MEMORANDUM

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

FROM: Hon. John D. Bates, Chair
Advisory Committee on Civil Rules

RE: Report of the Advisory Committee on Civil Rules

DATE: June 4, 2019

Introduction

The Civil Rules Advisory Committee met in San Antonio, Texas, on April 2-3, 2019. The draft minutes of that meeting are attached at Tab B.

The Committee has two action items to report. The first is a recommendation for adoption of an amendment of Civil Rule 30(b)(6) that simplifies the proposal published for comment in August 2018. The second is a recommendation to publish amendments of Civil Rule 7.1 that conform it to pending amendments in Appellate Rule 26(a) and Bankruptcy Rule 8012(a), and also call for disclosure of the names and citizenship of each person whose citizenship is attributed to a party for purposes of determining diversity jurisdiction.

The information items that form the balance of this report begin with the work of two subcommittees, the MDL Subcommittee and the Subcommittee for Social Security Disability

Review cases. Added subjects include the effect of consolidating originally independent actions on finality for appeal; marshal service for an *in forma pauperis* plaintiff; party consent to trial before a magistrate judge; and limiting remote access to court records in actions for benefits under the Railroad Retirement Act.

I. Action Items

A. For Final Approval: Rule 30(b)(6)

The Rule 30(b)(6) amendment proposal published for public comment drew much attention. Twenty-five witnesses appeared at the hearing in Phoenix and 55 at the hearing in Washington, DC. Some 1780 written comments were submitted, about 1500 of them during the last week of public comment. Summaries of the testimony and those written comments are included at Appendix A.

Having reviewed the public commentary and received the Subcommittee's report and recommendation, the Advisory Committee is bringing forward a modified version of the preliminary draft amendments with the recommendation that it be forwarded to the Judicial Conference for adoption. The Committee has concluded that an amendment requiring in all cases what many commenters affirmed was best practice – conferring about the matters for examination in order to improve the focus of the examination and preparation of the witness – would improve the rule.

The Advisory Committee also considered an alternative of proposing publication for public comment of a revised amendment that would require the organization to identify the designated witness or witnesses a specified time before the deposition, and also add a 30-day notice requirement for 30(b)(6) depositions. It was agreed that any such revised proposal would require re-publication and public comment. The importance of such additional disclosure and the risks that the information might be misused were addressed. It was noted that good lawyers who testified during the hearings said that they often would agree to identify their witness or witnesses in advance when confident that this information would not be misused, but that several emphasized also that there were cases in which they would not provide advance identification. Advisory Committee members expressed uneasiness about overriding those decisions not to identify witnesses in advance. After extensive discussion described in the minutes of its meeting, the Committee decided not to propose that the Standing Committee direct publication of this alternative.

At the end of this section of the report are a version of the published preliminary draft showing the changes made after public comment as well as a "clean" version of the amended rule and Committee Note. This report explains the changes made to the proposal after the public comment period.

Deleting the requirement to confer about witness identity: Very strong opposition to this directive was expressed by many witnesses and in many comments. Witnesses emphasized that the case law strongly supports the unilateral right of the organization to choose its witness, and asserted

that the requirement that the organization confer in "good faith" would undercut that case law. Although the Committee Note said that the choice of the witness remained the sole prerogative of the organization, that raised the question how it could then be the subject of a mandatory requirement to confer in good faith.

It bears mention that there was limited public comment in favor of requiring the organization to confer about witness identity from those who regularly use this rule to obtain information from organizations. Some candidly acknowledged that they had no say in the organization's choice of a witness so long as the person selected was properly prepared to address the matters for examination on the 30(b)(6) list.

Deleting "continue as necessary": The preliminary draft directed that the conference not only be in good faith but also that it "continue as necessary." To a large extent, that provision was included because the draft directed the parties to confer about the identity of the witness. Very often the organization could not be expected to settle on a specific person to testify without first having obtained a clear understanding of what matters were to be addressed. So there was a need for a rule provision emphasizing that the amendment requires an iterative interaction in most instances. But that need has lessened with deletion of the requirement to confer on witness identity.

Removal of this provision is not meant to say that the parties need never engage in an iterative exchange about the matters for examination. Indeed, even though the conference is now limited to the matters for examination it will often be fruitful for the parties to touch base more than once with regard to the kinds of information available and the burdens of obtaining it. The revised Committee Note makes this point.

Deleting the directive to confer about the "number and description of" the matters for examination: The Advisory Committee did not propose adding to the rule a numerical limitation on matters for examination, though it was urged to do so. But the preliminary draft did direct the parties to discuss "the number" of matters.

The directive to discuss the number of matters in addition to conferring about the matters themselves drew strong objections during the public comment period. The right focus, many said, was on the matters themselves. Discussing an abstract number did not serve a productive purpose. To the extent it might result in some sort of numerical limit, it might also encourage broader descriptions so that the list of matters would be shorter. That seems out of step with both the particularity direction in the rule and with a requirement to confer that is designed in significant part to improve the focus of the listed matters and ensure that the organization understands exactly what the noticing party is trying to find out. The Committee recommends removing "number of" from the conference requirement.

The addition of the words "description of" seemed unnecessary; the basic objective ought to be to confer about and refine the matters for examination.

Adding a reference to Rule 31(a)(4) depositions to the Committee Note. Rule 31(a)(4) authorizes a deposition by written questions of an organization "in accordance with Rule 30(b)(6)." It also requires that the noticing party's questions and any questions any other parties wish the officer to pose to the witness be served in advance. Although it has repeatedly been told about problems with Rule 30(b)(6) depositions, the Advisory Committee has not been advised that there have been any problems with this mode of obtaining testimony from organizations. And the advance exchange of all questions to be asked would make a conference about the matters for examination superfluous. Accordingly, a paragraph has been added at the end of the Committee Note to explain that the conference requirement does not apply to a deposition under Rule 31(a)(4).

> GAP Report: Having received public comment, the Advisory Committee recommends that the proposed requirement to confer about witness identity be removed, that the direction that the parties' conference "continue as necessary" be deleted, and that the directive that the parties confer about the "number and description of" the matters for examination be deleted, with the amendment requiring only that the parties confer about the matters for examination.

AMENDMENT PROPOSED TO BE FORWARDED TO JUDICIAL CONFERENCE

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. 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. Before or promptly after the notice or subpoena is served, ~~and continuing as necessary,~~ the serving party and the organization must confer in good faith about ~~the number and description of~~ the matters for examination ~~and the identity of each person the organization will designate to testify.~~ A subpoena must advise a nonparty organization of its duty ~~to make this designation and~~ to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization.This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

* * * * *

DRAFT COMMITTEE NOTE

Rule 30(b)(6) is amended to respond to problems that have emerged in some cases. Particular concerns raised have included overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses. This amendment directs the serving party and the named organization to confer before or promptly after the notice or subpoena is served~~, and to continue conferring as necessary, regarding~~ about the ~~number and description of~~ matters for examination ~~and the identity of persons who will testify~~. ~~At the same time, it may be productive to discuss other matters, such as having the serving party identify in advance of the deposition the documents it intends to use during the deposition, thereby facilitating deposition preparation.~~ The amendment also requires that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will ~~one or more witnesses to~~ testify. It facilitates collaborative efforts to achieve the proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1).

Candid exchanges about the purposes of the deposition and the ~~discovery goals and~~ organization's ~~sal~~ information structure may clarify and focus the matters for examination, and enable the organization to designate and to prepare an appropriate witness or witnesses, thereby avoiding later disagreements ~~reduce the difficulty of identifying the right person to testify and the materials needed to prepare that person. Discussion of the number and description of topics may avoid unnecessary burdens. Although the named organization ultimately has the right to select its designees, discussion about the identity of persons to be designated to testify may avoid later disputes.~~ It may be productive also to discuss "process" issues, such as the timing and location of the deposition, the number of witnesses and the matters on which each witness will testify, and any other issue that might facilitate the efficiency and productivity of the deposition.

The amended rule directs that the parties confer either before or promptly after the notice or subpoena is served. If they begin to confer before service, the discussion may be more productive if the serving party provides a draft of the proposed list of matters for examination, which may then be refined as the parties confer. The ~~rule recognizes that the~~ process of conferring may ~~will often~~ be iterative~~, and that a single conference may not suffice. For example, the organization may be in a position to discuss the identity of the person or persons to testify only after the matters for examination have been delineated.~~ Consistent with Rule 1, t~~T~~he obligation is to confer in good faith about the matters for examination, ~~consistent with Rule 1, and~~ but the amendment does not require the parties to reach agreement. In some circumstances, it may be desirable to seek guidance from the court. ~~The duty to confer continues if needed to fulfill the requirement of good faith. But the conference process must be completed a reasonable time before the deposition is scheduled to occur.~~

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. In appropriate cases, it may also be helpful 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.

Because a Rule 31 deposition relies on written questions rather than a description with reasonable particularity of the matters for examination, the duty to confer about the matters for examination does not apply when an organization is deposed under Rule 31(a)(4).

"Clean" Version

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. The named organization must 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. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

* * * * *

DRAFT COMMITTEE NOTE

Rule 30(b)(6) is amended to respond to problems that have emerged in some cases. Particular concerns raised have included overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses. This amendment directs the serving party and the named organization to confer before or promptly after the notice or subpoena is served about the matters for examination. The amendment also requires that a subpoena notify a nonparty organization of its duty to confer and to designate each person who will testify. It facilitates collaborative efforts to achieve the proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1).

Candid exchanges about the purposes of the deposition and the organization's information structure may clarify and focus the matters for examination, and enable the organization to designate and to prepare an appropriate witness or witnesses, thereby avoiding later disagreements. It may be productive also to discuss "process" issues, such as the timing and location of the deposition, the

number of witnesses and the matters on which each witness will testify, and any other issue that might facilitate the efficiency and productivity of the deposition.

The amended rule directs that the parties confer either before or promptly after the notice or subpoena is served. If they begin to confer before service, the discussion may be more productive if the serving party provides a draft of the proposed list of matters for examination, which may then be refined as the parties confer. The process of conferring may be iterative. Consistent with Rule 1, the obligation is to confer in good faith about the matters for examination, but the amendment does not require the parties to reach agreement. In some circumstances, it may be desirable to seek guidance from the court.

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. In appropriate cases, it may also be helpful 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.

Because a Rule 31 deposition relies on written questions rather than a description with reasonable particularity of the matters for examination, the duty to confer about the matters for examination does not apply when an organization is deposed under Rule 31(a)(4).

B. For Publication: Rule 7.1

The Committee recommends publication for comment of proposals to amend Rule 7.1 regarding disclosure statements for two purposes. The first is to conform Rule 7.1 to pending amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a). The second is to facilitate the determination whether diversity jurisdiction is defeated by attribution of a nonparty's citizenship to a party.

Maintaining consistency in disclosure requirements among the sets of Enabling Act rules is desirable. No reason has appeared to distinguish the Civil Rules from the Appellate and Bankruptcy Rules regarding disclosure by a nongovernmental corporation that seeks to intervene. The proposed amendment also deletes the direction to file two copies of the disclosure statement. Electronic court dockets ensure that a judge who wants a paper copy can get it without burdening the clerk's office with extra pieces of paper. This amendment does not present any difficulties.

Finding a means to support confident determinations of diversity jurisdiction at the outset of an action has always been important. Complete diversity is required for jurisdiction under 28 U.S.C. § 1332(a). Problems arise when a party takes on not only its own citizenship(s) but also citizenships of nonparties that are attributed to the party. These problems have been much reduced by the general rule that a corporation is a citizen of every state and foreign state by which it has been incorporated and the state or foreign state where it has its principal place of business. But they have been multiplied by the great popularity of organizing an enterprise as an LLC. An LLC party takes on the citizenship of each of its owners. And if one of the owners is an LLC, all of the owners of that LLC also pass through to the LLC party. Committee study of the LLC issues has shown that many judges require the parties to provide detailed information about LLC citizenship. This practice serves to ensure that diversity jurisdiction actually exists, a matter that is important in itself. It also protects against the risk that a federal court's substantial investment in a case will be lost by a belated discovery – perhaps even on appeal – that there is no diversity.

Beyond LLC parties, many other parties take on the citizenships of their constituents. As recognized by Rule 82, the Civil Rules play no role in defining the various forms of human association that invoke attributed citizenships. The rule text simply invokes whatever rules are developed around the enigmatic text of § 1332(a). The third paragraph of the Committee Note emphasizes that disclosure extends to every attributed citizenship, no matter how the pass-through being is characterized for other purposes.

These amendments are proposed for publication now despite the possibility that other disclosure requirements may be recommended in the future. The MDL Subcommittee continues to study third-party litigation funding (TPLF), including various proposals for disclosure. All that is clear at the moment is that the underlying phenomena that might be characterized as third-party funding are highly variable and often complex. They continue to evolve at a rapid pace as large third-party funders expand dramatically. It seems clear that more study will be required to determine

whether a useful disclosure rule could be developed. Nor does it seem likely that the several advisory committees will soon be in a position to frame possible expansions of disclosure requirements designed to support better-informed recusal decisions.

The proposed Rule 7.1 amendments are presented first in over- and underlined form, and then in a clean version:

Rule 7.1. Disclosure Statement

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or any nongovernmental corporation that seeks to intervene must file ~~2 copies of~~ a disclosure statement that:

(~~1~~A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(~~2~~B) states that there is no such corporation.

(2) *Parties in a Diversity Action.* Unless the court orders otherwise, a party to an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) must file a disclosure statement that names – and identifies the citizenship of – every individual or entity whose citizenship is attributed to that party.

* * * *

Committee Note

Rule 7.1 is amended to require a disclosure statement by a nongovernmental corporation that seeks to intervene. This amendment conforms Rule 7.1 to similar recent amendments to Appellate Rule 26.1 and Bankruptcy Rule 8012(a).

Rule 7.1 is further amended to require a party to an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) to disclose the citizenship of every individual or entity whose citizenship is attributed to that party. Two examples of attributed citizenship are provided by § 1332(c)(1) and (2), addressing direct actions against liability insurers and actions that include as parties a legal representative of the estate of a decedent, an infant, or an incompetent. Identifying citizenship in such actions is not likely to be difficult, and ordinarily should be pleaded in the complaint. But many examples of attributed citizenship arise from noncorporate entities that sue or are sued as an entity. A familiar example is a limited liability company, which takes on the citizenship of each of its owners. A party suing an LLC may not have all the information it needs to adequately plead the LLC's citizenship. The same difficulty may arise with respect to many other forms of noncorporate entities, some of them familiar – such as partnerships and limited partnerships – and some of them more exotic, such as "joint ventures." Pleading on information and belief is acceptable at the pleading stage, but disclosure is necessary both to ensure that diversity jurisdiction

exists and to protect against the waste that may occur upon belated discovery of a diversity-destroying citizenship. Disclosure is required by a plaintiff as well as all other parties.

What counts as an "entity" for purposes of Rule 7.1 is shaped by the need to determine whether the court has diversity jurisdiction under § 1332(a). It does not matter whether a collection of individuals is recognized as an entity for any other purpose, such as the capacity to sue or be sued in a common name, or is treated as no more than a collection of individuals for all other purposes. Every citizenship that is attributable to a party must be disclosed.

Discovery should not often be necessary after disclosures are made. But discovery may be appropriate to test jurisdictional facts by inquiring into such matters as the completeness of a disclosure's list of persons or the accuracy of their described citizenships. This rule does not address the questions that may arise when a party's disclosure statement or discovery responses indicate that the party cannot ascertain the citizenship of every individual or entity whose citizenship may be attributed to it.

The rule recognizes that the court may limit the disclosure in appropriate circumstances. Disclosure might be cut short when a party reveals a citizenship that defeats diversity jurisdiction. Or the names of identified persons might be protected against disclosure to other parties when there are substantial interests in privacy and when there is no apparent need to support discovery by other parties that goes behind the disclosure.

"Clean" Version

Rule 7.1. Disclosure Statement

(a) WHO MUST FILE; CONTENTS.

(1) *Nongovernmental Corporations.* A nongovernmental corporate party or any nongovernmental corporation that seeks to intervene must file a disclosure statement that:

(A) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or

(B) states that there is no such corporation.

(2) *Parties in a Diversity Case.* Unless the court orders otherwise, a party to an action in which jurisdiction is based on diversity under 28 U.S.C. § 1332(a) must file a disclosure statement that names – and identifies the citizenship of – every individual or entity whose citizenship is attributed to that party.

II. Information Items

A. MDL Subcommittee

During its January 2019 meeting the Standing Committee extensively discussed the various issues pending before the Advisory Committee's MDL Subcommittee. Since that time, representatives of the Subcommittee have attended a variety of events at which pertinent issues were discussed.[1] The Subcommittee has also received very valuable information from the Judicial Panel on Multidistrict Litigation. At the Subcommittee's request, the Federal Judicial Center's Research Division investigated the use of plaintiff fact sheets (PFSs) and defendant fact sheets (DFSs) in product liability MDL litigation. A copy of that report is included at Appendix B.

During the Advisory Committee's April 2019 meeting, there was an extensive discussion of the various issues on which the Subcommittee has focused. That discussion confirmed the Subcommittee's present inclination to focus primarily on four issues: (1) use of PFSs (and perhaps DFSs) to organize MDL personal injury litigation and "jump start" discovery; (2) providing an additional avenue for interlocutory appellate review of district court orders in MDL litigation; (3) addressing the court's role in relation to "global" settlement of multiple claims in MDL litigation; and (4) third-party litigation funding. Those four issues are the main focus of this report.[2]

---

[1]Those events have included and will include the following:

State-Federal Conference, Emory University Institute for Complex Litigation and Mass Claims, Feb. 28-March 1, 2019, Newport Beach, CA.
Conference on Dispute Resolution of Consumer Mass Disputes: Collective Redress Class Action and ADR, University of Haifa, March 28-29, 2019, Haifa, Israel.
Lawyers for Civil Justice Membership Meeting, May 3, 2019, Washington, DC.
MDL Roundtable, Emory University Institute for Complex Litigation and Mass Claims, May 9-10, 2019, Boston, MA.
American Association for Justice Convention, July 27-30, 2019, San Diego, CA.

[2]The Subcommittee also has been examining two other issues that were included in the January 2019 presentation to the Standing Committee. Based on the Subcommittee's examination of these issues and the discussion during the Advisory Committee's April meeting, these issues appear less promising targets for rulemaking. They are:

Filing fees: 28 U.S.C. § 1914(a) requires that any party initiating a civil action pay a filing fee unless excused from doing so. There were suggestions that filings by multiple plaintiffs (joined under Rule 20) might mean that the per capita filing fee would be very low, and that insisting that each claimant pay a full filing fee could deter groundless claims. Investigation has revealed that in MDL personal injury proceedings individual filing fees are charged in the great majority of instances, perhaps due to orders in cases regarding "direct filing" in the MDL transferee district. To the extent the "Field of Dreams" problem of multitudes of groundless claims persists, then,

1. PFS/DFS Practice

The Subcommittee initially addressed this topic in response to concerns about large numbers of unfounded claims that are included in large MDL mass tort proceedings. A number of submissions urged that because there often are many such claims, their presence can distort the proceedings. Accordingly, a rigorous early effort to identify and remove them might be warranted.[3] This might be called screening.

But insisting that transferee judges make claim screening the first order of business might often intrude on the latitude that they need to manage the MDL litigations before them. And prescribing by rule what should be required for such screening, and when it should occur, could intrude further into management of the litigation.

The FJC research on PFS and DFS practice in product liability MDLs (included in Appendix B) found PFS requirements in 81% of the MDLs with more than 100 actions, and 87% of the "mega"

---

addressing filing fees by rule amendment does not seem to provide an effective screen.

Master complaints: Master complaints may be used in MDL litigation as a case management tool or instead treated as superseding individual complaints, as the Supreme Court has recognized. *See Gelboim v. Bank of America Corp.*, 135 S. Ct. 897, 904 n.3 (2015). Proposals were made to add mention of master complaints to Rule 7, but the existing practice under the current rule indicates that there is no need to change the rule. To the extent the concern has been that some transferee judges resist Rule 12 challenges to master complaints or to individual complaints, that appears ordinarily to be a matter of case management, and a rule forbidding it might unduly limit the latitude the transferee court should have in managing the litigation.

[3] To illustrate, the Fairness in Class Action Litigation Act of 2017, passed by the House of Representatives in the last Congress, included a provision adding a new subsection (i) to 28 U.S.C. § 1407, the multidistrict litigation statute:

> ALLEGATIONS VERIFICATION – In any coordinated or consolidated pretrial proceedings conducted pursuant to subsection (b), counsel for a plaintiff asserting a claim seeking redress for personal injury whose civil action is assigned to or directly filed in the proceeding shall make a submission sufficient to demonstrate that there is evidentiary support (including but not limited to medical records) for the factual contentions in plaintiff's complaint regarding the alleged injury, the exposure to the risk that allegedly caused the injury, and the alleged cause of injury. The submission must be made within the first 45 days after the civil action is transferred to or directly filed in the proceedings. That deadline shall not be extended. Within 30 days after the submission deadline the judge or judges to whom the action is assigned shall enter an order determining whether the submission is sufficient and shall dismiss the action without prejudice if the submission is found to be insufficient. If a plaintiff in an action dismissed without prejudice fails to tender a sufficient submission within the following 30 days, the action shall be dismissed with prejudice.

proceedings with over 1,000 actions.[4] This study also found that all the PFS requirements identified included some common features:

> Health records: information about general health, health issues related to the product in issue, names of doctors and pharmacies, and information about denial of health insurance
>
> Personal identifying information: names, addresses, and employment history
>
> Litigation history: information about prior tort litigation, past bankruptcy, social security claims, and workers' compensation claims

Many PFS orders also required medical or other types of releases. In 64% of the MDL product liability matters with over 100 cases, there was also an order for a DFS, often designed to collect information about plaintiffs already in the defendant's possession. In MDLs with over 1,000 actions, DFS requirements appeared in 72% of the matters.

Another way of looking at this practice is that it is not really a screening method so much as a useful way to "jump start" discovery in these massive proceedings and to permit the parties to develop an "inventory" of the claims included. Thus, although the FJC found that PFS requirements led to dismissal activities in a majority of the cases, it seems that such activity was often under Rule 37(b)(2) or Rule 41(b), and focused more on failure of certain claimants to respond to orders to complete a PFS than on the adequacy of the material so provided.

Whether viewed as screening devices or as case management methods, it could be that PFSs (and perhaps DFSs) have become sufficiently pervasive to warrant inclusion in the Civil Rules. But in considering such an addition to the rules one must ask whether rule provisions would be unnecessary (because the practice is already widespread) or counter-productive (if there are good reasons for not requiring such measures in the minority of large MDLs in which they are not used). These issues continue to be studied by the MDL Subcommittee.

Rule 26(f)/16(b) approach: One alternative might be to try to develop something like the Rule 26(f) planning conference and direct the parties in covered MDLs to confer and report to the court about the utility and content of PFS and/or DFS requirements for the centralized cases. Perhaps something like Rule 16(b) could be adopted to direct the court to develop a plan for managing the MDL proceeding, including provision, if appropriate, for PFS requirements.

One potential difficulty with such an approach is that resolution of these issues might have to be deferred until the transferee court has appointed leadership lawyers in the MDL proceeding.

[4] Indeed, the JPML informed us that PFSs were used in all but two of the current mega proceedings, and that they would not have been useful in either of the two other proceedings in which they were not used.

Ordinarily, leadership from the Plaintiffs' Steering Committee (PSC) would be expected to negotiate such matters with defense counsel. And in some cases there may be a need for liaison counsel on the defense side if there are numerous defendants. It is customary for transferee judges to appoint such leadership lawyers in larger MDLs. Planning for things like the details of a PFS or DFS probably would have to await such an appointment.

The fact that such appointments usually happen in larger MDLs suggests that adopting a rule requiring the parties to confer after the Panel acts is unnecessary. Most MDL transferee judges convene some sort of status or case management conference relatively promptly after centralization occurs. One of the early pieces of business then is likely to be appointment of a leadership team for the plaintiff side and, perhaps, also for the defense side.

Particularly in the larger MDLs, it seems likely that something like what a rule of this sort might require is already happening. It seems that repeated management conferences already occur in many MDLs without stimulus by a rule. If so, it is unclear why a rule should command transferee judges or counsel to focus on a PFS or DFS in the small minority of large MDLs in which one is not used. Moreover, the transferee judge has many issues to consider and address in early case management of an MDL proceeding, and adding only the PFS/DFS issue in Rules 26(f) and 16(b) may be problematic. But there is initial support for this approach from lawyers on both sides of the "v."

In part due to the likely need first to appoint leadership counsel, the timing for a 26(f) type rule requirement might be tricky. Rule 26(f) itself is keyed to the date for the Rule 16(b) scheduling conference, which in turn focuses on the time when a defendant has been served or has appeared in the action. Given the multiplicity of actions involved in MDL proceedings, that trigger will not work. Perhaps the entry of a Panel transfer order would be a suitable trigger. In addition, care would be necessary in determining which MDLs should be covered by such a rule, a topic also treated below in regard to rule provisions prescribing the contents of PFSs.

Rule prescription of use and contents of PFS: A more aggressive approach could stop well short of proposed legislation quoted in footnote 3 above. If designed to "jump start" discovery, it might be included in Rule 26(a)(1) or analogous to that initial disclosure requirement. Taking this approach might raise a variety of issues:

What MDLs should be covered by a rule? The proposed statute quoted above would have applied to "personal injury" actions. Looking at product liability MDL proceedings (including some that were not personal injury cases), the FJC found that they ranged in number of cases from three to over 40,000. That may suggest that one could limit such a rule to MDLs with more than a certain number of actions. Looking to the FJC report, it seems that one could pick 1,000 cases as the cutoff, or perhaps 100 cases. Alternatively, the cutoff could be set at a similar number of plaintiffs. Any such number could be challenged as arbitrary, and there might also be uncertainty about counting cases. Determining what would constitute "personal injury" could also prove challenging. For

example, in data breach litigation involving medical records, if emotional distress damages were allowed on such a claim would that be a "personal injury" MDL? Perhaps "physical or emotional injury" would be better.

Should a rule be limited to MDLs? There have been cases that involved more than 1,000 claimants but were not subject to an MDL order. *See, e.g.*, *Avila v. Willits Environmental Remediation Trust*, 653 F.3d 828 (9th Cir. 2011) (claims on behalf of over 1,000 present and former residents of town for health problems resulting from exposure to toxics from a chrome plating facility); *Acuna v. Brown & Root, Inc.*, 200 F.3d 335 (5th Cir. 2000) (tortious injury claims by over 600 people allegedly resulting from uranium mining activity). In both these cases, the district court required plaintiffs to provide details as a matter of case management. Using a standard looking to number of claimants might support applying a PFS requirement to cases not subject to a Panel order. But since district courts appear to have authority under Rule 16 to impose such a requirement, extending the rule beyond MDLs seems unnecessary. To date, there has been no argument in favor of wider application.

Who should draft the PFS? Assuming a rule could not itself prescribe all the exact contents of a PFS, it might assign initial responsibility for preparing one. Ultimately, a court order would normally be required to implement the PFS requirement, but that does not mean the court should draft the PFS. Instead, it seems more reasonable that counsel should develop a proposed PFS. But as noted above, it may be that serious drafting of a PFS could not begin until the court appoints lead counsel for the plaintiffs. And we heard complaints that drafting and agreeing to a PFS, which can take eight months or more, is often part of the problem.

When should a rule direct that a PFS or DFS order be entered? The statutory proposal quoted above would have mandated submission of required information within 45 days of transfer to or direct filing within a covered MDL. But the FJC research showed that actual experience to date has been that the average time from centralization to entry of a PFS order was 241 days (8 months). Some took longer. And claimants would need time after that to provide the needed information once the order is entered.

How is the PFS scheme to be enforced/policed? The proposed statutory provision quoted above would have imposed on the court a duty to review each submission within 30 days. Even if conceived principally as a screening device, such a requirement could impose a very heavy burden on the court; perhaps a better method would be to authorize defendants to challenge the sufficiency of individual PFSs. In some mass tort MDLs, a sort of show-cause method is used for this purpose. Whether that should be considered more like a Rule 12(b) motion or a Rule 56 motion is not entirely clear. To the extent this is considered mainly a "jump start" for discovery, perhaps a Rule 37 or Rule 41(b) model for enforcement would be the right choice.

An alternative approach – an initial "census": Very recently, during the Emory Institute roundtable on May 9-10, 2019, mentioned in footnote 1 above, another idea has emerged – that there

should be an initial "census" of the claims submitted in "mass" MDLs. This approach would call for claimants to make a showing of exposure to the product or item involved in the litigation, and also a showing that they have sustained an injury of the sort alleged in the proceeding. The exact contours of this approach remain unclear, and it may be that it would not supplant the later use of a PFS for those claims that satisfy the census requirements. The Subcommittee is seeking further information on this new idea and expects to consider it as the process moves forward.

2. Interlocutory Appellate Review

The Advisory Committee has been urged to consider an aggressive rule provision ensuring interlocutory appellate review of at least some orders in MDL mass tort proceedings.[5] There have been suggestions also that a rule provision mandate expedited treatment in the court of appeals for such appeals. If the Civil Rules Advisory Committee pursues these ideas, it will need to coordinate with the Appellate Rules Advisory Committee.

The Subcommittee is not focused on mandatory appellate review or requirements to expedite review. Instead, it is more focused on something akin to Rule 23(f), which allows courts of appeals to review orders denying or granting class certification but grants them discretion to decide whether to allow interlocutory review.

An abiding question is whether there is any need to add a new appellate avenue since 28 U.S.C. § 1292(b) already permits district courts to certify orders for immediate review.[6] As a matter of theory, there might be reasons why the statutory requirements – "a controlling question of law" on which there is a "substantial ground for difference of opinion" – might not be suitable for all important orders in MDL mass tort litigations.

Section 1292(b) also says that the district court must certify that immediate review would "materially advance the ultimate termination of the litigation," which (at least in some circuits) might by itself be a major obstacle to certifying an order for immediate review due to the delay resulting from having to wait for a court of appeals ruling.

---

[5] For example, the Fairness in Class Action Litigation Act passed by the House of Representatives during the last Congress would have added a new subsection to § 1407 providing as follows:

> The Court of Appeals having jurisdiction over the transferee district shall permit an appeal to be taken from any order issued on the conduct of coordinated or consolidated pretrial proceedings conducted pursuant to subsection (b) provided that an immediate appeal from the order may materially advance the ultimate termination of the proceedings.

[6] Review may also be available in some circumstances by mandamus or pursuant to Rule 54(b).

The Advisory Committee has received a very thorough study of actual experience with § 1292(b) review in MDL mass tort litigations, and it does appear that such review occurs only rarely. Whether the rarity of review results in significant part from the provisions of the statute cannot easily be determined, however.

Finally, § 1292(b) gives the district court what amounts to a veto over immediate review. In individual litigation, that seems warranted; unless the district court sees an advantage in requesting immediate review, there would rarely be any reason to provide that opportunity. Arguably things are different in MDLs, or at least in mass tort MDLs that sometimes include thousands of cases.

Rule 23(f) does not give the district court a veto over petitions for review of class-certification decisions. But in that instance, the order is often of central importance (inviting "death knell" images for denial and grant of certification), and the courts of appeals have developed a jurisprudence regarding the showing needed to raise serious doubts about the certification ruling made by the district court.

Articulating a standard to determine whether to permit immediate review could present a challenge. As noted above, the § 1292(b) standard – "materially advance the ultimate termination of the litigation" – may not be ideal. One suggestion looks instead to a standard modeled on that for direct appeals to the court of appeals in bankruptcy proceedings – "materially advance the progress of the case or proceeding." 28 U.S.C. § 158(d)(2)(A)(iii). Something along those lines might be better adapted to this additional route to interlocutory review.

A related point is that nobody urges that immediate review be offered for every order. Initially, the suggestion was to limit the opportunity for interlocutory review to certain issues such as preemption rulings or *Daubert* rulings. A different idea is that review should be available only when a significant number of cases (*e.g.*, 50 cases) would be affected, sometimes summarized as asking whether an order is "cross-cutting."

But whatever the standard, it would likely be inappropriate to expect the court of appeals to apply it without a clear understanding of the district court's views. So some method of providing the district court with a way to make its views known would likely be important to any serious rule proposal.

At the Emory Institute conference on May 9-10, 2019, there was a thorough examination of the need for greater access to interlocutory appellate review and the case for expanded review was not convincingly made. That discussion did not lead to agreement, however, and it is expected that proponents of expanded opportunities for review will make a revised proposal in the near future.

It is not clear, then, that any additional route to interlocutory review is warranted, but it does appear that fashioning one would require considering the issues identified above.

3. Settlement Review/PSC Supervision

Rule 23 was dramatically revised in 1966, and the MDL statute came into being at about the same time – 1968. As the Standing Committee knows, class action settlements have become extremely important. That was evidently not apparent in 1966. Rule 23(e) did say that class actions could not be dismissed or settled without court approval. Here is the entirety of the 1966 Committee Note accompanying that rule provision: "Subdivision (e) requires approval of the court, after notice, for the dismissal or compromise of any class action."

Settlement has now emerged as a major concern in MDL litigation. By the late 1970s, barely 5% of cases centralized under § 1407 were remanded to the transferor districts. In some instances that was because they were resolved by Rule 12 motions or Rule 56 motions in the transferee districts. But in a great many instances, the low number of remands was because the MDL proceedings were settled, often due to some sort of "global peace" arrangement. Sometimes those arrangements included rather forceful inducements for plaintiffs to accept the overall deal.

The great importance of settlement in class actions produced legal rules governing judicial approval of such settlements. At first, the various courts of appeals developed a general standard – "fair, reasonable, and adequate" – to guide the judicial decision under Rule 23(e). In 2003, that standard was written into the rule. Effective Dec. 1, 2018, Rule 23(e) was further amended to guide district courts in evaluating proposed class-action settlements. These features are designed in part to protect the interests of absent class members, and some courts say that judges have a "fiduciary" duty to protect the interests of these persons when reviewing a proposed settlement.

MDL proceedings are different. Ordinarily, each claimant has a lawyer, and the claimant can accept or reject a settlement. As in any other litigation, the judge has no role reviewing that settlement, and cannot insist on the right to "approve" it. That general rule changes in class actions only because unnamed class members are bound by the settlement. Section 1407 gives no similar power to transferee judges to bind claimants to a deal they do not accept.

