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: May 11, 2018

Introduction

The Civil Rules Advisory Committee met in Philadelphia, Pennsylvania, on April 10, 2018. Draft Minutes of this meeting are attached.

Part I of this Report submits a recommendation to publish for comment a proposal to improve the procedure for taking depositions of an organization under Rule 30(b)(6). A Subcommittee has been working on this subject for two years.

Part II describes the ongoing work of two Subcommittees, the Multidistrict Litigation Subcommittee and the Social Security Review Subcommittee. Each Subcommittee is gathering information to address whether it is desirable to go beyond the information-gathering stage to begin developing possible rules proposals. There is a real prospect that each Subcommittee will recommend that new rules provisions are not warranted.

Part II also describes two new agenda items. The first, focusing on the aspect of the CM/ECF system that jeopardizes the anonymity of refusals to consent to assign a case to a magistrate judge, will be actively developed for consideration next fall. The other arises from suggestions to extend personal jurisdiction by allowing federal courts to further expand the circumstances for relying on a "national contacts" test of Fifth Amendment due process. That item

remains on the agenda, but will require a heavy investment of Committee resources if it is to be developed. Further consideration has been postponed.

Part III describes one item that has been removed from the agenda — selection of the newspaper for publishing notice in a condemnation proceeding. It briefly notes three other items that have also been removed from the agenda.

I. Action Item

Rule 30(b)(6): Duty to Confer

The Advisory Committee on Civil Rules proposes that the preliminary draft of an amendment to Rule 30(b)(6), with accompanying Committee Note, be published for public comment. The proposed amendment and Note are presented below.

The preliminary draft was developed by the Advisory Committee's Rule 30(b)(6) Subcommittee, which was formed in April 2016 in response to a number of submissions proposing consideration of a variety of changes to the rule. Initially, the Subcommittee considered several specific changes that were introduced to the Standing Committee during its January 2017 meeting. After further consideration, that list of possible rule changes was pared back to six specific possible amendment ideas.

The Subcommittee then invited comment on these items. Over 100 comments were submitted, many of them very detailed and thoughtful. At the Standing Committee's June 2017 meeting, an interim report on the invitation for comment was made. The agenda book for the Standing Committee's January 2018 meeting included a detailed summary of those comments.

The Subcommittee then resumed discussion of ways to deal with Rule 30(b)(6) issues. Eventually it concluded that the most productive method of improving practice under the rule would be to require the parties to confer in good faith about the matters for examination. Much of the commentary it had received indicated that such conferences often provide a method for avoiding and resolving problems. Requiring the parties to confer therefore holds promise as a way to address the difficulties cited by those who urged amending the rule.

At its November 2017 meeting, the Advisory Committee discussed this proposal. That discussion suggested that the rule should make it clear that the requirement to confer in good faith is bilateral — it applies to the responding organization as well as to the noticing party — and also raised the possibility that the rule require that the parties confer about the identity of the witnesses to testify. The Subcommittee met by conference call after that meeting to address concerns raised by the Advisory Committee.

At the Standing Committee's January 2018 meeting, there was discussion of the evolving Rule 30(b)(6) proposal to require the parties to confer, including the possibility (raised during the Advisory Committee meeting) that the identity of the witnesses be added to the list of topics for discussion. There was also discussion of the possibility of providing in the rule that additional matters be mandatory topics for discussion.

After the Standing Committee's meeting, the Subcommittee again met by conference call. Notes of this conference call are included in this agenda book. The Subcommittee worried that adding topics to the mandatory list for discussion might generate disputes rather than avoid them. Another concern was that adding to the list of mandatory topics could build in delay. The eventual

resolution was not to expand the list of mandatory topics beyond the number and description of the matters for examination and the identity of the designated witnesses.

The Subcommittee also considered adding a reference to Rule 30(b)(6) in the Rule 26(f) conference list of topics. There was considerable sentiment on the Subcommittee not to introduce this topic at the early point when the Rule 26(f) conference is to occur because, in most cases, it is too early for the parties to be specific about such depositions. Nonetheless, the consensus was to present the possibility of publishing a possible change to Rule 26(f) to the full Advisory Committee, in case that seemed desirable should public comment strongly favor such a change. The Subcommittee would not recommend that course, however.

At its April 2018 meeting, the Advisory Committee considered the Subcommittee's recommendation that a Rule 30(b)(6) preliminary draft be published for comment. The discussion considered the addition of the identity of the witness or witnesses to the list of topics for conferring and the risk that some might interpret that as requiring that the organization obtain the noticing party's approval of the organization's selection of its witness. The proposed amendment, however, carries forward the present rule text stating that the named organization must designate the persons to testify on its behalf. The Committee Note affirms that the choice of the designees is ultimately the choice of the organization. The Advisory Committee resolved to retain the identity of the witness as a topic for discussion.

A different concern voiced at the Advisory Committee's meeting was that the draft, as then written, might be interpreted to suggest that a single conference would satisfy the requirement to confer, which could prove particularly problematical with the addition of the identity of the witness as a required topic. Instead, it is likely that the process of conferring will be iterative. To reflect that reality, the rule text was amended to add the phrase "and continuing as necessary" to the rule. This addition recognizes that often a single interaction will not suffice to satisfy the obligation to confer in good faith. With that change, the Advisory Committee voted to recommend publication of the preliminary draft rule presented below for public comment.

Regarding the possibility of publishing a draft amendment to Rule 26(f), there was no support on the Advisory Committee for doing so, and accordingly that idea is not part of this recommendation to the Standing Committee.

After the Advisory Committee's meeting, a revised Committee Note reflecting the addition the Advisory Committee made to the rule was circulated to the Advisory Committee, which voted on it by email. With refinements to that Note, the Advisory Committee brings forward the following preliminary draft with the proposal that it be published for public comment.

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Rule 30. Depositions by Oral Examination

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(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. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person who will testify. A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party. 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.

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Draft Committee Note

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

Candid exchanges about discovery goals and organizational information structure may reduce the difficulty of identifying the right person to testify and the materials needed to prepare that person. Discussion of the number and description of topics may avoid unnecessary burdens. Although the named organization ultimately has the right to select its designee, discussion about

the identity of persons to be designated to testify may avoid later disputes. It may be productive also to discuss "process" issues, such as the timing and location of the deposition.

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

When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f) conference may provide an occasion for beginning discussion of these topics. In appropriate cases, it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery plan submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference under Rule 16.

II: Information Items

A. Rules for Multidistrict Litigation

MDL dockets have become more prominent in recent years. Presently, over a third of all pending civil cases in federal court are subject to an MDL transfer order. If one excludes the large number of prisoner petitions and actions seeking review of denials of Social Security disability benefits, MDL cases constitute well over 40% of pending federal civil cases.

At least with regard to mass tort litigation, there has been increased scrutiny of MDL litigation. A prominent example is provided by the Fairness in Class Action Litigation Act, H.R. 985, passed by the House in March 2017 and now pending in the Senate. Section 5 of that bill, entitled "Multidistrict Litigation Proceedings Procedures," includes provisions noted at three points below.

Looking back a half century to the birth of 28 U.S.C. § 1407, the MDL transfer statute, recent scholarship reports that the judicial drafters and proponents of the statute "believed that their creation would reshape federal litigation and become the primary mechanism for processing the wave of nationwide mass-tort litigation they predicted was headed the federal courts' way." Bradt, "A Radical Proposal": The Multidistrict Litigation Act of 1968, 165 U. Pa. L. Rev. 831, 839 (2017). As a consequence, the author says that "MDL is now working essentially as its creators intended." *Id.* at 841.

But MDL may not be working just as Congress intended in 1968. Some history indicates that the basic purpose of § 1407 was to coordinate discovery, not to decide or settle transferred cases. Indeed, the expansion of the transferee judge's statutory authority from ruling only on discovery disputes to ruling on all pretrial matters was justified partly on the ground that a judge who could not rule on Rule 12(b) motions or Rule 56 motions really was hobbled in managing discovery. H.R. 985 might be said to show that some members of the current Congress are concerned about how the current MDL process is working.

The members of Congress who adopted § 1407 probably did not appreciate how much the pretrial functions of federal judges would expand. Since 1968 the judicial attitude toward judicial case management and settlement promotion has undergone something of a metamorphosis. As amended in 1983, Fed. R. Civ. P. 16 has generally authorized judicial attention to a wide variety of matters that were formerly left to the lawyers, including possible settlement. So one could say that MDL transferee judges who attend to settlement possibilities (and take a pro-active role regarding other pretrial developments) are handling those cases the same way they are handling all their other cases. *See, e.g.*, *Matter of Rhone-Poulenc Rorer Pharmaceuticals, Inc.*, 138 F.3d 695 (7th Cir. 1998) (upholding transferee court's order limiting number of proposed expert witnesses defendants could use after the cases were remanded to transferor courts, and observing that "it is inevitable that pretrial proceedings will affect the conduct of the trial itself").

As reported to the Standing Committee during its January 2018 meeting, the Advisory Committee on Civil Rules has received three formal submissions urging that it consider rulemaking to address issues particular to MDL proceedings. In addition, it has received a renewed proposal (first advanced in 2014) that initial disclosure be expanded to include what are called third-party funding arrangements. These funding arrangements may sometimes play an important role in connection with MDL litigation. It seems fair to comment that these proposals more generally seek to change the current reality of how MDL is working.

At its November 2017 meeting, the Advisory Committee established a Subcommittee to consider this collection of issues. The Subcommittee has begun the process of gaining familiarity with the issues, and has sketched out a series of questions and topics on which it is seeking input. Those topics were discussed during the Advisory Committee's April 2018 meeting, and the Subcommittee hopes to receive further insights from the Standing Committee about those topics and whether any other topics should be added to the list.

As part of its self-education effort, the Subcommittee has begun having representatives attend events that promise to shed light on the underlying issues. The events presently contemplated include the following:

Duke Law Conference on Documenting and Seeking Solutions to Mass-Tort MDLs, April 26-27, Atlanta, GA.

Emory Law School Institute for Complex Litigation and Mass Claims Litigation Finance & State/Federal Coordination Roundtable and Conference, June 4-5, Berkeley, CA.

American Association for Justice Annual Convention, July 7-10, Denver, CO.

Emory Law School Institute for Complex Litigation and Mass Claims Conference, Aug. 8-10, Atlanta, GA.

Lawyers for Civil Justice event, Sept. 14, 2018, Washington D.C.

George Washington Law School Roundtable on Third Party Legal Funding: Nov. 2018, Washington, D.C.

The Subcommittee has begun gathering information and identifying issues on which rule changes might focus. The MDL Panel has been extremely helpful, providing what some Subcommittee members have described as a "treasure trove" of information about pending MDL matters. Outreach to the Panel will continue in various ways. Two of the members of the Subcommittee are transferee judges in MDL proceedings, and representatives of the Subcommittee have attended and will be attending events organized by the Panel.

Despite this preliminary activity, the Subcommittee's work remains at a very early stage. The ultimate result may be that no rules are proposed, or that rule proposals are made only on a few of the many topics presently under preliminary study. Thus, the introduction of the issues

below is strewn with questions that probably will arise should the Subcommittee focus on a given topic for extended study.

The Subcommittee's basic objective at present is to receive guidance on which issues initially seem most worthy of study, and also whether there are methods for generating information about these topics beyond what the Subcommittee is already contemplating. In pursuing this objective, the Subcommittee seeks to draw on the experience of Standing Committee members. Below is a listing of issues that the Subcommittee has identified to date, along with some of the questions already raised about them. Are there topics that should be added? Is there an initial sense among Standing Committee members about which seem promising topics for rulemaking?

(1) Importance of judicial discretion in MDL proceedings: The transferee judge has broad discretion in an MDL proceeding. Is preserving that discretion an important goal? Some who discuss specific rule provisions governing the handling of these cases worry about a "judicial straitjacket." In a sense, this concern reflects a debate that has occurred at least since the 1983 amendments to Rule 16 expanded judicial authority to engage in case management, and (in Rule 16(b)) required judges to do at least some case management in most of their cases. Judicial latitude in individual cases may be less troubling than in MDL centralized actions, but latitude may be more important in at least some MDL proceedings. This consideration reappears in relation to the question whether access to interlocutory review should be expanded in MDL litigation.

(2) Scope: The scope for any rule amendments probably can't be fully explored until it is determined what those amendments might be. But it is worth introducing this question at the outset. The rules could apply only to those matters centralized by the Judicial Panel (or only some of them based on number of claimants or some other criterion), or only to actions of a certain type (e.g., "mass" personal injury). But it may be that actions with no MDL activity could also benefit from procedures developed for MDL proceedings. *See, e.g., Avila v. Willits Environmental Remediation Trust*, 633 F.3d 828 (9th Cir. 2011) (enforcement of *Lone Pine* order in three consolidated actions involving some 1,000 plaintiffs making claims for toxic soil contamination). What criteria should define the scope of application for any rule amendments?

The selection of criteria might bear on when it could be determined whether these rules apply. For example, if these rules apply only after the Panel has granted a petition to centralize, that event will often occur long after many individual actions have been filed. And there might also be a question whether the rules become inapplicable after remand by the Panel (though remand presently happens only in a small proportion — 3% to 5% — of cases transferred pursuant to an MDL transfer order).

(3) Master complaints and answers: Submissions have urged that the Civil Rules explicitly address these filings. In some MDL proceedings, "master" pleadings may lack any specifics about individual plaintiffs or defendants, and thus not provide any significant notice about the grounds for claims or defenses raised in the pleadings. Semi-automatic adoption of these generic documents for all cases in the MDL litigation may prevent any challenge to the claims or defenses of individual parties.

Rule provisions about master complaints or answers might specify standards for evaluating their adequacy. If these are pleadings in the Rule 7 sense, they are presumably subject to Rule 12(b) motions to dismiss, Rule 12(c) motions for judgment on the pleadings, and Rule 12(f) motions to strike. They also presumably serve as guideposts for the scope of discovery and summary-judgment motions.

These possibilities raise a number of questions on which input from Committee members would be helpful. Are "master" pleadings used only in MDL proceedings? When they are employed, are they treated as superseding the pleadings in individual actions? Would addressing them separately in the Civil Rules provide benefits, or raise risks?

(4) Unsupported claims, and more particularized pleading/"fact sheets": An abiding concern with some MDL litigation — at least for mass torts — might be called the "Field of Dreams" concern that "if you build it they will come." The "it" for these purposes is an MDL centralization order. And allegedly a lot of plaintiffs who file actions after MDL centralization don't really have valid claims. But that sort of failing may be obscured in the mass of MDL filings and discovery staging, which may impede efforts to "weed" out these claims. One reaction in some cases is to enter a *Lone Pine* order or to require all claimants to fill out "fact sheets" (sometimes quite extensive). For judges, trying to evaluate hundreds or thousands of such submissions could be extremely onerous.

The question whether this problem is a serious one can be debated. Even accepting that 30% of claims may often turn out to be unsubstantiated, one response has been: "But why focus on those? We should focus on the other 70%." To some, the main issue is whether the product in question is harmful, not whether every single claimant before the court can present basic information about his or her use of the product at the start of the case. From this perspective, the consequence of the "fact sheet" approach is to impose "massive" discovery obligations on plaintiffs before defendants even face fundamental discovery about the product involved.

A reaction to this view is that having to spend time and resources on the 30% (or so) of claims that should never have been filed is wasteful. In addition, the pendency of an inflated number of claims may trigger some reporting obligations for defendants (to the FDA, accounting firms, the SEC, etc.) with greater adverse consequences than if the litigation were slimmed down to the supportable claims. It could also be that including the "excess" claims may distort the value of the cases in the settlement context.

One approach to this set of questions might be to make initial disclosure under Rule 26(a)(1) more robust, at least in some cases. Besides addressing the scope issues mentioned above, an empowered disclosure provision might require that each claimant provide detailed specifics about harms suffered and experience with the product that allegedly caused those harms. Reports indicate that "Plaintiff Fact Sheets," for example, tend to be extremely detailed and need to be keyed to the specific issues pertinent to a given set of cases.

Is the "fact sheet" approach useful? Would a Civil Rules provision foster the use of such methods in a helpful way? Have the current provisions of the rules interfered with use of such methods in cases where they might be useful? Would something like the pleading requirements for fraud cases under Rule 9(b) provide useful guidance for district judges considering this route? Could a new rule provide a template for a useful fact sheet?

H.R. 985 contains a requirement that, within 45 days of transfer to an MDL docket, or direct filing in it, any plaintiff asserting a claim for personal injury must "make a submission sufficient to demonstrate that there is evidentiary support" for the complaint's allegations. The court would be required within 30 days to determine whether each plaintiff's submission is sufficient. If the court determines that a submission is not sufficient, it must then dismiss without prejudice to plaintiff promptly filing a sufficient submission, failing which the court must dismiss with prejudice.

Another possible reaction, using the current rules, is to invoke Rule 11 and suggest that the sort of specifics a "fact sheet" would require are exactly what any attorney screening possible claims should gather before filing suit.

Is more vigorous use of Rule 11 a promising way of dealing with this set of problems? In considering this question, it is important to appreciate that plaintiff lawyers may sometimes have limited time for background investigation before expiration of the statute of limitations, and that the fact that a claim eventually fails on the merits does not mean that the lawyer who brought the claim violated Rule 11. A possible solution to this limitations problem has been party agreement to toll the running of limitations pending a background investigation. Could a rule provide such tolling? (Note that in the 1990s some district courts presented with large numbers of asbestos personal injury claims by plaintiffs not alleging current harmful impact set up "pleural registries" on which claims by such plaintiffs could be "stored" and revived if they developed symptoms later.)

(5) Rule 20 joinder and filing fees: To the extent that some attorneys (perhaps with the assistance of "lead generators" — see topic (7) below) file actions without sufficiently scrutinizing the validity of the claims asserted, it might be that requiring payment of a filing fee for each plaintiff could be a practical answer to the problem. It seems that 28 U.S.C. § 1914(a) presently requires one filing fee for a "civil action," no matter how many parties there are.

Rule 20 is broadly permissive regarding joinder of parties, so in conjunction with § 1914 it permits the filing of a single case on behalf of a large number of plaintiffs (and against a large number of defendants). *See, e.g., Avila v. Willits Environmental Remediation Trust*, 633 F.3d 828 (9th Cir. 2011) (three consolidated actions for environmental contamination brought on behalf of some 1,000 individual plaintiffs).

A defendant can move to divide a single multi-plaintiff action into separate actions, but to do that seemingly requires a finding that the claims do not involve a common question — a standard similar to the MDL §1407(a) transfer standard — or arise out of the same "transaction or

occurrence, or series of transactions or occurrences." It is not clear what advantage separation would have for the MDL proceeding, nor on the eventual remand, apart from augmenting filing fees (and thereby perhaps dissuading the filing of marginal cases).

Arguably, requiring every plaintiff properly joined under Rule 20(a) to pay a separate filing fee in every civil action would overreach. Do Committee members regard the problem of "phantom" claims to be a serious one? If so, is that true only in MDL proceedings? Is a response that focuses on filing fees promising? It seems that electronic filing would alleviate possibly burdensome aspects of such a rule for the Clerk's office, which would have to calculate the filing fee for a civil action based on the number of plaintiffs named in the complaint.

It may be that the principal focus of this concern is "direct filing," a practice by which plaintiffs file directly in the MDL transferee district rather than in their "home" district (in the latter event they would be tag-along cases sent to the transferee district). Ordinarily such direct filing results from a consensual order under which defendants agree not to raise venue or other objections to the initial filing in the transferee district, providing that once all pretrial proceedings are completed in that district the case would be "remanded" to the "home" district. Would a rule governing "direct filing" be a desirable possibility to consider? If so, what should it provide about filing fees, venue, personal jurisdiction, "remand" and other issues?

(6) Sequencing discovery: In general, complex litigation often benefits from sequenced discovery. One could say that a "fact sheet" approach is a version of that — presumably plaintiffs normally have to satisfy this requirement before they are allowed to proceed with discovery in their cases. As a matter of rulemaking, would a prescribed sequence of discovery be more promising than a rule requiring plaintiffs in certain actions always to submit such detailed support for their claims? If there is to be a master complaint, should that be completed before detailed discovery or disclosure is required from plaintiffs?

Is discovery sequencing helpful in general? In MDL proceedings? Would rulemaking improve current practices? One possible concern with sequenced discovery in MDL proceedings is that it may tend to delay or impede attention to claims involving "outlier" defendants who may be restricted in their ability to explore grounds for summary judgment.

(7) Third Party Litigation Funding and "lead generators": These topics may not intrinsically be linked, but linking them may generate useful discussion. Preliminary research by Patrick Tighe, Rules Law Clerk, shows that about half the courts of appeals and about a quarter of the district courts have local rules requiring disclosure of some information about third-party funding. These local rules seem designed principally to focus on recusal issues.

