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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

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

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

RE: Report of the Advisory Committee on Civil Rules

DATE: December 6, 2017

1 *Introduction*

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

4 No items are submitted for action by this Report.

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

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

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

28 The three major potential undertakings are described in Part II. One would respond to the
29 request of the Administrative Conference of the United States, firmly supported by the Social
30 Security Administration, that specific rules be adopted to regulate district-court review under
31 42 U.S.C. § 405(g) of administrative decisions that deny individual claims for disability benefits.
32 Another would undertake to develop specific rules to supplement the general Civil Rules in
33 consolidated Multidistrict Litigation proceedings. The third would require mandatory initial
34 disclosure of third-party litigation financing agreements. The Social Security review proposal
35 will require close work, but it is finite in scope. If MDL rules are to be developed, the first steps
36 will force the Committee to develop a deep understanding of the many different kinds of cases
37 that may be consolidated and to learn about the procedures currently crafted by MDL judges to
38 successfully manage proceedings. But at least MDL proceedings are well developed, and the
39 basic framework is generally understood. Third-party litigation financing is different. It seems to
40 be expanding rapidly. The submissions to the Committee and other sources hint that third-party
41 financing agreements come in many forms, giving rise to various concerns. The initial
42 submissions supporting disclosure are countered by submissions that deny all of the fact
43 assertions offered by the proponents and question the proponents' real motives. Finally, Part II D
44 provides a brief summary of the need to allocate Committee resources among these three
45 potential subjects.

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

53

I. RULE 30(b)(6)

54 The Civil Rules Advisory Committee formed its Rule 30(b)(6) Subcommittee in April
55 2016 in response to several submissions suggesting various changes to the rule. After
56 considerable discussion, that Subcommittee identified 16 different issues that might warrant
57 study as possible rule amendments, and initial sketches of amendments that might address those
58 issues in various ways were discussed. Those sketches were included in the Standing
59 Committee’s agenda book for its January 2017 meeting.

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

- 67 (1) Inclusion of reference to Rule 30(b)(6) depositions in Rules 26(f) and 16
- 68 (2) Adding rule provisions concerning whether statements by a 30(b)(6) witness
69 constitute judicial admissions
- 70 (3) Providing for supplementation of 30(b)(6) testimony
- 71 (4) Forbidding contention questions during 30(b)(6) depositions
- 72 (5) Adding a rule provision authorizing objections by the named organization to a
73 30(b)(6) notice
- 74 (6) Addressing the application of limits in the rules on the number of depositions and
75 the length of depositions to 30(b)(6) depositions

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

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

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

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

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

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

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

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

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

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

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

131 **Rule 30. Depositions by Oral Examination**

132 * * * * *

133 **(b) Notice of the Deposition; Other Formal Requirements**

134 * * * * *

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

148 * * * * *

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

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

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

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

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

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

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

185

II. THREE MAJOR OPPORTUNITIES

186

A. Social Security Disability Review

187 The Administrative Conference of the United States, working from a massive report
188 prepared by Professors Jonah Gelbach and David Marcus, has recommended that explicit rules
189 be developed to establish a uniform national procedure for district-court actions under 42 U.S.C.
190 § 405(g) to review final administrative decisions that deny an individual request for disability
191 benefits. Discussion in the Standing Committee last June led to a preliminary determination that
192 any new rules probably should be in the Civil Rules rather than in a sixth stand-alone set of rules.
193 Further study was assigned to the Civil Rules Committee, which has decided that its initial work
194 should remain focused on Social Security review cases, not on all cases involving review on an
195 administrative record.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

305 **B. Rules for MDL Proceedings**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

412 **C. Disclosing Third-Party Litigation Financing Agreements**

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

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

420 This proposal was considered in 2014, and again in 2016. Each time it was carried
421 forward for further consideration. The sense then was that third-party litigation financing is both
422 growing and evolving, and that it takes many forms with various sorts of agreements. The
423 information provided by different sources often presents direct contradictions about whether
424 there are general practices, what the practices may be, and what variations may occur or emerge.
425 Work toward possible rules must begin, if at all, by undertaking a careful quest for information
426 that may be hard to come by. Neither financing firms nor lawyers nor litigants may be eager to
427 reveal the full terms of their agreements. None of them may even be able, much less willing, to
428 describe the full impact of their agreements on the conduct of lenders, lawyers, and parties in
429 third-party funded litigation. The topic may be no more ripe for further work now than it was in
430 2014 or 2016.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

553 **D. Summary**

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

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

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

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

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

576 **III. OTHER RULE PROPOSALS**

577 **A. Publication of Notice in Condemnation Actions**

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

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

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

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

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

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

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

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

618 **B. The Role of Judges in Settlement**

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

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

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

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

643 **IV.**

644 **A. Pilot Projects**

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

650 The Mandatory Initial Discovery project displaces the limited initial disclosures required
651 by Rule 26(a)(1) by requiring early responses to the discovery requests framed by the project. A
652 party must provide the requested information, just as with party-initiated discovery, even though
653 the information is unfavorable to the party’s position and would not be used by the party in the
654 litigation. The project became effective in the District of Arizona by general order on May 1,
655 2017. Most judges in the Northern District of Illinois adopted it, taking effect on June 1.

