MINDS INTERTWINED: THE COGNITIVE TEAMWORK OF FEDERAL CIVIL RULEMAKING

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ABSTRACT

Amending a Federal Rule of Civil Procedure is an act of intricate teamwork. Members of the Advisory Committee on Civil Rules must make sense of thousands of pieces of information, account for a variety of stakeholder perspectives, and anticipate the consequences of even the most modest rule change. This Article provides a unique look inside the rulemaking process, using personal interviews with Committee members, direct observations of Committee deliberations, and primary source documents to reconstruct the history of the 2020 amendment to Federal Rule of Civil Procedure 30(b)(6). It reveals a complex and deeply layered cognitive process that is likely unfamiliar even to those who follow federal civil rulemaking.

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† Professor of Law, New England Law | Boston. I am grateful to Elizabeth Burch, Kevin Clermont, Sean Endo, Lawrence Friedman, Steven Gensler, Tara Leigh Grove, Paul Lund, Sean Lyness, Thom Main, Chance Meyer, Portia Pedro, Jeff Stempel, and the organizers of the Fifth Annual Civil Procedure Workshop at the University of Texas School of Law for their thoughtful comments on earlier drafts. I am also indebted to Brian Edmonds for excellent research assistance, and to past and present members of the Advisory Committee on Civil Rules for their willingness to talk to me about their rulemaking experiences.

INTRODUCTION

Since the turn of the century, the federal Advisory Committee on Civil Rules (Advisory Committee or Committee) has taken on an increasingly substantial and important role in the governance of American civil litigation. Almost every year brings a rule change or a package of related changes, many addressing core components of the civil process like discovery[1] and summary judgment.[2] Bar groups pay close attention to the Committee's deliberations,[3] federal judges look to committee notes for guidance in rule application,[4] and many state court systems integrate the Committee's prescribed changes into their own rules.[5] Chief Justice Roberts has written approvingly of the Committee's efforts.[6]

The Committee's increased visibility has also led to growing interest in—and scrutiny of—its work. In recent years, for example, some commentators have voiced concern that the Committee's membership overrepresents the views of men, federal judges, and the business community.[7] This demographic imbalance, it is claimed, causes the Committee to engage in "groupthink," a form of cognitive bias in which group members with similar backgrounds or outlooks unwittingly confirm each other's worldviews.[8] As a result, critics assert, the Committee routinely and systematically fails to account for alternative perspectives, information, and solutions.[9]

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1. See*, e.g.*, Karen A. Henry & Diana Palacios, *The 2015 Amendments to the Federal Rules of Civil Procedure*, 14 MINORITY TRIAL LAW. 2, 2, 6–8 (2016).

2. *See, e.g.*, Edward Cooper, *Revising Civil Rule 56: Judge Mark Kravitz and the Rules Enabling Act*, 18 LEWIS & CLARK L. REV. 591, 592–97 (2014).

3. *See, e.g.*, Thomas Y. Allman, *The Proportionality Principle After the 2015 Amendments*, 83 DEF. COUNS. J. 241, 241–45 (2016) (writing on behalf of the International Association of Defense Counsel); Susan Steinman, *Rule Changes Ahead*, 54 TRIAL 18, 18 (2018) (writing on behalf of the American Association for Justice).

4. *See, e.g.*, Landry v. Swire Oilfield Servs., 323 F.R.D. 360, 376–80 (D.N.M. 2018); *see also* David S. Yoo, *Rule 33(a)'s Interrogatory Limitation: By Party or by Side?*, 75 U. CHI. L. REV. 911, 919 n.41 (2008) ("When the Supreme Court adopts Federal Rules amendments, the Advisory Committee Notes become an important source of legislative history.").

5. *See* Stephen N. Subrin & Thomas O. Main, *Braking the Rules: Why State Courts Should Not Replicate Amendments to the Federal Rules of Civil Procedure*, 67 CASE W. RES. L. REV. 501, 502–03 (2016).

6. *See* CHIEF JUSTICE JOHN G. ROBERTS, JR., 2015 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9–11 (2015) [hereinafter 2015 YEAR-END REPORT].

7. *See* Stephen B. Burbank & Sean Farhang, *Federal Court Rulemaking and Litigation Reform: An Institutional Approach*, 15 NEV. L. J. 1559, 1576, 1591 (2015); *see also* Sarah Staszak, *Procedural Change in the First Ten Years of the Roberts Court*, 38 CARDOZO L. REV. 691, 692–94 (2016); Brooke D. Coleman, *#SoWhiteMale: Federal Civil Rulemaking*, 113 NW. U. L. REV. 52, 53 (2018); Elizabeth Thornburg, *Cognitive Bias, The "Band of Experts," and the Anti-Litigation Narrative*, 65 DEPAUL L. REV. 755, 766–67 (2016); Patricia W. Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1087 (2015).

8. Irving L. Janis, *Groupthink*, 5 PSYCH. TODAY 43, 43 (1971); *see also* Brian Mullen, Tara Anthony, Eduardo Salas, & James E. Driskell, *Group Cohesiveness and the Quality of Decision Making: An Integration of Tests of the Groupthink Hypothesis*, 25 SMALL GRP. RSCH. 189, 199 (1994).

9. *See, e.g.*, Steve W. J. Kozlowski & Georgia T. Chao, *Unpacking Team Process Dynamics and Emergent Phenomena: Challenges, Conceptual Advances, and Innovative Methods*, 73 AM.

But is that really true? Not all decision-making groups suffer from crippling cognitive bias. Indeed, some groups, known in the literature as expert teams, deliberately seek out, share, and discuss information that complicates or even contradicts the prevailing narrative.[10] Members of expert teams "contribute detailed explanations of their ideas, and spend time constructively discussing each other's perspectives, integrating information, and determining how to apply their knowledge resources to the problem at hand . . . ."[11] Team members are also adept at managing their time, tasks, and interpersonal relationships; they develop clear procedures for sharing information and distributing work, do not take conflict personally, and prioritize team goals over individual accolades.[12] Put differently, expert teams are defined by their high motivation and productive interactions. By elaborating upon the information in their possession, and by seeking additional information and perspectives whenever possible, expert teams are able to define a problem more fully, consider a wider range of options, and increase the likelihood of an optimal response.[13]

Whether the Advisory Committee is closer to an expert team or one mired in groupthink, therefore, depends primarily on how its members approach their task and each other.[14] How do Committee members collectively frame issues and share information? How do they manage their time and relationships? How motivated are they to seek out additional information and perspectives? And how do they respond to internal conflict and external pressures? If the Committee really is infected by groupthink or other cognitive bias, it should come through in its behaviors and discussions. Conversely, if the Committee bears qualities of an expert team, that, too, should be visible in its interactions.

This Article directly investigates these issues through a detailed case study of a recent rule change: the 2020 amendment to Federal Rule of Civil Procedure 30(b)(6). Introduced in 1970, Rule 30(b)(6) governs the

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PSYCH. 576, 586 (2018); Garold Stasser & William Titus, *Pooling of Unshared Information in Group Decision Making: Biased Information Sampling During Discussion*, 48 J. PERSONALITY & SOC. PSYCH. 1467, 1467 (1985).

10. *See* Daan van Knippenberg, Carsten K. W. De Dreu, & Astrid C. Homan, *Work Group Diversity and Group Performance: An Integrative Model and Research Agenda*, 89 J. APPLIED PSYCH. 1008, 1011 (2004).

11. Christian J. Resick, Toshio Murase, Kenneth R. Randall, & Leslie A. DeChurch, *Information Elaboration and Team Performance: Examining the Psychological Origins and Environmental Contingencies*, 124 ORG. BEHAV. & HUM. DECISION PROCS. 165, 166 (2014).

12. *See* Dana E. Sims & Eduardo Salas, *When Teams Fail in Organizations: What Creates Teamwork Breakdowns?*, *in* RESEARCH COMPANION TO THE DYSFUNCTIONAL WORKPLACE 302, 303 (Janice Langan-Fox, Cary L. Cooper, & Richard J. Klimoski eds., 2007); *see also* Eduardo Salas, Michael A. Rosen, C. Shawn Burke, Gerald F. Goodwin, & Stephen M. Fiore, *The Making of a Dream Team: When Expert Teams Do Best*, *in* THE CAMBRIDGE HANDBOOK OF EXPERTISE AND EXPERT PERFORMANCE 439, 440, 446–49 (K. Anders Ericsson, Neil Charness, Paul J. Feltovich, & Robert R. Hoffman eds., 2006).

13. *See* Knippenberg et al., *supra* note 10, at 1009, 1011.

14. *See* Sallie J. Weaver, *From Teams of Experts to Mindful Expert Teams and Multiteam Systems*, 12 J. ONCOLOGY PRAC. 976, 976 (2016) ("[N]o matter how expert individual teams may be, the secret to expert team performance lies in how members manage their interdependencies and the teamwork processes used to address them.").

depositions of corporations and organizations; it is one of the most commonly used discovery tools in federal civil litigation.[15] The rule generally requires the deposing party, in its notice of deposition, to "describe with reasonable particularity the matters for examination."[16] In return, the organizational deponent must designate one or more witnesses to testify on its behalf as to those specific matters.[17] The 2020 amendment added a new requirement that "[b]efore or promptly after" the notice of deposition is served, the parties must "confer in good faith about the matters for examination."[18] This seemingly modest change—the only time in its history that Rule 30(b)(6) has been amended—represented more than three years of work by the Committee.

To understand why and how the Advisory Committee changed the rule, I followed its work in real time, attending its semiannual meetings as an observer and taking detailed notes on its deliberations. I supplemented these observations with personal interviews with Committee members, as well as publicly available documents on the Committee's decision-making processes.[19] The story that emerged from these interviews and observations reveals a complex and deeply layered cognitive process, dominated by an internal culture of "getting it right." In particular, the Committee repeatedly sacrificed speed in favor of information-gathering, consensus-building, and avoiding unintended consequences.

The balance of this Article examines the Advisory Committee's cognitive teamwork in four parts. Part I provides a brief background of Rule 30(b)(6) and the case study. Part II describes the Committee's effort to develop shared mental models of 30(b)(6) practice and potential areas of improvement, a process that was both time-consuming and surprisingly difficult. In all, the Committee went through seven distinct (and often bumpy) cycles of decision-making before it arrived at a final rule proposal. Part III explores the importance of healthy task conflict in team information processing and assesses the Committee's efforts to build an internal climate of constructive confrontation. Part IV offers observations about the quality and nature of the Committee's overall teamwork and

15. *See* Tiffany Ward & Jessica Kennedy, *A Review of the 2020 Amendments to Rule 30(b)(6): A Guide for Practitioners on How to Approach the New Corporate Deposition Process*, 95 FLA. BAR J. 42, 42 (2021).

16. FED. R. CIV. P. 30(b)(6).

17. *Id.*

18. UNITED STATES COURTS, CONGRESSIONAL RULES PACKAGE 2020 0058 (2020), https://www.uscourts.gov/rules-policies/archives/packages-submitted/congressional-rules-package-2020.

19. As one scholar has observed, field research on organizational behavior can be especially powerful because careful description of concrete events provides future analysts "opportunities to cogitate about potential contextual influences." Gary Johns, *The Essential Impact of Context on Organizational Behavior*, 31 ACAD. MGMT. REV. 386, 390 (2006). *See also* Amnon Reichman, Yair Sagy, & Shlomi Balaban, *From a Panacea to a Panopticon: The Use and Misuse of Technology in the Regulation of Judges*, 71 HASTINGS L. J. 589, 596 (2020) (noting the ability of a single case study to capture the nuances and contextual complexities of a regular decision-making process).

considers broader lessons for rulemaking and court administration that flow from the 30(b)(6) experience.

I. A CASE STUDY: AMENDING RULE 30(B)(6)

Organizations rely on small groups, known as knowledge worker teams (KWTs), to make decisions that are important to organizational functioning.[20] KWTs consist of individuals who leverage their specialized knowledge to create new, communal knowledge "in the form of new products, services, or solutions . . . ."[21] Organizations turn to KWTs in part because they are typically better than individuals at processing information: the team collectively has more information than does any individual member, and teams tend to be superior at recalling information consistently and accurately.[22] Team members are also able to expand each other's knowledge bases by contributing facts, ideas, solutions, or preferences during group discussion, leading to new ideas or alternatives that would not have occurred to an individual decisionmaker.[23]

The Advisory Committee on Civil Rules is one of the best known KWTs within the federal court system. It consists of fifteen members—primarily federal judges, but also a state supreme court justice, a law professor, and several practitioners—who are charged with reviewing the Federal Rules of Civil Procedure and recommending new rules, or amendments to existing rules, as needed.[24] The Committee is assisted by a Reporter and an Associate Reporter, who undertake much of the drafting responsibilities,[25] as well as a Rules Law Clerk and representatives from the Federal Judicial Center (FJC), the Administrative Office of the United States Courts, and other committees within the federal judiciary.[26] Recommendations for rule changes may come from the Committee itself, others

20. *See* Brian D. Janz, Jason A. Colquitt, & Raymond A. Noe, *Knowledge Worker Team Effectiveness: The Role of Autonomy, Interdependence, Team Development, and Contextual Support Variables*, 50 PERS. PSYCH. 877, 880–81 (1997) (describing different types of domains over which KWTs may have autonomy for decision-making).

21. Kyle Lewis, *Knowledge and Performance in Knowledge-Worker Teams: A Longitudinal Study of Transactive Memory Systems*, 50 MGMT. SCI. 1519, 1520 (2004).

22. *See* Michael D. Johnson & John R. Hollenbeck, *Collective Wisdom as an Oxymoron: Team-Based Structures as Impediments to Learning*, *in* RESEARCH COMPANION TO THE DYSFUNCTIONAL WORKPLACE 322 (K. Anders Ericsson, Neil Charness, Paul J. Feltovich, & Robert R. Hoffman eds., 2006).

23. *See* Carsten K. W. De Dreu, Bernard A. Nijstad, & Daan van Knippenberg, *Motivated Information Processing in Group Judgment and Decision Making*, 12 PERSONALITY & SOC. PSYCH. REV. 22, 24 (2008).

24. *See* Hon. John G. Koeltl, *Rulemaking*, 41 LITIG. 5, 5 (2015).

25. *Committee Membership Selection*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/committee-membership-selection (last visited Oct. 24, 2022). While not voting members, the Reporter and Associate Reporter are the only participants on the Committee with open-ended terms, which allows them to serve as the Committee's primary source of institutional memory as well as a source of information and guidance on past practices, customs, successes and mistakes, and external relationships. *See id.* (outlining the role and duties of the Committee's reporters); *see also* Koeltl, *supra* note 24, at 5 (noting the voting Committee members).

26. *See* ADVISORY COMMITTEE ON CIVIL RULES, APRIL 2017 AGENDA BOOK 15–17 (2017) [hereinafter APRIL 2017 AGENDA BOOK].

within the federal court system, or external observers.[27] The Committee need not act on any given suggestion, and indeed many proposals are rejected or deferred.[28] If the Committee decides to pursue a suggestion, however, it must commence a rulemaking procedure requiring "at least seven stages of formal comment and review, in a process involving five separate institutions: the Advisory Committee on Civil Rules [itself], the Standing Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, the Supreme Court, and Congress."[29] The pacing of the Advisory Committee's work is deliberate: typically, three years or more pass before a suggestion becomes a final rule.[30]

This study reconstructs the Advisory Committee's cognitive teamwork on Rule 30(b)(6) through a variety of sources, starting with the Committee's own documents. Prior to each of its semiannual meetings, the Committee produces an agenda book, which includes, among other things, minutes from the Committee's previous meeting and reports from each of the subcommittees whose work will be up for discussion.[31] Throughout the amendment process, the Agenda Book included reports from a dedicated 30(b)(6) subcommittee containing detailed descriptions of its work, notes of its meetings (typically conducted by teleconference), documents relevant to its deliberations, and often a series of questions or items for the full Committee's consideration.[32] The Agenda Book materials therefore provide a contemporaneous record of the activities and thought processes of both the 30(b)(6) subcommittee and the full Committee.

The notes of subcommittee meetings are a particularly valuable source of information because those meetings are not open to the public and no transcript is available. The minutes of the full Committee meetings, which are open to observation but for which transcripts are also unavailable, offer similar informational value. But while official notes and minutes can be rich in substance, they provide only a glimpse into the team's overall dynamics. They are often written in the passive voice and typically do not identify speakers by name.[33] And while they are generally true to the flow of the discussion, occasionally the minutes reorder comments or questions, presumably to improve readability. As an overall historical record of the Committee's (and subcommittee's) work, then, meeting minutes and official notes are highly useful. But as a guide to the flow of discussion, memory, and personal interactions between Committee members, they are incomplete.

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27. *See Overview for the Bench, Bar, and Public*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works/overview-bench-bar-and-public (last visited Oct. 24, 2022).

28. *Id.*

29. Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PENN. L. REV. 1099, 1103 (2002).

30. *See* Cooper, *supra* note 2, at 595–96.

31. *See generally* APRIL 2017 AGENDA BOOK, *supra* note 26.

32. For an example of the Rule 30(b)(6) subcommittee's report, see generally *id.* at 239–315.

33. For an example of the Committee's draft minutes, see generally *id.* at 71–92.

To fill this gap, this study turned to a second major source of information: direct observation of the Committee's semiannual meetings. The Advisory Committee meets twice a year, once in April (at rotating locations across the United States) and once in October or November (in Washington, D.C.).[34] These meetings are open to the public and usually draw one to two dozen observers, most of whom attend in their capacity as bar and public interest group representatives.[35] I attended all but one Advisory Committee meeting between November 2016 and April 2019 and created detailed handwritten transcripts of each meeting's discussion as it pertained to Rule 30(b)(6).[36] I also noted seating arrangements, members' behaviors and interactions, and room conditions.[37] I then compared my field notes against the Committee's official minutes. Because the subcommittee's meetings were closed to the public, I relied primarily on the notes of its conference calls to understand what had happened during its deliberations.

Finally, I interviewed members of the Advisory Committee to directly capture their perspectives on team dynamics and the sharing of individually held information.[38] I initially contacted the members in writing to explain the purpose of the study and request a telephone interview.[39] Three Committee members agreed to be interviewed for the study, including two who served on the subcommittee.[40] Interviews were semi-structured and focused on information that was not ascertainable from the Committee's public meetings and documents, including: (1) how individual

34. *See Open Meetings and Hearings of the Rules Committee*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/open-meetings-and-hearings-rules-committee (last visited Oct. 24, 2022). The Committee's meetings in 2020 and 2021 were conducted via videoconference in response to the coronavirus pandemic. *See* ADVISORY COMMITTEE ON CIVIL RULES, OCTOBER 2020 AGENDA BOOK 19, 28, 35, 43 (2020); ADVISORY COMMITTEE ON CIVIL RULES, APRIL 2021 AGENDA BOOK 3 (2021); ADVISORY COMMITTEE ON CIVIL RULES, OCTOBER 2021 AGENDA BOOK 3, 13 (2021).

35. Observers at the Advisory Committee's semiannual meetings typically include representatives from the American Bar Association, National Employment Lawyers Association, Lawyers for Civil Justice, American Association for Justice, and Institute for the Advancement of the American Legal System, as well as select corporate counsel, government lawyers, and private practitioners.