It appears that the amount and dollar volume of TPLF activity has expanded rapidly in recent years. Some of this activity has caught the attention of the popular press. Patrick Tighe has also found that several states have adopted statutes regulating this activity. None of these states required automatic disclosure of the identity of litigation funders in connection with civil litigation (thought the Wisconsin legislature very recently adopted a disclosure requirement similar to the

Rule 26(a)(1) proposal before the Advisory Committee). But state court decisions and some state statutes have imposed registration requirements on litigation funders and required that certain disclosures be made to borrowers, such as the annual percentage rate charged.

Besides recusal concerns, a variety of other concerns have been urged as justifying disclosure or some other response to the growing use of TPLF. Many of these could be characterized as raising "ethical" issues or conflict of interest problems that seemingly lie behind the call for inquiry into "lead generators." Questions have been raised about whether third-party funders acquire control over litigation decisions. In particular, their role in regard to possible settlement has troubled some judges, who may worry that there is a third-party funder outside the settlement conference room who is actually controlling the behavior of the people in that room.

Are "lead generators" or third party funding the source of significant settlement problems? Do they often raise "ethical" issues that should concern judges? Would disclosure be a positive response to those issues? In class actions, in particular (often included in mass tort MDL proceedings), Rule 23(g) directs the court to consider the resources counsel will commit to the case in appointing class counsel. Outside Rule 23, should the court seek such information in designating lead counsel? If disclosure would be a positive response, what should the court do with the information disclosed? Will disclosure lead to further discovery and motions? If there is a role for such disclosure, is it important outside the "mass tort" area?

(8) Bellwether trials: To begin with, at least some seem to resist the entire notion of bellwether trials on the ground that they are not truly "representative" and therefore provide no real guidance on claim values even though their outcomes may magnify settlement pressure. H.R. 985 addresses similar issues by directing that the MDL transferee judge may conduct a trial in a civil action transferred to or directly filed in the MDL court only upon consent of all parties.

Whether rulemaking on this subject would be useful is unclear. Are such trials held only in MDL proceedings? Is it sufficiently clear what a "bellwether" trial is to permit a rule to prescribe regulations for them? Though it is true that such a trial is intended as a guide to settlement value and non-trial resolution, does that not happen without the "bellwether" designation?

Perhaps a more general inquiry would be whether MDL transferee judges try too hard to resolve the transferred cases without the need for a remand (a concern suggested by H.R. 985). Certainly the remand rate of around 3% to 5% is rather low, but so is the trial rate for ordinary cases. Should the Subcommittee be concerned about undue pro-settlement pressure in MDL proceedings? If so, is that a matter to be addressed in a Civil Rule? Note that Rule 16(c) now authorizes the court to raise settlement issues in all cases. Should that invitation exclude MDL proceedings?

Perhaps relatedly, it has also been suggested that, when the time to try cases arrives, additional judges should be recruited to preside over those trials. The Panel did once make such a suggestion. *See In re Asbestos Products Liability Litigation* (No. VI), 771 F. Supp. 415 (J.P.M.L.

1991) (suggesting creation of "a nationwide roster of senior district or other judges available to follow actions remanded back to heavily impacted districts"). Would that approach hold promise for the concerns raised here?

(9) Facilitating appellate review: Submissions have urged measures to facilitate interlocutory review. A starting point is to recognize that there already exist methods of obtaining such review. *See, e.g.*, Rule 23(f) and 28 U.S.C. § 1292(b). Neither of those provides an absolute right to such review, however.

It is likely that a Civil Rule could expand the circumstances for such review and, perhaps, mandate it under some circumstances. (If serious attention focuses on these issues, it will be important to involve the Appellate Rules Committee.) H.R. 985 would require review of interlocutory orders whenever review "may materially advance the ultimate determination of one or more civil actions in the proceedings." That seems a very broad standard, particularly if the court of appeals is to apply it without initial certification by the district court, as under §1292(b).

But becoming more specific about the trigger for immediate appeal may itself be a challenge. Some who favor immediate review for some interlocutory orders suggest that examples include decisions about admissibility of expert opinion evidence under the *Daubert* "gatekeeper" standard, choice of law rulings, "general causation" issues, and rulings on preemption, all issues which they contend have cross-cutting importance in MDL litigation. But those who do not favor expanding such review urge that even these decisions may depend on individual circumstances of specific cases rather than having a global impact on all cases. Moreover, expanding access to interlocutory appeal may significantly delay MDL proceedings and burden the courts of appeals.

Are the existing methods inadequate for appropriate access to interlocutory review in MDL proceedings? It seems that certain rulings that in individual litigation might be regarded as "ordinary" could assume much greater importance in MDL or other multiparty litigation. How would a rule identify such orders? Could a court of appeals meaningfully discern whether a given order was of that variety? Would broadening interlocutory appellate review unduly delay MDL cases?

(10) Coordination between "parallel" federal- and state-court actions: There have been instances of highly productive cooperation and collaboration between federal and state judges handling related matters. Indeed, some states (e.g., California and New Jersey) have centralization mechanisms similar to the Panel for related actions pending in their courts. Such collaboration has been around for a generation. *See, e.g.*, Schwarzer, Weiss & Hirsch, Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts, 78 Va. L. Rev. 1689 (1992).

Is such collaboration between state and federal judges productive? Have the Civil Rules impeded such collaboration? Would revisions to the Civil Rules provide a helpful impetus or mechanism for such activity? It may be that this is another aspect of individualized case management that cannot effectively be governed by rule.

The independent actions of state courts handling "parallel" cases might be seen as complicating the federal court's management of the MDL proceeding. Assuming that the federal court has inaugurated a program of sequenced or staged discovery pointing toward a set of bellwether trials, it might view a state court's decision to proceed to an early trial as potentially disrupting the federal court's management of its MDL docket. In at least some situations, federal judges have reacted negatively to such developments. *See Retirement Systems of Alabama v. J.P. Morgan Chase & Co.*, 386 F.3d 419 (2d Cir. 2004) (holding that MDL transferee judge who had certified a class action for trial could not, due to the Anti-Injunction Act, enjoin an Alabama state-court judge from proceeding with a trial even though the federal defendants' need to prepare for the state-court trial might interfere with the federal court's trial schedule).

On the other hand, it may be that a Panel order transferring all federal cases to a specific judge makes that judge a natural leader. See Hermann, To MDL or Not to MDL? A Defense Perspective, 24 Litigation 43, 46 (1998) ("Without an MDL proceeding, there is no obvious leader among the federal judges handling federal cases. It can thus be very difficult to convince state court judges to follow the lead of any one particular federal judge.").

As Judge Schwarzer's article cited above suggests, informal coordination between federal judges and state judges may be the best way to handle potential tensions, in both MDL litigation and other litigation. That sort of cooperation has certainly occurred. *See, e.g., In re New Motor Vehicles Canadian Export Antitrust Litigation*, 229 F.R.D. 35 (D. Me. 2005) (referring to a Joint Coordination Order designed for use in both the MDL proceedings and parallel state proceedings, and conferences of the federal and state judges).

(11) Plaintiff Steering Committee formation and common fund directives: There is no rule directive for MDLs like Rule 23(g) about appointment of lead or liaison counsel or the members of the PSC. Common fund contribution orders (particularly when combined with fee caps) may generate hostility among some counsel. In addition, there has been concern about the diversity of membership on such committees, which some judges have mentioned. *See, e.g., JP Morgan Chase Cash Balance Litigation*, 242 F.R.D. 265, 277 (S.D.N.Y. 2007) (describing "this court's diversity requirement"); *compare Martin v. Blessing*, 134 S. Ct. 402 (2013) (Alito, J., regarding denial of certiorari) (raising question about a judge who "insists that class counsel 'ensure that the lawyers staffed on the case fairly reflect the class composition in terms of relevant race and gender metrics'").

Do these issues of appointment of the PSC create problems? Would rules improve practice? Manual for Complex Litigation (4th) § 10.244 offers guidance to judges. Would something more detailed or prescriptive be helpful?

(12) Other issues: As noted at the outset, besides seeking guidance about the issues it has already identified, the Subcommittee also would appreciate suggestions about additional issues that could be added to this list.

* * * *

Whatever the level of concern with the issues identified above, it seems worth invoking again the history of the statute. As Professor Bradt presents the history, early drafts of the statute contained a provision for rulemaking by the Supreme Court. But "[Judge] Becker and [Dean] Neal . . . eliminated the provision for implementing rules governing procedure in multidistrict litigation enacted through the Enabling Act process altogether." 165 U.Pa. L. Rev. at 880. In part, the concern was that formal rulemaking "would require lengthy consideration and review by the Standing Committee on Federal Rules of Procedure and its Sub-Committee on Federal Rules of Civil Procedure, to be followed frequently by further consideration and/or review in the Supreme Court and the Congress." *Id.* at 881, quoting memorandum on file in Judge Becker's papers. This concern, however, arose from a sense of urgency in launching the MDL procedure. Much has happened in the 50 years of MDL practice to justify consideration of possible new rules.

This inquiry is at a very early stage. The series of questions above is presented only to prompt commentary, and should not be taken to indicate what the Subcommittee will ultimately recommend to the Advisory Committee. It remains a real possibility that no rule changes will be pursued. But such a recommendation (or a recommendation of some specific rule changes) must await the careful educational and analytical process that is just beginning. Therefore, the Advisory Committee invites Standing Committee members to provide their thoughts.

B. Social Security Disability Review

A recommendation of the Administrative Conference of the United States, firmly supported by the Social Security Administration, urges that the Judicial Conference of the United States develop uniform procedural rules "for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g)." The question whether this project should be undertaken has been assigned for development to the Social Security Review Subcommittee. The Subcommittee is gathering information from as many as possible of the individuals and organizations that have detailed information and deep experience in these review proceedings. The inquiry is not yet designed to frame specific rules proposals. Instead, the purpose is to determine whether the project should progress to the point of framing specific rule proposals.

Section 405(g) provides for review "by a civil action" in a district court. That framework supports the tentative conclusion that new rules should be developed in the ordinary Rules Enabling Act process. It also suggests that initial work be undertaken by the Civil Rules Advisory Committee.

The motive for adopting uniform national rules arises from widespread disuniformity in the local practices used in different districts for reviewing social security claims. Many review actions are filed every year, currently running between 17,000 and 18,000 annually. The Social Security Administration is represented by United States Attorneys, but its own lawyers commonly bear much or most of the work. Social Security Administration lawyers may be assigned to cases in different districts, imposing significant costs in learning and conforming to local practices. It seems likely that the major gain from adopting uniform national rules would be to enable government lawyers to focus more of their severely limited time on the merits of the review actions. There is no great hope that uniform rules would do much to reduce either the high rate of remands to the administrative process or the wide differences among districts in remand rates. Nor is there any great hope that uniform rules would do much to reduce delay in awarding benefits to those who deserve them. The primary source of delay lies in the administrative process. District courts seem to be deciding these cases with reasonable dispatch.

Three alternative rules structures have been considered: (1) A self-contained set of rules that do not borrow from the Civil Rules. (2) A set of "supplemental rules" that govern some specific aspects of a § 405(g) review action but depend on the Civil Rules for many matters. (3) Specific new rules that are incorporated directly in the body of the current Civil Rules. The draft currently sketched by the Subcommittee is shaped as supplemental rules, but the draft is designed only to stimulate further discussion. No conclusion has been reached as to the form that may be most appropriate if work progresses to the point of developing rules intended for eventual recommendation and adoption.

The scope of possible rules is closely related to the form. The simplest rules would address the simplest cases in which a single claimant sues only the Commissioner and seeks only review on the administrative record. Such rules would cover most — probably virtually all — actions for

review. But occasional cases seem to arise that involve additional claims or even parties. When a case departs from the simple model, one approach would be to oust the new rules entirely, leaving the action to be governed by the present Civil Rules alone, as happens now. A different approach would be to continue to apply the new rules to the parts of the action that seek review on the record of one claimant's claims, employing the full sweep of the present rules for the other parts. The draft rules that have been sketched for the purpose of provoking comment assume this second approach, albeit only for the time being.

The Subcommittee met last November with representatives of the Administrative Conference, the Social Security Administration, the Department of Justice, the National Organization of Social Security Claimants' Representatives, and the American Association for Justice. The insights provided at that meeting, and a draft of review rules prepared by the Social Security Administration, were used to solicit a second round of input by the Administration, the Department, and the lawyers' groups. Their responses — including a lengthy summary of a survey conducted by NOSSCR — paved the way for preparation and discussion of a rules sketch.

The sketch is a "bare bones" set of three supplemental rules. Rule 1 defines the scope and supplemental character of the rules. Rule 2 addresses initiation of the action; sets out minimal pleading requirements for the complaint; provides for electronic service by the court on the Commissioner of Social Security and the local United States Attorney; and addresses the Commissioner's answer and motions. (The provision for electronic service of process has met widespread enthusiasm, and reflects actual experience in some courts where the government lawyers have consented to sidestep the ordinary Civil Rule 4 service requirements.) Rule 3 establishes the means of bringing the action on for decision — the plaintiff files a motion for the relief requested in the complaint, with a supporting brief; the Commissioner files a response brief; and the plaintiff may file a reply brief. The sketch omits several parts of the Administration's draft rules such as detailed provisions governing the length of briefs and separate provisions for claiming attorney fees.

As noted earlier, the purpose of the rules sketch is to provoke discussion with interested people. It will prove a good target if it draws detailed and well-informed criticism. The Subcommittee believes that the focus provided by this target will stimulate helpful exchanges that might not emerge from more diffuse questions and examples.

The rules sketches are set out below in two forms. The first is a clean draft of the rules and illustrative Committee Notes. The second is the rules alone, with multiple footnotes pointing to many of the questions raised by the assumptions made for purposes of illustration. The Subcommittee hopes that the footnotes will help to spur discussion, and that many more questions will emerge as the inquiry proceeds.

No action is requested, but discussion will be welcome.

SUPPLEMENTAL RULES GOVERNING ACTIONS UNDER 42 U.S.C. § 405(G)

Rule 1. Scope

(a) Section 405(g). These Supplemental Rules apply to an action brought by an individual or personal representative to obtain review of a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g).

(b) Federal Rules of Civil Procedure. The Federal Rules of Civil Procedure also apply to a proceeding under these Supplemental Rules, except to the extent that they are inconsistent with these Supplemental Rules.

Committee Note

These Supplemental Rules establish a simplified procedure that recognizes the essentially appellate character of claims to review a final decision of the Commissioner of Social Security under 42 U.S.C. § 405(g). An action is brought under § 405(g) for this purpose if it is brought under another statute that explicitly provides for review under § 405(g).

Most actions under § 405(g) are brought by a single plaintiff against the Commissioner as the sole defendant and seek only review on the administrative record as provided by § 405(g). All aspects of such cases are governed directly by these Supplemental Rules and the compatible general provisions of the Civil Rules.

Some actions, however, may join more than one plaintiff, or more than one claim for review on the administrative record, or more than one defendant. The Civil Rules apply directly to the parts of such actions that seek relief not provided by § 405(g). These Supplemental Rules apply to the § 405(g) parts of the action.

Rule 2. Initiating the Action; Complaint; Service; Answer

(a) Commencing the Action. An action for review under [42 U.S.C.] § 405(g) is commenced by filing a complaint with the court.

(b) The Complaint. The complaint in an action for review under § 405(g) must:

(1) Identify the plaintiff by name, address, and the last four digits of the social security numbers of the plaintiff and the person on whose behalf — or on whose wage record — the plaintiff brings the action;

(2) Identify the titles of the Social Security Act under which the claims are brought;

(3) Name the Commissioner of Social Security as the defendant;

(4) State that the plaintiff [has exhausted all administrative remedies,] that the Commissioner has reached a final decision, and that the action is timely filed;

(5) State [generally {and without reference to the record}] that the final administrative decision is not supported by substantial evidence or [rests on] [must be reversed for] errors of [substantive or procedural] law;

(6) State any other ground for relief; and

(7) State the relief requested.

(c) Serving the Complaint. The court must notify the Commissioner [of Social Security] of the commencement of the action by [electronic transmission of]{electronically transmitting} the complaint to the Commissioner at [the]{an} address established by the Commissioner for this purpose and to the United States Attorney for the district [where the court is located]. [No other service is required.]

(d) The Answer; Motion; Voluntary Remand; Time. The time for the Commissioner [of Social Security] to serve an answer, a motion under [Civil] Rule 12 [of the Federal Rules of Civil Procedure], or a motion to remand is as follows:

(1) An answer must be served on the plaintiff within 60 days after notice of the action is given under Supplemental Rule 2(c) unless a later time is provided by [Supplemental Rule 2] (d)(4). The answer must include a certified copy of the [complete] administrative record.

(2) A motion under [Civil] Rule 12 must be made within 60 days after notice of the action is given under Supplemental Rule 2(c).

(3) A motion to voluntarily remand the case to the Commissioner may be made at any time.

(4) Unless the court sets a different time or a later time is provided by [Supplemental Rule] 2(d)(1), serving a motion under [Supplemental Rule 2] (d)(2) or (d)(3) alters the time to answer as provided by [Civil] Rule 12(a)(4).

Committee Note

Section 405(g) provides for review of a final decision "by a civil action." Civil Rule 3 directs that a civil action is commenced by filing a complaint. In an action that seeks only review on the administrative record, however, the complaint can closely resemble a notice of appeal. The elements specified in Supplemental Rule 2(b) plead the grounds for the court's jurisdiction under § 405(g) and the grounds that bring the action within § 405(g), including the provisions of the Social Security Act underlying the claim. Paragraph (7) provides for pleading the nature of relief sought from review on the administrative record. In an action that seeks relief outside the limits of

§ 405(g), Supplemental Rules 2(b)(6) and (7) support pleading the claim under the Civil Rules — including, if appropriate, the grounds for subject-matter jurisdiction — and pleading the relief requested.

When the complaint names only the Commissioner as defendant, Supplemental Rule 2(c) provides a means for serving the complaint that supersedes Civil Rule 4(i)(2). The Commissioner must establish an address for electronic service by the court. The address might, in the Commissioner's discretion, include only the Commissioner, the Commissioner and the regional [X] office for the district where the action is filed, or only the regional office. Notice must also be served on the United States Attorney for the district. Any defendant other than the Commissioner should be served with the complaint and a summons under Civil Rule 4.

Supplemental Rule 2(d) incorporates the general provisions of Civil Rules 8 and 12 for answers, including affirmative defenses, and motions. It also reflects this part of § 405(g): "As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are made."

The Commissioner at times seeks a voluntary remand for further administrative proceedings before the action is framed for resolution by the court on the administrative record. Supplemental Rule 2(d) recognizes that the Commissioner may move to remand before or after filing and serving the record.

Rule 3. Plaintiff's Motion for Relief; Briefs

(a) Plaintiff's Motion for Relief and Brief. The plaintiff must file and serve on the Commissioner a motion for the relief requested in the complaint and a [supporting] brief[, with references to the record], within [30] days after the record is filed or 30 days after the court disposes of all motions filed under Supplemental Rule 2(d)(2) or (d)(3), whichever is later. [The accompanying brief must support arguments [assertions? statements?] of fact by references to the record.]

(b) Defendant's [Response] Brief. The defendant must file and serve on the plaintiff, within [30] days of service of the plaintiff's motion and brief, a response brief[, supported by references to the record]. [The brief must support arguments [assertions? statements?] of fact by references to the record.]

(c) Reply Briefs. The plaintiff may, within 15 days of service of the defendant's brief, file a reply brief and serve it on the defendant.

Committee Note

Supplemental Rule 3 addresses the procedure for bringing on for decision a § 405(g) review action that has not been remanded to the Commissioner before review on the record. The plaintiff files a motion for the relief requested in the complaint or any amended complaint. The motion sets

out the grounds of fact and law that require relief from the Commissioner's decision. The motion is supported by a brief that is similar to a brief supporting a motion for summary judgment, pointing to the parts of the administrative record that underlie the argument that the final decision is not supported by substantial evidence in the administrative record. The Commissioner responds. A reply brief is allowed. The times set for these briefs may be revised by the court when appropriate.

678 **SUPPLEMENTAL[1] RULES GOVERNING ACTIONS UNDER 42 U.S.C. § 405(G)**

679 **Rule 1. Scope**

680 **(a) Section 405(g).** These Supplemental Rules apply to an action brought by an individual[2]
681 or personal representative to obtain review of a final decision of the Commissioner of
682 Social Security[3] under 42 U.S.C. § 405(g).[4]

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[1] "Supplemental" follows the model of the admiralty rules, and emphasizes that the Civil Rules apply to all matters not specifically addressed by these rules.

Identifying the proper scope for a set of Supplemental Rules remains a difficult question. At least two distinctive sets of questions make it so.

