuse.”⁸²

The Chamber has not offered any evidence of any similar risk of judicial conflicts of interest associated with the involvement of third-party litigation funders. That is because federal judges are well aware of their ethical responsibilities, and would be well advised to avoid investing in litigation finance entities (whether public or private). However, if a federal judge ever were to have a relationship with a litigation finance company that rose to the level of warranting disqualification in cases in which that company was involved, such a judge would be fully equipped to issue an individual practice rule or standing order requiring disclosure of any relationship with that company. In short, any concern about judicial conflict of interest is so attenuated that it cannot support a broad disclosure rule of the kind suggested by the Chamber.⁸³

It is also important to consider the conscious choice made at the time of the adoption of Rule 7.1 about the extent of disclosure that was desirable in the context of civil litigation. In the interest of judicial efficiency, the Federal Rules of Civil Procedure do not aim for disclosure of every conceivable relationship a party has that might touch a judge. Instead, Rule 7.1 draws a bright line at 10% shareholdings, while exempting debt, derivatives, convertibles and many other kinds of financial interests. As the Committee noted at the time of Rule 7.1’s adoption:

⁷⁹ See, e.g., *Miller UK Ltd.*, 17 F. Supp. 3d at 734-35 (“For purposes of a privilege analysis, there is nothing unique about cases involving third party litigation funding. . . . Materials that contain counsel’s theories and mental impressions . . . do not necessarily cease to be protected because they may also have been prepared or used to help [the plaintiff] obtain financing.”).

⁸⁰ Fed. R. Civ. P. 7.1(a).

⁸¹ Minutes of Advisory Committee on Civil Rules at 9 (Apr. 10-11, 2000).

⁸² *Id.* at 10.

⁸³ The Chamber’s invocation of the *Chevron v. Ecuador* case illustrates the point. In that case, a private attorney serving as a discovery special master, Max Gitter of Cleary Gottlieb, determined that disclosure of plaintiffs’ litigation funders was appropriate under the circumstances. As Mr. Gitter himself acknowledged, it was “[b]y amazing coincidence” that he happened to have been former co-counsel with Burford’s chief investment officer and acquainted with its Chief Executive Officer. Dep. of Steven Donziger at 631:18-633:22 (Nov. 29, 2010), *In re Application of Chevron*, No. 10 MC 00002 (LAK) (S.D.N.Y. 2010), ECF No. 306-1 (“Donziger Dep.”). Notably, Mr. Gitter did not recuse himself despite those relationships, and the parties did not seek his recusal. Moreover, the Chamber misrepresents Mr. Gitter’s testimony. Mr. Gitter did not, as the Chamber states (at 16), receive a “brochure about funding one of Burford’s cases.” Instead, Chris Bogart, the former general counsel of *Time Warner* (and not, as the Chamber misstates, general counsel of Burford), sent Mr. Gitter a brochure to suggest he join the company as a special advisor. Donziger Dep. at 631:18-633:22.

Although the disclosures required by Rule 7.1(a) may seem limited, they are calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts. Unnecessary disclosure of volumes of information may create a risk that a judge will overlook the one bit of information that might require disqualification, and also may create a risk that unnecessary disqualifications will be made rather than attempt to unravel a potentially difficult question. It has not been feasible to dictate more detailed disclosure requirements in Rule 7.1(a).⁸⁴

Litigation finance is far less prevalent than many other kinds of financial interests that by policy choice remain undisclosed.

Litigation Finance Agreements Are Not Analogous to Insurance Coverage Under Rule 26. The Chamber asserts that requiring initial disclosure of litigation finance agreements is justified by “[p]arity” concerns between a funded plaintiff and a defendant—mainly that “Rule 26 already requires the disclosure of insurance coverage, including insurance that will pay for the defense.”⁸⁵ However, as the Committee has recognized in the past, there are differences between litigation finance and insurance arrangements that make the Chamber’s analogy inapt.⁸⁶

In 1970, the Committee amended Rule 26(b)(2) to require disclosure of a defendant’s insurance coverage because it felt that “[d]isclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation.”⁸⁷ In doing so, however, the Committee expressly limited the new requirement “to insurance coverage, which should be distinguished from *any other facts concerning defendant’s financial status* (1) because insurance is an asset created specifically to satisfy the claim; [and] (2) because the insurance company ordinarily controls the litigation.”⁸⁸ The Committee made clear that “[t]he provision applies only to persons ‘carrying on an insurance business’ and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification.”⁸⁹ Notably, the Committee *specifically excluded* from disclosure under Rule 26 any “personal and financial information concerning the insured, discovery of which is beyond the purpose of this provision.”⁹⁰

There are a number of differences between insurance coverage and litigation finance agreements that do not support the Chamber’s assertion that the two are analogous. First, as discussed in greater detail below, litigation funders do not “ordinarily control[] the litigation.” Unlike insurers, who typically assume the position of the litigant and control the underlying lawsuit, litigation funders do not assume the claims at issue or attempt to control the litigation.

⁸⁴ Fed. R. Civ. P. 7.1 advisory committee’s note to 2002 amendment.

⁸⁵ 2017 Letter at 22.

⁸⁶ See Oct. 2014 Minutes at 11 (stating that “the analogy is not perfect”).

⁸⁷ Fed. R. Civ. P. 26(b)(2) advisory committee’s note to 1970 amendment.

⁸⁸ *Id.* (emphasis added).

⁸⁹ *Id.*

⁹⁰ *Id.* Advisory Committee on Civil Rules | November 7, 2017

Second, at the time of the 1970 amendment, many cases were “sharply in conflict on the question [of] whether defendant’s liability insurance coverage is subject to discovery in the usual situation when the insurance coverage is not itself admissible and does not bear on another issue in the case.”⁹¹ Unlike insurance coverage, however, there is virtually no conflict over whether litigation finance agreements are subject to discovery where the agreement “is not itself admissible and does not bear on another issue in the case.”⁹² Nor has the Chamber presented any evidence to suggest otherwise. As the Committee noted in 2014, “[l]ong before 1970, liability insurance had come to play a central role in supporting actual effectuation of general tort principles. Litigation financing is too new, and experience with it too limited, to come squarely within the same principle.”⁹³

Third, insurance is “an asset created specifically to satisfy the claim.”⁹⁴ Thus, disclosure of insurance coverage and the associated coverage limits informs the parties (particularly the plaintiff) of the total amount they may receive from a defendant’s primary source of financing. This particularly affects settlement, as a plaintiff may agree to take a lower settlement offer if a defendant lacks a high coverage limit.⁹⁵ Unlike insurance coverage, however, litigation finance is not “an asset created specifically to satisfy the claim.” Litigation funders typically provide financial assistance to a plaintiff in exchange for a share of the recovery if the plaintiff is victorious; the amount to which a litigation funder is entitled would not inform the parties of the total amount that the plaintiff can receive from a primary financial source of the defendant, nor the total amount that the plaintiff is entitled to receive should he or she win. On the other hand, mandatory disclosure of funding agreements would provide the *defendant* with detailed knowledge of the plaintiff’s ability to fund the litigation—giving defendants a strategic advantage they are not entitled to obtain.

Fourth, the mandatory disclosure requirement of liability insurance in Rule 26 is much narrower in scope than the Chamber’s proposal to require mandatory disclosure of “any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.”⁹⁶ Courts have refused efforts by plaintiffs to use the mandatory disclosure of liability insurance coverage to secure all portions of insurance documents connected to the defendant’s liability coverage, as opposed to just those portions that address the disclosure required by Rule 26—*i.e.*, the insurance agreement stating the amount of money available to satisfy a judgment against the defendant. Courts have refused plaintiffs access under Rule 26 to an insurer’s reservation of rights letter connected to a liability policy (*see, e.g., Native American Arts, Inc. v. Bundy-Howard, Inc.*, No. 01 C 1618, 2003 WL 1524649 (N.D. Ill. Mar. 20, 2003) or an accounting of how much of the policy limits in a policy had been used for legal fees before an insured had assumed the cost of its own representation and secured new counsel (*see, e.g., Excelsior College v. Frye*, 233 F.R.D. 583 (S.D. Cal. 2006)). The plain meaning of the Chamber’s proposal—to require mandatory

⁹¹ *Id.*

⁹² *Id.*; *see Kaplan*, 2015 WL 5730101, at *5 (“[T]he defendants did not show that the [funding agreement is] relevant to any party’s claim or defense. Therefore, the defendants’ motion to compel production of the plaintiffs’ Litigation Funding Documents is denied.”); *Miller UK Ltd.*, 17 F. Supp. 3d at 742.

⁹³ Oct. 2014 Minutes at 11.

⁹⁴ Fed. R. Civ. P. 26(b)(2) advisory committee’s note to 1970 amendment.

⁹⁵ *See, e.g., Cook v. Welty*, 253 F. Supp. 875, 877 (D.D.C. 1966).

⁹⁶ 2017 Letter at 2
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disclosure of “any agreement” involving litigation finance—would allow a defendant to obtain information about a plaintiff’s litigation posture that courts prohibit *plaintiffs* from securing under the same insurance disclosure requirements cited by the Chamber as support for its proposal.

Thus, disclosure of litigation finance agreements would not “enable counsel for both sides to make the same realistic appraisal of the case,” because the amount a defendant could realistically pay in damages to a plaintiff is not affected by the presence of litigation finance.⁹⁷ “Unlike an insurer, [a third-party litigation funder] . . . has not paid nor will ever pay [the plaintiff] for any losses . . . it will never be a plaintiff seeking indemnification from [the defendant] . . . [i]f [the plaintiff] loses, that is the end of the matter.”⁹⁸ As “calling a tail a leg does not make it one,” neither does “[c]alling [a plaintiff’s] funder a subrogee . . . make it one.”⁹⁹

The Committee has long recognized other distinctions between insurance coverage and litigation finance. In 2014, the reporter to the Committee noted that “knowing that the other side has an ‘unlimited budget’ to continue the litigation . . . does not seem to be the reason that discovery of insurance agreements was authorized in 1970, and discovery of [litigation finance] agreements seems to raise different issues.”¹⁰⁰ The reporter similarly recognized the fact that “insurance is a *peculiarly* regulated business.”¹⁰¹ And unlike insurance coverage, which had been “customarily secured early in litigation”¹⁰² since at least 1970, there is no evidence to suggest that the same is true for litigation finance agreements. Indeed, as the Chamber’s letter itself indicates, the opposite is true: litigation finance agreements have *not* been “customarily secured early in litigation.”¹⁰³

IV. The Chamber’s Policy Concerns Are Unsubstantiated

The Chamber proffers a number of policy arguments regarding the practices of litigation finance. Specifically, the Chamber asserts that litigation funders seek to control the litigation, that litigation finance scuttles settlement efforts, and that mandatory initial disclosure of litigation finance agreements should be required in all cases because litigation funders are real parties in interest.¹⁰⁴ All of the Chamber’s arguments are misplaced. At any rate, the Chamber’s disapproval of litigation finance as a policy matter does not justify amending Rule 26 to require disclosure of such arrangements.

Litigation Funders Do Not Control Litigation Strategy. The Chamber’s purported concerns of control by litigation funders mischaracterize the way litigation finance operates. Burford’s practice—and, to the best of its knowledge, the practice of other large litigation finance companies—is that it does not obtain any contractual right to control the decisions of the litigant and its counsel with respect to the litigation. Burford makes this clear in its marketing materials. For example, the frequently asked questions (“FAQ”) section of Burford’s website

⁹⁷ Fed. R. Civ. P. 26(b)(2) advisory committee’s note to 1970 amendment.

⁹⁸ *Miller UK Ltd*, 17 F. Supp. 3d at 729-30.

⁹⁹ *Id.*

¹⁰⁰ Reporter’s Mem. at 4.

¹⁰¹ *Id.* (emphasis added).

¹⁰² Fed. R. Civ. P. 26(a)(1) advisory committee’s note to 1993 amendment.

¹⁰³ See 2017 Letter at 9.

¹⁰⁴ See 2017 Letter at 16-21.
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clearly states that it does not “get any rights to manage the litigation in which we invest. . . . Just as a leasing company does not tell you how to drive your car, we don’t drive the litigation. Nor do we get any rights to control the settlement of the litigation, which remains wholly in the litigant’s control.”¹⁰⁵ Similarly, the FAQ section of litigation funder Therium’s website states that “Therium has no influence on the cases, and in particular, does not control settlement.”¹⁰⁶ Indeed, this is standard practice, as evidenced by similar statements made by other litigation finance companies.¹⁰⁷

The Chamber cites litigation funder Bentham IMF’s “Best Practices” document as evidence that Bentham seeks to control the litigation in which it invests.¹⁰⁸ But that document actually states the opposite: “The funder shall not induce a litigant’s counsel to breach their professional duties,”¹⁰⁹ including counsel’s duty of loyalty to the litigant (and only the litigant). And nothing in the document indicates that Bentham’s statement that it may “[m]anage a litigant’s litigation expenses”¹¹⁰ means that Bentham seeks to exert control over the litigation or take part in any of the litigant’s decision-making. Similarly, Bentham’s statement that it “provide[s] *input* on any settlement demand and/or offer, and any response” does not equate to control of the litigation or settlement.¹¹¹ Because litigation funders are repeat players in the litigation space, and the underwriters and case managers typically are experienced litigators themselves, many litigation funding clients expect and appreciate input from their funder about litigation strategy. In fact, this expertise is part of the reason funding clients choose to work with litigation funders—it is part of a funder’s value-add.

The Chamber’s characterization of industry practice is contrary to voluminous scholarly literature recognizing that “[f]unders generally do not control the course of litigation or unduly interfere with the attorney-client relationship.”¹¹² The “[u]ltimate decisions regarding settlement and [other] legal strategy are always in the hands of the claimant and lawyer.”¹¹³ Litigation funders “are not in control of the litigation; they are not investing in the litigation; they are

¹⁰⁵ Burford Capital LLC, *Frequently Asked Questions*, <http://www.burfordcapital.com/faqs>.

¹⁰⁶ Therium Group Holdings Ltd., *Frequently Asked Questions*, <http://www.therium.com/frequently-asked-questions>.

¹⁰⁷ See, e.g., Lake Whillans, *Ethics*, <http://lakewhillans.com/ethics> (“Ensuring that there are no restrictions on the ability of claimholder’s trial counsel to exercise independent judgment on behalf of the claimholder throughout the litigation.” “Protecting the trial lawyer’s duty of loyalty to the client.”); Harbour Litigation Funding, *Code of Conduct for Litigation Funders* at 2 (Jan. 2014), https://www.harbourlitigationfunding.com/wp-content/uploads/2015/07/code-of-conduct_for_litigation_funders_-jan-2014-final-pdfv2-2.pdf (“A funder will . . . not take any steps that cause or are likely to cause the Funded Party’s solicitor or barrister to act in breach of their professional duties.” “A funder will . . . not seek to influence the Funded Party’s solicitor or barrister to cede control or conduct of the dispute to the funder.”); Vannin Capital, *FAQS*, <http://vannin.com/content/FAQs.php> (“[Y]our case will be run in the same way it would have been if it wasn’t funded. You will retain control of all key decision making and can continue to use your first choice of law firm and counsel.”).

¹⁰⁸ 2017 Letter at 17.

¹⁰⁹ Bentham IMF, *Code of Best Practices* at 1 (Jan. 9, 2017), <https://www.benthamimf.ca/docs/default-source/default-document-library/bentham-imf-codes-of-best-practices.pdf?sfvrsn=6>.

¹¹⁰ *Id.* at 2.

¹¹¹ *Id.* (emphasis added).

¹¹² Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 Geo. L.J. 65, 92 (2010).

¹¹³ Anne Rodgers, et al., *Emerging Issues in Third-Party Litigation Funding: What Antitrust Lawyers Need to Know*, 16 Antitrust Source 1, 4 (2016), http://app.antitrustsource.com/antitrustsource/december_2016/?pg=14&pm=2&ul=friend.

investing in the *potential outcome* of the litigation.”¹¹⁴ Cases addressing the issue likewise have found that litigation funders do not control the underlying litigation.¹¹⁵

Moreover, the Chamber mischaracterizes the two examples it offers. The Chamber asserts that the funding agreement utilized by Burford in a dispute involving Chevron and Ecuador is “[a] prime example of substantial funder control.”¹¹⁶ But “the Agreement also states that ‘the Claimants may at any time without the consent of the Funder either settle or refuse to settle the Claim for any amount.’”¹¹⁷ The Chamber focuses on one term of the agreement permitting Burford to approve the lawyers selected by the litigant.¹¹⁸ But that provision did not allow Burford to select the litigant’s counsel; it merely ensured that counsel was selected from a long list of highly qualified and reputable “nominated” law firms, or another law firm with Burford’s approval (not to be unreasonably withheld). Once a firm was selected, the litigant’s counsel retained all duties to the litigant, and Burford did not have any right to approve or disapprove settlement, or otherwise control the underlying litigation.¹¹⁹ It is wholly appropriate—and beneficial to the civil justice system—for Burford to ensure that the litigation it funds is handled by top-notch lawyers, while still leaving the ultimate choice of counsel and litigation decision-making authority solely in the client’s hands.

The Chamber also asserts that the funding agreement in *Gbarabe v. Chevron Corp.* “contains several key provisions that suggest the funder’s desire to influence the course of the litigation.”¹²⁰ Yet the provisions the Chamber cites merely gave the funder the ability to monitor and provide input on the litigation. The funding agreement did not vest in the funder any right to approve or disapprove settlement, or otherwise control the underlying litigation.

Litigation Finance Promotes Settlement Efforts. Without any real support, the Chamber asserts that litigation finance “delay[s] and distort[s] the settlement process.”¹²¹ In fact, experience shows that litigation finance actually *promotes* settlement efforts between the parties.

“[T]here is considerable evidence that the existence of third-party funding actually tends to promote settlement.”¹²² Because a litigation funder receives a return only if a case resolves successfully, funders have an incentive to ensure that financing does not encourage counterparties to turn down risk-appropriate settlement offers. A plaintiff is similarly incentivized: as “third-party lending agreements include a structural incentive to settle, and to do so as quickly as possible,”¹²³ a plaintiff who wants to maximize their own recovery will want to

¹¹⁴ Joanna S. Bailey, *et al.*, *Third-Party Litigation Financing*, 8 J.L. Econ. & Pol’y 257, 276 (2011) (emphasis added).

¹¹⁵ *See, e.g., Charge Injection Techs., Inc.*, 2016 WL 937400, at *4 (“The Court is not persuaded by [defendant]’s argument that the [agreement] is champertous because of Burford’s alleged ‘*de facto* control.’”).

¹¹⁶ 2017 Letter at 17.

¹¹⁷ Maya Steinitz, *The Litigation Finance Contract*, 54 Wm. & Mary L. Rev. 455, 472 (2012) (quoting the Funder Agreement).

¹¹⁸ *See* 2017 Letter at 17.

¹¹⁹ *See* Steinitz, 54 Wm. & Mary L. Rev. at 472 (citing the Funder Agreement).

¹²⁰ 2017 Letter at 17.

¹²¹ *Id.* at 18.

¹²² Jason Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. Rev. 571, 597 (2010).

¹²³ *Id.*
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“make every effort to bring their cases to resolution at the earliest possible point in the process.”¹²⁴

Litigation finance arrangements also encourage a defendant to settle as early as possible, freeing up critical judicial resources for other cases. A defendant’s awareness of the fact that a plaintiff can withstand a drawn-out litigation may “forc[e] a recalcitrant defendant to approach a case reasonably and pragmatically in light of the fact that its adversary has the resources to meaningfully prosecute the matter.”¹²⁵ Indeed, “[b]oth the public and the justice system benefit when litigants with legitimate disputes face one another on a level playing field.”¹²⁶ Otherwise, a defendant will often drag out litigation to pressure an indigent plaintiff to accept “unfair or unjust settlements brought about by a party’s economic desperation or financial inability to litigate meritorious claims.”¹²⁷ In sum, litigation finance leads to fairer settlements based on the merits of the case, rather than a party’s ability to fund its litigation efforts.¹²⁸

Litigation Funders Are Not Real Parties in Interest. The Chamber argues that “a funder is effectively a real party in interest” that “should bear responsibility (to the same degree as any other party) in the event there is wrongdoing and a corresponding imposition of sanctions or costs.”¹²⁹ That is not correct. Under Rule 17, “[t]he real party in interest is the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery.”¹³⁰ Litigation funders do not “hol[d] the substantive right sought to be enforced,”¹³¹ because the litigant continues to hold the claim and prosecute it itself.

Because litigation funders are not real parties in interest under Rule 17, Rule 26(b)(1)’s direction to “conside[r] . . . the [real] parties’ resources” in determining the scope of discovery does not support requiring initial disclosure of litigation finance agreements. Nor would Rule 26 mandate the disclosure of litigation funders even if they were real parties in interest under Rule 17 (which they are not), because Rule 26 does not mandate the disclosure of real parties in interest *at all*.¹³²

Moreover, disclosure of litigation funding agreements would not be “important information to have on the record in the event that a court determines it should impose sanctions or other costs under Rule 11, [and] Rule 37,”¹³³ because neither Rule 11 nor Rule 37 applies to litigation funders. The sanctions provided by those rules apply to attorneys and “parties,” but, as discussed above, litigation funders are not “parties” as defined by Rule 17, and they do not serve as the litigant’s counsel.

¹²⁴ *Id.*

¹²⁵ Douglas R. Richmond, *Other People’s Money: The Ethics of Litigation Funding*, 56 Mercer L. Rev. 649, 661 (2005).

¹²⁶ *Id.*

¹²⁷ *Id.*; see *In re K.A.H.*, 967 P.2d 91, 93 (Alaska 1998) (“Defendants, aware of the economic pressure burdening unaided plaintiffs, have every economic incentive to prolong the litigation with frivolous motions and discovery.”) (quoting Charles W. Wolfram, *Modern Legal Ethics* § 9.2.3 (1986)).

¹²⁸ See Molot, 99 Geo. L.J. at 83.

¹²⁹ 2017 Letter at 19.

¹³⁰ *Farrell Constr. Co. v. Jefferson Parish*, 896 F.2d 136, 140 (5th Cir. 1990).

¹³¹ *Id.*

¹³² See Fed. R. Civ. P. 26.

¹³³ 2017 Letter at 20.

The Chamber’s reliance on *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691 (Fla. Dist. Ct. App. 2009), a Florida state court case, is misplaced.¹³⁴ First and foremost, the court merely determined whether an errant individual and an investment company “were ‘parties’ within the meaning of” three *Florida* state statutes, *not* whether they were real parties in interest under Rule 17.¹³⁵ And in contrast to a typical litigation finance arrangement (as discussed in further detail above), the individual funder completely “controlled the litigation.”¹³⁶ Indeed, that particular individual “had to approve the filing of the lawsuit; controlled the selection of the plaintiffs’ attorneys; recruited fact and expert witnesses; received, reviewed and approved counsel’s bills; and had the ability to veto any settlement agreements. [The funder] even paid \$13,000 for the medical expenses of plaintiffs’ main witness.”¹³⁷ It is clear that *Abu-Ghazaleh* does not reflect the practices of professional litigation funders. Nor can an interpretation of Florida state statutes *possibly* be relevant for determining whether, under Rule 17, litigation funders should be considered real parties in interest in federal court.

Amending Rule 26 for Class Action and Mass Action Cases Is Not Warranted. The Chamber asserts that the need for disclosure requirements is “most acute” in the class-action context because “aggregate litigation already involves little, if any, control by the plaintiffs” and thus exposes absent class members to a situation where the litigation finance company will control the lawsuit.¹³⁸ The Chamber’s concerns are misplaced. As explained above, litigation funders do not control the litigation; the parties and their counsel do. And the Chamber’s suggestion that the need for a new disclosure rule is *greater* in the class-action context is backwards, given that Rule 23 already contains numerous procedural safeguards for absent class members, including Rule 23(a)’s requirements of adequacy of representation. The Chamber has offered no evidence in support of its assertion that a broad amendment to Rule 26 is necessary to ensure that absent class members’ interests are properly protected.

The Northern District of California’s standing order confirms that an across-the-board disclosure requirement is unnecessary.¹³⁹ That court considered requiring disclosure of litigation funders in *every* civil lawsuit, but it ultimately limited the scope of the order to apply only to class actions.¹⁴⁰ Likewise, while the court in *Gbarabe* ultimately granted the defendant’s motion to compel disclosure of the funding agreement, it did so only after finding that the agreement was relevant to the adequacy determination because of the specific “circumstances of *this case*.”¹⁴¹ Notably, neither the litigation funder nor the plaintiff’s lawyers in *Gbarabe* contested that relevance determination or opposed disclosure.

Finally, the Fairness in Class Action Litigation Act (“FCALA”) does not support the Chamber’s position. Importantly, FCALA does not propose to require disclosure of third-party

¹³⁴ *See id.*

¹³⁵ *Abu-Ghazaleh*, 36 So. 3d at 693.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ 2017 Letter at 20.

¹³⁹ *See generally* N.D. Cal. Standing Order.

¹⁴⁰ *See* U.S. District Court for the Northern District of California, *Comments Received on Draft Local Rule 3-15*, <https://www.cand.uscourts.gov/filelibrary/2879/Comments-Received-On-Draft-CLR-3-15.pdf>; U.S. District Court for the Northern District of California, *Notice Regarding Civil Local Rule 3-15*, <https://www.cand.uscourts.gov/news/210>.

¹⁴¹ *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016) (emphasis added).

litigation funding arrangements in *all* cases, only in class action lawsuits.¹⁴² And FCALA is not law: although it passed the House, it is far from clear whether the Senate will enact it. The Committee thus should give no weight to FCALA in its decision-making.

* * *

For all of the foregoing reasons, we respectfully submit that the Chamber’s renewed request does not merit this Committee’s reconsideration.

Respectfully submitted,

/s/

Christopher P. Bogart
Chief Executive Officer

¹⁴² “In any *class action*, class counsel shall promptly disclose in writing to the court and all other parties the identify of any person or entity, other than a class member or class counsel of record, who has a contingent right to receive compensation from any settlement, judgment, or other relief obtained in the action.” Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 103(a) (emphasis added)

Ms. Rebecca A. Womeldorf
 Secretary of the Committee on Rules of Practice and
 Procedure of the Administrative Office of the
 United States Courts
 One Columbus Circle, NE
 Washington, D.C. 20544

September 6, 2017

Dear Ms. Womeldorf:

On behalf of Bentham IMF, a commercial litigation finance company providing funding to claimants and law firms in the United States, I respond to the letter submitted on June 1, 2017 by the U.S. Chamber Institute for Legal Reform (the “Chamber”). In its letter, the Chamber urges the Committee to revisit its 2014 decision not to proceed with a proposed amendment to the Federal Rules of Civil Procedure (“federal rules”) to require automatic disclosure of litigation funding agreements at the outset of all civil litigation. None of the “noteworthy developments” cited by the Chamber warrants action by the Committee.¹ To the contrary, three years on, it has become increasingly apparent that a rule requiring automatic disclosure of litigation finance in every civil action is not appropriate.

Summary of Bentham’s Position

The Chamber’s radical proposal to invade parties’ financial privacy and their attorneys’ work product is inconsistent with the underlying purpose of the federal rules “to secure the just, speedy, and inexpensive determination of every action.” It is also notably contrary to the most recent important implementation of the rules’ fundamental purpose—the “proportionality” amendments to Rule 26. Automatic disclosure by definition is not tailored to the “needs of the case,” and more often than not, would likely prejudice parties receiving funding and create unnecessary discovery disputes. The Chamber’s proposal also rubs against the grain of the emerging consensus of the federal courts that have considered the discoverability of litigation funding documents and found that litigation funding arrangements classically anticipate litigation and thus warrant protection as attorney work product.

The Chamber attempts to tag litigation funding with “problems” that largely either do not exist, or are in truth benefits. “Frivolous litigation” is the Chamber’s principal whipping boy. Nothing suggests that litigation funding causes cases of little or no merit to be filed in federal court, or that the Chamber’s automatic disclosure proposal would head off such filings. Litigation funding in fact encourages careful assessment of litigation prospects and costs—the antithesis of “frivolous litigation”—and therefore *discourages* frivolous litigation and *promotes* fair settlements, both in theory and in practice.

¹ Some of the Chamber’s “noteworthy developments” are not even “developments”—many of the cases and articles that the Chamber cites predate its 2014 proposal, some by decades.

The Chamber's miscellaneous other arguments are equally misguided. Existing rules already address any issues of attorney ethics and judicial ethics related to litigation funding. Funders are rarely real parties in interest, and their resources are not "parties' resources" for purposes of a proportionality analysis. Automatic disclosure would not advance any interest certain states might have in regulating champerty. The recent rule change in the Northern District of California touted by the Chamber counsels *against* the Chamber's proposal. The Chamber's inapposite analogy to insurance fails on multiple levels.

Litigation funding represents only one of many ongoing developments in the evolution of litigation and dispute resolution. These developments include increased reliance on technology to perform tasks that formerly only lawyers performed, increased use of private resources in resolving disputes, increased control of litigation by the parties themselves, and increased focus on the resource constraints for litigation. These developments are largely beneficial. The Chamber's proposal is an ill-disguised attempt to thwart perhaps the most significant and salutary of them all, namely litigation funding, and we urge the committee to reject it.

I. The Chamber's Proposal Would Override The Federal Court Consensus That Litigation Funding Agreements Are Protected Attorney Work Product.

As far as Bentham is aware, every federal court to have considered the issue has ruled that litigation funding documents, including litigation funding agreements, are protected as attorney work product.² See, e.g., *Odyssey Wireless, Inc. v. Samsung Electronics Co., Ltd*, No. 3:15-cv-01738, 2016 WL 7665898, at *4-5 (S.D. Cal. Sept. 20, 2016) ("Odyssey contends that [...] 'the type of agreements at issue here by definition are only contemplated and ultimately prepared because of a very real prospect of litigation.' [...] The work-product doctrine applies to these documents."); *In re Int'l Oil Trading Co.*, 548 B.R. 825, 838 (S.D.Fla. 2016) ("The Funding Agreement itself is work product as it was entered into with the intent to facilitate litigation. [...] [S]ome terms of a litigation funding agreement represent an assessment of risk based on discussions of core opinion work product of the case. Revealing certain terms of the agreement might disclose attorney mental impressions and opinion about the case.")³

² There was no work-product determination in *Gbarabe v. Chevron Corp.*, No. 14-cv-00173-SI, 2016 WL 4154849, at *2 (N.D. Cal. Aug. 5, 2016) because no work-product objection was raised. Incidentally, the Chamber mischaracterizes the funding agreement in *Gbarabe*, stating in its letter that "putative class members will have to hand over part of their recovery to the litigation funder." The funding agreement in fact provides that it is not the class members, but the lawyers, who are obligated to pay the funder, and only out of their contingency fee, not out of the class recovery. *Id.*, Dkt. No. 186-4 (N.D. Cal. filed Sept. 16, 2016), §3.2 on p. 75 of 159, §§11.1-11.7 on pp. 82-83 of 159.

³ See also *Viamedia, Inc. v. Comcast Corp.*, No. 1:16-cv-05486, 2017 WL 2834535, at *3 (N.D. Ill. June 30, 2017) (concluding that documents disclosed to prospective litigation funders were protected as attorney work product); *Ioengine, LLC v. Interactive Media Corp.*, 1:14-cv-01571 (D. Del. Aug. 3, 2016) (same); *United States v. Homeward Residential, Inc.*, No. 4:12-cv-461, 2016 WL 1031154, at *6 (E.D. Tex. Mar. 15, 2016) ("The Court finds that the litigation funding information is protected by the work product doctrine. The litigation funding documents were between Fisher and actual or potential litigation funders and were used to possibly aid in future or ongoing litigation."); *Morley v. Square., Inc.*, No. 4:10-cv-02243, 2015 WL 7273318 (E.D. Mo. Nov. 18, 2015) (work-product protection not waived by disclosure to litigation funders); *Doe v. Soc'y of Missionaries of Sacred Heart*, No. 11-cv-02518, 2014 WL 1715376, at *3 (N.D. Ill. May 1, 2014) ("[T]he Financing Materials identified by Plaintiff in his privilege log constitute opinion work product. These materials incorporate opinions by Plaintiff's counsel regarding the strength of Plaintiff's claims, the existence and merit of certain of Defendants' defenses, and

To be sure, in some of these cases, litigation funding agreements have been ordered to be produced, but only where the court found that the defendants had demonstrated a “substantial need” for the agreement under the circumstances. Even then, the court typically ordered the agreement to be produced in redacted form “to protect against disclosure of the mental impressions, conclusions, opinions, or legal theories,” etc.⁴ These occasional outcomes show that a rule change is unnecessary to ensure that funding agreements will be produced in appropriate cases. The Chamber asks this Committee to override these judges by fiat by requiring parties to disclose their attorney work-product-protected funding agreements *automatically*, in their *entirety*, in *every* case. The Chamber’s proposal would abrogate parties’ attorney work-product protection and tie the hands of judges who have consistently denied or limited the disclosure of litigation funding agreements.

Bentham is not aware of any example in the history of the federal rules in which a proposed rule has been amended in a manner directly contrary to the apparently unanimous views of the sitting judges who have considered the issue. The Chamber compares its proposed amendment to the current requirement of Rule 26(a)(1)(A) that insurance policies be disclosed, which was part of the 1970 Amendment. With respect to that amendment, however, the context in which the federal courts were then considering the issue was very different. As the Notes of the Advisory Committee on the 1970 Amendment explain:

Both cases and commentators are sharply in conflict on the question whether defendant’s liability insurance coverage is subject to discovery in the usual situation when the insurance coverage is not itself admissible and does not bear on another issue on the case. The division in reported cases is close. State decisions based on provisions similar to the federal rules are similarly divided. It appears to be difficult if not impossible to obtain appellate review of the issue. Resolution by rule amendment is indicated.⁵

The 1970 amendment requiring disclosure of insurance policies was appropriate because federal courts were “sharply in conflict,” and state courts were “similarly divided.” There is no such conflict or division here. The federal courts are not hopelessly deadlocked or split on the issue. (Nor are the state courts.) They are, to the contrary, remarkably consistent in holding that litigation funding documents are not ordinarily discoverable even on a motion to compel, let alone automatically.

other observations and impressions regarding issues that have arisen in this litigation.”); *Devon IT, Inc. v. IBM Corp.*, No. 10-2899, 2012 WL 4748160, at *1 (E.D. Pa. Sept. 27, 2012) (“Litigation strategy, matters concerning merits of claims and defenses and damages would be revealed if the documents were produced. The matters directly involve the mental impressions of counsel and are protected from disclosure as work-product.”); *Mondis Tech., Ltd. v. LG Elecs., Inc.*, No. 2:07-CV-565-TJW-CE, 2:08-CV-478-TJW, 2011 WL 1714304, at *3 (E.D. Tex. May 4, 2011) (“All of the documents were prepared... with the intention of coordinating potential investors to aid in future possible litigation. The Court holds that these documents are protected by the work product protection.”).

⁴ See, e.g., *Odyssey Wireless*, 2016 WL 7665898, at *7; *In re Int’l Oil Trading Co.*, 548 B.R. at 839.

⁵ Fed. R. Civ. P. 26(b)(2) Advisory Committee’s note (1970) (citations omitted).

II. The Chamber's Proposal Would Mandate Discovery That Is *Not* "Proportional."

Effective December 2015, Rule 26 was amended to emphasize that the scope of discovery is limited to matters that are “relevant to any party’s claim or defense and proportional to the needs of the case.”⁶ The Chamber told this Committee that it “strongly applauds” and “enthusiastically endorses” the 2015 amendments to Rule 26 because, in the Chamber’s view, they serve “to narrow overbroad discovery.”⁷ The Chamber’s proposal to amend Rule 26 again, this time to require automatic disclosure of litigation funding in every civil action, flies in the face of the 2015 proportionality amendments.⁸

The 2015 proportionality amendments require that discovery be “relevant to any party’s claim or defense” (as opposed to being relevant only to the “subject matter” of the action) and that parties seeking information make a showing that the requested discovery is “proportional to the needs of the case” based on the comprehensive six-factor test set out in the amended Rule 26. In contrast, an *automatic* disclosure rule would force discovery of litigation funding *in every case* even though it is *not* relevant in most cases, and *not* proportionate to the needs of most cases. In *VHT, Inc. v. Zillow Group, Inc.*, No. C15-1096JLR, 2016 WL 7077235 (W.D. Wash. Sept. 8, 2016), for example, the defendant moved to compel the plaintiff to identify any litigation funder involved in the case. Like the Chamber here, the defendant presented “just theories,” “imaginable hypotheticals,” and “speculation” as to why the requested information was relevant. *Id.* at *1-2. Citing the “dearth of evidence,” the court denied the motion to compel, concluding that the identity of any litigation funder was “negligibly relevant, minimally important in resolving the issues, and unduly burdensome,” and was therefore ultimately “disproportional to the needs of the case.” *Id.* at *1. The Chamber’s proposed amendment would go much further than the request the court denied in *VHT*. It would require not just automatic disclosure of the identity of any funder, but automatic production of any funding agreement.

Even before the “proportionality” amendments went into effect, courts denied attempts to discover funding agreements and the identity of funders in the absence of a showing of relevance.⁹ It should go without saying that it would not be “proportional” to require automatic

⁶ Fed. R. Civ. P. 26(b)(1).

⁷ U.S. Chamber Inst. for Legal Reform, Public Comment to the Advisory Committee on Civil Rules Concerning Proposed Amendments to the Federal Rules of Civil Procedure, November 7, 2013 (“Chamber 2013 Comment”), at 1 and 6-7, available at http://www.instituteforlegalreform.com/uploads/sites/1/FRCP_Submission_Nov.7.2013.pdf (last visited Aug. 30, 2017).

⁸ In enthusiastically endorsing the “proportionality” amendments to Rule 26, the Chamber urged the Committee to limit the scope of discovery even further “by adding a requirement that the information not only be relevant, but also *material* to a party’s claim or defense.” *Id.* at 7. Litigation funding agreements are rarely relevant, and almost never material, to a claim or defense.

⁹ See *Kaplan v. S.A.C. Capital Advisors, L.P.*, No. 12-cv-9350, 2015 WL 5730101, at *5 (S.D.N.Y. Sept. 10, 2015) (“[T]he reasons adduced by the defendants in support of their view that they are entitled to discovery of the Litigation Funding Documents [...] are purely speculative. [...] [T]he Court finds that the defendants did not show that the requested documents are relevant to any party’s claim or defense.”), *aff’d*, 141 F.Supp.3d 246 (S.D.N.Y. 2015); *Miller UK Ltd. v. Caterpillar, Inc.*, 17 F. Supp. 3d 711, 740 (N.D. Ill. 2014) (“The actual transactional documents between Miller and its funder—the ‘deal documents’ reflect the terms of the funding agreement, the amount funded, and the details about how any recovery is to be divided between Miller and the funder if Miller wins

disclosure of information that courts typically have found is not even relevant. In advocating for the 2015 “proportionality” amendments to the federal rules, the Chamber itself cautioned this Committee that, “[i]nstead of accomplishing its original goals of preventing unfair surprise at trial and ensuring the fair resolution of litigation, discovery is all too often used for strategic purposes.”¹⁰ Automatic disclosure of litigation funding would serve the Chamber’s “strategic purposes,” not the legitimate goals of discovery.

III. The Chamber’s Proposal Would Prejudice Parties and Needlessly Burden the Courts.

The Chamber’s proposal fails the acid test of any proposed rule amendment, which is whether it would foster “the just, speedy, and inexpensive determination of every action and proceeding.”¹¹ Automatic disclosure of litigation funding agreements would do the opposite.

A. The Chamber’s Proposal Would Make Federal Civil Litigation Less Just.

Automatic disclosure of litigation funding agreements would make federal civil litigation *less just* because it would give large corporate defendants an important and unfair advantage—identifying those plaintiffs that lack the resources to weather a lengthy litigation campaign.¹² In cases that are funded, automatic disclosure of the funding agreement would reveal a plaintiff’s maximum litigation budget, as well as potential pressure points along the way, based on the economic structure of the deal. In cases that are not funded, an automatic disclosure rule would force plaintiffs to reveal, by omission, that their case has no third-party financial support and that they may therefore not have the wherewithal to withstand a barrage of defense motions and still prosecute the case through trial and appeal. Either way, a rule requiring automatic disclosure of funding arrangements would reveal to large corporate defendants early in the case how susceptible a plaintiff might be to financial pressure—the same pressure that such defendants have so often used to force unfair resolutions of meritorious cases.

B. The Chamber’s Proposal Would Make Federal Civil Litigation Less Speedy and More Expensive.

Automatic disclosure of litigation funding agreements would make federal civil litigation *less speedy and more expensive* because it would embolden and enable the Chamber’s big-business constituents to clog the courts with frivolous defense motions. Inevitably, defendants notified of the presence of a litigation funder will seek to exploit this fact for strategic gain by filing expensive and time-consuming motions in court.

the case and what happens if it does not. This and related information [...] have nothing to do with the claims or defenses in the case [...].”).

¹⁰ Chamber 2013 Comment at 2.

¹¹ Fed. R. Civ. P. 1.

¹² For ease of explanation, Bentham refers to third-party-funded litigants herein as “plaintiffs” and to their adversaries as “defendants,” though depending on the proceeding, the funded party might be a “counterclaimant,” a “petitioner,” a “respondent,” an “appellee,” etc.

Courts would see a multiplication of motions to compel *further* disclosures regarding the funder, the source of its funds, the identities and backgrounds of its decision makers, the nature of its case-selection and due-diligence processes, its communications with its counsel and subject-matter experts, and its communications with the plaintiff, the plaintiff's counsel, and the plaintiff's experts. Making these "fishing expeditions" yet more costly, defendants would also serve and seek to enforce subpoenas on the litigation funders themselves—and not just the funder paying for the litigation, but every funder the plaintiff or its counsel may have approached.

Of course, defendants would not seek such information for its own sake. In claiming to be concerned about ethics and conflicts—which we address on the merits below—the Chamber is really positioning its constituents to file even more frivolous motions of their own. The Chamber's references to "utiliz[ing] discovery tools to uncover unethical conduct by plaintiffs" signal a strategy of filing harassing defense motions for sanctions and to disqualify plaintiffs' counsel. The Chamber's references to judicial ethics signal, in extreme cases, a strategy of filing tactical motions for disqualification of judges. In the vast majority of cases, these defense motions to compel, to sanction, to disqualify, etc. would be unsuccessful on the merits. Unfortunately, however, the piling-on of such motions would often be successful *strategically*, because it would add to the expense and delay of the litigation.

This is perhaps the real key to the Chamber's request. Large corporate defendants have long managed to achieve one-sided settlements by turning civil litigation into a war of attrition that many plaintiffs are not financially equipped to survive. Increasingly, litigation funding is available to level the playing field. The Chamber's proposal for automatic disclosure—and the multiplication of motion practice that would follow—is a rearguard attempt to make it *more* expensive to litigate cases using litigation funding, blunting funding's effectiveness.

