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

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: December 6, 2017

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on November 7, 2017. Draft Minutes of this meeting are attached.

No items are submitted for action by this Report.

Part I of this Report summarizes progress in developing a proposal to improve the procedure for taking depositions of an organization under Rule 30(b)(6). No recommendation is advanced now, but the goal is to prepare a proposed amendment that can be submitted this spring with a recommendation to approve for publication.

Beyond the Rule 30(b)(6) proposal, the Civil Rules agenda lies at a mid-point. More potentially worthy projects have appeared than can be managed within the limits of Committee capacities. As reported last June, four possible subjects have been deferred, to be taken up for further work or abandonment when decisions have been made as to the three major undertakings described in this report.

The four deferred projects include the rules on demanding jury trial, both generally and in the specific context of actions removed from state court; lawyer participation in voir dire examination of prospective jurors; the mode of serving subpoenas under Civil Rule 45; and both narrowly focused and broad questions as to offers of judgment under Rule 68. Jury-trial demand rules have not been considered for many years, if indeed they have been examined at any time since 1938. The other topics have been considered—repeatedly in the case of Rule 68—without developing any clear sense of direction. The question whether Rule 38 should be amended to delete any requirement of a demand when any party is entitled to a jury trial may be the most novel and important of the four. Still, it has seemed wise to defer action for a while. The topic was suggested by two members of the Standing Committee, which is a reason to pay close attention. But it may be that the major reason to reconsider the judgment of 1938 is the dramatic decline in the incidence of jury trials. The Advisory Committee was not particularly enthusiastic when the subject was discussed at the April 2017 meeting. All competing demands on Committee resources must be considered before scheduling a close examination of this topic.

The three major potential undertakings are described in Part II. One would respond to the request of the Administrative Conference of the United States, firmly supported by the Social Security Administration, that specific rules be adopted to regulate district-court review under 42 U.S.C. § 405(g) of administrative decisions that deny individual claims for disability benefits. Another would undertake to develop specific rules to supplement the general Civil Rules in consolidated Multidistrict Litigation proceedings. The third would require mandatory initial disclosure of third-party litigation financing agreements. The Social Security review proposal will require close work, but it is finite in scope. If MDL rules are to be developed, the first steps will force the Committee to develop a deep understanding of the many different kinds of cases that may be consolidated and to learn about the procedures currently crafted by MDL judges to successfully manage proceedings. But at least MDL proceedings are well developed, and the basic framework is generally understood. Third-party litigation financing is different. It seems to be expanding rapidly. The submissions to the Committee and other sources hint that third-party financing agreements come in many forms, giving rise to various concerns. The initial submissions supporting disclosure are countered by submissions that deny all of the fact assertions offered by the proponents and question the proponents' real motives. Finally, Part II D provides a brief summary of the need to allocate Committee resources among these three potential subjects.

Part III offers brief notes on publication of newspaper notices in condemnation actions governed by Rule 71.1, a topic that remains open on the agenda, and a possible rule defining the role of a trial judge in encouraging settlement, a topic that has been removed from the agenda. Part IV concludes with reports on progress with the mandatory initial discovery and expedited procedure pilot projects, and an initial discovery protocol for individual Fair Labor Standards Act cases developed under the auspices of the Institute for the Advancement of the American Legal System.

I. RULE 30(b)(6)

The Civil Rules Advisory Committee formed its Rule 30(b)(6) Subcommittee in April 2016 in response to several submissions suggesting various changes to the rule. After considerable discussion, that Subcommittee identified 16 different issues that might warrant study as possible rule amendments, and initial sketches of amendments that might address those issues in various ways were discussed. Those sketches were included in the Standing Committee's agenda book for its January 2017 meeting.

Through early 2017, the Subcommittee pursued its discussions of these ideas and gradually narrowed its focus through a kind of triage that shortened the list of potential issues to six. At that point, it concluded that input from the bar about these possible amendment ideas would be helpful. Under date of May 1, 2017, it therefore invited written commentary about those issues. A copy of the invitation for comment was included in the Standing Committee agenda materials for its June 2017 meeting. Briefly, the issues on which written input was invited were:

(1) Inclusion of reference to Rule 30(b)(6) depositions in Rules 26(f) and 16

(2) Adding rule provisions concerning whether statements by a 30(b)(6) witness constitute judicial admissions

(3) Providing for supplementation of 30(b)(6) testimony

(4 Forbidding contention questions during 30(b)(6) depositions

(5) Adding a rule provision authorizing objections by the named organization to a 30(b)(6) notice

(6) Addressing the application of limits in the rules on the number of depositions and the length of depositions to 30(b)(6) depositions

In addition, representatives of the Subcommittee attended two events focused on the rule. On May 5, 2017, during the meeting of the membership of the Lawyers for Civil Justice in Washington, D.C., its representatives received comments in an "open mike" session about the rule. On July 21, 2017, during the annual convention of the American Association for Justice in Boston, there was a three-hour roundtable discussion with approximately 30 AAJ members with experience using the rule.

The May 1 invitation for comment asked that comments be submitted by August, and more than 100 comments were submitted. Many were very thoughtful and thorough. Summaries of the comments are included in this agenda book. The volume and tenor of these

comments shows that many in the bar care deeply about Rule 30(b)(6), and that many feel some practice under the rule has caused significant problems.

The comments also show that there are significant disagreements in the bar about what are the most serious problems. One set of concerns focuses on perceived over-reaching in use of the rule, sometimes leading to overbroad or overly numerous topics for interrogation, or strategic use of the judicial admission possibility. A competing set of concerns focuses on organizations' preparation of their witnesses; some say organizations too often evade their responsibilities and that enforcement of the duty to prepare is too lax.

At the same time, the input revealed another significant aspect of actual practice under the rule. Very often, after notice of deposition is given, the parties engage in constructive exchanges that produce improvements from the perspective of both the noticing party and the organization and facilitate an orderly inquiry. For one thing, the list of matters for examination could be modified or focused based on such exchanges. For another, candid exchanges may ensure that the witnesses designated are suitable in light of the topics to be discussed.

After receiving all this helpful input, the Subcommittee resumed its review of amendment ideas in a series of conference calls. In light of the rather strong objections from many who commented about various of the amendment ideas mentioned in the invitation for comment, it seemed that proceeding along many of those lines could readily produce controversy rather than improve practice.

At the same time, it seemed that prompting, or even requiring, communication about recurrent problem areas would hold the potential to improve practice. Initially, that idea focused on a change to Rule 16(c) calling for the court to consider including provision for 30(b)(6) depositions in a case management order or directing the parties to discuss the matter during their Rule 26(f) discovery planning conference. But there were significant concerns that in most cases the 26(f) conference would occur too soon for the parties to engage in meaningful discussion of problem areas bearing on 30(b)(6) depositions.

Another concern was that it seemed odd to highlight this particular form of discovery at the Rule 26(f) conference or scheduling order stage. True, the 2006 "E-Discovery" amendments did require parties to consider some specifics, such as form of production, at that point. But singling out one form of deposition from the entire panoply of other discovery tools did not seem warranted.

A third concern was that the full effect of the 2015 discovery amendments is difficult to gauge as yet. Certainly meaningful communication and a cooperative problem-solving approach could go far toward avoiding problems with 30(b)(6) depositions. And the concept of proportionality could be an antidote to over-reaching or overbroad lists of matters for interrogation. The unfolding experience under the 2015 amendments seemed to cut against proposing aggressive changes in Rule 30(b)(6) practice now.

With these concerns in mind, the Subcommittee returned to Rule 30(b)(6) itself, considering whether some requirement should be added to that rule mandating that the parties communicate about 30(b)(6) depositions when a party proposes to take such a deposition. That would be the time when the communication would be most important and effective. Putting such a provision right into Rule 30(b)(6) would be more direct than putting something into Rule 16 or Rule 26(f), and it would be right where the parties would look when considering 30(b)(6) depositions.

Accordingly, the Subcommittee brought the following revised rule sketch to the full Advisory Committee during its November 2017 meeting:

Rule 30. Depositions by Oral Examination

* * * * *

(b) Notice of the Deposition; Other Formal Requirements

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

* * * * *

As is clear from the brackets in the above sketch, the Subcommittee is in the ongoing process of evaluating how best to design a rule provision.

Discussion during the Advisory Committee's meeting is reflected in the minutes of that meeting, included in this agenda book. Several topics came up. One was that the rule sketch did not make it clear that there should be a bilateral obligation to confer (an obligation resting on the named organization also), although that seems important. Another was that the named organization should be expected to discuss the identity of the person to be offered as its designee

as well as the matters for examination. Yet another was that keeping "attempt to confer" in the rule might introduce difficulties even though a similar provision exists in Rule 37 with regard to conferences to avoid the making of a motion to compel. In addition, it was suggested that if the rule explicitly requires the named organization to confer about these matters, it would make sense to locate that requirement after the sentence in the current rule about the obligation of the organization to designate a witness to testify on its behalf.

There was also discussion of the question whether some sort of change to Rule 26(f) would be a helpful idea. That question remained unresolved pending further work by the Subcommittee. But it was agreed that the Rule 16 approach no longer looked promising, and that it would not be pursued further.

Since the Advisory Committee meeting, the Subcommittee has resumed work and held another conference call about developing a rule proposal that seems most promising. Initial inclinations regarding the bracketed phrases in the draft presented to the Advisory Committee were (1) to retain "or promptly after," (2) to use "must" rather than "should," and (3) not to include "or attempt to confer." Additional issues under discussion include providing by rule that the named organization must confer in good faith, and adding the identity of the person or persons to testify to the list in the rule of topics for discussion.

The question whether to propose a change to Rule 26(f) remains under discussion, and several possible versions of such a change have been proposed. Whether such an addition would be useful remains uncertain. One possibility is that the Subcommittee might recommend publication of a possible Rule 26(f) amendment with the caveat that the Committee is publishing this possibility to obtain public comment about it, perhaps saying that unless the commentary provides strong reasons for including this change the Committee's initial attitude is that it would not be useful.

The Subcommittee has already scheduled a further conference call for January 2018 and presently contemplates being in a position at the time of the Advisory Committee's Spring meeting to recommend to the Advisory Committee a preliminary draft of an amendment to Rule 30(b)(6) for presentation to the Standing Committee and possible publication in August 2018.

II. THREE MAJOR OPPORTUNITIES

A. Social Security Disability Review

The Administrative Conference of the United States, working from a massive report prepared by Professors Jonah Gelbach and David Marcus, has recommended that explicit rules be developed to establish a uniform national procedure for district-court actions under 42 U.S.C. § 405(g) to review final administrative decisions that deny an individual request for disability benefits. Discussion in the Standing Committee last June led to a preliminary determination that any new rules probably should be in the Civil Rules rather than in a sixth stand-alone set of rules. Further study was assigned to the Civil Rules Committee, which has decided that its initial work should remain focused on Social Security review cases, not on all cases involving review on an administrative record.

Work began with a conference call for members of an informal subcommittee. They agreed that a good first step would be to hear from government representatives about the need for new national rules, and from representatives of claimants. The meeting was held at the Administrative Office on Monday, November 6, the day before the Civil Rules Committee meeting. Participants included the Executive Director-Acting Chief of the Administrative Conference; the General Counsel of the Social Security Administration; the Counsel to the Associate Attorney General; the Deputy Director of Government Affairs of the National Organization of Social Security Claimants' Representatives; and a representative of the American Association for Justice. The meeting began with formal statements, much as in an official hearing, and developed through open give-and-take discussion that substantially focused and seemed to narrow the issues.

The value of uniform national rules was strongly supported by the Administrative Conference and the Social Security Administration. The Department of Justice also offered some support. The claimants' representatives were somewhat more cautious, warning that while good national rules would be a positive thing, bad national rules would not.

The participants all agreed that the purpose of seeking uniform national rules is to alleviate the inefficiencies imposed by the great differences among the 94 districts in the procedures used for § 405(g) review cases. There is little reason to anticipate that uniform national procedures will have any direct effect on other issues that confront the system, including different substantive law adopted in different circuits; an average rate of remands to the agency of 45% that includes remands requested by government counsel in 15% of all review cases; wide differences in remand rates among different districts, with surprisingly close conformity in remand rates for judges within any single district; and lengthy delays in processing individual claims in a heavily burdened administrative system.

The inefficiencies imposed by district-level differences in review procedures are in large part a function of the administrative structure. The Social Security Administration is organized

by regions. Most of the delay is in the administrative process it operates. It does not have the capacity to represent itself directly in subsequent review proceedings; official representation is provided by United States Attorneys. Most of the substantive work on review, however, is done by attorneys in the Office of General Counsel. These attorneys commonly practice in more than one district, and may appear in several. They have to bear heavy case loads that severely limit the amount of time that can be devoted to any single case. Learning and relearning the procedure of each district eats up some of the time available for the case. Similar burdens may fall on claimants' representatives. Some claimants' lawyers maintain regional or national practices, in part because high volume is an important element in supporting a specialized practice.

The Social Security Administration presented a set of draft rules to illustrate the matters that might be brought into uniform national rules. These drafts covered many matters, including detailed rules for the content and length of briefs, motions for attorney fees, and the like.

Discussion tended toward the conclusion that the most important goal is to establish a firm understanding that § 405(g) review cases, although civil actions, resemble appeals. The action, on this view, should be initiated by a complaint that is closely akin to a notice of appeal under the Appellate Rules. The response should be either the administrative record or a motion to dismiss (as for untimeliness or lack of a final administrative decision). The actual issues in contention should be framed by the claimant's initial brief, the Administration's responsive brief, and a reply brief for the claimant. Beyond this point, formal service on the government under Civil Rule 4(i) generates inefficiencies for everyone concerned. The wish is for a rule that calls for an electronic notice of filing sent directly by the district court's CM/ECF system to the Social Security Administration. Some districts are beginning to experiment with local rules that move toward this mode of service even now.

The question whether it is consistent with § 405(g) to provide for a limited complaint and for an answer that does no more than file the administrative record was discussed. The initial conclusion is that there is no real risk of inconsistency, and no corresponding fear that such rules would supersede the statute. Section 405(g) provides for review by a "civil action." Rule 8 now defines a complaint in a civil action. It is equally within the Enabling Act to provide for a different kind of complaint; endless possibilities for revising Rule 8 have been discussed in recent years. Rule 8 also defines what is an answer. Section 405(g) provides that the administrative record should be filed as "part of" the answer. It is not inconsistent with this to limit the answer to filing the administrative record, to be followed by a somewhat different process of defining and presenting the issues for review.

The proposal that the issues be developed by the briefs found strong support. Some room may remain to explore the possibility that briefing can be made more efficient by some means of pleadings-like initial statements. A claimant might find some advantage in knowing, before writing the first brief, that some issues will not be contested. It is not uncommon, for instance, for an administrative decision to be inconsistent with governing law in the circuit where review is had, either as a matter of oversight or as a matter of deliberate nonacquiescence in the pursuit

of the uniform national substantive policies the Social Security Administration thinks right. A claimant need not brief such a point at length if the Administration recognizes the inconsistency —indeed a clear focus on the issue may lead the Administration to request a voluntary remand. But if that possibility is put aside, it will remain for the rules to address the nature and sequencing of the briefs.

Initial discussion suggested that it may not be important to freeze into national rules such matters as the statement of facts in the claimant's brief, responses in the Administration brief, page limits, times for filing, and the like. These matters still should be explored further.

Fitting the new rules into the body of the Civil Rules also remains an open topic. The discussion was inconclusive, but it seemed to be recognized that there may be legitimate occasions for discovery incident to a proceeding that ordinarily cannot look outside the administrative record, apart from remanding under § 405(g) to develop the record further. Greater uncertainty was expressed as to the suggestion that new rules should explicitly prohibit class actions brought under § 405(g). Examples of class actions were cited, but it was unclear whether they relied on § 405(g) jurisdiction or some other ground of jurisdiction. The potential role for a class action would be to challenge rules or practices common to the individual review and a class of other claimants.

Transsubstantivity presents another set of questions. District courts encounter review on an administrative record in other settings, not only in Social Security disability cases. A transsubtantive rule for all proceedings for review on an administrative record is an open possibility. And substance-specific rules present familiar dangers of misunderstanding a specific context, seeming to favor one set of interests over another, and a need to maintain current knowledge of substantive developments (including statutory amendments) that may call for rule amendments. But there are persuasive reasons to focus on Social Security review.

One reason is that the needs of Social Security review proceedings are likely to be distinctive from other review proceedings, which are quite likely to be distinctive from one another as well. Cases come to the district courts from administrative proceedings in Social Security cases that labor under severe constraints. Administrative law judges, the central actors in the adjudication process once state agencies have concluded initial disposition of applications, are charged with deciding 500 to 700 cases a year. Appeal proceedings do not enjoy much time for consideration and decision. And, as compared to the rest of the entire universe of administrative review in the district courts, there are great numbers of Social Security review proceedings. Annual new case loads run from 17,000 to 18,000. That is enough to provide 20 or so cases for every district judge and senior district judge. Rules for this single subject can be developed with greater confidence than general rules could be, and would respond to distinctive needs.

If this task is taken up, it will be important to coordinate with the Appellate Rules Committee. The appellate nature of the district court's review obligations has a close analogy to

direct review of administrative agencies under other statutes and the Appellate Rules. Coordination will be pursued when work has advanced to a point that makes it useful.

A formal Subcommittee has been appointed to carry forward the work on Social Security review cases. Much work will remain to be done if the decision is to pursue the recommendation of new rules. It is not likely that anything will be ready for recommendation this spring. A progress report is the most that can be anticipated then.

B. Rules for MDL Proceedings

Three proposals have suggested that new rules are required for actions transferred for "coordinated or consolidated pretrial proceedings" under 28 U.S.C. § 1407. Two of them suggest specific amendments of present Civil Rules. One is quite different, suggesting that five judges should be assigned for further proceedings after pretrial discovery has brought a proceeding involving more than 900 cases to the brink of bellwether trials.

MDL proceedings account for a large share of all individual actions in the federal courts. There is common agreement on that. The opportunities for efficiency in pretrial proceedings, particularly discovery, are apparent. Beyond that, it has become common to reach final disposition of hundreds or even thousands of cases without remanding for trial in the courts where they were filed. It also has become common to suggest that a consolidated proceeding has failed if it concludes by remanding the constituent cases for trial.

Sound procedures are important when the stakes are so high. A common theme of the requests for new rules is that many MDL proceedings are managed outside the Civil Rules. In the eyes of some observers, "there are no rules." But those who support the present system argue that flexibility is required by the differing circumstances of MDL proceedings that come in different sizes and that cross many areas of substantive law, state and federal. Flexibility in administering the rules in the spirit of Rule 1 is important; the question is whether the lessons of successfully flexible administration can be captured and expressed in amended rules. A related question is whether flexibility leads not only to creativity, but to unbridled creativity that at times impedes sound outcomes.

These questions have caught the attention of Congress. H.R. 985, which was passed in the House in March 2017, includes several provisions that would amend § 1407 along lines similar to several of the suggestions made in the proposals for new Civil Rules.

Many parts of the current proposals seem to focus on mass tort proceedings that involve large numbers of individual plaintiffs whose personal claims involve significant injuries and damages. Many of the specific proposals for rule amendments draw from the belief that a troubling number of the individual plaintiffs in these MDL proceedings have no claim whatever, indeed often no connection to the events that give rise to the litigation. Tales are told of proceedings in which twenty, thirty, even forty percent of the consolidated plaintiffs are "zeroed

out" when the time comes to make individual awards. The plea is for rules that will weed out these bogus plaintiffs early in the proceeding, a task that is not accomplished by motions to dismiss or for summary judgment.

The most modest suggestions for rules that would support early disposition of frivolous claims address pleading. These rules would recognize the separateness of "master complaints" from "individual complaints." Each individual plaintiff would be required to file a complaint that meets standards of particularized pleading parallel to the Rule 9(b) tests for claims of fraud or mistake. And each individual plaintiff would be required to pay a filing fee, without opportunity for dispensation by the court. These suggestions correspond, at least in a way, to the laments that Rule 12(b)(6) motions to dismiss for failure to state a claim are not sufficient to the needs of MDL proceedings.

More ambitious suggestions appear to respond to the concern that motions for summary judgment also are inadequate. One of these suggestions would require a plaintiff to respond to a new Rule 12(b)(8) motion to dismiss by providing "meaningful evidence of a valid claim." The court would be required to rule on the motion within a defined period, perhaps 90 days; the plaintiff would be dismissed with prejudice if meaningful evidence were not provided within 30 days of an initial finding that there is none. A related suggestion would require initial disclosure by each plaintiff of "significant evidentiary support for his or her alleged injury and for a connection between that injury and the defendant's conduct or product." Implementation of these procedures would be difficult in large MDL proceedings, and likely impossible in those that involve thousands of plaintiffs and joinder of new claimants on a daily basis.

Another suggestion addressed to weeding out false plaintiffs is that initial disclosure should reveal "any third-party claim aggregator, lead generator, or related business * * * who assisted in any way in identifying any potential plaintiffs * * *." The theory is that those who get paid for identifying potential plaintiffs do not pay sufficient attention to the bona fides of the potential claims.

These proposals aimed at early dismissal of claims that lack any colorable foundation rest on the belief that early dismissal is important. This belief is tested by observations that, in the types of cases where this is a problem, the parties know that a substantial fraction of the claims are unfounded. They manage the litigation and negotiations for settlement with this in mind. If a resolution is reached, it likely will be on terms that include claims processes that dismiss the unfounded claims. The proponents counter that the complexity of the proceedings grows as the number of plaintiffs increases; that numbers raise the stakes and pressures; that settlement requires a realistic understanding of what the overall proceeding is worth; and that publicly traded companies face serious consequences when loss of a single bellwether trial requires reporting the loss and the pendency of 15,000 similar pending claims.

Another suggestion simply incorporates the proposal for disclosure of third-party litigation financing discussed in Part II C.

A different set of suggestions address bellwether trials. These suggestions seem to reflect a perception that the court may press parties to agree to a bellwether trial in the consolidated proceedings even when the case was not, or could not have been, filed in that court as an initial matter. This concern is triggered in part by what are called "Lexecon waivers" that require a party to waive remand to the court where its action was filed and also to waive objections to "jurisdiction." These suggestions have not yet been fleshed out in sufficient detail to support initial understanding and appraisal.

A final set of suggestions would expand the opportunities for interlocutory appeals from pretrial rulings. These suggestions do no more than identify categories of rulings that are likely candidates for appeal. The details of implementation have not been refined, particularly in choosing between appeal as a matter of right or some measure of discretion in the MDL court, the court of appeals, or both. The specific categories of orders identified in the proposals include *Daubert* issues, preemption motions, decisions to proceed with bellwether trials, judgments in bellwether trials, and "any ruling that the FRCP do not apply to the proceedings." (The comparable provision in H.R. 985 directs that the circuit court for the MDL court "shall permit an appeal from any order" "provided that an immediate appeal of the order may materially advance the ultimate termination of one or more civil actions in the proceeding." This blend of mandate and discretion presents obvious challenges.) Much remains to be learned about these suggestions, and the reasons for finding inadequate the many existing opportunities for review under elaborated concepts of finality—most obviously the "collateral order" doctrine; partial final judgment under Rule 54(b); interlocutory appeal by permission under § 1292(b); and extraordinary writ. The values of appellate guidance are plain, for the MDL judge as well as the parties. The delay that can arise from even a single appeal, on the other hand, can be a serious obstacle to effective progress in the proceedings.

Discussion of these issues supports the conclusion that it is important to learn more, likely much more, about the underlying phenomena and viewpoints. Most of the suggestions and discussion have been provided by those who represent defendants. They are seriously concerned about many aspects of MDL proceedings. But little has been heard from those who represent plaintiffs; it is common to observe that they seem content with the present state of affairs. Nor has the wisdom and experience of the Judicial Panel on Multidistrict Litigation or of MDL judges been brought to bear. The Panel makes many resources available to MDL judges, providing opportunities for uniformity that may accomplish as much uniformity as is desirable.

A Subcommittee has been appointed to launch the search for more information about MDL procedures. The task will not be easy. At least six months, and more likely a year, will be required to determine whether there is an opportunity to improve MDL practice by amending current rules or adopting new rules. Coordination with the Judicial Panel on Multidistrict Litigation will be an important part of this undertaking. Many other resources must be tapped. If it appears that something useful might be done, developing and refining specific rules proposals will likely require more than the three-year cycle that suffices for less ambitious rulemaking.

C. Disclosing Third-Party Litigation Financing Agreements

The U.S. Chamber Institute for Legal Reform and 29 other organizations have resubmitted a proposal to add a new Rule 26(a)(1)(A)(v) that would require automatic disclosure of

> any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.

This proposal was considered in 2014, and again in 2016. Each time it was carried forward for further consideration. The sense then was that third-party litigation financing is both growing and evolving, and that it takes many forms with various sorts of agreements. The information provided by different sources often presents direct contradictions about whether there are general practices, what the practices may be, and what variations may occur or emerge. Work toward possible rules must begin, if at all, by undertaking a careful quest for information that may be hard to come by. Neither financing firms nor lawyers nor litigants may be eager to reveal the full terms of their agreements. None of them may even be able, much less willing, to describe the full impact of their agreements on the conduct of lenders, lawyers, and parties in third-party funded litigation. The topic may be no more ripe for further work now than it was in 2014 or 2016.

One aspect of the proposal is clear. The proponents steadfastly maintain that it is not designed to regulate third-party lending in any way. All it would require is disclosure of the financing agreements. The benefits to be gained by disclosure are less clear. One specific argument is that a court that knows the financing terms can structure settlement proceedings in ways that protect against undue influence by the lender. A more general argument is that some financing agreements may be illegal under some residuum of state laws prohibiting champerty, maintenance, and barratry—disclosure will enable the adversary to win protection through vaguely anticipated court remedies. These arguments seem to depend on disclosure of the agreement. Other arguments might be satisfied by disclosure that reveals only the fact of third-party financing, and the identity of the financer.

These general arguments are met by counter-arguments that the professed motives camouflage different motives. One purpose may be to gain access to agreements that can be used in seeking direct regulation of third-party financing practices. Another may be to gain strategic advantage in particular litigation.

Questions about regulation, whether through musty common-law concepts that are likely to be substantially superseded by other forms of regulation or through new forms of direct regulation, point to the broad questions about the value of third-party financing. Proponents of the practice advance a simple argument. Litigation in many fields is becoming ever more costly.

The risks that inevitably attend adversary litigation further deter claimants who have strong claims. On this view, third-party financing is necessary to support litigation that is important both to provide remedies for private wrongs and to promote the public interest.

Those who champion disclosure argue from perceived consequences of third-party financing. As summarized in the 2017 proposal, "third-party funding transfers control from a party's attorney to the funder, augments costs and delay, interferes with proportional discovery, impedes prompt and reasonable settlements, entails violations of confidentiality and work-product protection, creates incentives for unethical conduct by counsel, deprives judges of information needed for recusal, and is a particular threat to adequate representation of a plaintiff class." No specific examples are provided.

Third-party funders meet these arguments by direct denial. None of them, they say, are true. The arguments and responses present conflicting versions of fact that cannot be resolved with the information now at hand.

The mandatory initial disclosure of liability insurance coverage under Rule 26(a)(1)(A)(iv) is invoked to support disclosure of third-party financing agreements. This disclosure requirement grew out of 1970 amendments that resolved disagreements among the lower courts in favor of allowing discovery. As polished by the Style Project, disclosure is now required of "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action * * *." The 1970 Committee Note recognizes that insurance coverage ordinarily is not admissible in evidence, and that knowing about coverage will not enable an adversary to find admissible evidence. Discovery was allowed to enable all parties to make the same realistic choices about conducting litigation and to alter the balance of bargaining for settlement. The outcome might be to advance settlement, or instead to impede settlement. The analogy to third-party financing agreements is in part clear. Disclosure of the agreement is not likely to lead to evidence admissible on the merits. But it can affect the parties' strategies. The question posed by the analogy is whether the social and strategic roles of third-party financing are so similar to the social and strategic roles of liability insurance as to resolve the debate.

The analogy to liability insurance may be useful in another way. Disclosure is carefully limited to an agreement with "an insurance business." Other forms of indemnification agreements are not covered. Nor is discovery generally allowed into a defendant's financial position, even though both indemnification agreements and overall resources may have impacts similar to, or even exceeding, the impact of liability insurance. The question for third-party financing disclosure is how to define the kinds of agreements that must be disclosed. A plaintiff, for example, may borrow the costs of litigating from friends and family on terms that, expressly or implicitly, call for repayment only if the litigation is successful. Health insurers routinely have rights of subrogation that depend on the outcome of individual tort actions. Joint defense agreements might allocate initial contributions according to rough guesses of relative exposure, with final allocations that depend on the outcome of the action. Some forms of indemnification

agreements might involve provisions that could be caught up in a disclosure rule without any clear advance judgment whether disclosure should be required.

A first step in attempting to craft a rule, then, would be to learn enough about various arrangements that may involve rights to repayment contingent upon the outcome of litigation. One preliminary possibility, needing refinement, would be to carry out the analogy to insurance disclosure to invoke disclosure only of agreements with an enterprise carrying on the business of investing in litigation.

Detailed arguments about the consequences of third-party funding move beyond these preliminary issues to focus on actual impact in practice. As already noted, fierce debates rage around the likely consequences. No more than brief descriptions are needed to provide a working picture of the debates.

The proponents of disclosure argue that third-party financing arrangements transfer a significant measure of control away from the financed party's lawyer to the financer. The effects are said to create conflicts of interest and to diminish the lawyer's exercise of independent judgment in representing the client. A more specific version of the control argument is that financers exert undue influence on settlement, at times to press for inadequate early settlements that ensure repayment of the financer's share and at other times to impede reasonable settlements in the hope that a greater profit can be gained under the terms of the agreement by holding out for a more favorable settlement or for trial. Special concerns are expressed about the impact of third-party funding on the adequacy of representation provided by counsel for a plaintiff class. Counter arguments are readily found. Financers argue that far from control, their expert advice is willingly sought by their clients to improve the conduct of the litigation and to assess the value of settlement offers.

Different concerns are expressed about the disclosure of confidential information and litigation strategy in the course of arranging third-party financing. One consequence might be to enhance the shift of control to the financer. Another might be that a court might conclude that confidentiality, privilege, and work-product protection are somehow waived by treating the third-party financer as outside the scope of protected disclosures. (The proposals do not extend to exploration of agreements with potential third-party financers that do not culminate in a financing agreement. The effect of disclosures in that setting does not seem to be impacted by the proposed disclosure rule.)

Another concern is that disclosure is needed to provide information to enable the assigned judge to recuse when there is a direct or indirect connection to the financer. Those who resist disclosure respond that judges should not, and do not, invest in enterprises that finance litigation, and that disclosure is not justified by the low risk of unknown connections of friends or family members with a specific litigation financer. A somewhat similar concern is that disclosure is needed to enable counsel for the opposing party to know whether it has a relationship with a financer that generates a conflict for counsel.

Third-party financing also is attacked on the theory that it supports frivolous litigation. Not surprisingly, financers counter that they have no interest in investing in anything other than litigation with strong prospects of success.

A distinctive argument against disclosure is that it will distort decisions about the proportionality of discovery requests. The Rule 26(b)(1) factors of proportionality include "the parties' resources." The fear is that knowledge of third-party financing will lead a court to approve discovery requests that otherwise would be rejected as disproportional, increasing costs and delay.