One set of questions asks how far the full sweep of the Civil Rules should be available in actions under § 405(g). The information now available suggests that most of these actions do not involve, and do not need, the pretrial rules so important in other civil actions. When review is confined to examination of the administrative record, there are few occasions for Rule 16 conferences and discovery. Some courts rely on summary judgment as the vehicle for focusing on the parts of the record that show whether the Commissioner's decision is supported by substantial evidence, and that may be needed to decide questions of law. Much of Rule 56 is irrelevant to review on an administrative record, however, including the standard for decision. Summary judgment must be denied if the case could go either way. The administrative decision must be affirmed if the case could go either way.

Pure § 405(g) review actions may nonetheless provide some occasions for discovery, pretrial management, and other general procedures. [Discovery, for example, may be appropriate if the decision is challenged for bias of the administrative law judge, or ex parte communications, or pressure from the administration to reduce the frequency of benefit awards, or omissions from the record.] And a great many more formal rules cannot be disregarded. [Examples begin at least with Rule 5 filing, Rule 6 time computation, Rule 7 on motions, and on through such matters as voluntary dismissal, entry of a partial final judgment, formal entry of judgment on a separate document, references to or trial with a magistrate judge, responsibilities of the clerk's office, and so on.]

The other set of questions arise when a plaintiff seeks to join additional claims or parties in an action that includes § 405(g) review. These questions include whether two or more plaintiffs may join in a single petition — for example if both raise the same question of law? Apparently some plaintiffs have attempted to combine class-action claims with individual § 405(g) review — without deciding whether that combination should be allowed in a single action, what happens if a separate class action raising the same issues is filed on a different jurisdictional foundation and consolidated with the § 405(g) action? Variations on these questions are likely to depend on deep knowledge of the underlying substantive law. A claimant, for example, may seek to advance a claim that a Social Security Administration rule is invalid under the Administrative Procedure Act on substantive or procedural grounds. Are such claims properly part of the § 405(g) review itself? If they are, they may well call for reliance on the general Civil Rules. So too, may there be circumstances in which it is proper to join a defendant in addition to the Commissioner?

683 **(b) Federal Rules of Civil Procedure.** The Federal Rules of Civil Procedure also apply to a
684 proceeding under these Supplemental Rules, except to the extent that they are inconsistent
685 with these Supplemental Rules.

The need to avoid confusing or even conflicting procedural requirements puts a pragmatic twist on these questions. There should be no room for doubt, for example, about the application of Civil Rule 8 to any claim for relief that goes beyond the proper scope of an action that seeks no more than § 405(g) review. The same holds true for the times allowed for subsequent pleadings and motions. The court's overriding authority to manage the action cannot be left in doubt.

These difficulties do not obviously defeat the quest for uniform national rules for § 405(g) cases. But they do demand careful consideration.

[2] "[A]n individual" is the statutory term. Emphasis could be added to reflect the SSA's concern that the rule should explicitly exclude actions with multiple plaintiffs and class actions: "brought by only one plaintif"; "no more than one plaintiff"; "a single plaintiff"; or something else. So too, rule text could add "only to obtain review" But this seems better left for the Committee Note.

There may be smaller technical issues, bound up with substantive law. Suppose a claimant dies somewhere along the line: can the claim survive if disability is found before death? Presumably a representative would be an individual plaintiff, even if two people function jointly as representative. (It seems likely that survivor benefits are not influenced by disability before death, although it would be good to be sure of that.)

[3] The SSA draft explicitly excludes actions that include defendants "other than" the Commissioner. There is no need to use more words if the idea is to exclude actions that do not name the Commissioner as defendant. If the idea is to prohibit adding any defendant in addition to the Commissioner, the statute cannot be relied on — the negative implication from providing for review of the Commissioner's final decision is not sturdy enough.

As with the question of multiple plaintiffs, we would need to learn more to address multiple defendants. There might be good reason to invoke the provisions for review on the record for all claims under § 405(g), particularly if the rules recognize case management under Civil Rule 16.

[4] Two questions arise from the statutory reference. Other social security statutes invoke § 405(g): need they be listed? The three examples cited by SSA directly provide for review under § 405(g). If there are no others, or all directly invoke § 405(g), they might be listed in the Committee Note. But it may be better to make only a generic reference to other statutes that expressly incorporate § 405(g).

And how about actions that include both a § 405(g) claim for review on the record and some other claim? The SSA rules draft excludes them. But there may be advantages in invoking these rules for the part of the action that invokes § 405(g) review. See note 1 above.

Rule 2. Initiating the Action; Complaint; Service; Answer

(a) Commencing the Action. An action for review under [42 U.S.C. § 405(g) is commenced by filing a complaint[5] with the court.[6]

(b) The Complaint. The complaint in an action for review under § 405(g) must:

(1) Identify the plaintiff by name, address, and the last four digits of the social security numbers of the plaintiff and the person on whose behalf[7] — or on whose wage record[8] — the plaintiff brings the action;

(2) Identify the titles of the Social Security Act under which the claims are brought;

(3) Name the Commissioner of Social Security as the defendant;

(4) State that the plaintiff [has exhausted all administrative remedies,] that the Commissioner has reached a final decision, and that the action is timely filed;[9]

(5) State [generally {and without reference to the record}][10] that the administrative decision is not supported by substantial evidence or [rests on] [must be reversed for] errors of [substantive or procedural] law;

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[5] The SSA model rule calls it a petition for review. That is consistent with the terminology used by Appellate Rule 15(a)(1). "Complaint," however, is consistent with the § 405(g) provision for review by commencing a civil action, and avoids the need to amend Rule 7(a) to define a petition for review as a pleading.

[6] This does not address the time for filing, set by § 405(g) as "within sixty days after the mailing to [the plaintiff] of notice of such [final] decision or within such further time as the Commissioner of Social Security may allow." Appellate Rule 15(a)(1) provides for filing "within the time prescribed by law." That is better than copying the statute into the rule, but perhaps not necessary because this rule applies only to this single statutory provision. The Commissioner can raise the question by a motion to dismiss.

[7] The "on whose behalf" phrase is drawn directly from the form in the SSA rule appendix.

[8] Is this an appropriate term?

[9] Some of the NOSSCR responses suggested that timeliness can be an issue that calls for explanation.

[10] The SSA does not want anything beyond these bare bones. Its draft Rule 2(b) says that the petition "must not include any attachments or evidence, nor may it include argument or allegations as to the substance of the administrative decision that is the subject of the petition." This position may reflect

700 **(6)** State any other ground for relief;[11] and

701 **(7)** State the relief requested.[12]

702 **(c) Serving the Complaint.** The court must notify the Commissioner [of Social Security] of
703 the commencement of the action by [electronic transmission of]{electronically
704 transmitting} the complaint to the Commissioner at [the]{an} address established by the
705 Commissioner for this purpose and to the United States Attorney for the district [where the
706 court is located]. [No other service is required.][13]

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the belief that scarce government attorney resources are best used by preparing a single response to a single statement of the plaintiff's arguments of fact and law.

The incentive to provide an elaborate statement in the complaint may be limited if the plaintiff anticipates that the answer will be limited to filing the administrative record. But even then there may be some value in omitting any explicit limits of the sort proposed in the SSA draft — a cogent statement in the complaint might lead to voluntary remand. Draft Rule 2(d), as § 405(g) itself, contemplates an answer that goes beyond filing the administrative record. The occasion for answering with more than the administrative record is likely to be a complaint that includes claims that extend beyond review on the record. This draft applies the ordinary Civil Rules both to that part of the complaint and the corresponding part of the answer.

[11] This paragraph could be eliminated if the foundation in the opening of Supplemental Rule 2(a) were changed to something like this: "A plaintiff pleading a claim for review [on the record] under § 405(g) must plead only * * *."

[12] These elements abbreviate the more elaborate provisions in the draft SSA rule. Any can be expanded.

[13] Rule 4(i)(2) directs that when an officer of the United States is sued in an official capacity service be made on the United States, with a copy mailed to the officer. The bracketed provision that "no other service is required" is designed to exclude separate service on the United States. That approach might be offset by adding to this Supplemental Rule one part of Rule 4(i)(1)(A)(i) for serving the United States, directing that a copy of the complaint be delivered "to the United States Attorney for the district where the action is brought." Whether or not the rule should direct service on the United States Attorney, service on the Attorney General seems unnecessary.

There are great advantages in establishing a single electronic mailbox to receive notice of every § 405(g) action. Surely the established CM/ECF system, now or "next gen," should be able to accomplish this easily when the complaint is e-filed. More work will be required with a paper complaint, scanning into an e-record, but the court will do that anyway.

It would be possible to add a paragraph to the Committee Note to provide comfort for district clerks when the system falters.

(d) The Answer; Motion; Voluntary Remand; Time. The time for the Commissioner [of Social Security] to serve an answer, a motion under [Civil] Rule 12 [of the Federal Rules of Civil Procedure], or a motion to remand is as follows:

(1) An answer must be served on the plaintiff within 60 days after notice of the action is given under Supplemental Rule 2(c) unless a later time is provided by [Supplemental Rule 2] (d)(4). The answer must include a certified copy[14] of the [complete][15] administrative record.

(2) A motion under [Civil] Rule 12 must be made within 60 days after notice of the action is given under Supplemental Rule 2(c).

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[14] The SSA draft rules provide that the transcript and all other filings are exempt from any redaction requirements. Rule 5.2(b) exempts the record of an administrative or agency proceeding from its redaction requirements. That does not reach "all other filings." The SSA model complaint requires only the last four digits of the social security number. It is not clear what other redaction requirements may trouble the SSA, nor whether the rule should defeat the court's authority to order redaction in specific circumstances. Consider, for example, the address of a plaintiff who has a fictitious address to protect against harassment.

A C.D.Wash. local rule requires that the administrative record be filed under seal. That seems flatly inconsistent with Rule 5.2(c)(2), which provides that "any other person may have electronic access to the full record at the courthouse."

[15] The record should include both hearing transcripts and what comments describe as "case documents." "Complete" addresses complaints that the Commissioner does not always file a complete record. One example appears to be a rule that allows the Administrative Law Judge to exclude evidence not proffered five days before the hearing. Apparently the excluded evidence is not made part of the record. Perhaps it is better to avoid rule text that undertakes to define the contents of the administrative record. Section 405(g) says only that the Commissioner must "file a certified copy of the transcript of the record including the evidence on which the findings and decision complained of are based." There may be administrative regulations that refine this definition. "Transcript" is omitted from the rule text for now because it may be read too narrowly. Adding "complete" is an open-ended attempt to compromise. More might be added. *See* Appellate Rule 16, an all-agencies review provision that does define the record, and that authorizes the court to direct that a supplemental record be prepared and filed.

716 **(3)** A motion to voluntarily remand the case to the Commissioner may be made at any
717 time.[16] [17]

718 **(4)** Unless the court sets a different time or a later time is provided by [Supplemental
719 Rule] 2(d)(1), serving a motion under [Supplemental Rule 2] (d)(2) or (d)(3) alters
720 the time to answer as provided by [Civil] Rule 12(a)(4).[18]

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[16] The sixth sentence of § 405(g) begins like this: "The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner * * *." "Before" clearly belongs in rule text. But the motion for voluntary remand often should be supported by the transcript, in part so the plaintiff can respond. Adding "after" seems useful; see note 17 below. Perhaps the rule text should also provide for a motion to defer filing the transcript [for no more than X days] to allow time to decide whether to move for voluntary remand.

[17] There was some discussion of timing in the comments. The view that the Commissioner may not have an idea of the grounds for voluntary remand before filing the record seems cogent. Adding "after" seems useful. But one horrified look at the record may persuade the Commissioner to seek a voluntary remand before preparing a complete record.

[18] Rule 2 does not address Rule 16 pretrial procedures. It has been urged that § 405(g) actions should be exempted from pretrial procedures. But there may be occasions when Rule 16 is useful. One example arises in the relatively rare situations in which discovery is requested. It does not seem necessary to have a draft rule that confirms the role of Rule 16 — Supplemental Rule 1 does that. But if there is a risk that the question will be disputed, a rule provision might look like this:

~~**Rule 3 Case Management**~~

~~The [special]{appellate} character of review on an administrative record should guide management of the action under Rule 16.~~

~~**COMMITTEE NOTE**~~

~~Supplemental Rule 3 serves to remind the parties and the court that review on the administrative record under § 405(g) is essentially an appeal. It does not support inferences for the procedure in actions for review on an administrative record outside § 405(g). There may be circumstances in which management under Civil Rule 16 is useful, but it seems unlikely that extensive management will often be needed.~~

Rule 3. Plaintiff's Motion for Relief; Briefs

(a) Plaintiff's Motion for Relief and Brief. The plaintiff must file and serve on the Commissioner a motion for the relief requested in the complaint and a [supporting] brief,[19] [with references to the record,] within [30] days after the record is filed or 30 days after the court disposes of all motions filed under Supplemental Rule 2(d)(2) or (d)(3), whichever is later. [The accompanying brief must support arguments [assertions? statements?] of fact[20] by references to the record.[21] [22]]

(b) Defendant's [Response] Brief.[23] The defendant must file and serve on the plaintiff, within [30] days of service of the plaintiff's motion and brief, a response brief[, supported by

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[19] Filing a motion may provide reassurance that the CM/ECF system notices about the progress of the action are more effective.

The analogy to appellate review, however, may suggest that a brief alone suffices:

> **(a) Plaintiff's [Merits] Brief.** The plaintiff must file and serve on the Commissioner a brief supporting the complaint, with references to the record, within 30 days after the record is filed or within [X] days after the court disposes of all motions filed under [Supplemental] Rule 2(d)(2) or (d)(3), whichever is later.

[20] Is it useful to require references to the transcript to support arguments of law? To show that they were made in the agency?

[21] The plaintiff's motion for relief and the supporting brief function in ways similar to the summary-judgment procedure now used by some courts in § 405(g) cases. The motion identifies the evidentiary or legal failures that justify setting aside the Commissioner's decision. The brief points to the parts of the record that support the arguments. But the analogy to summary judgment is imperfect because summary judgment cannot be granted if a case could be decided either way, while the Commissioner's decision must be affirmed if the case could be decided either way.

[22] The SSA draft rules include this: "all page references to the transcript shall be to the transcript page number and not to the docket page number created by the CM/ECF system upon filing the transcript." It seems better to avoid this sort of system-dependent provision.

[23] This draft does not provide for a motion by the Commissioner to affirm. The plaintiff is in the better position to identify the ways in which the Commissioner's decision is not supported by substantial evidence on the record or errs on questions of law. A motion by the Commissioner before the plaintiff has identified the plaintiff's claims may impose on the plaintiff unnecessary burdens to respond.

It would be possible to reverse the sequence of the briefs, so that the first brief is filed by the Commissioner with citations to the record showing the substantial evidence that supports the decision. But

references to the record]. [The brief must support arguments [assertions? statements?] of fact by references to the record.]

(c) Reply Brief. The plaintiff may, within 15 days of service of the defendant's brief, file a reply brief and serve it on the defendant.[24]

it may be difficult to anticipate the arguments that will be made to show the decision is not supported by substantial evidence.

[24] The SSA draft rule directs that the reply brief "must be limited to responding to Defendant's brief and shall not raise new issues." This limit may be so well understood in practice that it can be omitted. Compare Appellate Rule 28(c). (There has not been any discussion of cross-appeals by the Commissioner.)

C. Anonymous Consent to Assigning a Magistrate Judge

Under 28 U.S.C. § 636(c)(1) and (2), a magistrate judge may be designated to exercise civil jurisdiction in a case with the consent of the parties and the clerk shall notify the parties of the availability of a magistrate judge. "The decision of the parties shall be communicated to the clerk of court. * * * Rules of court for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent."

Civil Rule 73(b)(1) seeks to protect voluntary consent by anonymity:

> To signify their consent, the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response to the clerk's notice only if all parties have consented to the referral.

The problem that calls for study arises from the apparently incurable design of the CM/ECF system that refuses to sequester a separate consent statement filed by any one party. The system automatically sends the statement to the judge assigned to the case. Judges may contrive to create their own strategies to bypass this notice, but failures seem inevitable.

One strategy to bypass this quirk of the CM/ECF system is suggested by the language of § 636(c)(2) itself: the parties could individually "communicate" their consents to the clerk, who would file them only if all parties consent. There is strong reason, however, to fear that attempts to impose this new burden on the clerk's office would fail too often for comfort.

The approach that has come first to mind is to establish a procedure that puts on the parties the burden of seeking a joint consent statement signed by all parties before filing. This procedure has worked successfully in at least some courts. One model is to issue a consent form to the plaintiff when the action is filed. If the plaintiff is amenable to referring the action to a magistrate judge, the plaintiff takes the lead in soliciting consents from the other parties. If all consent, the form is filed.

Drafting an amendment of Rule 73(b)(1) must take account of the fact that some districts include magistrate judges in the pool for initial random assignment as cases are filed. That phenomenon should not create any problems beyond the need for careful attention in drafting.

Other issues may well be omitted from this task. One familiar problem arises when the original parties consent to referral, the magistrate judge assumes jurisdiction, and then another party is joined. This and perhaps some other issues will be considered, but the conclusion may be that the present task should be limited to the specific CM/ECF problem that stirred the Committee's interest.

It may be that in the end no need will be found to amend Rule 73(b)(1). Local adaptations may prove equal to the task. But unless unexpected complications emerge, a straight-forward amendment may well be proposed for publication after further examination.

D. Expanding Personal Jurisdiction

Two proposals, sketched below, would expand the personal jurisdiction of federal courts beyond present limits. One is narrowly focused. The other is very broad. Each relies on the proposition that Fifth Amendment due process allows federal courts to base jurisdiction on contacts with the United States as a whole, no matter whether there are sufficient contacts with any particular state to satisfy Fourteenth Amendment due process.

These proposals hold a place on the docket, but will not come on for sustained attention in the immediate future. They present substantial conceptual challenges. Working through the challenges will require much time and further effort. Determining the actual importance of expanding plaintiffs' access to broader personal jurisdiction in federal courts will be the first order of business when it appears that adequate resources may become available for the task.

Rule 4 addresses the means for serving the summons and complaint, or for waiving service. Rule 4(k) confirms that serving a summons or a waiver of service "establishes personal jurisdiction over a defendant" in three alternative provisions.

Rule 4(k)(1)(A) directs that personal jurisdiction is established over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located." This provision enables a federal court to acquire personal jurisdiction over a defendant outside the state where the court is located by using the state's longarm statute. Reliance on the state court's jurisdiction entails the Fourteenth Amendment due process limits on state-court jurisdiction.

Rule 4(k)(1)(B) establishes a narrowly limited opportunity to extend personal jurisdiction beyond state-court limits. Service establishes personal jurisdiction over a defendant "who is a party joined under Rule 14 or 19 and is served within a judicial district of the United States and not more than 100 miles from where the summons was issued."

Rule 4(k)(2), prescribed in 1993, reacted to a Supreme Court decision ruling that although a defendant in London might well have such contacts with the United States as a whole as to be subject to personal jurisdiction as limited by Fifth Amendment due process, jurisdiction failed for want of a rule making the defendant amenable to service. The Court suggested that perhaps provision for jurisdiction could be made by statute or court rule. Rule 4(k)(2), like Rule 4(k)(1)(B), is very narrow. Service establishes personal jurisdiction over a defendant "for a claim that arises under federal law" if: "(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws."

The narrower proposal, advanced by Professor Borchers, would expand present Rule 4(k)(2) to include actions based on 28 U.S.C. § 1332 diversity and alienage jurisdiction, but — as with the present federal-question provision — only if the defendant is not subject to jurisdiction in any state's courts of general jurisdiction. The purpose is to provide a forum in the

United States for plaintiffs such as the one in *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011). Nicastro was injured in New Jersey while working with a machine made by a firm in England and sold to an independent distributor in Ohio. Although the manufacturer hoped the distributor would sell its machines throughout the United States, and many states were in fact reached, no more than four — and possibly only the one that injured the plaintiff — reached New Jersey. The Court reversed New Jersey's assertion of specific personal jurisdiction. Justice Kennedy's plurality opinion suggests that perhaps Fifth Amendment due process would support jurisdiction in a federal court based on sufficient contacts with the United States as a whole.

The broader proposal, first advanced by Professor Spencer before he became a member of the Civil Rules Advisory Committee, is much different. It would erase the limits in present Rule 4(k) and, for any action within federal subject-matter jurisdiction, authorize personal jurisdiction over any defendant up to the limits of Fifth Amendment due process. The location of litigation within the federal court system would be governed by the venue statutes. Professor Spencer continues to believe that this system should be adopted, but has come to believe that the Rules Enabling Act does not authorize the Supreme Court to prescribe rules of personal jurisdiction. "Jurisdiction" on this view is not a general rule of practice and procedure. He also recognizes that the expansion of personal jurisdiction he advocates should be effected by Congress only with substantial revisions of present venue statutes.