IV. The Recent Rule Change in The Northern District of California Counsels Against The Chamber's Proposal.

The Chamber cites the January 2017 amendment to the Standing Order for All Judges in the Northern District of California, which provides that "in any proposed class, collective, or representative action, the required disclosure includes any person or entity that is funding the prosecution of any claim or counterclaim."¹³ The court had initially proposed a rule which would have required disclosure of the identity of any funder in *all* civil cases. After receiving public comments and engaging in its own deliberations, the court adopted the narrower amendment quoted above, applying only in class, collective, or representative actions—all of which are actions in which the court has a special supervisory role to play. The Chamber's proposed amendment is far broader than even the initial proposal of the Northern District of California, which the judges of that district ultimately declined to adopt: not only would the Chamber's proposed amendment apply in *all* civil cases, but it would require *production of funding agreements*, not just identification of funders. The Northern District of California's rulemaking process shows that the Committee should reject the Chamber's proposed amendment, both because the Chamber's proposal is wildly overbroad, and because the district courts will address any legitimate concerns through their own local rulemaking.

¹³ Standing Order for all Judges of the N.D. of Cal., Contents of Joint Case Mgmt. Stmt., § 19 (Jan. 2017).

V. The Analogy to Insurance Fails.

The Chamber argues that plaintiffs should be required to produce funding agreements because defendants are required to disclose indemnity insurance policies. As discussed above, when the amendment requiring disclosure of insurance policies was added to Rule 26, the federal courts were deeply divided as to the discoverability of such policies, and rulemaking was the only solution. In contrast, the federal courts are broadly *united* in finding that litigation funding documents are *not* routinely discoverable. Moreover, none of the key reasons for the 1970 Amendment requiring the disclosure of indemnity insurance policies supports an amendment requiring disclosure of funding agreements.

The 1970 Notes of the Advisory Committee explain what justified singling out indemnity insurance policies for disclosure:

The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or his insurer; and (4) because disclosure does not involve a significant invasion of privacy.¹⁴

Unlike an indemnity insurance policy, a litigation funding agreement cannot "satisfy the claim." Therefore, disclosure of its terms would not enable counsel to make a realistic appraisal of the potential value of the case or to settle or dismiss the matter where pursuing litigation would not likely yield a better outcome. Unlike an insurance company, a litigation funding company ordinarily does *not* control the litigation. Unlike disclosure of an insurance policy, disclosure of a litigation funding agreement *does* involve a significant invasion of privacy and of attorney work product. The only thing that insurance policies and litigation funding agreements have in common from the Advisory Committee's list is that they are both only available from the adverse party in the litigation. But this is true of many kinds of information which would never be subject to automatic disclosure.

The disclosure of indemnity coverage does not necessarily give plaintiffs access to the defendant's litigation budget. Rather, the rationale for its disclosure is tied to an early assessment of a defendant's ability (or possible inability) to pay a judgment or settlement *based on the merits of the case*. Automatic disclosure of a plaintiff's ability to pay legal fees and costs, in contrast, would give defendants enormous leverage to force unjust settlements on plaintiffs, with no connection to the merits of the claims or defenses.¹⁵ Such a one-sided automatic disclosure requirement would be inconsistent with the courts' general approach to parties' sensitive financial information, which is to permit discovery of such information where appropriate, but not to require automatic disclosure. For example, defendants' counsel are not required to disclose their law firms' lines of credit at all, let alone automatically, even though

¹⁴ Fed. R. Civ. P. 26(b)(2) advisory committee's note (1970).

¹⁵ The Chamber also claims that automatic disclosure would create "parity" of financial disclosure because some corporate defendants are required under the securities laws to disclose information pertaining to their financial wherewithal. The securities laws, of course, do not apply to all defendants. And, unlike the Federal Rules of Civil Procedure, they are intended to protect investors, not litigants.

such credit, like litigation funding, is often repaid from and secured by attorney's fees generated by the litigation. Nor are defendants required automatically to disclose their litigation reserves or any assistance (financial or otherwise) from third-party allies.¹⁶

VI. Litigation Funding Discourages Frivolous Litigation.

The constant refrain in the Chamber's letter—that the growth of litigation funding and innovations in funding practices will necessarily result in frivolous lawsuits that burden the courts and defendants—has been repeatedly rejected as nonsensical.¹⁷ No funder is interested in funding frivolous cases. A non-recourse funder like Bentham cannot survive, let alone succeed, unless it funds only the most meritorious cases. Bentham rejects over 95% of the matters it considers. This extreme selectivity applies both to single-case investments and law firm portfolio investments, in which Bentham carefully analyzes the portfolio, as well as the law firm's experience and track record. If startup companies are using unconventional funding and case analysis models that might encourage frivolous lawsuits (which is doubtful), they will soon go out of business. The Chamber, of all interest groups, should realize that market dynamics will be far more effective than automatic disclosure at solving any such problem.

¹⁶ The false analogy between litigation funding and insurance was perhaps best addressed by the court in *Miller UK Ltd.*, 17 F. Supp. 3d at 729-30 (citations omitted):

I have reviewed *in camera* the agreement between Miller and its funder, and there is nothing in those agreements that remotely supports Caterpillar's attempt to equate Miller's funding agreement to the relationship between an insured and its insurer. Unlike an insurer, the funder in this case has not paid nor will ever pay Miller for any losses caused by Caterpillar's claimed misappropriation of trade secrets and breach of contract; it will never be a plaintiff seeking indemnification from Caterpillar. Nor is it an assignee of Miller. Rather, it is contractually obligated to provide Miller with an agreed amount of funds to assist Miller in defraying expenses incurred in suing Caterpillar to recover for its claimed losses. If Miller loses, that is the end of the matter.

Abraham Lincoln once was asked how many legs a donkey has if you call its tail a leg. His answer was four: calling a tail a leg does not make it one. Just so here.

¹⁷ Jonathan T. Molot, *Litigation Finance: A Market Solution to A Procedural Problem*, 99 Geo. L.J. 65, 106 (2010) ("Although opponents of third-party financing predict that such financing might encourage meritless filings rather than meritorious ones, the claim makes little sense."); Anthony J. Sebok, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DePaul L. Rev. 453, 455 n.14 (2011) (explaining "skepticism of studies that claim that litigation financing increases frivolous litigation" and calling efforts to prove such claims "unimpressive"); Victoria A. Shannon, *Harmonizing Third-Party Litigation Funding Regulation*, 36 Cardozo L. Rev. 861, 875 (2015) ("It is not in the funder's interest to fund frivolous cases, because the funder would incur only costs without benefits when the case fails, and a court may sanction the funded party for bringing a frivolous case."); Anne Talcott, *Third-Party Litigation Funding In The United States: An Invitation for Fraud and Increased Litigation or Much Ado About Nothing?*, 11 In-House Defense Quarterly 26 (Winter 2016) ("Attorneys have long acted as the gate keepers, declining to prosecute cases that lack merit because of ethical rules and rules of civil procedure. These rules will continue to act as an obstacle for overly zealous claimants and funders. Moreover, funders are in the business of seeking a return on their investment. Thus, they would have a financial disincentive to provide a non-recourse loan to a claimant with a meritless claim."); see also Ass'n of the Bar of the City of N.Y. Comm. on Prof'l Ethics, *Formal Opinion 2011-2: Third Party Litigation Financing*, available at <http://www2.nycbar.org/pdf/report/uploads/20072132-FormalOpinion2011-2Third-partyLitigationFinancing.pdf> (last visited Aug. 30, 2017) (commercial funders "undertake an analysis of the merits of the contemplated claim that is more rigorous than the analysis employed in personal injury cases").

As far as established funders like Bentham are concerned, there is reason to believe that the rise of litigation funding makes it *less* likely that weak cases will be filed. Plaintiffs and law firms know that established funders are “smart money.” A commercial litigation funder’s decision to fund a case is a strong vote of confidence in its merits by a group of experienced professionals. Conversely, a decision not to fund a case typically indicates those professionals’ uncertainty about liability, damages, or collectability. Where one or more funders declines to fund a case, plaintiffs and law firms are often deterred from pursuing the case using their own resources, even where they *can* do so. In this way, funders act as gatekeepers not only by promoting the filing of stronger cases, but also by discouraging the filing of weaker ones.

Contrary to the Chamber’s argument, the increase in the reported income of several litigation funders indicates the *strength* of funded claims, as funders only earn income if the funded claims are successful. In fact, there has not been an increase in litigation, let alone frivolous litigation. The most recent Federal Judicial Caseload Statistics indicate that civil case filings in district courts have *fallen* by 1.4 percent since 2012.¹⁸ Not only does the Chamber fail to show that litigation funding promotes frivolous litigation, it also fails to explain how or why *automatic disclosure* of funding arrangements would help prevent this. It appears that the Chamber is pushing for automatic disclosure not as an end in itself, but as a means to cobble together anecdotal support for future anti-funding proposals in general. As one Committee member observed in 2014, “[t]he proponents of disclosure may be concerned more with generating information to support careful examination of third-party litigation financing in general than with the impact on disclosure in any particular action.”¹⁹ The Committee should not lend the imprimatur of federal rulemaking to assist the Chamber in its data-collection project.

VII. Litigation Funding Promotes Fair Settlements.

The Chamber argues that litigation funding encourages plaintiffs to reject reasonable settlement offers. If anything, it is more plausible that third-party funding promotes settlement.²⁰ It is always in a funder’s interest to incentivize claimants to *accept* reasonable settlement offers to maximize the likelihood of a reasonable investment return.²¹ Moreover, funders rationally would prefer the certainty of a settlement to the uncertainties of trial. If the economic terms of a funding arrangement push a claimant to take an unreasonable settlement position, the whole transaction is likely to be undermined. In practice, funders are careful to prevent this by conservatively valuing claims and structuring transactions to incentivize early resolution.²²

¹⁸ U.S. Courts, “Federal Judicial Caseload Statistics 2016,” available at <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2016> (last visited Aug. 30, 2017).

¹⁹ Civil Rules Advisory Committee Minutes at 11.

²⁰ J. Lyon, *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. Rev. 571, 597 (2010) (“It is not at all clear though that third-party financing in fact discourages settlement. To the contrary, there is considerable evidence that the existence of third-party funding actually tends to promote settlement.”).

²¹ Civil Rules Advisory Committee Minutes at 12.

²² See S. Gillers, *Waiting for Good Dough*, 43 Akron L. Rev. 677, 693 (2010) (funders “dim the plaintiff’s enthusiasm to press for trial” by “calibrating the return on its investment to the length of time” to resolution).

The only clear way in which commercial litigation funding impacts the settlement process is by leveling the playing field between parties of different financial means. This helps to focus settlement negotiations on the substantive merits of the claims, not on which party has the greater resources.²³ Committee members previously asked, “is it desirable to facilitate settlement at lower values when the defendant knows there is no outside support and that it may be easier to wear out the plaintiff’s reserves?”²⁴ The answer is no. Although swift settlements are certainly desirable, *fair and reasonable* settlements should remain the paramount goal of a just court system.

Even if third-party funding changes settlement incentives, there is no reason to believe that its impact is any different or more significant than that of contingency fee arrangements, the value of which has long been recognized (and which the Chamber has expressly carved out of its proposed amendment). If there is any fee arrangement that is inimical to early settlement and that is likely to create a financial conflict of interest between an attorney and his or her client, it is the hourly fee. The hourly fee creates an incentive, which every ethical litigator must resist, to draw out the litigation as long as possible. The Chamber has not proposed any heightened disclosure requirements or enhanced ethical safeguards to address this concern.

If anything, there is reason to believe that litigation funding is a *solution* to the perverse incentive and conflicts problems the Chamber raises. Litigation funding often encourages and enables alternative or hybrid fee arrangements, which help to align the financial incentives of attorneys, their clients, and funders with respect to settlement. Once again, not only has the Chamber failed to show that the purported problem (distorted settlement incentives) even exists, it has also failed to explain how automatic disclosure of third-party litigation funding would address it. As Committee members explained when presented with the same argument in 2014, “[i]t is hard to follow the argument that disclosure will remove a deterrent to settlement. Knowing the specific terms of the financing agreement will not contribute to that.”²⁵ Defendants should not be entitled automatically to probe the details of their opponents’ financial wherewithal simply to better evaluate litigation strategies that are resource-based, rather than merits-based.

VIII. Existing Rules Already Address Ethical Concerns.

There is no reason to believe that existing ethical and disclosure rules, which have proven adequate to ensure the integrity of the judicial system thus far, are suddenly insufficient. As this Committee noted in 2014, it simply “is not clear that initial disclosure will advance consideration” of whatever ethical questions might be raised by litigation funding.

²³ Lyon, 58 UCLA L. Rev. at 597-98.

²⁴ Civil Rules Advisory Committee Minutes at 12; *see also* Gillers, *Waiting for Good Dough*, 43 Akron L. Rev. at 692 (“[E]ven if the prediction that the plaintiff’s changed circumstances will increase the likelihood of trial is true, we must ask whether that prospect as a matter of public policy justifies denying the needy plaintiff the financial means that will enable her to reject a settlement offer that is too low. Which harm is worse?”); *id.* at 691 (“No legitimate policy can support denial of funding as a way to squeeze plaintiffs without financial reserves and thereby force an early unjust settlement, especially when defendants can use procedural strategies to buy delay.”).

²⁵ *Id.* at 13.

A. Attorney Ethics.

The Chamber seeks to justify its call for automatic disclosure as “consistent with federal courts’ interest in safeguarding legitimate, ethical civil litigation practices,” an interest the Chamber notes is supported by existing discovery rules permitting defendants to probe unethical conduct. The Chamber fails to explain why those very same discovery rules are inadequate to address ethical concerns relating to funding. There is nothing that currently prevents a party from probing an adversary’s funding arrangements in discovery, so long as those arrangements are demonstrated to be relevant to the issues in the case.

Where there is unethical behavior, courts already have strong tools to address it. 28 U.S.C. §1927 authorizes awards against attorneys who have “multiplied the proceedings... unreasonably and vexatiously.” Rule 11 authorizes sanctions against attorneys who file pleadings or other papers without a legal or factual basis. Federal courts also have inherent power to impose sanctions for bad faith conduct and for violations of applicable rules of professional conduct, and even to impose terminating sanctions dismissing cases where warranted.

Existing state ethics rules already address the Chamber’s stated concerns that funders are investing in mass tort claims bundled by lawyers through purportedly improper client solicitation practices. Likewise, Model Rule of Professional Conduct 5.4(a) already addresses ethical concerns regarding attorney fee-splitting, and Model Rule 1.7 already addresses the attorney’s duty of loyalty to the client and duty to exercise independent professional judgment.²⁶ Under the Model Rules, a lawyer must disclose a conflict of interest to a client and/or withdraw from a representation if there is “a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests,”²⁷ including any business or contractual relationships with funders. Lawyers who violate these rules risk malpractice suits and disbarment. Federal regulation is inappropriate for a problem best addressed by the states in licensing, regulating, and supervising the professional conduct of their respective bars.

It is in funders’ interest to comply with these rules as well. The Chamber mischaracterizes Bentham’s Code of Best Practices to suggest the contrary. Bentham’s Code does not provide that a funding agreement should give the funder control over the litigation, but only that a funding agreement should be clear about *whether or not* the funder has control over the litigation. Bentham’s funding agreements expressly provide that it does *not* have control over the litigation or settlement.²⁸

²⁶ In the guise of protecting clients’ rights as decision-makers, the Chamber ignores the fact that clients typically instruct their attorneys to protect the confidentiality of their private financial information, including litigation funding agreements. The Chamber’s proposed rule would override such client instructions by mandating the disclosure of funding in every case.

²⁷ MODEL RULES OF PROFESSIONAL CONDUCT 1.7 cmt. [8].

²⁸ The only exception is a narrow procedural right: the parties agree in advance that a pre-selected neutral arbitrator (typically a retired federal judge) may intervene in cases where *bad faith or fraud* is apparent in a claimant’s settlement decision. Bentham has never invoked this procedure, nor has it been a party to an arbitration or litigation with any claimant, for *any* reason.

B. Judicial Ethics.

The Chamber argues that Rule 26 must be amended to require disclosure of litigation funding agreements in all civil cases to avoid judicial conflicts of interest. If this is the Chamber's real concern, it is proposing the wrong amendment to the wrong rule. It is Rule 7.1, not Rule 26, that addresses disclosures required to enable judges to identify and avoid conflicts. Rule 7.1 requires parties to file a disclosure statement that "identifies any parent corporation and any publicly held corporation owning 10% or more of its stock." To alert judges of the involvement of a litigation funder, it would be sufficient to amend Rule 7.1 to require parties to disclose only the *name* of any litigation funding company paying the fees or costs in the case. It is totally unnecessary to amend Rule 26 to require production of litigation funding *agreements*.

But even such an amendment to Rule 7.1 would be inappropriate because it would expand that rule beyond its carefully crafted scope. A comparison of Rule 7.1 to 28 U.S.C. § 455 is instructive. Section 455 includes a list, too voluminous to quote here, of circumstances under which federal judges must disqualify themselves. Despite this long list, the only information that is required to be automatically disclosed in every civil case is the information required by Rule 7.1 quoted above. As the Committee Notes to Rule 7.1 explain:

Although the disclosures required by Rule 7.1(a) may seem limited, they are calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure will be difficult. Unnecessary disclosure requirements place a burden on the parties and on courts.²⁹

There is no credible argument that the purported need for automatic disclosure of the identity of a litigation funder is *greater* than the need for automatic disclosure of the circumstances listed in section 455, most of which do *not* have corresponding automatic disclosure requirements in Rule 7.1 or in any other rule. In this sense, the Chamber's proposed amendment is extremely under-inclusive. There should either be no amendment at all, or there should be an amendment requiring automatic disclosure of every fact in every case that could ever give rise to a need for judicial recusal under any of the circumstances listed in section 455. Such a comprehensive disclosure rule, of course, would extend to all third-party financial and other interests on the *defendant's* side of a case. Such a rule is unnecessary and inappropriate, but it least it would be fair—and the Chamber would probably be the first to oppose it.

More to the point, the fact that a litigation funding company is paying the bills in a matter before a judge is extremely unlikely to trigger any of the long list of provisions in section 455 requiring recusal. Certainly, no sitting judge should have a financial or business relationship with a litigation funding company. The Code of Conduct for United States Judges states that judges "should refrain from financial and business dealings that exploit the judicial position or involve the judge in frequent transactions or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves."³⁰ And, "[a]s soon as

²⁹ Fed. R. Civ. P. 7.1(a) Advisory Committee's note (2002).

³⁰ CODE OF CONDUCT FOR UNITED STATES JUDGES, CANON 4(D).

the judge can do so without serious financial detriment, the judge should divest investments and other financial interests that might require frequent disqualification.”³¹ In the absence of any such financial relationship on the judge’s part, there is no need for automatic disclosure.

While there is some theoretical risk of a judge having a personal relationship with individuals employed by or investing in litigation funders, this risk is no greater than the possibility of a judge having a personal relationship with any other interested third party. Provided the judge is not aware of the interested third party’s relationship to the case, there is no conflict requiring recusal. 28 U.S.C.A. § 455(b)(5)(iii) applies only where a close *family* relation—not a neighbor, not a casual acquaintance—of the judge is “*known by the judge* to have an interest that could be substantially affected by the outcome of the proceeding.” The catch-all provision of 28 U.S.C.A. § 455(a) requires a judge’s recusal only “in any proceeding in which his impartiality might reasonably be questioned.” A judge’s impartiality cannot reasonably be questioned merely because the judge happens to know some person who has some relationship to a third party that, *unbeknownst to the judge*, might be funding the case.

IX. Funders Are Rarely Real Parties in Interest, And Their Assets Are Not “Plaintiff’s Resources.”

The Chamber broadly asserts that “a funder is effectively a real party in interest,” but the typical commercial litigation funder is a passive investor, while the “real party in interest” is commonly understood as “the person holding the substantive right sought to be enforced, and not necessarily the person who will ultimately benefit from the recovery.”³² Because most litigation funders do not exercise control over litigation strategy or settlement decisions, it would be unfair to subject them to sanctions arising out of such decisions. In any event, as Committee members recognized in 2014, the Chamber’s argument that disclosure enables courts to better shift discovery costs ignores that “cost-shifting does not seem to happen often, and an inquiry into third-party financing can always be made at the time of a cost-shifting motion.”³³ Cost-shifting and other specific issues are “better dealt with in the case than by adopting initial disclosure.”³⁴

As noted above, Rule 26 has been amended since the Chamber last requested automatic disclosure of litigation funding to require courts to consider “the parties’ resources” as part of a “proportionality” analysis. However, it would be no more appropriate to consider the assets of a plaintiff’s third-party litigation funder than it would be to consider the assets of a defendant’s lender. A third-party funder’s assets are not “plaintiff’s resources,” just as a defendant’s *bank’s* assets, or a defendant’s *insurer’s* assets, are not “defendant’s resources.”

³¹ *Id.*

³² See *Farrell Constr. Co. v. Jefferson Parish, La.*, 896 F.2d 136, 140 (5th Cir.1990); see also *Miller UK Ltd.*, 17 F. Supp. 3d at 728-29 (rejecting defendant’s argument that funder was a real party in interest and/or subrogee analogous to insurer). The sole case cited by the Chamber in support of its argument, *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 693-94 (Fla. Ct. App. 2009), turned on whether a funder in a bankruptcy proceeding with unusually strong control rights was a “party” under Florida laws that defined the term “party” as “any person who participates in litigation regardless of whether or not the party is actually named in the pleadings.”

³³ Civil Rules Advisory Committee Minutes at 12.

³⁴ *Id.* at 13.

X. Automatic Disclosure In All Federal Cases Is An Entirely Inappropriate Approach To A Minority Of States' Champerty Concerns.

The Chamber argues that automatic disclosure of litigation funding agreements should be required in every *federal* case, because some *states* do not permit litigation funding. It is far from clear that the federal rules should be pressed into the service of policing compliance with state substantive law. For instance, states regulate attorney fee agreements and attorney conflicts of interest, among many other things. By the Chamber's logic, broad automatic disclosures should be required at the beginning of every *federal* case to allow officious parties to assess whether their adversaries' counsel are in compliance with all applicable *state* laws.

In any event, only a minority of states restrict litigation funding.³⁵ California, by far the largest state of all, with the largest court system in the world (larger even than the United States' federal court system), affirmatively endorses litigation funding. In *Pacific Gas & Electric Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1136-37 (1990), the California Supreme Court rebuffed an attempt by a defendant against whom litigation had been funded (PG & E) to hold the third-party funder (Bear Stearns) liable:

In fact we have no public policy against the funding of litigation by outsiders. If any person who induced another to bring a lawsuit involving a colorable claim could be liable in tort, free access to the courts could be choked off with an assiduous search for unnamed parties. It is important to remember what PG & E is trying to achieve through this lawsuit. It seeks to enjoin Bear Stearns from further participation in the lawsuit in order to avert what it considers to be the irreparable harm of an adverse judgment. It is essentially seeking to abort the lawsuit by starving the litigant of funds. In *Sierra Club v. Butz*, *supra*, 349 F.Supp. 934, too, there were doubtless persons who induced the representatives of the club to bring the action, and who provided financial assistance in support of the lawsuit, who were not named parties. Yet it would defeat the purpose of assuring free access to the courts, and cause a flood of oppressive derivative litigation, to assess tort liability for their activities. [...] Our legal system is based on the idea that it is better for citizens to resolve their differences in court than to resort to self-help or force. It is repugnant to this basic philosophy to make it a tort to induce potentially meritorious litigation.

In this excerpt, the California Supreme Court could just as aptly have been describing the Chamber's proposal to require automatic disclosure of litigation funding.

To be sure, some other states take a different view, but the patchwork nature of states' approaches to litigation funding—some permitting it outright, some restricting it in various ways, and some prohibiting it—counsels *against*, not for, sweeping rulemaking by this Committee. Even in those states that do prohibit third-party litigation funding, often the law simply declares the funding agreement itself unenforceable as between the parties to the agreement. In such

³⁵ ABA Commission on Ethics 20/20, Informational Report to the House of Delegates on Alternative Litigation Finance (2011), available at https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf (last visited Aug. 30, 2017), at 11.

states, the fact that a case is funded does not give rise to an affirmative defense by the defendant in the funded case, nor to a tort claim by the defendant against the funder.³⁶ Automatic disclosure of third-party litigation funding would accomplish nothing in the vast majority of states, where champerty is not available as an affirmative defense to funded claims.

The real motive behind the Chamber's champerty argument was eloquently exposed and rejected by the court in *Miller*:

To sustain a maintenance/champerty defense in this case would create a greater legal wrong than vindicating the defense would avert. It would effectively [...] encourage future commercial dishonesty—a wrong of manifestly greater significance than whatever wrong could be averted by recognizing the defense at the insistence of the alleged tortfeasor, who is a stranger to the contract claimed to be champertous.

Miller UK Ltd., 17 F. Supp. 3d at 726-727.

XI. Conclusion.

The Chamber argues that automatic disclosure is now appropriate because the industry has grown since 2014. Again, the Chamber is wrong about both its premise and its conclusion. While the rate of increase in available litigation funding has been significant, the overall number of funded cases remains very low, representing only a fraction of one percent of total civil case filings. What growth there has been is not something to be “exposed,” but rather fostered, as it reflects increasing demand from attorneys and their clients for this valuable resource for parties facing the ever-increasing costs of litigating meritorious claims. As one Committee member put it in 2014, funding “makes it possible to bring cases that deserve to be brought.” As New York Justice Eileen Bransten put it, litigation funding “allows lawsuits to be decided on their merits, and not based on which party has deeper pockets or stronger appetite for protracted litigation.”³⁷

³⁶ See, e.g., *Miller UK Ltd.*, 17 F. Supp. 3d at 726 (N.D. Ill. 2014) (explaining that champerty and maintenance are not a “viable defense” to litigation claims which are unrelated to the agreement, and also that “the few state courts that have held funding agreements champertous under their state statutes have only done so in the context of a suit by the parties to the contract seeking its enforcement”); *Kipperman v. Onex Corp.*, 411 B.R. 805, 886 (N.D. Ga. 2009) (“A third party who is not party to an agreement cannot raise the agreement’s nature as a champertous or maintenance contract as a defense to claims between it and a party to the agreement.”); *Welch v. Coro, Inc.*, 97 F. Supp. 185, 186 (S.D.N.Y. 1951) (“The law is that the defendant in an action has no standing to complain that there is a champertous agreement between the party suing him and someone else- i.e. a defendant cannot avail himself of a champertous agreement to which he is not a party as a defense to an action brought against him.”).

³⁷ *Lawsuit Funding, LLC v. Lessoff*, Index No. 650757/2012, 2013 WL 6409971, at *6 (N.Y. Sup. Dec. 9, 2013) (Bransten, J.); see also *Miller UK Ltd.*, 17 F. Supp. 3d at 718 (“Where a defendant enjoys substantial economic superiority, it can, if it chooses, embark on a scorched earth policy and overwhelm its opponent. . . . But even where a case is not conducted with an ulterior purpose, the costs inherent in major litigation can be crippling, and a plaintiff, lacking the resources to sustain a long fight, may be forced to abandon the case or settle on distinctly disadvantageous terms.”); *Hamilton Capital VII, LLC, I v. Khorrami, LLP*, No. 650791/2015, 2015 WL 4920281 at *5 (N.Y. Sup. Aug. 17, 2015) (“Modern litigation is expensive, and deep pocketed wrongdoers can deter lawsuits from being filed if a plaintiff has no means of financing her or his case. Permitting investors to fund firms by lending money secured by the firm’s accounts receivable helps provide victims their day in court.”); *In re Int’l Oil Trading Co., LLC*, 548 B.R. at 835 (“[W]ithout litigation funders, parties owed money, or otherwise stymied by

That dozens of organizations have signed on to the Chamber's letter does not show that the Chamber's proposal enjoys broad support. To the contrary, the signatories are all advocacy organizations for corporate defendants. There is not a single impartial signatory, let alone a single signatory on the other side.³⁸ When one considers the general hostility the Chamber has shown toward litigation and discovery in general, its advocacy here for a broad automatic disclosure requirement appears to be motivated by concerns other than the healthy functioning of the legal system.³⁹

There is an emerging consensus among the federal courts that have actually considered and ruled upon motions for discovery of litigation funding documents (including litigation funding agreements). That consensus is that these documents are ordinarily *not* discoverable. That the Chamber and its big-business allies make their automatic disclosure proposal in the face of this trend exposes their true motive—to achieve through top-down regulation what they have failed to achieve through courtroom advocacy. The Chamber's proposal is an attack on the sound discretion of district judges and magistrate judges, as well as on financial privacy, client confidentiality, the attorney work-product protection, the goals of the federal rules, and Rule 26's renewed emphasis on proportionality. This Committee should decline to entertain the Chamber's agenda.

Bentham is appreciative of this Committee's continued study of litigation funding, which Bentham believes provides significant value to parties with meritorious claims but limited means, and to the law firms that fight for them. Bentham appreciates the opportunity to respond to the Chamber's proposal and would welcome further opportunities to assist this Committee in its consideration of the important and evolving role of litigation funding in the legal industry.

Sincerely,



Allison K. Chock
Chief Investment Officer
Bentham IMF

deep-pocketed judgment debtors, might have reduced or no ability to pursue their claims. Litigation funders may be essential to the provision of legal advice in such cases.”).

³⁸ David Brodwin, *The Chamber's Secrets: A closer look at the U.S. Chamber of Commerce reveals it may not be as pro-business as it claims*, US News & World Report (Oct. 22, 2015), available at <http://www.usnews.com/opinion/economic-intelligence/2015/10/22/who-does-the-us-chamber-of-commerce-really-represent>.

³⁹ U.S. Chamber Inst. for Legal Reform, Issues: Discovery (last visited Aug. 30, 2017) (describing discovery as “one of the most hostile and burdensome civil litigation procedures in the United States”), <http://www.instituteforlegalreform.com/issues/discovery>.



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September 27, 2017

Ms. Rebecca A. Womeldorf
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Ms. Womeldorf:

A June 1, 2017, letter from the U.S. Chamber Institute for Legal Reform and numerous allied organizations (collectively, “the Chamber”) proposes an amendment to Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure to require disclosure of third-party litigation funding in every civil case. Among other reasons the Chamber gives for mandatory disclosure is that it is necessary to enable district courts to carry out a function of “safeguarding legitimate, ethical civil litigation practices” by lawyers appearing before them. Chamber Letter, p. 10. Simply put, the Chamber seeks to enlist federal judges as monitors and enforcers of lawyer professional responsibility, a role that has traditionally been entrusted to state courts of last resort and agencies under their supervision.

Briefly on our qualifications: We both teach professional responsibility, at Cardozo (Sebok) and Cornell (Wendel) Law Schools, and we both have written extensively in this field. Wendel is a co-editor of a leading law school casebook, Geoffrey C. Hazard, et al., *The Law and Ethics of Lawyering*, now in its 6th edition, and is the sole author of a widely adopted student textbook, *Professional Responsibility: Examples and Explanations*, now in its 5th edition. He has been a member of the drafting committee for the Multistate Professional Responsibility Examination (MPRE) since 2007. Sebok is also a frequently cited scholar on third-party litigation funding, including its effect on the attorney-client relationship. He has taught and lectured about litigation finance internationally. He is a member of the American Law Institute, for which he serves as an Advisor for the forthcoming Restatement of Torts (Third), Intentional Torts to Persons, and is the Co-Director of the Jacob Burns Center on Ethics in the Practice of Law at Cardozo Law School.

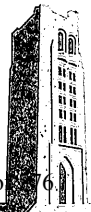


We also served as co-Reporters to the American Bar Association's Ethics 20/20 Commission Working Group on Alternative Litigation Financing, and were co-drafters of the Commission's White Paper on this subject. The Ethics 20/20 Commission invited the submission of written comments and live testimony from interested parties regarding, among other things, the impact of third-party litigation funding on the compliance by lawyers with their ethical obligations. After considering public comments and extensive internal discussion, the Commission decided that the existing framework of state-based rules of professional conduct was sufficient to prevent any risks to the lawyer-client relationship created by third-party funding. The Commission therefore directed us to prepare a guidance document explaining any ethical issues implicated by third-party funding and their treatment by the disciplinary rules. After approval by the ABA House of Delegates, the White Paper was released and is available at https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111212_ethics_20_20_alf_white_paper_final_hod_informational_report.authcheckdam.pdf

We write as scholars of legal ethics and professional responsibility, with a particular interest in third-party litigation funding. We both serve as outside ethics counsel to commercial litigation funding companies – Sebok for Burford Capital LLC, and Wendel for Bentham IMF and Longford Capital Management, LP. However, we submit this comment solely in our individual capacities. We have not reviewed this comment with any industry actor, nor have we been compensated for preparing this submission. But we do rely on many years of experience with leading players in the commercial litigation funding industry to support our contention that third-party litigation funding does not create risks for the lawyer-client relationship that cannot be mitigated by the conscientious application of existing state disciplinary rules.

I. Role of State Courts in Attorney Regulation

Lawyers often speak loosely about being admitted to “the bar,” but strictly speaking that is incorrect. Lawyers are admitted to practice in a state by a state court – generally the court of last resort, although in New York it is the Appellate Divisions of the Supreme Court. State appellate courts have the inherent authority, as a matter of state constitutional law, to admit lawyers to practice in a state, to formulate and administer rules of professional responsibility, and to establish a system of lawyer discipline. *See* Restatement (Third) of the Law Governing Lawyers § 1, cmt. c (2000) (hereinafter “Restatement”); Charles W. Wolfram, *Modern Legal Ethics* §2.2.2 (1986) (hereinafter “Wolfram”). Lawyers may be required to join a state bar association when they are admitted to practice (a so-called “unified” or “integrated” bar), or may elect to join one of several voluntary bar associations, but it is the state judiciary, not the organized bar, that



adopts, investigates, and enforces remedies for lawyer misconduct. Wolfram § 2.3. Most states have adopted disciplinary rules based on the American Bar Association's Model Rules of Professional Conduct, but the authority to regulate is inherent in the state judiciary; the ABA has no regulatory authority. Lawyers who violate rules of professional conduct adopted by a state court may be subject to discipline ranging from a reprimand to permanent disbarment. *See* Restatement § 5.

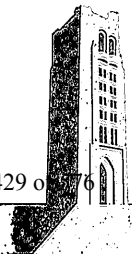
Trial-level courts of general jurisdiction, both state and federal, have a different type of inherent power than the highest state appellate courts. This species of inherent power is related to the common-law authority to punish contempts, but also includes the right to insist upon silence and decorum in the courtroom, to vacate judgments procured by fraud, and to dismiss for *forum non conveniens*. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991). Courts have relied upon this type of inherent authority to craft remedies for lawyer misconduct that directly affects the conduct of the proceedings.¹ Much of the law governing conflicts of interest is grounded in this form of inherent authority. Early, influential decisions applied the remedy of disqualifying counsel for one of the parties owing to its concurrent or prior representation of another party. *See, e.g., T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265 (S.D.N.Y. 1953); *Emle Indus., Inc. v. Patentex*, 478 F.2d 562 (2d Cir. 1973); *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2d Cir. 1976); *IBM Corp. v. Levin*, 579 F.2d 271 (3d Cir. 1978). It is now recognized that the remedies crafted by these courts was dependent upon the inherent power of judges to regulate the conduct of lawyers appearing before them, as well as the courts' authority to issue injunctions and similar orders. *See* Restatement § 6, cmt. i.

It is extremely important to recognize the distinction between regulation attorney misconduct *in general* by the state appellate courts of and the exercise of inherent authority to regulate the conduct of lawyers having an impact on a pending proceeding. One difference is that for example, that a court can refer to legal principles other than those contained in the rules of professional conduct of a lawyer's state of admission.² Another

¹ For example, a court may exclude evidence developed through an investigation outside the scope of the discovery process that involves communication with a party represented by counsel, *see, e.g., Niesig v. Team I*, 558 N.E.2d 1030 (N.Y. 1990), or makes use of deceptive tactics, *see, e.g., Midwest Motor Sports v. Arctic Cat Sales, Inc.*, 347 F.3d 693 (8th Cir. 2003); *In re Air Crash Disaster Near Roselawn, Indiana*, 909 F. Supp. 1116 (N.D. Ill. 1995).

²

The district court has primary responsibility for controlling the conduct of attorneys practicing before it. Although the ABA does not establish rules of law that are binding on this Court, it is the Court's prerogative to disqualify counsel based on contravention of the ABA Model Rules. . . . This is true, despite the fact that neither this Court's Local



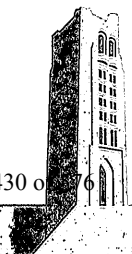
difference is the remedy involved. The state appellate courts can impose a range of sanctions relating to the practice of law such as suspensions and even disbarment, while attorney misconduct in the courtroom may result in a range of injunctive and monetary remedies. Trial courts are essentially on their own (subject to appellate precedent to the contrary) in crafting rules of conduct with respect to pending proceedings.

More to the point of our objection to the Chamber's proposal, the court's exercise of inherent authority over the conduct of the pending litigation is *not* for the purpose of protecting clients or the public generally, or ensuring high standards of ethical conduct by lawyers. That responsibility is vested in state appellate courts. As the New York Court of Appeals explained, in an opinion that remains influential today, state disciplinary rules have "a different provenance and purpose" than procedural rules governing the conduct of the parties and their counsel. *Niesig v. Team I*, 558 N.E.2d 1030, 1032 (N.Y. 1990). Disciplinary rules "embody[] principles of ethical conduct for attorneys as well as rules for professional discipline." *Id.* As such, they may strike a different balance among the policy considerations underlying the rule. *Id.* at 1033. The kind of inherent power involved in cases like *Niesig* is exercised for the purpose of protecting the integrity of the adversarial system and the litigation process, insofar as it affects the rights of the parties to a pending proceeding. Trial courts, including federal district courts, do not have a roving commission to regulate the ethics of the legal profession. That function is reserved to the highest courts of the admitting jurisdictions of lawyers, who adopt and enforce rules of professional conduct.

The Chamber asserts that third party funding "threaten core ethical" principles that "undergird our civil justice system" and that this threat justifies the disclosure rule they propose. This claim, to the extent that the word "ethical" refers to the rules attorney regulation described above, is based on two assumptions. First, that third party funding *in general* is more likely to lead attorneys to violate their professional responsibilities as set out in their states. And second, that to the extent that third party funding leads attorneys to violate their professional responsibilities as set out in their states (a claim we deny) the federal rules of procedure for a trial court should be used to address this threat to professional responsibility. We believe that the Chamber has failed to prove either assumption.

Rules nor the Rules of Professional Conduct of the State Bar of California expressly refers to the ABA Model Rules.

Securities Investors Protection Corp. v. Vigman, 587 F. Supp. 1358, 1362 (C.D. Cal. 1984) (with lengthy procedural history not relating to disqualification order).



II. Third Party Funding and the Risk of Violations of Professional Obligations by Attorneys

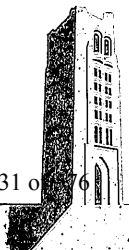
Violation of professional obligations by attorneys occur despite the fact that most attorneys strive to uphold the obligations imposed on them by the jurisdiction where they have been admitted to practice. The fact that violations of professional obligations *may* occur in the course of a transaction is not, in itself, a reason for the federal courts to address that kind of transaction. The ground for asking the federal courts to address the risk of ethical impropriety in third party funding is that there is some clear relationship between ethical impropriety and third party funding. The Chamber alleges such a connection, but we remain unconvinced based on the evidence it has presented. The Chamber's allegation is based on the putative appearance of ethical impropriety in three areas of professional responsibility.

A. Control Over the Conduct of Litigation

Critics of third-party litigation funding, including the Chamber in its submission, often invoke the image of the funder as a puppet master, secretly controlling the actions of the plaintiff and its counsel. An Australian High Court case generally known as *Fostif* approved a funding agreement that provides for extensive control by the funder over the conduct of the litigation, including retaining and discharging counsel, tactical decision-making, and acceptance or rejection of settlement offers. *See Campbells Cash and Carry Pty Limited v Fostif Pty Ltd* [2006] HCA 41. The Chamber seems to be suggesting that third party funding contracts seek to smuggle foreign concepts of third-party control into the attorney-client relationship in American cases.

Every attorney licensed in an American jurisdiction is obliged to obey certain rules designed to insure that the attorney's loyalty remains with her client. These rules include variations of Model Rule 1.2 (client determines objectives and scope of representation) and Model Rule 5.4 (guaranteeing the professional independence of the attorney). At their core, these obligations are not waivable by the client. Furthermore, the law of third party funding in the states does not permit clients to contract with funders to waive these obligations.

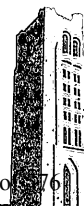
Certainly, as the Chamber knows, the mere fact that an attorney's client wishes to engage in third party funding in a jurisdiction where it is permitted under the local law does not increase the risk that the client's control over her attorney will be weakened. In New York, for example, the Bar Association of the City of New York noted that the rules of professional responsibility provide clear guidance to attorneys whose clients seek third party funding in the same way that these rules provide clear guidance to attorneys in other



situations where third parties may seek to influence attorneys. *See* The Association of the Bar of the City of New York Committee on Professional Ethics, Formal Opinion 2011-2.