These various arguments lead to further concerns. Fears about confidentiality, conflicts of interest, vigorous advocacy, party control of settlement, and even fee-splitting resonate to rules of professional responsibility that are traditionally and peculiarly a matter of state regulation. Some states have already undertaken specific regulation of third-party financing. Others may follow, recognizing the apparent desuetude of earlier concepts of champerty, maintenance, and barratry. It is to be expected that many states will be jealous of their regulatory interests.

These preliminary debates demonstrate a complicated and politically charged interplay between rules of procedure, rules of professional responsibility, and substantive regulation of third-party financing. The stakes are high and important. Much more must be learned before determining whether a useful role can be found for new procedures, and particularly for determining whether disclosure without more can play a useful role. One caution has been that it may be counterproductive to require disclosure of information that raises potentially troubling questions that cannot be addressed within the framework of existing law.

The Committee concluded that these questions can be delegated, at least initially, to the Subcommittee appointed to develop information about the MDL proposals. One of the MDL proposals explicitly incorporates the proposal for disclosure of third-party financing agreements. There is reason to believe that MDL litigation is one of the prominent occasions for third-party funding. This Subcommittee's work will prepare the way for a determination whether third-party financing disclosure should be pursued.

D. Summary

The three subjects described in this Part II are each important. Each requires deep familiarity with complex problems. Attempting to develop specific proposals in each area along simultaneous tracks may well prove more than the process can readily bear, in the Civil Rules Committee, Standing Committee, and public comment stages. Making choices, however, must await development of further information and thought.

It well may be that the Social Security review task is the least complicated. It presents a finite subject. Substantial preparatory work has been done by and for the Administrative

Conference and by the Social Security Administration. Helpful guidance may yet emerge from closer study of actual practice in different districts.

The MDL questions are complex. The prospects that uniform national rules can be developed to enhance management of MDL cases without unduly confining the need for flexibility in such procedures are uncertain. The task of learning enough to assess the balance between potential benefits and harms is formidable. The questions are worth further work now, but it remains uncertain whether initial inquiries will provide a foundation that justifies the hard work of developing specific proposals. But at least there is a solid foundation of long and widespread experience with MDL litigation to build on.

Third-party litigation financing is like the MDL questions in its complexity. But it is quite different in terms of present experience and understanding. Courts have no more than episodic encounters with the terms of actual financing arrangements, nor even a reliable sense of just how common these arrangements are or will become. The questions presented, whether in terms of a specific disclosure proposal or more generally, are new and growing. Additional information and perspectives will be welcome.

III. OTHER RULE PROPOSALS

A. Publication of Notice in Condemnation Actions

This "mailbox" proposal would amend Rule 71.1(d)(3)(B)(i) to discard the preference for publishing notice of a condemnation action in a newspaper published in the county where the property is located. The suggestion will be carried forward for further work.

The complaint in a condemnation action is filed with the court. Defendants are served with a notice that provides the essential details of the action, not with the complaint. Service is to be made under Rule 4 in the same way as service of a summons and complaint, if the defendant has a known address and resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States. If the defendant has a known address outside these limits for Rule 4 service, service is made by publishing the notice and, if the defendant has a known address, mailing notice to the defendant. Publication is to be

> in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located.

The proposal, drawing from examples in the Uniform Probate Code and in New Mexico rules, is to allow publication in a newspaper with general circulation where the property is located even when the newspaper is not published in the county. The suggestion is that a newspaper of general circulation may provide a better chance that the defendant will actually notice the notice. In addition, the amendment would reduce the tension that arises when the

incorporation of state modes of service in Rule 4(e)(1) and (h)(1) allows service by publication in a newspaper of general circulation.

The central question is pragmatic. It may well be that a newspaper published in the county has severely limited distribution, while other newspapers of general circulation published elsewhere have broader distribution. That observation might in turn invite speculation about requiring publication in the newspaper with the broadest general circulation in the county, a likely thankless and at times perilous prospect. More to the point, the empirical question remains: are those people who are concerned about published legal notices more likely to look to a local newspaper than to others published elsewhere but more broadly circulated? It may prove difficult to find a confident answer to that question. The uncertainty provides a reason to stick with the rule as it is. It may be significant that the question has not emerged until this one suggestion was made. On the other hand, the Department of Justice has not objected to the proposal. The Department surely has broader collective experience with condemnation proceedings than any other federal-court litigant.

This narrow question can be addressed without asking the kinds of questions that have repeatedly been put aside in addressing the migration to electronic communication. It is easy to debate what counts as a newspaper, how to locate the place of publication, and whether widespread access to the Internet establishes general circulation of any newspaper that is published in electronic form, at least so long as the newspaper also has a print edition.

As noted, the question will be retained on the docket. But it faces an uncertain future unless reliable information can be found on the habits of those who actually look for published legal notices.

B. The Role of Judges in Settlement

This question is raised by a proposal to amend Rule 16 advanced in a thoroughly researched and argued article: Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement,* 78 Ohio St.L.J. 73 (2017). The core of the proposal is that a judge assigned to manage and adjudicate a case should not also serve as a "settlement neutral." The proposed rule is somewhat more complicated, however, because it would allow the assigned judge also to act as a settlement neutral if all parties give consent through a procedure that guarantees confidentiality for any party that does not consent, and further would allow the judge to urge the parties to consider settlement and available ADR options.

The proper role of the judge in settlement is a familiar problem. Both the ABA Model Code of Judicial Conduct and the Code of Conduct for United States Judges, having considered the question, provide only that the judge should not coerce a party to surrender the right to judicial decision. Federal Judicial Center programs for new judges and on case management regularly address these questions. Judges who participate in these programs take a variety of approaches. Many abstain from any involvement with settlement, and avoid even any

encouragement to settle or seek assistance from others in settling. Others, however, recognizing the valuable contributions a judge may make—contributions that Professor Deason recognizes—take more active roles. The temptation to assist in settlement grows when the parties ask the judge to help on the eve of trial or after trial has begun. By that point the judge knows the case and the parties' positions in great detail.

Much of the discussion was neatly captured in the observation that "Judges have different temperaments and skill sets." Although there are strong arguments on all sides, the arguments have been explored repeatedly and thoroughly. The Committee decided to remove this matter from the agenda. A Civil Rule may not be the best way to address this essentially ethical question.

IV.

A. Pilot Projects

The two pilot projects developed to provide empirical exploration of opportunities to advance civil practice, whether through rule amendments or through emulation, are well known. Participation by willing courts is being actively pursued. At present, two courts have enlisted in the Mandatory Initial Discovery project. No courts have yet enlisted in the Expedited Procedures project.

The Mandatory Initial Discovery project displaces the limited initial disclosures required by Rule 26(a)(1) by requiring early responses to the discovery requests framed by the project. A party must provide the requested information, just as with party-initiated discovery, even though the information is unfavorable to the party's position and would not be used by the party in the litigation. The project became effective in the District of Arizona by general order on May 1, 2017. Most judges in the Northern District of Illinois adopted it, taking effect on June 1.

Initial experience in Arizona reflects the fact that many of the pilot project terms have been taken from the broad initial disclosure rules that Arizona has had in state courts for many years and that were recently expanded. Still, early experience showed some problems that were addressed by modifying the general order in September. "Almost all Rule 26(f) reports report compliance." The court has worked to make sure that the CM/ECF system will track initial discovery events, supporting Federal Judicial Center research that will test the experience.

The project also is progressing smoothly in Illinois, in part because the court is able to draw freely on the experience and adjustments made in Arizona. There have been few problems. One potential source of difficulty could be that the time limits for responding to the initial discovery requests are impracticable in cases that involve massive amounts of information. Judges are aware of this problem, and accommodate the need for more time when it arises. Guidance is available for lawyers who, unlike Arizona lawyers, are not accustomed to initial discovery of this scope, and for judges who, like the lawyers, are new to this mode of discovery.

An important test of mandatory initial discovery likely will come at summary judgment and at trial. There is a risk that if judges allow use of evidence that was not disclosed, lawyers will shirk the obligations imposed by the project. Data on this development will be valuable.

The experience in Arizona and Illinois may ease the way in recruiting additional districts to provide a broader foundation for empirical research. They have ironed out initial problems, and can provide enthusiastic endorsements. Experience, however, shows that significant obstacles remain. Initial consideration in other courts has shown interest and receptivity. But when the matter is considered by a full district bench, "issues arise." Difficulties are found in work loads, vacancies and local culture.

The Expedited Procedures pilot is different in an important way. It is based on case-management practices that have been widely adopted in many courts and that have proved successful. It sets initial deadlines for specific steps in a litigation, such as the close of all discovery, but proponents of the project are willing to enlist districts that insist on more flexibility in the deadlines and that cannot ensure participation by all judges in the district. Vigorous efforts are being made to enlist at least a few districts. But here, too, work loads, vacancies, and local culture have presented obstacles.

B. FLSA Discovery Protocol

The Institute for the Advancement of the American Legal System has adopted Initial Discovery Protocols for Fair Labor Standards Act Cases Not Pleaded as Collective Actions. The protocols deserve active endorsement, adoption, and encouragement.

These protocols follow the model of the earlier and successful Initial Discovery Protocols for Employment Cases Alleging Adverse Action. The employment case protocols have been adopted by many federal judges, and have proved successful. The FLSA protocols were developed under IAALS auspices by teams led by the same plaintiff and defense lawyers as developed the employment case protocols, Joseph Garrison and Chris Kitchel. The team efforts were guided by the same judges, Lee Rosenthal and John Koeltl. The result matches the high standard achieved by the employment case protocols.

Discussion recognized that committees acting within the Rules Enabling Act framework are not authorized to offer formal endorsement of any work that does not proceed through the full Enabling Act process to emerge as formal court rules. But, following the path taken with the employment case protocols, it is possible for judges involved in the Enabling Act committees to consider adopting the FLSA protocols for their own dockets, to encourage other judges on their courts to follow that lead, and to take other steps to promote the protocols for wider adoption. The protocols deserve those kinds of support.

TAB 4B

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SUMMARY OF 2017 30(b)(6) COMMENTS

On May 1, 2017, the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules invited comments on possible changes to that rule. This summary of those comments identifies comments by the name of the commenter and the designation assigned to the comment when it was posted in the Archived Rules Suggestions listing maintained by the Rules Committee Support Office. This summary is limited to comments submitted after May 1. Important submissions were received before that date, including no. 16-CV-K, submitted by the Lawyers for Civil Justice on Dec. 21, 2016, no. 17-CV-I, submitted by the National Employment Lawyers Association on March 20, 2017, and no. 17-CV-J, submitted by the American College of Trial Lawyers on March 28, 2017 (and incorporated by reference in its submission in July (17-CV-DDD)).

For simplicity's sake, the identification in this summary will be limited to the letters assigned to the comment. All those designations were preceded by 17-CV-, and it seemed unnecessary to repeat that each time.

The comments are presented in a topical manner, addressing the following topics:

Overall
Inclusion in Rules 26(f) and 16
Judicial admissions
Supplementation
Forbidding contention questions
Adding a provision for objections
Addressing the application of limits in the rules on number of depositions and length of depositions
Other matters

Overall

Nancy Reynolds (L): I have defended numerous 30(b)(6) depositions. These depositions should carry the status of any other deposition except for the designation in advance of the areas for inquiry and the duty of the deponent to prepare to answer questions about the designated area.

Timothy Patenode (M): Rule 30(b)(6) and its local state equivalent has been a pet peeve of mine for years. I saw a news report on the committee's work and thought I would comment. The origin of the rule was to provide an antidote to "bandying," but the actual practice has moved far beyond that. No advocate awaits bandying to take a 30(b)(6) deposition. I have received notices at the outset of oral discovery that list, as topics, almost every element and salient factual point in the case. "The rule is effectively used to force the corporation to marshall its evidence on those topics." I laud the proposals to make clear that testimony does not constitute a judicial admission and to foreclose contention questions and allow supplementation.

Craig Drummond (R): I oppose the proposed changes. They appear to be designed to protect corporate defendants, all to the detriment of the individual litigant. An individual is bound by what he says in a deposition. Through the great legal creation of the 30(b)(6) deposition, so is a corporation.

Jonathan Harling (S): These amendments are ill-advised and will ultimately hinder the judicial system. Trials are searches for the truth and these rules will allow litigants to obfuscate the truth.

Christian Gabroy (T): "30(b)(6) should be allowed to be binding testimony, to narrow the issues, and help streamline the process as allowed by FRCP 1. Please do not make it more difficult for Plaintiffs to gain such important testimony."

Lawyers for Civil Justice (U): The rule has improved the process for both sides, but must be revised to make sure that it continues to work for both sides. Although LCJ's corporate members are often defendants, they are plaintiffs as well. They do not only respond to discovery requests, they also seek discovery, including 30(b)(6) notices. Unfortunately, practice under the rule has not kept up with its promise to be advantageous to both sides. Because there is no consideration of these depositions in the Rule 26(f) process, the rule has become a catch-all for the kinds of disproportional demands, sudden deadlines, and "gotcha" games that have largely been removed from the other discovery rules. Too often the responding party is confronted with a Hobson's choice of attempting to comply with overbroad topics or filing a motion for a protective order, which could result in an even worse outcome including sanctions.

Jeff Scarborough (V): I strongly oppose such changes as they only make it even more difficult for Plaintiffs to obtain justice.

David Stradley (X): The proposed changes slant the discovery process in favor of corporate defendants. They should be rejected. The rule provides a powerful tool for an individual who is litigating against a corporation, especially where the litigation focuses on the corporation's conduct. The corporation frequently possesses most or all of the salient information needed to prove the claim. The rule was written to prevent abusive discovery avoidance by corporate parties. Amanda Mingo (Y) submitted identical comments.

McGinn, Carpenter, Montoya & Love (AA): Our firm uses Rule 30(b)(6) and our state's analogue as efficient tools to gather information from organizations on behalf of injured people. We oppose most or all of the proposed changes, and urge that the Committee keep in mind that without this rule an organizational party has an unfair advantage in litigation by virtue of the fact that it consists of multiple individuals. If a corporation is to be afforded the privileges of personhood, it should also be subject to the same responsibilities and rules that apply to individuals. When the corporation's lawyers depose an individual plaintiff, they can ask any question they want. But when the tables are turned, the individual plaintiff would be forced to sift through a maze of individuals within the entity to try to connect the dots to learn what the entity "knows," what the entity "believes" happened in the case, what the entity will "say" at trial through the agents and employees it selects to testify. This rule is the only tool that empowers a plaintiff to treat a legal entity just as it is treated in every other aspect of the law: as a person. But many of the changes under consideration would undermine the purposes of the rule, which include preventing bandying. They would severely prejudice individual and corporate plaintiffs alike, adding to the cost of litigation and making discovery a game of "blindman's buff." The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), and Ken Graham (NN).

Christopher Beckstrom (BB): The proposed changes would be devastating to plaintiffs who already face disadvantages when facing down corporations and businesses who are negligent and cause injury. This rule provides an important mechanism during discovery to obtain testimony from a business entity that facilitates the entire litigation process and helps hold wrongdoers accountable. Please do not take the teeth out of this important rule.

James Ream (CC): The rule as it currently exists is only effective when the plaintiff attorney is completely devoted to getting the information, has prepared for hours, and has waded through decoy witnesses in order to find someone at the company who is willing to take responsibility as a spokesperson for the company. I have never found it easy to have a corporate representative appear and give testimony for the company. Anything that makes it more difficult simply denies justice to more people trying to get justice.

Bryant Crooks (DD): The rule is an invaluable part of the rules of civil procedure. The requesting party has the burden to draft the notice outlining the areas of testimony, and the responding party has the burden to designate persons to answer about those topics. The responding party's burden is what gives the rule its force and effect, which greatly reduces the number of depositions that otherwise would have to be taken. It also eliminates the "I don't know" response that would be otherwise run rampant were there no duty for the company to prepare its designated representatives to answer. I urge the Committee not to make any changes in this salutary rule. Any issues that arise are properly handled by the district judge. The courts have handled those disputes well since the rule went into effect.

Ryan Skiver (EE): I oppose most, if not all, of the suggested changes. Corporations and other entities are treated as "people," and they should have to respond to discovery just as other people do. I have found 30(b)(6) to be an efficient tool to gather information from corporations on behalf of injured people. It overcomes what would otherwise be an unfair advantage for the corporation, and enables the plaintiff to treat a corporation just it is treated in every other aspect of the law -- as a person. Making these changes would severely prejudice individual and corporate plaintiffs alike, increase the cost of litigation, and make discovery drastically less effective, producing a "game of blindman's buff."

Bernard Solnik (HH): Any change to the rule that would weaken the ability of parties to obtain information from a corporate defendant and to rely on that information would be unfair to the parties and a disservice to our system of justice. Our system prevents corporations from ducking the truth about their actions and ducking their duties not to endanger or harm the rest of us. Corporations want the right to be a "person" and thus should have the responsibilities to answer questions the same way persons must.

Frederick Goldsmith (II): My firm represents both plaintiffs and defendants. I am concerned that each of the proposed changes to the rule can only be seen as an effort to improperly insulate corporate defendants and other large organizations from the consequences of their conduct, to weaken

the rights of litigants to discover information, and to tilt the playing field in favor of large corporations. As presently written, the rule is a wonderful tool to force a corporation to facilitate discovery of pertinent facts and documents, and of the identity of pertinent witnesses. Each of these proposed changes would weaken the rule.

Patrick Yancey (JJ): I concur with the comments of Frederick Goldsmith (II). The combination of Rules 30(b)(5) and (6) allows a party to get documents produced on certain subject matters/topic areas and to have the corporation designate a person who is best qualified to discuss both those documents and the topic areas. The corporation knows who that person is, and that person will know the subject and meaning of the documents. That person will speak the truth under oath for the corporation as to what is meant by those documents. Why should a corporate party be allowed to Monday morning quarterback its responses to its answers.

Ken Graham (NN): This is a back door effort to assist corporations avoid providing information vital to opposing parties attempting to prove their case or prepare to meet the corporation's defenses. The rule already requires that we give the corporation advance notice of the topics for the deposition, and it can choose the person to testify. In our experience, the only problem results from corporations intentionally naming witnesses who have no knowledge and have not been prepared. These amendments would encourage that sort of behavior by allowing the corporation to "hide the ball" until it has used discovery to force the other side to completely reveal its deposition strategy. The current rule provides the most efficient way for a party to obtain information through discovery from a corporation.

Ford & Cook (OO and PP -- duplicate submissions): The rule is an efficient way to gather information from corporations on behalf of injured people. The original purpose of the rule still applies today -- to prevent the corporation from having an unfair advantage because it involves multiple individuals. If a corporation is afforded the privileges of personhood, it should also be bound by the rules that apply to persons. When the lawyers for a corporation depose an individual plaintiff, they can ask any question they want. Without this rule, plaintiff would be forced to sift through a maze of individuals within the entity to try to connect the dots and learn the totality of what the entity knows, believes, and what it will say at trial through the witnesses it calls to testify. Many of the suggested changes would undermine the real purpose of the rule. We will be stuck again with a game of "blindman's buff."

Department of Justice (RR): The Department has considerable experience with the rule, both as a plaintiff and as a defendant.

Based on its unique perspective, the Department believes that the rule serves a useful and important purpose, but that it could benefit from improvements with regard to judicial admissions and contention questions. But we do not think that requiring discussion of 30(b)(6) depositions during the 26(f) meeting is a good idea.

Jeremy Bordelon (TT): I handle cases for plaintiffs seeking disability benefits, either through ERISA or individual insurance policies. In these cases, 30(b)(6) depositions are often taken to gather information about the insurance companies' practices. This information is crucial for the courts' understanding of the issues raised in these cases. But each of the proposed changes to the rule would improperly insulate corporate defendants from the consequences of their conduct and weaken the rights of litigants to discovery and further tilt the laying field to favor large corporate interests and harm those who would try to justly discovery information and documents from corporations.

Michael Romano (UU): I have represented both plaintiffs and defendants in complex and non-complex litigation. I have also served as president of the West Virginia Association for Justice and as a member of the West Virginia Senate. "Discovery is the essence of civil litigation and the only path to a just outcome. Civil litigation also is one of the tenets of democracy keeping in check forces that would subvert our institutions." These proposed changes would improperly insulate parties from the consequences of bad faith discovery conduct, weaken the rights of litigants to discover relevant information and tilt the playing field in favor of corporate litigants that will play "hide the ball." The current rule is the best discovery tool for obtaining full and complete discovery responses. David Sims (XXX), Damon Ellis (QQQQ), and Laura Davis (GGGGG) submitted essentially identical comments [including typo].

Michael Merrick (VV): I represent individual employees in litigation about employment issues. I think that a number of the proposed changes would introduce costly and time-consuming motion practice about matters that the parties have been resolving without court intervention for years. Some would also encourage gamesmanship. Each is solicitous to the interest of organizational litigants at the expense of both individual litigants and judicial economy. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA), Charles Lamberton (BBB), Thomas Padgett (CCC), Mary Kelly (CCCC), and Bernard Layne (IIII) submitted very similar or identical comments.

Corey Walker (XX): Corporations want and receive the same constitutional rights as people do. A corporation acts as a single being and the rules, as is proper, address the deposition of a corporation. There is no need to substantively change the rule.

J.P. Kemp (ZZ): I strongly object to any changes to the rule, particularly of the sort identified in the invitation for comment. I can provide real life examples of my concerns if the committee would like to hear them. I primarily handle employment discrimination cases, representing plaintiffs. This rule is a vital tool to getting meaningful discovery in these types of cases. The defendant controls nearly all the information and we have found that interrogatories and requests for production are almost a waste of time. You receive almost nothing but objections and non-answers to written discovery in our cases. Initial disclosure are also treated as either a joke or a method to dump huge quantities of largely useless documents in which there may be one or two proverbial needles in a haystack. "But the 30(b)(6) deposition, now there is a useful tool to obtain discovery!!! Doing anything to make it less effective or more cumbersome to use would be a travesty."

Frank Silvestri, American College of Trial Lawyers (DDD and J): Our Federal Civil Procedure Committee does not believe that any amendments to Rule 30(b)(6) are warranted at this time. Several suggested amendments seek to codify answers to issues that reasonable counsel, mindful of their duty to cooperate, ought to be able to resolve. Particularly in light of the framework provided by the 2015 amendments to the discovery rules, we see no reason to modify Rule 30(b)(6) at this time.

Nitin Sud (EEE): I am a solo employment attorney, primarily representing individuals in wrongful termination litigation. The proposed changes to this rule would drastically impede the ability of attorneys representing individuals against corporations.

John Paul Truskett (FFF): We represent hundreds of clients and, over the years, thousands of people. Do not change 30(b)(6). If you do it will substantially impact our clients horribly.

Heather Leonard (GGG): I handle employment litigation for employees and employers. In almost every case I have handled, there has been a 30(b)(6) deposition. It is not unusual for the rule to be the only vehicle to obtain testimony about a company's defenses and/or the reasons for the actions at issue in the case. I fear that the suggested changes would hinder and burden litigation. Overall, they would encourage gamesmanship from the larger firms that have the time and resources to apply litigation strategies to delay, bog down, and spread thin counsel representing individuals.

Kevin Koelbel (HHH): Rather than provide for efficient discovery, the proposed changes provide an arsenal to corporate defendants to obfuscate and delay. They will create more problems than exist under the current practice.

Jonathan Feigenbaum (JJJ): In its current form, the rule works. The proposed changes will force courts to become micromanagers of discovery,and will elevate procedure over substance even more than the current situations. These changes are one-sided and favor defendants. [Several specific comments seem not to be directed to topics included in the invitation to comment.]

Robert Landry III (KKK): I am a plaintiff side employment lawyer. Organizational depositions are one of the key avenues to access information in my cases, which involve asymmetrical information because the defendant employer has much more information.

Wright Lindsey Jennings (MMM): We encourage the Subcommittee to continue its efforts to explore possible changes to the rule.

Richard Seymour (NNN): These are defense bar proposals to tilt the discovery rules further in their favor. Some of the proposals may have some merit, but some would largely gut the rule. Based on extensive experience as a mediator and arbitrator, I understand the concerns of organizational defendants about the burdens and risks of these depositions. Based on almost 49 years of practice, I can say that the rule as currently written is invaluable as a means of keeping discovery costs down, and assuring that discovery is proportional to the needs of the case. My experience is that defense counsel ordinarily contact me well in advance of the deposition to discuss the topics, and in the process to apprize me of how the defendant makes and stores its records. Our discussions can lead to rephrasing the topics to reduce the burden on the defendants and increase their utility to me. Indeed, these discussions often help to shape the entire remaining conduct of the case. What makes this process work is that the rule is well-balanced now, and presents no advantage to be gained by bad behavior.

Josh Eden (QQQ): The proposed changes to the rule will only aid corporations attempting to hide the ball. Corporations cannot be permitted to weasel out of being bound by the testimony of their employees. "DO NOT CHANGE IT!!!"

Dennis Murphy (RRR): Please do not change the rule. It helps reduce discovery costs considerably. Often there is no need for any additional discovery. Without the rule, individual litigants would have to take several other depositions to complete the process.

Jeffrey Pitman (SSS): "The current rule is fair for plaintiff and defendant. It strikes a fair balance. The proposed change would create imbalance and is unfair. It is a solution in search of a problem. It is not broke and doesn't

need to be 'fixed.' Just let it be."

Michael Quiat (TTT): "I am writing to express my dismay about the proposed changes to Rule 30(b)(6). It seems obvious that these changes would serve the interests of deep pocket corporate/institutional parties, to the great prejudice of the individual." The changes will provide new opportunities for corporate obfuscation.

Jeffrey Jones (UUU): I believe any change to 30(b)(6) that would weaken the ability of parties to obtain information from a corporate defendant would be unfair to the parties and a disservice to justice. Corporations want the right to be a "person" but also to avoid responsibility for their actions. Any change to the rule would allow them to slip, dodge and otherwise attempt to evade their responsibilities.

Robert Keehn (VVV): I have a lot of experience representing both plaintiffs and defendants. Though I have a relatively balanced experience, I see each of the proposed changes as an effort to improperly insulate corporate defendants from the consequences of their conduct.

Patrick Mause (WWW): Based on my experience defending (at a defense firm) and taking 30(b)(6) depositions as a plaintiff lawyer now, I believe the current rule works well. I worry that the proposed changes will undermine the rule's purpose and make it incredibly more difficult, if not impossible, for parties to obtain the facts they need. The changes would essentially make the rule toothless.

David Romano (YYY): I am opposed to any change to the rule that would limit its effectiveness. It is perhaps the only way to require an organization to provide sworn testimony about a subject about which another party has no idea who may have the needed information. I recognize that, too often, the notice is imprecise and too broad while the responding party plays hide and seek. But throwing out the baby with the wash is not the answer.

Dave Maxfield (ZZZ): I oppose the proposed changes because they will put corporate depositions on an unequal footing with individual fact depositions. These depositions can avoid significant expense for the parties and burden for the court in identifying persons with knowledge. Because the corporation has been granted the status of a "person," fairness dictates that this person be required to answer questions under oath.

Laurel Halbany (AAAA): The proposals to declare the testimony nonbinding or forbid contention questions would have the sole purpose of gutting the use of this rule.

George Wright Weeth (BBBB): The proposed changes are a

solution in search of a problem. The rule is functioning well. These suggestions by business interests would gut the rule and make it even more difficult to obtain a verdict against corporate defendants.

Product Liability Advisory Council (DDDD): Rule 30(b)(6) is unique in that it is directed only to organizations. As a result, its treatment of defendants and plaintiffs in product liability litigation is not equal. A corporate defendant must prepare to respond to all questions a plaintiff's attorney may ask, and if the designated representative is unable to answer, the corporation and its counsel are subject to sanctions. Plaintiffs do not face that risk because they will only be asked to respond to information within their personal knowledge. "This disparate treatment fails to provide equal protection under the law." In our experience, notices are often too general to provide necessary guidance, or so narrow and detailed that it is virtually impossible to comply with the notice.

Bowman and Brooke (EEEE): Our firm primarily defends product liability cases. In general, we support the Lawyers for Civil Justice submissions supporting adding 30(b)(6) to the 26(f) list of topics, and allowing supplementation of testimony. We also think that there should be a 30-day notice requirement.

Defense Research Institute (GGGG): 30(b)(6) has become a battleground rule that imposes disproportionate costs and burdens without providing commensurate benefits to the parties. Making changes is in keeping with the 2015 amendments to the discovery rules encouraging cooperation, proportionality, and case management. DRI supports the positions taken by Lawyers for Civil Justice. We urge that work continue on all the topics identified in the Subcommittee's invitation for comment, and also on a presumptive limit on the number of topics as well as a rule prohibiting a 30(b)(6) deposition on topics that have been the subject of a deposition for which a transcript is available.

National Employment Lawyers Ass'n Georgia (HHHH): Our members represent employees with claims against employers. The employers generally have custody of all or most of the potential evidence, so we often use 30(b)(6) depositions early in discovery as an efficient means of identifying the categories of documents and other evidence available for discovery. We fear that several of the amendment ideas identified in the invitation for comment would introduce costly and time-consuming motion practice to resolve issues that the parties now resolve without the need for court involvement. Overall, these proposals are too solicitous to the interests of organizational litigants. Adopting such changes would be a troubling departure for the Advisory Committee, which has worked to issue carefully-calibrated rule changes that do not favor one set of litigants over another. Columbia Legal Services (NNNN) submitted very similar comments.

Matt Davis (JJJJ): Individual plaintiffs already have a huge hill to climb in order to utilize their constitutional rights under the 7th Amendment to redress wrongdoing by corporate defendants. These changes are an attempt to allow corporations to hide key information that would otherwise come to light through discovery.

Ford Motor Co. (KKKK): Ford has found that 30(b)(6) depositions employed in a focused, reasonable and proportional manner are an efficient and effective discovery tool. But too often these depositions are not sought to uncover facts but used to pursue large numbers of vague or irrelevant topics. Sometimes litigants use them to take advantage of the spontaneous nature of depositions to surprise the deponent and capture unprepared, awkward, or confused statements on the record. Indeed, some of the comments submitted to the Subcommittee tout the use of surprise tactics in these depositions. "A corporate representative cannot possibly speak for he company on the basis of the information known or reasonably available if the noticing party's true intent is to question the witness about topics not identified in the notice." To provide the Subcommittee with details, Ford collected a sample of 52 representative notices it has received. These notices averaged 31 topics each, within one listing 129 topics. In 57% of the sample notices, more than 20 topics were listed, and 24% had more than 40. In 8% of the cases in the sample, plaintiffs served multiple 30(b)(6) notices. Often the topics are broad and broadly worded, and examples are provided in the submission.

Timothy Bailey (LLLL): 30(b)(6) depositions are often essential. Many of these amendment ideas would render the rule almost useless.

Jennifer Danish (PPPP): Each of these changes can only be seen as an effort to improperly insulate corporate defendants from the consequences of their conduct and weaken the rights of individuals to discover information.

State Bar of California Litigation Section Federal Courts Committee (TTTT): The problems prompting review of 30(b)(6) are real, and arise frequently. We do not believe they are unique to plaintiffs or defendants. We recommend that the Subcommittee move forward on durational and numerical limitations for these depositions, a procedure for objections, and the expectations of the witness and permitting supplementation.

National Employment Lawyers Ass'n -- Illinois (UUUU): One purpose of 30(b)(6) is to put individuals and corporations on a similar footing. We would add the following just before the last sentence of the current rule:

In all other respects, depositions under this sub-section

> should be treated exactly the same as depositions of individuals taken under this Rule.