Although the foregoing is technically true, the actual conduct of at least some MDL proceedings may seem to many claimants and their counsel to be a lot like class actions when it comes to settlement. Often the court will appoint a Plaintiffs' Steering Committee (PSC) and direct that only those lawyers may conduct the litigation activities, including settlement negotiations. Those settlement negotiations may produce a "take it or leave it" deal that lawyers with "inventories" of MDL claimant clients are strongly urged to strongly recommend to their clients. The defendants, seeking "global peace," may refuse to settle unless all or almost all claimants sign up. The transferee judge may play a prominent role in encouraging the global settlement. And there is often a special master – appointed by and hence an extension of the court – who is intimately involved in shaping the process and terms of the settlement.

One description of this sort of situation is that it is a "quasi class action." Judges sometimes use that term to support actions in MDL proceedings that resemble what they do in class actions, such as limits on attorney fees. Those judges may also require that attorneys not in leadership positions "contribute" a portion of their fees from settlements to a "common benefits fund" that can later be used to fund awards to PSC members and other lead counsel for common benefit work done to pursue the litigation. In class actions, such orders are guided by Rule 23(h).

Putting all of this together suggests that when judicial involvement is important (perhaps critical) to global resolution in MDL mass tort proceedings there should also be some judicial responsibility and authority to review the fairness of such a deal in a way like what Rule 23(e) authorizes in class actions. In some MDL proceedings, class action treatment is actually used as a vehicle for such a resolution, so Rule 23(e) does apply. Some have urged that the Subcommittee focus on methods of ensuring fairness to MDL claimants, particularly when "inventories" of claims are being settled. Assurances of fair distribution and valuation procedures like those encouraged by Rule 23(e) could be valuable.

A possible rule-based way of providing such oversight could be to focus on the appointment of leadership counsel such as the PSC. That seems to be a recurrent feature of MDL litigation, and the criteria for selecting class counsel under Rule 23(g) seem pertinent also to selection of lawyers to serve in this role. Often orders appointing such lawyers to leadership positions not only regulate their responsibility to handle or assign to other lawyers such litigation functions as drafting pleadings, conducting discovery, and making motions, but also authorize them to conduct settlement negotiations, at least if those negotiations focus on settlement terms for claimants who are not direct clients of attorneys appointed to leadership positions. Such a rule might also recognize that MDL courts wield authority to regulate the fees of the lawyers so appointed, and of other lawyers who benefit from the efforts of the lawyers so appointed.

As with other topics, the discussion at the May 9-10 Emory Institute conference was very illuminating on this subject. But it did not show a widespread enthusiasm in the bar for new rules addressing the settlement role of the MDL transferee judge.

There is reason to continue considering whether – as in class actions – firmer direction and authority for the court in regard to settlement in MDL mass tort proceedings might be a goal worth pursuing. Doing so through rules would present issues described above; not doing so would leave the topic to "common law" development.

4. Third-Party Litigation Funding

The general topic of TPLF has received a great deal of attention. The Litigation Funding Transparency Act of 2019, S. 471 (introduced on Feb. 13, 2019), includes a proposed amendment to § 1407, adding a new subsection (g)(1) as follows:

> In any coordinated or consolidated pretrial proceedings conducted pursuant to this section, counsel for a party asserting a claim whose civil action is assigned to or directly filed in the proceedings shall –
>
> (A) disclose in writing to the court and all other parties the identity of any commercial enterprise, other than the named parties or counsel, that has a right to receive payment that is contingent on the receipt of monetary relief in the civil action by settlement, judgment, or otherwise; and
>
> (B) produce for inspecting and copying, except as otherwise stipulated or ordered by the court, any agreement creating the contingent right.

The proposed legislation has a similar provision for disclosure of TPLF in "any class action," perhaps not limited to class actions in federal court.

The Advisory Committee has before it a proposal from the U.S. Chamber Institute for Legal Reform (17-CV-O) calling for the addition to Rule 26(a)(1)(A) of an additional disclosure requirement:

> (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.

A similar proposed amendment to Rule 26(a) was considered by the Advisory Committee and not acted upon in 2014.

There are differences between the rule proposal and the proposed legislation. One is that the rule proposal is not limited to class actions or MDL proceedings. Another is that the legislation is not limited to compensation "sourced from" proceeds of the litigation. A third is that the legislation is limited to a "commercial enterprise," while the rule proposal is broader (including, *e.g.*, relatives of the plaintiff). A fourth is that the legislation explicitly states that the court may alter the requirement to produce the agreement (though that would seem implicit in the rule-amendment proposal).

The Advisory Committee continues to receive submissions in favor of, and opposing, disclosure rule proposals. It seems that litigation funding is growing by leaps and bounds, and in many different contexts. On the day after the Advisory Committee's November meeting, George Washington University Law Center organized a very informative program about TPLF attended by most of the members of the Subcommittee. That program emphasized that there are at least two discrete sorts of such funding, which might be called the "consumer" and the "commercial" branches. The former may often involve loans to cover living expenses for plaintiffs awaiting

resolution of their litigation. These sorts of loans ordinarily do not involve huge sums of money, though that money may be very important to the borrowers. The commercial lending category (e.g., for patent litigation) often involves much larger amounts of money (*e.g.*, potentially millions of dollars).

The Subcommittee does not have a clear picture of the current status or trajectory of TPLF. That activity may be assuming a much larger importance than even in the relatively recent past. *See, e.g.*, Greg McPolin, Legal Finance – From Necessity to Business Development Tool, Bloomberg Law News, Feb. 22, 2019 (article by managing director of a litigation funding firm about how using legal finance can enable law firms to manage litigation risk and better serve their clients); Holly Urban, Law Firm Clients Should Heed the Tech World, Consider Crowdfunding, Bloomberg Law News, Jan. 8, 2019 ("Crowdfunding as a means of litigation funding, or to pay for otherwise expensive legal work, should be understood in much the same way as traditional forms of funding."); Glenn Jeffers, Boies Schiller Joins Bentham in Vietnam Partnership, S.F. Daily Journal, April 17, 2019, at 1 (describing agreement between American law firm and Australian litigation funder to provide up to $30 million in funding to support litigation or arbitration of business claims arising in Vietnam).

As research done for the Committee in the past has shown, many district courts and courts of appeals have some requirements for disclosure of litigation funding as it might bear on recusal. But that concern does not seem central to the issues before the Subcommittee.

At the same time, it seems that very few MDL transferee judges presently report that they are aware of TPLF in the proceedings before them. On the other hand, the FJC found that some PFS orders include questions about TPLF involvement. And at least some high-profile MDL proceedings have involved TPLF issues. Thus, in the NFL concussion litigation the judge entered an order regarding the enforceability of funding agreements signed by some class members,[7] and in the opioid litigation the transferee judge entered an order requiring submission of information about TPLF for in camera inspection by the court. Nonetheless, at present it does not appear that TPLF issues are peculiar to, or peculiarly important in, MDL litigation.

The TPLF topic remains on the Subcommittee's agenda.

* * * * *

In sum, the focus of the MDL Subcommittee has narrowed, but the ultimate result of its work is not yet clear. Some ideas initially proposed appear, on further examination, not to offer promising

[7] On April 26, 2019, the Court of Appeals for the Third Circuit vacated aspects of the district court's orders regarding third party funding as beyond her authority under Rule 23. *See In re National Football League Players' Concussion Injury Litigation*, 923 F.3d 96 (3d Cir. 2019).

grounds for amending the rules. Others continue under study, but that does not mean actual rule proposals will result. And (as with the Rule 23 work in the 2011-2014 period), it is quite possible that if a package of rule amendment proposals results it will include topics not yet explored and not include some that seem presently to warrant consideration.

B. Social Security Disability Review

The Social Security Disability Review Subcommittee continues to work toward a determination whether new Civil Rules can improve the patchwork of procedures employed around the country to resolve actions to review disability decisions under 42 U.S.C. § 405(g).

The Subcommittee has scheduled a meeting on June 20, 2019 with representatives of claimants, the Social Security Administration, magistrate judges, and others who are familiar with present practices. They will be asked to review a draft rule that has evolved in some ways from the version that was included in the materials for the January Standing Committee meeting, but the changes are designed only to achieve greater clarity. The review will serve several purposes. One purpose of the meeting will be to accept advice on further drafting refinements. But the more important purposes will be to determine how well the assumptions that underlie the draft coincide with the realities of current practice, and to determine whether new rules based on realistic assumptions will be a worthy improvement over present practice.

The Subcommittee hopes to have a recommendation whether to proceed further with a disability review rule in time for the October Advisory Committee meeting.

C. Rule 4(c)(3): *In forma pauperis* Service by the U.S. Marshals Service

At the January 2019 meeting of the Standing Committee, Judge Jesse Furman raised questions about the meaning of the Civil Rule 4(c)(3) provisions for service of process by a marshal in cases brought by a plaintiff *in forma pauperis*. These questions are being explored with the U.S. Marshals Service. Initial discussions show that practices vary from one district to another. The Service would welcome greater national uniformity on some practices, but it is not clear whether amending the Civil Rules can usefully do more than remove an apparent ambiguity in the rule text.

The questions described below have a place on the Civil Rules agenda but have not been extensively considered.

Rule 4(c)(3) has its roots in 28 U.S.C. § 1915(d), which provides that when a plaintiff is authorized to proceed *in forma pauperis*, "[t]he officers of the court shall issue and serve all process, and perform all duties in such cases." The statute does not limit the category of officers to marshals. Apparently some clerks' offices actively facilitate service in i.f.p. cases by issuing summons or waivers of service.

The ambiguity in Rule 4(c)(3) goes back before it was restyled in 2007. The first sentence says that "[a]t the plaintiff's request," the court may order service by a United States marshal. The second sentence says "The court *must so order* if the plaintiff is authorized to proceed *in forma pauperis* * * * or as a seaman." These two sentences could be read together to mean that the court must order service by a marshal only if the plaintiff has requested it. Or the second sentence could be read independently to require the order whether or not the plaintiff has made a request. There is some disarray in the cases that address this ambiguity. The ambiguity can be fixed – the question is whether to say clearly that an i.f.p. plaintiff must move for a court order, or to say that the court must enter the order automatically in every i.f.p. case. Instead, the rule could say that the marshal must make service without a court order, changing the present practice that provides marshal service only if the court so orders. As noted below, the marshals would not be likely to welcome that approach.

A second question is whether a marshal can request a waiver of service before undertaking to make service. USMS Policy Directive 11.8 takes the position that an i.f.p. plaintiff cannot require the marshal to request a waiver, but that the marshal can request a waiver if that seems useful to avoid the costs of actual service, and can support a claim for the costs of service if the request is refused. Sometimes a court order refers to sending waiver forms. The national office encourages waivers, but in many circumstances it is easier just to make service. The potential advantage of recovering the costs of service if waiver is refused is apparently reduced by a practice of not seeking to recover. And the potential advantage of seeking waivers is reduced by the fact that many – perhaps most – defendants in i.f.p. actions are government employees who do not execute waivers. On the other hand, some districts have entered into agreements with state entities, such as a department of corrections, to accept waivers of service issued by the clerk's office.

These two questions may lead to further questions about the interplay between Rules 4(c)(1) and (3). Rule 4(c)(1) says this: "The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service." The extent of an *in forma pauperis* plaintiff's obligation to facilitate service by a marshal is not clear from the face of the rule. In some measure the marshal expects the plaintiff to provide information as to the defendant's name and address by filling in those spaces on Form USM-285, the form for "process receipt and return." But some clerks' offices fill out the form, and often locate the defendant. Internet resources often facilitate the process of locating the defendant, and there is case law that requires the marshal to make good faith efforts to locate the defendant and make service.

A similar question arises from Rule 4(b), which provides that the plaintiff may present a summons to the clerk for signature and seal. USMS Policy Directive 11.8 seems to indicate that the clerk issues the summons "upon presentation by the plaintiff." But in practice the clerk often acts without presentation by the plaintiff.

There are real questions surrounding the extent to which Rule 4 might usefully be amended to allocate responsibilities between i.f.p. plaintiffs and the marshal when the marshal is ordered to make service.

The history of Rule 4 reflects abiding concerns about imposing duties to serve process on the marshals. The Service would as soon be out of the business. One possibility might be to allow the Service to subcontract the task to local police agencies or private process servers. If that practice is consistent with § 1915(d), it might be available without amending Rule 4(c)(3) – the marshal is making service, albeit through an agent. However that may be, the shape of any possible rule amendments must be informed by these concerns. The Advisory Committee will consider whether it needs to learn more about actual practices. It is too early to predict whether any amendments will be proposed.

D. Final Judgment in Consolidated Cases

The Civil and Appellate Rules Committees have formed a Joint Subcommittee to consider the opportunity to amend the rules – perhaps only the Civil Rules – to address the effect of consolidating initially separate actions on the final judgment rule. *Hall v. Hall*, 138 S. Ct. 1118 (2018), established a clear rule that actions initially filed as separate actions retain their separate identities for purposes of final judgment appeals, no matter how completely they have been consolidated in the trial court. Complete disposition of all claims among all parties to what began as a single case establishes finality for purposes of appeal under 28 U.S.C. § 1291.

The Joint Subcommittee has begun its deliberations with a conference call to discuss the best approach to beginning its work. The opinion in *Hall v. Hall* concluded by suggesting that if "our holding in this case were to give rise to practical problems for district courts and litigants, the appropriate Federal Rules Advisory Committees would certainly remain free to take the matter up and recommend revisions accordingly." Although something useful can be learned from the divergent approaches taken in the courts of appeals before *Hall v. Hall*, this invitation suggests it will be useful to assess experience with the newly established rule. The first step will be to determine what means might be used to assess actual experience, and how much time should be allowed for experience to develop before undertaking the inquiry. It may prove difficult to generate hard empirical information, but the possibilities will be explored. If it can be developed, good empirical information will inform the decision whether to recommend any rules amendments, and which of several current rules sketches might be developed for that purpose.

E. Rule 73(b)(1): Consent to Magistrate Judge Trial

Rule 73(b)(1) was brought up for review by reports that the CM/ECF system automatically sends to the district judge assigned to a case individual consents to trial before a magistrate judge. That feature of the system disrupts the operation of the rule that "[a] district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral."

No other ground to revisit Rule 73(b)(1) has been suggested. It would be better to correct the workings of the CM/ECF system than to amend the rule. Initial advice was that it is not possible to defeat the automatic notice feature. More recent advice, however, suggests that it may be feasible to work around the system in a way that protects the anonymity of individual consents yet does not impose undue burdens on the clerk's office. Consideration of draft rule amendments has been suspended pending further exploration of ways to work around the system.

F. Railroad Retirement Act

The General Counsel of the Railroad Retirement Board has suggested that court rules should be amended to afford actions for Railroad Retirement Act disability benefits the same protections against remote electronic access to court records as Civil Rule 5.2(c) and Appellate Rule 25(a)(5) provide in actions to review social security decisions. The Appellate Rules Committee is taking the lead because Railroad Retirement Act review lies in the courts of appeals, not the district courts. The Civil Rules Committee will work with the Appellate Rules Committee if that proves appropriate.

THIS PAGE INTENTIONALLY BLANK

APPENDIX A

THIS PAGE INTENTIONALLY BLANK

Summary of Comments
Rule 30(b)(6)
2018-19

The following summarizes the testimony and written comments received regarding the preliminary draft of amendments to Rule 30(b)(6) during 2018-19. Each of the written comments was assigned a designation beginning CV-2018-0003- followed by the number assigned to that particular comment. Since the only designation that is specific to a given comment is the number after the material quoted above, only that number is included with the comments below.

In May, 2017, the Rule 30(b)(6) Subcommittee invited public comment on a variety of rule-amendment ideas it had under discussion. More than 100 comments were received during that period. After that, the Subcommittee decided to pursue only some of the ideas originally under discussion. A number of the witnesses and a number of the written comments summarized below urge that topics included in the 2017 invitation for comment be revived. The summary of those 2017 comments can be found at pp. 217-95 of the agenda book for the Advisory Committee's November 7, 2017, meeting. The summary of current comments about the topics considered in 2017 are in the final section of this summary.

The summary of written comments below begins with no. 125, and includes several that were submitted after the Advisory Committee voted to submit its proposal to the Standing Committee but before the formal beginning of the public comment period. The comments are summarized in numerical order, starting with the earliest. Therefore, comments 125 to 128 are items received before the Standing Committee approved publication and before the formal public comment period began.

During the last week of the public comment period, over 1,000 comments were received. Some of these comments were extremely brief, expressing only support or (more often) opposition to change (sometimes to changes not actually in the proposal). These comments seemed often to repeat points already made in other comments. This summary does not summarize all of these comments, but attempts to provide a report on the frequency of various points in them. Very often repetitive comments are summarized only in the overall assessment category even though it could be said that they also bear on topics addressed in depth in later parts of this summary.

The following summary is divided into the following sections:

Overall assessment
Requiring a conference about the number and description of the matters for examination
Requiring a conference about the identity of the person designated to testify
Requiring that the conference continue "as necessary"
Committee Note mention of identifying documents to be used during the deposition
Reviving amendment topics not included in Preliminary Draft

Overall assessment

Washington, DC Hearing

[The following listing of witnesses at the DC hearing is in alphabetical order rather than the order in which the witnesses testified.]

Lauren Barnes (testimony and no. 187): "The changes proposed by the Committee articulate the routine (and common sense) set of negotiations by counsel that already occur. Discussions to clarify topics and advance identification of the Rule 30(b)(6) witness or witnesses by both sides happen almost without exception" in my cases. These cases usually involve claims of antitrust violations or anticompetitive conduct by pharmaceutical manufacturers. The defendants are typically corporations, and the cases often involve multiple 30(b)(6) depositions.

Mark Behrens (International Association of Defense Counsel) (testimony and no. 174): Our members have a loud and clear message -- the rule is broken and needs fixing to deal with unfair and over-reaching practices of noticing parties. But it seems that the Committee's interest in proposing an amendment may be driven by the assertion by some plaintiff counsel that some witnesses show up not fully prepared. We do not share this perspective. If it really is a problem, however, the Committee's prescription is not a cure. Identification of the witness before the deposition will not fix the alleged preparation problem. All a rule can usefully do is to provide a framework for a reasonable meet and confer as to the "number and description" of the matters for examination and specify a process for when that process breaks down. Meeting and conferring is widely practiced and often beneficial, but simply mandating a conference, without more, will not address the problems that led the Committee to take up the rule. The amendment does not adequately specify what is to be discussed, or how to determine when the good faith requirement has been satisfied.

Paul Bland (Public Justice) (testimony and no. 172): The preservation of 30(b)(6) is essential to public interest litigation. It provides invaluable discovery about materials within the exclusive control of defendants in such cases. In each of our cases, the power of the rule depends in part on good faith cooperation instead of one size fits all limits and procedures. "We've seen firsthand the role Rule 30(b)(6) depositions play in a diverse range of litigation contexts where an individual with limited resources is trying to hold a larger, more powerful organization -- be it a corporation, a government agency, or a school district -- accountable.

Sharon Caffrey (Duane Morris) (testimony and no. 203): This rule has generated a lot of litigation across the country, but this amendment package will not make things better. The proposed amendments will be both ineffective and harmful. What lawyers need is specific guidance on how such depositions should be handled, such as an objection procedure, how much notice is required, and how they count toward the limit on number of depositions. "The problem is that the Rule does not give enough guidance to practitioners, such that disagreements between counsel must be resolved by courts, which are often inconsistent in their decisions."

Megan Cacace: We have a national practice representing plaintiffs in housing cases and employment cases. We favor the amendments. They will promote efficiency.

Andrew Cooke (testimony and no 165): "Rule 30(b)(6) is misused by many attorneys due to its unusual lack of structure or guidance and its overly broad terms. When coupled with a judicial inclination for liberal, rather than proportional, discovery, responding parties confront extraordinary and disproportionate burdens. The present proposed rule change does nothing to remedy the flaws in the rule as it provides no structure or guidance for the use of the rule."

Philippa Ellis (testimony and no. 359): From 30 years of representing defendants in products cases, I express concern that the proposed amendments may have the unintended consequence of creating a complex web of discovery disputes and increased costs, as well as wasting judicial resources. The rule provides an adequate method for resolving issues about 30(b)(6) as presently written.

John Guttman (testimony and no. 173): I generally represent defendants, often in environmental and toxic tort cases. I find that 30(b)(6) depositions are routinely taken. "These depositions are very important and valuable to the parties. In many cases, Rule 30(b)(6) depositions streamline discovery." But I think that the requirement that the parties discuss the identity of the person to testify will cause harm rather than help. And there should be a numerical limit on topics. Compare the ten-deposition limit. That has worked, and a limit here could work also. In general, in my practice the lawyers work things out. But there are some lawyers who go out of their way to create disputes. We need to focus our rules on the unreasonable attorneys. A limit of 25 depositions would be perfectly reasonable.

Toyja Kelley (President, Defense Research Institute) (testimony and no. 132): The suggested rule change should, in the main, be helpful to all litigants by imposing the duty to meet and confer concerning the number and description of matters for examination. This should help all parties clarify the scope of the deposition and allow better preparation by each side. But there is no framework for the discussion included in the proposed amendment.

Jennifer Klar (testimony and no. 175): My firm represents plaintiffs in housing, lending, employment, and public accommodations cases. I take a 30(b)(6) deposition in almost every case. They are very effective, and serve the goal of deciding cases on their merits. Taking a 30(b)(6) deposition regularly enables me to reduce the number of depositions needed in the case. In addition, in many cases, it reduces the burden of Rule 34 discovery because I can use a 30(b)(6) deposition to learn about the defendant's information organization methods, and then tailor further discovery in a way to gets me the information I need in a manner that does not unduly burden the defendant. The required conference codifies what we already do in my practice. "In almost every case, after serving a 30(b)(6) notice, I have a discussion with opposing counsel regarding the meaning of 30(b)(6) topics and the amount of time needed for the defendant to prepare."

Mark Kozieradski (testimony and no. 192): As a plaintiff lawyer in cases involving nursing home negligence, I find that 30(b)(6) depositions are the single most effective tool for efficiently discovering information held by institutions. Using these depositions, my firm is able to narrow which facts are actually in dispute and identify the positions of the parties early in the litigation. These depositions have eliminated countless hours of attorney time and unnecessary delays, avoiding unnecessary motions. The major recurrent problem I see is that some organizations do not adequately prepare their witnesses. But that is not due to a problem with the rule; instead, it results from attorneys' ignorance of the obligation under the rule to prepare the witness.

Altom Maglio: In my personal injury practice representing plaintiffs, 30(b)(6) levels the playing field. The vast majority of the time, the identity of the witness is disclosed.

Brad Marsh: This amendment will inject uncertainty into the rules. That allows lawyers to take advantage.

Michael Neff (testimony and no. 184): In my view, the single most important tool that the plaintiff's counsel has to pursue the truth in an efficient and economical manner is the 30(b)(6) deposition. In one case, we did only a 30(b)(6) deposition with regard to a factual basis for liability, and the only other discovery was expert depositions and damages witnesses. We

obtained a $9 million verdict.

Michael Nelson (testimony and no. 164): These amendments do not address the real problems with the current rule. We see frequent designation of hopelessly overbroad topics, and of purely legal conclusions or contentions that no lay witness should be required to address. The problem is that the rule lacks necessary guidelines, and this amendment does not provide them.

Terry O'Neill (National Employment Lawyers Assoc.) (testimony and no.144): We commend the Committee on the process that led to the proposals to amend the rule, and on the substance of the proposed amendment. In particular, the Subcommittee's "road show," which permitted input from a wide range of perspectives, resulted in a proposal that is well balanced in addressing concerns. This rule works well in practice and achieves the efficiencies it was intended to achieve.

Thomas Pirtle: I represent plaintiffs in drug and medical device cases. 30(b)(6) is working. Meet and confer is an excellent idea. I can't remember a 30(b)(6) deposition when I didn't know the identity of the witness in advance. Seven days notice of the identity is sufficient.

Thomas Regan (testimony and no. 199): Few experienced practitioners would disagree with the need for amending this rule. As currently written, it is divisive and far less explicit than other civil rules. The sheer frequency with which it is used begs for amendment and clarity. But the proposed changes to the rule will lead to gamesmanship and cause more disagreements than currently arise. In particular, the focus on the process of choosing a corporate witness will cause problems.

Terri Reiskin (Dykema Gossett) (testimony and no. 196): "The Firm opposes the proposed amendment to Fed. R. Civ. P. 30(b)(6) in its entirety and submits that if the Committee is to undertake the potentially disruptive step of amending the organizational deponent rule, it should do so in a manner that is scrupulously fair to plaintiffs and defendants, and addresses the very real problems the Rule raises, rather than creating new ones. The proposed amendment is a solution in search of a problem, and does nothing to address the real issues with the Rule." The rule has not been amended for almost 50 years, while other discovery rules have been clarified significantly. It is time for that sort of comprehensive process for this rule as well. The open-ended nature of the current rule has led to many difficulties and produced thousands of decisions that specifics could avoid.

Ira Rheingold (National Assoc. of Consumer Advocates) (testimony and no. 149): Rule 30(b)(6) is the most important part of discovery for my cases. It's really working well. The goal is to set up a system that gets people to work things out reasonably. The proposed amendment represents a reasonable change that will facilitate fact-finding and achieve efficiencies. The rule has proved effective and essential in consumer law cases since its adoption. There is a balance to be reached. The plaintiffs' bar complains that corporate representatives too frequently show up at depositions only to claim ignorance as to matters on the topic list. The defense bar complains that far-reaching deposition notices require too much preparation. The proposed amendment's conference requirement is well designed to reduce both these problems and be beneficial to both sides. A key problem in litigation of the sort we handle is information asymmetry. Usually, the corporation or government agency on the other side has sole knowledge of the events that give rise to the suit and its own practices in regard to such matters. That explains why plaintiffs' notices may at first be quite broad. By conferring, parties can home in on the most relevant areas. This will assist the company in preparing for the deposition and in choosing the person to designate. All in all, this amendment package would effect only a minor change in practice. In some jurisdictions, the amendment would simply codify existing practice. But it is nonetheless worth doing. Indeed, the success similar directives have had in many places provides strong assurance these amendment will work smoothly. We do think that a couple of small changes are

in order. First, we think it would be valuable to say affirmatively that the burden still rests on the company to seek judicial relief if agreement cannot be reached. This could be done as follows in the draft Committee Note:

> The duty to confer as necessary continues if needed to fulfill the requirement of good faith. But the conference process must be completed a reasonable time before the deposition is scheduled to occur. If the conference process fails to produce agreement between the parties, the recipient of the notice may move the court for a protective order under Rule 26.

In addition, the rule itself should say that the parties must confer on which witness will address which matter. This could be done with the addition of three words:

> Before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person the organization will designate to testify on each matter.

Brittany Schultz (Ford Motor Co.) (testimony and no. 151): Ford opposes this amendment package because it does not address the long-standing problems with the rule. Ford submitted detailed comments on July 31, 2017, but the proposals it endorsed there are not in this package. Ford is deeply disappointed that the proposed amendment does not address procedural gaps in the rule, such as the absence of a specified objection procedure, or a means for addressing topics on which the company has only documentary information. As an illustration of the current problems, she received a notice with 150 topics. One of them was "all information Ford has about steering mechanisms" or something equally broad. A conference requirement without any specifics about how to resolve issues is not useful.

Michael Slack (testimony and no. 170): Representing plaintiffs in actions against airlines and multi-national manufacturers, I find 30(b)(6) to be the most efficient discovery device. It imposes accountability on corporate defendants. Among other things, due to the existence of this form of discovery corporations are less likely to be evasive in response to other forms of discovery because they know that a 30(b)(6) notice can follow evasive responses. An "I don't know" response by a 30(b)(6) witness can be fatal, while an "I don't know" response from an individual witness can undermine the utility of an ordinary deposition. In addition, 30(b)(6) is immeasurably better at identifying the most relevant individuals to be the focus of individual depositions.

Andrew Trask (testimony and no. 176): I speak from 20 years' experience and also on the basis of research done for a book I've written on litigation tactics that is to be published by Cambridge University Press. These rule changes are likely to promote gamesmanship. Already noticing counsel seek to question witnesses about topics beyond the notice. A few of these questions may be natural follow-ups to information disclosed about the specified topics during the deposition, but many are designed to elicit what appears to be a corporate admission on a matter of legal interpretation, or commit the corporation to a hypothetical course of action. Similarly, although questioning the witness briefly about his or her specific position with the company may provide valid background information, it will often move beyond simple background information and spread into factual matters not encompassed within the topics specified.

Julie Yap (Seyfarth Shaw) (testimony and no. 188): Although Seyfarth Shaw supported the Committee's decision to take a close look at this rule, it opposes these changes. They will not remedy the serious problems with the current rule, and could produce more difficulties. In particular, the directive to confer about the identity of the witness will likely lead to noticing

parties claiming they have standing to influence that selection.

Hassan Zavareei (testimony and no. 191): In my public interest practice, I find that 30(b)(6) depositions are an essential tool for eliciting crucial information regarding organizations' structure, leadership, policies, and practices. This information can be the groundwork for all later discovery in a case. In class actions, it can be critical to resolution of class certification.

Phoenix Hearing

John Griffin (testimony and written statement): No other country has a rule like this one. Over the years, it has made many friends and a few enemies. Although in general I adhere to the maxim "If it ain't broke, don't fix it," I favor the Committee's proposed amendments. I have used Rule 30(b)(6) often to very good effect, particularly in representing disabled candidates for employment with federal protective agencies such as the U.S. Marshalls Service. Without the tool provided by Rule 30(b)(6), these clients would have had no way to obtain critical information about the policies of the agencies about employing disabled workers. The tweaks and adjustments the Committee has proposed can make the rule work better.

Lisa LaConte: Mandating this conference will not solve the problems I see in my practice representing asbestos defendants. The rule provides no means to address an impasse in the conference, which is going to happen when both sides hold their ground. The draft lacks objective features that could address those impasses. I often see lists of 50, 75, or even 100 categories, often delving into the distant past. The rule should provide a framework that will resolve issues; conferring alone will not do that.

John Sutherland: I do not think that this package of amendments should be adopted. Instead, the Committee should continue work and enact meaningful proposals. The current package will lead to more problems than it will solve, and it threatens to frustrate the very purpose of the rule. When adopted in 1970, the rule was designed to lessen the burden on organizational litigants that otherwise would have to produce many individuals to testify. The current amendment would eviscerate that purpose. It will also encourage gamesmanship by the requesting party. In addition, it will increase the likelihood that a responding organization will have to produce multiple witnesses. Changes are needed to ensure that the commitment to proportionality is met. The current proposal contains no specifics to resolve impasses in the conference.

Nieves Bolanos (NELA): For those who represent plaintiffs in employment litigation, Rule 30(b)(6) is very important. Individual plaintiffs are at a clear disadvantage in knowing about corporate structures, etc. Using this rule, they can find out about the company's payroll system, organization of data, etc. This amendment proposal adopts existing best practices in handling this essential vehicle for gathering information. The current rule is working well, and in our practice in the Seventh Circuit the parties regularly meet and confer regarding discovery issues, including those specified in the proposed amendment. This has proved useful.

John Sundahl (Defense Lawyers Assoc. of Wyoming): We oppose the amendments. The amendments will likely create more litigation and confusion. They will spark unnecessarily contentious discovery battles that will end up in court. We urge the Committee to address the concerns raised in the written comment from Lawyers for Civil Justice. This amendment will not produce positive change. Already, the parties confer as needed in advance of 30(b)(6) depositions.

Lee Mickus (testimony and no. 141): These depositions generate disagreements at a particularly high rate, but the proposed amendments will do little to prevent such disputes. And

many courts already require such conferences and most practitioners will undertake these efforts. Since pre-deposition conferences already occur frequently, building this requirement into the rule itself cannot be expected to yield significant improvements in practice.

William Rossbach (testimony and written statement): I begin with the goals of Rule 1. Rule 30(b)(6) may be the most important and most effective rule in achieving the goals of Rule 1. With carefully drafted and focused descriptions of subject matters for the deposition and well qualified and prepared witnesses, much of the maligned "fishing expeditions" that written discovery so often entails can be limited and reduced. Likewise, many of the expensive and time-consuming fishing expedition depositions can be avoided. In one of my first cases, a single 30(b)(6) deposition provided a basis for achieving a settlement. When I learned of the initial ABA proposal for radical changes to the rule, I was deeply concerned.

Bradley Peterson (testimony and no. 138): I have often done CLE programs on 30(b)(6) depositions. I begin them by saying that I love trying cases, but that the worst part of trying cases is having the other side play the deposition in some prior case in which my client's designated witness was poorly prepared. "Rule 30(b)(6) can be a highly-efficient, highly-effective discovery device. It provides parties in multi-million-dollar, high exposure cases with a significant tool that can be used in program litigation for years and years. "Unfortunately, the Rule gets abused -- used as a weapon to create discovery disputes that already over-worked courts often do not spend enough time trying to understand and fairly resolve, thus leading to sanctions and a resolution based on something other than the true facts, and justice."

Jennie Anderson (testimony and no. 148): A majority of the defendants in the lawsuits brought by my firm are corporations. We know little about the structure of these companies. 30(b)(6) depositions are an efficient and effective means of gathering corporate information to lay a foundation for discovery during the remainder of the litigation. In class actions, class certification may depend on information generated by these depositions.

Keith McDaniel: This amendment will not help. The real need is to provide specifics on other topics. My experience is that invariably you get the 30(b)(6) notice after the individual witness depositions and before the expert depositions. What we really need is a definite minimum time for notice, and an objection procedure modeled on Rule 45.

A.J. de Bartolomeo (testimony and written statement): The Committee carefully and thoughtfully considered the various comments received about its initial focus and produced a balanced and fair procedure with evenly imposed obligations on all parties. This is a textbook example of "best practices" in rulemaking.

Donald Myles: The rule should not be touched or it should be completely redone.

Written comments

Brian King (130): These amendments will create further delay with no gains in efficiency. Presently, as a matter of practice, counsel usually propose dates for the deposition and agree on them. They also confer or file motions regarding the scope of the topics to be covered. But the amendment seems to impose a meet and confer requirement in every case, even those where counsel would likely have agreed to the deposition without needing a conference. Given the difficulties of scheduling conferences of counsel, this addition will add more delay in an era of shrinking dockets and ever-tighter discovery deadlines. Moreover, the timing is vague -- before or promptly after the notice. I oppose this new requirement, but if it is imposed it should be before the notice is served. In addition, the new requirement that a subpoena on a nonparty organization advise it of the duty to confer is unnecessary. As a practical matter, a nonparty organization served with a subpoena will reach out to the lawyer who sent the subpoena and

confer without the advice that the amendment calls for.