Furthermore, there are several well-established features of American law that prevent litigation funders from asserting control over critical decisions in litigation. These include:

- *Champerty concerns.* As discussed in the ABA Ethics 20/20 Commission’s White Paper on alternative litigation finance, acquiring an interest in a litigant’s cause of action is permitted, notwithstanding traditional restrictions on champerty, in many American states. However, even in states in which there is no longer a per se prohibition on champerty, a transaction may be deemed champertous and therefore voidable if the party acquiring the interest engages in “intermeddling” in the litigation, including seeking to control decision-making by the party and its lawyer. *See, e.g., Am. Optical Co. v. Curtiss*, 56 F.R.D. 26, 29–32 (S.D.N.Y. 1971) (agreement limiting litigant’s control over whether to sue violated Fed. R. Civ. P. 17(a) requirement of suit brought by real party in interest); *Kraft v. Mason*, 668 So. 2d 679, 682 (Fla. Dist. Ct. App. 1996) (“officious intermeddling” is an element of champerty). One Florida appellate court deemed a funder a “party” for the purposes of a fee-shifting statute because of the extent of control the funder exercised over the litigation. *See Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 693 (Fla. Dist. Ct. App. 2009) (disapproving of transaction where funder had right under financing agreement “to approve the filing of the lawsuit; controlled the selection of the plaintiffs’ attorneys; recruited fact and expert witnesses; received, reviewed and approved counsel’s bills; and had the ability to veto any settlement agreements.”).
- *Control over settlement.* The exclusive right of the client to accept or reject settlement offers is another central principle in the law of lawyering. “The requirement that an attorney’s advice to the client be ‘independent’ means that if the defendant in a civil case makes an offer to settle that is conditioned on a waiver of attorneys’ fees, the lawyer must communicate the offer and render objective advice about its merits that is independent of the lawyer’s own interests in protecting the fee.” *ABA/BNA Lawyers’ Manual on Prof’l Conduct* ¶ 41:1609 (citing numerous ethics opinions). The ethical obligation to preserve a client’s control over settlement is maintained by parallel requirements in state law concerning third party funding. Courts will carefully scrutinize contractual provisions that have the effect of limiting or burdening the client’s exclusive right to make decisions regarding settlement. Control over settlement, for example, is one difference that Florida invokes to distinguish between third party funding contracts that it will enforce as



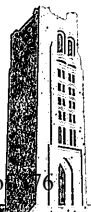
opposed to those it will not enforce. *Compare Brown v. Dyrnes*, 109 So. 2d 788 (Fla. Dist. Ct. App. 1959) (control sought and contract held to be void) *with Kraft v. Mason*, 668 So. 2d 679, 682 (Fla. Dist. Ct. App. 1996) (no control sought and contract found in accord with public policy). We accordingly advise our clients in the third-party funding industry that attempting to exercise any control over settlement would raise concerns for both the lawyers of the funded party and any court reviewing the enforceability of the contract.

These considerations are well understood, both by commercial litigation funders and by lawyers representing claimants in funded litigation. Both of us have reviewed numerous commercial litigation funding agreements, all of which specifically disclaim any attempt by the funder to exert any control over the conduct of the litigation by counsel. Mandatory disclosure of third-party financing is not warranted on this ground because there is nothing to discover. Reputable commercial financing firms are not calling the shots in litigation. They protect their investment by extensive due diligence and transactional structures that do not interfere with the lawyer-client relationship.

B. Sharing Fees with Non-Lawyers

Model Rule 5.4(a), a version of which is in effect in every jurisdiction except for the District of Columbia, prohibits sharing legal fees with non-lawyers. The prohibition on fee-splitting protects clients and society against three dangers.

- First, the prohibition of fee-splitting with non-lawyer employees and agents serves the goal of preventing the unauthorized practice of law (UPL). *See O'Hara v. Ahlgren, Blumenfeld & Kempster*, 127 Ill. 2d 333, 342 (1989) (fee-splitting arrangements facilitate UPL).
- Second, the prohibition of fee-splitting with non-lawyer employees and agents serves the goal of preventing the impermissible solicitation of clients. *See* Wolfram § 16.5. For typical solicitation cases involving “runners” or “cappers” *see, e.g., In re Nelson*, 1 Cal. State Bar Ct. Rptr. 178 (Review Dept. 1990); *Danzig v. Danzig*, 904 P.2d 312 (Wash. Ct. App. 1995). The underlying concern in the runner/solicitation cases is that there will be a bidding war among lawyers paying for client referrals. *See, e.g., Crawford v. State Bar*, 7 Cal. Rptr. 746, 355 P.2d 490 (1960); *see also McIntosh v. Mills*, 117 Cal. Rptr. 3d 66, 74 (Cal. Ct. App. 2004) (summarizing purposes of fees-splitting rule and citing numerous cases). The rule appears to be implicated most frequently today in the context of referral arrangements and the compensation of client-development consultants and in-house employees. *See, e.g., Son v. Margolius, Mallios, Davis, Rider & Tomar*, 709 A.2d 112 (Md. Ct. App. 1998);

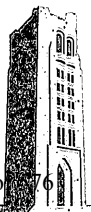


In re Rappaport, 588 N.Y.S.2d 436 (App. Div. 1992); *Trotter v. Nelson*, 684 N.E.2d 1150 (Ind. 1997); *State Bar of Texas v. Faubion*, 821 S.W.2d 203 (Tex. 1991); *In re Anonymous Member of the South Carolina Bar*, 367 S.E.2d 17 (S.C. 1988); Penn. Bar Op. 2004-3 (2004); Fla. Bar Op. 02-1 (2002); N.C. Bar Op. 147 (1993); N.Y. State Bar Op. 927 (2012); N.Y. State Bar Op. 727 (2000).

- Third, the prohibition of fee-splitting with non-lawyer employees and agents serves the goal of preventing non-lawyer interference with an attorney's professional judgment. As Comment [1] to Rule 5.4 states, the limitations in the rule "are to protect the lawyer's professional independence of judgment." *See, e.g.* Lawrence J. Fox, *Accountants, the Hawks of the Professional World: They Foul Our Nest and Theirs Too, Plus Other Ruminations on the Issue of MDPs*, 84 Minn. L. Rev. 1097, 1106 (2000) (arguing that Rule 5.4 guards against "interference by non-law trained masters who wish us to take short cuts to maximize profits"). Ethics opinions barring fee splitting with non-lawyer agents emphasize that there is a risk that, when a lawyer's agent's earnings are contingent on the outcome of a case on which he works, he may act against the client's interests by directing (or otherwise causing) the attorney to invest time and other resources among multiple clients based on which case promises the greatest reward and not what would be required under the attorney's obligation to provide competent representation. *See* Tex. Disciplinary Rules of Professional Conduct R. 5.04 cmt. 1 and D.C. Bar Op. 322 (2004).

The Chamber's bare allegation that third party funding raises special concerns relating to fee-splitting do not connect third party funding with the concerns outlined above. Funders are capital providers, like banks, and transact directly with clients, not the clients' attorneys. They do not offer to work for attorneys and split a fee with them. Funders do not seek to earn referral fees and do not seek to "sell" client referrals to attorneys. And, as noted above, funders are prohibited under the state laws of champerty to seek to take control of a client's litigation decisions, so they are not in a position to interfere with an attorney's ability to communicate her independent legal judgment to her client.

The Chamber's letter fails to draw a connection between the main purpose of the prohibition on fee-splitting and third party funding because the Chamber fails to recognize that third party funding is a form of financing. The fee-splitting rule cannot be applied rigidly or formalistically to law firm financing transactions, because even something as ordinary and pervasive as interest payments on a commercial line of credit must, by

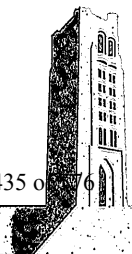


definition, involve the sharing of legal fees with a non-lawyer.³ Similarly, paying financing charges to a credit card issuer would involve the sharing of legal fees with a non-lawyer, yet these payments are universally permitted. *See, e.g.*, Cal. State Bar Formal Op. 2007-172 (permitting lawyers to accept payments of fees by credit card, even though the attorney makes a payment out of the earned fees by means of a service-charge debit, notwithstanding literal violation of California fee-splitting rule); Or. Bar Op. 2005-133 (2005) (establishing credit facility to pay lawyers' fee, in return for 10% financing charge, does not violate Rule 5.4(a)); Ill. Bar Op. 92-9 (1993) (same result as Oregon opinion, on a similarly structured transaction). Law firms may even, with appropriate safeguards, take out a loan to finance the expenses of litigation and pass the interest expense along to the client. *See, e.g., Chittenden v. State Farm Mut. Auto. Ins. Co.*, 788 So.2d 1140 (La. 2001); Mich. Op. RI-332 (2003); N.Y. State Bar Ass'n Op. 754 (2002); Kent. Bar Op. E-420 (2002); Ariz. Bar Op. 01-07 (2001); L.A. County Bar Op. 499 (1999); Ill. Bar Op. 94-06 (1994).

No one seriously contends that ordinary financing transactions such as these violate the fee-splitting rule. *See* Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* (3d. ed. supp. 2011) § 45.5, Illus. 45-1; Doug Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 Mercer L. Rev. 649, 677 (2005) ("Of course there is no prohibition against attorneys borrowing from banks to finance their practices. No courts or disciplinary authorities have ever suggested that attorneys who finance aspects of their practices with bank loans "share" or "split" their fees with the banks when they make loan payments."). Significantly, a recent ethics opinion of the New York City Bar approved of third-party litigation financing without mentioning New York's version of Model Rule 5.4, except in the context of referral fees and in support of the proposition that "absent client consent, a lawyer may not permit the company to influence his or her professional judgment in determining the course or strategy of the litigation, including the decisions of whether to settle or the amount to accept in any settlement." *See* Ass'n of the Bar of the City of N.Y. Op. 2011-2 (2011).

The Virginia State Bar's Standing Committee on Legal Ethics, when faced with a different issue concerning the application of Virginia's version of Model Rule 5.4(a) to an innovative financing agreement between a client and a lawyer, offered advice which we think other committees will heed. The opinion, Virginia Legal Ethics Op. 1783 (2003), considered a case in which an attorney was hired to collect on a promissory note that included a provision requiring payment of 25% of the principal balance as attorneys' fees in the event of a collection action. Because the lender had been paying the attorney on an hourly basis and the attorney proposed to reimburse the lender out of the proceeds of the

³ Because law firms are prohibited from forming partnerships with non-lawyers, *see* Model Rule 5.4(b), any revenue of a law firm must come from attorneys' fees.

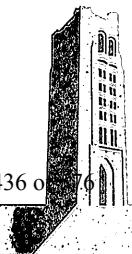


recovery, including the 25% attorneys' fee, the attorney was concerned that reimbursing the lender would violate the fee-splitting rule. The committee held that, on its face, this transaction involved splitting an attorney's fee with a client who was also, in effect, a third-party payor. It emphasized, however, that "application of Rule 5.4(a) must move beyond a literal application of language of the provision to include also consideration of the foundational purpose for that provision." The purpose is to avoid improper interference by third parties with the conduct of the litigation. The Committee noted that it had repeatedly emphasized that "[t]he primary purpose of Rule 5.4 is to prohibit nonlawyer interference with a lawyer's professional judgment and ensure lawyer independence." *Id.* (citing Va. Legal Ethics Op. 1744 (no violation of the fee-splitting rule in sharing portion of court-awarded fees with nonprofit organization)).

The most closely analogous authority on the application of Model Rule 5.4(a) to the specific context of third-party litigation financing is a series of ethics opinions from the Utah State Bar Ethics Advisory Committee. The Utah opinions employ the substance-over-form approach that characterize the only sensible analysis of the application of the fee-splitting rule to financing transactions. The permissibility of the transactions turns on whether they are structured in a way that creates the potential for a severe misalignment of interests between the funded law firm and the client.

The most relevant of the three opinions, Utah Bar Ethics Opinion 06-03, involved a loan by a third-party litigation financing company to a law firm, with a conditional obligation on the part of the lawyer to repay out of the proceeds of any judgment or settlement received. Because the obligation made reference to a single case for which the lawyer had borrowed from the third-party lender, there were foreseeable situations in which the lawyer would be better off financially if he lost the case and the client recovered nothing. For example, if the lawyer had borrowed \$80,000 to finance \$100,000 of litigation costs and expenses, and obtained a recovery of \$100,000 for the client, the lawyer's obligation would be to repay the original \$80,000, plus a funding fee of \$80,000, for a total of \$160,000. If, on the other hand, the lawyer "took a dive" in the case and recovered nothing for the client, the lawyer would be obligated to pay the lender nothing. The adverse incentive created by the presence of third-party financing was deemed an intolerable limitation on the lawyer's independence. On those narrow grounds, the opinion concluded that the investment violated the fee-splitting rule. The opinion noted, however, that a non-recourse financing arrangement in which it is "mathematically impossible for the lawyer to be able to reduce the lawyer's losses by obtaining no recovery for the client" would not violate Utah's prohibition on fee-splitting.

These authorities show that the fee-splitting rule cannot be applied literally or formalistically to financing transactions. An analysis that considers the substance of the



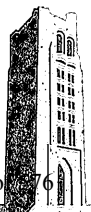
fee-splitting rule over its form focuses on the effect the financing transaction has on the lawyer's independence and professional judgment. The blanket disclosure requirement for which the Chamber is advocating is unsuited to this kind of highly fact-specific, rule-of-reason analysis. The putative concern about fee-splitting cited by the Chamber cannot be supported by reference to the small set of cases, like that described in Utah Opinion 06-03, in which a financing transaction creates an impermissible interference with a lawyer's independent professional judgment.

C. Conflicts of Interest

Lawyer independence is also regulated by conflict of interest rules promulgated by state appellate courts, and generally based on Model Rules 1.7, 1.8, and 1.9 (the major provisions governing conflicts of interest arising out of concurrent representation, personal interests of an attorney, and successive representation, respectively). The Chamber seems to be arguing that disclosure of financing transactions must be mandatory so that the district court can investigate the transaction to determine whether it creates impermissible conflicts of interest. As is the case with the fee-splitting rule, application of the conflicts rules is highly fact-specific, and would involve district judges in lengthy, often quite technical, and unnecessary investigations into the possibility of conflicts of interest. This burdensome requirement is particularly inappropriate when it is quite clear that the potentially adverse financial interests of a lawyer do not create conflicts of interest at all.

For example, ordinary contingent fee financing involves a well-known conflict between the attorney's interest in maximizing his or her effective hourly rate and the client's interest in obtaining a larger judgment or settlement. This structural problem has never been treated as creating a conflict under Model Rule 1.7, *see Hazard & Hodes, supra* § 8.14.1, nor has the situation in which lawyers have incurred substantial indebtedness to a commercial lender to finance the representation of a client in a particular matter. Similarly, the U.S. Supreme Court refused to use the term "ethical dilemma" to refer to a settlement offer conditioned upon an agreement by the plaintiff's lawyer to waive a statutory entitlement to seek attorney's fees. *See Evans v. Jeff D*, 475 U.S. 717 (1986). Justice Stevens wrote:

[A] lawyer is under an ethical obligation to exercise independent professional judgment on behalf of his client; he must not allow his own interests, financial or otherwise, to influence his professional advice. Accordingly, it is argued that a lawyer is required to evaluate a settlement offer on the basis of his client's interest, without considering his own interest in obtaining a fee; upon recommending settlement, he must abide by the client's decision whether or not to accept the offer.



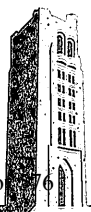
Lawyers are also under a professional obligation, and not regarded as subject to a conflict of interest or in an ethical dilemma under the rules, where they are paid by a liability insurer to defend the interests of an insured. Other provisions in the rules, such as the independence requirement of Model Rule 2.1 and the allocation of decision-making authority in Model Rule 1.2(a), ensure that the client's interests are protected. *See Hazard & Hodes, supra* § 45.3, at 45-6. It is a highly unusual situation in which the conflict between an attorney's financial interests and the obligation to provide independent advice to a client will be deemed so severe that it rises to the level of an ethical dilemma mandating separate treatment under the rules, as opposed to being merely one of the ways in which the obligation of professionalism can occasionally be demanding.

III. Amending Rule 26 To Address Alleged Violations of Professional Responsibility

As we have argued in the foregoing section, we do not believe that the Chamber has demonstrated that third party funding is associated with a special or salient risk of attorney misconduct. However, even if there were some concern with professional responsibility that arose from third party funding, we are skeptical that an amendment to the federal rules relating to disclosure of third party funding in litigation would effectively address the risk of attorney misconduct.

It bears repeating that the goals of the various states' rules of professional responsibility and the goals of rules of procedure (state or federal) are different. The rules of procedure are designed to promote justice by protecting the interests of the parties adverse to each other in litigation. The rules of professional responsibility are designed to protect the interests of clients to the extent that those interests can be promoted through the legal system in ways that do not harm third parties, the courts, and society in general. Sometimes, of course, rules intended to serve ends in litigation overlap with the rules of professional responsibility. For example, the rules concerning the disqualification of counsel due to concurrent conflicts in federal courts borrow directly from the rules of concurrent conflict adopted by the various bar disciplinary bodies. *See, e.g. Richardson v. Hamilton Int'l Corp.*, 469 F.2d 1382, 1383-84 (3d Cir. 1972) (American Bar Association's Code of Professional Responsibility provided the content of Rule 11 of the Local Rules of the United States District Court for the Eastern District of Pennsylvania with regard to determining disqualification of a party plaintiff).

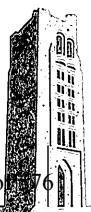
The Chamber is suggesting that the requirements of professional responsibility are so clear that it would be easy and costless for the federal rules to assist in their enforcement while pursuing other ends, such as balancing the interest of adverse parties in discovery.



But it is unlikely that the rules of professional responsibility would be reinforced by the proposed disclosure rule in a way that was either simple or costless.

To take but one example, we demonstrate above that the so-called concern with fee-splitting – as it connects up with third party funding – is really a concern with the risks that certain forms of financing would impermissibly interfere with lawyers’ independent professional judgment. The problem with trying to assist the various states in their regulations of this kind of financing (assuming that the states need assistance, which we deny) is that the states do not agree over the definition of the form of financing that would impermissibly interfere with lawyers’ independent professional judgment. One ethics committee in Ohio, for example, has taken the extreme position that any form of factoring of a legal fee is fee-splitting, even if the lawyer is offering to sell to a factor a fee that arises from a settlement approved by a court. *See* Advisory Opinion, Ohio Supreme Court’s Board of Commissioners on Grievances and Discipline, Opinion 2004-2 (transaction violates Rule 5.4(a)). On the other hand, Utah, as seen above, does not consider the sale of a contingent fee prior to settlement in exchange for financing to be even a question of fee-splitting, but treats the question as one of a waivable conflict of interest under Rule 1.7(a)(2). As this range illustrates, there is no single national perspective on the so-called “problem” of fee-splitting as it relates to third party funding secured by an attorney’s immature contingent fee. There is a diversity of interpretations among the states and the authorities charged with enforcing the prohibition on fee-splitting. *See* Anthony J. Sebok, *Unmatured Attorneys’ Fees and Capital Formation in Legal Markets*, 2018 Ill. L. Rev. ___ (forthcoming 2018). It hard to see how a federal rule can support all the various jurisdictions in their effort to ensure that attorneys are fulfilling their professional responsibilities if the rule will be necessarily either over- or under-inclusive in its characterization of the rule it is trying to reinforce.

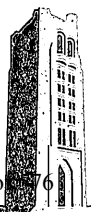
It is instructive to see how courts have responded to invitations by parties to incorporate claims about violations of the prohibition on fee-splitting in cases where contingent fees have been financed and disputes have arisen over obligations to pay. In numerous cases where debtors have raised the argument that their obligations were based on contracts that violated public policy because they were based on violations of obligations of professional responsibility, the courts have eschewed any invitation to consider the effect of their decision on the promotion of the rules of professional responsibility and looked narrowly at the underlying contract. In *Santander Bank, N.A. v. Durham Comm. Capital Corp.*, Civil Action No. 14-13133-FDS, 2016 U.S. Dist. LEXIS 5430 (D. Mass. Jan. 15, 2016), for example, the court held that Massachusetts Rules of Professional Conduct were relevant its analysis of whether earned fees could be sold given the limitations of Rule 5.4(a), the court analyzed the argument only in terms of its relevance to Massachusetts contract interpretation, and not in terms of how its decision would



address or affect the risk of attorney misconduct. The same analysis can be seen in other cases that refused to hold finance agreements void because they allegedly involved impermissible forms of fee-splitting. *See, e.g. Lawsuit Funding, LLC v. Lessoff*, 2013 WL 6409971 at *5 (NY Sup. Ct. 2013) and *PNC Bank v. Berg*, 1997 WL 529978, at *10 n.5 (Del. Super. Ct. 1997). The court in one Texas case was very blunt about the relevance of allegations that impermissible fee-splitting would be rewarded in its review of the enforceability of finance agreement: “any alleged violation of the Disciplinary Rules does not necessarily establish a cause of action ‘nor does it void an otherwise valid contract executed outside of the attorney-client relationship.’” *Counsel Fin. Servs., L.L.C. v. Leibowitz*, 2013 Tex. App. LEXIS 9252, 2013 WL 3895331, at *24 (Tex. App. 2013), *reh’g overruled* (2013), *rev. den.* (2014)) (citation omitted).

Courts keep claims about violations of the rules concerning fee-splitting at arms-length for a reason, which is that they recognize that even in their own jurisdiction the enforcement of the obligations of attorneys in connection with financing litigation involves unsettled ethical principles which they are not equipped to evaluate. If it is this difficult for state courts to adopt and apply rules within their own jurisdiction, it seems to us to be highly unlikely that claims about the application of the rules of professional responsibility to financing by third party funders are likely to be accurate. The burden is on the Chamber to explain how its proposal promotes the enforcement of the states’ rules of professional obligations. The letter submitted by the Chamber does not even attempt to meet this burden — it assumes that any amendment to the federal rules that is consistent with one state’s rules of professional responsibility, even if only of marginal benefit in that one state, justifies an amendment to the rules of procedure. That assumption is unproved and therefore we conclude that the Chamber has failed to meet its burden. Furthermore, for reasons stated in this letter, we think it is highly unlikely that they could ever meet its burden.

In conclusion, we would like to emphasize that we are writing only in response to the Chamber’s assertion that its proposed amendment to Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure to require disclosure of third-party litigation should occur so that “core ethical principles” in the legal profession will be protected. This claim is supported by two assertions. The first is that third party funding is currently causing lawyers to act in violation of their states’ ethical obligations. The second is that the proposed amendment to the federal rules of civil procedure can help with the threat to professional ethics putatively identified by the Chamber. Our response is simple. First, we do not see any evidence – in the Chamber’s letter or in our own experience – that third party funding is causing lawyers to act in violation of their states’ ethical obligations. Second, we do not think that amending Rule 26 of the Federal Rules of Civil Procedure will help the states promote ethical conduct among their lawyers in connection with the concerns raised by



Ms. Rebecca A. Womeldorf
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the Chamber. In the absence of a need for intervention and in the face of no evidence that the intervention recommended will actually help, we urge the Committee to reject the proposed amendment.

Sincerely,



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Sincerely,



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Submission 14-CV-B

This is a joint submission from the U.S. Chamber Institute for Legal Reform, the American Insurance Assoc., the American Tort Reform Assoc., Lawyers for Civil Justice, and the National Association of Manufacturers. It proposes adding another provision to Rule 26(a)(1)(A) calling for initial disclosure (in addition to the four sorts of initial disclosure already required under the rule) of the following:

(v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from any proceeds of the civil action, by settlement, judgment or otherwise.

In some ways, this proposal builds on the requirement in Rule 26(a)(1)(A)(iv) of disclosure as follows:

(iv) for inspection and copying as under Rule 34, any agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

The explanation for this proposal is that third-party litigation funding (TPLF) has emerged as a "burgeoning aspect" of at least some litigation, and that it can produce "potentially adverse effects * * * on our civil justice system." Several reasons are advanced for adopting a change along the proposed lines. Before turning to those reasons, however, it seems useful to sketch out something about litigation funding and also to describe the development of what is now in Rule 26(a)(1)(A)(iv).

Third-Party Litigation Funding

In the "good old days," one might say that there was almost nothing that could be called TPLF. Private law firms called for their partners to put up the capital needed for firm operations. Contingency-fee lawyers might find their income very uneven as it depended on settlement of cases. In recent decades, some large private law firms have turned to letters of credit or similar arrangements with lenders, often banks, to finance ongoing firm activities. According to reports in the press, some of those firms have borrowed considerably, and that borrowing (and its conditions) may have contributed to the failure of some large law firms in the last decade or so. Plaintiff-side firms, meanwhile, seem increasingly to have obtained financing for their operations from other sorts of lenders, not traditional banks. Magazines targeting plaintiff firms therefore include ads about such financing options.

This proposal appears not to inquire into all these various

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kinds of law firm financing. Instead, it focuses on a relatively new field that sometimes involves lending tied to a specific lawsuit, with payment contingent on the outcome of that lawsuit, an activity which the proposers call TPLF. The proposed draft attempts to define that focus by calling for disclosure of "any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from any proceeds of the civil action, by settlement, judgment or otherwise." Whether this could include other means of financing litigation of plaintiff-side law firm operations might be debated in some cases.

The whole topic of law firm financing -- including TPLF -- has received quite a lot of attention in recent years. One illustration is a conference at DePaul University Law School in 2013 entitled "A Brave New World: The Changing Face of Litigation and Law Firm Finance," which produced papers published at 63 DePaul L. Rev. 195-718 (2014). A Google search for "litigation financing" produced over 36 million responses, including, up front, several links to firms offering the sorts of services also appearing in ads in plaintiff-lawyer magazines. A quick review of those web pages suggests that they offer something in the nature of a general line of credit for law firms representing plaintiffs, not what this proposal is about. Others seem more directed to what appears to be the specific focus of this proposal -- underwriting a specific litigation (often after some review of the litigation itself) in return for some sort of high return if the litigation produces a settlement or judgment, with the amount of the return related to the level of success.

Some bar organizations have addressed some issues about litigation financing, broadly considered, in recent years. Perhaps members of the Advisory Committee are familiar with some of those efforts. It may be that the entire landscape of other legal responses to new financing arrangements has not yet stabilized, which may be a factor in deciding whether to proceed now along the lines suggested by this proposal.

The Rule 26 treatment of insurance coverage

As noted above, Rule 26(a)(1)(A)(iv) already has a requirement that insurance coverage be disclosed at the outset of the litigation. This disclosure requirement built on an amendment to the rule in 1970 prompted by a distinct split in the cases on whether insurance agreements were properly subject to discovery.

It is easy to understand why there was a split on that question before 1970. If discovery is designed to enable parties to obtain evidence for use at trial, this information does not seem within it. Indeed, evidence the defendant is insured is

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almost universally excluded. See, e.g., Fed. R. Evid. 411. Thus, arguments that the existence of insurance (or absence of it) bear on whether defendant was negligent, etc., would not support discovery of this sort. More generally, discovery is not ordinarily allowed to verify that the defendant will have sufficient assets to pay a judgment. Indeed, in California discovery regarding defendant's assets is permitted in relation to a punitive damages claim (where defendant's wealth may be a measure of the award) only after a showing that plaintiff has a "substantial probability" of prevailing on the punitive damages claim. Cal. Civ. Code § 3295(c). So more generally the question of discovery regarding assets is a sensitive one.

Notwithstanding, the rulemakers decided in 1970 to opt in favor of allowing discovery regarding insurance coverage; as the Committee Note then explained:

Disclosure of insurance coverage will enable counsel for both sides to make the same realistic appraisal of the case, so that settlement and litigation strategy are based on knowledge and not speculation. It will conduce to settlement and avoid protracted litigation in some cases, though in others it may have an opposite effect. The amendment is limited to insurance coverage, which should be distinguished from any other facts concerning defendant's financial status (1) because insurance is an asset created specifically to satisfy the claim; (2) because the insurance company ordinarily controls the litigation; (3) because information about coverage is available only from defendant or its insurer; and (4) because disclosure does not involve a significant invasion of privacy.

The rulemakers emphasized the narrowness of the discovery opportunity:

The provision applies only to persons "carrying on an insurance business" and thus covers insurance companies and not the ordinary business concern that enters into a contract of indemnification. Thus, the provision makes no change in existing law on discovery of indemnity agreements other than insurance agreements by persons carrying on an insurance business. Similarly, the provision does not cover the business concern that creates a reserve fund for purposes of self-insurance.

It should be apparent that there are differences between TPLF arrangements and the insurance agreements brought within discovery in 1970. An insurance agreement often contained two basic features -- a duty to defend and a duty to indemnify. Although disclosure of the agreement presumably would ordinarily include both features, the focus of the 1970 amendment appears to have been on the indemnity aspect. Many may be familiar with

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"settlement for the coverage limits" discussions. Discovery about the insurer's indemnity obligation would provide information highly pertinent to those discussions. Under these circumstances, it seems that revealing information about the indemnification aspect would "conduce toward settlement," as the Committee Note observed. Perhaps knowing the terms of TPLF agreements could similarly bear on litigants' willingness to settle; knowing that the other side has an "unlimited budget" to continue the litigation might prompt a party to settle if it had believed before that the adverse party's litigation budget was strapped. But that does not seem to be the reason that discovery of insurance agreements was authorized in 1970, and discovery of TPLF agreements seems to raise different issues.

The TPLF situation differs from the insurance situation in other ways. The 1970 amendment was designed to be limited to persons "carrying on an insurance business" and did not reach other indemnification arrangements. This limitation to insurance companies responds to their distinctive treatment in other ways. In many states, insurance is a peculiarly regulated business; it is not clear that those involved in the TPLF business are similarly regulated. Indeed, some of the recent discussion of TPLF seems to be about whether the activities of these entities, or of the lawyers who use them, should be regulated, and what the regulations should be.

Another point that may distinguish TPLF is the Committee Note's observation that the insurer "ordinarily controls the litigation." Much concern has arisen about whether that is true in the TPLF situation, a point made in this submission. At least some involved in this new business seem to abjure such efforts to control.

For example, in November, 2011, the Association of Litigation Funders of England and Wales (where TPLF seems to be more widespread than in the U.S.) adopted a Code of Conduct for Litigation Funders including the following:

A Funder will: * * *

(b) not take any steps that cause or are likely to cause the Litigant's solicitor or barrister to act in breach of their professional duties;

(c) not seek to influence the Litigant's solicitor or barrister to cede control or conduct of the dispute to the Funder * * *

How such commitments actually work in the UK, and whether practices in the U.S. differ, are probably considerably debated.

One point of tension might be settlement; in the U.S. "bad

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faith failure to settle" claims against insurers have been recognized in many states. It is conceivable that similar arguments could be made if TPLF entities have a veto power over settlement, and disagreements about settlement emerge between plaintiffs and TPLF entities.

The contractual arrangements between plaintiffs and TPLF providers might have pertinent provisions on the proper role of each in the settlement context. One American enterprise included the following in its "Code of Best Practices":

13. The LFA [litigation funding agreement] shall state plainly whether and in what circumstances the Funder may be entitled to participate in the Claimant's settlement decisions. For example, subject to agreement between the parties, the LFA may provide that:

a. The Claimant, counsel and the Funder shall consult in good faith as to the appropriate course of action to take in connection with all settlement demands or offers.

b. If the Funder and the Claimant differ in their views as to whether a claim should be settled and they are unable to resolve their differences after consulting in good faith, then either of them may refer their differences to an independent arbitrator for expedited resolution, whose decision shall be final and binding.

Bentham IMF, Code of Best Practices (January 2014).

In sum, authorizing discovery of TPLF arrangements might differ substantially from the authorization given in 1970 for discovery of insurance agreements and might immerse the Committee in tough and tricky emerging and uncertain issues surrounding TPLF activity. At the same time, it does appear that courts are struggling with whether such discovery should be allowed under the current rules. For a thoughtful and thorough examination of such issues by Magistrate Judge Jeffrey Cole, see *Miller UK Ltd. v. Caterpillar, Inc.*, 2014 WL 67340 (N.D. Ill., Jan. 4, 2014).

In 1993, initial disclosure was introduced and the insurance agreement discovery authority was converted into an initial disclosure obligation applicable in all cases. The Committee Note's explanation for making a discovery request unnecessary was that these four types of information "have been customarily secured early in litigation through formal discovery."

It seems unlikely that there has to date been a history of discovery of TPLF information. Even in cases that order such discovery, it seems to be justified by specific circumstances in

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the given case. For example, in *Conlon v. Rosa*, 2004 WL 1627337 (Mass. Land Court, July 21, 2004), a case cited in the submission, the court cited indications that the plaintiff's lawsuit was actually funded by a competitor of defendant and asserted that "[a] surprising number of plaintiff's lawsuits are secretly funded by outsiders, often commercial competitors or political opponents." The Massachusetts court cited, e.g., *Jones v. Clinton*, where the federal judge had ordered production of documents showing contributions to plaintiff to support her litigation against the President. In the Massachusetts case, the court noted that there was a claim that the funding was provided for competitive purposes by a competitor of defendant.

Whether or not such considerations sometimes would justify ordering discovery of TPLF information, it may be that there is no reason to add a TPLF provision to initial disclosure under Rule 26(b)(1)(A), which applies to all cases except those excluded under Rule 26(a)(1)(B). Moreover, it appears that such financing is sometimes extended only after the litigation has been under way for some time. Some funders may even wait until a favorable verdict occurs at trial and provide funding then during the pendency of an appeal. That timing would make "initial" disclosure impossible. Ordinary indemnity insurance agreements presumably do not present this timing wrinkle, but TPLF arrangements may present it often.

In sum, there are some ways in which the current proposal builds on the handling of insurance under Rule 26 presently, but other factors that make it appear significantly different.

Reasons offered for proposed amendment

The proposal urges that "[w]henever a third party invests in a lawsuit, the court and the parties involved in the matter should be so advised." It offers four reasons:

Enabling courts and counsel to ensure compliance with ethical obligations: The first reason presented is that some TPLF entitles are publicly traded companies or companies supported by investment funds whose individual shareholders may include judges or jurors. Whether that would make information about this subject discoverable under Rule 26 is uncertain. It might be that the right focus would be on Rule 7.1 disclosure statements. Moreover, to the extent it is true that some funders only invest after a favorable verdict, it would seem that any possible implications about the interests of the trial court judge or the jurors would not be relevant then.

In addition, the submission says that "counsel in the case may have investment or representational ties to a funding entity that they may need to disclose to their clients." The example given is that defense counsel may be a shareholder in an entity

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that may profit from plaintiff's victory in the litigation, a potential conflict that counsel should broach with the defendant. At least some of these concerns seem to have occurred to some involved in the TPLF business. Thus, one TPLF enterprize includes in its best practices between the funder and claimants' attorneys the following: "7. The Funder shall not knowingly allow an attorney or law firm representing a Claimant to invest in the Funder." Bentham IMF Code of Best Practices (January 2014).

So these issues may be important in some cases, though it is not clear how many. Certainly, avoiding conflicts of interest for judges, jurors, and attorneys is a desirable goal. That would seem to be the role of disclosure statements like those called for by Rule 7.1. Whether discovery is a suitable vehicle for that purpose may be more debatable. A plaintiff's discovery request for information about the investment portfolio of defense counsel would likely be resisted vigorously. This proposal does not authorize such discovery, but does seem to involve the courts more deeply in policing such topics.

In the same vein, it is not at all clear that the way to police lawyers' ethics is for trial courts to take the lead. Traditionally, that is the job of state bar ethics committees and the like. Judges who become aware of questionable conduct thus may refer matters to the state bar. So the entire topic seems somewhat outside the normal scope of disclosure and discovery.

Alerting defendants to who is "really on the other side of an action": Citing the 2004 Massachusetts Land Court case involving financing of litigation by a commercial competitor of defendant mentioned above, the submission urges disclosure of all TPLF arrangements. It is not clear how many such cases there are, or whether they are a model that calls for a rule like the one proposed.

This second reason emphasizes a somewhat different concern, however -- that "[a] party that must pay a TPLF entity a percentage of the proceeds of any recovery may be inclined to reject what might otherwise be a fair settlement offer in the hopes of securing a larger sum of money." Indeed, the agreement may show that the funder will get a disproportionate share of the first dollars in a settlement, which might deter otherwise reasonable settlements.

This argument resembles one of the reasons for allowing discovery of insurance coverage -- that it would "enable counsel for both sides to make the same realistic appraisal of the case," in the words of the 1970 Committee Note. Given the history in many cases of settlement for "the coverage limit," that was an understandable motivation for the 1970 provision. How exactly information about TPLF arrangements factors into settlement

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discussions is less clear. It does not appear that those arrangements constitute funds to cover settlement payouts, which could play a role like the indemnity feature (not the duty to defend) of insurance policies. Perhaps the defendant would be moved to increase its offer once aware that plaintiff has ample financial resources to continue litigating. Perhaps information about the TPLF funder's "take" would inform that decision. But if that's really true, plaintiff's counsel would presumably have an incentive to alert defense counsel to these considerations during settlement negotiations.

The submission also suggests that, having learned of the role of the funder, "the court may wish to require that funder to attend any mediation." On that score, there is at least some uncertainty about whether the insurance analogy is useful. There has been uncertainty about the power of the court to command a nonparty insurer (rather than the insured party) to attend and participate in settlement conferences. See *In re Novak*, 932 F.2d 1397, 1407-08 (11th Cir. 1991) (holding that the court did not have inherent authority to require attendance by a representative of a party's insurer at a settlement conference). Rule 16 was amended in response to rulings that the court could not require a represented party to attend settlement conferences, and Rule 16(c)(1) now authorizes the court to require a party to attend or be "reasonably available" to consider possible settlement. No specific provision extends to insurers or TPLF providers. It might be worthwhile to revisit the insurer question under Rule 16(c)(1) and add TPLF providers.

Finally, it might be noted that if the objective is to identify those with a real stake in the litigation, some revision of Rule 17(a) on real party in interest might be in order.

Facilitating resolution of motions for cost-shifting: The third reason given for the amendment focuses on cost-shifting with regard to discovery. The submission notes that, on questions of discovery cost-shifting, courts may consider the parties' financial ability to pay, and urges that it may be pertinent that one party's suit is "being financed by a lucrative TPLF company." It adds that the pending proposal to revise Rule 26(b)(1) invites consideration of "the parties' resources" in making that determination, a consideration that might be illuminated by requiring disclosure of TPLF agreements.

One reaction to this suggestion is that it is a variant on the "discovery about discovery" issue that occasionally arises -- the question whether it is proper to order discovery about one matter in order to illuminate whether to order discovery about another. One recently-adopted example is Rule 26(b)(2)(B), which recognizes that there may sometimes be reason to allow discovery about the costs of retrieving information from sources that are allegedly not reasonably accessible. That discovery is not

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pertinent to the outcome of the suit, but only to the resolution of a discovery dispute about whether to order contested discovery. Similarly here, reference to TPLF arrangements would bear on proportionality only once a proportionality issue has arisen.

Whether initial disclosure of TPLF arrangements is useful to deciding cost-bearing issues is uncertain. Presumably, once parties have put proportionality at issue both the question of the cost of complying with discovery demands and the wherewithal of the party seeking discovery could merit examination. So it's possible that both sorts of "discovery about discovery" might come into play.

Perhaps relatedly, the submission seems to suggest that TPLF arrangements are somehow improper. Not only does it describe TPLF companies as "lucrative," it also notes that "[u]nlike an average plaintiff, a TPLF entity's business purpose is to raise funds to prosecute and to profit from litigation." *Id.* at 6, emphasis in original. How this factor should affect a determination about the parties' resources under amended Rule 26(b)(1) (if it is amended effective Dec. 1, 2015) is uncertain. It may be worth mentioning that the Committee Note to the current proposed amendment observes:

[C]onsideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that "[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party whether financially weak or affluent."

How this observation will affect the courts' handling the role of the parties' resources in making proportionality determinations remains to be seen.

It may be premature to forecast how TPLF arrangements would affect consideration of the parties' resources beginning after Dec. 1, 2015, should the amendment be adopted. It is probably premature (and possibly unwise) for the Committee to take a view on the propriety of TPLF arrangements.

In regard to the current proposal, the key point seems to be that much depends on the interpretation of the pending amendment to Rule 26(b)(1). Furthermore, even if that amendment makes resources important sometimes, that nonetheless would likely be in the relatively rare case, so that a blanket rule of disclosure may be too broad.

Information bearing on sanctions: The fourth and final

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reason focuses on sanctions. Citing a Florida state-court case holding that TPLF funders who controlled a litigation should be regarded as parties for purposes of sanctions under a state statute authorizing levy of attorneys' fees for claims advanced "without substantial fact or legal support," the submission urges that the proposed disclosure provision would provide important information in such circumstances. It might be noted that Magistrate Judge Cole rejected defendant's reliance on this Florida case in *Miller UK Ltd. v. Caterpillar, Inc.*, 2014, WL 67340 (N.D. Ill., Jan. 6, 2014):

Contrary to Caterpillar's assertion that the [Florida] court held the financing agreement was relevant to the issues in the case-in-chief, there was not so much as an insinuation that it was. Nor did the opinion have anything to do with pretrial discovery of a funding agreement; it involved an appeal of the trial court's denial of plaintiff's *post-trial* motion for attorney's fees and costs against [the nonparty] who funded and controlled plaintiffs' case.

Slip op. at 8-9 (emphasis in original).

The frequency of such situations is uncertain. As noted above, if the idea appears to be to recognize that the funder is actually the real party in interest, it might be that Rule 17(a) is the place to focus. Whether the right place to look for sanctions of this nature is in the rules might also be a subject for discussion. Perhaps this issue really arises more in relation to 28 U.S.C. § 1927 sanctions. It is likely true that the number of cases in which sanctions of any sort are seriously considered is fairly limited, and the number of those that involve TPLF arrangements probably a good deal smaller. Under those circumstances, a disclosure regime that applies in every case except those exempted by Rule 26(a)(1)(B) might seem far too broad to address the concern raised.

* * * * *

This submission raises a number of intriguing issues in relation to a just-emerging phenomenon. Should the Committee wish to proceed, it might well be important initially to try to get a better grasp of the TPLF phenomenon itself, for devising a rule that suitably deals with it seems to depend on some confidence about how it works. Although the phenomenon may have stirred controversy in some quarters, it is not clear how much a rule change would improve the handling of those controversies.

April 9, 2014

Mr. Jonathan C. Rose
Secretary of the Committee on Rules of
Practice and Procedure of the Administrative
Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

RE: Proposed Amendment to Fed. R. Civ. P. 26(a)(1)(A)

Dear Mr. Rose:

On behalf of the U.S. Chamber Institute for Legal Reform, the American Insurance Association, the American Tort Reform Association, Lawyers for Civil Justice, and the National Association of Manufacturers, we are writing to urge the Advisory Committee on Civil Rules (the “Committee”) to adopt an amendment to Rule 26(a)(1)(A) of the Federal Rules of Civil Procedure that would require disclosure of third-party investments in litigation (also called “third-party litigation funding” or “TPLF”) at the outset of a lawsuit. A draft of that proposed amendment is attached as Appendix A.

TPLF occurs when a person or entity with no other connection to a lawsuit (usually a specialized investment company) acquires a right to an outcome-contingent payment from any proceeds produced by the case. Typically, the TPLF investor obtains that right by paying money to the plaintiff (or plaintiff’s counsel). In many instances, that money is used to finance prosecution of the case (e.g., discovery costs, attorneys’ fees, expert witness expenses). Often, plaintiff’s counsel takes the lead in securing the third-party investment; in addition, they sometimes receive the money and agree to make the specified outcome-contingent payment to the TPLF investor from their fee recovery.

TPLF is a burgeoning aspect of civil litigation in the United States. As a recent article put it: “[T]he American TPLF market in complex commercial cases has

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exploded.”¹ We are concerned about the potentially adverse effects TPLF may have on our civil justice system.² At the very least, if TPLF is to be part of our legal system, its use should be transparent. Whenever a third party invests in a lawsuit, the court and the parties involved in the matter should be so advised.

