ADVISORY COMMITTEE
ON
CIVIL RULES

Washington, DC
November 7-8, 2013

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Agenda
November 7-8, 2013
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   Emery Lee, FJC

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TAB 1

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TAB 1A

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Draft Minutes

Civil Rules Advisory Committee

April 11-12, 2013

The Civil Rules Advisory Committee met at the University of Oklahoma College of Law on April 11 and 12, 2013. Participants included Judge David G. Campbell, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Hon. Stuart F. Delery; Judge Paul S. Diamond (by telephone); Parker C. Folse, Esq. (by telephone); Judge Paul W. Grimm; Peter D. Keisler, Esq.; Dean Robert H. Klonoff; Judge John G. Koeltl; Judge Scott M. Matheson, Jr.; Chief Justice David E. Nahmias (by telephone); Judge Solomon Oliver, Jr.; and Judge Gene E.K. Pratter. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S.Sutton, Chair, Judge Diane P. Wood, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated by telephone. The Department of Justice was further represented by Theodore Hirt. Jonathan C. Rose, Andrea Kuperman, Benjamin J. Robinson, and (by telephone) Julie Wilson represented the Administrative Office. Emery Lee represented the Federal Judicial Center. Steven S. Gensler, a former committee member, managed the meeting. Professor Thomas D. Rowe, Jr., another former committee member, also attended. Observers included Joseph D. Garrison, Esq. (National Employment Lawyers Association); John K. Rabiej (Duke Center for Judicial Studies); Jerome Scanlan (EEOC); Alex Dahl, Esq. and Robert Levy, Esq. (Lawyers for Civil Justice); John Vail, Esq. (American Association for Justice); Thomas Y. Allman, Esq. (by telephone); Kenneth Lazarus, Esq. (American Medical Association); Ariana Tadler, Esq., Henry Kelston, Esq., William P. Butterfield, Esq., Maura Grossman, Esq., and John J. Rosenthal (Sedona Conference); Professor Gordon V. Cormack; and Ian J. Wilson.

Judge Campbell opened the meeting by welcoming the Committee and observers to the beautiful Oklahoma campus and the impressive Law School building. Dean Joseph Harroz, Jr., in turned welcomed the Committee to the Law School, noting the School's delight that Jonathan Rose and Professor Gensler had suggested that the Committee meet in Norman.

Judge Campbell noted that three new members have been appointed to replace Chief Justice Shepard, Judge Colloton, and Anton Valukas, who have rotated off the Committee — Judge Colloton is chairing the Appellate Rules Committee, however, making it likely that he will be involved in projects that join the two committees. Chief Justice Nahmias of the Georgia Supreme Court is a graduate of Duke and of the Harvard Law School. He clerked for Judge Silberman on the D.C. Circuit and then for Justice Scalia. He practiced with Hogan & Hartson, in the U.S. Attorney's office in Atlanta, as Deputy Assistant Attorney General in the Criminal

Division, and as United States Attorney for the Northern District of Georgia. He was appointed to the Georgia Supreme Court in 2009. Judge Matheson is a graduate of Stanford, Oxford as a Rhodes Scholar, and Yale Law School. He practiced with Williams & Connally, and as district attorney. He was Dean of the University of Utah Law School for eight years, and held a chair at the Law School when he was appointed to the Tenth Circuit. Parker Folse is a graduate of Harvard and the University of Texas Law School. He clerked for Judge Sneed in the Ninth Circuit and for Chief Justice Rehnquist. He founded the Seattle office of Susman Godfrey in 1995. He has been active in the ABA Antitrust Section. He represents both plaintiffs and defendants in complex litigation, often involving antitrust and patents. He has been named lawyer of the year for "bet-the-company" litigation. A personal commitment prevented his attendance at this meeting.

Judge Campbell also noted that this will be the last meeting for Judge Wood as liaison from the Standing Committee. Her term on the Standing Committee concludes this fall, and she will promptly become Chief Judge of the Seventh Circuit. She has been more a member of the Civil Rules Committee than a liaison. She has always been fully prepared on all agenda items, and participates as an active member.

Judge Campbell also noted that "we still miss Mark Kravitz." Professor-Reporter Coquillette reported that rules committee members had given generously to establish funds in Judge Kravitz's memory at the Connecticut Bar Foundation and the Friends School for Disadvantaged Children in New Haven.

Judge Campbell reported on the Standing Committee's January meeting. The Committee approved Rule 37(e) for publication, understanding that some revisions would be made and presented for review at their June meeting. They like the rule. They also responded favorably to a presentation of the Duke Rules package. They approved for publication minor revisions of Rules 6(d) and 55(c), and a technical correction of Rule 77. The Judicial Conference approved the Rule 77 correction as a consent calendar item.

The Supreme Court has approved the proposed amendments of Rule 45. There is no reason to expect that Congress will be moved to make revisions.

November 2012 Minutes

The draft minutes of the November 2012 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Activity

There is little legislative activity to report in these early days of the new Congress. The House Subcommittee will continue to look at the work of this Committee.

"Duke Rules" Package

Judge Koeltl, chair of the Duke Conference Subcommittee, recalled that three main themes were repeatedly stressed at the Duke Conference. Proportionality in discovery, cooperation among lawyers, and early and active judicial case management are highly valued and, at times, missing in action. The Subcommittee has worked on various means of advancing these goals. The package of rules changes has evolved through many drafts and meetings. The Subcommittee is unanimous in proposing that each part of the rules be recommended for publication.

The rules proposals are grouped in three sets. One set looks to improve early and effective case management. The second seeks to enhance the means of keeping discovery proportional to the action. The third hopes to advance cooperation.

CASE-MANAGEMENT PROPOSALS

The case-management proposals reflect a perception that the early stages of litigation often take far too long. "Time is money." The longer it takes to litigate an action, the more it costs. And delay is itself undesirable.

Rule 4(m): Rule 4(m) would be revised to shorten the time to serve the summons and complaint from 120 days to 60 days. The Department of Justice has reacted to this proposal by suggesting that shortening the time to serve will exacerbate a problem it now encounters in condemnation actions. Rule 71.1(d)(3)(A) directs that service of notice of the proceeding be made on defendant-owners "in accordance with Rule 4." This wholesale incorporation of Rule 4 may seem to include Rule 4(m). Invoking Rule 4(m) to dismiss a condemnation proceeding for failure to effect service within the required time, however, is inconsistent with Rule 71.1(i)(1)(C), which directs that if the plaintiff "has already taken title, a lesser interest, or possession of" the property, the court must award compensation. This provision protects the interests of owners, who would be disserved if the proceeding is dismissed without awarding compensation but leaving title in the plaintiff. The Department regularly finds it necessary to explain to courts that dismissal under Rule 4(m) is inappropriate in these circumstances, and fears that this problem will arise more frequently because it is frequently difficult to identify and serve all owners even within 120 days.

The need to better integrate Rule 4(m) with Rule 71.1 can be met by amending Rule 4(m)'s last sentence: "This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A)." The Department of Justice believes that this amendment will resolve the problem. The Department does not believe that there is any further need to consider the integration of Rule 4 with Rule 71.1(d)(3)(A).

Rule 16(b)(2): Time for Scheduling Order: Rule 16(b)(2) currently directs that a scheduling order must issue within the earlier of 120 days after any defendant has been served or 90 days after any defendant has appeared. Several Subcommittee drafts cut these times in half, to 60 days and 45 days. The recommended revision, however, cuts the times to 90 days after any defendant is served or 60 days after any defendant appears. The reduced reductions reflect concerns that in many cases it may not be possible to be prepared adequately for a productive scheduling conference in a shorter period. These concerns are further reflected in the addition of a new provision that allows the judge to extend the time on finding good cause for delay. The Subcommittee believes that even this modest reduction in the presumed time will do some good, while affording adequate time for most cases.

But the Department of Justice expressed some concerns about accelerating time lines at the onset of litigation. There is room to be skeptical that shortening the time to serve and the time to enter a scheduling order will do much to advance things. It is important that lawyers have time at the beginning of an action to think about the case, and to discuss it with each other. More time to prepare will make for a better scheduling conference, and for more effective discovery in the end. The Note should reflect that extensions should be liberally granted for the sake of better overall efficiency.

A judge responded to the Department's concern by offering enthusiastic support for the proposed limits. "Lawyers will do things only when they have to; government lawyers may be the worst, perhaps because they are overworked." It is proving necessary to micromanage the case-management rules "because judges don't manage." Reducing the up-front times is a good idea.

In response to a question, the Department of Justice said that its experience with the "rocket docket" in the Eastern District of Virginia is that at times it gets relief from the stringent time limits, and at other times it does not get relief. Agencies that get sued there allocate their resources to give priority to Eastern District cases; this is known to be a special situation. The result is to do these cases instead of some others. A judge observed that "the Eastern District is free riding on the lack of comparable time constraints elsewhere."

Rule 16(b)(1)(B): Contemporaneous Conference: Rule 16(b)(1)(B) now provides for a scheduling conference "by telephone, mail, or other means." The reference to mail is clear, but loses the advantages of direct contemporaneous communication. The reference to other means is unclear — resort to a ouija board is not contemplated, but other possibilities are vague. The proposal strikes these words, but the Committee Note makes it clear that "conference" includes any mode of direct simultaneous exchange. A conference telephone call suffices. Skype or other technologies also suffice. The Subcommittee considered the possibility of requiring an actual conference by these means in all cases subject to the scheduling order requirement, but in the end accepted the views of several participants in the Dallas miniconference that there are cases in which the parties' Rule 26(f) report provides a suitable foundation for an order without needing a conference with the court.

Rule 16(b)(3) [26(f)]: Preserving ESI, Evidence Rule 502: The proposals add two subjects to the "permitted contents" of a scheduling order and to the Rule 26(f) discovery plan. One is the preservation of electronically stored information. The other is agreements under Evidence Rule 502 on [non]waiver of privilege or work-product protection. Emphasizing the importance of discussing preservation of electronically stored information addresses a problem that touches on the broader issues addressed by the proposal to amend Rule 37(e) that has been approved for publication and will be discussed later in this meeting. Adding Evidence Rule 502 responds to the concern of the Evidence Rules Committee that lawyers simply have not come to realize the value — or perhaps even the existence — of Rule 502.

An observer said that it is good to add these references to Rule 502. "We need more acknowledgment of how it works."

Another observer said that the Rule 16 and 26(f) dialogue about preserving ESI "should not become a case-by-case discussion of a party's preservation methods, procedures, systems." Different companies have general systems they should be allowed to use in all their cases.

Rule 16(b)(3): Conference Before Discovery Motion: The third subject proposed to be added to the list of permitted topics is a direction "that before moving for an order relating to discovery the movant must request a conference with the court." About one-third of federal judges now require a pre-motion conference before a discovery motion. Their experience is that most discovery disputes can be effectively resolved at an informal conference, often by telephone, saving much time and expense. The Subcommittee considered making the pre-motion conference mandatory, but put the idea aside for fear that there may be some courts that are not in

a position to implement a mandatory rule.

A judge member of the committee observed that the premotion conference is widely used and "is inspiring in practice. A telephone call can clear the disputatious sky."

Rule 26(d), 34(b)(2)(A): Early Requests to Produce: This proposal would revise the discovery moratorium imposed by Rule 26(d) to allow delivery of a Rule 34 request before the parties' Rule 26(f) conference. Delivery does not have the effect of service. The request would be considered served at the first Rule 26(f) conference. A parallel amendment to Rule 34 starts the time to respond at the first Rule 26(f) conference, not the time of delivery. The goal is to provide a more specific focus for discussion at the conference. In part the change would reflect a puzzling experience with present practice — many lawyers seem unaware of the moratorium, either serving discovery requests before the 26(f) conference or asking for a stay of discovery during a time when a stay is not needed because the moratorium remains in effect. The proposal does not authorize delivery of Rule 34 requests with the complaint. A request may be delivered by the plaintiff to a party more than 21 days after serving the summons and complaint on that party. The party to whom delivery is made may deliver requests to the plaintiff or any other party that has been served. Some lawyers who generally represent plaintiffs are enthusiastic about this proposal. And at the Dallas miniconference, some lawyers who generally represent defendants thought this practice would be useful "so we can begin talking."

The Department of Justice noted concerns about allowing early Rule 34 requests. Early discussion of discovery plans is useful, but early delivery of formally developed requests may have the effect of backing parties into positions before they have a chance to talk. This concern is felt in different parts of the Department. "This could be a step backward." The purpose of generating focused discussion might be better served by adding to the subjects for discussion at a Rule 26(f) conference the categories of documents that will be requested.

In responding to a question, the Subcommittee and Reporter recognized that no thought had been given to the role of Rule 6(d) in measuring the time to respond to an early discovery request considered to have been served at the first Rule 26(f) conference. If, for example, the request was delivered by mail, would it also be considered to have been served by mail, allowing 3 extra days to respond? This question could be addressed in the Committee Note, but it may be as well to leave it to the parties and courts to figure out that the mode of delivery should carry through. One reason for letting the issue lie may be that Rule 6(d) is due for reconsideration in the rather near future.

Expediting the Early Stages: General Observations: Discussion of the case-management proposals began with the observation that it is disappointing that there is a continuing need to micro-manage the rules that address case management. It would be better to promote effective case management by better educating judges in the opportunities created by simpler rules. But that does not seem to work. The package achieves a good balance. "Lawyers may not like it, but their clients will." It is important that the FJC continue its education efforts.

An observer said that it is a great thing to work toward earlier district-court involvement in litigation.

PROPORTIONALITY

Three major changes are proposed for Rule 26(b)(1).

"Subject matter" Discovery: Rule 26(b)(1) was amended in 2000 to distinguish between discovery of matter "relevant to any party's claim or defense" and discovery of matter "relevant to the subject matter involved in the action." Subject-matter discovery can be had only by order issued for good cause. This distinction between lawyer-managed and court-managed discovery will be ended by eliminating the provision for subject-matter discovery. Discovery will be limited to the parties' claims and defenses. This will further the longstanding belief that discovery should be limited to the parties' claims and defenses, a position that can readily be found even in the pre-2000 rule language. Of course it remains open to ask whether that is too narrow.

A former Committee member observed that in the late 1990s he had argued against the separation of "subject matter" discovery from the scope of lawyer-controlled discovery. "Now I think it's the right thing." The present provision for court-controlled subject-matter discovery does not seem to make a difference. It was adopted in part in the hope that it would get judges more involved in managing discovery through motions for subject-matter discovery. That has not much happened. There were, and remain, many cases in which judges are actively involved. The attempt to expand these numbers did not matter much.

Proportionality Factors: The proposals limit the scope of discovery to matter "proportional to the reasonable needs of the case," considering the factors described in present Rule 26(b)(2)(C)(iii). "People never get to Rule 26(b)(2)(C)(iii)." Experience shows that it is left to the judge to invoke these limits. Rule 26(b)(2) imposes a duty on the judge to raise these issues without motion, but it is important that they be directly incorporated in the scope of discovery to reinforce the parties' obligations to conduct proportional discovery. Rule 26(g)(1)(B)(iii) will continue to

further reinforce the parties' obligations in these directions. Some early comments have addressed this proposal. One question, reflecting comments on earlier drafts that simply referred to proportionality, is how to define proportionality. Related questions seem to ask for reconsideration of the factors now included in (b)(2)(C)(iii) — should account be taken of the parties' resources? Of the balance between burden or expense and likely benefit? Judges have been required to consider these elements since 1983. They are better brought directly into the scope of discovery defined by (b)(1).

Early comments by a number of plaintiffs' lawyers protest the plan to relocate the (b)(2)(C)(iii) factors to become part of (b)(1). They believe it should be the court's duty, not the parties' duty, to consider these proportionality factors. Imposing this duty on the lawyers will, they argue, lead to increased fights about discovery.

The Department of Justice expressed support for this part of the Rule 26(b)(1) proposal.

An observer suggested that while proportionality is a worthy concept, it must be refined so that it is not used to limit access to justice.

A Subcommittee member reported feeling pleased by the FJC closed-case survey finding that about two-thirds of the lawyers who responded thought that discovery was reasonably proportioned to their case. But then a friend observed that if one-third of lawyers think discovery has been disproportional to the needs of the case, something should be done. "The challenge is not to overhaul the entire system, but to keep what is good and deal with cases where cost is disproportionate." The Subcommittee understands that access to the courts is important. But one part of access is cost. It is hard to cope with that. Lawyers may react with equanimity to the FJC finding that median costs per case are $15,000 or $20,000. But in a prior case the figure was $5,000 less. "How many middle-class Americans can afford to spend that to go to court? They cannot." More than 20% of the cases filed in the Southern District of New York are pro se cases. In some courts the figure is higher. Cost is an important deterrent that needs to be addressed. An observer added a comment that the FJC cost figures look to lawyer costs. They do not include the internal costs borne by the parties, an often important cost.

An observer who worked with the Sedona Working Group # 1 recalled that the Group spent two years in discussing these issues. They submitted a proposal to the Committee last October. For now, comments seem most important on proportionality and preservation. Rule 26(b)(1) should refer to proportionality in preservation. Rule

26(b)(2)(C) also should address proportional preservation. These rules should be embellished by detailed Committee Notes. The Rule 26(f) proposal should be expanded to address not only preservation of ESI but to suggest the details of preservation that should be discussed, and also to include plans to terminate preservation. And the parties should be required to report any remaining disputes after the Rule 26(f) conference. So too, the Rule 16 proposals should be expanded to include a purpose to resolve disputes about preservation.

The proportionality proposal was questioned. The rules have had a proportionality requirement in Rule 26(b)(2)(C)(iii) for nearly 30 years. It has become routine to protest that requested discovery is "too much." Proportionality is a rough measure. The proposed rule changes the burden — under it, the proponent of discovery must prove the requests are proportionate in order to be entitled to discovery. "That's a wrong step. 'Proportionality' will become the new 'burdensomeness.'" It will be the requester's duty to establish proportionality. There are many problems with that. Consider an action with one or two natural persons as plaintiffs suing a large entity. One deposition is enough to glean all the discoverable information a natural person has. Many depositions may be needed to retrieve the information held by an entity.

A direct response was offered to the observation about the burden to show proportionality. Rule 26(g)(1)(B)(iii) provides that the person who propounds a discovery request automatically certifies that it is proportional.

"Reasonably calculated to lead to the discovery of admissible evidence": Rule 26(b)(1) was amended more than 60 years ago by adding the sentence that now reads: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." This provision was meant only to respond to admissibility problems; a common illustration is discovery of hearsay that may pave the way to admissible forms of the same information. But "reasonably calculated" has taken on a life of its own. Many lawyers seek to use it to expand the scope of discovery, arguing that virtually everything is discoverable because it might lead to admissible evidence. Preliminary research by Andrea Kuperman has uncovered hundreds if not thousands of cases that explore this phrase; many of them seem to show that courts also think it defines the scope of discovery. "Relevant" was added as the first word in 2000. The Committee Note reflects concern that this sentence "might swallow any other limitation on the scope of discovery." The same concern continues today. Current cases seem to ignore the 2000 amendment and its purpose. The Subcommittee proposal amends Rule 26(b)(1) to make it clear that this sentence properly addresses only the discoverability of information in forms that may not be admissible

in evidence, and does not expand the scope of discovery defined by the first sentence: "Information within this scope of discovery need not be admissible in evidence to be discoverable."

Early comments by a number of plaintiffs' lawyers protest this proposal, arguing that the "reasonably calculated" concept is the cornerstone of discovery. A Committee member, on the other hand, commented that it is stunning how many courts overlook the 2000 amendment. The purpose of this amendment is to achieve what the Committee thought it had accomplished with the 2000 amendment.

The Department of Justice believes that the "reasonably calculated" formula should be retained as it is in the present rule. This is a familiar phrase. Even though some courts may misread this sentence now, amending it will be seen by many as narrowing the scope of discovery. That perception should be addressed in the Committee Note if the proposal carries through, but there still may be unintended limiting effects.

Another Committee member expressed concern that "we should think hard" about deleting the "reasonably calculated" sentence.

Rule 26(c): Allocation of Expenses: Another proposal adds to Rule 26(c)(1)(B) an explicit recognition of the authority to enter a protective order that allocates the expenses of discovery. This power is implicit in Rule 26(c), and is being exercised with increasing frequency. The amendment will make the power explicit, avoiding arguments that it is not conferred by the present rule text.

An observer said that shifting costs "will continue to limit discovery."

Presumptive Limits: Rules 30 and 31: Rules 30 and 31 now set a presumptive limit of 10 depositions by the plaintiffs, by the defendants, or by third-party defendants. Rule 30(d)(1) sets a presumptive time limit of one day of 7 hours for a deposition. The proposal reduces the presumptive number to 5 depositions, and the presumptive time limit to one day of 6 hours. Criticisms have been made, especially by plaintiffs' lawyers, of the reduction to 5 depositions. The Subcommittee considered the criticisms, but decided that the 5-deposition figure is reasonable. The FJC study shows a reasonable number of cases with more than 5 depositions per side. When this happens, a good share of lawyers think the discovery is too costly; it may be that discovery costs in those cases went up for other reasons as well, but increasing the number of depositions feeds the sense of disproportionality. The number, moreover, is only presumptive. The parties can stipulate to more. If the parties fail to agree, the court must grant leave for more depositions to the extent consistent with Rules 26(b)(1) and (2).

Reducing the presumptive number provides another tool for judicial case management, and promotes dialogue among the lawyers.

Emery Lee described his research on the numbers of depositions in practice. He used the data base for the 2009 Civil Rules Survey. The survey drew from all cases closed in the final quarter of 2008. the sample excluded cases that concluded in less than 60 days, and categories of cases that typically have no discovery. He looked for counts of depositions in cases that had any discovery, in cases that had at least one deposition (fact depositions were more common than expert-witness depositions), and in cases that actually went to trial (trial cases were over-sampled in the whole set, so as to have a meaningful number for evaluation). The report is set out at pages 125 to 133 of the agenda materials. Table 1 reflects the number of cases with more than 5 depositions from the group of cases that had any discovery. The estimates by plaintiffs and defendants are close enough to conclude with some confidence that more than 5 depositions were taken in about 10% of these cases. The numbers increase dramatically for cases with depositions of expert trial witnesses. Table 2 shows that among the cases with any depositions, fewer than 5 depositions were the most common count, with 6 to 10 not far behind. More than 10 depositions were taken in no more than 5% of this group of cases. Table 3 shows that still higher numbers of depositions were taken in cases that went to trial — the range from 6 to 10 was around 25% for depositions taken by plaintiffs, and close to 15% for depositions taken by defendants. The ranges were around 10% for more than 10 depositions by plaintiffs, and somewhat less for 10 depositions taken by defendants. Tables 4 and 5 show that as the number of depositions increased, attorneys were more likely to think that discovery costs were disproportionate to the stakes. But it is fair to suspect that as compared to lawyers' estimates, clients are rather more likely to think the costs of discovery are disproportionate to the stakes.