Mackin Johnson (131): I support the proposed amendment. It reflects how the employment bar works in Mississippi. I represent management in employment suits. I often receive 30(b)(6) notices with more than 50 topics, many of which can't be reasonably responded to by the same witness. Before filing any motions, I get on the phone with plaintiff's counsel and try to work through the notice and proposed witnesses. It is rare that a lawyer will not cooperate, but it will be helpful to have a rule that requires such cooperation.

Scott Silbert (134): The proposed amendment makes perfect sense with a non-party deponent. But as to parties to the litigation it is unnecessary. There is already a very workable solution with regard to existing parties. In every district in which I practice, there is a local rule mandating a conference about discovery disputes. The 30(b)(6) deposition is critical to creating a sensible discovery plan for the rest of the case. Imposing the conference requirement creates a tool the defense can use to make the taking of the deposition more difficult, and will tend to create rather than avoid roadblocks. "I can see the defense bar applauding such an amendment as it creates a substantial billing opportunity."

Michael Neff (135): "Changes are not needed in FRCP 30(b)(6)."

John Branum (136): "Please do not make it more difficult to get information from corporations. It is already hard enough as it is."

Richard Cook (137): Requiring a pre-deposition conference will do more harm than good. As a practical matter, conferences already occur if there is an issue on the scope or number of topics since the rules already require such a conference before a discovery motion is filed. This amendment will encourage counsel to raise issues and objections that otherwise might not have been raised. "Attorneys naturally want to feel that they are important and are not potted plants. If required to speak on a topic they will."

Michael Rosman (140): Rules that parties must "confer" in "good faith" are generally difficult to enforce. The enforcement of the particular requirement in this amendment is even more problematic because there is no obvious means of enforcement. The court can become involved only if somebody makes a motion, and Rule 37 independently requires efforts to avoid the need for court action.

Federal Magistrate Judges' Association (142): We generally support the concept of directing counsel to confer on these matters. We have observed that Rule 30(b)(6) deposition practice has become a contentious subject. Our only hesitation is whether the proposed amendment goes far enough. Assuming the amendment is approved, we respectfully suggest that, after a period of time, the Committee consider whether further amendments -- such as, for example, one imposing a presumptive limit on the number of matters for examination -- are warranted.

Paul Godfrey (152): On behalf of the Minnesota State Bar Association, I write to support the proposed amendments. If these amendments are adopted for the federal rule, our Association stands ready to petition our state supreme court to adopt a conforming amendment to the Minnesota Rules of Civil Procedure.

Gregory Antollino (167): The proposed amendment is overbroad. If there are problems the responding organization should be given notice that it should immediately confer with counsel for the noticing party. The burden to confer should be on the responding organization, not on the noticing party.

Palmer Vance (and 25 other past, present, or future Chairs of the ABA Section of Litigation) (180): The proposed change is helpful in requiring that the parties communicate in advance of a 30(b)(6) deposition, but it does not go far enough. As we have before, we urge that it be strengthened with language along the following lines:

> If the parties cannot resolve material disagreements, they are encouraged to request a conference with the Court to obtain an early resolution of the matters.

Carmen Caruso (194): The amendment is not needed. Counsel acting in good faith can and do meet and confer without being ordered to do so. Counsel acting in bad faith tend to abuse meet and confer requirements and turn them into make-work. On balance, this amendment will be counter-productive.

Jonathan Feigenbaum (no. 204): These amendments will lead to slower movement of cases and more motion practice. It will invite further abuses by organizations as part of their litigation strategy. I spend most of my time litigating ERISA cases. For me, 30(b)(6) is extremely important because it provides meaningful discovery.

Amar Raval (205): There is no rational reason to change Rule 30(b)(6) unless the goal is to slow movement of cases. I thought the whole point of the 2015 amendments was to avoid that. But these changes will cause a whole new category of discovery disputes. I litigate ERISA cases, and this rule provides meaningful discovery and fairness for the individual.

Paul Wood (207): The proposed changes will help reduce disputes and reduce the need for court intervention.

Nicholas Ortiz (208): The proposed changes are unfair and will limit a party's ability to obtain full and fair discovery. They will make it easier for corporations to hide the truth.

American Association for Justice (209): "AAJ thanks the Advisory Committee for its work on drafting the Proposed Amendments and recognizes that the Committee carefully crafted the Amendments with regard to fairness for both plaintiff and defense interests." The changes impose new obligations on all parties, which is essential to maintaining a balance.

Victoria Katz (211): We agree with the proposed amendment, which appears to be a reasonably calculated response to address the problem it was meant to address.

John Ireland (212): The rule is very efficient and effective. I agree that meet and confer is a good idea. I hope that the amendment will fix the defendants' frequent hide the ball tactics by requiring that the identity of the witness be disclosed in advance. Having the name provided 7 to 14 days in advance is a good idea.

Eric Stravitz (213): I support the proposed changes to the rule, and the minor tweaks suggested by Public Justice.

U.S. Chamber Institute for Legal Reform (214): The business community strongly believes that this rule is ripe for reform. It has become a major sticking point in civil litigation. But the proposed amendment threatens to spawn a new form of "bandying" -- exploiting discussions related to the identity of corporate representatives to make corporate depositions more burdensome. Conferring about these depositions, in general, holds promise to reduce some areas of dispute, but the provision about the identity of the witness will not do that.

Dan Kozma (215): I fully support Public Justice's comments on the proposed amendments and oppose any restrictions on the rule which would make it more difficult to obtain

necessary information from corporations.

138 companies joining in LCJ comments (217): On behalf of 138 companies, we join in the Lawyers for Civil Justice comments. We strongly oppose the required conference about the identity of the witness. Saying that the company "ultimately" can choose its own witness is not sufficient to prevent abuse. And even though there are pressing problems with 30(b)(6) depositions, the amendment does nothing to cure them. The proposed amendments should be rejected.

Pamela Smith (218): I support the proposed changes. This rule makes the discovery process smoother and more efficient. It requires the company to identify the individual most knowledgeable about the topics in the notice, which makes discovery more effective. This process dramatically reduces guesswork about which person at the company can speak about the relevant issues. When I represented minority employees who were making discrimination claims against a large university, by using this rule I was able to elicit testimony about discrimination against other employees by the individual defendant, and concealment of evidence about his behavior. Had it not been for this rule, I likely would not have obtained this information.

Edward Zebersky (219): 30(b)(6) is one of the only ways a plaintiff can obtain detailed information concerning a corporation's actions. The rule is fair and balanced. I am very concerned that the rule may become too narrow. If a numerical limit were imposed on topics, that would be harmful. The existing rule provides sufficient protection against overbroad topic designation.

Jennifer Lipinsky (220): Many attorneys already confer, so the proposed amendment would change little except to codify good conduct and perhaps make difficult cases easier to manage. Disclosure of the identity of the witness should be helpful in preparing for the deposition and ascertaining whether the witness will be able to answer questions. Limiting the number of topics will further complicate the process.

Nick Verderame (221): The current rule is a good rule that is fair and balanced. Adding a numerical limit on topics would hinder individuals to fully question corporations. The addition of attention to the identity of the witness is desirable, for it will allow for efficiency and transparency in the entire process.

Mark Kitrick (223): The meet and confer idea is helpful. Many issues and conflicts are resolved or reduced when lawyers discuss matters prior to major discovery. There is no downside to requiring such a conference. Adding the identity of the person is important, as it forces the people to focus on who really has the information relevant to the discovery. This sort of exchange should take place early in the case, before any discovery.

Kevin Powers (224): I join the NELA comments. We represent plaintiffs in employment discrimination cases. Almost always there is a substantial imbalance between the plaintiff's resources and the defendant's resources. 30(b)(6) plays an important role in allowing parties to cut through a mass of documents and vague accounts and find out what actually took place and the reasons behind the actions at issue. The proposed amendments will, in most instances, make litigation more efficient and less subject to gamesmanship.

Bruce Braley (227): I support the changes. The amendment requires candid discussions before the deposition to ensure that the parties are on the same page as to their expectations of what will be the focus of the deposition. Most federal judges presented with disputes about these depositions will inquire about how the parties tried to avoid disputes. This amendment will foster that sort of discussion.

Gregory Cusimano (228): I always make an effort to meet and confer when dealing with good attorneys. We are generally successful. I think it's a solid idea to require this behavior. Identifying the witness will be helpful and likely shorten depositions.

Patrick Malone (29): This is a common sense change that should be adopted. It's a shame we need a rule to require attorneys to talk to each other. But too often I have found only after the deposition has begun that there were "misunderstandings" about what I thought were plain English topics set out in my notice. Alternatively, some corporations' counsel will go directly to motion practice without any communication with me about clarifying or narrowing the topics. It's time to end the hide and seek games.

Jason Faqgnano (230): I support the proposal. It will help ensure the witness is knowledgeable and prepared.

Richard Frischer (231): I support this amendment. I find the comprehensive meet and confer requirements in federal court helpful because the aim to quell disputes. Often the witness appears but does not understand the categories requested. Sometimes it's simply the wrong person. Working out these issues ahead of time saves all parties costs and leads to more meaningful depositions.

Graham Owens (Nat. Ass'n of Manufacturers) (233): The NAM applauds the decision to focus on this rule. But the proposed amendment does not solve the problems with the rule. Instead, without clear parameters and a reasonable process for resolving disputes, the proposed meet and confer requirement will incentivize abusive behavior. We urge that the proposal be withdrawn so that it can draft a new amendment that will add clarity, not ambiguity, to the 30(b)(6) process. Presently, noticing parties regularly abuse the rule, by submitting lengthy and overbroad lists and then pursue questioning about yet other topics during the depositions. They also use these depositions to try to pin the witnesses down on legal contentions. These depositions trap the corporation in an unwinnable situation, and leave it on an uneven playing field that should be evened by rule amendments. But the actual proposals will introduce new avenues for abusive behavior. The real problems are (a) that adequate preparation is impossible when there are no boundaries to overbroad lists or questioning; (b) the rule has become a back door for discovering legal contentions; (c) parties regularly use the depositions to obtain binding admissions rather than useful information; and (d) plaintiffs try to use the rule to create "super witnesses" who are to synthesize all facts and issues in a setting in which the witness is likely to misspeak inadvertently. In the face of these problems, the Committee's proposal misses the mark. In particular, it does not establish concrete rules for addressing party disputes, and it will create even greater room for disputes. We agree with the statement submitted by the International Association of Defense Counsel, and urge the Committee to put forth proposals that deal with the real problems under the rule.

Michael Warshauer (234): The proposed changes make sense. There can't be a meaningful numerical limit on topics as the parties can't possibly know what they don't know until the deposition is taken. Requiring parties to identify the witness prior to the deposition will allow the deposition to be conducted more efficiently. The meet and confer requirement will require both sides to explain their respective positions consistent with the process now in place for discovery disputes.

Walt Cubberly (235): I largely support the proposed amendments, including the identification requirement and the fact that it doesn't limit the topics for examination. The only misgiving I have is about the Committee Note suggestion that the serving party identify in advance of the deposition the documents it plans on using during the deposition.

Jay Henderson (236): The primary problem with these depositions is the tension between

an overly broad notice and an overly detailed notice. When the parties are genuinely acting in good faith, a meet and confer provision is beneficial. Unfortunately, corporate entities frequently use the broad v. narrow dilemma to thwart the intent of the rule.

Erin Campbell (237): As a lawyer representing plaintiffs on a contingency fee basis, I support the proposed amendment. In my practice, 30(b)(6) depositions often require expensive travel, and efficiency is very important. This amendment will improve the efficiency of these depositions. I see little downside for this amendment. The corporation learns a bit more about the questions – but on balance this is not a bad thing for the deposing party because it has a bigger interest in getting the questions answered than in any surprise advantage. Rule 30(b)(6) depositions are too valuable to waste on personal capacity questions.

Geoff Hamby (238): The proposed amendment is unnecessary and would lead to a slowdown of the discovery process. There is no need for this mandatory conference in the vast majority of cases. I average about one 30(b)(6) deposition per month, and I have yet to run into a situation where I believe that a meet and confer requirement would have led to a productive outcome. So adding this only delays the process. When the parties disagree about one of these depositions, requiring them to meet and confer is extremely unlikely to lead to a compromise.

Russell Abney (239): Meet and confer is always desirable, as it often allows the parties to resolve issues without wasting the court's time. I think the conference should occur before the notice or subpoena is served.

Ruben Honik (240): The proposed amendment is fair and balanced. Preserving its fairness requires retaining the requirement about the identity of the witness. There should be no numerical limits on the topics.

Julie Bickis (241): The proposed change is not necessary and has significant potential to be abused. The organization should not have to negotiate who is chooses to be the witness.

Brenda Fulmer (242): I believe the current rule is fair and balanced, and that the proposed changes are unnecessary. I am concerned about any change that would permit a defendant to avoid disclosing the identity of the witness before the deposition.

Kenneth Haynes (243): I believe adding the meet and confer requirement would be a desirable change. Too often I don't find out who will be testifying until the night before the deposition, and too frequently it turns out that the witness is not prepared. I think the meet and confer should occur before the deposition is noticed.

Maria Diamond (244): This is a very important rule, and the Committee made a balanced proposal. But the words "number and" should not be included. It could lead to arbitrary limits on the number of topics.

Karen Menzies (245): The meet and confer is the most effective avenue for ensuring as narrow as possible a deposition. It can also be helpful to the court in focusing matters.

Joseph Condeni (246): The current use of this rule is reasonable as a way to make defendants provide evidence. If the goal of our judicial system is "blind justice," then the present proposal to limit the scope and breadth of these depositions should be dismissed.

Frank Bailey (247): "The current 30(b)(6) is perfect and does not need change which would limit the scope of information obtained."

Ryan Babcock (248): The proposed changes are consistent with the intend of the rules as

a whole and should aid in the fair and just determination of disputes. The meet and confer process should help ensure that corporate representatives show up to the deposition prepared.

Robert Edwards (249): The proposed changes will not crated problems for parties who approach discovery in good faith. I would be opposed, however, to any presumptive limitation on the number of topics.

Edward Grossi (250): I favor the proposed amendment because it will make the discovery process more efficient. But I oppose the additional changes proposed by groups that seek to limit discovery.

E. Craig Naue (251): "Please do not limit the number of issues that can be covered by 30(b)(6) subpoena or notices."

Kevin Haynes (252): I would like the amendments to ensure that (1) the organization will identify the witness; (2) there is no limit on the number of matters to be explored; and (3) the organization must raise any objections well in advance of the deposition. Right now, we often learn the identity of the witness only on the day of the deposition, or the evening before. This can result in an unproductive deposition.

Mark Napier (254): Please do not limit the number of topics. If the number is limited, then plaintiff attorneys will be forced to make the topics more broad.

Eric Romano (255): I generally support the proposed rule change, as I think that if lawyers meet and confer that prompts professionalism and helps avoid disputes. But there should be no numerical limit on topics.

Richard Thalheim (256): The rule should not be fashioned to allow respondents to squabble and nit-pick the scope as too broad and then complain that specific topic descriptions exceed some artificial number.

Todd Romano (257): There are already procedures in place for companies to object and seek a protective order. The meet and confer requirement seems to be well-intentioned, but it is likely to invite the deposing counsel to disclose work-product privileged information by telegraphing his or her planned examination. That would enable the defending counsel to gain an unfair advantage by fishing for information.

Frank Butler (258): This rule does not need a change. There is no problem that needs solving.

John Tiwald (259): I fear that the meet and confer requirement raises a presumption that a 30(b)(6) notice's content must be conferred, no matter how proper. This will be used to mean that every item must be negotiated, leading to a transactional approach. Previously we saw bluff objections, but now the rule will say these bluffs must be taken seriously. This will make 30(b)(6) depositions more complicated.

Daniel Karon (260): The proposed amendment supports the parties' mutual search for truth by encouraging both sides to talk. That is the only way we can understand each other's needs. Our clients require and deserve this proposed amendment, and I can't remember ever seeing a more balanced and thoughtful one.

Mark Samson (261): I oppose the proposed change. The requirement of a meet and confer will tempt defendants to limit the examination by not agreeing to certain topics. This is a poster child for a solution in search of a problem.

Lisa White (262): The proposed amendment is sensible and probably will reduce gamesmanship. Advance notice of the identity of the witness will reduce the likelihood that a person without knowledge will be named.

Norman Siegel (263): This amendment furthers the purposes of Rule 1. The disputes that arise generally result form lack of mutual understanding as to the expectations of the parties. The amendment addresses this issue by facilitating a meet and confer session.

Gerry Goldsholle (264): The proposed amendment seems highly sensible and fair and balanced. But adding a ten-topic limit would be counter-productive.

Anthony Leone (265): The proposal is a good amendment, but a numerical limit would be a bad idea.

David Rodibaugh (266): I support the proposed amendment. All too often, due to lack of communication, 30(b)(6) depositions are needlessly prolonged. A mandatory conference will help streamline the process.

Jeffrey Mansell (267): I have rarely encountered an instance in which attorneys and witnesses were not cooperative and professional. I think that the proposed conference requirement may be unnecessary in most cases, but that it could be helpful in the event the court has to resolve a dispute. But the rule should not be changed further, to impose a limit on the number of topics.

David Stradley (268): I support the proposed amendment. 30(b)(6) notices frequently draw motions for protective orders. Only then does the meet and confer process begin. That wastes time. Although the amendment puts the burden of initiating the conference on the noticing party, it will introduce efficiencies.

Bert Utsey (269): I oppose the proposed change. This rule is the best way to discovery corporate knowledge. The proposed changes reflect an effort to frustrate the free exchange of information. There should be no arbitrary limits on use of this rule.

Lauren Ellerman (270): I am concerned that the rule change inherently favors corporations. Please do not change the rule to limit the areas of direct inquiry.

Jonathan Freidin (271): The changes to 30(b)(6) will create an arbitrary limit on the number of topics, and support more stonewalling.

Erik Heninger (272): While I support the general premise of the proposed amendment, I emphatically oppose any effort to place artificial numerical limits on the number of topics.

Miranda Soucie (273): Creating presumptive limits on areas of inquiry creates a very real risk that corporations will claim that every notice is overbroad. Providing greater detail in the notice gives the corporation greater clarity on what it must prepare to address.

Mike Stag (274): While I agree that discussion about the notice is helpful, in my experience parties do this voluntarily. What concerns me most is the attempt to create an arbitrary limit on the number of topics. Why would one object to specificity?

Reza Davani (275): I have grave concerns about the language "confer in good faith about the number" being used to limit the number of topics in a notice. More specific descriptions are valuable.

Greg Yaffa (276): Meeting and conferring makes sense because it should provide clarity. But limiting the number of topics would frustrate the purpose of the rule.

Michael Kittleson (277): The proposed changes will serve only to put obstacles in the way of obtaining the truth from a corporation.

George Wise (278): 30(b)(6) is the one discovery tool that singularly forces accountability and promotes efficiency over alternative discovery options. It is of great value to plaintiffs.

Laura Johnson (279): Making significant changes to this rule that limit topics will allow corporations to avoid responsibility for their actions.

Bruce Greenberg (280): Meeting and conferring in advance will streamline these depositions by bringing to the surface early, rather than at the deposition itself, any disputes.

Warren Christian (281): I oppose limiting the areas of inquiry in these depositions. There are no restrictions in areas of inquiry from a corporation to an individual plaintiff, so why should there be limits favoring the corporation?

Michael Dampier (282): I do not support the rule changes. The current rule works fine, and there are enough rules, procedures, and meet and confers in place to handle any issue. This is just attempted "tampering" with the rule for no compelling benefit.

Washington Legal Foundation (283): While the current rule has many defects in need of fixing, the proposed change addresses none of them. The most glaring defect in the proposal is the extraordinary mandate that the parties confer on the identity of the witness. The additional required conference about the number and description of the matters for examination provides no meaningful guidance or direction on what precisely is to be discussed.

Carmaletta Henson (284): I represent the frailest of our population -- elderly residents of nursing homes. This rule provides a mechanism for my clients to gain relevant knowledge. My strong concern is that the amendment will in effect impose a presumptive limit on the number of matters of inquiry. In order to draft a notice that is not overly broad, I need to be very specific about matters such as staffing. Our courts already require that notices be drafted with painstaking specificity.

Jason Downs (285): I am opposed to the proposed change. It will almost assuredly increase discovery disputes. Corporations will claim that every notice is overbroad.

Nicholas Panagakis (286): I do not support any rule changes. The current rule is clear and unambiguous. The proposed change will complicate things needlessly.

William Carr (288): This rule is effective and used by many to streamline discovery. There is no need to put an arbitrary cap on the number of topics.

Michael Dampier (289): The one proposed rule change that needs commenting on is the egregious limit on the topics for examination. This serves no purpose except to prejudice the party seeking corporate information.

Joseph Bryant (290): Any change to the current rule would impede the claimant's absolute right to seek information clearly relevant to discovery. This is another attempt by industry to hide its bad conduct.

Clay Mitchell (291): Amending this rule as described will only serve to require more depositions to be taken and will unfairly limit the scope of the deposition.

Adrian Mendiondo (292): The proposed change would give organizations additional tools to obstruct and delay discovery.

Frank Kerney (293): The proposed changes will create a logistical nightmare and increased litigation across the board.

Christopher Hinckley (294): Creating presumptive limits on areas of inquiry creates a very real risk that responding organizations will claim every notice is overbroad.

Anonymous Anonymous (295): Limiting the number of topics limits a party's ability to conduct discovery on relevant issues.

Harold Velez (296): The proposed changes will fuel the ever increasing costs of litigation. Almost all responses will draw an objection. Providing greater detail in requests risks the increase of claims that the notice goes beyond the presumptive limit on the number of topics.

Michael Hanna (297): I do not support the proposed amendment. It will lead to unnecessary limitations and greater litigation to clarify the notice.

Joseph Kopacz (298): The rule is very important to make sure witnesses are prepared and bring all required information to the deposition.

W. Doug Martin (299): I am against limiting the number of areas of inquiry.

Marc Semago (301): Leave the rule as it is. The meet and confer requirement will turn every 30(b)(6) notice into a fight over whether it is broad and burdensome. The is a backdoor attempt to limit the scope of discoverable information.

Henry Watkins (302): I do not support limiting the number of topics.

Steve Thompson (303): The proposed amendment seems noble and is something that most good attorneys attempt to do anyway. 30(b)(6) depositions are the only real way to find out the facts instead of relying on the selective culling by defense counsel. It is necessary to obtain information from a giant corporation.

Schuyler Brown (304): I believe that the proposed 30(b)(6) rule should not be changed as to limit the number of topics that I can question on.

Richard Bates (305): The proposed rule has the effect of supporting presumptive limits on the number of topics. This will force the noticing lawyer to broaden the topics, and lead to "overbroad" objections.

Joseph Rugg (306): Any arbitrary limitation on the number of topics would be unfair and prejudicial.

Jill Bollwerk (307): Although I think it is worthwhile to require a good faith conference before depositions, any efforts in limiting the number of topics could be very dangerous.

Jamison Shekter (308): Any proposed change to 30(b)(6) should not include a limit on the number of topics.

Ariston Johnson (309): Many attorneys who represent corporations object to every discovery request, because the burden of conferring and filing a motion will dissuade opposing counsel form pursuing the discovery. Currently, if counsel receive an overly burdensome notice they can pick up the phone and seek clarification. A rule change that requires that call would be a bad thing.

John Doyle ()310): I support the current proposed amendment to reduce litigious motions. I am adamantly against any attempts to set a limit on the number of topics.

Darrell Kropog (311): These changes are bad. They will have the effect of creating presumptive limits of areas of inquiry. Organizations will claim that every request is overbroad.

Sarah Foster (312): The rule should not propose a meet and confer on the number of topics. That should be left to the noticing party or, if at issue, the court.

Stefano Portigliatti (313): Although a meet and confer requirement makes good sense, the issues that are typically handled in the meet and confer requirements of a motion for a protective order are sufficient. Limiting the number of topics may see a good way to reduce the scope of ridiculously burdensome requests, but it would result in litigants simply using fewer but broader topics.

Jeffrey Constantinos (314): This proposed amendment must not be adopted. The benefit of requiring the attorneys to confer does not outweigh the increased litigation that will result. It invites litigation about what was and was not addressed in the conference.

Corey Friedman (315): I am concerned that the proposed amendments may deplete judicial economy and hamper productive litigation. It appears to be an effort by the defense bar to shift neutral rules. Arbitrary limits on the number of topics should not be adopted.

Michael Shiver (316): Although this amendment is well intentioned, I fear it will create yet another delay in obtaining necessary discovery. By placing presumptive restrictions on the number of categories which can be sought, the rule would place a restriction upon the requesting party and shift the burden of demonstrating relevance.

Marc Edelman (317): I am opposed to the amendment. Creating a conferral requirement about the number and topics will create presumptive limitations that will subvert effective discovery.

Kyle McClain (318): The meet and confer addition is a reasonable change. Any limit on the number of topics would be unworkable.

Navah Spero (319): This is a bad idea, as it would greatly prejudice the party seeking to take the deposition. There is a constant back and forth in litigation about whether the topics are overly broad. The solution to that problem is to increase the number and make them more specific.

David Moffett (320): What started as a good proposal to meet and confer has the potential of limiting access to relevant information and becoming a new cottage industry of litigation. By creating presumptive limits on areas of inquiry there is a risk that responding organizations will claim ever notice is overbroad.

Ryan Roberts (321): I do not support the proposed change because it creates a mandator conference when one may not be necessary. It will increase legal fees and court involvement where these things are not needed. I have found that very few of my requests cause concern, and

in all instances when they did opposing counsel has conferred with me. I have never had a discovery hearing in court about a 30(b)(6) deposition.

Emily Joselson (322): I lend my voice to those who seek to have the rule go forward as proposed. I urge the Committee to resist adding any further language to the rule. I emphatically oppose any attempt to put artificial numerical limits on the number of topics.

A Daniel Vazquez (323): I am concerned about the chilling effect limiting the scope of 30(b)(6) depositions would have on the process of justice.

Lesley Clement (324): Any time lawyers meet and confer it is an opportunity to promote professionalism. Therefore, I support the proposed amendment. I oppose the proposal to put artificial numerical limits on the number of topics, however.

Amy Ferrera (325): The committee should reject the request to limit the number of topics.

Kristi Schubert (326): I strongly oppose any rule which would limit the number of topics. The provisions for the corporation to seek a protective order provide an adequate mechanism for it to avoid burden. The proposed requirement that the attorneys meet and confer about the number of topics provides further assurance that the corporation will not be unduly burdened.

Richard Kennedy (327): This amendment will impose additional burdens on attorneys and give rise to disputes about the number of topics. They potentially deprive injured persons and their families of vital information that only the corporations know about.

Neil Alger (328): The meet and confer proposal simply codifies a practice that most attorneys already employ. 30(b)(6) is essential to litigation, and as technology develops it will become more essential. The Committee should worry about the realities of practice for attorneys who do not handle billion dollar cases. Every dollar counts in most of my cases, and adding requirements can make waste.

Chris Gill (330): The committee should reject the request to limit the scope and number of matters for examination. This would allow defending corporations to hide the ball.

Wesley Laird (331): As a Plaintiff lawyer, I support the proposed change to require a conference. But I do not support any limitation on the number of topics.

Andrew Burnett (332): I am opposed to any presumptive limit on the scope of 30(b)(6) depositions.

Matthew Hitt (333): "This is a horrible idea."

Matthew Christian (334): The proposed changes are appropriate and necessary. We already encounter significant delays with the current rule due to unprepared witnesses. Requiring advance identification of the person will help make the litigation more efficient.

Kurt Wolfgram (335): "An artificial limit on the number of topics is a mistake. I urge amendment to exclude that portion of the proposed rule change."

Jay Vaughn (336): I support the proposed amendment. A good faith conference reduces unnecessary motion practice. But I oppose any limits on the number of topics.

Shayla Reed (337): I think any time lawyers meet and confer it is a good opportunity to

promote professionalism. Therefore, I support the proposed amendment. But I emphatically oppose any limit on the number of topics.

Fred Buck (American College of Trial Lawyers) (338): The College believes that this amendment is not desirable, as it said in prior submissions in 2017 and 2018. Our members find that most 30(b)(6) notices are not objectionable and that when objections are made they are resolved informally through the meet and confer provisions of rules 26(c)(1) and 37(a)(1). Adding a mandatory meet and confer provision would create unneeded burdens on the parties and inject delay and additional cost.

J.T.Borah (339): I support the proposed amendment. But I am very concerned about any attempt to limit the number of topics.

Daniel Purtell (340): Any limit on the number of topics would be counter to the pursuit of justice.

Jason Wesoky (341): The duty to confer on 30(b)(6) topics already exists. Often the responding organization objects, leading to a hearing in which the judge resolves the matter. But conferral on the "number" of topics is dangerous and silly. Setting a limit on topics would fundamentally undermine the rule.

Rachel Alexis Fuerst (342): I believe that the proposed changes are sensible. But there should not be a limit on the number of topics.

Tom Paris (343): Limiting the topics will not lessen the rancor but instead cause weeks of briefing on motions. Yes, the parties should confer, but limiting the number of topics provides a weapon for obstruction of discovery.

Kari Jones Dulin (344): "I support the proposed amendment as written and oppose any artificial presumptive limitation on topics."

Katie Curry (345): I support the proposed amendment as drafted. I oppose any attempt to limit the number of topics.

Dino Tangredi (346): I am opposed to the proposed amendments. The rules already have provisions to address alleged abuse of discovery. The nature of the case defines what is reasonable. One size does not fit all.

Sean Dormer (347): I support the proposed changes. We already make a practice of conferring about 30(b)(6) topics before issuing our notice, and we are often met with silence from the other side. The practice of ignoring letters asking to confer needs to stop.

Tim Edwards (348): Bad idea. Does nothing to decrease litigation costs. In fact, the result could be the opposite. The defense would use the conference to fish for information to better prepare the client for the deposition.

Paul Williams (349): I support the proposed amendments. I oppose any artificial limit on topics.

Jacob Jagdfeld (350): I oppose changing the rule to limit the number of topics.

H. Phillip Grossman (351): While I am for the proposed changes, I against any arbitrary limits on the number of topics.

Garrett Blanchfield (352): I oppose the defense bar proposal for a numerical limitation in the rule. Rather than pick an arbitrary limit, the more practical approach would be for the parties to meet and confer about the appropriate number of topics.

Michael Ace (354): This rule change could limit needed discovery by imposing a limit on the number of topics.

A. Evan Lloyd (355): If these amendment are adopted it will encourage gamesmanship. Creating presumptive limits on areas of inquiry will lead organizations to claim that every notice is overbroad.

Ben Yeroushalmi (356): While ensuring good faith meet and confer efforts is worthy of support, I am cautious about the unnecessary obstacles that are sure to arise from placing limits on the number of topics.

Randi McGinn (357): I write to oppose nay presumptive limitation of areas of inquiry. I support the proposed amendment as written, because meeting and conferring is never a bad idea.

Jeffrey Stowman (358): I support the proposal as written. The meet and confer requirement potentially will reduce inadequately prepared witnesses. But a presumptive limit on topics would hinder the discovery process

Michelle DeLong (360): I support the amendment as written. I oppose arbitrary limits on topics.

John Romano (361): The meet and confer provisions make sense, but I oppose artificial limits on topics.

Barton Keyes (362): The amendment is unnecessary. Parties already have meet and confer obligations under the rules. Adding this idea to this rule will suggest that it is somehow different. Any changes to this rule would actually lead to increased motion activity and delay.

Brian Hetner (363): I support the amendment as drafted, as it may facilitate definition of the matters for examination. But I oppose any limits on the number of topics.

Morgan Gaynor (364): The amendment is unnecessary at best, because there are already sufficient safeguards. Corporate representative depositions are essential to level the playing field. Limiting these depositions in the manner proposed will not make litigation more efficient. It would create additional incentives to hide the ball.

Alan Casper (365): I rely on this rule. I am therefore dismayed by the proposal to limit the number of topics that can be listed.

Patrick Murphy (366): Many of the changes suggested hold promise, but a presumptive limit on topics is arbitrary and will make other discovery more time consuming.

Robert Orant (367): Providing greater detail in a 30(b)(6) notice gives the organization greater clarity to prepare. If there is a presumptive limit on topics, they will have to be broader.

Gregory Wetzel (368): I favor the meet and confer idea. I oppose any sort of limitation on the number of topics.

Christian Gabroy (369): Requiring advance notice of witnesses makes formal what already occurs in most cases. But in general the same rules should apply in 30(b)(6) depositions

as in others.

Robert Ransom (370): It is already customary to confer with opposing counsel about the topics to be covered. It is also customary for opposing counsel to engage in seemingly unending objections to the notice. Frustratingly, defense counsel regularly refuse to comply rather than filing a motion for a protective order, saying that I have to file a motion to compel. In my experience, this is part of the overall strategy to make it as difficult as possible to obtain needed information. An amendment to the rule which makes it even harder to obtain information will be a step in the wrong direction.

William Compton (371): "I am opposed to any limit on the categories of inquiry that can be designated in a Rule 30(b)(6) deposition notice."

Kurt Maahs (372): I support the meet and confer requirement. I do not support limiting the number of topics.

Bret Gainsford (373): The existing rule works fine. The proposed change will only add unnecessary delay and costs.

Andrew Hagensbush (374): I do not support the rule change. It would make it more difficult to obtain information from corporations by limiting the scope of questions and topics.

Scott Webre (375): I oppose the amendment. Revising the rule as proposed would substantially reduce the effectiveness of this tool in challenging corporate positions.

Sumeet Kaul (376): By creating presumptive limits on areas of inquiry there is a very real risk that responding organizations will claim every notice is overbroad. It is often difficult to get information from a corporation. This amendment will make it harder.

Mixcoatl Mierra-Rosette (377): I support the change. But I also oppose any restriction on the number of topics.

Michael Sievers (378): I urge that you adopt the amendment as written and reject calls to adopt numerical limits on the topics.

Joshua Molandes (379): I do not support the language which refers to the "number" of matters. The deposition is time-limited, which sufficiently protects the witness.

Michael Holoman (380): There should not be any limit on the number of topics. Lawyers are not abusing the rule.