Multiple advantages might be gained by the broad proposal. It would establish uniform personal jurisdiction rules for all federal courts, free from the variability that arises from such state statutes as do not extend to the limits allowed by the Fourteenth Amendment. It would release the inherent Article III judicial power to reach all defendants, subject only to Fifth Amendment due process limits. It would enable federal diversity courts to shape convenient, comprehensive, and efficient litigation packages that might lie outside the reach of any state court. The advantages for domestic plaintiffs suing internationally foreign defendants, as in the *Nicastro* case, are apparent. It also would substantially reduce preliminary wrangling over personal jurisdiction — in most actions, all defendants would plainly have sufficient contacts with the United States, even if not with any particular state. And while defendants would often resent the jurisdiction, defendants also could be helped to join additional defendants and third-party defendants.

These proposals are intriguing, but there is no purpose in pursuing them if indeed they would not be authorized under the Enabling Act. The formal argument that rules of "jurisdiction" are not rules of "practice and procedure" for purposes of § 2072 cannot be dismissed out of hand. But support can be found for interpreting "practice and procedure" in light of the purposes and structure of § 2072. Congress retains final authority over rules prescribed by the Supreme Court under § 2072. That role supports a functional interpretation. The question then would be whether rules of personal jurisdiction are suitable for development and adoption through this process.

A working answer may be found in the present rules that directly provide for personal jurisdiction. At least since 1963, and arguably since 1938, successive Committees and the Supreme Court have acted in the belief that these rules are authorized by § 2072. The question of

authority was explicitly identified during the process that led to adoption of Rule 4(k)(2) in 1993. This history provides persuasive support for rules that define personal jurisdiction.

If the conclusion is that § 2072 includes authority to adopt rules that expand personal jurisdiction, it remains important to ensure that the authority is exercised with wisdom. Courts are properly reticent about adopting rules that expand their own power to compel submission by a resisting defendant. In addition, the broad proposal to expand to the limits of Fifth Amendment due process would require revisions of the venue statutes that clearly require action by Congress. The difficulty of coordinating judicial rulemaking with action by Congress provides a cogent reason to leave the field to Congress.

Any development of a broad proposal must encounter serious conceptual difficulties. There are substantial reasons to anticipate that as broad as national sovereign power may be, the Fifth Amendment may include as well some theories of fairness that at times operate as constitutional limits akin to venue limits. Questions of pendent personal jurisdiction could arise if anything less than maximum Fifth Amendment limits were adopted in a new rule, and might arise even if maximum limits were adopted. Several present statutes authorize "nationwide" personal jurisdiction; if a new rule went further than current interpretations of these statutes, supersession issues might arise. If diversity cases are included, attention should be directed to the choice-of-law consequences. And one consequence easily could be significant contraction, for federal courts, of the current distinctions between "general" and "specific" personal jurisdiction. Given minimum contacts with the United States as a whole, a domestic defendant would be subject to jurisdiction in any federal court, not only a particular state where the contacts are centralized. The defendant need not be "at home."

These proposals raise questions that fascinate the academic interests of all lawyers. Exploring the questions and framing rules around the answers would be a great adventure. Before embarking on that adventure, however, it will be important to assess the real-world need for expanding the personal jurisdiction reach of the federal courts. Are there cases that support the need for expanded personal jurisdiction, and if so, how many? Discussion of the need will be helpful. But for now, the Advisory Committee does not plan to pursue this item actively.

III: Items Removed from Agenda

A. Newspaper Notice in Condemnation Proceedings

The Advisory Committee has voted to remove from its agenda the question discussed with the Standing Committee in January about selecting the newspaper for publishing notice of a condemnation proceeding. The potential advantages and disadvantages of amending Rule 71.1(d)(3)(B)(i) depend on empirical information that would be difficult, if not impossible, to obtain. There has been only one suggestion to amend. The Department of Justice, the litigant with far more experience than any other, is neutral about the proposed amendment. In these circumstances it seems better to let this proposal go by.

Rule 71.1(d)(3)(A) provides for personal service "in accordance with Rule 4" on a defendant who resides in the United States and whose address is known. When a defendant is beyond the territorial limits of personal service but has a "place of residence * * * then known," Rule 71.1(d)(3)(B)(i) directs notice both by publication and by mail. Notice by publication is the sole means of notice only if the defendant has no known address or place of residence.

Rule 71.1(d)(3)(B)(i) directs publication of notice, when required:

> 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 is to eliminate the preference for a newspaper published in the county where the property is located. Publication could be made in any newspaper with general circulation where the property is located.

The central question is what medium of publication is most likely — or least unlikely — to reach a property owner who cannot be reached by personal service or by mail. A newspaper published in the county may have limited distribution; a newspaper published outside the county, but having general circulation "where the property is located," may have broader readership. But the question is where a property owner will look when concerned that the property may become subject to legal proceedings. Intuition may suggest that a truly local paper will be the most likely resource, particularly as compared to regional or national newspapers that have general circulation in the place. Would the owner of a farm in Sanilac County, Michigan, look first to the New York Times, the Wall Street Journal, or USA Today? Intuition, however, is a faulty guide — an owner far from Sanilac County may not even know of a newspaper published there. Finding information to supply an empirically accurate answer to this question lies beyond Committee competence — devising a sufficiently comprehensive survey is the best that could be hoped for, and even that may be little better than intuition.

Leaving the rule with the intuitions or wisdom it now embodies seems the better course. An added benefit of inaction is that action would require at least consideration of, if not action on,

questions of the sort that have been deliberately bypassed in recent years. What counts as a "newspaper" now? How safe is it to identify a place where it is "published"? What counts as general circulation when remote electronic access is widely available? For that matter, as the realm of newspapers enjoying general circulation expands, should a court rule attempt to refine the principles for choosing among them?

B. Other Removed Agenda Items

Three other items were removed from the agenda. They involve suggestions to require a return receipt when notice is served by mail under Rule 5(b)(2)(C); to add language to Rule 55(a) to duplicate and emphasize the direction that the clerk "must enter a party's default" in the circumstances described; and to prescribe tight limits on what goes into a complaint, inspired by the perception that "New Age complaints are totally out of control."

None of these items seemed to merit additional work. Service under Rule 5 has been considered extensively in recent work, with a focus on electronic service, without any thought that the longstanding provision for service by mail need be reexamined. The protest that at least one court forbids its clerk to enter defaults may involve some cases where judicial discretion is desirable, and in any event it is not a wise use of committee resources to attempt to find out about, and then to cure, every arguable mistaken use of the rules. Pleading has been studied extensively in recent years without showing any useful opportunities to revise the rules.

TAB 5B

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TAB B1

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE[1]

Rule 30. Depositions by Oral Examination

* * * * *

(b) Notice of the Deposition; Other Formal Requirements.

* * * * *

(6) ***Notice or Subpoena Directed to an Organization.*** In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who

[1] New material is underlined in red; matter to be omitted is lined through.

consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person who will testify. A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party. 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.

* * * * *

Committee Note

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

Candid exchanges about discovery goals and organizational information structure may reduce the difficulty of identifying the right person to testify and the materials needed to prepare that person. Discussion of the number and description of topics may avoid unnecessary burdens. Although the named organization ultimately has the right to select its designee, discussion about the identity of persons to be designated to testify may avoid later disputes. It may be productive also to discuss "process" issues, such as the timing and location of the deposition.

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

When the need for a Rule 30(b)(6) deposition is known early in the case, the Rule 26(f) conference may provide an occasion for beginning discussion of these topics. In appropriate cases, it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery plan submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference under Rule 16.

TAB B2

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Rule 30(b)(6) Subcommittee
Advisory Committee on Civil Rules
Conference call, Jan. 19, 2018

On Jan. 19, 2018, the Rule 30(b)(6) Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Judge Joan Ericksen (Chair of the Subcommittee), Judge John Bates (Chair of the Advisory Committee), Judge Craig Shaffer, John Barkett, Parker Folse, Virginia Seitz, Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Reporter, Subcommittee).

The call began with a report on the Standing Committee meeting. There was discussion at that meeting of the evolution of the Rule 30(b)(6) proposal from the original ideas discussed with the Standing Committee during its Jan., 2017, meeting, when this Subcommittee had begun considering a large number of very specific provisions for possible inclusion in the rule.

Since January 2017 the Subcommittee's focus and ambition had narrowed, and accordingly the list of possible amendment ideas in its May 1, 2017, request for comments was narrower than the one presented to the Standing Committee in January 2017. The many responses to that invitation for comment further emphasized the difficulties that could attend adopting specifics to govern the wide variety of situations and cases in which the rule now plays a central role. Accordingly, the Standing Committee was presented with a less ambitious current proposal this year.

The Standing Committee reaction was generally supportive. In particular, the idea of explicitly making the obligation to confer in good faith bilateral in the rule received support, and adding the identify of the persons to be designated to testify also received support.

At the same time, some members of the Standing Committee suggested that making this rule change would not really change practice much in some districts. In at least one district, the parties must certify that they have met and conferred about any matter that might be the subject of a motion before bringing a motion before the court. That means that when Rule 30(b)(6) depositions produce disagreement that might lead to a motion there already is an obligation to meet and confer.

Other comments favored adding items to the mandatory topics listed in the rule. Possible specifics suggested included judicial admissions, the problem of questioning on topics not on the list for the deposition, and using interrogatories instead of depositions in some instances.

In addition, the Subcommittee had before it recent submissions from the Lawyers for Civil Justice and the American Association for Justice concerning the desirability to adding some specifics to the rule.

The Subcommittee discussed the question whether to add specifics to the list of required topics contained in the draft rule circulated after the Nov. 28 conference call. There was concern that injecting more specifics into the rule could actually generate disputes rather than avoid them. In addition, it was noted that during the Nov. 28 conference call there was concern that parties might argue that the specific discussion topics in the rule really were implicit commands about how those specifics should be handled, or at least that the parties must resolve them by agreement, not only commands to discuss those specifics.

A different approach emerged: Perhaps there would be a way to require that the parties discuss what might be called the "logistics" of the deposition. This category of issues might include the timing and location of the deposition. One reaction was that those types of issues seem likely to be pertinent to many other depositions, not only 30(b)(6) depositions. Indeed, since the organization has fairly complete latitude in selecting the person to testify it would probably be in a better position to select a person able to testify at a given time and place than in a situation when the witness is selected by the party seeking discovery.

One reaction to this idea was that, although this kind of deposition does not seem terribly different from other kinds of depositions in regard to such matters, there nonetheless might be a value to trying to make such a point. There is some reason to think that magistrate judges see such disputes fairly frequently. but concern was expressed that, if a capacious word like "logistics" were a mandatory topic of discussion in the rule it would open the door to many disputes. "That seems contrary to the direction in which we're going."

Discussion focused on whether something like "the process for the deposition" could usefully be added to the draft rule language before the Subcommittee. But that raised the concern about a somewhat ambiguous word being part of a command in the rule. Instead, it was suggested, the best approach would probably be to introduce the idea in the Committee Note. That received support. Discussion will often naturally lead to such matters even if it begins focused on the specifics now included in the draft amendment.

That comment prompted a reaction to the Committee Note draft before the group. One sentence jumped out: "If the conference occurs before service of the notice or subpoena, the noticing party should ordinarily provide a draft of the proposed list of matters for examination, making it clear that the list is subject to refinement during the required conference." That sounds a lot like a command. Can a Committee Note issue such a command? Another participant had a similar reaction: "I highlighted that sentence when I got to it."

There followed a discussion of the proper balance between what's in the rule and what's in the Note. We have been admonished not to engage in "rulemaking by Note." On the one hand, the Note is meant to be read to explain the rule, so very specific directives in the Note may be given effect though not in the rule. On the other hand, some courts may regard the Note as akin to legislative history and very separate from the rule language, which is what was really adopted. So a strong specific might need to be put into the rule to ensure that it received appropriate attention. And it does appear that a considerable proportion of the lawyers rarely or never look at the Note.

One idea was that this particular sentence probably should be softened. It could instead say something like "It is often a good idea" to provide a list in advance, that "The conference is likely to be more productive if" a list is provided in advance. That gets out the idea but seems less of a command. Could an organization now say, for example, that its duty to confer in good faith does not apply until the list is supplied? That might well be counterproductive.

The same sort of treatment could be used for raising other specifics. For example: "Parties may well wish to discuss . . ." As to some things, however, that might seem odd. For example, how would one deal with post-deposition supplementation at that point? Why should the parties presume, before the deposition, that there will be a need to supplement?

Concerns were reiterated about being too prescriptive in either the rule or the Note. Prescriptions can be used as weapons in the negotiation. Putting in too many specifics, or pressing them too forcefully, could reinforce the sort of confrontational behavior that now frustrates discovery in general and sometimes 30(b)(6) depositions in particular.

The discussion shifted to efforts to emphasize the importance of the 2015 amendments in the Note. The changes to Rule 1 and Rule 26(b)(1), stressing both cooperation and proportionality, should appear at the outset. That could tie in with urging the parties to resolve "process issues" in a cooperative manner.

One more point was raised: At least one member of the Subcommittee has heard recently of frustration about the application of the Committee Note to the 2000 amendment to Rule 30 imposing a one day of seven hours limit on depositions, as applied to 30(b)(6) depositions. That Note says that the time limit for each person designated should be a full seven hours. At least in one case, that worked as something of an added burden on an organization that designated two persons. On the other hand, if an organization designates six people that may present real challenges for the party seeking discovery in deciding how much time to spend with the first or the second person so designated. That might be particularly difficult if there is no

advance disclosure which witness will address which topic, and more so if some of the people designated possess information about relevant issues not on the topic list for the 30(b)(6) deposition.

A reaction was that this kind of timing issue is not at all unusual. But usually the parties work these matters out. Another reaction was that this experience illustrates the role of the Committee Note. The specific from 2000 was in the Note, not in the rule, but the judge said that would be treated as being the meaning of the rule.

Another possible topic to mention in the Note was raised -- should the Note tell lawyers when they should go to the judge? We don't want to encourage them to reach impasse and require judicial mediation, but we also don't want them to persist too long in confrontational behavior before seeking judicial guidance. The reaction was that such advice is not needed. The lawyers know that the judge is the ultimate arbiter and also that they are expected to work out things on their own. Moreover, the question is likely to vary from case to case, and perhaps from judge to judge.

A reaction was that the 2015 Committee Note to Rule 26(b)(1) addresses fairly specifically the issue when the parties should go to the judge. But that discussion emerged in large measure from objections during the public comment period that the rule amendment commanded the party seeking discovery to demonstrate that the discovery sought was not a disproportionate burden on the responding party. So that discussion is not so much about the question of timing as it is about what one might call the burden of proof.

More generally, a caution was added: The more detailed we make the rule, the more we may build in delay. If there's a long list of mandatory or semi-mandatory topics for discussion, that can be a recipe for delay.

On the other hand, it was noted, there is a different risk if things are left to fester -- there may be a need to reopen the deposition once those details are resolved, perhaps by the court. "It is a lot more effective to get them resolved at the front end."

The reality seems to be that lawyers sometimes think it is tactically better to go to the judge only after what one might call a "failed deposition," rather than going before the deposition when concerns may seem overblown.

There was agreement about frequent lawyer attention to such tactics, but a caution that generalizing is almost impossible. One thing that is almost certainly true almost all the time is that a meet and confer session will make the trip to court more productive. But it is not particularly productive to make a trip

to court when one really is not needed. That is also a major purpose of meet and confer requirements -- to avoid judicial intervention unless it is really needed.

The consensus emerged that the current draft rule amendment should remain as in the draft for this call, and that Prof. Marcus should attempt to work up revised Note language to address the concerns discussed during this call. To facilitate that effort, it would be very useful for Subcommittee members to send in suggestions about ways the current draft could be improved. That could be done by email, with copies to all involved. At present, it does not seem that a further conference call will be needed before the April full Committee meeting. If it is needed, it should occur well in advance of the date on which agenda materials must be submitted for the April meeting.

One point was made about the revision of the Note: The Note refers to the "noticing party," but the rule speaks of the "serving party." It would be good to use the term from the rule in the Note.

One more topic came up: During the Nov. 28 call, the possibility of making a parallel change to Rule 45 was mentioned, and the Reporter was to look into that. That review leads to the conclusion that no change to Rule 45 is needed. Our amendment does propose adding a requirement that the subpoena inform the nonparty of the duty to confer about the things listed in the amendment to the rule. The clearly bilateral rule language we have drafted makes that clear.

But adding that requirement for the subpoena does not mean that there need be a change to Rule 45. Rule 30(b)(6) already requires that the subpoena alert the nonparty organization that it is required to select a person to testify on its behalf. That required notice in the subpoena is nowhere mentioned in Rule 45, but the failure to mention it in Rule 45 has not produced any difficulties. So there is no need to worry about adding something to Rule 45 about what we are adding to Rule 30(b)(6).

Rule 26(f)

Discussion shifted to the question whether to bring to the Advisory Committee the possibility of a change to Rule 26(f) in addition to the change just discussed to Rule 30(b)(6).

Based on the discussion on Nov. 28, Prof. Marcus had presented four alternatives for such a Rule 26(f) change. Among those four alternatives, the consensus was that if a change were brought before the Advisory Committee it should be Alternative 1.

But the policy question was "Do we have to do this?" Several members of the Subcommittee are unconvinced that making a change to Rule 26(f) would be productive. The Rule 26(f) conference is usually much too early to delve into any details of

a 30(b)(6) deposition. Any change should make clear, at least in the Note, that early arrangements about such depositions are subject to revision later in light of developments in discovery in the case. Although there may be a few categories of cases in which one can state with confidence (perhaps near certainty) at the outset that 30(b)(6) depositions will occur, and perhaps also speak with some confidence about what issues they should cover, that will not be true in most cases.

The argument in favor of bringing the 26(f) idea forward is that unless it is included in a published package it will almost surely not be possible to add it afterwards even if public comment shows that it would be a valuable addition. On the other hand, it would not be difficult to include this idea is an invitation for comment on the 30(b)(6) proposal while making it clear that the Advisory Committee is not urging the adoption of such a change to Rule 26(f) but only inviting comment on whether it should be adopted along with the 30(b)(6) change if that goes forward after public comment. Such an invitation could even note that there is concern that in many cases such discussion would be premature at the 26(f) stage.

For the present, the question is only whether to bring this issue to the Advisory Committee. If we do, we should frame the possibility in the best possible way. We need not tell the full Advisory Committee that the Subcommittee strongly favors amending Rule 26(f) or, perhaps, even that it strongly favors including the possibility in the package put out for public comment.

The consensus was to carry forward the 26(f) idea for the Advisory Committee meeting.

A question was raised about leaving in the word "contemplated" in the draft. It is in brackets now. Retaining that word may be a way to emphasize awareness that 26(f) conferences occur early enough in the case that often the idea of a 30(b)(6) deposition arises only later. On the other hand, including it may invite everyone to say "Oh, I hadn't thought about it yet, so it was not contemplated." Surely we do want people to consider this issue if it's in the cards from the outset.

The resolution was to leave "contemplated" in the draft, but also to leave it in brackets.

Prof. Marcus should try to draft a brief Committee Note for the 26(f) change, which should explain that this change somewhat parallels the change to Rule 30(b)(6) and (perhaps in brackets) that it is intended only to urge discussion of such depositions when they are reasonably contemplated at the time the conference occurs.

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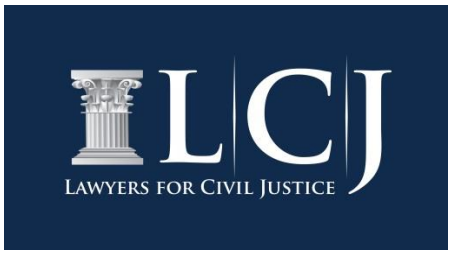

18-CV-M

COMMENT
to the

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

THE PROPOSED RULE 30(b)(6) AMENDMENT SHOULD NOT BE PUBLISHED WITH THE RADICAL MANDATE THAT AN ORGANIZATION "MUST CONFER" ABOUT THE IDENTITY OF WITNESSES WHO WILL TESTIFY ON ITS BEHALF

May 18, 2018

Lawyers for Civil Justice ("LCJ")[1] respectfully submits this Comment to the Committee on Rules of Practice and Procedure ("Standing Committee").

INTRODUCTION

The Civil Rules Advisory Committee ("Advisory Committee") proposes to amend Rule 30(b)(6) for the principal purpose of assisting counsel in resolving the frequent back-and-forth disputes[2]

[1] Lawyers for Civil Justice ("LCJ") is a national coalition of corporations, law firms and defense trial lawyer organizations that promotes excellence and fairness in the civil justice system to secure the just, speedy and inexpensive determination of civil cases. For over 30 years, LCJ has been closely engaged in reforming federal civil rules in order to: (1) promote balance and fairness in the civil justice system; (2) reduce costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation. Although LCJ's corporate members are often defendants, they are plaintiffs as well. They not only respond to many discovery requests, they also seek discovery. They receive many 30(b)(6) notices but also, on occasion, serve them and expect meaningful compliance. LCJ wants Rule 30(b)(6), like the rest of the FRCP, to be fair and efficient for everyone, regardless of their position in any particular lawsuit.