The value of these data in projecting the costs of discovery in the future was questioned on the ground that they come from a time when, as the FJC studies showed, discovery of electronically stored information was avoided in many cases. The FJC study may understate the actual costs of discovery today. Often there was no discussion of electronically stored information in the Rule 16 conference; a significant number of cases had no litigation hold on ESI; indeed many cases did not involve any discovery of ESI. As practice as evolved since then, discovery of electronically stored information is common, and commonly expensive. Another comment was that it is particularly striking that in cases with more than 5 depositions on both sides about 45% of the lawyers thought that discovery costs were too high in relation to the stakes.

The Department of Justice expressed concerns about reducing presumptive limits on discovery. Department lawyers who litigate on

the "affirmative side" are particularly concerned. Five depositions may not be enough, and they fear it will be difficult to get leave to take more. Several branches, including those that litigate antitrust, environment, civil rights, multiple violations of workplace safety requirements at multiple facilities of a single employer, and others report real difficulty in getting leave to take more than 10 depositions. At the least, the Committee Note should say more about the importance of sympathetic consideration of the need to take more than 5 depositions in many types of cases. Responding to a question, the Department recognized that it does not yet have the kind of empirical data that would document the extensive anecdotal reports. The reports, however, are based on real experience with many judges who seem to view 10 depositions as a fixed limit, not a point that suggests the need for involved case management.

A Committee member enthusiastically supported the 5-deposition presumptive limit. His experience as a judge is that when one side wants to take more than 10 depositions, the other side usually also wants to take more than 10. Usually the need is obvious. A 5-deposition limit will work as well as the 10-deposition works.

Another Committee member expressed reservations about tightening presumptive numerical limits. It may be that managing up from lower numbers will prove more expensive than managing down from higher numbers. It may be worth asking whether it would work better to adopt a concept of reasonable numbers, to be measured by proportionality. And there can be problems with Rule 30(b)(6) depositions.

An observer said that limiting discovery limits the ability to prove the case. As pleading standards become more demanding, limiting discovery risks premature decisions on the merits. Tightening numerical limits may be unnecessary — the statistics seem to show that generally people are behaving reasonably. "I am concerned there are many judges who are literalists, who will not let us negotiate upward." Six-hour depositions may lead to requests for an extra day; my own practice is to start early and finish on time. If tighter limits are adopted, depositions of expert trial witnesses and Rule 30(b)(6) depositions of an entity should be exempted from the limits. She was asked whether her experience with the present rules is that leave is readily given to take more than 10 depositions. She replied that in most large cases leave is given. "But most of my cases are with forward-looking judges. I did not like the 10-deposition limit, but learned to live with it. But the lower the number, the more difficult it will be to negotiate upward."

Another observer suggested that presumptive limits provide a framework for discussion. The parties can work it out without

involving the court.

Presumptive Limits: Rule 33: The proposals reduce the presumptive number of Rule 33 interrogatories from 25 to 15. There have been some comments that interrogatories are critical to discovery, and that the reduction will gut the rule. The Southern District of New York, however, has for years set a general limit at 5 categories of information at the outset of the litigation. The limit in part results from the collective wisdom of experienced judges that lawyers write questions seeking vast amounts of information and other lawyers respond by writing answers designed to disguise, not reveal, information.

Presumptive Limits: Rule 36: The proposals establish for the first time a presumptive numerical limit of 25 on Rule 36 requests to admit. Requests to admit the genuineness of documents are excluded from the limit. The proposal responds to a concern that Rule 36 has been abused in some cases. Early comments support the proposal, although a few express doubts.

Responding to a question about the basis for settling on 25 as the presumptive number of requests to admit, Judge Koeltl said that 25 was chosen by analogy to present Rule 33, drawing from the thoughts of the Subcommittee and the experience of the Committee. The comments received so far support the number — indeed the letter from the leadership of the ABA Litigation Section suggests that requests to admit the genuineness of documents might be included in the limit. The employment lawyers have focused more on Rule 33, but some of them have supported the limit proposed for Rule 36. Emery Lee added that the FJC report for the Duke Conference found that plaintiffs and defendants both reported that plaintiffs requested 22 admissions per case; defendants reported that defendants averaged 13.2 per case, while plaintiffs reported that defendants averaged 21 per case. The proposed presumptive limit of 25 is higher than average case experience.

An observer said it is helpful to carve requests to admit the genuineness of documents out from the presumptive limit.

Rule 34 Responses: The Rule 34 proposals address widespread perceptions of abuses in responding. The Standing Committee reviewed these proposals with enthusiasm. A common response to a Rule 34 request is a boilerplate litany of objections, concluding: "to the extent not objected to, any relevant documents will be produced." The requesting party has no sense whether anything has been withheld. The proposals require that a response state the grounds for objecting to a request "with specificity." These words are borrowed from Rule 33(b)(4). If an objection is made, it must state whether any responsive materials are being withheld on the basis of the objection. The Committee Note observes that this

obligation can be met, when relevant, by stating the scope of the search — for example, that the search has been limited to documents created after a specified date, or to identified sources.

The Department of Justice "completely endorses" the need to get beyond boilerplate objections to find whether anything has been withheld.

An observer noted that "a party cannot tell you what they do not know about documents they are not looking for." It might be better to move into rule text the Committee Note statement that it suffices to state the limits of the responding party's search.

Rule 34 Production: Rule 34 speaks, almost at random, of permitting inspection and of producing. The proposals provide that a party who responds that it will produce copies of documents or electronically stored information must complete production no later than the time for inspection stated in the request or a later reasonable time stated in the response. The Committee Note, drawing from discussion at the Dallas miniconference, recognizes that "rolling" production may be made in stages, within a time frame specified in the response.

The Department of Justice expressed concerns that it can be a challenge to do a production and to figure out the appropriate time frame for rolling production. It must be made clear that responders often need time to get on top of production obligations. An observer offered a similar comment that the end-date for production should be kept flexible.

Multitrack System: An observer asked whether the Committee had considered recommending a multitrack system, working toward proportionality by steering simpler cases toward reduced discovery. The Committee has considered simplified procedure proposals in the past. The Subcommittee considered it briefly in developing the new rules proposals, but concluded that it is not yet time to move in this direction. Still, the time may come. Utah, for example, has adopted a tiered discovery approach, and allocates a total number of hours for depositions rather than a limit on the number of depositions. Texas has adopted a mandatory program. Further discussion noted that differentiated case tracks have not proved successful in federal courts. "Parties do not want to say that their cases are simple." The Northern District of California speedy trial project has had no takers.

COOPERATION

Rule 1: The Subcommittee considered drafts that would amend Rule 1 to add an explicit duty of cooperation by the parties. Participants at the Dallas miniconference and others expressed concerns about

this direct approach. One concern was that Rule 1 would become a source of frequent collateral litigation, in the way of Rule 11 in the form it took from 1983 to 1993. Another was that this new duty might become entangled with obligations of professional responsibility, and might trench too far on providing vigorous advocacy. Responding to these concerns, the proposal would amend Rule 1 to provide that these rules "should be construed, ~~and~~ administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action." The Committee Note observes that "[e]ffective advocacy is consistent with — and indeed depends upon — cooperative and proportional use of procedure."

An observer said it is good to encourage cooperation. A similar observation said that the proposed rule and Note "are terrific."

Another observer noted that the Sedona Conference working group had recommended that Rule 1 be amended to provide that the rules should be "complied with" to achieve their goals. Their suggested Note stated that cooperation does not conflict with the duty of vigorous representation.

PACKAGE

These proposals form a package greater than the sum of the parts. Some parts appeal more to plaintiffs than to defendants, while others appeal more to defendants than to plaintiffs. Some sense of balance may be lost if changes appear to go in one direction only. Still, each part must be scrutinized and stand, be modified, or fall on its own. The proposals are not interdependent in the sense that all, or even most, must be adopted to achieve meaningful gains.

And, inevitably, some style issues remain. And, as always, vigilance is required to search out absent-minded errors. As one example, the draft fails to renumber present Rule 26(d)(2) as (3) to reflect the insertion of a new paragraph (2).

It was noted that this package has stimulated an unusual number of pre-publication comments by some groups that have been closely following the Committee's work. The most recent tally counts 249 comments. Most of them come from plaintiffs' employment lawyers, with some reflecting concerns for civil-rights litigation more generally. They have not yet been distributed to the Committee. It seems unwise to start revising a carefully developed package in response to comments from one segment of the bar that has been more diligent than others. These comments of course will be considered. Many of them focus on the presumptive limitations on depositions and other discovery. A frequent theme is that "the

system is not broken, and does not need to be fixed." Plaintiffs' lawyers say that employers have most of the information needed to litigate discrimination claims. They fear that judges will see presumptive limits as firm limits. They note that when providing representation on a contingent-fee basis they have built-in incentives to limit the costs of discovery. They fear that stricter limits on discovery will leave them unable to survive summary judgment. And they respond to the suggestion that it is easier to manage up than to manage down by arguing that the limits will generate more disputes and increase the need for judicial management in place of responsible self-regulation by the parties. All of these concerns will be taken into account, but after publication provides a spur to other segments of the bench and bar that may provide offsetting views.

An observer repeated the prediction that the package will stimulate a large number of comments. It will be important to remember that many people think the system is not broken, and to articulate the problems the proposals address.

A letter signed by many in the leadership of the ABA Litigation Section largely supports the package of proposals.

A judge member of the Committee observed that the package is good. "A lot of this is common sense." Many of the proposals reflect practices that have been adopted by local rules or in standing orders. The Committee will continue to balance all comments that come in, as it has balanced everything it has heard so far. Some of the early letters seem to reflect a fear that there would be no public hearings; these concerns will be assuaged as the public comment period plays out in its usual full course.

Another judge commented that this is an important package. "We will hear a great deal about it, more even than we heard about the Rule 56 proposals." The Rule 56 experience shows that the Committee is eager to learn from public comments. One of the important changes made in response to testimony and written comments was to abandon the "point-counterpoint" procedure. The Committee will be equally eager to learn from comments about this package. It is difficult to foresee what changes may be made, but cogent arguments will be evaluated with great respect.

The next comment was that the Subcommittee took its work very seriously. "Bring the comments on." This is a good-faith package of proposals to reduce cost and delay.

Yet another committee member observed that "If we don't figure out ways to address cooperation, proportionality, and increased management, we're in trouble." The package seems to make real strides. It is exciting to have proposals to recommend for

publication just three years after the Duke Conference, even if it is only in the context of careful rulemaking that three years seems like speed.

The Department of Justice comments noted that the Subcommittee and Committee have taken account of the Department comments made as the package has been developed. It makes sense to publish the package for comment. "There is much that is excellent. We are bedeviled by the cost of discovery, and often by the difficulty of getting it." The Department is sympathetic to the pursuit of proportionality, to the Rule 34 proposals on objections and response time, and to early case management. It continues, however, to have the concerns addressed to several of the proposals as noted above.

A Committee member observed that this is "an impressive package. The whole is greater than the sum of the parts." It will generate a great debate. A similar view was expressed by another member. This is great work. It makes sense to publish the package as a whole.

Another Committee member suggested that the proposals are affected by a relatively uniform conclusion that initial disclosures under Rule 26(a)(1)(A) are not particularly useful. A recent conversation with lawyers in Florida showed that average cases take a year and a quarter in the Northern and Southern Districts, but only 4 months in the Middle District. Lawyers at the conference said that the difference is the judge. Extensive public comments can be expected on the package — "Everyone will have a dog in this race." Initial reactions may be overblown. It will be important to allow the dust to settle to provide a better picture.

This prediction of extensive public comment provoked mixed reactions. One suggestion was that it is easy to assume that a package as important as this one will get the attention of the bar and draw extensive comments. But sometimes experience belies expectations, perhaps because not all parts of the bar become aware of published proposals. "We should be sure to get word out to all parts of the bar." But a contrary suggestion was that the outpouring of comments from a relatively narrow segment of the bar may presage thousands of comments after publication. "We may be entering a brave new public-comment world." It will be desirable to consider the possibility of establishing a site for public comments that allows participants to channel their comments by subject-matter, easing the task of compiling, comparing, and learning from them. Some such approach could facilitate the important task of making sure that the Committee takes maximum advantage of comments from all parts of the profession, and that no group feel left out of the process.

An observer said that "we all could do better" in working to reduce the cost of litigation and to promote resolutions on the merits.

An observer said that this is a good overall package. "The system *is* broke in terms of cost." The scope-of-discovery proposals are especially good. Presumptive limits are positive, whether the limit is 10, 5, or 7 depositions. Depositions usually end late, so the reduction from 7 to 6 hours is good. "Proportionality is great." But it would be good to add a presumptive numerical limit on the number of custodians whose records must be searched in discovering electronically stored information.

An observer suggested reservations about characterizing these proposals as a "package." Earlier sets of proposals have been whittled down. For example, a proposal to adopt a presumptive limit of 25 Rule 34 requests to produce carried a long way through the process, only to be stripped out. The Committee should not be reluctant to abandon further particular parts that the public comment process shows to be unwise.

Another observer said that there is a crisis in discovery today, caused by an exponential growth in the volume of data. In a significant number of cases the system is driven by the cost of discovery, not the merits. The best answer is to be found in clear, self-executing rules.

A Committee member recalled that when Chief Justice Roberts approved the idea of holding the Duke Conference he urged that it not be just another academic exercise. This package of rules proposals provides a real, practical outcome, admirably advancing the pragmatic hopes for the conference.

Another Committee member suggested that these are transsubstantive rules. Committee members tend to speak from "a privileged experience, where we negotiate and work it out." Limits on the number of depositions, for example, are readily worked around. But we will be hearing from people experienced with very different kinds of cases, where there is no MDL judge on the scene, where discovery is uniquely addressed to a single case. It is an open question whether the system is broke for some types of cases.

A motion to recommend approval of the Duke Rules package for publication passed by unanimous vote.

Judge Campbell noted that the Committee should promote a wealth of comments from all segments of the bar. This is a package, but it is not an unseverable package. Each of the individual proposals must be able to stand independently of any proposals that are shown to be unwise by the testimony-and-comment process.

Rule 37(e): Preservation and Sanctions

Judge Grimm noted the long progress of Rule 37(e), beginning immediately after the Duke Conference panel suggested that a detailed rule should be adopted to set standards for preserving electronically stored information for discovery. The Committee approved a proposed rule in November. The Subcommittee resolved questions that were left open by the Committee. It considered suggestions by the Style Consultant, adopting many of them. In January the Standing Committee approved the rule for publication, recognizing that it had left some questions for further work with a report back to the June meeting. It also suggested some questions that should be specifically flagged in the request for comment.

The Subcommittee has considered the questions left open after the Standing Committee meeting, finding ready answers to most. One, dealing with the loss of information that irreparably deprives a party of a meaningful opportunity to litigate, has presented drafting challenges that need careful attention today.

Four principles shape the proposal. Curative measures are available to address the loss of information even if no fault was involved in the loss. Sanctions are not appropriate if the party acted reasonably and proportionally. Sanctions are appropriate if the party acted willfully or in bad faith and the loss causes substantial prejudice. And sanctions also are proper if the loss irreparably deprives another party of a meaningful opportunity to present or defend against the claims in the action, meaning the core of the action rather than incidental claims or defenses, and if the loss resulted from some measure of fault, described in the proposal as negligence or gross negligence. It is this final provision that has caused continuing debate, in large part because it stirs fears that some judges will find a party has been irreparably deprived of a meaningful opportunity to claim or defend in circumstances that would not even support a finding of substantial prejudice, all for the purpose of imposing sanctions for negligence or gross negligence. What is intended to require super-prejudice as a condition for sanctions absent willfulness or bad faith might come to restore the negligence standard the Committees intend to reject. At the least, uncertainty in predicting implementation of this exception could defeat the purpose to provide reassurance against the uncertainties of present practice that cause many large enterprises to overpreserve vast amounts of information for fear of sanctions rested on hindsight evaluations of what was reasonable.

Five sets of issues raised in the November Advisory Committee meeting were considered by the Subcommittee after the meeting.

(1) The argument that Erie doctrine requires that federal

courts defer to state law on spoliation is not persuasive. The questions involve discovery procedure in federal courts. Some states recognize an independent tort remedy for spoliation. The Committee Note recognizes that Rule 37(e) does not affect those rights.

(2) One observer suggested expansion of the role played by the list of factors in proposed Rule 37(e)(2). They might be brought to bear in determining what curative measures or what sanctions to employ, and to measure the prejudice or irreparable deprivation element. The Subcommittee concluded that these factors should be confined, as they have been, to measuring whether discoverable information should have been preserved and whether the failure was willful or in bad faith. They were not developed to measure other things, and do not seem well adapted to serve other purposes.

(3) The punctuation of(e)(1)(B)(i) created a possible ambiguity. It has been reorganized to eliminate any ambiguity.

(4) It was suggested that the list of factors in (e)(2) should be prefaced with two additional words: "should consider all relevant factors, including when appropriate * * *." These words seem unnecessary. The list is suggestive, not exclusive, and it is apparent on casual inspection that some items in the list need not be considered in a particular case. For example, if there was no request to preserve information, that factor disappears from the underlying calculations.

(5) Many drafts of the list of factors included litigation holds. This factor was deleted from concern that it might prove misleading in practice. Holds are nuanced. They come in many shapes, and what is appropriate in particular circumstances may be inapposite in other circumstances. Including holds as a factor might cause a court to give too much weight to some particular method.

The Standing Committee discussion raised seven questions that were considered by the Subcommittee.

(1) The Note to the January draft referred to "displacing" state law requiring preservation. One thought was that this might seem to displace statutory preservation obligations. "We displaced displaced." The Committee Note now says that Rule 37(e) rests on the duty to preserve that has been recognized by the common law of court decisions. Rule 37(e) itself does not create an obligation to preserve.

(2) It was suggested that the very word "sanctions" is risky because it overlaps the duty of professional responsibility to self-report "sanctions." The Note was revised to address this

concern, stating that Rule 37(e) does not address professional responsibility duties. The "sanctions" term is adopted from Rule 37(b)(2), the rule incorporated here.

(3) The provision for sanctions when a loss of information irreparably deprives a party of a meaningful opportunity to present a claim or defense stirred concern arising from the experience that many actions combine central claims or defenses with incidental or peripheral claims or defenses that lack any real importance. Depriving a party of an opportunity to litigate the lesser issues should not warrant sanctions. This concern led to redrafting that refers to deprivation of any meaningful opportunity to present or defend against the claims in the action. The Committee Note underscores the point: "Lost information may appear critical to a given claim or defense, but that claim or defense may not be central to the overall action."

(4) It was possible to read the January draft to mean that sanctions could be imposed absent any fault for loss of information that should have been preserved if the loss irreparably deprived a party of a meaningful opportunity to present or defend against a claim. Among the examples was a hospital that lost records stored in a basement that was flooded by Superstorm Sandy, an unforeseeable event. This came to be referred to as the "Act of God" problem. The January draft was not intended to support sanctions in such circumstances. The revised draft requires negligence or gross negligence to support sanctions. The idea is that the "irreparably deprived" standard requires super-prejudice, something more than the "substantial prejudice" that supports sanctions for willful or bad-faith loss of information. Greater prejudice would justify sanctions on a lesser showing of fault, described as negligence or gross negligence. Although the reference to "gross negligence" seems redundant, it was included to fill in the gap and, by implication, to demonstrate that greater fault is required to show willfulness or bad faith. The Subcommittee has remained divided on this question, however, for the reason noted above. Some courts might seize on this provision as an excuse to impose sanctions for merely negligent behavior in circumstances that at worst involve only substantial prejudice, and that might come to involve still lower levels of harm.

(5) The concept of a "meaningful" opportunity to present or defend against a claim was thought to lack precision. But none of the words considered as a substitute seemed satisfactory. "Meaningful" was retained.

(6) The Department of Justice expressed concern that present Rule 37(e) should be retained, either independently or within the body of what is proposed as an amended Rule 37(e). But the present rule provides only a limited safe harbor; the Committee Note

suggests that a party may have to intervene to halt the routine operation of an electronic information system because of present or reasonably anticipated litigation. The Subcommittee concluded that the proposed Rule 37(e) confers all the protection conferred by the present rule, and more. It should suffice to inform people that the new rule provides greater protection. The new Committee Note addresses this question in a full paragraph that, among other things, states that the routine, good-faith operation of an electronic information system should be respected under the rule. And one of the ways in which the new rule confers greater protection is that it is not limited to ousting sanctions "under these rules." Present case law, in a loose and imprecise way, frequently relies on inherent authority to justify sanctions. The Committee Note expressly forecloses reliance on inherent authority.

The Department renewed the suggestion to retain present Rule 37(e) during later discussion. It has proved helpful in dealing with information technology systems specialists during the design of new information systems.

(7) The Department of Justice has expressed concern that "substantial prejudice" should be defined more expansively. But the Subcommittee concluded that it is not helpful to attempt greater precision outside the context of a particular case. Courts are good, with the help of the parties, in measuring the impact a loss of information has on a particular case.

The Department renewed this suggestion during later discussion. It would be useful to ask for comments during the publication process. Various elements that bear on prejudice could be offered as examples — the availability of other sources of information, the materiality of the lost information, and the like. It was pointed out that Question 4, at p. 163 of the agenda materials, is sketched in terms that anticipate possible expansion along these lines.

The Subcommittee worked out the present proposal through a great number of conference calls. The level of participation by Subcommittee members was extraordinary. The Subcommittee believes that it has effectively addressed all of the potential problems just described, apart from finding suitable language to protect against sanctions when discoverable information is lost without a party’s fault but the result is great prejudice. Any reference to negligence or gross negligence in rule text causes real anxiety to many participants and observers.

In addition to the questions posed by the Advisory Committee and Standing Committee, the Subcommittee made three changes on its own.

(1) "reasonably" was deleted in describing the duty to preserve: "If a party failed to preserve discoverable information that ~~reasonably~~ should have been preserved * * *." The factors in (e)(2) provide better direction in this dimension, most obviously in (e)(2)(B) — "the reasonableness of the party's efforts to preserve the information."

(2) The provision for curative measures was expanded by deleting these words: "order ~~the party to undertake~~ curative measures * * *." The change was made to support curative actions taken without court order. A party, for example, could be permitted to introduce evidence of another party's failure to preserve, and to argue that adverse inferences should be drawn from the failure. The party's argument would not be an adverse-inference instruction subject to the limits imposed by (1)(B). Such measures can help to level the playing field.