The proposed amendment to Rule 26(a)(1)(A) would simply add to the list of required “initial disclosures” in the existing provision a requirement that “a party must, without awaiting a discovery request, provide to the other parties . . . for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.” (New language underscored.) We believe that this amendment would serve several important purposes, all related to transparency.

First, by identifying persons/entities with a stake in the outcome of the litigation, the contemplated disclosures would allow courts and counsel to ensure compliance with ethical obligations. Many TPLF entities are either publicly traded companies or companies supported by investment funds whose individual shareholders may include judges or jurors.³ Thus, without disclosure of TPLF, a

¹ Jasminka Kalajdzic, Peter Cashman & Alana Longmoore, *Justice for Profit: A Comparative Analysis of Australian, Canadian and U.S. Third Party Litigation Funding*, 61 Am. J. Comp. L. 93, 145 (2013); see also Cassandra Burke Robertson, *International Law in Domestic Courts: The Impact of Third-Party Financing on Transnational Litigation*, 44 Case W. Res. J. Int’l L. 159, 181 (2011) (“Third-party litigation finance is a growing industry. The market for lawsuit investment is already quite large in . . . the U.S.”).

² See U.S. Chamber Institute for Legal Reform (“ILR”), *Selling Lawsuits, Buying Trouble: The Emerging World of Third-Party Litigation Financing in the United States* (Oct. 28, 2009) and U.S. Chamber Institute for Legal Reform, *Stopping the Sale on Lawsuits: A Proposal to Regulate Third-Party Investments in Litigation* (Oct. 24, 2012) for additional background from ILR regarding TPLF.

³ Credit Suisse, for example, recently “spun off its ‘litigation risk strategies’ division into a standalone litigation financing firm.” See Bert I. Huang, *The Democratization of Mass Litigation?: Litigation Finance: What Do Judges Need to Know*, 45 Colum. J.L. & Soc. Probs. 525, 527 (2012) (citing Jennifer Smith, *Credit Suisse Parts with Litigation Finance Group*, WALL ST. J. L. BLOG (Jan. 9, 2012, 6:13 PM), <http://blogs.wsj.com/law/2012/01/09/credit-suisse-parts-with-litigation-finance-group>). In addition, Citigroup financed an investment firm that funded the multi-million-dollar lawsuit brought by 9/11 ground zero workers. See Binyamin Appelbaum, *Betting on Justice: Putting Money on Lawsuits, Investors Share in the Payouts*, N.Y. TIMES, Nov. 15, 2010, at A1. And Burford Capital Limited raised funds from institutions that had shareholders who could have been connected to the litigation in order to bankroll a lawsuit against Chevron in Ecuador. A Special Master appointed in an ancillary proceeding to that case explained that disclosure of the TPLF arrangement was necessary to ensure that U.S. judges hearing aspects of the case had no relationship with Burford that might disqualify them

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judge or juror may unwittingly sit in judgment of a case in which he or she has a financial interest, a scenario that creates an appearance of impropriety and may violate applicable ethics rules. Further, counsel in the case may have investment or representational ties to a funding entity that they may need to disclose to their clients, consistent with their zealous representation obligations. For example, if a defendant's counsel is a shareholder in an entity that may profit from a plaintiff's victory in the litigation, that counsel would need to appropriately address that conflict with his/her client. The proposed amendment would thus aid in the identification of potential ethical issues and thereby protect the integrity of the judicial process.

Second, the proposed amendment would satisfy defendants' entitlement to know who is really on the other side of an action. The decision in *Conlon v. Rosa* is illustrative.⁴ In that case, the plaintiffs challenged a decision of a zoning board of appeals to allow a developer to demolish existing buildings and construct a Walgreens drugstore on the site. One of the plaintiffs owned property near the site and leased her property to Brooks Drugs, a competitor of Walgreens. The developer challenged the plaintiff's asserted status as a real party in interest and demanded disclosure of any funding agreement between her and Brooks Drugs, contending that Brooks Drugs was driving the litigation. The plaintiff objected, contending that evidence of such an agreement was not relevant. But the court disagreed, holding that litigation funding was "surely a relevant subject to explore in discovery."⁵ In so holding, the court warned that "[s]uch hidden funding can introduce a dynamic into a plaintiff's case – an agenda unrelated to its merits, a resistance to compromise – that otherwise might not be present and, unless known, cannot be managed or evaluated."⁶

from acting as neutral arbiters in the case. See Roger Parloff, *Have you got a piece of this lawsuit?*, Fortune, June 28, 2011, <http://features.blogs.fortune.cnn.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/>.

⁴ Nos. 295907, 295932, 2004 Mass. LCR LEXIS 56, at *5 (Mass. Land Ct. July 21, 2004).

⁵ *Id.* at *6-7.

⁶ *Id.* In its ruling, the court in *Conlon* noted that "[a] surprising number of plaintiff's lawsuits are secretly funded by outsiders" and relied on several unreported trial court rulings ordering the production of documents pertaining to litigation funding. *Id.* at *5-6 (citing *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark. Dec. 4, 1997) (ordering production of documents showing contributions to plaintiff); *Jones v. Clinton*, No. LR-C-94-290 (E.D. Ark. Nov. 25, 1997) (same); *Margolis v. Gosselin*, No. 95-J-959 (Mass. App. Ct. Dec. 18, 1995) (upholding Superior Court Order allowing discovery into whether plaintiff filed and pursued her lawsuit "in aid of a super-market operator that competed with Star Market"); *Triandafilou v. Kravchuk*, No. 95-J-355 (Mass. App. Ct. May 30, 1995) (directing production of documents showing funding of challenge to supermarket expansion by a competing supermarket chain).

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That troubling dynamic is particularly apparent when it comes to settlement efforts. A party that must pay a TPLF entity a percentage of the proceeds of any recovery may be inclined to reject what might otherwise be a fair settlement offer in the hopes of securing a larger sum of money. In short, the party will seek extra money to make up at least some of the amount (likely substantial) that will have to be paid to the TPLF entity. Further, some of the TPLF agreements that have become public reveal that TPLF entities often structure their agreements to maximize their take of the first dollars of any recovery, thereby deterring reasonable settlements.⁷ In fact, in the first empirical study of the effects of TPLF, researchers in Australia (where TPLF is prevalent) found that increased litigation funding was “associated with slower case processing, larger backlogs, and increased spending by the courts.”⁸ Disclosures stating that TPLF investments are present in a case will allow both courts and defendants to more accurately evaluate settlement prospects and to better calibrate settlement initiatives. Further, it will allow courts to structure settlement protocols with greater potential to succeed. For example, if a litigation funder controls settlement decisions (in whole or in part), the court may wish to require that funder to attend any mediation. Absent the proposed disclosures, the funder’s presence as a player in the settlement process likely will remain hidden.

Third, a litigation-funding disclosure provision would facilitate a fuller, fairer discussion of motions for cost-shifting in cases involving onerous e-discovery. Courts confronted with cost-shifting requests typically consider a party’s financial ability to pay in determining whether to impose cost-shifting in complex discovery disputes.⁹ If

⁷ The most notorious example of this problem was the \$4 million investment by a fund associated with Burford in the lawsuit against Chevron filed in an Ecuadorian court alleging environmental contamination in Lago Agrio, Ecuador. The investment agreement included a “waterfall” repayment provision, which provided for a heightened percentage of recovery on the first dollars of any award. Under the agreement, Burford would receive approximately 5.5% of any award, or about \$55 million, on any amount starting at \$1 billion. But, if the plaintiffs settled for less than \$1 billion, the investor’s percentage would actually go up. See Funding Agreement Between Treca Financial Solutions and Claimants, *Chevron Corp. v. Donziger*, No. 11-cv-0691 (S.D.N.Y.), Docket No. 356, Ex. B. In a March 4, 2014, opinion in the *Chevron* case, Judge Kaplan found that the Ecuadorian plaintiffs’ “romancing of Burford,” led plaintiffs’ counsel to adopt a litigation strategy against Chevron designed to maximize plaintiffs’ ability to collect on any judgment – rather than focus on securing a just and speedy resolution. See *Chevron*, Docket No. 1874, at 175.

⁸ Daniel Chen, *A Market for Justice: A First Empirical Look at Third Party Litigation Funding* (January 2012), at 27, www.law.upenn.edu/cf/faculty/dabrams/workingpapers/MarketforJustice.pdf.

⁹ See, e.g., *Xpedior Credit Trust v. Credit Suisse First Boston (USA), Inc.*, 309 F. Supp. 2d 459, 466 (S.D.N.Y. 2003) (refusing to order cost-shifting even though the information was not reasonably accessible largely

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a plaintiff's suit is being financed by a lucrative TPLF company, the calculus may differ from a case in which funding is not present. Indeed, the involvement of a TPLF company that has invested to profit from a lawsuit might make cost-shifting all the more appropriate. For this reason too, disclosure of TPLF arrangements at the beginning of civil litigation makes sense.

For similar reasons, a disclosure provision would be particularly appropriate if the Supreme Court adopts the Advisory Committee's current proposal to amend Rule 26(b)(1) to include a proportionality element. The Committee's proposed amendment to Rule 26(b)(1) would make the scope of discovery "proportional to the needs of the case, considering . . . the parties' resources . . . [and] whether the burden or expense of the proposed discovery outweighs its likely benefit." When a TPLF entity acquires an outcome-contingent right to proceeds in a case, it becomes a real party in interest for practical purposes: the TPLF investor pays to prosecute the case; it presumably is involved in strategic decision-making;¹⁰ it presumably communicates with attorneys;¹¹ and it often stands to recover the lion's share of any recovery.¹² Moreover, unlike an

because the defendant's "assets clearly dwarf[ed] [plaintiff's]"); *Lent v. Signature Truck Sys.*, No. 06CV569S, 2009 U.S. Dist. LEXIS 95726, at *7 (W.D.N.Y. Oct. 14, 2009) ("In light of the . . . relative financial resources of the parties, the Court declines to shift the cost of the inspection to the plaintiff."); see also *Annex Books, Inc. v. City of Indianapolis*, No. 1:03-cv-918-SEB-TAB, 2012 U.S. Dist. LEXIS 34247, at *9 (S.D. Ind. Mar. 14, 2012) (basing discovery cost decision in large part on possibility that "the Defendant, a municipality, has greater financial resources than Plaintiffs.").

¹⁰ The lawsuit-investment industry makes no secret of its interest in protecting litigation investments by influencing cases. A principal of investor BlackRobe Capital Partners, LLC, was quoted as saying his firm would take a "pro-active" role in lawsuits." A former Burford chairman said that his new investment company would not "control" litigation, but would "do[] more than was done before." See Nate Raymond, *Sean Coffey Launches New Litigation Finance Firm with Juridica Co-Founder, Vows to Move Beyond 'Litigation Funding 1.0.'* The American Lawyer (June 17, 2011).

¹¹ Recent commercial arbitration between a company called S&T Oil Equipment & Machinery Ltd. and the Romanian government is illustrative. S&T had sought financing for its case from Juridica Investments Limited, and, under their agreement, Juridica paid some legal fees for S&T in exchange for a percentage of arbitration proceeds. After Juridica withdrew funding, causing S&T's case to collapse, a sealed complaint filed by S&T against Juridica in Texas federal court alleged that S&T's own lawyers had begun seeking legal advice from Juridica after Juridica began paying their fees, and that Juridica required the lawyers to share with Juridica their legal strategy for the arbitration and any factual or legal developments in the case. See B.M. Cremades, Jr., *Third Party Litigation Funding: Investing in Arbitration*, Transnational Dispute Management, Vol. 8, Issue 4 (Oct. 2011), at 25-33, 27 n.105 (citing *S&T Oil Equip. & Mach. Ltd. v. Juridica Invs. Ltd.*, No. H-11-0542 (S.D. Tex. Feb. 14, 2011), sealed complaint, ¶¶ 29, 30.

¹² Litigation between a network-security company called Deep Nines and a TPLF provider that had invested in Deep Nines's prior commercial litigation against a software company illustrates this point. Deep Nines had entered into an agreement with the TPLF provider to finance patent litigation with an \$8 million investment. Deep

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average plaintiff, a TPLF entity's business purpose is *to raise funds to prosecute and to profit from litigation*. The existence of a TPLF agreement to fund litigation is thus relevant to the proportionality element of the scope of discovery. TPLF companies are well-heeled strangers to a case who willingly buy into the litigation hoping to profit from its successful prosecution. For the purposes of the resources element of the proportionality requirement contained in the Committee's proposed amendment to Rule 26(b)(1), any TPLF company that has bought a stake in a case should be considered as part of the "parties' resources."

Fourth, the disclosure of TPLF arrangements would be important information to have on the record in the event that a court determines it should impose sanctions or other costs. For example, in *Abu-Ghazaleh v. Chaul*, a Florida state appeals court held that TPLF funders (an individual and company) that controlled the litigation qualified as a party to the lawsuit and therefore became liable for the defendant's attorneys' fees and costs.¹³ The state statute at issue in that case specifically authorized the levy of attorneys' fees on the plaintiff where the claim advanced was "without substantial fact or legal support."¹⁴ The court found that the plaintiff's claim was bereft of such legal or factual support. The court then determined that the TPLF providers were liable for the attorneys' fees because they were essentially a "party" to the litigation (and the named plaintiff was financially unable to pay such fees, which is often the case). The court reached this conclusion by scrutinizing the agreement entered into by the plaintiff and the TPLF providers, which provided that the funders were to receive 18.33% of any award the plaintiffs received and gave them "final say over any settlement agreements proposed to the plaintiffs."¹⁵ As evidenced by *Abu-Ghazaleh*, if courts are put on notice that a third party is financing the underlying litigation, they will be in a much better position to determine how to impose sanctions or other costs, if such costs are warranted in a given case.

Nines had a strong case, and eventually, the case settled for \$25 million. After paying off the investor, as well as paying its attorneys and court costs, Deep Nines only ended up with \$800,000 – about three percent of the total recovery. The TPLF investor took \$10.1 million (the return of its \$8 million investment, plus 10% annual interest, plus a \$700,000 fee). See Alison Frankel, *Patent Litigation Weekly: Secret Details of Litigation Financing*, The Am Law Litigation Daily (Nov. 3, 2009); *Altitude Nines, LLC v. Deep Nines, Inc.*, No. 603268-2008E (N.Y. Sup. Ct.); see also Joe Mullin, *Patent Litigation Weekly: How to win \$25 million in a patent suit – and end up with a whole lot less*, The Prior Art (Nov. 2, 2009).

¹³ See *Abu-Ghazaleh v. Chaul*, 36 So. 3d 691, 693-94 (Fla. Ct. App. 2009).

¹⁴ *Id.* at 694.

¹⁵ *Id.*

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For all of the foregoing reasons, we urge the Committee to consider adoption of the attached proposed amendment to Fed. R. Civ. P. 26(a)(1)(A). Your review of this proposal is greatly appreciated.

Sincerely,



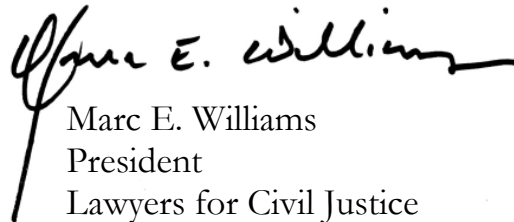
Lisa A. Rickard
President
U.S. Chamber Institute for Legal Reform



J. Stephen Zielezienski
Senior Vice President
American Insurance Association



Sherman "Tiger" Joyce
President
American Tort Reform Association



Marc E. Williams
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Linda E. Kelly
Senior Vice President and General Counsel
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APPENDIX A – PROPOSED AMENDED RULE

The amended Fed. R. Civ. P. 26(a)(1)(A) would read as follows, with the new proposed language in underscore and deletions in ~~striketrough~~:

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; ~~and~~

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment; ~~and~~

(v) for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.

445 **Excerpt from Minutes of October 30-31, 2014 Meeting**

446 *Third-Party Litigation Financing: Dkt. 14-CV-B*

447 This proposal would add automatic initial disclosure of
448 third-party litigation financing agreements to Rule 26(a)(1)(A).

449 Third-party litigation financing is, or seems to be, a
450 relatively new phenomenon. It is not clear just what forms of
451 financial assistance to a lawyer or to a party might be included
452 under this label, nor is it clear whether the label itself
453 should be adopted. Many ads offering financial support to
454 lawyers seem to involve general loans to the firm, or to be
455 ambiguous on the relationship between possible financing terms
456 and specific individual litigation.

457 The proposal seeks to exclude contingent-fee agreements
458 from the disclosure requirement, referring to "any agreement
459 under which any person, other than an attorney permitted to
460 charge a contingent fee representing a party, has a right to
461 receive compensation that is contingent on, and sourced from any
462 proceeds of the civil action, by settlement, or otherwise."
463 This language could include assignments. If work proceeds, the
464 rule language will require careful attention to capturing the
465 arrangements that seem fair subjects for mandatory disclosure,
466 excluding others.

467 The proposal has been supplemented in the few days before
468 this meeting by submissions from opponents and proponents of
469 disclosure addressing some issues raised in the Committee's
470 agenda memo.

471 The proponents of disclosure may be concerned more with
472 generating information to support careful examination of third-
473 party litigation financing in general than with the impact on
474 disclosure in any particular action.

475 Supporters of disclosure invoke the provision for initial
476 disclosure of liability insurance. This disclosure provision
477 grew out of 1970 amendments that resolved a disagreement among
478 district courts by allowing discovery of liability insurance.
479 The idea was that liability insurance plays an important role in
480 the practical decisions lawyers make in determining whether to
481 settle and in preparing to litigate. Permission for discovery
482 was converted to initial disclosure in 1993, making it routine.
483 But the analogy is not perfect. Long before 1970, liability
484 insurance had come to play a central role in supporting actual

485 effectuation of general tort principles. Litigation financing is
486 too new, and experience with it too limited, to come squarely
487 within the same principle. The effect on settlement
488 negotiations, for example, may be rather different. The 1970
489 Committee Note recognized that discovery of insurance terms and
490 limits might encourage settlement, but in other cases might make
491 settlement more difficult. The role of insurers in settlement
492 negotiations is familiar, and in many states has led to rules of
493 liability for bad-faith refusal to settle. What role litigation
494 financing firms may play in settlement decisions, properly or
495 otherwise, is a thorny question.

496 The settlement question is one example of a broader range
497 of questions. Some third-party financing arrangements may, by
498 their terms or in operation, raise questions of professional
499 responsibility. How far may the lender intrude on the client's
500 freedom to decide whether to accept a settlement – for example,
501 an offer on terms that would reward the lender but leave very
502 little for the client? How far may the lender, either in making
503 the arrangement initially or as the action progresses, ask for
504 disclosures that intrude on confidentiality – and what
505 protections may there be to ensure truly informed client
506 consent?

507 The proponents offer several policy reasons for disclosure.

508 First, it is urged that disclosure will help ensure that
509 judges do not have conflicts of interest arising from the
510 judge's stake in an enterprise that, directly or indirectly, is
511 providing the litigation financing. Present Rule 7.1 does not
512 seem to extend this far. Third-party litigation financing,
513 further, may be provided for the first time pending appeal, when
514 the case is no longer in the district court. Should a
515 disclosure rule attempt to reach this far, or should the
516 Appellate Rules be revised in parallel?

517 Another argument is that a defendant should know who is
518 really on the other side of the action. This can affect
519 settlement decisions, for example by knowing that the plaintiff
520 has financial support to stay in the litigation for the long
521 haul. But is it desirable to facilitate settlement at lower
522 values when the defendant knows there is no outside support and
523 that it may be easier to wear out the plaintiff's reserves?
524 Third-party financing firms, moreover, assert that they are
525 always interested in quick, sure payment through settlement.

526 Disclosure also is supported by arguing that it may be
527 important in deciding motions that seek to shift the burden of
528 litigation expenses. Even before the current pending proposals,
529 the rules provide that a court determining the proportionality
530 of discovery should consider the parties' resources. The
531 pending proposals would amend Rule 26(c) to include an express
532 reference to allocating the expense of discovery as part of a
533 protective order, reflecting established practice. The argument
534 is that it would be unfair, or worse, to allow a party to
535 pretend to have no more than the party's own resources to bear
536 the expenses of discovery. But cost-shifting does not seem to
537 happen often, and an inquiry into third-party financing can
538 always be made at the time of a cost-shifting motion.

539 Finally, it is argued that information about third-party
540 financing can be useful in determining sanctions. Support is
541 found in a case from a Florida state court.

542 These questions are interesting. There is much to learn.
543 DePaul Law School held a conference on third-party financing
544 last year, generating more than 500 pages of articles. They
545 provide a fascinating introduction, but not a complete picture.

546 Discussion after this introduction began with the
547 observation that the question is not whether third-party
548 financing agreements are discoverable. They might – or might
549 not – be discoverable as an incident to settlement negotiations.
550 The question whether to provide for automatic initial disclosure
551 may be premature. Whether characterized as a range of phenomena
552 or a broad phenomenon that includes many variations, there are
553 too many things involved to justify adopting a disclosure
554 requirement now. "This is too much different from insurance."
555 These views were echoed by others.

556 Another member offered an analogy to Supreme Court
557 Rule 37.6, which requires disclosures for briefs amicus curiae.
558 The lawyer who files the brief must reveal "whether counsel for
559 a party authored the brief in whole or in part and whether such
560 counsel or a party made a monetary contribution intended to fund
561 the preparation or submission of the brief," and identify
562 contributors other than the identified friend. The Court's
563 interest in knowing who may be masquerading as an amicus is
564 perhaps different from third-party financing of litigation as a
565 whole, but suppose the identified plaintiff has actually been
566 paid off and is as much a shell as a purported amicus?

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567 A different member stated that he deals with third-party
568 financing in about half his cases, often in representing
569 plaintiffs in patent cases. The cost of litigating patent
570 actions is ever increasing. Simple out-of-pocket expenses can
571 run into the millions of dollars. Fewer lawyers are able to
572 take these cases on contingent-fee agreements alone. "Third-
573 party litigation financing makes it possible to bring cases that
574 deserve to be brought." At the same time, the ethical issues
575 are real. Attention has been paid to these issues, and more
576 attention will be paid to them. It is not clear that initial
577 disclosure will advance consideration of these questions. And,
578 although it seems clear that knowledge of third-party financing
579 can advance decision of specific issues in an individual case –
580 cost-shifting is an example – that is better dealt with in the
581 case than by adopting initial disclosure. So too, the analogy
582 to insurance disclosure is not close. It is hard to follow the
583 argument that disclosure will remove a deterrent to settlement.
584 Knowing the specific terms of the financing agreement will not
585 contribute to that. There are, moreover, many different forms
586 of financing: it may be as simple as a loan, with contingent
587 repayment, that leaves the lender entirely out of the conduct of
588 the litigation. But some funders want to be involved in
589 developing and pursuing the case, and in settlement. These
590 arrangements bear on attorney-client privilege, and may lead to
591 divided loyalties as between lender and client. Again, those
592 problems do not have much to do with the disclosure proposal.

593 A judge expressed doubts about the need for disclosure. He
594 routinely requires the person with settlement authority to be
595 present at conferences; "I can get the information I need."
596 Similarly, the information can be got if it is relevant to cost-
597 shifting.

598 Another judge agreed that the proposal is premature. We do
599 not yet know enough about the many kinds of financing
600 arrangements to be able to make rules.

601 A member noted that the ABA 20/20 Commission on Ethics
602 produced a white paper on alternative litigation funding. The
603 paper noted that these practices are evolving. The paper
604 expressed a hope that work would continue toward studying the
605 impact of funding on counsel's independence, candor,
606 confidentiality, and undivided loyalty.

607 A third judge thought third-party funding "is like ghost-
608 writing; I like to know who's writing what I read." The judges
609 on her court have not yet agreed whether they can compel

610 disclosure of third-party financing. But this belongs in the
611 array of things that judges should be aware of.

612 A fourth judge agreed with a different analogy.
613 Professional-looking filings appear in pro se cases. It is
614 useful to know whether the party has had professional help in
615 order to decide whether to measure a pleading by the more
616 forgiving standards that apply to pro se parties. "I do ask
617 questions at status hearings; some of my colleagues are more
618 aggressive." His court is considering a local rule to address
619 this question. The third judge agreed – she has a standing
620 order that requires identification of the actual author.

621 A fifth judge suggested that the concern about potential
622 conflicts extends beyond judges to include opposing counsel.
623 But this is not a study for this Committee to undertake.

624 And a sixth judge agreed that courts have the tools to get
625 the information needed to rule on discovery issues, and to order
626 appearance by a person with settlement authority, and so on.
627 The task of determining the author of nominally pro se papers
628 presents a different question.

629 Discussion concluded with the observation that no one has
630 argued that these questions are unimportant. Nor has it been
631 argued that they should be ignored. But third-party financing
632 practices are in a formative stage. They are being examined by
633 others. They have ethical overtones. We should not act now.

634 Another member agreed that the question is premature. There
635 has been a flurry of articles. "The authors are all over the
636 place." Some, highly respected, have suggested that the
637 concerns reflected by this proposal are premature.

638 The Committee decided not to act on these issues now.

TAB 7C

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40 treat the master complaint as an administrative summary of the
41 claims, "not meant to be a pleading with legal effect."

42 The proposal is to recognize the distinctiveness of master
43 pleadings by adding four new paragraphs to Rule 7(a):

- 44 (a) Only these pleadings are allowed: * * *
- 45 (8) a master complaint in a consolidated
46 proceeding;
 - 47 (9) a master answer in a consolidated
48 proceeding;
 - 49 (10) an individual complaint in a
50 consolidated proceeding; and
 - 51 (11) an individual answer in a consolidated
52 proceeding.

53 (2),(3) Particularized Pleading or Initial Evidence: These
54 alternative proposals seek to elicit from each individual
55 plaintiff more fact information than present rules require from
56 a plaintiff in an individual or class action. One means is
57 enhanced pleading. The other is to require some sort of
58 "meaningful evidence."

59 The premise is that "MDL cases are notoriously
60 characterized by a very high number of meritless claims." One
61 estimate is that 30% to 40% of claims are dismissed at the
62 settlement stage. A means must be found for "dismissing non-
63 meritorious claims before trial." It is not feasible to address
64 the problem by summary-judgment motions in each individual
65 action. Rules 11 and 12(b) are no better suited "for requiring
66 the production of sufficient evidence and dismissal of claims
67 for failing to meet the appropriate standard."

68 One approach would be "to establish that Rule 9's clear,
69 uniform and well-understood 'particularity' requirement applies
70 to individual complaints in MDL cases." There may be an implied
71 illustration of particularity in describing an order in a drug
72 product-liability case that required each plaintiff to establish
73 "standing" by showing a "qualifying injury," and actual use of a
74 minimum amount of the drug within a proximate time of the
75 qualifying injury.

76 A different approach would be to add a new paragraph to
77 Rule 12(b), providing a motion to dismiss for: "(8) failure to
78 provide meaningful evidence of a valid claim in a consolidated
79 proceeding." The rule should in addition require a ruling on
80 the motion within a prescribed period – perhaps 90 days – and,

81 if dismissal is indicated, an additional period – perhaps 30
82 days – to provide "meaningful evidence, after which the
83 dismissal will be made with prejudice." The "meaningful
84 evidence" standard is said to "provide a liberal standard for
85 access to courts," while protecting against meritless claims.

86 (4) Permissive Joinder of Plaintiffs: This suggestion reflects
87 the observation that it has become a practice in MDL cases for
88 plaintiffs' counsel to file a single complaint on behalf of many
89 plaintiffs. This practice circumvents the filing fee required
90 by 28 U.S.C. § 1914(a). It also "effectively creates a loophole
91 for pleading standards" by reducing the care that would be taken
92 in drafting an individual complaint for each plaintiff. To
93 combat this problem, Rule 20 should be amended to establish a
94 separate standard for joinder of plaintiffs in an MDL
95 proceeding. The actual proposal, however, seems to address
96 pleading more than joinder:

97 (c) CONSOLIDATED PROCEEDINGS. In cases consolidated under
98 28 U.S.C. § 1407, a defendant may move the court
99 to require each plaintiff to submit and file a
100 separate complaint detailing the basis for each
101 claim. Neither the defendant's motion nor
102 plaintiff's opposition shall exceed five (5)
103 pages, excluding heading and certificate of
104 service. Either party may request a hearing on
105 this issue. The court may not waive the filing
106 fee required by 28 U.S.C. § 1914(a).

107 (The filing-fee provision is obscure. Section 1914(a) requires a
108 party "instituting any civil action, suit or proceeding, whether
109 by original process, removal or otherwise," to pay a filing fee.
110 It is not clear how filing a "separate complaint" severs an
111 initially permissible joinder of parties into separate actions.)

112 (5) Required Disclosures: Three distinctly separate disclosure
113 proposals are combined under a single heading.

114 The first proposal reports that MDL courts follow different
115 practices "governing discovery into the plaintiffs'
116 allegations." Some focus discovery on the defendant's conduct.
117 Some require individual fact sheets, or enter "Lone Pine"
118 orders. "Responses are often incomplete and unverified." This
119 concern tracks the proposals summarized above: some means must
120 be found to identify and dismiss unfounded claims at the
121 beginning. This proposal focuses on initial disclosure,
122 proposing a new subparagraph 26(a)(1)(F):

123 (F) *Consolidated Proceedings.* In any action
124 consolidated pursuant to 28 U.S.C. § 1407, each
125 plaintiff must disclose within 45 days of
126 transfer or filing significant evidentiary
127 support for his or her alleged injury and for a
128 connection between that injury and the
129 defendant's product or conduct.

130 The second proposal recommends disclosure of third-party
131 litigation funding, tracking the proposal in 17-CV-0. (Lawyers
132 for Civil Justice was one of the thirty organizations submitting
133 17-CV-0.)

134 The third proposal would require disclosure of "the use of
135 lead generators and aggregators." Lead generators are described
136 as lawyers who advertise to attract claimants who are then
137 referred to other lawyers who aggregate the claimants into MDL
138 proceedings. Plaintiffs recruited by these means are different
139 "because such companies are driven by financial incentives to
140 identify as many potential mass tort plaintiffs as possible
141 without taking steps to verify the merits." Identifying
142 plaintiffs brought into the action by these means would inform
143 the court's decisions about discovery, help defendants calculate
144 appropriate settlement values, and deflate the instinctive
145 reaction that the defendant must be liable if such a large
146 number of plaintiffs claim injury. It also protects plaintiffs
147 with legitimate claims. The proposal is to amend Rule
148 26(a)(1)(A)(i), which requires disclosure of witnesses a party
149 may use. The amendment would add a further obligation to
150 provide:

151 if relevant, a disclosure of any third-party claim
152 aggregator, lead generator, or related business or
153 individual, who assisted in any way in identifying any
154 potential plaintiff(s), and if relevant, the
155 identification of any plaintiff that was recommended,
156 referred, or otherwise directed to plaintiff's counsel
157 based on a recommendation, referral, or other
158 information gathered from such a third party claim
159 aggregator, lead generator, or related business or
160 individual.

161 (6) True Consent for Bellwether Trials: This proposal is quite
162 distinct from those summarized above. The underlying concerns
163 extend beyond bellwether trials, and it is not clear that the
164 actual proposed Rule 42(c) would address all of the concerns.

165 The initial description of a bellwether trial is that "the
166 parties present their evidence and the judge informs them of how
167 he or she would rule on the legal issues, often for the purpose
168 of informing settlement discussions." But this description is
169 followed by decrying a case in which the judge refused to enter
170 judgment on a jury verdict after a bellwether trial. Later
171 bellwether trials in the same MDL proceeding are described as
172 suspending the rules of evidence and taking other improper
173 actions, to be followed by an order that defendants submit to
174 9,300 bellwether proceedings. The description may be unclear
175 because actual practices vary, but the uncertainty undermines
176 the part of the proposal that incorporates "bellwether trial" as
177 rule language. In addition, there is a concern that parties may
178 be pressured to agree to a bellwether trial, in part for fear of
179 reprisals against a party who refuses to agree.

180 A distinct concern is advanced in this proposal. It is
181 said that parties to MDL proceedings are often required "to
182 execute a so-called *Lexecon* waiver, waiving remand and
183 jurisdiction." In turn the waiver complicates procedural
184 requirements, statutes of limitations, circuit interpretations
185 of federal law, "etc."

186 These concerns are combined in a proposal to add a new
187 Rule 42(c):

- 188 (c) CASES CONSOLIDATED PURSUANT TO 28 U.S.C. § 1407.
- 189 (1) *Trial Prohibition.* The judge or judges to
190 whom an action is assigned by the Judicial
191 Panel on Multidistrict Litigation may not
192 conduct a trial in a civil action
193 transferred to or directly filed in the
194 proceedings unless all parties to that
195 action consent via a confidential procedure.¹
- 196 (2) *Bellwether Trials.* Parties shall not be
197 required to waive jurisdiction in order to
198 participate in bellwether trials.²

¹ As drafted, this provision mirrors the ambiguity in "directly filed" that is noted below in describing the new § 1407(j) in HR 985.

² This paragraph is particularly unclear. It could be read to suggest that a party may agree to participate in a bellwether trial without waiving jurisdiction, something that makes sense only if the result is not a judgment. Or it may mean that a party who objects to

199 (3) *Remand of Select Cases for Trial.* The judge
200 or judges to whom an action is assigned by
201 the Judicial Panel on Multidistrict
202 Litigation may remand select cases for trial
203 in the transferor courts.

204 (7) Appellate Review: The difficulties in obtaining appellate
205 review of interlocutory orders in MDL proceedings are decried
206 not only for loss of the inherent values of review but also
207 because erroneous rulings result in "an unfair and unbalanced
208 mispricing of settlement agreements." Appellate review is
209 circumscribed by the final-judgment rule and limited concepts of
210 collateral-order finality; great reluctance to provide relief
211 through the extraordinary writ of mandamus; sparing use of
212 permissive appeals under § 1292(b); and the limits of Rule 54(b)
213 as a means of entering a partial final judgment.

214 The proposal, not reduced to actual rule language, is that
215 Rule 54(b) should be expanded "to list a handful of rulings that
216 are highly impactful to the proceedings." Five examples are
217 offered: "(1) *Daubert* motions; (2) pre-emption motions; (3)
218 decisions to proceed with a bellwether trial; (4) judgment in a
219 bellwether trial (to include material rulings during trial); and
220 (5) any ruling that the FRCP do not apply to the proceedings."
221 This description of the proposal does not say whether it would
222 invoke trial-court discretion, as Rule 54(b) does, nor whether
223 it would require a finding that there is no just reason for
224 delaying an appeal.

225 Collectively, these proposals draw from many evaluations of
226 current practice in MDL proceedings. The evaluations that are
227 unfavorable rest on conclusions about current practice as it is.
228 They open correspondingly important questions that look to
229 information about the wide variety of procedural tactics used in
230 managing MDL proceedings, both as a matter of description and as
231 a matter of understanding what works and why it works. Many may
232 be of the view that the current MDL practice works well enough.
233 Identifying those precise subjects that might benefit from
234 Enabling Act rulemaking will be necessary. Translating the
235 final lessons into good rule text would mark the last step. None
236 of these tasks will be easy.

jurisdiction cannot be required to participate in a bellwether trial
on terms that require surrender of the objection.

237

17-CV-CCCCC

238 This submission by the Washington Legal Foundation provides
239 two papers from its Legal Studies Division to support the
240 proposal by Lawyers for Civil Justice. The overall themes are
241 generally similar to 17-CV-RRRRR.

242 The first paper, by James M. Beck, urges earlier
243 application of federal pleading standards to individual
244 plaintiffs. It identifies a widespread problem – MDLs become
245 "warehouses for meritless, unvetted claims that would be quickly
246 dismissed if brought as individualized actions." One suggestion
247 is that every plaintiff should file a detailed plaintiff fact
248 sheet to be treated as an amended complaint and evaluated under
249 current fact-pleading requirements. An alternative is to
250 require "evidentiary support" for each plaintiff's claims. This
251 is compared to present practice, which often puts the burden on
252 defendants to police the deficiencies in fact sheets and to
253 gather medical records identified by the sheets. The resulting
254 costs are unfairly imposed on defendants. Finally, it is
255 recommended that the Manual for Complex Litigation should be
256 revised to allow enforcement of current pleading standards
257 against a standardized form document – a "master complaint" – to
258 enable culling meritless actions.

259 The second paper is a "conversation with" Charna L.
260 Gerstenhaber and John H. Beisner. The themes are familiar.
261 Supported by third-party funding, many MDL proceedings serve as
262 magnets for mass advertising that accumulates inventories of
263 clients whose cases are not screened by the lawyers who file
264 them. A means must be found to screen them out. Plaintiff fact
265 sheets are described not as pleadings but as a response to
266 initial interrogatories and requests to produce. Requiring
267 individual plaintiffs to put up evidence that substantiates an
268 important element of their cases by "Lone Pine" orders is
269 valuable. Defendants should resist "Lexecon waivers" in order
270 to encourage transfer of cases back to the courts where they
271 were filed and where effective summary-judgment practice and
272 trials are possible. And there are recommendations for
273 effective management by MDL judges.

274

17-CV-K

275 This proposal suggests a new Rule 23.3 that would be
276 limited to the largest MDL proceedings, identified as those that
277 include 900 or more individual cases. For whatever reason,
278 there seem to be about 20 of these large consolidations at any

279 one time. Collectively, they include about 90% of all
280 centralized cases, about 120,000. They would be better handled
281 if, "at some point *after* most discovery takes place," and
282 shortly after the bellwether cases have been selected, the work
283 is divided among five judges "to decide whether to dispose of a
284 case on motion, settle, or remand." Judges from other districts
285 could have inter-circuit assignments to sit on the MDL court for
286 these purposes.

287 This proposal aims to increase individualized treatment of
288 individualized cases, recognizing at the same time that in the
289 largest MDL proceedings – the three largest at the moment
290 involve some 15,000 cases each – assigning 3,000 cases to each
291 of five judges will not provide much opportunity for closely
292 individualized treatment. Distribution of bellwether trials to
293 be handled by different judges "could potentially give parties a
294 more accurate picture of their cases' true worth." The pressure
295 on any single judge to get everything right would be reduced.
296 And delaying the allocation to other judges would retain the
297 original purpose of enabling efficient resolution of early
298 discovery issues by a single judge.

299 The proposal recognizes some drawbacks. Reassignment would
300 require formation of new, although smaller, steering committees.
301 "Shared authority would also create the potential for
302 conflicting or inconsistent rulings on similar later-stage
303 issues." The four new judges would have to "quickly familiarize
304 themselves with the litigation."

305 There are some elements in common with 17-CV-RRRRR. It is
306 recognized that MDL judges "have developed procedures out of
307 whole cloth." These procedures include appointment of
308 plaintiffs' steering committees; establishment of common-benefit
309 funds; screening complaints, especially tag-along complaints;
310 and selection of bellwether cases. Common-benefit funds are
311 described as augmenting the pressure on the judge to settle an
312 MDL proceeding. Remands are said to irritate the other judges
313 to whom cases are returned when there is no settlement, and to
314 reduce the prospect of winning "future, highly desired MDL
315 assignments." Common-benefit funds increase this pressure
316 because they demand a large investment of time and money by
317 plaintiffs' lawyers and steering committees. The judge who has
318 put the lawyers to all this work may be reluctant to risk
319 defeating any compensation by failing to achieve a settlement.

320

The Overall Question

321 MDL proceedings in district courts are, by command of Rule
322 1, governed by the Civil Rules. Many Civil Rules are designed to
323 emphasize case-specific judgment and flexibility. Flexibility
324 blends into creativity. The pressures that encourage creative
325 adoption and use of practices designed to manage large-scale and
326 often sprawling MDL proceedings are manifest.

327 Judges respond to these pressures in the spirit of Rule 1,
328 seeking to accomplish the just, speedy, and inexpensive
329 determination of the actions brought into an MDL consolidation.
330 Different proceedings generate different procedures and
331 management techniques. Many of the differences likely result
332 from factors unique to a specific consolidation. But it may
333 prove possible to identify common elements in many MDL
334 proceedings, and to identify common responses. When disparate
335 responses to common elements appear, the very differences may
336 offer fruitful opportunities to identify and encourage the
337 better responses. It also is possible that different responses
338 to common problems, as well as unique responses to unique
339 problems, are inadequate or simply wrong. Some observers, and
340 perhaps particularly those in the academy, fear that creativity
341 may cross the line between sound procedure and the realm of ad
342 hoc, unprincipled control. Short of that, the search for
343 creative solutions may divert attention from better solutions
344 provided by the Civil Rules themselves.

345 So the question is whether the time has come to undertake
346 an effort to generate rules specially adapted to MDL
347 proceedings, including rules that are directed only to MDL
348 proceedings. Such rules should fit comfortably within the
349 § 2072 authority to prescribe "general rules of practice and
350 procedure." MDL proceedings are governed by the Civil Rules now.
351 MDL proceedings involve actions under different sources of
352 substantive law. They are maintained within the universe of
353 civil actions governed by the Civil Rules.

354 The case for getting started now is clear enough. But it
355 is a formidable undertaking. A great deal of information must
356 be gathered to support useful rulemaking. The information
357 includes the character of the common elements of MDL proceedings
358 and of the disparate elements that affect some number – perhaps
359 most – of them. The necessary information also includes the
360 range of practices that have emerged and the contexts in which
361 they have emerged. It seems quite possible that practices have
362 matured to a point that will make most of this information

363 useful for the years that will be required to develop specific
364 rules, if that can be done, and useful also for some years after
365 the rules take effect. New practices surely will continue to
366 emerge, some unique but others that can be adapted into general
367 rules. But there is little reason to expect such upheaval as to
368 defeat any efforts that can be made now.

369 The very breadth, depth, and complexity of the information
370 that bears on any attempt to adopt rules specifically focused on
371 MDL proceedings may be added reason to undertake the work.
372 Congress is interested in these questions. H.R. 985, 115th
373 Congress, has passed in the House. Section 5 includes several
374 provisions that would be added to 28 U.S.C. § 1407, the MDL
375 statute. Some of these provisions are echoed in 17-CV-RRRRR.

376 New § 1407(i) would require counsel for a plaintiff
377 claiming personal injury to "make a submission sufficient to
378 demonstrate that there is evidentiary support * * * for the
379 factual contentions in the plaintiff's complaint regarding the
380 alleged injury, the exposure to the risk that allegedly caused
381 the injury, and the alleged cause of the injury." The court
382 cannot extend the deadline for filing the submission, set at 45
383 days after the action is transferred to or directly filed in the
384 proceedings.³ The judge has 90 days to determine whether the
385 submission is sufficient. If not, the judge shall dismiss the
386 action without prejudice. If the plaintiff fails to tender a
387 sufficient submission within the following 30 days, the action
388 shall be dismissed with prejudice. It is difficult to
389 understand how this provision could work in a large-scale MDL.
390 And the retroactivity provision of the bill creates a special
391 problem. Section 107 applies the bill "to any civil action
392 pending on the date of enactment of this title." On its face,
393 this seems to mean that the MDL judge must act on every case in
394 the consolidated proceeding within the prescribed times. If
395 application on a rolling basis is impossible, application to a
396 massive current consolidation is beyond impossible. A great
397 deal must be learned to determine whether a revised version
398 could work, and would be useful.