[2] Such disputes frequently manifest themselves in motions in which the noticing party claims the witness was unprepared to address the topics set forth in the notice, while the responding party asserts that the questions raised during the deposition exceeded the scope of the announced topics. Such disputes suggest a lack of mutual understanding of the topics. For examples of cases addressing such disputes arising from the parties' inconsistent expectations about Rule 30(b)(6) topics, *compare New Jersey Mfrs. Insurance Grp. v. Electrolux Home Prod., Inc.*, No. CIV. 10-1597, 2013 WL 1750019, at *3 (D.N.J. Apr. 23, 2013) (duty to prepare a witness is "limited to information called for by the deposition notice"); *State Farm*, 250 F.R.D. at 216 ("If a Rule 30(b)(6) witness is asked a question concerning a subject that was not noticed for deposition . . . the witness need not answer the question."); *King v. Pratt & Whitney, a Div. of United Techs. Corp.*, 161 F.R.D. 475, 476 (S.D. Fla. 1995) (if the examining party asks questions outside the scope of the matters described in the notice and if the deponent does not know the answer to questions outside the scope of the notice that is the examining party's problem) *with Clapper v. Am. Realty Inv'rs, Inc.*, No. 3:14-CV-2970-D (N.D. Tex. Nov. 9, 2016) (requiring a second deposition, at the deponent company's expense, where the deponent was unfamiliar with several areas of inquiry); *Wausau*

concerning "overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses."[3] After considering a number of ideas for reforming practice under the rule,[4] the Advisory Committee settled on a meet-and-confer approach that requires a good-faith conference about "the number and description of the matters for examination."[5] This approach holds some promise of promoting cooperation and helping lawyers gain a mutual understanding about a deposition's intended subject matters, and, therefore, the appropriate scope of witness preparation. Unfortunately, however, the Advisory Committee has also added a novel and problematic provision directing that organizations "must confer" regarding "the identity of each person who will testify."[6] Such a requirement would radically and inappropriately depart from the well-settled principle that it is the organization's sole prerogative to name the witness who will speak on its behalf. Even if it is not the Advisory Committee's intent to provide noticing parties input in selecting the witnesses, the proposal suggests otherwise and would result in more discovery disputes, not fewer.[7] Including this provision in the proposed amendment for public comment would elicit an overwhelming reaction from the bar, defeating the Advisory Committee's goal of obtaining useful input on the broader question of whether Rule 30(b)(6) should include a mandatory conference about "the number and description of the matters for examination." The Standing Committee should remove "the identity of each person who will testify" from the proposed amendment prior to any decision on publication.

Underwriters Ins. Co. 310 F.R.D. 683, 687 (S.D. Fla. 2015) (barring a company from testifying at trial on any matters on which the company's selected deponent had been unable or unwilling to testify); *Martin Cty. Coal Corp. v. Universal Underwriters Ins. Servs., Inc.*, No. 08-93-ART, 2010 WL 4629761, at *12 (E.D. Ky. Nov. 8, 2010) (threatening sanctions where a deponent was "unprepared"); *State Farm*, 250 F.R.D. at 217 (compelling additional testimony and granting monetary sanctions where a company failed to adequately prepare its designated representative for deposition).

[3] Advisory Committee on Civil Rules, *Agenda Materials, Philadelphia, PA, April 10, 2018*, Report of the Rule 30(b)(6) Subcommittee, at 117, [hereinafter Agenda Materials] available at http://www.uscourts.gov/sites/default/files/2018-04-civil-rules-agenda-book.pdf.

[4] For a discussion of ways to improve Rule 30(b)(6), *see* Lawyers for Civil Justice, "*Advantageous to Both Sides": Reforming the Rule 30(b)(6) Process to Improve Fairness and Efficiency for All Parties* (July 5, 2017), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_response_to_invitation_for_comment_on_rule_30_b__6__7-5-17.pdf; Lawyers for Civil Justice, *Not Up To the Task: Rule 30(b)(6) and the Need for Amendments that Facilitate Cooperation, Case Management and Proportionality* 6-8 (Dec. 21, 2016), http://www.lfcj.com/uploads/3/8/0/5/38050985/lcj_comment_on_rule_30_b__6__12-21-2016.pdf, and Lawyers for Civil Justice, "*Give Them Something to Talk About: Drafting a Rule 30(b)(6) Consultation Requirement with Sufficient Parameters to Ensure Meaningful Results* 2-3 (December 15, 2017), http://www.lfcj.com/uploads/1/1/2/0/112061707/lcj_comment_on_30_b__6__consultation_requirement_final_12-15-17.pdf.

[5] Agenda Materials at 116-17.

[6] *Agenda Materials* at 117.

[7] An Advisory Committee member made a similar observation prior to the Advisory Committee's non-unanimous vote to recommend the proposal for consideration by the Standing Committee.

I. MANDATING THAT ORGANIZATIONS "MUST CONFER" ABOUT THEIR CHOICE OF RULE 30(b)(6) WITNESSES WOULD CREATE A NEW DISCOVERY REQUIREMENT THAT IS ANTETHETICAL TO EXISTING CASE LAW AND THE PRINCIPLE OF THE RULE.

Rule 30(b)(6) requires "the named organization" to designate one or more persons "to testify on its behalf."[8] Because the Rule 30(b)(6) deponent speaks for the organization, the organization has complete discretion and responsibility for determining the identity of its representatives.[9] The ABA Section of Litigation Federal Practice Task Force agrees: "Since the organization will be bound by the witness's testimony, it should retain maximum flexibility as to who it may choose to designate."[10] The party serving the Rule 30(b)(6) deposition notice has no basis for demanding any role in the selection of witnesses.[11] As one court put it, Rule 30(b)(6) "does not permit the plaintiff to designate a deponent to speak for the corporate defendants [and] the plaintiff's attempt to do so is not appropriate."[12] The organization's choice "will not be disturbed as long as the witness can testify competently."[13] In fact, courts have widely held that, because the witness is not speaking to his or her personal knowledge, the organization need not disclose the name of the witness in advance of a Rule 30(b)(6) deposition[14] because the identity

[8] FED. R. CIV. P. 30(b)(6); *Resolution Tr. Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993) ("[Rule 30(b)(6)] places the burden of identifying responsive witnesses for a corporation on the corporation").

[9] *See*, *e.g.*, *Quilez-Velar v. Ox Bodies, Inc*., Civ. No. 12-1780(GAG/SCC), 2014 WL 12725818, at *1 (D.P.R. Jan. 3, 2014)("the noticed corporation alone determines the individuals who will testify on those subjects. What the discovering party simply cannot do is require that a specific individual respond to a Rule 30(b)(6) notice."); *Colwell v. Rite Aid Corp*., No. 3:07cv502, 2008 WL 11336789, at *1 (M.D. Penn. Jan. 24, 2008)("Nothing in the rule indicates that the party seeking the deposition can determine the identity of the person to be deposed. "); *Booker v. Massachusetts Dept. of Public Health*, 246 F.R.D 387, 389 (D.Mass. 2007)("Plaintiff may not impose his belief on Defendants as to whom to designate as a 30(B)(6) witness.").

[10] ABA Section of Litigation Federal Practice Task Force Report on Rule 30(b)(6) Depositions of Organizations 4 (Nov. 23, 2015) (*attached to* Letter from Koji Fukumura et al. to the Hon. Judge D. Bates (Oct. 13, 2017) available at http://www.uscourts.gov/sites/default/files/17-CV-DDDDDD-Suggestion_Koji_Fukumura_0.pdf).

[11] *See* 8A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 2103 (3d ed. 2013) ("[T]he party seeking discovery under [Rule 30(b)(6)] is not permitted to insist that it choose a specific person to testify[.]"); 7 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 30.25[3](3d ed.2013) ("It is ultimately up to the organization to choose the Rule 30(b)(6) deponent, and the party requesting the deposition generally has no right to assert a preference if the designee is sufficiently knowledgeable on the subject matter.").

[12] *Dillman v. Indiana Ins. Co.*, No. 3:04-CV-576-S, 2007 WL 437730, at *1 (W.D. Ky. Feb. 1, 2007). *See also Cleveland v. Palmby*, 75 F.R.D. 654, 657 (W.D. Okla. 1977) ("[Rule 30(b)(6)] does not provide that a party can specifically name an employee of an organization and then require the organization to designate such employee as a witness to testify on behalf of the organization").

[13] *See, e.g., Thermolife Int'l, LLC v. Vital Pharm., Inc.*, No. 14-61864-CIV-ZLOCH, 2015 WL 11197783, at *1 (S.D. Fla. Oct. 5, 2015); *see also Poseidon Oil Pipeline Co., v. Transocean Sedco Forex, Inc.*, No. 00-2154, 2002 WL 1919797, at *3 (E.D. La. Aug. 20, 2002) ("[organization] is correct that [noticing party] cannot compel it to name a specific person").

[14] *Id. See also Roca Labs, Inc. v. Consumer Opinion Corp.*, No. 8:14-CV-2096-T-33EAJ, 2015 WL 12844307, at *2 (M.D.Fla. May 29, 2015)(denying motion to compel identity of witnesses and stating "the identity of Defendants' corporate representatives is not relevant and Defendants are not required to identify their Rule 30(b)(6) witnesses prior to deposition."); *Klorczyk v. Sears, Roebuck & Co*., Civ. No. 3:13CV257 (JAM), 2015 WL 1600299, at *5 (D.Conn. Apr. 9, 2015)("the Court will not require Sears to disclose the name(s) or resume(s) of its 30(b)(6) witness.");

of the witness is "irrelevant."[15] A party who wants to depose a particular individual already has separate mechanisms for seeking such a deposition.[16]

The Advisory Committee's proposed amendment mandating conferral about "the identity of each person who will testify" [17] will upend these well-settled principles by seeming to provide noticing parties standing to participate in the decision about who will testify, and to resist the organization's decision if the noticing party would prefer a different witness. The language will exacerbate, not remedy, the contentious nature of many Rule 30(b)(6) depositions. Moreover, if not removed from the proposed amendment prior to publication, this provision is sure to draw such overwhelming attention from the bar that it will compromise the Advisory Committee's ability to get useful reaction to the more salient question of whether a good-faith conference about "the number and description of the matters for examination" would assist counsel in avoiding or resolving disputes about "overlong or ambiguously worded lists of matters for examination and inadequately prepared witnesses." The Standing Committee should remove this provision from the proposed amendment.

II. DEFINING THE CONFERENCE AS "CONTINUING IF NECESSARY" DOES NOT REMEDY THE COMPLICATIONS CAUSED BY CREATING AN OBLIGATION TO CONFER ABOUT THE IDENTITY OF WITNESSES.

During its April meeting, the Advisory Committee added timing language to the draft Rule 30(b)(6) amendment defining the obligation to confer as "continuing if necessary." This timing language was intended to facilitate the mandate to confer about witness identity because, without it, the proposal would give rise to an expectation that conferral about witness identity would occur during the same meet-and-confer session in which the "number and description of the matters for examination" are discussed. Obviously, the organization cannot provide witness names on the spot, immediately upon learning the description of the topics. A responding organization often needs time to determine appropriate and available witnesses, and identifying such witnesses well in advance of an upcoming deposition can be difficult or even impossible. To address this issue, the Advisory Committee entertained several ideas of language that would define the obligation to confer as ongoing, and quickly adopted to the "continuing if necessary" construction. But that language does not solve the many problems that would follow from a mandate to confer about "the identity of each person who will testify," as discussed above.

[15] *See*, *e.g.*, *Cruz v. Durbin*, No. 2:11-CV-342-LDG-VCF, 2014 WL 5364068, at *8 (D.Nev. Oct. 20, 2014)("the Rule 30(b)(6) deponent's name is irrelevant. Rule 30(b)(6) deponent[s] testify on behalf of the organization. *See* FED.R.CIV.P. 30(b)(6). Therefore, the court denies Cruz's motion to compel with regard to the identify of Wabash's Rule 30(b)(6) deponent because it seeks irrelevant information.").
[16] FED. R. CIV. P. 30(a) & 30(b)(1); *Lizana v. State Farm Fire & Cas. Co.*, No. CIV.A.108CV501LTSMTP, 2010 WL 445658, at *2 (S.D. Miss. Feb. 1, 2010).
[17] Agenda Materials at 116-17.

CONCLUSION

Although the Advisory Committee's proposed meet-and-confer amendment to Rule 30(b)(6) holds some promise to help lawyers reach common understanding about "the number and description of the matters for examination," requiring the conference to include "the identity of each person who will testify" would instead exacerbate an already acrimonious process by up-ending well-established law. The Standing Committee should not publish the proposal as-is because doing so will thwart rather than facilitate the Advisory Committee's goal of obtaining useful input from the bar as to whether Rule 30(b)(6) should require a conference about the substance of the deposition. Instead, the Standing Committee should remove the mandate to confer about "the identity of each person who will testify" from the proposed amendment prior to any decision about publication for public comment.

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18-CV-N

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VIA EMAIL AND US MAIL

May 24, 2018

Honorable David G. Campbell
U.S. District Court, District of Arizona
Sandra Day O'Connor U.S. Courthouse
401 W. Washington Street, SPC 58
Phoenix, AZ 85003

Re: Rule 30(b)(6)

Dear Judge Campbell:

We write to you in your capacity as Chair of the Standing Committee on Rules of Practice and Procedure of the United States Judicial Conference to address changes to Fed. R. Civ. P. 30(b)(6) proposed by the Advisory Committee on Court Rules.

As an initial matter, we greatly appreciate the fact that the Advisory Committee decided to review Rule 30(b)(6) at the request of the ABA Section of Litigation's Federal Practice Task Force based upon the Task Force's Report of November 23, 2015, as well as other requests noted by the Committee. While we are disappointed that the proposals emanating from the Advisory Committee did not address more of the issues we highlighted in the Task Force Report, we will reserve additional comments for the formal comment period after publication of a specific proposed amended rule. We write now, however, to raise two modest proposals we hope the Standing Committee will incorporate prior to publication of the Advisory Committee's proposed amended rule.

First, we focus on the following language that we understand is being proposed regarding requiring parties to meet and confer before taking a Rule 30(b)(6) deposition:

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

We suggest that the following, in words or substance, be added:

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

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At present, if issues emanating from the service of notices or subpoenas for Rule 30(b)(6) depositions of organizations cannot be resolved prior to the deposition, the only recognized course is for the responding organization to move for a protective order, or for the noticing party to move to compel additional testimony after an inadequate deposition, both of which are often expensive for the parties and time-consuming for all, including the Court. Consistent with rule changes encouraging more informal practices for resolving discovery disputes, we believe a more efficient mechanism for resolving these disputes should be available. We endorse early court conferences on discovery disputes, and Rule 30(b)(6) disputes are no different. It will of course be up to the individual judge or magistrate judge to decide how to handle requests for conferences. Some may have a short call or brief in-person conference, preceded by, or in lieu of, short letters, or handle the requests in a different manner.

Moreover, the availability of early court intervention without the need for formal motion practice is likely salutary in resolving, or at least narrowing, the disputes. Lawyers are plainly more reasonable when they understand they will need to defend their positions orally, face-to-face to the court. Pre-deposition involvement of a court to address issues, such as the number of topics that may be requested, selection of particular witnesses, or the number of witnesses to offer, not only is consistent with the objectives of Rule 1, but also better enables lawyers to push back on possible unreasonable demands of both adversaries and even clients. This informal approach is far superior to formal motions for protection or enforcement, with the attendant expense and delay.

Second, we seek the resolution of what we perceive as an inconsistency in the Rule Notes. We previously identified this point in the Task Force Report, dated November 23, 2015, at 7, but the point may not have been addressed due to the volume of comments received by the Committee. The Note states a Rule 30(b)(6) deposition counts as a single deposition but, if multiple witnesses are identified, each witness may be deposed for seven hours. We urge that this approach carries unintended consequences. An organization is disincentivized to produce more than one witness, even when multiple witnesses with knowledge in different areas might be more appropriate. By designating multiple witnesses, organizations subject themselves to multiple days of depositions, when the organization could limit the deposition to a single day by educating a person without any independent knowledge on all subjects. We submit a person with second-hand information is often less knowledgeable than more than one witness with first-hand knowledge.

Instead, we propose a practical approach based upon the time actually expended. If multiple witnesses can cover the subjects identified in a single seven-hour day, the deposition should count as one deposition. If, on the other hand, it is necessary to exceed seven hours in a single day to complete the number of subjects identified, regardless of the number of witnesses, each seven hours should be treated as a separate deposition for purposes of the ten-deposition limit, or any other limits as may be set by the Court.

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We hope the Standing Committee will find these two modest suggestions persuasive for the rule revision process.

Respectfully yours,

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* The signers are present, past and upcoming Chairs of the ABA Section of Litigation, the current co-chairs and members of the ABA Section of Litigation Federal Practice Task Force, and the Section Liaison to the Advisory Committee on Civil Rules. As required by ABA protocol, we offer these comments only in our individual capacities. Additionally, the views expressed in this letter are solely our own and may not reflect the views of our respective law firms.

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MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 10, 2018

The Civil Rules Advisory Committee met in Philadelphia, Pennsylvania,, on April 10, 2018. 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. (by telephone); Judge Craig B. Shaffer; 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 (by telephone), Professor Catherine T. Struve, Associate Reporter, and Peter D. Keisler, Esq., 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. 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. Dr. Emery G. Lee attended for the Federal Judicial Center. Observers included Alexander Dahl, Esq.(Lawyers for Civil Justice); Brittany Kauffman, Esq. (IAALS); William T. Hangley, Esq. (ABA Litigation Section liaison); Fred B. Buck, Esq. (American College of Trial Lawyers); Benjamin Robinson, Esq. (Federal Bar Association); Joseph Garrison, Esq. (NELA); Susan H. Steinman, Esq. (AAJ); Amy Brogioli (AAJ); Melissa Whitney, Esq., (FJC); Naomi Mendelsohn, Esq. (Social Security Admn.); Francis Massaro, Esq. (Admn. Conf. of U.S.); Jerome Scanlan, Esq. (EEOC); Professor Jordan Singer; Leah Nicholls, Esq.; Robert Levy, Esq.; Brittany Schultz, Esq.; David Kerstein; Julia Sutherland; Bob Chlopak; Kristina Sesek; John Beisner, Esq.; Robert Owen, Esq.; Malini Moorthy, Esq.; Andrew Cohen, Esq.; and Andrew Strickler, Esq.

Judge Bates welcomed the Committee and observers to the meeting. He noted that four members — Barkett, Folse, Matheson, and Nahmias — were finishing six years of service, the maximum two terms in standard practice. Judge Shaffer is retiring from federal service, and a replacement must be found. And no successor has yet been appointed for former member Judge Oliver. As many as six new members may have been appointed by the time of the next meeting in November. This will be more change than usual in the Committee's membership.

Judge Bates reported that the Standing Committee meeting in January provided valuable input on the Rule 30(b)(6), MDL, and social security review projects. The subcommittees have taken this

input into account in the ongoing work that they report today. Nothing in the work of the Judicial Conference last March bears on the Committee's ongoing work. Finally, he noted that the Supreme Court continues to deliberate the Civil Rules proposals that were transmitted by the Judicial Conference last fall.

November 2017 Minutes

The draft Minutes of the November 7, 2017 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Report

Julie Wilson presented the Legislative Report. She noted that in November the Senate Judiciary Committee held a hearing on the impact of lawsuit abuse on American small businesses and job creators. The subject is connected to the Lawsuit Abuse Reduction Act of 2017, which passed the House in March 2017 and remains pending in the Senate. Another House Bill addresses nationwide injunctions, a topic that was recently on the Committee agenda. It has a provision that would limit an injunction so that it reaches only parties to the case, and a provision that would limit injunctions to the district where issued.

Rule 30(b)(6)

Judge Bates introduced the three primary items on the agenda as the Reports of the Subcommittees on Rule 30(b)(6), MDL practices, and Social Security review. Skeptics have questioned the need for rules amendments in each of these areas. Each will provoke significant discussion, particularly Rule 30(b)(6) if it leads to a recommendation to publish a proposal for comment.

Judge Ericksen introduced the Report of the Rule 30(b)(6) Subcommittee. The November Committee meeting provided useful discussion of ways to improve the November draft. The Subcommittee conferred and made improvements following that meeting. The Subcommittee conferred again after learning of the January discussion in the Standing Committee.

The Rule 30(b)(6) amendment proposed by the Subcommittee appears at pp. 116-117 of the agenda materials. Several features deserve notice. It directs the person serving the notice or subpoena and the entity named as deponent to confer before or promptly after the notice or subpoena. "or promptly after" has been confirmed following earlier discussion. The question whether to say the parties "should" or "must" confer has been resolved in favor of "must," as a more appropriate direction for rule text. On the other hand, the possibility of adding "or attempt to confer" has been

rejected. Those words make sense in Rule 37, where they ensure that a recalcitrant party cannot thwart an attempt to compel proper discovery behavior by refusing to confer. They do not fit in Rule 30(b)(6), which should not be satisfied by a perfunctory attempt.