Later discussion asked why an adverse-inference instruction is treated as a sanction — why is it not also a curative measure? The response was that there is a continuum of available tools along this dimension. The most powerful is an instruction by the judge that the jury must find the lost information was harmful to the case of the party who lost it. A less powerful version instructs the jury that it may infer the information was harmful. Still another version may leave it to the jury to determine whether any information was lost, and then to determine what inferences might be drawn from the loss. These inferences logically flow only from knowing that the information was harmful. They do not flow from being sloppy or disorganized. Willfulness or bad faith is the key. Another Committee member observed that Wigmore referred to "a consciousness of a weak case." Another participant noted that an adverse-inference instruction was given in the Zubulake case. The fear of these instructions is one of the fears that drives prospective parties to over-preserve. "We need to limit this nuclear weapon."

Another Committee member continued the discussion. There are many possible versions of adverse-inference instructions or arguments. It is difficult to define a precise line. It is desirable to preserve flexibility that enables a court to avoid too much direction. Although it has not proved possible to draft a clear distinction between an instruction that amounts to a sanction and lesser measures that qualify as curative measures, the distinction remains important. "There should be no dispositive inferences without fault."

An observer suggested that asking the jury to decide what inferences to draw "asks the jury to decide a side issue, not the merits of the case."

(3) "in the anticipation or conduct of litigation," an important element of (e)(1), was added to the (e)(2) reference to failure to preserve information that "should have been preserved in the anticipation or conduct of litigation." The Subcommittee was worried about failures to preserve information as required by independent duties imposed by statute or regulation; such failures might not reasonably bear on the duty to preserve for litigation. The change helps to focus the (e)(2) factors on preservation for litigation.

"Act of God": Successive drafts have provided for sanctions when discoverable information is lost without willfulness or bad faith, but the effect is to irreparably deprive a party of any meaningful opportunity to present or defend against the claims in the action. This provision reflects situations that came, in Subcommittee discussions, to be identified with the Silvestri case in the Fourth Circuit. The owner of the automobile in which the plaintiff was injured allowed it to be destroyed before the defendant manufacturer had any opportunity to inspect it. The court of appeals affirmed a dispositive sanction imposed by the district court, finding there was no abuse of discretion. This decision, and others like it, are part of the common law. The purpose of Rule 37(e) is to recognize the common-law duty to preserve. The Subcommittee has believed that the rule text should reflect these decisions. The Standing Committee, however, feared that as drafted the rule would authorize sanctions when discoverable information was destroyed without any fault, as by an "Act of God." The Subcommittee agreed that while sanctions should not be imposed, curative measures should be available. That created a drafting problem. It would not do to suggest in the Committee Note that loss by an Act of God does not amount to a party's failure to preserve, since that interpretation of the rule text would bar not only sanctions but also curative measures. The same difficulty arises with any attempt to limit the meaning of "should have been preserved. The solution was to add a limiting element: sanctions could be imposed only if the failure to preserve "was negligent or grossly negligent." The Subcommittee recognized that "grossly negligent" was redundant — any grossly negligent failure also would be negligent. But it thought that including these words in (e)(1)(B)(ii) would help to prevent concepts of gross negligence from bleeding into the "willfulness" that suffices to support sanctions when loss of discoverable information causes substantial prejudice.

Discussion within the Subcommittee repeatedly reflected a concern that any reference to negligence or gross negligence in the rule text would suggest a sliding scale that balances degrees of culpability against degrees of prejudice. A judge reluctant to brand a lawyer with bad faith might "skitter off" into finding negligence that irreparably deprived another party of any

meaningful opportunity to litigate.

The cases that present the "no-fault" failure seem to involve tangible evidence. The Subcommittee could not find a case where a loss of electronically stored information effectively put another party out of court unless there was willfulness or bad faith. "ESI, like cockroaches and styrofoam, is something you cannot get rid of." This thought suggested that it might be better to avoid the question by addressing Rule 37(e) only to the loss of electronically stored information and requiring willfulness or bad faith, as well as substantial prejudice, and omitting any provision addressing extreme prejudice but no willfulness or bad faith. Given the speed of change in electronic information systems, however, the Subcommittee was uncertain whether that is prudent. Accordingly it chose to maintain the draft that allows sanctions for irreparable deprivation if there is only negligence or gross negligence, but also to prepare for publication of an alternative draft that focuses only on electronically stored information and omits the irreparable deprivation provision.

The alternative draft is set out in an appendix to the draft rule and Committee Note. It may be an advantage that it does not attempt to regulate the loss of tangible evidence, or traditional documents. Common-law sanctions would remain available for loss of discoverable information that is not electronically stored. This approach is less complete, less elegant. But this project was launched in response to complaints that parties and prospective parties feel forced to over-preserve electronically stored information, in part for want of any common nationwide standards. Public comments can test the hypothesis that ESI is so often recoverable by curative measures that irreparable deprivation is unlikely, apart from cases of willfulness or bad faith. This alternative approach avoids any concern that no-fault losses of information will be sanctioned. It avoids the risk that parallel rule provisions would encourage a creeping tendency to import negligence concepts into willfulness.

The Committee was reminded that the Standing Committee has approved publication of Rule 37(e) this summer. The questions open for discussion are those that have not yet been explored in this Committee, including the question whether the rule should be limited to loss of electronically stored information.

The Committee also was pointed to the list of questions that will be flagged in transmitting the rule for public comment. Are these the right questions? Are they properly framed?

Discussion of the ESI-only alternative began with the observation that usually the Committee publishes a preferred version, raising questions about potential changes without

publishing a full alternative draft. The question whether Rule 37(e) should be limited to loss of electronically stored information was discussed repeatedly in the Subcommittee and with the Committee, and the choice always has been to stick with a comprehensive rule that applies to all forms of discoverable information. One consideration is that the line between electronically stored information and other information is uncertain, and may become more uncertain with further advances in technology. And it is better to adhere to general principles absent some convincing reason to believe that different standards may properly apply. Still, the most recent rounds of discussion may shake faith in that conclusion. The problems encountered in attempting to recognize problems of irreparable loss that do not seem to be encountered with electronically stored information may be so great as to narrow the focus to loss of electronically stored information. The original concern was over-preservation of electronically stored information. Publishing the alternative might provoke comments showing instances in which loss of electronically stored information has irreparably deprived a party of a meaningful opportunity to litigate, contrary to the tentative belief that this event is unlikely.

Support for publishing the alternative was expressed in more positive terms. "Residential Funding" is a problem with respect to the pre-litigation duty to preserve. There is a serious risk that concepts of negligence and gross negligence will prove expansive. Adding them to proposed (e)(1)(B)(ii) threatens to expand the risk.

A similar observation suggested the ESI-only version in the appendix may be desirable. The reliance on negligence or gross negligence is troubling. This project began to give clear guidance in the use of curative measures and sanctions, and in the process to overrule cases that employ sanctions for negligence or gross negligence. The ESI-only version avoids the "Act of God" problem by requiring willfulness or bad faith for any sanctions. Resort to the negligence or gross negligence standard from concern that loss of other forms of discoverable information may have more severe consequences may cause problems.

A more general observation was that it is important to seek comment during the publication period on every alternative the Committee sees as possible. Whether by publishing an appendix or posing questions, the issues should be clearly identified so as to reduce the risk that the comments will suggest changes so profound as to require republication to ensure full opportunity to comment.

Another observation expressed concern that the amendments give judges tools to use if information is lost without fault. As information storage moves into the cloud, there will be increasing risks that information will be lost without fault. The main draft

gives clear guidance, both as to curative measures and as to sanctions.

The Department of Justice understands the impetus to get away from sanctions for negligence or gross negligence, but has thought that a rule covering all types of evidence is preferable. It may be best to publish the alternative rule addressing only ESI. Comments may show a way to reconcile these concerns.

Another comment suggested that another approach would be to retain a rule that applies to all forms of information, not electronically stored information alone, but to require willfulness or bad faith for sanctions. That would overrule the negligence or gross negligence cases even when the negligent behavior irreparably deprived another party of any meaningful opportunity to litigate. No one has wanted to do that. Adopting an ESI-only rule that requires willfulness or bad faith would be defended on the ground that loss of ESI will not have such irreparable consequences.

An observer noted that after struggling with this problem, the Sedona working group chose to rely on an "absent exceptional circumstances" limit on sanctions. It would be a mistake to adopt a negligence or gross negligence standard. Multiple standards will generate incredible problems. No one thinks negligence or gross negligence should be the standard.

Another observer said that adopting a negligence or gross negligence test would inject a tort standard into a rule of procedure. The true issue is whether the rule should apply to ESI only. Publishing an all-information rule that includes negligence or gross negligence will focus comments on that problem, reducing the level of comments on the question whether the rule should be limited to loss of ESI alone.

An interim summary was attempted. These are tough questions. The "Act of God" concern led to incorporating a negligence or gross negligence standard to ensure that sanctions are not available for a no-fault loss of discoverable information, while sanctions remain available if the loss irreparably deprived a party of a meaningful opportunity to litigate. The hospital servers in a basement inundated by Superstorm Sandy became a running example: should sanctions be imposed when records are unavailable in the next malpractice action? The January draft could be read to authorize sanctions even absent negligence or gross negligence, imposing liability because the information was lost and it was information that "should" have been preserved. Subsequent discussions focused mostly on loss of ESI, but it is difficult today to distinguish between ESI and other forms of information, and the difficulty may well increase as technology evolves. Is a print-out of information lost from an electronic storage system ESI? What about the

information recorder in an automobile damaged in a collision and then scrapped?

Would it do to omit any reference to negligence or gross negligence, falling back to the January draft, and rely on a statement in the Committee Note that loss to an Act of God is not a party's failure to preserve? But how would that square with the desire to allow curative measures in such circumstances?

A Committee member agreed that it is artificial to distinguish between ESI and other forms of information-evidence. The distinction is difficult to explain in theory, and it may become increasingly difficult to apply in practice. Another member was enthusiastic about deleting any reference to negligence or gross negligence, but retaining a rule that applies to all forms of information. The Committee Note could provide assurance enough for the Act of God situation.

Discussion returned to the possibility that (e)(1)(B)(ii) could be dropped entirely, even from a rule that applies to loss of any form of discoverable information. That would mean that no sanctions are available absent willfulness or bad faith, no matter how severe the prejudice to the party who never had the information and never had any opportunity to preserve it, and no matter now negligent the party who had the information was. But it may be better to publish (B)(ii); it will be easier to delete it in the face of adverse comments than to add it back. The alternative of adopting a rule limited to loss of ESI, requiring willfulness or bad faith for any sanctions, can still be flagged in requesting comments.

An alternative to "negligent or grossly negligent" was suggested as a way out of distaste for the tort-like aura of these words. The failure to preserve irreparably depriving another party of any meaningful opportunity to litigate might be described as "culpable." The Committee Note could explain that culpability is intended to distinguish the "Act of God" loss.

These suggestions foundered on the reminder that curative measures, unlike sanctions, should be available even when no fault at all was involved in the loss of information that should have been preserved. A Committee Note cannot give different meanings to "failure to preserve" for curative measures than for sanctions. As an example, loss of the servers flooded in the basement might be cured by spending $50,000 to retrieve the same information from a backup system. Ordering restoration is an appropriate response.

The concern persists: which party should bear the consequences of an irreparable loss of information?

Seeking ways to protect the party who had no opportunity to preserve the information led to other suggestions. Would it be possible to define loss by an "act" of a party, and distinguish an Act of God? This could be done by revising (e)(1)(B): "impose any sanction * * * but only if the court finds that the ~~failure~~ actions of the party * * *." This rule text would provide a functional foundation for Committee Note discussion of the no-fault loss of information.

Further discussion emphasized the importance of coming to rest on the version that seems best to the Committee. That version can be published for comment. All of the issues can be raised as questions addressed to the rule text that is preferred for now. There is no need to publish an alternative version that is limited to electronically stored information — the rule text changes are minimal, and the question can be clearly focused without cluttering the proposal for comment. What is important is to raise all foreseeable issues clearly, so that all participants have an opportunity to comment. That will reduce the risk that dramatic changes in response to public comments will require republication for a second round of comments. There is continuing interest in allowing sanctions, not mere curative measures, when loss of information as a result of a party's negligence irreparably limits another party's opportunity to litigate. This threshold of injury is higher than the substantial prejudice that justifies sanctions when information is lost because of willfulness or bad faith. Despite some continuing support for dropping the irreparably deprived provision entirely, it is better to publish it.

Discussion of Rule 37(e) resumed on the second day of the meeting. The Subcommittee convened early and explored several alternatives. In the end, it agreed unanimously to abandon publication of an ESI-only alternative as an appendix, and to revise proposed (e)(1)(B) as follows:

> (B) impose any sanction listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction, but only if the court finds that the party's actions ~~failure~~:
> (i) caused substantial prejudice in the litigation and was willful or in bad faith; or
> (ii) irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation ~~action and was negligent or grossly negligent~~.

The Subcommittee agreed that "actions" include inaction, a failure to act. The focus is on what a party did or did not do, and on "irreparably deprived." The Note will focus the "Act of God" concern by discussing events beyond a party's control. Such events as a fire, earthquake, or severe storm are not a party's act.

Sanctions will not be available. But curative measures will remain available.

A motion to recommend that the Standing Committee approve publication of proposed Rule 37(e) as thus revised was unanimously approved.

Rule 84

The tentative conclusion that Rule 84 should be abrogated was not listed as an action item on the agenda for this meeting in deference to the other matters calling for prompt action. But it would be useful to reconfirm the conclusion to prepare the way for publication as part of a single package with the other proposals that have been approved for publication this summer or that will be recommended for approval for publication. The Standing Committee is increasingly interested in assembling packages of proposals for periodic publication, rather than confront the bench and bar with smaller sets of amendments every year.

Judge Pratter noted that the Rule 84 Subcommittee initially thought that abrogation is the obvious right answer. But rather than act quickly, it took a step back to make sure abrogation is the right answer. One important consideration, as discussed in earlier Committee meetings, is that the Rules Enabling Act process is not well adapted to generating, maintaining, and revising a good and useful set of forms. The Working Group on Forms working with the Administrative Office does good work, with a more flexible process. The Committee can support their work, perhaps with a liaison to ensure a reliable means of communication.

Andrea Kuperman has provided a careful analysis of the question whether the Forms would continue to influence practice after formal abrogation. She found that courts readily respond by recognizing that abrogated rules no longer control. Habits of thought formed under the Forms' influence may carry forward, but there is nothing wrong with that. The most sensitive questions are likely to involve pleading. The process of weaving together the notice pleading traditions embodied in the pleading Forms and more recent Supreme Court decisions will continue either way.

Forms 5 and 6 present a unique question. Rule 4(d)(1)(D) directs that a request to waive service must "inform the defendant, using text prescribed in Form 5, of the consequences of waiving and not waiving service." Although this text does not refer to Form 6, Form 6 is embedded in Form 5. It likely will prove desirable to maintain waiver forms that are, in some way, "official." The Subcommittee will consider this question further and circulate a proposed solution to the Committee in time for action to be submitted to the Standing Committee in June.

The Committee unanimously approved abrogation of Rule 84, subject to adopting an appropriate resolution of the questions posed by Forms 5 and 6.

Rule 17(c)(2)

Rule 17(c)(2) provides: "The court must appoint a guardian ad litem — or issue another appropriate order — to protect a minor or incompetent person who is unrepresented in an action."

This seemingly innocent provision presents a difficult question. When is a court obliged to inquire into the competence of an unrepresented party? It would be possible to read the rule to require an inquiry in every case, to ensure that its purpose is fulfilled. It also is possible to read the rule in a quite different way, requiring appointment of a guardian only if an unrepresented party has been adjudicated incompetent in a separate proceeding and the adjudication is in fact brought to the court's attention. A wide range of alternatives lie between these readings. The court wrestled with this mid-range of alternatives in *Powell v. Symons*, 680 F.3d 301 (3d Cir.2012). It lamented "the paucity of comments on Rule 17," and adopted an approach that raises a duty of inquiry only when there is "verifiable evidence of incompetence." "[B]izarre behavior alone is insufficient to trigger a mandatory inquiry * * *." Judge Sloviter, a former member of the Standing Committee, concluded by noting that "We will respectfully send a copy of this opinion to the chairperson of the Advisory Committee to call to its attention the paucity of comments on Rule 17." 680 F.3d at 311 n. 10.

Discussion began with the observation that the cost of appointing a guardian or other representative is a problem. Who will pay? This is not merely an academic concern. It is a serious problem.

Another judge thought it likely that many judges have not thought of this. "We get a lot of pro se cases." Many are frivolous; "we evaluate the case, not the litigant." If a case seems to have potential merit, his court has funds that can be used to pay court costs and makes an effort to find representation. But the possible need to inquire into the party's competence is not considered.

Another judge echoed the concern that this is a difficult question. The rate of pro se filings continues to grow. It has reached 40% in the District of Arizona, including many actions by prisoners. The rate approaches 50% in the Eastern District of California. Inquiring into competence is a difficult undertaking. The Third Circuit recognizes that "once the duty of inquiry is satisfied, a court may not weigh the merits of claims beyond the §

1915A or § 1915(e)(2) screening if applicable." It is uncertain what amounts to "verifiable evidence of incompetence." The Ninth Circuit appears to find a duty of inquiry when there is a "substantial question." That may impose a greater obligation on the district court. This question may arise with some frequency — the Third Circuit opinion has already been cited by at least six district courts. The question is whether it is better to leave this question for further development in the genius of the common-law process, or to take it into the Enabling Act process now?

A Committee member suggested that as a practical matter, the immediate reaction is to appoint counsel. That makes the issue go away. Then counsel has to wrestle with the question whether the party is competent to function as a client — there still may be a need for an actual representative. It might help to survey lawyers who represent pro se litigants to see whether a rule change is needed.

Another judge asked how the Committee could go about gathering useful information. One example appears in the statutory command to appoint a guardian for a child involved in a child pornography case. The statute commands, but there is no money to pay for it. "Learning more may suggest a rule."

Yet another judge offered an analogy to the "fairly high standard" for referring a criminal defendant for a determination of competency. There will be a minefield of problems if some analogous practice is adopted for pro se civil litigants.

A Committee member suggested that the case law seems to address the problem when a person who appears without a guardian later appears to be not competent. Perhaps the common law should be allowed to develop. At the same time, it might be useful to reach out to groups who work with people who might become enmeshed in this problem.

A judge suggested that "there is a huge set of people out there who are not known to be incompetent." The rulemaking problems overlap with state law. Perhaps it is better to put these problems aside for now?

A different judge observed that the rule appears to be written to say this is the court’s responsibility. That can be onerous.

Another analogy was offered. These problems arise in proceedings to remove aliens to other countries. Screening for incompetence is a real problem.

The question was put by framing three alternatives: (1) These issues could be left to continued development in the courts, a

"common-law" solution. (2) We could undertake a thorough survey of the cases to form a comprehensive understanding of the approaches taken to define a standard for a duty of inquiry. Or (3) We could undertake a broader inquiry by reaching out to others to attempt to reach some understanding of the extent and frequency of litigation by unrepresented incompetents.

These alternatives were supplemented by a fourth: the question could be kept on the long-term agenda for future consideration.

A motion was made to take the topic up again in a year, after doing a survey of the case law. One question to put to the cases is how often the issue of competence is addressed "up front," compared to how often it is raised only later in the proceedings.

An earlier theme returned. "This is a world of limited resources." There is no present proposal to change the rule. "We're not likely to be able to do anything about it." It is best to attempt nothing now, but to keep the question on the agenda.

A similar view was expressed. The question should be kept on the agenda, within a broader system that attempts to keep track of everything on the agenda that affects pro se litigation.

Another suggestion was that the Committee could ask for advice from the Committee on Court Administration and Case Management.

These questions returned on the second day of the meeting. Three approaches were again suggested: (1) Take it off the table. (2) Keep it in the cupboard, to be revisited next year. (3) Keep it on a more active list, looking into the case law and perhaps asking whether the Committee on Court Administration and Case Management is interested.

A Committee member confessed to reading 20 Rule 17(c)(2) cases overnight. "The fact patterns are quite varied." And there are many more cases. Courts recognize that there must be some basis to make a decision, not just a party's assertion. Perhaps we should wait a year.

The Committee was reminded that the question is not the standard for appointing a representative once the issue is raised. The question is to identify the circumstances that oblige the court to raise the issue of competence without a motion. Is there a duty to inquire simply because a party is behaving in a way that suggests issues about competence? How high should the threshold be? Remember that at least as articulated, the Ninth Circuit threshold may be lower, imposing the duty of inquiry more frequently, than in at least some other circuits.

Another member suggested that it would be helpful to have some research to support further consideration of a problem that likely goes by without being considered in many cases.

The relation between screening and Rule 17(c)(2) was brought back into the discussion. "There are cases that are delusional." But "no one expects an amendment to be enacted in the near term. We have many other things to do." There likely will be a tide of comments on the proposals the Committee is recommending for publication this summer. Why undertake further research now?

A judge volunteered to commission research by a summer intern. The research could help decide whether to move these questions up for further attention in the near future. This offer was accepted. The target will be to get a memorandum out to the Committee by late summer.

Rule 41(a): Dismissal by All Parties

Judge Martone, District of Arizona, brought to the Committee's attention a possible source of dissatisfaction with the provisions of Rule 41(a)(1)(A)(ii) and (a)(1)(B) that combine to enable all parties to a litigation to stipulate to dismissal without prejudice. The parties in a case before him asked to vacate a firm trial date so they could complete the details of anticipated settlements. He refused. The parties then sought to reopen the question and he again refused. Three days later the parties filed a stipulation dismissing the action without prejudice.

Judge Martone's order in that case directed the parties to address two questions. First, is the district plan for setting firm trial dates, adopted under the Civil Justice Reform Act, an "applicable federal statute" that, under the express terms of Rule 41(a)(1)(A), limits the right to dismiss without prejudice by stipulation of all the parties? And second, was the stipulation in this case such improper conduct or collusion as to authorize an exercise of inherent power to reject it?

The express language of Rule 41 provides that the stipulation is effective "without a court order." It responds to a long and deep tradition of party control. Just as the parties can moot an action by settlement, so they can agree to dismiss on terms that do not bar a second action on the same claim. The simple acts of filing an action and litigating it even deep into the pretrial process do not create such court interests as to warrant denial of the right to dismiss without prejudice.

This traditional understanding may be subject to challenge in an era of increasing judicial responsibility for case management. Setting a firm trial date has proved a valuable and effective

management tool. Increasing management responsibilities, moreover, increase the court's investment in the action. Allowing the parties to thwart the control exercised in setting a firm trial date, and to waste the court's investment, might seem too high a price to pay to preserve the traditional freedom to dismiss without prejudice when all parties agree to do so.

This introduction was elaborated by a description of the litigation that confronted Judge Martone. Many parallel cases were pending before other judges in the same court. The parties were undertaking to settle some 500 cases. The circumstances made it imperative to get all of the cases virtually settled before they could reach final settlements in any. Other judges, confronted with this problem, agreed to continue the cases, requiring periodic progress reports every 60 days. Settlements actually were accomplished. That approach worked.