Many of the amendment ideas, however, are inconsistent with this principle. Treating corporations differently would be unwise, and "a probable violation of due process and equal protection."

Gray, Ritter & Graham, P.C. (VVVV): The rule functions as intended now, and there are very few disputes that cannot be resolved without court intervention. As plaintiff lawyers, we often agree to amend the notice if provided good reasons. Further, the deposition can often be done in stages, where one witness has been produced, and the parties may revisit how many are really needed. The rule already has sufficient protections for the responding entity.

Christine Webster (WWWW) [note -- mistakenly designated WWW, but there is already another WWW]: I make substantial use of 30(b)(6) in virtually every case I litigate. I believe the rule is working well as it is, and that no changes are needed.

Seyfarth Shaw (YYYY): We have experienced, firsthand, the significant burdens imposed by current practice under 30(b)(6). We support serious consideration of changes to the rule that would move this form of discovery closer to the cooperation and proportionality objectives of the 2015 amendments. Besides the ideas identified by the Subcommittee, we submit that there should be presumptive limits on the number of topics, and that there should be a minimum notice requirement and that the rules should include an objection process.

Potter Bolanos (ZZZZ): We find that 30(b)(6) is an essential tool in our employment litigation practice. In our experience, it is working well.

Leto Copeley (BBBBB): The rule provides a powerful tool for an individual who is litigating against a corporation. It was written to stop abusive discovery behavior by corporations. It has functioned to provide quicker discovery and cut down on discovery disputes. These changes would improperly strengthen the position of corporate litigants.

Clay Guise (HHHHH): The fact that many depositions occur without court involvement dos not mean that the rules are "good enough." The lack of clarity and guidance in the rules favors the noticing party, which can serve a notice nearly any time before discovery closes and demand a designee regarding an unlimited number of topics. The problems worsen when there is not enough time to present a motion to the court. The corporation has no clear recourse under the rules when confronted with such a notice and faces a disproportionate burden.

Lord + Heinlein (IIIII): In our personal injury practice representing plaintiffs, our no. 1 challenge is to get information from corporations. Often, we are faced with a game of "hide the ball." 30(b)(6), as written and enforced, creates an efficient solution to this problem. This effectiveness serves judicial efficiency as well. We are very concerned that some of the proposals will reduce the organization's duty to prepare and could effectively gut the rule's effectiveness. In particular, we note that it is often desirable to have more than one 30(b)(6) deposition on different issues. The rule should not impede this efficient procedure.

John Beisner, U.S. Chamber Institute for Legal Reform (JJJJJ): The rule was originally adopted to deal with the problem of "bandying." But it has evolved into a one-sided weapon that can be abused by the interrogating party to the prejudice of the corporation. Reforms are in order. It is time to level the playing field for corporate and individual parties alike. The three changes that should go forward are adding this topic to the 26(f) conference, establishing a clear procedure for objections, and clarifying that statements made during these depositions are not judicial admissions.

Sherry Rozell (KKKKK): 30(b)(6) depositions present very different challenges for smaller local corporations and huge multi-national corporations. But several key amendments would help to create a smoother and more collaborative experience for all sorts of litigants. Some of these matters are on the Subcommittee's list, and others are not.

Spencer Pahlke (LLLLL): We represent injured plaintiffs and regularly use 30(b)(6). It plays an essential role in our efforts to gather information from organizational litigants. The proposed changes would slow litigation, in crease motion practice,and open the door to unnecessary gamesmanship.

Maglio Christopher & Toale (MMMMM): Our practice is nationwide, focusing on complex litigation. We regularly use 30(b)(6) and its state equivalents, both taking and defending depositions. We believe the proposed changes are misguided and will result in significantly increased litigation and costs. The changes do not address the real problem, which is the unprepared witness. We urge the Committee to forgo changing the rule. But if it does proceed with changing the rule it should focus on the problem of witness preparation.

Henry Kelston (NNNNN): I am a partner at Milberg L.L.P., where we represent victims of corporate and other large-scale wrongdoing. We find that 30(b)(6) depositions are often the most effective route to the heart of discovery, enabling us to draft more targeted document requests, interrogatories, and identify essential witnesses for additional depositions. A review of the

Subcommittee's reports to the full Committee, and of the submissions in response to the call for comments, shows that there is not a compelling need to amend the rule at this time. Instead, the clear consensus seems to be that, though disputes of various sorts about 30(b)(6) depositions are common, the vast majority are resolved without the need to involve the court. There is no evidence that disputes about these depositions have become more frequent or virulent in recent years, even though discovery in general has grown in complexity. Moreover, there is a serious risk that some of the amendments under discussion could actually work at cross-purposes with making discovery more efficient and less expensive.

Michael Slack (PPPPP): The experience at our firm has been that Rule 30(b)(6) is the most effective discovery tool available to promote efficient discovery and deter discovery abuse. It is effective because it enforces accountability by its own terms. As a result, we rarely have to seek court intervention with depositions under the rule. The same cannot be said about the rules related to disclosures, requests for production and interrogatories. We have taken and defended 30(b)(6) depositions, and know both sides of the rule very well. We implore the committee not to relax the duty to prepare or dilute the binding-effect features of the rule. We frequently receive supplemental disclosures and document production from a corporate defendant immediately after a 30(b)(6) deposition request has been made. As a consequence, we frequently request subject areas which allow us to explore the effort made by the organization to search for and produce responsive documents or to identify previously undisclosed persons who may possess knowledge. The rule has proven to be beneficial in making discovery more focused and efficient. In particular, it has been effective in allowing us efficiently to learn about (1) organizational hierarchy and areas of responsibility; (2) post-occurrence investigations by the organization; (3) the existence of safer alternative designs; and (4) the lack of support for defenses raised in the answer. We are convinced the rule should be left alone.

Baron & Budd (QQQQQ): Disputes concerning 30(b)(6) depositons are rare, and we believe that the rule does not need a major overhaul. In fact, the rule is one of the most useful tools in civil litigation. Unlike written discovery, which can be of limited use due to objeciotns and qualified responses, 30(b)(6) uniquely provides an opportunity to obtain oral testimony from an organization. At the outset of litigation, in particular, organizations frequently object toproviding documents or other information that woudl make it easy to ascertain the identities ofindividual witnesses from whom relevant information can be obtained. The rule puts the obligation on the entity to identify individuals who can address the relevnnt topics. As a result, Rule 30(b)(6) depositions provide an early and efficient opportunity to obtain discovery on core issues.

American Association for Justice (SSSSS): AAJ stresses the importance of 30(b)(6) as an invaluable tool for plaintiffs litigating against corporate defendants. Without the rule, injured plaintiffs would face the all-too-frequent practices of many corporate defendants and their counsel, including bandying, delaying, and sometimes denying the right to seek legitimate discovery. The rule has worked well over time, streamlining discovery and ensuring that organizational parties provide an educated, prepared witness. Changing the rule in many of the ways under consideration would raise risks of returning to the days of bad practices that the rule banished. It certainly seems that the tenor of the ideas under study favors the interests of corporate defendants and is one-sided. It is important to recognize that, as currently written, the rule is the most efficient means for the discovery of relevant facts within a corporation's control. The proposed changes appear to favor corporations and to invite a return to the practices that the rule sought to end. Often corporate defendants have most or all of the relevant information. This rule enables plaintiffs to identify key sources of information as well as information about corporate policies and practices. When this Committee last looked at the rule more than ten years ago, it concluded in 2006 that although there were complaints about unprepared witnesses and overbroad topic descriptions, a rule change would not be an effective tool in solving these problems. The issues raised this time are "eerily reminiscent" of the ones examined a decade ago. The fact that this rule has remained unchanged over several reviews is evidence of its effectiveness. AAJ would suggest that it not be changed, or that if it is changed the amendments be incremental rather than aggressive.

Public Justice (TTTTT): In our view, most of the change ideas are not balanced, and they would create unequal obligations under the rules by favoring large corporations over individual litigants. They would also create inefficiencies and prompt satellite litigation. Except for the last item on the Subcommittee's list -- duration and number of depositions -- we think that these proposals should not move forward.

Mark Cohen (UUUUU): Organizations' statuements in depositions shoud not be treated differently from those made by individual parites. All deponents have the abiltiy to change the testimony through an errata sheet. This is adequate to protect the organization, as it is adequate for the individual litigant.

Inclusion in Rules 26(f) and 16

Nancy Reynolds (L): Most corporate-representative deposition notices are overbroad and onerous. I have successfully moved for protective orders to limit the scope. Some notices are intended as fishing expeditions to locate new theories for amended complaints. Others are intended to elicit lack of knowledge or information responses when plaintiff counsel knows the information is not typically known are retained in an industry. Opposing counsel refuses to accept this response and spends the next 15 pages of transcript attempting to elicit a lack of knowledge response to read to a jury. Then opposing counsel seeks sanctions for the witness not being prepared and requests that the area of inquiry be deemed admitted. This is a common occurrence.

Timothy Patenode (M): This is one of the committee's most effective suggestions. I think the 30(b)(6) deposition should be permitted only if so ordered by the court or agreed to by the parties during the 26(f) conference. This may seem extreme, but before a party can impose on another the duty of marshalling evidence and educating witnesses there should be a demonstration that the burden is warranted in the circumstances of the case. The circumstances that might justify going forward go beyond demonstrated bandying, such as asymmetrical discovery. An individual suing a corporation might properly use the rule to cost-effectively discover the case. But counsel could most profitably address these issues as part of the discovery conference.

Steve Caley (N): I have written two articles about the rule for the National Law Journal (in 2000 and 2011). I am opposed to adding the topic to the Rule 26(f) conference. That may be too early in the process for attorneys to have adequately and intelligently considered their 30(b)(6) needs. Moreover, requiring the parties to discuss this topic will prompt lawyers to make "knee jerk" demands, for fear of waiving the right to do a 30(b)(6) deposition if not raised at the conference. That could often be wasteful, because a 30(b)(6) deposition is not needed, and needed information can be obtained in other ways.

Lawyers for Civil Justice (U): Rule 30(b)(6) deserves to be treated as an important part of the discovery plan. Adding it to the list of 26(f) topics would be consistent with the thrust of the 2015 amendments to the discovery rules. Putting it on the list for all cases is warranted. Language along the following lines could be added to Rule 16(b)(3)(B), 16(c)(2) and Rule 26(f):

> Include any agreements the parties reach for conducing Rule 30(b)(6) depositions, including as to the number and identification of anticipated topics, the anticipated number

of witnesses for those topics, anticipated objections to the topics, and the timing for objections to such topics, the scope of the deposition(s), the date, duration, and location for the deposition, and supplementation.

Jeff Scarborough (V): Having to incorporate a discussion/plan for 30(b)(6) depositions in the Rule 26 conference and discovery plan at the beginning of the case is senseless as Plaintiff has not yet had a chance to engage in discovery.

Barry Green (W): In most cases, a number of 30(b)(6) topics will be known at the outset of the case. However, in every case, additional topics for 30(b)(6) depositions are disclosed through discovery responses. Accordingly, either the proposed change should not be enacted because it could cut off important discovery, or it should be enacted with the express ability to include additional 30(b)(6) topics without the time and expense of requesting permission from the court.

David Stradley (X): Promoting cooperation during discovery is a laudable goal, but adding a requirement that the discovery plan address 30(b)(6) testimony substantially disadvantages parties who litigate against corporations. Corporations know who has information, where documents are stored, and the ease or difficulty attendant to accessing the important information. The other side lacks much or all of this information. The discovery conference occurs before even initial disclosure has occurred, so imposing a requirement that it address 30(b)(6) would require litigants to commit to a plan regarding specific depositions before receiving even the limited information provided in initial disclosures. In any event, in my experience counsel on both sides engage in substantial communication prior to 30(b)(6) depositions under current practice. The corporation nearly always objects to one or more topics, and we frequently attempt to modify topics to make them mutually agreeable. But this discussion usually occurs after initial written discovery, including document production, has been completed. At that point, both sides can intelligently discuss the parameters of a 30(b)(6) deposition. Amanda Wingo (Y) submitted identical comments.

McGinn, Carpenter, Montoya & Love (AA): Adding a reference to 30(b)(6) to Rule 26(f) would be the only specific reference in 26(f) to any discovery mechanism. [Note: Rule 26(f)(2) says the parties must "make or arrange for the disclosures required by Rule 26(a)(1)."] Requiring a party, in the earliest stage of a case, to commit to which depositions are needed would serve no purpose other than to unfairly restrict the party's ability to obtain deposition testimony at the time when the need for that testimony becomes apparent. At that point in the case, the plaintiff would be able to provide only a very broad and general

description of the types of topics 30(b)(6) depositions would explore. Inevitably, any dispute about a specific deposition would still have to be resolved later when the parties are aware of the specific matters noticed. If any amendment is proposed, it should be a simple addition to Rule 26(f)(3)(B), as follows:

> * * * the subjects on which discovery may be needed, when discovery should be completed, whether the parties anticipate the need for any deposition noticed pursuant to Rule 30(b)(6), and whether discovery should be conducted in phases or be limited to or focused on particular issues * * *

As far as amending Rule 16 is concerned, note that the rule already requires a scheduling order to limit the time to complete discovery. Placing further restrictions on 30(b)(6) depositions, particularly if a supplementation provision is added to the rule, would completely defeat the purpose of the rule. The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), and Ken Graham (NN).

Frederick Goldsmith (II): Although at first blush this may seem a good proposal, on further reflection it seems more an effort to give the corporate defendant a head's up of its opponent's litigation plans than to genuinely avoid later discovery disputes.

Patrick Yancey (JJ): This is not needed. At the initial stages of litigation, plaintiff will probably not know whether or not a 30(b)(6) deposition will be needed. To require a disclosure of a possible future use of a discovery method is not warranted. That would only provide the possibility for the corporation to object and lead to needless additional litigation in the court.

Ford & Cook (OO and PP -- duplicate submissions): This would be the only reference in 26(f) to a specific discovery mechanism. The rule does not require parties to provide in a discovery plan setting forth what specific topics the parties will inquire about through interrogatories, requests for production, or other types of depositions. Requiring a party to commit to which depositions are needed at the earliest stage of a case would serve no purpose other than to unfairly restrict the party's ability to obtain deposition testimony at a time when the need for that testimony becomes apparent. Inevitably, any dispute about a specific deposition would still have to be resolved later in the case when the parties are aware of the specific matters being noticed. If the plaintiff is subject to this limitation, the corporation should also be required to limit

its topics of inquiry so as to level the playing field. Litigation often takes unexpected turns, and requiring one side to limit its topics very early in the litigation will simply cause laundry lists to be developed which create busy work for lawyers. Regarding an amendment to Rule 16, if the rule allows supplementation of 30(b)(6) testimony after the Rule 16 deadline for this kind of deposition is unfair.

Department of Justice (RR): We do not believe that requiring discussion of 30(b)(6) depositions during the 26(f) meeting or in the report to the court under Rule 16 is advisable. We believe that such an amendment is not only impractical, but that it also may even lead to unintended, unhelpful consequences. For one thing, it risks raising 30(b)(6) issues too early in the pretrial process. The discovery plan must be submitted at least 21 days before a scheduling conference. Under Rule 16(b)(2), the court ordinarily must issue the scheduling order within the earlier of 90 days after any defendant has been served or 60 days after any defendant has appeared. Adding this to the list of topics for the 26(f) conference would mean that the parties must discuss such things as the topics for a 30(b)(6) deposition at the earliest stages of the litigation, before the parties even know whether such a deposition will be necessary and before the parties have engaged in meaningful document discovery. That sort of requirement may result in unnecessary or inefficient 30(b)(6) depositions, which is contrary to the rationale for considering amending the rule. Even though this approach should provide the court with broad flexibility in managing discovery, it likely would come too early to be effective. As currently drafted, Rules 26(f) and 16 are sufficiently flexible to enable discussion of 30(b)(6) discovery when that would be useful.

Jeremy Bordelon (TT): Realistically, the element of surprise can be important in discovery. Adding this topic to the 26(f) meeting seems fair on its face, but it would in practice give corporate defendants unnecessary advance notice of plaintiff's litigation plans.

Michael Romano (UU): On the surface, this change appears harmless, perhaps even helpful. However, the effectiveness of 30(b)(6) is somewhat grounded in not being sure if it is part of an opponent's litigation plans. While not telegraphing one's discovery strategy may not seem important to those who do not regularly try cases, it does shape the eventual completeness of an opponent's discovery responses.

Michael Merrick (VV): This suggestion seems to assume (a) that disputes are arising regarding 30(b)(6) depositions that cannot be resolved without court intervention, and (b) that such disputes arise early enough in a case to be addressed effectively at the 26(f) conference. We submit that neither assumption is correct. To the contrary, including 30(b)(6) depositions as a

topic for discussion at the 26(f) conference would undermine much of what makes the rule useful and threaten to create disputes that otherwise would not exist. We represent individuals with claims against large entities, which generally have custody of all or most of the potential evidence at the outset of a case. So we tend to be at a considerable disadvantage at that point in identifying key documents and witnesses. We therefore often use 30(b)(6) depositions early in discovery as an efficient means of identifying the categories of documents and other evidence that may be available for discovery. Acquiring this information early in a case creates additional efficiencies and enables us to tailor further discovery narrowly. Inclusion of 30(b)(6) depositions in the initial case planning discussions would threaten these efficiencies and risk grinding the discovery process to a halt by creating the opportunity for defendant to create disputes about a host of items, such as when and where the deposition will take place, the topics that will be covered, the timeframes at issue and whether follow-up depositions can be obtained. Under existing practice, these types of issues have been resolved by the parties themselves without any need for court involvement. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA), Charles Lamberton (BBB), Thomas Padget (CCC), Mary Kelly (CCCC), and Terrell Marshall (EEEEE) submitted very similar or identical comments.

J.P. Kemp (ZZ): It appears that this suggestion is aimed at making it more difficult to get 30(b)(6) depositions. The implication is that if no 30(b)(6) depositions are discussed at the earliest part of the case, a party could be precluding from using this rule. This simply makes no sense. Very often until some preliminary discovery or investigation is done, it cannot be determined if the 30(b)(6) deposition will be needed (although it almost always is) or what its scope may be. Recall that, in many of the discrimination cases that I do, there is a 90-day window to bring suit after the EEOC has finished with the case. Sometimes clients don't make it to see me until there are just a few days or weeks until the time limit runs out. Frontloading discussion of 30(b)(6) does not seem to help anything.

Frank Silvestri, American College of Trial Lawyers (DDD and J): Counsel who anticipate problems in handling 30(b)(6) depositions are able to bring these issues up at the 26(f) conference and present them to the court if they are not resolved at the conference. No rule change is needed.

Nitin Sud (EEE): Adding this topic to the 26(f) discussion is unlikely to help. It is usually difficult to determine the potential scope of a 30(b)(6) deposition until after initial disclosures and initial written discovery. Regardless, however, I often reference the possibility of a 30(b)(6) deposition in the case management pan anyway.

Kevin Koelbel (HHH): Rule 30(b)(6) depositions have always been scheduled with reasonable notice in cooperation with opposing counsel. The need for and scope of potential 30(b)(6) depositions is always addressed at Rule 26 conferences.

Richard Seymour (NNN): This change would not produce positive results, at least insofar as it calls for including specifics on these depositions in the court's scheduling order. That could lead to the burden on the parties (and the court) of getting the order changed. Adding the topic to the 26(f) list would forseeably create problems. There is no problem to be solved, and the default orientation should not be "more case management" to every discovery question.

Jonathan Gould (OOO): This is a solution in search of a problem. The 26(f) conference is generally too early to make any final decisions on 30(b)(6) depositions. All it could produce in most cases is a pro forma designation to preserve the opportunity for later use.

Tae Sture (PPP): This change would add to the time needed to prepare for the 26(f) conference, but it is difficult to see any advantage to adding it. The parties ordinarily discuss 30(b)(6) depositions separately at varying stages of liability discovery. Focusing only on employment litigation, it is clear that the timing and content of the 30(b)(60 depends hugely on the subject matter of the case. Usually, it is necessary first to do written discovery and then begin to fashion the topics for the 30(b)(6) deposition. So even though adding this provision would not necessarily prejudice either party, it would not produce benefits.

Michael Quiat (TTT): This idea is a recipe for strategic sandbagging by corporate defendants. Clearly such a mechanism will allow these defendants to learn more about plaintiff's strategy in discovery and permit these parties to orchestrate their responses accordingly.

Robert Keehn (VVV): This seems mainly to be an effort to give the corporate defendant a heads-up of its opponent's litigation plans rather than a genuine proposal to avoid later discovery disputes.

Patrick Mause (WWW): This would be almost entirely unworkable and unfair. You often do not know what topics will need to be included until well into the case, after you have gotten corporate documents. To get those documents typically requires a motion to compel because corporate defendants will rarely divulge any document without a court order. Moreover, it would require a party to essentially divulge his or her litigation strategy before any meaningful discovery has been allowed. Down the road, a corporate defendant will likely try to

bind the plaintiff to extraordinarily preliminary topics included in the Rule 16 case management plan. This would only give the corporation a heads-up on the plaintiff's litigation strategy.

David Sims (XXX): This conference occurs too early in the case, and it is impossible to imagine what 30(b)(6) depositions will be needed that early in the case. So the most the rule would achieve is to get parties to make a pro forma indication that would have little or no practical value.

George Wright Weeth (BBBB): The conference is too early; one must first send interrogatories and requests for production before deciding what 30(b)(6) topics to pursue.

Huie, Fernambucq & Stewart, LLP (FFFF): Particularly since the 2015 amendments, it is important that attention be focused on Rule 30(b)(6) at the outset to discourage wasteful pretrial activities. Too often, 30(b)(6) notices seek information already obtained through other discovery. For example, even though the defendant has already produced the actual test reports, a plaintiff may often notice a 30(b)(6) deposition to inquiring into the testing of the product. It should not be necessary for the defendant to spend the time and money to respond with regard to materials already in the requesting party's possession. Too often, there is no choice but filing a motion for a protective order, thereby burdening the court's docket and possibly disrupting the Rule 16 scheduling order. True, issues may arise later that were not foreseen, but a more robust conference between the parties early in the case and a more active role for the judge will help both sides set more reasonable expectations for discovery.

Matt Davis (JJJJ): This would not streamline discovery but instead lead to additional costly and time-consuming discovery disputes later in the process. 30(b)(6) depositions are usually taken only after initial disclosures and routine written discovery is conducted. Plaintiffs would have to speculate about the topics for these depositions, and will identify every possible topic to avoid the risk of losing the opportunity to take add a topic later. This change would also provide corporate defendants an unfair advantage by forcing plaintiff counsel to reveal trial strategy at the earliest stages of litigation.

Ford Motor Co. (KKKK): Adding 30(b)(6) to this early discussion will better establish appropriate expectations and frame the deposition needs of the case, as well as allowing the parties to vet their respective positions as to proposed areas of inquiry. The parties should discuss and identify the topics about which there will be inquiry. Advance notice about topics is essential to selecting the person to testify. This early discussion will also make the "reasonable particularity" provision in the current rule more workable, including a method

for supplementation. It would be important also to discuss the timing and staging of these depositions. "Rule 30(b)(6) depositions undertaken to learn certain core facts, obtain descriptions of key events, or identify individuals who participated in significant activities presumably should be conducted early within the discovery period. Rule 30(b)(6) depositions conducted later in the litigation lifecycle should focus on central disputes and issues not addressed by other discovery, rather than fundamental fact-finding." Also, the court should establish a limit on the number of topics to be explored in 30(b)(5) depositions. In Ford's experience, it is necessary to add this topic to Rule 26(f) because, when Ford has tried to raise it, too often courts respond by deferring the issue until notices are served and disputes arise.

Timothy Bailey (LLLL): I have never been a fan of the delay in moving a case forward occasioned by the 26(f) conference. These events are rarely more than mere formalities, but they delay productive discovery. Injecting 30(b)(6) into the agenda simply lengthens the process. It is not possible to discuss these issues meaningfully at that point. Sometimes formal written discovery provides responses that are sufficient to give me the company's position. "On the other hand, if I get responses which amount to nothing more than legal posturing, I know I am going to need to simply ask a company representative the same or similar questions by deposition. Again, that is not something I will want to discuss in a Rule 26 conference."

Brandon Baxter (MMMM): In my practice, 30(b)(6) depositions are taken near the end of fact discovery, when you know what is needed from an entity. That information usually comes from other discovery. The most that can be done early in the case is to state that a 30(b)(6) deposition will be likely.

Christina Stephenson (OOOO): I like the idea of inclusion of specific reference to these depositions in the 26(f) agenda. Early attention can help act as a catalyst for consideration of the various issues raised by such depositions.

Jennifer Danish (PPPP): This seems to be an effort to give a corporate defendant a head's up of its opponent's litigation plans rather than genuinely to avoid later disputes. I have found that some discovery and extensive preparation is necessary before I can prepare a detailed an appropriate 30(b)(6) notice. Early discussions are unlikely to be fruitful.

Frederick Gittes and Jeffrey Vardaro (SSSS): We often use the 26(f) process to bring preliminary problems to the attention of the court and establish the ground rules for the case right off the bat. But that process should be reserved for the most common and problematical issues. Otherwise the report will become burdensome and might also be used against parties in

problematic ways. Although 30(b)(6) depositions are sometimes early in the case, as a way to identify other witnesses and focus discovery, on other occasions this deposition is used to probe things that emerged through discovery. We have seen 26(f) reports used against a party who has failed to anticipate future developments in discovery, and expanding the topic list will broaden the risk of this sort of "estoppel." Moreover, it would only rarely be true that issues about these depositions would be ripe for resolution early in the case.

Hagans Berman Sobol Shapiro (XXXX): Our firm represents consumers, whilsteblowers, and others in consumer fraud, antitrust, investment fraud, securities, employment, environmental and other personal injury cases. We both defend and take 30(b)(6) depositions regularly. We support the proposal to include a specific reference to 30(b)(6) among the topics for discussion during the 26(f) conference. Due to the size of the cases we litigate, we often discuss the scope of 30(b)(6) depositions with opposing counsel at an early stage. We propose that the rule be amended to require the parties to confer on the number and sequencing of these depositions. Such discussions could include whether those depositions will count as one deposition or multiple. In our experience, when the parties sharpen their pencils on these issues early in the case, they save time and resources down the line.

Potter Bolanos (ZZZZ): In our jurisdiction, the parties follow the practice of conferring about discovery issues, and there is only rarely occasion to raise 30(b)(6) issues before a judge. But we do not believe that adding the topic to the 26(f) list would make sense. The specific topics for such depositions vary from case to case, and typically can't be determined until some discovery is done. Until then, it would not be possible for the parties to have a meaningful discussion, and it would be a waste of the court's time to worry about these issues at that point.

Robert Rosati (AAAAA): I think it borders on fantasy to think that there will be early judicial attention to 30(b)(6) depositions. I have participated in hundreds of 26(f) conferences and normally address the list of witnesses I expect to want to depose, including 30(b)(6) depositions. I cannot recall any judge ever asking about my list of witnesses or being remotely interested in the list. My awareness of the 30(b)(6) needs of one case is likely to be very different from another case. Too often thinking about this topic up front would be a waste of time. I never take a 30(b)(6) deposition without first ending a draft of the notice with the areas of inquiry to opposing counsel. Rational and competent lawyers work out any issues that emerge.

Leto Copeley (BBBBB): Promoting cooperation during

discovery is laudable, but adding a requirement that 30(b)(6) depositions be discussed substantially disadvantages parties litigating against corporations. The discovery conference is just too early for the party to know everything that should be included. In any event, counsel normally engage in substantial communication prior to 30(b)(6) depositions under the current regime. The corporation nearly always objects to some topics, and we often attempt to modify topics to make them mutually agreeable. But this discussion occurs only after initial written discovery, including document production, has been completed.

Terrence Zic (CCCCC): The parties should be required to discuss the timing and service of 30(b)(6) notice during the 26(f) conference, and a deadline should be set in any scheduling order.

Clay Guise (HHHHH): The early discussion of discovery is one of the best ways to avoid later disputes. Although a number of commenters to the Subcommittee assert the 30(b)(6) depositions are not appropriate for discussion in the 26(f) conference, I disagree. It is true that a party may be reluctant to identify specific topics, agree to limitations on topics, or commit to the timing for taking 30(b)(6) depositions, but that is not always the case. In fact, the repeated statements about the importance of this discovery device shows that it should be included in the early planning.

John Beisner, U.S. Chamber Institute for Legal Reform (JJJJJ): 30(b)(6) depositions are a central aspect of discovery in many cases, but they are rarely discussed until late in the discovery process. Moreover, the discussions that eventually occur usually occur after the plaintiff has propounded a 30(b)(6) notice that calls for a deposition on numerous and poorly defined topics. At that point, the corporation faces a risk of sanctions unless it moves for a protective order or reaches agreement with plaintiff about how to proceed. The resulting rancorous motion practice could largely be obviated by fleshing out the timing, number, scope or location of these depositions at the outset. Adding these depositions as a topic of the conference and scheduling order would be consistent with the 2015 amendments, which are designed to prompt judges to engage in early and active case management. We endorse the language submitted by LCJ on July 5 as an addition to Rule 16 and 26(f) (quoted above).

Sherry Rozell (KKKKK): Making this change is especially important for complex cases involving large corporations. It is often difficult to identify persons and documents necessary for compliance with the now commonplace notices containing copious and in-depth topics and document demands served at or near the end of the discovery period. By outlining the parameters at the outset, the parties can conduct discovery with an eye toward potential 30(b)(6) issues that may be resolved in a way that

benefits all parties and without the need for motion practice. The rules should require that the parties set forth the timing, scope, and limitations for 30(b)(6) depositions at the beginning of the litigation, when meaningful collaboration can provide the most benefit.

Spencer Pahlke (LLLLL): It is impossible for plaintiffs to have a clear plan for 30(b)(6) depositions at the time of the 26(f) conference. Any discussion of these issues would have to be very preliminary and nonbinding. Anything more specific would place an unfair burden on the plaintiff.

Henry Kelston (NNNNN): The proposed addition of 30(b)(6) to the topics for discussion at the 26(f) conference might have some salutary effect, assuming that the intent is purely to flag the potential use of 30(b)(6) without the obligation to provide details of topics and duration, for that may be premature at that time. As other submissions have pointed out, in most cases the 26(f) conference occurs too early in the case for a detailed discussion of 30(b)(6) to occur. However, there may be situations in which the prospect of a 30(b)(6) deposition will provide added incentive for a corporate party to produce information on an expedited and less formal basis. We have found, for example, that some companies prefer to provide information about their data systems and document repositories voluntarily rather than prepare their IT personnel for a 30(b)(6) deposition. The inclusion of 30(b)(6) among the subjects for discussion early in the litigation may assist some litigants in reaching similar agreements.

American Association for Justice (SSSSS): Although AAJ does not believe that any amendment to the rule is warranted, discussing the potential need for a 30(b)(6) deposition early in the litigation without discussing the specifics of the depositions is a proposed amendment that AAJ could potentialy support subject to wording and clarity in the corresponding Committee Note. Any such change should be designed to avoid slowing down necessary early discovery, and to warn against trying to get into specifics as to topics and scope of inquiry that cannot usefully be addressed so early in the case.

Judicial Admissions

Nancy Reynolds (L): Would testimony of a lay person be a binding admission? No. People can change their testimony if there are valid reasons to do so. Cross-examination and impeachment with deposition testimony are the standard mechanisms to address changed testimony. If it turns out that the person designated is not as knowledgeable as expected, the corporation should be allowed to designate another person for later deposition on that topic.