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

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

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

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

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

685 **B. FLSA Discovery Protocol**

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

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

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

TAB 4B

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SUMMARY OF 2017 30(b)(6) COMMENTS

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

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

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

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

Overall

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In all other respects, depositions under this sub-section

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Inclusion in Rules 26(f) and 16

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Leto Copeley (BBBBB): Promoting cooperation during

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

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

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

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

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

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

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

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

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

Judicial Admissions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

are appropriate.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Supplementation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

organizational litigants would be allowed to that without cost.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Forbidding contention questions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Adding a provision for objections

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

National Employment Lawyers Ass'n Georgia (HHHH):

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

is a remedy in search of a problem.

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

Addressing application of limits
on number and duration of depositions

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

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

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

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

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

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

important discovery tools.

(1) Number of topics: Too often, Rule 30(b)(6) notices are overloaded with dozens of topics. (A footnote cites cases involving 80 to 220 topics.) Responding to such sprawling lists requires the responding party to investigate all factual aspects of each topic. There should be a limit of ten topics.

(2) Scope of topics: The rule should also require that topics be reasonable in scope and proportional to the needs of the case. But some courts interpret the rule's directive that the topics be defined with "reasonable particularity" as requiring only that the notice "describe topics with enough specificity to enable the responding party to designate and prepare one or more deponents." These sorts of lists frequently lead to rancorous disputes.

(3) Numerical limit on deposition hours: Based on the Committee Note to the 2000 addition of a seven-hour limit to depositions, many courts allow multiple 30(b)(6) depositions on the ground that the seven-hour clock "resets" each time a different corporate designee takes the witness chair. This approach has the perverse effect of penalizing organizations that designate multiple witnesses, thereby incentivizing the use of a single witness. In many cases, however, both sides would benefit from designation of additional witnesses.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

lots of people, it will.

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

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

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

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

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

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

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

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

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

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

Robert Rosati (AAAAA): In my experience, counsel understand that a 30(b)(6) deposition counts as one, and the absence of a rule provision is not important.

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

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

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

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

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

Other matters

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

same witness.

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

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

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

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

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

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

1. I always attach exhibits to the deposition notice and integrate the exhibits with the areas of inquiry. If you want the deposition to be effective, you have to tell the witness what the areas of inquiry are. If you don't provide the exhibits, it is much more likely that the witness will not be properly prepared.
2. A minimum notice requirement is unnecessary, assuming competent counsel who coordinate the timing with each other.
3. Forbidding questioning beyond the topic list is meaningless. The standard 30(b)(6) notice will include: "I will ask the witness or witnesses about their personal knowledge of the facts of the case outside the areas of inquiry addressed in the balance of this deposition notice."
4. Substituting interrogatories for live testimony may work, and perhaps a deposition on written questions. But a Rule 31 deposition works only in very narrow circumstances.
5. Advance notice of the identity of the witnesses would be helpful.
6. The rule does not presently prohibit a second deposition of the organization.
7. Limiting 30(b)(6) to parties would be a bad idea. I use 30(b)(6) with nonparties because the alternative would often involve deposing a lot of nonparty employees.
8. I can't imagine how identifying the documents reviewed by the witness in preparation would benefit anyone.
9. Expanding initial disclosure would not obviate any problems with 30(b)(6).
10. Attempting to forbid "duplication" would be a bad idea. This would tempt a party to offer false testimony in a

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

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

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

1. The rule should also include a 30-day notice period. Notices are often sent out late in the discovery process.
2. Further depositions should not be allowed on matters already covered in a 30(b)(6) deposition.
3. The rule should state that the witness is not required to respond with regard to matters not listed in the notice. An instruction not to answer risks sanctions under Rule 30(d).
4. The Federal Rules of Evidence should be amended to permit admissibility of affirmative testimony provided by the witness. Otherwise, counsel may object to admissibility on the ground that the witness lacked personal knowledge.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

process.

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

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

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

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

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Minutes

Civil Rules Advisory Committee

November 7, 2017

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

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

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

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

50 *April 2017 Minutes*

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

54 *Legislative Report*

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

71 *Rule 30(b)(6)*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

306 *Social Security Disability Claims Review*

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

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

330 Social Security disability review annually brings some
331 17,000 to 18,000 cases to the district courts. The national
332 average experience is that 45% of these cases are remanded to
333 the Social Security Administration, including about 15% of the
334 total that are remanded at the request of the Social Security
335 Administration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

542 *Third-Party Litigation Financing*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

737 Professor Coquillette offered several thoughts.

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

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

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

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

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

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

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

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

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

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

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

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

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831 explicit or implicit understandings that repayment will depend
832 on success.