A broader question was asked: Is there a general problem around the country with parties who stipulate to dismiss without prejudice in order to escape a particular case-management program? How frequently does this happen? And how often is the dismissal in fact followed by a new action? If there is a new action, how often is it possible to salvage much, or most, of the management invested in the first action?

A Committee member replied that he had never heard of a stipulated dismissal followed by reinstatement. This is not like the old practice of settling a case pending appeal and asking that the district-court judgment be vacated. The judgment is a public act that should not be subject to undoing by the parties. But before judgment the case is the parties' property. "We can rely on the defendant to protect the public interest. The defendant does not want to be hit with another action."

Another member agreed. It will be a rare event to find that the parties "are in the same place" in a complex case. Stipulated dismissals without prejudice do not happen often.

A third member observed that statutes of limitations provide a disincentive. The risk of losing the claim to a limitations bar falls entirely on the plaintiff. "There is not a vast reservoir of actions that will spring" back to life after a stipulated dismissal.

A fourth member said that the defendant's agreement to the dismissal "should do it."

A judge noted that the risk of judge shopping is reduced by the rules in many courts that would reassign a refiled case to the judge who was assigned to the original case.

Another judge said that in nine years on the bench he had never had a case where he thought the parties were colluding to achieve an improper result through dismissal. There have been cases where the parties need time to settle. They can be resolved by placing the case in suspense and denying all pending motions without prejudice.

A third judge said he had never seen a problem. The right to a stipulated dismissal is not abused. And it is important to remember that courts are established to serve the public.

And a fourth judge reported that sixteen years of experience with settlement conferences shows many reasons why parties need to suspend proceedings while working out a settlement. It works to suspend the case while requiring regular progress reports. And it may help to reflect that fewer than 2% of civil actions go to trial. There will not be many cases in which a stipulated dismissal is followed by revival in a new action that actually goes to trial.

The Committee agreed that there is no need to explore this question further. It will be removed from the agenda.

Questions Referred from CACM

The Committee on Court Administration and Case Management has referred a number of questions about possible changes in the Civil Rules.

Videoconferencing for Civil Trials. Judge Sentelle, Chair of the Judicial Conference Executive Committee, referred this question to both the Committee on Court Administration and Case Management and the Committee on Rules of Practice and Procedure. The question was asked by a judge who helps out courts in other districts "by handling civil cases remotely through our videoconferencing facilities." He observes that videoconferencing can work to "remotely handle the pre-trial aspects of a variety of civil cases and even try jury waived cases * * *." Any limits that may be imposed by the statutes that define the places where a district judge can exercise judicial functions are outside the Enabling Act process. But it is a fair question whether the Civil Rules might be amended to support this kind of cooperation.

The most immediately relevant rule appears to be Rule 43(a). Rule 43(a) directs that testimony be taken in open court, but concludes: "For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location." This standard was deliberately set very high. Should it be relaxed in some way to enable a judge in one district to better participate in proceedings in another district without leaving the home

district?

The first observation was that the pending amendments of Rule 45 raised questions about the distance witnesses should be compelled to travel to attend a hearing or trial. The Committee concluded that the current limits should remain undisturbed, even though the 100-mile rule goes back to the Eighteenth Century. Rule 43 is extremely cautious about the circumstances that justify live testimony without travelling to the hearing or trial. Starting down the road to greater use of remote transmission "is a big deal." We should be careful.

The next observation was that nothing in the rules inhibits conferences with attorneys by telephone or video. That practice is routine. District judges in Alaska and Hawaii regularly participate in actions pending in Arizona by these means. Even in criminal cases, where confrontation is an important consideration, video hearings can be used in determining competence. It is a fair question whether judges should be permitted to do anything that rules now prevent.

Another judge focused on the suggestion that a bench trial might be held in one courtroom while the judge is in another courtroom. That is quite different from using video or like means when communicating directly with one person or with a few more in a conference, not a contested proceeding.

A similar observation was that remote witnesses are heard regularly in criminal competency hearings.

A Committee member with extensive arbitration experience said that international arbitrations often involve participation by people in all corners of the earth, and in circumstances that make it prohibitively expensive to bring them all to one place. Remote transmission has proved workable in such circumstances, and is often useful in less complex situations.

It was suggested that one useful step would be to foster an exchange of techniques that courts are using now. The FJC could gather the information and put it in a bench book or in educational programs.

The early stages of these topics means that CACM has not yet determined whether there are things courts should be allowed to do but that are prevented by current rules, or that could be guided and encouraged by well-thought rules amendments. The Committee concluded that a report should be made to CACM that current rules seem sufficiently flexible to support many useful practices, but that the Committee will be pleased to consider any recommendations that CACM may advance.

E-Filing Issues: CACM has urged consideration of two issues that arise in conjunction with development of the next generation of the CM/ECF system for case management and electronic case filing.

The first issue is whether the Notice of Electronic Filing that court systems automatically generate should be recognized as a certificate of service. CACM endorses the concept and asks consideration "whether the federal rules of procedure should be amended to allow an NEF to constitute a certificate of service when the recipient is registered for electronic filing and has consented to receive notice electronically." This approach would not apply to litigants that have not registered for electronic filing or have not consented to electronic service.

The second issue goes to retention of records requiring a third party's "wet signature." A number of alternatives are possible. CACM prefers "a national rule specifying that an electronic signature in the CM/ECF system is *prima facie* evidence of a valid signature." A person challenging the validity of the signature would have the burden of proving invalidity.

The introduction of these questions concluded by asking whether the time has come to establish, under auspices of the Standing Committee, an all-committees group to work on a variety of issues that may arise with respect to e-filing. Rule 5(d)(3), for example, provides for e-filing only according to a local court rule, and further provides that a local rule may require e-filing only if reasonable exceptions are allowed. Should this be reexamined in conjunction with the new CM/ECF system and the continuing development of electronic communication? Another example that has been noted repeatedly is Rule 6(d), which allows an additional 3 days to act after being served by electronic means. Whatever the situation when this provision was added, is it still sensible to add the 3 days? No doubt other issues will be identified. Many of them will be common to several different sets of rules. When the time comes to address them, a joint enterprise seems valuable. And the time may be now, or soon.

Discussion began with a report that the Bankruptcy Rules Committee has proposed a rule on e-signatures that treats e-filings as if signed in ink. A scanned copy of a paper document signed under penalty of perjury has the same effect as a wet signature. The filer does not have to retain the originals. "These are sensitive issues." The Bankruptcy Rules Committee hopes for guidance on a trans-committee level. There is a great value in uniformity across the different sets of rules.

It was further noted that there is a federal e-signing statute, and a Uniform Act that has been adopted in 46 states. Many

federal agencies have e-signature rules. There is a statute for the IRS. One possibility may be that study by the rules committees will show problems so general as to warrant a recommendation for additional legislation. But that possibility lies in the future, as something the joint enterprise may conclude is useful more than as something to be pursued at the outset.

The discussion of e-signing provoked a reminder that there are many issues in addition to e-signatures. Changes in e-filing rules may well prove desirable. Much will depend on the final shape of the next-generation CM/ECF system.

Discussion concluded by endorsing the value of launching a project that brings all the advisory committees together under the guidance of the Standing Committee.

Restricted Filers: The next generation of the CM/ECF system will include a national database, available only to "designated court users," that identifies "restricted filers." Examples of restricted filers are prisoners subject to restrictions under the Prisoner Litigation Reform Act and attorneys who have been subject to disciplinary action. The question arises from the requirement in Rule 4(a)(1)(C) that a summons must "state the name and address of the plaintiff's attorney or — if unrepresented — of the plaintiff." Many restricted filers appear pro se. And many pro se plaintiffs change addresses frequently. Changed addresses will frustrate identification. A new address will mark the filer as "new" in the system. CACM suggests that Rule 4(a)(1)(C) be amended to read: "(C) state the name and address of the plaintiff's attorney or — if unrepresented — the plaintiff's name, address, and last four digits of the social-security number of the plaintiff."

Discussion began with an expression of real concern about requiring the plaintiff to disclose part of the social security number. "We need to reflect on the mental makeup of pro se plaintiffs." Many of them will resist this requirement. There also is a risk with public availability: it is often easy to get the first five digits of the number from public data. "We should require redacting — it will be a real burden."

Safer alternatives might be considered, such as part of a passport number, or a driver's license number, or the number in a state-issued identification card. This might be added to the face of the complaint form. It might be feasible to ask the clerk to inspect the document. And it may be feasible to find a work-around for plaintiffs who lack any of these documents.

The discomfort with using social-security numbers was expressed by another participant, who suggested that it might help to require a plaintiff to disclose all names the plaintiff has ever

been known by. And better use of "match technology" might be part of the solution.

It was asked how often these problems arise: how many disbarred attorneys attempt to file, how many prisoners who have maxed-out?

The clerk answered that her office always checks attorneys; about once a year they catch one who has been disbarred. Her court has not had much of a problem with maxed-out prisoners. A judge agreed that his court has a much greater problem with disbarred attorneys than with other restricted filers.

It was pointed out that the Seventh Circuit's private site can identify restricted filers with "the press of a button." This feature could be nationalized. Or party identification can be sought through PACER.

Bankruptcy courts have similar problems, but they are dealt with through such means as withdrawing e-filing privileges. It is not apparent that there is a need for added protections.

These questions seem best addressed initially to those who are working directly with the next generation CM/ECF system. The concerns about requiring disclosure of even part of a social-security number can be conveyed to them. It seems premature to attempt judgments about Civil Rules amendments before there is a better sense of how the new CM/ECF system will work, what burdens may be placed on clerks' offices, and what burdens may be placed on plaintiffs. These reactions will be communicated to the Committee on Court Administration and Case Management.

Rule 62

The Appellate Rules Committee is carrying forward work on stays pending appeal and appeal bonds. It is recognized that the work is likely to involve Rule 62. The questions involve such matters as the fit between the 14-day automatic stay, the 28-day period after judgment to move for relief under Rules 50, 52, and 59, and the 30-day period to file a notice of appeal. Other questions also are being studied. There are not yet any specific proposals to amend the Civil Rules.

It was agreed that the Civil Rules Committee should designate someone to work with the Appellate Rules Committee. Depending on the choices of the Appellate Rules Committee, it may prove desirable to appoint a joint subcommittee in the form that has proved useful in past projects that require the integration of Civil Rules with Appellate Rules.

International Child Abduction: Prompt Return

Chafin v. Chafin, 133 S.Ct. 1017 (2013), ruled that return of a mother and child to the habitual residence determined by the district court under the Hague Convention on the Civil Aspects of International Child Abduction did not moot the father's appeal. The Court's opinion emphasized that courts nonetheless "should take steps to decide these cases as expeditiously as possible * * *. Many courts already do so." Justice Ginsburg also emphasized the need for speedy decision, and in footnote suggested that "the Advisory Committees on Federal Rules of Civil and Appellate Procedure might consider whether uniform rules for expediting [Convention] proceedings are in order." 133 S.Ct. at 1029 n. 3.

Justice Ginsburg's suggestion was introduced with full agreement that these cases should be treated with all possible dispatch. The question is whether that goal is better furthered by adopting encouraging provisions in court rules or by other means.

The need for court rules may be examined in light of the Court's recognition that most courts understand the need for prompt decision and do their best to move these cases as quickly as possible. The Court's encouragement will add force to this common approach. Judicial education efforts can supplement the Court's urging. The Federal Judicial Center International Litigation Guide, for example, includes a 2012 volume on the Hague Convention; the chapter on procedural issues begins with four pages stressing that expeditious handling is required by Article 11 of the Convention and provided by the courts.

Given these alternative resources, there is added reason to consider the reasons that may weigh against adopting a Convention-specific court rule. State courts have concurrent jurisdiction of these proceedings, so a federal court rule would not cover all cases. More importantly, the Judicial Conference has a longstanding and regularly renewed policy opposing statutes or rules that give docket priority to specific types of litigation. One priority, or a few priorities, could easily interfere with management of conflicting needs for immediate attention by a court burdened by many cases of many different types. The road from one priority to many priorities, moreover, is all too easy to follow. Conflicting priority commands would inevitably emerge, confusing and impeding wise allocation of scarce judicial resources.

Discussion began with a judge's suggestion that FJC education of judges will work better than a court rule.

Another judge recalled spending a year with a Hague Convention case, involving two parents "who hate each other." The need for prompt disposition is well understood. The problems with

implementing it are not susceptible to resolution by court rule. But at least one parent will provide constant reminders of the need for speed. And a court of appeals can expedite matters by deciding, "opinion to follow."

Still another judge observed that "ten minutes of reading will instruct any judge on the need for expedition. I cannot imagine a judge who will not understand the need." His court gets these cases constantly, and although it is one of the busiest courts in the country the judges manage to resolve these cases promptly.

Still another judge reported that discussion with the Mass Torts group at the Judicial Conference meeting in March found agreement that a rule will not help. The Supreme Court has resolved the mootness problem. Any court of appeals will expedite the appeals now that they are not open to dismissal for mootness if return to the home country has been accomplished.

The Committee decided that no action should be taken on this matter.

Rule 23

Dean Klonoff reported for the Rule 23 Subcommittee. Last November,the Subcommittee identified a list of issues that may deserve study. The issues were divided between "front burner" and "back burner" categories. The lists are tentative, both in determining what issues deserve study and in assigning priorities among whatever issues come to be studied. Further work has been stayed pending disposition of the several class-action cases pending in the Supreme Court.

The 5:4 decision in the *Comcast* case rewrote the question presented and went off on narrow grounds. It is a technical decision, followed by a grant-vacate-remand disposition of a couple of similar cases. It does not provide the guidance that some had hoped to come from the Court. The Subcommittee will need to study the impact of this decision. The *Amgen* decision is largely limited to securities class actions. The Subcommittee will resume deliberations, and at some point will want to consult with the bench and bar on what issues should be studied in depth. A miniconference is a likely means of gathering views. But a miniconference or similar venture is not likely in the near future.

A Subcommittee member pointed out that the Appellate Rules Committee is considering whether rules should be adopted to govern settlement by an objector pending appeal from a class-action judgment. "This is a problem. There has been a lot of discussion. The Subcommittee will want to work on this." And it will be important to see what impact *Comcast* has, "if any."

Pleading

It was noted that the agenda continues to hold a place for consideration of pleading standards as they evolve in reaction to the *Twombly* and *Iqbal* decisions. The Federal Judicial Center is working on a study of all dispositive motions, advancing — among other things — its initial study of the impact of these decisions. No decision has been made as to the appropriate time to return to these questions.

Publicizing Rules Amendments

It has been suggested that the Committee should consider whether more should be done to publicize rules amendments as they happen. The seeming widespread disregard of Evidence Rule 502 in its early years provides an object lesson on the occasional — or perhaps more frequent — failure of rules amendments to be recognized and implemented by the bar.

A first effort might be made to draw attention to the pending revisions of Rule 45. It will be important to help the bench and bar understand how they will work. Technically, a lawyer who on December 2 issues a subpoena from a district court in California for discovery in an action pending in the district court in Arizona will issue a nonbinding instrument. Under revised Rule 45 the subpoena must issue from the Arizona court where the action is pending.

Another example of a rule change that will affect many lawyers is the impending change of the Appellate Rules to collapse separate statements of the case and of the facts into a single statement. It will be important to educate lawyers in this change.

Initial suggestions were that the Federal Judicial Center might be helpful in communicating rules changes to the federal courts. There might be some way for the Committee to draw attention to new rules by an open letter, or by an article prepared by some appropriate person or entity. The Evidence Rules Committee, for example, became concerned that Evidence Rule 502 is underutilized. It held a conference and the Reporter, Professor Capra, wrote it up as a law review article. But any such efforts must be tempered by concern about the Committee's proper role. There is a real risk that works that seem to be sponsored by the Committee may generate post hoc and spurious "legislative history," giving unintended meaning to the new rules.

A Committee member said that "web site practitioners" regularly visit the sites of the FJC and the Judicial Panel on Multidistrict Litigation. These lawyers would read new rules, whether the full text is posted on the site or whether instead

there is a simple "alert" that new rules have been adopted.

Another member noted that the Civil Procedure ListServ can be used to draw the attention of law professors.

The ABA Litigation Section was suggested as another source to reach many lawyers. The Litigation Section is the largest ABA section, and regularly holds CLE programs. A Committee member said that Rule 45 would be included in upcoming programs — that it is easy to accomplish this form of education.

Beyond the ABA, the Federal Bar Association could be notified of rules changes, expecting that the chapters in large cities will be an effective means of communication.

The courts of appeals have regular conferences. It should be possible to include a ten-minute identification of new rules on their programs.

A more adventuresome suggestion from an observer was that perhaps CM/ECF systems could be programmed to provide an automatic notice of rules changes to lawyers the first time each lawyer signs into the system.

A practical note was sounded by the observation that new rules generally apply to pending cases. The Administrative Office Forms Group has begun work on a new subpoena form for bankruptcy cases. These forms have been sent to the Civil Rules Committee, and are being considered here as well. And the bankruptcy courts have a "blast e-mail" system that is sent to all e-filers whenever a rule or form is changed, with links to the new version. All federal courts could be urged to do this.

The Administrative Office staff noted that the package of rules amendments the Supreme Court sends to Congress is sent to all federal judges. The Administrative Office can ask court clerks and executives to send notice to all e-filers. The notice could simply advise consulting the e-file versions of new rules on the AO web site. And proposed amendments are sent to legal publishers.

A still more intriguing observation was that the Advisory Committee may have submitted an amicus brief to the Supreme Court in the case considering the validity of Rule 35, *Sibbach v. Wilson*.

Cautions were sounded about the extent to which the FJC might be involved. The FJC regularly engages in many efforts to keep federal judges current on new developments, including rules amendments. Court attorneys are included in these efforts. But it has not taken on the role of continuing education for the bar in general.

Impending Publication

Educating bench and bar on newly adopted rules is important. It also is important to the process to encourage widespread participation in the public comment process when proposed rules are published for comment. Notices are sent to all state bars, and to a goodly number of other groups and individuals that have indicated interest in the process. Committee members were encouraged to think of ways to stimulate interest that might be adopted if, as recommended, extensive sets of amendments are approved for publication this summer.

Technology Assisted Review

Computers are being put to the task of sorting through vast amounts of computer-based information to reduce the burdens of discovery. Much attention focuses on retrieving information to respond to discovery requests, but computers can be used for other discovery-related purposes as well. A party receiving responses to discovery requests, for example, may use computer searches to extract the useful information from the produced documents and also to search for leads to other responsive and relevant materials that were not included in the responses. The most sophisticated of these computer-assisted methods have come to be referred to as "technology assisted review." One of these methods, called "predictive coding," relies on humans familiar with the litigation to "teach" a computer how to identify relevant and responsive documents.

To assist the Committee in becoming familiar with the opportunities to advance the cause of proportional discovery through advanced computer search techniques, The Duke Law School Center for Judicial Studies presented a panel on predictive coding. The panel presentation was an introduction to a day-long program to be presented by the Center on April 19. The panel was moderated by John K. Rabiej, Director of the Center, and included Gordon V. Cormack, Maura R. Grossman, John J. Rosenthal, and Ian J. Wilson.

The panel presentation was followed by questions. The questions and answers reflected several points. Many lawyers, litigants, and courts are unfamiliar with TAR or uneasy about it. At its best, it can recall a higher fraction of relevant documents than human reviewers find, and at lower cost. One source of cost saving can be greater precision in selecting only relevant documents; fewer documents to review for privilege, confidentiality, or other protections means lower cost for a process that most litigants prefer to conduct by human review. It is important to recognize that properly implemented search methods are at least as good as human review, but to accept that neither approach achieves perfection. It is important that courts

understand the limits of human review in comparison to technology assisted review. Human review typically achieves about 70% recall. If computer-aided review does that well or better, it should be accepted even though it does not achieve 100% recall. And it must be recognized that not every process that may be labeled as technology assisted review is equal to every other process. The market of providers is likely to sort itself out in the coming years.

Next Meeting

The next meeting is set for November 7 and 8 in Washington, D.C. If the recommendations to publish rules proposals are approved — Rule 37(e) changes and some less important proposals have already been approved — that will be a good time to schedule the first public hearing on the proposals. Given the history of past November hearings, and the likelihood that the November agenda will be relatively light in order to conserve energy for the work that will remain in digesting comments and testimony on the published proposals, it seems safe to set aside the first day, November 7, for the hearing. If the hearing occupies the first full day, it may be necessary to anticipate a full day for the meeting on November 8.

A Thank You

Judge Campbell concluded the meeting by expressing warm thanks to the University of Oklahoma and the Law School for being wonderful hosts.

Respectfully submitted

Edward H. Cooper
Reporter

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 3-4, 2013
Washington, D.C.

Draft Minutes as of September 12, 2013

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ATTENDANCE

The spring meeting of the Judicial Conference Committee on Rules of Practice and Procedure ("Standing Committee") was held in Washington, D.C., on Monday and Tuesday, June 3 and 4, 2013. The following members were present:

Judge Jeffrey S. Sutton, Chair
Deputy Attorney General James M. Cole
Dean C. Colson, Esq.
Roy T. Englert, Jr., Esq.
Gregory G. Garre, Esq.
Judge Neil Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Larry D. Thompson, Esq.
Judge Richard C. Wesley
Judge Diane P. Wood
Judge Jack Zouhary

Also participating were Professor Geoffrey C. Hazard, Jr., and Professor R. Joseph Kimble, consultants to the Standing Committee; and Peter G. McCabe, Administrative Office Assistant Director for Judges Programs. In addition to the Deputy Attorney General, the Department of Justice was represented at various points by Stuart F. Delery, Esquire, Theodore J. Hirt, Esquire, Christopher Kohn, Esquire, Elizabeth J. Shapiro, Esquire, and Allison Stanton, Esquire. Judge Michael A. Chagares, Chair of the Inter-Committee CM/ECF Subcommittee, also participated.

Providing support to the Standing Committee were:

Professor Daniel R. Coquillette	The Standing Committee's Reporter
Jonathan C. Rose	The Standing Committee's Secretary and Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Rules Officer and Counsel to the Rules Committees
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman	Chief Counsel to the Rules Committees
Joe Cecil	Senior Research Associate, Research Division, Federal Judicial Center
Scott Myers	Attorney, Bankruptcy Division, AO
James Wannamaker	Attorney, Bankruptcy Division, AO
Bridget M. Healy	Attorney, Bankruptcy Division, AO

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
- Judge Steven M. Colloton, Chair
- Professor Catherine T. Struve, Reporter (by telephone)

Advisory Committee on Bankruptcy Rules —
- Judge Eugene R. Wedoff, Chair
- Professor S. Elizabeth Gibson, Reporter
- Professor Troy A. McKenzie, Associate Reporter

Advisory Committee on Civil Rules —
- Judge David G. Campbell, Chair
- Judge Paul W. Grimm, Chair of Discovery Subcommittee (by telephone)
- Judge John G. Koeltl, Chair of Duke Subcommittee (by telephone)
- Professor Edward H. Cooper, Reporter
- Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules —
- Judge Reena Raggi, Chair
- Professor Sara Sun Beale, Reporter
- Professor Nancy King, Associate Reporter

Advisory Committee on Evidence Rules —
Chief Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by thanking the chairs, reporters, committee members and staff for their extraordinary work in preparation for this meeting with its heavy agenda.