Joseph Sanderson (P): This point is frequently litigated, and in the head of trial often leads to erroneous rulings and unnecessary appeals. Codifying that testimony in a 30(b)(6) deposition is a statement of a party opponent but not "binding" unless so ordered under Rule 37 as a sanction for nondisclosure would be desirable.

Craig Drummond (R): Corporations should be bound by 30(b)(6) testimony just as individuals are bound by their testimony. Otherwise, the individual litigant cannot "hold" the corporation to what it has said. To have it otherwise could mean that corporations can continue to answer things vaguely with no real repercussions for gamesmanship.

Christian Gabroy (T): "Absolutely the testimony should be a judicial admission as this is binding testimony."

Jeff Scarborough (V): Absolutely the testimony should be judicial admission as this is an opportunity for plaintiff to establish binding testimony.

Barry Green (W): I oppose this change. The courts have been ruling more and more frequently with regard to a party's deposition answers that "a deposition is not a take-home examination" where answers can be changed. The proposed rule would allow corporations the ability to change their answers when individual parties cannot. I believe the rule should be amended to make it clear that corporations are not allowed to contradict the testimony of the person they provide at the deposition who is supposed to be their most knowledgeable person on that subject. That individual's answers should be judicial admissions.

McGinn, Carpenter, Montoya & Love (AA): In theory, an amendment that simply provides that 30(b)(6) testimony is not a judicial admission -- i.e., one that cannot be changed at trial -- would be acceptable. However, there is a danger that the rule would be interpreted to permit the type of sandbagging that Rule 30(b)(6) is intended to eliminate. The term "binding" means that the witness is speaking not as an individual but as the organization, and that the testimony should have the same consequences when used against the organization as testimony

would have against an individual. For example, the deposing party should be permitted to use the testimony in a summary judgment motion and the organization should not be permitted to respond with an affidavit contradicting that testimony, unless there is some change in circumstances that justifies the change in position. The binding effect of 30(b)(6) deposition testimony serves to motivate the organization to fully prepare its witnesses and deters sandbagging. The burden-shifting approach of Rainey v. American Forest & Paper Ass'n, 26 F.Supp. 2d 94 (D.D.C. 1998), is the right approach. To change the testimony, the organization must show that the new information was not known or reasonably available at the time of the deposition. The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), Ken Graham (NN), and Ford & Cook (OO and PP).

Bryant Crooks (DD): The rule should make clear that the testimony of a corporate representative is binding on the entity and define what that means. It should mean that if the corporation wants to amend its testimony it must show that the new evidence was not available at the time of the testimony, and provide the supplemental information a reasonable time in advance of trial. If the information could or should have been located earlier, the corporation should be denied leave to amend its answers and bound by the testimony given during the deposition. Any evidence contradicting the testimony should be excluded. This middle ground would protect the corporation against unfair treatment, but also punish a lax entity for failure to prepare its witnesses. In effect, it tracks the way an individual deponent is treated -- if such a witness does not supplement or amend deposition testimony prior to trial, then I can impeach with the prior deposition testimony. If the corporate witness spontaneously testifies differently at trial, the examining party should simply impeach with the corporation's prior testimony. This would offer a solution to the most common disputes I have encountered with 30(b)(6) practice.

Matthew Millea (GG): The rule was adopted to provide an efficient method of obtaining binding testimony from a large organization. The testimony must come from a witness who has been properly prepared to address the matters identified in the notice. The corporation must not be allowed to change the testimony of its designee, except in circumstances when it can demonstrate that there is new information that it could not have had at the time of the testimony. Otherwise, corporations will simply fail to provide the information. The right approach is to follow Rainey v. American Forest & Paper Ass'n, 26 F. Supp. 2d 82, 95 (D.D.C. 1998).

Frederick Goldsmith (II): Lawyers representing corporations have long known the significance of a Rule 30(b)(6) deposition and the consequences which attend witness testimony at such a deposition. That is the stimulus for them to prepare the witness well. Any effort to water down the rule so that the deponent's testimony carries less force can only be seen as an effort to tilt the playing field in corporations' favor. Jeremy Borden (TT) submitted identical comments.

Patrick Yancey (JJ): Simply stated, this concern is about the truth being told. When the person chosen as the person of authority on a particular subject for a corporation says the color white is white, then the color is white. There is no need to be concerned about the truth, even if it is detrimental to the corporation.

Department of Justice (RR): There is currently a split of authority on this question. The majority view is that the organization is not bound. See U.S. v. Taylor, 166 F.R.D. 356, 362 n.6 (M.D.N.C. 1996). Under this view, testimony given by a 30(b)(6) witness is like the testimony of any other witness, admissible but subject to contradiction by other evidence. See A.I. Credit v. Legion Ins. Co., 265 F.3d 630, 637 (7th Cir. 2001). But there is a minority view that, by commissioning the designee as the voice of the organization, the organization cannot argue new or different facts that could have been included in the 30(b)(6) deposition. See Rainey v. American Forest & Paper Ass'n, 26 F.Supp.2d 94 (D.D.C. 1998). The Department believes that the majority view is the right solution, and it supports further consideration of a rule amendment that codifies the majority view.

Michael Romano (UU): This testimony should be binding, just as the testimony of an individual is binding. Of course, testimony can always be changed, but only upon a demonstration of a good faith basis for the prior erroneous response and a good faith explanation of the modification. The well-known consequences of changing prior testimony must remain, not only so that the need to fully prepare the witness remains, but also to conclusively narrow issues for trial, which can only be accomplished by binding answers from the corporation.

Michael Merrick (VV): We think that the question whether a corporation should be allowed to offer evidence inconsistent with its testimony should be decided by courts on a case-by-case basis. Although most courts recognize that 30(b)(6) testimony is no more "binding" than testimony of other witnesses, a different result is appropriate in some circumstances. Some courts have rejected affidavits presented at the summary-judgment stage that vary the deposition testimony, invoking the "sham affidavit" doctrine. Attempting to create a bright-line rule that applies in all situations has the potential to create confusion, and this

matter is best left to the courts to decide on a case-by-case basis. Alternatively, because this idea focuses on the interaction of the Civil Rules and the Evidence Rules, perhaps it would be appropriate to refer it to the Advisory Committee on Evidence Rules for its review and analysis before proceeding further. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA), Charles Lamberton (BBB), Thomas Padget (CCC), and Mary Kelly (CCCC) submitted very similar or identical comments.

J.P. Kemp (ZZ): If anything, the rule should be amended to make clear that the answers to questions at a 30(b)(6) deposition are indeed judicial admissions equivalent to those made in pleadings. My clients as individuals are certainly considered to have made judicial admissions in their depositions. The "sham affidavit" doctrine shows what happens when they try to stray from deposition testimony. Changing the rule to eliminate the binding effect of the testimony would gut the whole purpose of this rule. The corporation could easily avoid providing useful discovery, and would be almost encouraged to do so. "This is a horrendous idea that should be immediately scrapped." You could add an escape valve that would allow the corporation to move the court to be relieved of its admissions as under Rule 36, but the presumption should be that these are binding admissions unless such relief is granted.

Frank Silvestri, American College of Trial Lawyers (DDD and J): We do not favor an amendment addressing the judicial admissions issue. Although the Rainey case is cited as being a "minority position," there are no cases expressly holding that a 30(b)(6) witness's statements are judicial admissions. The current rule provides judicial discretion to decide whether or not to bind a deposed business to its testimony. To treat such testimony as a judicial admission in all instances is a bright-line rule that is too strict for these depositions. There are already remedies in place to punish bad actors and deter misleading or incomplete statements from 30(b)(6) witnesses. If testimony is later altered, it can be attacked through cross examination or impeachment, or simply utilized to demonstrate a lack of trustworthiness throughout the party's case in chief. If the altered testimony is flagrant, the court may impose sanctions under Rule 37(d). Moreover, it seems to us that the question how to treat 30(b)(6) testimony is not sufficiently unsettled to justify an amendment to the current rule. No court has declared 30(b)(6) testimony a judicial admission, so there is no widespread confusion that requires action from the Advisory Committee. We note that the NELA letter to Judge Bates on March 20, 2017, similarly urges a case-by-case approach to the handling of these matters. This flexibility allows better analysis by the courts.

Nitin Sud (EEE): There shouldn't be a bright-line rule, and it should be decided on a case-by-case basis. It is necessary to

bind a party to its answers, as otherwise the purpose of the deposition is defeated. But this does not need to be a "gotcha." The effect must be decided by the judge on a case-by-case basis.

Heather Leonard (GGG): In my practice, I have not encountered any problems on this topic. I fear a rule change would lead to gamesmanship. The rule in its current state allows courts to address this issue, when necessary, on a case-by-case basis.

Kevin Koelbel (HHH): Rule 30(b)(6) testimony should carry the same weight as any other deposition testimony. Similarly, post-deposition clarifications should abide the existing rule.

Jonathan Feigenbaum (JJJ): This change will lead to confusion over the weight that such testimony should received in a particular instance. Tome will be wasted fighting over so-called mixed issues of law and fact.

Wright Lindsey Jennings (MMM): A clear majority of courts have held that the organization is not bound by the designee's testimony. We believe this is the better rule, and that a change to the text of the rule that codifies that view should be considered.

Richard Seymour (NNN): It would be very useful to the parties and the courts to clarify the weight to be given to answers in a 30(b)(6) deposition. Case law is interesting, but it does not address the point of what the rule should say in order to make this discovery device as effective as it can be. And the FJC study found that much of the litigation over these depositions involves the effect of the testimony. I think the rule can be effective only if the answers have a strong binding effect, to a much greater extent than other evidence, so the entity has a strong interest in ensuring the accuracy of the information. Litigants rely on the answers given in these depositions to shape subsequent discovery requests. If the only effect is to immunize the answers against a hearsay objection that would give a license to corporations to provide misleading answers and hide the truth. But it would be proper for the corporation to seek consent of the plaintiff or leave of court to change the answer on an adequate showing that there was a diligent good-faith investigation, that they could not have obtained the added or accurate information earlier, and that they disclosed the added information at the earliest possible opportunity. Then there should be added discovery at the expense of the corporation. I have agreed to this solution in cases in which defense counsel contacted me and explained the problem.

Jonathan Gould (OOO): Some binding effect of the witness's testimony is necessary. Otherwise the rule would be worthless. Evidentiary admissions are usually what the courts have decided

are appropriate.

Tae Sture (PPP): I have never encountered this issue. And so far as I know, it's never been raised by members of the Indiana bar. Litigants merely treat 30(b)(6) statements as evidentiary statements, not judicial admissions. The litigants treat the sworn statements as binding upon the deponent, and not necessarily the corporation.

Michael Quiat (TTT): If the responses are not binding, that will dilute the impact of deposition testimony which is otherwise highly probative. Again, this advantages the corporations and disadvantages the individual.

Robert Keehn (VVV): Any attempt to water down the binding effect of deposition answers can only be seen as an effort by defense interests to tilt the playing field.

Patrick Mause (WWW): The 30(b)(6) depositions are essential to getting admissible evidence regarding the corporation's knowledge. If the corporate defendant elects to send an unprepared or deliberately evasive witness to the deposition, it should do so at its own peril. The proposed change would encourage gamesmanship.

David Sims (XXX): There must be some binding effect to the witness's testimony. Otherwise the rule will be worthless.

George Wright Weeth (BBBB): A primary reason for taking a deposition is to obtain judicial admissions. The corporate party should operate the same rules that apply to everyone else.

Timothy Bailey (LLLL): "This is absolutely shocking to me. Corporations and other organizations use these legal identities to escape personal responsibility." The jury is entitled to hear the corporation's actual position on matters of fact from an actual person. When the defendant is an individual, the person testifies. It should not be different for a corporation. If the corporation produces the right person, why shouldn't the jury be allowed to rely on what that person says? If this change is allowed, corporations will simply use their lawyers and paid experts to state their positions.

Brandon Baxter (MMMM): Most of the problems relating to "binding" testimony arise out of lack of proper preparation of the witness. That issue is often addressed in reported decisions, but is not addressed in this proposal. We should not encourage lack of preparation by explicitly sending the message that the answers are not "binding."

Christina Stephenson (OOOO): Statements during 30(b)(6) depositions should be considered judicial admissions, not merely

admissible hearsay. The organization should be forbidden to offer contrary evidence.

Hagans Berman Sobol Shapiro (XXXX): We are wary of an amendment that would reduce the effect of admissions made in testimony. Under the rule, an organization should be bound to a position it takes during a deposition. Although such statements may not always be tantamount to a "judicial admission," organizations may not disavow their testimony. If they are dissatisfied with the testimony, the solution for the company is to explain and explore these points through cross-examination, or the timely introduction of evidence that may contradict or expand the testimony. Allowing this change would encourage bandying.

Robert Rosati (AAAAA): This is a non-issue. Every appellate court that has addressed the issue has rejected the conclusion that the organization is forbidden to offer evidence inconsistent with the answers in the 30(b)(6) deposition. Making a rule change about this subject would only engender confusion given the state of the law.

John Beisner, U.S. Chamber Institute for Legal Reform (JJJJJ): A driving force behind that widespread use of 30(b)(6) depositions is the ability to force the entity to make binding admissions. Some corporate defendants have been barred from defeating a motion for summary judgment using evidence that conflicts with a prior 30(b)(6) deposition. Although other courts have properly recognized that corporations may offer divergent evidence, the high-stakes and costly nature of these disputes warrants taking a fresh look at this rule, and clarifying that the majority of courts are right about the "binding" effect -- it is admissible evidence but not a judicial admission.

Spencer Pahlke (LLLLL): Because plaintiffs rely on what they learn during discovery to build their case and prepare for trial, it is essential that 30(b)(6) testimony not be used as a tool for sandbagging. Both the judicial admissions and supplementation ideas could lead to exactly that. If an amendment is made regarding judicial admissions, it must also clarify that the testimony is "binding" and define clearly that this means the witness is speaking as the organization rather than as an individual. The testimony should bear on the organization in the same way as it would an individual party. If the organization wants to change its answer, it should bear the burden to provide that the information involved was not available at the time of the deposition.

American Association for Justice (SSSSS): Without a binding effect, answers in a 30(b)(6) deposition would be essentially meaningless. But that does not mean they are routinely found to be judicial admissions. To the contrary, no district courts or

courts of appeals expressly hold that the 30(b)(6) witness's statements are judicial admissions. AAJ has examined the 114 cases since 1991 that expressly address whether a statement in such a depositoin is a judicial admission. The overwhelming majority of these cases recognize that, although it is binding, the testimony of a 30(b)(6) witness is not a judicial admission. In the handful of cases in which courts precluded corporate parties from offering evidence that contradicted the testimony of their 30(b)(6) witnesses, the courts' motivation was punitive, triggered by extreme and unusual evasive behavior. The existing case law shows that there is a common sense case-by-case approach to these issues that should not be disturbed by a change in the rule.

Public Justice (TTTTT): This amendment would be unnecessary and harmful. Presently, the issues it would address have been left to the courts to be decided on a case-by-case basis. That is as it should be. Most courts regard 30(b)(6) testimony as binding only in the sense that all deposition testimony is "binding." In some cases, courts have rejected declarations contradicting prior 30(b)(6) testimony using reasoning analogous to the "sham affidavit" rule. But those decisions were based on the court's conclusion that the organization had attempted improperly to thwart the objectives of the rule. "Courts are perfectly capable of determining when a statement given during a Rule 30(b)(6) deposition should be treated as a binding admission." Attempting to create a bright-line rule to apply in all situations would invite the very gamesmanship the rule seeks to avoid.

John H. Hickey (VVVVV): The testimony of an individual litigant is of course binding, or at least binding as a practical matter in the eyes of the fact finder. Courts have taken different positions on whether an admission in a corporate representative deposition is "binding" on the corporate party. The S.D. Fla., where I usually practice, has taken a "hybrid" approach. When the representative is unable to answer the question and the corporation fails to provide an adequate substitute, the corporation will be bound by the "I don't know" response. This precludes the corporation from offering contrary evidence at trial and prevents trial by ambush.

Massachusetts Academy of Trial Attorneys (AAAAAA): The proposal to clarify whether testimony constitutes a judicial admission is unnecessary and invites confusion and additional wated time. The current state of the law works well. Allowing parties the abiltiy to disavow Rule 30(b)(6) testimony rather than "correct the record" through traditional cross-examination or intrducing subsequent evidence undermines the value and dignity of the deposition as a discovery tool.

Supplementation

Nancy Reynolds (L): Supplementation should be permitted for corporate depositions just as it is for individual depositions. In both situations, if the supplementation is significant, a second deposition can be requested at the expense of the witness. Particularly if the deposition occurs early in the discovery process, it is likely that some information will not be known at the time of the deposition. "[I]t is a common tactic for plaintiffs to depose corporate representatives before the information is known to obtain lack of knowledge responses and display to a jury that the corporation did not care or doesn't know what it is doing or the like. I have moved to quash early corporate representative depositions because of the unfairness of such an approach."

Timothy Patenode (M): The reality is that if deadlines are tight, the corporation has few avenues to supplement or rebut the witness's testimony. This may be an appropriate result when bandying has occurred, but it seems prejudicial at an early stage of discovery.

Christian Gabroy (T): "There should be no supplementation rule as this will just add confusion and murky up testimony and allow a rewrite by counsel of the testimony."

Lawyers for Civil Justice (U): Supplementation should be allowed under the rule. 30(b)(6) depositions are taken at different times in different cases, and it is inevitable that new information will sometimes emerge. Allowing supplementation in such situations would further the truth-finding function. In a way, these depositions are like the deposition of retained expert, which is subject to the supplementation rule. "Any supplementation should be in written form accompanied by an affidavit explaining the reason for the additional information or explanation or, if the parties agree, through another means such as a supplemental deposition. The amendment should provide that any second deposition is limited to the subject matter of the supplement."

Jeff Scarborough (V): There should be no supplementation rule. Such a rule would just add confusion and murky up testimony and allow a rewrite by counsel of the testimony.

Barry Green (W): The proposed change would provide corporations with the ability to change testimony, when the parties do not have that ability. It would also render the deposition useless because all information given would be subject to change.

David Stradley (X): Adding this provision will "gut the preparation requirement." If corporations are not bound by their

testimony in the deposition, they will skimp on preparing their witnesses, if they prepare them at all. They will know that counsel can supplement the answers after hearing the specific questions. The committee may as well eliminate the 30(b)(6) deposition altogether. Amanda Mingo (Y) submitted identical comments.

McGinn, Carpenter, Montoya & Love (AA): Allowing the organization to supplement would potentially defeat the purpose of the rule by giving the organization the ability to wait until the end of discovery to disclose the full extent of its positions and knowledge while offering an inadequately prepared witness at the deposition. If supplementation is allowed at all, it should be allowed only when the same type of burden shifting process that should apply on the judicial admissions point is employed. The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), Ken Graham (NN), and Ford & Cook (OO and PP).

Frederick Goldsmith (II): This proposal smells like an opportunity for corporations who did not like how the deposition turned out to get a do-over. This wreaks of another attempt by defense interests to change the rule to strengthen their hand. Jeremy Bordelon (TT) submitted identical comments.

Patrick Yancey (JJ): When the person most familiar with Safety Rule Y of a corporation comes into the deposition and tells us and the world that the purpose and meaning of Rule Y is Z, then we and the court should be able to rely on what is supposed to be truthful testimony. The corporation should not have any need to "amend" the authoritative person's answers.

Michael Romano (UU): This would create an opportunity for corporations to change prior testimony without a good faith explanation. That would blunt the effectiveness of the 30(b)(6) deposition. Many depositions adjourn with requests for additional information, but permitting supplementation by rule may create the unintended result of "sandbagging" at the deposition, knowing that relevant information can be provided up until the close of discovery. As things stand under the current rule, courts expect an explanation supporting the change, and usually permit the opposing party to test the altered testimony by further deposition.

Michael Merrick (VV): This change would encourage intentionally failing to prepare witnesses or introducing sham testimony. Courts routinely strike sham affidavits, but allowing supplementation would permit 30(b)(6) witnesses to say "I don't know. I will need to review our records" instead of answering.

That would make the deposition a largely empty exercise. Moreover, this change would only benefit organizational defendants, and would create serious inequities without any recognizable benefit. Rule 26(e) does not require supplementation of deposition testimony. Efforts to supplement by a plaintiff would b subject to a motion to strike and/or impeachment at trial. It is therefore difficult to understand why organizational parties would be allowed or required to freely supplement, while leaving individual plaintiffs subject to the existing, harsher rule. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA), Charles Lamberton (BBB), Thomas Padget (CCC), and Mary Kelly (CCCC) submitted very similar or identical comments.

J.P. Kemp (ZZ): This change would gut the rule. The witness would be coached to testify to a lack of knowledge about all the pertinent facts so that later the attorney could answer all the questions in writing in ways that are evasive and seek to hide the truth.

Nitin Sud (EEE): Allowing the deponent to supplement will result in a complete waste of time and promote gaming of the process.

Heather Leonard (GGG): The proposed change would encourage wasteful forms of gamesmanship, such as intentionally failing to prepare witnesses or introducing sham testimony.

Jonathan Feigenbaum (JJJ): Allowing supplementation will create "do-overs" and a one-sided chance to entities to avoid binding statements when the testimony does not come out as hoped for. Individuals don't have this opportunity.

Robert Landry III (KKK): Allowing supplementation would encourage wasteful forms of gamesmanship, such as failing to prepare witnesses or introducing sham testimony. This change would only benefit organizational defendants. If a plaintiff sought to change her prior testimony, the new "testimony" would be subject to a motion to strike or impeachment at trial. A corporation already has the advantage of selecting the witness, and it can choose the most knowledgeable. So it would doubly unfair then to allow these witnesses to decline to provide responsive, complete testimony.

Richard Seymour (NNN): The solution to the judicial admissions issue outlined above should apply here also. Good-faith mistakes or omissions should be subject to correction based on a showing of full deposition preparation and the impossibility of obtaining the supplemental information earlier.

Jonathan Gould (OOO): Supplementation should be allowed only as to new facts not reasonably within the party's possession

at the time of the deposition. Otherwise, it would lead to "I'll get back to you" answers.

Tae Sture (PPP): I oppose this change because it would open the door even further to gamesmanship. I have too often been confronted by defense counsel "supplementing" defendant's document production just a few days before the deposition even though the documents have clearly been in defendant's possession for a long time. The result was a postponed deposition. This would happen a lot more often.

Michael Quiat (TTT): This is a bad idea. I have personally confronted insurance company attempts to "correct" transcripts which were otherwise detrimental to their litigation interests. Providing a formal mechanism for doing this would be a disaster.

Robert Keehn (VVV): This is a terrible idea. It provides a "do-over" opportunity for corporations who do not like how things turned out at a Rule 30(b)(6) deposition.

Patrick Mause (WWW): This is a terrible idea. It would invite corporations to completely rewrite testimony after the attorneys get ahold of the transcript would invite gamesmanship. Companies would deliberately present unprepared witnesses, and then "supplement" their testimony with attorney argument. If this is adopted, the committee might just as well eliminate 30(b)(6) in its entirety.

David Sims (XXX): This would invite failure to prepare the witness and sham testimony. Contradictory testimony by a plaintiff would be subject to a motion to strike under the "sham affidavit" doctrine, or impeachment at trial. A corporate defendant already has the advantage of choosing the witness, and allowing lawyers to "supplement" the witness's testimony later would be unfair. Allowing in additional evidence should be limited to new facts not reasonably within the party's possession at the time of the deposition.

George Wright Weeth (BBBB): This would simply open the door to more evasive answers during the deposition, after which the lawyer can answer the questions.

National Employment Lawyers Ass'n Georgia (HHHH): We oppose this idea, for it would encourage gamesmanship. Courts routinely strike sham affidavits, but allowing supplementation would permit the 30(b)(6) witness to say "I don't know. I will need to review our records." That would transform the deposition into an empty exercise. Because the change would benefit only organizational litigants, this would create serious inequities without any recognizable benefit. If a plaintiff changes her deposition testimony, there can be a motion to strike or impeachment at trial. It is therefore difficult to understand why

organizational litigants would be allowed to that without cost.

Timothy Bailey (LLLL): "This proposed changes is more than shocking. It is an invitation to obstruction and deceit." The efforts to prepare the witness will be downgraded. Counsel will, in effect, be able to testify. Testimony will never be final.

Christina Stephenson (OOOO): This should not be allowed because it would take away any incentive to prepare the witness adequately. In my experience, even the most sophisticated attorneys do not know what is required in terms of preparing a witness for these depositions.

Glen Shults (RRRR): This is unnecessary and would be inequitable. Because the notice identifies the topic for examination, the witness has the opportunity to prepare to address those subjects. Allowing supplementation could undermine the basic purpose of the deposition. The deposition would become a risk-free exercise for corporate counsel, because problematical testimony can be "cleaned up" later. Other witnesses do not have this right even though the do not get advance notice of the topics for examination.

Frederick Gittes and Jeffrey Vardaro (SSSS): This proposal (and the one for formal objections) would move farther away from the normal deposition model. Ideally, the 30(b)(6) deposition should be a way to simplify the discovery process. But the proposals would make this deposition more different from an ordinary deposition. Our individual plaintiffs know that if they "mess up" during their depositions they may confront "sham affidavit" arguments, the striking of their corrections, or at least impeachment. The idea of allowing automatic supplementation of a 30(b)(6) transcript that has been reviewed and signed would mean that the corporate designee is less bound. That makes no sense. Adoption this rule change (and the objection one) would also multiply the number of motions before the court.

State Bar of California Litigation Section Federal Courts Committee (TTTT): Adding a provision similar to Rule 26(e)(2) for 30(b)(6) depositions, perhaps specifying that the supplementation must be done in writing and providing a ground for re-opening the deposition to explore the additional information, may be helpful.

Christine Webster (WWWW) [note -- mistakenly designated WWW, but there is already another WWW]: This change would substantially undermine the usefulness of the rule because there would be little incentive to prepare. It would also be grossly one-sided.

Hagans Berman Sobol Shapiro (XXXX): This would be an

invitation to mischief. But the rule should not forbid correction when (1) at the time of the deposition, the organization did not know, or could not have known, the information sought to be added, (2) fact discovery has not yet closed, and (3) the witness may be re-called.

Potter Bolanos (ZZZZ): 30(b)(6) witnesses are not like retained experts. They are the hand-picked mouthpieces for parties. This change would invite corporations not to prepare their witnesses, and make the playing field uneven since the individual witness cannot supplement.

Robert Rosati (AAAAA): A retained expert is different from a 30(b)(6) witness. The expert must prepare a report, and if the witness is going to provide other opinions the report must be supplemented. A 30(b)(6) witness can, like any other witness, change form or substance of answers given pursuant to Rule 30(e). If that happens, the court can order the deposition reopened. The big problem in 30(b)(6) depositions is that the company does not adequately prepare the witness. The courts know how to address this problem by imposing sanctions. There is no need to amend the rule, and an amendment might be interpreted by some as virtually an invitation to perjury.

Maglio Christopher & Toale (MMMMM): Allowing supplementation would exacerbate one of the biggest problems with such depositions: the "I don't know" or evasive witness. Depending on the drafting this change could completely eliminate the utility of 30(b)(6) depositions to narrow issues for trial. The already difficult task of obtaining remedies from the trial court for this sort of behavior would likely be undermined or effectively eliminated. Instead, "I don't know," combined with "We'll get back to you" would be the new norm.

American Association for Justice (SSSSS): Adding a supplementation provision would be devastating to plaintiffs and would defeat the purpose of the rule. It would effectively extinguish the duty of corporate defendants to prepare a witness properly to testify. The "I'll get back to you" response could readily become the new norm. The utility of these depositions depends on the binding effect of the answers given. Without that, there is very little reason to take the deposition at all. Deponents already have a right under Rule 30(e)(1)(B) to make changes in form or substance to the recording or transcript of the deposition and provide the reasons for making the changes within 30 days of the taking of the deposition. The rules already permit timely changes to be made without leaving the deposition open indefinitely, which would render it useless. No other rule allows a deposition witness to rewrite her testimony without consequence. Although it has been suggested that supplementation here is like supplementation of the deposition of a retained expert witness, the situations are not analogous. The

expert is required to make a written report, and the supplementation requirement is closely tied to that report requirement. There is no similar report requirment with regard to a 30(b)(6) witness.

Public Justice (TTTTT): We strongly oppose this idea. It would undermine the core goals of the rule and unfairly advantage organizational litigants over individuals. An individual who tried to change deposition testimony via supplementation would be subject to impeachment or a motion to strike. But corporations would have carte blanche to do so. In practice now, all party deponents face potentially serious legal consequences for failure to prepare for their depositions. And individual plaintiffs often have much less experience preparing for and testifying in depositions than corporations, particularly hand-picked 30(b)(6) witnesses. Making this change would also add to the courts' workload by generating more motion practice.

John H. Hickey (VVVVV): The only case law applicable to the idea of supplementation is the law of errata sheets, which are meant only to correct a scrivener's error in the record. If the changes add or significantly change testimony, the deposing party can with leave of court retake the deposition. This rule should suffice. Any additional provision would unfairly expand the ability of the corporate party to avoid committing to a position. That would serve only to increase the time and costs of litigation.

Massachusetts Academy of Trial Attorneys (AAAAAA): Making this change would undermine the function and effectiveness of the deposition. It would invite organizations to be less precise during a deposition, safe in the knowledge that they have a blanket opportuntiy to revisit the issue in written form at a later date. An organization's ability to supplemenet deposition testimony should be tied to narrow circumstances.

Forbidding contention questions

Timothy Patenode (M): A rule change may not be adequate. A contention question is in the eye of the beholder. No advocate will want to instruct a witness not to answer on this ground, or to suspend a deposition to get a ruling.

Steve Caley (N): Given that the witness is testifying on behalf of the corporation, I think that contention questions are appropriate, provided that the 30(b)(6) notice explicitly gives notice that the witness will be asked contention questions and identifies, at least generally, the subjects of those questions.

Craig Drummond (R): Contention questions should be allowed. If a party wants to make an objection, that is fine, but the witness must answer. This attempt to "forbid" such questions appears to be just one more attempt to allow the corporate party to game the 30(b)(6) deposition. "Shouldn't a party be able to get an actual answer about an issue from a corporate defendant prior to trial? We all know that written discovery through interrogatories and Requests for Admissions are mainly a joke that are riddled full of objections and vague answers. Often, the only time to nail a corporate party down [is] to use gamesmanship at a 30(b)(6)."

Christian Gabroy (T): "There should be no forbidding of contention questions because facts need to be addressed so as to formulate what defendant considers defenses, etc."

Lawyers for Civil Justice (U): These depositions are designed to "discover facts." The rule should forbid contention questions. At present, it permits what are in effect oral contention interrogatories that require witnesses to such things as "state all support and theories" for myriad contentions in a complex case. Not only is this an almost impossible challenge, it also threatens the attorney-client privilege as it probes into attorney/client communications. Therefore, the rule should forbid contention questions to non-lawyer witnesses, or inquiries into materials reviewed in preparation for the deposition.

Jeff Scarborough (V): Contention questions should not be forbidden because all facts need to be addressed, including facts in support of defendant's defenses.

Barry Green (W): This is another effort to prevent the designated witness's testimony from binding the corporation. The rules already contain a procedure for dealing with this issue. The attorney for the deponent can object to the question, but the question must be answered. The corporation can then move the court to allow amendment of the answer because the question is a contention question.