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

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

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

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

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

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

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

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

891 *Rules for MDL Proceedings*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

996 Professor Marcus reported that Professor Andrew Bradt has
997 worked through the history of § 1407. The history shows a
998 tension in what the architects thought it would come to mean for
999 mass torts. The reality today presents "hard calls. The stakes
1000 are enormous, the pressures great. Judges have provided a real
1001 service."

1002 Judge Bates predicted that a rulemaking project would bring
1003 out "two clear camps. We will not find agreement."

1004 The appeals proposals were the last topic approached in
1005 introducing these topics. The suggestions in the submissions to
1006 this Committee are no more than partially developed. It is
1007 clear that the proponents want opportunities to appeal from
1008 pretrial rulings on *Daubert* issues, preemption motions,
1009 decisions to proceed with bellwether trials, judgments in
1010 bellwether trials, and "any ruling that the FRCP do not apply to
1011 the proceedings." It is not clear whether all such rulings
1012 could be appealed as a matter of right, or whether the idea is
1013 to invoke some measure of trial-court discretion in the manner
1014 of Civil Rule 54(b) partial final judgments. Nor is it clear
1015 what criteria might be provided to guide any discretion that
1016 might be recognized. One of the amendments of § 1407 embodied
1017 in H.R. 985 would direct that the circuit of the MDL court
1018 "shall permit an appeal from any order" "provided that an
1019 immediate appeal of the order may materially advance the

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1020 ultimate termination of one or more civil actions in the
1021 proceedings." The proviso clearly qualifies the "shall permit"
1022 direction, but the overall sense of direction is uncertain. The
1023 Enabling Act and 28 U.S.C. § 1292(e) authorize court rules that
1024 define what are final judgments for purposes of § 1291 and to
1025 create new categories of interlocutory appeals. If the
1026 Committee comes to consider rules that expand appeal
1027 jurisdiction, it likely will be wise to coordinate with the
1028 Appellate Rules Committee.

1029 The first suggestion when discussion was opened was that
1030 these questions are worth looking into. The Committee may, in
1031 the end, decide to do nothing. "Some of the ideas won't fly."
1032 But it is worth looking into.

1033 Judge Bates noted that almost all of the input has been
1034 from the defense side. The Committee has yet to hear the
1035 perspectives of plaintiffs, the Judicial Panel on Multidistrict
1036 Litigation, and MDL judges.

1037 A Committee member noted that his experience with MDL
1038 proceedings has mostly been in antitrust cases, "on both sides
1039 of the docket," and may not be representative. "The challenges
1040 for judges are enormous." Help can be found in the Manual for
1041 Complex Litigation; in appointing special masters; in seeking
1042 other consultants; and in adaptability. Still, judges' efforts
1043 to solve the problems may at times seem unfair. It is difficult
1044 to be sure about what new rules can contribute. If further
1045 information is to be sought before deciding whether to proceed,
1046 where should the Committee seek it?

1047 Judge Bates suggested that it may be difficult to arrange a
1048 useful conference of multiple constituencies in the course of a
1049 few months or even a year. The Committee can reach out by
1050 soliciting written input. It can engage in discussions with the
1051 Judicial Panel. It can reach out to judges with extensive MDL
1052 experience. Judge Fogel noted that the FJC and the Judicial
1053 Panel have scheduled an event in March. "The timing is very
1054 good." That could provide an excellent opportunity to learn
1055 more.

1056 Another judge suggested that judges that have managed MDL
1057 proceedings with large numbers of cases might have useful ideas

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1058 about what sort of rules would help. "We have nowhere near the
1059 information we would need to have" to work toward rules
1060 proposals. At least a year will be required to gather more
1061 information.

1062 A Committee member echoed this thought. "We're far from
1063 being ready to think about this." She is not opposed to looking
1064 into these questions, "but we must hear from all sides."

1065 Another judge noted that she has an MDL proceeding with
1066 more than 4,000 members. She has 17 *Daubert* hearings scheduled.
1067 "It's a lot of pressure" to get things right. We should think
1068 about working with the Appellate Rules Committee. Another judge
1069 described an MDL proceeding with 3,200 claimants and 20 *Daubert*
1070 hearings.

1071 A Committee member asked whether the Judicial Panel has
1072 accumulated information about MDL practices.

1073 Judge Campbell described resources available to MDL judges.
1074 The Judicial Panel has a web site with a lot of helpful
1075 information and forms. The Judicial Panel staff attorneys are
1076 very helpful about model orders. The Manual for Complex
1077 litigation is useful. There are annual conferences for MDL
1078 judges. And lawyers "bring a lot to the table." Experienced
1079 MDL lawyers reach agreement much more often than they disagree.
1080 But the question of appeal opportunities is important and should
1081 be explored. It would be very hard to manage an MDL if there are
1082 multiple opportunities to appeal. As an example, in one massive
1083 securities case a § 1292(b) appeal was accepted from an order
1084 entered in August, 2015. The appeal remains pending. The case
1085 has been essentially dead while the appeal is undecided.
1086 "Managing with appeals is a tough balance."