He reported that in April 2013, the Supreme Court adopted without change and sent to Congress the package of fifteen proposed rule changes previously approved by the Judicial Conference at its September meeting. Rules and forms to be amended are listed below.

- Appellate Rules 13, 14, 24, 28, and 28.1, and Form 4
- Bankruptcy Rules 1007(b)(7), 4004(c)(1), 5009(b), 9006(d), 9013, and 9014
- Civil Rules 37 and 45
- Criminal Rule 11
- Evidence Rule 803(10)

In accordance with the provisions of Sections 2072 and 2075 of Title 28, United States Code, these amendments will take effect on December 1, 2013, if Congress does not enact legislation to reject, modify, or defer them. They will govern in proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

Judge Sutton also stated that the Standing Committee would try this year to advance the timing of its report to the Judicial Conference to have it available by the first week in July. After the Judicial Conference meeting in September, an equivalent effort will be made to have the package of amendments approved by the Conference available to the Supreme Court no later than early October. Under the old schedule, proposed rule changes typically did not arrive at the Court until mid- to late-December after approval by the Judicial Conference at its meeting in September.

This new process will enlarge the time available and increase scheduling flexibility for the Court to address the proposed rule changes while still adhering to the timelines mandated by the Rules Enabling Act.

Judge Sutton also reported that the Chief Justice had made appointments for all Rules Committee vacancies in May 2013 so that the new committee members could be notified in time to attend their respective committee meetings this fall. This represented a tremendous effort on the part of all responsible to expedite the appointment process. Judge Sutton expressed his thanks on behalf of all the Rules Committee chairs to Laura Minor, Judge Hogan, and the Chief Justice.

He further expressed his intention to invite retiring Standing Committee members Judges Huff and Wood to participate as panelists at the January meeting, when their exceptional contributions would be formally recognized.

APPROVAL OF MINUTES OF THE LAST MEETING

Action: The Standing Committee, by voice vote without objection, approved the minutes of its last meeting, held on January 3–4, 2013, in Cambridge, Massachusetts.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge David G. Campbell, assisted by the advisory committee's two reporters, Professor Edward H. Cooper and Professor Richard L. Marcus, presented the report of the Civil Rules Advisory Committee. The advisory committee sought approval to publish for public comment a number of proposed amendments.

ACTION ITEMS

A. Proposed Action: Publication of Revised Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37 (the Duke Conference rules package)

Judge Campbell first presented the advisory committee's recommendation for publication of a series of amendments aimed at improving the pretrial process of civil litigation, which are the product of a conference on civil litigation that the Civil Rules Committee hosted at Duke University School of Law in 2010. The proposed revisions recommended for publication include changes to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37. These recommendations were little changed in their basic thrust from the proposals that were presented for discussion at the January 2013 meeting of the Standing Committee. However, a number of revisions were made both to the amendments and to the committee notes to address the concerns expressed at the January meeting.

Judge Campbell first explained how the proposed revised rules relate to the three major themes of the Duke Conference. He stressed the primary role of Judge Koeltl and his Duke Conference Subcommittee as well as the advisory committee's two reporters in the development of the package of proposed amendments. These amendments are designed to reduce the costs and delays of civil litigation and to promote the aim of the rules "to assure the just, speedy and inexpensive determination of every action and proceeding."

The three main themes repeatedly stressed at the Duke Conference were: (1) early and active judicial case management, (2) the necessity for proportionality in discovery, and (3) a duty of cooperation in the discovery process by counsel. The conclusion of the Duke Conference was that at present some or all of these elements are too often missing in civil litigation. The proposed rule changes address these three areas.

Case Management Proposals

The case management proposals reflect a perception that the early stages of litigation often take far too long. The most direct aim at early case management is reflected in proposed amendments to Rules 4(m) and 16(b). Another important proposal relaxes the Rule 26(d)(1) discovery moratorium to permit early delivery of Rule 34 requests to produce, but sets the time to respond after the first Rule 26(f) conference.

Rule 4(m): Time to Serve the Summons and Complaint: Rule 4(m) would be revised to shorten the time to serve the summons and complaint from 120 days to 60 days. As under the current rule, a judge would retain the ability to extend the time for service for good cause. The amendment responds to the commonly expressed view that four months to serve the summons and complaint is too long.

A concern raised by the Department of Justice about confusion over the applicability of Rule 4(m) to condemnation actions is addressed by amending the last sentence: "This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A)."

Rule 16(b)(2): Time for Scheduling Order: The proposed amendment to Rule 16(b)(2) would reduce the present requirements for issuing a scheduling order by 30 days to 90 days after any defendant is served or 60 days after any defendant appears. The addition of a new provision allows the judge to extend the time for a scheduling order on finding good cause for delay.

Rule 16(b): Actual Conference: Present Rule 16(b)(1)(B) authorizes issuance of a scheduling order after receiving the parties' Rule 26(f) report or after consulting "at a scheduling conference **by telephone, mail, or other means**." The proposed amendment would eliminate the bolded language. Judge Campbell explained that the advisory committee believes that in the absence of a Rule 26(f) report, an actual conference by simultaneous communication among the parties and court is a very valuable case management tool. A judge would retain the ability to issue a scheduling order based only on the Rule 26(f) report.

Rules 16(b)(3), 26(f): Additional Subjects: The proposals add preservation of electronically stored information (ESI) and agreements under Evidence Rule 502 on waiver of privilege or work product protection to the "permitted contents" of a scheduling order and to the Rule 26(f) discovery plan. A third proposal would add a new Rule 16(b)(3)(B)(v), permitting a scheduling order to "direct that before moving for an order relating to discovery the movant must request a conference with the court." A number of courts now have local rules similar to this proposal. Experience has shown that an informal pre-motion conference with the court often resolves a discovery dispute.

Rule 26(d)(1): Early Rule 34 Requests: After considering a variety of proposals that would allow discovery requests to be made before the parties' Rule 26(f) conference in order to enhance its focus and specificity, the advisory committee limited the proposed change to Rule 34 requests to produce by adding a new Rule 26(d)(2) that would permit the delivery of such requests before the scheduling conference.

A corresponding change would be made to Rule 34(b)(2)(A), setting the time to respond to a request delivered under Rule 26(d)(2) within 30 days after the parties' first Rule 26(f) conference. As Rule 34 requests frequently involve heavy discovery burdens, the advisory committee thought that early court consideration of such requests might be useful.

Proposals to Incorporate Proportionality

Several proposals seek to promote responsible use of discovery proportional to the needs of the case. Some important changes address the scope of discovery directly by amending Rule 26(b)(1) and by requiring clearer responses to Rule 34 requests to produce. Others tighten the presumptive limits on the number and duration of depositions and the number of interrogatories, and for the first time add a presumptive limit of 25 to the number of requests for admission other than those that relate to the genuineness of documents. Yet another proposed change explicitly recognizes the district court's existing authority to issue a protective order specifying an allocation of expenses incurred by discovery.

Rule 26(b)(1): Adopting Rule 26(b)(2)(C)(iii) Cost-Benefit Analysis: Given the widespread respect for balanced discovery principles embodied in Rule 26(b)(2)(C)(iii), the advisory committee proposed to transfer the analysis required by that rule to become a limit on the scope of discovery permitted by Rule 26(b)(1). Under the new proposed Rule 26(b)(1), "discovery must be proportional to the needs of the case, considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

A corresponding change is made by amending Rule 26(b)(2)(C)(iii) to cross-refer to (b)(1); thus, the court remains under a duty to limit the frequency or extent of discovery that exceeds these limits, on motion or on its own.

Other changes are also made in Rule 26(b)(1). Under the amended rule, all discovery is limited to "matter that is relevant to any party's claim or defense." The ability to extend discovery to "any matter relevant to the subject matter involved in the action" is eliminated. The parties' claims or defenses are those identified in the pleadings.

Rule 26(b)(1) also would be amended by revising the penultimate sentence: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Many cases continue to cite the

"reasonably calculated" language as though it defines the scope of discovery, and judges often hear lawyers argue that this sentence sets a broad standard for appropriate discovery. To eliminate this potential for improper expansion of the scope of discovery, this sentence would be revised to read: "Information within this scope of discovery need not be admissible in evidence to be discoverable."

The proposed revision of Rule 26(b)(1) also omits its current specific reference to "the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Discovery of such matters is so deeply entrenched in practice that the current reference is superfluous.

Several discovery rules cross-refer to Rule 26(b)(2) as a reminder that it applies to all methods of discovery. Transferring the restrictions of Rule 26(b)(2)(C)(iii) to become part of subdivision (b)(1) makes it appropriate to revise the cross-references to include both (b)(1) and (b)(2).

Rule 26(c): Allocation of Expenses: Another proposal adds to Rule 26(c)(1)(B) an explicit recognition of the court's authority to enter a protective order that allocates the expenses of discovery.

Rules 30, 31, 33, and 36: Presumptive Numerical Limits: Rules 30 and 31 establish a presumptive limit of 10 depositions by the plaintiffs, or by the defendants, or by third-party defendants. Rule 30(d)(1) establishes a presumptive time limit of one 7-hour day for a deposition by oral examination. Rule 33(a)(1) sets a presumptive limit of "no more than 25 written interrogatories, including all discrete subparts." There are no presumptive numerical limits for Rule 34 requests to produce or for Rule 36 requests to admit. The proposals reduce the limits in Rules 30, 31, and 33. They add to Rule 36, for the first time, presumptive numerical limits.

The proposals would reduce the presumptive limit on the number of depositions from 10 to 5, and would reduce the presumptive duration to 1 day of 6 hours. Rules 30 and 31 continue to provide that the court must grant leave to take more depositions "to the extent consistent with Rule 26(b)(1) and (2)."

The presumptive number of Rule 33 interrogatories under the proposed amendment is reduced to 15. Rule 36 requests to admit under the proposed rule would have a presumptive limit of 25, but the rule would expressly exempt requests to admit the genuineness of documents. After due consideration, a proposal to limit Rule 34 requests to produce was rejected because of a concern that a limit might simply prompt blunderbuss requests.

Rule 34: Objections and Responses: Discovery burdens can be pushed out of proportion to the reasonable needs of a case by those asked to respond, not only those who make requests. The proposed amendments to Rule 34 address objections and actual production by adding several specific requirements.

Objections are addressed in two ways. First, Rule 34(b)(2)(B) would require that the grounds for objecting to a request be stated with specificity. Second, Rule 34(b)(2)(C) would require that an objection "state whether any responsive materials are being withheld on the basis of that objection." This provision responds to the common complaint that Rule 34 responses often begin with a "laundry list" of objections, then produce volumes of materials, and finally conclude that the production is made subject to the objections. The requesting party is left uncertain whether anything actually has been withheld.

Actual production is addressed by new language in Rule 34(b)(2)(B) and a corresponding addition to Rule 37(a)(3)(B)(iv). Present Rule 34 recognizes a distinction between permitting inspection of documents, ESI, or tangible things, and actually producing copies. However, if a party elects to produce materials rather than permit inspection, the current rule does not indicate when such production is required to be made. The new provision would direct that a party electing to produce state that copies will be produced, and directs that production be completed no later than the time for inspection stated in the request or a later reasonable time stated in the response. Rule 37 is further amended by adding authority to move for an order to compel production if "a party fails to produce documents."

Enhancing Cooperation

Reasonable cooperation among adversaries is vitally important to successful use of the resources provided by the Civil Rules. Participants at the Duke Conference regularly pointed to the costs imposed by excessive adversarial behavior and wished for some rule that would enhance cooperation.

Proposed Addition to Rule 1: The advisory committee determined that proposals to mandate cooperation would be problematic. Instead, it settled on a more modest proposal – an addition to Rule 1. The parties are made to share responsibility along with the court for achieving the high aspirations expressed in Rule 1: "[T]hese rules should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

Standing Committee Discussion of Proposed Duke Conference Amendments

Following the presentation of Judge Campbell and the advisory committee reporters, Judge Sutton, echoed by every other Standing Committee member who spoke, thanked them, Judge Koeltl, the members of the Duke Conference subcommittee and the full Civil Rules Advisory Committee for the countless hours of painstaking deliberation and work reflected in the careful crafting of these proposals. Professor Cooper then offered to entertain any

questions from the Standing Committee concerning all elements of the Duke Conference amendments package.

One member expressed curiosity about the reasons for a small list of what he suspected were "unnecessary tweaks" in the current rules, which could distract those submitting comments and others from the truly significant and major positive changes to the civil litigation process made by other parts of the Duke Conference amendments package. He commented on his list of tweaks as follows.

He first expressed substantial skepticism as to the wisdom of changing the current text of Rule 1 to emphasize the duty of parties to cooperate. He thought little practical impact would be achieved. Rule 1 as written, he believed, has achieved a certain talismanic quality with the passage of time. Tinkering with its aspirational language seemed to him perilously close to the committee simply talking to itself.

As to the proposals' attempt to limit discovery by refining the definition of its permissible scope, he found that unlikely to succeed. He recalled the various efforts to redefine the scope of discovery over the years first to broaden it, and then later to narrow it. The sequence reminded him of Karl Marx's observations about history repeating itself first as tragedy and then as farce. He thought that the current proposal effectively brought us back to the most constricted definition of the permissible scope of discovery. In his view, all the various changes over time resulted in less practical impact on cases than any of their authors had expected. For the same reasons, he did not think this tweak of accepted discovery scripture would achieve very much, but did not oppose its publication.

Pursuing his list, he agreed with the change of the length of a deposition day from 7 hours to 6 if that had proven to be a more reasonable definition of a deposition day.

Concerning the proposed changes to Rule 16, he found the emphasis on face-to-face or simultaneous communication in a Rule 16 conference to be a distracting and almost counterproductive change. His practical experience as a judge in a far flung, heavy caseload district was that the achievement of simultaneous communication by a judge and opposing counsel was a "big deal, highly time-consuming, and unnecessary in very many cases." He acknowledged that counsel for most parties would love to "shmooze" with the judge, but have no real need to do so. He predicted that the change would just lead to the widespread delegation of discovery issues to magistrate judges.

Judge Campbell responded to several of the foregoing points. First, he observed that there was broad consensus of his committee that increased cooperation by counsel on discovery matters would in fact be helpful. However, any attempt to make it mandatory in the rules would likely just enhance satellite ligation on the issue. The purpose of the Rule 1 change was to emphasize that the duty of cooperation applied to the parties and not solely to the judge. It would also give the Federal Judicial Center ("FJC") a hook on which to hang their instruction to judges about cooperation as an element of best practices in case

management.

There was an even broader consensus on the efficacy of simultaneous communication in Rule 16(f) conferences as a case management tool. A spur to early case involvement by judges was widely thought to be central to speeding things up. Early exposure by the parties to the judge tends to eliminate a lot of collateral motion practice and frivolous delay. Once counsel get a sense of how a judge is likely to rule on a given topic, a lot of delay-causing tactics are simply never tried.

Judge Campbell said he has a 15- or 20-minute Rule 16 scheduling conference in every civil case. He also requires a joint telephone call before the filing of any written discovery motion. Professor Cooper added that there was initial committee sentiment to make a Rule 16 conference mandatory. However, after further examination and the expression of opinion by other judges, the advisory committee realized that in some cases the Rule 26(f) report shows that a Rule 16 conference really is not necessary.

Judge Sutton observed that all of these points were likely to provoke many comments upon publication. The initially skeptical member of the Standing Committee also conceded that he had misunderstood that a Rule 16 conference would simply be encouraged, but not mandatory under the proposed amendment. However, he stressed his thought that the advisory committee was doing a lot. For that very reason, it should want public comments only on the consequential and important changes. The proposed changes to Rule 1 and to the definition of the permissible scope of discovery did not, he thought, come close to the hurdle or threshold of importance for a rule change and thus presented a significant risk of merely distracting people from a focus on the important changes.

Another member praised the package, found no harm in publication of the proposed change to Rule 1, and found the text of the proposed Rule 16 clear enough that a Rule 16 conference was discretionary as opposed to mandatory. Judge Campbell stressed again that proposed Rule 16(b) makes clear that a Rule 26(f) report OR a Rule 16 conference meets the requirements of the proposed rules.

Another participant observed that the package added up to enshrining in the rules a series of practices that a judge may adopt, but doesn't have to. He thought a better approach to these discovery issues might well be an educational strategy implemented by the FJC as opposed to a strategy that relied on these permissive but not mandatory proposed changes in discovery rules.

The Department of Justice representative said that the Department shared virtually all of the concerns raised by the skeptics, but was doing its best to arrive at a timely position on the merits of the proposed changes. In the meantime, it supported publication of the proposed changes and thought the public comments would likely be illuminating and helpful. The representative observed that certain types of litigation by the Department, such as those relating to "pattern and practice," require full discovery, as well as initial time limits both

long enough and sufficiently flexible for the government to get adequate discovery in some of its cases.

A final comment was that the package overall was an "amazing job." This member observed that the committee note should include the rationale for cutting the number of depositions from 10 to 5 and questioned why the proposal contained no limit on requests for production. On the latter point, Judge Campbell responded that the advisory committee's sentiment was that the most useful discovery tool in many cases was a set of targeted production requests under Rule 34. The advisory committee thought that a limit on them might simply provoke blunderbuss production requests. When pressed whether some limit on Rule 34 requests would not help, Judge Campbell replied that in his court he did set a presumptive limit of 25.

Judge Sutton expressed his own concerns about the proposed change to Rule 1. However, he thought it would be anomalous to subtract from publication the only proposed remedial change that addressed one of the three major prongs of concerns expressed at the Duke Conference – cooperation by counsel.

After Judge Campbell expressed agreement with those who thought that an FJC education effort was also important, Judge Sutton called for a vote on publication of the proposed amendments to the rules relating to discovery. Publication of the package of Duke Conference amendments received unanimous support from the Standing Committee with the exception of three members who dissented from the decision to publish the proposed change to Rule 1.

Action: The Standing Committee, by voice vote, approved publication of the proposed amendments to Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37, with three members objecting to the proposed amendment to Rule 1.

B. Proposed Action: Publication of Revised Rule 37(e)

The Duke Conference also addressed the need to focus on the issues of preservation requirements and sanctions with a particular emphasis on electronic discovery.

In January 2013, the Standing Committee preliminarily approved proposed amendments to Rule 37(e) for publication in August 2013, with the understanding that the advisory committee would present at the June 2013 meeting a revised proposal for publication that addressed concerns expressed in January.

The fundamental thrust of the proposal presented for publication remains as presented during the Standing Committee's January 2103 meeting – to amend the rule to address the overly broad preservation many litigants and potential litigants believe they have to undertake to ensure they will not later face sanctions. The proposal grew out of the suggestion made by a panel at the 2010 Duke Conference that the advisory committee

attempt to adopt rule amendments to address preservation and sanctions. The Discovery Subcommittee set to work on developing amendments soon thereafter. The advisory committee hosted a mini-conference in September 2011 to evaluate the various proposed approaches the subcommittee had identified. From that point, the subcommittee refined the approach that was first presented to the Standing Committee in January 2013.

The proposed amendment focuses on sanctions rather than attempting directly to regulate the details of preservation. But it provides guidance for a court by recognizing that a party that adopts reasonable and proportionate preservation measures in anticipation of litigation should not be subject to sanctions. In addition, the amendment provides a uniform national standard for culpability findings to support the imposition of sanctions. Except in exceptional cases in which a party's actions irreparably deprive another party of any meaningful opportunity to present or defend against the claims in the litigation, sanctions may be imposed only on a finding that the party acted willfully or in bad faith and that the conduct caused substantial prejudice. The amendment rejects the view adopted in some cases, such as *Residential Funding Corp. v. DeGeorge Finan. Corp*., 306 F.3d 99 (2d Cir. 2002), that permits sanctions for negligence in failing to meet preservation obligations.

Judge Campbell gave a short explanation of how the concerns expressed at the January 2013 meeting had been addressed by tweaks in the rule or note language, and also reviewed the five questions specifically posed in the request for public comment. Slight changes in the rule and note text were thought necessary to make clear that a court could order curative measures beyond merely orders to a party to remedy the failure to preserve discoverable information. Similarly, changing the rule text to focus on "the party's actions" rather than simply "the party's failure" would operate to prevent the imposition of sanctions in the absence of willfulness or bad faith only if "the party's actions" as opposed to an "act of God" deprived the opponent of a meaningful opportunity to litigate the case.

Significant efforts were made to refine the rule's attempt to preserve a line of cases that allow the imposition of sanctions in cases of failure to preserve, not involving bad faith or willfulness, where a party's actions "irreparably deprive a party of any meaningful opportunity to present or defend against claims in the litigation." To address a concern that this provision should not apply to the deprivation of opportunity to litigate a minor claim in the case, the advisory committee had tweaked the text and added language to the note that explains that the provision requires an impact on the overall case. The advisory committee also recognized the concern that this provision could swallow the rule's limits on sanctions, but continued to think it necessary to avoid overruling a substantial body of case law. It was thought that public comment would assist in pointing out the need for any additional revisions. Other concerns expressed in January about whether the proposed rule could be construed as relating to sanctions for attorney conduct or as displacing other laws relating to preservation requirements outside the discovery context were eliminated by appropriate revisions in the committee note.

Members of the advisory committee believed that the coverage of the proposed new

Rule 37(e) was coextensive with that provided under the prior version and therefore elimination of the prior version was warranted.

The questions for public comment are:

1. Should the rule be limited to sanctions for electronically stored information?
2. Should Rule 37(e)(1)(B)(ii) be retained in the rule?
3. Should the provisions of the current Rule 37(e) be retained in the rule?
4. Should there be an additional definition of "substantial prejudice" under Rules 37(e)(1)(B)(i)? If so, what should be included in that definition?
5. Should there be an additional definition of willfulness or bad faith under Rule 37(e)(1)(B)(i)?

Standing Committee Discussion of Proposed Amendments to Rule 37(e)

There was a short committee discussion concerning Rule 37(e). It was observed that electronic discovery is rapidly becoming the most burdensome aspect of discovery and therefore may provoke the most comment.