David Stradley (X): The rule helps balance the lack of information that defendants are required to provide in their pleadings. Under Rule 8, there is no consensus that a defendant is required to plead facts in support of its affirmative defenses. Accordingly, a plaintiff can face a raft of affirmative defenses, yet be utterly in the dark as the factual basis for these defenses. Rule 30 allows a plaintiff to question the defendant as to the factual basis of its affirmative defenses. The proposed change would prevent plaintiff from learning the factual basis of a corporation's affirmative defenses. Such questions are vital to efficient discovery and trial preparation. Counsel can easily toss an affirmative defense into an answer, especially where he does not have plea facts in support of that defense. Preparing a witness to support such a defense is quite another kettle of fish. Amanda Mingo (Y) submitted identical comments.

McGinn, Carpenter, Montoya & Love (AA): This rule change would confer special rights on corporations that already have the advantage of knowing in advance what topics will be explored during a deposition. There is no prohibition in Rule 30 against asking an individual about her contentions or opinions, and ordinary witnesses are routinely asked these types of questions in depositions. The concern that a "spontaneous answer in a deposition seems quite different" from an interrogatory answer that the answering party has 30 days to prepare has no merit. A typical 30(b)(6) deposition involves the same 30-day period because of requests for documents. Prohibiting contention questions would only serve to allow a corporate defendant to polish its testimony through its attorneys and to save its contentions for trial, where the opposing party would have no prior testimony with which to impeach. Individual deponents are not afforded this luxury, and organizational deponents should not be afforded it either. The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), Ken Graham (NN), and Ford & Cook (OO and PP).

Bryant Crooks (DD): Contention questions are very important and should be maintained. A corporation can request an individual person to answer what she contends and factual basis or support they have for contending it. There is no reason this should suddenly become unfair when asked of a corporate party. Indeed, the sophisticated corporation is likely better equipped to respond to such a question.

Frederick Goldsmith (II): Organizational defendants often hide behind boilerplate affirmative defenses. The ability to ask contention-related questions is an important tool in flushing out whether the entity actually has any facts or documents to support

its defenses. Litigants are entitled to know before trial what the other side's case is. Jeremy Bordelon (TT) submitted identical comments.

Patrick Yancey (JJ): Why should a plaintiff not be permitted to ask the corporation a contention question such as "If employee John Doe who is required to comply with safety Rule Y either did not or did not do A, B and C to comply with Safety Rule Y, isn't it true that he violated Safety Rule Y?" The corporation does not need 30 days to sit down and craft some obscuring response to this question. Permitting it to do so will only lengthen the time it takes to get to the truth.

Department of Justice (RR): The Department has had the experience of being subject to 30(b)(6) depositions that seek the United States' views about legal theories or legal opinions, particularly in cases where the United States is a plaintiff in litigation. This practice raises substantial privilege concerns. A rule amendment that distinguishes between factual contentions, on the one hand, and legal opinions or legal theories, on the other, would be worth further consideration.

Michael Romano (UU): Making this change would create a risk of "trial by ambush." Corporations often hide evidence behind affirmative defenses, and contention questions are often the only way to flush out the grounds for these defenses.

Michael Merrick (VV): This change would unfairly impose a discovery restriction on individual litigants, but not on organizational parties. It is true that there is much more time to respond to contention interrogatories, but corporate defendants often ask plaintiffs numerous contention questions during their depositions. For example: "What support do you have for your claim that you suffered discrimination?" Allowing this sort of question to be asked of plaintiffs but not defendants would unfairly tilt the scales in favor of one side. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA), Charles Lamberton (BBB), Thomas Padget (CCC), Robert Landry (KKK), Walt Auvil (LLL), Tae Sture (PPP), and Mary Kelly (CCCC) submitted very similar or identical comments.

J.P. Kemp (ZZ): "Oh my god!! This is over the top bad." An example is provided by the Farragher/Ellerth defense. Suppose the defendant invokes this defense in its answer. The 30(b)(6) notice lists as a topic: "The factual bases for Defendant's 27th affirmative defense in which it claims to have investigated and taken prompt remedial action." This is a "contention question," beyond a doubt. Why shouldn't the plaintiff employee's counsel be allowed to ask questions about this? The defendant has raised an affirmative defense that is diametrically opposed to Plaintiff's theory of the case. Should the defendant be able to hide behind its pleading and provide no

facts in sworn testimony about what investigation it contends to have done and what prompt remedial action it claims to have taken?

Frank Silvestri, American College of Trial Lawyers (DDD and J): We do not favor making a change to the rule on this issue. There are very few reported decisions on this issue. Those that limit contention inquiries or topics do not establish a blanket exclusion. In fact, many of the cases deal with efforts to depose counsel, or to invade the work product protection to the extent that only counsel could answer the questions in the notice. We agree that the deposition should be limited to factual matters, we do not think the rule needs to have a blanket exemption that might stymie efforts to obtain the factual underpinning of the complaint, answer or counterclaim. If the topics are properly framed to obtain facts, that should be acceptable.

Nitin Sud (EEE): "You have to be kidding me. Such questions are permissible for individuals being deposed, and are often the basis of the high percentage of pro-employer decisions. Companies often assert a plethora of affirmative defenses. They should be able to back them up at a deposition."

Heather Leonard (GGG): This change would create a double standard for parties. It is common for contention questions to be posed to individual parties. To immunize corporate defendants against such questions would unfairly impose a discovery restriction on individuals.

Robert Landry III (KKK): This change would unfairly impose a discovery restriction on individual litigants. Corporate defendants often ask plaintiffs numerous contention questions.

Wright Lindsey Jennings (MMM): The practice of using 30(b)(6) depositions to seek the views of a corporation regarding legal theories or legal opinions should be forbidden. The purpose of these depositions is discovery of factual matters known to the entity. Allowing questions about legal theories threatens to invade the attorney-client privilege. Putting corporate designees, who are usually not lawyers, on the spot with such questions should be prohibited.

Richard Seymour (NNN): Contention questions can be subdivided usefully into legal and factual contention questions. Mixed questions of law and fact can be regarded as legal questions. An amendment should disallow legal contention questions and allow factual contention questions. Interrogatories can be used for legal contention questions. It seems to me an abuse of the 30(b)(6) deposition to ask such questions. Perhaps that would mean only a lawyer could be designated as a witness. In addition, allowing such questions

would often lead to a game of "gotcha." How can jurors evaluate answers to these sorts of questions? If this sort of questioning were allowed, would that lead to cross-examining counsel on their briefs? But factual contentions are an entirely different matter. If 48 years of practicing law has taught me anything, it is the critical nature of finding out how the other side sees the facts, and what the other side's factual contentions really are.

Jonathan Gould (OOO): Fact contention questions are totally appropriate in a 30(b)(6) deposition. Legal contentions should probably be excluded.

Michael Quiat (TTT): I frankly think this is silly. "Anyone who has done any serious litigation over time recognizes that frequently pleadings, prepared by lawyers, have dubious evidentiary support. To suggest that those areas are beyond the pale of contention questions serves no practical function and can severely prejudice a party legitimately seeking areas of probative evidence."

Robert Keehn (VVV): The opportunity to ask contention-related questions is an extremely important tool in flushing out whether the entity actually has any facts or documents to support its defenses, as opposed to simply hiding behind a multitude of boilerplate affirmative defenses.

Patrick Mause (WWW): If a corporate defendant is going to file an answer with 25 affirmative defenses and then serve evasive interrogatory responses, the only opportunity to obtain a corporate admission is at a 30(b)(6) deposition. The spontaneity of the witness's response is a feature of the rule, not a flaw. I disagree, as well, with the idea that contention-type questions are rarely used in depositions of other witnesses.

David Sims (XXX): Defendants typically ask contention questions during depositions, and to deny plaintiffs that opportunity unfairly tilts the scales.

George Wright Weeth (BBBB): Fact contention questions are totally appropriate in a 30(b)(6) deposition and should not be restricted.

National Employment Lawyers Ass'n Georgia (HHHH): This would unfairly provide for different treatment of organizational litigants and individual plaintiffs. Corporate defendants often ask plaintiffs numerous contention questions during depositions. Columbia Legal Services (NNNN) submitted very similar comments.

Ford Motor Co. (KKKK): Ford has observed that the most common contention questions address its affirmative defenses or its assessment of the claim asserted. 30(b)(6) topics seeking to explore legal theories or evaluate the application of facts to

specific claims and defenses are particularly unsuitable for these depositions. Addressing legal theories requires involvement of counsel, and often legal theories evolve during the course of a case, and can be finalized only after the close of discovery. Trying to channel all the pertinent information through a single witness, particularly early in the case, presents a situation ripe for confusion. Contention questions during 30(b)(6) depositions usually amount to little more than gamesmanship seeking to generate awkward moments on videotape. Interrogatory answers are a better way to get at such matters.

Timothy Bailey (LLLL): Isn't litigation all about contentions? With individual litigants, contention questions are fair game. Why can't corporations state their contentions also? Counsel for a corporation should have the same duty to prepare the witness as counsel for an individual.

Brandon Baxter (MMMM): The ability to obtain spontaneous answers in cross-examination is one of the keys to obtaining unvarnished truth. The topics have already been provided to the entity. Questions about motives or opinions are commonplace in depositions, and they should not be limited.

Christina Stephenson (OOOO): Contention questions should not be forbidden, but the company might be allowed to answer in writing so long as the answer is provided within the time allowed for interrogatory answers and without the requesting attorney having to submit a separate request for the information.

Jennifer Danish (PPPP): Corporations often hide behind boilerplate affirmative defenses. Contention questions are an important tool to flush out whether the company really has any facts or documents to support its defenses. We are entitled to know before trial what the other side's case is.

Glen Shults (RRRR): This would leave the playing field between corporations and individual litigants even more tilted than it already is. Defense counsel can ask plaintiffs contention questions, even though those are often very challenging for plaintiffs with limited educations. I see no reason why a hand-picked witness, fully prepared by counsel, can't be asked similar questions. Contention interrogatories are a poor substitute.

Christine Webster (WWWW) [note -- mistakenly designated WWW, but there is already another WWW]: I have found 30(b)(6) depositions addressing the bases for a defendant's claim to have acted in "good faith" or to identify what defendant contends was a legitimate non-discriminatory reason for an employment decision to be the most effective means of discovery on those issues. No defendant has seriously objected to such inquiries.

Potter Bolanos (ZZZZ): The Subcommittee is wrong that contention questions are rarely used in individual depositions. They are frequently used. It would be wrong to deny plaintiffs a similar opportunity to explore the contentions of their corporate opponents.

Robert Rosati (AAAAA): Contention questions are clearly improper in a deposition of any kind. Numerous federal cases recognize that contention questions are improper legal questions, not factual questions. In my experience, competent counsel do not ask contention questions in 30(b)(6) or other deposition. Competent counsel representing the witness do not allow their clients to answer such questions.

Leto Copeley (BBBBB): It makes no sense to eliminate questions designed to help a party learn the factual bases of a corporation's affirmative defenses.

Sherry Rozell (KKKKK): The rule should be amended to prohibit questioning that requires the deponent to express opinions or contentions that relate to legal issues, such as the corporation's beliefs or positions as to the contentions in the suit. Applying law to the facts in this way often forces the deponent, generally not a lawyer, to analyze complex legal and factual positions and commit the organization to a legal position in the case. Questioning regarding a party's theories in the case is better left to contention interrogatories. This is particularly true in instances in which the witness's answers are considered binding on the corporation.

Spencer Pahlke (LLLLL): There is inherently a gray area in determining what is and is not a contention question. Often questions straddle the line between basic facts and facts supporting a contention. Adopting a rule that bars questions one attorney construes as contention questions will dramatically increase the number of instructions not to answer at deposition, thereby provoking more motion practice. So if a rule change is adopted, it should also say that this is not a ground for instructing a witness not to answer.

Maglio Christopher & Toale (MMMMM): This idea runs completely counter to any efforts to increase the speed and efficiency of litigation. Together with requests for admissions, "contention" questions are the best tools to narrow issues for trial and thus eliminate the need for discovery on those topics. "Contention" questions are utilized in almost every party deposition. Giving organizations a special immunity to answering such questions makes no sense. Moreover, what constitutes a contention question is often a complicated analysis with a large body of case law developed over years to delineate which avenues of questioning are permissible and which are not. A rule change would certainly serve to complicate the situation.

American Association for Justice (SSSSS): The appropriateness of a contention question can only be determined on a case-by-case basis. Barring all "contention" questions would be too broad. Consider, for example, inquiries about the factual basis for affirmative defenses a corporation has included in its answer. Clearing up which affirmative defenses actually call for further attention is a key service 30(b)(6) depositions can provide. As with other proposals, this one would multiply the burden of motions on the court, which would have to make the context-controlled decision whether the question should be allowed.

Public Justice (TTTTT): We also strongly oppose this idea. Although it is true that there is much more time to respond to contention interrogatories, corporate defendants often ask individual plaintiffs contention questions during their depositions. Allowing these questions to be asked of plaintiffs but not corporate defendants has no principled justification. Moreover, allowing these questions streamlines the litigation and is good for both sides. By helping to define and refine the issues in cotroversy, these questions help the parties cut to the chase. Finally, trying to define forbidden "contention" questions would prove very difficult.

John H. Hickey (VVVVV): This proposal would limit the abiltiy of litigants to get to the real contested issues in the case. The apex doctrine properly limits the ability of litigants to depose the top officers of a corporation. But directing that lower level witnesses chosen by the corporation cannot be asked its position could in a sense might cut against the apex doctrine by making it necessary to question those top officers to determine the corporation's position. Moreover, the rule would create an asymmetry because corporations could ask individual litigants contention questions but would be immune to them.

Adding a provision for objections

Timothy Patenode (M): This would be a useful change. Indeed, I've always thought the right to object was implicit in the rules.

Steve Caley (N): I strongly favor this change. 30(b)(6) depositions are frequently objectionable as burdensome, harassing, or irrelevant. Permitting a party to serve written objections, rather than have to make a motion for a protective order, will force the noticing party to take a realistic look at the topics and will provide a mechanism for parties to resolve such disputes informally.

Joseph Sanderson (P): I support this change. The practice of allowing pre-deposition objections to 30(b)(6) topics is common in modern practice because it is more efficient and avoids the expense of wasted motions for protective orders. Indeed, the rule should require pre-deposition objections, in particular objections to the scope of the topics. The rule should provide that such objections are waived unless raised before the deposition begins.

Christian Gabroy (T): "There should be no objection rule provision, which will just waste court time and excuse valid points."

Lawyers for Civil Justice (U): The rule should establish a clear procedure for objecting to the notice. These depositions by their nature generate controversy. Preparing a witness to provide all the organization's information can impose an enormous burden on the organization. That burden can be justified if the information is actually important to the case, but that is not always so. When the topics are not defined with "reasonable particularity" the process of preparation can become almost impossible. Presently, different district courts have endorsed different procedures for handling these problems. Some say that the only vehicle is a motion for a protective order, requiring that the matter be raised before the deposition begins. Other courts find motions for protective orders generally improper, and some even say they are not available at all for overbreadth or relevance objections. Rule 30(b)(6) should be amended to include a provision like the one in Rule 45(d)(2) for subpoenas, with an early deadline for objections and clear consequences for failure to do so. This should come with a 30-day notice requirement for these depositions.

Jeff Scarborough (V): There should be no objection provisions. They would waste the court's time and act only as a roadblock to a successful deposition.

Barry Green (W): This addition would be ripe for abuse. If

it is adopted, it should require that objections be specific, and impose a mandatory sanction for frivolous objections.

David Stradley (X): Making this change would be "the greatest step backward in civil discovery in my career." Scheduling 30(b)(6) depositions is frequently an exercise in futility already. In the past, I have provided a draft notice along with a request for dates. Almost universally, my request goes unanswered. I follow up, but am again greeted with silence, weeks of silence. So I now begin by serving the actual notice, with a letter offering to work with opposing counsel as to the date, time, and place of the deposition, but also say that we will go forward at the time noticed unless an agreement can be reached. Even following this procedure, it can take weeks to get a deposition scheduled. Making the suggested change would slow things even more. That would allow corporations to stall without moving for a protective order, while individual litigants must move for a protective order. This way, every 30(b)(6) deposition would be preceded by a motion to compel. [Note: In regard to adding 30(b)(6) to the 26(f) list of topics, this comment also includes the following: "[I]n my experience at least, counsel on both sides engage in substantial communication prior to 30(b)(6) depositions under current practice. The corporation nearly always objects to one or more topics, and we frequently attempt to modify topics to make them mutually agreeable." Amanda Mingo (Y) submitted identical comments.

McGinn, Carpenter, Montoya & Love (AA): Making this change would slow down litigation by permitting an organizational party to obstruct the discovery process in a way that individual parties cannot. A plaintiff does not have the benefit of being notified in advance what topics will be explored in a deposition and cannot object to questioning in advance. Allowing the corporation to receive special treatment by using the noticed topics as a basis for objections would give those organizations an unfair advantage. The most efficient way for parties to address questioning that exceeds the boundaries of relevance is through objections to deposition designations at the time of trial, just like with other witnesses. Pre-deposition objections would inevitably result in delays and motion practice over the permissible scope of a 30(b)(6) deposition. The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), Ken Graham (NN) and Ford & Cook (OO and PP).

Bryant Crooks (DD): The rule should make it clear that unless the responding party obtains a protective order it must attend and testify. Merely moving for a protective order should not be enough. It might be a good idea also to place a specific

time limit on making such a protective-order motion a specified time before the deposition. Failure to abide this rule should be an automatic ground for sanctions, just like failure to attend a deposition by an individual litigant.

Frederick Goldsmith (II): Allowing objections to take the place of a protective order motion will invite the kind of mischief that lawyers have long faced from obstructive and baseless objections to interrogatories and Rule 34 requests.

Patrick Yancey (JJ): This is not needed. There is already a procedure for the corporation to protect itself -- a motion for a protective order.

Michael Romano (UU): Making this change will only invite mischief by corporations. It is easy to envision a plethora of objections, only to find the Rule 30(b)(6) representative unprepared to respond to any area of inquiry to which an objection has been lodged. Those objections would have to be resolved prior to the deposition. The time-tested requirement of objecting to a question to preserve the record remains the best method to protect all parties. If a request is too burdensome, the right measure is a motion for a protective order, and it must be filed and heard before the deposition.

Michael Merrick (VV): The 30(b)(6) deposition is often the first deposition taken in a case. Encouraging formal objections would create more motion practice at the start of the discovery process, with resulting delays. Specifying that the responding party must indicate what it will provide (as under Rule 34) would do little to resolve this issue. To the contrary, that would require that a party sit for multiple depositions -- one on the topics it has agreed to address, and a second after the court rules on the objections at the inevitable motion to compel. These types of inefficiencies can be avoided by leaving the rule as it is now written. More generally, this proposal runs counter to the recent amendment to Rule 1 and to the overall direction of the Committee's approach to discovery in recent years. It would surely increase the workload of overworked federal judges. Malinda Gaul(WW), Caryn Groedel (YY), Susan Swan (AAA), Charles Lamberton (BBB), Thomas Padget (CCC), Robert Landry (KKK), Walt Auvil (LLL), and Mary Kelly (CCCC) submitted identical or very similar comments.

J.P. Kemp (ZZ): This change would simply jam up the process and put the onus on the person seeking the discovery to have to prove it is necessary. It puts the inmates in charge of the asylum. If the party to be deposed truly believes that a topic is objectionable, it should move for a protective order on an emergency basis. Even better, have the courts deal with these issues on conference calls.

Frank Silvestri, American College of Trial Lawyers (DDD and J): We do not favor a provision on objections. The only procedure the courts recognize now for objections is a motion for a protective order. We believe that the protective-order paradigm operates sufficiently well and that no amendment is warranted. To introduce the suggested right to object would likely lead to heightened pre-deposition wrangling.

Nitin Sud (EEE): This would delay the discovery process and probably require additional depositions or other discovery. Usually the parties discuss the topics in advance and any concerns are addressed at that time.

Heather Leonard (GGG): This would create a situation in which companies would feel obligated to object to almost every topic out of an abundance of caution to avoid waiver of an objection. That, in turn, would generate more motion practice. All of this runs counter to the spirit of Rule 1.

Jonathan Feigenbaum (JJJ): A formal objection process will lead to more and more delays. It will also require judges to expend their time to resolve disputes over more and more procedural matters rather than on the substance of the dispute.

Wright Lindsey Jennings (MMM): The lack of a procedure for objecting to the list of topics in a 30(b)(6) deposition notice creates uncertainty, and a very real possibility of sanctions against the entity. The Subcommittee should consider a procedure for objection to specific topics, to the number of topics, to the reasonable particularity of the topics. After objections are made, the parties should be required to meet and confer as they must for other discovery disputes, and the party seeking the deposition should have the burden of justifying the requests. In keeping with this proposal, there should also be a minimum time for noticing such a deposition. This procedure might lead to more motion practice before the deposition, but it would reduce the post-deposition motion practice.

Richard Seymour (NNN): This proposal should not be pursued. The unstated assertion is that it's too difficult to get a protective order motion heard, but in every court in the country there is a method for getting a needed ruling on an emergency basis. The only ones favoring this idea are the law professors, for abstract reasons that neither practicing lawyers nor judges endorse. Moreover, allowing objections would encourage game-playing.

Jonathan Gould (OOO): This is another solution in search of a problem. The procedures in place for protective orders are sufficient now.

Tae Sture (PPP): I oppose this idea. Corporate defendants

have far more resources available to litigate. Defense counsel, as they zealously represent their clients, will routinely object, much as they do in answering interrogatories. It is far easier to raise a spurious objection than to mount a response.

Michael Quiat (TTT): This is not a sound idea. This would be used by well-financed litigants to "smoke out areas of questioning before the witness is under oath and forced to respond." It will also unnecessarily limit the scope of questions.

Robert Keehn (VVV): Making this change will invite the kind of obstructive conduct individual litigants have long faced. "The last thing our profession needs is another avenue for defense lawyers to assert ridiculous objections to discovery."

Patrick Mause (WWW): Corporate parties already object enough to impede the collection and presentation of evidence. In my experience, when 30(b)(6) topics are served defendants often abject on numerous grounds anyway as part of the pre-motion "meet and confer," and the parties often end up having to take the issue to the court anyway. The last thing we need is to give corporate defendants more tools to obstruct discovery.

David Sims (XXX): Defense counsel will routinely object to a 30(b)(6) deposition, much like what they do in response to other discovery. Allowing a pre-deposition objection will only add to the time and expense in the process. If this change is made, the courts are going to face even more discovery disputes.

George Wright Weeth (BBBB): This would unnecessarily delay discovery and add another opportunity for motion practice by the defense. It is unlikely the court will deal with objections before the deposition, leading to adjournment of the deposition.

Product Liability Advisory Council (DDDD): Unlike Rules 33, 34, or 45, Rule 30(b)(6) is silent on objections. Recipients should be permitted to formally object to the written notices. Objections should be made with specificity. The requesting party should be required to meet and confer with the respondent on the objections before presenting the issue to the judge or before an answer covered by specific objections must be given. This process would help ensure control over the number of topics that may be served in such a notice the number of hours the witness must testify. The company should not be required to obtain a protective order.

Bowman and Brooke (EEEE): Providing corporations with the opportunity to object will would be an important protection.

Huie, Fernambucq & Stewart, LLP (FFFF): Because Rule 30 is the only discovery method without an objection procedure, we

often see it used as a sword. For example, depositions are often scheduled at a time known the be unworkable. Particularly under 30(b)(6), the noticing party often takes the position that the company must present a fully prepared witness unless the court issues a protective order. Thus, the current setup actually promotes adversarial posturing. Rule 45 provides a good template for 30(b)(6). This will prompt plaintiffs to take greater care to tailor their requests narrowly. It will also incentivize more robust meet-and-confer sessions before the notice goes out. It will also reduce motion practice before the court.

National Employment Lawyers Ass'n Georgia (HHHH): Encouraging more objections would create more motion practice for the court. Requiring the objecting party to produce a witness to address the topics not objected to would require the party to sit for multiple depositions. These inefficiencies can be avoided by leaving the rule as it stands. There is no showing that the few protective-order motions that have been filed have been resolved in an incorrect manner. Adding this provision would cut against the overall direction of the Advisory Committee in recent years, seeking to reduce expense and judicial workload. Columbia Legal Services (NNNN) submitted very similar comments.

Ford Motor Co. (KKKK): The lack of direction about objections creates a procedural ambiguity that deepens disagreement between parties and has even led some courts to refuse to address objections until after the deposition has been concluded. Other discovery devices that direct a corporate party to scour its resources, such as Rule 34 and 45, establish official procedures for objecting. Adopting a similar procedure for 30(b)(6) would end the current confusion on the subject. Moreover, the failure of the noticing party to describe the topics with reasonable particularity puts the responding party in the impossible position of having to prepare a witness to testify with only an opaque notion of the questions that will be asked. For example, Ford's sample of notices includes such topics as "Ford's safety philosophy for its customers" and "Discuss crashworthiness." Ford finds that propounding parties often do not want to focus the issues. Some topics are so vast in scope that they offend against proportionality principles. Consider, for example: "Ford's historical knowledge of safety belt buckle performance in rollovers." Moreover, Ford often receives 30(b)(6) notices that seek "discovery on discovery," such as: "Ford Motor Company's document retention policies." Ford has found that the lack of a recognized objection process makes the meet-and-confer process less productive, because the propounding party seems to feel less concerned about possible court intervention. Some courts will not even consider a protective-order motion before the deposition, but proceeding with the deposition and objecting can burden the court will phone calls seeking court resolution. That sort of on-the-spot ruling creates risks of sanctions if the objection is overruled, or that

the witness must return for further testimony about subjects not foreseen in preparation.

Timothy Bailey (LLLL): The motion for a protective order covers the same ground. This change would merely shift the burden required to go to court. That is a bad idea.

Christina Stephenson (OOOO): There should be a provision for pre-deposition objections, requiring that they be specific. The deposition should go forward on all other issues. The party taking the deposition should have the option of moving to compel answers to questions not answered based on objections.

State Bar of California Litigation Section Federal Courts Committee (TTTT): We support consideration of an addition to the rule of an explicit provision for written objections that may be served in advance of the deposition. Many 30(b)(6) notices are broad and can require extensive research and preparation. A simple and efficient mechanism to raise these concerns, short of a motion for a protective order, would be helpful. One thing that might be included would be a requirement like the one now in Rule 34(b) that the objecting party specify what it will provide despite the objection. However, concerns about objections halting or delaying depositions are real, as well as disputes over requirements to move to compel or for a protective order before or after the deposition begins.

Gray, Ritter & Graham, P.C. (VVVV): Rule 34(b)'s objection provision is not a good comparison. That applies to all parties. An objection provision in 30(b)(6) would protect only organizational litigants. To even the discovery scale, it would be necessary to devise a method for the plaintiff to peremptorily limit questioning at his or her deposition. Adding a provision like the one proposed would delay and increase the costs of litigation. We do not believe it's too difficult for the defense to seek a protective order if informal resolution is not possible. That has certainly not been our experience.

Christine Webster (WWWW) [note -- mistakenly designated WWW, but there is already another WWW]: This is not needed and would be harmful. It is common for a producing party to raise objections in advance of the deposition, but those objections do not block the deposition form going forward. Nearly always, by the time the deposition is completed, there are no disputes remaining for a court to address. In those cases where there continue to be disputes, the testimony provided in the deposition gives context that provides a sounder basis for resolving the disputes.

Hagans Berman Sobol Shapiro (XXXX): We strongly oppose any amendment that would excuse a party's attendance at a deposition when the party lodges an objection to the notice.

Seyfarth Shaw (YYYY): In its current form, the rule does not say how objections should be handled, and district courts have created or endorsed different avenues for a party to protect itself. Some courts say that only a protective-order motion will suffice, and that unless such an order is granted the party noticed may be subject to sanctions for failure to comply fully. Other courts refuse to entertain 30(b)(6) issues before the deposition occurs, usually allowing the responding party to object in advance and refuse to provide the material objected to, leaving issues to the motion-to-compel stage. Moreover, courts often disagree about whether 'undue burden or expense" is the same as "overly broad/unduly burdensome," creating an asymmetry between potential objections and grounds for a protective order.

Seyfarth Shaw (YYYY): The rule should adopt an objection and motion to compel procedure like that in Rule 45. Rule 45 requires that objections be submitted in 14 days, which affords time to resolve them before the deposition if that must be 30 days from notice. This would also allow the deposition to go forward on the unobjectionable topics. Moreover, it is likely that the objection process would often led to a resolution by the parties without involvement from the court.

Potter Bolanos (ZZZZ): This change would make absolutely no sense. Corporations already make objections before the deposition and we meet and confer in an effort to clarify the scope and resolve the issues. Even when the objections are not resolved this way, they are often mooted by the actual deposition. Under the change proposal described in the invitation for comment, responding parties would have an incentive to object to delay the deposition. But requiring them to provide their objections in advance -- without requiring a court ruling on those objections -- so that the parties can confer in preparation for the deposition, might make 30(b)(6) depositions more efficient.

Robert Rosati (AAAAA): In reality this is a common practice. The rule does not have to be amended to authorize it.

Terrence Zic (CCCCC): The burden should not be on the party responding to the notice to quickly file a motion for a protective order. The noticing party can take weeks, or months, to draft a notice with scores of potentially overly broad and unduly burdensome matters for examination. A 30-day notice period would provide some opportunity to meet and confer. A right to object should be added; having to make a motion is too much to ask on short notice.

Clay Guise (HHHHH): There should be clear procedures in the rule for resolving disputes. In some courts a protective-order motion is necessary. Others take the opposite view.

John Beisner, U.S. Chamber Institute for Legal Reform (JJJJJ): There is presently no formal procedure for the responding corporation to object to the scope of the topic list or otherwise. But the topic lists are often hotly contested. Courts have diverged on what is meant by "reasonable particularity." There are also disputes about what counts as corporation knowledge, particularly when the corporation has no person on staff who is familiar with events that occurred long ago. Even the courts that are most stringent about the corporation's duty to prepare recognize that there can be instances when it simply does not possess knowledge about some subjects. Corporate deposition notices increasingly precipitate these sorts of disputes. These burdensome and costly disputes could be avoided by a formal objection procedure. Like LCJ, we believe that Rule 45 is a useful model for such a procedure. It places the burden on the party that served the subpoena to move to compel and relieves the nonparty of any obligation to comply absent a court order. Applying this approach to 30(b)(6) depositions of parties would facilitate resolution of certain disputes that now lead to protective-order motions. At a minimum, adding such a procedure would solve the problem created by uncertainty about how to proceed under the current rule. In this way, "corporations would no longer have to face the Hobson's choice of complying with an improper or overreaching deposition notice or mounting a pre-deposition challenge and risking draconian sanctions."

Sherry Rozell (KKKKK): Standardizing the practice for objections would promote consistency within the rules, and provide the parties with a procedure for addressing these matters. The rule should enable the parties to proceed with the agreeable topics while seeking to resolve those in dispute. Rule 45 could serve as a model.

Spencer Pahlke (LLLLL): The relevance of a particular line of questioning often becomes evident only through the context provided by the deposition setting. Allowing a party to object to a line of questioning before the deposition begins will only create yet another hurdle to getting depositions on calendar and completed. It will also make the actual deposition much more cumbersome, with parties spending time arguing about what the parameters of their pre-deposition objections were.