1087 Judge Campbell continued by taking up the question of means
1088 for early procedures to weed out frivolous cases. In his 3,200-
1089 claimant MDL there are four new claims filed every day. It is
1090 impossible in this setting to have evidential showings for each
1091 claimant. It would be all the more impossible in cases with
1092 15,000 claimants and 20 new claimants every day. The lawyers
1093 seem to know there are frivolous cases, and bargain toward
1094 settlement with this in mind. They often establish a claims
1095 process that weeds out frivolous claims. What is the need to

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1096 weed them out at an earlier stage? The flow of new cases has no
1097 effect on discovery, on the day-to-day life of the case. It
1098 will be useful to learn why early screening is important.

1099 Another judge seconded these observations. "I don't think
1100 it makes a difference to sort out the frivolous cases at the
1101 beginning. We know they're there. Weeding them out takes
1102 effort. Weeding them out before discovery is especially
1103 doubtful."

1104 An observer from a litigation funder asked what is the
1105 overlap between MDL procedures and third-party financing?
1106 Judge Bates noted that one of the MDL submissions expressly
1107 incorporates the disclosure proposal advanced for third-party
1108 financing.

1109 John Rabiej described his proposal. The Center for
1110 Judicial Studies has been holding conferences since 2011. Data
1111 bases show that a large share of all the federal-court case load
1112 is held by 20 judges. "This holds over time. There is a
1113 business model that will endure for the foreseeable future."
1114 They are planning a conference for April, asking lawyers to
1115 address problems in practice. The Center has prepared a set of
1116 best practices guidelines that are being updated. It is a
1117 mistake to underestimate the burden that frivolous claims
1118 imposes on defendants. The problem is the frivolous cases, not
1119 the "gray-area" cases. Reliable sources suggest that in big
1120 MDLS of some types 20% or more of the claims are "zeroed out."

1121 There is some momentum in practice for providing some
1122 minimum information about each claimant at the outset. In drug
1123 and medical products cases, for example, the information would
1124 show a prescription for the medicine, and a doctor's diagnosis.

1125 MDL proceedings are a big part of the caseload. "The Civil
1126 Rules are not involved." Judges like the status quo because
1127 they like the discretion they have. "Plaintiffs are basically
1128 happy, although they recognize there is room for rules on some
1129 topics such as the number of lawyers on a steering committee.
1130 The Civil Rules Committee should be involved in this."

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1131 Judge Bates agreed that the Committee needs to learn more
1132 about the basis for the positions taken than the simple facts of
1133 what plaintiffs say, what defendants say, what MDL judges say.

1134 Responding to a question, John Rabiej said that he has not
1135 found anyone who wants to talk about third-party financing in
1136 the MDL setting. It would be difficult for the Center to devise
1137 best practices for third-party financing. "It does come up in
1138 MDL proceedings - funders even direct attorneys where to file
1139 their actions."

1140 Susan Steinman noted that most American Association for
1141 Justice members work on contingent-fee arrangements. "They have
1142 no incentive to take cases that are not meritorious." Third-
1143 party financing is not an issue to be addressed in the Civil
1144 Rules. "It is a business option some members choose." There
1145 may be some areas of disagreement among plaintiffs, but they
1146 tend to have negative views of disclosure.

1147 Alexander Dahl said that weeding out frivolous claims is an
1148 important part of the system. "Rules 12 and 56 are designed for
1149 this." In MDL proceedings, the weeding-out function is still
1150 more important. "It is numbers that make them complex." The
1151 numbers are inaccurate in ways that we do not know. "Numbers
1152 raise the stakes and pressures." "Some courts see MDL
1153 proceedings as a mechanism for settlement, not truth-seeking.
1154 Settlements require a realistic understanding of what the case
1155 is worth." And there is an important regulatory aspect. A
1156 publicly traded company has to disclose litigation risks. If it
1157 loses a bellwether trial, it has to disclose the 15,000 other
1158 cases, even though many of them are bogus, inflating the risk
1159 exposure.

1160 Alexander Dahl also provided a reminder that the proposal
1161 to disclose litigation-financing agreements calls only for
1162 disclosure. There is no need to resolve all the mysteries that
1163 have been identified in discussing third-party financing.

1164 A judge asked whether a "robust fact sheet" would satisfy
1165 the need for early screening? She requires them. A defendant
1166 can look at them. Alexander Dahl replied that there are a lot
1167 of cases where that does not happen. When it does happen, it
1168 can work well. What is important is uniformity of practice.

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1169 A Committee member observed that not all MDL proceedings
1170 involve drugs or medical devices.

1171 Another Committee member asked what is the "simple
1172 disclosure" of litigation-funding that is proposed? Alexander
1173 Dahl replied that the proposal seeks the funding agreement,
1174 although "the existence of funding is the most important thing."