Brian Wojtalewicz (381): The proposed change to meet and confer is fine, but an arbitrary limit on the number of matters is very dangerous.

Edmund Schmidt (382): The rule works well and requires no revision. We need it to gain information from wealthy corporations.

Carl Lopez (383): I oppose any limitation on the areas of inquiry. That will lead to an objection that every request is overbroad.

Chris Kuhlman (384): I oppose the amendment. Federal civil litigation in increasingly bogged down in paperwork. This promotes gamesmanship. With corporate defendants, scheduling discovery can turn into a prolonged game of cat and mouse. The meet and confer requirement will enable them to play the game even longer.

Maria Sperando (385): I support the proposed change because meeting and conferring will be useful for both sides. But I am strongly opposed to numerical limitations on the topics.

John Branum (386): "I do not believe that the rules should be changed with regard to corporate representative depositions. I oppose those changes."

Justin May (387): I am opposed to putting any limit on the number of topics. Corporate defendants are upset that they have to spend money to produce relevant documents, but changing the rule to suit them is not fair to plaintiffs.

Fletcher Handley (388): I do not support any limitations on use of this important tool for individual litigants.

Daniel Talbot (389): I support the proposed change and oppose any other changes, especially placing a limit on the number of topics.

Virginia Buchanan (390): I oppose the amendment. It imposes additional constraints, which will hurt plaintiffs. Having to meet and confer will presumptively limit the areas of inquiry. Defendants will routinely interpose objections. The defense bar is well organized and can offer some horror stories, but the ordinary reality is that this rule is very effective.

Charles Watkins (391): I oppose the changes as unnecessary and potentially confusing to litigants. Rule 37 already has a sufficient requirement to meet and confer.

Scott Smith (392): I oppose the proposed amendments because they would limit access to relevant information and create more litigation through motion practice. By creating presumptive limits on areas of inquiry, the amendment will enable organizations to claim every notice is overbroad.

Matthew Winter (393): I oppose the proposals that would limit the number of topics. I support the change to identify the witness. This will help to ensure that the right individual will testify.

Scott Wolleson (394): I oppose any predetermined limitation on the number or scope of topics.

James Biggart (395): The proposed amendment to limit the number of topics will result in more depositions and greater expense for all parties. The meet and confer is a good idea.

Jim Buxton (396): I support the proposed amendment. But placing a limit on the number of topics will create a litigation nightmare.

James Neal (397): In theory conferring is a good idea. But in practice it will lead to more fictitious litigation. If you begin limiting the scope and breadth of these depositions, you will only provide greater opportunity for objections and obstruction.

William Tilton (398): I oppose further changes to this rule. There is no substitute for this rule. Please do not change it.

Karen Allen (399): The proposal is good as written; meeting an conferring promotes professionalism. But numerical limits would be a bad idea.

Quentin Urquhart (400): I strongly oppose a requirement that the corporation disclose the identity of the witness. The organization should have the sole right to pick its representative.

Jordan Lebovitz (401): I think meet and confer is a fantastic idea and is most practical. But there is no reason to limit the number of topics.

Rob Schenk (402): Limiting the number of matters would hinder the utility of this rule for my clients.

Brandon Baxter (403): Requiring a conference is a good idea. But imposing a limit on the number of topics is a bad idea.

Troy Chandler (404): I support the proposal. In particular, I support disclosure of the identity of the witness before the deposition. I oppose a limit on the number of topics.

Michael Sabbeth (405): The duty to confer on the topics already exists. The responding corporations regularly object to topics and that leads to a conference and sometimes a hearing before the judge. But conferring about the "number" of topics is dangerous and silly. Judges are already trapping lawyers with the bogus argument that a notice has "too many" topics. The committee cannot endorse this idea.

Randall Poerschke (406): If you are going to limit the topics for 30(b)(6) depositions, then you must also limit the number for all other depositions. The limit on the number of topics should be REJECTED.

Lee Cope (407): The meet and confer amendment is a good idea. But imposing a limit on the number of topics is a bad idea.

Ellen McCarthy (408): Adding a meet and confer requirement makes good sense. What does not make sense is limiting what can be accomplished in a deposition.

Daniel Inscore (409): I support the meet and confer requirement. I am opposed to any limitation on the number of topics.

Scott Link (410): I oppose the proposed change to limit the topics of inquiry. I am always open to meeting and conferring, but I do not want to have to show my hole cards.

George Gray (411): I do not support changing the rule to limit the number of topics.

Thomas Fuller (412): Our rules already have adequate provisions to protect against oppressive discovery. A limit on the number of topics is not needed.

JC Powell (413): If changes are made that limit the breadth of the rule, that will enable corporations to take advantage and defeat the purpose of discovery.

James Coogan (414): This rule is vital to parties litigating against corporations. The companies seek to conceal, confuse, and even destroy information. Please do not take any actions that will curtail the utility of this rule.

JoDee Nell (415): Identical with no. 405 (Michael Sabbeth).

Jeffrey Mehalic (416): This change will enable corporations to challenge every notice on the ground that it exceeds the permitted number of items. That would be harmful.

Smanatha Flores (417): There should be no numerical limit on topics. Identifying the witness is helpful to all. Identifying the documents to be used in advance of the deposition is harmful.

Madeleine Simmons (418): Limiting the number of topics will cut against precise topic descriptions and harm those suing corporations.

Blake Ringsmuth (419): The proposed amendments make discovery much more efficient. Knowing the identity of the witness allows preparation and questioning to be more concise and less costly. The same is true of the requirement to meet and confer.

Nancy Iler (420): Identical with no. 405 (Michael Sabbeth).

Robert Kerpsack (421): I favor adding a meet and confer requirement. I oppose any attempt to limit the number of topics.

Adam Russell (422): I support the amendment as proposed, but oppose any limitation on the number of topics.

Thomas Shlosman (423): Limiting the number of topics will limit the utility of the rule.

Christopher McKinner (424): I support the proposed change.
I oppose any artificial limits on the number of topics.

Thomas Murphy (Massachusetts Academy of Trial Attorneys) (425): The Academy opposes these changes. Imposing a meet and confer requirement would be inefficient because, early on, the plaintiff has not had a chance to engage in meaningful discovery. This change will undermine the goals of Rule 1.

Danny Ellis (426): The proposed meet and confer will only bog the case down. There can be an unending back and forth trying to "work out" the differences. It allows a party inclined to delay a perfect way to do that.

Michael Chaloupka (427): I support the proposed meet and confer. I already do this. I am adamantly opposed to any limit on the number of topics.

Jessica Dean (428): This rule is important, and often corporations fight fiercely to avoid providing information.

M. Justin Lusko (429): I oppose any amendment that would limit the number of topics.

Peter Kraus (430): The suggestion that the rule be changes to remove the requirement to identify witnesses will gut the effectiveness of these depositions. I urge this committee not to make such a change.

Eric Penn (431): I favor the meet and confer requirement so long as it is clear that there is no presumptive limit on the number of topics. Greater specificity in topic descriptions is more important than the sheer number.

James O'Brien (432): The current rule has robust protections against abusive deposition practices. A numerical limit on the topics would add nothing to the existing protections. I encourage the committee to reject the proposed numerical limit on topics.

John Dady (433): I support the amendment proposal and oppose any limits on the number of topics. The best way for the witness to prepare is to have a detailed list of topics. If the number were limited, the topics necessarily would be described more generally.

Hans Leibensberger (434): Any time lawyers meet and confer it is an opportunity to

promote professionalism. But I strongly oppose numerical limits on the topics.

Scott Frost (435): Rule 30(b)(6) is the last tool plaintiffs have to fend off obstructionist corporate defendants and their counsel. The abuse of Rules 33 and 34 is so prevalent that the rules almost serve no purpose.

Matt Young (436): I oppose this change. It would only make depositions more burdensome and increase the costs of an already costly process.

Richard Eddington (437): I strongly oppose limiting the number of topics. That would lead to discovery abuse.

Rachel Leonard (438): The amendment as written serves the desired purpose. Any further limitation of topics thwarts the intention of this rule.

Neil Nazareth (439): The draft language about meeting and conferring is important so the parties communicate about the topics and potentially streamline the areas to be discussed at the deposition. In my practice, I routinely do this. The number of topics should not be limited.

Joseph Musso (440): I endorse the meet and confer idea. We do that already and it is a desirable practice. But I strongly oppose any limit on the number of topics. As a nursing home abuse attorney, I fight gamesmanship every day. Presumptive topic limits are a tool that will tip an already uneven playing field further against our nation's institutionalized elderly.

David Jostad (441): This rule is critical to obtain information from corporations and government. Modifying the rule in any way which limits access to relevant information (in particular limits on the number of topics) would inevitably be construed as establishing presumptive limits. I oppose that.

Jeff Paradowski (442): I favor the meet and confer requirement but not any presumptive limits on the number of topics.

Taylor Cunningham (443): I oppose the proposed amendment. It will not remedy any issues presented by the rule in its current form. Placing a presumptive limit on the topics is arbitrary, and could lead to the need for more depositions.

Casey Gartland (444): I oppose the proposed changes as they will likely lead to the necessity of taking more depositions and cost litigants more time and money.

Peter Everett (445): The rule should not be constricted in any way. In its absence, corporate parties can stonewall and obfuscate. I oppose the proposed meet and confer impediment, as it simply allows corporations to delay depositions. Under no circumstances should the number of topics be limited.

David Wiley (447): As a lawyer who represents individual workers in employment cases, I support this change. Identifying the witness can help, so this seems a good change to me. I strongly discourage any other modification because it invites satellite litigation and could undermine the original purpose of the rule.

Nathan Wittman (448): The proposed change is unlikely to yield the kind of results its proponents seem to expect. The meet and confer language is likely to be used to create a cottage industry of litigation activity designed to obfuscate, stall, and frustrate a litigant's access to the "voice" for the corporate entity.

Thomas Conlin (449): I write to oppose a limit on the number of topics. The right number varies widely.

Kevin Liles (450): I oppose the meet and confer impediment because we see enough stonewalling already, and this addition would enable parties to delay things even longer. Under no circumstances should the topics be limited numerically.

Joseph Fried (451): Because this amendment will make things worse, I must strongly oppose the amendment and the efforts to suggest even further limitations (e.g., arbitrary limitation on the number of requests).

Charles Murray (452): The meet and confer provision is important and worthwhile. Our experience is that it works. If the rule is changed to give corporate counsel more power to reduce the ability to use this tool, the corporate parties will have the upper hand in litigation.

Richard Hricik (453): The proposed amendment, as written, is a reasonable and sensible change. Arbitrarily limiting the number of topics would create needless obstacles.

Ingrid Evans (454): I represent elderly patients against nursing home corporations. We need this rule to work. Efficiency is served when the parties are transparent about identifying the witness and the topics to be covered in advance.

John Hickey (455): LIMITATIONS ON THE NUMBER OF DESIGNATIONS ARE A BAD IDEA.

Derek Larwick (456): Changing 30(b)(6) to limit the number of topics is ridiculous. This is just one more attempt by corporate defendants to avoid having to produce evidence.

Steven Goldberg (457): I oppose the onerous meet and confer requirement, as it is just another impediment to conducting discovery and another way corporate parties can delay depositions. Under no circumstances should the number of topics be limited.

Mike Milligan (458): The Committee should be mindful of the adverse effect upon small businesses that will result from the proposed limit on the number of topics.

John Harris (459): "I do not support limitations on their use, as the Judges already have the ability to control the number and scope of inquiry to those that are relevant to the issues of the case."

J. Antonio Tramontana (460): I oppose the proposed changes. They will enable corporations to "hide the ball."

Ralph Blasier (461): "The proposed amendment seem to impede plaintiffs' discovery in favor of defendants. Why do this?"

Matthew Saint (462): I support the proposed changes as written and oppose any presumptive limits on topics.

Timothy Hummel (463): I strongly oppose the proposed amendment. It offers nothing of value to increase the efficiency or fairness of the litigation process. Meet and confer is already a requirement before presenting a discovery dispute to the court. Putting arbitrary limits on the number of topics would be even worse.

Grant Kuvin (464): I oppose any changes to 30(b)(6). The proposed changes will only

increase the amount and cost of litigation and require multiple depositions. Creating more hurdles and red tape is a bad idea.

Sergio Rufo (465): This rule is the last tool for fending off obstructionist corporate defendants and their counsel. The mandatory meet and confer requirement would only benefit the defense by delaying the process.

Magali Sunderland (466): As currently written, the rule is neutral To limit it in any way, even by adding a meet and confer, would largely favor only business interests and marginalize an individual's access to justice. The rule should not be amended. It should be implemented as written.

Shelly Greco (467): I concur with adding a conference on who will serve as corporate representative on each topic. I oppose any limitation on the number of topics.

Walt Auvil (448): I write to support the draft changes and to oppose suggestions that a numerical cap be placed on the number of topics. This rule is the most effective tool in the civil procedure tool kit, which allows parties to eliminate areas of controversy early in the litigation and focus discovery only on the areas that are disputed.

Robert Roe (469): I support the proposed rule change. Both sides in litigation benefit when the witness is knowledgeable and qualified to discuss the matters relevant to the case. Limits on the number of topics are unnecessary.

Beverly Carson (470): Amending this rule to limit the number of topics will result in undue delay and greater cost.

Mark Millen (471): These proposed changes are terrible. This will create satellite litigation around entity depositions. The defense bar is attempting to create more and more obstacles to basic discovery. The changes will allow corporations to play even more games in discovery.

Raymond Mullman (472): I am against the proposed changes, particularly limiting the number of topics. Corporations will claim every notice is vague and overly broad. Then, when given greater specificity, they will claim the numerical limit has been exceeded. Providing more detail in the notice gives the organization greater clarity for what needs to be prepared.

Nicholas Maxwell (474): I support the proposed rule changes as written and reject the notion that additional revision to the rule is necessary. The rule is now fair and balanced. There should be no limitation on the number of topics.

Pressley Henningsen (475): A rule that requires to talk through their disagreements before engaging the court makes sense in today's electronic age. But limiting the number of topics makes no sense.

Anthony Ellis (476): Meet and confer requirements, like the one in this amendment, are a good step towards managing this process. From the plaintiff's side, we often find it impossible to draft topics in a manner that is narrowly tailored without having access to some information about the organization. Good faith conferring can bridge this gap, to the advantage of both sides. However, any effort to limit the number of topics would ignore the complex realities of modern litigation.

Jed Nolan (477): What started as a good proposal to meet and confer about the notice has the potential of limiting access to relevant information and becoming a new cottage industry in

litigation. Imposing numerical limits on notices will invite corporations to object to every notice as overbroad.

Krzsztof Sobczak (479): I support the proposed changes as written and would make it even stronger, with presumptive sanctions to be issued if the deponent fails to appear prepared after having engaged in the conference. I oppose any other changes that would impose artificial or presumptive limits on the number of topics.

Jason DePauw (480): I see no need to change this rule. If there is a dispute about the number of scope of the items in the notice, the parties must meet and confer before a motion proceeding. These changes appear to create a new limit on the number of matters of inquiry and limit the scope of the matters of inquiry. But because the language is so vague, it is unclear what the limit is and it is likely that a court will read the language to impose a new artificial limit on the number of matters of inquiry. The requirement to confer about the identity of the person to be designated appears to change the requirement that the corporation must identify the person from mandatory to permissive. This is unacceptable because the deposing party must know the designee's identity in order to adequately prepare for the deposition and cut out needless background matters of inquiry.

Chase Brockstedt (481): I support this proposed rule change as written and oppose any other changes, especially those that would place artificial presumptive limitations on topics.

Kenneth LaBore (483): Corporations try to hide and obfuscate. A meet and confer requirement is welcome. But any arbitrary limit on the number of topics would impede needed discovery.

Todd Bialous (484): Limiting the number of topics in a 30(b)(6) deposition is impractical and can lead to obstructive abuses.

Andrew Horowitz (485): I support the proposed amendment as written and oppose other changes to this rule, especially any that would impose artificial presumptive limits on the number of topics or enable corporate deponents to hid the identity of their deponents until the day of the deposition.

Corey Walker (486): Imposing a limit on the number of topics would further allow corporations to dodge discovery. They could force plaintiffs to take several depositions to find out what now can be learned in a corporate deposition. Corporations do not have to limit the number of topics they can pursue in depositions of plaintiffs.

Russell Guest (487): I support the proposed amendments as drafted. The obligation to confer is of great significance when obstructionism is often the strategy. Naming the designee is clearly helpful in reducing the confusing of what designee will ultimately testify.

Conrad Meis (485): If the rule could be changed to effectively limit the number of issue created by a party to a suit, then it might make sense to similarly limit the number of topics subject to discovery. We can't, and it doesn't.

Robert Bruner (489): The amendment codifies the existing practice of good attorneys on both sides. Adding limitations on topics or areas as suggested by some will further close the door of the courthouse to individuals.

Andrew Delaney (490): Limits on the number of subjects are not supported by practice nor necessary. There are no such limitations for individual depositions.

Dustin Bergman (491): I oppose these amendments. This is an unnecessary change that will undoubtedly lead to additional discovery disputes and further delay.

Brendan Faulkner (492): "Rule 30(b)(6) is the great equalizer. It would be a travesty if it were limited or watered down as has been proposed. A trial is supposed to be a search for the truth, and should be decided by what facts are revealed, not which facts are concealed."

Kent Winingham (493): It is critical that 30(b)(6) be maintained to serve the purpose it so efficiently serves -- allowing clarity in notices so that an appropriate designee may be identified. Limiting the number of topics will limit the ability to use the rule.

Robert Curran (494): I oppose the proposed rule change. It is impossible to determine a reasonable limit on every type of suit in a vacuum. Any such predetermined number would be an injustice in some cases. There is no need for an artificial limit on the number of topics.

Thomas Dillon (495): Limiting topics in 30(b)(6) depositions would result in a significant advantage to defendants and make litigation less fair to plaintiffs.

Ashley Hadler (496): I support the proposed rule change as written but adamantly oppose any further limitation on the scope or number of topics.

David O'Brien (497): I support the proposed meet and confer requirement, but oppose any change limiting the number of topics.

Sean Stokes (498): 30(b)(6) depositions are vital to the search for the truth. Cases calling for such practice are often complex. An arbitrary limit of the number of topics would unnecessarily hinder the ability of litigants to get to the core issues in a given case.

Kyle Kosleracki (499): While 30(b)(6) as now written is not broken, I find the proposed rule quite balanced,and believe that the identification of witnesses could streamline the process further. I oppose, however, any presumptive limit on the number of topics.

Chandrika Srinivasan (500): I support the proposed amendments as written. However, I oppose any presumptive limitation on the number of topics.

Requiring a conference about the number
and description of the matters for examination

Washington, DC Hearing

Keith Altman: The meet and confer idea is important. People are often wrong about what the other side actually wants. 30(b)(6) is a basic tool, and I need to use it to find out how the company is organized. If there has been an increase in the use of 30(b)(6) depositions, one reason for the last decade has been the impact of Twombly and Iqbal. Setting a numerical limit on topics is not a good idea. Any number would disregard some cases. The fact that there is a numerical limit for interrogatories is not significant. There's a big difference between interrogatories and these sorts of depositions. Setting the number at 10 would definitely limit me. A key problem is that some people are not reasonable. The right way to do this is to start thinking about it at the 26(f) conference.

Leslie Barnes (testimony and no.187): I think this amendment codifies best practices. I handle class actions in which often my clients are businesses, so I am on both sides of the 30(b)(6) depositions. We on the plaintiff side do not want to waste time in discovery. We try to tailor our topics to what we need, but that can mean that there are more of them than somebody who was vaguer would have. And counting them can be a difficulty. For example, a recent case had 26 topics, but one could say that because there were sub-topics there were really 49. The number of topics depends on the case.

Paul Bland (Public Justice) (testimony and no. 172): The duty to confer about the number of topics should be removed. Conferring about the substance of the topics, not the *number* of topics, is what should be required. Imposing a duty to confer about the number of topics suggests that the parties have to agree to a set number, somehow separate from what the topics are. That will generate disputes about how to count the topics as well as inviting broad topic definitions. Moreover, during a 30(b)(6) deposition, a party may learn about another topic that it needs to ask questions about. We worry, however, that organizations may employ the conference process as a delaying tactic. We think the Committee Note should clarify that the duty can be satisfied in some cases with a single conference or a series of discussions, and confirm that the duty to confer is not an excuse to slow down the discovery process and take more time to respond to a 30(b)(6) deposition notice.

Edward Blizzard (testimony and no. 179): I support disclosure of the identity of the witness. Conferring about that is not important to me in my plaintiff practice. Giving notice seven days before the deposition would be reasonable.

Mark Chalos (Tennessee Trial Lawyers Ass'n) (testimony and no. 190): Limiting the number of topics to be covered in a deposition would be unfair and lead to inefficiencies. But requiring 30 days notice of the deposition would not ordinarily be a problem.

Susannah Chester-Schindler (testimony and no. 186): The Committee Note about identifying the documents to be used during the deposition seems superfluous. The vast majority of attorneys on both sides bring courtesy copies of all documents to the deposition. A preliminary production seems unnecessary, and could be somewhat burdensome on smaller firms whose attorneys have limited "bandwidth," as it were. In general, the meet and confer requirement is in keeping with the rules. The 26(f) meeting is the time to create a framework for addressing issues as they arise in the case. But at that stage in the litigation it is rare to be able to get into the substantive issues involved because it's too early. To illustrate, we may need to start with a 30(b)(6) deposition regarding the defendant's information setup. Only after that can we frame further discovery, and that further discovery may show that we need a 30(b)(6) on other topics.

William Conroy: My overall experience with 30(b)(6) depositions in defense of catastrophic injury cases in positive. But sometimes things come off the tracks. Conferral is good. I want to avoid discovery motions.

Jennifer Klar (testimony and no. 175): In my plaintiff-side practice, what this rule requires is what we already do. I have conference with opposing counsel, and have often clarified topics, edited topics, or removed topics. These discussions also often lead to agreements to address different topics on different days.

Mark Kozieradski (testimony and no. 192): I oppose adding this requirement to the rules because the defense will use it as an occasion to delay discovery. "It creates an unwarranted presumption that the notice's requests are defective, [which will] incentivize the responding entity and its attorney to treat valid matters for examination" as a focus for "transactional negotiation." "Everything will be subjected to compromise. I am very concerned about anything that suggests that the number of topics is somehow to be limited."

Chad Lieberman (testimony and no. 178): Lawyers always confer about the scope and timing of the 30(b)(6) deposition. But what is missing is more about how the matters to be discussed should be handled during this conference. Provisions regarding the notice required, etc., would be valuable. Rule 37 does not provide a suitable alternative; although it does have a meet and confer requirement, that requirement arises in a different context and has an overtone of discovery violations. Similarly, issues about the preparation of the witness are invariably post-deposition matters. "I have never encountered an issue regarding the adequacy of a 30(b)(6) witness's preparation."

Tobias Milrood (AAJ) (testimony and no. 185): AAJ opposes any proposal for a presumptive limit on the number of topics. The words "number and" should be removed from the rule's directive that the parties confer. Having such a provision in the rule will lead to broad designations and multiple 30(b)(6) depositions. It may be that requiring a conference about the topics will provide a foundation for motions for sanctions when the witness is not prepared to address the topics. Otherwise, the company might be able to say "We did not know what the plaintiff wanted."

Terry O'Neill (National Employment Lawyers Assoc.) (testimony and no. 144): Experienced counsel already confer about the topics to be covered when that is needed, but adding this to the rule is a good idea because making it an explicit requirement will ultimately reduce disputes and promote efficiency. In our experience, the "horror story" of a 100-topic deposition notice are a very rare exception. We have rarely encountered disputes about the number of topics listed. Imposition of a bright-line rule about number would only encourage counsel to make each topic broader.

Michael Neff (testimony and no. 184): I am opposed to any required conferral. There should be no limit on the number of topics. If necessary, topics problems can be worked out without a rule.

Bruce Parker (testimony and no. 145): As a practical matter, counsel currently confer on the matters for examination. Consequently, aside from generating more expense to a process that is already too expensive, current practice will not materially change under a mandate to meet and confer on this issue.

Jonathan Redgrave: Conferring about the topics is a good thing. But when there is a dispute, you need judicial input. So the rule should go further and provide a vehicle for that input.

Terri Reiskin (Dykema Gossett) (testimony and no. 196): The meet and confer requirement duplicates existing federal dispute resolution mechanisms and provides no useful resolution process or remedy for the kinds of disputes that arise regarding 30(b)(6) depositions. The real difficulty is that the district courts disagree about how one is to present the court with issues that arise; some insist that the corporation file a motion for a protective order, while others require that the deposition go forward and then entertain motions to compel.

Greg Schuck: We do confer on the topics. The best way to do that is before the notice even goes out.

Brittany Schultz (Ford Motor Co.) (testimony and no. 151): This amendment will not produce meaningful change. This is already common practice. Ford voluntarily engages in such conferences, and also recognizes that many district courts direct that the parties must meet and confer before a 30(b)(6) dispute will become ripe for court attention. So adopting this requirement will not change or improve practice. There may be a small body of practitioners who do not know about these practices, but that small number do not make this addition to the rule worthwhile.

Patrick Seyferth (testimony and no. 182): I oppose the requirement to confer about the topics "in good faith." True, that is sometimes done now, but this amendment will therefore affect only the cases in which it would not happen under the current rule. Requiring a meet and confer when it would not occur promotes disputes. If we are to be required to meet and confer, the rule should also provide a "mechanized" approach for bringing disagreements before the court.

Donald Slavik (testimony and no. 146): My standard practice is to confer in advance about the topics for examination. I would rather know up front what subjects I've listed that the producing party objects to, or if the party cannot provide a witness who has knowledge that is relevant. If there is a disagreement about the subjects for the deposition, I'd rather bring it to the attention of the judge before taking testimony so that we can prevent having to bring it up afterwards. I've had the experience of a witness declining to respond on a subject contained in the notice, with no forewarning by opposing counsel, resulting in the need for another deposition. The amendment should ensure that the parties are jointly responsible for communicating with each other in advance to avoid such problems. But a focus on the "number" of topics is fraught with problems. That really depends on the nature of the case. Every case is different. "I've had first-hand experience in this with automobile mass tort and class action litigation. Limiting or negotiating how many areas that can be asked about in deposition will lead to more, not fewer, discovery motions brought before the Court."

Andrew Trask (testimony and no. 176): When we receive a 30(b)(6) notice I call opposing counsel and try to work things out. I describe what we can provide. In about 80% of the cases, that resolves things. After that is resolved, we decide who the witness or witnesses will be.

Palmer Vance (on behalf of around 20 past and present leaders of the ABA Section of Litigation, submitting views as individuals): The current proposal is an improvement. But it would be more of an improvement if it included a dispute resolution mechanism. For that reason, we think that the rule should say that if the parties cannot agree they are encouraged to seek a judicial resolution. Perhaps "encouraged" would be an odd word to use in a rule; perhaps the idea could be added to the Committee Note. Another idea worth considering would be to say in the rule that every seven hours of 30(b)(6) deposition could count as one deposition toward the limit of ten.

Christine Webber: The right time for the conference the proposed amendment seeks is when the amendment directs. Saying that this must be addressed at the 26(f) conference won't work.

Hassan Zavareei (testimony and no. 191): The requirement that the parties confer on the number of topics for the deposition will unnecessarily create conflict. The number should not be an abstract quantity, but depend on the specifics of the case. The right thing to talk about is the specific topics, not an abstract number. When there really are too many topics, defense counsel will make motions. And that leads to a conference under Rule 37(a).

Terrence Zic (testimony and no. 147): Typically we see 30 to 100 matters in the notice. Recently I got a notice with 177 matters listed. On that one we are still in the meet and confer process. In another case in Baltimore, at the end of the discovery period we got a 30(b)(6) notice with hundreds of items that went way beyond the products involved in the case. Yes, we do meet and confer regarding scope of the topics, but that can lead to an impasse.

Phoenix Hearing

John Griffin (testimony and written statement): I think advance communication about the topics to be covered is useful. I want to know in advance of the deposition if my opponent has concerns about the topics listed in the notice. Whether it is useful to include the number of topics in this discussion is not so clear. That is more granulated than the designation of the topics to be covered, and could invite bandying over something that would not otherwise provoke a fight.

Sandra Ezell: Representing corporate clients, I have handled hundreds of 30(b)(6) depositions. I support the concept of requiring advance discussion of the matters for examination. It would be valuable to have the documents that will be used during the deposition identified.

William Rossbach (testimony and written statement): This amendment attempts to find a solution to the one real problem with these depositions -- underprepared or unprepared witnesses. I recognize that lawyers often criticize meet and confer requirements. In my experience, the problem is not with the need to meet and confer, but with the lack of real diligence and good faith on the part of some counsel to make a meaningful effort to resolve any disputes. I think it would be good to add, either in the rule or the Note, that there could be a written report to the court when the meet and confer process did not resolve all differences, so that the court could then become involved.

Patrick Fowler: Having a conference in advance about the topics is a good idea. Particularly if there are a lot of topics, I usually do that. Even if the rule does not require discussion also of the identity of the witness, it will probably be important that the conference be iterative.

Bradley Peterson (testimony and no. 138): Meeting and conferring has long been a best practice that I advocate and follow when trying to understand the scope of the notice. I have seen notices that list as many as 149 separate topics. It is not unusual in "ordinary" cases to see a list of 20 to 60 topics. This is too much. If the company must proceed in the face of such notices, it must at least have unfettered latitude in selecting the person to represent it in the deposition.

Bina Ghanaat: The solution to unprepared witnesses is to ensure early discussion of the topics to be covered. It should be included in Rule 26(f) and Rule 16.

Phillip Willman (DRI): The amendment is laudable in requiring good faith conferring about the topic list.

A.J. de Bartolomeo (testimony and written statement): The rule should say that the conference ought to include the "number of" matters for examination. What the parties should be focused on is the description of the matters. Focusing instead on how many there are is not helpful. And mentioning it in the rule could give undue importance to this issue. In any event, it would be easy to manipulate the number of topics, encouraging the use of broad rather than rifle-shot topics.

Francis McDonald: I am not concerned about the meet and confer requirement. We do that already, with regard to the topics.

Michael Denton: Proportionality is the way to deal with the 140 topic notice. Sometimes plaintiff attorneys don't know what to list in advance. And given the number of corporate transitions and takeovers, sometimes involving new names, a conference would be a valuable way to clear the air.

Written comments

Kenneth Reilly (126): There should be transparency and fairness in practice under Rule 30(b)(6). Certain benefits may result from the proposal that the parties be required to confer in good faith before the deposition occurs. The portion of the draft amendment that calls for conferring about the number and description of the matters for examination is progressive and may be widely supported by corporate litigants. Requiring the noticing party to identify topics for examination in a meet and confer in advance of the deposition will greatly streamline the process for corporate litigants to identify the most qualified witness. It will also help thwart needless and costly litigation about the number of topics for examination.

American Tort Reform Assoc. (128): The idea of requiring the parties to meet and confer in "good faith" when a party seeks to depose a corporation is a good one. It has the potential to avoid unnecessary burdens and reduce the difficulty of identifying the right person to testify. But (as set forth below) we strongly disagree with the requirement that the identity of the person to testify.

Richard Broussard (143): To avoid confusion, the mandated conference should take place after the notice or subpoena is served. That does not prevent pre-notice conferences, but where conferences are mandated there should be an objective document about which to confer. In addition, a more specific directive should be provided about when to confer, such as a number of days prior to the production of the witness or a number of days after the notice is served. This will reduce dilatory tactics.

Jonathan Hoffman (168): I cannot recall an occasion in the last 30 years in which a party noticed a deposition without first calling, emailing, or sending a letter proposing depositions and possible dates. If there is to be a required conferral process, it should be the same for all forms of discovery. And if conferring is required, why not include the other parties, not only the noticed company and the noticing party?

Brooks Kushman (171): Our firm is the largest intellectual property law firm in the state of Michigan. It has procured over 15,000 patents over the last 35 years. We oppose this proposal because it will undermine widespread efforts to control litigation costs for defendants in patent cases. Patent litigation is extremely expensive. As a consequence, many district courts have patent local rules that defer discovery until plaintiff regarding specifics of its claim. Only with this information can the infringement claim be evaluated, and only with this information can

the defendant determine how to respond to a 30(b)(6) deposition. But the rules permit plaintiff to serve a 30(b)(6) deposition notice as soon as the 26(f) conference has concluded. As the Advisory Committee has already recognized, the 26(f) conference usually happens too early in the litigation for there to me effective discussion of 30(b)(6) depositions. Upsetting the carefully-designed sequence of litigation under the local patent rules of many districts is undesirable.

Federal Civil Procedure Section Council of the Illinois State Bar (193): We think that any agreements reached through the conference should be disclosed to all other parties to the litigation. In addition, we think that a time limit be added to the rule change, somewhat as follows:

> Before or promptly after the notice or subpoena is served, but no later than [*X*] days prior to the date set for the deposition, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters for examination.

Sam Cannon (195): The proposed requirement that the parties meet and confer regarding the matters for examination is a fine addition to the rule. Most experienced litigators already do this. My practice is to send a draft notice to opposing counsel and then discuss any modifications that need to be made. Once we have an agreement, we serve the notice formally. On the other hand, limiting the number of topics would be counterproductive. The conference process works best when the topics are as narrow as possible. Any limit on the number of topics will lead to broader topic descriptions.

Andrew Lucchetti (197): The conference requirement should call for early contact; otherwise attorneys may use it to delay matters. A numerical limitation on topics will prompt attorneys to use broader descriptions. The rule already requires reasonable particularity.

Dan Mordarski (198): I oppose any limitation on the number of topics. Rule 26 already directs that discovery be proportional. Given that, it would be inappropriate to place an arbitrary limit in Rule 30. In many cases, multiple 30(b)(6) depositions are required.

Mark Napier (201): This rule can be very useful, but a limit in the rule on the number of topics would be harmful.

John Hickey (202): I represent plaintiffs in personal injury cases. Placing a limit on the number of topics in the rule would be a bad idea. Corporate entities often complain that the designations are too broad and general. In order to avoid a broad and general designation of topics, and instead to be specific and narrow, one needs to list more topics.

Jonathan Feigenbaum (no. 204): When I notice a 30(b)(6) deposition, I confer with the recipients's attorney. We can work through issues that the recipient sometimes raises. I often take an early 30(b)(6) deposition about electronic storage systems. I find that organizations often proffer an underprepared deponent who can't answer my questions.