36. *See generally* Author's Field Notes from Advisory Committee Meeting (Nov. 3, 2016) [hereinafter Nov. 2016 Field Notes] (on file with author); Author's Field Notes from Advisory Committee Meeting (Apr. 25, 2017) [hereinafter April 2017 Field Notes] (on file with author); Author's Field Notes from Advisory Committee Meeting (Apr. 10, 2018) [hereinafter April 2018 Field Notes] (on file with author); Author's Field Notes from Advisory Committee Meeting (Nov. 1, 2018) (on file with author); Author's Field Notes from Advisory Committee Meeting (Apr. 2–3, 2019) [hereinafter April 2019 Field Notes] (on file with author).

37. *See, e.g.*, Nov. 2016 Field Notes, *supra* 36, at 1. For a similar example of using qualitative field notes in this context, *see* Connie J. G. Gersick, *Time and Transition in Work Teams: Toward a New Model of Group Development*, 31 ACAD. MGMT. J. 9, 14 (1988).

38. *See* Serena G. Sohrab, Mary J. Waller, & Seth Kaplan, *Exploring the Hidden-Profile Paradigm: A Literature Review and Analysis*, 46 SMALL GRP. RSCH. 489, 521 (2015) ("Simple methodological practices like postevent debriefings (perhaps especially if done in private) can help reveal who knew what, when, and why they did or did not choose to share that information.").

39. Letters inviting committee members to participate in interviews are on file with the author.

40. Telephone Interview with Committee Member A (Jan. 27, 2020) [hereinafter Member A Interview] (on file with author); Telephone Interview with Committee Member B (Jan. 29, 2020) [hereinafter Member B Interview] (on file with author); Telephone Interview with Committee Member C (Feb. 3, 2020) [hereinafter Member C Interview] (on file with author).

members prepared for meetings, (2) the interpersonal dynamics within the Committee and 30(b)(6) subcommittee, (3) the dynamics of information-sharing among Committee and subcommittee members, and (4) the integration of new members and new information over time. Collectively, these interviews, documents, and observations tell a richly textured story about the Committee's teamwork in the rulemaking arena.

II. TEAM MENTAL MODELS AND THE CAPACITY TO ELABORATE

Effective teams must be able to integrate and organize a wide range of information into a single base of team knowledge. This collective capacity begins with the traits of individual members, who each bring a relevant set of knowledge, skills, and abilities (collectively, KSAs) to the task.[41] Members of high-functioning teams typically have "a unique set of KSAs and experiences that are needed to meet team objectives," meaning that the team's overall KSAs are complementary and have minimal overlap.[42] Ideally, members also have a broad range of social and professional networks, which allows them to access additional information and perspectives from external sources.[43]

But exemplary personal KSAs and networks are just the beginning. The team must also be able to share and organize its information in a way that is accessible to every team member. Put differently, teams like the Advisory Committee cannot succeed unless their members are on the same page about the problem to be solved, each member's role in solving it, and how the available information might provide a solution.[44] Teams achieve this alignment by developing shared schemas among their members, collectively known as team cognitions, which reflect common understandings about the scope, content, and context of the team's task.[45] Among other things, team cognitions help members conceptualize the specific problem

41. *See* Sallie J. Weaver, Jessica L. Wildman, & Eduardo Salas, *How to Build Expert Teams: Best Practices*, *in* THE PEAK PERFORMING ORGANIZATION 129, 130 (Ronald J. Burke & Cary L. Cooper eds., 2009). Some KSAs are technical (pertaining to substantive expertise in a particular field), while others relate to teamwork (such as interpersonal and self-management skills). *See* Michael J. Stevens & Michael A. Campion, *The Knowledge, Skill, and Ability Requirements for Teamwork: Implications for Human Resource Management*, 20 J. MGMT. 503, 504–05 (1994).

42. Sims & Salas, *supra* note 12, at 314.

43. *See* Suzanne T. Bell, Anton J. Villado, Marc A. Lukasik, Larisa Belau, & Andrea L. Briggs, *Getting Specific About Demographic Diversity Variable and Team Performance Relationships: A Meta-Analysis*, 37 J. MGMT. 709, 711 (2011); DEBORAH ANCONA & HENRIK BRESMAN, X-TEAMS: HOW TO BUILD TEAMS THAT LEAD, INNOVATE, AND SUCCEED 166–67 (2007).

44. *See* Brandon Randolph-Seng, Mario P. Casa de Calvo, Tammy Lowery Zacchilli, & Jacqueline L. Cottle, *Shared Cognitions and Shared Theories: Telling More Than We Can Know by Ourselves?*, J. SCI. PSYCH. 25, 25–26; R. Scott Tindale & Tatsuya Kameda, *'Social Sharedness' as a Unifying Theme for Information Processing in Groups*, 3 GRP. PROCESSES & INTERGROUP RELS. 123, 124 (2000).

45. *See* Leslie A. DeChurch & Jessica R. Mesmer-Magnus, *The Cognitive Underpinnings of Effective Teamwork: A Meta-Analysis*, 95 J. APPLIED PSYCH. 32, 33 (2010).

that the team is trying to solve,[46] understand their specific roles and the roles of their teammates,[47] and keep track of who knows what.[48] When team cognitions are well-developed and integrated, team members are better able to assess a situation, seek out and share information, develop potential responses, respond to environmental changes, and forge an appropriate solution.[49] When such cognitions are poorly developed, however, team members may struggle to make sense of the information they have or may simply talk past each other, allowing task-relevant information to fall through the cracks and adversely affect team performance.[50]

During the 30(b)(6) amendment process, the Advisory Committee developed a series of interrelated, team-level cognitions to communicate and collaborate effectively. This study focuses on one type of cognition—the team mental model (TMM)—as a proxy for the Committee's overall team cognition.[51] A TMM represents a "shared, organized understanding and mental representation of knowledge about key elements of the team's relevant environment . . . ."[52] It enables team members to interpret new information and environmental cues in the same way,[53] anticipate each other's actions, and coordinate their behaviors.[54] Teams employ a number of TMMs for any given task, addressing, for example, the nature of the problem, how team members interact with each other, and how the task is to be accomplished.[55] Because it captures many important aspects of team

46. *See* Susan Mohammed & Katherine Hamilton, *Studying Team Cognition: The Good, the Bad, and the Practical*, *in* RESEARCH METHODS FOR STUDYING GROUPS AND TEAMS: A GUIDE TO APPROACHES, TOOLS, AND TECHNOLOGIES 132, 142 (Andrea B. Hollingshead & Marshall Scott Poole eds., 2012).

47. *See* Nancy J. Cooke, Eduardo Salas, & Preston A. Kiekel, *Advances in Measuring Team Cognition*, RSRCH. GATE, Jan. 2004, at 9.

48. *See* John R. Austin, *Transactive Memory in Organizational Groups: The Effects of Content, Consensus, Specialization, and Accuracy on Group Performance*, 88 J. APPLIED PSYCH. 866, 866 (2003).

49. *See* James A. Grand, Michael T. Braun, Goran Kuljanin, Steve W. J. Kozlowski, & Georgia T. Chao, *The Dynamics of Team Cognition: A Process-Oriented Theory of Knowledge Emergence in Teams*, 101 J. APPLIED PSYCH. 1353, 1353–54 (2016).

50. *See* Nancy J. Cooke, Jamie C. Gorman, Christopher W. Myers, & Jasmine L. Duran, *Interactive Team Cognition*, 37 COGNITIVE SCI. 255, 257 (2012) (citing historical examples of team breakdowns).

51. For a discussion on the history and recent popularity of TMMs, see Susan Mohammed, Lori Ferzandi, & Katherine Hamilton, *Metaphor No More: A 15-Year Review of the Team Mental Model Construct*, 36 J. MGMT. 876, 878 (2010).

52. Beng-Chong Lim & Katherine J. Klein, *Team Mental Models and Team Performance: A Field Study of the Effects of Team Mental Model Similarity and Accuracy*, 27 J. ORG. BEHAV. 403, 403 (2006).

53. *See* Eduardo Salas, Michael A. Rosen, C. Shawn Burke, & Gerald F. Goodwin, *The Wisdom of Collectives in Organizations: An Update of the Teamwork Competencies*, *in* TEAM EFFECTIVENESS IN COMPLEX ORGANIZATIONS: CROSS-DISCIPLINARY PERSPECTIVES AND APPROACHES 39, 45 (Eduardo Salas, Gerald F. Goodwin, & C. Shawn Burke eds., 2009).

54. *See* Rebecca Grossman, Sarit B. Friedman, & Suman Kalra, *Teamwork Processes and Emergent States*, *in* THE WILEY BLACKWELL HANDBOOK OF THE PSYCHOLOGY OF TEAM WORKING AND COLLABORATIVE PROCESSES 245, 256 (Eduardo Salas, Rico Ramón, & Jonathan Passmore eds., 2017); *see also* Lynn M. Lopucki, *Legal Culture, Legal Strategy, and the Law in Lawyers' Heads*, 90 NW. U. L. REV. 1498, 1510 (1996).

55. *See, e.g.*, John Mathieu, M. Travis Maynard, Tammy Rapp, & Lucy Gilson, *Team Effectiveness 1997–2007: A Review of Recent Advancements and a Glimpse into the Future*, 34 J. MGMT.

knowledge and awareness, the strength of a team's TMMs has been shown to be predictive of the team's overall performance.[56]

TMMs are emergent phenomena, becoming more defined and universally held over time as team members interact with new information, the environment, and each other.[57] The emergence of the Advisory Committee's TMMs was plainly visible during the 30(b)(6) Amendment process. At the outset of deliberations, Committee members could draw only upon their individual knowledge of organizational deposition practice. For some members, that knowledge was based on extensive personal experience; for others, it was colored more heavily by anecdotes, third-party reports, or a handful of direct encounters with the rule. As the Committee's work progressed, however, these individual mental models converged into a series of overlapping TMMs which allowed the Committee to approach the issue in a unified way. First, Committee members developed a TMM of the underlying problem, premised on the belief that the existing version of Rule 30(b)(6) created (or at least permitted) under-the-radar opportunities for contentiousness and gamesmanship. In this TMM, problems posed by the rule often resolved without court intervention, but nevertheless created "heartburn" for the attorneys who had to spend time and energy to resolve them.[58] Second, the Committee forged a TMM of the decision-making environment, which recognized divisions in how plaintiff and defense counsel viewed some aspects of the rule and how each would greet prospective rule changes. Finally, the Committee crafted a TMM about the most appropriate solution: after contemplating a range of specific fixes to the text of the rule, Committee members coalesced around a "case management approach" that would invite attorneys to meet and confer on potentially contentious issues before the deposition took place.

The foundation of each TMM appeared early in the Committee's deliberative process and then evolved—sometimes radically—over the course of three years, in seven distinct cycles. It was not a smooth ride. During each cycle, the Committee's TMMs were tested by new information and perspectives, leading to a discussion and reassessment of both the 30(b)(6) problem and potential solutions.[59] The Committee went

410, 430 (2008); Janis A. Cannon-Bowers, Eduardo Salas, & Sharolyn Converse, *Shared Mental Models in Expert Team Decision Making*, *in* INDIVIDUAL AND GROUP DECISION MAKING: CURRENT ISSUES 221, 229 (N. John Castellan, Jr. ed., 1993).

56. *See* Mohammed et al., *supra* note 51, at 892 (citing studies that demonstrate the positive correlation between a strong TMM and team performance). While TMMs are emphasized here, other team cognitions will be discussed as needed throughout this Part.

57. *See* Piet Van den Bossche, Wim Gijselaers, Mien Segers, Geert Woltjer, & Paul Kirschner, *Team Learning: Building Shared Mental Models*, 39 INSTRUCTIONAL SCI. 283, 287–88 (2011).

58. The Committee initially adopted the "heartburn" analogy during its semiannual meeting in April 2017. *See* discussion *infra* Section II.B.

59. The Committee's activity was consistent with the IMOI (input-mediator-output-input) model of team decision-making, which posits that that KWTs transform information into a final decision over the course of multiple cycles. In each cycle, a team uses activity and group discussion—mediated by team members' attitudes, behaviors, cognitions, processes, and timeframes—to convert informational inputs (such as anecdotes, data, or observations) into provisional outputs (such as mental

through false starts, put time and effort into solutions that were ultimately rejected, and constantly realigned its existing understandings with newly acquired information. Yet with each successive iteration, the Committee's TMMs grew stronger, richer, more sophisticated, and more universally held, allowing the Committee to converge on its final proposal in the spring of 2019. The story of the rule's emergence—and of the TMMs and interactions underlying that emergence—follows.

A. Assessing the Original Rule

Rule 30(b)(6) was originally introduced in 1970 as part of a package of amendments to the Federal Rules of Civil Procedure governing discovery.[60] The purpose of the Rule was to address certain problematic practices that had arisen in connection with corporate depositions.[61] Prior to the Rule's introduction, the only way to elicit the testimony of a corporation was to depose its officers, directors, or managing agents, whose testimony could then be used against the corporation for any purpose.[62] But it was not always clear to the deposing party which corporate representatives held knowledge relevant to the lawsuit, leading some parties to take multiple depositions in an effort to find a knowledgeable person.[63] Moreover, only managing agents, not ordinary agents or employees, could be deemed to speak for the corporation, and often it was difficult to classify a witness properly before the deposition began.[64] Some corporate litigants further exploited this arrangement by "bandying" their opponents with a string of witnesses, each of whom disclaimed having relevant knowledge.[65] For their part, deposing parties also took advantage of the system by insisting on deposing all officers or agents of a corporation.[66] The resulting process was rendered frustrating, expensive, and inefficient.

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models, research questions, or possible solutions). *See* Daniel R. Ilgen, John R. Hollenbeck, Michael Johnson, & Dustin Jundt, *Teams in Organizations: From Input-Process-Output Models to IMOI Models*, 56 ANN. REV. PSYCH. 517, 520–21 (2005). Those outputs are then fed back into the next cycle as new inputs, combined with additional information, and again subjected to group discussion to yield a more refined set of outputs. *See id*. at 520. The process continues until the final output (a solution) is reached and the task is completed. *See id.* at 520, 535.

60. FED. R. CIV. P. 30(b)(6) advisory committee's note to 1970 amendment. In the same year, the Advisory Committee—among other changes—eliminated the "good cause" requirement for document requests, expanded the scope of matters subject to requests for admission, and added an explicit procedure for seeking a motion to compel discovery. *See* Douglas C. Rennie, *The End of Interrogatories: Why Twombly and Iqbal Should Finally Stop Rule 33 Abuse*, 15 LEWIS & CLARK L. REV. 191, 201–02 (2011). These amendments ushered in what has been deemed the "high-water mark" of party-controlled discovery in the federal courts. *See, e.g.*, Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 749 (1998).

61. *See* FED. R. CIV. P. 30(b)(6) advisory committee's note to 1970 amendment.

62. *See* Kelly Tenille Crouse, *An Unreasonable Scope: The Need for Clarity in Federal Rule 30(b)(6) Depositions*, 49 U. LOUISVILLE L. REV. 133, 137 (2010).

63. *Id.* at 138.

64. *See Discovery Against Corporations Under the Federal Rules*, 47 IOWA L. REV. 1006, 1007, 1009 (1962).

65. *See* Richard Marcus, *Treading Water? Current Procedural Issues in America*, 23 ZZPINT 183, 193 (2018).

66. *See* Crouse, *supra* note 62, at 138.

Rule 30(b)(6) was intended to stop the bandying problem by requiring the deposing party to "designate with reasonable particularity" the matters on which it planned to inquire of the corporation and requiring the organizational deponent to designate one or more witnesses who were competent and prepared to testify on each topic.[67] Specifically, the Rule provided:

> A party may in his notice name as the deponent a public or private corporation or a partnership or association or governmental agency and designate with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.[68]

The new Rule eliminated some of the most egregious instances of bandying and provided some stability and predictability to corporate depositions.[69] But important questions continued to surface. If an organization designated more than one representative to testify on its behalf, did each witness count as a separate deposition toward the deposing party's presumptive limit?[70] Did the 30(b)(6) testimony of a corporate officer or agent constitute a "judicial admission"—that is, an admission that is treated as established fact which may not later be challenged or contradicted by other evidence?[71] And most vexingly, how should the parties and the courts deal with witnesses who arrived at a 30(b)(6) deposition unprepared and were therefore unable to speak competently on the organization's behalf?[72] From time to time, concerned observers raised these (and related) issues with the Advisory Committee, leading the Committee to undertake

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67. *See* FED. R. CIV. P. 30(b)(6) advisory committee's note to 1970 amendment (noting that Rule 30(b)(6) "will curb the 'bandying' by which officers or managing agents of a corporation are deposed in turn but each disclaims knowledge of facts that are clearly known to persons in the organizations and thereby to it.").

68. For the original text of the 1970 iteration of the Rule, see FED. R. CIV. P. 30(b)(6), *in* RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 27 (1970).

69. *See* Crouse, *supra* note 62, at 161.

70. A party is presumptively limited to ten depositions without further leave of court. *See* FED. R. CIV. P. 30(a)(2).

71. *See, e.g.*, Lisa C. Wood & Matthew E. Miller, *Serving as the Company's Voice—The 30(b)(6) Deposition*, 24 ANTITRUST 92, 95 (2010).

72. Courts have held that an organization's failure to produce an adequately prepared witness is tantamount to a failure to appear at a deposition and is therefore sanctionable. *See, e.g.*, Black Horse Lane Assoc. v. Dow Chem. Corp., 228 F.3d 275, 304 (3d Cir. 2000). Bar groups, however, have argued that sometimes adequate preparation may not be possible notwithstanding an organization's best efforts. *See* ADVISORY COMMITTEE ON CIVIL RULES, APRIL 2016 AGENDA BOOK 251, 276, 278 (2016) [hereinafter APRIL 2016 AGENDA BOOK]. For example, if the events underlying the litigation occurred long in the past, if all the first-hand witnesses have departed the organization, or if the deposition was scheduled very early in the discovery process, even a well-intentioned organization might not be able to produce a fully informed witness. *Id.* at 251, 276–78.

preliminary investigations of possible amendments in 2006 and 2013.[73] The 2006 review, in particular, involved extensive outreach to bar groups to gather information on the operation of the rule in practice.[74] Yet the Committee chose not to address the Rule further on either of these occasions, concluding that the issues raised did not warrant a full-scale rule change and could be resolved by the parties and the courts on a case-by-case basis.[75]

In January 2016, the 30(b)(6) issue arose anew when the Advisory Committee received a letter from members of the American Bar Association Section of Litigation Federal Practice Task Force (ABA Task Force).[76] The signatories asked the Committee to review Rule 30(b)(6) and associated case law "with the goals of resolving conflicts among the courts, reducing litigation on its requirements, and improving practice under the Rule, particularly in light of the purposes and text of the 2015 Amendments to the Federal Rules."[77] Attached to the letter was a copy of the ABA Task Force's own study of Rule 30(b)(6), completed the previous November, which recounted the history of the rule and identified a dozen separate issues within 30(b)(6) practice "upon which courts interpret the Rule differently, . . . other issues upon which the [Committee] Note suggests solutions which may no longer be the best approach, and . . . areas upon which practice under the Rule may be improved."[78]

The ABA Task Force's letter and accompanying report were thorough and well-researched, and it did not hurt that the ABA was a well-known organization that was unlikely to weigh in on rule changes lightly. Still, several factors were working against the Committee taking up the 30(b)(6) issue. For one, it had twice considered—and rejected—amending the rule during the previous decade.[79] For another, the existing rulemaking climate warranted caution. In December 2015, just one month before the ABA Task Force sent its letter, the most significant changes to the federal discovery rules in at least two decades had gone into effect. Among other things, the Advisory Committee added language to Federal Rule of Civil Procedure 1 to stress the parties' coequal obligation to ensure "just, speedy, and inexpensive" administration of the rules, altered Federal Rule of Civil Procedure 26(b) to more heavily emphasize proportionality, and inserted explicit references to electronically stored information throughout the federal discovery rules.[80] The 2015 amendments were the

73. *Id.* at 215–17.
74. *Id.* at 250.
75. *Id.* at 215.
76. *See id.* at 219–20 (including the January 2016 letter).
77. *Id.* at 219. The letter stressed that the thirty-one signatories were writing in their individual capacities, not on behalf of the ABA or its Section of Litigation. *Id.*
78. *Id.* For the Task Force's full report, see *id.* at 221–43.
79. *See* APRIL 2016 AGENDA BOOK, *supra* note 72, at 215 (discussing proposals by the New York State Bar Association and New York City Bar that were "considered and put aside" in 2006 and 2013, respectively).
80. *See* 2015 YEAR-END REPORT, *supra* note 6, at 6. The changes were sufficiently notable to merit comment in the Chief Justice's (typically terse) Year-End Report. *See generally id.* at 4–11.

product of a widely publicized process that began with a major civil litigation conference in May 2010, and the rule changes themselves had elicited both extensive praise and heavy criticism.[81] A number of veteran Committee members remained from the 2015 amendment period, and experience counseled waiting to see how the new rules would be used before engaging in additional tinkering.[82]

Perhaps the most significant initial hurdle, though, was aligning Committee members' perceptions of Rule 30(b)(6) enough to allow for meaningful discussion about whether to pursue any changes. In the spring of 2016, each member of the Committee held a personal view of how Rule 30(b)(6) operated in real-world litigation: how often it was used, how effective it was at meeting its stated goals, what kinds of problems (if any) tended to arise, and how those problems were resolved. These understandings varied substantially across the Committee: some members regularly dealt with 30(b)(6) practice, while others admitted to confronting the rule only on rare occasions.[83] Framing the larger issue for discussion would be very important, and much of that responsibility fell to the Committee's Reporter, Professor Edward Cooper.