1175 Judge Campbell noted that he understands the argument for
1176 early screening. In his big MDL there is a master complaint.
1177 Each plaintiff files a fact sheet. The defendant carefully
1178 tracks the fact sheets and identifies suspect cases. "But I
1179 never see them." The defendants identify the suspect cases in
1180 bargaining. "How is it feasible for the judge to screen them?"
1181 Alexander Dahl responded that the use of fact sheets varies.
1182 Compliance varies. "Often defendants have to gather the
1183 information on their own." Defendants eventually bring motions
1184 to dismiss where that is important. Again, "uniformity in
1185 practice is important, including uniform standards for
1186 dismissal." Further, we need to know what ineffectual judges
1187 are doing. The rulemaking process would be beneficial to all
1188 sides. Rules can allow sufficient flexibility while still
1189 providing guideposts for cases where guidance is needed.

1190 John Rabiej described an opinion focusing on a proceeding
1191 with 30% to 40% "zeroed-out plaintiffs." Fact sheets are used
1192 in many of these cases. That is why lawyers are devising
1193 procedures to get some kind of fact information. That is all
1194 they need.

1195 A Committee member asked why is it necessary to consider
1196 particularized pleading, or motions to dismiss for want of
1197 meaningful evidence? Why is it not sufficient to apply the
1198 pleading standards established by the Twombly and Iqbal
1199 decisions?

1200 Judge Bates summarized the discussion by stating that the
1201 Committee needs to gather more information. Valuable
1202 information has been provided, but it is mostly from one
1203 perspective. The Committee has learned a lot from the comments
1204 provided this day. But the Committee needs more, particularly
1205 from the Judicial Panel. The Committee should embark on a six-
1206 to twelve-month project to gather information that will support

1207 a decision whether to embark on generating new rules. A
1208 Subcommittee will be appointed to develop this information. For
1209 the time being, third-party financing will be part of this, at
1210 least for the MDL framework.

1211 *Rule 16: Role of Judges in Settlement*

1212 A proposal to amend Rule 16 to address participation by
1213 judges in settlement discussions is made in Ellen E. Deason,
1214 *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78
1215 Ohio St.L.J. 73 (2017). The proposal calls for a structural
1216 separation of two functions – the role of “settlement neutral”
1217 and the role of the judge in “management and adjudication.” The
1218 judge assigned to manage the case and adjudicate would not be
1219 allowed to participate in the settlement process without the
1220 consent of all parties obtained by a confidential and anonymous
1221 process. The managing-adjudicating judge could, however,
1222 encourage the parties to discuss settlement and point them
1223 toward ADR opportunities. A different judge of the same court
1224 could serve as settlement neutral, providing the advantages of
1225 judicial experience and balance.

1226 The proposal reflects three central concerns. The judge’s
1227 participation may exert undue influence, at times perceived by
1228 the parties as coercion to settle. Effective participation by a
1229 settlement neutral usually requires information the parties
1230 would not provide to a case-managing and adjudicating judge. If
1231 the judge gains the information, it will be difficult to ignore
1232 it when acting as judge. In part for that reason, the parties
1233 may not reveal information that they would provide to a
1234 different settlement neutral, impairing the opportunities for a
1235 fair settlement.

1236 The proposal recognizes contrary arguments. The judge
1237 assigned to the case may know more about it, and understand it
1238 better, than a different judge. The parties may feel that
1239 participation by the assigned judge gives them “a day in court”
1240 in ways not likely with a different judge or other settlement
1241 neutral. And the assigned judge may be better able to speak
1242 reason to unreasonably intransigent parties.

1243 These questions are familiar. Professor Deason notes that
1244 after exploring these problems both the ABA Model Code of

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1245 Judicial Conduct and the Code of Conduct for United States
1246 Judges adopted principles that simply forbid coercing a party to
1247 surrender the right to judicial decision.

1248 These questions are regularly explained in the Federal
1249 Judicial Center's educational programs for judges, including the
1250 programs for new judges. Discussion at those programs shows
1251 that many judges prefer to avoid any involvement with settlement
1252 discussions. Some, however, believe that they can play an
1253 important role in facilitating desirable settlements. It may
1254 well be that judges who have this interest and aptitude play
1255 important roles.

1256 Judge Bates followed this introduction by noting that this
1257 suggestion has not come from the bar. "Judges do have a variety
1258 of perspectives. I would guess that most judges work hard to
1259 avoid involvement in settlements." Judges often refuse active
1260 participation, but do encourage the parties to explore
1261 settlement.

1262 Judge Fogel noted that some judges do become involved in
1263 settlements, usually with the parties' consent. Some, on the
1264 other hand, refuse to become involved even if the parties ask
1265 for help from the judge. Judges divide on the question whether
1266 it is even appropriate to urge the parties to consider
1267 settlement. "Judges have different temperaments and skill
1268 sets." The Code of Conduct gives pretty good guidance on the
1269 need to avoid coercion. "We should educate judges to be alert
1270 to uses of 'soft power.'" It is difficult to see how a court
1271 rule could improve on the present diversity of approaches.