Henry Kelston (NNNNN): A new procedure permitting formal written objections to 30(b)(6) notices would result in objections being served in response to virtually every deposition notice, as they are in response to every set of document requests and interrogatories. Written objections would then lead to motion practice -- and protracted delay -- far more often than responding parties now move for a protective order. And adding this would be unnecessary. Nobody seriously claims that the absence of a rule provision prevents a company's counsel from

contesting the proposed date or list of topics in a 30(b)(6) notice. The amendment would only lead to less cooperation, more delay, and more expense.

American Association for Justice (SSSSS): Such a change would mark a dramatic departure from current practice and would stall discovery. It would create more pre-trial motions practice and create more disputes requiring judicial involvement. Judges, in turn, will not only have more motions to decide, they would have to decide those motions without proper context. There will surely be many baseless objections, often boilerplate in nature. Often an early 30(b)(6) deposition will enable plaintiff to identify which files contain relevant information. Allowing objections to stall such early depositions of the organization would stall other discovery. In class actions, 30(b)(6) depositions are often the only discovery needed for plaintiffs to support class certification motions, some thing that Rule 23 says should be resolved early in the case. So allowing objections could hamstring a court trying to comply with Rule 23. The amendment idea seems to be based on a flawed notion about current practice. True, Rule 45 has an objection provision with regard to document production. But that is designed to protect nonparty witnesses against burdens. The situation of a corporate defendant is materially different. No other litigant has a similar right to block a deposition, and corporations should not get this special right.

Public Justice (TTTTT): We strongly oppose this amendment idea. It is one of the most potentially disruptive changes currently on the table. It would make discovery far more cumbersome, and slow things dramatically right form the outset. A 30(b)(6) depositoin is often the first deposition taken in the case, so a formal objection process would cause delay from the beginning of discovery. Nearly every 30(b)(6) deposition would be preceded by objections and a motion to compel. This would de facto place the burden of persuasion on the party seeking discovery. Discoery would come to a standstill. If the 30(b)(6) notice is truly objectionable, the responding party can file a motion for a protective order. There has been no showing that the courts are overburdened by such motions at present. Only the most compelling circumstances would support creating new mechanisms to allow lawyers to fight about discovery. This mechanism would create motion practice without solving an actual problem.

John H. Hickey (VVVVV): This proposal would serve only to engender more motion practice and delay. If the noticed party truly is unable to educate any witness on an issue, the representative or counsel can say so on the record at the deposition. There can, of course, be issues about whether the corporate party has properly prepared the witness. But there is a well-developed body of law on that obligation. This proposal

is a remedy in search of a problem.

Massachusetts Academy of Trial Attorneys (AAAAAA): Making this change would not be helpful to the process. Plaintiffs already have an information disadvantage during discovery. This proposed change would amplify the imbalance by laying the burden of obtaining a court order compelling attendance on the noticing party. It would do nothing to streamline the process and likely result in more protracted litigation.

Addressing application of limits
on number and duration of depositions

Nancy Reynolds (L): In my experience, when a corporation is deposed, the deposition is considered one deposition. If the corporation wants to designate 20 people in response to the notice, it may do so, but it remains the deposition of one corporation. I have designated up to 12 employees to respond because I wanted the most knowledgeable people answering questions. The duration for each witness's deposition was 7 hours because it was the corporation that opted for numerous deponents.

Timothy Patenode (M): There is a common strategy of taking an early 30(b)(6) deposition, and then noticing up depositions for the same individuals that testified in the 30(b)(6) deposition, giving the interrogator two bites at the apple.

Steve Caley (N): I think this is a good idea, as it will provide certainty with respect to these issues and, in turn, reduce motion practice. I agree with the Committee Notes that a 30(b)(6) deposition should count as only one deposition, no matter how many people are designated. I strongly disagree with the view that the examining party should be entitled to seven hours of questioning for each person designated. 30(b)(6) notices may include dozens of topics on disparate subjects, requiring a corporation to designate many individuals. To give the interrogator the right to question each of them for seven hours would effectively nullify the rules' limitation on number of depositions. To retain the seven-hour rule for the entire deposition will force the questioner to focus on what is truly material.

Joseph Sanderson (P): 30(b)(6) depositions are generally much more efficient ways of getting discovery than noticing multiple individual depositions. There is a risk that parties will try to game the system by trying to cram as many topics as possible into a single day. The rules should explicitly state that (1) a 30(b)(6) deposition may last seven hours for each person designated, with time freely granted for additional time when needed, and (2) for purposes of the ten-deposition limit a 30(b)(6) deposition is one deposition regardless of the number of people designated.

Christian Gabroy (T): "There should be no limitation on duration. There can be multiple individuals designated, and costs increase."

Lawyers for Civil Justice (U): The rule should define presumptive limits on in order to improve communication, cooperation, and case management. The present situation is anomalous because presumptive limits apply to several other

important discovery tools.

> (1) Number of topics: Too often, Rule 30(b)(6) notices are overloaded with dozens of topics. (A footnote cites cases involving 80 to 220 topics.) Responding to such sprawling lists requires the responding party to investigate all factual aspects of each topic. There should be a limit of ten topics.
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> (2) Scope of topics: The rule should also require that topics be reasonable in scope and proportional to the needs of the case. But some courts interpret the rule's directive that the topics be defined with "reasonable particularity" as requiring only that the notice "describe topics with enough specificity to enable the responding party to designate and prepare one or more deponents." These sorts of lists frequently lead to rancorous disputes.
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> (3) Numerical limit on deposition hours: Based on the Committee Note to the 2000 addition of a seven-hour limit to depositions, many courts allow multiple 30(b)(6) depositions on the ground that the seven-hour clock "resets" each time a different corporate designee takes the witness chair. This approach has the perverse effect of penalizing organizations that designate multiple witnesses, thereby incentivising the use of a single witness. In many cases, however, both sides would benefit from designation of additional witnesses.

Barry Green (W): This proposed change has some merit, but should not be limited to 30(b)(6) depositions. Whatever limitations are imposed should be applicable to all depositions to prevent discovery abuse.

David Stradley (X): The Committee Notes to the current rules contain the right answer. The deposing part should get one day of deposition time for each person designated, and the 30(b)(6) deposition counts as a single deposition toward the ten-deposition limit. If each day were counted as a separate deposition, corporations could use up their opponents' deposition days be designating multiple individuals unnecessarily. Similarly, if the 30(b)(6) deposition were limited to a single day, without regard to the number of designees, the corporation could eat up all the time by designated multiple witnesses, requiring deposing counsel to explore the background of each of them. Amanda Mingo (Y) submitted identical comments.

McGinn, Carpenter, Montoya & Love (AA): If an amendment is made on this subject, it should codify what now appears in the Committee Notes. One day should be allowed for each person designated, but the 30(b)(6) deposition counts for only one of the ten permitted each side. Otherwise, the corporation might simply designate 10 witnesses in response to a 30(b)(6) notice

and argue that the deposing party is prohibited from taking any more depositions. The following comments are either verbatim duplicates of these comments, or almost verbatim duplicates: Barry Elmore (FF), W. Scott Lythgoe (KK), Richard Plattner (LL), Taylor King & Assoc. (MM), Ford & Cook (OO and PP), Kenneth "Rusty" Mitchell (QQ), Lyons & Cone (SS), W. Scott Lythgoe (KK), Ken Graham (NN), and Ford & Cook (OO and PP).

Bryant Crooks (DD): The rule should make clear that a 30(b)(6) deposition counts as only one for purposes of the ten-deposition limit.

Frederick Goldsmith (II): This change will only invite mischief. The corporation can designate a gaggle of witnesses and they argue that the other side has already used up all ten of its depositions. Jeremy Bordelon (TT) submitted identical comments.

Patrick Yancey (JJ): There is no need to amend the rules to limit either the duration or the number of depositions needed under 30(b)(6). If the corporation chooses to designate many witnesses, than the other side needs to be able to take their depositions.

Michael Romano (UU): In my twenty years of practice, I have never encountered an issue about these matters. As with any deposition, the rule against redundancy protects litigants from unnecessary or excessive depositions.

Michael Merrick (VV): We have found that a full day is usually permitted for each 30(b)(6) witness, and it is rare for disputes to arise on this topic. If they do, they can be worked out without court intervention. It is important to note that the corporation is in control of how many individuals to put forward. If on limited the time that could be spent with given individuals, that could prevent some topics from being thoroughly explored, leading to additional fact depositions. This set of issues is not currently a source of disputes that the parties cannot resolve, and should not be the focus of rule changes. Malinda Gaul (WW), Caryn Groedel (YY), Susan Swan (AAA) Charles Lamberton (BBB), Thomas Padget (CCC), Robert Landry (KKK), and Mary Kelly (CCCC) submitted very similar or identical comments.

J.P. Kemp (ZZ): This is typically not a big problem. In my district the rule is that the 30(b)(6) counts as one deposition no matter how many people are designated, and that each person may be questioned for seven hours. To change this would permit and encourage game playing.

Frank Silvestri, American College of Trial Lawyers (DDD and J): Attempting to definitively answer these questions by amending the rule would essentially put the cart before the

horse. Practicing attorneys generally understand that the "one bite at the apple" rule applies to 30(b)(6) depositions. One well-drafted notice therefore counts as one single, separate, seven-hour deposition, no matter how many witnesses the corporation involves. The current framework is sufficient to encourage a logical resolution of the problem.

Nitin Sud (EEE): This has never been an issue. There is no problem that needs to be fixed.

Kevin Koelbel (HHH): The number of 30(b)(6) depositions should be left to the discretion of the trial judge, who can set appropriate limits at the Rule 26 conference.

Richard Seymour (NNN): We must not allow organizations to play "keep away" be exhausting the plaintiff's supply of ten depositions through its practices in designated 30(b)(6) witnesses. To reduce the seven hours for each witness's deposition would reinforce the tendency of some lawyers to "play out the clock" with lengthy speaking objections. The recommendations of the Committee Note should be inserted into the rule. "I cannot count the number of times I have had to point out this Note to plaintiffs' or defense counsel, resulting in a change of position." The Notes are just not that prominent, and by now the 2000 Note (where the provision is found) is buried behind the Notes for several further sets of amendments.

Jonathan Gould (OOO): The rule should make clear that 30(b)(6) witnesses should be counted as only one of the ten depositions. Otherwise a party could circumvent the rules by designating several witnesses to deprive the other side of enough depositions to prepare.

Tae Sture (PPP): Giving the corporate defendant the ability to use up plaintiff's depositions by designating lots of witnesses is wrong. Plaintiffs are constrained by costs; they will not "run up the clock" with excessive deposition practice.

Robert Keehn (VVV): This change would only invite mischief by the organization, which would argue that its opponent's permissible number of depositions has been exhausted by the gaggle of people it has designated.

Patrick Mause (WWW): A Rule 30(b)(6) deposition should count as one deposition to avoid game-playing by the corporation. Saying that these issues should be worked out between counsel is a pleasant thought but highly unrealistic. Counsel for large corporations do not always play nice.

David Sims (XXX): I am opposed to any separate limitation on 30(b)(6) depositions. The current rule is adequate. If the corporation can eat up plaintiff's depositions by designating

lots of people, it will.

George Wright Weeth (BBBB): Each plaintiff is a person who counts as a separate depositions. Corporate defendants should also be counted as one person. Allowing the company to curtail the other side's use of deposition by designating lots of witnesses is not fair.

Product Liability Advisory Council (DDDD): A potential limitation to guard against overbroad notices would be a limit on deposition hours. Although Rule 30 says a deposition must not be longer than seven hours, often courts have allowed multiple 30(b)(6) depositions, each lasting seven hours.

National Employment Lawyers Ass'n Georgia (HHHH): Our experience is that most jurisdictions allow a full day of deposition for each designee. Disputes that cannot be worked out between the parties on this subject are rare. Limiting the time that can be spent with a witness could impair the ability to get to all needed topics. Columbia Legal Services)NNNN) submitted very similar comments.

Brandon Baxter (MMMM): This is not currently an issue. The Committee Notes have it right.

Christina Stephenson (OOOO): There is no principled reason there should be limits on the number of 30(b)(6) depositions. These depositions are governed by topics, not by amount of time or number, because multiple people may be designated. This has not caused disputes I have observed.

State Bar of California Litigation Section Federal Courts Committee (TTTT): Although not all of our members agree on whether a 30(b)(6) deposition should be considered one deposition for the ten-deposition limit, or whether a full seven hours should be allowed for each designated individual, we do agree that further guidance in the rules would eliminate potential disagreements and accompanying cost and delay. Parties often dispute whether the limitation on number of depositions of a witness should preclude a second deposition of an organization on different topics. An early 30(b)(6) deposition is a useful way to find out what sources of information exist and learn about technologies and record-keeping practices of an adverse party. Later depositions are likely prompted by testimony and other discovery occurring later. Both early and later depositions may be appropriate in a given case. Accordingly, clarity about whether more than one 30(b)(6) deposition may be taken, and the timing of such depositions, would be desirable.

National Employment Lawyers Ass'n -- Illinois (UUUU): We believe the Committee Note statements about the handling of these matters should be elevated to the rule.

Gray, Ritter & Graham, P.C. (VVVV): We fully agree that this should be worked out by counsel. Our experience has not suggested any significant problem in doing that.

Christine Webster (WWWW) [note -- mistakenly designated WWW, but there is already another WWW]: The Committee Notes establish satisfactory guidance. Operating in a plaintiff-side contingency practice, I have zero interest in taking unnecessary depositions. When a defendant designates a large number of witnesses, I find that those with a few topics may be deposed for an hour or two. When witnesses are designated to cover more, or more significant topics, a full day is necessary. I have not found these issues difficult to resolve with opposing counsel.

Potter Bolanos (ZZZZ): The rule should be amended to make explicit that the 30(b)(6) deposition is one deposition.

Robert Rosati (AAAAA): In my experience, counsel understand that a 30(b)(60 deposition counts as one, and the absence of a rule provision is not important.

Leto Copeley (BBBBB): This proposed change would be an open invitation to abuses by corporations. Right now, the deposing party gets one day of deposition for each person designated, and the 30(b)(6) deposition is a single deposition. To change this rule would invite gamesmanship.

Spencer Pahlke (LLLLL): If the Subcommittee addresses these issues by amendment, it should codifying what is now in the Committee Notes. Any deviation from these guidelines will lead to gamesmanship.

American Association for Justice (SSSSS): Parties frequenlty agree on these matters and, if they do not, a judge familiar with the specifics of the particular litigation can best determine what is appropriate.

Public Justice (TTTTT): We agree that some clarification in this regard would be useful. We think the ten-deposition limit should be amended to exclude 30(b)(6) and expert depositions from the count. So the rule should be rewritten to say that the limit is ten depositions, exclusive of 30(b)(6) depositions and expert depositions. In addition, the current prohibition of a second deposition of a deponent should be rewritten to exclude 30(b)(6) deponents. Multiple 30(b)(6) depositions of the same party are often needed and desirable. "[A] plaintiff has a dilemma in deciding whether to take an initial corporate deposition to help narrow the scope of discovery and of the issues -- a type of deposition that serves the purpose of both fact-finding and efficiency. A plaintiff does not know at the beginning of a case whether a court will allow one or more later substantive 30(b)(6) depositions."

John H. Hickey (VVVVV): The rules should be amended to say that the limit on number of depositions does not apply to 30(b)(6) deponents. Certainly the corporation's decision to designate multiple witnesses should not eat up the plaintiff's right to take ten depositions. And the time limits should not apply to 30(b)(6) depositions either. These are depositions to eliminate issues, and can be crucial to a case. There should be no time limit on that.

Other matters

Nancy Reynolds (L): Exceeding the scope of the topics listed in the notice is often an issue. We make it very clear on the record that the area of questioning is outside the scope, and that the deponent is not speaking on behalf of the corporation. Motions in limine address any attempts to use the responses about undesignated topics at trial.

Joseph Sanderson (P): The submission offers several additional ideas:

(1) The rule should provide for expedited pre-deposition ruling on motions to compel. There should be a notice period of 28 days for these depositions, and objections should be due 14 days prior to the scheduled date for the deposition. Any motion to compel or for a protective order could then be due 7 days before the deposition.

(2) The rule should provide special protections for nonparties subpoenaed to provide information. The Advisory Committee Notes should be amended to state that "information known are reasonably available to the organization" includes information which it could reasonably obtain from persons or entities under its control.

(3) Because the limit on number of interrogatories prompts parties to ask about matters that could more efficiently be responded to in writing than in an oral deposition, the rule should be amended to state that a 30(b)(6) notice may include questions for which written answers are sought.

(4) Regarding nonparty depositions using subpoena, the rules should explicitly permit 30(b)(6) depositions of nonparties via subpoena, and clarify that a single subpoena can list separate dates for production of documents and the deposition itself.

(5) The rule should be amended to clarify that it applies to unincorporated businesses. Even a one-person corporation is covered, but unincorporated sole proprietorships (still common in some states) may not. The rule should be amended to state that an "entity" includes unincorporated businesses.

Lawyers for Civil Justice (U): LCJ had two additional proposals:

(1) The rule should allow for a written response when the organization has no knowledge on a particular topic. This sort of problem is common when the litigation is about something that occurred in the distant past. Presently, an

organization faces the threat of sanctions if it fails to produce a prepared witness despite the fact that the witness adds nothing to the information contained in the documents. This is pointless. The rule should be amended along the following lines:

> An organization receiving a Rule 30(b)(6) deposition notice may respond to the notice, or individual topics contained therein, by providing a written response in lieu of presenting a witness if the responding entity certifies that the written response provides the responsive information reasonably available to the organization and no further information would be provided at a deposition. The written response may include a production of documents, tangible materials or electronically stored information.

Such a rule should clarify that the organization is not required to obtain knowledge it does not have at the time of the deposition notice by seeking out and interviewing former employees.

(2) The rule should prohibit redundant depositions. Duplicative depositions are wasteful. One way this waste can occur is that when a relevant employee has testified as fact witness, he or she is then called upon to testify a second time pursuant to a 30(b)(6) notice. Such notices often identify topics on which fact witnesses have already testified. In complex product liability litigation, this problem can be even more significant. The current situation means that the same witness can be deposed repeatedly in different cases. One defendant's regulatory witness was deposed seven different times, always concerning the same issues and documents. The rule should be amended to exclude matters for examination that have been covered in prior depositions, and should include a new process for objections in order to avoid such duplication.

Barry Green (W): Another topic that could be addressed is the problem with deposing 30(b)(6) witnesses who are also fact witnesses. In many states like New Mexico, it often turns out than an LLC is comprised of one or two members who are also fact witnesses. In keeping with the idea of limiting depositions and their duration, trying to determine whether the witness is being questioned as a fact witness or as a corporate witness is difficult. The actual solution seems to be separate depositions, but the rule should clearly state that all questions must be answered subject to objection unless a privilege is invoked.

National Federation of Independent Business (Z): NFIB is a nonprofit association with more than 300,000 members across the country. Unlike large corporations, its members do not employ

staffs of lawyers and accountants. More than half its members have five or fewer employees. When they are served with subpoenas these businesses need time to find and consult a lawyer. There should be a reasonable period of time for nonparties to find and consult counsel before responding to the subpoena. A nonparty business should have the ability to raise objections to the subpoena before the deposition, with the burden on the party seeking the deposition to seek a court order rather than imposing on the nonparty small business the burden of moving for a protective order. We propose that something like the following be added to the rule:

> A nonparty organization shall have a reasonable time to engage and consult an attorney prior to responding to the subpoena. A nonparty organization shall notify the party issuing the subpoena if the organization objects to the subpoena's description of the matters for examination on the ground of privilege, lack of reasonable particularity, or exceeding the scope of discovery and may decline to present deponents to testify on the matters to which the objection applies unless otherwise directed by the court at the instance of the party issuing the subpoena.

Jonathan Feigenbaum (JJJ): Proposals to require a minimum notice procedure or impose a numerical limit on topics for the deposition would be counterproductive. Requiring parties to provide the exhibits in advance will prompt parties to list an excessive number of exhibits. There is no need to state that the examination must be limited to the topics listed.

Wright Lindsey Jennings (MMM): Though the Subcommittee's invitation to comment does not mention it, we believe that the "reasonable particularity" standard in the rule should be re-examined. In our experience, parties often designate topics that are so broad as to defy any reasonable effort to prepare a witness on them. More focused topics make the process of preparing the witness simpler, and increase the likelihood that the party taking the deposition will get answers to the questions it asks.

Product Liability Advisory Council (DDDD): There should be a limit on the number of topics permitting in order to allow the corporation to focus on the real issues in dispute rather than being burdened with researching topics that are not relevant.

Bowman and Brooke (EEEE): Rule 30(b)(6) notices should be expressly subject to the scope of discovery defined by Rule 26(b)(1), including the principles of proportionality. There should be a presumptive limit on the number of topics that can be included, and an express acknowledgement that depositions may not be necessary where other evidence exists, either through written discovery or due to prior depositions on the same topic or of the

same witness.

Huie, Fernambucq & Stewart, LLP (FFFF): Too often plaintiff attorneys insist that we disclose the materials relied upon by the witness to prepare or chosen by an attorney to prepare the witness. This kind of question is almost universal. The lack of any protection in Rule 30(b)(6) comparable to Rule 26(b)(3) is a glaring hole that must be filled. Proper preparation requires the company's lawyer to select documents from the larger production already made in the case in order to focus the preparation and concentrate on the areas pertinent to the list of topics for the deposition. Without this protection, attorneys and witnesses have to review every document produced in the case, which is wasteful and contrary to Rule 1.

Ford Motor Co. (KKKK): There should be a safe harbor of companies that have information only in documentary form with regard to certain topics. For example, Ford received a notice in 2015 asking for manufacturers of replacement parts during the period 1955-79. Companies often do not have employees with actual knowledge about such matters, so the only information they have is in documents. The person designated cannot do more than repeat what is in the documents, and if there are discrepancies between the documents the witness cannot reconcile them. The language proposed by LCJ in its July 7 comments would address this problem. Another problem that should be solved is repetitive discovery regarding a topic already covered in a 30(b)(6) deposition. Once an issue has been so addressed in discovery, that should be presumptively sufficient. Ford finds that it is subjected to repeat 30(b)(6) inquiries in copycat litigation, and believes that these duplicative discovery efforts merely increase the cost it bears and give the questioning attorney an opportunity to grandstand. Instead, a party should be allowed to satisfy a 30(b)(6) notice by providing the transcript of the deposition already taken in a different case. If the propounding party insists on going forward after receipt of the transcript, there should be a presumption that it will bear the costs for the company of the deposition.

State Bar of California Litigation Section Federal Courts Committee (TTTT): A rule inviting the noticing party to provide the witness with the exhibits to be used in advance of the deposition is a technique that could focus the responding party in a way that is better than the current provision that requires merely a description of the matters upon which the organization may be examined. Putting it in the rule tells the parties they get the advantage of greater particularity by taking this step. Another provision that could be useful would a rule provision addressing the problem of questions on matters no specified in the notice.

Seyfarth Shaw (YYYY): The rule should require 30 days

notice, which would provide time to prepare for the deposition and eliminate motion practice about whether sufficient notice has been given. The rule should also include a presumptive limit on the number of topics that can be included. Under the current rule, the noticing party has no incentive to leave off lesser topics. But the investigatory burden of each topic may be heavy, and the absence of a numerical limit undermines proportionality in the use of this device. In keeping with the goals of the 2015 amendments, the rule should also state that the topics must be reasonable in scope and proportional to the needs of the case.

Robert Rosati (AAAAA): I know that the Subcommittee has a "B" list and offer the following reactions to it:

1. I always attach exhibits to the deposition notice and integrate the exhibits with the areas of inquiry. If you want the deposition to be effective, you have to tell the witness what the areas of inquiry are. If you don't provide the exhibits, it is much more likely that the witness will not be properly prepared.

2. A minimum notice requirement is unnecessary, assuming competent counsel who coordinate the timing with each other.

3. Forbidding questioning beyond the topic list is meaningless. The standard 30(b)(6) notice will include: "I will ask the witness or witnesses about their personal knowledge of the facts of the case outside the areas of inquiry addressed in the balance of this deposition notice."

4. Substituting interrogatories for live testimony may work, and perhaps a deposition on written questions. But a Rule 31 deposition works only in very narrow circumstances.

5. Advance notice of the identity of the witnesses would be helpful.

6. The rule does not presently prohibit a second deposition of the organization.

7. Limiting 30(b)(6) to parties would be a bad idea. I use 30(b)(6) with nonparties because the alternative would often involve deposing a lot of nonparty employees.

8. I can't imagine how identifying the documents reviewed by the witness in preparation would benefit anyone.

9. Expanding initial disclosure would not obviate any problems with 30(b)(6).

10. Attempting to forbid "duplication" would be a bad idea. This would tempt a party to offer false testimony in a

30(b)(6) deposition and then try to prevent depositions of its employees.

11. Limiting the number of areas of inquiry would not be a good idea. The requirement of reasonable particularity is sufficient. Placing a numerical cap on the topic areas prompts parties to be more vague or general.

Terrence Zic (CCCCC): There should be a presumptive limit on the number of matters for examination, and the rule should require detailed specificity and proportionality with regard to the matters. As counsel for a major defendant in asbestos litigation, I often confront 30 to 50 matters for examination. Sometimes the time frame is enormous. One recent notice (attached as an exhibit) listed 54 matters, the last of which asked us to produce a witness to testify with regard to any factual basis for which the defendant was contesting the authenticity of 900 documents identified by plaintiff. Other changes should be made:

1. The rule should also include a 30-day notice period. Notices are often sent out late in the discovery process.

2. Further depositions should not be allowed on matters already covered in a 30(b)(6) deposition.

3. The rule should state that the witness is not required to respond with regard to matters not listed in the notice. An instruction not to answer risks sanctions under Rule 30(d).

4. The Federal Rules of Evidence should be amended to permit admissibility of affirmative testimony provided by the witness. Otherwise, counsel may object to admissibility on the ground that the witness lacked personal knowledge.

Thomas Sims (DDDDD): The only change to the rule that should be considered is to confirm that one may take more than one 30(b)(6) deposition. For example, in one case we took one such deposition regarding organizational structure and a second one regarding electronically stored information.

McDonald Toole Wiggins, P.A. (FFFFF): Our firm has defended countless 30(b)(6) depositions on behalf of numerous multi-national and national corporations. We favor the following changes:

1. The rule should limit the number of topics and the duration of the deposition. All too often the notice is voluminous and vague, as well as duplicating prior discovery. The deposition should, in its entirety, be limited to one day of seven hours.

2. Parties should not be foreclosed from seeking additional 30(b)(6) depositions, with leave of court, if they encounter new issues.

3. The scope of the notice should be expressly limited to information within the company's possession, custody or control. It should be forbidden to use the notice to obtain information from non-party subsidiaries, parent companies or foreign entities outside the subpoena power of the court.

4. Work product protection should be explicitly recognized with regard to the documents used to prepare the witness. The courts have not resolved this issue consistently, and for corporations with litigation pending nationwide that is a significant problem.

5. There should be a reasonable minimum notice period -- 30 or 45 days. The court's scheduling order should address this question.

Clay Guise (HHHHH): The rule should include a presumptive limit on the number of topics and on the length of the deposition.

Sherry Rozell (KKKKK): We believe there are additional measures that would improve the functioning of 30(b)(6) depositions:

1. There should be a minimum notice period, which would be better than the current rule's requirement of a "reasonable" period. We suggest 30 days.

2. The rule should require that the parties schedule these depositions at a mutually agreeable time and date. This would boost cooperation.

3. The rule should define a specific number of sufficiently detailed topics that may be included in the notice. We re routinely presented with notices that contain 20 to 30 far-reaching topics about all aspects of the case. Often several of these should be sought through written discovery. By placing a limit of 10 topics, the Subcommittee could improve practice. (Five topics should suffice in many cases.)

4. When discovery of the relevant information has already occurred, such as by interrogatory, the rule should prevent duplicative discovery.

5. The rule should expressly prohibit questioning about materials reviewed in preparation for the deposition. This is necessary to protect the integrity of the litigation

process.

Maglio Christopher & Toale (MMMMM): We believe the rule should be left alone. But if the Committee elects to proceed with an amendment, the focus should be on the "I don't know" response. The time, expense, and uncertainty of obtaining a remedy from the judiciary for this behavior often means that this tactic succeeds. Courts often feel that the most they can do is order a second deposition. That sort of order is inadequate, increases costs, and wastes time. The second deposition is likely to be fruitless also. We believe that the remedy is to direct that what the corporation does not know at deposition it cannot know at trial, somewhat like the judicial admission issue raised by the Subcommittee. That result should be written into the rule for the "I don't know" answer.

Henry Kelston (NNNNN): If and when the Committee does consider amending 30(b)(6), I urge that a provision be added stating that more than one deposition of the entity may be noticed where circumstances warrant. It is unrealistic to expect that an early 30(b)(6) deposition to include every topic on which an examination of the company may be needed. Unless more than one may be had, counsel can be forced into a difficult choice -- forgo an early deposition that may simplify and clarify the remaining discovery, or draft a very broad notice to preserve topics for possible later depositions.

Baron & Budd (QQQQQ): There is one issue that occasionally arises which could be addressed in an amendment. There is a split in authority about whether more than one 30(b)(6) depositon is permitted without leave of court. If the rule is to be changed, we suggest that it should be made clear that Rule 30(a)(2)(A)(ii) does not apply to 30(b)(6) depositions, and that multiple depositions of the same party organization can be taken. Among other things, such a change would mean that parties opposing organizational litigants can safely be precise and focused in their topic definitions, knowing that they don't have to cover everything in one omnibus deposition.

American Association for Justice (SSSSS): AAJ suggests that the rule should be fortified with language emphasizing the obligation of the defenant to provide a witness who is properly prepared. The rule could incentivize such preparation by identifying specific sanctions that are triggered by a failure to prepare. In addition, the rules could be clarified to state that the "one deposition only" provision of Rule 30(a) does not apply to organizational depositions. A plaintiff who wants to take an early deposition of the corporation to get the lay of the land for purposes of discovery should not be prevented from taking a later organizational deposition about important specific topics in the case. One solution would be to amend Rule 30(a)(2)(A)(ii) to state that it does not apply to 30(b)(6) deponents.

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Minutes

Civil Rules Advisory Committee

November 7, 2017

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on November 7, 2017. Participants included Judge John D. Bates, Committee Chair, and Committee members John M. Barkett, Esq.; Judge Robert Michael Dow, Jr.; Judge Joan N. Ericksen; Parker C. Folse, Esq.; Judge Sara Lioi; Judge Scott M. Matheson, Jr. (by telephone); Judge Brian Morris; Justice David E. Nahmias; Hon. Chad Readler; Virginia A. Seitz, Esq.; Judge Craig B. Shaffer (by telephone); Professor A. Benjamin Spencer; and Ariana J. Tadler, Esq.. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge David G. Campbell, Chair, Professor Daniel R. Coquillette, Reporter, and Professor Catherine T. Struve, Associate Reporter (by telephone), represented the Standing Committee. Judge A. Benjamin Goldgar participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated (by telephone). The Department of Justice was further represented by Joshua Gardner, Esq.. Rebecca A. Womeldorf, Esq., Julie Wilson, Esq., and Patrick Tighe, Esq. represented the Administrative Office. Judge Jeremy D. Fogel and Dr. Emery G. Lee attended for the Federal Judicial Center. Observers included Alexander Dahl, Esq.(Lawyers for Civil Justice); Professor Jordan Singer; Brittany Kauffman, Esq. (IAALS); William T. Hangley, Esq. (ABA Litigation Section liaison); Dennis Cardman, Esq. (ABA); David Epps (ABA); Thomas Green, Esq. (American College of Trial Lawyers); Benjamin Robinson, Esq. (Federal Bar Association); John K. Rabiej, Esq. (Duke Center for Judicial Studies); Joseph Garrison, Esq. (NELA); Chris Kitchel, Esq.; Henry Kelston, Esq.; Robert Levy, Esq.; Ted Hirt, Esq.; John Vail, Esq.; Susan H. Steinman, Esq.; Brittany Schultz, Esq.; Janet Drobinkske, Esq.; Benjamin Gottesman, Esq.; Jerome Kalina, Esq.; Jerome Scanlan, Esq. (EEOC); Leah Nicholls, Esq.; and Andrew Pursley, Esq.