The Subcommittee discussed the proposed Committee Note at length. It chose a "less is more" approach. The Note does not prescribe topics to be discussed, for fear of prompting litigation about the adequacy of the conferring.

The Subcommittee also presents for consideration a possible amendment of Rule 26(f), which appears at p. 119 of the agenda materials. This proposal would add a suggestion that the parties "may consider issues regarding [contemplated] depositions under Rule 30(b)(6)" in the Rule 26(f) conference. The Subcommittee believes the Committee should consider this topic, but recommends that the amendment not be advanced for publication. Although the parties may be in a position to think about Rule 30(b)(6) depositions at the Rule 26(f) conference in some cases, in most cases the need to depose an entity and the matters to be covered will develop only as discovery progresses through other means. The possible Rule 26(f) proposal is described in a bracketed sentence in the Committee Note, p. 118 lines 237-239. The sentence that follows, also in brackets, observes that in some cases discussion at a Rule 26(f) conference may satisfy the Rule 30(b)(6) obligation to confer. This sentence makes sense whether or not the Rule 26(f) amendment is proposed, but it is not clear that it should be retained. It may be that it will simply invite disputes about the sufficiency of preliminary discussion in a Rule 26(f) conference to satisfy the Rule 30(b)(6) requirement.

Judge Bates thanked the Subcommittee for this report, and suggested that it be reviewed from the perspective of experience. From the outset, the Committee has been advised that most Rule 30(b)(6) problems are handled by the parties. If that fails, the court can resolve them without much ado. Judges, especially magistrate judges, say they seldom encounter Rule 30(b)(6) problems. So it is argued there is no need for any amendment. What is the Subcommittee view on this?

Judge Ericksen responded that anxiety about amending Rule 30(b)(6) has been substantially reduced when lawyers see the conservative amendment actually proposed. The question whether to go ahead with the proposal was the subject of back-and-forth discussion in November. The Subcommittee concluded that the proposal will bring into rule text the good practices in some courts and spread them to courts where the rule is not working so well. The need is real. "There is a disconnect between what lawyers see — frustration, and a wish to do something — and what judges see."

May 8 version

Professor Marcus observed that about 12 years ago, the Committee went through Rule 30(b)(6) very carefully. Since then the Committee has repeatedly heard of problems with it. A lot can be learned from public comment, just as the Subcommittee learned a lot from the hundred or so comments offered in response to the Subcommittee's invitation.

A Subcommittee member added that the Subcommittee also recognizes that the 2015 amendments are working their way through the system. And reading all the Rule 1 cases shows that judges are invoking Rule 1 "to tell lawyers to behave better." Help also will be found in the new Rule 26(b)(1) definition of the scope of discovery. Not that progress is as uniform as might be hoped. References to the stricken phrase "reasonably calculated to lead to the discovery of admissible evidence," for example, have appeared in 99 cases in the weeks since this February 1, either in describing arguments of counsel or in the court's own statements. "Rule 30(b)(6) is a lightning rod." It generates disputes about the number and lack of clarity of matters for examination, what documents to prepare for, and lack of preparation. These seem to be case-management problems. If the proposed amendment encourages judges to become more involved, it will do good work.

Another Subcommittee member noted that he had been a fairly strong advocate for amending Rule 30(b)(6) based on his own experience. "Over the years, the process keeps getting reinvented case-by-case." But some proposals to solve problems directly would spawn their own problems. The Subcommittee proposal looks fairly modest. "It is what happens when good lawyers work together." Yet not all lawyers do that. Putting it into the rule can make it happen more often. And the Committee Note highlights added issues the lawyers should talk about. Some proponents of change will be upset that the proposal does not go far enough. But it is so modest that it is hard to imagine being upset with what it does.

Still another Subcommittee member echoed these thoughts. "Putting in more detailed commands will lead to more fights." Limiting the amendment to a requirement to confer is a sound approach. It is better at this point in the rule's evolution.

A different Subcommittee member observed that "The grandiose ideas gave way to a 'little nudge.'" The proposal is a good first step to prod the parties to confer and work it out.

Three Committee members turned to the draft Rule 26(f) amendment, agreeing that they would not recommend it for publication. It is likely to stir fights in the Rule 26(f) conference.

That issue prompted a suggestion that if the Rule 26(f) draft

does not go forward, thought should be given to deleting the final sentence from the proposed Committee Note, p. 118, lines 242-245: "In appropriate cases, it may also be helpful to include reference to Rule 30(b)(6) depositions in the discovery plan submitted to the court under Rule 26(f)(3) and in the matters considered at a pretrial conference under Rule 16." Discussion suggested that if the Rule 26(f) proposal does not go forward, the bracketed sentence referring to it at lines 237 to 239 will be deleted. The next bracketed sentence, suggesting that discussion at a Rule 26(f) conference might at times satisfy the Rule 30(b)(6) mandate to confer, might also be deleted for fear of generating new disputes. But why not keep the suggestion that the parties might, without prompting by new rule text, find it helpful in some cases to include provisions for Rule 30(b)(6) in their discovery plan and perhaps seek to work out Rule 30(b)(6) issues at a scheduling conference? These questions will be framed more directly once the fate of the Rule 26(f) draft is decided, but the suggestion at lines 242-245 seems useful. "Let's not tinker too much with the Note."

It was noted that the Department of Justice would oppose going forward with the Rule 26(f) draft. As to Rule 30(b)(6), experience has been that it is not a concern. Still, it can be a difficult area for litigants given the breadth of the matters that may be described for examination. On the other hand, why does it matter who will be the persons designated by an entity deponent to provide testimony? Requiring discussion of who might be a witness may be difficult when the entity is not in a position to commit, and there is a risk that it will be difficult to change witnesses later. The entity may not yet know who can best testify, or how many.

The first response was that "there is a bit of reciprocity." The deposing party has to discuss the number and description of matters for examination. The deposed entity can think about the designation of witnesses only when the descriptions of the matters for examination are worked out. The party taking the deposition, on the other hand, needs to know whether the designated witness is also a fact witness. That can support discussion of ways to avoid duplicating depositions. The entity "is not required to put its feet in concrete. This is discussion, not a binding commitment."

A counterpoint was that over the last 25 years of reviewing discovery decisions, the most litigated issue arises from arguments that Rule 30(b)(6) designated witnesses are not adequately prepared.

The first response found a parallel. The proposal only requires that the parties confer in good faith. "They need not resolve every problem, but they can reduce the number of problems."

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The doubt about discussing the identity of witnesses was repeated. It will help to confer about the matters for examination to learn whether they are needed, and how clearly they are defined. But why does the deposing party care whether the witness is John Smith or Joan Smith?

The next response was that the entity can say that the witness will be John Smith or Mary Jones. Then they can confer about whether one of them also will be a fact witness, and perhaps should be designated as the entity's witness for that reason.

A Subcommittee member said that in his cases, the deposing party always asks who the witness will be. And, at some point, the entity always says who it will be. A similar comment was that the entity can, in conferring, say that "I can't tell you now. I will tell you later."

The doubter agreed that "parties do tend to share names." But requiring discussion may lead to problems. One response was that the entity can say that it is too early to be sure who will be designated, even that the choice may depend on who can be made available on the day the deposing party wants to take the deposition.

Another response agreed that witnesses are named in advance. "There are cases where the witness is obvious." On the other hand, there are cases where it may take weeks or even months to prepare the witness to testify. If the witness is not obvious because of his role in the underlying events, what value is there in conferring about identity?

Judge Ericksen noted that the direction to confer about the identity of the witnesses could be stripped from the proposal, leaving the rest to go ahead.

Professor Marcus pointed out that the Committee Note, reflecting the present rule text that will remain unchanged, says that the entity has the right to designate its witness. The proposal does not compel it to identify them before the deposition. But getting the topic on the table at the conference seems like a good idea. If conferring about witness identity remains in the proposal for publication, we will get comments and learn from them.

Another Committee member suggested that discussion of witness identity should be left in the proposal to elicit comments. Perhaps some way might be found to stimulate comments, such as placing this part in brackets, adding a question in a footnote, or specifically inviting comments in the message transmitting the proposal for publication. It was agreed that any of those tactics can be used. But even without them, there is enough interest to guarantee

comments.

Judge Ericksen asked whether it would help to place brackets around "[and the identity of each person who will testify]." The Subcommittee got a lot of comments in response to its invitation. But it continues to be important to get comments about all aspects of the proposal. Emphasizing one part might be a distraction.

The opportunity to begin to confer "promptly after" the notice or subpoena was pointed out as a feature that should reduce the problem with discussing witness identity. That may justify leaving this subject in the published proposal. But it would be better to take it out. It will stir claims by deposing parties that they are entitled to know the identity of the witnesses before the deposition is taken.

This concern was echoed. Focusing on "the identity of each person who will testify" "seems definitive." A different Committee member suggested that the text might be revised to require discussion of who "might be" testifying as witnesses.

The duty to confer "in good faith" came back into the discussion. The duty is not satisfied by one phone call. There will be a continuing exchange. Perhaps the Committee Note can identify the iterative nature of the process. Agreement was expressed. One phone call is not good-faith conferring. The first step must be to identify with some clarity the matters for examination. Then the conference can move on to discuss who might be witnesses. Later discussion added further support for the view that it is important to emphasize the iterative nature of the process.

This view of the continuing duty to confer was questioned under the rule text. It might be argued that a duty to confer "before or promptly after" the notice or subpoena is satisfied by a single, one-off conference. One way to address this concern may be by elaboration in the Committee Note without changing the rule text. The Note could say that beginning no later than "promptly after" does not mean that prompt beginning should always be a prompt conclusion. In some — perhaps many — cases the discussion will have to continue through successive exchanges.

Judge Ericksen said that the proposal should carry forward with the duty to confer about the identity of the witnesses. But it could be useful to expand the Committee Note to say that although the conference must be initiated promptly, it will often be an iterative process that requires more than one direct discussion.

Another participant observed that the problem is that the entity may not know the identity of its witnesses when the notice or subpoena is served. Perhaps the rule should instead direct

discussion of "the manner in which the organization will respond," or "the steps the organization will take to respond." A Committee member suggested that perhaps one of these phrases, with or without some revision, might be published as a bracketed alternative. Professor Marcus expressed concern that publishing several bracketed alternatives might make the product seem less finished, less carefully considered. It is more forceful to include discussion of witness identity in rule text, without leaving it to Committee Note elaboration on "steps to respond." Another participant expressed a different concern: "manner" or "steps to" respond seem to impose a very broad obligation to discuss such things as the manner of searching electronic files, steps to learn from internal sources who may be good witnesses because of personal knowledge, the ability to learn added information, and the skill to communicate information accurately under deposition questioning.

Discussion returned to a renewed observation that a lot of people have said that it is a problem to begin a deposition without knowing before that moment who the witness will be. This was met with a question: would it be enough to resolve the problems for both sides by directing discussion of not who "will," but who "may" testify? One response was that "in good faith" properly identifies the process of conferring, but "may" seems to reduce the quality of the process.

A different suggestion was to add a few words to the rule text: "must confer in good faith about the number and description of the matters for examination, and in due course the identity of each person who will testify." Or: "the matters for examination. This discussion must include the identity of each person * * *."

Another possibility was suggested: "and begin to confer about * * *."

A still different possibility was proposed: within a reasonable time after determining the matters for examination, the entity could be required to identify the persons "who likely will testify." This met a widespread response: "likely" is not enough. It also elicited a response that it would create problems to require actual identification in rule text, but the issue could be discussed in the Committee Note.

Committee discussion of Rule 30(b)(6) was suspended at this point to enable the Subcommittee to confer over the lunch break. The way was left open for recommendation of alternative rule texts.

After lunch, the Subcommittee returned with a proposal to revise the Rule 30(b)(6) amendment by adding two words: "Before or promptly after the notice or subpoena is served, the serving party and the organization must begin to confer about * * *." These words

would give a meaningful time to work out the steps that will make the deposition as useful as possible. They will support Committee Note language elaborating the iterative nature of the process and the interdependence of defining the matters for examination with designating the witnesses.

Professor Marcus noted that adopting this change would require revising the Committee Note in ways that cannot be accomplished by drafting on the Committee floor. It will be better to draft after the meeting, and to circulate the Subcommittee's recommendation for electronic review and voting by the Committee. Enough time remains for that to be done before the Report to the Standing Committee must be submitted.

A Subcommittee member said that the Note will emphasize that the conference is an ongoing process. It should emphasize the connection between defining the matters for examination and identifying the witnesses. The time for identifying witnesses depends on this. The Note also should continue to make it clear that the entity determines who the witnesses will be, and is responsible for making sure that they are prepared.

The "begin to" words raised a new concern. Are they too soft? Can a recalcitrant party say that it has no duty beyond beginning to confer, and can quit once it has begun? One response was that the Note can emphasize that "a voice-mail message is not good faith." But another Committee member "would rather not change rule text. 'Begin to' may soften the command." The Note can discuss the iterative nature of the conferring process without adding these words.

Judge Ericksen asked about a slight variation: "Beginning before or promptly after * * *." It was agreed that this change would not soften the command as much as "begin to confer." A further change was suggested to make it firmer still: "Beginning before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization must confer * * *." That suggestion met the continuing fear that any added rule language will provoke new fights, this time about what is "necessary." But it was responded that "necessary" is clear, and rejoinded that "I can't tell you what I don't know" — it should not be necessary to go on conferring forever to force a designation at some indeterminate time before the deposition begins. Still, three other members expressed support for the "continuing as necessary" language.

These suggestions led to a renewed suggestion that the Subcommittee's original proposal should be recommended for publication without changing the rule text. The Committee Note can explain the ongoing, iterative nature of the conferring process.

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All agreed that the "begin to confer" alternative should be dropped.

An observer suggested that all of this effort could be spared by simply omitting "and the identity of each person who will testify." There is no obligation to identify the person, so why require discussion of identity? The organization needs to know the matters for examination so it can prepare its witnesses, but the conference should not go further. This view was supported by a Committee member who did not want to encounter objections to the organization's choice of witnesses, nor to require discussion of who they will be. Professor Marcus replied that ultimately the organization must choose someone to testify. The witness's identity will be made known no later than the day of the deposition.

These questions were brought to a vote. The suggestion to add "and continuing as necessary" was adopted by voice vote. The Committee recommended publication of the proposal originally advanced by the Subcommittee with this addition, adding these words to Rule 30(b)(6):

> * * * Before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person who will testify. A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party. * * *

The Committee Note will be revised to discuss the iterative nature of the obligation to confer. The new Note language will be circulated for review and a vote by the Committee.

A vote was called on the question whether to pursue further the draft that would amend Rule 26(f) to include a reminder that the Rule 26(f) conference may consider issues regarding contemplated depositions under Rule 30(b)(6). No Committee member voted to publish. All opposed publication. The draft was dropped from further consideration.

MDL Practice

Judge Bates introduced the Report of the MDL Subcommittee by noting that at present the main questions go to the scope of any project that might be undertaken.

Judge Dow, the Subcommittee Chair, began by stating that "this is the alpha, not the omega" of the work. The Subcommittee has entered what will be an extensive information-gathering phase to

see whether to propose any rules for conducting centralized proceedings in an MDL court.

Judge Dow also expressed thanks to Rules Committee Support Office staff Womeldorf, Wilson, and Tighe for the work they have done to gather background information on many topics. The Judicial Panel on Multidistrict Litigation also has been a treasure trove of information.

Third-party litigation funding is another big topic that has been committed to the Subcommittee, in part because it may be related to MDL practice. But the Subcommittee is not yet prepared to suggest discussion in the Committee.

The Subcommittee has launched a "road show" that will involve meetings with several groups. It has planned engagements with at least five outside groups.

Work so far has identified many topics for study. The result of the work is many things for the MDL world to think about. The current agenda includes ten topics for study.

Professor Marcus led discussion of the ten current agenda topics.

(1) Scope. The scope of inquiry might extend beyond proceedings actually centralized in an MDL court. One possibility would be to aim at all proceedings that involve a large number of claimants — one proposal has been to establish special procedures for bellwether trials in MDL proceedings that involve more than 900 claimants. That number, or some other, might be adopted as a threshold for aggregations outside MDL consolidation and class actions. Or it might be adopted as a threshold to separate MDL proceedings to be governed by special MDL rules from smaller MDL proceedings left outside the special rules. A different possibility, closer to MDL proceedings, would be to take on actions that seem ripe for MDL consolidation before the Judicial Panel orders transfer, addressing such matters as timing. Something might also be said about whether the MDL rules lose all force when an individual action is remanded to the court where it was filed.

(2) Master Complaints and Answers. The use of master complaints and answers seems to be increasing. Do they supersede the original individual-case pleadings? Should they? Should they be the focus of Rule 12(b) motions, motions for summary judgment, and discovery rulings? If a case is remanded to the court where it was filed, do rulings on a master pleading unravel? If master complaints tend to be generated only after the consolidated proceeding is pretty much organized, will this be a fit subject for rules?

Discussion of this topic began with a judge noting that he took on an MDL proceeding when there were 200 cases. The question was what do defendants do to answer new complaints? The parties set out a master complaint to be incorporated by individual plaintiffs by directly filing a short-form complaint in the MDL proceeding. The defendants do not even answer the short-form complaint, but can move to dismiss it.

Further discussion asked whether there is much opportunity for a rule to improve a practice that seems to be pretty well developed already.

The next question was how the master pleading practice relates to initial disclosures. In this MDL, each plaintiff files an individual fact sheet 30 days after the short-form complaint. The defendant files a fact sheet for that plaintiff thirty days after the plaintiff files, stating that the product affecting that plaintiff is Lot X, sold by Y. This is case management, not a pleading rule.

A Committee member observed that there are big differences between different case types. Antitrust cases, data breach cases, personal injury, and still others do not present the same kinds of problems. "We need to think about this." One response was that these issues involve the scope of whatever rules might one day be designed.

(3) Particularized Pleading/Fact Sheets. One proposal, focused on personal-injury tort cases, has been to require particularized fact pleading in a model similar to Rule 9(b). Fact sheets, not pleadings, may be considered instead. Attention also can be directed to "Lone Pine" orders. These and still other practices can resemble initial disclosure of what will be claimed, of how it will be supported, or even of some of the supporting evidence itself.

A Committee member suggested that "this is moderately standardized." The fact sheet "does the particularizing." There is no need to make it a Rule 9(b) pleading rule, especially if there also is a master complaint.

Another participant suggested that it would be easy for the Subcommittee to gather a couple of dozen fact sheet forms from different MDL proceedings to give an idea of what is asked for. They are not pleadings. They are sworn to. Defendants can use them to identify who is a real plaintiff.

The question whether fact sheets have been used in anything other than personal-injury MDL proceedings found only one answer — that may have happened in a "fax" case that settled too early for the fact-sheet approach to be tested.

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(4) Rule 20 Joinder and Filing Fees. The direct joinder question is raised by those who fear a "Field of Dreams" effect: building an MDL proceeding works as an invitation to joinder by would-be claimants who in fact have no connection to the events in suit. Various forms of this proposal emphasize the value of requiring payment of an individual filing fee for each plaintiff in a multi-plaintiff complaint as a means of ensuring at least close enough attention by counsel to the question whether there is any support for the claim. One difficulty with this approach might be that it could be difficult for the clerk's office to trace through a very long pleading to determine just how many plaintiffs and fees are involved. But it could be easy to require a filing fee for each plaintiff who directly files in the MDL court. This could serve as another screening device.

Individual filing fees in the largest MDL proceedings could generate millions of dollars.

A judge with a pending MDL proceeding noted that each direct-filing plaintiff provides a short-form complaint and pays a filing fee. The parties agreed that new plaintiffs would file directly in the MDL proceeding, and identify the district the plaintiff is from and to which the case will be remanded if it is not resolved in the MDL proceeding. There have been more than 3,000 direct filings.

Others noted that direct filing has become "very prevalent." It depends on the arrangements agreed to by the parties. Another Committee member agreed that direct filing is not unusual, but that it also is not unusual to have tag-along cases filed elsewhere before they are transferred to the MDL.

This discussion concluded with the question whether anyone had experience with a case with multiple plaintiffs and only one filing fee. No one identified any such case.

(5) Sequencing Discovery. Sequencing discovery to address common core issues first is a familiar case-management tool. Would a rule specifically addressing this practice be a positive development? What of the need for case-specific discovery addressing "bystander" or "outlier" claimants? Is it a problem to delay case-specific discovery until completion of discovery on the common core issues?

A Committee member observed that class-action lawyers see sequencing of discovery as bifurcation, and do not like it.

A judge observed that Rule 16 authorizes sequencing. What more might be accomplished by another rule? Should a rule tell a judge to do it when it seems more a case-specific issue?