Judge Campbell answered questions and elaborated on the proposal. He stressed that one major goal of the amendments to Rule 37(e) was to distinguish between the negligent and intentional loss of evidence. He also explained that an example of a critical evidentiary loss is the loss of the instrumentality causing injury before the defendant can examine it, and an example of a curative measure would be requiring the restoration of back-up tapes in the case of a loss of evidence.

A Standing Committee member expressed his disappointment that specific safe harbors were not a part of the amendments package. He said that the ability to preserve something that should have been discoverable in the context of a lawsuit was virtually impossible in a large organization. He thought that was particularly true with respect to the ever expanding social media. He asked if drafting some specific safe harbors, particularly for large organizations, should be attempted.

Judge Campbell replied that his committee has tried to address some of these concerns by strengthening the emphasis on the relevance requirements and by adding substantial prejudice as prerequisite to triggering sanctions for the loss or absence of evidence. The attempts at a "safe harbor" provision ran into a roadblock of serious dimensions. No one has any idea what ESI will look like 5-10 years from now.

Action: The Standing Committee, by voice vote without objection, approved publication of the proposed amendments to Rule 37(e), as revised after the January 2013 meeting.

C. Proposed Action: Publication of Proposals to Abrogate Rule 84, Amend Rule 4(d)(1)(D), and Retain Current Forms 4 and 5 as a Part of Rule 4

Judge Campbell presented the recommendation that the Standing Committee approve the publication for comment of proposals that would abrogate Rule 84 and the Official Forms, and amend Rule 4(d)(1)(D) to incorporate present Forms 5 and 6 as official Rule 4 Forms.

A Rule 84 Subcommittee was formed to study Rule 84 and Rule 84 forms. The subcommittee found that these forms are used very infrequently and there is little indication that they often provide meaningful help to pro se litigants.

In addition, there is an increasing tension between the pleading forms in Rule 84 and emerging pleading standards. The pleading forms were adopted in 1938 as an important means of educating the bench and bar on the dramatic change in pleading standards effected by Rule 8(a)(2). They – and all the other forms – were elevated in 1948 from illustrations to a status that "suffice[s] under these rules." The range of topics covered by the pleading forms omits many of the categories of actions that comprise the bulk of today's federal docket. Indeed some of the forms are now inadequate, particularly the Form 18 complaint for patent infringement. Attempting to modernize the existing forms, and perhaps to create new forms to address such claims as those arising under the antitrust laws (*Twombly*) or implicating official immunity (*Iqbal*), would be a time-consuming undertaking. Such an undertaking might be warranted if in recent years the pleading forms had provided meaningful guidance to the bar in formulating complaints. However, the subcommittee's work has suggested that few, if any, lawyers consult the forms when drafting complaints. They either use their own forms, or refer to other sources, such as forms drafted by the Administrative Office's working group on forms.

Two forms require special consideration. Rule 4(d)(1)(D) requires that a request to waive service of process be made by Form 5. The Form 6 waiver of service of summons is not required, but is closely tied to Form 5. The advisory committee has concluded that the best course is to abrogate Rule 84, but preserve Forms 5 and 6 by amending Rule 4(d)(1)(D) to incorporate them recast as Rule 4 Forms attached directly to Rule 4.

Standing Committee Discussion of Proposed Abrogation of Rule 84 and Amendment to Rule 4

The Standing Committee's discussion was short. The current Rule 84 forms have become an obsolete appendage. The discussion of pleading standards in *Twombly* and *Iqbal* cases is simply illustrative of the many potential difficulties generated by the presence of obsolete forms in the Civil Rules. One member thought those cases should be specifically mentioned in any advisory committee note discussing the abrogation of Rule 84 and its forms. However, the prevailing view of other members and the reporters was that the Standing Committee should adhere to its practice of not taking a position on particular cases.

A final observation was that unless the Civil Rules Advisory Committee was prepared to undertake a thorough review of all of the civil forms, they should be abolished. It was further observed that the AO forms committee was a more than satisfactory substitute.

Action: The Standing Committee, by voice vote without objection, approved publication of the proposed amendments to Rules 84 and 4.

INFORMATION ITEMS

Judge Campbell agreed with Judge Sutton that the items contained in the information section of the Civil Rules Advisory Committee's report could be read rather than reviewed at this meeting.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Chief Judge Sidney A. Fitzwater, assisted by the advisory committee's reporter, Professor Daniel J. Capra, presented the report of the Evidence Rules Committee. The advisory committee sought final Standing Committee approval and transmittal to the Judicial Conference of the United States of four proposals: (1) an amendment to Rule 801(d)(1)(B) – the hearsay exemption for certain prior consistent statements – to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility; and (2) amendments to Rules 803(6)-(8) – the hearsay exceptions for business records, absence of business records, and public records – to eliminate an ambiguity uncovered during the restyling project and to clarify that the opponent has the burden of showing that the proffered record is untrustworthy.

ACTION ITEMS

A. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rule 801(d)(1)(B)

The advisory committee proposed that Rule 801(d)(1)(B) be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The amendment is intended to eliminate confusing jury instructions on the permissible use of prior consistent statements. Judge Fitzwater emphasized that this amendment would preserve the rule of *Tome v. United States*, 513 U.S. 150 (1995). Under that case, a prior consistent statement is not hearsay only if it was made prior to the time when the motive to fabricate arose.

A member of the Standing Committee observed that if a witness was in court and available to be cross-examined, there seemed little reason to exclude prior consistent statements on any basis. The advisory committee's reporter observed that this current

amendment represented a small step in that direction.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rule 801(d)(1)(B) for transmission to the Judicial Conference for its approval.

B. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 803(6)-(8) (Hearsay Exceptions for Business Records, Absence of Business Records, and Public Records) – Burden of Proof As To Trustworthiness

The advisory committee proposed that Rules 803(6)-(8) be amended to address an ambiguity uncovered during restyling, but left unaddressed. Subsequent restyling efforts in Texas revealed the ambiguity could be misinterpreted as placing the burden of proof on a proponent of a proffered record to show that it was trustworthy.

The proposed amendments clarify that the *opponent* has the burden of showing that the proffered record is untrustworthy. The reasons espoused by the advisory committee for the amendments are: first, to resolve a conflict in the case law by providing uniform rules; second, to clarify a possible ambiguity in the rules as originally adopted and as restyled; and third, to provide a result that makes the most sense, as imposing a burden of proving trustworthiness on the proponent is unjustified given that the proponent must establish that all the other admissibility requirements of these rules are met – requirements that tend to guarantee trustworthiness in the first place.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 803(6)-(8) for transmission to the Judicial Conference for its approval.

INFORMATION ITEMS

Judge Fitzwater noted as an informational matter that the Evidence Rules Advisory Committee had received a suggestion from a judge in the 9th Circuit to consider an amendment to Rule 902 to include federally recognized Indian tribes on the list of public entities that issue self-authenticating documents. The advisory committee decided not to pursue consideration of such a rule without further guidance from the Standing Committee. It believed that other rules might well impact Indian tribes. Judge Campbell noted that this spring the 9th Circuit had reversed a case of his involving the admission of a tribal document verifying membership in a tribe on the very ground that federally recognized tribes were not included in the Rule 902 list of public entities that can issue self-authenticating documents. Judge Sutton noted that the Appellate Rules Advisory Committee had previously dealt with the ability of Indian tribes to file amicus briefs by deciding to wait for a reasonable period to see if the 9th Circuit adopted a local rule allowing the filing of such briefs. He noted that this particular issue appeared to be one involving considerations of tribal "dignity" – perhaps

an inherently more political area where the Rules Committees should move with caution. However, he placed the practical concerns raised in a case like Judge Campbell's involving self-authentication of tribal documents in a different category. There he believed that some action by the Evidence Rules Advisory Committee might be warranted.

Finally, Judge Fitzwater reminded the Standing Committee of the symposium scheduled at the University of Maine School of Law in Portland this October, which will address the intersection of the Rules of Evidence and emerging technologies. This symposium will present an opportunity to discuss the alternatives to validate electronic signatures currently presented in the proposed amendments to the Bankruptcy Rules.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Reena Raggi, assisted by the advisory committee's two reporters, Professor Sara Sun Beale and Professor Nancy King, presented the report of the Criminal Rules Advisory Committee. In summary, this report presented three items for action by the Standing Committee:

1. Approval to transmit to the Judicial Conference a proposed amendment to Rule 12 (pretrial motions), and a conforming amendment to Rule 34;

2. Approval to transmit to the Judicial Conference proposed amendments to Rules 5 and 58 (adding consular notification); and

3. Approval to transmit to the Judicial Conference a technical and conforming amendment to Rule 6 (the Grand Jury).

These recommendations were reviewed at the Standing Committee meeting as follows.

ACTION ITEMS

A. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 12 (Pretrial Motions) and 34

These proposed amendments have their origin in a 2006 request from the Department of Justice that "failure to state an offense" be deleted from current Rule 12(b)(3) as a defect that can be raised "at any time," in light of the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (holding that "failure to state an offense" is not a jurisdictional defect).

The advisory committee's efforts to craft such an amendment have sparked extensive and protracted discussions over time within the advisory committee and between the advisory

committee and the Standing Committee regarding various aspects of Rule 12. This interplay has resulted in three separate amendment proposals being presented to the Standing Committee, the third of which was approved for publication in August 2011. In response to the thoughtful public comments received and on its own further review, the advisory committee further revised its third proposal for amendment to Rule 12, but did not believe the revisions require republication. The submitted proposals had the unanimous approval of the advisory committee.

The substantive features of the proposed amendment to Rule 12 (which also restyles this rule) can be summarized as follows:

(1) By contrast to current Rule 12(b)(1), which now starts with an unexplained cross-reference to Rule 47 (discussing the form, content, and timing of motions), the proposed revised Rule 12(b)(1) would achieve greater clarity by stating the rule's general purpose – to address the filing of pretrial motions (relocated from current Rule 12(b)) – before cross-referencing Rule 47.

(2) Proposed Rule 12(b)(2) identifies motions that may be made at any time separately from Rule 12(b)(3), which identifies motions that must be made before trial. This provides greater clarity – visually as well as textually. The current Rule 12(b)(3) identifies motions that may be made at any time only in an ellipsis exception to otherwise mandatory motions alleging defects in the indictment or information.

(3) Proposed Rule 12(b)(2) recognizes lack of jurisdiction as the only motion that may be made "at any time while the case is pending," thus implementing the Justice Department's request not to accord that status to a motion raising the failure to state an offense.

(4) Proposed Rule 12(b)(3) provides clearer notice with respect to motions that must be made before trial.

(a) At the start, it clarifies that its motion mandate is dependent on two conditions:

i. the basis for the motion must be reasonably available before trial, and
ii. the motion must be capable of resolution before trial.

This ensures that motions are raised pretrial when warranted while safeguarding against a rigid filing requirement that could be unfair to defendants.

(b) Proposed Rule 12(b)(3)(A)-(B) provides more specific notice of the motions that must be filed pretrial if the just-referenced twin conditions are satisfied. While the general categories of "defect[s] in instituting the prosecution" (current Rule 12(b)(3)(A))

and "defect[s] in the indictment or information (current Rule 12(b)(3)(B)) are retained, they are now clarified with illustrative non-exhaustive lists.

Proposed Rule 12(b)(3)(A) thus lists as defects in instituting the prosecution that must be raised before trial:

i. improper venue,
ii. preindictment delay,
iii. violation of the constitutional right to a speedy trial,
iv. selective or vindictive prosecution, and
v. error in grand jury or preliminary hearing proceedings.

Proposed Rule 12(b)(3)(B) lists as defects in the indictment or information that must be raised before trial:

i. duplicity,
ii. multiplicity,
iii. lack of specificity,
iv. improper joinder, and
v. failure to state an offense.

The inclusion of failure to state an offense in Rule 12(b)(3)(B) accomplishes the amendment originally sought by the Department of Justice.

The proposed rule does not include double jeopardy or statute of limitations challenges among required pretrial motions in light of concerns raised in public comments. The advisory committee believes that subjecting such motions to a rule mandate is premature, requiring further consideration as to the appropriate treatment of untimely filings.

(5) Proposed Rule 12(b)(3)(C)-(E) duplicates the current rule in continuing to require that motions to suppress evidence, to sever charges or defendants, and to seek Rule 16 discovery must be made before trial.

(6) Proposed Rule 12(c) identifies both the deadlines for filing motions and the consequences of missing those deadlines. Grouping these two subjects together in one section is a visual improvement over the current rule, which discusses deadlines in (c) and consequences in later provision (e). More specifically,

(a) Proposed Rule 12(c)(1) tracks the current rule's language in recognizing the discretion afforded district courts to set motion deadlines. Nevertheless, it now adds a default deadline – the start of trial – if the district court fails to set a motion deadline. This affords defendants the maximum time to make mandatory pretrial motions, but it forecloses an argument that, because the district court did not

set a motion deadline, a defendant need not comply with the rule's mandate to file certain motions before trial.

(b) Proposed Rule 12(c)(2) explicitly acknowledges district court discretion to extend or reset motion deadlines at any time before trial. This discretion, which is implicit in the current rule, permits district courts to entertain late-filed motions at any time before jeopardy attaches as warranted. It also allows district courts to avoid subsequent claims that defense counsel was constitutionally ineffective for failing to meet a filing deadline.

(c) Proposed Rule 12(c)(3)(A) retains current Rule 12(e)'s standard of "good cause" for review of untimely motions (with the exception of failure to state an offense discussed separately in submitted Rule 12(c)(3)(B)). At the same time, the submitted rule does not employ the word "waiver" as in the current rule because that term, in other contexts, is understood to mean a knowing and affirmative surrender of rights.

With respect to "good cause," the proposed committee note indicates that courts have generally construed those words, as used in current Rule 12(e), to require a showing of both cause and prejudice before an untimely claim may be considered. The published proposed amendment substituted cause and prejudice for good cause, hoping to achieve greater clarity, but after reviewing public comments and further considering the issue, the advisory committee decided to retain the term "good cause," to avoid both any suggestion of a change from the current standard and arguments based on some constructions of "cause and prejudice" in other contexts, notably, the miscarriage of justice exception to this standard in habeas corpus jurisprudence.

The amended rule, like the current one, continues to make no reference to Rule 52 (providing for plain error review of defaulted claims), thereby permitting the courts of appeals to decide if and how to apply Rules 12 and 52 when arguments that should have been the subject of required Rule 12(b)(3) motions are raised for the first time on appeal.

(d) Insofar as the submitted amendment, at Rule 12(b)(3)(B), would now require a defendant to raise a claim of failure to state an offense before trial, the proposed Rule 12(c)(3)(B) provides that the standard of review when such a claim is untimely is not "good cause" (*i.e.*, cause and prejudice) but simply "prejudice." The advisory committee

> thought that this standard provides a sufficient incentive for a defendant to raise such a claim before trial, while also recognizing the fundamental nature of this particular claim and closely approximating current law, which permits review without a showing of "cause."

The committee note to accompany the proposed amendment to Rule 12 has been revised to make clear that the amendment is not intended to disturb the existing broad discretion of the trial judge to set, reset, or decline to reset deadlines for pretrial motions.

A conforming amendment to Rule 34 that omits language requiring a court to arrest judgment if "the indictment or information does not charge an offense" is also presented for publication.

Standing Committee Discussion of Proposed Amendments to Rule 12

Judge Raggi noted that the default deadline for filing the mandatory pretrial motions specified by Rule 12 would be at the start of trial when the jury is empaneled and jeopardy attaches when the jury is sworn.

Deputy Attorney General James Cole acknowledged that the Department of Justice originally prompted a review of this rule. He expressed the Department's gratitude to the Criminal Rules Advisory Committee and the Standing Committee for their years of hard work. He thought this proposed amendment would provide greater clarity regarding mandatory pretrial motions and therefore strongly supported it.

Another member wondered whether any defendant realistically would ever have "prejudice" resulting in the grant of relief after failing to file a mandatory pretrial motion. He discounted speculation that defense attorneys might try to "game" the system by failing to raise a defective indictment (*e.g.*, missing an element of the crime) until after jeopardy had attached. He pointed out that the attorney would risk the defect being noticed by the judge, and it could be cured by a proper instruction to the jury. Another member responded that a "prejudice" issue would likely arise on a post-trial motion only after jeopardy had attached and a defendant had been convicted. He predicted that district and appellate courts might arrive as to differing conclusions on what amounted to "prejudice" in the context of a new Rule 12.

A final concern was raised about how information protected by grand jury secrecy under Rule 6(e) might be raised in the context of a Rule 12 motion and how such information would relate to the mandatory filing and prejudice issues. The response of the reporters was that such information would be governed by the "reasonably available" standard of the rule. If such information was not "reasonably available" pretrial and was sufficiently important to the motion, a court would have discretion to hear the motion at issue at a later time.

Judge Raggi asked that former advisory committee chair Judge Richard Tallman and

current subcommittee chair Judge Morrison England be commended for their enormously important contributions to producing this final version of a proposed comprehensive amendment to Rule 12. Judge Sutton added his personal inclusion of Judge Raggi and Professors Sara Sun Beale and Nancy King to the list of those whom the Standing Committee should commend for their outstanding efforts. The members of the Standing Committee unanimously agreed.

Finally, Judge Sutton expressed his personal thanks to the chairs and members of the Criminal Rules Advisory Committee, whose efforts over the years had culminated in such a worthwhile compromise resolving the major prior difficulties and stumbling blocks to amending the rule.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 12 and 34 for transmission to the Judicial Conference for its approval.

B. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 5 and 58 (Consular Notification)

The advisory committee also recommended approval of its second proposal to amend Rules 5 and 58 to provide for advice concerning consular notification, as amended following publication.

In 2010, the Justice Department, at the urging of the State Department, proposed amendments to Rules 5 and 58, the rules specifying procedures for initial proceedings in felony and misdemeanor cases respectively, to provide notice to defendants of consular notification obligations arising under Article 36 of the multilateral Vienna Convention on Consular Relations ("Vienna Convention"), as well as various bilateral treaties.

The first proposed amendments responding to this request were published for public comment and subsequently approved by the advisory committee, the Standing Committee, and the Judicial Conference. In April 2012, however, the Supreme Court returned the amendments to the advisory committee for further consideration.

At its April 2012 meeting, the advisory committee identified two possible concerns with the returned proposal: (1) perceived intrusion on executive discretion in conducting foreign affairs, both generally and specifically as it pertains to deciding how, or even if, to carry out treaty obligations; and (2) perceived conferral on persons other than the sovereign signatories to treaties – specifically, criminal defendants – of rights to demand compliance

with treaty provisions.[1]

The amendments were redrafted to respond to these concerns. The redrafted amendments were carefully worded to provide notice without any attending suggestion of individual rights or remedies. Indeed, the committee note emphasizes that the proposed rules do not themselves create any such rights or remedies. The Standing Committee approved publication of the redrafted amendments in June 2012.

Upon review of received public comments, as well as its own further consideration, the advisory committee made the following changes to the proposed amendments, none of which requires further publication.

The introductory phrase of submitted Rules 5(d)(1) and 58(b)(2) now provides for the specified advice to be given to all defendants, in contrast to the published rule, which had provided for consular notification to be given "if the defendant is held in custody and is not a United States citizen."

The change was made to avoid any implication that the arraigning judicial officer was required to ascertain a defendant's citizenship, an inquiry that could involve self-incrimination. Providing consular notice to all defendants without such an inquiry parallels Rule 11(b)(1)(O) (which the Supreme Court has now transmitted to Congress), which provides for all defendants to be given notice at the plea proceeding of possible immigration consequences without specific inquiry into their nationality or status in the United States.

As for the "in custody" requirement, interested parties disagreed as to when a defendant was "in custody" or "detained." Providing notice to all defendants at their initial appearance not only avoids the need to resolve this question, it avoids the need to consider a further notice requirement when defendants initially admitted to bail are subsequently remanded. Thus, while the advisory committee is mindful of the need to avoid adding unnecessary notice requirements to rules governing initial appearances, sentences, etc., it concluded, as now stated in the proposed committee note, that "the most effective and efficient method of conveying this [consular notification] information is to provide it to every defendant, without attempting to determine the defendant's citizenship."

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[1] Insofar as Article 36 of the Vienna Convention provides for signatory nations to advise detained foreign nationals of other signatory nations of an opportunity to contact their home country's consulate, litigation has not yet resolved whether such a provision gives rise to any individual rights or remedies. *See Sanchez-Llamas v. Oregon,* 548 U.S. 331 (2006) (holding that suppression of evidence was not appropriate remedy for failure to advise foreign national of ability to have consulate notified of arrest and detention regardless of whether Vienna Convention conferred any individual rights). Thus, the advisory committee concluded that the remand of the amendment proposal from the Supreme Court could be understood to suggest that the rule may have gotten ahead of settled law on this matter.

Standing Committee Discussion of the Proposed Amendments to Rules 5 and 58

Deputy Attorney General Cole again commended Judge Raggi and her committee for its excellent work in assisting to conform the Criminal Rules with the treaty obligations of the United States.

Another member inquired whether judges would simply read the materials specified in the rule as an advisory notice to the defendant or whether the judge's reading of the notice was intended to provoke a response from the defendant. There was unanimous agreement with the position of the advisory committee that all the amended rule proposals sought to accomplish was simply to give the notification required by the treaty to the defendant of a foreign nation.

Deputy Attorney General Cole observed that treaty violations occur mostly in state court. The amended Rules 5 and 58 thus provide a good model for the states. Professor Beale observed that 47 percent of defendants in the federal courts are not U.S. citizens. This rule provides the basis for the court to make a good record of the notification it has provided.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 5 and 58, as amended following publication, for transmission to the Judicial Conference for its approval.

C. Proposed Action: Transmission to the Judicial Conference of Proposed Technical and Conforming Amendment to Rule 6 (The Grand Jury)

The Office of the Law Revision Counsel informed the Administrative Office of a reorganization of chapter 15 of Title 50 of the United States Code. This revision has made incorrect a current statutory reference in Rule 6(e)(3)(D) to the code section defining counter-intelligence. The proposed amendment would simply substitute a reference to the correct section of Title 50 for the current one that is now obsolete.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendment to Rule 6 for transmission to the Judicial Conference for its approval.

INFORMATION ITEM

The Department of Justice has urged amendment of Criminal Rule 4 to facilitate service of process on foreign corporations. It submits that the current rule impedes prosecution of foreign corporations that have committed offenses punishable in the United States, but that cannot be served for lack of a last known address or principal place of business in the United States. It argues that this has created a "growing class of organizations, particularly foreign corporations" that have gained "an undue advantage" over the government relating to the initiation of criminal proceedings. The advisory committee

has referred the matter to a subcommittee for further study and report.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Steven M. Colloton, assisted by the advisory committee's reporter, Professor Catherine T. Struve (by telephone), presented the report of the Appellate Rules Advisory Committee. In conjunction with the Bankruptcy Rules Advisory Committee's proposal to amend Part VIII of the Bankruptcy Rules – the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel ("BAP") – the Appellate Rules Advisory Committee sought final approval of a proposed amendment to Appellate Rule 6 (concerning appeals to the court of appeals in a bankruptcy case).