Mark Boyle (216): My firm tries to meet and confer about potential 30(b)(6) depositions during the parties' Rule 26(f) conference, or in an early Rule 16 pretrial conference. That allows for these issues to be considered early in the case and permits input and direction from the court. This approach allows the parties to establish appropriate expectations. But sometimes our adversaries are not willing to engage in this early planning. We often find that in those cases we encounter notices that include a burdensome number of topics or seek to duplicate topics already covered in depositions of individual witnesses. What we need is a clear mechanism for addressing faulty notices and obtaining a court ruling on them. This should be accompanied by

an express numerical limit on topics.

Jessica Ibert (226): In my practice, I typically meet and confer with opposing counsel when drafting at 30(b)(6) notice before it is finalized and served. This amendment would codify professional behavior that is already taking place, and perhaps make difficult cases easier to manage. I think it's best to have this conference before the notice is served.

Joseph Hunt (Department of Justice) (646): DOJ believes that the new mandatory meet and confer requirement is unnecessary given that Rule 26(c) and 37 already impose a meet and confer requirement before bringing a dispute concerning a Rule 30(b)(6) deposition to court. It is not apparent how imposing an additional meet and confer requirement would be beneficial. Moreover, there is no indication what are the consequences of failure to meet and confer. The proposed amendment would likely lead to additional collateral litigation.

Requiring a conference about the identity of
the person designated to testify

Washington, DC Hearing

Keith Altman: The identity of the witness is very important. It may be that this person has been deposed many times before. That's valuable information and it can also make the current deposition more efficient. It is very unusual for the company to designate somebody who independently has information about the topics listed, however.

Leslie Barnes (testimony and no. 187): When I am representing the company, I always disclose the identity of the witness. Sometimes the other side won't when I'm taking the deposition, however. That does not mean that I am keen on conferring about it; I don't get a say in who the other side designates. It can happen, however, that I will call up opposing counsel and ask why this witness was selected. For example, if the witness is mentioned in only 13 documents among the two million produced I am concerned.

Mark Behrens (International Association of Defense Counsel) (testimony and no. 174): Our members say that disclosing the identity of the person designated in advance will enable plaintiff attorneys to weaponize the rule. Disclosure of the identity of the person will not, however, solve alleged problems of poor preparation of witnesses. That is dependent on preparation, not on the identity of the witness. Although the Committee Note clarifies that the amendment is not meant to undercut the organization's right to choose its representative, even requiring conferral about the identity of the person is problematic. Instead of promoting cooperation, this proposal will lead to disagreements and increase litigation costs. Some plaintiff counsel will actually try to block the choice of witnesses known to be effective representatives of the organization, in hopes that weaker alternative witnesses will have to be used instead. And a substitute requirement that the organization identify the person selected in advance (without any requirement that it confer about that choice) is also problematic. That would be an improvement over the current proposed requirement of good faith conferring about the choice, for it would not suggest that the noticing party has a legitimate role in making that choice. But it would create its own set of problems. For one thing, some plaintiff counsel could "weaponize" the rule by conducting social media research to question the witness about his or her background and engage in personal attacks. Except for very basic background information, such inquiry is not appropriate in a 30(b)(6) deposition. "What comes next: the resume, CV, an attempt to learn the rationale as to why the person was selected?" There is good case law saying that the name of the witness is irrelevant because the organization is the actual witness. Requiring advance identification could shift the focus of the deposition to the individual rather than the organization. Moreover, if the organization has to switch witnesses for some reason, that switch could generate new discovery fights. "We appreciate that many defendants do identify their client's spokesperson in advance of a deposition. Our concern is with a rigid 'one size fits all' requirement. The decision to disclose the identity of the witness may depend on whether a particular plaintiffs' counsel has a reputation for cooperation or gamesmanship. The timing of any disclosure may vary for practical reasons."

Richard Benenson: Instructing the parties to confer about the identity of the witness will create more problems than it will solve. It is presently well understood that the noticing party has no say in the selection of the witness. Indeed, that's the only area regarding 30(b)(6) depositions in which I have never encountered disputes from the defense side. I have seen a barrage of personal questions result when the identity is disclosed in advance. Opposing counsel will work the database and find all documents mentioning the witness, whether or not they have anything to do with the listed topics.

Paul Bland (Public Justice) (testimony and no. 172): The duty to confer about the identity of the witness should stay in the rule. Under current practice, parties that receive a 30(b)(6) notice generally inform the noticing party about the identity of the witness. This common practice should be codified in the rule because it helps ensure the organization is choosing an appropriate witness. With this requirement, the parties can work together to ensure the organization provides a well-prepared witness.

Megan Cacace: Knowing in advance who the organization intends to designate to testify helps identify misunderstandings about what we are trying to learn. For example, suppose our objective is to do an early 30(b)(6) deposition to learn about the defendant's information systems. This is a way we can tailor our further discovery to avoid unnecessary burdens on the defendant. But for that purpose, we need to talk to a person familiar with the defendant's information systems. If we learn that the defendant intends instead to designate the regional manager of HR, we need to clarify what we're after. Making these things clear in the conference does not imply that we have some sort of "veto" over the organization's choice of a designee. But an important opportunity to avoid later complications is lost if we don't have a chance to clear things up before the deposition begins. In addition, when we know who will be testifying we can tailor our questioning to examples that bear on the experience of this person. Furthermore, advance notice serves efficiency interests when it turns out we will also want to do an individual deposition of the designated person; that enables us to "double up" and accomplish two objectives at once.

Sharon Caffrey (Duane Morris) (testimony and no. 203): This requirement should not be adopted. To the extent the amendment is intended to change the existing rule that the organization has the right to pick its representative, the amendment is grossly unfair. To the extent it leaves the organization's right intact, it makes no sense to require that the organization confer about something that is subject to its sole discretion. For example, in one recent product liability case plaintiffs sought to pierce the corporate veil. The corporation selected a corporate officer and in-house counsel to testify. Allowing plaintiff's counsel to press for a particular deponent, say a mid-level plant manager, would have made it impossible to prepare the witness adequately. Understanding the intricacies of the corporate structure and form of a multi-national corporation is outside the understanding of most lay witnesses. A recent deposition regarding a Rule 12(b)(2) personal jurisdiction motion illustrates the problems. We met with plaintiff's counsel before the deposition and he agreed not to ask about anything except the issues raised by our motion to dismiss. But as soon as the deposition started, the lawyer launched into unrelated topics. What we need is meaningful guidance about how to present these sorts of problems to the court. They can arise in ordinary depositions, but they are particularly difficult in 30(b)(6) depositions. In a regular deposition, the witness speaks from personal knowledge. In this sort of deposition, that's not enough. The problem is that, in cases like the recent personal jurisdiction deposition, we don't get an order implementing our agreement. And we can't readily instruct the witness not to answer questions that go beyond the topic list.

Mark Chalos (Tennessee Trial Lawyers Ass'n) (testimony and nos. 190 and 206): Disclosing the identity of the designated witness in advance of the deposition promotes efficiency and is consistent with the spirit of the rules. I have heard objections to the idea, but no good reason for refusing to identify the person in advance. With corporate websites, we can be much better aware of the role of this person in the organization and streamline the deposition. That could often save an hour of blind inductive questioning during a deposition. Conferring about the identity of the person is not as important as knowing who will appear in advance. Sometimes this can lead to a "hybrid" deposition, in which the person testifies in part on behalf of the corporation regarding the topics in the notice, and also testifies as an individual about matters within the witness's personal knowledge. It may be that this "individual" testimony will be admissible against the corporation over a hearsay objection if the subject matter is within the witness's scope of employment (see Fed. R. Evid. 801(d)(2)(D)), but that is not certain.

Susannah Chester-Schindler (testimony and no. 186): Knowing the identity of the witness is critical in conducting an efficient deposition. This is true in all types of cases. I usually get the identity of the witness as a result of the meet and confer about the 30(b)(6) deposition.

William Conroy: I do not identity the witness. I have had bad experiences and found that it leads to lots of mischief. I find that there is no clear line between testimony about the listed topics and other things that the witness may also know about. When the witness has already been deposed as a 30(b)(6) representative of the company, sometimes I will disclose that. Sometimes that can avoid the need for another deposition altogether. But I worry about other situations and a rule directive. It's not invariably a cause of mischief, but it can be.

Alex Dahl (Lawyers for Civil Justice) (testimony and no. 129): The radical mandate to confer about witness selection would upset well-settled law and spark contentious discovery battles for the courts to decide. The case law is now clear that the choice of the witness rests exclusively with the organization. Whether or not the Committee so intended, this amendment would inevitably be seen as an invitation to break with this well-settled law and require instead that there be a give-and-take exchange about who would testify. The Committee Note qualifies the entity's right with the qualifier "ultimately" and further invites this interpretation. The collateral litigation about this question will impose costs on the parties and the courts.

Philippa Ellis (testimony and no. 359): I oppose the provision about identity of the witness. The selection of the witness is difficult. The deposition can be an ordeal for the witness. I had one person actually quit the company to escape the obligation to testify as its 30(b)(6) witness. The number or identity of designated witnesses can also change up to the day of the deposition. The current rule works for addressing these challenges. What we need are 30 days' notice of the deposition so we can go about picking the person or persons in an orderly manner. Rather than providing that, these amendments call for prompt consultation with the other side, and thereby threaten to usurp the organization's right to pick its own representative. I'm not in favor of a requirement to identify the witness before the deposition. If I have to change the person, do we need to meet and confer again? Perhaps the rule should say "encourage" meeting and conferring rather than saying that the parties "must" confer.

John Guttman (testimony and no. 173): Meet and confer requirements are a good thing, particularly in regard to discovery. They frequently narrow and eliminate disputes. In this instance, however, a mandatory conference would have exactly the opposite effect. The party producing the witness is bound by that witness's testimony in a way that is not true of any other witness. "In every case, each party noticing a 30(b)(6) deposition would want the producing party to put forth witnesses who would offer testimony that helps the noticing party." Inevitably, this will lead to situations in which the noticing party will claim that the noticed party has not conferred in a meaningful way because it has not agreed to pick the person the noticing party wants.

Jill Jacobson (Husqvarna Prof. Prods, Inc.): Identifying the witness is superfluous. Providing that in advance leads to conflating the 30(b)(6) deposition with 30(b)(1) deposition issues. Providing the witness's identity in advance will be harmful because it will shift focus to the individual from the company. Even if there are multiple designees addressing different topics in the notice, the identity of each one and advance notice about which topics each will address is irrelevant.

Toyja Kelley (President, Defense Research Institute) (testimony and no. 132): Though the requirement to discuss the topics is desirable, the requirement to discuss the identity of the witness is not. This is a new and unwarranted duty for the organization. Imposing it in every case is unwise. Once the scope of the actual subjects is known (due to the conference) the duty

to designate the right person is usually easily met and seldom of concern. After all, the designation is about the organization's knowledge, not the personal knowledge of the person designated. Compelling the organization to confer in good faith about the identity implies that the noticing party has some legitimate role in the selection of that person, which contradicts the rule's clear recognition that this is the organization's call. If the noticing party wants testimony from a specific person, it can notice a deposition of that person, but that is not a 30(b)(6) organizational deposition. Under the current rule, I sometimes disclose the identity of the witness in advance. That is a strategic choice. But I have found that doing so too often changes the scope of the deposition, which goes beyond the topic list for which we were preparing the witness. What we need is a comprehensive framework for resolving issues in regard to these depositions.

Jessica Kennedy (McDonald Toole Wiggins) (testimony and no. 133): It is settled law that the organization has sole responsibility for selecting the witness who will testify on its behalf. Shifting to a "shared responsibility" regime removes the clarity of established law and will expand collateral litigation. The Committee Note says that making this change will facilitate "identifying the right person to testify," implying that this decision no longer rests with entirely with the organization.

Sterling Kidd: I oppose a requirement that the company identify the witness in advance. Requiring the company to confer about who will speak for it is not just. The fact that the Committee Note says the company has the right to chose whoever it wants will not prevent the use of this requirement as a way of giving the noticing party a say in that choice. Practitioners do not read the Committee Notes, so they won't make a difference. Even telling the other side who will testify in advance implies that the other side gets a say in who that will be. Then the other side can made a motion for relief from the court to require the company to pick the person the noticing party wants designated. Moreover, with a small company it may be difficult or impossible to make a call until right before the deposition. Even two days before the deposition it still may be uncertain who will testify. My biggest concern is that plaintiff's counsel will do research on the individual and turn this into an individual deposition.

Mark Kozieradski (testimony and no. 192): I support a requirement that the organization disclose the identity of each person designated to testify. Knowing when an institution will produce multiple designees improves the organization of the questioning. Knowing who will testify about which topics enables the examiner to prepare and organize the documents and categories of questions into an efficient outline.

Craig Leslie: When I was a younger lawyer, I would identify the witness in advance. But I have seen a parade of horribles, such as inquiry into the witness's personal finances. In mass torts, when the witness has previously testified as a 30(b)(6) witness, I may share the transcript of the prior testimony with plaintiff counsel.

Chad Lieberman (testimony and no. 178): I find the identity of the corporate witness to be irrelevant because the witness is the company. But if the conference requirement means give and take, that implicitly chips away at the right of the organization to pick the witness.

Altom Maglio (testimony and no. 183): I represent individuals who often sue corporations. A recurrent problem for some is to show that the person "speaking for" the corporation can bind the corporation. "The only time when it is unequivocal that an employee is speaking on behalf of the corporation is with a 30(b)(6) deposition. Therefore, 30(b)(6) depositions are extremely important to obtaining justice in any litigation involving corporations." One of the most common problems I have encountered is that the designated person cannot or won't speak for the corporation, even on noticed topics. "Codifying in the rule the standard practice of identifying the designated witness in advance helps alert the noticing party when a

problematic representative selection is made and makes the meet and confer process more fruitful."

Brad Marsh: This amendment will inject uncertainty about whether the organization has a free choice who is to represent it at the deposition. Presently the identity of the witness is never a matter of dispute, but this amendment will make it a new focus of dispute. Choosing the right person is a tough job for the defendant, and giving the plaintiff a say in that choice simply makes it tougher without producing good results. I do usually provide the name of the witness two or three days before the deposition. But what if the witness gets ill? Then changing the witness will produce more problems. Note language recognizing that the organization can change designees when necessary due to such developments will not solve the problems.

Tobias Milrood (AAJ) (testimony and no. 185): A fair and balanced rule must include attention to the identity of the witness who will be testifying. At least, that should provide for advance notice on the identity of the witness. This will ensure that the witness is properly prepared to testify on the designated topics. Retaining a provision regarding the identity of the witness is essential to avoid unfair treatment of plaintiffs, as compared with defendants. Without this provision, the amendment creates new burdens for plaintiffs while allowing corporations to further control litigation and the pretrial discovery process.

Michael Neff (testimony and no. 184): As a plaintiff lawyer, I see no reason to add a meeting regarding the identity of the witnesses. Instead, just require the defendant to identify the witnesses at least two weeks before the deposition. Requiring disclosure of the identity of the witnesses is important to give time for the plaintiff's lawyer to do adequate preparation. I know that some defense counsel object this will lead to investigation of social media information about the witness. So what? The defense always does that with regard to the plaintiff. I also noted that Bradley Peterson, a witness in the Phoenix hearing, said that in selecting a witness for his corporate clients, he would focus on the witness's qualifications, personal knowledge and experience, and prior experience testifying. Well, that's important to me also in getting ready for the deposition. I should be able to do my own homework.

Michael Nelson (testimony and no. 164): Requiring advance notice by the corporation of its designee or conferring about that will not deal with the problems under the rule or avoid disputes. Instead, it will add another layer of potential disputes. If the witness is not adequately prepared, the organization will face sanctions, and it will also must live with the answers given by an unprepared witness. Usually the identity is provided, but we don't need a rule for that. And often you think you have the right person, but then further preparation shows that somebody else should be designated.

Michael Neff (testimony and no. 184): From the plaintiff's perspective, knowing the identity of the witness in advance is critical. It allows us to save time. As a plaintiff's lawyer working on a contingency, that's very important to me. We should have ten days to two weeks. Then we can check out individual documents in our database. We can use that to impeach the witness.

Mary Novachek (Bowman and Brooke) (testimony and no. 169): Requiring the parties to confer about the identity of the witness is contrary to settled law and would create confusion and burden, giving rise to new litigation issues for the courts to resolve. This amendment would work a sea change in the current law on these depositions. Noticing parties will claim that the amendment means that they have a role to play in selection of the witness. Mandating discursion about why a certain person is designated to represent the corporation simply adds to the already heavy burdens of preparing for these depositions. Without a doubt, noticing parties would use the amended rule to increase pressure on corporations to extract settlements. The current Committee Note language saying that the organization "ultimately" has the right to choose the

witness does not solve the problem. The word "ultimately" indicates that the requesting party will have some level of involvement in the choice. These problems are exacerbated by the requirement that the conference occur "promptly." Often in the high stakes litigation we handle the 30(b)(6) notices are sent out months in advance of the eventual deposition. From the corporation's standpoint, preparation of the initially selected witness may indicate that a different person would be a better choice. Does that require a new round of conferring? Even advance notice of the identity can raise problems. It's important to appreciate the human toll that 30(b)(6) can inflict on the designated person. For example, in a case involving the location of the fuel tank in a vehicle, the witness was an engineer involved in the design of the vehicle. The engineer had been deposed again and again. The depositions became a war of endurance. Plaintiff attorneys repeatedly abused the witness. I've seen designated witnesses have heart attacks, leave the company to avoid having to testify, etc. This is stark evidence of this human toll. It's particularly difficult in the 30(b)(6) context (compared to a 30(b)(1) deposition) because the witness can't say "I don't know." It's true that Rule 30 says I can instruct the witness not to answer in order to permit me to apply to the court for relief, but that is not sufficient protection against this abuse.

Terri O'Neill (National Employment Lawyers Assoc.) (testimony and no. 144): Requiring advance notice of the identity of the witness makes sense. It is not a "radical mandate," as suggested by LCJ. Making the practice of giving notice mandatory will eliminate gamesmanship in situations where parties refuse to identify witnesses, hindering counsel's ability to adequately prepare and making the deposition longer and more costly. Of course, the company will retain control over the witnesses provided. But advance discussion should help avoid later disputes.

Bruce Parker (testimony and no. 145): The selection of the witness is one area of practice that does not routinely cause disputes. It has been abundantly clear that the corporation has the sole right to select the witness. Indeed, the draft Committee Note acknowledges as much. Is the idea that the corporation does not really have sole authority to make this choice? As attorney for the company, I regard my choice to be a matter of work product, and my reasons are also. How can I discuss that with the other side "in good faith" without permitting the invasion of the attorney-client privilege or work product? Am I required to provide that information to the other side? Consider the following scenarios:

> Scenario #1: Noticing counsel demands to know who was considered as designees. The rationale offered for this demand is that meaningful discussion can't occur without this information. Of course, it's true that the company's lawyer has ordinarily developed a list of possible witnesses, and then given careful consideration to each of them. This is like the process that counsel goes through in deciding which expert witness to use. That is core work product. Should counsel nonetheless be required to answer questions about how the selection was made? The same sort of problem arises if noticing counsel asks why others under consideration were not selected to be the designated witness. If requesting party files a motion seeking to compel answers to these questions, the company's lawyer may find himself or herself in front of a judge asking why one person was selected rather than another. This is not dependent on a showing that the person counsel designated is unprepared to answer questions on the designated topics.
>
> Scenario #2: Assume that the other side has already taken the depositions of several company personnel involved in the matters at issue. In some depositions, the witnesses have demonstrated poor witness skills. So the company's lawyer would not want to choose them for the 30(b)(6) deposition. But for much the same reason, noticing counsel will want these people acting as the company's representative in the 30(b)(6) deposition. So noticing counsel will argue that this choice is improper,

> pointing to the individual depositions to show that these witnesses are best qualified to testify and try to persuade the court to insist on their acting as the company's spokesperson at the 30(b)(6) deposition.

Disclosure of the identity of the witness is a different thing. I do a lot of work in MDL litigation, and often that sort of disclosure is required by the MDL judge. I will share the identity of the person if I know that opposing counsel is professional. But too often that will lead to a personal attack on the designee. Focus on the Committee Note to the 2010 amendments regarding communications between counsel and the retained expert witness; that shows the importance of guarding against intrusion into that sort of communication.

Virginia Bondurant Price: Practices vary on disclosing the identity of the witness in advance, and which topics each witness will address if there's more than one witness. A problem is that when there is a need to substitute a different person the identification issue can complicate things. If the notice requirement applied shortly before the deposition, say three days, that might be acceptable, particularly if there were also a recognition that sometimes things come up that require substitution of a different witness.

Thomas Regan (testimony and no. 199): Imposing this requirement is a radical mandate that can only lead to disagreement and gamesmanship. If the selection of the witness is, in the end, entirely up to defense counsel, what purpose is there in requiring that it be the subject of conference? That requirement will be leveraged by the noticing party. Even if there is an agreement due to the conference about the person to be designated, that will not prevent a later dispute about whether the selected person was adequately prepared for the deposition. Even a requirement that the witness be identified after unilateral choice by the corporation would create risks. In general, research into the background of a witness could validly be used to reveal bias. But in a 30(b)(6) deposition the person designated is there to answer questions on behalf of the company, so the particular witness selected is really not important if the witness is adequately prepared. Some suggest that the bad actors are outliers, but that is not my experience. Identifying the witness in advance does nothing more than trigger an inquiry into the person's past, such as the DWI arrest when he was a teenager, or where he lives. As a result, I will provide the identity only with lawyers I know to be of a high caliber. When there will be multiple witnesses, I've told the opposing lawyer which witness will address which topic, but not provided the personal identity of the various witnesses.

Jonathan Redgrave: Requiring a conference about the identity of the witness is the wrong way to go. It will not deal with whether the witness is adequately prepared. Whether it's a good idea to provide the witness's identity in advance is a mixed bag. Sometimes case management orders so require. Disclosure for efficiency is a good thing.

Terri Reiskin (Dykema Gossett) (testimony and no. 196): The organization's right to pick the witness lies at the heart of this rule. Until now, this issue has not produced many disputes, while other issues have been litigated thousands of times. This amendment would introduce a new focus for dispute. The amendment would give the noticing party an unwarranted advantage.

Ira Rheingold (National Assoc. of Consumer Advocates) (testimony and no. 149): The identification requirement will help to reduce the frequency of bandying. By requiring open and frank discussion about the witness or witnesses the organization plans to designate, the proposed amendment undoubtedly will help ensure that the representatives ultimately designated will be "the right person to testify."

Sherry Rozell: The requirement to confer about the identity of the witness will diminish the right of the company to pick its represent. The identity of the witness is completely within

the company's purview. I sometimes do disclose, perhaps half the time. It really depends on the case. In my most recent 30(b)(6) deposition I did disclose a couple of days before. But we may not know who the witness will be until shortly before the deposition occurs. Making this the subject of a meet and confer discussion will produce disputes. I often have extensive exchanges with the plaintiff's counsel about the topics, but the identity of the witness has never come up at that point. We can't decide who we should designate until we are clear on the topics.

Greg Schuck: I often represent small companies. Requiring them to identify the witness in advance will be a burden. Often we don't know who it will be until shortly before the deposition. I've seen bad results from advance identification. Divorce records, pictures of the witness's house -- all sorts of things can come up. Telling the other side how many people will be showing up does not give me pause, however.

Brittany Schultz (Ford Motor Co.) (testimony and no. 151): This new discovery obligation should not be enacted. It will foster more disagreements between the parties. "[T]he propounding party often knows exactly whom they want to answer questions on behalf of the organization -- the weak link who cannot withstand the pressure of interrogation. The propounding party will fight for this deponent, citing prior testimony demonstrating subject matter knowledge and direct personal involvement with the matters at issue. For the noticing party, selection of the Rule 30(b)(6) witness is often not a search for information, but instead a search for a powerful sound bite that can impact the opening statement." The entire idea of requiring discussion of the identity of the witness should be rejected. A company should not be required to suffer interference from its litigation opponent in determining who will speak for it. Ford has already encountered intransigence on this subject. For example, in *Ash v. Ford Motor Co.*, 2008 WL 1745545 (N.D. Miss., April 11, 2008), plaintiff counsel unsuccessfully attempted to force Ford to designate the witness plaintiff counsel wanted instead of the one Ford selected. "In another recent matter, the requesting party's counsel outright refused to depose the individual being offered as Ford's 30(b)(6) witness without any meaningful explanations or rationale."

Patrick Seyferth (testimony and no. 182): This amendment is a solution in search of a problem. The problem if the unprepared witness is very rare. Implementing this meet and confer requirement will unfairly burden the corporation's practical ability to select its more capable witness. Doing that is no simple task, for it involves finding a person who can be both educated about the topics in issue and able to explain the company's position about those topics. The amendment's requirement that we discuss the selection with opposing counsel in effect gives opposing counsel as seat at the table, and that upsets the careful balance reflected in the current rule. The requirement in the amendment will lead to demands by noticing parties that the company explain how it decided on a given witness, and also that it hurry that choice. As a practical matter, these demands will undercut the company's long-established right to select the person it wants to speak for it. Actually, that selection has not in the past led to conflict. And a meet and confer requirement is usually limited to situations when there is an existing dispute. So this invites a dispute on a topic that has not previously produced disputes. Certainly it would be unfair for the company to be bound by the testimony of a person selected by the opposing party.

Donald Slavik (testimony and no. 146): Including the identity of the witness as a subject for the conference is a good idea. Requiring identification in advance permits me to determine whether this person is likely to have at least some first-hand knowledge of the subject matter. I can also find out whether the proposed witnesses have testified in the past in a similar matter and, if so, to attempt to collect the transcripts of that testimony. By reading those transcripts, I can better prepare to conduct the examination in the current case. I have not seen the sorts of personal attacks on the witness that others have described.

Michael Slack (testimony and no. 170): Usually we get the names of the witnesses about seven days before the deposition. Sometimes it turns out that we also want an individual

deposition of that person, and we try to fold that into the deposition for efficiency's sake.

Andrew Trask (testimony and no. 176): Ordinarily we do not identify the witness in advance. If there is a likelihood that the person will also be deposed as an individual, we often do disclose.

Christine Webber: Knowing who will be the witness saves time. For example, in my employment cases on the plaintiff side, there may be many, many different documents with the same basic content. Using one that this witness sent or received can speed up the deposition, but to do that I need to know in advance. I am told who the witness will be in 90% of my cases.

Julie Yap (testimony and no. 188): I oppose any requirement to confer about the identification of the witness. I do usually provide the name of the witness. But in one case opposing counsel spent hours on questions that went beyond the notice. It was difficult to instruct the witness not to answer. Despite this experience, I will still provide the identity in advance for efficiency.

Hassan Zavareei (testimony and no. 191): Requiring the disclosure of the identity of the witness or witnesses before the deposition is a good change. With this information, the noticing party may be able to simply confirm the witness's background, experience, and position before quickly moving on to more substantive topics. Relatedly, this information may enable the noticing party to limit its inquiry to the topics and documents that are most essential. This requirement would also blunt some tactics some corporations attempt. For one thing, the noticing party needs to know if multiple witnesses are designated so that it can direct its questions toward the person designated for specific topics. Corporations may often designate witnesses that lack knowledge of the relevant subject matter in order to cause delay and put financial pressure on under-resourced plaintiffs. The failure to disclose in advance leads to longer and less effective depositions. The opponents of this provision wrongly argue that noticing parties will use the amendment to block witnesses they perceive as particularly effective corporate representatives. That's not so; the amendment recognizes that the company has the right to choose its own representative. If the word "ultimately" in the Committee Note causes problems in this regard, we suggest that it be removed.

Terrence Zic (testimony and no. 147): Adding the requirement that the parties confer about the identity of the witness will increase the volume of discovery disputes and use up valuable judicial resources. These results will occur because noticing parties will claim that they have the right to request the witnesses they want, and companies will be unable to make sensible and careful choices on the spot during the conference. To say that the choice of the witness is "ultimately" the company's choice suggests that it is also a fit matter for the noticing party to influence. It would be inherently unfair to permit the opposing party to pick the person who officially speaks for the company, as a 30(b)(6) witness does. Moreover, given that this conference is simultaneously addressing the topics to be covered, the company will be required in essence to guess who would be a suitable witness on those topics. Some courts may construe the amendment as requiring that the company disclose the identity early in the conference, when these specifics remain uncertain. Even a requirement to identify the witness in advance will cause problems. I've only been asked to do that a couple of times. I surely can't choose a witness until I am clear on the topics to be addressed. What if the witness needs to be changed? That will produce additional disputes. And nobody can legitimately complaint that my witnesses are not adequately prepared.

Phoenix Hearing

John Griffin (testimony and written comments): The rule would be improved by directing that the organization identify the person who will testify before the day of the

deposition. The Texas experience is informative. Rather than requiring a conference about the identity of the person or persons designated, Tex. Rule 119.2(b)(1) says that the organization must designate the witness a reasonable time before the deposition. In Texas, "designate" is interpreted as meaning that the organization must provide the noticing party with the name and title of the person who will testify. This Texas rule has worked all right in practice, so much so that there is only one Texas case even discussing the operation of the rule.

Sandra Ezell: The identity of the witness is irrelevant and should not be a mandated subject of discussion. Even if the designated person was copied on a document, that is not what the witness is there for. The organization does not have to take account of the job duties of the person designated in selecting the person to designate. Indeed, in representing corporate defendants I often find that there is nobody who knows about the topics the other side wants to explore. We never provide the name of the person designated in advance of the deposition. We don't refuse to reveal the name, but nobody has ever asked for the identity of the person who will testify.

John Sutherland: This proposal will turn existing case law on its head. The case law is clear that the organization gets to choose the person who will testify. The requesting party has no role in making that choice. The party doing discovery can take the deposition of any person it wants under Rule 30(b)(1), so this amendment is confusing and cumulative of the existing rule. In my practice the identity of the person who will testify is not disclosed in advance. The identity of the witness is irrelevant. It won't affect the documents to be used in the deposition. The identity of the person should not affect the preparation by the requesting party. Often I don't know, even seven days before the deposition, who I will use. I may learn that I need to substitute somebody else, or add another person. Rule 30(b)(1) exists to permit the requesting party to follow up with any specific individuals it wants to depose.

Nieves Bolanos (NELA): Obtaining advance notice of the identity of the witness is a practical necessity. In our experience, responsible counsel provide this information as a matter of course. Making this practice mandatory would eliminate wasteful gamesmanship. Of course, the organization retains ultimate control over the choice of the witness, but advance discussion will avoid later disputes. Knowing who will testify in advance also assists counsel in assessing what personal knowledge the witness will have. If a 30(b)(6) witness is also a regular witness, the parties can discuss how to structure the examination to ensure that the witness will not be required to attend multiple depositions. We have been able to reach agreements in the past that avoid such duplicative depositions. But this amendment does not give the plaintiff control over who the defendant designates to testify; that is up to the defendant. If the company retracts its initial designation, we would not follow up with an individual notice of that person. And we do not think that the organization is obliged to disclose its tactical considerations in selecting the person it chooses.

Mark Kenney: Requiring the advance identification of witnesses is an existential question for organizational litigants. I do not provide advance notice of who I will present. Making us confer about that means that we have to have a robust discussion. I have a variety of important considerations in mind when I am choosing my witnesses. I should not have to disclose those to the other side. That invades my opinion work product at a very basic level. In addition, the other side will use the information to comb through social media and other sources to bring up during the deposition. This should be avoided. Just as a general matter, a 30(b)(6) deposition should not focus on the individual. It's about the organization itself. True, the Note says the organization retains the power to choose, but making it a mandatory subject of "good faith" discussion undercuts the purpose of this rule. The concern with unprepared witnesses does not provide a reason for making this change to the rule. In any event, that is a de minimis problem. Judges come down with a hammer when the corporate witness is not prepared.

John Sundahl (Defense Lawyers Assoc. of Wyoming): This is a radical departure from established law. The rule on its face says that the organization is to designate the person to testify. "The need to preserve this absolute right is fundamental to jurisprudence because the person selected as the witness binds the organization. To allow the opponent to have input and dispute the name of the person(s) who will speak for the organization compromises the due process right of the organization to be heard with its own witnesses in a meaningful manner." It will be taken as mandating a give-and-take with each party having the right to reject the choice of the other side. The draft Committee Note appears to encourage that result by asserting that the parties' exchanges will facilitate "identifying the right person to testify." Opening the door to negotiation about which witness is designated will invite tactical abuse. Aggressive lawyers will use the rule to block or challenge organizational witnesses perceived to be the most experienced, articulate and effective representatives for the organization. Does this amendment require the organization to designate the "most knowledgeable" person? It would help if the Committee Note were iron clad on the right of the organization to make its own choice. Sometimes the parties do talk about these matters already, but that shows that the rule is working fine as written now, and the proposed change could produce harmful consequences. Good lawyers are doing what they should now, and bad lawyers will abuse the additional provisions.

Lee Mickus (testimony and no. 141): This provision offers no meaningful benefit and will encourage more disputes. It imposes a new discovery obligation that has never before been recognized, and will create the opportunity for the litigants to disagree and make motions, in turn requiring that the court get involved. It may lead in some instances to a noticing party insisting that the rule now gives it a right to insist on designation of a particular person. It also can produce confusion about the capacity in which the witness is speaking because the person selected by the noticing party also has personal information. Even mandating only that the identity be disclosed in advance is not desirable because the noticing party is likely to use that information to its advantage. For example, it may prepare to ambush the witness who is prepared to address issues on the topics list, but instead faces questions about his or her personal knowledge on other topics instead. The organization cannot readily stop such questioning because some courts permit questioning on other relevant matters when the witness has such knowledge. It is highly unusual in my practice for the identity of the person to be disclosed before the deposition. On those occasion when that has occurred, the deposition has become confused. The noticing party will exploit social media and transcripts of prior testimony by the witness. So although disclosure does sometimes happen, that does not mean that the noticing party finds it more difficult to complain that the witness is not adequately prepared. Revealing the identity of the witness in advance will not meaningfully help with the problem of witness preparation. The way to do that is to introduce an objection procedure like the one in Rule 45 so that the overbroad topic lists can be narrowed. But this conference procedure would create new conflicts or generate more motions. Usually counsel can work things out when there are objections. The best idea is to work these topics into Rules 26(f) and 16(b).