Another judge agreed that the authority is already there. But perhaps there is a place for a best-practices rule, something akin to the front-loading built into Rule 23 in the proposed amendments now pending in the Supreme Court. This could be part of a broader rule, or perhaps sufficiently relevant to another new rule to warrant discussion in a Committee Note.

The first judge reported that in his MDL, the parties proposed sequencing. "It was pretty obvious what needed to be done. It's case management."

Another judge agreed. It is important to encourage the parties to be creative.

(6) Third-party Litigation Financing and "Lead Generators." Although joined in the list of agenda items, these two topics are not necessarily linked to each other. There is considerable interest in third-party financing. It is not clear whether third-party financing has special ties to mass personal-injury tort MDLs, or whether it is tied to MDLs of other sorts. The concern in the mass tort cases is that lead generators explain the large numbers of claims from "people who did not use the product."

Are there problems with third-party financing serious enough to justify a rules response? What would the rule be, and where would it fit?

A judge, seconded by Professor Coquillette, noted that the Committee should be cautious in approaching the issues of professional responsibility raised by some who view third-party financing with alarm.

Additional discussion noted that third-party financing has become involved with bankruptcy practice in New York, but it is unclear just how. This prompted the further question whether, if third-party financing is to be approached at all, any new rules should address only the MDL context.

(7) Bellwether Trials. The broad questions about bellwether trials can be framed by asking whether they should be encouraged? Discouraged? Addressed in rules? No rule now addresses them. Indeed there may be some ambiguity about the concept — in any mass tort context, any trial provides useful information for the parties in all other actions. If indeed a rule might be useful, it will remain to decide where it should be lodged in the rules structure and what it might provide.

A judge reported finishing a bellwether trial a week earlier. It was a regular trial of an individual case. There was nothing different about it. Although tried in Arizona, it involve a Georgia

plaintiff, application of Georgia law, and the same witnesses as would have testified at trial in Georgia. This is a case management technique. The parties wanted it. A total of six cases were set for trial, with the parties' consent. Case selection can be an issue. In this proceeding, each side proposed 24 cases for the process. More extensive disclosures were required for these 48 cases. Twelve of them went to full discovery: doctors were deposed, and the plaintiffs were deposed. The parties then were able to agree on one case to be a bellwether. The judge picked the remaining five, looking to get a representative mix of cases. The purpose of these trials is to facilitate settlement. "I'm drawing the line at six. If they don't settle, the cases go home."

(8) Facilitating Appellate Review. The basic concern about appeals is that interlocutory rulings that for good reason are not appealable in ordinary litigation become so important in MDL proceedings as to warrant appeal before final judgment. 28 U.S.C. § 1292(b) interlocutory appeals by permission may not be sufficient to meet the need. The recent study of Rule 23 showed that many people wanted to amend Rule 23(f) to establish mandatory jurisdiction of appeals from orders granting or denying class certification. That wish was not granted. But some rulings in MDL proceedings are "really, really important." Is there a way to define when appeal should be available?

Judge Bates noted that if appeal jurisdiction is taken up, it will be necessary and helpful to coordinate with the Appellate Rules Committee.

Another judge found the desire to appeal understandable. But there is a practical problem, at least in a busy circuit. In a pending class action, he had to confront two lines of conflicting circuit authority. He chose one to decide a summary-judgment motion and certified the question for appeal. The panel decision was rendered 27 months later, and the mandate has not yet issued. What would happen in a case that afforded two or three opportunities for interlocutory appeal on complicated issues? A suggestion that a rule could require expedited appellate procedure was rewarded with doubting laughter.

(9) Coordinating between "parallel" federal- and state-court actions: Parallel actions may be centralized both in a federal court MDL proceeding and in similar state-court consolidations. Some observers suggest that the federal MDL should become the leader, even suggesting enactment of legislation to remove related state actions to the federal MDL. Is there a serious problem? What is it? Can a rule reduce any problem? Informal coordination actions do happen, at least at times.

A judge noted that she recently sat on the bench for three

days with a state-court judge at a Daubert hearing. The state judge, applying state law, dismissed all the state cases. She, applying federal law, cleared the path for the federal cases to go to trial. She also observed that coordination could delay settlement, for example if a strong state case is used as an obstacle. So, perhaps, a strong individual case in a federal MDL could become an obstacle to settlement.

A Committee member suggested there is no need for a rule. "I often see some level of coordination to achieve efficiency by avoiding redundant discovery." Defense counsel can join with plaintiffs' counsel in arranging to do a deposition once, and in adjusting for the phenomenon that state rules do not have the same time limit for depositions as the federal rules. "Often we work it out." Another problem, however, is presented by a race to settle and take credit for it.

(10) PSC Formation and common-fund directives. Questions have been raised about the formation of plaintiffs' steering committees, executive committees, coordinating counsel, and similar arrangements. Common-benefit funds to compensate lead counsel for their efforts also raise many questions. And some observers suggest that "insiders" are too often appointed to leadership positions.

Related concerns are raised by court-imposed caps on fees for individual representation of individual plaintiffs, combined with the "tax" for the common benefit fund.

Some courts borrow the Rule 23(g) and (h) criteria for designation of lead counsel and their compensation. The Manual for Complex Litigation advises judges to take an active interest in these matters. Here too, the questions are whether there are problems? Do any problems have rules solutions?

A judge suggested that these questions overlap third-party financing questions. In his MDL the estimate was that plaintiffs' counsel would have to invest $20 million to pursue the case. Third-party financing can be part of the answer to the need for heavy investment. It can enable non-insider lawyers to take the lead. A court must consider the resources the lawyers can commit to the litigation. This observation was seconded by a fervent "amen."

Another judge reported learning that expenditures on a first bellwether trial usually are astronomical, mounting into the millions. "We want more diversity, new faces. But those on the steering committee must be able to bear the cost."

Discussion of these ten agenda items concluded by asking whether there are other matters the Subcommittee should investigate, and with agreement that after learning more the

Subcommittee would likely profit from arranging a miniconference. An outline of the format suggested gathering 6 MDL judges, 6 plaintiffs' lawyers, and six defense lawyers.

Judge Bates then opened an opportunity for comments by observers.

John Beisner said that this process of inquiry is important. The bar becomes accustomed to regular practices. For some time, it was accepted that cases could be transferred for trial in the MDL court by supplementing § 1407 transfer with § 1404 transfer. Then the Supreme Court said that could not be done. The bar responded by developing the "Lexecon waiver." Workarounds like this may rest on foundations that appellate courts will not accept. Developing an understanding of common practices may support new rules that incorporate and advance them. He suggested further that data should be compiled to inform MDL courts about what other MDL courts are doing. The MDL process generally works well, but not all MDLs do. When an MDL goes awry, it can come to grief after investing many years and millions of dollars. Problems include orders that cannot be reviewed until long after they are issued, and orders that are not issued until there has been a long delay. It is important to come up with best practices or common rules.

Another observer who practices on the plaintiff side asked "What is broken to need fixing"? None of the agenda items address anything that is broken. Flexibility is necessary. Courts have express or inherent authority to address most of these issues. And as for appellate review, there is always mandamus. Expanding the opportunities for appeal will not do much. "The issues can be addressed as they arise."

Susan Steinman said that a lot of the agenda ideas do not work well for AAJ members. Flexibility is needed to address the different needs of different kinds of cases. Mass disaster cases are different from environmental disasters. The AAJ has a working group to consider these problems. The issues that raise concerns include master complaints and answers, particularized pleading-fact sheets, and sequencing discovery. She also suggested that MDL cases that "aren't quite ready to go" could be put in an inactive file for later development. Professor Marcus added that the inactive-file approach was used in Massachusetts for pleural thickening asbestos cases.

Alex Dahl noted that Lawyers for Civil Justice has filed written comments on the Subcommittee Report. He offered several specific points. (1) "The Rules are not applied in all MDL cases." Practice has evolved beyond the Rules. As a practical matter, the Rules do not work when there are too many parties. Discovery does not work to reveal false plaintiffs. (2) There must be a rule that

enables the parties to find out whether each MDL plaintiff has a claim. (3) In response to a question whether new rules should address all MDL proceedings, he said the need is for rules that work. Distinctions can be drawn. For example, Rule 7 could be amended to recognize the use of a master complaint, but to apply only to cases in which a master complaint is in fact used. (4) Devising rules that expand the opportunities to appeal is worth the complication because appeals are important to the judicial system as a whole and also to the parties. (5) The repeat-player phenomenon is a real problem. Outsiders cannot learn about "real" MDL procedure. If means can be found to educate outsiders in the practices that have been honed by the repeat players, the problem can be reduced. (6) The need for disclosure of third-party financing is demonstrated by the 24 district rules and 6 circuit rules that require disclosure. There should be a uniform national rule that requires disclosure of nonparties that have a financial interest in the outcome. Protection of the opportunity for judicial recusal is a compelling reason for disclosure, but there are additional reasons as well. The present local rules were not designed to address the other reasons for disclosure, and vary one from another. (7) In conclusion, MDLs are a complicated subject. The Committee should act to make sure that the Civil Rules apply in all cases. It should begin with a handful of topics including discovery, trial, and appeals.

Judge Bates thanked the Subcommittee, Judge Dow, and Professor Marcus for their excellent work.

§ 405(g) Social Security Review

Judge Bates introduced the work of the Social Security Review Subcommittee by noting that the project has been recommended by the Administrative Conference of the United States with the enthusiastic endorsement of the Social Security Administration. It raises interesting and somewhat novel issues about rulemaking for a specific substantive area.

Judge Lioi delivered the Subcommittee Report. The Subcommittee is in the early stages of exploring whether uniform review rules should be developed. Working from a rough and "bare bones" draft that illustrated one possible approach, it sought reactions from the groups that provided initial advice in a meeting with the Subcommittee last November 6. The draft covers such topics as initiating an action for review, electronic service of the complaint, the Commissioner's response, and briefing on the merits. Reactions were provided by the Social Security Administration, the Department of Justice, the National Organization of Social Security Claimants' Representatives, and the American Association for Justice. The initial draft was revised to reflect their reactions. That draft was discussed in a Subcommittee conference call on March

9. The draft was then revised again; that revised draft is the one included in the agenda materials.

The question for today is whether it will be useful to use this revised draft, as it might be revised still further, as a basis for eliciting further comments. The draft is not yet ready to serve as the basis for refining into a foundation for work toward actual rules.

The questions were explained further. The Subcommittee has not decided whether it will recommend that any rules be adopted. It will continue to gather information from as many as possible of the people and groups with experience in social security review actions. The outcome may be a recommendation that no rules be developed. It may be that the wide variations now found in local district practice reflect different conditions in the districts, and that little would be accomplished by forcing all into a uniform national template. Or it may be that although the variations do exact substantial costs, it will be difficult to develop national rules that effect substantial improvements. And there is some remaining uncertainty whether it is appropriate to develop rules for one specific substantive area.

If rules are to be developed, choices remain as to form. One possibility would be to amend several of the present Civil Rules — for example, a special pleading provision could be added to Rule 8. Another possibility would be to create new rules within the body of the Civil Rules. Abrogation of Rules 74, 75, and 76 has left a hole that might be filled, in whole or in part, by social security review rules. The draft in the agenda materials takes a different approach, creating a new set of supplemental rules along the lines of the supplemental rules for admiralty or maritime claims and civil asset forfeiture. No choice has been made among these possibilities.

The draft rules begin with a scope provision that may be refined further as the work progresses. One possibility is to limit the new rules to actions that are pure § 405(g) actions: One claimant seeks nothing more than review of fact and law questions on the administrative record, joining only the Commissioner as defendant. That category would include a large majority — likely nearly all — of § 405(g) actions. Any action presenting any additional claims or including any additional parties would, as at present, be governed only by the general Civil Rules. The alternative possibility is to apply the § 405(g) rules to the part of a broader action that seeks review on the administrative record, leaving all other parts to the regular Civil Rules. Whichever approach is taken, it will remain necessary to include a provision invoking the full body of the Civil Rules except to the extent that they are inconsistent with the supplemental rules.

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The next step is a rule for initiating the review proceeding. Discussions of this topic often begin by noting that review on an administrative record is essentially an appeal, and can be initiated by a document that is in effect a notice of appeal. The draft rule characterizes the initial filing as a complaint, reflecting the § 405(g) provision calling for review by filing a civil action. The elements of the complaint are simple, covering identification of the parties, jurisdiction, a general statement that the Commissioner's decision is not supported by substantial evidence or rests on an error of law, and a request for relief. Successive drafts also have included an opportunity to "state any other ground for relief," reflecting the possibility that a claimant may raise issues outside the administrative record.

The next provision has met widespread approval among those who have seen it. It provides that instead of Rule 4 service of a summons and the complaint, the court makes service of process by electronic notice to the Commissioner. The current draft places the responsibility for designating the "address" for electronic service on the Commissioner. Some districts have begun to use electronic service by agreement of the Commissioner and local United States Attorney. Their experience has been satisfactory. It may be that this provision should direct service on the local United States Attorney as well as the Commissioner, but still rely on the Commissioner to determine whether service should be made directly on the Commissioner, on the social security district where the district court is located, on both, or on yet some other office.

The next step is the Commissioner's answer. Earlier drafts, picking up a suggestion by the Social Security Administration, provided that the answer would include only the complete record of administrative proceedings. Discussion in the Subcommittee, however, broadened this provision to say only that an answer must be served and must include the record. This approach was taken from concern that closing off the answer might lead to forfeiture of affirmative defenses. Res judicata, for example, is an affirmative defense that must be pleaded under Rule 8(c) or lost. Estoppel may be another example.

Dispositive motions also are covered. Earlier drafts limited dilatory motions to exhaustion and finality, timeliness, and jurisdiction in the proper court. Summary-judgment motions were excluded on the theory that they contribute no advantage when all of the facts for decision are already in the administrative record, and may be an occasion for delay or confusion. Some districts now seize on summary-judgment procedure to frame the review, a sound practice to the extent that it calls for identifying the issues and tying them to the record. But many parts of Rule 56 are inapposite and may cause confusion. All of the advantages of Rule 56 might be gained directly by the review rules themselves. Be that as it may

for cases that involve nothing more than review on the record, however, summary judgment has a role to play when other claims or issues are introduced. The present draft says nothing of Rule 56, and recognizes the full sweep of Rule 12 motions. The time to answer is governed by Rule 12(a)(4). And the special role of motions to remand is recognized by providing that a motion to remand can be made at any time.

The procedure for bringing the case on for decision relies primarily on the briefs. The current draft directs the plaintiff to file a motion for the relief requested in the complaint and a supporting brief. The Commissioner as defendant must file a response brief, again with references to the record. The draft includes bracketed provisions that the briefs must support the arguments by references to the record.

The draft rules do not include other provisions that are included in the draft rules prepared by the Social Security Administration. Little other support has been found for provisions that would specify the length of the briefs. Nor has there been much other support for adding detailed provisions for seeking attorney fees. The general feeling has been that district courts should remain free to set rules for the format and lengths of briefs that fit their local circumstances and general practices. So too it has been felt that the general procedures for seeking attorney fees are adequate. Still, there may be room to inquire whether special provision should be made for seeking fees under the Social Security Act as compared to fees under the Equal Access to Justice Act.

Judge Lioi reminded the Committee that the question the Subcommittee presents for discussion is whether the Subcommittee should use the present draft of supplemental rules, as it might be revised in light of ongoing discussions, to prompt further responses from those who have experience on all sides of social security review cases.

Discussion began with agreement that "it seems logical to seek input from the people who do it." Another Committee member agreed — there seems to be a strongly felt need. The draft will draw attention. Responding to a question, Judge Lioi reiterated that this is not a proposal for publication. The Subcommittee seeks only to go forward in gathering more information. The first rounds have been valuable, but the focus may have been diffused by the strong reactions to proposals to specify stingy page limits for briefs. Providing a clear target in the form of draft rules will also stimulate clearly focused responses. Efforts will be made to find and engage as many stakeholders as possible.

Judge Bates suggested that the stakeholders are not likely to

address the question whether it is appropriate to develop rules that address a specific substantive subject. The Committee must continue to deliberate this question. One alternative would be to broaden any new rules to apply generally to all district-court actions for review on an administrative record.

A Committee member responded by suggesting that it is improper to have special rules for special parts of the docket, at least unless special needs are shown to justify the specific focus. Another Committee member shared this concern, but added that we can continue to explore the need for any rules. Judge Lioi pointed out that the Subcommittee Report touches on these questions, beginning at line 47 on page 243. The Report in turn points to the discussion at the November Committee meeting, as reported in the November Minutes.

Judge Bates agreed that the need for uniform national rules is part of the calculation. But he pointed out that the problem of delay in winning benefits arises in the administrative proceedings; Civil Rules will not address that, and district courts act quickly enough that there does not seem to be much room to reduce delay there. Nor can Civil Rules do anything about differences among the circuits on substantive law.

Another judge thought the draft was a great starting point, but asked why it contemplates Rule 12 motions — he has never seen one in the many social-security review actions he has had. It was noted that earlier draft rules had limited motions to issues of exhaustion and finality, jurisdiction, and timeliness. But the Subcommittee thought the full sweep of Rule 12 should be made available. There may not be much risk of dilatory motions to dismiss for failure to state a claim. It would be difficult for a lawyer to frame a complaint that does not meet the proposed standards; pro se litigants might actually benefit from the education provided by a Rule 12(b)(6) motion. An additional consideration is that much of the impetus for uniform national rules seems to arise from the powerful time constraints that confront the lawyers who represent the Commissioner. There is little incentive to multiply proceedings by preliminary motions that can do little more than anticipate the ways in which the merits arguments will explore the administrative record. A different judge sharpened the question: the draft rule sets out seven matters to be included in the complaint. Is there a risk of "Supplemental Rule 2(b)" motions challenging perceived inadequacies in complying with the rule?

Discussion concluded with Judge Bates's thanks to the Subcommittee for its work.

Rule 71.1(d)(3)(B)(i): Newspaper Publication

May 8 version

A specific question about Rule 71.1(d)(3)(B)(i) was raised by an outside observer. The question is whether the rule should continue to make "a newspaper published in the county where the property is located" the first choice for publication of notice of a condemnation proceeding. Discussion at the November meeting concluded by asking the Committee Chair, Judge Bates, and the Reporters to make a recommendation about further action.

The recommendation is to remove this item from the agenda.

The context of Rule 71.1(d) helps to explain the question. Property owners are served with a notice of condemnation proceedings. If an owner resides within the United States or a territory subject to the administrative or judicial jurisdiction of the United States, personal service of the notice must be made "in accordance with Rule 4." Rule 71.1(d)(3)(A).

Rule 71.1(d)(3)(B)(i) addresses service by publication when personal service cannot be made under subparagraph (A). Publication must be supplemented by mailing notice if the defendant's address is known. Whether or not mailed notice is possible, publication must be made "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 suggestion is to eliminate the preference for publication in a newspaper published in the county where the property is located. Publication in any newspaper of general circulation where the property is located would suffice.

In this setting, the main concern centers on the efficacy of publication that cannot be supplemented by mail addressed to a defendant. Which publication is more likely to effect actual notice? A locally published newspaper, even one that does not enjoy general circulation, or any of what may be more than one newspapers of general circulation? Empirical information is required to address that concern usefully, or, if empirical information is as difficult to generate as seems likely, empirical intuition. Where will a property owner who anticipates possible condemnation proceedings more likely look for notice?

Several considerations prompt the recommendation to withdraw this question from further study. The present rule has been used without known questions for many years. The Department of Justice, the most common litigant in condemnation proceedings, is neutral about the proposal. The proposal itself rests on uncertain assumptions about the possible effects of state practice on publication under Rule 71.1(d)(3)(B)(i). Rule 4 service under subparagraph (A) apparently includes service under state law as incorporated in Rule 4(e)(1) and (h)(1), which may include service

by publication on terms that do not give priority to a newspaper published in a particular county. But subparagraph (B)(i) seems an independent and self-contained provision that does not make any reference to state law. It governs by its own terms.

One element of the empirical question goes to the prospect that there may be two, three, or even more newspapers of general circulation in the place where the property is located. Giving priority to a newspaper published in the county narrows the search, perhaps to one unique newspaper. Free choice among competing newspapers means that a careful property owner must attempt to identify and regularly read them all.

Additional questions arise from issues that have been made familiar, but not easy, by repeated encounters. What counts as a newspaper in an era of physical publication, electronic publication, and mixed physical and electronic publication? Where is an electronic edition published? The Committee has not yet found these issues ripe for study as a general matter, and it would be awkward either to take them on or to ignore them in proposing amendment of Rule 71.1(d)(3)(B)(i).

The Committee voted without opposition to remove this item from the agenda.

Rule 4(k)

Two proposals have been made to expand personal jurisdiction under Rule 4(k). They are presented to the Committee without any recommendation as to future action. The purpose is to identify the many complex and difficult challenges that will be faced if one or both is taken up, and to open a discussion of the practical benefits that might be gained by further extensions of personal jurisdiction. The nature and importance of the benefits should figure importantly in deciding whether to take on the challenges.