In advance of the Committee's April 2016 meeting, Professor Cooper prepared a summary of the 30(b)(6) issue, which noted the overlap between the ABA Task Force's concerns and those raised by the New York State Bar in 2006 and the New York City Bar in 2013.[84] The summary continued:

> The history of recent and relatively recent proposals cuts two ways. Rule 30(b)(6) was studied extensively ten years ago. The conclusion then was, roughly, that although real problems may arise in deposing an entity, it would be at best difficult to craft rules amendments that would do more good than harm. A similar conclusion was reached in addressing the much more modest 2013 proposal. The present proposals, moreover, largely go to issues of administration that should be worked out as a matter of cooperative common sense. Some persuasive reason must be found to justify entering once again into this thicket. The other side of the coin is that Rule 30(b)(6) has provoked genuine concern in three different and valuable bar groups. It seems worthwhile to at least consider the possibility that some rules changes might improve the practice.[85]

The Cooper summary provided an initial lens through which Committee members could assess their own beliefs and experiences concerning Rule 30(b)(6) practice and compare them to the perspectives articulated by the ABA Task Force and the bars of New York State and New York

81. *See* Thomas Y. Allman, *The 2015 Civil Rules Package as Transmitted to Congress*, 16 SEDONA CONF. J. 2, 2, 5–6 (2015).
82. *See generally* Nov. 2016 Field Notes, *supra* note 36.
83. *Id.*
84. *See* APRIL 2016 AGENDA BOOK, *supra* note 72, at 215–16.
85. *Id.* at 215.

City. This starting point also allowed Committee members to begin to identify areas of overlap among their individual mental models—a process that, in time, would foster an elaborate TMM about real-world 30(b)(6) practice.

Professor Cooper's summary also enabled the Committee to begin developing other team cognitions regarding 30(b)(6). By reminding members that the Committee had looked at the 30(b)(6) issue a decade earlier, Professor Cooper triggered members' awareness that information from those prior discussions could be located in the archival documents and memories of those who had been on the Committee at the time.[86] And by recounting that the two most recent proposals to amend 30(b)(6) had come from the New York State Bar and the New York City Bar respectively, Professor Cooper's summary invited Committee members to think about their own connections to those groups and similarly interested external stakeholders.

To be clear, at this very early stage in its work, the Committee's team cognition on Rule 30(b)(6) practice was not well-developed. Its members' views and information on the topic had barely been probed. Yet, one nascent TMM concerning the broader litigation environment was enough to drive the process forward. The Committee was struck by the fact that "three important groups ha[d] now suggested the need to attempt improvements"[87] to Rule 30(b)(6), and that "as hard as it may be to make the Rule better, we should feel an obligation to address these issues."[88] The Committee accordingly moved Rule 30(b)(6) to its active agenda and charged Judge John Bates, the Committee Chair, with forming a subcommittee to examine the matter further.[89]

B. Constructing the Problem Space

Shortly after the April 2016 meeting, Judge Bates appointed a subcommittee to investigate the 30(b)(6) issue. Assembling the subcommittee provided a rare opportunity for the Advisory Committee to directly control an input in its decision-making process. Subcommittee members could be drawn more or less freely from the pool of existing Committee members, which provided Judge Bates with some flexibility to construct a team that was particularly suited to the task.[90] Judge Bates ultimately appointed two U.S. district judges (Joan Ericksen and Brian Morris, both of whom had

86. Knowing which team members hold specific knowledge can encourage other members to ask questions of them, thereby increasing their own individual knowledge stock—a process known as transactive retrieval. *See* Julija N. Mell, Daan van Knippenberg, & Wendy P. van Ginkel, *The Catalyst Effect: The Impact of Transactive Memory System Structure on Team Performance*, 57 ACAD. MGMT. J. 1154, 1158 (2014).

87. ADVISORY COMMITTEE ON CIVIL RULES, NOVEMBER 2016 AGENDA BOOK 84 (2016) [hereinafter NOV. 2016 AGENDA BOOK].

88. *Id.*

89. *Id.*

90. There were, of course, some practical restrictions on the subcommittee's composition, given that several Committee members were already serving on other subcommittees and that others were nearing the end of their Committee service generally.

joined the Committee the previous fall),[91] as well as a U.S. magistrate judge (Craig Shaffer),[92] and three of the Committee's practitioner members (John Barkett, Parker Folse, and Virginia Seitz).[93] Judge Ericksen was appointed as the subcommittee's chair, and Professor Richard Marcus as the subcommittee's Reporter.[94]

With respect to individual KSAs, the subcommittee was unquestionably well-constructed. Judge Shaffer was a prominent writer on federal discovery issues and could provide an in-the-trenches judicial perspective of 30(b)(6) disputes.[95] Barkett, Folse, and Seitz were experienced and well-connected attorneys who could provide the perspectives of different segments of the bar, particularly as they related to issues that were unlikely to be brought to the courts' attention.[96] Professor Marcus provided institutional memory and drafting expertise and was—like the practitioners—a veteran of the subcommittee process.[97] This depth of experience assured that subcommittee members would not reinvent the wheel; many questions of procedure, timing, and substance could be ironed out by resort to the successes and failures of earlier practices. Only Judge Ericksen and Judge Morris were subcommittee novices, although both were experienced district judges.[98] Overall, the diversity of experience and task-related KSAs on the subcommittee suggested that its members were well-positioned to take on the 30(b)(6) question and determine whether changes were necessary.

Notwithstanding these apparent advantages, the subcommittee's first attempt at addressing Rule 30(b)(6) was a failure. Soon after the subcommittee was formed, Professor Marcus circulated to its members a list of

91. *See* NOV. 2016 AGENDA BOOK, *supra* note 87, at 135.

92. *Id.*

93. *Id.*

94. *Id.*

95. Judge Shaffer's writings were targeted to judicial, practitioner, and academic audiences alike. *See, e.g.*, Hon. Craig B. Shaffer, *Deconstructing "Discovery About Discovery"*, 19 SEDONA CONF. J. 215 (2018); Hon. Craig B. Shaffer, *The "Burdens" of Applying Proportionality*, 16 SEDONA CONF. J. 55 (2015); Craig B. Shaffer & Ryan T. Shaffer, *Looking Past the Debate: Proposed Revisions to the Federal Rules of Civil Procedure*, 7 FED. CTS. L. REV. 180 (2013); Craig B. Shaffer, *Motions to Compel from a Judicial Perspective*, 34 COLO. LAW. 97 (2005).

96. *See John M. Barkett*, SHOOK HARDY & BACON, https://www.shb.com/professionals/b/barkett-john (last visited Oct. 25, 2022); *Parker C. Folse: Partner*, SUSMAN GODFREY L.L.P., https://www.susmangodfrey.com/attorneys/parker-c-folse/ (last visited Oct. 25, 2022); *Virginia A. Seitz*, SIDLEY AUSTIN LLP, https://www.sidley.com/en/people/s/seitz-virginia-a (last visited Oct. 25, 2022).

97. *See, e.g.*, *Richard Marcus*, U.C. HASTINGS, https://www.uchastings.edu/people/richard-marcus (last visited Sept. 3, 2022) ("Since 1996, he has served as Associate Reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the U.S., and has since then had a principal role in drafting amendments to the Federal Rules of Civil Procedure. . . .").

98. *See, e.g.*, Jeya Paul, *Hon. Joan N. Ericksen: Senior U.S. District Judge, District of Minnesota*, FED. LAW. (Jan./Feb. 2021), https://www.fedbar.org/wp-content/uploads/2021/02/JudicialProfile-Ericksen.pdf; *Chief Judge Brian Morris Chambers*, U.S. DIST. CT.: DIST. OF MONT., https://www.mtd.uscourts.gov/chief-judge-brian-morris-chambers (last visited Oct. 22, 2022). It has been common practice for new members of the Advisory Committee to be asked to chair subcommittees, notwithstanding their lack of Committee experience. One advantage to this approach is to increase the likelihood that the subcommittee will complete its work before the end of the chair's tenure on the full Committee.

sixteen issues for consideration, most of which were drawn from the original ABA Task Force letter.[99] During their first conference call on September 1, 2016, subcommittee members agreed that all sixteen issues had "some validity"[100] and generated three additional ideas for discussion.[101] Even as the subcommittee recognized the need for more research into current 30(b)(6) practice, its members agreed that it would make sense, at least initially, to try to address the thicket of issues in a "stand-alone" rule reminiscent of the independent treatment of nonparty discovery in Federal Rule of Civil Procedure 45.[102] Over the next two weeks, Professor Marcus undertook the laborious task of preparing an omnibus, wholly revised Rule 30(b)(6), which gathered all the previously identified concerns about 30(b)(6) practice into a single stand-alone rule.[103] It was exactly what the subcommittee had requested, yet its members were dissatisfied.[104] The draft rule felt overly complicated, addressing issues that might best be handled elsewhere in the Federal Rules, or not at all.[105] The notion of an exhaustive, stand-alone rule governing organizational depositions was discarded, leaving the subcommittee at a crossroads as to next steps.

While surely frustrating, this false start turned out be an essential step in the subcommittee's cognitive process. To formulate meaningful solutions to a complex problem, KWTs first must collectively define the problem's contours, a process known as constructing the "problem space."[106] The problem space is a specific type of TMM that captures the team's collective sense of the problem it faces.[107] "[W]ithout a shared understanding of what the problem is, not only may a team be solving the wrong problem, but they also cannot make full use of their resources, the very reason teams are assembled in the first place."[108] Accordingly, team

99. *See* NOV. 2016 AGENDA BOOK, *supra* note 87, at 101–03. Marcus also circulated "a considerable body of material generated during that work done" on Rule 30(b)(6) a decade earlier. *Id.* at 135.

100. *Id.* at 103.

101. *See id.* at 103, 129, 136. The three additional issues were requiring the deposing party to provide relevant documents in advance of the deposition, replacing 30(b)(6) depositions of nonparties with some form of written questions, and addressing the "recurring problem" of incorporating proportionality principles into the 30(b)(6) setting. *Id.*

102. *Id.* at 137.

103. *See* NOV. 2016 AGENDA BOOK, *supra* note 87, at 32, 135.

104. *See generally id.*

105. *See* NOV. 2016 AGENDA BOOK, *supra* note 87, at 103. The subcommittee itself described the composite rule as generating an "overwhelming 'oh my God' sort of reaction." *Id.*

106. *See* Woei Hung, *Team-Based Complex Problem Solving: A Collective Cognition Perspective*, 61 EDUC. TECH. RES. & DEV. 365, 375 (2013).

107. *See* JOAN-JOSEP VALLBÉ, FRAMEWORKS FOR MODELING COGNITION AND DECISIONS IN INSTITUTIONAL ENVIRONMENTS 88 (2015) (defining the problem space as "the representation of th[e] task environment" as formulated by the problem solver); Grand et al., *supra* note 49, at 1356 (describing a theory of team problem space construction).

108. Stephen M. Fiore & Jonathan W. Schooler, *Process Mapping and Shared Cognition: Teamwork and the Development of Shared Mental Models*, *in* TEAM COGNITION: UNDERSTANDING THE FACTORS THAT DRIVE PROCESS AND PERFORMANCE 133, 137 (Eduardo E. Salas & Stephen M. Fiore eds., 2004).

members must check in with each other to "get on the same page" before investing time and effort into developing possible solutions.[109]

In hindsight, both the issue list circulated before the first subcommittee call and the draft omnibus rule were early efforts to define the 30(b)(6) problem space. Both documents served the same function of visually organizing the subcommittee's thoughts and providing a starting point for a shared definition of the problem—namely, the existence of multiple discrete issues that arose in 30(b)(6) practice as a result of gaps in the Rule's text. This conception of the problem space was undoubtedly influenced by the framework of the ABA Task Force letter, and it was natural that subcommittee members would take that framework as their point of departure. But as the omnibus draft rule demonstrated, the problem space could not be captured simply by a list of concerns. To truly understand the problem—or whether there even was a problem—the subcommittee would need to place the enumerated concerns in broader context. And that would require the subcommittee to locate, share, and discuss other sources of information on 30(b)(6) practice.

The subcommittee's first stop was the full Advisory Committee, which received an update on the subcommittee's work in November 2016.[110] The subcommittee presented its omnibus draft rule with appropriate caveats (including the acknowledged need to collect more information) and invited the full Committee's thoughts on how to approach the problem.[111] But here came a second blow to the subcommittee: several members of the Committee were not convinced there was a problem, or at least one worthy of a rule change. Some judges volunteered that (in Judge Bates's words) the issues raised in the ABA letter "never come up to me in court."[112] Two attorney observers reinforced this view, with one stating that "[t]he absence of Local Rules [supplementing Rule 30(b)(6)] does suggest an absence of problems,"[113] and the other counseling that "[o]ften issues are resolved by counsel during the [Rule 26(f)] meet and confer. Don't rush in to change the rule . . . ."[114]

At this point, the 30(b)(6) problem space was poorly defined, with individual mental models of 30(b)(6) ranging from a practice posing no perceptible problem to one laden with pervasive issues that severely hampered the discovery process. Recognizing the need for more and better information, the subcommittee asked the Rules Law Clerk to examine the existing case law and practitioner literature on 30(b)(6) practice.

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109. *See* Fiore & Schooler, *supra* note 108, at 137; *see also* Hung, *supra* note 106, at 376.

110. *See* Fiore & Schooler, *supra* note 108, at 101; *see also* Nov. 2016 Field Notes, *supra* note 36, at 4.

111. *See* NOV. 2016 AGENDA BOOK, *supra* note 87, at 101–05.

112. Nov. 2016 Field Notes, *supra* note 36, at 6 (comment by Judge Bates).

113. *Id.* at 7 (comment by National Employment Lawyers Association (NELA) representative, Joseph Garrison).

114. *Id.* at 9 (comment by Ariana Tadler).

The subcommittee also began considering input from other interested groups. Early on, however, that input only reinforced the divergent mental models of 30(b)(6) that had been expressed within the full Committee.[115] On the one hand, the defense-oriented group, Lawyers for Civil Justice (LCJ), argued that the Rule was not working well at all and that an attitude of "fatalism" regarding 30(b)(6) practice had in fact overtaken the bar.[116] On the other hand, the plaintiff-oriented National Employment Lawyers Association (NELA) argued that "Rule 30(b)(6)—while not perfect—works well in practice, and continues to achieve the efficiencies at which the Rule was aimed."[117] When apprised of the Committee's deliberations, several members of the Standing Committee on Rules of Practice and Procedure (Standing Committee) also expressed skepticism about a rule change, noting that they had not personally encountered serious problems with 30(b)(6) practice.[118] These different views were sincerely held but seemingly incompatible, and they left the subcommittee grasping for a consistent, shared, and overarching mental model of the 30(b)(6) problem.

A breakthrough finally came at the end of March 2017, when the Rules Law Clerk completed her research.[119] Her memo to the subcommittee concluded that while both plaintiff and defense counsel seemed "generally content to operate within the existing framework," 30(b)(6) controversies did arise with regularity.[120] In fact, her research turned up approximately 8,300 published decisions citing to the Rule in some way.[121] Moreover, the memo suggested that the proliferation of decisions mostly reflected requests for clarification about compliance with the Rule rather than active disputes.[122] This new information shaped a more supple model of the problem space: the notion of 30(b)(6) practice as an under-the-radar source of attorney "heartburn" that might go unnoticed by judges but have a real impact on pretrial discovery. In particular, the large number of reported decisions suggested that 30(b)(6) concerns did not always work themselves out, and—more pressingly—that even when issues were resolved, gaps in the Rule were causing lawyers to expend excess energy behind the scenes.[123] This model also rationalized the disparity between the Standing Committee and LCJ perspectives: issues often were worked out and did avoid judicial notice, but still were sources of significant contention.

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115. *See* NOV. 2016 AGENDA BOOK, *supra* note 87, at 103–04.

116. *Id.* at 275. For the Lawyers for Civil Justice's full comment to the Committee, see APRIL 2017 AGENDA BOOK, *supra* note 26, at 275–86.

117. For NELA's comment to the Committee, see *id.* at 287–92.

118. *Id.* at 239.

119. For the March 2017 Memorandum from Lauren Gailey, Rules Law Clerk, to the 30(b)(6) Subcommittee, see generally *id.* at 249–65.

120. *Id.* at 249–50.

121. *Id.* at 249.

122. *Id.* at 249 n.1.

123. *See* Nov. 2016 Field Notes, *supra* note 36, at 4, 6.