399 New § 1407(j) would prohibit the MDL court from conducting
400 "any trial in any civil action transferred to or directly filed
401 in the proceedings unless the parties to the civil action
402 consent to trial of the specific case." This provision may
403 reflect the same concern with bellwether trials advanced in 17-

³ It is not clear whether this subsection would apply to an action filed in the MDL court before the MDL proceeding is created.

404 CV-RRRRR. It has some quirks. On its face, it seems to prohibit
405 trial of an action properly filed in the original jurisdiction
406 of the MDL court – even one filed before the MDL proceeding was
407 born – unless all parties agree to trial. There may, however,
408 be some ambiguity in the term "directly filed." It might be
409 meant to refer only to cases filed under a "direct filing order"
410 that allows a case to be filed in the MDL without passing
411 through the Panel's conditional transfer order process or
412 without satisfying ordinary venue (and personal jurisdiction?)
413 requirements. It also seems to amend the current interpretation
414 of § 1407 that bars trial of a transferred case in the MDL
415 court, a result that seems hard to quarrel with if all parties
416 agree and the judge is willing.

417 New § 1407(k) addresses appeals. It directs that the court
418 of appeals for the circuit of the MDL court "shall permit an
419 appeal to be taken from any order" in MDL proceedings, "provided
420 that an immediate appeal from the order may materially advance
421 the ultimate termination of one or more civil actions in the
422 proceedings." These words suggest an uncertain balance between
423 the command of "shall permit" and the open-ended and necessarily
424 discretionary "materially advance" qualification. At best, it
425 would take a great deal of practice to reduce the opportunities
426 for confusion and delay. Subsection (k) also includes a simpler
427 provision authorizing the court of appeals to accept an appeal
428 from an order granting or denying a motion to remand to state
429 court.

430 New § 1407(l), finally, provides that a personal-injury
431 plaintiff "shall receive not less than 80% of any monetary
432 recovery obtained for those claims." This is a substantive
433 matter outside the Enabling Act. But it could have an impact on
434 MDL case management. If it is read to mean that common benefit
435 awards to lead counsel must come out of the remaining 20%, it
436 could become more difficult to structure the proceedings through
437 the use of lead counsel.

438 Careful inquiry of the sort that characterizes Enabling Act
439 work could prove invaluable in assessing and perhaps improving
440 such provisions as these. The questions are clearly important.
441 The challenge is great – so great that although it would be
442 unwise to defer for long the decision whether to undertake the
443 work, it may be better to seek out further information before
444 committing to a final decision up or down.

445 Many sources can be tapped for further information. Those
446 who are engaged already can be asked for still more. Others can

447 be encouraged to join in. And in particular, a means must be
448 found to win the insights and enlist the guidance of the
449 Judicial Panel on Multidistrict Litigation. Section 1407(f)
450 authorizes the Panel to prescribe rules for the conduct of its
451 business. Its rich experience with consolidation provides a
452 wealth of information that can be invaluable in developing
453 Enabling Act rules for MDL courts. Careful assessment of the
454 comparative opportunities and benefits of § 1407(f) rulemaking
455 and Enabling Act rulemaking will be important.

456 Three principal alternatives frame the question to be
457 decided at this meeting. Work to develop special rules for MDL
458 proceedings could begin immediately. The Committee could
459 instead decide to postpone the work indefinitely because
460 whatever shortcomings characterize current variable practice are
461 outweighed by the difficulties of learning enough about current
462 practice to enable wise rulemaking. Or the Committee could
463 decide to seek out additional information over the next six or
464 twelve months before choosing between the other two
465 alternatives. This third course may be the best choice. MDL
466 practice has grown, and perhaps matured, for many years. Little
467 harm is likely to follow a decision to delay for a short time
468 for the purpose of learning more about the opportunities to
469 frame new, MDL-specific, rules.



**REQUEST FOR RULEMAKING
to the
ADVISORY COMMITTEE ON CIVIL RULES**

**RULES FOR “ALL CIVIL ACTIONS AND PROCEEDINGS”:
A CALL TO BRING CASES CONSOLIDATED FOR PRETRIAL PROCEEDINGS
BACK WITHIN THE FEDERAL RULES OF CIVIL PROCEDURE**

August 10, 2017

Lawyers for Civil Justice (“LCJ”)¹ respectfully submits this Request for Rulemaking to the Advisory Committee on Civil Rules (“Committee”) requesting amendments to adapt the Federal Rules of Civil Procedure (“FRCP”) to cases that are consolidated pursuant to 28 U.S.C. § 1407 for “coordinated or consolidated pretrial proceedings” (“MDL cases”).

I. INTRODUCTION

According to Rule 1, the FRCP “govern the procedure in all civil actions and proceedings in the United States district courts.”² It is widely known, however, that the FRCP do not govern key elements of procedure in many MDL cases, which now constitute 45 percent of the federal docket.³ The reason is straightforward: the FRCP no longer provide practical presumptive procedures in MDL cases, so judges and parties are improvising. While some *ad hoc* procedures have more merit than others, they all share the same lack of clarity, uniformity and predictability that the FRCP are supposed to remedy.⁴ Many common practices also cause an unbalanced

¹ Lawyers for Civil Justice (“LCJ”) is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 29 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

² FED. R. CIV. P. 1.

³ Excluding prisoner and social security cases. Duke Law Center for Judicial Studies, “MDL Standards and Best Practices,” xi (2014).

⁴ The FRCP’s purpose is to provide a consistent and clear method for arriving at justice. In the words of Second Circuit Judge Martin Manton on the 1938 adoption of the Rules:

The new Federal Rules of Civil Procedure are a consistent, comprehensive, and, I might add, a successful, effort to bring judicial procedure in harmony with the tone of our economic and social life. They establish a uniform system throughout the country; they raise federal practice to the position of a real body of jurisprudence; they seek to eliminate needless delays in the disposition of cases; they free the courts and practitioners from that confusion which often resulted from the application of state rules of practice to

litigation environment by failing to provide protections inherent in the FRCP. A solution is needed, and the Committee should undertake an effort to remedy this situation by bringing MDL cases back within the existing and well-proven structure of the FRCP.⁵

Many MDL proceedings are governed by a “master complaint,” but courts are inconsistent on whether such documents are pleadings. In many MDL cases, there is no pretrial testing of claims because the existing FRCP mechanisms for doing so are not practical at a large scale. Many plaintiffs are joined to MDL cases despite their failure to comply with statutory requirements for filing a complaint and the courts’ lack of jurisdiction over their claims. Many MDL courts hold “bellwether trials” without obtaining the willing consent of the parties. And very, very few MDL cases get the benefit of appellate review because the FRCP has no provision for how such review can occur.

These holes in the FRCP are vacuums that others are acting to fill. In January, the U.S. House of Representatives passed the Fairness in Class Action Litigation Act of 2017 (“FICALA”),⁶ which would supersede the FRCP in MDL cases with statutes requiring plaintiffs to demonstrate “evidentiary support” for each claim, prohibiting transferor courts from holding “bellwether” trials unless all parties consent, requiring that federal jurisdiction exist for each plaintiff, and providing mandatory appellate review. Meanwhile, the Duke Law Center for Judicial Studies and the Emory Institute for Mass Claims and Complex Litigation are each working on “best practices” as a stand-in for missing rules of procedure. Those efforts, however well intended, are not sufficient reason for the Committee to remain on the sidelines because “[t]he Judicial Conference has long opposed direct amendment of the federal rules by legislation rather than through the deliberative process of the Rules Enabling Act,”⁷ and best practices are no substitute for civil rules—especially when it comes to fundamental matters relating to the integrity of the judicial process.

Bringing MDL cases back within the FRCP is a matter of adapting well-established principles, not a *de novo* invention. The Committee could draft a handful of amendments that would furnish MDL cases with the same procedural clarity enjoyed by the other 55 percent of civil cases for the basic steps of litigation: pleadings, dismissal, joinder, required disclosures, trial and appellate review. Doing so would mean amendments in six areas:

- (1) Pleadings: Include in Rule 7 the documents that function as pleadings in MDL cases;
- (2) Dismissal: Add individual claims in MDL cases to Rule 9’s list of matters that must be pled with particularity or, alternatively, create a Rule 12(b)(8) for individual claims in MDL cases that lack meaningful evidence of a valid claim;

federal litigation; they are clearly and concisely phrased, and seem to cover every situation which might ordinarily arise in the course of a law suit.

Judge Martin Manton, “Foreword,” MOORE’S FEDERAL PRACTICE: A TREATISE ON THE FEDERAL RULES OF CIVIL PROCEDURE, v.1 (1938).

⁵ There are, of course, many facets of MDL practice that do not fall within the Committee’s jurisdiction, and the Committee should leave those matters to others.

⁶ Fairness in Class Action Litigation Act of 2017, H.R. 985, 115th Cong. (2017).

⁷ Letter from David G. Campbell, Chair, Committee on Practice and Procedure, and John D. Bates, Chair, Advisory Committee on Civil Rules, to Bob Goodlatte, Chairman, H. Comm. on the Judiciary (Feb. 14, 2017).

- (3) Joinder: Amend Rule 20 to prohibit joinder of plaintiffs who fail to abide by the statutory requirements for filing a complaint and over whose claims the MDL court lacks jurisdiction;
- (4) Required disclosures: Modify Rule 26 to require plaintiffs in MDL cases to produce meaningful evidence in support of their claims, and to disclose the existence of third-party financing arrangements and the use of lead generators;
- (5) Trial: Establish in Rule 42 a confidential consent procedure without which bellwether trials in consolidated trials cannot occur; and
- (6) Appellate review: Create a straightforward pathway for appellate review of critical rulings in MDL cases.

These amendments, which are squarely within the Committee’s core jurisdiction and responsibility, would restore the FRCP as “rules for all civil actions and proceedings” by providing MDL cases with clear, consistent and uniform procedures that presumptively govern the basic steps of litigation.

II. PLEADINGS: RULE 7 SHOULD ACKNOWLEDGE MDL PLEADING PRACTICES BY INCLUDING “MASTER COMPLAINTS” AND “INDIVIDUAL COMPLAINTS” AS PLEADINGS.

It is common practice in MDL cases for a “master complaint” to function as the pleading that guides the proceedings (particularly discovery). Master complaints are an invention driven by the need for efficiency inherent in MDL cases, and they often deliver that efficiency by distilling the common allegations and enabling a master answer. Master complaints are distinguished from individual complaints, which have a different role when master complaints are used. MDL courts deal with these two types of complaints separately and even impose different legal standards. Some of the courts that give master complaints the function of pleadings ironically hold that master complaints are not pleadings when it comes to motions under Rules 8, 9, 11 or 12.⁸ That type of inconsistency is inevitable when practice exists outside the framework of the FRCP.

⁸ See e.g. *In re Trayslol Prods. Liab. Litig.*, No. 08-MD-1928, 2009 U.S. Dist. Lexis 65481, at *72-73 (S.D.F. 2009). (“The Court cannot envision the task of adequately pleading the consolidated master complaint in a manner which would satisfy the Defendants, without completely removing the compromise and attempt at efficiency the Parties and I had in mind in allowing the filing of the Consolidated Master Complaint. At this stage of the litigation I prefer to assess the sufficiency of plaintiffs’ claims with substantial leniency, especially when the information that may or may not support Plaintiffs’ claims is largely within the control of the Defendants.”); see also *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 590 (6th Cir. 2013) (“In many cases, the master complaint is not meant to be a pleading with legal effect but only an administrative summary of the claims brought by all the plaintiffs.”); *In re Nuvaring Prods. Liab. Litig.*, Case No. 4:08MD1964, 2009 U.S. Dist. Lexis 70614, at *16 (E.D.Mo. Aug. 6, 2009) (The parties acknowledged “that a master consolidated complaint does not supersede the underlying cases and that consolidation of the claims is a matter of convenience and economy in administration.”); *In re Zimmer Nexgen Knee Implant Prods. Liab. Litig.*, Case No. 11c5468, MDL No. 2272, 2012 U.S. Dist. Lexis 117239, at *18 (E.D. Ill. Aug. 16, 2012) (noting Plaintiffs cite a number of MDL opinions which recognize that a “master” or “consolidated” complaint is a “procedural device used to promote judicial efficiency and economy,” not to be “given the same effect as an ordinary complaint” or considered to “merge the suits into a single cause, or

The first step to bringing MDL cases back within the ambit of the FRCP is to acknowledge that master complaints exist, that they are pleadings, and so are master answers. Where master complaints exist, individual complaints have a different role than they do in ordinary cases, so they should be acknowledged separately as well. The following additions to Rule 7 would achieve the purpose:

- (8) a master complaint in a consolidated proceeding;
- (9) a master answer in a consolidated proceeding;
- (10) an individual complaint in a consolidated proceeding;
- (11) an individual answer in a consolidated proceeding.

III. DISMISSAL: RULE 9 SHOULD REQUIRE INDIVIDUAL COMPLAINTS IN CONSOLIDATED CASES TO BE PLED WITH PARTICULARITY.

MDL cases are notoriously characterized by a very high number of meritless claims. By one estimate, approximately 30 to 40 percent of plaintiffs' claims are dismissed at the settlement stage.⁹ The fact that so many meritless claims remain part of the proceedings until settlement indicates a significant failure of procedure.

A. Current Mechanisms Are Insufficient for Testing the Merits of Claims in MDL Cases.

A mechanism for dismissing non-meritorious claims before trial is key to a functioning judicial system. Soon after the FRCP were adopted, Chief Judge Joseph Chappell Hutcheson, Jr. of the Fifth Circuit explained:

Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial; it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial; it is to carefully test this out, in advance of trial, by inquiring and determining whether such evidence exists.¹⁰

change the rights of the parties, or make those who are parties in one suit parties in another.”) (citing *In re Propulsid Prods. Liab. Litig.*, 208 F.R.D. 133, 141-42, 144 (E.D. La. 2002); *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 454 (E.D. La. 2006) (“[A] master complaint is only an administrative device used to aid efficiency and economy and, thus, should not be given the status of an ordinary complaint.”); *In re Digitek Prods. Liab. Litig.*, MDL No. 2:08md01968, 2009 WL 2433468, at *8 (S.D. W. Va. Aug. 3, 2009) (considering a motion to dismiss in light of “[t]he administrative nature of a master complaint and its focus on facilitating management of the litigation, as opposed to being a primary operative pleading.” This court agrees that ‘master’ or ‘consolidated’ complaints must be interpreted in light of the ‘primary purpose of multidistrict litigation: ‘to promote efficiency through the coordination of discovery.’”)).

⁹ Malini Moorthy, “Gumming Up the Works: Multi-Plaintiff Mass Torts,” U.S. Chamber Institute for Legal Reform, 2016 Speaker Showcase, *The Litigation Machine*, available at <http://www.instituteforlegalreform.com/legal-reform-summit/2016-speaker-showcase>.

¹⁰ *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940).

Protecting the judicial system from non-meritorious claims serves several purposes, and “[c]hief among these is avoidance of long and expensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement.”¹¹

Although summary judgment has been granted in several MDL cases where causes of action were not supported by the facts, in many other cases, Rule 56 has proven to be of little utility because it is not an efficient mechanism for culling non-meritorious claims out of a pool of thousands. Rule 56’s requirement that the court evaluate the plaintiffs’ legal claims based on undisputed material facts means that a motion for summary judgment requires full discovery, including expert testimony on causation. In an MDL case with thousands of plaintiffs, courts and parties lack the time and resources to handle the briefing and hearings on thousands of individual claims.

For different reasons, Rules 11¹² and 12(b)¹³ are also failing to provide an appropriate procedural framework for testing the sufficiency of claims in MDL cases. Although Rule 11 requires counsel to have a basis for every claim filed, the rule is neither designed for, nor capable of, serving as the routine mechanism for requiring the production of sufficient evidence and dismissal of claims for failing to meet the appropriate standard. Rule 12(b) as currently written is also ill-fitted for this purpose; its requirement that courts accept all well-pleaded factual allegations in the complaint, together with the nearly universal preference for liberal leave to amend, do not provide for the substantive testing or finality needed to focus large MDL cases on the merits of legitimate claims.¹⁴

This current rule environment allows non-meritorious claims to thrive. Judge Clay D. Land described this dynamic in an order granting summary judgment in an MDL proceeding regarding pelvic mesh implants:

The Court has spent considerable time in this MDL deciding summary judgment motions when plaintiffs’ counsel should have known that no good faith basis existed for pursuing the claim to the summary judgment stage. Some of these cases involved claims that were clearly barred by the applicable statute of limitations. In others, plaintiffs’ counsel was unable to identify a specific causation expert or point to other evidence to create a genuine factual dispute on causation. And in some cases, counsel threw in the towel and did not even bother to respond to the summary judgment motion. Nevertheless, the Court had to waste judicial resources deciding motions in cases that should have been dismissed by plaintiffs’ counsel earlier—cases that probably should never have been brought in the first place. Enough is enough.¹⁵

¹¹ *Washington Post Co. v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966) (The Hon. J. Skelly Wright).

¹² FED. R. CIV. P. 11 (by filing a complaint (or other legal briefing) the filing attorney certifies to “[t]he best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under circumstances,” that they have a basis for the claim).

¹³ FED. R. CIV. P. 12(b).

¹⁴ See e.g. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

¹⁵ *In re Mentor Corp. Obtape Transobturators Sling Prods. Liab. Litig.*, MDL No. 2004 F:08-MD-2004, at *1 (Sept. 7, 2016).

Frustrated that flawed claims had not been identified without resorting to Rule 56, Judge Land threatened plaintiffs' counsel with sanctions if he had to rule on a similar summary judgment motion in the future.¹⁶ He observed that, after fifteen years on the bench and a "front row seat as an MDL transferee judge," he is convinced an unintended consequence of the MDL process is the filings of new cases with "marginal merit" that "would not have been filed otherwise."¹⁷ These gaps in procedural rules should be fixed.¹⁸

B. Inconsistent, *Ad Hoc* Procedures are Not the Solution.

Because the FRCP lack a practical standard for verifying plaintiffs' claims and dismissing the ones that lack merit, many MDL courts understandably take it upon themselves to invent *ad hoc* procedures for that purpose. In the *Vioxx* MDL litigation, for example, the court developed three requirements for standing: each plaintiff had to show (1) that he or she had a qualifying injury—i.e., a heart attack, an ischemic stroke or sudden cardiac death; (2) that he or she used a minimum amount of Vioxx; and (3) that he or she took Vioxx within a proximate time of the alleged medical event.¹⁹ The results show both why such a requirement is necessary as well as the utility of a test that is more rigorous than Rule 12(b) but not as burdensome as Rule 56. Sixty-three percent of the plaintiffs were disqualified after failing to meet the court's requirements. Of that 63 percent, 32 percent failed to meet all of the standards, and an additional 31 percent failed even to provide all of the necessary paperwork.²⁰ Although this is a success story for an *ad hoc* pre-trial testing mechanism, the fact that this occurs only in some cases and not others demonstrates that a regular, transparent rule is needed.

The most efficient way to enforce meaningful pleading standards for MDL cases is to establish that Rule 9's clear, uniform and well-understood "particularity" requirement applies to individual complaints in MDL cases. Doing so would ensure that meritorious claims proceed to litigation and prevent non-meritorious claims from clogging the courts' dockets, distracting parties from the actual areas of contention and serving as a means of harassment or coercion.

C. Alternatively, Rule 12(b) Should Be Amended to Allow Dismissal of Individual Complaints that are Unsupported by Meaningful Evidence.

In the alternative, the Committee should create a new process for judicial determination of sufficiency and for dismissal of claims that fail to meet that standard in Rule 12(b).²¹ The

¹⁶ *Id.* at *2.

¹⁷ *Id.* at *4-5.

¹⁸ The Judicial Panel on Multidistrict Litigation has declined to consider the presence of non-meritorious claims prior to establishing an MDL proceeding. *See, e.g., In re Ethicon Physiomesher Flexible Composite Hernia Mesh Prods. Liab. Litig.*, MDL No. 2782 (J.P.M.L. June 2, 2017) ("On several occasions, the Panel has rejected the argument that we should deny centralization because creating an MDL would proliferate non-meritorious claims. . . . [W]hether particular claims are without merit is a matter "more appropriately addressed to the court which oversees those claims.") (citations omitted).

¹⁹ *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, Transcript of Record (E.D. La. July 27, 2007).

²⁰ U.S. Chamber of Commerce, "MDL Proceedings: Eliminating the Chaff," 11 (Sept. 2015).

²¹ Doing so would accomplish in the FRCP, more simply, what FICALA would impose by statute. FICALA would create a statute as follows: "(i) Allegations verification.—In any coordinated or consolidated pretrial proceedings conducted pursuant to subsection (b), counsel for a plaintiff asserting a claim seeking redress for personal injury whose civil action is assigned to or directly filed in the proceedings shall make a submission sufficient to

following might suffice:

(8) failure to provide meaningful evidence of a valid claim in a consolidated proceeding.

The rule should also set forth a timeline for rulings on such motions (90 days would be reasonable), as well as a further opportunity (perhaps 30 days following dismissal) for plaintiffs to come forth with meaningful evidence, after which the dismissal will be made with prejudice. This mechanism would benefit courts and parties alike by providing clarity and consistency. It would provide a liberal standard for access to courts while still allowing a mechanism for protecting the case and the courts from meritless claims that can be used to harass or coerce settlements.

IV. JOINDER: THE FRCP SHOULD PROHIBIT JOINDER OF PARTIES WHO FAIL TO COMPLY WITH FILING REQUIREMENTS OR OVER WHOSE CLAIMS THE TRANSFEREE COURT LACKS JURISDICTION.

A party initiating a lawsuit must pay a filing fee to cover the administrative costs of processing and assigning the claim.²² It has become common practice in MDL cases, however, for plaintiffs' counsel to circumvent the rule by filing a single complaint on behalf of many plaintiffs.²³ This unilateral pre-consolidation maneuver not only deprives the courts of important fee revenue, but also effectively creates a loophole for pleading standards. As one court observed: "[O]ften times if a lawyer has to prepare a pleading for each individual claimant, more often than not, the lawyer will make sure that this is a valid claim or significant claim before they deal with that and file a lawsuit normally. It's easier to join multiple claimants than it is to file a specific lawsuit for each."²⁴ In other words, if Rule 20 honored 28 U.S.C. § 1914(a), it would also reinforce Rule 11, which requires attorneys to consider whether there are grounds for their client's claims.²⁵

Rule 20 enables the circumvention of filing requirements in MDL cases because of its broad allowance of joinder and its narrow grounds for opposing it. Under Rule 20, a party may challenge joinder on the basis of "embarrassment, delay, expense, or other prejudice that arises..."²⁶ The Rule does not contemplate a challenge to joinder based on the misuse of it to avoid filing fees or other improper conduct.

demonstrate that there is evidentiary support (including but not limited to medical records) for the factual contentions in plaintiff's complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of the injury. The submission must be made within the first 45 days after the civil action is transferred to or directly filed in the proceedings. That deadline shall not be extended. Within 90 days after the submission deadline, the judge or judges to whom the action is assigned shall enter an order determining whether the submission is sufficient and shall dismiss the action without prejudice if the submission is found to be insufficient. If a plaintiff in an action dismissed without prejudice fails to tender a sufficient submission within the following 30 days, the action shall be dismissed with prejudice."

²² 28 U.S.C. § 1914(a).

²³ Seth Rothman and Michael Tiger, "Severance in Multiplaintiff Pharmaceutical Cases," LAW 360 (Oct. 18, 2011).

²⁴ *In re Vioxx Prods. Liab. Litig.*, MDL No. 1657, Transcript of Record at 18 (E.D. La. July 27, 2007).

²⁵ J. Story, EQUITY PLEADINGS § 47 (1838) (Counsel's signature served to guarantee that "there is good ground for the suit in the manner in which it is framed.")

²⁶ FED. R. CIV. P. 20(b).

The Committee should amend Rule 20 to provide a common standard for determining whether plaintiffs in an MDL proceeding should be joined or if instead a separate complaint should be submitted for each one. A useful analogy exists in Rule 23, which requires the court to consider whether common issues predominate over the individual's. The following amendment to Rule 20 might suffice:

Rule 20. Permissive Joinder of Parties

....

(c) Consolidated Proceedings. In cases consolidated pursuant to 28 U.S.C. § 1407, a defendant may move the court to require each plaintiff to submit and file a separate complaint detailing the basis for each claim. Neither the defendant's motion nor plaintiff's opposition shall exceed five (5) pages, excluding heading and certificate of service. Either party may request a hearing on this issue. The court may not waive the filing fee required by 28 U.S.C. § 1914(a).

V. REQUIRED DISCLOSURES: RULE 26 SHOULD REQUIRE PRODUCTION OF MEANINGFUL EVIDENCE IN SUPPORT OF CLAIMS IN MDL CASES, AND SHOULD MANDATE DISCLOSURE OF THIRD-PARTY FINANCING AND THE USE OF LEAD GENERATORS AND AGGREGATORS.

A. Rule 26 Should Require Plaintiffs to Disclose Significant Evidence Supporting their Claims Early in the Proceeding.

One of the FRCP's most visible and important failures in the MDL context relates to procedures governing discovery into the plaintiffs' allegations. Practices vary wildly. Some MDL judges in effect ignore such discovery by focusing instead on discovery about defendants' conduct. Others fill the rules vacuum by using *ad hoc* procedures including "plaintiff fact sheets" and "*Lone Pine*" orders (named after *Lore v. Lone Pine Corp.*²⁷). The utility of such *ad hoc* requirements varies depending upon what the court orders and how the court enforces compliance. The best "fact sheets" ask plaintiffs to state when they used the product in question and to describe how they were injured. The best *Lone Pine* orders require plaintiffs to provide evidence such as medical records and an affidavit by a physician.²⁸ Responses are often incomplete and unverified,²⁹ so, as a practical matter, the onus to follow up and gather recalcitrant plaintiffs' responses frequently falls upon defendants. Whether effective or not, the common denominator

²⁷ *Lore v. Lone Pine Corp.* No. L-33606-85, 1986 WL 637507 (N.J. Super. Nov. 18, 1986) at 12; *see also* Michelle Yeary, "Lone Pine Cheat Sheet," (Nov. 30, 2012), available at <https://www.druganddevicelawblog.com/2012/11/lone-pine-cheat-shee.html> (listing every entry of a *Lone Pine* order from 1986-2012).

²⁸ In one case, the judge required plaintiffs to submit notices of diagnoses certifying that a licensed medical doctor examined the plaintiff and diagnosed them with the complained-of condition. U.S. Chamber of Commerce, "MDL Proceedings: Eliminating the Chaff," 15-16 (Sept. 2015) (internal citations omitted).

²⁹ Duke Law Center for Judicial Studies, "MDL Standards and Best Practices," 11 (2014) (citing John H. Beisner & Jessica D. Miller, *Litigate the Tort, Not the Mass*, Washington Legal Foundation (2009)).

of all these *ad hoc* methods is that they lie outside the FRCP, and therefore are not uniform or transparent, and there are no clear standards.

Unclear standards and unpredictable results are inevitable when the FRCP leave it to each court to fashion a process for discovery. Therefore, Rule 26 should require plaintiffs in MDL cases to provide meaningful evidentiary support for allegations of “fact” and “injuries” at an early point in the proceeding. An amendment to Rule 26(a)(1) could look something like this:

(F) *Consolidated Proceedings*. In any action consolidated pursuant to 28 U.S.C. § 1407, each plaintiff must disclose within 45 days of transfer or filing significant evidentiary support for his or her alleged injury and for a connection between that injury and the defendant’s product or conduct.

B. Rule 26 Should Require Disclosure of Third-Party Finance Arrangements.

The course of many civil cases—especially MDL cases—is strongly influenced by non-parties that are largely unknown to courts and parties despite having become fixtures in the federal justice system. Entities that provide third-party litigation finance (“TPLF”) to support lawsuits exercise significant control over litigation decisions and should be disclosed to the court, the parties and juries.

In a typical TPLF arrangement, a third-party business or individual acquires the right to receive an outcome-contingent payment from any proceeds that result from the proceeding. In exchange for that right, the TPLF provider funds some or all of the plaintiff or plaintiff’s counsel’s litigation costs. The TPLF provider also obtains the ability to exercise significant decision making authority over material litigation and settlement decisions.³⁰

An amendment to Rule 26(a)(1) should require parties to disclose such arrangements with their initial disclosures. The amendment should provide:

“a party must, without awaiting a discovery request, provide to the other parties . . . for inspection and copying as under Rule 34, any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.” (New language underscored.)

This amendment is necessary for several reasons. First, by identifying people and entities with a stake in the outcome of the litigation, the disclosure would allow courts and counsel to ensure compliance with the parties’ ethical obligations. For example, many TPLF entities are public companies whose shareholders could include jurors, judges or parties.³¹

³⁰ See Letter from U.S. Chamber Institute for Legal Reform, the American Insurance Association, the American Tort Reform Association, Lawyers for Civil Justice and the National Association of Manufacturers, submitted to Jonathan C. Rose, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts, “Re: Proposed Amendment to FED. R. CIV. P. 26(a)(1)(A),” (April 9, 2014), available at <http://www.lfcj.com/disclose-third-party-litigation-funders.html>.

³¹ Credit Suisse, for example, recently “spun off its ‘litigation risk strategies’ division into a standalone litigation financing firm.” See Bert I. Huang, “The Democratization of Mass Litigation?: Litigation Finance: What Do Judges

Second, courts applying the Rule 26(b)(1) proportionality standard concerning the scope of discovery are required to consider “the parties’ resources” as one factor. Obviously, a third-party’s agreement to fund some or all litigation expenses is material to that inquiry.

Third, knowing who is on the other side can assist a party to determine its litigation and/or settlement strategy. A party’s obligation to pay a percentage of proceeds to a TPLF entity could influence that party’s willingness and ability to resolve a litigation matter and will shape settlement negotiations. Disclosure can help a party understand the risk faced by cost-shifting or mandatory fee awards, particularly if the other side will not be constrained by the normal liquidity considerations that must be made in litigating a case.³²

Lastly, the disclosure of TPLF arrangements would be important information to have on the record in the event that a court determines it should impose sanctions or other costs. To the extent a court eventually determines a claim lacks merit, the court may consider not only imposing sanctions against plaintiff’s counsel, who may have deep or shallow pockets, but also on the TPLF entity since it could share responsibility for the financing and encouragement of the lawsuit.³³

C. Rule 26 Should Require Disclosure of the Use of Lead Generators and Aggregators.

The fact that 30 to 40 percent of claims in some MDL cases are dismissed at the settlement stage³⁴ is largely a function of the way those claims enter into the judicial system: through “lead generators” and “aggregators.” A study by the Washington Legal Foundation found that the lack of merit in many mass tort claims is due to the fact that “many of the claims are not developed by the filing counsel—they effectively were purchased from other attorneys who advertised to

Need to Know,” 45 COLUM. J.L. & SOC. PROBS. 525, 527 (2012) (citing Jennifer Smith, Credit Suisse Parts with Litigation Finance Group, WALL ST. J. L. BLOG. (Jan. 9, 2012), available at <http://blogs.wsj.com/law/2012/01/09/credit-suisse-parts-with-litigation-finance-group>). In addition, Citigroup financed an investment firm that funded the multi-million dollar lawsuit brought by 9/11 ground zero workers. See Binyamin Appelbaum, “Betting on Justice: Putting Money on Lawsuits, Investors Share in the Payouts,” N.Y. TIMES, Nov. 15, 2010, at A1. Burford Capital Limited raised funds from institutions that had shareholders who could have been connected to the litigation in order to bankroll a lawsuit against Chevron in Ecuador. A Special Master appointed in an ancillary proceeding to that case explained that disclosure of the TPLF arrangement was necessary to ensure that U.S. judges hearing aspects of the case had no relationship with Burford that might disqualify them from acting as neutral arbiters in the case. See Roger Parloff, “Have You Got a Piece of This Lawsuit? (June 28, 2011), available at <http://features.blogs.fortune.cnn.com/2011/06/28/have-you-got-a-piece-of-this-lawsuit-2/>.

³² See Letter from U.S. Chamber Institute for Legal Reform, the American Insurance Association, the American Tort Reform Association, Lawyers for Civil Justice and the National Association of Manufacturers, submitted to Jonathan C. Rose, Secretary of the Committee on Rules of Practice and Procedure of the Administrative Office of the United States Courts, “Re: Proposed Amendment to Fed. R. Civ. P. 26(a)(1)(A),” (April 9, 2014), available at <http://www.lfcj.com/disclose-third-party-litigation-funders.html>.

³³ See *Id.*

³⁴ Malini Moorthy, “Gumming Up the Works: Multi-Plaintiff Mass Torts,” U.S. Chamber Institute for Legal Reform, 2016 Speaker Showcase, The Litigation Machine, available at <http://www.instituteforlegalreform.com/legal-reform-summit/2016-speaker-showcase>.

attract claimants in their home markets with no intention of ever litigating the claims themselves.”³⁵

The lead generation industry is big business. One study estimates that lead generating companies ran a total of 67,000 personal injury or mass tort commercial television spots in one year.³⁶ It has drawn the attention of the American Medical Association (“AMA”),³⁷ other health professionals and Congress, which have documented not only an increase in the number of lawsuits, but also an increase in the number of patients who abandon their prescriptions in defiance of their doctors’ orders after viewing inflammatory commercials.³⁸ The House Judiciary Committee initiated an investigation into lead-generating companies in March 2016³⁹ and held a hearing about the effects of advertising for plaintiffs in June 2017.⁴⁰

Plaintiffs originating from lead generators and aggregators are different from other plaintiffs because such companies are driven by financial incentives to identify as many potential mass tort plaintiffs as possible without taking steps to verify the merits of those potential plaintiff’s claims. In one case, for example, lead generators drove mobile X-ray vans to local union halls, motels, strip mall parking lots and other locations to provide “assembly-line” X-rays at a rate of one every five to ten minutes.⁴¹ The lawyers then engaged a small number of physicians to read hundreds of thousands of X-ray films generated by the screenings, who in turn diagnosed the claimants with asbestosis, lung profusions or other asbestos related injuries.⁴² Professor Lester Brickman of the Cardozo School of Law reviewed those litigation screenings and concluded that “the vast majority of those diagnosed with asbestosis would not have been found to have an asbestos-related disease if they were examined in a clinical setting by doctors without a financial stake in the litigation.” Professor Brickman estimates that while the litigation screenings often result in diagnosis of asbestosis of 80 percent or more of individuals screened, the clinical diagnosis rate is closer to 15 to 23.2 percent.⁴³ Confirming the compelling profit motive at play, Professor Brickman concluded that the average cost of screening a potential plaintiff was \$500-

³⁵ Duke Law Center for Judicial Studies, “MDL Standards and Best Practices,” 11 (2014) (citing John H. Beisner & Jessica D. Miller, *Litigate the Tort, Not the Mass*, Washington Legal Foundation (2009)).

³⁶ U.S. Chamber of Commerce, “MDL Proceedings: Eliminating the Chaff,” 4 (Sept. 2015). The authors also discuss another example of where lawyers allegedly paid neurologists \$10,000 a day to screen welders for various medical conditions, resulting in the recruitment of 10,000 welders to file lawsuits that their exposure to welding fumes had caused them various medical injuries. *Id.* at 5.

³⁷ In March 2017, the AMA adopted a resolution supporting a legislative or regulatory “requirement that attorney commercials which may cause patients to discontinue medically necessary medications have appropriate warnings that patients should not discontinue medications without seeking the advice of their physician.” Letter to the American Bar Association from the Congress of the United States House of Representatives, Committee on the Judiciary (March 7, 2017).

³⁸ *Id.*

³⁹ Letter to The Relion Group Legal Network from the Congress of the United States House of Representatives, Committee on the Judiciary (March 7, 2017).

⁴⁰ Hearing before House of Representatives Judiciary Committee and the Subcommittee on the Constitution and Civil Justice, “Examining Ethical Responsibilities Regarding Attorney Advertising,” (June 23, 2017), available at <https://judiciary.house.gov/hearing/examining-ethical-responsibilities-regarding-attorney-advertising/>.

⁴¹ Lester Brickman, “Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screenings and Clinical Studies,” 29 CARDOZO L. REV. 514, 518 (2007).

⁴² *Id.* at 520.

⁴³ *Id.* at 521-22; 563.

\$1,000, but provides the potential of generating \$30,000-\$50,000 in attorneys' fees and expenses.⁴⁴

Further proof that plaintiffs identified by such means are different from other plaintiffs is the fact that lead generators often produce serial plaintiffs. Judge Jack, who presided over the silica sand MDL proceeding discussed above, not only discovered that many of the silicosis diagnoses were fraudulent, but she also found that 60 percent of the plaintiffs previously filed asbestos related claims.⁴⁵ That is an extraordinary figure in light of the fact that medical experts have concluded that the diagnosis of both asbestos and silica-related conditions is a "clinical rarity."⁴⁶

Courts, defendants and even the other plaintiffs should know whether the pool of plaintiffs in a particular case is likely to include a large number of suspect claims. Transparency could help inform the court about the nature and timing of discovery required in the case. It could help defendants calculate the appropriate settlement value of the case and counter the implication or appearance that a high number of plaintiffs means the defendants "must be guilty."⁴⁷ And it could help plaintiffs with legitimate claims avoid an unjust dismissal of their own claims hidden amongst the non-meritorious and fraudulent ones.

In order to provide transparency to courts and parties, the Committee should amend Rule 26(a)(1)(A)(i) to include the following required disclosure:

The name and, if known, the address and telephone number of each individual likely to have discoverable information... and if relevant, a disclosure of any third-party claim aggregator, lead generator, or related business or individual, who assisted in any way in identifying any potential plaintiff(s), and if relevant, the identification of any plaintiff that was recommended, referred, or otherwise directed to plaintiff's counsel based on a recommendation, referral, or other information gathered from such a third party claim aggregator, lead generator, or related business or individual. (New language underscored.)

VI. TRIALS: RULE 42 SHOULD ESTABLISH A CONFIDENTIAL CONSENT PROCEDURE THAT MUST BE FOLLOWED IF BELLWETHER TRIALS ARE TO OCCUR.

The MDL statute provides for "coordinated or consolidated pretrial proceedings," not trials.⁴⁸ Despite the clear limit of this statutory authority, many MDL judges exercise the extraordinary power that inures to them by virtue of presiding over high stakes litigation to pressure parties to agree to a "bellwether" or test trial. Many parties feel they have no choice but go along with a judge who wants to hold a bellwether trial, even if they do not want to. A confidential

⁴⁴ *Id.* at 525.

⁴⁵ Lester Brickman, "Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screenings and Clinical Studies," 29 CARDOZO L. REV. 514, 579 (2007).

⁴⁶ *Id.*

⁴⁷ Malini Moorthy, "Gumming Up the Works: Multi-Plaintiff Mass Torts," U.S. Chamber Institute for Legal Reform, 2016 Speaker Showcase, The Litigation Machine, <http://www.instituteforlegalreform.com/legal-reform-summit/2016-speaker-showcase>.

⁴⁸ 28 U.S.C. §1407.

mechanism should be established so parties are free to withhold consent without fear of reprisal—perhaps one similar to the system used to determine whether all parties consent to a trial by a magistrate judge.

The idea of bellwether trials is simple enough: the parties present their evidence and the judge informs them of how he or she would rule on the legal issues, often for the purpose of informing settlement discussions.⁴⁹ But the reality of bellwether trials can be much different from the ideal.

The MDL proceeding concerning Pinnacle hip replacements illustrates how proceedings can go off the rails. The presiding judge conducted two multi-month bellwether trials. In the first proceeding, the manufacturer won, but the court refused to enter a judgment and called for more briefing and more bellwether trials.⁵⁰ This proceeding is the subject of multiple interlocutory appeals by the defendants. During the subsequent bellwether trials, according to the defendants, the court suspended the rules of evidence, admitting evidence that was hearsay, irrelevant, or purely inflammatory, including an allegation that nonparty subsidiaries made payments to “Saddam’s henchman” and assertions from a book about supposedly improper scientific articles planted in the literature by “Big Tobacco.”⁵¹ Halfway through the MDL proceeding the court also *sua sponte* limited the defendant’s trial time to six more trial days without applying a corresponding time limitation for plaintiff’s counsel.⁵² The defendants allege that following their consent to two bellwether proceedings, the court has now required the defendants to submit to 9,300 bellwether proceedings.⁵³ Given such decisions, no one should feel compelled to participate in bellwether trials.

Further complicating the issue of bellwether trials, judges often require parties to execute a so-called *Lexecon* waiver, waiving remand and jurisdiction (the legality of which, in some cases, may now be even more suspect in the wake of recent Supreme Court decision in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*⁵⁴). Waiving jurisdiction and submitting to the laws of the transferee court can have important consequences, including different statutes of limitations, procedural requirements, and circuit court interpretations of federal law, etc.⁵⁵ Parties should not feel pressed to make such waivers.

⁴⁹ Caroline U. Hollingsworth, “A Brief Overview of Multi-District Litigation,” Heninger Garrison Davis, LLC (2016); see also *In re DePuy Orthopedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, Writ of Mandamus to Fifth Circuit Court of Appeals, 17-10812, at *2 (July 25, 2017) (citing *Manual for Complex Litig.* (Fourth) (2004) (“the purpose of bellwether trials is to ‘produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis.’”))

⁵⁰ *See In re DePuy Orthopedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, Writ of Mandamus to Fifth Circuit Court of Appeals, No. 16-10845, at *2 (June 23, 2016).

⁵¹ *Id.* at *2.

⁵² *Id.* at *9.

⁵³ *In re DePuy Orthopedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, Writ of Mandamus to Fifth Circuit Court of Appeals, No. 17-10812, at *2 (July 25, 2017).

⁵⁴ *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, No. 16-466 (June 19, 2017).

⁵⁵ MULTIDISTRICT LITIGATION MANUAL, § 9.18, “Choice of Law in the Transferee Court.”

Bellwether trials virtually insure that parties cannot return their case to the original, transferring court. Only 2.9 percent of MDL cases return to their original district court. In a recent survey of 90 lawyers who practice in MDL proceedings conducted by Professor Francis McGovern of Duke University Law School, the “single most prominent complaint about multidistrict litigation arises from counsel’s negative experience in so-called black hole cases.”⁵⁶ A reported 96 percent of the individual actions consolidated in MDLs are terminated by the MDL transferee judge, many if not most by settlement, meaning few cases are ever transferred back to their original court for resolution.⁵⁷

The FRCP should be amended to provide express protections so parties do not feel unduly pressured to participate in bellwether trials and/or to waive jurisdiction. Adding the following language to Rule 42, which governs consolidation, might suffice:

(c) Cases consolidated pursuant to 28 U.S.C. § 1407.