ACTION ITEM

A. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Appellate Rule 6

The proposed amendment to Appellate Rule 6 would: (1) update that rule's cross-references to the Bankruptcy Part VIII Rules, (2) amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling, (3) add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2), and (4) revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal.

Proposed Appellate Rule 6(c) would treat the record on direct appeals differently than existing Rule 6(b) treats the record on bankruptcy appeals from a district court or BAP. Rule 6(b) contains a streamlined procedure for redesignating and forwarding the record on appeal, because in the appeals covered by Rule 6(b), the appellate record already will have been compiled for purposes of the appeal to the district court or the BAP. In a direct appeal, the record generally will be compiled from scratch. The closest model for the compilation and transmission of the bankruptcy court record is the set of rules chosen by the Bankruptcy Rules Part VIII project for appeals from the bankruptcy court to the district court or the BAP. Thus, proposed Rule 6(c) incorporates the relevant Part VIII rules by reference while making some adjustments to account for the particularities of direct appeals to the court of appeals.

Both the Bankruptcy Rules Part VIII project and the project to revise Appellate Rule 6 have highlighted changes in the treatment of the record. The Appellate Rules were drafted on the assumption that the record on appeal would be available only in paper form. The proposed Part VIII Rules are drafted with a contrary presumption in mind: the default principle under those rules is that the record will be made available in electronic form. In revising Rule 6(b) and in drafting new Rule 6(c), the Appellate Rules Committee adopted language that can accommodate the various ways in which the lower-court record could be made available to the court of appeals – *e.g.*, in paper form, in electronic files that can be sent to the court of appeals, or by means of electronic links.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Appellate Rule 6 for transmission to the Judicial Conference for its approval.

INFORMATION ITEMS

Two other matters were briefly discussed during Judge Colloton's presentation. First, a Standing Committee member inquired whether the conversion of page limits to word limits in appellate briefs may not have resulted in the filing of longer appellate briefs. Judge Colloton said a review of the matter would be part of the advisory committee's broader review of other page limits for appellate filings.

Another Standing Committee member prompted a general discussion of whether appellate courts are sufficiently responsive to the need for swift adjudication of proceedings under the Hague Convention on the Civil Aspects of International Child Abduction. While appellate consideration of stay applications is usually prompt, decisions on the merits can sometimes be delayed. The discussion resulted in a preliminary suggestion that a letter from the advisory committee chair to chief judges of the circuits might be appropriate to remind them of the Supreme Court's concern about expediting these cases as expressed in the opinions in *Chafin v. Chafin*, 133 S. Ct. 1017 (2013). Judge Colloton agreed to discuss the matter with Judge Sutton, bearing in mind that letters to chief judges from the committees should be employed sparingly if they are to have the desired effect.

Other members of the Standing Committee were of the view that despite the traditional reluctance of the rules committees to endorse provisions that require the expediting of specific classes of cases, stronger measures than mere exhortation may be required.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Eugene Wedoff, assisted by the advisory committee's two reporters, Professor Elizabeth Gibson and Professor Troy McKenzie, presented the report of the Bankruptcy Rules Advisory Committee. The advisory committee sought the Standing Committee's final approval and transmission to the Judicial Conference of most of the previously published items: the revision of the Part VIII Rules and amendments to 10 other rules and 5 official forms. Because the advisory committee made significant changes after publication to one set of published forms – the means test forms – it requested that those forms be republished.

The advisory committee also requested publication for public comment of (1) the remaining group of modernized forms for use in individual-debtor bankruptcy cases, and (2) a chapter 13 plan form and implementing rule amendments.

ACTION ITEMS

In brief, the actions sought from the Standing Committee by Judge Wedoff and his committee were as follows.

1. Approval for transmission to the Judicial Conference of amendments to Rules 1014, 7004, 7008, 7012, 7016, 7054, 8001-8028, 9023, 9024, 9027, and 9033, and Official Forms 3A, 3B, 6I, and 6J;

2. Approval for transmission to the Judicial Conference without publication of a conforming amendment to Official Form 23;

3. Approval for republication in August 2013 of amendments to the means test forms – Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2 – along with the initial publication of Official Form 22A-1Supp; and

4. Approval for publication in August 2013 of amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5005, 5009, 7001, 9006, and 9009, and Official Forms 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 113, 119, 121, 318, 423, 427, 17A, 17B, and 17C.

Judge Wedoff first discussed the rules recommended for transmission to the Judicial Conference and the forms sought to be approved by the Judicial Conference with an effective date of December 1, 2013.

A. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 7008, 7012, 7016, 9027, and 9033

Amendments to Rules 7008, 7012, 7016, 9027, and 9033 are proposed in response to *Stern v. Marshall*, 131 S. Ct. 2594 (2011). The Bankruptcy Rules follow the Judicial Code's division between core and non-core proceedings. The current rules contemplate that a bankruptcy judge's adjudicatory authority is more limited in non-core proceedings than in core proceedings. For example, parties are required to state whether they do or do not consent to final adjudication by the bankruptcy judge in non-core proceedings. There is no comparable requirement for core proceedings. *Stern*, which held that a bankruptcy judge did not have authority under Article III of the Constitution to enter final judgment in a proceeding deemed core under the Judicial Code, has introduced the possibility that such a proceeding may nevertheless lie beyond the power of a bankruptcy judge to adjudicate finally. In other words, a proceeding could be "core" as a statutory matter but "non-core" as a constitutional matter.

The proposals would amend the Bankruptcy Rules in three respects. First, the terms "core" and "non-core" would be removed from Rules 7008, 7012, 9027, and 9033 to avoid possible confusion in light of *Stern*. Second, parties in all bankruptcy proceedings (including removed actions) would be required to state whether they do or do not consent to entry of final orders or judgment by the bankruptcy judge. Third, Rule 7016, which governs pretrial

procedures, would be amended to direct bankruptcy courts to decide the proper treatment of proceedings.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 7008, 7012, 7016, 9027, and 9033 for transmission to the Judicial Conference for its approval.

B. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 8001-8028 (Part VIII of the Bankruptcy Rules)

On Tuesday morning, June 4, 2013, the Standing Committee meeting opened with a presentation by Professor Elizabeth Gibson of the comprehensive set of amendments to Part VIII of the bankruptcy appellate rules. These amendments are designed with the goal of making the bankruptcy appellate rules consistent with the Federal Rules of Appellate Procedure. Professor Gibson observed that this project of conforming and restyling the bankruptcy appellate rules, which is now finally approaching conclusion, has been a lengthy one – ongoing since she first became a reporter to the Bankruptcy Rules Advisory Committee.

In summary, she noted that the proposed amendments to Rules 8001-8028 (Part VIII of the Bankruptcy Rules) constitute a comprehensive revision of the rules governing bankruptcy appeals to district courts, bankruptcy appellate panels, and with respect to some procedures, courts of appeals. This multi-year project attempted to bring the bankruptcy appellate rules into closer alignment with the Federal Rules of Appellate Procedure; to incorporate a presumption favoring the electronic transmission, filing, and service of court documents; and to adopt a clearer style. Existing rules have been reorganized and renumbered, some rules have been combined, and provisions of other rules have been moved to new locations. Much of the language of the existing rules has been restyled.

In general, the public comments reflected a positive response to the proposed revision of the Part VIII rules. Thus, the advisory committee unanimously voted to recommend them for final approval to the Standing Committee with the post-publication changes listed by Professor Gibson as follows:

Rule 8003. Several comments pointed out that the provision in subdivision (d) directing the clerk of the appellate court to docket an appeal "under the title of the bankruptcy court action" is unclear since "action" might refer to the overall bankruptcy case or to an adversary proceeding within the case. The advisory committee agreed that this was an instance in which the Appellate Rules' language needs to be modified for the bankruptcy context. It voted to change the wording in Rule 8003(d)(2) and the parallel provision in Rule 8004(c)(2) to "under the title of the bankruptcy case and the title of any adversary proceeding."

Rule 8004. The clerk of a BAP commented on Rule 8004(c)(3), which directed the dismissal of an appeal if leave to appeal is denied. She stated that appellants sometimes file a motion for leave to appeal when leave is not required and in that situation, although the

motion is denied, dismissal is not appropriate. The advisory committee voted to delete the sentence in question, which is not contained in either the current bankruptcy rule or the appellate rule from which the proposed rule is derived.

Rule 8005. Several comments questioned whether an election to have an appeal heard by the district court, rather than the BAP, must still be made by a statement in a separate document. At the spring meeting, the advisory committee approved for publication an amendment to the notice of appeal form, Official Form 17A, that will include a section for making an election under this rule. That form, which if approved will take effect on the same date as the rule, will clarify that the separate-document rule no longer applies.

The advisory committee agreed with one of the comments it received, which recommended that the BAP clerk notify the bankruptcy clerk if an appeal is transferred to the district court, and it voted to add a sentence to that effect in subdivision (b).

Rule 8007. The advisory committee agreed that the rule should be clarified to eliminate the possibility of filing a motion for a stay in the appellate court prior to the filing of a notice of appeal.

Rule 8013. One comment suggested that district courts be allowed to require a notice of motion in bankruptcy appeals if they otherwise follow that practice in their court. Another comment made a similar suggestion concerning proposed orders. The advisory committee agreed with these comments and added "Unless the court orders otherwise" to subdivision (a)(2)(D)(ii).

Rule 8016. Two comments raised questions about subdivision (f), which addressed the consequences of failing to file a brief on time. It was unclear why the provision was located in the rule governing cross-appeals, and it seemed to be inconsistent with a provision in Rule 8018. The advisory committee thought that the comments were well taken, and it voted to delete the subdivision.

Rule 8018. The advisory committee voted to reword the provision to clarify that dismissal of an appeal or cross-appeal can occur only upon motion of a party or on the court's own motion, after which the appellant would have an opportunity to respond.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 8001-8028 (Part VIII of the Bankruptcy Rules) for transmission to the Judicial Conference for its approval.

C. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rule 1014(b)

Rule 1014(b) governs the procedure for determining where cases will proceed if petitions are filed in different districts by, against, or regarding the same debtor or related debtors. The rule currently provides that, upon motion, the court in which the first-filed petition is pending may determine – in the interest of justice or for the convenience of the parties – the district or districts in which the cases will proceed. Except as otherwise ordered

by that court, proceedings in the cases in the other districts "shall be stayed by the courts in which they have been filed" until the first court makes its determination.

The proposed amendment both clarifies and narrows the scope of the stay provision. The current rule applies a blanket rule that all the later-filed cases are stayed while the first court makes the venue determination. The amended rule would limit the stay to situations in which the first court finds that the rule in fact applies and that a stay is needed.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendment to Rule 1014(b) for transmission to the Judicial Conference for its approval.

D. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 7004(e)

Rule 7004(e) governs the time during which a summons is valid after its issuance in an adversary proceeding. The current rule provides that a summons is valid so long as it is served within 14 days of its issuance. The advisory committee sought final approval of an amendment to reduce that period from 14 days to 7 days.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendment to Rules 7004(e), with a minor technical revision, for transmission to the Judicial Conference for its approval.

E. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 7008 and 7054

Rules 7008(b) and 7054 would be amended to change the procedure for seeking attorney's fees in bankruptcy proceedings. The advisory committee proposed the amendments in order to clarify and to promote uniformity in the procedures for seeking an award of attorney's fees. Rule 7054 would be amended to include much of the substance of Civil Rule 54(d)(2). Rule 7008(b), which currently addresses attorney's fees, would be deleted. Just as the procedure for seeking attorney's fees in civil actions is governed exclusively by Civil Rule 54(d), Bankruptcy Rule 7054 would provide the exclusive procedure for seeking an award of attorney's fees in bankruptcy cases, unless the governing substantive law requires the fees to be proved at trial as an element of damages.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 7008 and 7054 for transmission to the Judicial Conference for its approval.

F. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Rules 9023 and 9024

Rule 9023, which governs new trials and amendment of judgments, and Rule 9024, which governs relief from judgments or orders, would be amended to include a cross-reference to proposed Rule 8008, which governs indicative rulings. The advisory committee

proposed these amendments in order to call attention at an appropriate place in the rules to that new bankruptcy appellate rule. Rule 8008 prescribes procedures for both the bankruptcy court and the appellate court when an indicative ruling is sought. It therefore incorporates provisions of both Civil Rule 62.1 and Appellate Rule 12.1. Because a litigant filing a post-judgment motion that implicates the indicative-ruling procedure will not encounter a rule similar to Civil Rule 62.1 in either the Part VII or Part IX rules, the advisory committee decided that it would be useful to include a cross-reference to Rule 8008 in the rules governing post-judgment motions.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Rules 9023 and 9024 for transmission to the Judicial Conference for its approval.

G. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Official Forms 3A, 3B, 6I, and 6J

Official Forms 3A (Application for Individuals to Pay the Filing Fee in Installments), 3B (Application to Have the Chapter 7 Filing Fee Waived), 6I (Schedule I: Your Income), and 6J (Schedule J: Your Expenses) were selected for the initial-implementation stage of the Forms Modernization Project ("FMP") because they make no significant change in substantive content and simply replace existing forms that apply only in individual-debtor cases. The restyled forms all involve the debtors' income and expenses, and they are employed by a range of users: the courts, U.S. trustees, and case trustees, for varied purposes. The publication of these forms has already provided valuable feedback on the FMP approach to form design, and, if adopted, their use will provide a helpful gauge of the effectiveness of the FMP approach. Published last August, these forms were recommended by the advisory committee, unanimously, for final approval with some post-publication changes.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Official Forms 3A, 3B, 6I, and 6J, with the post-publication changes, for transmission to the Judicial Conference for its approval.

H. Proposed Action: Transmission to the Judicial Conference of Proposed Amendments to Official Form 23

The Supreme Court has approved an amendment to Rule 1007(b)(7), due to go into effect on December 1, 2013, that will relieve individual debtors of the obligation to file Official Form 23 if the provider of an instructional course concerning personal financial management directly notifies the court that the debtor has completed the course. The preface and instructions to Official Form 23 would be amended to reflect that change by stating that a debtor should file the form only if the course provider has not already notified the court of the debtor's completion of the course.

Action: The Standing Committee, by voice vote without objection, approved the proposed amendments to Official Form 23 for transmission to the Judicial Conference for its approval without publication.

I. Proposed Action: Republication of Proposed Amendments to Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, and Publication of Proposed New Official Form 22A-1Supp

Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, the restyled means-test forms for individual debtors under chapters 7, 11, and 13, were published for comment in August 2012. Because it determined that the changes made in response to comments were of sufficient significance to require republication, the advisory committee requested that the newly revised means-test forms be published for public comment in August. Along with the republication of Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2, the advisory committee requested publication of new Official Form 22A-1Supp, which was created in response to the comments.

Action: The Standing Committee, by voice vote without objection, approved for publication the proposed amendments to Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2 as revised and Form 22A-1Supp.

J. Proposed Action: Publication of Rules Related to New Chapter 13 Plan Form

For the past two years, the advisory committee has studied the creation of a national plan form for chapter 13 cases. The twin goals of the project have been to bring more uniformity to chapter 13 practice and to simplify the review of chapter 13 plans by debtors, courts, trustees, and creditors. These goals are consistent with the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010), which held that an order confirming a procedurally improper chapter 13 plan was nevertheless entitled to preclusive effect and that bankruptcy judges must independently review chapter 13 plans for conformity with applicable law.

The advisory committee approved a draft plan and accompanying rule amendments at its April 2013 meeting in New York. The advisory committee voted unanimously to seek publication of the form and rule amendments related to the new chapter 13 plan.

Professor Troy McKenzie led the following discussion, which summarizes the amendments to the Bankruptcy Rules that the Standing Committee voted to publish with the chapter 13 plan form.

Rule 2002. The Bankruptcy Rules describe categories of events that trigger the obligation to provide notice. Rule 2002 currently requires 28 days' notice of the time to file objections to confirmation of a chapter 13 plan as well as of the confirmation hearing itself. An amendment to Rule 3015(f), however, would require that objections to confirmation of a chapter 13 plan be filed at least seven days before the confirmation hearing.

The advisory committee proposed to retain the 28-day period for notice of a chapter 13 confirmation hearing, but to amend Rule 2002 in light of the new time period for

objections to confirmation in Rule 3015(f). Thus, Rule 2002 would require 21 days' notice of the time to file objections to confirmation.

Rule 3002. Rule 3002(a) would be amended to require a secured creditor, as well as an unsecured creditor, to file a proof of claim in order to have an allowed claim. In keeping with Code § 506(d), however, the amendment also makes clear that the failure of a secured creditor to file a proof of claim does not render the creditor's lien void. Second, Rule 3002(c) would be amended to change the calculation of the claims bar date. Rather than 90 days from the meeting of creditors under Code § 341, the bar date would be 60 days after the petition is filed in a chapter 13 case. The amended rule includes a provision for an extension of the bar date when the debtor has failed to provide in a timely manner a list of creditors' names and addresses for notice purposes. In response to concerns raised during a mini-conference held in Chicago, the amended rule would also include a longer bar date for certain supporting documents required for mortgage claims on a debtor's principal residence. With those claims, the mortgagee would be required to file a proof of claim within the 60-day period but would have an additional 60 days to file a supplement with the supporting documents.

Rule 3007. Objections to claims are governed by Rule 3007. Because the plan form permits some determinations regarding claims to be made through the plan, the advisory committee proposed an amendment to Rule 3007. The amended rule would provide an exception to the need to file a claim objection if a determination with respect to that claim is made in connection with plan confirmation under proposed Rule 3012.

Rule 3012. The proposed amendment would provide that the amount of a secured claim under Code § 506(a) may be determined in a proposed plan, subject to objection and resolution at the confirmation hearing. Current Rule 3012 provides for the valuation of a secured claim by motion only. The amended rule would also make clear that a chapter 13 plan would not control the amount of a claim entitled to priority treatment or the amount of a secured claim of a governmental unit.

Rule 3015. Rule 3015 governs the filing of a chapter 13 plan as well as plan modifications and objections to confirmation. The advisory committee proposed extensive amendments to the rule. They include an amended subdivision (c) requiring use of the official form for chapter 13 plans, a new 7-day deadline in Rule 3015(f) for filing objections to confirmation, and an amended subdivision (g) providing when the plan terms control over contrary proofs of claim. These amendments dovetail with proposed amendments to Rules 2002, 3007, and 3012.

Rule 4003. Code § 522(f) permits a debtor to avoid certain liens encumbering property that is exempt from the debtor's estate. Current Rule 4003(d) provides that lien avoidance under this section of the Code requires a motion. The plan form, however, would include a provision for a debtor to request lien avoidance as permitted by § 522(f). The advisory committee proposed an amendment to Rule 4003(d) to give effect to that part of the plan form.

Rule 5009. The advisory committee has included a procedure in proposed amended Rule 5009(d) for the debtor to obtain an order confirming that a secured claim has been satisfied. The language of the proposed amended rule permits the debtor to request entry of the order but does not specify the requirements for lien satisfaction.

Rule 7001. The advisory committee proposed to amend Rule 7001(2) so that determinations of the amount of a secured claim (under amended Rule 3012) and lien avoidance (under amended Rule 4003(d)) through a chapter 12 or chapter 13 plan would not require an adversary proceeding.

Rule 9009. In order to ensure use of the chapter 13 plan form without significant alterations, the advisory committee proposed an amendment to Rule 9009. Because greater uniformity is a principal goal of the plan form, proposed amended Rule 9009 would limit the range of permissible changes to forms.

Action: The Standing Committee, by voice vote without objection, approved for publication the proposed rule amendments related to the proposed new chapter 13 plan.

K. Proposed Action: Publication of Proposed Amendments to Rule 5005 (electronic signatures)

Rule 5005 governs the filing and transmittal of papers. The advisory committee sought approval to publish for public comment a proposed amendment to Rule 5005 that would create a national bankruptcy rule permitting the use of electronic signatures of debtors and other individuals who are not registered users of CM/ECF, without requiring the retention of the original document bearing a handwritten signature.

The proposed amendment to Rule 5005 would allow the electronic filing of a scanned signature page bearing the original signature of a debtor or other non-filing user to be treated the same as a handwritten signature without requiring the retention of hard copies of documents. The scanned signature page and the related document would have to be filed as a single docket entry to provide clarity about the document that was being attested to by the non-filing user. The amended rule would also provide that the user name and password of a registered user of the CM/ECF system would be treated as that individual's signature on electronically filed documents. The validity of a signature submitted under the amended rule would still be subject to challenge, just as is true for a handwritten signature.

The proposal incorporates recommendations from the Inter-Committee CM/ECF Subcommittee, which is chaired by Judge Michael A. Chagares and which includes members of the Standing Committee, each of the advisory committees, and the Committee on Court Administration and Case Management. As noted, the amended rule would provide that the scanned signature of a non-filing user, when filed as part of a single filing with an electronic document, serves as a signature to that document – without any requirement that the original be retained. The subcommittee noted that once a non-filing user has a signature scanned, there is no assurance that the signature was to the original document – and that concern is

greater than with a hard copy, as it is less likely that a hard copy signature page would be attached to a number of documents. The subcommittee suggested publishing two alternative solutions to this issue. The advisory committee agreed with that suggestion and presented its proposed amendment to the Standing Committee with the suggested alternatives incorporated.

One alternative would be for the rule to state that the filing by the registered user is deemed a certification that the scanned signature was part of the original document. The second alternative would keep the filing lawyer out of the matter of any attestation about authenticity by using notaries public for that purpose. The Standing Committee accepted the recommendation of the CM/ECF Subcommittee and the Bankruptcy Rules Advisory Committee that Rule 5005(a)(3)(B) be published with both alternatives. It was agreed that publication of proposed Rule 5005(a)(3)(B) with both alternatives would allow careful public consideration of the problem of assuring that scanned signatures are a part of the original document. It would assure input from interested and knowledgeable members of the public on how best to protect against the possible misuse of electronic signatures.

Judges Fitzwater and Sutton again reminded the Standing Committee that the Evidence Rules Advisory Committee is hosting a technology symposium in Portland, Maine in October 2013, which would provide another forum to solicit public comment on alternative methods to verify electronic signatures.

Judge Chagares noted that the CM/ECF Subcommittee will examine whether there are other technology issues related to the Next Generation of CM/ECF that should be addressed across all the sets of rules. Professor Capra, the reporter to the subcommittee, will work with the advisory committee reporters to identify rules affected by electronic filing and CM/ECF. If common issues arise across the different sets of rules, a model might be developed for the sake of uniformity.

Action: The Standing Committee, by voice vote without objection, approved publication of the proposed amendment to Rule 5005, including an invitation for comment on the proposed alternative methods for assuring that a signature is part of the original document.