It is most accurate to say that the research memo crystallized a gestating "heartburn" model of the problem space rather than creating it from scratch. Indeed, hints as to the "heartburn" view were expressed during the Advisory Committee's meeting the previous November. In particular, subcommittee member Parker Folse articulated the concern that "[l]awyers keep burning energy on the same problems" and that "most problems don't get put in front of the judge enough."[124] At that time, however, the Committee's attention was still focused on the discrete problems raised by the ABA Task Force letter, and its nascent mental models did not yet permit large-scale consideration of the broader underlying problem. The subsequent release of the research memo reinvigorated and sharpened the mental model of 30(b)(6) practice as a source of under-the-radar problems, and when the full Committee next met in April 2017, subcommittee members were ready to explain why they had come over to this view:

> Ericksen: One of the most important things [in the Agenda Book materials] is the research memo at Tab 7B. It underscores the subcommittee's sense that 30(b)(6) is "causing a lot of heartburn." [The rule] having been cited in 8,300 decisions is sufficient to answer our concerns that there is no problem at all. But it is still unclear whether we can do anything.
>
> Bates: It seems to me there is tension. This is a flashpoint for litigation, but Standing Committee members and judicial members of this committee don't see many problems with 30(b)(6).
>
> Ericksen: Great point. 30(b)(6) fights probably take place between parties [i.e., outside the court's view]. And there are 8,300 cases where the problem is cited.
>
> . . . .
>
> Shaffer: I did my own research—looking at Westlaw for "30(b)(6)"—and got 726 decisions in the Tenth Circuit and 7,500-plus in all federal courts. When I searched for "30(b)(6)" and "dispute" I got only 56 decisions since May 2000. So these problems come up, but in the main, attorneys work it out. Can we help attorneys do this?
>
> . . . .
>
> Folse: . . . Some problems come up continuously in certain sectors of civil litigation. Judges don't see it much, but in my own experience and CLEs and writings, it is a time-consuming source of controversy. Some types of disputes come up over and over again. Yes, they usually get worked out. But we might be able to do something to promote the goals of the Federal Rules by knocking off sources of attorney squabbles.[125]

124. *Id.* at 4, 6.
125. *See* April 2017 Field Notes, *supra* note 36, at 2–3.

The subcommittee's new perspective on the problem—supported both by the Rules Law Clerk's memo and individual research—operated as an invitation to other Committee members to synthesize the "heartburn" view of 30(b)(6) with their own views and experiences. And indeed, as deliberation continued, several judicial members began to acknowledge the possibility of an under-the-radar problem consistent with the "heartburn" view. Judge Robert Dow captured the sentiment of many of his judicial colleagues:

> My sense is the same as other district judges—I don't get many 30(b)(6) issues. It is an attorney problem and is usually resolved. Based on what I've heard and read, there may be things [we can do] at the margins to assist attorneys. Sometimes more rules are bad, but my sense is that other judges don't hear about it.[126]

This emerging understanding of the problem space created a shared framework in which the full Committee could begin to consider possible solutions to alleviate the "heartburn." But the Committee still recognized that it needed more information about the specifics of 30(b)(6) practice before it could craft a meaningful solution. As Judge Solomon Oliver put it toward the end of the discussion, "I don't doubt there are problems, [but] it's hard to know what the core problems are when you don't see them every day. We need to go to lawyers to identify three or four areas that are the most problematic."[127]

C. Building Team Knowledge

Following Judge Oliver's suggestion, shortly after the Committee's April 2017 meeting, the subcommittee invited comment from the bar on six discrete issues related to 30(b)(6) practice.[128] The invitation to comment stressed that the subcommittee's work was still in the preliminary stages and that no decision had been made about whether and how any rule change would be implemented.[129] The subcommittee set an informal three-month deadline to submit comments, and by August 1, more than 100 comments had been submitted, many addressing topics far beyond the scope of the subcommittee's request.[130]

Subcommittee members also met with two prominent bar groups over the summer to solicit their views. In early May, a portion of the subcommittee participated in an "open mike" session about Rule 30(b)(6) at an LCJ conference in Washington, D.C. And in late July, a selection of

126. *Id.* at 4.

127. *Id.*

128. *See* ADVISORY COMMITTEE ON CIVIL RULES, NOVEMBER 2017 AGENDA BOOK 185–88 (2017) [hereinafter NOV. 2017 AGENDA BOOK] (noting the six issues for comment include: (1) discussing the logistics of 30(b)(6) depositions at the parties' Rule 26(f) conference; (2) judicial admissions; (3) supplementing responses; (4) contention questions; (5) objections; and (6) timing and numerical limits).

129. *Id.* at 185.

130. *See generally id.* at 217–91 (summarizing the comments received, organized by topic).

subcommittee members participated in a roundtable discussion about Rule 30(b)(6) with approximately thirty members of the American Association for Justice (AAJ) in Boston.[131] These meetings with LCJ and AAJ had symbolic value in that they demonstrated the subcommittee's interest in the perspective of two national bar organizations—the former defense-oriented and the latter plaintiff-oriented. But the decision to meet with LCJ and AAJ was also practical: the membership of both organizations was likely to have had ample experience with deposition practice under Rule 30(b)(6), and almost from the start both organizations had shown strong interest in the Committee's review of the Rule.[132] If LCJ and AAJ were completely at odds about how well Rule 30(b)(6) operated, the subcommittee might choose to proceed with caution. To the extent the two organizations raised overlapping concerns, however, it would be an important signal that the practicing bar felt the Rule could be improved.[133]

Additional input came from the Standing Committee, which was apprised of the subcommittee's work in mid-June. The minutes of the Standing Committee's meeting suggest that while discussion was relatively brief, some members worried that a reworked Rule 30(b)(6) could create its own set of problems.[134] Professor Marcus, who was present at the meeting, acknowledged to the Standing Committee that "case management may be the only workable solution," but noted that the subcommittee would continue to explore specific rule changes.[135]

To make use of these many inputs, the subcommittee would have to convert them into a broader store of team knowledge. Team knowledge "signifies information that has been processed by team members via some form of analysis."[136] Like a TMM, team knowledge emerges when team members combine and augment their individual knowledge through group discussion.[137] According to one recent model, team members initially learn on their own by attending to relevant information (for example, by reading or listening to it), encoding it in memory (by transforming it into more abstract representations that can later be recalled), and integrating it into their existing knowledge.[138] Subsequently, members share their individual knowledge with the group. Sharing is not merely a "data dump" of all accumulated knowledge, but rather a deliberate process that requires each member to determine when to speak up, what information to share, and

131. *Id.* at 173.
132. *Id.* at 173–74.
133. The benefits of such outreach efforts were well-known to the Committee by this time. *See* Richard Marcus, *Rulemaking's Second Founding*, 23 U. PA. J. CONST. L. 2463, 2480 (2022) (describing similar outreach to the bar in the late 1990s which eventually led to the 2006 e-discovery amendments).
134. *See* NOV. 2017 AGENDA BOOK, *supra* note 128, at 50.
135. *Id.*
136. Stephen M. Fiore, Michael A. Rosen, Kimberly A. Smith-Jentsch, Eduardo Salas, Michael Letsky, & Norman Warner, *Toward an Understanding of Macrocognition in Teams: Predicting Processes in Complex Collaborative Contexts*, 52 HUM. FACTORS 203, 218 (2010).
137. *See* Grand et al., *supra* note 49, at 1364.
138. *Id.* at 1359.

what tone to take in sharing the information.[139] The sharing process is not complete until the intended audience acknowledges that it has received the information, a mechanism that "facilitates team members' understanding of 'who knows what' . . . as well as recognition of what information has yet to be addressed . . . ."[140] Like the development of TMMs, knowledge emergence is iterative: over time, as information is shared within the group, each member cultivates a unique knowledge base, which in turn may trigger new connections and lead to more sharing.

The subcommittee's efforts to grapple with a wealth of new information in mid-2017 closely followed this model of knowledge emergence. Initially, each subcommittee member had to review the public's written comments, as well as the comments from the LCJ and AAJ meetings which they had attended, and integrate the new information into their existing mental models and understandings of Rule 30(b)(6) practice.[141] The new information would be stored in the member's memory as a schematic representation, meaning that it could be triggered and recalled through a variety of different stimuli. For example, a comment from the LCJ open mike session concerning numerical limits on 30(b)(6) topics might be stored in the member's memory under "LCJ," "numerical limits," "deposition topics," "oral comments," and so on. Any subsequent stimulus raising one or more of these concepts might bring that information to the forefront of the individual's memory and allow it to be shared with others.

Because individual learning takes place without others' input, and because one grafts new information onto one's own existing schemas and understandings, each subcommittee member's integration of the new information varied at least slightly from that of fellow members.[142] Accordingly, while there was certainly overlap in the knowledge of subcommittee members by the end of the informal comment period, collective team knowledge could not emerge until subcommittee members took time as a group to discuss what they had learned.

That process began during a conference call on August 29, 2017.[143] As the notes of that call reflect, the subcommittee's discussion made clear the difficulty of making specific changes to Rule 30(b)(6) in a way that would win widespread approval.[144] Defense lawyers, for example, had advocated strongly for a formal process of objecting to defective 30(b)(6) notices, while plaintiffs' lawyers had warned that objections would "only invite mischief."[145] Likewise, defense counsel strongly supported a rule expressly allowing organizations to supplement their responses after the deposition, while plaintiffs' counsel thought such a rule would encourage

139. *Id.* at 1362–66.
140. *Id.* at 1359.
141. *Id.* at 1366.
142. *Id.* at 1356, 1363.
143. *See* NOV. 2017 AGENDA BOOK, *supra* note 128, at 209.
144. *Id.* at 209–10.
145. *Id.* at 274.

gamesmanship.[146] Similar rifts were apparent with respect to the use of contention questions[147] and the imposition of numerical and time limits.[148] Reflecting on this new information, one subcommittee member said, "I had high hopes for developing clear lines. But having seen the comments, I am concerned that trying to devise those might be more likely to heighten contentiousness."[149]

At this point, the subcommittee might have decided to abandon the project altogether. After all, even if the underlying problem was worth addressing, no one wanted to promulgate a solution that would make things worse. But continued conversation and the sharing of a different piece of information during the same conference call opened another possibility—or rather, reopened it. One member pointed out a written comment that "seemed to steer a middle course" and "sought to promote lawyer communication about the number and clarity of topics for examination, advance notice of the identity of the witnesses designated, and provision of some or most of the documents on which examination will focus in order to enable the witness to be fully prepared."[150] That submission appears to have triggered a memory among subcommittee members about their earlier discussions concerning good lawyers who work out such issues on their own. The subcommittee eventually gravitated to that message, concluding that the best hope for improving Rule 30(b)(6) would be "to get the parties to talk about the issues attending a 30(b)(6) deposition before going to the judge . . . ."[151] As one subcommittee member put it, "the thrust of [the] change should be to raise consciousness about the valid issues that both sides have and also raise consciousness that judges are available to respond to those concerns."[152]

This realization, born of emergent team knowledge, represented the subcommittee's first TMM of the solution to the 30(b)(6) problem. In some ways, this solution was nothing new: most of its contours had been explored by the subcommittee in one form or another since early 2016.[153] This time, however, the subcommittee was able to revisit the issue with the benefit of a more concrete conception of the problem space and a sharpened sense of where the boundaries of consensus lay within the

146. *Id.* at 251, 253.
147. *Id.* at 258.
148. *Id.* at 227, 286.
149. *Id.* at 213.
150. *Id.* at 210. While not designated in the subcommittee's notes, this appears to be a reference to the letter submitted by the Hagens Bergen law firm on August 1, 2017. *See* Letter from Thomas M. Sobol, Attorney at Hagens Berman Sobol Shapiro LLP, to Advisory Committee on Civil Rules (Aug. 1, 2017), www.regulations.gov/document?D=USC-RULES-CV-2018-0003-0066.
151. *See* NOV. 2017 AGENDA BOOK, *supra* note 128, at 214.
152. *Id.*
153. *See generally* NOV. 2016 AGENDA BOOK, *supra* note 87, at 101–67 (recording initial exploration by the subcommittee into possible solutions to the 30(b)(6) problem).

bar.[154] Indeed, the subcommittee turned to an early conference among attorneys precisely because its team knowledge (and corresponding TMMs) now made clear that: (1) Rule 30(b)(6) practice was causing "heartburn" in enough cases to warrant the Advisory Committee's attention, (2) attorneys who engaged in meaningful communication nevertheless managed to work out most 30(b)(6) disputes on their own, and (3) more specific fixes to recurrent problems would likely be challenged by a substantial portion of the bar.[155]

D. Formulating a Draft Rule

With a general solution model in place, the subcommittee could finally turn to formulating a concrete rule amendment. That task raised two issues. First, what should the amendment say? Second, where in the text of the Rules should the proposal be located? Answering these questions would lead the subcommittee on a bumpy and sometimes circular journey over the next few weeks.

On the first question—the content of the proposed amendment—the subcommittee's TMMs and team knowledge counseled it to tread lightly. As Judge Ericksen would later explain to the full Committee, the subcommittee aimed for a "modest proposal" responsive to its emerging understanding that 30(b)(6) practice is more fluid and case-specific than originally thought.[156] Three elements of the subcommittee's team knowledge particularly influenced this view. First, the 2015 discovery amendments had not been in force long enough to determine whether they would impact 30(b)(6) practice.[157] Second, there was a deep divide between plaintiff and defense counsels' perceptions of Rule 30(b)(6), although neither side particularly wanted the courts to get involved.[158] Third, most problems with 30(b)(6) depositions were worked out by the parties, although there was no formal court-supervised process for doing so.[159] Over the course of three conference calls in August and September 2017, the subcommittee used this knowledge of the problem and the legal environment to craft a rule that would require parties to confer in advance about the logistics of Rule 30(b)(6) depositions.[160]

The second question facing the subcommittee—where to locate the proposal—was similarly influenced by its emergent team knowledge. It

154. *See* NOV. 2017 AGENDA BOOK, *supra* note 128, at 171, 174. The subcommittee would later report that "[t]he comments received were very helpful in focusing [its] thoughts . . . ." *See* ADVISORY COMMITTEE ON CIVIL RULES, APRIL 2018 AGENDA BOOK 113 (2018) [hereinafter APRIL 2018 AGENDA BOOK].

155. *See* APRIL 2018 AGENDA BOOK, *supra* note 154, at 68–69. Due to unforeseen circumstances, I was unable to attend and observe the November 2017 meeting. References to the activities of that meeting are accordingly drawn exclusively from the Committee's official minutes.

156. *Id.* at 68.

157. *See* NOV. 2017 AGENDA BOOK, *supra* note 128, at 209.

158. *Id.* at 209–10.

159. *Id.* at 213.

160. For notes from the 2017 conference calls, held on August 29, September 19, and September 26, see NOV. 2017 AGENDA BOOK, *supra* note 128, at 191–215.

was important that the rule command the attention of attorneys who would not otherwise be inclined to confer on their own, but the subcommittee had become aware that "trying to put some specifics into Rule 30(b)(6) itself might produce more contention without any significant benefits."[161] The subcommittee accordingly identified three other Federal Rules of Civil Procedure in which the conference requirement might be placed—Rule 16(c), Rule 26(f), and Rule 26(g)—and asked Professor Marcus to draft possible language for each of these alternatives. While the ultimate solution remained the same, each of the three alternatives offered a very different tone, with relative advantages and disadvantages.

The first alternative called for revising Rule 16(c) to include "the process or timing for [contemplated] depositions under Rule 30(b)(6)" as a topic for consideration at a pretrial conference.[162] One subcommittee member characterized the approach as a "soft change" that seemed the most promising considering the bar's ongoing adjustment to the 2015 discovery amendments.[163] This soft change had the further advantage of promoting discussion among the parties and the court, and allowing the parties to address sticky issues surrounding 30(b)(6) practice without the need to compel attorney behavior by rule. The Rule 16(c) approach also provided a drafting advantage: the recent round of public comments had identified issues that would be difficult to incorporate into Rule 30(b)(6) itself, but a soft change to Rule 16(c) might allow the Committee to address those issues in a note.[164] At the same time, the subcommittee recognized that placing requirements for organizational depositions exclusively in Rule 16(c) was an awkward solution, creating the risk that essential components of the proposed change would get lost.[165] Moreover, placing a host of substantive issues in a committee note risked turning it into a "best practices manual," which the Committee generally sought to avoid.[166]

A second alternative involved amending Rule 26(f) to require the parties, as part of their ordinary meet and confer obligations, to "consider the process and timing of [contemplated] depositions under Rule 30(b)(6) . . . ."[167] As with Rule 16(c), amending Rule 26(f) could advance the primary goal of "get[ting] the parties talking."[168] However, like Rule 16(c), a change to Rule 26(f) seemed like an indirect solution: the parties might not be ready to discuss 30(b)(6) logistics at the Rule 26(f)

161. *Id.* at 196.

162. *Id.* at 203 (brackets in original). In light of the subcommittee's "initial inclination . . . in favor of the less 'mandatory' approach of Rule 16(c)," Professor Marcus also drafted an alternative amendment to Rule 16(b)(3) that would permit the court to "address the process or timing for [contemplated] depositions under Rule 30(b)(6)" in its scheduling order. *Id.* at 202–03 (brackets in original). That alternative amendment, however, does not appear to have been seriously entertained by the subcommittee.

163. *Id.* at 195.

164. *Id.* at 196–98.

165. NOV. 2017 AGENDA BOOK, *supra* note 128, at 196–98.

166. *See id.* at 195–96.

167. *Id.* at 180 (brackets in original).

168. *Id.* at 198.

conference, and they might lose sight of the obligation later. Rule 26(g), which articulates the obligations flowing from an attorney's signature on discovery documents, but which says nothing about the party being deposed, was similarly determined to be a clumsy fit.[169]

The approaches of Rule 16 and Rule 26 having been deemed too subtle or incompatible with the subcommittee's mental model of the solution, in mid-September a member reraised the idea of placing the conference obligation in Rule 30(b)(6) itself.[170] This suggestion was a pivotal moment in the subcommittee's deliberations. Although it had shied away from that same notion just a few weeks earlier, the subcommittee was now open to the idea, in part because it would require the parties to confer when—and only when—an organizational deposition was necessary.[171] Professor Marcus was asked to draft revised language to reflect the view that the parties should be prodded to discuss issues related to 30(b)(6) depositions as early as practicable.

Refocusing its energy on the text of Rule 30(b)(6) seemed to provide the subcommittee some psychic relief. Reading through the notes of its September 19, 2017 conference call, one can sense a growing tone of optimism; conceptually, the subcommittee had turned the corner.[172] The lingering question—how to phrase the edict—suddenly seemed more manageable, so much so that at the start of its next conference call on September 26, one subcommittee member observed that "we are 'zeroing in' on recommending a change to Rule 30(b)(6)."[173] And indeed, much of the September 26 call was dedicated to wordsmithing proposed language in Rule 30(b)(6) to address the timing of the conference and to having its language mirror the injunction in Federal Rule of Civil Procedure 37(a), which requires that the parties "in good faith confer[] or attempt[] to confer . . . ."[174] The subcommittee's proposal (with new matter underlined and alternative language bracketed) ultimately read:

> (6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. Before [or promptly after] giving the notice or serving a subpoena, the party must [should] in good faith confer [or attempt to confer] with the deponent about the number and description of the matters for examination. The named organization must then designate

169. *See id.* at 197.

170. *Id.* at 198. The minutes of the Committee meeting from November 2017 suggest that this suggestion came from Judge Shaffer. *See id.* at 69.

171. NOV. 2017 AGENDA BOOK, *supra* note 128, at 198–99.

172. *See id.* at 195–99 ("The first reaction was that this approach had positive features. . . . A further reaction was that this is a good idea. We should prompt the parties to address these issues.").

173. *Id.* at 191.

174. *See* FED. R. CIV. P. 37(a). The subcommittee acknowledged a desire "to conform the language [of the Rule 30(b)(6) amendment] as closely as possible with what's in Rule 37(a)." NOV. 2017 AGENDA BOOK, *supra* note 128, at 192–93.