Bradley Smith: Experience on the defense side shows that a requirement to discuss, or even only to reveal, the identity of the witness is a bad idea. One example is a case in which, two days before the deposition, he found that the witness was not appropriate. He had to get another person to drive to San Francisco to testify. He wanted to make sure that the questions in the deposition were answered. The identity of the witness is not important to that. He can count on the fingers of one hand the number of cases in which the plaintiff has cared who would show up. And where it is important, it may be because the plaintiff can misuse this information. In another case, shortly before the deposition he found that the chief engineer of his client would not be the right person to present. This new obligation would enable the other side to argue "He pulled the chief engineer the day before the deposition." In another case, he provided the name of the witness, and plaintiff counsel said "I won't take that deposition. I know what he'll say."

William Rossbach (testimony and written statement): I strongly urge the Committee to

maintain the requirement that the identity of the witness be a subject of conference. Identification of the witness or witnesses in advance facilitates the depositions and greatly reduces the time spent taking the deposition. Opponents of this requirement provide no good, principled reason why disclosing the name of the witness should not be required. That disclosure eliminates time wasted during the deposition that could be used instead to get at the substance of the matters at issue. It also helps assure that the witness designated is appropriate and qualified to testify on the particular matters. I can't recall a single 30(b)(6) deposition in which I've been involved in which the identity of the witness was unknown to the noticing party until the deposition began. I do not think this will blur the line between a 30(b)(1) deposition and a 30(b)(6) deposition. To the extent one can inquire into both organizational knowledge and the personal knowledge of the witness, that makes the deposition more efficient. When you are preparing for a deposition, the identity of the person testifying is hardly irrelevant. There may be hundreds of thousands of documents, and you can use that name to focus on the ones this person is familiar with.

Patrick Fowler: Adopting a requirement to discuss the identity of the witness will have unintended and undesirable consequences. We will end up with hybrid 30(b)(6)/30(b)(1) depositions. I will have to object repeatedly that questions are outside the scope of the notice and that any answer is not on behalf of the organization. In my experience, it is unusual for the plaintiff lawyer to ask the identity of the person designated in advance. But when it has come up, it has proved problematical in some cases. It is particularly difficult if there are 95 topics. On the other hand, with opposing counsel I've worked with before it has proved helpful to identify the witness in advance.

Gary Culbreath: Requiring discussion of the identity of the witness is a solution in search of a problem. For example, in a recent case involving a subpoena on a nonparty, the noticing attorney said "You're going to have Mr. Smith testify, aren't you?" Do I have to answer that? To do so might make me reveal my attorney work product. Why do I have to reveal why I do or do not want to designate Mr. Smith?

Michael Carey: Meeting and conferring in advance of the deposition may be the right idea, but including the identity of the witness among the mandatory subjects is flawed. Compare the expert designation requirements of Rule 26(a)(2). That is important because this is the person who will be testifying at trial, but there certainly is no requirement to discuss the choice of an expert with the other side. In the 30(b)(6) setting, we are not talking about somebody will be testifying before the jury. At a minimum, this will be read as requiring advance identification of the witness. And the preliminary draft even suggests that this should be discussed before the formal topic list is served. This will add costs in every case.

Bradley Peterson (testimony and no. 138): Adding the identity of the witness to the list of required topics is a mistake. That must be in the sole province of the company. In making the choice of a representative or representatives, the company and its attorney must consider a variety of factors. In part, that choice is affected by the hearsay provisions of Fed. R. Evid. 801 and 802. If the testimony is of a party, its officer, director, or managing agent, it is admissible under Rule 32. This means that the selection of the representative is a delicate task that must be the sole preserve of the company. To allow the noticing party to have any role in the choice of that person conflicts with the rule. That person will be the "face of the company." The company will have to live with that "face" in this litigation and, potentially, in future litigations. As a consequence, as the company's lawyer I must consider a wide variety of concerns, such as the witness's personal qualifications and knowledge of the matters in dispute, the witness's prior experience testifying, the witness's ability to be educated about topics beyond his or her personal knowledge, whether designating this person will be harmful to the company because the witness is needed to do other work due to his or her responsibilities at the company. Consider a situation in which the noticing party urges that a specific person be the designee. A requirement such as

the one in the draft amendment could raise many issues. Here are some illustrations:

> Should the company have to publicly disclose its concerns about having this individual serve as its representative?
> Will sharing information avoid having this employee deposed or simply invite more notices of deposition?
> If the noticing party or court chooses the representative, but the witness fails to give knowledgeable testimony despite the company's best efforts to prepare the witness, will that deposition nevertheless be admissible against the company?
> Will the company be sanctioned for not giving knowledgeable answers about the proper topics when the noticing party chose the witness?

The range of discovery disputes that could arise under this proposed amendment surely includes myriad other things, but even this list suggests the shoals in prospect.

Jennie Anderson (testimony and no. 148): It is efficient for the parties to be transparent about the witness or witnesses, and which topics will be addressed by which witness if there is more than one witness. In one case involving an international price fixing claim, candid communications with the company's counsel about who would testify about which topics vastly improved the process. Knowing the identity of the witnesses allowed for better preparation and planning. I was able to cover each witness's background and experience quickly and confirm the topics for inquiry with this witness, permitting me to move into those topics efficiently. Advance disclosure can also make scheduling easier, sometimes permitting scheduling more than one witness on a day. I always ask to be told in advance who will be testifying, and don't think opposing counsel has ever refused. I do expect that I can cross examine the witness about his or her personal knowledge even if that testimony is not in a representative capacity. I see no real downside to advance identification and discussion during the meet and confer session.

Bina Ghanaat: The "problem" with identifying the witness does not exist. The identity of the specific person to testify is irrelevant. I handle asbestos defense. If the designated person has previously testified on the topics scheduled for this deposition, I will offer the prior transcript as a substitute for new testimony in this case.

Keith McDaniel: One time I did identify the witness in advance. The result was that we wasted time on social media activities of this person. I have since been asked again. But I have refused to reveal the identity until the topics are worked out.

Phillip Willman (DRI): I oppose including the identity of the witness as a topic. For example, suppose I have to substitute somebody else two days before the deposition. How does advance notice then help?

A.J. de Bartolomeo (testimony and written statement): Conferring in good faith about the identity of the witness will facilitate efficiency and economy. It will help avoid disputes that too often arise when the witness cannot answer questions on the listed topics. I think it would be helpful for the rule or the Note to include the idea that the discussion of the identity includes the witness's qualifications to speak competently on the topics for testimony. Without this additional information, the discussion may be meaningless. At the same time, it may be best to remove the word "ultimate" from the Committee Note acknowledgement that the organization chooses the witness. Opponents argue that the amendment would undercut the organization's right to choose its representative. The including of "ultimately" in the Note may give some color to that argument. In fact, the proposed amendment does not do what the opponents say it will do. Taking out that word could make that clearer. I do not want to inject myself into the company's selection of the witness. But if it turns out that the person selected is a person I would want to depose individually as well, that can aid efficiency. If that happens, I can prepare differently.

Amir Nassihi: In California there is an objective standard (person most qualified) to determine who should testify for the company. 30(b)(6) does not prescribe such a standard. The California procedure does not lead to disputatious discussion of who will be designated, but the current federal proposal will create problems. If the person originally designated is withdrawn, that will immediately bring forth a notice for the individual deposition of that person. This change will inject a whole new source of conflict. In fact, I often do notify the other side who will be testifying. But there are at least two opposing counsel with whom I would not disclose based on prior experience with them. I also urge that the Committee look at the standing order of Judge Donato (N.D. Cal.) as a model.

Donald Myles: I will often reveal the identity of the witness. In smaller cases, we will identify the witness shortly before the deposition. In those cases, the plaintiff and defense bar cooperate. But making this mandatory will make this a game for a minority of lawyers.

Francis McDonald: Requiring discussion of the identity of the witness is more controversial than discussion of the topics. A lot of times I don't even get asked about this. Opposing counsel may not know about how 30(b)(6) works. If providing the identity were required by the rule, it would be problematical unless it were only 24 to 48 hours of notice. Otherwise, there would be a potential for misuse.

Michael Denton: I think it's important for me to know the identity of the witness. Often I can combine an individual deposition with the organizational one. The goal is to keep it to one trip for the deposition instead of two. "If they want to dig up information about Jim Bob, go ahead."

Written Comments

International Assoc. of Defense Counsel (125): We strongly urge the Standing Committee not to publish the preliminary draft amendment that the Advisory Committee approved. The requirement that the parties discuss the identity of the witness is highly problematic. It would direct an unprecedented and unfair role for the noticing party in selecting the organization's witness. If the identity of the witness must be identified, moreover, noticing counsel will use the information to gain a litigation advantage. For example, if the person selected has a reputation for connecting well with juries, the noticing counsel may seek to replace that person with a less effective deponent. In addition, the organization may be hampered in its right to replace the initially selected witness. All of this will lead to disputes and generate motion practice. Requiring that the matter be resolved at a meet and confer session would also place an unfair burden on the organization, which would not be able to fully vet the selection. This possibility results in part from the amendment's statement that the conference should "continue as necessary." A perceived delay in designating a witness might be characterized as violating the "good faith" requirement of the amendment.

Kenneth Reilly (126): Though the discussion of the topics may yield benefits, the addition of a requirement that the organization discuss the identity of the witness invites mischief and improperly imposes an affirmative new discovery obligation on corporate litigants. Should the parties' efforts at this newly required obligation fail because the noticing party disagrees with the corporate litigant's choice of a witness, motion practice will surely ensue. "I have litigated against counsel who will use this opportunity to litigate over witness choice and demand that the court give some sort of credence to the noticing party's position on who is the appropriate witness. Some will even argue that the amendment means that the noticing party is entitled to an equal voice in the choice. But established case law under the current rule shows that the organization has an absolute right to select its representative." Moreover, the timing is impossible because the amendment says that the witness must be identified during the conference. But the corporation must have a clear fix on the matters to be covered before

selecting the person to testify. That cannot happen simultaneously.

Victor Schwartz (127): I urge the Standing Committee not to publish the 30(b)(6) amendment proposal forwarded by the Advisory Committee. The requirement to discuss the identity of the witness will invite unfair and unprecedented participation by noticing counsel in the organization's selection of the witness that serves as its representative. Noticing counsel will likely contend that the amendment affords them some measure of input as to which person should be designated. If this argument were accepted by courts, it would undermine the organization's discretion to pick its own representative. Noticing counsel will be incentivized to use this opportunity to obtain a litigation advantage.

American Tort Reform Assoc. (128): We urge the Standing Committee not to publish the amendment proposal that the organization be required to confer in good faith about the identity of the witness. The requirement to discuss the identity of the witness creates a serious potential problem. It could be interpreted to require the corporation to identify each person who will testify on each matter during the conference when the specifics about the matters are first discussed. Making an "on the spot" decision about that issue is asking too much. The selection of the witness must wait until the topics for examination are fully understood. Insisting that this decision be made on the spot would deprive the corporation of its long-recognized right to make the choice in a deliberate manner. "[T]he experience of ATRA members is that some plaintiffs' counsel will work to urge courts to interpret the amended Rule 30(b)(6) language as requiring the organization to consider the plaintiff's proffered deponent within the organization as part of the parties' 'good faith' requirement."

Sean Domnick (139): Far too often, the corporation designates someone who is not knowledgeable about the topics to be discussed and has done little or no work to gain that knowledge. Thus, the timely disclosure of the identity of the designated witness will help the parties ensure that the right person with the right knowledge is presented. It allows for better preparation and results in a better use of time for all involved.

Michael Rosman (140): There is no rule that requires the responding party to disclose the identity of the witness or witnesses. So what precisely constitutes "good faith conferral" about this topic? Suppose the organization's attorney says "I have three people in mind for the depositions, but my choice will depend on their schedules that week." Is that a "good faith" conference? If not, why not? And if so, what good has this conference obligation done? The rule should either explicitly require the entity to disclose the person or skip the obligation to confer about the identity of the witness.

Richard Broussard (143): Frequently corporate defendants will designate witnesses who have little or no knowledge concerning the matter set out in the notice. Occasionally that designated witness will be an attorney specifically retained for the purpose of responding knowledgeably to the notice. This even occurs when there are corporate employees directly involved in handling the subject matters that are noticed. Requiring a conference concerning the identity of witnesses will allow deposing attorneys to call to the attention of the court obstructive activities before travelling to distant locations to be presented with obstruction and no discovery.

Robert Mullins (150): I oppose the proposed amendments. They will make Rule 30(b)(6) more vulnerable to abuse than it currently is. "In my experience, the adversaries of corporate defendants attempt to maximize recovery by finding ways to criticize a corporate defendant's handling of discovery." For example, in 30(b)(6) depositions the noticing attorney may keep asking the witness if anyone at the company is better equipped to discuss the listed matters than he or she is, but not get to asking the witness about the matters themselves. I would expect the conference requirement to work out the same way. I believe the choice of the person to testify for the company draws on my legal analysis, and that I should not be required to "meet

and confer" with the other side about that analytical process. This will lead to requests for the court to intervene in the selection before the designated witness has even testified and been tested on the topics listed.

Defense Lawyers Ass'n of Wyoming (160): We oppose the proposed amendment, which undercuts the right of the organization to designate its witness. This will be an invitation to tactical abuse by noticing parties. It will inflame tensions among the attorneys and add to the judicial workload.

Timothy Domin (161): Allowing an opposing party a say in who speaks for the company is unreasonable. If the company picks somebody who is ignorant, that will be detrimental to the company. If the opposing party wants to take the deposition of a specific witness, it can subpoena that witness.

Gordon Arnold (162): A corporation should be the sole party to choose its representative. Allowing the other side to have a say will expand collateral litigation.

Bryan Stevens (163): Allowing the noticing party a role in choosing the witness will be an invitation to break with the well-settled rule that the company can pick its witness.

John Lovett (166): If the noticing party has input into the selection of the witness, the company is no longer free to choose its own voice. The amendment will lead to efforts to obtain discovery of the reason a given witness was selected.

Federal Civil Procedure Section Council of the Illinois State Bar (193): This requirement to confer would interfere with the right of the organization to select its witness. On occasion, it is necessary to change the deponent on short notice because of the changing evidentiary needs of the case or because of the retirement, dismissal, death, or illness of the contemplated deponent. The organization needs flexibility to deal with such issues. In any event, this discussion is not useful to the noticing party, which is primarily interested in the number of witnesses and the topics each witness will address. So we propose that the amendment focus on the number of witnesses and the topics each will address.

Dan Mordarski (198): I support this change. For most ethical lawyers, this is not a problem, and it regularly is done. My experience is that when opposing counsel won't disclose the identity of the witness in advance, it often turns out that the witness is not adequately prepared. There is no good reason for keeping the identity of the witness a secret.

John Hickey (202): I represent plaintiffs in personal injury cases. I take 30(b)(6) depositions in every case. This is a common sense requirement. The corporation knows who it will designate weeks in advance. It has sent that witness documents and its lawyers have had many conversations with that witness. It only makes sense that the party divulge early on the full name and title of the person or persons it is producing and to indicate on which designations that person will be testifying. As a practical matter, this information can speed up the deposition's treatment of background material about the witness.

American Association for Justice (209): A rule change requiring that the identity of the witness be addressed in advance is likely to prevent a party from abusing the 30(b)(6) process. Disclosure of the identity who will testify must be included to achieve balance and fairness. In our experience, corporations wait until the last minute to disclose who their witnesses are, which prevents adequate preparation by the noticing party. Although the noticing party does not have a say in who the witness will be, it is helpful to be able to ascertain basic information about the deponent, such as the witness's background and position in the company. Nothing in the amendment suggests that the noticing party has any authority to designate who will be the

witness. Unless the identity of the witness remains in the rule, AAJ believes that the rule would no longer be balanced. Instead, the amendments would tip the scale in favor of corporate defendants.

Michael Boorman (210): Requiring conferral about the identity of the representative would be a big step in the wrong direction. The rule focuses on the corporation's information, not the personal identity of the individual delivering that information. No legitimate needs will be served by allowing the deposing party to intrude on the choice of that representative. But adding a requirement to confer about that will increase wrangling, disputes, and motion practice.

U.S. Chamber Institute for Legal Reform (214): The required conference about the identity of the witness is a bad idea. It will lead to a new type of bandying, as the requesting party can manipulate discussions about the "identity" of the witness by adding deposition topics in an effort to obtain more depositions and -- by extension -- more deponents. This will effectively precipitate the kind of bandying that the rule was supposed to eliminate. The practical problems for corporations will be severe, as it takes time to pick a witness, after the question what the topics will be is cleared up. This requirement will produce more disputes. But the proposal says that the conference must occur "before or promptly after the notice or subpoena is served." That is unrealistic. It imposes a stringent time requirement that will not work.

Mark Boyle (216): The requirement to confer about the identity of the witness will produce problems for both plaintiffs and defendants. The noticing party has no right to reject the person selected by the company to represent it. But the amendment would embolden noticing lawyers to try to block or challenge selected organizational witnesses. This will be tempting when the witness is known to be experienced at testifying. Often the list of topics exceeds the limit on interrogatories, making the selection of a witness or witnesses very difficult. The change will also produce waste as the parties argue about the identity of the witness. We already have to hold multiple meet and confer sessions to clarify the topic list.

Nicholas Gerson (222): I represent personal injury plaintiffs. I strongly urge the committee to require the corporation to identify the corporate designee. Many times, corporations do not designate a witness for all areas of inquiry. We are then forced to re-notice a second deposition. Requiring q corporation to identify the witness prior to the deposition would eliminate this surprise tactic. We would know in advance who would be testifying and for what areas. Corporations are entitled to know the identity of all witnesses in advance. They should not be afforded a strategic advantage in regard to these depositions.

Vess Miller (225): We represent both individuals and businesses. We believe that identifying the witnesses in advance of 30(b)(6) depositions will promote efficiency. Knowing the identity of the proposed designee may prevent the unfortunate but common situation in which the chosen designees lacks the appropriate knowledge. The noticing party is often left in the position of having to repetitively ask the designee "Who would be the person most knowledgeable to testify regarding this topic?" This increases the expense for all parties. If the person is identified in advance, that will enable all parties to raise concerns. It can also reduce the number of depositions if the designated person will also be an individual witness.

Jessica Ibert (226): Requiring the organization to identify who will testify would be helpful. It would allow me to better prepare for the deposition, and make the deposition more efficient. I could better tailor my questions to the person actually before me.

Melissa Kruegel (232): The disclosure of the identity of the designee would be extremely helpful in the preparation of the deposition. Often, I do not know the name or position of the individual I am going to depose until only a few minutes before the start of the deposition. This is done to place me at a disadvantage.

Walt Cubberly (235): In my experience, the requirement to identify the witness merely makes explicit what is already implicit federal practice. Opposing counsel has always shared with me -- well in advance of the examination -- the identity of the person or persons to be presented and the topics each will address. Often they do this because the person will be testifying in two capacities, and they refuse to put him up twice. I have always accepted this arrangement without objection. It is always helpful to know in advance the person I am going to be deposing. It allows me to better prepare for the deposition, knowing which corporate documents the person had a part in either creating or receiving. It also allows me to do some preliminary background research, which makes things go faster at the deposition. I fully support the explicit requirement that the corporation identify whom it will be presenting.

Jay Henderson (236): Knowing the identity of the deponent would be helpful. That said, we must keep in mind that the 30(b)(6) witness's personal background and knowledge are technically irrelevant since the witness is really just a spokesperson for the entity.

Erin Campbell (237): "In my experience, resolving questions about the matters for examination and the corporation's representatives in advance reduces the length of the deposition,improves the quality of the answers, and greatly improves the likelihood that the witness will actually be prepared to answer questions on the noticed topics."

Russell Abney (239): Knowing which witness will be testifying on behalf of the corporation would allow a much more efficient preparation and execution of the deposition. With this information, I can use exhibits that the witness will recognize. There is no reason for the defendant not to be upfront about who the witness will be so that everyone can be informed and prepared. It also avoids situations where the designated witness is totally unfamiliar with the designated topics.

Maria Diamond (244): A good faith meet and confer requirement as to the identity of the witness will promote efficiency. Knowing the identity of the witness in advance is very helpful to proper preparation. Some have objected that this will intrude on the entity's choice of its witness. The proposal does no such thing. If the word "ultimately" in the Note is a basis for that concern, it could be removed.

Karen Menzies (245): Identification of the witness ahead of time helps focus the deposition preparation and lessens the risk that there will be a need for a supplemental deposition.

Ryan Babcock (248): Discussion regarding the identity of the witness should aid in the discovery process. While the ultimate responsibility of naming a representative will still rest with the corporation, disclosure of that person and requiring a good faith discussion regarding the proposed representative's ability to speak for the corporation is a reasonable requirement that will tend to encourage that the representative is prepared and knowledgeable.

Matthew Christ (253): Requiring the disclosure of the identity of the individual designated would assist in the preparation of the deposition. Too often,t he opposing party doe not provide the identity of the deponent until shortly before the deposition, which hinders adequate preparation for the deposition.

John Tiwald (259): The identity of the witness should be disclosed. But insisting that it be the subject of a conference creates problems. In our experience, identity is often disclosed voluntarily. That enables us to be better prepared for the deposition. Making identity the subject of transactional negotiation will not further the preparation process and could generate further disputes.

Joshua Kersey (287): Knowing the identity of the person to be deposed ahead of time would be helpful and would make the deposition more efficient.

Jonathan Kerr (300): Advance disclosure of the identity of the witness would help in preparing for the deposition and to ascertain that the person designated is able to answer questions.

Emily Jeffcott (329): The proposed change makes sense. It can eliminate disputes about the appropriateness of the person selected and allow all parties to be better prepared.

Fred Buck (American College of Trial Lawyers) (338): The College believes that this requirement suggests a significant and unnecessary change in the organization's obligations that will increase delay and expense with no enhancement of practice under this rule. Although the minutes of the Standing Committee's meeting and the Committee Note say that the choice is ultimately up to the organization, we view the inclusion of this language mandating discussion of the identity of the witnesses to be designated as a suggestion that the noticing party has a right to participate in selecting the designees. This poses the very real possibility of disagreements between the parties and involvement of the court on issues relating to the identity of the witness. Directing that the organization to confer in "good faith" about its choice is not a positive development.

Rachel Alexis Fuerst (342): Requiring advance notice of the identity of the witness would allow the deposition to be more efficient. Requiring that this be a subject of conference is reasonable also.

J. Michael Goldberg (353): Identifying the witness can only promote judicial economy and the policy goals of discovery. Defendants often designate witnesses with little knowledge of the matters or inquiry, wasting time and money. Requiring timely identification of the witnesses will minimize gamesmanship and abuse in discovery and allow the examining attorney to fine tune his or her examination and avoid wasting time.

Scott Frost (435): Not requiring that the witness be named allows defense counsel to p;lay games and does not lead to advantage on either side. It is important to know who you are going to depose to properly prepare.

Neil Nazareth (439): Disclosure of the identity of the witness prior to the deposition is important because it causes both sides to consider the deponent's specialization within the corporation, and whether the witness will be able to adequately testify as to each and every topic.

Ingrid Evans (454): In many cases, a corporate defendant will designate different witnesses for different topics. Knowing who is going to testify allows plaintiff attorneys like us to move quickly through preliminary questions and into the substantive matters. With advance knowledge, we can schedule more efficiently. Sometimes we can schedule three witnesses on discreet topics in a single day. We applaud the Committee Note that recognizes that the company has sole authority in picking the witness. The goal is to reduce surprises.

Michael Bradley (473): Disclosing the identity of witnesses in advance of depositions promotes efficiency and is consistent with the letter and spirit of the rules. It imposes no significant burden on the entity. I suggest that the amendment be clarified to say that the identity of the witness must be disclosed reasonably in advance of the deposition.

Marc Weingarten (482): I support the proposed amendment to the rule. I oppose not requiring that the identity of the witness be disclosed in advance of the deposition. Such pre-deposition disclosure enables research to be conducted in advance of the deposition in order to

make the deposition itself more efficient and productive.

Sherman Joyce (American Tort Reform Ass'n) (503): ATRA opposes any requirement that parties confer about the identity of the persons to be designated to testify. The amendment implies that the noticing party has a legitimate say in which person the organization chooses. Plaintiff's counsel will urge courts to give them some say in the selection of the person. Moreover, that choice can't be made until the precise topics for testimony have been fleshed out. Plaintiff counsel will contend that the corporation is bound by the choice it suggested during the conference. ATRA also does not see any benefit from a requirement to identify the witnesses who will testify in advance. The identity of the witness is simply irrelevant because the focus is on the knowledge of the corporation, not the individual.

Joseph Hunt (Department of Justice) (646): DOJ believes that the requirement to confer about the identity of the witness will result in additional discovery disputes. The noticing party has no say in the designation and preparation of an organization's designee, so no useful function would be served by adding this requirement to the rule. Although it is true that in practice the organization often provides some notice about the identity of the designee before the deposition, any such notice usually occurs close in time to the deposition. The responding party in the course of diligent preparation efforts may not determine the appropriate designee until well into the process.

Requiring that the conference continue "as necessary"

Washington, DC Hearing

Mark Chalos (Tennessee Trial Lawyers Ass'n) (testimony and nos. 190 and 206): The explicit statement in the Committee Note that the parties have an ongoing obligation to meet and confer, but that the process must be completed in a reasonable time, promotes efficient resolution of disputes.

Alex Dahl (Lawyers for Civil Justice) (testimony and no. 129): Requiring a conference to be "continuing as necessary" will add new uncertainty to the rule and invite more gamesmanship. There will be one party who feels that more conferencing is necessary while the other side will be equally convinced that the obligation has been satisfied. Practitioners won't know what is expected under the rule, and some will seek sanctions for the "unreasonable" behavior of the other side. This sort of outcome is especially likely in the context of a brand new duty like this conference requirement.

Philippa Ellis (testimony and no. 359): Adding the phrase "and continuing as necessary" does not resolve the concerns I have about intruding into the organization's right to pick its own witness. The change in the rule is certain to produce protracted discovery disputes.

Tobias Milrood (AAJ) (testimony and no. 185): AAJ recommends that the "before or promptly after" phrase be moved to end of the sentence:

> ~~Before or promptly after the notice or subpoena is service, and continuing as necessary, t~~ The serving party and the organization must confer in good faith about the ~~number and~~ description of the matters for examination and the identity of each person the organization will designate to testify on each matter before or after the notice or subpoena is served, and continue conferring as necessary.

Terri O'Neill (National Employment Lawyers Assoc.) (testimony and no. 144): We agree that the amendment clarifies that the new meet and confer process will be ongoing, if necessary. As the Committee Note explains, that does not mean that the parties must reach agreement on any particular topic. But this directive is in keeping with the spirit of Rule 1.

Thomas Regan (testimony and no. 199): Having more than one conference may lead to a more efficient process. Choosing the witness ordinarily must await clarification of the topics, which should be the first order of business. Trying to resolve everything in one conference would usually not work. But the "continuing if necessary" language lacks any clear delineation of when the good faith duty to confer ceases, an issue that largely results from the new requirement to confer about the identity of the witness designation. This language could be leveraged by inexperienced or exploitive counsel to interfere with the process. We recommend that the language say that the requirement to confer continues until either agreement or an impasse is reached as to the categories of inquiry, or when the witness is selected by the corporation's counsel, which should end the process of conferring.

Phoenix Hearing

Lisa LaConte: Mandating this meet and confer session is a new requirement that will create an infinite loop in asbestos defense litigation of the sort I handle on the defense side.

Nieves Bolanos (NELA): We agree with the proposal to adopt an ongoing duty to confer. This is in keeping with the spirit of the rules. Our experience is that the most serious and recurrent problem is with unprepared witnesses, and we think that the conference contemplated

by this amendment will give the parties an opportunity to ensure that the witness is an appropriate designee and thus that the preparation problem will be minimized.

John Sundahl (Defense Lawyers Assoc. of Wyoming): The proposal imposes a duty to confer as "continuing as necessary." This additional requirement invites further disputes. Who decides when the additional duty to confer becomes "necessary"? If one of the parties is unhappy with the results of this conference, does it have a right to seek discovery sanctions for prematurely terminating the duty to confer?

Patrick Fowler: Having a conference in advance about the topics is a good idea. Particularly if there are a lot of topics, I usually do that. Even if the rule does not require discussion also of the identity of the witness, it will probably be important that it be iterative.

Written comments

Michael Bradley (473): The Committee Note saying that the parties have an ongoing obligation to meet and confer, but that the process must be completed within a reasonable time, promotes efficient resolution of disputes. I support this language in the Committee Note.

Committee Note mention of identifying documents
to be used during the deposition

Washington, DC Hearing

Jennifer Klar (testimony and no. 175): Requiring advance production of all exhibits would impose unnecessary work on both sides. The noticing party would feel it necessary to over-designate. Look at the length of lists of exhibits to be used at trial, as compared to the number actually offered in evidence.

Terri O'Neill (National Employment Lawyers Assoc.) (testimony and no. 144): We believe the Committee should consider removing the sentence in the Committee Note referring to providing documents to the company in advance. This will merely result in counsel over-disclosing exhibits and it "could effectively turn what should be a cross-examination into a mere live version of interrogatories." This raises a risk of reading into the rule a requirement of providing such advance notice of exhibits that the Committee examined and discarded.

Phoenix hearing

Sandra Ezell: It would be valuable to have the documents that will be used during the deposition identified. The 30(b)(6) deposition should be used to locate information about discrete topics. This can be done without discussion of the identity of the witness because the identity of the person designated is irrelevant in this setting.

Nieves Bolanos (NELA): We believe the Committee should consider removing this comment about advance identification of documents. Such a requirement would cause counsel to over-disclose numerous possible exhibits out of an abundance of caution and worry that it "could effectively turn what should be a cross-examination into a mere live version of interrogatories." As a practical matter, the reality is that documents are sometimes produced very near to, or even on the day of the deposition. Such a requirement would bar use of such documents when their relevance becomes clear only as the testimony proceeds. Putting this possibility into the Note raises the risk that the amendment will be read as requiring such advance notice.

William Rossbach (testimony and written statement): I try to notify the other side what documents I will be using. Talking about what documents will be used is a good idea. But it is critical to have flexibility. Unanticipated things come up that involve documents in a way not appreciated before the deposition.

Bradley Peterson (testimony and written comment no. 138): Sometimes the notice asks for production of the documents used to prepare the witness. When I receive one of those, in the meet and confer session we already do hold I ask the noticing attorney to provide any documents that may be used in the deposition. Often the opposing attorney refuses this request on the basis of work product, apparently hoping to "surprise" the witness. Yet the noticing party insists that I should provide the documents I used to prepare the witness. I think my selection of documents is work product. Some courts, however, have not upheld this objection, but some of them nonetheless enable the noticing attorney to employ surprise in this way. The protection of work product in this context should be recognized in the rule. In addition, given the purpose of the deposition to identify company information rather than surprise the witness, the rule should require identification of all such documents that will be used. Perhaps it would then be permissible to direct that the company also identify the documents used to prepare the witness.

Written comments

Walt Cubberly (235): I disagree with the comment in the Committee Note speculating that "the serving party [may need to] identify in advance of the deposition the documents it intends to use during the deposition." The idea that the party would be required, in advance, to share with the other side what documents it was panning on using during the deposition would revolutionize deposition practice. It would hinder the ability of a party to impeach witnesses. It would allow counsel for the organization to help the organization craft testimony in a way that would be inimical to discovering the truth, and it would prohibit the party taking the deposition from following new leads developed during the course of the deposition. I strongly disagree with this offhand aside in the Note.

Jay Henderson (236): It would be worthwhile for the parties to confer,and the serving party may enhance this process by offering to disclose document it may use during the examination. But this disclosure should not be compulsory.

Reviving amendment topics not included
in Preliminary Draft

Washington, DC Hearing

Lauren Barnes (testimony and no. 187): "Arbitrary, one size fits all limitations on the number of topics, how they will be treated, and how and when notices must be service and negotiated serve no efficient purpose and may instead simply result in more trips to the court over issues that can and should be negotiated by counsel. What is appropriate in the [very large] cases I pursue may make no sense for many other cases."

Mark Behrens (International Association of Defense Counsel) (testimony and no. 174): The Committee should adopt other ideas that are not included in the current amendment package: (1) set forth a clear notice requirement; (2) establish a clear objection procedure; (3) identify presumptive limits on the number of deposition topics; (4) clarify how 30(b)(6) depositions should be counted toward the ten-deposition limit and the one-day time limit; (5) permit a written response that an organization has no information on a given topic; and (6) prohibit contention questions; and (7) forbid inquiry into what materials the witness reviewed to prepare for the deposition. These may be said to constitute one size fits all solutions, but they fit enough cases to make them important. The absence of those limits has enabled some lawyers to weaponize the rule.

Paul Bland (Public Justice) (testimony and no. 172): We strongly oppose rule provisions imposing specific limits on 30(b)(6) depositions. In particular, we see no advantage and many drawbacks in (1) an objection procedure; (2) a uniform notice period; and (3) a limit on the number of topics.

Edward Blizzard (testimony and no. 179): I am here to respond to comments made by Tim Pratt, former general counsel of Boston Scientific, curing the Phoenix hearing. Mr. Pratt made some assertions about the pelvic mesh litigation in which Boston Scientific was a defendant. I was on the Plaintiffs' Steering Committee in that MDL litigation. That was a unique litigation, with more than 26,000 plaintiffs suing Boston Scientific in federal court, and many additional plaintiffs suing in state courts. The litigation involved 13 BSC products, and the court ordered 200 individual cases to complete discovery for trial. In that litigation, BSC moved to quash or for a protective order against our 30(b)(6) notices. Among other things, it urged that the deposition be limited as to products and that it be quashed as to topics on which individual BSC employees had testified. The magistrate judge's ten-page order is attached to my submission. She denied BSC's motion to quash and rejected its burden arguments. She also directed it to designate prior individual testimony that it would adopt as its own testimony with regard to matters it said had already been explored. The experience in MDL 2326 does not support Mr. Pratt's contention that the Committee should impose specific limitations applicable in all cases. To the contrary, MDL 2326 illustrates the need for flexibility in determining what is appropriate in a given case.

Susannah Chester-Schindler (testimony and no. 186): "While the addition of a numerical limitation on the matters may seem efficient at first blush, in practice the limitation will necessarily be arbitrary and may trigger additional unnecessary motions practice."