One central challenge will be whether rules defining personal jurisdiction fall within the "general rules of practice and procedure" that may be prescribed under the Rules Enabling Act. Competing views on this question will be outlined in the present discussion. A second set of challenges arises from the common element that underlies both proposals. The proposals rest on the view that the constitutional constraint on personal jurisdiction in federal courts arises from the Fifth Amendment, not the Fourteenth Amendment. What Fifth Amendment due process requires is sufficient contacts with the United States as a whole, not sufficient contacts with any specific place within the territorial limits of one or another state.

Moving beyond the challenges, the proposals rest on the belief

that much good can be accomplished by extending the reach of federal court personal jurisdiction to Fifth Amendment due process limits. The need to select appropriate places to exercise the nationwide power can be satisfied by venue statutes, as they are now or as they might be amended to reflect the new jurisdiction.

The background begins with present Rule 4(k). Both paragraphs (1) and (2) explicitly establish personal jurisdiction. Rule 4(k)(1)(A) provides that serving a summons establishes personal jurisdiction over a defendant who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located. This provision turns the jurisdiction of a district court on the longarm statutes of the state where it sits, and incorporates the 14th Amendment due process limits that constrain the longarm statute when it is applied by a state court. (Rule 4(k)(1)(B) extends personal jurisdiction, independent of state lines or practice, through a "100-mile bulge" to join a party under Rule 14 or Rule 19.)

Rule 4(k)(2) is more adventuresome. It provides that "for a claim that arises under federal law," serving a summons establishes personal jurisdiction if "(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and (B) exercising jurisdiction is consistent with the United States Constitution and laws."

The first proposal, advanced by Professor Borchers, is more modest. It would simply expand Rule 4(k)(2) to include not only claims that arise under federal law but also cases in which jurisdiction is based on 28 U.S.C. § 1332 diversity and alienage jurisdiction. It would retain the requirement that the defendant not be subject to jurisdiction in any state's courts of general jurisdiction. The central purpose is to reach internationally foreign defendants that have sufficient contacts with the United States as a whole to support jurisdiction but lack sufficient contacts with any individual state. The purpose is illustrated by the circumstances of the Supreme Court's decision in *J. McIntyre Mach., Ltd. v. Nicastro,* 564 U.S. 873 (2011). Nicastro, the plaintiff, was injured in New Jersey while operating a large machine that the defendant made in England. Although the machine made its way to the United States, and although the defendant clearly and deliberately sought to make as many sales as it could in the United States, the Court ruled that New Jersey could not exercise personal jurisdiction. The defendant neither sold the machine to the plaintiff's employer nor shipped it directly to the employer. The sale was made by an independent distributor in another state. At most only four, and perhaps just this one of the defendant's machines had come into New Jersey. The proposal is that the broader reach of the national sovereign authorized by the Fifth Amendment supports personal jurisdiction.

May 8 version

Additional goals are offered by Professor Spencer to support the measure of personal jurisdiction that he believes proper, although he has come to believe that the limits of the Enabling Act mean that only Congress can adopt his proposal. This proposal would abandon Rule 4(k)(1) and expand Rule 4(k) to provide that serving a summons establishes personal jurisdiction when exercising jurisdiction is consistent with the United States Constitution. "[A]nd laws" might be added as a further constraint, drawing from present 4(k)(2)(B). This proposal would establish uniform personal jurisdiction rules for the federal courts, freeing them from dependence on the vagaries of such state statutes as do not extend to the limits of Fourteenth Amendment due process and likewise freeing them from Fourteenth Amendment limits that derive from the territorial definitions of state sovereignty. Federal courts would be freed to locate litigation in the most desirable court, as defined by federal venue statutes. Federal courts also would be freed from much of the preliminary wrangling that now arises over personal jurisdiction, since in most cases it will be clear that the defendant has sufficient contacts with the United States to satisfy Fifth Amendment due process. For diversity cases, expanded personal jurisdiction would help to advance the purposes of providing convenient federal courts for enforcing state-created rights. And in some ways, defendants also would be helped by expanding the narrow limits of present Rule 4(k)(1)(B) to allow broader joinder of defendants both by the plaintiff initially and by the defendant under Rules 13, 14, 19, and 20.

These potential gains from expanded personal jurisdiction should be considered carefully. They may be real and important. Or they may be largely theoretical, particularly if experience shows that in most cases there is a convenient court that can assert personal jurisdiction over all parties that should reasonably be joined. The benefits, large or small, must then be weighed against the potential costs and uncertainties.

One major uncertainty arises from Professor Spencer's conclusion that the Rules Enabling Act does not authorize the Supreme Court to prescribe rules defining personal jurisdiction. He will elaborate this view later in the meeting. The core conclusion is that personal jurisdiction lies outside the initial authority to prescribe "general rules of practice and procedure." On this view, procedure encompasses what the parties and court do once the court acquires personal jurisdiction. Jurisdiction is a distinct and separate concept. In a pinch, it also might be argued that rules that expand or limit personal jurisdiction abridge, enlarge, or modify a substantive right. A still more ambitious argument can be made that Article III judicial power necessarily entails authority to exercise personal jurisdiction to the limits permitted by Fifth Amendment due process. On this view, Rule 4(k)(1) is invalid not because it establishes personal jurisdiction but because it

curtails the personal jurisdiction that inheres in any case that falls within a statute establishing subject-matter jurisdiction within Article III.

A contrary view of the Enabling Act is also possible. One approach is to resist the temptation to rely on abstract definitions of "practice and procedure" and of "jurisdiction." On this approach, what is "practice and procedure" for Enabling Act purposes may be different from what is practice and procedure for other purposes. The question should be approached more directly by asking whether the Enabling Act should be interpreted to include rules that define personal jurisdiction. That approach does not lead to an automatic answer. Defining personal jurisdiction is a matter of important and sensitive concerns. It may be particularly sensitive to rely on courts to define the extent of their own power. In many ways, particularly with respect to internationally foreign defendants, personal jurisdiction is a more fundamental component of judicial power than the lines that limit federal subject-matter jurisdiction. A defendant from Maine or France may care more that he not be subject to suit in any court in California than that the court in California be a federal court or a state court.

The approach that attempts a purposive interpretation of the Enabling Act can be bolstered by looking to tradition. The original version of Rule 4 expanded authority to serve summons from the district to anywhere in the state embracing the district. The Supreme Court upheld this rule as one relating to the manner and means of enforcing rights. In 1963 Rule 4 was amended to confirm and expand decisions interpreting an earlier version to enable federal courts to assert jurisdiction under state longarm statutes. Then Rule 4(k)(2) was added in 1993, reacting to a Supreme Court decision that although a foreign defendant might well be subject to personal jurisdiction because of sufficient contacts with the United States, jurisdiction could not be perfected for want of a rule authorizing service. The Court hinted that this lack could be corrected by Congress or by court rule. *Omni Capital Int'l. v. Rudolf Wolff & Co.*, 484 U.S. 97, 111 (1987). The 1993 Committee Note says that the amendment responds to the Court's "suggestion." The Committee Note also begins with a "SPECIAL NOTE: Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (k)(2). Should this limited extension of service be disapproved," the Committee recommends adoption of the balance of the rule.

The Committee, in short, seems to have acted, and to have acted repeatedly, on the view that the Enabling Act authorizes adoption of rules that define personal jurisdiction. This view seems to be supported by Supreme Court decisions. The tradition and opinions may be wrong. In any event a conclusion that authority

exists does not define wise exercise of the authority.

Expanding personal jurisdiction for cases governed by state law will add to the occasions for arguing choice-of-law issues. As the law now stands, a federal court must choose among competing state laws by adopting the choice-of-law rules of the state where it sits. This rule has been applied even in an interpleader action that could not have been entertained by the local state courts for want of personal jurisdiction over all claimants. Expanding personal jurisdiction could expand a plaintiff's opportunity to choose governing law by picking among the courts that have venue. It is possible to think about adding choice-of-law provisions to a rule that expands personal jurisdiction, but the task would be uncertain and contentious. And on some philosophies of choice-of-law it would abridge, enlarge, or modify substantive rights.

Reliance on present venue statutes to establish suitable constraints on the exercise of nationwide personal jurisdiction also presents problems. A simple example is provided by 28 U.S.C. § 1391(c)(3): "a defendant not resident in the United States may be sued in any judicial district." For those defendants, there is no venue limit. A more complex example is provided by § 1391(c)(2), which provides that a defendant that is an entity with the capacity to sue and be sued "shall be deemed to reside * * * in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question." This provision interacts with § 1391(b), which establishes venue in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located." If there is only one defendant, venue again does not limit personal jurisdiction. If there are multiple defendants, venue again is no limit if all are entities subject to personal jurisdiction. Other examples may be found, but these suffice to suggest that present venue statutes are not adequate to the task. Carefully crafted legislation would be needed to establish satisfactory venue rules to locate litigation within a system of federal courts exercising general nationwide jurisdiction.

A number of other questions would be raised as well. It is enough to sketch them. Congress has enacted a number of statutes that assert some form of "nationwide" personal jurisdiction. It is not clear whether all of them would be interpreted to reach as far as a new court rule might. If the rule goes farther than the statute, there might be a supersession question. The Enabling Act authorizes rules that supersede statutes, but this power is exercised only for compelling reasons. A different approach would be to cut the rule short if the statute does not go so far — that might be accomplished by retaining the requirement in present Rule 4(k)(2)(B) that exercising jurisdiction be consistent with the United States "laws."

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Establishing personal jurisdiction for some claims and parties might also prompt further developments in the concept of pendent personal jurisdiction. The occasion would be much reduced by a general national-contacts rule, but might arise for related claims or even parties that share a common nucleus of operative fact but standing alone do not seem to have sufficient independent national contacts.

A further complication relates to the venue statutes. There is a strong strain of thought that Fifth Amendment due process is not always satisfied by contacts with the nation as a whole. There may be some inherent requirements of fairness that protect against the transactional inconveniences of litigating in a distant forum. Working through these questions would take time, imagination, and sound judgment.

Finally, it may be wondered what to make of the increasingly sharp distinctions between specific and general jurisdiction that are emerging in Fourteenth Amendment decisions, and of the elusive tests for asserting specific jurisdiction. If a defendant is engaged in a business that pervasively involves all the states, does any real distinction remain?

Professor Spencer outlined his views as explained in two articles. The earlier article is included in the agenda materials. The more recent article remains in draft and is being revised for publication in 2019. The nubbin is that as desirable as it would be to expand federal personal jurisdiction by freeing it from ties to the lines of territorial sovereignty that confine state courts, jurisdiction is not a matter of practice or procedure. Enabling Act rules can only address the manner of adjudicating claims. Both Rule 4(k) and the property jurisdiction provisions in Rule 4(n) go too far. Even Rule 4(k)(1), invoking the bases for personal jurisdiction in state courts, needs to be enacted by Congress.

Rules of evidence are not procedure, but they are authorized by separate language in § 2072(a). It cannot be said that anything that is not substantive is procedural.

The better line begins with recognizing that it is the Fifth Amendment that limits the territorial reach of federal courts. A federal court should be able to exercise personal jurisdiction whenever that is consistent with due process and the venue statutes. "Rule 4(k)(1) is an artificial constraint." With "some tweaking," the venue statutes can do the job of localizing litigation within the federal court system, along with a more fully developed Fifth Amendment fairness test. The federal courts have not yet had occasion to develop such fairness tests, but expanding a national-contacts foundation will provide the occasion.

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Present venue statutes reflect a background of Fourteenth Amendment due process thought. They will need to be revised to fit expanded personal jurisdiction.

This expansion would not change the result in the Goodyear case — the Turkish manufacturer of a tire that failed in Paris would not become subject to federal-court jurisdiction. It is not clear whether national-contacts jurisdiction would support the claims of nonresident plaintiffs in a federal court in California against the defendant in the Bristol-Meyers case.

Choice of law is not a problem. Expanding personal jurisdiction might give plaintiffs a greater choice of federal courts and thus expand the bodies of state choice rules they could shop for, but any state rule is limited to choosing a law that has a constitutionally adequate connection to the litigation. If Congress enacts expanded jurisdiction, it can give attention to this.

Professor Spencer concluded by stating that it is worthwhile to continue Committee discussion, but that the aim should be to develop proposals for action by Congress.

A Committee member asked whether the Committee has acted on matters outside the Enabling Act by making proposals to Congress. Professor Marcus noted that Evidence Rule 502 is a recent example of the special provision in 28 U.S.C. § 2074(b): "Any such rule creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." But it went through the full Enabling Act process. The only difference is that other Enabling Act rules take effect after submission to Congress "unless otherwise provided by law," § 2074(a).

Apart from that, the Committee has not engaged in recommending legislation, either by developing a proposed statute or by a more open-ended suggestion that Congress should address a problem. The closest approaches have come when fully developed proposals have adopted Enabling Act rules in the ordinary course, but the rules can become effective only if existing statutes are revised. The Appellate Rules Committee has successfully won statutory revisions to support Appellate Rules amendments, and statutory revisions were also sought and won to support some of the rules changes adopted in the Time Computation Project that swept across multiple sets of rules. The Federal-State Jurisdiction Committee regularly comments on proposed legislation, and Enabling Act Committee Chairs occasionally send formal letters to Congress commenting on pending bills. But there is no known precedent for something like developing a package of proposed personal jurisdiction and venue statutes.

A judge asked about the 1963 amendments of the personal jurisdiction provisions in Rule 4. Were they seen as expanding or as limiting personal jurisdiction? The answer is that they were seen to confirm existing interpretations of earlier Rule 4 provisions, and to ensure that federal courts could reach as far as their neighboring state courts. There is no indication that they were seen as limiting inherent personal jurisdiction that otherwise would be exercised without Rule 4 provisions for service. Instead they were intended to enable a federal court to do what a state court could do, no more.

This question came back in a different form: If Rule 4(k)(1) were rewritten to free federal courts from the limits on state-court jurisdiction, and for the purpose of expanding federal-court jurisdiction, what would be the practical effect? Will most cases have venue only where a substantial part of the events or omissions giving rise to the claims occurred, see § 1391(b)(2)? Professor Spencer answered that it would remain necessary to redefine "resides." But the outcome would not be complete chaos. The earlier discussion of the effects of the present definitions of "resides" was renewed, with an added twist. The discussion of multidistrict

centralization pointed to the limits that prevent transfer for trial in an MDL court that cannot independently establish personal jurisdiction. Adopting national-contacts personal jurisdiction could dramatically change practice in this respect.

Discussion returned to the benefits of expanding federal-court jurisdiction. It would reduce wrangling about personal jurisdiction in many cases. But it is difficult to predict just how far, and when, the actual result would be to bring actions to a federal court that could not entertain them now.

The question was repeated: Is there some value in going to Congress first? A Committee remember responded that normally the Committee does not do that.

Another Committee member asked whether, if indeed the Enabling Act process cannot prescribe rules of personal jurisdiction, parts of present Rule 4 are invalid? It would be better to avoid acting in a way that would suggest that current rules are invalid. And the discussion shows that indeed these are complicated questions.

Judge Bates suggested the Committee vote on three possible approaches: (1) Close out this agenda item. (2) Undertake full exploration of rules amendments now. This will be a major undertaking, with added complexity arising from interdependence with the venue statutes. or (3) Carry this topic forward on the agenda, but not pursue it actively now. No votes were cast for closing it out. Two votes were cast for present active pursuit. Eight votes were cast for pausing work, carrying the subject forward for future consideration.

Rule 73(b): Consent to Magistrate Judge

Judge Bates guided discussion of this agenda item. Rule 73(b)(1) provides that to signify consent to conduct proceedings before a magistrate judge "the parties must jointly or separately file a statement consenting to the referral. A district judge or magistrate judge may be informed of a party's response * * * only if all parties have consented to the referral."

This provision for anonymity implements the direction of 28 U.S.C. § 636(c)(2), which directs that rules of court for reference to a magistrate judge "shall include procedures to protect the voluntariness of the parties' consent."

The problem arises from a collision between the provision for anonymity and the CM/ECF system. As soon as a single party files a consent form, the system automatically forwards the consent to the district judge assigned to the case. Apparently there is no way to circumvent this feature. An alternative might be to direct the

parties to deliver their separate consents to the clerk without filing them. That approach, however, would impose significant burdens on the clerk's office and would lead to occasional lapses in one direction or another.

The suggestion to amend Rule 73(b)(1) made by the clerk for the Southern District of New York is for a simple change, deleting the reference to separate statements: "the parties must jointly ~~or separately~~ file a statement consenting * * *." It may be that somewhat greater revisions should be made to facilitate the process of generating a joint statement. Guidance might be found in the joint consent form used in the Southern District of Indiana.

Discussion began by suggesting that it is worthwhile to at least attempt to sort through this question.

A judge observed that the problem is that one party consents, and others do not, and the judge finds out about it. Or it may be that all but one consent, and start to behave as if all consented, forcing a nonconsenting party to protest.

Another judge observed that the rule functioned well in pre-ECF days. Now it is incumbent on the Committee to look at it. Yet another judge and a practicing Committee member agreed.

A different judge observed that in some districts magistrate judges are automatically assigned to civil actions, leaving it to the parties to consent or withhold consent. Any amended rule must be compatible with this practice.

Judge Bates concluded the discussion by stating that the question will be pursued further. Laura Briggs and a Committee member will be asked to help.

Other Agenda Items

17-CV-EEEEEE: Judge Bates described this proposal that return receipts be required for service by mail under Rule 5(b). He noted that the Committee has recently devoted close attention to Rule 5(b), focusing on electronic service and accepting service by ordinary mail without further ado. The Committee voted to remove this item from the agenda without further discussion.

18-CV-A: Rule 55(a) directs that "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default." The proposal complains that one district court refuses to let its clerk enter default, permitting action only by a judge. The solution is to add a sentence embellishing the "must enter" already in the rule. Judge

Bates suggested that there may be some reason to preserve an element of judicial discretion about entering the default, in part because Rule 55(c) allows the court to set aside a default for good cause. Nor should the Committee be charged with policing potential misapplications of a Civil Rule by continually adding new language to emphasize what the rule already says. The Committee voted without further discussion to remove this item from the agenda.

18-CV-G: This proposal urges that complaints have become too long: "New Age complaints are completely out of control." It recommends a rule that would considerably shorten complaints. Judge Bates observed that most judges likely would agree that many complaints are too long. The Committee, however, has repeatedly considered Rule 8, often in depth, over the course of the last 25 years. There is little reason to again take up the subject now. The Committee voted to remove this item from the agenda without further discussion.

Pilot Projects

Judge Bates noted that the mandatory initial discovery pilot project is actively going forward in the District of Arizona and the Northern District of Illinois. Work continues to find districts to participate in the expedited procedures pilot project.

Judge Campbell said that the mandatory initial discovery pilot took effect in the District of Arizona on May 1, 2017. So far 1,800 cases are in the pilot. "It has been very smooth." The Arizona bar is used to extensive initial disclosures in state-court practice. The test will come when the cases come to summary judgment or trial and arguments are made to exclude evidence that was not disclosed. "We likely can deal with that," in part by drawing guidance from state-court practice.

Judge Dow reported that the Northern District of Illinois launched the mandatory initial discovery pilot on June 1, 2017. Great help was provided by draft standing orders and related guidance from the District of Arizona. "Our lawyers aren't used to it," unlike lawyers in Arizona. Rumors have been heard that e-discovery vendors are advising firms not to file cases with massive e-discovery in the Northern District because of the project. But the court has been reasonable about the deadlines set in the pilot rules. Parties are not required to file terabytes of information in 30 days. Emery Lee is collecting data for the Federal Judicial Center's evaluation of the project. About 75% of the cases in the Northern District are in the project. All but one of the active judges participate. Only one senior judge participates. The project is going well.

Emery Lee described the FJC study of the mandatory initial discovery projects. He is approaching the second round of lawyer

surveys of cases closed within the last six months. "We have data on 5,000-plus cases in the two districts together." A Committee member reported hearing that one effect of the project is that people settle when they find documents they do not want to disclose. Lee responded that the study is tracking that.

The FJC also is studying data on the longstanding differentiated procedure practice in the Northern District of Ohio, with help from Judge Zouhary. Experience there suggests that it is easy to assign cases to tracks.

Discussion of the mandatory initial discovery project turned to the Employment case protocol that was created in November, 2011. The FJC has collected data on cases resolved in 2016-2017. In all it has data on hundreds of cases. The more recent data include mature cases. There is a plan to collect data on a sample of comparison cases. The hope is to be able to report in November.

Some courts already have adopted the parallel protocol for individual actions under the Fair Labor Standards Act.

Next Meeting

Judge Bates confirmed that the next scheduled meeting will be on November 2 in Washington, D.C.

The meeting adjourned.

Respectfully submitted,

Edward H. Cooper
Reporter