> one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf, and it may set out the matters on which each person designated will testify. * * * * *[175]

Although it had been generated through a circuitous route, this proposal meshed closely with the subcommittee's mental model of the solution and team knowledge of the legal landscape. The official notes from the subcommittee's September 26 conference call explain that:

> [T]his modest addition to Rule 30(b)(6) ties in with the recent changes to Rule 26(b)(1) and Rule 1. As of the present, it is still not certain how those 2015 amendments will play out. But this amendment idea would fit well with them. Moreover, making this change to encourage communication should not invite the sort of diametrically opposed views we saw in the comments on the issues on which we invited comments during the summer.[176]

Having reached a consensus about marking up Rule 30(b)(6), the subcommittee revisited the question of amending Rule 26(f) and 16(c) as well. The subcommittee reasoned that a Rule 26(f) proposal would be limited in scope and designed merely to remind parties of the larger 30(b)(6) change.[177] Because it supplemented the Rule 30(b)(6) changes in a beneficial way, the subcommittee decided to recommend it to the full Committee as well.[178] The Rule 16(c) alternative, by contrast, no longer seemed necessary and was not recommended for further consideration.[179]

It is noteworthy just how explosive the subcommittee's output was during this period. After a year and a half spent grasping at the problem and experiencing more than one false start at a solution, in just four weeks the subcommittee managed to process a wide range of information on at least six discrete issues and codify a solution designed to secure broad consensus. Perhaps even more startling, while the timing and content of this outburst likely had no salience to anyone on the subcommittee at the time, from the perspective of the work team literature it was entirely predictable. As Professor Connie Gersick has described, KWTs do not progress toward final outcomes in a gradual, linear fashion.[180] Rather, they follow a pattern of "punctuated equilibrium" in which long periods of inertia are periodically disrupted by revolutions in group behavior, performance strategies, and interaction patterns.[181] Moreover, as Professor Gersick has shown, the first revolution occurs midway between when the group starts its work and its final deadline, regardless of the size of the

175. NOV. 2017 AGENDA BOOK, *supra* note 128, at 176.
176. *Id.* at 193.
177. *Id.* at 194.
178. *Id.*
179. *Id.* The subcommittee decided not to recommend the 16(c) proposal to the Committee, but still voted to include it among its materials so that the Committee could see its entire range of work. *See id.*
180. *See* Gersick, *supra* note 37, at 17.
181. *Id.* at 9, 17.

group, its task, or the total time it takes.[182] That pattern held almost perfectly here: about eighteen months had passed since Judge Bates formed the subcommittee in the spring of 2016, and another nineteen months of work lay ahead.

E. Refining the Draft Rule

Having reached a solution—at least in principle—to the problem of 30(b)(6) "heartburn," the subcommittee set about testing its proposal. In some ways, this called for a return to the familiar cycle of collecting feedback, processing that information as a team, and refining the draft rule in light of changes to the subcommittee's TMMs and team knowledge. In another way, however, the cycle would feel very different, with the full Advisory Committee becoming much more involved in elaboration of information related to the proposed rule.

Reviewing the subcommittee's proposed changes to Rule 30(b)(6) during its November 2017 meeting, the Committee expressed concern that the draft did not do enough to encourage bilateral discussion.[183] As framed, the draft only imposed an obligation on the deposing party to meet and confer, and several Committee members noted that (in the words of one member) "lawyers are really good at avoiding conferring."[184] Moreover, the draft rule said little about the scope and topics for the conference, instead relying on a committee note to provide more detailed guidance.[185] This, of course, was the product of the subcommittee's deliberate choice to avoid placing too much detail in the text of the rule. But some issues, Committee members argued, might be better off in the rule itself.[186] Some members, for example, suggested that conferring explicitly about the identity of witnesses can open other useful discussion about the forthcoming deposition.[187]

The feedback proved to be clarifying for the subcommittee. When it reconvened by conference call on November 28, it amended the draft rule to impose a bilateral obligation to confer, as well as to address the issue of early witness identification.[188] The new draft stated that "the part[ies] . . . must confer in good faith about the number and description of the matters for examination and the identity of each person who will testify."[189]

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182. *See id.* at 34.
183. *See* NOV. 2017 AGENDA BOOK, *supra* note 128, at 73.
184. *Id.* at 72.
185. *See id.* at 73.
186. *Id.*
187. *Id.* at 72–73.
188. *See* APRIL 2018 AGENDA BOOK, *supra* note 154, at 129. The subcommittee also ratified some of the Committee's "wordsmithing" suggestions, including using "must" instead of "should" to describe the conference obligation, and removing "attempt to confer" as a qualifier. *Id.*
189. *Id.* at 117. An earlier draft had also suggested that the parties confer on "the matters on which each [witness] will testify." *Id.* at 130. Some subcommittee members worried that this provision could be read to require the organization to specify which person would address each topic. This was

Additional feedback poured in during the next several weeks. In early January 2018, the Standing Committee received an update on the subcommittee's work.[190] Some Standing Committee members expressed support for the "meet and confer" approach, but others remained skeptical, with one member questioning whether the resulting rule would be worth the effort that had been put into it.[191] Other members suggested adding mandatory discussion topics to the good faith conference, including how to handle judicial admissions, questions outside the scope of the listed topics, and the use of interrogatories instead of depositions.[192] Reflecting on this litany of proposals, Standing Committee Chair Judge David Campbell inquired whether a best practices guide might be a better solution than a rule change.[193]

LCJ and AAJ also submitted fresh comments on the proposal. LCJ generally praised the draft rule but felt that the meet and confer requirement lacked teeth because the deposing party could simply end the discussion without resolution and initiate the deposition.[194] LCJ's solution was to add "specific language listing key topics to be covered during the consultation"—including the scope of topics for testimony, the length and timing of depositions, the availability of less burdensome discovery alternatives, and objection procedures.[195] LCJ further asked that the Committee set a presumptive limit of ten topics for a 30(b)(6) deposition.[196] AAJ unsurprisingly opposed LCJ's specific proposals but described its reaction to the subcommittee's work as "cautiously optimistic" and referred to the subcommittee's proposal as a "reasonable, balanced approach."[197]

The subcommittee again had to make sense of conflicting information. Having chosen to pursue an amendment which emphasized professional cooperation and case-specific flexibility, and which accordingly was deliberately low on specifics, the subcommittee now faced pushback from those in the judiciary and the bar who would add much more detail to the rule. Some on the subcommittee expressed dismay at this demand, noting that "injecting more specifics into the rule could actually generate

problematic, because while the full Committee had expressed "fairly strong support . . . for including designation of the matters to be addressed by each person in the rule," Rule 30(b)(6) itself had long stated that the organization "may set out the matters on which each person designated will testify," suggesting that such designation was not required. *Id.* After one attorney member of the subcommittee reported that organizations would not be comfortable designating witnesses for each topic so early in the process, the subcommittee, by consensus, dropped the language concerning "matters on which each [witness] will testify." *Id.* However, it would not be the last time the subcommittee would confront the witness identification issue. *See* discussion *infra* Section II.F.

190. APRIL 2018 AGENDA BOOK, *supra* note 154, at 115.

191. *Id.* at 28.

192. *Id.* at 123.

193. *Id.*

194. *Id.* at 139–40. For Lawyers for Civil Justice's full comment to the Committee in response to the proposed change to 30(b)(6), see *id.* at 139–42.

195. *Id.* at 140–42.

196. *See* APRIL 2018 AGENDA BOOK, *supra* note 154, at 140.

197. *Id.* at 135–36. For the American Association for Justice's full comment to the Committee in response to the proposed change to 30(b)(6), see *id.* at 135–38.

disputes rather than avoid them."[198] The subcommittee brainstormed solutions that could address these external concerns without disrupting the framework it had already set in place but ultimately decided to leave the language unchanged from its most recent draft.[199]

In April 2018, the full Committee reconvened its deliberations on Rule 30(b)(6).[200] Now two years into the project, the Committee's TMMs about 30(b)(6) practice had coalesced to the point where a meet and confer approach was the consensus solution. However, the Committee had never fully discussed the advance identification of witnesses, which was now a central component of the subcommittee's draft.[201] To resolve the matter, the Committee would have to introduce, elaborate upon, and rationalize information that, to that point, had been in the possession of only some of its members. A portion of the Committee's discussion, drawn from verbatim field notes, illustrates how the elaboration process unfolded:

> Chad Readler [Department of Justice representative]: I was curious to ask the subcommittee why language on witness identification was added. It won't help plaintiffs since it is a corporate deposition, and it is tough for defendants to sometimes identify proper witnesses early on. I would love to hear from the committee.
>
> Bates: Others have had similar concerns. Subcommittee members?
>
> Folse: Based on the input we received, there is a bit of reciprocity. On the one hand, a party is required to discuss topics. On the other hand, a party is required to identify deponents. From the standpoint of a person taking the deposition, there is a benefit to knowing the witness's identity; discussing it is helpful. They may also be fact witnesses. You can have a discussion that leads to an arrangement that avoids duplication. The rule doesn't make a corporation "put its feet in the concrete" as to who the witnesses will be.
>
> Marcus: Since I am the person who has summarized discovery rules for twenty-five years, I can say that the most significant dispute is over unprepared witnesses.
>
> Shaffer: In some instances, your [Readler's] concern is well-founded. The point is that the parties must confer in good faith.

198. *Id.* at 124.

199. *Id.* at 125–27. The subcommittee did ask Professor Marcus to revise the Committee Note to reflect the substance of its deliberations. *Id*. at 127. The subcommittee also reconsidered whether to recommend a related amendment to Rule 26(f), with some members expressing concern that the Rule 26(f) conference occurs too early for the parties to discuss organizational depositions meaningfully. *Id.* at 127–28. In the end, the subcommittee elected to send the Rule 26(f) draft to the Committee for discussion, but signaled its own ambivalence about the right approach by declining to recommend that it be published for comment. *Id.* at 113. The Committee ultimately agreed not to publish the Rule 26(f) proposal. *See* ADVISORY COMMITTEE ON CIVIL RULES, NOVEMBER 2018 AGENDA BOOK 32 (2018) [hereinafter NOV. 2018 AGENDA BOOK].

200. *See* APRIL 2018 AGENDA BOOK, *supra* note 154, at 27–28.

201. *See id*. at 117 ("This amendment directs the [parties] to confer before or promptly after the notice or subpoena is served, regarding the number and description of matters for examination and the identity of persons who will testify.").

> Readler: I agree on the reciprocity point. But ultimately, the identity of the witness is the defendant's choice.
>
> Shaffer: They can talk about it. The organization can tell the other party that it is mulling several possible witnesses, and they can discuss it. They are conferring in good faith.
>
> Folse: My experience is so anecdotal, but the deposing party always asks who the witness will be.
>
> Shaffer: And I have lawyers who just show up.
>
> Readler: These issues can be resolved without putting it in the rule itself.
>
> Shaffer: There can be resolution. The corporation says, "Let me go do some research, and I'll get back to you before the deposition." This is conferring in good faith.
>
> Readler: I'm not sure every judge would see it that way.
>
> Ariana Tadler [practitioner member]:[202] Sometimes the 30(b)(6) witness is obvious, but in lots of cases the 30(b)(6) witness needs to be prepared for the deposition. It may take weeks or months. At what point does the witness's identity get stated?
>
> Shaffer: That's what you confer about in good faith.[203]

Each participant in this conversation took on a distinct role in expanding the team's knowledge base. Readler and Tadler articulated different practitioner views of the witness identification requirement, allowing Committee members to hold in their heads the diverse perspectives of the practicing bar. Bates acted as a facilitator, reminding members that Readler's concerns were not unique. Folse and Marcus served as additional sources of collective memory, with Folse providing context for the subcommittee's thinking and Marcus offering a broader historical perspective. Shaffer repeatedly sought to center the discussion on the proposed "good faith" language as a way of synthesizing and addressing the divergent concerns. Shaffer and Folse also offered brief personal anecdotes to further contextualize the issue and invite others into the broader discussion.

Even though the conversation did not fully resolve the issue of early witness identification, it expanded the Committee's team knowledge and made clear the need to obtain further information about the proposal's consequences. And the Committee's own procedures made it possible to solicit that information. As long as it included the witness identification

202. Tadler joined the Advisory Committee in the fall of 2017. *Ariana J. Tadler*, TADLER LAW LLP, https://www.tadlerlaw.com/profile/ariana-tadler (last visited Oct. 25, 2022). She had been an active observer for years before her appointment.

203. April 2018 Field Notes, *supra* note 36, at 3–4.

language in its draft rule, the Committee could gather additional perspectives during the formal public comment period and revisit the issue later. The draft language on witness identification was therefore retained, with the expectation that public comment would provide additional views for consideration in the next cycle.

A second sticking point in the draft concerned the proposed timing of the parties' conference. The problem, as some Committee members saw it, was that the requirement to confer "[b]efore or promptly after the notice or subpoena is served" would lead to disputes about exactly when the conference must occur, and whether a single conference could satisfy the parties' good faith obligations.[204] This reading of the draft language appears to have taken the subcommittee members by surprise. As Folse explained to the Committee, the original language "did not concern me because a good faith conferral is not satisfied by one phone call."[205] Barkett similarly noted, "I would expect 'good faith' to mean continuing conversation."[206] After significant discussion, the Committee landed on a two-part fix: it added the phrase "and continuing as necessary" to the Rule to clarify the parties' ongoing conferral obligations,[207] and it emphasized the iterative nature of the process in an expanded committee note.[208]

Unlike the earlier discussion about witness identification, which illuminated a real difference of perspective among Committee members (and, by extension, members of the bench and bar), the discussion over the timing of the good faith conference began from a unified premise that the process should be iterative.[209] But the discussion was equally helpful from the standpoint of information elaboration because it raised awareness within the Committee about inconsistent interpretations of its draft, forcing the Committee to be more specific about its intended goals. Put differently, even though the Committee shared a TMM about the iterative nature of good faith conferral, it needed a robust discussion to expand its team knowledge about possible alternative understandings of the draft rule.

In May 2018, the Committee submitted its draft rule, together with a detailed committee note, to the Standing Committee with a recommendation that they be published for formal comment.[210] The final proposal read:

> (6) ***Notice or Subpoena Directed to an Organization***. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or

204. *See* NOV. 2018 AGENDA BOOK, *supra* note 199, at 85–86.
205. April 2018 Field Notes, *supra* note 36, at 4.
206. *Id.*
207. *See* NOV. 2018 AGENDA BOOK, *supra* note 199, at 85–86; *see also* April 2018 Field Notes, *supra* note 36, at 7.
208. *See* NOV. 2018 AGENDA BOOK, *supra* note 199, at 86 ("The Committee Note will be revised to discuss the iterative nature of the obligation to confer.").
209. *Id.* at 31.
210. Memorandum from Hon. John D. Bates, Chair, Advisory Comm. on Civ. Rules, to Hon. David G. Campbell, Chair, Comm. on Rules of Prac. and Proc. (May 11, 2018), https://www.uscourts.gov/sites/default/files/cv_report_0.pdf.

> other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, and continuing as necessary, the serving party and the organization must confer in good faith about the number and description of the matters for examination and the identity of each person who will testify. A subpoena must advise a nonparty organization of its duty to make this designation and to confer with the serving party. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.[211]

The Standing Committee approved the drafts in June. On August 15, 2018, the proposed amendment and committee note were formally published, opening a six-month period for public comment.[212]

F. Responding to Additional Inputs

At this point in its work, the Advisory Committee had developed a mental model of the 30(b)(6) problem space, solicited information from targeted sources to build team knowledge about 30(b)(6) practice, and fashioned a solution designed to spur attorney cooperation without creating ancillary disputes. That solution envisioned a continuing obligation among attorneys to meet and confer about each 30(b)(6) deposition, during which they would discuss the number and description of matters for examination, as well as the identity of the designated witnesses.

Now the proposal needed to be tested against real-world concerns. Would the notion of an early, iterative meet and confer be greeted with applause or suspicion? Would the proposed conference topics be seen as promoting efficiency or creating points of contention? The Advisory Committee's next steps would hinge on the reactions of external stakeholders, and those reactions were voluminous. By February 2019, the Committee had received more than 1,700 written comments on the proposal.[213] The subcommittee also held two public hearings in early 2019—one in Phoenix in January and one in Washington, D.C. in February—which collectively drew seventy-five witnesses representing a wide range of legal

211. *Id.*

212. *See* Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, and Civil Procedure, and the Federal Rules of Evidence: Request for Comment (proposed Aug. 15, 2018), https://www.uscourts.gov/sites/default/files/2018-08-15-preliminary_draft_rev._8-22-18_0.pdf.

213. *See Proposed Rule: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, REGULATIONS.GOV (Aug. 12, 2018), https://www.regulations.gov/document/USC-RULES-CV-2018-0003-0001/comment (archiving the public comments made to the Committee's proposed 30(b)(6) amendment).

practice.[214] As it had done during its initial knowledge-building phase in 2017, the subcommittee had to convert this feedback into team knowledge to assess the ongoing efficacy of its proposal.[215]

The public comments told three stories, each focusing on a different element of the Committee's proposed solution. The first story was straightforward: no one favored requiring the parties to confer about the number of matters for examination.[216] While some commenters vigorously advocated for a presumptive limit on the number of topics, and others asserted that no rule-based limit was warranted, no commenter expressed the view that a mandate to *confer* on the number of topics would be beneficial.[217] As one hearing witness explained, the requirement was "a little superfluous because I don't know what it achieves. . . . I don't know how that takes us to the next step in the litigation."[218]

The second story was far more complex: commenters split on the advisability of requiring a good faith conference at all, with hundreds of comments favoring the practice and hundreds more arguing that it should not be placed in the Rule.[219] Adding to the complexity was the fact that those against the conference requirement offered different reasons for their opposition: some argued that the current Rule was working well and changes were unnecessary, while others asserted that although the current Rule was problematic, a conference requirement would create even more disputes and delays.[220]

The third story, concerning witness identification, dominated the subcommittee's attention, but in an unexpected way. Only six minutes into the first public hearing on the proposed rule, a lawyer mentioned that the cognate of Rule 30(b)(6) in the Texas court system[221] requires an organization to disclose the identity of the witness at a reasonable time before the deposition.[222] Although the Committee's proposal had simply called

214. *See* ADVISORY COMM. ON CIV. RULES, PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: CIVIL RULE 30(B)(6) 1–4 (Jan. 4, 2019) [hereinafter Jan. 2019 Public Hearing Transcript]; ADVISORY COMMITTEE ON CIVIL RULES, PUBLIC HEARING ON PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: CIVIL RULE 30(B)(6) 2–4 (Feb. 8, 2019) [hereinafter Feb. 2019 Public Hearing Transcript].

215. *See Rulemaking's Second Founding*, *supra* note 133, at 2537 (noting that "[h]earings focus the mind and the Committee in ways that permit . . . consequences to be discovered before they become a major force in litigation.").

216. *See* ADVISORY COMMITTEE ON CIVIL RULES, APRIL 2019 AGENDA BOOK 193–202 (2019) (listing the names of hundreds of commenters who favored conferring but opposed numerical limits) [hereinafter APRIL 2019 AGENDA BOOK].

217. *See generally id.* at 154–60.

218. Feb. 2019 Public Hearing Transcript, *supra* note 214, at 263 (testimony of Tobias Millrood).

219. *Compare id.* at 100 ("We [already] try in my practice to reach an agreement as to the number of topics at the Rule 16 conference . . . ."), *with id.* at 222 ("I think in terms of a conferral, I'm not opposed to it.").

220. *See* APRIL 2019 AGENDA BOOK, *supra* note 216, at 197–202 (listing hundreds of commenters who "oppose a requirement to confer because the rule is good as is" and hundreds of others who oppose such a requirement "because it will create more disputes and [] defendant will use it to stall . . . .").