Judge Bates welcomed the Committee and observers to the meeting. He noted that two members have joined the Committee. Ariana Tadler has attended many past meetings and participated actively as an observer; she is well known. Professor Spencer,

of the University of Virginia, has substantial rules experience and has written widely on rules subjects.

Judge Bates reported that in June the Standing Committee approved for adoption amendments of Rules 5, 23, 62, and 65.1, basically as they were published and recommended for adoption. In September these amendments were approved by the Judicial Conference without discussion as consent calendar items. They have been transmitted to the Supreme Court. If the Court prescribes them by May 1, 2018, they will go to Congress and take effect on December 1, 2018, unless Congress acts to delay them.

April 2017 Minutes

The draft minutes of the April 2017 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Julie Wilson presented the Legislative Report. Little has changed since the April meeting. She noted that while the Administrative Office tracks and often offers comments on many legislative proposals that affect court procedure, the agenda materials include only bills that would operate directly on court rules — for this Committee, the Civil Rules. There is little new since the April meeting. H.R. 985 includes provisions aimed at class actions and multidistrict litigation. It passed in the House in March, and remains pending in the Senate. The Lawsuit Abuse Reduction Act of 2017, H.R. 720, renews familiar proposals to amend Rule 11. It has passed the House. A parallel bill has been introduced in the Senate, where it and the House bill are lodged with the Judiciary Committee. She also noted that AO staff will attend a hearing on the impact of frivolous lawsuits on small businesses that is not focused on any specific bill.

Rule 30(b)(6)

Judge Ericksen delivered the Report of the Rule 30(b)(6) Subcommittee. She began by describing the "high-quality input" from the bar that has informed Subcommittee deliberations. An invitation for comments was posted on the Administrative Office website on May 1. There were more than 100 responses. Subcommittee representatives attended live discussions with Lawyers for Civil Justice and the American Association for Justice. The many responses reflect deep and sometimes bitter experience. These comments helped to shape what has become a modest proposal. Three main sets of observations emerged:

First, there has not been enough time for the new discovery rules that took effect on December 1, 2015 to bear on practice under Rule 30(b)(6).

Second, there is a deep divide between those who represent plaintiffs and those who represent defendants. Examples of bad practice are presented by both sides. Plaintiffs encounter poorly prepared witnesses. Defendants encounter uncertainty, vague requests, and overly broad and burdensome requests. All agree that courts do not want to become involved with these problems. These divisions urge caution, invoking the first principle to do no harm.

Third, most of the issues get worked out. But the problem is that there is no established process for working them out before expending a great deal of time and cost. These reports are consistent with the common observation that judges seldom encounter these problems — the problems are there, but are resolved, often at high cost, without taking them to a judge.

These and other observations led to substantial trimming of the proposals that the Subcommittee had considered. When the Subcommittee reported to the April meeting, it had an "A List" of six proposals, supplemented by a "B List" of many more. All but one of the A list proposals have been discarded, including those addressing the use of Rule 30(b)(6) testimony as judicial admissions, the opportunity or obligation to supplement Rule 30(b)(6) testimony, the use of "contention" questions, a formal procedure for objections, and applying the general

provisions governing the number of depositions and the duration of a single deposition.

What remained was a pair of proposals aimed at encouraging early discussion of potential Rule 30(b)(6) problems, most likely through Rule 16 pretrial conference procedures or through the Rule 26(f) party conference. There has been hope that substantial relief can be had by encouraging the parties to anticipate problems with Rule 30(b)(6) depositions and to discuss them in the Rule 26(f) conference. But in many cases it is not feasible to anticipate the timing or subjects of these depositions as early as the 26(f) conference — often they come after substantial other discovery has been had and digested. A central question has been whether a way can be found to engage the parties in direct discussions when the time is ripe.

During Subcommittee discussions, Judge Shaffer suggested that encouraging discussion between the parties is more likely to work if a new provision is lodged in Rule 30(b)(6) itself. That is where the parties will first look for guidance. The Subcommittee developed this proposal into the version presented in the agenda materials:

> (6) *Notice of Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. Before [or promptly after] giving the notice or serving a subpoena, the party must [should] in good faith confer [or attempt to confer] with the deponent about the number and description of the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf, and it may set out the matter on which each person designated will testify. * * *

In addition, the Subcommittee also considered adding a direction in Rule 26(f)(2) that in conferring the parties should "consider the process and timing of [contemplated] depositions

under Rule 30(b)(6).” It recommends the Rule 30(b)(6) proposal for further development. The Rule 26(f)(2) proposal bears further discussion, but may be put aside as unnecessary.

Professor Marcus added that the basic questions presented are “wordsmithing”" with the Rule 30(b)(6) text and whether adding to Rule 26(f) a reference to Rule 30(b)(6) would be useful. The Rule 16 alternative to Rule 26(f) is only an alternative; the Subcommittee does not favor it. Some of the rule text questions are identified by brackets in the proposal. Choices remain to be made, but it may be that the rule text should include "or promptly after," carry forward with “must” rather than “should,” and recognize that "attempt to confer" should be retained to prevent intransigence from blocking a deposition.

Judge Ericksen explained that providing for conferring promptly after giving notice or serving a subpoena facilitates discussions informed by actually knowing the number and description of the matters for examination. Professor Marcus added that with a subpoena to a nonparty, it may be difficult to arrange to confer before the subpoena is served.

Judge Ericksen further explained that “must” confer is more muscular than “should,” and may prove important in making the conference requirement work. So it has proved useful to recognize in Rule 37 that an attempt to confer may be all that can be required, an insight that may also be useful here.

Judge Ericksen repeated the advice that the Committee should consider the possibility of adding a cross-reference to Rule 30(b)(6) in Rule 26(f)(2), but that it may be better to drop this possibility. The concern that lawyers often cannot look ahead to Rule 30(b)(6) problems at the time of the Rule 26(f) conference is offset by the information that Rule 30(b)(6) depositions often are sought at the beginning of discovery in individual employment cases. But it seems awkward to refer to only one specific mode of discovery in the list of topics to be addressed at the conference.

A subcommittee member stated that the Rule 26(f) proposal is not a bad idea, but it is not necessary. The present general language of Rule 26(f) calling for a discovery plan covers

Rule 30(b)(6) along with other discovery questions; it is indeed odd to single out one particular subdivision of one discovery rule for specific attention. He does support the 30(b)(6) proposal.

Another Subcommittee member was slightly in favor of adopting the Rule 26(f) cross-reference, but thought the question is "not to die for." A second Subcommittee member shared this view.

Discussion turned to the draft Committee Note. A Subcommittee member noted that the Note reflects some of the problems that the Subcommittee had struggled with but decided not to address in rule text. Discussion of the Note will help the Subcommittee.

This suggestion was supplemented by another Subcommittee member. The Subcommittee spent a lot of time on these ideas and the comments directed to them. It proved difficult to address them in rule language. The issues are better resolved by discussion among the lawyers, acting in the spirit of Rule 1 (which is being invoked by a number of courts around the country). Judges can help when necessary. "We hope for reasonable responses." "Reasonable" appears more than 75 times in the Rules, and more than 25 times in Rules 26 and 37. But "there are a lot of emotional responses to Rule 30(b)(6) on both sides."

A Committee member suggested that some of the statements in the third paragraph of the draft Committee Note, remarking on notices that specify a large number of matters for examination, or ill-defined matters, or failure to prepare witnesses, seem "extreme" in some ways. These are the kinds of issues that will be addressed by the Subcommittee as it goes ahead. Committee members should send their suggestions to Judge Ericksen and Professor Marcus.

Judge Bates raised a different question: We continually hear that judges do not often encounter Rule 30(b)(6) disputes. Is there a prospect that requiring lawyers to confer will lead to more litigation about the disputes, so judges will see more of them? Judge Ericksen and Professor Marcus responded that while there might be a flurry of activity during the early days

of an amended rule, the long-term goal is to reduce the occasions to go to the judge. Still, "judge involvement can be good." Something like the proposed process happens now, without generating much work for judges.

A Subcommittee member agreed. "Good lawyers do this now." It is hard to expect that making it more general will bring problems to judges more often. Lawyers are very reluctant to do that.

Attention turned to the question whether the rule should be satisfied by an attempt to confer. A judge observed that a suggestion in a rule will help only if it encourages lawyers to talk early. "I've been impressed by the ability of lawyers to avoid conferring." A rule provision that requires conferring may lead to protracted avoidance. A Subcommittee member agreed that "lawyers are really good at avoiding conferring." Does that mean that a lawyer will be able to stymie a deposition by avoiding a conference? And what of a nonparty deponent — it may be especially difficult to get it to confer before a subpoena is served.

Judge Ericksen observed that these problems do come to magistrate judges. Part of the goal is to get a better result when you do have to go to the court. Repeated unsuccessful attempts to confer will help persuade the judge that it is useful to become involved.

A Subcommittee member agreed that the Committee should carefully consider the parallel to the "attempt to confer" provision in Rules 26(c) and 37.

Professor Marcus explained that the idea in Rule 37 is that you have to certify at least an attempt to confer to get to court with a motion. It shows there is a need for judicial involvement. But it is important to be satisfied with a good-faith attempt, lest a motion be defeated by evading a conference. The draft Rule 30(b)(6) is not exactly the same — it does not expressly say that you cannot proceed with the deposition absent a conference or attempt to confer. In response to a question, he elaborated that the Rule 30(b)(6) provision is not framed as a precondition to a motion. "It addresses a different sort of event, and analogizes."

A Subcommittee member suggested that the problem is often simple. One party may try hard to confer, while the other may not.

A judge agreed that it is a judgment call whether to include "attempt," or to rely directly on mandatory language alone. Why not put the obligation to initiate a conversation on the party or nonparty deponent?

Another question was raised: should the conference include discussion of who the witnesses will be? The draft Committee Note suggests this may be useful; should it be added to rule text? A Subcommittee member said that the Subcommittee had considered this, as well as other subjects addressed in the Note — how many witnesses there will be for the deponent, and how much time for examination. A Committee member agreed that it is useful to discuss who the witnesses will be. That can lead to discussions whether this is an appropriate witness — indeed the party noticing the deposition may already have documents or other information suggesting that a different witness would be more appropriate. Or it may be that discussion will show that a proposed witness should be deposed as an individual, not as a witness for an organization named as deponent.

Another Committee member suggested that the point of the proposal is to encourage bilateral discussion. Burying important parts of the discussion in the Committee Note is not enough. It may be better to add more to the rule text. What are the obligations of the noticing party, or of the deponent, in conferring? This might be easier if the text is rearranged a bit: the first two sentences of the present rule could remain as they are, identifying the opportunity and obligations of the party noticing the deposition and then the obligations of the organization named as deponent. The new text, identifying a new obligation to confer that is imposed on both, could come next, and perhaps provide greater detail without interfering with the flow of the rule text.

Judge Ericksen responded that the Subcommittee has considered that an obligation to confer is inherently bilateral, but it will consider further how much should be in the rule text.

Judge Bates said that the Committee had had a good discussion. There is more work ahead for the Subcommittee. The Rule 26(f) proposal "remains alive." All agree that amending Rule 16 is out of the picture. The goal will be to draft a proposal for the April meeting, based on this discussion. Thanks are due to Judge Ericksen, Professor Marcus, and the Subcommittee for their work.

Social Security Disability Claims Review

Judge Bates introduced the proposal by the Administrative Conference of the United States (ACUS) that explicit rules be developed to govern civil actions under 42 U.S.C. § 405(g) to review denials of individual disability claims under the Social Security Act.

The Standing Committee has decided that this subject should be considered by the Civil Rules Committee. The work has started. An informal Subcommittee was formed. Initial work led to a meeting on November 6 with representatives of several interested groups. The meeting resembled a hearing. Matthew Wiener, Executive Director and acting Chair of the Administrative Conference, made the initial presentation. Asheesh Agarwal, General Counsel of the Social Security Administration, followed. Kathryn Kimball, counsel to the Associate Attorney General, represented the Department of Justice. And Stacy Braverman Cloyd, Deputy Director of Government Affairs, the National Organization of Security Claimants' Representatives, presented the perspective of claimant representatives. Susan Steinman, from the American Association for Justice, also participated. Professor David Marcus, co-author with Professor Jonah Gelbach of a massive study that underlies the ACUS proposal, participated and commented by video transmission.

Social Security disability review annually brings some 17,000 to 18,000 cases to the district courts. The national average experience is that 45% of these cases are remanded to the Social Security Administration, including about 15% of the total that are remanded at the request of the Social Security Administration.

Here, as generally, there is some reluctance about formulating rules for specific categories of cases. But such rules have been adopted. The rules for habeas corpus and § 2255 proceedings are familiar. Supplemental Rule G addresses civil forfeiture proceedings. A few substance-specific rules are scattered around the Civil Rules themselves, including the Rule 5.2(c) provisions for remote access to electronic files in social security and some immigration proceedings. It is important to keep this cautious approach in mind, both in deciding whether to recommend any rules and in shaping any rules that may be recommended.

One problem leading to the request for explicit rules is that a wide variety of procedures are followed in different districts in § 405(g) cases. Some districts have local rules that address these cases. The rules are by no means consistent across the districts. Other districts have general orders, or individual judge orders, that again vary widely from one another. The result imposes costs on the Social Security Administration as its lawyers have to adjust their practices to different courts — it is common for Administration lawyers to practice in several different courts. The disparities in practice may raise issues of cost, delay, and inefficiency. These cases are in some ways unique to district-court practice, as essentially appellate matters, and there are many of them. These considerations may support adoption of specific uniform rules that displace some of the local district disparities.

At the same time, most of the problems that give rise to high remand rates lie in the agency. Delays are a greater issue in the administrative process than in the courts. And there are great disparities in the rates of remands across different districts, while rates tend to be quite similar among different judges in the same district, and also to cluster among districts within the same circuit. There is sound ground to believe that these disparities arise in part from different levels of quality in the work done in different regions of the Social Security Administration.

The people who appeared on November 6 did not present a uniform view. The Administrative Conference believes that a uniform national rule is desirable. The Social Security Administration strongly urges this view. But discussion seemed

to narrow the proposal from the highly detailed SSA rule draft advanced to illustrate the issues that might be considered. There was not much support for broad provisions governing the details of briefing, motions for attorney fees, and like matters. Most of the concern focused on the process for initiating the action by a filing essentially equivalent to a notice of appeal; service of process — the suggestion is to bypass formal service under Rule 4(i) in favor of electronic filing of the complaint to be followed by direct transmission by the court to the Social Security Administration; and limiting the answer to the administrative record. There has been some concern about how far rules can embroider on the § 405(g) provision for review by a "civil action" and for filing the transcript of the record as "part of" an answer.

Beyond these initial steps, attention turned to the process of developing the case. It was recognized that there are appropriate occasions for motions before answering — common occasions are problems with timeliness in filing, or filing before there is a final administrative decision. Apart from that, the focus has been on framing the issues in an initial brief by the claimant, followed by the Administration's brief and, if wished, a reply brief by the claimant.

Discovery was discussed, but it has not really been an issue in § 405(g) review proceedings.

Discussion also extended to specific timing provisions and length limits for briefs. These are not subjects addressed by the present Civil Rules. And the analogy to the Appellate Rules may not be perfect.

Professor Marcus added that the Conference and other participants agreed that adopting uniform procedures for district-court review is not likely to address differences in remand rates, differences among the circuits in substantive social-security law, or the underlying administrative phenomena that lead to these differences. There was an emphasis on different practices of different judges. Local rules and individual practices must be consistent with any national rule that may be developed, but reliance must be placed on implicit inconsistency, not on explicit rule language forbidding specific

departures that simply carry forward one or many of the present disparate approaches.

Further initial discussion elaborated on the question of serving notice of the review action. The Social Security Administration seems to be comfortable with the idea of dispensing with the Rule 4(i) procedure for serving a United States agency. Direct electronic transmission of the complaint by the court is more efficient for them. This idea seems attractive, but it will be necessary to make sure that it can be readily accomplished by the clerks' offices within the design of the CM/ECF system. Some claimants proceed pro se in § 405(g) review cases, and are likely to file on paper even under the proposed amendments of Rule 5. The clerk's office then would have to develop a system to ensure that electronic transmission to the Administration occurs after the paper is entered into the CM/ECF system.

This presentation also suggested that the question whether it is consistent with § 405(g) to adopt the simplified complaint and answer proposals may not prove difficult. The Civil Rules prescribe what a complaint must do, and that is well within the Enabling Act. Prescribing what must be done by a complaint that initiates a "civil action" under § 405(g) seems to fall comfortably within this mode. So too the rules prescribe what an answer must do. A rule that prescribes that the answer need do no more than file the administrative record again seems consistent both with § 405(g) and the Enabling Act. The rules committees are very reluctant to exercise the supersession power, for very good reasons. But there is no reason to fear supersession here.

A member of the informal Subcommittee noted that none of the stakeholders in the November 6 meeting suggested that uniform procedures would affect the overall rate of remands or the differences in remand rates between different districts. The focus was on the costs of procedural disparities in time and expense.

Another Subcommittee member said that the meeting provided a good discussion that narrowed the issues. The focus turned to complaint, answer, and briefing. Remand rates faded away.

Yet another Subcommittee member noted that she had not been persuaded at first that there is a need for national rules. But now that the focus has been narrowed, it is worthwhile to consider whether we can frame good rules. As one of the participants in the November 6 discussion observed, good national rules are a good thing. Bad national rules are not.

Professor Coquillette provided a reminder that there are dangers in framing rules that focus on specific subject-matters. Transsubstantivity is pursued for very good reasons. The lessons learned from rather recent attempts to enact "patent troll" legislation provide a good example. It would be a mistake to generate Civil Rules that take on the intricacy and tendentiousness of the Internal Revenue Code. But § 405(g) review proceedings can be addressed in a way that focuses on the appellate nature of the action, distinguishing it from the ordinary run of district-court work. Even then, a rule addressed to a specific statutory provision runs the risk that the statute will be amended in ways that require rule amendments. And above all, the Committee should not undertake to use the supersession power.

A judge suggested that this topic is worth pursuing. Fifteen to twenty of these review proceedings appear on his docket every year. These cases are an important part of the courts' work. Both the Administrative Conference and the Social Security Administration want help.

Another judge agreed. A Civil Rule should be "very modest." The Federal Judicial Center addresses these cases in various ways. They are consequential for the claimants. The medical-legal issues can be complicated. Better education for judges can help. The problems mostly lie in the administrative stages. But it is worthwhile to get judges to understand the importance of these cases.

Another judge observed that the importance of disability review cases is marked by the fact that they are one of the five categories of matters included in the semi-annual "six month" reports. The event that triggers the six-month period occurs after the initial filing, so a case is likely to have been pending for nine or ten months before it must be included on the list, but the obligation to report underscores the importance of

prompt consideration and disposition. There is at least a sense that the problems of delay arise in the agency, not in the courts.

A Committee member observed that § 405(g) expressly authorizes a remand to take new evidence in the agency. "This is different from the usual review on the administrative record." This difference may mean that at times discovery could be helpful. "We should remember that this is not purely review on an administrative record."

A judge noted that the discussion on November 6 suggested that discovery has not been an issue in practice.

A Committee member observed that other settings that provide for adding evidence not in the administrative record include some forms of patent proceedings and individual education plans. In a different direction, she observed that the emphasis on the annual volume of disability review proceedings in arguing for uniform national rules sounds like the questions raised by the agenda item on multidistrict litigation. If we consider this topic, we should consider how it plays out across other sets of problems.

Another judge renewed the question: Do the proposals for uniform rules deviate from the principle that counsels against substance-specific rules?

Judge Bates responded that neither the Administrative Conference nor the Social Security Administration have linked the procedure proposals to the remand rate. They are concerned with the inefficiencies of disparate procedures.

A Committee member asked whether it is possible to adopt national rules that will really establish uniformity. Local rules, standing orders, and individual case-management practices may get in the way.

A judge responded that one reason to have local rules arises from the lack of a national rule. The Northern District of Illinois has a new rule for serving the summons and complaint in these cases. "It's all about consent; the Social Security Administration consents all the time." But "local rules are antithetical to national uniformity." If national rules save

time for the Social Security Administration, that will yield benefits for claimants and for the courts. Another judge emphasized that local rules must be consistent with the national rules, but it can be difficult to police. At the same time, still another judge noted that the Federal Judicial Center can educate judges in new rules. And a fourth judge observed that local culture makes a difference, but "some kind of uniformity helps."

Judge Bates concluded the discussion by stating that the Committee should explore these questions. A start has been made. The Subcommittee will be formally structured, and will look for possible rule provisions. We know that the Southern District of Indiana is working on a rule for service in disability review cases.

Third-Party Litigation Financing

Judge Bates introduced the discussion of disclosing third-party litigation financing agreements by noting that additional submissions have been received since the agenda materials were compiled. One of the new items is a letter from Representative Bob Goodlatte, Chair of the House Committee on the Judiciary.

The impetus for this topic comes from a proposal first advanced and discussed in 2014, and discussed again in 2016. Each time the Committee thought the question important, but determined that it should be carried forward without immediate action. The Committee had a sense that the use of third-party financing is growing, perhaps at a rapid rate, and that it remains difficult to learn as much as must be learned about the relationships between third-party financers and litigants. It is difficult to develop comprehensive information about the actual terms of financing agreements. The questions have been renewed in a submission by the U.S. Chamber Institute for Legal Reform and 29 other organizations.

The specific proposal is to add a new Rule 26(a)(1)(A)(v) that would require automatic disclosure of

> any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive

compensation that is contingent on, and sourced from, any proceeds of the civil action, by settlement, judgment or otherwise.

Detailed responses have been submitted by firms engaged in providing third-party financing, and by two law professors who focused on the ethical concerns raised by the proponents of disclosure.

The first point made about the proposal is that it does not seek to regulate the practice or terms of third-party financing. It seeks nothing more than disclosure of any third-party financing agreement.

Many arguments are made by the proponents of disclosure. They are summarized in the agenda materials: "third-party funding transfers control from a party's attorney to the funder, augments costs and delay, interferes with proportional discovery, impedes prompt and reasonable settlements, entails violations of confidentiality and work-product protection, creates incentives for unethical conduct by counsel, deprives judges of information needed for recusal, and is a particular threat to adequate representation of a plaintiff class."

These arguments are countered in simple terms by the financers: None of them is sound. They do not reflect the realities of carefully restrained agreements that leave full control with counsel for the party who has obtained financing. In addition, it is argued that disclosure is actually desired in the hope of gaining strategic advantage, and in a quest for isolated instances of overreaching that may be used to support a campaign for substantive reform.

The questions raised by the proposal were elaborated briefly in several dimensions.

The first question is the familiar drafting question. How would a rule define the arrangements that must be disclosed? Inevitably, a first draft proposal suggests possible difficulties. The language would reach full or partial assignment of a plaintiff's claim, a circumstance different from the general focus of the proposal. It also might reach subrogation interests, such as the rights of medical-care

insurers to recover amounts paid as benefits to the plaintiff. It rather clearly reaches loans from family or friends. So too, it reaches both agreements made directly with a party and agreements that involve an attorney or law firm.

Parts of the submissions invoke traditional concepts of champerty, maintenance, and barratry. It remains unclear how far these concepts persist in state law, and whether there is any relevant federal law. There may be little guidance to be found in those concepts in deciding whether disclosure is an important shield against unlawful arrangements.

Proponents of disclosure make much of the analogy to Rule 26(a)(1)(A)(iv), which mandates initial disclosure of "any insurance agreement under which an insurance business may be liable" to satisfy or indemnify for a judgment. This disclosure began with a 1970 amendment that resolved disagreements about discovery. The amendment opted in favor of discovery, recognizing that insurance coverage is seldom within the scope of discovery of matters relevant to any party's claims or defenses but finding discovery important to support realistic decisions about conducting a litigation and about settlement. It was transformed to initial disclosure in 1993. At bottom, it rests on a judgment that liability insurance has become an essential foundation for a large share of tort law and litigation, and that disclosure will lead to fairer outcomes by rebalancing the opportunities for strategic advantage. The question raised by the analogy is whether the same balancing of strategic advantage is appropriate for third-party financing, not only as to the fact that there is financing but also as to the precise terms of the financing agreement.

Much of the debate has focused on control of litigation in general, and on settlement in particular. The general concern is that third-party financing shifts control from the party's attorney to the financer. Financers and their supporters respond that they are careful to protect the lawyer's obligation to represent the client without any conflict of interest. Indeed, they urge, their expert knowledge leads many funding clients to seek advice about litigation strategy, and to seek funding to enjoy this advantage.

The concern with influence on settlement is a variation on the control theme. The fear is that litigation finance firms will influence settlements in various directions. At times the pressure may be to accept an early settlement offer that is unreasonably inadequate from the litigant's perspective, but that ensures a safe and satisfactory return for the lender. An alternative concern is that at other times a lender will exert pressure to reject an early and reasonable settlement offer in hopes that, under the terms of the agreement, it will win more from a higher settlement or at trial. Funders respond that it is in their interest to encourage plaintiffs to accept reasonable settlement offers. They avoid terms that encourage a plaintiff to take an unreasonable position.

Professional responsibility issues are raised in addition to those presented by the concerns over shifting control and impacts on settlement. Third-party financing is said to engender conflicts of interest for the attorney, and to impair the duty of vigorous representation. Special concern is expressed about the adequacy of representation provided by a class plaintiff who depends on third-party financing. Fee splitting also is advanced as an issue.

A different concern is that a judge who does not know about third-party funding is deprived of information that may be necessary for recusal. A response is that judges do not invest in litigation-funding firms, and that it reaches too far to be concerned that a family member or friend may be involved with an unknown firm that finances a case before the judge. In any event, this concern can be met, if need be, by requiring disclosure of the financer's identity without disclosing the terms of the agreement.

Yet another concern is that the exchanges of information required to arrange funding inevitably lead counsel to surrender the obligation of confidentiality and the protection of work product.

Disclosure also is challenged on the ground that it may interfere with application of the rules governing proportionality in discovery. Rule 26(b)(1) looks to the parties' resources as one factor in calculating proportionality. The concern is that a judge who knows of third-party financing

may look to the financing as a resource that justifies more extensive and costly discovery, and even may be inclined to disregard the terms of the financing agreement by assuming there is a source of unlimited financing.

Finally, it is urged that third-party financing will encourage frivolous litigation. The financers respond that they have no interest in funding frivolous litigation – their success depends on financing strong claims.

All of these arguments look toward the potential baneful effects of third-party financing and the reasons for discounting the risks.

There is a more positive dimension to third-party funding. Litigation is expensive. It can be risky. Parties with viable claims often are deterred from litigation by the cost and risk. Important rights go without redress. Third-party financing serves both immediate private interests and more general public interests by enabling enforcement of the law. It should be welcomed and embraced, no matter that defendants would prefer that plaintiffs' rights not be enforced.

The abstract arguments have not yet come to focus, clearly or often, on the connection between disclosing third-party financing agreements and amelioration of the asserted ill effects that it would foster. One explicit argument has been made as to settlement – a court aware of the terms of a financing agreement can structure a settlement procedure that offsets the risks of undue influence. More generally, a recent submission has suggested that "if a party is being sued pursuant to an illegal (champertous) funding arrangement, it should be able to challenge such an agreement under the applicable state law – and certainly should have the right to obtain such information at the outset of the case." This argument relies on an assumption of illegality that may not be supported in many states (some states have undertaken direct regulation of third-party financing), and leaves uncertainty as to the consequences of any illegality on the conduct and fate of the litigation.

Professor Marcus suggested that it is important to recognize that proponents of disclosure may have "collateral motives." He noted that third-party financing takes many forms,

and that the forms probably will evolve. Financing may come to be available to defendants: how should a rule reach that? More specific points of focus should be considered. Rule 7.1 could be broadened to add third-party financers to the mandatory disclosure statement. Rule 23(g)(1)(A)(iv) already requires the court to consider the resources that counsel will commit to representing a proposed class; it could be broadened to require disclosure of third-party funding. Third-party financing also might bear on determining fees for a class attorney under Rule 23(h).

Professor Marcus continued by observing that there may be a need to protect communications between funder and counsel for the funded client. And he asked whether the jury is to know about the existence, or even terms, of a funding arrangement?

The local rule in the Northern District of California was noted. It provides only for disclosure of the fact of funding, not the agreement, and it applies only to antitrust cases. Including patent cases was considered but rejected.

A judge suggested that third-party funding seems to be an issue primarily in patent litigation and in MDL proceedings.

Professor Coquillette offered several thoughts.

First, he observed that the common-law proscriptions of maintenance, barratry, and champerty have essentially disappeared. "We keep tripping over the ghosts and their chains." State regulation has displaced the ghosts, in part because these are politically charged issues.

Second, he urged that even coming close to regulating attorney conduct raises sensitive issues for the Civil Rules. The rules do approach attorney conduct in places, such as Rule 11 and regulation of discovery disputes. The prospect of getting into trouble is reflected in the decision to abandon a substantial amount of work that was put into developing draft Federal Rules of Attorney Conduct. That effort inspired sufficient enthusiasm that Senator Leahy introduced a bill to amend the Enabling Act to quell any doubts whether the Act authorizes adoption of such rules. But there was strong resistance from the states and from state bar organizations.

Third, Professor Coquillette noted that third-party funders argue that the relationships are between a lay lender and a lay litigant-borrower. The lawyer, they say, is not involved. "I do not believe that lawyers are not involved." Lawyers are involved on both sides, dealing with each other. "There are major ethical issues." These issues are the focus of state regulation. Here, as before, the Committee should anticipate that proposals for federal regulation will meet substantial resistance from the states.

A Committee member identified a different concern about conflicts of interest. Often she is confident that there is funding on the other side. The risk is that her firm has a conflict of interest because of some involvement with the lender. She also noted that she believes that some judges have standing orders on disclosure. A judge agreed that there are some. Patrick Tighe, the Rules Committee Law Clerk, stated that many courts have local rules that supplement Rule 7.1 by requiring identification of anyone who has a financial interest in an action. But it is not clear whether these rules are interpreted to include third-party financing.

A Committee member stated that he has worked with third-party financing in virtually every patent case he has had in the last five years. He is not confident, however, that his experiences and the agreements involved are representative of the general field.

His first observation was that disclosure of insurance is unlike the general scope of discovery in Rule 26(b)(1). There are reasons to question whether disclosure of third-party funding should be treated as a phenomenon so much like insurance as to require disclosure. "We need to know exactly what we're dealing with" Third-party funding creates risks, including ethical risks. The duty of loyalty may be affected. The lawyer still must let the client make the decision whether to settle, but third-party financing may generate pressures that make settlement advice more complex. Disclosure, of itself, will not bear on these problems. Many steps must be taken from the disclosure to make any difference.