Andrew Cooke (testimony and no. 165): What is really needed is to add the following to the rule: (1) a right to object; (2) authority for a party that has already given ten or more depositions on the same subject to submit prior 30(b)(6) transcripts in lieu of further 30(b)(6) depositions; (3) limiting such depositions to seven hours; (4) limiting the number of topics; (5) including cost-shifting for depositions that seek extraordinary discovery beyond the primary structure of the rule; and (6) making clear the supplementation is allowed. As the rule is

currently structured, it imposes too much burden on the responding entity. In addition, there is a split among courts on whether one should raise these issues before the deposition with a protective-order motion or after the deposition with a motion to compel. The lack of structure in the current rule prevents meaningful conferences, and presumptive limits and an objection procedure would provide that structure. Numerical limits work with interrogatories, and they can work here also. This subject should be added to the Rule 16 list of topics to address in the scheduling order. Having a limit leads to more careful drafting of the discovery requests.

Alex Dahl (Lawyers for Civil Justice) (testimony and no. 129): These proposed amendments will not deal with the real problems the Committee has identified in 30(b)(6) practice. So we urge that the Committee return to the drawing board and draft meaningful amendments that will do the needed job. The basic problem is that the present rule does not provide a real framework for the lawyers to reach agreements on the questions that arise over and over. The needed amendments, therefore, are (1) a numerical limit on topics for discussion; (2) an objection procedure that permits the organization to prevent proceeding into improper areas without court supervision; (3) a clear minimum notice requirement; (4) clarification of the application of the existing limits on the number of depositions and the duration of a single deposition in the 30(b)(6) context; and (5) explicitly forbidding contention questions during a 30(b)(6) deposition. Numerical limits have worked well with other discovery devices such as interrogatories. "Unlimited" is the wrong limit, but it's what we have right now. 25 might be best as a starting point. "Presumptive limits are a rulewriter's tool." They are not a penalty, but a guide. They serve the interests of proportionality.

Peter Fazio: I represent defendants in products cases. There are cases in which we need multiple depositions. I had a case against Donald Slavik (also testifying today) and it involved ten corporate deposition and 31 individual depositions. I think you should go back to the drawing board and reconsider a numerical limit. If you impose a numerical limit the lawyers will respond and deal with it. A starting point might be 25. Then the lawyers can confer and come up with a good system for the case. If the court will pay attention, this can work.

Toyja Kelley (President, Defense Research Institute) (testimony and no. 132): In 2017, DRI identified additional measures that should be included in the rule. These include: (1) amendments to Rule 16 and 26(f) calling for early discussion of 30(b)(6) depositions; (2) amending Rule 26(e) to permit supplementation of testimony; (3) amending the rule to provide a mechanism for making and resolving objections; (4) providing a presumptive limit of ten topics; (5) an amendment permitting the organization to certify that it has no knowledge beyond what is in its documents, which would mean that no deposition is required; (6) an amendment directing that no deposition is required on topics on which have already been the subject of deposition testimony; and (7) an amendment prohibiting contention questions in 30(b)(6) depositions.

Jessica Kennedy (McDonald Toole Wiggins) (testimony and no. 133): What is really needed is that some specifics be added to the rule. The rule now requires that the corporate representative be adequately prepared, but that is possible only if there is a limitation in the rule on the number of topics. I suggest that the limit be eight topics. In addition, the topics should be consistent with the nature of discovery that has already occurred and not seek to interject new areas of inquiry that were not previously the subject of inquiry by less burdensome means. In addition, a 30(b)(6) deposition should not duplicate depositions of those with personal knowledge on the subject. The rule should also include a provision for objections to the topics on the noticing party's list. The rule should also explicitly recognize that the organization is only required to provide information within its possession, custody, or control. It therefore should not be required to obtain information from non-party subsidiaries, parent companies, or foreign entities outside the subpoena power of the court. In addition, discovery about the preparation of the witness should be declared off limits on grounds of privilege. The limit on number of topics

should be ten. Even if these topics are defined broadly, the company will be better able to prepare the witness than in true now with many, many more topics. Such a limit should not necessarily lead to motions to expand in every case. We try to reach agreement at the Rule 26(f) meeting, and having a limit encourages conversation. To illustrate, I brought along examples of recent 30(b)(6) notices with as many as 263 topics. One simply asks that the company provide a witness to address every allegation in the complaint. The cases in which these depositions produce the most problems are product cases, as revealed by a Westlaw search.

Jennifer Klar (testimony and no. 175): The arguments for adding particulars to the rule should be rejected. The objection idea would lead to long delays in discovery, which would essentially be stayed until the court ruled on objections. The idea of a deadline for taking a 30(b)(6) deposition should not be adopted; sometimes it is appropriate to take a 30(b)(6) deposition at the end of discovery. A ban on contention questions would not be appropriate. It would treat corporations differently from other litigants. And since the corporation has the absolute right to select the person who testifies, one should expect the chosen witness to be the person best qualified to answer for its contentions.

Chad Lieberman (testimony and no. 178): What we need is a presumptive limit on the number of topics. 15 is a number that might work. Having that before them will help the parties focus. My experience indicates that 15 is a sufficient number. In larger class actions, the parties may need to go beyond. More generally, the problem is that the rule does not provide a framework for 30(b)(6) disputes. We need a baseline. Then the judge would have guidance on when to grant a protective order.

Terri O'Neill (National Employment Lawyers Assoc.) (testimony and no. 144): We believe that the public comment period should not be used to disinter proposals that the Committee has already considered and discarded for good reason. Nonetheless, some are urging that the Committee return to those ideas. But because these matters have arisen again, some comment is in order.

> (1) A formal objection procedure would be counter-productive. In discussing the topics for the deposition, the parties may tailor them in a way that makes the deposition more efficient. But as reported cases have noted, the rule does not include a formal objection procedure like the Rule 45 objection procedure. In part, that is because any issue that arises at a 30(b)(6) deposition about specific topics or questions is much easier for the court to evaluate in the context of the actual deposition rather than in the abstract.
>
> (2) A uniform 30-day notice requirement is too inflexible. There is no reason to wait 30 days after the mandated conference occurs. Professional counsel will always discuss depositions dates with opposing counsel and seek a mutually agreeable time for the deposition. To have a rigid 30-day rule for only one type of deposition is not warranted.
>
> (3) A strict numerical limitation on the number of topics is artificial and unproductive. There is no such limit on Rule 34 requests. Imposing one here will merely encourage use of broader topics. It is simply not true that it is "common" for a notice to include 60 or 100 topics.
>
> (4) The current rule that a 30(b)(6) deposition counts as one, but that fully seven hours are permitted as to each person designated, should be maintained. A corporation could game the system by designating many witnesses. Plaintiffs have no incentive to draw out the discovery process. As things stand now, witnesses with few topics can be finished in an hour or two. The noticing party should not have to accommodate the tactical decision by the company to designate a large number of witnesses.

(5) Contention questions should not be banned. Corporate defendants frequently ask plaintiffs in employment cases contention questions like "What support do you have for your claim that you suffered discrimination." To say the plaintiff may not ask the same sort of questions of the person hand-picked by the company to testify is one-sided. Moreover, such a prohibition would lead to frequent disputes about what is a contention question.

Virginia Bondurant Price: A specific number in the rule would be a useful starting point for discussions with opposing counsel. It would not be a straightjacket. Presently I often get outlandish numbers of topics, and sometimes have to move for a protective order.

Patrick Regan: Presumptive limits are problematical since there are so many different types of cases. Sometimes ten would do, and in other cases fifty are needed. Having a specific limit will lead to motions in court. We should not legislate for the "lunatic fringes."

Thomas Regan (testimony and no. 199): The rule needs changing, but not the changes proposed by the Committee. Instead, what are needed are: (1) a clear notice requirement; (2) clear specification of how the limits that apply to other depositions in terms of overall number of depositions and duration of deposition should apply in 30(b)(6) settings; (3) questions about the material reviewed in advance of the deposition should be forbidden; (4) there should be a procedure for the corporation to indicate that it lacks information on given topics, relieving it of the duty to produce a witness.

Terri Reiskin (testimony and no. 196): Having a number helps move the discussion with opposing counsel forward. For example, the rules now set a limit of ten depositions. At the start of the case, that provides a baseline for discussing what is appropriate to that case. As things stand now, 30(b)(6) depositions often are used as an end run around numerical limits on interrogatories. Another subject on which the rules should provide guidance is whether the one deposition per witness rule applies to the company. If there is one 30(b)(6) deposition, does that mean there cannot be another. Beyond that, the proper application of the ten-deposition and seven-hours limits in the 30(b)(6) context should be made clear. The present reality is terribly inefficient. I think that the 26(f) conference is the right time to start thinking about these issues, and discussing them. Maybe fairly specific guidance can be included in the Rule 16(b) scheduling order.

Brittany Schultz (Ford Motor Co.) (testimony and no. 151): The Committee should reconsider making substantial amendments that would provide guidance and address functional deficiencies in the current rule. That is what Ford proposed in July, 2017. But that is not what the Committee has done. In particular, there should be a defined procedure for objecting to the notice, and also for situations in which the company has only documentary information about a given topic.

Patrick Seyferth (testimony and no. 182): The real need is for an objection procedure. Presently, practitioners are confronted by diverging case law; some courts require a motion for a protective order before the depositions, while others insist that the matter be raised by a motion to compel after the deposition.

Michael Slack (testimony and no. 170): I do sometimes list over than 30 topics. I suppose I could come up with a sensible number for aviation cases, which are the kind of cases I do.

Michael Slavik (testimony and no. 146): A strict numerical limit would be counter-productive. For example, I recently noticed a deposition with 47 topics. But they were essentially 47 very specific questions. With them in hand, the witness was able to finish the

deposition very expeditiously.

Christine Webber: An across the board limit on the number of topics would not be helpful. For example, in a recent employment discrimination action I had ten to fifteen topics for each of a large number of plant locations.

Michael Weston: We need presumptive limits in the rules where they do not appear. For example, Rule 36 has no such limits, and I have seen cases with 200 to 300 such requests. What we need is a framework to resolve or avoid impasses. Setting a number sets an expectation. In complex cases, we agree to increase the number. A motion regarding the number of topics could happen before the deposition. In addition, it would be good to have a clear time limit. I get 50 to 60 topics in every one of my cases.

Julie Yap (Seyfarth Shaw) (testimony and no. 188): Instead of proceeding with the proposed amendments, the Committee should provide amendments that address the real problems under the current rule. There should be a minimum 30-day notice period. There should be a numerical limit on topics, no higher than ten. The rule should provide that the topics must be reasonable in scope and proportional to the case. These depositions should be subject to the seven-hour limit that applies to other depositions. There should be a recognized objection process. Having 70+ topics makes it almost impossible to prepare the witness on all of them.

Phoenix Hearing

Lisa LaConte: The rule should have an objection procedure that makes further responses unnecessary once an objection is served. It is true that Rule 30 does not authorize such an objection and failure to respond with other depositions, but the obligations and burden of a 30(b)(6) deposition are different.

James McCrystal (Defense Research Institute) (testimony and written testimony from Troya Kelley): This amendment package is deficient because it does not include specifics on the number of topics or on the length of the deposition. We have for years had specifics in the deposition and interrogatory rules about the number and duration of depositions and the number of interrogatories. Those specific limitations were positive improvements. But there is nothing in the current amendment package that corresponds to those beneficial specifics. The 2015 proportionality amendments call for such specifics. It is important to guide practice under Rule 30(b)(6) with specifics of that sort. Specifically, DRI favors the following

- Amending Rules 16 and 26(f) to include Rule 30(b)(6) in the 26(f) conference and submission to the court under Rule 16
- Amending Rule 30(b)(6) to allow supplementation of testimony at the deposition
- Amending Rule 30(b)(6) to provide a method of making and resolving objections to the notice before the deposition
- Amending Rule 30(b)(6) to permit an organization to certify that it possesses no knowledge beyond what is contained in documents and directing that in those circumstances no deposition is required
- Amending Rule 30(b)(6) to provide that a deposition of the organization is not required on topics that have been the subject of individual depositions already
- Amending Rule 30(b)(6) to forbid contention questions

Although some of these concerns are mentioned in the Committee Note, which is helpful, the better course would be to amend the rule to address these matters specifically. DRI also supports the positions in the written comment from Lawyers for Civil Justice (no. 129).

John Sutherland: Instead of pursuing the current package of amendments to the rule, the

Committee should adopt more practical solutions:

> (1) The rule should provide a method for objecting. Because the rule does not now have such a procedure, it can be used as a sword as if it were a legitimate discovery tool. For example, it is not uncommon for a requesting party to unilaterally schedule a deposition on a date and time that is not available or does not allow sufficient time to properly prepare and present a witness. Because the rule lacks a reasonable objection procedure, the requesting party takes the position that the company must appear with a prepared witness or file a motion for a protective order. Rule 45 is a model for a solution. It provides that service of an objection within 14 days means that the deposition will not go forward until and unless the requesting party obtains a court order to proceed. Adopting this procedure will cause requesting parties to take more care in specifying topics for examination.
>
> (2) The rule should contain a provision that protects attorney work product and attorney-client communications. The most troubling aspect of 30(b)(6) depositions is that the requesting party usually insists that the materials relied upon by the witness to prepare for the deposition or chosen by an attorney to prepare the witness be subject to disclosure. The lack of any discernible protection of this type of material is a glaring hole that must be filled in Rule 30(b)(6).

Nieves Bolanos (NELA): We commend the Committee for its careful consideration of a variety of perspectives on the rule before it announced its proposed amendments, and for not including some that had been proposed. Adding arbitrary numerical limits on use of this discovery device would be counterproductive. For example, a presumptive cap on the number of topics would encourage counsel to broaden the definition of each topic and make it more difficult to prepare for the deposition. We are aware that there have been notices with as many as 100 topics, but such examples are in our experience anomalous. Our firm recognizes that serving such a notice would prompt intractable disputes. We carefully tailor the number and description of topics, both because we do not want to engender costly disputes and because we expect judges to limit overly broad requests. Often we litigate against public entities, and it is then absolutely essential to learn about their systems.

William Rossbach (testimony and written statement): The proposals that were made by the ABA organization to limit the number of topics, make the testimony not binding, allowing after-the-fact changes and supplementation by counsel, and prohibiting contention questions, would have eviscerated the rule and made it effectively useless in achieving the goals of Rule 1. These proposals would not have addressed any significant problem with the rule and were entirely one-sided. The real problem is that too often the organization does not adequately prepare the witness. Though that may sometimes result from notices that fail to describe the matters with reasonable particularity, the changes proposed by the ABA group would not deal with that problem in a helpful way. The proposed amendment avoids the mistakes proposed by the ABA group.

Gary Culbreath: 30(b)(6) depositions can be a trap for the unwary. The current rule lacks specifics that should be added. This would provide procedural guidance. The current amendment, however, will invite more litigation rather than avoiding it. One important protection would be an objection feature like the one in Rule 45 for subpoenas. In the District of South Carolina, the judges usually won't allow the deposition to go forward on grounds objected to until the objection is resolved by the court. Having a meet and confer session should be optional with the attorneys. In South Carolina, some judges convene a meet and confer session with the court to address such matters.

Bradley Peterson (testimony and no. 138): Rather than pursue the current amendment proposal, it would be better instead to amend the rule to add the following: (1) a minimum notice period; (2) an objection procedure; (3) a presumptive limit on the number of topics; (4) a bar on questioning the representative on topics outside the list; and (5) specifics on duration of the deposition and counting towards the presumptive limit of ten depositions if more than one person is designated.

Jennie Anderson (testimony and no. 148): The Committee was right not to impose a specific limitation on the number of topics. Rigid limits like that would undermine some of the efficiency of this rule. It would lead to broader designations, complicating and delaying the depositions. The more specific the designating party can be, the more effective the deposition.

Tim Pratt (President of LCJ): The real need is for specifics in the rule. With Boston Scientific, he found that 30(b)(6) depositions might include 18 topics with 50 subparts. It has happened that a witness who testified for four days as a designated 30(b)(6) witness then had to testify two more days as an individual witness. The current proposal simply institutionalizes the existing practice without meaningful guidelines. There should be a clear limit on the number of topics. Judges say they can't determine what is a "reasonable" number of topics; we need a number. For example, if the presumptive limit is ten, you have a starting point. I don't believe there is really a problem with unprepared witnesses, separate from the problem of overbroad and overly numerous topics. But companies really don't want to go to the judge on such issues. And absent that there is no incentive for plaintiff lawyers to be reasonable.

Phillip Willman (DRI): What we really need is a clear minimum notice time, an objection process, and a requirement that 30(b)(6) be discussed in the 26(f) conference and covered in the 16(b) order. Only with a national rule will there be national uniformity on these matters.

A.J. de Bartolomeo (testimony and written testimony): I would not have a problem with a 30-day notice period for these depositions. But I do take strong issue with the inclusion of reference to the number of topics in the draft.

Written comments

Sean Domnick (139): Efforts to limit the number of 30(b)(6) depositions in a one size fits all sort of way will inhibit the ability of parties to gather information. Federal judges and magistrates are more than capable of addressing the particular needs of each case without arbitrary limitations being placed upon their discretion.

Federal Magistrate Judges' Association (142): We generally support the concept of directing counsel to confer on these matters. We have observed that Rule 30(b)(6) deposition practice has become a contentious subject. Our only hesitation is whether the proposed amendment goes far enough. Assuming the amendment is approved, we respectfully suggest that, after a period of time, the Committee consider whether further amendments -- such as, for example, one imposing a presumptive limit on the number of matters for examination -- are warranted.

Richard Broussard (143): There should be no numerical limit on the deposition topics. The differences among cases make such a limit counterproductive. Regarding other proposals made by LCJ, they are blatant strategic efforts to impede reasonable discovery. Prohibiting inquiry into what the witnesses have reviewed in preparation for testifying is only designed to prevent needed discovery. That is the way to determine whether the corporation complied with its duty to prepare the witness.

Jonathan Hoffman (168): These amendments do not deal with the real problems we encounter today. They do not offer a solution of the problem of a company without knowledge on specific topics. That is more likely now because statutes of limitations have been extended, and companies are more frequently acquired by other corporations. In addition, there are problems when the designated witness is also a fact witness, but that is not addressed.

Palmer Vance (and 25 other past, present, or future Chairs of the ABA Section of Litigation) (180): The rules should be amended to follow the New Jersey rule recently adopted (N.J. Rules of Court, Rule 4:104-3(a)(2)) for complex cases. That rule provides that every seven hours of testimony of an entity representative counts as one deposition toward the overall deposition limit. We have not researched the rules in other states' courts. This approach has the virtue of enabling the noticing attorney decide how mich time to spend, so to avoid being "charged" with a second deposition.

Jonathan Feigenbaum (no. 204): Allowing supplementation of 30(b)(6) deposition answers will encourage sandbagging, which is already a problem with intransigent defense tactics. Prohibiting contention questions when the witness is an organization but not when it's an individual (like my clients) is an unfair idea. Making it easy to object and hamstring the deposition will feed into defense delay strategies.

Amar Raval (205): Formalizing an objection process will simply lead to more motions being filed. Some insurance companies will stonewall everything as part of their litigation "strategy." This is perfectly designed for that tactic.

U.S. Chamber Institute for Legal Reform (214): The rule does not provide a formal procedure for objecting to a notice. Instead, the only mechanism is a motion for a protective order. Some courts require that the order be sought before the deposition occurs, but others are not willing to entertain the motions until after the deposition has occurred. A better approach can be built on the Rule 45 model -- that an objection halts the deposition until the court rules on the objection. The rule should also specify that 30(b)(6) testimony does not constitute a judicial admission.

MEMORANDUM

TO: Professor Richard Marcus
FROM: Lauren Lee
RE: Federal Rules of Civil Procedure Rule 30b6

I favor conferring but oppose numerical limits.

Patrick M. Regan (502)
James Cook (510)
Michael Vogelsang (515)
Daniel Cragg (516)
A John Arenz (518)
Daniel Cragg (516)
Jeremy Flachs (519)
Richard Allen (521)
Steven Zoni (523)
Eric Iverson (524)
Will Nefzger (526)
Paul Kelley (528)
Emily Thomas (530)
Kirk Laughlin (532)
Frank Piscitelli (539)
John Fabry (544)
Joshua Geist (549)
Justin Sanders (550)
Anthony Irpino (551)
Eugene Brooks (553)
Gary Schaaf (557)
Beverly Bove (558)
S. Burgess Williams (560)
Teresa McClain (561)
Ben Lebsack (565)
Tony Colyer (566)
Michael Schafer (574)
Richard Cornfeld (576)
Sean McDonough (582)
Patrick Yancey (584)
James Keim (588)
Sam Badawi (592)
Florence Murray (594)
Avery Halfon (596)
Gretchen Lipman (598)
Joshua Christian (600)
Renee Rubish (602)
Stephen Tiger (603)
Thomas Sims (605)
Jacob Lowenthal (606)
Jennifer Lawrence (610)
Richard Plattner (611)
Michael McGlamry (612)
Michael Cruise (614)
Ken Pearson (620)
Jeff Bouma (621)
Matthew Fogelman (629)
Nimish Desai (634)
Anne Gilday Judge (640)
Lindsay Lawrence (643)
Emily Hubbard (644)
Patrick Beirne (645)
Robert Sparks (648)
Alison Kennamer (649)
Brian Sanford (652)
Jon Hollan (657)
Taylor Sorrels (660)
Michael Shepard (661)
Rob Astorino Jr (662)
Ben DuBose (664)
Samuel Iola (667)
Sharon Zinns (668)
Paul Stewart Abney (669)
Jose Becerra (670)
Jason Beale (671)
Richard Kaudy (672)
Stewart Matthews (674)
Matthew Donohue (676)
Erika O' Donnell (677)
Jonathan Ruckdeschel (678)
Michael McCann (679)
Matt McGill (681)
Kurt Zaner (682)
Michael Patronella (683)
Caryn Papantonakis (685)
Jonathan Armour (687)

Darron Berquist (690)
Patrick Wigle (692)
Alina Gregory (693)
Jessica Schlatter (694)
Leslie Cronen (696)
Donald Blydenburgh (697)
Benjamin Flicker (698)
Jennifer Foote (699)
Charles Branham (700)
Kyla Cole (701)
Jerome Prather (702)
Galen Trine-McMahan (703)
Z. Stephen Horvat (704)
Dusti Harvey (705)
Roger Turgeon (706)
David Webster (708)
Tom Henson (709)
Benjamin Adams (710)
Scott Britton-Mehlisch (712)
Kevin Paul (714)
Scott Armitage (715)
Christopher Placitella (716)
Marsha Kazarosian (719)
David Boohaker (723)
James Hetu (725)
Matthew McLeod (726)
Benjamin Schmickle (727)
William Zook (728)
Megan Roper (729)
Case Dam (730)
Steven Aroesty (734)
Evan Cole (737)
Stewart Davis (738)
Stephanie Gold (739)
Barrett Naman (743)
Kevin Berry (744)
M Cristina Sanchez (745)
David Cannella (747)
Nicholas Nighswander (749)
Mary-Ann Leon (754)
John Theil (757)
Nathaniel Mudd (758)
Patrick Malone (763)
Timothy Garvey (764)
Sarah Gilson (766)
Mark Bratt (771)
Travis Harper (772)
Andrew Cioffi (774)
Dan Stack (775)
Joseph Garrison (777)
Erin Hergenrother (778)
Robert McEvoy (779)
Lucas Garrett (780)
Katie McGregor (781)
Paul Gatto (782)
Sophie Zavaglia (783)
Seth Cardeli (785)
Stefan Feidler (788)
John Nowakowski (789)
D'Arcy Rapp (790)
Joseph Cirilano (792)
Daniel Wood (798)
Nathaniel Falda (799)
Christopher Bryant (800)
Nina Windsor (801)
Cara Wall (802)
Theile McVey (803)
Allison Aoki (804)
Lisa Conserve (806)
Richard Shallcross (808)
Amy Heins (810)
Paul Lees (831)
Thomas Howard (832)
Thomas Taylor (839)
Margaret Samadi (843)
Chad Alexander (848)
Michael Patrick (857)
Gabriel Zambrano (858)
Glenn McGovern (859)
Dennis Bottone (868)
Jude Bratman (875)
Mark (877)
Brian Mohs (879)
Daniel Henderson (885)
Jeffrey Williams (887)
David Larson (889)
Thomas Chumbley (891)
Shane Prince (892)
League Creech (898)
Austin Crosby (901)
Abby Resnick-Parigian (902)
Robert King (903)

Stephan Mashel (904)
John Taussig (907)
Steven Langer (908)
Katherine Barrett Wiik (909)
Michael Karst (912)
John Burke (919)
Marianne LeBlanc (921)
Adam Kehrli (925)
Regina Poserina (927)
Jill Kanatzar (929)
Lucas Baker (932)
Mark Prince (940)
Avi Kumin (946)
Thomas Meyers (948)
Michael Ryan (949)
Seth Bernanke (954)
Michael Scimone (957)
David Bolt (965)
Benjamin Folkman (967)
Grahame Holmes (968)
Brent Johnson (970)
Wesley Phillips (971)
Jonathan Halperin (972)
Jeffrey Marion (974)
Robert Haslam (978)
S Lee Patton (983)
George Garrow (985)
Jonathan Karon (988)
Elizabeth Cabraser (989)
Edward Airhart (990)
Nathan Berger (991)
Cheryl Trine (997)
Robert Beatty-Walters (1022)
Casey Brown (1025)
Joshua Davis (1042)
Lisa Barley (1060)
Marc Willick (1061)
David Sugerman (1063)
William Leonard (1087)
Lucas Watson (1131)
Michael Donahue (1139)
Virginia Hardwich (1154)
Frederick Longer (1161)
Michael Merrick (1177)
Ty Hyderally (1184)
Stephen DeNittis (1186)
Emanuel Turnbull (1193)
Seamus Culhane (1195)
Rebecca (1230)
Tim Stevenson (1255)
Paul Merry (1260)
Phillip Chupik (1264)
Joseph D'Aversa (1273)
Todd Matthews (1277)
James Fitzgerald (1285)
Margaret Strickland (1288 & 1295)
Christina Hagen (1302)
David Arbogast (1307)
Robert McKnight (1323)
Mark Biddison (1328)
Gavriela Bogin-Farber (1334)
Mark Hammons (1336)
Neil Solomon (1339)
Deborah Mains (1349)
Jocelyn Larkin (1352)
Rhonda Maloney (1374)
Leonard Bates (1380)
Ryan Harrell (1383)
James Sanford (1390)
Michael Bigos (1400)
Roger Mandel (1403)
Jill Zwagerman (1437)
Clayton Thompson (1443)
Rachel Boyd (1444)
Timothy Manchin (1446)
Lauren Barnes (1458)
Taylor Downs (1459)
James Campbell (1461)
Joseph Garcia (1465)
Michele Cybulski (1487)
Joseph Gates (1492)
Elizabeth Eiland (1503)
Michael Patrick (1506)
Graham Esdale (1509)
Shannon Pennock (1524)
Emily Acosta (1541)
Roy Thibodaux (1555)
Jeff Crollard (1562)
Robert Garcin (1563)
Jerome F. O'Neil (1572)
Archie Grubb (1575)
Amy Brogioli (1579)

Tina Wolfson (1580)
Susanne Thompson (1592)
Laurel Li Harris (1594)
Leslie Anne Taylor (1595)
Paul Simmons (1603)
Hunter Swain (1614)
Rian Butler (1620)
Ryan Toomey (1622)
Sydney Abdallah (1623)
Stefani Preston (1624)
Jono Young (1626)
Brendan McQuaid (1638)
Michael Cupero (1639)
Marnie McGoldrick (1640)
Chelsea Cates (1643)
Donald Slavik (1644)
Tyler Watkins (1646)
Peggy Rensberger (1648)
Joseph Bates (1654)
Andrew Rogers (1657)
Branson Rogers (1665)
Douglas Stevick (1673)
Patrick Mause (1676)
Daniel Price (1681)
Christopher Hood (1689)
Devonna Joy (1690)
Jennifer Danish (1701)
Traci Buschner (1705)
Shaun Peck (1716)
Michael Greenspan (1717)
Mike Arias (1719)
John Gear (1729)
Katherine Harvey-Lee (1731)
William Rossbach (1736)
Robert O'Hare (1738)
Navan Ward Jr. (1767)
Brian Sullivan (1771)
Sommer Luther (1777)
John Beisner (1779)

I am neutral on conferring (or does not mention about conferring) but oppose numerical limits.

James Fitzsimmons (513)
Jeff Warncke (525)
Rafael Velzquez-Villares (529)
Michal Shinnar (531)
Zev Antell (534)
Eileen Kroll (536)
Eashaan Vajpeyi (540)
Timothy Mcilwain (542)
Robert Lewis (543)
Peter Whelan (554)
Thomas Strelka (562)
Blake Dickson (575)
Natalia Blaskovich (577)
Henry Miniter (578)
Linda Strelka (579)
Matthew Nace (580)
Marc Diller (583)
Kevin Kruse (586)
Ray Gallo (591)
Simina Vourlis (593)
Thomas Pleasant (599)
Chris Nidel (601)
Douglas Hartnett (607)
William Lawson (619)
Anthony Bribriesco (623)
Shane Smith (637)
Richard Hay (638)
Anthony Olson (654)
David Rash (665)
Laura Browne (675)
Kasie Braswell (680)
Michael Bahr (688)
Lindsey Cheek (717)
Kelly Parry (718)
Patrick DiBenedetto (720)
Lorraine Parker (721)
Sarah London (722)
John McCabe (731)
Cody Roberson (732)
Benno Ashrafi (733)
Matt Morris (735)
Timothy Scott (767)
Melanie Schmickle (776)
N Novack (791)
Frederick Rispoli (793)
Caela Baker (805)
W. Kelly Lundrigan (809)
Matthew Turner (813)
Jessica Mallett (837)
Camy Francis (838)
Danial Laird (860)
Aaron Brown (866)
Samuel Elswick (869)
Kara Harp (874)
Laura Castagna (883)
Gregory Whitley (888)
Ben miller (897)
Mark Abramowitz (910)
Sarah Nason (930)
Jonathan Meyers (952)
Philip Miller (963)
Raeann Warner (982)
Josiah Corrigan (987)
Dan Talmadge (1003)
Shawn Miller (1008)
Zachariah Parry (1024)
Thomas Henderson (1028)
Michael Jewell (1045)
Matthew Holycross (1052)
Joseph Lovretovich (1091)
Peter Goldstein (1129)
Jennifer Tobin (1155)
Jennifer Vorih (1173)
Corinne Cundiff (1223)
David Terry (1259)
Robert Linton (1261)
Joanne D'Alcomo (1303)
Lisa Sahli (1309)
Jory Ruggiero (1376)
Randy Hood (1564)
Alexander Ackel (1694)
Patrick Ardis (1708)
Delana Sanders (1728)

I oppose a requirement to confer because the rule is good as it is/changes are unnecessary and oppose numerical limits.