221. TEX. R. CIV. P. 199.2(b)(1).

222. Jan. 2019 Public Hearing Transcript, *supra* note 214, at 9.

for the parties to discuss witness identification, subcommittee members were intrigued by the requirement to affirmatively identify the witness in advance.[223] Throughout the rest of the hearing, subcommittee members probed the commenters for their perspectives on an early witness identification requirement.[224] Among other things, subcommittee members inquired about the frequency with which lawyers were asking or being asked to identify witnesses, how such identification might help or hinder the preparation of the deposition, and how the timing of witness identification might influence a party's preparation.[225]

Perhaps unsurprisingly, word spread after the first public hearing, and at the second hearing a few weeks later, the commenters were prepared to discuss the witness identification issue. Indeed, each of the first four commenters—and thirteen out of fifty-two total—directed their remarks almost exclusively to the witness identification requirement.[226] Advocates argued that early witness identification would streamline the discovery practice by, among other things, allowing the deposing party to review prior testimony in advance and (if necessary) schedule coinciding 30(b)(6) and fact witness depositions for the same witness.[227] Opponents related that they sometimes had to substitute 30(b)(6) designees at the last minute and expressed concern that they would be accused of bad faith if the proffered witness did not match the organization's original designation.[228] They also feared that advance designation would allow deposing parties to rummage through the witness's personal social media accounts.[229]

As important as the substance of the comments was the way in which that substance was presented. Much of the testimony came in the form of anecdotes, with witnesses opening their statements by describing the nature of their practice and experience with 30(b)(6) depositions.[230] Commenters relayed dozens of stories—many of them just a week or two old—regarding both efficiencies and under-the-radar problems affecting 30(b)(6) practice.[231] Most of the commenters also faced extensive questioning from members of the Advisory Committee, which often elicited further personal reflections.[232] While personal stories are sometimes derided as "anecdata" unworthy of serious consideration, they can in fact

223. *See, e.g.*, APRIL 2019 AGENDA BOOK, *supra* note 216, at 83–84.
224. *See, e.g.*, Jan. 2019 Public Hearing Transcript, *supra* note 214, at 31, 50.
225. *See generally id.*
226. *See* Feb. 2019 Public Hearing Transcript, *supra* note 214, at 7–32 (testimony of Mark Behrens, Megan Cacace, Brad Marsh, and Mark Chalos).
227. *See, e.g.*, *id.* at 17–18 (testimony of Megan Cacace).
228. *See, e.g.*, *id.* at 150–151 (testimony of Virginia Bondurant Price).
229. *See, e.g.*, *id.* at 10–11 (testimony of Mark Behrens).
230. *See, e.g.*, *id.* at 14, 19–20 (testimony of Mark Behrens and Megan Cacace).
231. *See, e.g.*, Feb. 2019 Public Hearing Transcript, *supra* note 214, at 26–27, 313–14 (testimony of Mark Chalos and Edward Blizzard).
232. *See, e.g.*, *id.* at 25–32 (testimony of Mark Chalos, eliciting questions from five Committee members during a five-minute span).

have a profound and positive impact on small-group deliberation.[233] As one group of scholars has noted, "[s]tories from personal experience can embody practical judgment" and "can function in public deliberation to help people comprehend very different experiences and perspectives . . . ."[234] After relying on numerical data and interest group advocacy for information on the 30(b)(6) process in the early stages of its deliberations, the Committee was able to formally integrate a new form of information—the personal narrative—into its store of team knowledge.

As in previous cycles, the expansion of team knowledge about 30(b)(6) practice initially complicated the search for a solution. The Committee's original proposal—which required the parties to confer about the number of topics and identity of witnesses—had drawn very little external support; even deposing parties agreed that the choice of witness was exclusively the province of the organization.[235] The real debate had been about whether the witness should be identified in advance, and on that topic the Committee's emergent team knowledge counseled in opposite directions. On the one hand, there was real value for deposing parties to know the identity of organizational witnesses in advance of the deposition,[236] suggesting that it would be worthwhile to incorporate this practice into the rule. On the other hand, advance identification was not always practical and could lead to abuses, creating more of the attorney "heartburn" that the Committee was deliberately trying to avoid.[237]

In light of this new complexity, the subcommittee drafted two (really three) new versions of the Amendment for discussion at the Committee's April 2019 meeting.[238] Alternative 1 deleted any reference to witnesses or the number of topics from the new conference requirement, simply stating that "[b]efore or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination."[239] Alternative 2, by contrast, required advance identification of witnesses, mandating that "[n]o fewer than [7] {5} [3] days before the deposition, the organization must identify the person or persons it has designated by name and, if it has designated more than one person, set out matters on which each person will testify."[240] A slightly softer version of Alternative 2, designated as Alternative 2A, only required the

233. *See, e.g.*, Laura W. Black, *Deliberation, Storytelling, and Dialogic Moments*, 18 COMM. THEORY 93, 93–94 (2008); David M. Ryfe, *Narrative and Deliberation in Small Group Forums*, 34 J. APP. COMM. RSCH. 72, 73 (2006).

234. Cynthia R. Farina, Dmitry Epstein, Josiah Heidt, & Mary J. Newhart, *Knowledge in the People: Rethinking "Value" in Public Rulemaking Participation*, 47 WAKE FOREST L. REV. 1185, 1233 (2012).

235. *See, e.g.*, February 2019 Public Hearing Transcript, *supra* note 237, at 161–63 (testimony of Francis McDonald).

236. *See* APRIL 2019 AGENDA BOOK, *supra* note 216, at 103, 107.

237. *Id.* at 107.

238. *Id.* at 107–08.

239. *Id.* at 105.

240. *Id.* at 110 (brackets in original). The precise number of days was left to the Committee to determine, with bracketed alternatives included as placeholders.

organization to identify the number (as opposed to the names) of witnesses it would produce and the topics on which each would testify.[241] The aim of this version was to preclude the deposing party from investigating the personal attributes of the deponent in advance, which might "lead to wasteful, and even potentially abusive, questioning about personal matters."[242] The subcommittee further noted that this version might help prevent "blur[ring] the line between a 30(b)(6) deposition and a 30(b)(1) deposition."[243] It would fall to the full Committee to determine which, if any, of these alternatives to pursue.

G. Finalizing the Amendment

The Advisory Committee entered its April 2019 meeting with the need to process an extensive series of new inputs on the 30(b)(6) issue, including public comments on the published draft of the rule and the three alternative drafts provided by the subcommittee. For the first time, the Committee also faced a significant timing component. If it made "substantial" changes to the draft rule, it would have to submit the new version for another round of public comment.[244] This meant that if the Committee chose to include a witness identification requirement like that proposed in Alternative 2, its work on 30(b)(6) would likely be extended another year. Even if the Committee chose not to require witness identification in the rule, it would still need to finalize the amendment at its April 2019 meeting to keep it on schedule for promulgation in 2020.

Before it could decide among the alternatives, though, the Committee would need to realign its members' knowledge and mental models concerning Rule 30(b)(6), which had begun to diverge during the previous year. One major factor contributing to this divergence was heavy turnover in Committee membership. About half of the members who were present at the start of the 30(b)(6) inquiry in 2016, including original subcommittee members Barkett, Folse, and Shaffer, were no longer on the Committee by the spring of 2019.[245] Meanwhile, seven new members had joined the Committee in late 2018: U.S. Circuit Judge Kent Jordan and attorney Joseph Sellers (both of whom were assigned to the 30(b)(6) subcommittee), as well as U.S. Magistrate Judge Jennifer Boal, Assistant Attorney General Joseph Hunt (representing the DOJ), Utah Supreme Court Justice Thomas Lee, U.S. District Judge Robin Rosenberg, and attorney Helen Witt.[246] These new members carried fresh perspectives but could not yet have fully assimilated the Committee's mental models, team knowledge, or memory on the 30(b)(6) question.

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241. *See* APRIL 2019 AGENDA BOOK, *supra* note 216, at 112.
242. *Id.*
243. *Id.*
244. *Id.* at 115, 119 (citing Procedures for Judicial Conference Rules Committees § 440.20.50(b)).
245. *See* APRIL 2019 AGENDA BOOK, *supra* note 216, at 67.
246. *Id.*

Turnover was not the only issue. The Committee had barely discussed Rule 30(b)(6) at its previous meeting in November 2018 because the draft rule was still in the public comment phase. The influx of comments after that meeting, however, meant that many members of the Committee needed to be brought up to speed on the full range of public feedback. Put differently, the Committee as a whole needed to expand its team knowledge about external reactions to its meet and confer proposal. Separately, the Committee needed to develop new TMMs concerning the practice of identifying witnesses in advance of a 30(b)(6) deposition—a topic which the full Committee had not previously subjected to rigorous examination.

The first two hours of the Committee's deliberations at the April 2019 meeting were dedicated almost exclusively to performing this cognitive teamwork. Expanding team knowledge proved the more straightforward task, in part because many members of the Committee had participated in at least one of the public hearings, and in part because Professor Marcus provided a detailed subcommittee report that carefully laid out the core of the public comments.[247] This extensive groundwork allowed Judge Ericksen to summarize the nature of the public feedback and the subcommittee's thought process at the outset of deliberations,[248] leaving other members to fill in additional details as discussion continued.

Developing mental models regarding advance witness identification was the bigger challenge and took far more time. The Committee had to forge four separate but interrelated TMMs, governing (1) the origins of the proposed requirement; (2) the way in which witness identification played out in real-world litigation; (3) whether witness identification could be considered a best practice; and (4) the level of public support (if any) for placing witness identification in the Rule. Moreover, the Committee could not simply tackle these issues *seriatim*. Rather, Committee members had to engage in an overlapping discussion that drew at once from team knowledge, collective memory, and personal reflection. A segment of the exchange, occurring about an hour into the Committee's deliberations, provides an illustration:

> Morris: Alternative 1 [i.e., requiring a conference without mandating that the parties discuss witness identification] is a punt. If there is a best practice, put it right in the rule.
>
> Jordan: On best practice: the best lawyers do [engage in advance witness identification] and choose to do it, on their professional judgment for that case. [But it] is better for us to recognize that there is give-and-take here. The world won't end if we recommend [witness identification through] Alternative 2, but witness identification came from us, not outside commenters. This may not be a best practice.

247. *See id.* at 101–03.
248. *See* April 2019 Field Notes, *supra* note 36, at 2–3.

> Hunt: We [the DOJ] would agree with that. Witness identification is the organization's information. The best practice is to identify topics so that the best witnesses can be selected.
>
> Rosenberg: What struck me and made me lean toward Alternative 1 was [the acknowledgement in the subcommittee report that] historically, nobody urged a witness identification [requirement] in 2016 and 2017.
>
> Sellers: My recollection is that the origin of the witness identification requirement arose due to criticism about the prior proposal. We still respect the prerogative of the designating party to designate. By consensus, the subcommittee agreed to drop conferring over witness identification; identifying the witness arose as an alternative.[249]

Two things are particularly striking about this exchange. First, the participants simultaneously shared views about the origins of the witness identification proposal and whether witness identification itself was a best practice. Second, almost all the speakers invoked a discrete component of the Committee's overall team knowledge. Judge Jordan, for example, pointed out that the identification requirement was an internal development, not one pushed by external commenters. Judge Rosenberg identified documentation supporting that fact. Sellers provided important historical context.

To be sure, some on the Committee advocated for the inclusion of a witness identification requirement, primarily motivated by the belief that early identification of witnesses would streamline the deposition and the broader discovery process. But as the discussion progressed, the Committee coalesced around a mental model of existing 30(b)(6) practice in which early witness identification was not always a best practice and would sometimes create more problems than it solved. The moment in which this mental model achieved critical mass was captured in the following exchange, which again blended memory, team knowledge, and personal anecdote:

> Campbell: We think we know that this [Rule 30(b)(6)] is the most used tool in civil litigation. We don't want to impair it. We looked it twelve years ago—right, Rick?
>
> Marcus: Yep.
>
> Campbell: The complaints then were too many topics, and lack of witness preparation—recurring themes for years. The most helpful things we can do to solve both is to get parties to talk before the deposition. I think Alternative 1 has the potential to solve the problems that magistrate judges are seeing. I don't see how it creates a potential problem.
>
> Bates: Any observations on advance witness identification?

249. *See id.* at 5.

> Campbell: When I used to take 30(b)(6) depositions, I went in with a list of issues. The identity of the witness wasn't important. I see less potential upside and more potential downside. So Alternative 2 is more problematic.
>
> Judge Sara Lioi: I see it the same way as [Campbell] . . . . As [Jordan] said, it may upset the balance of how good attorneys negotiate. I worry that requiring identification will be choosing sides on a problem that is not a problem. I haven't dealt with Alternative 2 problems.
>
> Professor Benjamin Spencer: What [Campbell] says makes sense . . . .[250]

The view that a general meet and confer was a consensus best practice, and that advance witness identification was not clearly so, eventually carried the day. After several hours of deliberation, the Committee voted to send Alternative 1 to the Standing Committee with a recommendation for promulgation and declined to move forward with Alternatives 2 and 2A.[251] After seven cycles, the final version of the amendment read:

> (6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.[252]

This version of the amendment was ultimately promulgated by the Supreme Court, becoming effective in December 2020.[253]

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250. *See id.* at 7.

251. *Id.* at 9–10. The Committee also discussed and edited a detailed note the next day, a process that took nearly an hour, included input from nearly every Committee member, and involved ten separate votes on the draft language. *Id.* at 12–16.

252. Memorandum from Hon. John D. Bates, Chair, Advisory Comm. on Civ. Rules, to Hon. David G. Campbell, Chair, Comm. on Rules of Prac. and Proc. (Jun. 4, 2019) (emphasis added), https://www.uscourts.gov/sites/default/files/advisory_committee_on_civil_rules_-_june_2019_0.pdf.

253. *See* FED. R. CIV. P. 30(b)(6).

III. CONSTRUCTIVE CONFRONTATION AND THE MOTIVATION TO ELABORATE

The evolution of the Advisory Committee's mental model of Rule 30(b)(6) practice—from a disparate series of practical problems, to an under-the-radar source of attorney "heartburn," to a collection of related issues most appropriately handled by attorneys conferring in advance, to a practice enhanced by the early identification of witnesses, and back again to an event improved simply by a preliminary attorney conference—was no accident. Rather, this cognitive emergence was dependent on Committee members sharing individually held information and seeking out others' perspectives in ways that could be incorporated and used by the entire team. Of course, because the Advisory Committee's work on Rule 30(b)(6) was not a controlled experiment, it is not possible to know the degree to which information was shared with (or withheld from) the group. But evidence drawn from interviews, observations of the Committee's meetings, and contemporaneous documents suggest that Committee members, both individually and collectively, had a high level of motivation to share and process information as a team.

Certain personality traits drive team members to seek out and understand the information held by others and to share their own privately held information with others.[254] These inclinations include a preference for team success over individual accolades,[255] a readiness "to expend effort to achieve a thorough, rich, and accurate understanding of the world" (a quality known as epistemic motivation),[256] and a "willingness to explore, tolerate, and consider new and unfamiliar ideas and experiences" (a quality known as openness to experience).[257] Interviews with Advisory Committee members about the 30(b)(6) experience found ample evidence of these characteristics. As one subcommittee member explained, "We always looked for input. You're going to put a final package in front of the Committee, and you don't want them to vote it down."[258] Another member explained that the subcommittee explicitly explored unintended consequences for each iteration of the rule, fearful that after promulgation, zealous advocates might twist the language of an amendment to their unfair advantage.[259]

Committee members must also believe that their input will meaningfully contribute to the group's deliberations. In less successful teams, members hold back because they sense that the team is inevitably headed

254. *See* De Dreu et al., *supra* note 23, at 23.
255. *See id.*
256. *See id.*
257. Astrid C. Homan, John R. Hollenbeck, Stephen E. Humphrey, Daan Van Knippenberg, Daniel R. Ilgen, & Gerben A. Van Kleef, *Facing Differences with an Open Mind: Openness to Experience, Salience of Intragroup Differences, and Performance of Diverse Work Groups*, 51 ACAD. MGMT. J. 1204, 1208 (2008).
258. Member A Interview, *supra* note 40, at 2.
259. Member C Interview, *supra* note 40, at 1.

toward a particular outcome. To mitigate this risk, high-performing teams seek to introduce a moderate level of task conflict—"disagreements among group members related to the content of their decisions and differences in viewpoints, ideas, and opinions about the task"—into the group.[260] Selecting team members who share the commitment to "getting it right," but who also bring different attitudes, values, and experiences to the task, can promote an active and respectful exchange of contradictory views.[261] As long as disagreements are limited to the substance of the task and are not taken personally, they can benefit teams by exposing different points of view or important information on potential solutions.[262]

Because contributions born of task conflict often contradict or complicate the prevailing narrative, team members must also believe that their input will be accepted and appreciated by the group.[263] The degree to which this comfort exists is captured by a variety of affective mechanisms—qualities of the team that promote unity, harmony, and trust. Such mechanisms include team cohesion (a shared attraction among team members grounded in social or task-based aspects of team membership),[264] team confidence (a shared belief that the team can succeed in its task),[265] team orientation (the belief that the team's goals supersede individual goals),[266] psychological safety (a shared sense that the team environment is safe for interpersonal risk taking),[267] and team trust (a shared willingness to accept vulnerability based on positive expectations of others).[268]

Because affective mechanisms promote harmony and task conflict promotes dissent, teams must keep them in careful balance.[269] Without sufficient trust and cohesion, team members may perceive task-based

260. Bret H. Bradley, Bennett E. Postlethwaite, Anthony C. Klotz, Maria R. Hamdani, & Kenneth G. Brown, *Reaping the Benefits of Task Conflict in Teams: The Critical Role of Team Psychological Safety Climate*, 97 J. APPLIED. PSYCH. 151, 152 (2012).

261. *Id.*

262. *See* Steve W. J. Kozlowski & Daniel R. Ilgen, *Enhancing the Effectiveness of Work Groups and Teams*, 7 PSYCH. SCI. PUB. INT. 77, 93–94 (2006); Karen A. Jehn, *A Multimethod Examination of the Benefits and Detriments of Intragroup Conflict*, 40 ADMIN. SCI. Q. 256, 260–61, 275–76 (1995); Carsten K.W. De Dreu & Laurie R. Weingart, *Task Versus Relationship Conflict, Team Performance, and Team Member Satisfaction: A Meta-Analysis*, 88 J. APPLIED. PSYCH. 741, 742 (2003) (citing studies).

263. *See* Bradley et al., *supra* note 260*,* at 155; *see also* Tony L. Simons & Randall S. Peterson, *Task Conflict and Relationship Conflict in Top Management Teams: The Pivotal Role of Intragroup Trust*, 85 J. APPLIED PSYCH. 102, 108 (2000).

264. *See* Grossman et al., *supra* note 54, at 248.

265. *Id.* at 249.

266. *See* Weaver et al., *supra* note 41, at 136.

267. *See* Bradley et al., *supra* note 260, at 151.

268. *See* Grossman et al., *supra* note 54, at 250. In order for members to trust the team as a whole, "they must feel that (a) the team is competent enough to accomplish their task . . . , and (b) that the team will not harm the individual or his or her interests . . . ." Ilgen et al., *supra* note 59, at 521.