"Warring camps" are involved. The proponents of disclosure have strategic interests. They would like to outlaw third-party

financing because it enables litigation that would not otherwise occur. There is no question that funding enables lawsuits. Many of them are meritorious, though perhaps not all. In present practice, defendants seek discovery about financing. Objections are made. The law will evolve, and may come to allow routine discovery. There are settings in which funding can become relevant, as in the class-action context noted earlier. There may be guidance in decisional law now, but "I'm not aware of it."

Another Committee member responded that case law is emerging. Financing agreements are listed on privilege logs. Motions are made for in camera review. State decisions deal with work-product protection for communications dealing with third-party financing. Something depends on how the agreement is structured. Some courts say third-party funding is not relevant. For that matter, how about disclosure of contingent-fee arrangements? The Committee has never looked at that. Disclosure of third-party funding is increasingly required in arbitration, because of concerns about conflicts of interest, and also because of concerns that a party who depends on third-party financing may not have the resources required to satisfy an award of costs.

The Committee member who described experiences with third-party funding suggested that disclosure of the existence of funding may be less problematic than disclosing the terms of the agreement.

A Committee member suggested that ethics issues "are not our job." At the same time, it seems likely that there will be an increase in local rules.

A judge suggested that care should be taken in attempting to define the types of agreements that must be disclosed. A variety of forms of financing may be involved in civil rights litigation, in citizen group litigation, and the like. One example is litigation challenging election campaign contributions and activities. "We need to think about the impact." Another judge suggested that in state-court litigation it is common to encounter filing fees borrowed from family members, and many similar instances of friendly financing, with

explicit or implicit understandings that repayment will depend on success.

A third judge suggested that it would be useful to know about financing in appointing lead counsel, and also in settlement. He can "ask and order" to get the information when it seems desirable.

These questions about defining the kinds of arrangements to be disclosed prompted a suggestion that some help might be found in the analogy to insurance disclosure, which covers only an insurance agreement with an insurance business. Other forms of indemnity agreements, and business or personal assets, are not included. Although further refinement would be needed, it might help to start by thinking about disclosure, more or less extensive, of financing agreements with enterprises that engage in the business of investing in litigation.

A judge said that he had encountered various forms of funding arrangements on the defense side. Others who are interested in the outcome, directly or precedentially, may help fund the defense. Joint defense agreements often address cost sharing, and contributions may be set by making rough calculations of likely proportional liability. The prospect of such arrangements, and perhaps investments by firms that now engage in funding plaintiffs, should be considered in shaping any disclosure proposal that might emerge.

The Committee member who has dealt with third-party funding in patent litigation responded to questions by noting that he has clients who can fund their own patent litigation. But patent cases have become increasingly costly. The cost increase is due in part to an increasing number of hurdles a plaintiff must surmount to get to verdict and then through the Federal Circuit. The pendulum has shifted in patent law, making it more difficult to get to trial. In the old days, his firms and others could pay the expenses. But "as costs rose, and risks, we became less willing to cover the expenses." Third-party financing is replacing law firms as the source of financing.

Professor Coquillette observed that "we need to learn more." If work goes forward, it will be important to learn what states are doing about third-party financing. The states are

better equipped than the federal courts are to deal with ethical issues such as conflicts of interest and control.

A judge suggested that it may not be useful to require disclosure of information when the courts are not equipped to do anything with the information. An example is suggested by litigation in which a defendant, after a number of unfavorable rulings, retained as additional counsel a law firm that included the judge's spouse. Rather than countenance this attempt at judge shopping, the chief judge ordered that the new firm could not play any role in the litigation. Something comparable might happen with third-party financing, without the opportunity for an analogous cancellation of the financing agreement. It does not seem likely that judges will invest in enterprises that engage in third-party financing, but there may be a risk, especially with networks of related interests. Judge Bates noted that similar concerns had emerged with filing amicus briefs on appeal.

Judge Bates summarized the discussion by suggesting that a sense of caution had been expressed. Further discussion might be resumed in the discussion of MDL proposals, one of which explicitly adopts the disclosure proposal that prompted this discussion.

Rules for MDL Proceedings

Judge Bates opened the discussion of the proposals for special Multidistrict Litigation Rules by suggesting that two of the proposals are essentially the same, while the third is distinctively different.

All three proposals agree that MDL proceedings present important issues. They account for a large percentage of all the individual cases on the federal court docket. The Civil Rules do not really address many of the issues encountered in managing an MDL proceeding. Proponents of new rules suggest that courts often simply ignore the Civil Rules in managing MDL proceedings. And Congress has shown an interest. H.R. 985, which has been passed in the House, includes several amendments of the MDL statute, 28 U.S.C. § 1407.

The major concerns focus on cases with large numbers of claimants. The perception is that many of the individual claimants have no claim at all, not even any connection with the events being litigated by the real claimants. The concern is that there is no effective means of screening out the fake claimants at an early stage in the litigation. Many alternative means of early screening are proposed. But it is not clear what differences may flow from early screening as compared to screening at the final stages of the litigation if the MDL leads to resolution on terms that dispose of the component actions. Apart from the several proposals for early screening, concerns also are expressed about pressures to participate in bellwether trials and about the need to expand the opportunities to appeal rulings by the MDL court.

Several different early screening proposals are advanced. Some of them interlock with others.

An initial proposal is that Rule 7 should be amended to expressly recognize master complaints and master answers in consolidated proceedings, and also to recognize individual complaints and individual answers. Subsequent proposals focus on requirements for individual complaints or supplements to them.

A direct pleading proposal is that some version of Rule 9(b) particular pleading requirements should be adopted for individual complaints in MDL proceedings. An alternative is to create a new Rule 12(b)(8) motion to dismiss for "failure to provide meaningful evidence of a valid claim in a consolidated proceeding." The court must rule on the motion within a prescribed period, perhaps 90 days; if dismissal is indicated, the plaintiff would be allowed an additional time, perhaps 30 days, to provide "meaningful evidence." If none is provided the dismissal will be made with prejudice.

A related proposal addresses joinder of several plaintiffs in a single complaint. The suggestion is that Rule 20 be amended by adding a provision for a defense motion to require a separate complaint for each plaintiff, accompanied by the filing fee.

The next proposal is for three distinct forms of disclosure. One would require each plaintiff in a consolidated action to file "significant evidentiary support for his or her alleged injury and for a connection between that injury and the defendant's conduct or product." The second disclosure tracks the disclosure of third-party financing agreements as proposed in the submission already discussed. The third would require disclosure of "any third-party claim aggregator, lead generator, or related business * * * who assisted in any way in identifying any potential plaintiff(s) * * *." This proposal reflects concern that plaintiffs recruited by advertising are not screened by the recruiters, and often do not have any shade of a claim.

Turning to bellwether trials, the proposal is that a bellwether trial may be had only if all parties consent through a confidential procedure. In addition, it is proposed that a party should not be required to "waive jurisdiction in order to participate in" a bellwether trial. This proposal in part reflects concern with "Lexecon waivers" that waive remand to the court where the action was filed and also waive "jurisdiction." (Since subject-matter jurisdiction cannot be waived, the apparent concern seems to be personal jurisdiction in the MDL court.)

Finally, it is urged that there should be increased opportunities to appeal as a matter of right from many categories of pretrial rulings by the MDL court. The concern is both that review has inherent values and that rulings made unreviewable by the final-judgment rule result in "an unfair and unbalanced mispricing of settlement agreements."

A quite different proposal was submitted by John Rabiej, Director of the Center for Judicial Studies at the Duke University School of Law. This proposal aims only at the largest MDL aggregations, those consisting of 900 or more cases. At any given time, there tend to be about 20 of these proceedings. Combined, they average around 120,000 individual cases. There are real advantages in consolidated pretrial discovery proceedings. But when the time has come for bellwether trials, the proposal would split the aggregate proceeding into five groups, each to be managed by a separate judge. Separate steering committees would be appointed. The

anticipated advantage is that dividing the work would increase the opportunities for individualized attention to individual cases, although the large numbers involved might dilute this advantage.

One concern that runs through these proposals is that MDL judges are "on their own." Judicial creativity creates a variety of approaches that are not cabined by the Civil Rules in the ways that apply in most litigation.

Addressing rules for MDL proceedings "would be a big undertaking. It is a complex and broad project to take on." And it is a project affected by Congressional interest, as exhibited in H.R. 985, which includes a number of proposals that parallel the proposals advanced in the submissions to the Committee.

Professor Marcus reported that Professor Andrew Bradt has worked through the history of § 1407. The history shows a tension in what the architects thought it would come to mean for mass torts. The reality today presents "hard calls. The stakes are enormous, the pressures great. Judges have provided a real service."

Judge Bates predicted that a rulemaking project would bring out "two clear camps. We will not find agreement."

The appeals proposals were the last topic approached in introducing these topics. The suggestions in the submissions to this Committee are no more than partially developed. It is clear that the proponents want opportunities to appeal from pretrial rulings on *Daubert* issues, preemption motions, decisions to proceed with bellwether trials, judgments in bellwether trials, and "any ruling that the FRCP do not apply to the proceedings." It is not clear whether all such rulings could be appealed as a matter of right, or whether the idea is to invoke some measure of trial-court discretion in the manner of Civil Rule 54(b) partial final judgments. Nor is it clear what criteria might be provided to guide any discretion that might be recognized. One of the amendments of § 1407 embodied in H.R. 985 would direct that the circuit of the MDL court "shall permit an appeal from any order" "provided that an immediate appeal of the order may materially advance the

ultimate termination of one or more civil actions in the proceedings." The proviso clearly qualifies the "shall permit" direction, but the overall sense of direction is uncertain. The Enabling Act and 28 U.S.C. § 1292(e) authorize court rules that define what are final judgments for purposes of § 1291 and to create new categories of interlocutory appeals. If the Committee comes to consider rules that expand appeal jurisdiction, it likely will be wise to coordinate with the Appellate Rules Committee.

The first suggestion when discussion was opened was that these questions are worth looking into. The Committee may, in the end, decide to do nothing. "Some of the ideas won't fly." But it is worth looking into.

Judge Bates noted that almost all of the input has been from the defense side. The Committee has yet to hear the perspectives of plaintiffs, the Judicial Panel on Multidistrict Litigation, and MDL judges.

A Committee member noted that his experience with MDL proceedings has mostly been in antitrust cases, "on both sides of the docket," and may not be representative. "The challenges for judges are enormous." Help can be found in the Manual for Complex Litigation; in appointing special masters; in seeking other consultants; and in adaptability. Still, judges' efforts to solve the problems may at times seem unfair. It is difficult to be sure about what new rules can contribute. If further information is to be sought before deciding whether to proceed, where should the Committee seek it?

Judge Bates suggested that it may be difficult to arrange a useful conference of multiple constituencies in the course of a few months or even a year. The Committee can reach out by soliciting written input. It can engage in discussions with the Judicial Panel. It can reach out to judges with extensive MDL experience. Judge Fogel noted that the FJC and the Judicial Panel have scheduled an event in March. "The timing is very good." That could provide an excellent opportunity to learn more.

Another judge suggested that judges that have managed MDL proceedings with large numbers of cases might have useful ideas

about what sort of rules would help. "We have nowhere near the information we would need to have" to work toward rules proposals. At least a year will be required to gather more information.

A Committee member echoed this thought. "We're far from being ready to think about this." She is not opposed to looking into these questions, "but we must hear from all sides."

Another judge noted that she has an MDL proceeding with more than 4,000 members. She has 17 *Daubert* hearings scheduled. "It's a lot of pressure" to get things right. We should think about working with the Appellate Rules Committee. Another judge described an MDL proceeding with 3,200 claimants and 20 *Daubert* hearings.

A Committee member asked whether the Judicial Panel has accumulated information about MDL practices.

Judge Campbell described resources available to MDL judges. The Judicial Panel has a web site with a lot of helpful information and forms. The Judicial Panel staff attorneys are very helpful about model orders. The Manual for Complex litigation is useful. There are annual conferences for MDL judges. And lawyers "bring a lot to the table." Experienced MDL lawyers reach agreement much more often than they disagree. But the question of appeal opportunities is important and should be explored. It would be very hard to manage an MDL if there are multiple opportunities to appeal. As an example, in one massive securities case a § 1292(b) appeal was accepted from an order entered in August, 2015. The appeal remains pending. The case has been essentially dead while the appeal is undecided. "Managing with appeals is a tough balance."

Judge Campbell continued by taking up the question of means for early procedures to weed out frivolous cases. In his 3,200-claimant MDL there are four new claims filed every day. It is impossible in this setting to have evidential showings for each claimant. It would be all the more impossible in cases with 15,000 claimants and 20 new claimants every day. The lawyers seem to know there are frivolous cases, and bargain toward settlement with this in mind. They often establish a claims process that weeds out frivolous claims. What is the need to

weed them out at an earlier stage? The flow of new cases has no effect on discovery, on the day-to-day life of the case. It will be useful to learn why early screening is important.

Another judge seconded these observations. "I don't think it makes a difference to sort out the frivolous cases at the beginning. We know they're there. Weeding them out takes effort. Weeding them out before discovery is especially doubtful."

An observer from a litigation funder asked what is the overlap between MDL procedures and third-party financing? Judge Bates noted that one of the MDL submissions expressly incorporates the disclosure proposal advanced for third-party financing.

John Rabiej described his proposal. The Center for Judicial Studies has been holding conferences since 2011. Data bases show that a large share of all the federal-court case load is held by 20 judges. "This holds over time. There is a business model that will endure for the foreseeable future." They are planning a conference for April, asking lawyers to address problems in practice. The Center has prepared a set of best practices guidelines that are being updated. It is a mistake to underestimate the burden that frivolous claims imposes on defendants. The problem is the frivolous cases, not the "gray-area" cases. Reliable sources suggest that in big MDLS of some types 20% or more of the claims are "zeroed out."

There is some momentum in practice for providing some minimum information about each claimant at the outset. In drug and medical products cases, for example, the information would show a prescription for the medicine, and a doctor's diagnosis.

MDL proceedings are a big part of the caseload. "The Civil Rules are not involved." Judges like the status quo because they like the discretion they have. "Plaintiffs are basically happy, although they recognize there is room for rules on some topics such as the number of lawyers on a steering committee. The Civil Rules Committee should be involved in this."

Judge Bates agreed that the Committee needs to learn more about the basis for the positions taken than the simple facts of what plaintiffs say, what defendants say, what MDL judges say.

Responding to a question, John Rabiej said that he has not found anyone who wants to talk about third-party financing in the MDL setting. It would be difficult for the Center to devise best practices for third-party financing. "It does come up in MDL proceedings — funders even direct attorneys where to file their actions."

Susan Steinman noted that most American Association for Justice members work on contingent-fee arrangements. "They have no incentive to take cases that are not meritorious." Third-party financing is not an issue to be addressed in the Civil Rules. "It is a business option some members choose." There may be some areas of disagreement among plaintiffs, but they tend to have negative views of disclosure.

Alexander Dahl said that weeding out frivolous claims is an important part of the system. "Rules 12 and 56 are designed for this." In MDL proceedings, the weeding-out function is still more important. "It is numbers that make them complex." The numbers are inaccurate in ways that we do not know. "Numbers raise the stakes and pressures." "Some courts see MDL proceedings as a mechanism for settlement, not truth-seeking. Settlements require a realistic understanding of what the case is worth." And there is an important regulatory aspect. A publicly traded company has to disclose litigation risks. If it loses a bellwether trial, it has to disclose the 15,000 other cases, even though many of them are bogus, inflating the risk exposure.

Alexander Dahl also provided a reminder that the proposal to disclose litigation-financing agreements calls only for disclosure. There is no need to resolve all the mysteries that have been identified in discussing third-party financing.

A judge asked whether a "robust fact sheet" would satisfy the need for early screening? She requires them. A defendant can look at them. Alexander Dahl replied that there are a lot of cases where that does not happen. When it does happen, it can work well. What is important is uniformity of practice.

A Committee member observed that not all MDL proceedings involve drugs or medical devices.

Another Committee member asked what is the "simple disclosure" of litigation-funding that is proposed? Alexander Dahl replied that the proposal seeks the funding agreement, although "the existence of funding is the most important thing."

Judge Campbell noted that he understands the argument for early screening. In his big MDL there is a master complaint. Each plaintiff files a fact sheet. The defendant carefully tracks the fact sheets and identifies suspect cases. "But I never see them." The defendants identify the suspect cases in bargaining. "How is it feasible for the judge to screen them"? Alexander Dahl responded that the use of fact sheets varies. Compliance varies. "Often defendants have to gather the information on their own." Defendants eventually bring motions to dismiss where that is important. Again, "uniformity in practice is important, including uniform standards for dismissal." Further, we need to know what ineffectual judges are doing. The rulemaking process would be beneficial to all sides. Rules can allow sufficient flexibility while still providing guideposts for cases where guidance is needed.

John Rabiej described an opinion focusing on a proceeding with 30% to 40% "zeroed-out plaintiffs." Fact sheets are used in many of these cases. That is why lawyers are devising procedures to get some kind of fact information. That is all they need.

A Committee member asked why is it necessary to consider particularized pleading, or motions to dismiss for want of meaningful evidence? Why is it not sufficient to apply the pleading standards established by the Twombly and Iqbal decisions?

Judge Bates summarized the discussion by stating that the Committee needs to gather more information. Valuable information has been provided, but it is mostly from one perspective. The Committee has learned a lot from the comments provided this day. But the Committee needs more, particularly from the Judicial Panel. The Committee should embark on a six- to twelve-month project to gather information that will support

a decision whether to embark on generating new rules. A Subcommittee will be appointed to develop this information. For the time being, third-party financing will be part of this, at least for the MDL framework.

Rule 16: Role of Judges in Settlement

A proposal to amend Rule 16 to address participation by judges in settlement discussions is made in Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement,* 78 Ohio St.L.J. 73 (2017). The proposal calls for a structural separation of two functions — the role of "settlement neutral" and the role of the judge in "management and adjudication." The judge assigned to manage the case and adjudicate would not be allowed to participate in the settlement process without the consent of all parties obtained by a confidential and anonymous process. The managing-adjudicating judge could, however, encourage the parties to discuss settlement and point them toward ADR opportunities. A different judge of the same court could serve as settlement neutral, providing the advantages of judicial experience and balance.

The proposal reflects three central concerns. The judge's participation may exert undue influence, at times perceived by the parties as coercion to settle. Effective participation by a settlement neutral usually requires information the parties would not provide to a case-managing and adjudicating judge. If the judge gains the information, it will be difficult to ignore it when acting as judge. In part for that reason, the parties may not reveal information that they would provide to a different settlement neutral, impairing the opportunities for a fair settlement.

The proposal recognizes contrary arguments. The judge assigned to the case may know more about it, and understand it better, than a different judge. The parties may feel that participation by the assigned judge gives them "a day in court" in ways not likely with a different judge or other settlement neutral. And the assigned judge may be better able to speak reason to unreasonably intransigent parties.

These questions are familiar. Professor Deason notes that after exploring these problems both the ABA Model Code of

Judicial Conduct and the Code of Conduct for United States Judges adopted principles that simply forbid coercing a party to surrender the right to judicial decision.

These questions are regularly explained in the Federal Judicial Center's educational programs for judges, including the programs for new judges. Discussion at those programs shows that many judges prefer to avoid any involvement with settlement discussions. Some, however, believe that they can play an important role in facilitating desirable settlements. It may well be that judges who have this interest and aptitude play important roles.

Judge Bates followed this introduction by noting that this suggestion has not come from the bar. "Judges do have a variety of perspectives. I would guess that most judges work hard to avoid involvement in settlements." Judges often refuse active participation, but do encourage the parties to explore settlement.

Judge Fogel noted that some judges do become involved in settlements, usually with the parties' consent. Some, on the other hand, refuse to become involved even if the parties ask for help from the judge. Judges divide on the question whether it is even appropriate to urge the parties to consider settlement. "Judges have different temperaments and skill sets." The Code of Conduct gives pretty good guidance on the need to avoid coercion. "We should educate judges to be alert to uses of 'soft power.'" It is difficult to see how a court rule could improve on the present diversity of approaches.

Another judge fully agreed. "The key is coercion, and judges need to be aware of subtle pressure." Most often the judge assigned to the case assigns settlement matters to a magistrate judge. But as a case comes close to trial, and at the start of trial, the judge knows a lot about the case, and can really help the parties reach settlement. The proposed rule "would have my colleagues up in arms."

A Committee member described one case in which, before a jury trial, the judge told one party that something bad would happen if the case were not settled. Other than that, he had never encountered a judge who pressed one party to settle. "But

as it gets closer to trial — often a jury trial — there may be pressure on both sides."

A judge suggested that it is easy to abide by the command of Criminal Rule 11(c)(2) that the judge not participate in discussions of plea agreements. "But for civil cases, where lawyers want the judge to talk to them, it is hard to draft a rule that would not make me nervous."

Another judge observed that there are different pressures in bankruptcy and other bench trials.

The discussion concluded by deciding to remove this proposal from the agenda.

Publication Under Rule 71.1(d)(3)(B)(i)

This proposal is easily illustrated, but then should be fit into the full context of Rule 71.1(d). Rule 71.1(d)(3)(B)(i) directs that when notice is published in a condemnation action, the notice be published:

> in a newspaper published in the county where the property is located or, if there is no such newspaper, in a newspaper with general circulation where the property is located.

The proposal would eliminate the preference for a newspaper published in the county where the property is located, calling only for publication "in a newspaper with general circulation [in the county] where the property is located."

Under Rule 71.1 the complaint in a proceeding to condemn real or personal property is filed with the court. A "notice" is served on the owners. The notice provides basic information about the property and condemnation, and information about the procedure to answer or appear. Service of the notice must be made in accordance with Rule 4. But the notice is to be served by publication if a defendant cannot be served because the defendant's address remains unknown after diligent inquiry within the state where the complaint is filed, or because the defendant resides outside the places where personal service can be made. Notice must be mailed to a defendant who has a known address but who cannot be served in the United States.

The suggestion to delete the preference for publication in a newspaper published in the county where the property is located picks up from other rules for publishing notice that require only that the newspaper be one of general circulation in the county. Several provisions of the Uniform Probate Code are cited, along with New Mexico court rules. The New Mexico rules add a further twist. Federal Rule 4(e)(1) and (h)(1), incorporated in Rule 71.1(d)(3)(B)(i), allow service by "following state law." The New Mexico rule allowing service by publication in a newspaper of general circulation in the county, when incorporated in Rule 4, creates a conflict with the Rule 71.1(d)(3)(B)(i) priority for a newspaper published in the county.

This suggestion raises empirical questions that cannot easily be answered. It is easy to point to counties that are the place of publication of intensely local newspapers that have limited circulation. And it is easy to point to out-of-county newspapers that have much broader circulation within the county. In many counties there may be more than one out-of-county newspaper of "general" circulation — one question might be whether a rule should attempt to require publication in the newspaper of broadest circulation. But a different empirical question follows. Where will people interested in local legal notices look? Does it make sense to recognize publication in a newspaper of nationwide circulation, or is it highly unlikely that a resident of Sanillac County, Michigan, would look to USA Today for local legal notices? A participant looked at the current issue of a local Sanillac County newspaper and found eight legal notices. Perhaps readers indeed will look first at a locally published newspaper.

A second question is part theoretical, part empirical. In adapting the rules to the displacement of paper by electronic communication, the Committee has avoided many issues similar to the questions raised by this modest proposal. What counts as a "newspaper"? Should some form, or many forms, of electronic media be recognized? And where is a newspaper "published," particularly those that appear daily in electronic form but only one or two days a week in paper form? What should be done with a newspaper that is published daily on paper, and also — perhaps continually updated — on an electronic platform? Should a rule

direct publication in both forms, direct one form or the other, or leave the choice to the government?

It would be possible to recommend the proposed amendment without addressing these broader questions. But they must at least be considered in the process of framing a recommendation.

The Department of Justice does not object to the proposal.

A Committee member asked whether the proposed change raises due process problems. The Supreme Court has recognized that as compared to other means of notice, publication is a mere feint. But publication is recognized in circumstances that make better notice impracticable. So it is for a defendant in a condemnation action who has no known address. Rule 71.1(d)(3)(B)(i) begins the compromise by demanding that an address be sought only by diligent inquiry within the state where the complaint is filed. Publication is required only for "at least 3 successive weeks." The test is nicely expressed by asking what would satisfy a prudent person of business, counting the pennies but anxious to accomplish notice. In this setting, this simply returns the inquiry to the empirical questions: are there knowable advantages so general as to illuminate the choice between locally published newspapers and others that have general local circulation?

A judge expressed reluctance to change the rule. "You know to look to the local newspaper for legal notices," even when a newspaper published in a nearby county has broader circulation in the county.

These exchanges prompted a broader question: Should the Committee look at broader questions of publication by notice "in the world we live in"? The Committee agreed that the time has not come to address these questions.

Judge Bates summarized the discussion by suggesting that he and the Reporters will consider this proposal further. The present rule language is clear. The question is the wisdom of its choices. And it may be difficult to answer the empirical questions that underlie the choice, perhaps prompting a decision to do nothing.

IAALS FLSA Initial Discovery Protocol

The Institute for the Advancement of the American Legal System has submitted for consideration "and hopeful endorsement" the INITIAL DISCOVERY PROTOCOLS FOR FAIR LABOR STANDARDS ACT CASES NOT PLEADED AS COLLECTIVE ACTIONS.

The Protocols were developed by the people and process that developed the successful Initial Discovery Protocols for Employment Cases Alleging Adverse Action. IAALS was the overall sponsor. The drafting group included equal numbers of lawyers who typically represent plaintiffs and lawyers who typically represent defendants. Joseph Garrison headed the plaintiff team, while Chris Kitchel headed the defendant team. Judge John Koeltl and Judge Lee Rosenthal again participated actively.

The FLSA protocols appear to be headed for successful adoption by individual judges, just as the individual employment protocols have proved successful. The question for the Committee is whether to find some means of supporting and encouraging adoption.

The Committee can act officially only in its role in the Rules Enabling Act process by recommending rules to the Standing Committee. Formal endorsement of worthy projects does not fit within this framework, just as the Committee cannot revise earlier Committee Notes without proposing an amendment of rule text.

Judge Bates echoed this introduction, noting that rulemaking is not called for and asking how can the Committee approve or encourage this project?

Judge Campbell noted that with the individual employee protocols, the judges on the Committee "took them home," using them and encouraging other judges to use them. "I would encourage our judges to do this again."

Professor Coquillette agreed that there are many problems with acting officially. "Judge Campbell's suggestion is practical and gets results."

Joseph Garrison reported that plaintiffs' attorneys in Connecticut have changed their preference for state courts since the federal court adopted the individual employee protocols. They now prefer federal court because they get a lot of early

discovery, often leading to early settlements. Participation by judges is important. It would be good to have this Committee's members, and members of the Standing Committee, pursue the new protocols enthusiastically. These protocols will be more important in individual FLSA cases than in individual employment cases because FLSA cases tend to involve small claims and benefit from prompt closure. Protracted litigation generates problems with attorney fees.

Brittany Kauffman, for IAALS, expressed the hope that the Federal Judicial Center will publish the FLSA protocols. Working with IAALS to get the word out will be helpful.

A Committee member noted that the 30-day timeline in the FLSA protocols will prove difficult for the Department of Justice.

Judge Bates thanked the participants in the FLSA protocols for putting them together. The advice provided by Judge Campbell and Professor Coquillette is wise.

Pilot Projects

Judge Bates reported on progress with the two Pilot Projects.

The Mandatory Initial Discovery project has been launched in two courts. It became effective in the District of Arizona on May 1, 2017. Many judges in the Northern District of Illinois adopted it, effective on June 1, 2017. The pilot discovery provisions require answers that reveal unfavorable information that a party would not use in the case. And they require detailed information be provided without waiting to be asked. The provisions are thoroughly developed.

Judge Campbell reported that Judge Grimm oversaw the effort of developing the Mandatory Initial Discovery project. It is great work. It was adopted in the District of Arizona by general order. The time to provide the initial responses, 30 days, is not deferred by motions except for those that go to jurisdiction. The court did a lot of work to make sure the CM/ECF system would record the events, supporting research by Emery Lee that will assess the effects of the pilot. Dr. Lee also will ask lawyers in closed cases to respond to a brief

survey about their experiences, about how mandatory initial discovery affected their cases. The Arizona bar is used to sweeping initial disclosure, so implementing initial discovery has gone smoothly. Almost all Rule 26(f) reports reflect compliance. The District's judges met in September and modified the general order to address some problems. The only downside has been that the District has had to suspend its adoption of the individual employment discovery protocols because they are inconsistent with the pilot project.

Judge Dow reported that the judges in the Northern District of Illinois have followed in the wake of the District of Arizona. Between 16 and 18 active judges, one senior judge, and all magistrate judges are participating in the pilot; collectively they account for about 80% of the cases in the District. The project is progressing smoothly. Lawyers have rarely had questions. And there have been few problems. When it is not feasible to complete the mandatory initial discovery in the prescribed time, additional time is allowed. "We aren't asking for production of 30 terabytes in 30 days." Some general counsel have been uncomfortable with a new practice — signing their filings. As compared to Arizona, the project will begin differently in Illinois because the lawyers are not accustomed to this kind of initial disclosure or discovery. For the judges, Judge Dow and Judge St. Eve provide guidance. "If the culture changes so lawyers do early case evaluations after they get the discovery responses, we will have made a difference." In response to a question, he said that lawyers do cooperate.

Judge Campbell noted that Arizona judges report that most issues with their sweeping initial disclosure rule arise on summary judgment or at trial, when objections are made to evidence that was not disclosed. "If you allow the evidence rather than exclude it, word gets out fast." In Arizona as in Illinois, more time to make the initial discovery is allowed in cases that involve massive information. In turn that prompts more active case management.

A Committee member expressed a hope that the experience in Arizona and Illinois can be used to leverage the project for adoption in other districts. Judge Dow noted that Arizona and Illinois have already "ironed out a lot of bugs." It will be a lot easier for other districts to sign on.

Judges Bates and Campbell responded that although the initial experience may help, "we have tried." Personal approaches have been made to about 40 districts. "It is not always a tough sell initially, but when it gets to discussion by a full court, issues arise." Work load, vacancies, and local culture are obstacles.

Judge Bates turned to the Expedited Procedure Pilot. This project is designed simply to expand adoption of practices that many judges follow now. But no district has yet adopted the project. Again, problems arise from the culture of the bar or court, work load, and like obstacles. A concerted effort is being made to enlist some districts. Judge Sutton — former Chair of the Standing Committee — has engaged in the quest, and Judge Zouhary — a member of the Standing Committee — has joined the effort. They are prepared to consider more flexibility in the deadlines set by the project, and to accept participation by a district that cannot enlist all of its judges. In addition, the Federal Judicial Center study will be expanded to look at experience in districts that already are using practices like the pilot. And a group of leading lawyers are being enlisted to join a letter encouraging judges to participate.

Subcommittees

Judge Bates stated that the Social Security Review Subcommittee would be formally established, with Judge Lioi as chair.

Another Subcommittee will be established to consider the proposals for MDL rules, and with the MDL rules will also consider the proposal for disclosure of third-party litigation financing agreements that is adopted in one of the MDL proposals. This Subcommittee's work will extend for at least a year, and perhaps more. If the task of framing actual rules proposals is taken up, the work will extend for years beyond that.

Next Meeting

The next meeting will be held on April 10, 2018. The place has not yet been fixed, but Philadelphia is a likely choice.

Respectfully submitted,

Edward H. Cooper
Reporter