(1) Trial prohibition. The judge or judges to whom an action is assigned by the Judicial Panel on Multidistrict Litigation may not conduct a trial in a civil action transferred to or directly filed in the proceedings unless all parties to that action consent via a confidential procedure;

(2) Bellwether trials. Parties shall not be required to waive jurisdiction in order to participate in bellwether trials;

(3) Remand of select cases for trial. The judge or judges to whom an action is assigned by the Judicial Panel on Multidistrict Litigation may remand select cases for trial in the transferor courts.

VII. APPELLATE REVIEW: THE FRCP SHOULD PROVIDE A SIMPLE AND DIRECT PATHWAY FOR APPELLATE REVIEW OF CRITICAL RULINGS IN MDL CASES.

Appellate review is fundamental to the American judicial system because it ensures three essential judicial goals, including: “(1) increasing the probability of a correct judgment; (2) providing uniformity of result; and (3) increasing litigants’ sense that their dispute has been fully and fairly heard.”⁵⁸ These goals are critical in all MDL cases, even those that are headed toward settlement, because the lack of timely and adequate review results in an unfair and

⁵⁶ Hon. John G. Heyburn II and Francis E. McGovern, “Improving the MDL Process,” *LITIGATION*, Vol 38, No. 3, 31 (Spring 2012).

⁵⁷ Duke Law Center for Judicial Studies, “MDL Standards and Best Practices,” x (2014); *see also* “Overview of the MDL process,” 2 *BUS. & COM. LITIG. FED. CTS.* § 14.2 (3d ed.) (citing The Office of the Clerk, Judicial Panel on Multidistrict Litigation, (September 2014) available at http://www.jpml.uscourts.gov/sites/jpml/files/JPML_Statistical%20Analysis%20of%20Multidistrict%20Litigation_2014.pdf).

⁵⁸ Andrew Pollis, “The Need for Non-discretionary Interlocutory Appellate Review in Multidistrict Litigation,” 79 *FORDHAM L. REV.* 1644, 1646 (2011) (citing Professor Cassandra Burke Robertson of Case Western Reserve University School of Law, *Appellate Review of Discovery Orders in Federal Court: A Suggested Approach for Handling Privilege Claims*, 81 *WASH. L. REV.* 733, 771 (2006)).

unbalanced mispricing of settlement agreements.⁵⁹ In contrast to the benefits of appellate review, the current MDL process can be fairly characterized as follows:

A single judge renders all the important legal decisions in each MDL, exerting outsized impact on the parties and on the evolution of the law—and does so with virtually no scrutiny from other judges. This power centralization promotes efficient case management, but it can be an anathema to our conception of decentralized justice. One instance of unreviewable pretrial error can have an immediate and sweeping impact on thousands of cases in one fell swoop.⁶⁰

The Pinnacle hip replacement MDL case mentioned above⁶¹ is a dramatic example of the outsized impact of unreviewable MDL decisions—the parties to that case had no means to remedy the fundamentally unfair process when the Fifth Circuit denied the petitioner’s writ.⁶²

Insufficient appellate review is, of course, a function of inadequate rules. The need for a rule change is obvious from the current landscape of options:

- Under 28 U.S.C. § 1291, appellate jurisdiction exists only for “final” decisions that “end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment.”⁶³ This rule is of little relevance to MDL cases which, by virtue of being statutorily limited to pretrial proceedings, largely concern rulings on pretrial, non-dispositive issues. Although the collateral-order doctrine allows appeal of decisions that are “collateral to” the merits of the action and “too important” to be denied review,⁶⁴ in practice, courts are resistant to certify such appeals.
- Non-dispositive rulings are subject to review only through an extraordinary writ of mandamus or subsequent dismissal.⁶⁵ Generally, 28 U.S.C. § 1651(a) authorizes the court to “issue all writs necessary or appropriate in the aid of their respective jurisdictions and agreeable to the usages and principles of law.” In practice, the Supreme Court has referred to such writs as “drastic and extraordinary.”⁶⁶ Thus, it is rarely successfully employed and is not a reasonable avenue for appeal for MDL litigants.

⁵⁹ *Id.* at 1673 (“So a defendant, aggrieved by an erroneous legal ruling, will pay more to settle, because the prospect of trial is even worse. A similarly aggrieved plaintiff will take less. And the implications of this mispriced settlement go beyond the immediate financial impact to the parties; the mispricing remains a lingering anathema to the legal system’s role in encouraging or discouraging certain behaviors through economic models.”)

⁶⁰ *Id.* at 1646.

⁶¹ *See infra* p.13.

⁶² *In re DePuy Orthopedics, Inc., Pinnacle Hip Implant Prods. Liab. Litig.*, Order, Case No. 16-10845 (Sept. 29, 2016).

⁶³ Andrew Pollis, “The Need for Non-discretionary Interlocutory Appellate Review in Multidistrict Litigation,” 79 *FORDHAM L. REV.* 1644, 1652 (2011).

⁶⁴ *Id.* at 1649 (citing *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

⁶⁵ *See* 28 U.S.C. § 1407(e); *see also* Elizabeth Chamblee Burch, “Article: Judging Multidistrict Litigation,” 90 *N.Y.U.L. REV.* 71, 85 (April 2015).

⁶⁶ Andrew Pollis, “The Need for Non-discretionary Interlocutory Appellate Review in Multidistrict Litigation,” 79 *FORDHAM L. REV.* 1644, 1657 (2011)(citing *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004)). This issue with non-reviewability is eloquently described by Professor Andrew Pollis: “Despite the growth in MDL cases and the

- Under 28 U.S.C. § 1292(b), an appeal can occur if both the district court and court of appeals believe the order “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.”⁶⁷
- Rule 54(b) permits a trial court to enter a final judgment on one or more but not all claims by “expressly determin[ing] that there is no just reason for delay.” Because this mechanism requires final resolution on one claim, it, in practice, provides no meaningful relief for MDL litigants.⁶⁸

The Committee should amend Rule 54 to include a provision defining “judgment in cases consolidated pursuant to 28 U.S.C. § 1407” in a way that provides parties the ability to seek and obtain appellate review of material rulings. The Rules Enabling Act gives the Committee authority to do so.⁶⁹ Perhaps the best way to do so would be to list a handful of rulings that are highly impactful to the proceedings. Here are five:

- (1) *Daubert* motions;
- (2) pre-emption motions;
- (3) decisions to proceed with a bellwether trial;
- (4) judgment in a bellwether trial (to include material rulings during trial); and
- (5) any ruling that the FRCP do not apply to the proceedings.

Alternatively, the Committee could provide a mechanism similar to Rule 23(f) but that provides appeal as of right rather than as a matter of discretion.⁷⁰

The precise mechanism should be studied and vetted with public comment, but these two ideas would be far better than continuing to allow a material portion of the federal civil docket to exist outside the system of appellate review.

VIII. CONCLUSION

Although MDL proceedings have multiple cases (sometimes a staggering number of cases), they are fundamentally no different from other law suits: they involve plaintiffs and defendants who

resulting increase in the power consolidated in individual district court judges, the MDL system has no built-in mechanism for scrutiny of any kind – even of rulings that are fairly debatable, novel, or outright wrong – until after a case reaches final judgement. A party seeking to obtain review of an interlocutory MDL decision must rely on the categories of interlocutory appellate jurisdiction that exist for all other cases.” *Id.* at 1675.

⁶⁷ *Id.* at 1644.

⁶⁸ *Id.* at 1656.

⁶⁹ “Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.” 28 U.S.C. § 2072(c).

⁷⁰ For a discussion of how discretionary appeals under Rule 23(f) are failing to meet their purpose, see Lawyers for Civil Justice, “Public Comment to the Advisory Committee on Civil Rules: Amending Rule 23: A Call for Much-Needed Reform of Class Action Procedure,” (Oct. 3, 2016) available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjMyojd_MXVAhVmxVQKHwBNA24QFggoMAA&url=http%3A%2F%2Fwww.lfcj.com%2Fuploads%2F3%2F8%2F0%2F5%2F38050985%2Ffcj_public_comment_on_rule_23_proposals_final_10-1-16.pdf&usq=AFQjCNEch4qV_O32hZF5beJWJG3anTQBpg.

want and deserve a clear and credible procedure for adjudicating their claims and defenses on the merits. They should not exist outside the FRCP, but many of them do—and in material ways. The Committee should undertake an effort to provide MDL cases with clear, consistent and uniform procedures that presumptively govern the basic steps of litigation: pleadings, dismissal, joinder, required disclosures, trial and appellate review. Doing so would not only benefit all stakeholders in MDL cases, but also fulfill the Committee’s responsibility to maintain the original purpose of the FRCP as “rules for all civil actions and proceedings.”

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September 29, 2017

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

Re: Request for Rulemaking for Amendments to Adapt FRCP to MDL Proceedings

Members of the Committee:

Washington Legal Foundation (WLF) writes in support of an August 10, 2017 Request for Rulemaking filed by the Lawyers for Civil Justice (LCJ) and to provide two educational documents that might inform discussions regarding LCJ's request. WLF is a nonprofit public-interest law firm and policy center that devotes a substantial portion of its resources to promoting free enterprise, individual and business civil liberties, a limited and accountable government, and the rule of law. Over the past 40 years, WLF has actively participated in efforts to update and revise the Federal Rules of Civil Procedure, most recently commenting on proposed amendments to Rule 23. We also have consistently advocated for pre-trial procedures that preserve judicial efficiency and combat litigation abuses, such as the recent amendments to the Federal Rules governing electronic discovery.

LCJ's request that the Committee amend selected Rules to adapt their application to cases consolidated for pre-trial proceedings is very timely. As the request notes, nearly half of civil-litigation cases on federal courts' docket are before a multidistrict litigation (MDL) judge. Recent decisions by the U.S. Supreme Court regarding personal jurisdiction (*Bristol-Myers Squibb v. Superior Court* and *BNSF v. Tyrrell*) and venue (*TC Heartland LLC v. Kraft Food Brands LLC*) may lead to an increase consolidation requests. The prevailing lack of clarity and consistency among the many MDL proceedings on such basic matters as what constitutes a "pleading" and the standards by which courts judge the merits of individual claims will complicate the judiciary's ability to manage more case consolidation.

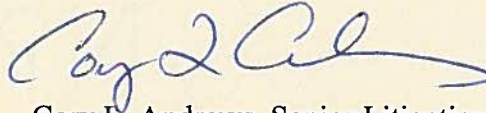
To help place LCJ's Rulemaking Request in a broader context, included with this letter are two WLF Legal Studies Division publications that illuminate the challenges faced by the federal judiciary with MDL proceedings. The WORKING PAPER by Reed Smith LLP's James M. Beck, *Multidistrict Litigation Reform: The Case for Earlier Application of Federal Pleading Standards*, explains how the failure of some MDL judges to apply Rule 8's basic pleading standards has resulted in the very harm Congress sought to avoid when adopting 28 U.S.C. § 1407: meritless, unvetted claims pile up on the court's docket, complicating pre-trial matters such as discovery, and impelling unwarranted settlements.

The second paper, a WLF “CONVERSATIONS WITH,” results from a moderated discussion with two leading voices on mass litigation and the consolidation of claims: Skadden, Arps, Slate, Meagher & Flom LLP partner John H. Beisner, and Novartis Pharmaceuticals Corp.’s Head of Litigation, Charna L. Gerstenhaber. Answers by Mr. Beisner and Ms. Gerstenhaber underscore several of the requests made by LCJ for amendments to the FRCP, including clarification of what constitutes a pleading and the need for plaintiffs to disclose third-party funding and lead generators to the MDL court. The paper’s participants also delve into the negative consequences of claims consolidation and urge MDL judges to minimize abuses through proactive docket management.

These WLF publications identify problems with the MDL process and attempt to diagnose their root causes. They also propose solutions that rely primarily upon the initiative of individual judges and “best practices” designed by third-party organizations. That piecemeal approach, however, cannot realistically achieve consistent success over a sustained period of time. The most effective way to fill “the holes in the FRCP,” as LCJ puts it in their Request for Rulemaking, is for this Committee to devise and pursue a process to amend the Rules with the unique challenges and pitfalls that arise from consolidated litigation in mind. The development and application of such Rules amendments can offer MDL litigants the consistency and reliability that court-by-court rulemaking and non-binding best practices cannot provide.

The federal judiciary has much to gain from this Committee’s consideration of and action on LCJ’s Request for Rulemaking, as do plaintiffs and defendants embroiled in multidistrict litigation. The proliferation of non-meritorious claims profoundly complicates the efficient and effective management of MDL proceedings, deters the eventual transfer of claims to transferor courts, and erodes financial recoveries by actually injured plaintiffs. We trust that the materials included with this letter will further the Committee members’ understanding of the prevailing problems, and that WLF’s support for LCJ’s request will be considered.

Sincerely,



Cory L. Andrews, Senior Litigation Counsel



Glenn G. Lammi, Legal Studies Chief Counsel

Enclosures

**MULTIDISTRICT LITIGATION REFORM:
THE CASE FOR EARLIER APPLICATION OF
FEDERAL PLEADING STANDARDS**

By
James M. Beck
Reed Smith LLP

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MULTIDISTRICT LITIGATION REFORM: THE CASE FOR EARLIER APPLICATION OF FEDERAL PLEADING STANDARDS

INTRODUCTION: THE PROBLEM OF MDL PLEADING

In the context of multidistrict litigation (MDL), the Federal Judicial Center's *Manual for Complex Litigation* does not mention the landmark US Supreme Court decisions *Ashcroft v. Iqbal*¹ or *Bell Atlantic Corp. v. Twombly*,² (collectively, "*TwIqbal*"), and discusses Federal Rule of Civil Procedure 8, which governs pleading, only in the context of civil actions under the Racketeer Influenced and Corrupt Organizations Act.³ The *MDL Standards & Best Practices* guide,⁴ published by the Duke Law Center for Judicial Studies, does not discuss pleadings at all, although it does contain a two-page discussion of plaintiff fact sheets (PFS), which it characterizes as "[o]ne of the most useful and efficient initial mechanisms for obtaining individual plaintiff discovery."⁵ However, the PFS as a litigation tool is not mentioned in any statute or rule, whereas *TwIqbal* and Rule 8 are binding law.

Given that complaints which are combined into an MDL vary widely based on the filing plaintiffs' law firm, especially when those complaints are originally filed in state court, some MDL judges have flinched from the amount of work that would be required to enforce the basic pleading standards of Rule 8 and *TwIqbal*. The following quotes from MDL courts support that conclusion:

- “[T]he Court does not intend to engage in the process of sorting through thousands of individual claims at the present time to determine which claims have or have not been properly presented.”⁶
- “With more than 549 individual actions ... [t]he proper court to hear dispositive motions concerning the sufficiency of plaintiff-specific allegations is the transferor court.”⁷
- “[C]ase-specific rulings are neither the purpose, nor the forte, of a court presiding over a multi-district litigation.”⁸
- “The MDL procedure is instead designed to maximize efficiency and fairness by minimizing both the sheer number of rulings required.”⁹

However, such attitudes contribute to the widespread problem of MDLs becoming warehouses for meritless, unvetted claims that would be quickly dismissed if brought as individualized actions. By refusing early on to require each plaintiff to meet the minimal pleading standards necessary for a case to survive a motion to dismiss, MDL courts expand the number of plaintiffs beyond those with viable causes of action and thus distort the true scope of MDL litigation. This distortion in turn affects other disputes, such as discovery, where the proportionality analysis is skewed by the presence of hundreds or thousands of unvetted plaintiffs. A lower pleading standard empowers plaintiffs’ lawyers to “park” a significant number of plaintiffs’ claims in an MDL as “inventory.” Such unvetted inventory causes the precise harm that the MDL statute, is intended to prevent.

I. USE OF MASTER COMPLAINTS TO AVOID THE FEDERAL RULES

One means of evading *Twlqbal* and Rule 8 has been the “master complaint.” In some contexts, “master” documents have a legitimate function in aggregated litigation. The *Manual for Complex Litigation* states:

Some courts ... have attempted to adopt techniques to facilitate trials in MDL transferee courts—for example, by the filing of a consolidated amended class action complaint, or master complaint, as an original action in the transferee forum. That complaint then may serve as the vehicle for determination of common issues.¹⁰

However, nothing in the federal statute authorizing MDL,¹¹ the MANUAL FOR COMPLEX LITIGATION, or any appellate decision governing MDL practice¹² permits an MDL transferee judge to suspend the operation of the Federal Rules of Civil Procedure.¹³

With respect to Rule 8 and MDL master complaints, the great majority of MDL decisions governing such complaints recognize the judicial obligation, when proper motion is brought, to police pleadings—including master complaints—in accordance with Rule 8 standards. In an MDL, “the master complaint is examined for its sufficiency when the defendants file a motion to dismiss.”¹⁴

In cases involving MDL master complaints, “we are bound to apply the pleading standard articulated in [*Twombly* and *Iqbal*].”¹⁵ The *In re Katrina Canal Breaches Litigation*¹⁶ court affirmed judgment on the pleadings against a master complaint that “superseded” the plaintiff’s previous complaint.¹⁷ Similarly, portions of the MDL master complaint were dismissed in *Hill v. Ford Motor Co.*, because the “plaintiffs

failed the *Twlqbal* test, as their assertion constituted little more than ‘labels and conclusions’ and ‘a formulaic recitation of the elements of a cause of action.’”¹⁸ The *In re FEMA Trailer Formaldehyde Products Liability Litigation* court held that “sufficient facts” were not “alleged to show that standing currently does exist” in the master complaint.¹⁹ Many other MDL proceedings have applied governing Rule 8 standards to master complaints, both before and after the Supreme Court clarified the rules of pleading in *Twlqbal*.²⁰

Unfortunately, not all MDL courts have been willing to follow Rule 8 with respect to master complaints in recent years. Some courts have sought to excuse master complaints from compliance with the Federal Rules on the ground that such complaints are mere “administrative tools” or “procedural devices” to which the ordinary rules of pleading do not apply.²¹ The result, in too many MDLs, has been exactly the opposite of what multidistrict proceedings are supposed to accomplish. Instead of “just and efficient” resolution²² of pre-trial proceedings, these courts’ refusal to apply the Federal Rules has resulted in thousands of MDL plaintiffs being allowed to continue with actions despite their failure to allege essential facts that are required for individual plaintiffs under the Federal Rules. The longer that meritless claims linger on MDL dockets, the more intense the pressure becomes for MDL defendants to settle.²³

This “administrative” approach to master complaints arises from misapplication of the law. The initial decisions ascribing an “administrative” nature to master complaints did not involve pleading, or indeed anything having to do with the Federal Rules, but rather occurred in the choice-of-law context.²⁴ *In re Trasyol Products Liability Litigation*²⁵ first mentioned pleading in passing, but only as to particularity of fraud allegations under Rule 9(b).²⁶ With the advent of *Twlqbal*, several MDL courts sought to downgrade master complaints to mere “administrative tools” as a way to avoid applying Rule 8.

Multidistrict litigation regarding prescription medical products is perhaps the most glaring example of MDL courts’ refusal to enforce Rule 8. This is no accident. Such litigation is characterized by widespread solicitation of clients through mass media, minimal pre-litigation investigation of facts, cookie-cutter multi-plaintiff complaints with a dearth of any information about each specific plaintiff’s claim, and hasty applications to the Judicial Panel for Multi-District Litigation so that MDL status can be touted in future advertising. In such litigation, “the information relevant to plaintiff’s condition and the causes therefore are solely available to him,” and defendants “have no information as to plaintiff’s medical condition, the causes of his condition, or his prognosis.”²⁷

II. APPLICATION OF RULE 8 TO PLAINTIFF FACT SHEETS, AS A PLEADING SUBSTITUTE

The problems that arise from inefficient application of *Twlqbal* and Rule 8 to individualized pleadings could be resolved if MDL judges look upon appropriately drafted PFS as amended complaints with respect to all plaintiffs' factual allegations. One approach MDL judges should consider is the application of *Twlqbal* and Rule 8 immediately to the legal sufficiency of transferred causes of action, as standardized by master complaints. Conversely, the adequacy of each plaintiff's factual allegations claims could await the submission of initial PFS. These PFS would not be the 30-page comprehensive histories seen in some MDLs—those could come later where necessary as a form of discovery not governed by Rule 8—but would instead track the requirements of Rule 8, as interpreted by those courts that have applied *Twlqbal* rigorously in relevant individual cases.²⁸

For example, in individual litigation involving prescription products, Rule 8 has been held to require that each plaintiff set forth the “who, what, when, and where” of their complaint against the defendants.²⁹ Complaints must allege: (1) plausible facts identifying the plaintiff as a citizen of a state to establish jurisdiction;³⁰ (2) facts establishing the identity of the product that the plaintiff used;³¹ (3) the nature of the alleged product defect;³² (4) identification of any alleged statutory or regulatory violations;³³ (5) identification of the language of any express warranty;³⁴ and (6) facts that plausibly establish that the claimed defect caused harm to the plaintiff.³⁵ Nor can

“information and belief” allegations be credited under Rule 8, where the information is accessible to the pleader.³⁶

Appropriate MDL practices should set a reasonable, but prompt schedule for *Twlqbal* motions based on PFS. One such schedule is set forth in pending legislation that recently passed the House of Representatives.³⁷ It would require that “within the first 45 days” of the action reaching an MDL court, each MDL plaintiff must provide “a submission sufficient to demonstrate that there is evidentiary support” for her claims. Within 90 days thereafter the MDL court must determine the sufficiency of the submission. Insufficient submissions would be dismissed without prejudice pending the “tender[ing] [of] a sufficient submission” within another 30 days. A second inadequate submission would require dismissal with prejudice.³⁸ Under Rule 8, this may or may not be an optimal schedule, but this legislation is a strong reminder that, if the judiciary will not clean up the MDL mess, other actors may well do so.

An MDL judge’s “most important function in the early stages of litigation management” is “to press the parties to identify, define, and narrow the issues.”³⁹ MDL case management orders “should include the usual interim breakpoints, *e.g.*, filing of a consolidated amended complaint (where appropriate), filing and briefing on motions to dismiss.”⁴⁰ “[W]here a defendant moves to dismiss some but not all of the plaintiffs’ claims, allow other discovery to proceed while *you decide* the motion.”⁴¹ Thus, MDL transferee courts are supposed to reduce the pleadings to those matters

actually in dispute. Use of Rule 8, in conjunction with PFS, is the type of pretrial proceeding MDLs are supposed to handle, since defendants do not have effective remedies of this sort after remand.⁴² Using PFS in this way removes current excuses for ignoring Rule 8, since a properly drafted PFS would incorporate all of the facts upon which *Twiqbal* “plausibility” turns.

Currently, it is not unusual in a pharmaceutical product-liability MDL, for instance, for the court to utilize a case management order that requires completion of PFS and provides medical/pharmacy records documenting use of the defendant’s product.⁴³ This process is typically followed by a “deficiency letter” process, under which the defendants must analyze PFS and identify their deficiencies—including such basic shortcomings as not identifying the dates the plaintiff used the defendant’s prescribed product or a pharmacy that dispensed the product, and failing to assert the plaintiff suffered from the medical condition which is the subject of the litigation after the ingestion of the product. After receiving a deficiency letter, plaintiffs typically have still more time to correct the deficiencies before any issue can be brought to the court’s attention. Unlike Rule 8, the deficiency letter process puts the onus, in time and expense, on defendants to police the adequacy of plaintiffs’ responses. Use of Rule 8 as enforcement tool would be much more efficient.

The requirement that a PFS be completed is often accompanied by a mandated medical-record-collection process, in which plaintiffs must provide medical

authorizations. Defendants routinely hire a third-party company to obtain the medical records.⁴⁴ Once again, the burden of establishing MDL plaintiffs' claims—assigned to plaintiffs by Rule 8—is effectively shifted to the defendants, who have to pay for the collection of pharmacy and medical records.

Thus, rather than requiring plaintiff's counsel to vet their cases before filing by securing the "who, what, when, and where of their client's potential lawsuit," MDL practice currently imposes that expense on defendants. Defendants must pay for the lawyer and paralegal time to determine basic deficiencies in individual cases, and pay third-party vendors to collect plaintiff records.⁴⁵

III. PLAINTIFF FACT SHEETS AND EQUITABLE COST ALLOCATION

While the PFS process ultimately results in numerous voluntary dismissals and successful motions to dismiss, current MDL practices impose the burden and expense of vetting the plaintiffs on the defendants, rather than requiring plaintiffs' counsel to confirm that their own clients have viable cases before bringing suit in the first instance, as mandated by Federal Rules of Civil Procedure 1, 11, and 12. Indeed, the defendant in *In re Digitek* described the "cost of determining each meritless claim on a case by case basis" as "staggering"—"[D]epletion of insurance proceeds by defense costs incurred by defending meritless cases is an interest that all parties and this Court should recognize."⁴⁶

Ultimately, in *Digitek* the entire MDL proved to be a waste of time and resources, since no plaintiff proved that the defendant sold any unit of the drug containing the claimed defect.⁴⁷ Had the *Digitek* plaintiffs been required to allege individualized exposure and causation, as Rule 8 requires, there would have been no need to waste years of effort in unproductive MDL discovery.

The PFS process and medical-record-collection process becomes particularly burdensome when large groups of plaintiffs are joined together in one complaint and all plaintiffs sue a number of co-defendants who have each manufactured a product in the class of products at issue, requiring defendants to ascertain which plaintiff (if any) has a plausible/viable claim against which defendant. While these cases can be sorted out and whittled down through arduous discovery, MDL courts' failure to uphold *Twqbal* pleading standards at the outset again shifts to the defendants what should be the plaintiffs' burden to investigate their cases before filing. This is hardly a "just and efficient" result, since it prolongs and perpetuates thousands of cases that should never have been filed in the first instance. Even from a plaintiffs' perspective, current MDL practice means that defendants must expend substantial resources on meritless claims, rather than conserving them for plaintiffs with viable claims.

IV. FIXING THE PROBLEM

The MANUAL FOR COMPLEX LITIGATION should be revised to specify that Rule 8 applies to an initial PFS, and that initial PFS should be treated as a factual amendment

to each plaintiff's complaint. Such a procedure would categorize all treatment of MDL master complaints as "administrative" without violating or nullifying Rule 8,⁴⁸ and without preventing early culling of meritless actions from MDL dockets. Conversely, such a reform would allow enforcement of *Twiqbal* standards against a standardized form document, rather than wastefully against heterogeneous complaints on a one-by-one basis.

Courts should not endorse any process that implies the existence of an "MDL exception" to federal pleading standards. A lower bar for MDL litigants disregards the pleading standards required of all litigants by the US Supreme Court and by Congress, both of which approved the language of Rule 8.

This hybrid form of complaint/PFS would achieve the dual goals of (1) ensuring that Rule 8 pleading standards are uniformly applied to all cases and (2) streamlining the pleading process. Under this hybrid system, each plaintiff would still be required to set forth the "who, what when and where" of their individual complaint in a short form complaint, while adopting the general allegations of a master complaint in a check off form. This process would still require *Twlqbal* "plausibility" for each individual plaintiff's cause of action, and thus would provide defendants with enough information to assert potential applicable affirmative defenses as well as potential 12(b)(6) motions.

ENDNOTES

¹ 556 U.S. 662 (2009).

² 550 U.S. 544 (2007).

³ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 35.31, at 702-07 (Fed. Jud. Cntr. 2004).

⁴ MDL STANDARDS & BEST PRACTICES (Duke L. Cntr. Sept. 11, 2014).

⁵ *Id.* at 11.

⁶ *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010*, 808 F. Supp. 2d 943, 965 (E.D. La. 2011), *aff'd on other grounds*, 745 F.3d 157 (5th Cir. 2014).

⁷ *In re Zimmer Nexgen Knee Implant Products Liability Litigation*, 2012 WL 3582708, at *4 (N.D. Ill. Aug. 16, 2012).

⁸ *In re Nuvaring Products Liability Litigation*, 2009 WL 4825170, at *2 & n.3 (E.D. Mo. Dec. 11, 2009) (refusing to rule on over 200 motions to dismiss; viewing the “goal” of the MDL solely in terms of “expeditious and efficient discovery”); *see In re Nuvaring Products Liability Litigation*, 2009 WL 2425391, at *1 (E.D. Mo. Aug. 6, 2009) (denying all individualized motions to dismiss).

⁹ *In re Phenypropanolamine Products Liability Litigation*, 2004 WL 2034587, at *2 (W.D. Wash. Sept. 3, 2004).

¹⁰ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.36, at 373. *See also id.* at § 40.52 (“Sample Orders”) (allegations in master complaint “would be suitable for adoption by reference in individual cases”).

¹¹ 21 U.S.C. § 1407.

¹² The US Supreme Court has addressed MDL master complaints only once, in a footnote. *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897, 905 n.3 (2015) (“Parties may elect to file a ‘master complaint’ and a corresponding ‘consolidated answer,’ which supersede prior individual pleadings. In such a case, the transferee court may treat the master pleadings as merging the discrete actions for the duration of the MDL pretrial proceedings.”).

¹³ To the contrary, in Diana E. Murphy, *Unified and Consolidated Complaints in Multidistrict Litigation*, 132 F.R.D. 597, 604-05 (1991), an experienced MDL transferee judge outlined a detailed procedure for deciding—not avoiding—motions to dismiss brought against master complaints.

¹⁴ *In re Refrigerant Compressors Antitrust Litigation*, 731 F.3d 586, 590 (6th Cir. 2013). Thus, MDL plaintiffs “may not sidestep customary jurisdictional rules by saying that the complaint at hand lacked legal effect.” *Id.* at 591.

¹⁵ *Ironworkers Local Union 68 v. AstraZeneca Pharmaceuticals, LP*, 634 F.3d 1352, 1359 (11th Cir. 2011) (affirming dismissal of all counts of MDL master complaint for failure to plead “plausible” causation and damages).

¹⁶ 309 F. Appx. 836 (5th Cir. 2009).

¹⁷ *Id.* at 838.

¹⁸ 975 F. Supp. 2d 1351, 1360 (N.D. Ga. 2013) (quoting *Twlqbal*).

¹⁹ 570 F. Supp. 2d 851, 857 (E.D. La. 2008).

²⁰ *In re Takata Airbag Products Liability Litigation*, 193 F. Supp. 3d 1324, 1332, 1336-42 (S.D. Fla. 2016) (applying *Twlqbal* and dismissing several counts of master complaint); *In re Oil Spill by the Oil Rig ‘Deepwater Horizon’ in the Gulf of Mexico, on April 20, 2010*, 168 F. Supp. 3d 908, 915-17 (E.D. La. 2016) (concluding that all “test-case” plaintiffs in master complaint “failed to plausibly allege valid claims”); *In re New England Compounding Pharmacy, Inc. Products Liability Litigation*, 2014 WL 4322409, at *16 (D. Mass. Aug. 29, 2014) (dismissing master complaint claims under Tennessee law for improper damages); *In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, on April 20, 2010*, 902 F. Supp. 2d 808, 814 (E.D. La. 2012) (MDL master complaint did not “plausibly allege facts” regarding purported economic loss); *In re FEMA Trailer Formaldehyde Products Liability Litigation*, 838 F. Supp. 2d 497, 506-16 (E.D. La. 2012) (applying *Twlqbal* and dismissing several counts of master complaint); *In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010*, 2011 WL 4575696, at *11 (E.D. La. Sept. 30, 2011) (dismissing MDL master complaint); *In re Ford Motor Co. Speed Control Deactivation Switch Products Liability Litigation*, 664 F. Supp. 2d 752, 765-68 (E.D. Mich. 2009) (deciding motions to dismiss against master complaint under nine states’ laws); *In re Medtronic, Inc. Sprint Fidelis Leads Products Liability Litigation*, 592 F. Supp. 2d 1147, 1158-62 (D. Minn. 2009) (dismissing 21 counts of MDL master complaint), *aff’d*, 623 F.3d 1200 (8th Cir. 2010); *In re Digitek Products Liability Litigation*, 2009 WL 2433468, at *7, 9 (S.D. W. Va. Aug. 3, 2009) (applying *Twlqbal* standards despite “administrative device” argument; finding master complaint sufficient); *Barasich v. Shell Pipeline Co.*, 2008 WL 6468611, at *1-2 (E.D. La. June 19, 2008) (granting *Twlqbal* motion to dismiss master complaint); *In re ConAgra Peanut Butter Products Liability Litigation*, 2008 WL 2132233, at *4 (N.D. Ga. May 21, 2008) (granting in part and denying in part *Twombly/Iqbal* motion to dismiss master complaint); *In re World Trade Center Disaster Site Litigation*, 2008 WL 1927265, at *3 (S.D.N.Y. May 1, 2008) (dismissing master complaint), *reconsideration denied*, 2008 WL 2704317 (S.D.N.Y. July 10, 2008); *In re Katrina Canal Breaches Consolidated Litigation*, 533 F. Supp. 2d 615, 642-43 (E.D. La. 2008) (granting *Twlqbal* motion to dismiss parts of master complaint), *aff’d*, 673 F.3d 381 (5th Cir. 2012); *In re Bausch & Lomb Inc.*, 2007 WL 3046682, at *7 (D.S.C. Oct. 11, 2007) (holding “conclusory statements” concerning injury in master complaint failed *Twlqbal*); *In re Ford Motor Co. Speed Control Deactivation Switch Products Liability Litigation*, 2007 WL 2421480, at *5-10 (E.D. Mich. Aug. 24, 2007) (granting motion to dismiss several counts of master complaint); *In re Educational Testing Service Praxis Principles of Learning & Teaching, Grades 7-12 Litigation*, 517 F. Supp. 2d 832, 840-54 (E.D. La. 2007) (state-specific adjudication of motion to dismiss master complaint); *In re Guidant Corp.*

Implantable Defibrillators Products Liability Litigation, 484 F. Supp. 2d 973, 983 (D. Minn. 2007) (dismissing several counts of master complaint); *Gray v. Derderian*, 464 F. Supp. 2d 105, 109-111 (D.R.I. 2006) (dismissing several defendants from master complaint); *Gray v. Derderian*, 371 F. Supp.2d 98, 104-08 (D.R.I. 2005) (dismissing several counts of master complaint); *In re September 11 Litigation*, 280 F. Supp. 2d 279, 295-313 (S.D.N.Y. 2003) (dismissing parts of master complaint), *interlocutory certification denied*, 2003 WL 22251325, (S.D.N.Y. Oct. 1, 2003); *In re Bridgestone/Firestone, Inc. Tires Products Liability Litigation*, 153 F. Supp. 2d 935, 948 (S.D. Ind. 2001) (dismissing several counts of master complaint).

²¹ See, e.g., *In re Zimmer Nexgen Knee Implant Products Liability Litigation*, 2012 WL 3582708, at *3-4 (N.D. Ill. Aug. 16, 2012).

²² 28 U.S.C. § 1407.

²³ “[M]ass tort proceedings using the MDL process have become magnets for advertising-driven, poorly investigated (and often patently invalid) personal injury claims.” House Report 115-25, “Fairness in Class Action Litigation Act of 2017,” at 5 (U.S. House of Rep. March 7, 2017). For example, in the *Phenypropanolamine* MDL more than 300 motions to dismiss were stricken, not because they were unmeritorious, but because they would have required “examining the plaintiffs’ individual complaints and applying the applicable state law.” *Phenypropanolamine*, 2004 WL 2034587, at *1. Adopting a “narrow role for an MDL transferor court,” the court refused to dismiss any action, requiring instead that Rule 8 motions “be refiled with the transferor court upon remand,” *id.* at *2—a remand that never took place.

²⁴ See *In re Mercedes-Benz Tele Aid Contract Litigation*, 257 F.R.D. 46, 56 (D.N.J. 2009); *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*, 489 F. Supp. 2d 932, 935-36 (D. Minn. 2007); *In re Vioxx Products Liability Litigation*, 239 F.R.D. 450, 454 (E.D. La. 2006); *In re Propulsid Products Liability Litigation*, 208 F.R.D. 133, 141-42 (E.D. La. 2002). These decisions addressed the law applicable to master complaints filed in the MDL forum, and regarded MDL master complaints as “administrative” conveniences so that issues ordinarily determined by the law of the transferor forum where individual plaintiffs originally brought their actions could not be circumvented by direct filing. More recent choice-of-law decisions do the same. See *In re Fresenius Granuflo/NaturaLyte Dialysate Products Liability Litigation*, 76 F. Supp. 3d 294, 300-05 & 314 n.11 (D. Mass. 2015).

²⁵ 2009 WL 577726, at *6-7 (S.D. Fla. Mar. 5, 2009).

²⁶ In *Trasylol*, the actual holding, as opposed to the *dictum*, was that “leniency must not overreach so as to effect a negation of the policy behind Rule 9.” 2009 WL 577726, at *9. Thus, “a broad claim that a Plaintiff or a Plaintiff’s physicians relied on fraudulent or misleading statements ... absent some recitation of what oral or written statement a particular drug representative made to a specific physician ..., is an insufficient basis for allowing Plaintiffs to proceed.” *Ibid.* Thus, the *Trasylol* MDL judge actually decided the motion to dismiss on its merits. See also *In re Trasylol Products Liability Litigation*, 2011 WL 2784237, at *5 (S.D. Fla. July 13, 2011) (enforcing dismissal order against similarly-pleaded tag-along complaints).

²⁷ *Moore v. C.R. Bard, Inc.*, 217 F. Supp. 3d 990, 996 (E.D. Tenn. 2016).

²⁸ Since MDL judges are “charged with the responsibility of ‘just and efficient conduct’ of the multiplicity of actions in an MDL,” *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1231 (9th Cir. 2006), it would be appropriate to apply *Twlqbal* rigorously as an early screening device to weed out meritless cases.

²⁹ See, e.g., *In re Bayer Corp. Combination Aspirin Products Marketing & Sales Practices Litigation*, 701 F. Supp. 2d 356, 366 (E.D.N.Y. 2010); *In re Actimmune Marketing Litigation*, 2010 WL 3463491, at *10 (N.D. Cal. Sept. 1, 2010), *aff’d*, 464 F. Appx. 651 (9th Cir. 2011).

³⁰ “A party’s citizenship is determined by her domicile, and the domicile of an individual is his true, fixed and permanent home and place of habitation.” *Washington v. Hovensa LLC*, 652 F.3d 340, 344 (3d Cir. 2011) (citation and quotation marks omitted). “[A] party seeking to invoke diversity jurisdiction should be able to allege affirmatively the actual citizenship of the relevant parties.” *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857 (9th Cir. 2001). Citizenship, like every other basis for jurisdiction, must be affirmatively pleaded under *Twlqbal*. See, e.g., *Antonacci v. City of Chicago*, 640 F. Appx. 553, 556 (7th Cir. 2016); *Young-Gibson v. Patel*, 476 F. Appx. 482, 483 (2d Cir. 2012); *Farmer v. Fisher*, 386 F. Appx. 554, 558 (6th Cir. 2010); *Vis Vires Group, Inc. v. Endonovo Therapeutics, Inc.*, 149 F. Supp. 3d 376, 390 (E.D.N.Y. 2016).

³¹ *Patterson v. Novartis Pharmaceuticals Corp.*, 451 F. Appx. 495, 497-98 (6th Cir. 2011); *Moore*, 217 F. Supp. 3d at 996; *Weddle v. Smith & Nephew, Inc.*, 2016 WL 1407634, at *5 (N.D. Ill. April 11, 2016); *Shells v. X-Spine Systems, Inc.*, 2015 WL 736981, at *3 (W.D. Okla. Feb. 20, 2015); *Henderson v. Sun Pharmaceuticals Industries, Ltd.*, 809 F. Supp. 2d 1373, 1378-79 (N.D. Ga. 2011); *Timmons v. Linvatec Corp.*, 263 F.R.D. 582, 584-85 (C.D. Cal. 2010); *Gilmore v. DJO Inc.*, 663 F. Supp. 2d 856, 860-61 (D. Ariz. 2009).

³² *Rodman v. Stryker Sales Corp.*, 604 F. Appx. 81, 82 (2d Cir. 2015); *Jeffries v. Boston Scientific Corp.*, 2017 WL 2645723, at *4 (D. Md. June 20, 2017); *Lussan v. Merck Sharp & Dohme Corp.*, 2017 WL 2377504, at *2 (E.D. La. June 1, 2017); *House v. Bristol-Myers Squibb Co.*, 2017 WL 55876, at *4 (W.D. Ky. Jan. 4, 2017); *Moore*, 217 F. Supp. 3d at 995; *Scianneaux v. St. Jude Medical S.C., Inc.*, 961 F. Supp.2d 808, 813 (E.D. La. 2013); *Gross v. Stryker Corp.*, 858 F. Supp. 2d 466, 494 (W.D. Pa. 2012); *Moore v. Mylan Inc.*, 840 F. Supp. 2d 1337, 1345 (N.D. Ga. 2012); *Mills v. Bristol-Myers Squibb Co.*, 2011 WL 4708850, at *3 (D. Ariz. Oct. 7, 2011); *Gelber v. Stryker Corp.*, 752 F. Supp. 2d 328, 334 (S.D.N.Y. 2010); *Maness v. Boston Scientific*, 751 F. Supp. 2d 962, 969 (E.D. Tenn. 2010); *Ilarraza v. Medtronic, Inc.*, 677 F. Supp. 2d 582, 589 (E.D.N.Y. 2009).

³³ *Caplinger v. Medtronic, Inc.*, 784 F.3d 1335, 1341 (10th Cir. 2015) (Gorsuch, J.); *Rodriguez v. American Medical Systems, Inc.*, 597 F. Appx. 226, 229 (5th Cir. 2014); *Wolicki-Gables v. Arrow Int’l, Inc.*, 634 F.3d 1296, 1301 (11th Cir. 2011); *Lawrence v. Medtronic*, 2017 WL 826963, at *1 (C.D. Cal. Feb. 27, 2017); *Yosowitz v. Covidien LP*, 182 F. Supp. 3d 683, 691-92 (S.D. Tex. 2016); *Clements v. Sanofi-Aventis, U.S., Inc.*, 111 F. Supp. 3d 586, 598 (D.N.J. June 11, 2015); *Sprint Fidelis Leads*, 592 F. Supp. 2d at 1158.