269. *See* Amanuel G. Tekleab, Narda R. Quigley, & Paul E. Tesluk, *A Longitudinal Study of Team Conflict, Conflict Management, Cohesion, and Team Effectiveness*, 34 GRP. & ORG. MGMT. 170, 193 (2009).

disagreements as personal attacks, leading to relationship conflict,[270] more limited collaboration, and diminished team performance.[271] On the other hand, if a team is too cohesive or trusting, team members may fall prey to groupthink and fail to seek or account for confounding information.[272]

The Advisory Committee's effort to achieve this balance was assisted in part by the very structure of the federal civil rulemaking process. High-functioning KWTs build in time to search for information and perspectives that might be relevant to their tasks, and to reflect on their work to date.[273] The Advisory Committee routinely took such pauses, with each semiannual meeting providing an opportunity for the Committee to reevaluate its existing TMMs, contemplate what it had missed or overlooked, and adjust its behavior and actions as needed.[274] Because the subcommittee's work was always presented as an ongoing effort rather than a fait accompli, Committee members could feel comfortable that a divergent perspective or new information would not upset a project already in its final stages. Beyond its internal deliberations, periodic and regular feedback from the Standing Committee, interested organizations like AAJ and LCJ, and the public provided a constant and anticipated source of extrapolation, pushback, and new ideas.[275]

The Committee leadership also sought to balance task conflict with team harmony by encouraging norms of constructive confrontation and information sharing.[276] During meetings, Judge Bates would often solicit views directly from members who had not yet contributed to the discussion. On other occasions, he would make a comment explicitly designed to stimulate broader conversation. At the Committee's April 2018 meeting, for example, he commented on the subcommittee's meet and confer proposal with the observation that "Standing Committee members and judicial members of this committee don't see many problems with 30(b)(6)."[277] On the surface, this was a puzzling statement, given that Judge Bates himself had participated in subcommittee meetings and understood full well why the subcommittee had gone forward with its

270. Relationship conflict reflects "conflicts about personal taste, political preferences, values, and interpersonal style." De Dreu & Weingart, *supra* note 262, at 741. It differs from task conflict in that it reflects tension based on team members' personal attributes, not disagreements about the task itself.

271. *See* Simons & Peterson, *supra* note 263, at 103–04.

272. *See* Janis, *supra* note 8, at 43.

273. *See* Michelle A. Marks, John E. Mathieu, & Stephen J. Zaccaro, *A Temporally Based Framework and Taxonomy of Team Processes*, 26 ACAD. MGMT. REV. 356, 366 (2001); *see also* Grossman et al., *supra* note 54, at 252; Jeffrey A. LePine, Ronald F. Piccolo, Christine L. Jackson, John E. Mathieu, & Jessica R. Saul, *A Meta-Analysis of Teamwork Processes: Tests of a Multidimensional Model and Relationships with Team Effectiveness Criteria*, 61 PERS. PSYCH. 273, 276 (2008).

274. *See generally* discussion *supra* Part II.

275. *See, e.g.*, APRIL 2019 AGENDA BOOK, *supra* note 216, at 125–26, 133–34; *see also* discussion *supra* Section II.E.

276. *See* Franz W. Kellermanns, Steven W. Floyd, Allison W. Pearson, & Barbara Spencer, *The Contingent Effect of Constructive Confrontation on the Relationship Between Shared Mental Models and Decision Quality*, 29 J. ORG. BEHAV. 119, 122–23 (2008).

277. *See* April 2017 Field Notes, *supra* note 36, at 2; NOV. 2017 AGENDA BOOK, *supra* note 128, at 117.

proposal. By framing the comment as he did, Judge Bates subtly reminded the entire Committee that there remained significant contrasting views on the 30(b)(6) issue, and that even after two years of subcommittee work, the Committee would not be permitted to ignore those views.[278] It also allowed the subcommittee to explain its own reasoning as to why an amendment was warranted and avoided the impression that Judge Bates spoke on its behalf. By gently raising a counternarrative and asking the subcommittee to respond, Judge Bates created psychological space for all Committee members to voice their views on the project.

The combination of structural guide rails and active leadership helped the Committee strike the right balance during the 30(b)(6) deliberations. Committee members reported being invested in the project and respectful of their peers' similar commitment.[279] "We all cared about the administration of justice, and approached everything through that framework," one subcommittee member noted in an interview, adding that there was "no tactical advantage to holding anything back" from the group.[280] Another subcommittee member echoed the sentiment: "A sense of responsibility settles onto your shoulders."[281] On a personal level, practitioner members described their peers on the Committee as "open, collegial, thorough, and respectful,"[282] and noted that even when they opposed each other in court, that adversarial relationship did not leach into Committee deliberations.[283]

Importantly, the Committee's sense of collegiality did not inhibit the presentation of conflicting views. As described above, for the first year of the project, many members questioned whether there was even an issue worthy of the Committee's attention.[284] And those who did feel that Rule 30(b)(6) could be improved often vocally disagreed about the nature of the problem and the best approach for the Committee to take.[285] The substantive jostling among Committee members, couched in an atmosphere of team cohesion and trust, allowed the Committee to feel comfortable revising its mental models of the problem and solution as frequently as new information warranted.

Strengthened by a stable process and engaged leadership, the Committee's culture of constructive conflict remained intact even as its composition changed. With many longstanding members having left during the summer of 2018, the Committee faced both the loss of specific knowledge and experience and a disruption of the processes it had used to

278. *See* April 2017 Field Notes, *supra* note 36, at 2; NOV. 2017 AGENDA BOOK, *supra* note 128, at 117.
279. *See* text accompanying *infra* notes 281–83.
280. Member A Interview, *supra* note 40, at 3.
281. Member C Interview, *supra* note 40, at 3.
282. Member B Interview, *supra* note 40, at 1.
283. *Id.* at 2.
284. *See* discussion *supra* Section II.B.
285. *See* discussion *supra* Section II.B.

draw upon that knowledge efficiently.[286] From the perspective of its remaining members, however, the Committee hardly missed a beat: one Committee member described the effects of the turnover as "imperceptible."[287] Judge Jordan and Joseph Sellers, the two new members assigned to the 30(b)(6) subcommittee, quickly immersed themselves in the subcommittee's work and engaged with commenters at the public hearings on the draft rule in early 2019.[288] Judge Jordan was a particularly active participant at both hearings.[289]

This successful transition was made possible both by the qualities of the new members and by their method of selection. When simultaneously replacing several members of a KWT, "the overall goal is to identify team members who will supplement or complement the makeup of [the] existing team[]."[290] In 2018, the Committee lost one circuit judge, one district judge, one magistrate judge, one Justice Department designee, one state supreme court justice, and two private attorneys, and its new members reflected the identical professional composition.[291] Maintaining that composition allowed the Committee's new members to tap into similar social networks as those they replaced, thereby preserving the overall balance and breadth of social networks available to the Committee. Moreover, each of the new members—like all Committee members—was handpicked by the Chief Justice, a form of selective recruitment that has been shown to increase the likelihood of a seamless socialization process.[292] The newcomers also possessed qualities shown to make socialization faster and easier, including familiarity with the group prior to entering it, personality traits associated with adaptability, commitment to the group, and appropriate task-specific skills.[293] Further, many of the new members were already known to the veteran members of the Committee, allowing

286. *See* Kyle Lewis, Maura Belliveau, Benjamin Herndon, & Joshua Keller, *Group Cognition, Membership Change, and Performance: Investigating the Benefits and Detriments of Collective Knowledge*, 103 ORG. BEHAV. & HUMAN DECISION PROCESSES 159, 159 (2007).

287. Member B Interview, *supra* note 40.

288. *See, e.g.*, Jan. 2019 Public Hearing Transcript, *supra* note 214, at 16, 25–28, 44; February 2019 Public Hearing Transcript, *supra* note 214, at 15–17, 40–42.

289. *See, e.g.*, Jan. 2019 Public Hearing Transcript, *supra* note 214, at 45–47, 50–54, 72–77; Feb. 2019 Public Hearing Transcript, *supra* note 214, at 48–52, 72–80.

290. Suzanne T. Bell & Neal Outland, *Team Composition Over Time*, *in* 18 TEAM DYNAMICS OVER TIME 3, 17 (Eduardo Salas, William Brandon Vessey, & Lauren Blackwell Landon eds., 2017).

291. *See* APRIL 2019 AGENDA BOOK, *supra* note 216, at 67. While this identical composition was the product of the federal court system's own internal protocols, it is consistent with the observations of organizational psychologists that "when turnover is infrequent and/or expected, . . . [one] tactic might be to seek a new member whose task knowledge resembles that of the person who is leaving." Richard L. Moreland, *Transactive Memory: Learning Who Knows What in Work Groups and Organizations*, *in* SHARED COGNITION IN ORGANIZATIONS: THE MANAGEMENT OF KNOWLEDGE 3, 19 (Leigh L. Thomson, John M. Levine, & David M. Messick eds., 1999).

292. *See* John M. Levine & Richard L. Moreland, *Knowledge Transmission in Work Groups: Helping Newcomers to Succeed*, *in* SHARED COGNITION IN ORGANIZATIONS: THE MANAGEMENT OF KNOWLEDGE 278 (Leigh L. Thomson, John M. Levine, & David M. Messick eds., 1999).

293. *Id.*

the veterans to assume that they had a certain level of familiarity with both the substantive 30(b)(6) issues as well as Committee practices.[294]

In the end, the Committee's motivation to elaborate in the 30(b)(6) context—like its capacity to elaborate—was influenced by individual personalities and experiences, the qualities of its leaders, and the internal climate of deliberations. Because members were carefully selected, quickly socialized into the group, and encouraged to share and explore confounding information, the Committee was able to explore a greater number of possible outcomes than might otherwise have occurred.

IV. LESSONS FROM THE 30(B)(6) EXPERIENCE

This case study investigated the cognitive teamwork of the Advisory Committee on Civil Rules as it contemplated changes to Federal Rule of Civil Procedure 30(b)(6). While the trajectory of the amendment process was uneven, the Committee's teamwork was remarkably consistent. Throughout their deliberations, Committee members remained open to a variety of approaches (including leaving the rule unchanged) and routinely updated their mental models to account for newly discovered information and perspectives.[295] Committee leaders explicitly encouraged members to solicit and discuss new information, especially information that challenged or complicated the existing view.[296] Committee members maintained moderate task conflict without creating overt relationship conflict.[297] They understood their collective and individual roles and took pride in them.[298] In short, in performing its task, the Committee exhibited many of the defining characteristics of an expert team.[299]

One should not draw outsized conclusions from a single case study. But examining the Advisory Committee's process for 30(b)(6) usefully reveals what must go right in order for the Committee to develop high-quality rules. Moreover, the 30(b)(6) experience highlights four factors that can particularly influence the Committee's deliberations: the attributes of its members, the approach of its leaders, the nature of the decision-making environment, and the degree of transparency.

A. The Characteristics of Committee Members

The Advisory Committee's work on Rule 30(b)(6) was shaped by the specific skills and traits of its members, who brought to the team complementary KSAs, relevant social and professional networks, and the right mix of personality traits. Members' task-specific KSAs and networks gave

294. *Id.* at 276.
295. *See* discussion *supra* Section II.C.
296. *See* discussion *supra* Part III.
297. *See* discussion *supra* Part III.
298. Member C Interview, *supra* note 40, at 2.
299. *See* Salas et al., *supra* note 12, at 447 tbl.25.1.

the Committee direct access to a wide range of information relevant to their assignment.[300] And members' deep-level characteristics—such as openness to experience, epistemic motivation, and need for cognition[301]—motivated them to share their individually held information with the larger group and to seek out and elaborate upon relevant information held by others.[302] Without this particular mix of traits, the Committee likely could not have reached the solution it did—and certainly not in as thorough and methodical a way.

This point bears special emphasis. The 30(b)(6) experience illustrates that more than any other set of attributes, Committee members must possess the deep-level personality traits that motivate them to share and elaborate upon information. Qualities such as openness to experience and the need for cognition not only predispose members to seek out information generally but also encourage them to listen more carefully to those who are different from themselves.[303] As one set of researchers explains:

> People who score high on openness to experience tend to be less dogmatic in their ideas, more willing to consider different opinions, more open to all kinds of situations, and less likely to deny conflicts than people who score low on openness to experience. All these aspects of openness to experience are closely related to the essence of working in a diverse team, as members of diverse teams are more likely to have different viewpoints, attitudes, and ideas (and therefore conflict) than members of homogeneous teams. Therefore, openness to experience should enable diverse teams to make better use of these differences and perform better. [304]

By contrast, team members who are not open to experience may "perceiv[e] dissimilar others as a threat or challenge to a positive and distinct self-image."[305] In these circumstances, the presence of surface-level differences like age, race, gender, or professional title can actually fracture the team by causing members to align only with those who share their

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300. *See* discussion *supra* Section II.B.

301. See discussion *supra* Section II.C. Need for cognition is "the dispositional tendency to thoroughly process a wide array of information." Eric Kearney, Diether Gebert, & Sven C. Voelpel, *When and How Diversity Benefits Teams: The Importance of Team Members' Need for Cognition*, 52 ACAD. MGMT. J. 581, 584 (2009).

302. *See* De Dreu et al., *supra* note 23, at 39.

303. *See* Knippenberg et al., *supra* note 10, at 1009–11; *see also* Yves R.F. Guillaume, Jeremy F. Dawson, Lilian Otaye-Ebede, Stephen A. Woods, & Michael A. West, *Harnessing Demographic Differences in Organizations: What Moderates the Effects of Workplace Diversity?*, 38 J. ORG. BEHAV. 276, 279–80 (2017); Timothy A. Judge & Jeffrey A. LePine, *The Bright and Dark Sides of Personality: Implications for Personnel Selection in Individual and Team Contexts*, *in* RESEARCH COMPANION TO THE DYSFUNCTIONAL WORKPLACE 344–45 (Janice Langan-Fox, Cary L. Cooper, & Richard J. Klimoski eds., 2007).

304. Homan et al., *supra* note 257, at 1208 (internal citations omitted); *see also* Kearney et al., *supra* note 301, at 584 (noting that a need for cognition is particularly valuable for diverse teams, "in which members often need to take more time to explain and try to convince their colleagues of their respective positions and to think through and discuss the options offered by the other individuals in the team.").

305. Guillaume et al., *supra* note 303, at 279.

demographic traits.[306] When teams experience fracturing, members are less likely to share information outside of their respective subgroups and are less likely to listen to and elaborate upon the information shared by members of other subgroups.[307] Such teams are also more likely to suffer relationship conflict and diminishing team member satisfaction.[308]

It is therefore not enough to simply suggest, as one recent commentator has, that "if the rules committees were more [demographically] diverse, the rules they produce would be of even higher quality."[309] To be sure, under the right conditions, demographic and experiential diversity among team members can provide access to additional perspectives and networks and spur the search for additional information. But "[i]n order for diversity to have any beneficial effects on team performance, the members of diverse teams must actively realize the potential inherent in an enlarged pool of knowledge, experience, and perspectives."[310] Put differently, no degree of surface-level diversity is sufficient unless Committee members first possess openness to experience and similar deep-level traits.

B. The Qualities of Committee Leaders

Shepherding the Advisory Committee through the rulemaking process requires a firm hand and diverse set of leadership skills; Professor Marcus has compared it to "steer[ing] an ocean liner."[311] On the one hand, the Committee (and subcommittee) chairs must nurture an inclusive environment that encourages elaboration,[312] positively reinforces the contributions of each Committee member,[313] and emphasizes the advantages of hearing a variety of perspectives—including dissenting views.[314] On the other hand, the chairs must keep a close eye on deadlines, resource

306. *See* Bertolt Meyer, *Team Diversity*, *in* WILEY BLACKWELL HANDBOOK OF THE PSYCHOLOGY OF TEAM WORKING AND COLLABORATIVE PROCESS 153–54 (Eduardo Salas, Rico Ramón, & Jonathan Passmore eds., 2017).

307. *See* Ramón Rico, Eric Molleman, Miriam Sánchez-Manzanares, & Gerben S. Van der Vegt, *The Effects of Diversity Faultlines and Team Task Autonomy on Decision Quality and Social Integration*, 33 J. MGMT. 111, 115 (2007); *see also* Sherry M. B. Thatcher & Pankaj C. Patel, *Group Faultlines: A Review, Integration, and Guide to Future Research*, 38 J. MGMT. 969, 970 (2012).

308. Rico et al., *supra* note 307, at 116.

309. Brooke D. Coleman, *#SoWhiteMale: Federal Procedural Rulemaking Committees*, UCLA L. REV.: DISCOURSE (Nov. 22, 2020), https://www.uclalawreview.org/sowhitemale-federal-procedural-rulemaking-committees.

310. Kearney et al., *supra* note 301, at 593.

311. *See* Richard Marcus, *How to Steer an Ocean Liner*, 18 LEWIS & CLARK L. REV. 615, 615 (2014).

312. *See generally* Wendy P. van Ginkel & Daan van Knippenberg, *Group Leadership and Shared Task Representations in Decision Making Groups*, 23 LEADERSHIP Q. 94 (2012).

313. Eric Kearney & Diether Gebert, *Managing Diversity and Enhancing Team Outcomes: The Promise of Transformational Leadership*, 94 J. APPLIED PSYCH. 77, 80 (2009).

314. *See id.* at 81; *see also* Kathleen Boies & John Fiset, *Leadership and Communication as Antecedents of Shared Mental Models Emergence*, 31 PERFORMANCE IMPROVEMENT Q. 293, 296 (2018). Indeed, leaders who emphasize elaboration and diversity of perspectives, and model the elaboration process themselves, tend to have teams that reach higher-quality decisions than leaders who focus on individual relationships or who stress the need to embrace a common viewpoint. *See* James R. Larson, Jr., Caryn Christensen, Ann S. Abbott, & Timothy M. Franz, *Diagnosing Groups: Charting the Flow of Information in Medical Decision-Making Teams*, 71 J. PERSONALITY & SOC. PSYCH. 315, 317 (1996).

acquisition, and other functional considerations that are equally as important to the Committee's success.[315]

The 30(b)(6) experience offers examples of how these seemingly divergent skills can be combined effectively. As described above, Judge Bates actively encouraged participation and comment from Committee members and liaisons during their semiannual meetings.[316] Judge Ericksen employed a similar approach as the chair of the 30(b)(6) subcommittee: one member noted in an interview that while each subcommittee meeting began with a set agenda, the discussion itself was typically "freewheeling," and every member was encouraged to raise issues or ideas as they came up.[317] This style invited members to spontaneously offer information or perspectives that they had not anticipated sharing before the meeting began.[318]

At the same time, both Judge Bates and Judge Ericksen were largely able to keep discussion focused and efficient, even under time pressure. Consider, for example, a moment from the Committee's April 2018 meeting. The Committee was discussing the proposed meet and confer requirement, and members had suggested several different alternatives to capture its iterative nature. Concerned about the full Committee's capacity to hold at least "five different language options" in its memory, as well as the need to complete its broader agenda, Judge Bates paused the debate and charged the subcommittee with working on the issue over the lunch break.[319] Judge Bates then refocused the full Committee on a point of widespread agreement: the decision not to recommend an associated change to Rule 26(f).[320] In so doing, Judge Bates was able to foster a sense of closure to the initial 30(b)(6) discussion, allowing the Committee to proceed to the morning's next topic with a feeling of accomplishment. Meanwhile, as deliberation moved to other topics, Judge Ericksen quietly led the subcommittee through an email discussion of the various language options. Consequently, Judge Ericksen was positioned to propose new language to the Committee even before the scheduled break.[321] Her efforts would not be recorded in the minutes or formally recognized by the Committee itself,

315. J. Richard Hackman & Richard E. Walton, *Leading Groups in Organizations*, *in* DESIGNING EFFECTIVE WORK GROUPS 72, 75 (Paul S. Goodman ed., 1986); *see also* Frederick P. Morgeson, D. Scott DeRue, & Elizabeth P. Karam, *Leadership in Teams: A Functional Approach to Understanding Leadership Structures and Processes*, 36 J. MGMT. 5, 8 (2010).