Laura Schultes (501)
Martin Kardon (505)
Amanda Condon (506)
Bruce Whitman (507)
Karen Evans (511)
Michael Galpern (512)
George Chronic (514)
Ben Davis (520)
Paul Maxon (533)
Peter Grenier (535)
Caleb Rannow (537)
Daniel Clayton (541)
Terry Grimes (546)
Brian Butler (547)
Henry Queener (552)
Charles Williams (556)
Wesley Nakajima (569)
Ronald Livingston (571)
Michael Peacock (597)
Render Freeman (626)
John Leighton (659)
Feliz Rael (538)
H David Kelly (548)
Gary Poliakoff (555)
Lawrence S. Lapidus (559)
Martell Harris (563)
Dennis Currell (567)
Paul Ivie (568)
James Donovan (572)
Matt Schultz (581)
Allan Siegel (585)
Rebekah McKinney (587)
Joshua Mankoff (589)
Ilana Waxman (604)
Shana De Caro (613)
Joel Bryant (618)
David Woodruff (627)
Michael Ganson (635)
Joel Smith (655)
Douglas Cannon (684)
Robert Cowan (695)
John Morrissey (707)
Kenny Harrell (740)
Lindsay Cordes (741)
Saul Gruber (742)
David Hoey (746)
Michael Bonamarte (748)
John Steffan (750)
Peter Giglione (751)
Sanford Horowitz (755)
Brian Dretke (759)
Stephen Seach (765)
Thomas Henson Jr (773)
Stephen Held (784)
Michael Gianantonio (786)
Jeffrey Adams (787)
Karen Shanks (795)
Mark Hanson (797)
Laura Mullins (807)
Brad Stark (811)
Ronald Barczak (812)
Sean Gambogi (819)
Stacy Stennes (820)
Nicole Lundrigan (823)
Jason Whittemore (824)
Teresa Arnold-Simmons (825)
Richard Davis (826)
Henry Courtney (827)
Product Liability Advisory Council (828) **concurs with limits**
Glenna Francis (830)
Heather Mullman (833)
Neil Anthony (834)
Alan Wagner (840)
Mark Bringardner (841)
Susan Ramsey (842)
Michael Mann (844)
Patrick Powers (845)
David Hollander (846)
Jon Moore (847)
John Leighton (849)
Heather Barnes (851)
Lyle Bosket (852)
Kim Valentine (853)
Allegra Carpenter (854)
David Diamond (855)

John Fischbach (856)
Sara Courtney Baigorri (861)
Winston Bouk (863)
Matthew Creech (865)
Carlin Phillips (867)
Debra Nelson (871)
Joseph Bilotta (872)
Ray Brady (873)
Ed Daniel (878)
Jeff Helms (880)
Daniel Goldfaden (882)
Spencer Payne (886)
Chester Tennyson (890)
Elizabeth Beall (894)
John Felder (895)
Neil O'Donnell (896)
Robert Langer (899)
Michael Scinta (905)
Neil O'Donnell (916)
Thomas Foley Jr (917)
Denise Jarman (918)
Michael Van Berkom (920)
Ruben Krisztal (922)
Jeremiah Fues (923)
James Morgan (924)
Neil O'Donnell (928)
Mitchell Chubb (931)
Scott Voorhees (933)
Scott Goldberg (934)
Paul McCarten (935)
Michael Foley (936)
James Curry (941)
Francis Dorrity (944)
Margaret Farley (947)
Thomas Thistle (950)
Stephen Curtice (951)
Brent Bigger (956)
Angel Mae Webby-Zola (958)
Michael A. Brusca (959)
Shane Newlands (960)
J Gregory Webb (964)
Matthew Morgan (969)
Christopher Bilecki (976)
Jason Ohliger (980)
J Steele Olmstead (981)
Michael Warshaw (984)
Steven Schepps (992)
R Saitz (993)
Lara Johnson (994)
Warner Mendenhall (995)
Ronald Wilcox (996)
Glenn Katon (998)
Patricia Willner (1000)
Lawence Jones (1001)
Gregg Neal (1002)
Ingrid Halstrom (1004)
Byron Warnken (1005)
Rip Andrews (1007)
Don Corson (1009)
Lisa Carper (1010)
Steve Seal (1011)
Andreas Bodmeier (1012)
Matthew Holland (1013)
Robert Cartwright Jr (1014)
Carla Aikens (1015)
Shane Kadlec (1016)
Eric Blank (1017)
Brook Hammond (1018)
Thomas Melville (1019)
Charles Bracewell (1020)
Jerald Block (1021)
Michael Crew (1023)
Stephen Norman (1026)
Anthony Chiosso (1029)
Marc Silverman (1030)
Matthew Granda (1032)
Rochelle Harding-Roed (1034)
John Joyce (1036)
Anthony Garza Vale (1037)
Jennifer Miller (1039)
Robert Ammons (1043)
Jim Wilkerson (1044)
Stan Johnson (1046)
Quinn Kuranz (1047)
Kara Rahimi (1048)
Joseph Pierry (1049)
Gordon Leech (1053)
Quinton Spencer (1054)
Cody Thornton (1055)
Daniel Buttram (1056)
Dylan Hooper (1057)
R Michael Shickich (1059)

Eric Gillin (1062)
Ronnie Cromer (1064)
Richard Budden (1065)
Vernon Sumwalt (1066)
Lincoln Sieler (1067)
Tina Stupasky (1068)
Stephen Voorhees (1071)
Kevin Coluccio (1072)
Wayne Mitchell (1074)
Kristine Keala (1077)
Sharon Cousineau (1078)
Marcus Vaden (1081)
Joseph Gillespie (1082)
John Barton (1083)
Jon Friedman (1084)
Gabriel Harvis (1089)
Robert Weppner (1090)
Jared Anderson (1092)
Matthew Hale (1093)
Kyle Moore (1094)
Richard Watson (1095)
William Kaetz (1096)
Mark Englehart (1098)
Isabel Cole (1099)
Sarah Silberger (1101)
David White (1102)
James Conroy II (1104)
David Nauheim (1105)
Mary Pool (1107)
Spencer Pahlke (1108)
John Xydakis (1109)
Ryan Hamilton (1110)
Chris Bataille (1111)
Daniel Malis (1112)
Mark Larson (1113)
Carl Varady (1114)
Christopher Burk (1115)
Sara Peters (1116)
Catherine O'Donnell (1117)
Michael O'Donnell (1119)
John Camillus (1120)
Jeffrey Rubin (1121)
William Ritchey (1122)
James Sellers (1123)
Tobias Cole (1124)
Benjamin Hall (1125)
Michael Stevens (1126)
Rhett Fraser (1130)
Michael Guilford (1132)
Louie Cook (1133)
Steven Margolis (1134)
Shammara Henderson (1135)
Radi Dennis (1136)
Gregory Pascale (1138)
Austin Watts (1140)
Stephen Lewis (1141)
Douglas Patrick (1145)
Omar Malik (1146)
Daryl Christopher (1149)
Peter Riley (1150)
David Sheller (1151)
Sara Ellen Hutchinson (1153)
David Crough (1156)
Karesa Rovnan (1157)
Jenny Marashi (1158)
Benjamin L Hall Jr (1163)
Remy Green (1164)
Brenton (1168)
Scott Lucas (1169)
Kenneth Hall (1170)
Stephen Shea (1171)
Nathan Anderson (1176)
Nathan Severson (1178)
Rhonda Hood (1179)
Daniel Goodwin (1180)
Christian Bagin (1183)
Joseph McClelland (1185)
Forrest Buffington (1187)
April Ferrebee (1188)
Ryan Ballard (1189)
Michael Carin (1190)
Carolyn Kubitschek (1194)
Koby Kirkland (1196)
Scott Murphy (1197)
Chris Hammons (1198)
Chelsea Edwards (1199)
Craig Marchiando (1200)
Paul Tershel (1202)
Mary Hashemi (1204)
Tad Thomas (1205)
Ralph Petty (1207)
Robert Quackenbush (1208)

Jane Clark (1209)
John Abaray (1210)
Kenneth Kinney (1211)
Seth Lehrman (1212)
Kevin Dillon (1214)
Ronald Burda (1215)
Gregory Milne (1216)
Timothy Lenahan (1217)
Yitzchak Zelman (1219)
Kevin Quinn (1220)
Bobby Martin (1221)
Michael Woerner (1222)
Chris Mills (1224)
William Marshall (1225)
Brock Duke (1226)
Whitney Judkins (1227)
Michael Mosher (1228)
Patrick Kang (1229)
Ruby Aliment (1234)
Michael Bardrick (1235)
Robert Landry (1237)
David B Rankin (1238)
Roy Comer (1239)
David Foster (1240)
Ryan Dreveskracht (1241)
Tariq Chaudhri (1242)
Marlena Grundy (1243)
John Powell (1244)
Andrew Brodie (1245)
George Quesada (1246)
Leonard Stephens (1247)
Jessica Scales (1248)
Anne Vankirk (1249)
Jeffrey Clause (1251)
Scott Wilson (1252)
Kay Teague (1262)
Bryan Johnson (1263)
Emily McCarty (1265)
Sarah Jane Hunt (1266)
Michael Walker (1267)
Dylan Kilpatric (1268)
Julie Celum Garrigue (1269)
Ann Deutscher (1270)
Scott Blair (1272)
Michael Mohlman (1274)
Jarrod Takah (1275)
Isaac Ruiz (1276)
Jeff Tuttle (1278)
John May (1279)
Daniel Cairns (1280)
Thomas Foley (1281)
Sam Elder (1282)
Egan Kilbane (1283)
Robert Bohm (1284)
Matthew Wurdeman (1286)
Richard Hitz (1287)
Elizabeth McLafferty (1289)
Joe Moore (1290)
Daniel McLafferty (1291)
Joel Hanson (1292)
Heather Cover (1294)
Ben Cox (1296)
Kate Denner (1297)
Thomas Domonoske (1298)
Devin Robinson (1299)
Charles Holliday (1300)
Kris Zucconi (1301)
Patrick MacDonald (1306)
Kevin Ambler (1308)
John Parisi (1311)
Eric Renner (1312)
Barry Nace (1313)
Joseph Backer (1314)
Sean Akari (1315)
Douglas Williams (1316)
David Heller (1318)
Hart Green (1319)
Catherine Clark (1321)
Sean DuBois (1324)
Aubrie Hicks (1326)
Charles Steinberg (1327)
Mercedes Donchez (1329)
Ryan Earl (1330)
Stephen Nordyke (1335)
Laurel Halbany (1338)
Daniel Edelman (1342)
Virginia Price (1343)
Richard Lane (1344)
Jared Hartman (1345)
Robert Stempler (1346)
Steven Howard (1347)
Mary Fons (1348)

Heather Jones (1350)
Don Bauermeister (1353)
McKean Evans (1355)
Christopher Love (1356)
Katherine Butler (1357)
Jeff Scott Olson (1359)
R.E. Chips Portales (1360)
Paul Bullman (1364)
Mark Clausen (1365)
Ryan Peterson (1366)
James Peterson (1367)
Casey Nash (1369)
Dante Trevisani (1370)
Grace Jun (1373)
Julia Yoo (1378)
Youssef Hammoud (1381)
Lauren Freidenberg (1382)
Charles Morgan (1387)
Joe Di Bartolomeo (1388)
David Holub (1389)
Ian Bratlie (1391)
Sean Laird (1392)
Ilan Wexler (1393)
Kimball Jones (1394)
Amil Minora (1397)
Patrick McArdle (1398)
Todd Young (1399)
Jim Lyons (1402)
Daniel Libbey (1404)
David Marco (1405)
Mike Godbe (1406)
Allen Arnold (1407)
James Michel (1410)
Kaelyn Steinkraus (1411)
Corey McGaha (1412)
David Trujillo (1413)
Matt Norris (1415)
Ronald Angerer (1418)
Andre Verdun (1419)
Duran Keller (1420)
Richard Feferman (1421)
Tyler Holyfield (1424)
Douglas Johnson (1425)
Kevin Foley (1426)
Arthur Csillag (1429)
Kelly Anderson (1430)
Justin Kahn (1431)
Deirdre O'Connor (1434)
Michael Doyel (1436)
Alexandria Parrish (1439)
Bob Semnar (1440)
C. Michael Bee (1441)
Ronda Kelso (1442)
Jason Orndoff (1447)
Andrew Hay (1448)
Steven Kazan (1450)
Nick Wooten (1451)
Ryan Duplechin (1452)
Charles Robinowitz (1454)
Joseph VanZandt (1455)
Herbert Hofmann (1456)
Deborah Raymond (1457)
David Benson (1462)
Sami Thalji (1463)
Deborah DeMack (1464)
James Beard (1466)
David Mann (1467)
Joel Grist (1468)
Ian Kalmanowitz (1469)
Omar Sulaiman (1470)
Michael Goldstein (1473)
Benjamin Locklar (1479)
Eudoxie Dickey (1480)
Mary Morris (1488)
Brian Brazier (1491)
Karl Dickhaus (1493)
Eric Artrip (1495)
Mike Bee (1496)
Douglas Clark Jr. (1501)
Alana Weatherstone (1504)
Charles Reese (1505)
Angel Diaz (1507)
Amy Davis (1508)
Lawrence Serbin (1510)
Wendy Fleishman (1514)
Sean Malcolm (1517)
Tiffany Yiatras (1518)
Brian Matise (1520)
Noah Rich (1521)
Roy Willey (1523)
David Rosenbaum (1525)
Ronald Kaplan (1526)

Meghan Quinlivan (1527)
Brad Sherman (1529)
Catherine Eranthe (1530)
Mike Cone (1532)
Frederick Schlosser (1536)
Paola Pearson (1537)
Jeremy Vishno (1538)
David Romano (1540)
Kenneth Segal (1542)
Kevin Chavez (1544)
Jeff Buncher (1545)
Joseph Kolar (1546)
J. Edward Kim (1547)
Thomas helm (1548)
Michael Quinn (1550)
Michael Block (1551)
Kelly Schulz (1552)
James Rosemergy (1554)
Mark Smith (1556)
Douglas Chabot (1557)
Chase Molchin (1559)
Sarah McEahern (1561)
Jeff Mueller (1566)
Forrest Jackson (1567)
Howard Manis (1569)
Richard Manger (1571)
Daniel Buba (1576)
Keith Frankl (1578)
Kristopher Torres (1581)
Tara Milliff (1582)
Camille Godwin (1583)
Lindsay Halm (1586)
Kathryn Anderson (1587)
Colleen Libbey (1588)
F Emmet Ciccone (1590)
Charles Hall (1591)
Glenn Gulick (1593)
Osler Peterson (1596)
Gary Poliakoff (1597)
G. Bryan Ulmer (1598)
Larry Jones (1599)
Bryan Pope (1600)
Gerald Waltman (1601)
Gregory Malush (1602)
Coleen Libbey (1604)
Ivan Lopez Ventura (1606)
Sara Neil Stribling (1608)
Frank Burge (1609)
Alan Robertson (1610)
Monique Olivier (1611)
C Artim (1612)
Richard Dillenburg (1613)
Aaron DeShaw (1615)
Jamie Goldstein (1616)
Gene Cullan (1617)
Rhett Francisco (1618)
Jon Mann (1619)
John Risvold (1621)
Peter Bowman (1625)
Gary Hazelton (1627)
Dennis O'Berry (1628)
Brandon Chase (1629)
Kelly Reed (1633)
Kelly Albers (1634)
Stephen Roach (1635)
Paul Mahoney (1637)
Molly Greenblatt (1647)
Greg Funfsinn (1649)
Marco Mercaldo (1655)
Joe Kelly (1661)
Eric Hertz (1662)
Adam Resmini (1663)
Phyllis Eddins (1664)
Jeffrey Galliher (1666)
Jonathan Jamieson (1667)
Douglas Fagan (1668)
Linda Commons (1670)
Brian Leonard (1671)
Paul Banker (1674)
Robert Michael Flynn (1677)
John Munoz (1678)
M. Stewart Ryan (1679)
Eric Awerkamp (1680)
Elizabeth Finizio (1685)
Blake Vance (1692)
Mollie McGraw (1693)
Donald Burke (1696)
Christian Schreiber (1697)
Claude Wyle (1698)
Randal LeNeave (1700)
Burke Smith (1707)
Simon Forgette (1709)

David Cluff (1710)
Robert Allenby (1711)
Jon Lee (1712)
Charles Meltmar (1713)
Colin Simpson (1714)
Sarah Swatosh (1718)
Thomas Myers (1720)
Adam Strauss (1721)
Jackson Pahlke (1722)
John Ksajikian (1723)
Laraclay Parker (1724)
Samantha Copeland (1725)
Luther Amundson (1727)
Michael Lewis (1733)
Shep Williams (1734)
Benjamin Crittenden (1735)
John Donohue (1739)
Joseph Koplin (1741)
Michael Phelps (1743)
Paul Albright (1745)
Bryce Bell (1747)
Robert Ferguson (1749)
Emily Peacock (1751)
Jennifer Hoekstra (1752)
Robert Underwood (1753)
Michele Henry (1754)
Daphne Saddler (1755)
Benjamin Cloward (1757)
Bob Edwards (1759)
Matthew Ghio (1761)
Adrian Sak (1762)
Rachel Solow (1766)
U.A. Lewis (1769)
Mark Rouse (1772)
William Smith (1773)
Michael Gunzburg (1774)
Vicente Barraza (1775)
Christina Henry (1776)

I oppose a requirement to confer because it will create more disputes and litigation/defendant will use it to stall and oppose numerical limits.

American Tort Reform Association (503)
Sergio Rufo (504)
Erin Jewell (508)
William Harty (509)
Jay Renneisen (517)
Nicholas Woodfield (522)
Taylor Lacy (527)
John Kirtley (545)
Sarah Emery (564)
Lawrence Knapp (570)
Lincoln Wright (573)
Michael S. Dampier (590)
Nicholas Carlin (595)
Kurt Holzer (608)
Amy Woodward (609)
Brett Powers (615)
W. Whitney Seals (617)
Grant Lawson (622)
Dennis Murray (624)
Kristin Karbowski (625)
John Chambless (628)
Bernard Solnik (630)
William Robins (631)
Matt Feller (632)
Daniel Laurence (633)
Peter Lynch (636)
Soha Saiyed (639)
Victoria Schall (641)
David Wulff (642)
DOJ (646)
Nancy Winschel (650)
Jacques Williams (651)
Kevin Weis (653)
Ann Wilson/ Motor & Equipment Manufacturers Association (656)
Justin Owen (658)
Aaron Whaley (663)
Lindsay Lien Rinholen (666)
James Piel (673)
Robert Kisselburgh (686)
Spencer Reiss (689)
Jake Eisenstein (691)
Duggy Reagan (711)
Bart Baumstark (713)
Todd Barnes (724)
Thomas Malone (736)
Joseph Tunstall (752)
Tara King (753)
Joel Franklin (756)
Andrew Wainwright (760)
Juliet Keene (761)
Natalie Sharp (762)
Thomas Murphy (768)
Philip Mullins (769)
Kelly Battley (770)
Paul Robinson (794)
Turner Rouse (796)
Henry Lindler (814)
Christopher Paulos (815)
Rachael Gilmer (816)
William Ruiz (817)
Daniel Francis (821)
Sean Cole (822)
Kenneth Mitchell (829)
Luke Dalton (835)
James Smith (836)
Matthew Sullivan (850)
Kenneth Levinson (862)
Margaret Battersby (864)
Hugh McCormick (870)
David Wendel (876)
Nathan Finch (881)
Michael Schwarz (884)
Ronnie Crosby (893)
Gary Marts (900)
Eric Richardson (906)
David Tyler (911)
Andrew Nadzam (913)
Christian Patno (915)
David Ybarra (926)
Scott Smith (937)
Sean FitzPatrick (938)
Allyson Romani (939)
John Henderson (942)
Marc Berman (943)

Stephen Burg (945)
Olivia Kronenberg (953)
Jeffrey Pollack (955)
Henry Salas (961)
Clarke Sturge (962)
Douglas Fees (966)
William Jungbauer (973)
Craig Leslie (975)
Francisco Rodriguez (977)
Sherry Rozell (979)
Charles Haake (986)
Jeffrey Bakst (999)
Mark Baumkel (1006)
Tim Mott (1027)
Sam Boyd (1031)
William McGaha (1033)
John Whitaker (1035)
Kiernan McAlpine (1038)
Geoffrey Bryan (1040)
Wayne Parsons (1041)
Laura Ozak (1050)
Joshua Watson (1051)
David Chami (1058)
Allan Brain (1069)
Kevin Williams (1070)
Corey Suda (1073)
Harry McGrath (1075)
Molly Clark (1076)
Edward Ciarimboli (1079)
Gregory Fellerman (1080)
Michael Starkman (1085)
Kenneth Morris (1086)
Crystal Rutherford (1088)
Charles Pekor (1097)
Erin Christison (1100)
Julianne Germinder (1103)
Brad Evans (1106)
Mark Joseph Kenney (1118)
William Cummings (1127)
Michael Pence (1128)
Casey Lott (1137)
Steven Kantor (1142)
Timothy Kittle (1143)
Laura Yaeger (1144)
T David Apodaca (1147)
Landis Curry (1148)
Steve Conley (1152)
Andrew Clarke (1159)
Paul Schlemmer (1162)
Matt Stapleton (1165)
Scott Korenbaum (1166)
Robyn Buckley (1167)
Kevin Hinkle (1172)
John Roper (1174)
Joel Strauss (1175)
Peter Silva (1181)
Aaron Swift (1182)
Brian Crockett (1191)
Warren Astbury (1192)
Paul Klehm (1201)
John Shook (1203)
Bruce Stern (1206)
Thomas Vesper (1213)
John McCraw (1218)
Victoria Herring (1231)
Kevin Costello (1232)
Jamed Bartimus (1233)
Robert Hill (1236)
Michael Charbonneau (1250)
Kevin Jones (1253)
Kelsey Marquard (1254)
Christopher Finney (1256)
Lance Sears (1257)
Denise Bradshaw (1258)
Christopher Graver (1271)
TJ Massey (1293)
Broke Timmer (1304)
William Thayer (1305)
George Kokkines (1310)
Charles Head (1317)
Rhonda Wilson (1320)
Alexander Melin (1322)
Christopher Nickson (1325)
Amanda Allen (1331)
Joe Ervin (1332)
Peter Barry (1333)
Alina Mooradian (1337)
Billy Howard (1340)
Steven Malek (1341)
S. Virginia Price (1343)
Bonnie Favor (1351)
Jocelyn Larkin (1352)

Gus Centrone (1354)
Michael McDonald (1358)
Malcom MacGregor (1361)
John Sly (1362)
Shelley Stangler (1363)
Sonya Edwards (1368)
Beth Davis (1371)
Alexander Trueblood (1372)
Rochelle Gumapac (1375)
Andrew Gross (1377)
Sandra Harrah (1379)
Stephen Skinner (1384)
Benjamin Donahue (1385)
Lee Dawn Daniel (1386)
Gregory Zeuthen (1395)
J. Carter Thompson Jr. (1396)
Mari Perczak (1401)
Noah Peters (1408)
Penny Cauley (1409)
Kirk Miller (1414)
Majdi Hijazin (1416)
Chris Miltenberger (1317)
Albert Dahm (1422)
Rex Anderson (1423)
Heather Leonard (1427)
John Nelson (1428)
Terrence Nealon, Jr. (1432)
Russel Dombrow (1433)
Bethany Hilbert (1435)
Michael Heineman (1438)
Michael Reiter (1445)
James Swartz (1449)
Morgan Adams (1453)
Dawn McCraw (1460)
Max Meyers (1471)
Kevin O'Brien (1472)
Nick Naiser (1474)
Drew Ashby (1475)
John MacLellan (1476)
Marcus Berg (1477)
Chris Roy (1478)
John Restaino (1481)
Richard Newsome (1482)
M. Raymond Hatcher (1483)
Richard Johnston (1484)
David Bernstein (1485)
Jeffrey Floyd (1486)
Ronald Truman (1489)
Breanne Cope (1490)
Michael Sowinski (1494)
Elizabeth Larrick (1497)
Robert Clements (1498)
Richard Russo (1499)
Nelson Boyle (1500)
Matthew Vance (1502)
David Damick (1511)
Brandon Beagley (1512)
Jeff Burns (1513)
Scott Shipman (1515)
Christopher Hill (1516)
Scott Stinson (1519)
John Rosenthal (1522)
Craig Schlapprizzi (1528)
Jean Martin (1531)
Jeff Gaddy (1533)
Lauren Bryne (1534)
Martin Summe (1535)
Paul Byrd (1539)
Melissa Wischerath (1543)
Glenn Kadish (1549)
Martin Meyers (1553)
Jeffrey Liggio (1558)
Andrew Young (1560)
Susan Rotkis (1565)
Chris Dandurand (1568)
Shelley Sanford (1570)
Jeremiah M. Hodges (1573)
Mark Lehman (1574)
Matthew Millea (1577)
Stan Friedman (1584)
Joanne Faulkner (1585)
Conor McLaughlin (1589) **concurs with limits**
Cortney LeNeave (1605)
Joseph Sayler (1607)
Frank Burge (1609)
Chadwick Meyers (1630)
Bina Ghanaat (1631)
Elizabeth Brancart (1636)
John Patrick Murphy (1641)
Jackie Sharp (1642)
George Hester (1645)
Scott Rodgers (1650)

Anonymous (1651)
Philip Goldberg (1652)
Jonah Flynn (1653)
N Dean Nasser, Jr. (1656)
James Gigax (1658)
Sean McConnell (1659)
Nicholas Teeples (1660)
Jerold Matayoshi (1669)
Jack Zinda (1672)
Dean Maglione (1675)
John Murray (1682)
Michael McReynolds (1683)
David Ledyard (1684)
Thomas Burnett (1686)
Brad Kendall (1687)
Jason Ibey (1688)
Daniel Stuart (1691)
Lawrence Kahn (1695)
Bruce Sherman (1699)
Ryan Brennan (1702)
Jack Edwards (1703)
Stuart Fagan (1704)
S. Taylor Chaney (1706)
Jay Krulewitch (1715)
Abbas Kazerounian (1726)
Mark Rodgers (1730)
Kenneth Sigelman (1732)
Misty Borland (1737)
Jeremy Romoser (1740)
Francis Petro (1742)
Michael Wirtz (1744)
Maridith Ramsey (1746)
Patrick Mangan (1748)
Stephen Van Gassbeck (1750)
Melissa Mosier (1756)
Breean Walas (1758)
Johnathan Leavitt (1760)
Charles Jackson (1763)
Nia Killebrew (1764)
Ashton Dennis (1765)
Elizabeth Calora (1768)
Michael Sandoval (1770)
Melissa Huelsman (1778)
Christian Singewald (1780)

APPENDIX B

THIS PAGE INTENTIONALLY BLANK

Plaintiff Fact Sheets in Multidistrict Litigation:

Products Liability Proceedings 2008–2018

Prepared for the Judicial Conference Advisory Committee on Civil Rules

Margaret S. Williams, Emery G. Lee III, and Jason A. Cantone

Federal Judicial Center

March 2019

Executive Summary

The Judicial Conference Advisory Committee on Rules of Civil Procedure (Committee) is currently considering various proposals to amend the Federal Rules of Civil Procedure to address the management of multidistrict litigation (MDL) proceedings. To inform its deliberations, the Committee requested that the Federal Judicial Center conduct research regarding MDL transferee courts' use of plaintiff fact sheets (PFS) and related case management tools. This report summarizes results of that research as of February 2019. Key findings include:

- PFS were ordered in 57% of the MDL litigation proceedings covered by the study (N = 116)

- PFS were more commonly ordered in the larger proceedings covered by the study. PFS were ordered in 87% of proceedings with more than 1,000 actions.

- The average time from centralization date to the date of the PFS order was 8.2 months, and the median time was 6.1 months.

- In just over half of proceedings in which PFS were ordered, 55%, there was docket evidence of activity to dismiss actions for failure to file substantially complete PFS.

- Plaintiff profile forms were ordered in 18% of proceedings covered by the study, generally in proceedings with large number of actions.

- Defendant fact sheets were ordered in 42% of proceedings covered by the study, also generally in proceedings with large numbers of actions.

- Short-form complaints were ordered in 34% of proceedings covered by the study, almost always in proceedings with more than 100 actions.

Background

For purposes of this report, plaintiff fact sheets (PFS) are standardized questionnaires that serve the same function as interrogatories and requests for production. As outlined in this report, PFS are often ordered in multidistrict litigation (MDL) proceedings with large numbers of plaintiffs. The term "plaintiff fact sheet" itself is commonly used in MDL proceedings and is generally used to distinguish PFS from other case management tools available to transferee judges.

PFS should not be confused with *Lone Pine* orders. *Lone Pine* orders are a case-management tool requiring production by the plaintiff of an expert affidavit identifying case-specific evidence of causation.[1] They differ from PFS in that PFS do not require submission of case-specific, sworn expert evidence. PFS and *Lone Pine* orders are not mutually exclusive—a *Lone Pine* order may issue at a later stage of an MDL proceeding, for example, to assist in evaluating remaining plaintiff claims after a settlement of other claims.[2] But they are distinct tools that serve different purposes in managing cases.

This report does not provide information about the use of *Lone Pine* orders. The PFS covered by this report were examined to determine whether the forms required plaintiffs to submit sworn statements or expert testimony as part of the PFS process. The general information required in the PFS included:

- health records (*e.g.*, general health, health issues related to the product, names of doctors, pharmacies, and denial of health insurance);
- personal identifying information (*e.g.*, names, addresses, education, and employment); and
- litigation history (*e.g.*, prior tort litigation, past bankruptcy, social security claims, and workers' compensation claims).

All the PFS required these types of information, and many of them included other categories of litigation-specific questions. They also frequently required medical or other types of releases. In addition, ten included questions regarding third-party litigation funding of plaintiff claims. None of the PFS covered in this report required expert testimony or sworn statements to be submitted as part of the PFS process. So, even though in some instances the line between a PFS order and a *Lone Pine* order may be indistinct, the orders discussed in this report do not represent such instances.

This report covers the incidence of PFS, plaintiff profile forms (PPF), defendant fact sheets (DFS), and short-form complaints (SFC) in a subset of MDL proceedings. The report also addresses the amendment of PFS and dismissal of cases for failure to submit substantially complete PFS.

[1] *See*, *e.g.*, *In re:* Digitek Prods. Liab. Litig., 264 F.R.D. 249, 255 (S.D.W. Va. 2010).
[2] *See In re:* Vioxx Prods. Liab. Litig., 388 Fed. Appx. 391, 397 (5th Cir. 2010).

Study Design

In its discussion of PFS, the Judicial Conference Advisory Committee on Rules of Civil Procedure (Committee) tends to focus on large MDL proceedings typically involving personal injury claims. For this reason, Federal Judicial Center (FJC) researchers collected data from proceedings centralized 2008–2018 (through October) categorized as products liability proceedings as well as two very large non-products liability proceedings (N=116).[3] The number of studied proceedings centralized each year of the study period varied from 6 to 17. The average size of these proceedings (for closed proceedings, at the closing of the proceeding; for total actions in open proceedings, as of October 2018) was 2,640 actions. The largest proceeding as of October 2018 was 40,533 actions; the smallest, 3 actions.[4] FJC researchers examined the case management orders in these proceedings for orders establishing a PFS process and related orders.

Plaintiff fact sheets and plaintiff profile forms

PFS were ordered in 66 (57%) of the 116 MDL proceedings examined. As anticipated, PFS were more commonly ordered in larger proceedings. PFS were ordered in 81% of proceedings with more than 100 actions (59 out of 73). The corresponding figure for proceedings with fewer than 100 actions was 16%. PFS were ordered in 87% of "mega" proceedings (more than 1,000 actions) (34 out of 39). (Moreover, PPF were ordered in 3 of the 5 mega proceedings without PFS orders.)

The average time from centralization date to the date of the PFS order was 241 days, or 8.0 months (N=65).[5] The median time was 187 days, or 6.1 months.

PPF were ordered in 21 proceedings (18% of all proceedings). As the term is generally used in orders, "plaintiff profile forms" are questionnaires, less extensive than PFS, ordered by the court. PPF appear to be less common than PFS. PPF were ordered in addition to PFS in 14 proceedings and in lieu of PFS in 7 proceedings. All PPF orders were in proceedings with more than 100 actions, and two-thirds of them (14, or 67%) were in mega proceedings.

Defendant fact sheets

DFS were ordered in 49 of the proceedings examined, 42%, with one proceeding planning a DFS for the future. DFS are questionnaires ordered by the court to collect information about plaintiffs that is in the defendant's possession or, in some instances, to collect information about defendants.

As with PFS, DFS were more commonly ordered in large proceedings. In proceedings with more than 100 actions (N=73), DFS were ordered in 47 proceedings, 64%. The corresponding figure

[3] *In re:* Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010, MDL No. 2179, and *In re:* E.I. Du Pont De Nemours & Co. C-8 Pers. Inj. Litig., MDL No. 2433.
[4] *In re:* Ethicon, Inc., Pelvic Repair Syst. Prods. Liab. Litig., MDL No. 2652, and *In re:* Saturn L-Series Timing Chain Prod. Liab. Litig., MDL No. 1920, respectively.
[5] One PFS did not have a docket entry.

for proceedings with fewer than 100 actions was 5%, with one fact sheet expected in the future. DFS were ordered in 72% of mega proceedings (28 out of 39).

The average time from centralization date to DFS order date was 315 days, or 10.5 months (N=49). The median time was 222 days, or 7.4 months. In many proceedings, one case management order directs the filing of both PFS and DFS.

Questionnaire development and amendment

The process by which PFS, PPF, and DFS are developed varies from proceeding to proceeding. Typically, however, a questionnaire is negotiated by the parties and then submitted to the court for its approval.

PFS were amended by a subsequent order in 21 proceedings (32% of proceedings with PFS). In 10 proceedings, PFS orders were amended a second time (15%). These counts do not include orders merely extending the deadline for the filing of PFS but involve changes to the PFS or related release forms.

DFS amendments were less common. DFS were amended by subsequent order in 11 of the 49 proceedings with DFS, 22%.

Dismissals of cases based on PFS

The Committee's interest in PFS is, in part, motivated by the role PFS may play in winnowing unsupported claims in large MDL proceedings. The potential screening functions of PFS are beyond the scope of this report. However, of the 66 proceedings with a PFS process, a majority (36, or 55%) included evidence (including show cause orders) of activity to dismiss cases when substantially complete PFS had not been filed.

There is no shortage of legal authority for dismissal of individual actions for failure to submit substantially complete PFS in a timely manner. Motions to dismiss actions for failing to submit completed PFS can rely, for example, on Federal Rule of Civil Procedure 41(b) (dismissal for failure to prosecute or comply with court order) or Federal Rule of Civil Procedure 37(b)(2) (dismissal for failure to comply with a discovery order). Circuit law determines the factors that a district court considers in deciding whether to dismiss in these circumstances, and the factual circumstances in the cases vary. But transferee courts have, at times, dismissed individual actions with prejudice for failure to comply with PFS obligations imposed by court order.[6]

[6] See, *e.g.*, *In re:* General Motors LLC Ignition Switch Litig., 2017 WL 9772106, at *1 (S.D.N.Y. June 16, 2017) ("[T]he Court finds that dismissal with prejudice is the appropriate sanction for Plaintiff's continued failure to submit PFSs as required by [court order]."); *In re:* Lipitor (Atorvastatin Calcium) Mktg., Sales Prac. and Prods. Liab. Litig., 2015 WL 12844447, at *2 (D.S.C. June 19, 2015) ("The information requested should be readily available to Plaintiffs and Plaintiffs bear the responsibility for their failure to adequately supply such information. Plaintiffs have failed to provide such information despite multiple warnings from the Court . . . .").

Short-form complaints

Short form complaints (SFC) are another case-management tool sometimes employed in large MDL proceedings in conjunction with PFS. Following the filing of a master complaint, SFC may be ordered for direct-file cases in the proceeding. SFC typically require party-identifying information, a statement that the short form complaint adopts and incorporates allegations from the master complaint, a statement of appropriate venue, a checklist of counts from the master complaint adopted by the plaintiff, specific case facts regarding injuries, a jury demand, and a prayer for relief.

SFC were ordered in 34% of proceedings (40). SFC were more commonly ordered in larger proceedings. In proceedings with more than 100 actions, SFC were ordered in 39 proceedings (53%). SFC were almost never ordered in proceedings with fewer than 100 actions. In mega proceedings, SFC were ordered in 25 proceedings (64%).

Table 1 shows how often PFS and SFC were ordered together for the proceedings in which information about both was available. PFS were ordered in a fair number of proceedings without a corresponding SFC, and in a plurality of proceedings, neither was ordered.

Table 1

		SFC		
		Yes	No	Total
PFS	Yes	35	29	64
	No	4	41	45
	Total	39	70	109

Information about both PFS and SFC was available for 70 proceedings with more than 100 actions (see Table 2). For these proceedings, PFS were ordered more than 80% of the time, and almost half of the time, the court ordered both PFS and SFC. To put this in slightly different terms, in proceedings with more than 100 actions, when courts ordered PFS, they ordered SFC 60% of the time.

Table 2

		SFC		
		Yes	No	Total
PFS	Yes	34	23	57
	No	4	9	13
	Total	38	32	70

Conclusion

In 116 products liability proceedings centralized between 2008 and October of 2018, PFS were ordered in 57% of all proceedings and in 87% of proceedings with more than 1,000 total actions. PFS are typically ordered within 8 months of centralization of the proceeding, requiring plaintiffs to submit information including medical history and medical and other releases. Information about third party litigation financing was required in 10 of the 66 PFS. DFS were required in 49 proceedings, always in conjunction with PFS or PPF. In 55% of proceedings in which PFS were ordered, there was some docket activity related to dismissal of cases for failure to submit substantially complete forms. SFC were typically ordered in large proceedings in conjunction with PFS.