³⁴ *Rodriguez*, 597 F. Appx. at 231; *Jeffries*, 2017 WL 2645723, at *5; *Lussan*, 2017 WL 2377504, at *3; *House*, 2017 WL 55876, at *6; *Spier v. Coloplast Corp.*, 121 F. Supp. 3d 809, 818 (E.D. Tenn. 2015); *Clements*, 111 F. Supp. 3d at 602; *Byrnes v. Small*, 60 F. Supp. 3d 1289, 1301 (M.D. Fla. 2015); *Martin v. Medtronic, Inc.*, 63 F. Supp. 3d 1050, 1060-61 (D. Ariz. 2014); *McConologue v. Smith & Nephew, Inc.*, 8 F. Supp. 3d 93, 114-15 (D. Conn. 2014); *Lindler v. Mentor Worldwide LLC*, 2014 WL 6390307, at *2 (D.S.C. Oct. 23, 2014); *Gelber* 752 F. Supp. 2d at 335; *Williams v. Cyberonics, Inc.*, 654 F. Supp. 2d 301, 308 (E.D. Pa. Sept. 10, 2009), *aff'd*, 388 F. Appx. 169 (3d Cir. 2010).

³⁵ *Rollins v. Wackenhut Services, Inc.*, 703 F.3d 122, 130 (D.C. Cir. 2012); *Funk v. Stryker Corp.*, 631 F.3d 777, 782 (5th Cir. 2011); *Rodman*, 604 F. Appx. at 82; *McElroy v. Amylin Pharmaceuticals, Inc.*, 573 F. Appx. 545, 546 (6th Cir. 2014); *Bailey v. Janssen Pharmaceutica, Inc.*, 288 F. Appx. 597, 608-09 (11th Cir. 2008); *Jeffries*, 2017 WL 2645723, at *3; *Becker v. Smith & Nephew, Inc.*, 2015 WL 268857, at *4 (D.N.J. Jan. 20, 2015); *Kennedy v. Pfizer, Inc.*, 2014 WL 4093065, at *5 (W.D. La. Aug. 15, 2014); *Gonzalez v. Bayer Healthcare Pharmaceuticals, Inc.*, 930 F. Supp. 2d 808, 813-14 (S.D. Tex. 2013); *Bergstresser v. Bristol-Myers Squibb Co.*, 2013 WL 6230489, at *8 (M.D. Pa. Dec. 2, 2013); *Mills*, 2011 WL 4708850, at *3. Most prescription-medical-product liability suits involve warning claims under the learned intermediary rule, so many of these cases require pleading that a different warning would have changed the relevant physician's prescription decision. *E.g.*, *Lussan*, 2017 WL 2377504, at *3 (applying *TwIqbal* to causation in warning context); *Moore*, 217 F. Supp. 3d at 995 (same).

³⁶ *In re Darvocet, Darvon, & Propoxyphene Products Liability Litigation*, 756 F.3d 917, 931 (6th Cir. 2014); *Aston v. Johnson & Johnson*, 2017 WL 1214399, at *7 (D.D.C. Mar. 31, 2017); *Teixeria v. St. Jude Medical S.C., Inc.*, 193 F. Supp. 3d 218, 225-26 (W.D.N.Y. 2016); *Stephens v. Teva Pharmaceuticals, U.S.A., Inc.*, 70 F. Supp. 3d 1246, 1249 (N.D. Ala. 2014); *Mills*, 2011 WL 4708850, at *2; *Berkowitz v. Metwest Inc.*, 2010 WL 5395777, at *3 n.6 (D. Colo. Dec. 23, 2010); *Funk v. Stryker Corp.*, 673 F. Supp. 2d 522, 525 (S.D. Tex. 2009), *aff'd*, 631 F.3d 777 (5th Cir. 2011).

³⁷ See H.R. 985, the "Fairness in Class Action Litigation & Furthering Asbestos Claim Transparency Act of 2017.

³⁸ *Id.* at § 105.

³⁹ MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.13, at 42.

⁴⁰ TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES, at 4 (J.P.M.D.L. & Fed. Jud. Cntr. 2009).

⁴¹ *Id.* (emphasis added).

⁴² See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.37, at 376 (transferor courts only hear "dispositive motions" after "the MDL pretrial proceedings are concluded and individual cases are remanded").

⁴³ See, *e.g.*, *In re Phenylpropanolamine (PPA) Products Liability Litigation*, 460 F.3d 1217, 1224-25 (9th Cir. 2006) (describing fact sheet procedure in detail); *In re Guidant Corp. Implantable*

Defibrillators Products Liability Litigation, 496 F.3d 863, 866 (8th Cir. 2007); *In re Silica Products Liability Litigation*, 398 F. Supp. 2d 563, 576-77 (S.D. Tex. 2005).

⁴⁴ See, e.g., *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 412 F. Appx. 527, 529 (3d Cir. 2011) (litigation over records production); *In re Accutane Products Liability Litigation*, 2006 WL 1281598, at *1-2 (M.D. Fla. May 9, 2006) (same); *In Re Serzone Products Liability Litigation*, 2003 WL 22319060 (S.D.W. Va. July 11, 2003) (medical records production order); *In re Norplant Contraceptive Products Liability Litigation*, 1997 WL 28427 (E.D. Tex. Jan. 17, 1997) (same).

⁴⁵ See *In re Digitek Product Liability Litigation*, 264 F.R.D. 249 (S.D. W. Va. 2010), in which the Defendants reported to the court that they would soon exceed \$100,000 in medical-record-production expenses, and that “[d]efendants are spending money and resources to evaluate these cases, collect records and analyze records which only ultimately serve to prove that these cases should never have been filed.” *Id.* at 254.

⁴⁶ *Digitek*, 264 F.R.D. at 254.

⁴⁷ *In re Digitek Products Liability Litigation*, 821 F. Supp. 2d 822, 836 (S.D. W. Va. 2011) (granting summary judgment because “not a single double-thick Digitek was ever found outside the plant”).

⁴⁸ See *Gelboim*, 135 S. Ct. at 904 n.3 (“[N]o merger occurs, however, when the master complaint is not meant to be a pleading with legal effect but only an administrative summary.”) (citation and quotation marks omitted); *Refrigerant Compressors*, 731 F.3d at 590-91 (holding that MDL master complaint that was an “operative pleading” could “supersede[] any prior individual complaints,” but not a mere “administrative summary”); *In re General Motors LLC Ignition Switch Litigation*, 2015 WL 3619584, at *8 (S.D.N.Y. June 10, 2015) (“Whether to treat such a complaint as ‘administrative’ or ‘superseding’ will depend on the particulars of a given MDL.”); *Fresenius Granuflo/NaturaLyte*, 76 F. Supp. 3d at 314 n.11 (“noting that the previously applicable long form complaint is not necessarily superseded for purposes of motion to dismiss practice” by “administrative” MDL master complaint).



Multidistrict Litigation: Reducing Incentives for Abuse

The Honorable Jay B. Stephens
Charna L. Gerstenhaber
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In this edition of Washington Legal Foundation's CONVERSATIONS WITH, the Chairman of WLF's Legal Policy Advisory Board, **Jay B. Stephens**, directs a discussion with **Charna L. Gerstenhaber**, Vice President and Head of Litigation for Novartis Pharmaceuticals Corporation, and **John H. Beisner**, a Partner with Skadden, Arps, Slate, Meagher & Flom LLP, on multidistrict litigation (MDL) and how judges can reduce systemic incentives for procedural abuse.

Introduction

A 1968 federal law facilitated the use of MDL proceedings to combine cases involving "one or more common questions of fact" before a single court for pretrial proceedings. The law created a Judicial Panel on Multidistrict Litigation (JPML), which, on its own initiative or upon the request of a party, can order the transfer of a lawsuit from federal court to an MDL proceeding. The responsibility of the MDL judge—a federal district court judge chosen by the JPML to oversee a group of cases—is to manage pretrial matters such as discovery. Once the MDL judge has addressed those preliminary issues, the "transferee" court returns each case to the JPML, Advisory Committee on Civil Rules | November 7, 2017

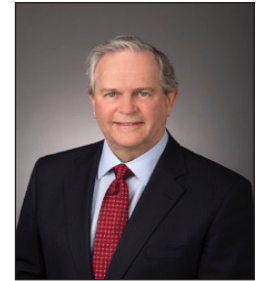
which then sends the case back to the "transferor" court for trial.

Today, 45% of all civil-litigation cases pending in federal court are consolidated in MDLs. Ten years ago, however, only 15% of federal civil cases were in MDLs. And rather than act as a temporary way-station on the road to trial, MDL courts have become permanent homes for the vast majority of transferred cases. MDL judges have returned a mere 2.9% of cases to the JPML for transfer.

Instead of improving judicial efficiency and achieving just resolution of litigation as Congress intended, the MDL device has developed into a black hole that attracts and warehouses claims. The device creates incentives for plaintiffs' lawyers to build up inventories of lawsuits with little consideration of their legal merit. This aggregation imposes enormous pressure on MDL defendants to settle—an outcome that MDL judges strongly encourage.

Jay Stephens: Charna, why has the number of claims consolidated into the MDL process increased so dramatically over the last decade?

Charna Gerstenhaber: Plaintiffs' counsel have looked for ways to aggregate claims for years; that part is not new. In the recent past, developments such as the Class Action Fairness Act (CAFA) and other procedural changes have helped



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Charna Gerstenhaber

lessen the abuse of aggregated filings in state and federal courts. In many types of cases, such as personal-injury litigation, it is now significantly easier to get MDL treatment than class-certification treatment.

And we cannot underestimate the role litigation funding is playing in increasing the aggregation of claims. The availability of easy money has allowed certain plaintiffs’ attorneys to take huge risks on less meritorious claims without having much, or maybe any, of their own money at stake. In that circumstance, there is no immediate financial disincentive to grouping together hundreds of dubious claims into an MDL with the hope of attracting even more claims and eventually pressuring defendants to settle.

The increase in advertising spending also pairs with the increased number of claims. To the extent that mass inventory is the end-game, advertising helps move the needle. We also see increased media involvement with MDLs. Plaintiffs’ counsel may release unsealed documents to plaintiff-friendly outlets or the media may follow the litigation independently. In tandem with the advertising spend and the corresponding social-media activity, the publicity attracts filings.

Certain procedural mechanisms common in MDLs also invite claims. For example, some courts use a so-called “Master Complaint” in which cases are filed with little more effort than checking a series of boxes and pushing the button. Add to that the reluctance of many courts to consider screening mechanisms such as *Lone Pine* orders or to enforce Federal Rule of Civil Procedure 11’s provisions regarding sanctions for bringing baseless causes of action, and it’s easy to see

how the number of claims can quickly multiply.

In addition, the case management of certain MDLs can invite more and more filings. For instance, if the MDL court allows plaintiffs’ counsel to park inventory without work-up so that there is little risk to plaintiffs’ counsel, and/or if the MDL court is intent on inventory resolution within the MDL so that certain meritorious defenses are not timely reached, the old “build-it-and-they-will-come” adage becomes reality.

Mr. Stephens: Some academics attribute the rise in MDL claims to an increase in federal courts’ rejection of motions to certify class actions. Do you see a connection between these two trends?

Ms. Gerstenhaber: There is no question that some state-court aggregation efforts have been thwarted, in part, by defendants’ ability to remove some mass filings under CAFA. As a result, there are more cases in federal court, where the more stringent application of Rule 23 has made it more difficult to pursue aggregation through class actions, especially for personal injuries. Although both developments are beneficial for defendants, they also have made MDL treatment a more attractive option for plaintiffs because aggregation often is in plaintiffs’ counsels’ interests, as I’ve noted.

But it’s not just that—some companies/defendants themselves ask or join in the request for creation of MDLs. This often is driven primarily by the cost/expense/effort that goes into discovery, given the rise of email and other electronic data. E-discovery is a huge expense. One school of thought is that an MDL ensures that a defendant only incurs e-discovery costs

once. But unfortunately there are often parallel state-court actions that may not simply follow the MDL discovery rulings. Also, efficiencies collapse if companies don't successfully resist the argument that MDL treatment requires the broadest discovery possible. The procedural vehicle should not open the door more widely than the individual cases would; but that principle sometimes gets lost.

We have noticed, by the way, that although the number of requests for MDL treatment may be increasing, the percentage of requests granted has declined. This may be a sign that the JPML is aware of the potential for MDL abuse and is increasingly open to other types of case coordination.

Mr. Stephens: John, do you have any thoughts on what's been behind the increase?

John Beisner: Several factors are at work. Fundamentally, the increase results from plaintiffs' counsel astutely observing that if they create and file enough claims in an MDL proceeding, there's a likelihood that those claims won't get much individualized scrutiny. Counsel can simply "warehouse" those claims in the proceeding, never having to justify their legitimacy or expend significant energy prosecuting them. Counsel then encourage the MDL transferee court to pressure the defendant(s) to clear away the mountain of claims with a global settlement that will allow plaintiffs to collect on those claims with little or no further examination of their individual merit. This phenomenon was well described in an opinion by Chief Judge Clay Land of the US District Court for the Middle District of Georgia:

[T]he evolution of the MDL process toward providing an alternative

dispute resolution forum for global settlements has produced incentives for the filing of cases that otherwise would not be filed if they had to stand on their own merit as a stand-alone action. Some lawyers seem to think that their case will be swept into the MDL where a global settlement will be reached, allowing them to obtain a recovery without the individual merit of their case being scrutinized as closely as it would if it proceeded as a separate individual action. This attitude explains why many cases are filed with little regard for the statute of limitations and with so little pre-filing preparation that counsel apparently has no idea where or how she will prove causation.

In re Mentor Corp. ObTape Transobturator Sling Prod. Liab. Litig., MDL Docket No. 2004, 4:08-MD-2004, slip op. at 3-4 (M.D. Ga. Sept. 7, 2016).

I agree with Charna that attorney advertising has also played a major role in the expansion of MDL cases. Once a potential mass tort is identified, plaintiffs' counsel invest enormous resources to locate potential claimants. Because of the indiscriminate trawling that occurs, many (if not most) "leads" generated by these ads involve individuals who had no exposure to the alleged risk or didn't experience any manifestation thereof. Many of these people respond primarily to the ads' references to substantial recoveries.

Also, to elaborate on third-party litigation funding, millions of dollars are now being invested in lawsuits. This money flows from hedge funds, private investors, and even "crowd funders." Once it becomes apparent that a mass-tort proceeding will

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“Historically, it was the *defendant* that usually moved for creation of MDL proceedings. In recent years, however, that pattern has shifted. Now, *plaintiffs’* counsel normally make the motion, usually before any mass tort has really taken shape. Presumably, they do so in the hope that creation of an MDL proceeding will attract large numbers of claims that will facilitate ‘warehousing’ of claims.”

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advance, funders sometimes team with lawyers who have little or no interest in actually litigating the matter and who won’t (or can’t) invest their own cash in advertising. The business model such lawyers follow is to give funders part of their 33-40% contingency-fee interest in each client’s claims in exchange for money to finance advertising campaigns to generate more claims (or counsel may simply keep all or part of the money as an “advance”).

Under this model, counsel file the claims but devote little or no effort to litigating them; they simply wait for settlement money. In short, the goal is quantity, not quality. The lawyers want to file as many claims as possible, hoping they’ll eventually be paid a large sum for their “bucket” of claims with minimal individual case scrutiny. Thus, although the problem of inadequately investigated claims pervades MDL proceedings, it appears to be particularly acute among counsel who have adopted this third-party-funding business model.

Mr. Stephens: What criteria does the JPML apply when it considers transfer of a lawsuit? Have those criteria, or the panel’s application of them, contributed to the rise in case consolidation?

Mr. Beisner: Consistent with the MDL statute, the JPML seeks to create efficient MDL proceedings for claims that have common factual elements. At the end of the day, the real question is whether the claims will require substantially common discovery that would benefit from coordination.

In my view, there really hasn’t been a major shift in those criteria that has contributed to the rise in case consolidation. The

explanation lies more in the fact that historically, it was the *defendant* that usually moved for creation of MDL proceedings, typically at a point when it began experiencing difficulties coping with multiple, conflicting discovery demands from cases pending in multiple federal courts. In short, defendants made the motions when they needed coordination.

In recent years, however, that pattern has shifted. Now, *plaintiffs’* counsel normally make the motion, usually before any mass tort has really taken shape. Presumably, they do so in the hope that creation of an MDL proceeding will attract large numbers of claims that will facilitate the “warehousing” I mentioned previously. Put another way, plaintiffs’ counsel seek creation of MDL proceedings at a stage when the coordination need is much more speculative. Such early motions pose a special challenge for the JPML, which must figure out whether it is confronting a controversy that—absent an MDL proceeding—would otherwise develop into a real mass tort warranting formal coordination. Recently, the JPML has been probing more deeply to ensure that MDL proceedings are created only where a real need exists.

Mr. Stephens: Do the criteria that MDL judges utilize when selecting a matter’s lead counsel and steering committee also inspire plaintiff recruitment?

Mr. Beisner: To some extent, yes. In appointing plaintiffs’ leadership, MDL judges logically prefer counsel who have enough clients involved to warrant a substantial time investment. The most aggressive claims-gatherers are often counsel who have no interest in assuming any leadership role—or in expending substantial effort on the litigation. They

are pleased to let other counsel do most of the work, while they simply wait for the defendant to settle their “warehoused” claims.

Mr. Stephens: With regard to the selection of counsel, University of Georgia Law School Professor Elizabeth Chamblee Burch has written that MDL judges often favor repeat players, which leads to “homogeneous thinking” and creates “hierarchies of influence.” Charna, are those accurate criticisms?

Ms. Gerstenhaber: They are somewhat accurate. One of the criteria for an MDL leadership position is experience in MDL leadership, so it can be hard for anyone to break into that group. And experience does matter. We absolutely benefit when dealing with counsel who have participated in major litigations. There is, however, a shift toward greater diversity in MDL leadership developing; recent reports and studies indicate that we’re seeing more and more MDLs with women or minorities in key leadership roles. We certainly support that change at Novartis in terms of our own representation. Of course the profession is not where it needs to be yet, but the value of diversity is gaining strength.

Mr. Stephens: As noted in the introduction, only 2.9% of cases transferred into the MDL process are being sent back to the transferor court. What impact does an MDL court’s warehousing of unresolved claims have on a corporate defendant like Novartis?

Ms. Gerstenhaber: One major reason plaintiffs’ counsel seek to aggregate claims is to gain leverage for settlement. As discussed earlier, the increased role of litigation funding allows attorneys to bring

large groups of claims without much risk. This discourages careful vetting of claims on their merits. Going into an MDL now, defendants know a large number of the claims could lack any legal and/or factual legitimacy.

Also, an MDL may allow aggregation without counsel necessarily having to work up huge numbers of claims. Plaintiffs may seek bellwethers, and defendants may seek resolution of certain common legal issues first, before discovery. So, again, it’s possible to have a lot of claims creating risk/exposure without an ability to assess their individual merits.

As a corporate defendant, it is important to have a long-term strategy specific to the issues of a litigation, and that includes considerations of possible approaches both on how to win certain cases or issues that are heard by the MDL court, and how to make sure cases are moving toward remand and resolution in other courts, such as by multi-track discovery plans, etc.

Defendants also need to consider strategies ensuring that all their trial eggs are not in the bellwether/MDL jurisdiction basket. For example, we recently defended the *Zometa* MDL in part by refusing to waive the rights derived from the US Supreme Court’s *Lexecon v. Milberg Weiss* case, which can be an effective way to get cases remanded out of an MDL and back to home jurisdictions for trial. As a result, 100% of the cases were transferred back to the transferor courts. We made that decision based upon our belief that we could be successful at trial and with case-specific summary judgment motions that the MDL court could not realistically entertain.

“Defendants need to consider strategies ensuring that all their trial eggs are not in the bellwether/MDL jurisdiction basket.”

Charna Gerstenhaber

“The desire to avoid remands can’t justify using pressure tactics to achieve global settlements without regard to the strengths and weaknesses of the individual claims in the proceeding—particularly the high likelihood that many (if not most) of the claims should never have been filed in the first place or have only marginal value.”

John Beisner

Mr. Stephens: What factors discourage MDL judges from returning individual cases back to their original courts?

Mr. Beisner: I fear that in recent years, the MDL community has been prone to award “gold stars” to judges who are able to quickly conclude MDL proceedings without remanding any (or many) cases to transferor courts. To some degree, that’s perfectly understandable. Who would want to be the jurist who dumps 30,000 cases back on his or her colleagues, particularly when those cases would likely be at the stage when they present the thorniest case-specific discovery issues and may be ready for trial dates in the short term?

To be sure, in some controversies, it’s possible to achieve such resolutions through deft, balanced case management practices. But where that outcome isn’t possible, the desire to avoid remands can’t justify using pressure tactics to achieve global settlements without regard to the strengths and weaknesses of the individual claims in the proceeding—particularly the high likelihood that many (if not most) of the claims should never have been filed in the first place or have only marginal value.

Indeed, full resolution of most MDL proceedings would probably occur more quickly if the transferee courts pressured *both* sides on points that would encourage overall resolution. For example, MDL courts could demand that plaintiffs’ counsel proffer hard, claim-by-claim evidence that their individual cases are each settlement-worthy and to self-winnow their claims (that is, to dismiss without payment claims they would be unwilling to take to trial or that should never have been filed in the first place.)

Mr. Stephens: Once claims are aggregated into MDL, and discovery begins, courts often find the docket is laden with meritless claims. What can MDL courts do to eliminate such claims earlier in the process?

Mr. Beisner: Let me start by saying that there is strong evidence that in most MDL proceedings, a significant percentage of the claims lack merit. For example, when parties reached a global settlement regarding Vioxx personal-injury claims several years ago, plaintiffs were required prove that they (a) had been prescribed the product and (b) had experienced the alleged risk (heart attack or stroke) before payment.

Obviously, before asserting such claims, counsel at a minimum should have confirmed that their clients could demonstrate those two points. Yet, astoundingly, close to 30% of the claimants in the pool were unable to muster such basic evidence, suggesting their claims should not have been brought in the first place.

As outlined in a 2009 WLF Monograph that Jessica Miller and I authored, transferee courts in mass-tort MDL proceedings should establish an upfront procedure that requires each claimant to provide a basic justification for his/her claim. One option in personal-injury cases is to require early production of a “notice of diagnosis”—documentation confirming that a qualified medical practitioner has seen the patient and determined that he or she is manifesting (or has manifested) the symptoms alleged in the proceeding. Another approach (not mutually exclusive) is to require each plaintiff to provide a plaintiff fact sheet—basically responses to a set of standard interrogatories and document requests.

Fortunately, plaintiff fact sheet requirements have become commonplace in mass-tort MDL proceedings. Some MDL courts are adamant about fact-sheet compliance, dismissing claimants who do not timely submit full responses. However, in other proceedings, the fundamental purposes of fact sheets are not fulfilled. Response protocols aren't enforced rigorously, and/or the required fact-sheet content doesn't really force claimants to justify their claims.

Plaintiff fact sheets should require proffering of clear evidence that before filing, counsel have subjected each claim to a thorough investigation of the relevant facts consistent with the requirements of Rule 11. In short, counsel should be required to "show their homework."

At minimum, the fact sheet should require production of medical records confirming that the claimant experienced the allegedly causative exposure alleged in the litigation (*e.g.*, proof that the claimant was prescribed the medicine at issue) and the alleged harmful effect (*e.g.*, the side effect that the medicine is alleged to cause). Those are matters that responsible counsel should have confirmed before filing a claim.

Such upfront justifications should be required because mass-tort MDL proceedings largely suspend the mechanisms courts use to ensure plaintiffs can justify their claims. Even though defendants typically are required to produce enormous amounts of discovery on factual issues generally applicable to the claims in the proceeding, MDL courts typically don't allow defendants to utilize the federal rules that permit them to test individual claims.

In many MDL proceedings, the defendant doesn't receive a complaint pled with the detail required by Rule 8. Instead, all claims are premised on a "master complaint." For that reason, the defendant typically is deprived of the opportunity to use Rule 12(b) motions to challenge the adequacy of each plaintiff's case-specific allegations. Plaintiffs normally aren't required to make the initial disclosures mandated under Rule 26.

Except in the few cases that may be designated for "bellwether" trial preparation (many of which are hand-picked by plaintiffs' counsel), the defendant isn't permitted to: depose the claimant (or other fact witnesses) under Rule 3; to pose interrogatories under Rule 32; to make document requests under Rule 34; or seek admissions under Rule 36. And because they are unable to take claimant-specific discovery, defendants also usually can't challenge individual claims with Rule 56 summary judgment motions.

Particularly in mass-tort proceedings in which individual plaintiffs' general causation theories and/or injury allegations may vary, *Lone Pine* orders may also be beneficial.

Mr. Stephens: What are *Lone Pine* orders, and how can they discourage the stockpiling of meritless claims?

Ms. Gerstenhaber: With *Lone Pine* motions, or similar requests, defendants ask the court to require plaintiffs to put up evidence that substantiates an essential element of their claims. *Lone Pine* orders are not new and there are many variations, but generally we've argued for them when dealing with claims that are inconsistent with well-established science or medicine, claims of multiple plaintiffs

"Depending on the timing, *Lone Pine* orders can discourage the filing of junk claims and in any event will allow all parties to better assess the inventory and its possible litigation value."

Charna Gerstenhaber

“Once a decision is made to litigate cases on their merits, it is crucial that corporate defendants hold plaintiffs to their burdens of proof. This includes challenges to the scientific bases underpinning the claims. But it needs to be an informed choice, not just a check-the-box rote filing.”

Charna Gerstenhaber

alleging identical injuries (often against many defendants), or claims that lack clear evidence of exposure. The idea, in the right case, is to streamline and narrow claims, or even eliminate them altogether. For example, in the *Zometa* MDL, many cases involved a question of product identification—generic or brand? It would have been very wasteful to pursue discovery without some threshold proof on product identification. Depending on the timing, *Lone Pine* orders can discourage the filing of junk claims and in any event will allow all parties to better assess the inventory and its possible litigation value.

Mr. Stephens: Can defendants file summary judgment motions or seek formal review of the plaintiffs’ scientific evidence through evidentiary motions?

Ms. Gerstenhaber: Yes. They can and they should—in the appropriate case. Once a decision is made to litigate cases on their merits, it is crucial that corporate defendants hold plaintiffs to their burdens of proof. This includes challenges to the scientific bases underpinning the claims. But it needs to be an informed choice, not just a check-the-box rote filing. Understandably, courts deny motions that appear to be filed as a routine matter, and that tends to undermine the pursuit of meritorious *Daubert* motions.

To be successful, challenges to scientific evidence require attorneys who truly understand not only the law but also the science, and then courts must take time and be willing to judge the experts’ methodology against the crucible of the scientific method—and the court must do so, notwithstanding a large aggregation of cases. The Supreme Court has asked a lot of our federal judges.

The upside of course can be significant. Early *Daubert* successes can end an MDL or, at the least, drastically reduce the value of remaining cases. See, e.g., *In re Viagra Prods. Liab. Litig.*, 658 F. Supp. 2d 950, 968 (D. Minn. 2009) (granting summary judgment in bifurcated proceedings after simultaneously-issued order excluded plaintiffs’ sole remaining general causation expert and noting “[t]hat decision effectively ended the current litigation, because ... absent an admissible general causation opinion, Plaintiffs’ claims necessarily fail”); *In re Zoloft (Sertralinehydrochloride) Prods. Liab. Litig.*, No. 12-MD-2342, 2016 WL 1320799, at *5, 11 (E.D. Pa. Apr. 5, 2016) (granting summary judgment in favor of defendant Pfizer in all MDL actions after finding plaintiffs failed to present admissible expert testimony with respect to general causation).

Mr. Stephens: If a select number of plaintiffs’ claims are found to be legally or factually without merit as a result of a defendant’s motion, does that create an opportunity to similarly challenge the other plaintiffs’ claims?

Mr. Beisner: Yes, it should. When MDL courts conclude in one or more test cases that there is a flaw requiring dismissal (e.g., inadmissible scientific evidence, preemption), they will sometimes issue an order to show cause why some or all other cases in the proceeding should not be dismissed on the same grounds. Each claimant is then allowed to step forward with counter-arguments. Often, however, there is really nothing more to say—and many more claims are properly dismissed on the basis of the ruling in the test case.

Mr. Stephens: Recently, a judge dismissed all claims in one particular MDL, *In re*

Mirena IUD Products Liability Litigation. What lessons can defendants draw from that outcome in terms of motions practice in MDLs?

Mr. Beisner: Where possible, defendants should aggressively probe for one or more flaws that pervade the claims in the MDL proceeding. Sometimes we're talking about whether plaintiffs' science case—the causation proof—can meet *Daubert* standards. In other matters, preemption arguments are the key (*e.g.*, there is "clear evidence" that the Food and Drug Administration would not have approved the labeling warnings that plaintiffs contend should have been given). And in some, arbitration clauses may bar litigation. But whatever the flaw, it's important to seek an early opportunity for the court to consider the challenge.

Mr. Stephens: Are there other examples you can point to where rather than simply pressuring the defendants to settle, the presiding judge proactively sought to weed out meritless or even fraudulent claims?

Mr. Beisner: Yes, there have actually been several recent outcomes like the *Mirena* MDL proceeding. In that litigation, the MDL court dismissed all 1,200 cases due to deficiencies in plaintiffs' science/causation evidence. Similarly, in the *Incretin Mimetics* MDL proceeding, hundreds of failure-to-warn claims were dismissed on preemption grounds. And in the *Zolofit* MDL, the court dismissed over 300 claims due to plaintiffs' inability to present scientific evidence that could pass muster under *Daubert*.

My concern is that courts are less likely to weed out meritless/fraudulent claims where claimants in the MDL proceeding assert varying liability theories, which

requires sorting claims into various categories. And a similar problem exists where the flaws must be assessed more on a case-by-case basis, such as where individual claims are fraudulent (*e.g.*, the claimant never used the product at issue) or poorly investigated (*e.g.*, there is clear evidence of an alternative cause of the alleged injury). To be sure, eliminating dubious claims in that setting is a more daunting task for the MDL court. But that claims-winnowing process could be facilitated through use of the upfront claims justification methods described previously. As Chief Judge Land noted in the *Mentor Corp.* ruling quoted previously:

MDL consolidation for product liability actions does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise. ... [T]ransferee judges should be aware that they may need to consider approaches that weed out non-meritorious cases early, efficiently, and justly. The undersigned has struggled with the best way to accomplish that. Hopefully, the robust use of Rule 11 will help.

Mentor Corp., slip op. at 4-5.

Further, where claims require highly individualized legitimacy assessments or advance widely varying liability theories, MDL courts should be more willing to remand cases to allow transferor courts to deal with these case-specific problems. Once an MDL court has completed its common discovery tasks, there's much less reason for it to assume the burden of addressing individualized claim challenges.

"Where claims require highly individualized legitimacy assessments or advance widely varying liability theories, MDL courts should be more willing to remand cases to allow transferor courts to deal with these case-specific problems."

John Beisner

“It is important for MDL judges to understand not only the benefits but also the negative consequences of aggregation. This could help to level the playing field so that aggregation is not a weapon.”

Charna Gerstenhaber

Mr. Stephens: What lessons can be derived from the *Zometa* MDL in which you were involved?

Ms. Gerstenhaber: The primary lesson is that the litigation plan must fit the litigation that is presented. We chose to defend on the merits because we believed strongly in the extraordinary value of the medicine and the strength of our defenses, even though we recognized that the winning defenses were case-specific and so the litigation would take years to conclude, which it did.

We had a highly experienced team of defense counsel leading the MDL and national defense. We also had an aggressive discovery plan that included the work-up of hundreds of cases, not just bellwethers, which provided a better sense of the inventory.

We filed certain motions across the inventory, such as *Lone Pine*-style motions on product identification and Rule 25-style motions forcing compliance on certain procedural party-substitution issues important to the litigation.

We used targeted motion practice in and out of the MDL to resolve individual cases. For example, we prevailed on more than 100 summary judgment motions or contested motions to dismiss. We also secured more than 156 expert-witness exclusions, either in whole or in part, under *Daubert*.

We did not waive our *Lexecon* rights, ensuring that we would have all trials held outside the MDL. We had teams of trial attorneys ready to take cases to trial once remanded. We also took cases to trial in a parallel state court mass-tort docket.

Mr. Stephens: The Manual for Complex Litigation, which nominally guides judges’ management of MDLs, hasn’t been updated since 2004. Would an update benefit MDL parties and the judges who oversee them?

Mr. Beisner: Yes, an update of the Manual (which I understand is in progress) would be very beneficial. In particular, the discovery portions of the Manual should more fully reflect current practice regarding e-discovery, including the import of the recent Federal Rules amendments.

Mr. Stephens: In addition to utilizing some of the tools that you mentioned earlier, what else can MDL judges do to achieve the goals that Congress intended for multidistrict litigation? We’d welcome thoughts from you both on that.

Ms. Gerstenhaber: It is important for MDL judges to understand not only the benefits but also the negative consequences of aggregation. This could help to level the playing field so that aggregation is not a weapon. A few other concluding thoughts:

- Evaluating the inventory should require both sides to have equal roles in picking cases for work-up (or trial, as appropriate). Plaintiffs’ tactic of immediately dismissing defense picks should result in another defense pick, not leaving only plaintiffs’ picks in play.
- Courts should meaningfully limit discovery based on the core case issues, and efficiently manage discovery with cost-sharing.
- Courts should facilitate coordination without abandoning tools that require some level of case screening by plaintiffs’ counsel.

- Courts should understand that settlement (in the MDL or later) is not always the appropriate answer in litigation, and aggregation doesn't trump that point.
- Finally, courts should recognize that remanding cases out of the MDL in some instances can be the best way to resolve them.

Mr. Beisner: We need to get back to the basics in MDL proceedings. As the Supreme Court observed in *Lexecon*, MDL proceedings should rigorously adhere to the congressional intent that MDL proceedings are intended to deal solely with pretrial matters—getting discovery completed and resolving pre-trial motions. If the parties decide to settle while the MDL proceeding is in process, that's fine. But settlement shouldn't be the MDL court's primary goal. And there's no indication that Congress intended to authorize an array of ad hoc procedures in MDL proceedings that effectively ignore the Federal Rules of Civil Procedure.

It's gratifying that in some MDL proceedings, courts have been more focused on identifying and resolving issues pertinent to many (if not all of) the constituent cases—preemption questions, *science/Daubert* issues, statute of limitations questions. That approach warrants applause and should be emulated in more MDL proceedings.

And rather than (or at least before) channeling the parties' resources into bellwether trials, it would be beneficial if MDL courts spent substantially more time testing the viability of individual claims—to separate the wheat from the chaff. As noted previously, there's a desperate need, particularly in the larger mass-tort MDL proceedings, to winnow the claims

inventory down to those that are actually trialworthy.

I applaud Charna's point that defendants should remember that they are under no obligation to participate in bellwether trials and that in some MDL proceedings, it would be best for the defendant to "just say no" and to allow individual claims to be tested on remand with the rigor normally afforded to non-MDL claims. And where a defendant concludes that one or more bellwether trials might be beneficial in an MDL proceeding, it has the right to waive *Lexecon* only if its terms for a bellwether trial are met—for example, if the specific case proposed for trial is acceptable and is limited to a single plaintiff's claims.

Finally, many of the abuses and excesses regularly observed in MDL proceedings are largely a product of their seemingly boundless fee-generating potential. To be sure, the plaintiffs' counsel who take lead roles in litigating mass-tort matters (that is, those who legitimately invest substantial time and resources) are entitled to reasonable compensation for any successes achieved for their clients.

But particularly given the efficiencies that MDL proceedings are supposed to (and do) foster, how can one justify payment of the standard 33-40% contingency on each individual claim? That's a particularly troubling question for those counsel who operate under the four-step MDL business model discussed previously: (1) advertise for claims (possibly with third-party litigation funding); (2) file claims; (3) wait (avoiding any real involvement in litigating claims) and then (4) accept settlement money. What is the basis for imposing a 33-40% fee on clients when you never set foot in a courtroom on their behalf and when you assumed little or no financial risk?

"We need to get back to the basics in MDL proceedings. As the Supreme Court observed in *Lexecon*, MDL proceedings should rigorously adhere to the congressional intent that MDL proceedings are intended to deal solely with pretrial matters—getting discovery completed and resolving pre-trial motions."

John Beisner

Some MDL courts have taken the relatively bold step of capping such contingency-fee payments, and those moves should be applauded. Such reductions, however, should become standard practice and should more directly target counsel who embrace the “no effort” business model.

Mr. Stephens: Charna, John, thank you for participating in this discussion.

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The Honorable Jay B. Stephens is Of Counsel with Kirkland & Ellis LLP in its Washington, DC office. He is Chairman of Washington Legal Foundation’s Legal Policy Advisory Board. Mr. Stephens joined Kirkland & Ellis LLP after retiring in 2015 from Raytheon Company, where he served for nearly 13 years as a member of the company’s senior leadership team, including as Senior Vice President, General Counsel, and Corporate Secretary. Prior to joining Raytheon, Mr. Stephens had a distinguished career in the public and private sectors, serving as Associate Attorney General of the United States (2001-2002); United States Attorney for the District of Columbia (1988-1993); Deputy Counsel to the President of the United States (1986-1988); and Deputy General Counsel of Honeywell International.

Charna L. Gerstenhaber is a Vice President and the Head of Litigation for Novartis Pharmaceuticals Corporation. She leads a team of attorneys and paralegals, and oversees the Company’s discovery and preservation practices. Ms. Gerstenhaber’s primary focus is on complex product-liability and commercial cases. As a member of the Pharmaceuticals Portfolio Stewardship Board—the company’s global safety board—she provides counseling on risk management issues. For several years, Ms. Gerstenhaber co-chaired Novartis’s Global Litigation Practice Team. In 2015, she was the first recipient of ACI’s Champion of the Product Liability Defense Bar Award.

John H. Beisner is a Partner with Skadden, Arps, Slate, Meagher & Flom LLP in the firm’s Washington, DC office. He is national chair of Skadden’s mass torts, insurance, and consumer litigation group. Over his almost 40-year career, he has represented defendants in a wide range of high-visibility litigation and enforcement matters at both the trial and appellate court level. Mr. Beisner has been involved in defending over 650 class actions and has served as lead counsel for defendants in numerous federal multidistrict litigation proceedings. He is a frequent writer and speaker on legal reform issues and regularly testifies before congressional committees on civil litigation matters. He is a member of the Council of the American Law Institute.

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May 19, 2017

Honorable John Bates
United States District Court
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave., N.W. Room 4114
Washington DC, 20001

Dear Chairman John Bates:

I write to propose that a new Rule 23.3 be added to the Federal Rules of Civil Procedure to address problems arising from unique procedures fashioned by transferee judges to govern large MDL actions, which consist of hundreds or thousands of individual, centralized cases.

MDL procedures are the subject of a growing chorus of concern and criticism. The House of Representatives passed H.R. 985, in part, to address perceived procedural unfairness in MDLs. Distinguished academic proceduralists raised multiple issues with MDLs at a recent roundtable hosted by the George Washington Law School. (By way of background and to reflect a range of views on MDLs, links to their roundtable papers are contained at the end of the attached proposal. Please note that several papers are draft and not finalized for general circulation.) The reach and complexity of the MDL problem warrant a full and open debate that can only be provided by the inclusive and transparent Rules Enabling Act rulemaking process.

The attached suggestion addresses only a single MDL aspect, the diffusion of a transferee judge's authority, and is proposed primarily to initiate the rulemaking process. A new Rule 23.3 should be comprehensive and address the many other problems created by procedures dealing with large MDLs, several of which are described in the roundtable academic papers. In accordance with the instructions posted on the Administrative Office's rulemaking website, I look forward to following the suggestion's progress after an agenda number is assigned to it. ("Upon receipt of a suggestion, an agenda number is assigned to prepare an

advisory committee's reporter and members for preliminary discussion at an upcoming meeting.”)

The MDL Problem

More than 130,000 civil cases are pending in MDLs today, roughly 35% of the entire U.S. pending civil cases, and nearly 50%, if social security appeals and prisoner cases are excluded.

Over the past two decades, 20 very large MDLs on average have been pending in the federal courts at any given point in time. These 20 cases include roughly 90% of the 130,000 individual cases centralized by the 250 pending MDLs. This is no temporary phenomenon. Bench and bar reliance on the MDL process will continue because Supreme Court jurisprudence has closed off the class-action procedure to treat aggregated personal injury actions, and MDLs are the only game in town.

The JPML has adopted a policy of spreading out its appointments to designate new transferee judges who have little or no prior MDL experience. Although commendable, inexperienced transferee judges have little guidance, and must rely on serendipitous conversations with experienced MDL judges or unofficial guidance, like the *Duke Law MDL Best Practices*. Left largely to their own devices, transferee judges have developed procedures out of whole cloth. These innovative procedures include: (1) appointment of attorneys to plaintiffs’ steering committees; (2) establishment of common-benefit funds; (3) screening of complaints—especially added tag-along complaints; and (4) selection of bellwether cases.

The fairness and legitimacy of these procedures are crucial because approximately 95% of the centralized cases are terminated by the transferee judges, notwithstanding the limited stated intent of the underlying enabling statute (28 U.S.C. § 1407), which authorizes courts to centralize cases for pretrial discovery rulings. The MDL procedures have evolved under the traditional trial-and-error process of common law. That tradition may be defensible when only the interests of individual litigants are involved. But the stakes are much higher in every large MDL when the consequences of well-intentioned, but flawed, procedures can penalize thousands of individual litigants.

No Principled Reason to Exclude MDLs from Rulemaking Scrutiny

Notwithstanding the admirable ingenuity and determination of individual transferee judges in working through the managerial MDL nightmares, there is no

principled reason to continue to exclude such a large percentage of cases from the rulemaking process. That debate was decided more than 80 years ago with the enactment of the Rules Enabling Act.

The JPML historically has offered informal advice on the management of cases centralized in MDLs since 1968, but the unprecedented surge in cases centralized in MDLs demand uniform and consistent procedures. Individual JPML judges, and for that matter, the JPML, are outstanding jurists, but they are no substitute for the rulemaking process, which brings together not only judges, but also Congress, Supreme Court, practitioners, academics, government officials, and all other interested parties.

The MDL procedures raise complicated issues, which require careful scrutiny by all interested parties under the disciplined and orderly rulemaking review process. There is a new urgency to initiate the rulemaking process because in the absence of judicial rulemaking, Congress has stepped in and, if not deterred, may preempt belated judiciary action.

Thank you for considering the proposal.

Sincerely,

A handwritten signature in black ink, appearing to read 'J.K.R.', with a stylized flourish at the end.

John K. Rabiej

Attachment

cc: Hon. David Campbell
Hon. Sarah Vance
Professor Edward Cooper
Professor Rick Marcus
Professor Dan Coquillette

PROPOSED RULE 23.3

BACKGROUND

The legal authority for many of the procedures undertaken by MDL transferee judges is not self-evident, e.g., establishing million-dollar common benefit funds, assessing attorney fee's in state-related cases. Although Rule 16(c)(2) provides judges with broad pretrial authority, relying exclusively on Rule 16 for ordering such far-reaching actions is troubling.