1272 Another judge fully agreed. "The key is coercion, and
1273 judges need to be aware of subtle pressure." Most often the
1274 judge assigned to the case assigns settlement matters to a
1275 magistrate judge. But as a case comes close to trial, and at
1276 the start of trial, the judge knows a lot about the case, and
1277 can really help the parties reach settlement. The proposed rule
1278 "would have my colleagues up in arms."

1279 A Committee member described one case in which, before a
1280 jury trial, the judge told one party that something bad would
1281 happen if the case were not settled. Other than that, he had
1282 never encountered a judge who pressed one party to settle. "But

1283 as it gets closer to trial – often a jury trial – there may be
1284 pressure on both sides.”

1285 A judge suggested that it is easy to abide by the command
1286 of Criminal Rule 11(c)(2) that the judge not participate in
1287 discussions of plea agreements. “But for civil cases, where
1288 lawyers want the judge to talk to them, it is hard to draft a
1289 rule that would not make me nervous.”

1290 Another judge observed that there are different pressures
1291 in bankruptcy and other bench trials.

1292 The discussion concluded by deciding to remove this
1293 proposal from the agenda.

1294 *Publication Under Rule 71.1(d)(3)(B)(i)*

1295 This proposal is easily illustrated, but then should be fit
1296 into the full context of Rule 71.1(d). Rule 71.1(d)(3)(B)(i)
1297 directs that when notice is published in a condemnation action,
1298 the notice be published:

1299 in a newspaper published in the county where the
1300 property is located or, if there is no such newspaper,
1301 in a newspaper with general circulation where the
1302 property is located.

1303 The proposal would eliminate the preference for a newspaper
1304 published in the county where the property is located, calling
1305 only for publication “in a newspaper with general circulation
1306 [in the county] where the property is located.”

1307 Under Rule 71.1 the complaint in a proceeding to condemn
1308 real or personal property is filed with the court. A “notice”
1309 is served on the owners. The notice provides basic information
1310 about the property and condemnation, and information about the
1311 procedure to answer or appear. Service of the notice must be
1312 made in accordance with Rule 4. But the notice is to be served
1313 by publication if a defendant cannot be served because the
1314 defendant’s address remains unknown after diligent inquiry
1315 within the state where the complaint is filed, or because the
1316 defendant resides outside the places where personal service can
1317 be made. Notice must be mailed to a defendant who has a known
1318 address but who cannot be served in the United States.

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1319 The suggestion to delete the preference for publication in
1320 a newspaper published in the county where the property is
1321 located picks up from other rules for publishing notice that
1322 require only that the newspaper be one of general circulation in
1323 the county. Several provisions of the Uniform Probate Code are
1324 cited, along with New Mexico court rules. The New Mexico rules
1325 add a further twist. Federal Rule 4(e)(1) and (h)(1),
1326 incorporated in Rule 71.1(d)(3)(B)(i), allow service by
1327 "following state law." The New Mexico rule allowing service by
1328 publication in a newspaper of general circulation in the county,
1329 when incorporated in Rule 4, creates a conflict with the
1330 Rule 71.1(d)(3)(B)(i) priority for a newspaper published in the
1331 county.

1332 This suggestion raises empirical questions that cannot
1333 easily be answered. It is easy to point to counties that are
1334 the place of publication of intensely local newspapers that have
1335 limited circulation. And it is easy to point to out-of-county
1336 newspapers that have much broader circulation within the county.
1337 In many counties there may be more than one out-of-county
1338 newspaper of "general" circulation - one question might be
1339 whether a rule should attempt to require publication in the
1340 newspaper of broadest circulation. But a different empirical
1341 question follows. Where will people interested in local legal
1342 notices look? Does it make sense to recognize publication in a
1343 newspaper of nationwide circulation, or is it highly unlikely
1344 that a resident of Sanillac County, Michigan, would look to USA
1345 Today for local legal notices? A participant looked at the
1346 current issue of a local Sanillac County newspaper and found
1347 eight legal notices. Perhaps readers indeed will look first at
1348 a locally published newspaper.

1349 A second question is part theoretical, part empirical. In
1350 adapting the rules to the displacement of paper by electronic
1351 communication, the Committee has avoided many issues similar to
1352 the questions raised by this modest proposal. What counts as a
1353 "newspaper"? Should some form, or many forms, of electronic
1354 media be recognized? And where is a newspaper "published,"
1355 particularly those that appear daily in electronic form but only
1356 one or two days a week in paper form? What should be done with
1357 a newspaper that is published daily on paper, and also - perhaps
1358 continually updated - on an electronic platform? Should a rule

1359 direct publication in both forms, direct one form or the other,
1360 or leave the choice to the government?