316. *See supra* note 277 and accompanying text. This leadership style, known as "participative leadership," treats all group members uniformly and seeks to promote interactions among them as a way of unearthing different perspectives. *See* Shelley D. Dionne, Hiroki Sayama, Chanyu Hao, & Benjamin James Bush, *The Role of Leadership in Shared Mental Model Convergence and Team Performance Improvement: An Agent-Based Computational Model*, 21 LEADERSHIP Q. 1035, 1038 (2010).

317. Member C Interview, *supra* note 40, at 2.

318. *Id.*

319. April 2018 Field Notes, *supra* note 36, at 5–6.

320. *Id.* at 6.

321. *Id.*

but they made a substantial difference in advancing the Committee's work in a timely and meaningful way.

At least anecdotally, the leadership styles of Judges Bates and Ericksen were largely consistent with those who have chaired the Advisory Committee over the past three decades.[322] Judge Bates's predecessors—among them Judge David Campbell, Judge Mark Kravitz, Judge Lee Rosenthal, and Judge Patrick Higginbotham—each earned a reputation for meaningful outreach, transparency, and efficiency while leading the Committee.[323] Such leadership qualities, however, cannot be taken for granted. Chairs who err too far on the side of achieving quick consensus may cut off possible avenues of study too early, while chairs who fail to provide resources and situational updates to the Committee, or who are unable to manage relationships with other parts of the organization, risk setting the Committee's work adrift.[324] Choosing a leader who can strike the right balance is essential.

C. The Elaboration Environment

As an arm of the Judicial Conference of the United States,[325] the Advisory Committee operates within a well-defined organizational environment. This setting conferred several benefits on the Committee during its deliberations on Rule 30(b)(6). The federal court system provided the Committee with material, human, and financial resources ranging from physical meeting space to support staff.[326] It also set specific goals for the Committee, including the public objective of crafting rules to promote the "just, speedy, and inexpensive"[327] determination of all civil cases and the less public, but equally important, goal of protecting the court system's own operations from instability and resource disruption.[328] As one Committee member explained, "We are highly mission-driven, and that mission is very well-defined."[329]

The Judicial Conference further situated the Advisory Committee within a broader organizational culture that made the fair and efficient administration of justice a top priority. One Committee member even recalled that Chief Justice Roberts's invitation to join the Advisory Committee specifically mentioned the administration of justice.[330] This framework shaped the Committee members' commitment to their task and to each

322. Member B Interview, *supra* note 40, at 1. As one Committee member noted during an interview, Judge Bates "runs an incredibly efficient meeting." *Id.*

323. *See, e.g.*, Cooper, *supra* note 2, at 593–94; Marcus, *supra* note 311, at 622–23.

324. *See* Sims & Salas, *supra* note 12, at 312–13.

325. *See About the Judicial Conference: The Judicial Conference of the United States is the National Policymaking Body for the Federal Courts*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference (last visited Oct. 26, 2022).

326. *See* Jordan M. Singer, *The Federal Courts' Rulemaking Buffer*, 60 WM. & MARY L. REV. 2239, 2241–44, 2264–65 (2019).

327. FED. R. CIV. P. 1.

328. *See* Singer, *supra* note 326, at 2242, 2250–51.

329. Member B Interview, *supra* note 40, at 2.

330. Member A Interview, *supra* note 40, at 2.

other.[331] For example, one Committee member noted in an interview that the Committee took an overarching interest in how any proposed change would affect judicial administration,[332] and another reported that the fairness of any proposal became the 30(b)(6) subcommittee's primary consideration.[333]

Perhaps the most important resource provided to the Committee, however, was time. The Judicial Conference set a standard timeline for the Committee's work, with long pauses between regular meetings and clear points at which external views would be solicited.[334] This protracted timeline relieved outside pressure on the Committee to act before it was ready.[335] Adequate time enables teams to fully define their tasks, collect information, diagnose and correct internal problems, seek feedback on processes and proposals, and revise their goals.[336] The passage of time also permits members' deep-level attributes to emerge and be recognized[337] and team-level cognitions and affective mechanisms to develop.[338] By contrast, when time is short, the elaboration process begins to break down.[339] Potentially relevant information is never considered, mediating processes and mechanisms do not fully develop, and provisional outcomes that form the foundations of a final decision lack the quality they might otherwise have achieved.

The relative lack of time pressure on the Advisory Committee allowed it to engage with and revise its TMMs on a regular basis. It took a full year for Committee members to coalesce around the "heartburn" model of 30(b)(6) practice, and only then after two full Committee meetings, several more subcommittee meetings, and extensive research had

331. *See* Sims & Salas, *supra* note 12, at 310 (noting that organizations can promote teamwork by encouraging "common objectives, shared values, mutual trust, frequent and honest communication, empowerment and learning"); *see also* Jessica R. Mesmer-Magnus, Raquel Asencio, Peter W. Seely, & Leslie A. DeChurch, *How Organizational Identity Affects Team Functioning: The Identity Instrumentality Hypothesis*, 44 J. MGMT. 1530, 1543–44 (2018) (explaining that if team members strongly identify with the parent organization, they will cooperate and contribute to the team's success even if they do not identify strongly with the team itself).

332. Member C Interview, *supra* note 40, at 3.

333. Member A Interview, *supra* note 40, at 2. These values aligned with the "five core values" of expert teams: "sensitivity to operations, commitment to resilience, deference to expertise, reluctance to simplify and pre-occupation with errors." Weaver et al., *supra* note 41, at 131.

334. *See* Singer, *supra* note 326, at 2295–97 (noting the Judicial Conference's standard rulemaking procedure).

335. *See id.* at 2287–97. *See also* Lotte Scholten, Daan van Knippenberg, Bernard A. Nijstad, & Carsten K.W. De Dreu, *Motivated Information Processing and Group Decision-Making: Effects of Process Accountability on Information Processing and Decision Quality*, 43 J. EXPERIMENTAL SOC. PSYCH. 539, 540 (2007).

336. *See* Steve W. J. Kozlowski, *Enhancing the Effectiveness of Work Groups and Teams: A Reflection*, 13 PERSPECTIVES PSYCH. SCI. 205, 206 (2018) (noting "the dynamic, emergent, and adaptive aspects of team member interactions with the environment, their task, and each other over time.").

337. *See* Natalie J. Allen & Thomas A. O'Neill, *The Trajectory of Emergence of Shared Group-Level Constructs*, 46 SMALL GRP. RSCH. 352, 354 (2015).

338. *Id.* at 376.

339. *See* Sohrab et al., *supra* note 38, at 505; Carol R. Paris, Eduardo Salas, & Janis A. Cannon-Bowers, *Teamwork in Multi-Person Systems: A Review and Analysis*, 43 ERGONOMICS 1052, 1061 (2000).

taken place.[340] It took another year of research and meetings before the Committee landed on a meet and confer solution to be placed in Rule 30(b)(6) itself.[341] And it took yet another year for the Committee to digest external feedback regarding the meet and confer proposal, compare it to the Committee's existing conceptions of the problem and solution, and make appropriate adjustments.[342] To be sure, Committee members were not working full-time on the 30(b)(6) issue, and it is possible that they could have reached a similar solution in a shorter timeframe. But the opportunity to research, discuss, and fully cogitate on the issue afforded by the deliberate pace of the Committee's proceedings greatly increased the likelihood that perspectives, data, and potential consequences of the new rule would not be overlooked.

Even with the time and other valuable resources provided by the federal court system, the Committee still faced considerable environmental pressure during its deliberations. For one thing, the Committee knew that it was being watched. Its meetings routinely drew two to three dozen outside observers, representing various coalitions of lawyers and industries.[343] And the volume of external commentary on the draft 30(b)(6) amendment—including more than 1,700 public comments and more than seventy-five witnesses at the public hearings—demonstrated that even a relatively modest rule change would not be treated as a minor affair.[344] Moreover, the court system imposed its own constraints and pressures on the Committee's work by obligating the Committee to account for the needs of internal constituencies such as judges, court staff, and the court system's bureaucracy.

The Committee navigated this environment by casting a wide net for external input while carefully controlling how and when that information was received. It used a variety of established channels for direct input, including written comments, public hearings, and brief but regular opportunities for observers to offer their thoughts at the Committee's semiannual meetings.[345] It also relied on its voting and liaison members[346] to bring forth the perspectives of their designated professional slots (judge, practitioner, academic, DOJ representative, etc.). In our interviews, members of the Committee explained that while they did not feel compelled to

340. *See* discussion *supra* Sections II.B, II.C.

341. *See* discussion *supra* Section II.D.

342. *See* discussion *supra* Sections II.E, II.F.

343. *See* sources cited *supra* note 36 (on file with author); *see also, e.g.*, APRIL 2017 AGENDA BOOK, *supra* note 26, at 71.

344. *See, e.g.*, *Proposed Rule*, *supra* note 213 (archiving the public comments made to the Committee's proposed 30(b)(6) amendment); *see also* discussion *supra* Sections II.E, II.F.

345. *See Procedures Governing the Rulemaking Process*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/laws-and-procedures-governing-work-rules-committees-0 (last visited Oct. 26, 2022) (articulating the procedures the Committee utilizes throughout the rulemaking process).

346. The Judicial Conference assigned a Clerk of Court representative to the Committee, as well as liaisons from the Standing Committee and the Advisory Committee on Civil Rules. *See, e.g.*, APRIL 2016 AGENDA BOOK, *supra* note 72, at 11.

advocate only for their "designated" viewpoint, they did feel a responsibility to assure that this viewpoint was presented fully and accurately.[347] This frequently involved canvassing similarly situated others before Committee meetings in order to present a cogent and appropriately nuanced view to the Committee.[348]

Another nod to environmental reality is reflected in the Committee's commitment to consensus. Procedural rulemaking is a low-demonstrability task, meaning that it does not lend itself to a single, objectively correct solution.[349] When faced with such tasks, successful teams often deliberately aim for a consensus solution that is consistent with the organization's overall needs.[350] Consensus solutions may not be as bold or dramatic as other alternatives, but they confer legitimacy when the objective accuracy of the solution is not ascertainable. Upon becoming chair in 2015, Judge Bates emphasized "the Committee's determination to work toward consensus in its deliberations,"[351] and indeed the final version of the 30(b)(6) amendment reflected careful consideration of consensus best practices designed to draw large-scale support from the bench and bar.

D. The Importance of Transparency

External input played a substantial role in the Advisory Committee's 30(b)(6) deliberations. Much of that was due to the Committee's willingness to consider information outside of its own knowledge base, but some was also due to transparency measures that were formally built into the Committee's work. Among other things, Committee meetings were open to public observation, key documents were posted on the U.S. Courts website, and public comments—both written and oral—were solicited and publicly posted at designated intervals.[352] These controls served the dual benefit of providing more complete information to the Committee and enhancing the Committee's legitimacy.[353]

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347. *See, e.g.*, Member B Interview, *supra* note 40, at 1.

348. Canvassing behavior was confirmed both in interviews, *see, e.g.*, Member B Interview, *supra* note 40, at 2, and in open Committee discussion. At the Committee's April 2019 meeting, for example, Magistrate Judge Jennifer Boal reported that "federal magistrate judges said this [30(b)(6)] was a frequently litigated area, and felt that a rule would help. The sense was that more conferral was better." April 2019 Field Notes, *supra* note 36, at 6.

349. Put differently, a task low in demonstrability is one in which "a correct solution does not exist or cannot be known until some future time . . . ." R. Scott Tindale, *Decision Errors Made by Individuals and Groups*, *in* INDIVIDUAL AND GROUP DECISION MAKING: CURRENT ISSUES 109, 110 (N. John Castellan ed., 1993).

350. *See* John M. Levine & Eliot R. Smith, *Group Cognition: Collective Information Search and Distribution*, *in* THE OXFORD HANDBOOK OF SOCIAL COGNITION 616, 620–23 (Donal Carlston ed., 2013).

351. APRIL 2016 AGENDA BOOK, *supra* note 72, at 42.

352. *See Rulemaking's Second Founding*, *supra* note 133, at 2538; *see also* sources cited *supra* notes 245–49.

353. *See* Singer, *supra* note 326, at 2287–97 (describing the federal court system's efforts to open rulemaking in the 1970s and 1980s in order to increase its legitimacy).

Unfortunately, this level of transparency remains the exception in federal court administration.[354] Of the more than two dozen committees and working groups under Judicial Conference supervision, only the rulemaking committees have established methods to seek input from, or regularly share information with, external audiences.[355] Consequently, many decisions of significance to the court system and its users are made without broad-based input and without any public record for ascertaining what information was considered and how the decisionmakers went about their process.

A recent example illustrates this problem. In the spring of 2016, the Judicial Conference's Committee on Court Administration and Case Management (CACM) met to consider whether video of federal court hearings should be made available to the public on a widespread basis. Five years earlier, the Judicial Conference had authorized a pilot program to test the viability and desirability of recording courtroom proceedings, and fourteen district courts had volunteered to participate.[356] The FJC worked closely with the pilot courts to assess the program and had issued a detailed report to CACM before its meeting.[357] The findings were in many ways equivocal. For example, most judges and attorneys who had participated in the pilot felt that video recording had little to no effect on their level of preparation, pressure to decide cases in a certain way, or incentive to act out for the cameras.[358] Moreover, most judges and attorneys agreed that the program increased public confidence in the federal courts, although they were divided as to the size of that increase.[359] On the other hand, the costs of administering the program were not insubstantial and presented a particular burden on IT staff in some courts.[360]

Given the timeliness and salience of the issue, the mixed results of the pilot, and the amount of time and money already invested in exploring the topic, it would have been entirely appropriate for CACM to synthesize and contextualize all available information before deciding the future of the program. Moreover, CACM had many sources of information at its disposal beyond the FJC report. Among other things, its members could have solicited views from state courts where video recording was already established; consulted scholarly research on the impact of courtroom

354. *See Rulemaking's Second Founding*, *supra* note 133, at 2534–35.

355. *See How to Submit Input on a Pending Proposal*, U.S. CTS., https://www.uscourts.gov/rules-policies/about-rulemaking-process/how-submit-input-pending-proposal (last visited Oct. 26, 2022). Moreover, the Standing Committee did not issue formal guidance regarding public input on rulemaking until 2019. *See* MINUTES: COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 26 (June 25, 2019).

356. For more on the pilot program, see Jordan M. Singer, *Judges on Demand: The Cognitive Case for Cameras in the Courtroom*, 115 COLUM. L. REV. SIDEBAR 79 (2015).

357. *See generally* MOLLY TREADWAY JOHNSON, CAROL KRAFKA, & DONNA STIENSTRA, VIDEO RECORDING COURTROOM PROCEEDINGS IN UNITED STATES DISTRICT COURTS: REPORT ON A PILOT PROJECT 42–46 (2016).

358. *Id.* at viii–ix.

359. *Id.* at ix.

360. *Id.* at x.

cameras; or reached out directly to judges, attorneys, and other court users who did (or did not) participate in the pilot to probe them further about their perspectives. Put differently, CACM could have used the FJC report as a jumping off point for a deeper analysis of the use of courtroom video.

But if CACM did elaborate upon information and ideas respecting the video recording pilot in 2016, it was entirely absent from the public record. CACM did not seek public input on the issue, either through hearings or in written form. Its meetings were not open to observers, nor were its meeting minutes posted for public view. Indeed, the only reference at all to CACM's decision and decision-making process was a single sentence in the minutes of the Judicial Conference's March 2016 meeting, which blithely observed that CACM "reviewed a report from the Federal Judicial Center on the Judicial Conference's cameras in the courtroom pilot project, and agreed that the findings of the report did not justify any change to the Judicial Conference's current broadcasting policy at this time."[361]

To be sure, the federal court system has occasionally made its decision-making process more transparent, especially on issues of obvious importance to the system's users. For example, the Federal Judiciary Workplace Conduct Working Group, formed in 2018, actively solicited views from court employees and law clerks about workplace policies and procedures.[362] Similarly, the court system posts information on the charges, membership, and meetings of the Electronic Public Access Public User Group (User Group), created in 2019 with the mission of providing advice and feedback on PACER and other court electronic information services.[363] The availability of such information makes it easier to assess whether the User Group is acting as an expert team. Not coincidentally, such openness also makes it more likely that the User Group will act an as expert team, since it will be positioned to receive a wider range of information and feedback, and its members will be better conditioned to consider and elaborate upon information from all sources. For all these benefits, however, the Workplace Conduct and PACER experiences were the outliers and the CACM experience the archetype.

While it may not be practical or desirable for every piece of committee work to be fully open to public view and input, increasing the availability of different perspectives and non-overlapping information raises the chance that committees will approximate high-performing teams.

361. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 12 (Mar. 15, 2016).

362. *See Judiciary Workplace Conduct Group Seeks Law Clerk, Employee Input*, U.S. CTS. (Feb. 21, 2018), https://www.uscourts.gov/news/2018/02/21/judiciary-workplace-conduct-group-seeks-law-clerk-employee-input.

363. *See Electronic Public Access User Group*, U.S. CTS., https://www.uscourts.gov/court-records/electronic-public-access-public-user-group (last visited Oct. 26, 2022). PACER, an acronym for Public Access to Court Electronic Records, is the federal court system's online docketing and records system. *See Judiciary Launches Redesigned PACER Website*, U.S. CTS. (Jun. 26, 2020), https://www.uscourts.gov/news/2020/06/26/judiciary-launches-redesigned-pacer-website.

Assuming that committees and working groups are chosen with as much care as the Advisory Committee, and assuming that other committees are provided with sufficient time to collect and assess the information needed to propose meaningful solutions, opening the door to more information is the more effective way to turn competent KWTs in the federal court system into expert teams.

CONCLUSION

The 2020 amendment to Federal Rule of Civil Procedure 30(b)(6) was relatively modest.[364] The cognitive teamwork required to reach this amendment, however, was anything but. From the earliest stages of considering the issue, through the development of several team mental models, to the search for and incorporation of new information, the Advisory Committee on Civil Rules routinely exhibited many of the characteristics of a high-performing team.

To conclude that the Committee demonstrated these qualities in this instance is not to say that it reached the definitive answer to improving Rule 30(b)(6). Indeed, there was no single correct answer for the Committee to find. But the Committee's collective willingness to grapple with confounding information and perspectives, even when individual members felt strongly about a particular approach, increased the quality of the resulting rule as well as public confidence in the rulemaking process.

A process built on the principles of expert teamwork does not mean that everyone will be pleased with the result, and the amendment to Rule 30(b)(6) is bound to draw criticism from some corners. But substantive disagreement with a proposed rule, or even concerns about its operation, need not elicit post hoc charges of cognitive bias or groupthink. Rather, those concerned about specific outcomes should engage with the rulemaking process directly and earnestly. Offering meaningful information and perspectives to the Committee at an early stage, rather than complaining from the sidelines after the fact, is the best way to assure high-quality civil rules and high-quality civil justice for all.

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364. *See Rulemaking's Second Founding*, *supra* note 133, at 2546 (calling the amendment "a pretty cautious proposal, particularly in comparison to some of the more aggressive ideas originally offered.").