It is no surprise that experienced judges see the possibility of rules governing MDLs as obstacles, because they narrow a judge's discretionary authority. But the oft-repeated argument that MDLs are too different for rulemaking is weak. First, the Civil Rules cover all types of cases, dwarfing the range of issues in MDLs. Second, only the 20 mega-MDLs are causing the biggest problems. Crafting rules governing only this small number would be relatively easy compared with typical rules that must govern all types of cases.

RULE 23.3

The specific procedural proposal targets only the largest MDLs out of the total 250 MDLs, which I define as any MDL consisting of more than 900 cases. There are three reasons for this limitation: First, these 20 mega-MDLs contain about 90% of all centralized cases, or about 120,000 cases. Second, the number of mega-MDLs has remained remarkably consistent over the years. Third, these mega-MDLs raise unique but common issues, including PSC selection, common-benefit fund, screening of complaint filings, and bellwether trials that are susceptible to common solutions.

To ensure that mega-MDLs are resolved fairly and with the most possible attention paid to each claim, transferee judges' power to dispose of mega-MDLs should be diffused. There is no doubt that centralizing thousands of cases under a single judge's purview vastly increases the efficiency of the process. Indeed, the 20 currently pending mega-MDLs—which include 90% of cases centralized in *all* pending MDLs—can be disposed of entirely by transferee judges. But investing individual judges with such power creates unforeseen consequences that adversely affect the proceedings' fairness.

The first fairness concern involves the attention a single judge can pay to each claim in a mega-MDL. It is difficult for a single judge to provide the adequate time or attention necessary to screen thousands of initial filings. Second, on the back end of the proceeding, one judge cannot provide the same amount of individualized care in disposing of thousands of aggregated cases as she would be

able to provide when disposing of a standalone case. This limited amount of attention has raised criticism about questionable rulings, most recently noted in the House Committee Report accompanying H.R. 985: “[s]ome MDL judges have issued questionable rulings on pivotal issues that are not subject to immediate appellate review, including the admissibility of expert evidence and the appropriateness of multi-plaintiff trials.”¹

The risk of questionable rulings increases not only because the judge has limited time available per case, but also because the judge is highly motivated to reach settlement, even at the cost of pressing parties to withdraw reasonable objections. There are two reasons motivating a judge to reach settlement. The first reason has been regularly raised at conferences. Transferee judges often view remand as a personal failure. Remands irritate colleagues, because transferor judges must start fresh and re-acclimate themselves to remanded cases. Thus, peer pressure strongly incentivizes settlement. Moreover, because remanding cases is perceived as failure, the judge risks losing future, highly desired MDL assignments.

The second reason has been largely ignored but applies an equal—if not more subtle—degree of pressure on transferee judges to settle mega-MDLs. That reason is the personal stake a transferee judge has in the disposition of her cases. Unlike class actions, in mega-MDLs, the transferee judge takes an active role in setting up the complex machinery needed to govern the case and hand-picking lawyers to serve on the plaintiffs’ steering committee. When a mega-MDL commences, the transferee judge inserts herself into the adversarial proceedings often authorizing a multi-million dollar common-benefit fund, which reimburses lawyers for common-benefit work. Creating and administering such a fund requires elaborate procedural machinery and creates high expectations of a pay-out.

This machinery demands a large investment of time and money by the PSC and plaintiff lawyers—all of which must be set in motion and authorized by the transferee judge. Unless a settlement is reached, all efforts to create and operate this procedural machinery, which was established by the judge, and the scores of individual lawyers performing common-benefit discovery work over several years—not to mention the expenses incurred by the plaintiffs’ steering committee—will go uncompensated. It is easy to see how establishing such a robust machinery can exert pressure on a transferee judge to do all in her power to settle a mega-MDL.

Unlike Rule 23 class actions, where the judge does not authorize the fund at the beginning of the case, in mega-MDLs the transferee judge takes on the personal responsibility for authorizing the fund at the beginning of the proceedings.

¹ H.R. REP. NO. 115-25, at (2017).

Although discovery lawyers recognize that no compensation is guaranteed in a mega-MDL, they have come to expect settlement (and hence compensation). As a result, if the transferee judge fails to settle the case, she must face the uncomfortable proposition of dealing not only with the 20 or so lawyers she hand-picked to serve on the steering committee, but also the scores of other lawyers who took on the discovery work in anticipation of eventually being compensated. Informing a small army of lawyers that millions of their collective dollars will go unreimbursed because the judge failed to persuade the parties to settle the mega-MDL must be difficult.

To combat these pressures and to mitigate the impact of a single ruling affecting thousands of individual litigants, case-disposition authority should be distributed to—and shared among—multiple judges. There are at least two ways to do this. One way would be for the JPML to divvy up cases among several judges at a mega-MDL's outset. But that would defeat § 1407's purpose to preserve efficiency by centralizing discovery responsibility in a single judge.

Another, more workable way to diffuse authority would be to equally assign individual cases to, for example, five judges for final disposition at some point *after* most discovery in the mega-MDL is complete, but before any bellwether trial takes place. Ideally, case assignments would be made shortly after the bellwether cases have been selected. At that point, the mega-MDL's individual cases would be allocated among and distributed to the five judges—including the transferee judge, who would receive a proportionate share of cases. Each judge's primary responsibility would be to oversee final disposition of her assigned cases; that is, to decide whether to dispose of a case on motion, settle, or remand. Although implementing this change might require a change in existing Judicial Conference policies, inter-circuit assignment rules could be relaxed to allow assignments to judges outside the district to handle the 20 mega-MDLs in the same district.

Allocating mega-MDLs in this way would certainly impose additional burdens on the Judiciary, but those burdens are proportionate to the interest in allocating authority and the share of the federal docket represented by the 20 mega-MDLs. Currently, the 20 mega-MDLs represent more than 35% of all pending civil cases in the federal trial courts and more than 50% of the civil docket if prisoner and social security cases are excluded. Approximately 1,000 federal judges are available to take cases. In light of those statistics, any increased burdens arising from the diffusion of disposal authority would be reasonable.

Diffusing authority in this way would provide many benefits. First, assigning more judges would afford greater attention to individual cases. This greater attention could mitigate some of the fairness concerns raised when case-

disposition authority is vested solely in the transferee judge. Nevertheless, the extent of individualized treatment should not be over-stated, particularly with respect to the three pending mega MDLs that each consist of more than 15,000 cases. Even if five judges were assigned to a mega-MDL with 15,000 cases, each judge would still be responsible for 3,000 cases. Although 3,000 cases is a large number, it is more manageable than 15,000 cases.

Second, if authority is distributed after bellwether trials are identified but before they are heard, those cases would be handled by different judges, which could potentially give parties a more accurate picture of their cases' true worth. Doing so would also relieve the pressure on any one judge to settle a litigation after creating a multi-million dollar common-benefit fund, raising expectations of a payout, and watching lawyers she appointed spend large amounts of money on discovery. Further, it would also relieve pressure on a judge who makes a ruling that disposes of all of her case's main issues. Under the current regime, such a ruling would affect every case in the mega-MDL. Instances of judges permitting "*Daubert* do-overs" illustrate the difficulties in making a single ruling governing thousands of individual cases. The effect would be mitigated if the mega-MDL's cases are divided up among multiple judges. Finally, dividing up disposal authority among five judges later in the MDL's life cycle would carry out Congress's original intention in enacting § 1407 by ensuring that the transferee judge retains authority to efficiently address early discovery issues.

Of course, diffusing the transferee judge's authority has its drawbacks. Doing so would create added transactional costs by requiring the formation of smaller, added steering committees to manage cases once they are reassigned to the five judges. Shared authority would also create the potential for conflicting or inconsistent rulings on similar later-stage issues. It would also increase inefficiency by introducing four judges to the case who would need to quickly familiarize themselves with the litigation. But these drawbacks are both tolerable and manageable in light of the benefits that such a diffusion of authority would provide.

PAPERS SUBMITTED AT GW ROUNDTABLE

Robert G. Bone - ["Compared to What?: A Qualified Defense of the MDL"](#)

Andrew Bradt - ["Geography, Personal Jurisdiction, and MDL Case Assignments"](#)

Stephen B. Burbank - ["The MDL Court and Case Management in Historical Perspective"](#)

Elizabeth Burch - ["Rethinking the Selection and Compensation of Lead Lawyers in Multidistrict Litigation"](#)

Abbe Gluck - ["Unorthodox Civil Procedure"](#)

Deborah R. Hensler - ["No Need to Panic: The Multi-District Litigation Process Needs Improvement Not Demolition"](#)

David Proctor and Sam Issacharoff - ["Selection and Compensation of Counsel in Multi-District Litigation"](#) (.ppt)

Linda S. Mullenix - ["Developments Relating to the European Union's Recommendations for Collective Redress, and the Opt-Out/Opt-In Problem"](#)

Linda S. Mullenix - ["Policing MDL Non-Class Aggregate Settlement: Empowering Judges through the All Writs Act"](#)

John Rabiej - ["Two Proposals to Improve How Courts Manage 'Mega-MDLs'"](#)

Judith Resnik - ["Doing the State's Business: From Collective Actions for Fair Labor Standards and Pooled Trusts to Class Actions and MDLs in the Federal Courts"](#)

Judith Resnik - ["'Vital' State Interests: From Representative Actions for Fair Labor Standards and Pooled Trusts to Class Actions and MDLs in the Federal Courts"](#)

Charles Silver - ["Some Questions About Lead Counsels' Appointment, Duties, and Compensation"](#)

Jay Tidmarsh - ["The MDL as De Facto Opt-In Class Action"](#)

John K. Rabiej, Director
Duke Law School Center for Judicial Studies
919-613-7059

TAB 7D

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1 **7D. 17-CV-XXXXX: Rule 71.1(d)(3)(B)(1): Newspaper Notice**

2 This suggestion is to allow publication of notice of a
3 condemnation action in a newspaper of general circulation in the
4 county where the property is located even when the newspaper is
5 not published in the county and another newspaper is published
6 there. Some detail is required to set the context for this
7 clear proposal.

8 Rule 71.1(c) requires a complaint in a condemnation action.
9 The defendants are the property and those persons who have or
10 claim an interest in the property and whose names are known.
11 The complaint is filed with the court, with "at least one copy
12 for the defendants' use and additional copies at the request of
13 the clerk or a defendant." Rule 71.1(c)(4) directs that all
14 defendants be served, not with the complaint, but with a notice.

15 Rule 71.1(d)(3) governs service of the notice. A defendant
16 must be personally served in accordance with Rule 4 if the
17 defendant has a known address and resides within the United
18 States or a territory subject to the administrative or judicial
19 jurisdiction of the United States. Service by publication is
20 required when the defendant cannot be personally served, either
21 because the defendant resides outside the places where personal
22 service can be made or because the defendant's address remains
23 unknown "after diligent inquiry within the state where the
24 complaint is filed." If the defendant has a known address
25 outside the limits of personal service, a copy of the notice
26 must be mailed to the defendant. That leaves publication as the
27 only means of notice to a defendant whose address is unknown.

28 Rule 71.1(d)(3)(B)(i) governs the mode of publication.
29 Notice must be published once a week for at least 3 successive
30 weeks "in a newspaper published in the county where the property
31 is located or, if there is no such newspaper, in a newspaper
32 with general circulation where the property is located."

33 The suggestion can now be put in context. It is simple:
34 even if there is a newspaper published in the county where the
35 property is located, the rule should allow publication in any
36 newspaper with general circulation where the property is
37 located.

38 As a practical matter, it may be that a newspaper with
39 general circulation where the property is located is more widely
40 read than a small weekly newspaper published in the county. As
41 a much smaller point, the property may cross county lines – a

42 newspaper with general circulation in two or more counties may
43 provide better notice than a less widely circulated newspaper
44 published in just one of the counties. The suggestion also says
45 that New Mexico has provisions for personal service by
46 publication that conflict with Rule 71.1(d)(3)(B)(i) when
47 incorporated in Rules 4(e)(1) and (h)(1)(A) because the New
48 Mexico provisions allow publication in a newspaper of general
49 circulation in the county.

50 The wisdom and importance of this suggestion must be
51 measured by those with deep knowledge of condemnation practice.
52 The Department of Justice has wider experience with the federal
53 practice than any other condemnation plaintiff. The Department
54 has reviewed the proposal and has no objection.

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August 10, 2017

Honorable John D. Bates
Senior United States District Judge
Chair, Advisory Committee on Civil Rules
United States District Court for the District of Columbia
E. Barrett Prettyman Courthouse
333 Constitution Avenue NW
Washington, DC 20001

Re: Suggested Amendment to Rule 71.1(d)(3)(B)(i)

Dear Judge Bates:

I write to suggest a small but important amendment to Rule 71.1(d)(3)(B)(i).¹

If certain conditions are met, the rule requires service of a notice directed to a defendant by publication “in a newspaper published in the county where the property is located.” (Emphasis added).

Only if there is no such newspaper does the rule permit publication of the notice in a newspaper “with general circulation” in that county. (Emphasis added).

If there ever was a principled reason for a distinction between a newspaper published in the county and one with general circulation in the county, that reason vanished long ago. Many, if not most authorities have abandoned that distinction, deleting the requirement of publication in a newspaper published in the county and retaining only the standard of publication in a newspaper with general circulation in the county. The Uniform Probate Code provides several examples.

¹ I have no condemnation case, pending or contemplated, in any federal court so have nothing to gain personally or professionally. I seek only to simplify and modernize one of the Federal Rules of Civil Procedure, similar to my work with the Uniform Law Commission and the American Law Institute. However, these views are my own.

Several sections of the Probate Code require publication for different purposes in a newspaper with general circulation in the county.²

More pertinent, our state rules of civil procedure require publication for service of process in a newspaper with general circulation in the county.³ This state rule may be used in federal court. Fed. R. Civ. P. 4(e)(1), (h)(1)(A). By making this state rule applicable in federal court proceedings, Rule 4 (e)(1) and 4(h)(1)(A) creates a conflict in this respect with Rule 71.1(d)(3)(B)(i). I do not believe that our state is alone, either in providing for service of process by publication or in providing for publication in a newspaper of general circulation in the county.

Perhaps the best reason for the elimination of the published-in-the-county requirement is that the requirement is an unnecessary complication at best and a trap for the ill-informed or unwary at worst.

It is unnecessary to inquire whether a condemnation judgment would bind one who claims lack of notice following a violation of this requirement or whether defenses might be available to defeat such a claim. It is necessary only to keep in mind that such a claim may be brought years or even decades after the condemnation case was closed.

Recent experience demonstrates that similar claims consume large amounts of judicial resources, even with the use of case-management tools. *See, e.g., T.H. McElvain Oil & Gas Ltd. P'ship v. Benson-Montin-Greer Drilling Corp.*⁴ That case arose from a quiet title decree entered in 1948 after several defendants were served with process by publication. After the property had increased in value, the successors of two of those defendants sued in 2010 to set aside the decree, alleging that service by publication was improper so that the court lacked jurisdiction over the defendants. After receiving the report of a special master, the district court entered summary judgment against the successors. The New Mexico Court of Appeals reversed the district court and remanded for consideration of defenses to the successors' claims. The New Mexico Supreme Court reversed the Court of Appeals and affirmed the district court in an opinion released for publication in 2017.

The upshot was that a case arising from an allegedly improper publication was finally resolved some 69 years later after occupying the time and attention of three courts for almost seven years.

² Unif. Probate Code § 1-401(a)(3) (notice of hearing on most petitions) 8 pt. I U.L.A. 82 (2013); *id.* §§ 3-310 (notice of intention to seek informal appointment as personal representative), 3-403(a) (notice of hearing on petition for formal testacy proceedings), 3-801(a) (notice to creditors) 8 pt. II U.L.A. 67, 86, 241 (2013).

³ Rule 1-004(K)(1) NMRA (applicable to the district courts, which are the state's courts of general jurisdiction).

⁴ 2015-NMCA-004, 340 P.3d 1277, *rev'd*, 2017-NMSC-004, 388 P.3d 240.

Rodey, Dickason, Sloan Akin & Robb, P. A.

Honorable John D. Bates
August 10, 2017
Page 3

Better to avoid such problems to the extent possible by making this minor adjustment to the rule.

Respectfully submitted,



John P. Burton

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TAB 8

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TAB 8A

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1 **8. IAALS FLSA Initial Discovery Protocol**

2 The Institute for the Advancement of the American Legal
3 System submits for consideration "and hopeful endorsement" the
4 Initial Discovery Protocols for Fair Labor Standards Act Cases
5 Not Pleaded as Collective Actions. These protocols follow in
6 the wake of the successful Initial Discovery Protocols for
7 Employment Cases Alleging Adverse Action. They were developed
8 by a similar process, with a committee comprised of attorneys
9 who regularly represent plaintiffs or defendants in FLSA
10 actions. The committee was chaired by Joseph Garrison and Chris
11 Kitchel, who co-chaired the Employment Cases protocol. Judges
12 Lee Rosenthal and John Koeltl again participated actively in
13 shepherding the committee toward agreement. Funding was
14 provided by the American College of Trial Lawyers Foundation.

15 The protocols substitute comprehensive initial discovery
16 for the initial disclosure provisions of Rule 26(a)(1). They
17 are attached. They are designed to be implemented by local rule
18 or by standing, general, or individual case orders. A model
19 standing order and interim protective order are included.

20 The Employment Cases protocols have been embraced by at
21 least a few dozen district judges. An FJC study has found them
22 successful. See Emery G. Lee, III and Jason A. Cantone, Report
23 on Pilot Project Regarding Initial Discovery Protocols for
24 Employment Cases Alleging Adverse Action (FJC 2015).

25 The success of the Employment Cases protocols and the
26 origins of the FLSA protocols provide a firm foundation for
27 welcoming the FLSA protocols and anticipating they will provide
28 real benefits. The Committee may well view them with favor.

29 An appropriate means of endorsing the FLSA protocols
30 remains an important question. The Committee exists as an
31 advisory committee, working to develop formal rules that can be
32 recommended by the Standing Committee, approved by the Judicial
33 Conference, and prescribed by the Supreme Court. Formal
34 endorsement of the protocols does not fit into this framework.
35 Just as the Committee regularly resists the temptation to
36 attempt additions to earlier Committee Notes without revising
37 rule text, so it should resist the temptation to formally
38 endorse even very good models for implementing present rules
39 outside the process for amending the rules.

40 The Committee, however, can consider and discuss these
41 protocols. Favorable comparisons to the Employment Cases

42 protocols can be noted. Individual committee members can adopt
43 the protocols, urge their district-court colleagues to adopt
44 them, and recommend them to other courts. The recommendations
45 can go beyond the intrinsic promise of the protocols to urge the
46 value of testing new procedures before they are considered for
47 adoption in the national rules. A particular comparison can be
48 made to the mandatory initial discovery pilot project already
49 underway in two districts. Still other means, short of formal
50 endorsement, may be found.

TAB 8B

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August 1, 2017

Hon. John D. Bates
United States District Court
E. Barrett Prettyman U.S. Courthouse
333 Constitution Ave., N.W., Room 4114
Washington, DC 20001

RE: FLSA Initial Protocols

Dear Judge Bates:

On behalf of the Fair Labor Standards Act (FLSA) Protocols Committee (Committee), IAALS, the Institute for the Advancement of the American Legal System, presents the attached Initial Discovery Protocols for FLSA Cases Not Pleaded as Collective Actions for the consideration—and hopeful endorsement—of the Civil Rules Advisory Committee.

Inspired by the Initial Discovery Protocols For Employment Cases Alleging Adverse Action, and at the encouragement of Judge Lee Rosenthal to consider pattern discovery for FLSA cases, IAALS formed the Committee with the goal of replicating the successes of the Employment Protocols for another case type that is both prevalent in our federal district courts and lends itself well to pattern initial discovery.

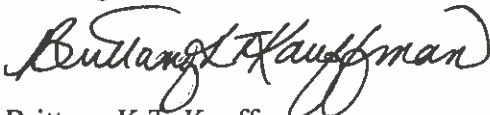
By design, the Committee was comprised of a balanced group of highly experienced attorneys from across the country who regularly represent plaintiffs or defendants in FLSA matters. The Committee was co-chaired by Joseph Garrison and Chris Kitchel, who also co-chaired the Employment Protocols Committee. The names of the Committee members are included on the attached list. Judge Rosenthal and Judge John Koeltl have both played an instrumental role in this effort, each facilitating a meeting and providing important guidance and support. As with the Employment Protocols, IAALS supported and facilitated the effort throughout and plans to continue its efforts to support education and implementation of the protocols. The American College of Trial Lawyers Foundation has played an important role as well, providing funding to support IAALS' work and the in-person meetings of the Committee.

The Committee has worked diligently over the last year, meeting three times in person, and holding numerous conference calls by the Plaintiff and Defense Sub-Committees. As with the Employment Protocols, the Committee's final product is the result of rigorous debate and compromise on both sides, inspired by the ultimate goal of improving the pretrial process in FLSA cases nationwide. The Committee has now finalized the attached set of pattern discovery requests for FLSA cases not pleaded as collective actions, along with a corresponding Model Standing Order and Interim Protective Order.

It is our hope that district courts will be invited to implement the pattern discovery on a pilot project basis, similar to the Employment Protocols. As described in the Protocols, the intent is to “encourage the parties and their counsel to exchange information and documents early in the case, help frame the issues to be resolved, and plan for more efficient and targeted discovery.” The Committee believes that this pattern discovery has the potential to reduce costly law and motion practice and to effectively narrow disputed issues, as has been shown in the evaluation of the Employment Protocols by the Federal Judicial Center.¹

The Civil Rules Advisory Committee’s support for and endorsement of the Employment Protocols has been instrumental to their successful implementation around the country. The FLSA Discovery Protocols Committee appreciates the Advisory Committee’s review and consideration of the attached protocols and requests that the Committee once again consider endorsement. I will be in attendance at the November Civil Rules Advisory Committee meeting on behalf of IAALS, and co-chairs Joseph Garrison and Chris Kitchel will be there as well. We would welcome having the FLSA Discovery Protocols added to the Committee’s agenda for the meeting and look forward to answering any questions the Committee may have.

Best regards,



Brittany K.T. Kauffman
Director, *Rule One Initiative*

cc: Hon. David G. Campbell
Professor Edward H. Cooper
Professor Richard L. Marcus

attachments:

1. Employment Protocols Committee List
2. Initial Discovery Protocols for Fair Labor Standards Act Cases Not Pleaded as Collective Actions
3. Model Standing Order and Interim Protective Order

¹ EMERY G. LEE, III AND JASON A. CANTONE, FEDERAL JUDICIAL CENTER, REPORT ON PILOT PROJECT REGARDING INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT CASES ALLEGING ADVERSE ACTION (2015).

INITIAL DISCOVERY PROTOCOLS FOR FAIR LABOR STANDARDS ACT
CASES NOT PLEADED AS COLLECTIVE ACTIONS

PART 1: INTRODUCTION AND DEFINITIONS.

(1) Statement of purpose.

- a. These Initial Discovery Protocols apply to FLSA cases not pleaded as collective actions. The Protocols are designed to be implemented by trial judges throughout the United States District Courts. The Protocols encourage the parties and their counsel to exchange information and documents early in the case, help frame the issues to be resolved, and plan for more efficient and targeted discovery.
- b. Participating courts may implement the Initial Discovery Protocols by local rule or by standing, general, or individual case orders. The Protocols apply to cases alleging minimum wage and overtime violations under the FLSA (the “FLSA Claims”). If any party believes that there is good cause why a case should be exempted, in whole or in part, from the Protocols, that party may raise such reason with the Court.
- c. The Initial Discovery Protocols are not intended to preclude or modify the rights of any party for discovery as provided by the Federal Rules of Civil Procedure and other applicable local rules, but they are intended to supersede the parties’ obligations to make initial disclosures under FRCP 26(a)(1) for the FLSA Claims.
- d. The Initial Discovery Protocols were prepared by a balanced group of highly experienced attorneys from across the country who regularly represent plaintiffs or defendants in FLSA matters. The Protocols require the exchange of information and documents routinely requested in FLSA cases. They are unlike initial disclosures under FRCP 26(a)(1) because they focus on the type of information most likely to be useful in narrowing the issues for FLSA cases.

(2) Definitions. The following definitions apply to cases proceeding under the Initial Discovery Protocols.

- a. **Concerning.** The term “concerning” means referring to, describing, evidencing, or constituting.
- b. **Document.** The terms “document” and “documents” are defined to be synonymous in meaning and equal in scope to the terms “documents” and “electronically stored information” as used in F.R.C.P. 34(a).

- c. **Identify (Documents).** When referring to documents, to “identify” means to give, to the extent known: (i) the type of document; (ii) the general subject matter of the document; (iii) the date of the document; (iv) the author(s), according to the document; and (v) the person(s) to whom, according to the document, the document(or a copy) was to have been sent; or, alternatively, to produce the document.
- d. **Identify (Persons).** When referring to natural persons, to “identify” means to give the person’s: (i) full name; (ii) present or last known address and telephone number; (iii) present or last known place of employment; (iv) present or last known job title; and (v) relationship, if any, to the plaintiff or defendant. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.
- e. **Defendant.** Any person or entity alleged to be an employer or joint employer of the plaintiff(s) in the operative Complaint, unless otherwise specified.
- f. **Plaintiff.** Any named individual(s) alleging FLSA Claim(s) in the operative Complaint.

(3) Instructions.

- a. For this Initial Discovery, the relevant time period begins two years before the date the initial Complaint was filed, or, if willfulness is alleged, three years. If the Plaintiff alleges a shorter relevant time period, then that is the time period for Initial Discovery.
- b. For this Initial Discovery, the relevant time period continues through the last date for which the Plaintiff seeks recovery or relief.
- c. This Initial Discovery is not subject to objections except for the reasons under FRCP 26(b)(2)(B) or on the grounds of privilege or work product. Documents withheld based on a claim of privilege or work product are subject to the provisions of FRCP 26(b)(5).
- d. If a partial or incomplete answer or production is provided, the responding party must state the reason that the answer or production is partial or incomplete.
- e. This Initial Discovery is subject to FRCP 26(e) on supplementation and FRCP 26(g) on certification of responses.
- f. This Initial Discovery is subject to FRCP 34(b)(2)(E) on form of production.

- g. This Initial Discovery will be subject to the attached Interim Protective Order unless the parties agree or the court orders otherwise. The Interim Protective Order will remain in place only until the parties agree to or the court orders a different protective order. Absent agreement by the parties, the Interim Protective Order will not apply to subsequent discovery.
- h. Prior to the production of documents by either Party to the other pursuant to the Initial Discovery Protocols, the Parties will meet and confer regarding the format (e.g. TIFF/text, searchable .pdf, Excel) for such production. This will not delay the timeframes for Initial Discovery absent ruling by the court.

PART 2: PRODUCTION BY THE PLAINTIFF.

(1) Timing.

The Plaintiff's Initial Discovery must be provided within 30 days after the Defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

(2) Documents that the Plaintiff must produce to the Defendant.

- a. Documents created or maintained by the Plaintiff recording time worked.
- b. Documents created or maintained by the Plaintiff recording wages or other compensation paid or unpaid by the Defendant.¹
- c. If the Plaintiff reported or complained internally to the Defendant (including but not limited to supervisors or administrative departments, such as human resources, payroll, timekeeping or benefits) about the FLSA Claim(s), the report(s) or complaint(s) and any response that the Defendant provided to the Plaintiff.
- d. Any offer letters, employment agreements, or compensation agreements for the Plaintiff.
- e. Any sworn statements from individuals with information relevant to the FLSA Claim(s).
- f. Documents that the Plaintiff relies on to support a claim of willful violation.

¹ This Initial Disclosure does not include personal tax returns or tax informational documents.

- g. All other documents that the Plaintiff relies on to support the Plaintiff's FLSA Claim(s).

(3) Information that the Plaintiff must produce to the Defendant.

- a. Identify persons the Plaintiff believes to have knowledge of the facts concerning the FLSA Claim(s) or defenses, and a brief description of that knowledge.
- b. Identify the start and end dates for the FLSA Claim(s);
- c. The Plaintiff's title or position and a brief description of the Plaintiff's job duties for the relevant time period.
- d. Describe the basis for the FLSA Claim(s).
- e. A computation of each category of damages claimed by the Plaintiff, including a) applicable dates, b) amounts of claimed unpaid wages, and c) the method used for computation (including applicable rates and hours).
- f. The names of the Plaintiff's supervisors during the relevant time period.
- g. If the Plaintiff reported or complained about the FLSA Claim(s) to any government agency, the identity of each such agency, the date(s) or such reports or complaints, and the outcome or status of each report or complaint.
- h. If the Plaintiff reported or complained to the Defendant (including but not limited to supervisors or administrative departments such as human resources, payroll, timekeeping or benefits) about the any FLSA Claim(s), state whether the report or complaint was written or oral, when the report or complaint(s) was made, to whom any report or complaint(s) were made, and any response provided by the Defendant.

PART 3: PRODUCTION BY THE DEFENDANT.

(1) Timing.

The Defendant's Initial Discovery must be provided within 30 days after the Defendant has submitted a responsive pleading or motion, unless the court rules otherwise.

(2) Documents that the Defendant must produce to the Plaintiff.

- a. Time and pay records created or maintained by the Defendant for the Plaintiff.
- b. If the Plaintiff reported or complained internally to the Defendant (including but not limited to supervisors or administrative departments, such as human resources, payroll, timekeeping or benefits) about the FLSA Claim(s), the report(s) or complaint(s) and any response that the Defendant provided to the Plaintiff.
- c. Any sworn statements from individuals with information relevant to the FLSA Claim(s).
- d. Documents that the Defendant relies on to support a claim that any alleged violation was in good faith.
- e. Any offer letters, employment agreements, or compensation agreements for the Plaintiff.
- f. Collective bargaining agreement(s) applicable to the Plaintiff.
- g. The job description for the position(s) the Plaintiff held during the relevant time period(s), if the job duties are at issue in the FLSA Claim(s).
- h. The Defendant's policies, procedures, or guidelines for compensation that are relevant to the FLSA Claim(s).
- i. The cover page, table of contents, and index of any employee handbook, code of conduct, or employment policies and procedures manual pertaining to compensation or time worked.
- j. Any other documents the Defendant relies on to support the defenses, affirmative defenses, and counterclaims to the FLSA Claim(s).
- k. Any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(3) Information that the Defendant must produce to the Plaintiff.

- a. Provide the following information related to the Plaintiff :
 1. Start and end dates for work performed;
 2. Work location(s);
 3. Job title(s);
 4. Employee or contractor identification number;
 5. In cases alleging the misclassification of the Plaintiff, the classification status of the Plaintiff (i.e., exempt or non-exempt);
 6. Immediate supervisor(s) and/or manager(s).

- b. If the Defendant does not have a job description for the Plaintiff, a brief description of the Plaintiff's job duties for the relevant time period(s), if the job duties are at issue in the FLSA Claim(s).

- c. Identify persons the Defendant believes to have knowledge of the facts concerning the FLSA Claim(s) or defenses, and a brief description of that knowledge.

- d. If the Plaintiff reported or complained to the Defendant about the FLSA Claim(s), whether the report(s) or complaint(s) were written or oral, when the report(s) or complaint(s) were made, to whom any report(s) or complaint(s) were made, and any response(s) provided by the Defendant.

**UNITED STATES DISTRICT COURT
FOR THE _____ DISTRICT OF _____
_____ DIVISION**

_____)	
)	
Plaintiff,)	
)	
vs.)	Case No. _____
)	
_____)	Judge _____
)	
Defendant.)	

**STANDING ORDER FOR FAIR LABOR STANDARDS ACT CASES
NOT PLEADED AS COLLECTIVE ACTIONS**

[This Court is participating in a Pilot Program for **INITIAL DISCOVERY PROTOCOLS FOR FLSA CASES NOT PLEADED AS COLLECTIVE ACTIONS**, initiated by the Advisory Committee on Federal Rules of Civil Procedure.]

The Initial Discovery Protocols will apply to FLSA cases not pleaded as collective actions.

Parties and counsel in the Pilot Program shall comply with the Initial Discovery Protocols, attached to this Order. If any party believes that there is good cause why a particular case should be exempted from the Initial Discovery Protocols, in whole or in part, that party may raise the issue with the Court.

Within 30 days following the defendant's submission of a responsive pleading or motion, the parties shall provide to one another the documents and information described in the Initial

Discovery Protocols for the relevant time period. This obligation supersedes the parties' obligations to provide initial disclosures under FRCP 26(a)(1) for the FLSA Claims. The parties shall use the documents and information exchanged in accordance with the Initial Discovery Protocols to prepare the FRCP 26(f) discovery plan.

The parties' responses to the Initial Discovery Protocols shall comply with the FRCP obligations to certify and supplement discovery responses, as well as the form of production standards for documents and electronically stored information. As set forth in the Protocols, this Initial Discovery is not subject to objections, except upon the grounds set forth in FRCP 26(b)(2)(B) or on the grounds of privilege or work product. Documents withheld based on a claim of privilege or work product are subject to the provisions of FRCP 26(b)(5).

ENTER:

Dated: _____

[Name]

United States [District/Magistrate] Judge

The Initial Discovery Protocols for FLSA Cases Not Pleaded As Collective Actions are designed to achieve the goal of more efficient and targeted discovery. Immediate entry of a protective order will allow the parties to commence discovery without delay. In furtherance of that goal, the FLSA Protocols Committee offers the following Interim Protective Order. The Interim Protective Order will remain in place only until the parties agree to or the court orders a different protective order. Absent agreement by the parties, the Interim Protective Order will not apply to subsequent discovery. Recognizing that the decision to enter a protective order, as well as the parameters of any such order, rests within the Court's sound discretion and is subject to local practice, the following provisions are options from which the Court might select.

INTERIM PROTECTIVE ORDER

It is hereby ordered by the Court that the following restrictions and procedures shall apply to certain information, documents and excerpts from documents supplied by the parties to each other in response to discovery requests:

1. Counsel for any party may designate any document, information contained in a document, information revealed in an interrogatory response or information revealed during a deposition as confidential if counsel determines, in good faith, that such designation is necessary to protect the interests of the client. Information and documents designated by a party as confidential will be stamped "CONFIDENTIAL." "Confidential" information or documents may be referred to collectively as "confidential information."
2. Unless ordered by the Court, or otherwise provided for herein, the Confidential Information disclosed will be held and used by the person receiving such information solely for use in connection with the above-captioned action.
3. In the event a party challenges another party's confidential designation, counsel shall make a good faith effort to resolve the dispute, and in the absence of a resolution, the challenging party may thereafter seek resolution by the Court. Nothing in this Protective Order constitutes an admission by any party that Confidential Information disclosed in this case is relevant or admissible. Each party specifically reserves the right to object to the use or admissibility of all Confidential Information disclosed, in accordance with applicable law and Court rules.
4. Information or documents designated as "confidential" shall not be disclosed to any person, except:
 - a. The requesting party and counsel, including in-house counsel;
 - b. Employees of such counsel assigned to and necessary to assist in the litigation;

- c. Consultants or experts assisting in the prosecution or defense of the matter, to the extent deemed necessary by counsel;
 - d. Any person from whom testimony is taken or is to be taken in these actions, except that such a person may only be shown that Confidential Information during and in preparation for his/her testimony and may not retain the Confidential Information; and
 - e. The Court (including any clerk, stenographer, or other person having access to any Confidential Information by virtue of his or her position with the Court) or the jury at trial or as exhibits to motions.
5. Prior to disclosing or displaying the Confidential Information to any person, counsel shall:
- a. inform the person of the confidential nature of the information and documents; and
 - b. inform the person that this Court has enjoined the use of the information or documents by him/her for any purpose other than this litigation and has enjoined the disclosure of that information or documents to any other person.
6. The Confidential Information may be displayed to and discussed with the persons identified in Paragraphs 4(c) and (d) only on the condition that prior to any such display or discussion, each such person shall be asked to sign an agreement to be bound by this Order in the form attached hereto as Exhibit A. In the event such person refuses to sign an agreement in the form attached as Exhibit A, the party desiring to disclose the Confidential Information may seek appropriate relief from the Court.
7. The disclosure of a document or information without designated it as “confidential” shall not constitute a waiver of the right to designate such document or information as Confidential Information provided that the material is designated pursuant to the procedures set forth herein no later than that latter of fourteen (14) days after the close of discovery or fourteen (14) days after the document or information’s production. If so designated, the document or information shall thenceforth be treated as Confidential Information subject to all the terms of this Stipulation and Order.
8. All information subject to confidential treatment in accordance with the terms of this Stipulation and Order that is filed with the Court, and any pleadings, motions or other papers filed with the Court disclosing any Confidential Information, shall be filed under seal to the extent permitted by law (including without limitation any

applicable rules of court) and kept under seal until further order of the Court. To the extent the Court requires any further act by the parties as a precondition to the filing of documents under seal (beyond the submission of this Stipulation and Order Regarding Confidential Information), it shall be the obligation of the producing party of the documents to be filed with the Court to satisfy any such precondition. Where possible, only confidential portions of filings with the Court shall be filed under seal.

9. At the conclusion of litigation, the Confidential Information and any copies thereof shall be promptly (and in no event later than thirty (30) days after entry of final judgment no longer subject to further appeal) return to the producing party or certified as destroyed, except that the parties' counsel shall be permitted to retain their working files on the condition that those files will remain confidential.

The foregoing is entirely without prejudice to the right of any party to apply to the Court for any further Protective Order relating to confidential information; or to object to the production of documents or information; or to apply to the Court for an order compelling production of documents or information; or for modification of this Order. This Order may be enforced by either party and any violation may result in the imposition of sanctions by the Court.

EXHIBIT A

I have been informed by counsel that certain documents or information to be disclosed to me in connection with the matter entitled _____ have been designated as confidential. I have been informed that any such documents or information labeled “CONFIDENTIAL – PRODUCED PURSUANT TO PROTECTIVE ORDER” are confidential by Order of the Court.

I hereby agree that I will not disclose any information contained in such documents to any other person. I further agree not to use any such information for any purpose other than this litigation.

_____ DATED:

Signed in the presence of:

(Attorney)

TAB 9

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PILOT PROJECTS

The Pilot Projects Working Group has continued its effort on two pilot projects: the Mandatory Initial Discovery Pilot (“MIDP”) and the Expedited Procedures Pilot (“EPP”).¹ Both pilots seek to measure whether improvements in the pretrial management of civil cases will promote the just, speedy and inexpensive resolution of cases, but they aim to do so in different ways. The Judicial Conference of the United States approved both pilot projects in September 2016 and Chief Justice Roberts referenced them in both his 2015 and 2016 year-end reports.

The MIDP seeks to measure whether court-ordered, robust, mandatory discovery that must be produced before traditional discovery will reduce the cost, burden, and delay in civil litigation. Under the MIDP, a party must produce specific items of information relevant to the claims and defenses raised in the pleadings, regardless of whether the party intends to use the information in its case and including information that is both favorable and unfavorable to the responding party. In developing the MIDP, the Working Group drew on the positive experience of some 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, 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 civil cases.

The basic features of the MIDP are: the mandatory initial discovery will supersede the initial disclosures otherwise required by Rule 26(a)(1); the parties may not opt out; favorable as well as unfavorable information must be produced; responses must be filed with the court, so that it may monitor and enforce compliance; and the court will discuss the initial discovery with the parties at the Rule 16(b) case management conference, and resolve any disputes regarding compliance. The initial discovery responses must address all claims and defenses that will be raised. Hence, answers, counterclaims, crossclaims and replies must be filed within the time required by the civil rules, even if a responding party intends to file a preliminary motion to dismiss or for summary judgment, unless the court finds good cause to defer the time to answer in order to consider certain motions based on lack of jurisdiction or immunity.

Educational materials were developed to assist participating judges, including a Standing Order, User’s Manual, Checklist, instructions for ECF administrators and Clerk’s office staff, notices to the bar, and a host of model form orders. Two instructional videos for pilot project judges and lawyers provide an overview of the pilot and a group discussion by state judges and lawyers in Arizona about the positive experience there with mandatory initial disclosures. The FJC was instrumental in these efforts.

With substantial assistance from Dave Campbell and his court’s clerk’s office, the District of Arizona became the first MIDP district, with all district and magistrate judges participating. The pilot began on May 1, 2017. All materials were customized to reflect local

¹ The Working Group includes past and present members of the Standing Committee, the Advisory Committee on Civil Rules, and the Committee on Court Administration and Case Management. The MIDP effort has been led by Judge Paul Grimm, a former member of the Civil Rules Committee, and the EPP effort is now headed by Judge Jack Zouhary, a member of the Standing Committee.

practices and procedures, without altering their original substance. Largely due to the excellent work of Amy St. Eve and Bob Dow, 16 active district judges, one senior district judge and all 11 magistrate judges in the ND Ill agreed to participate in the MIDP beginning on June 1. As with the District of Arizona, some customization of the forms has been done, again without altering the substantive content. The pilots therefore are well underway in these two courts.

Efforts to recruit additional courts for the MIDP have been disappointing. Although we developed leads for quite a few districts, none has yet agreed to participate. Many reasons have been given, to include reluctance of the bar, reluctance of the judges, court vacancies and workload. Some courts are still considering participation, but concerns among the judges and court vacancies mean that any participation is likely to be by only some of the judges of a court.

The EPP is designed to expand practices already employed successfully by some judges and thereby promote a change in judicial culture by confirming the benefits of active management of civil cases. The chief features of the EPP are: (1) holding a scheduling conference and issuing a scheduling order as soon as practicable, but not later than the earlier of 90 days after any defendant is served or 60 days after any defendant appears; (2) setting a definite period for discovery of no more than 180 days and allowing no more than one extension, only for good cause; (3) informal and expeditious disposition of discovery disputes by the judge; (4) ruling on dispositive motions within 60 days of the reply brief; and (5) setting a firm trial date that can be changed only for exceptional circumstances. The aim was to have almost all civil cases set for trial within 14 months.

With the commencement of the MIDP, more detailed work on the EPP began. We will need to assess whether creating an educational video is necessary; because the EPP Pilot is more general in nature than the MIDP, there may be fewer materials that need to be prepared. A “user’s manual” is being developed, and model forms and orders as well as other educational materials will be prepared before the EPP is ready for implementation. Mentor judges will be made available to support implementation in the pilot courts. The goal has been to have the project in place by the end of 2017, to run for a period of three years.

Unfortunately, to date no districts have agreed to participate in the EPP. Several have given preliminary commitments to do so, but once again court vacancies, the reluctance of the bench and bar, and other reasons have thwarted actual participation. This has led the working group to modify the EPP by increasing the flexibility of deadlines, excluding more categories of cases, and permitting participation in the pilot by fewer than all judges on a court. The working group has also embarked on a new outreach effort to get courts to agree to participate in the EPP. Consideration is also being given to including in the pilot an assessment of data from courts currently utilizing a case tracking or other expedited case management system. We are hopeful that these adjustments will encourage some courts to participate in the EPP, but considerable work remains to get this pilot up and running.