1361 It would be possible to recommend the proposed amendment
1362 without addressing these broader questions. But they must at
1363 least be considered in the process of framing a recommendation.

1364 The Department of Justice does not object to the proposal.

1365 A Committee member asked whether the proposed change raises
1366 due process problems. The Supreme Court has recognized that as
1367 compared to other means of notice, publication is a mere feint.
1368 But publication is recognized in circumstances that make better
1369 notice impracticable. So it is for a defendant in a
1370 condemnation action who has no known address.
1371 Rule 71.1(d)(3)(B)(i) begins the compromise by demanding that an
1372 address be sought only by diligent inquiry within the state
1373 where the complaint is filed. Publication is required only for
1374 "at least 3 successive weeks." The test is nicely expressed by
1375 asking what would satisfy a prudent person of business, counting
1376 the pennies but anxious to accomplish notice. In this setting,
1377 this simply returns the inquiry to the empirical questions: are
1378 there knowable advantages so general as to illuminate the choice
1379 between locally published newspapers and others that have
1380 general local circulation?

1381 A judge expressed reluctance to change the rule. "You know
1382 to look to the local newspaper for legal notices," even when a
1383 newspaper published in a nearby county has broader circulation
1384 in the county.

1385 These exchanges prompted a broader question: Should the
1386 Committee look at broader questions of publication by notice "in
1387 the world we live in"? The Committee agreed that the time has
1388 not come to address these questions.

1389 Judge Bates summarized the discussion by suggesting that he
1390 and the Reporters will consider this proposal further. The
1391 present rule language is clear. The question is the wisdom of
1392 its choices. And it may be difficult to answer the empirical
1393 questions that underlie the choice, perhaps prompting a decision
1394 to do nothing.

1395 *IAALS FLSA Initial Discovery Protocol*

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1396 The Institute for the Advancement of the American Legal
1397 System has submitted for consideration "and hopeful endorsement"
1398 the INITIAL DISCOVERY PROTOCOLS FOR FAIR LABOR STANDARDS ACT CASES NOT PLEADED
1399 AS COLLECTIVE ACTIONS.

1400 The Protocols were developed by the people and process that
1401 developed the successful Initial Discovery Protocols for
1402 Employment Cases Alleging Adverse Action. IAALS was the overall
1403 sponsor. The drafting group included equal numbers of lawyers
1404 who typically represent plaintiffs and lawyers who typically
1405 represent defendants. Joseph Garrison headed the plaintiff
1406 team, while Chris Kitchel headed the defendant team. Judge John
1407 Koeltl and Judge Lee Rosenthal again participated actively.

1408 The FLSA protocols appear to be headed for successful
1409 adoption by individual judges, just as the individual employment
1410 protocols have proved successful. The question for the
1411 Committee is whether to find some means of supporting and
1412 encouraging adoption.

1413 The Committee can act officially only in its role in the
1414 Rules Enabling Act process by recommending rules to the Standing
1415 Committee. Formal endorsement of worthy projects does not fit
1416 within this framework, just as the Committee cannot revise
1417 earlier Committee Notes without proposing an amendment of rule
1418 text.

1419 Judge Bates echoed this introduction, noting that
1420 rulemaking is not called for and asking how can the Committee
1421 approve or encourage this project?

1422 Judge Campbell noted that with the individual employee
1423 protocols, the judges on the Committee "took them home," using
1424 them and encouraging other judges to use them. "I would
1425 encourage our judges to do this again."

1426 Professor Coquillette agreed that there are many problems
1427 with acting officially. "Judge Campbell's suggestion is
1428 practical and gets results."

1429 Joseph Garrison reported that plaintiffs' attorneys in
1430 Connecticut have changed their preference for state courts since
1431 the federal court adopted the individual employee protocols.
1432 They now prefer federal court because they get a lot of early

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1433 discovery, often leading to early settlements. Participation by
1434 judges is important. It would be good to have this Committee's
1435 members, and members of the Standing Committee, pursue the new
1436 protocols enthusiastically. These protocols will be more
1437 important in individual FLSA cases than in individual employment
1438 cases because FLSA cases tend to involve small claims and
1439 benefit from prompt closure. Protracted litigation generates
1440 problems with attorney fees.

1441 Brittany Kauffman, for IAALS, expressed the hope that the
1442 Federal Judicial Center will publish the FLSA protocols.
1443 Working with IAALS to get the word out will be helpful.

1444 A Committee member noted that the 30-day timeline in the
1445 FLSA protocols will prove difficult for the Department of
1446 Justice.

1447 Judge Bates thanked the participants in the FLSA protocols
1448 for putting them together. The advice provided by
1449 Judge Campbell and Professor Coquillette is wise.

1450 *Pilot Projects*

1451 Judge Bates reported on progress with the two Pilot
1452 Projects.

1453 The Mandatory Initial Discovery project has been launched
1454 in two courts. It became effective in the District of Arizona
1455 on May 1, 2017. Many judges in the Northern District of
1456 Illinois adopted it, effective on June 1, 2017. The pilot
1457 discovery provisions require answers that reveal unfavorable
1458 information that a party would not use in the case. And they
1459 require detailed information be provided without waiting to be
1460 asked. The provisions are thoroughly developed.

1461 Judge Campbell reported that Judge Grimm oversaw the effort
1462 of developing the Mandatory Initial Discovery project. It is
1463 great work. It was adopted in the District of Arizona by
1464 general order. The time to provide the initial responses, 30
1465 days, is not deferred by motions except for those that go to
1466 jurisdiction. The court did a lot of work to make sure the
1467 CM/ECF system would record the events, supporting research by
1468 Emery Lee that will assess the effects of the pilot. Dr. Lee
1469 also will ask lawyers in closed cases to respond to a brief

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1470 survey about their experiences, about how mandatory initial
1471 discovery affected their cases. The Arizona bar is used to
1472 sweeping initial disclosure, so implementing initial discovery
1473 has gone smoothly. Almost all Rule 26(f) reports reflect
1474 compliance. The District's judges met in September and modified
1475 the general order to address some problems. The only downside
1476 has been that the District has had to suspend its adoption of
1477 the individual employment discovery protocols because they are
1478 inconsistent with the pilot project.

1479 Judge Dow reported that the judges in the Northern District
1480 of Illinois have followed in the wake of the District of
1481 Arizona. Between 16 and 18 active judges, one senior judge, and
1482 all magistrate judges are participating in the pilot;
1483 collectively they account for about 80% of the cases in the
1484 District. The project is progressing smoothly. Lawyers have
1485 rarely had questions. And there have been few problems. When
1486 it is not feasible to complete the mandatory initial discovery
1487 in the prescribed time, additional time is allowed. "We aren't
1488 asking for production of 30 terabytes in 30 days." Some general
1489 counsel have been uncomfortable with a new practice - signing
1490 their filings. As compared to Arizona, the project will begin
1491 differently in Illinois because the lawyers are not accustomed
1492 to this kind of initial disclosure or discovery. For the
1493 judges, Judge Dow and Judge St. Eve provide guidance. "If the
1494 culture changes so lawyers do early case evaluations after they
1495 get the discovery responses, we will have made a difference."
1496 In response to a question, he said that lawyers do cooperate.

1497 Judge Campbell noted that Arizona judges report that most
1498 issues with their sweeping initial disclosure rule arise on
1499 summary judgment or at trial, when objections are made to
1500 evidence that was not disclosed. "If you allow the evidence
1501 rather than exclude it, word gets out fast." In Arizona as in
1502 Illinois, more time to make the initial discovery is allowed in
1503 cases that involve massive information. In turn that prompts
1504 more active case management.

1505 A Committee member expressed a hope that the experience in
1506 Arizona and Illinois can be used to leverage the project for
1507 adoption in other districts. Judge Dow noted that Arizona and
1508 Illinois have already "ironed out a lot of bugs." It will be a
1509 lot easier for other districts to sign on.

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1510 Judges Bates and Campbell responded that although the
1511 initial experience may help, "we have tried." Personal
1512 approaches have been made to about 40 districts. "It is not
1513 always a tough sell initially, but when it gets to discussion by
1514 a full court, issues arise." Work load, vacancies, and local
1515 culture are obstacles.

1516 Judge Bates turned to the Expedited Procedure Pilot. This
1517 project is designed simply to expand adoption of practices that
1518 many judges follow now. But no district has yet adopted the
1519 project. Again, problems arise from the culture of the bar or
1520 court, work load, and like obstacles. A concerted effort is
1521 being made to enlist some districts. Judge Sutton – former
1522 Chair of the Standing Committee – has engaged in the quest, and
1523 Judge Zouhary – a member of the Standing Committee – has joined
1524 the effort. They are prepared to consider more flexibility in
1525 the deadlines set by the project, and to accept participation by
1526 a district that cannot enlist all of its judges. In addition,
1527 the Federal Judicial Center study will be expanded to look at
1528 experience in districts that already are using practices like
1529 the pilot. And a group of leading lawyers are being enlisted to
1530 join a letter encouraging judges to participate.

1531 *Subcommittees*

1532 Judge Bates stated that the Social Security Review
1533 Subcommittee would be formally established, with Judge Lioi as
1534 chair.

1535 Another Subcommittee will be established to consider the
1536 proposals for MDL rules, and with the MDL rules will also
1537 consider the proposal for disclosure of third-party litigation
1538 financing agreements that is adopted in one of the MDL
1539 proposals. This Subcommittee's work will extend for at least a
1540 year, and perhaps more. If the task of framing actual rules
1541 proposals is taken up, the work will extend for years beyond
1542 that.

1543 *Next Meeting*

1544 The next meeting will be held on April 10, 2018. The place
1545 has not yet been fixed, but Philadelphia is a likely choice.

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Respectfully submitted,

Edward H. Cooper
Reporter

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