L. Proposed Action: Publication of Proposed Amendments to Rule 9006(f)

Rule 9006(f), which is modeled on Civil Rule 6(d), provides three additional days for a party to act "after service" if service is made by mail or under Civil Rule 5(b)(2)(D), (E), or (F). At the January 2013 meeting, the Standing Committee approved for publication a proposed amendment to Civil Rule 6(d) that would clarify that only the party that is served by mail or under the specified provisions of Civil Rule 5 – and not the party making service – is permitted to add three days to any prescribed period for taking action after service is made. Because Rule 9006(f) contains the same potential ambiguity as current Civil Rule 6(d), the advisory committee requested approval to publish a parallel amendment of the bankruptcy rule.

Action: The Standing Committee, by voice vote without objection, approved publication of the proposed amendments to Rule 9006(f).

M. Proposed Action: Publication of Official Form 113 (new national Chapter 13 form)

The advisory committee recommended publication for public comment of a national plan form for chapter 13 cases. As described above in Item J, the plan form is the product of more than two years of study and consultation by the advisory committee.

The plan form includes ten parts. Beginning with a notice to interested parties (Part 1), the plan form covers: the amount, source, and length of the debtor's plan payments (Part 2); the treatment of secured claims (Part 3); the treatment of the trustee's fees, administrative claims, and other priority claims (Part 4); the treatment of unsecured claims not entitled to priority (Part 5); the treatment of executory contracts and unexpired leases (Part 6); the order of distribution of payments by the trustee (Part 7); the revesting of property of the estate with the debtor (Part 8); and nonstandard plan terms (Part 9). Part 10 is the signature box.

The plan form contains a number of significant features. First, it permits a debtor to propose to limit the amount of a secured claim (Part 3, § 3.2), to avoid certain liens as provided by the Bankruptcy Code (Part 3, § 3.4), and to include nonstandard terms that are not part of – or that deviate from – the official form (Part 9). In order to make any of these particular terms effective, however, the debtor must clearly indicate in Part 1 that the plan includes one or more of them by marking the appropriate checkbox. Thus, the face of the document will put the court, the trustee, and creditors on notice that the plan contains terms that may require additional scrutiny. Second, the plan form makes clear when it will control over a creditor's contrary proof of claim. For example, a debtor may propose to limit the amount of a nongovernmental secured claim under Code § 506(a) because the collateral securing it is worth less than the claim. The proposed amount of the secured claim would be binding, subject to a creditor's objection to the plan and a final determination of the issue in connection with plan confirmation. Otherwise, a creditor's proof of claim will control the amount and treatment of the claim, subject to a claim objection.

The treatment of nonstandard plan provisions has been a concern during the process of drafting the plan. As described earlier, Part 1 requires the debtor to indicate whether the plan form includes nonstandard terms. In order to give further assurance that the debtor has filed a plan form that otherwise adheres to the official form, the plan's signature box includes a certification to that effect. Thus, the plan form requires that the debtor's attorney (or the debtor, if pro se) must certify by signing the plan that all of its provisions are identical to the official form, except for nonstandard provisions located in Part 9.

Action: The Standing Committee, by voice vote without objection, approved publication of Official Form 113 (new national chapter 13 plan form).

N. Proposed Action: Publication of Individual Debtor Forms

The advisory committee requested publication of the following individual debtor forms to be effective December 2015:

101	Voluntary Petition for Individuals Filing for Bankruptcy
101A	Initial Statement About an Eviction Judgment Against You
101B	Statement About Payment of an Eviction Judgment Against You
104	List in Individual Chapter 11 Cases of Creditors Who Have the 20 Largest Unsecured Claims Against You and Are Not Insiders
105	Involuntary Petition Against an Individual
106Sum	Summary of Your Assets and Liabilities and Certain Statistical Information
106A/B	Schedule A/B: Property
106C	Schedule C: The Property You Claim as Exempt
106D	Schedule D: Creditors Who Hold Claims Secured by Property
106E/F	Schedule E/F: Creditors Who Have Unsecured Claims
106G	Schedule G: Executory Contracts and Unexpired Leases
106H	Schedule H: Your Codebtors
106Dec	Declaration About an Individual Debtor's Schedules
107	Statement of Financial Affairs for Individuals Filing for Bankruptcy
112	Statement of Intention for Individuals Filing Under Chapter 7
119	Bankruptcy Petition Preparer's Notice, Declaration, and Signature
121	Statement About Your Social Security Numbers
318	Order of Discharge
423	Certification About a Financial Management Course
427	Cover Sheet for Reaffirmation Agreement

The advisory committee also requested approval to publish for comment an instruction booklet for individuals.

Although the normal effective date for official bankruptcy forms published in 2013 would be December 1, 2014, Judge Wedoff noted that the effective date for the restyled individual-debtor forms that will be initially published this summer will be delayed at least until December 1, 2015, in order to permit them to go into effect at the same time as the restyled forms for non-individual cases.

Action: The Standing Committee, by voice vote without objection, approved publication of the Individual Debtor Forms, along with an instruction booklet for individuals.

O. Proposed Action: Publication of Official Forms 17A, 17B, and 17C

The advisory committee proposed publishing Official Forms 17A, 17B, and 17C, in connection with the revision of Part VIII of the Bankruptcy Rules, which govern bankruptcy appeals. Form 17A would be an amended and renumbered notice-of-appeal form, and Forms 17B and 17C would be new.

Proposed Form 17A would include in the Notice of Appeal a section for the appellant's optional statement of election to have the appeal heard by the district court rather than by the bankruptcy appellate panel. It would only be applicable in districts for which appeals to a bankruptcy appellate panel have been authorized.

New Form 17B – the Optional Appellee Statement of Election to Proceed in the District Court – would be the form that an appellee would file if it wanted the appeal to be heard by the district court and the appellant or another appellee did not make that election.

New Form 17C – Certificate of Compliance with Rule 8015(a)(7)(B) or 8016(d)(2) – would provide a means for a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text (the "type-volume limitation"). It is based on Appellate Form 6, which implements the parallel provisions of Appellate Rule 32(a)(7)(B).

The advisory committee sought approval for publication this summer so that the proposed amendments would be scheduled to take effect December 1, 2014, the same effective date as is anticipated for the revised Part VIII rules.

Action: The Standing Committee, by voice vote without objection, approved publication of Official Forms 17A, 17B, and 17C.

REPORT OF THE ADMINISTRATIVE OFFICE

Benjamin Robinson gave a short report on recent activity by the Rules Committee Support Office (RCSO) to deal with the expected flood of public comments arising from the publication of the proposed amendments to the Civil Rules and Bankruptcy Rules in August 2013. He stated that 250 public comments had been received after the January 2013 meeting of the Standing Committee and were being held for filing during the comment period. These showed some earmarks of an organized letter writing campaign and more were expected.

After consulting with the Administrative Conference of the United States and others heavily involved in rule-making activities, Mr. Robinson worked with the webmasters and designers of regulations.gov – a website currently used by more than 30 departments and 150 agencies for their rulemaking activities. As a result of these efforts, on August 15, 2013, the RCSO will activate a website on regulations.gov that will allow the electronic filing and docketing of comments on proposed rules. This new system should add to the transparency and realtime accessibility of public comments to the committees, their reporters, and the general public.

CONCLUDING REMARKS

Judge Sutton confirmed with Judge Campbell that one of the public hearings on the proposed Civil Rules would take place on Thursday, January 9, 2014. Attendance by members of the Standing Committee is encouraged but not required. Mr. Robinson noted that the RCSO would attempt to make the hearing available in courthouses through video conference and otherwise by teleconference. Judge Sutton confirmed that the Standing Committee will meet on Friday, January 10. The Standing Committee dinner will be Thursday evening, January 9. Judge Sutton then thanked everyone for the productive meeting and declared it adjourned.

NEXT MEETING

The Standing Committee will hold its next meeting in Phoenix, Arizona on January 9 and 10, 2014.

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E-Rules

The Standing Committee has appointed an all-advisory-committee subcommittee, chaired by Judge Chagares and reported by Professor Capra, to study the ways in which the several sets of rules might be amended to fit better with increased uses of electronic communications. The Civil Rules Committee is represented by Judge Oliver and Clerk Briggs.

Two lengthy conference calls have set the general direction for the project. It is hoped that some common topics will yield common rules provisions, with no more than minimal variations to account for distinctive problems that distinguish one area of practice and procedure from another. Beyond these topics, each advisory committee is left free to identify particular rules that might benefit from revision without apparent need to coordinate with other sets of rules.

The attached memorandum reflects both types of rules proposals. The rules that reflect common concerns are discussed from page 1 through page 9. The two that are best developed are the Bankruptcy Rule 5005(a)(3) published proposal on electronic signatures and a proposal to eliminate the "3 days are added" provision of Rule 6(d) for service by electronic means. The proposal that will require the most work, if it is to be developed, is to craft a general statement that electrons can be used in place of paper subject to exceptions for particular rules. The difficulty here is identifying the appropriate exceptions. Intermediate proposals deal with electronic filing and electronic service.

A modest number of possible revisions that may be unique to the Civil Rules follow, beginning on page 9.

Finally, there is an incomplete "vocabulary" list of words that, as they appear in the Civil Rules, may present ambiguities in deciding whether electrons can substitute for paper. The list may suggest that it would be a difficult chore to sort through all of these words wherever they appear and decide when electrons do, or do not, substitute for paper.

The next step will be discussion of the reactions by all advisory committees to the common issues, likely at the January meeting of the Standing Committee. The Subcommittee ambition is to have sets of common proposals presented to the June meeting of the Standing Committee with recommendations for publication.

E-Rules Amendments

Introduction

The Standing Committee has appointed a subcommittee, chaired by Judge Chagares and reported by Professor Capra, to examine the ways in which the several sets of rules might be amended to reflect the accelerating dominance of electronic means of communication. Joint consideration will enhance the deliberations of each advisory committee. It also will enhance the effort to adopt common answers to common questions, commonly expressed. At the same time, it is recognized that each advisory committee should examine the ways in which each particular set of rules addresses different circumstances that may warrant departures from the common model.

Two common questions are well developed. The several advisory committees have agreed to eliminate the "3 added days" for reacting after service by electronic means. There are some variations in the words chosen to fit into the relevant rules, but the meanings clearly are uniform. Common Committee Note language has been developed, again with variations suitable for each set of rules.

Another common question deals with electronic signatures. Bankruptcy Rule 5005(a)(3), published for comment this summer, addresses these questions. Subparagraph (A) provides that the user name and password of a registered user serves as the signature on an electronically filed document. Making doubly sure, it further provides that this signature has the same force and effect under the rules as a written signature. Subparagraph (B) directs what a registered user must do when an individual other than the registered user is required to sign an electronically filed document. The filing must include "a scanned or otherwise electronically replicated copy of the document's signature page bearing the individual's original signature." The proposal then offers alternative versions of an additional requirement. The first alternative states that by filing the document and signature page, the registered user certifies that the scanned signature was part of the original document. The second alternative directs that the document and signature page must be accompanied by an acknowledgment of a notary public that the scanned signature was part of the original document.

It is expected that the public comment period will advance further deliberations in choosing between the two alternatives just described. The Civil Rules delegates to the subcommittee — Briggs, Cooper, and Oliver — have substantial reservations about the alternative that requires a notary's acknowledgment. If the danger to be averted is that the registered user will submit a signature that was in fact affixed to another document and fraudulently transferred, it seems that the notary can provide protection only by witnessing the signature at the time of

filing, or by witnessing the signature and retaining possession of the entire file until the registered user transmits it. Requiring notarization, further, seems at odds with the purpose of 28 U.S.C. § 1746 to allow substitution of a statement sworn under penalty of perjury for a notarized document. In addition, it seems likely that the means now available for deterring similar wrongdoing on paper should suffice to deter the electronic equivalent. For the time being, this topic is treated here primarily as part of the Rule 5(d)(3) provision for electronic signatures.

A third common question is described in the next section.

Issues Common Across the Sets of Rules

Generic "e=p[aper]" Provision

The ascendancy of electronic delivery raises the question whether to adopt a general provision recognizing electronic action whenever the same action could be accomplished by physical paper. There is a strong temptation to adopt a rule stating that whatever may be done by paper may be done electronically. Later sketches pretty much do that for filing and service after the initial summons and complaint. What remains unresolved is whether to generalize beyond that.

A generic draft has been provided by the Subcommittee, recognizing that it may require adaptation to the circumstances established by any particular set of rules. This draft is direct:

Rule X. Information in electronic Form and Action by Electronic Means

(a) INFORMATION IN ELECTRONIC FORM. In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.

(b) ACTION BY ELECTRONIC MEANS. In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

The brackets leave open the opportunity to "otherwise provide," apparently by writing an explicit exception — likely with a cross-reference — into each rule that does not seem suitable for an electronic substitute for paper.

The brackets referring to Judicial Conference standards reflect present provisions — in the Civil Rules, Rule 5(d)(3). One question to be explored is whether parties frequently

transmit papers directly, without passing through the court system. Many discovery materials, for example, are never filed with the court. If transmission is accomplished without using the court's system, and the parties are agreeable to using their own methods, it may be inappropriate to require adherence to Judicial Conference standards.

Alternative drafting is possible. The following illustration is only an alternative, not a preferred alternative. One shortcoming is that the list of acts beginning with "delivering" is long enough to be annoying, but almost certainly incomplete.

Rule 5. Serving and Filing Pleadings and Other Papers

(a) Electronic filing and transmission. Electronic filing or transmission satisfies a rule [that provides] for delivering, entering, filing, issuing, producing, sending, or serving if [it][the filing or transmission]

(1) satisfies the requirements of form applied to a physical writing; and

(2) is transmitted by authorized means.

However drafted, a general rule equating electrons with paper presents the perennial problem of balancing need and potential benefit against uncertainty and risk. Filing and service are addressed directly in the proposed amendments to Rule 5(b) and (d), described below. What other needs for explicit permission to substitute electrons for paper might profitably be addressed? What are the countervailing risks of failing to identify each of the circumstances that should be made exceptions?

The potential benefits of a general rule equating electronic communication with communication by more tangible means could be significant. The opportunities for uncertainty are illustrated by the appendix that sets out examples of Civil Rules vocabulary that may seem ambiguous in this context. Some of the terms that obviously but ambiguously imply paper include affidavit, certificate, copy, declaration, document (remember that Rule 34 seems to distinguish electronically stored information from "documents," and was deliberately intended to make the distinction), minute, newspaper, papers, publish, record, sign (Rule 5(d)(3) seems to take care of this for things that are filed, but the rules provide for signing things that are not filed), transcript, warrant, writ, and writing (written, in writing).

Examining every appearance of the ambiguous words, and others like them, will be a challenging task. But it could be done. The purpose would be to decide whether, in each instance, electrons are an acceptable — or encouraged — substitute for paper. If there are only a few exceptions, they could be made in either of two ways. The general rule could, as the Subcommittee draft, refer generally to exceptions that would be identified in each rule. Or the

exceptions could be enumerated in the general rule. Given the likelihood that readers of any particular rule may fail to heed the general rule, it seems likely that the better course is to adhere to the "unless otherwise provided" approach in the general rule, spelling out the exceptions in each rule.

More important questions will be raised by the effort to decide which rules should be made exceptions. Prominent examples are provided by service of the initial summons and complaint, Rule 4; service of "process" under Rule 4.1; service of a summons and third-party complaint, Rule 14; service of summons and process in Supplemental Rule B attachment and garnishment; service of a warrant to arrest under Supplemental Rule C and D (and the territorial limits on service in Rule E(3)); and service of an arrest warrant in a civil forfeiture action under Supplemental Rule G. It may be too early to rely on e-service in some or all of these settings. But if that is generally right, still an outright exemption may not do. Rule 4 incorporates state grounds of personal jurisdiction. If the state practice allows service by mail, and is interpreted to allow service by e-mail, should the federal courts be precluded from adopting the state practice by a broadly worded exemption from the general rule that equates e-mail with postal mail?

A less prominent but more recent example is provided by service of a subpoena. After serious discussions, it was decided not to provide for service by mail in framing the revised Rule 45 slated to take effect this December 1. Of course the discussion can be reopened — some courts are now ruling that the Post Office can make service by delivering a copy of the subpoena, see Ott v. City of Milwaukee, 682 F.3d 552 (7th Cir.2012)(Wood, J.). But there is a recent resolution of this question to contend with.

It is difficult to guess at the number of more obscure examples that may arise. Supplemental Rule B(2)(b) provides for any form of mail requiring a return receipt: do e-mail systems count? Should they? Some rules provide for notice in a "newspaper." "Publish" may be linked to this. "Stenographically reported," Rule 80? A stipulation "signed by all parties who have appeared"? Rule 32(c) directs that a party provide a transcript of any deposition testimony the party offers, but allows nontranscript form "as well" and mandates nontranscript form in some circumstances. Can a "writ" be in e-form? Written findings or questions in Rule 49 verdicts? Written notice of an application for a default judgment if the defaulter has "appeared" by means that do not provide an e-address?

So the question: recognizing that there may be real value in a rule that generally equates electronic communication with paper, equivalence is not likely to be desirable in all branches of the Civil Rules. Defining the appropriate exceptions will require much careful work. The question is whether the task of identifying the exceptions can produce such sound results as to repay the effort

and risk of error. One further element of the answer may appear if the other sets of rules adopt a general provision equating electronic messages with paper. The absence of such a provision from the Civil Rules might support arguments against recognizing e-messages by inference from the comparison.

Service After Initial Process

Rule 5 now provides for service by electronic means, but only with the consent of the person served. There seems to be general agreement that a party should not be able to deny other parties the convenience of service by electronic means. Local rules in many districts effectively coerce consent now. At the same time, it seems likely that some exceptions should be allowed. One instant thought is that pro se parties should be exempt, but reflection suggests that it may not be wise to adopt a blanket national-rule exemption. Some courts are at least experimenting with plans that include pro se litigants in e-service systems. If it is unwise to attempt to define general categories of exemption, many alternative approaches are possible. Four are illustrated here; better versions may be discovered.

(b) Service: How Made. * * *

(2) *Service in General.* A paper is served under this rule by:

* * *

(E) sending it by electronic means — unless[1] ~~if~~ the person ~~consented in writing~~ {version 1} shows good cause to be exempted from such service {version 2} elects to refuse to be served by electronic means by filing the refusal at the time of the person's first appearance in the action {version 3} has no [known? valid?] address for electronic service; {version 4} is exempted from electronic service by local rule — in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served;

Electronic Filing

Rule 5(d)(3) now depends on local rules to establish

[1] It seems likely that the consent requirement has largely been reduced to fiction by local rules requiring consent as a condition of registering in the CM/ECF system. But it seems likely that there should be some escape clause. The "unless" clause has four variations; the fourth, leaving it to local rule, turns the problem over to each district. There may be reasons to allow local variations that endure over time. If not, local experience might provide guidance for better drafting a uniform national rule in the future.

electronic filing. It may be that there is no need for change. [Almost?] all districts have adopted local e-filing rules. Local rules are required to allow "reasonable exceptions." Although locally defined exceptions are not likely to be uniform across the country, there may be legitimate reasons for adopting different exceptions in different courts.

But it may be that the time has come to move at least part way toward a uniform national e-filing practice. The illustrative sketch of a revised Rule 5(d)(3) set out below begins with a mandate for e-filing, subject to reasonable exceptions set by local rule, with a possible additional or alternative "good cause" exception. It seems likely that local rules, or actual practice, will allow exceptions for good cause in any event. And it may continue to be desirable to avoid any attempt to adopt more definite exceptions in the national rule, leaving the question to ongoing development in local rules.

(d) FILING. * * *

(3) *Electronic Filing, Signing, or Verification.* ~~A court may, by local rule, allow papers to be filed~~ All filings must be made, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States, but reasonable exceptions must be allowed by local rule or[, if there is no local rule] for good cause.[2] ~~A local rule may require electronic filing only if reasonable exceptions are allowed.~~

It seems convenient to supplement this illustration with a revision of Rule 5(d)(1) that responds to a question raised by the Committee on Court Administration and Case Management. In line with their preference, the rule would be amended to allow a notice of electronic filing to be a certificate of service. That seems a good idea. But there may be subtle complications. It does not work to

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[2] This sketch is an attempt to recognize that almost y all districts require electronic filing by lawyers. It would be possible to attempt to include exceptions in the national rule — exempting pro se litigants would be an obvious example, but apparently there are some ongoing experiments that require at least some pro se litigants to file electronically. And it seems not unlikely that a general capacity for electronic filing will become widespread, even if many pro se litigants who are generally adept with electronic communications encounter difficulty with the court's formal requirements. Allowing a good-cause exemption runs into the costs of administration; the brackets suggest that a court could opt out of the general good-cause exemption by incorporating it — perhaps with some or many elaborations — in a local rule.

provide simply that a certificate of service or a notice of electronic filing must be filed — the notice is already in the court's system. It could work to provide that the notice is a substitute for the certificate:

(d) FILING.

(1) *Required Filings; Certificate of Service*. Any paper after the complaint that is required to be served ~~— together with a certificate of service —~~ must be filed within a reasonable time after service; a certificate of service also must be filed for every party that was not served by means that provide[d] a notice of electronic filing. * * *

The notice of electronic filing serves as a certificate of service only on the assumption that a local rule says that e-filing accomplishes service. An alternative might escape the perils of this assumption:

> a certificate of service also must be filed, but a notice of electronic filing is a certificate of service on any party served through the court's transmission facilities.

Contemplating these alternatives suggested a further question. Rule 5(d)(1) says only that a certificate of service must be filed. It does not say whether the certificates also must be served on all parties. Rule 5(a)(1), "Service: When Required," provides uncertain guidance — subparagraph (E) requires service of "A written notice, appearance, demand, or offer of judgment, *or any similar paper*." The prospect of infinite regress looms, but does not seem a serious problem — no one is likely to demand that a party serve on all other parties certificates of serving the first certificates, and so on.

So what is it? Is there a uniform understanding that can be relied on in drafting for the notice of electronic filing?

Or is there some prospect of confusion? Rule 5(d)(1) was added in 1991. Before that, certificates of service were required only by local rules, but most courts had the local rules. The Committee Note explained: "Having such information on file may be useful for many purposes, including proof of service if an issue arises concerning the effectiveness of the service." That statement looks only to having the certificate on file, and that is all the rule text has required. One treatise treatment of Rule 5(a)(1) sheds little light. See 4B, Wright & Miller, Federal Practice & Procedure: Civil §§ 1143, 1150 (3d ed. 2002 & 2013 Supp.).

Requiring service of the certificate of service could have at least two advantages. One is to provide a second-chance notice that cures any failure of the first service. Another is to reassure all

parties that all other parties indeed were served.

On the other hand, the potential advantages might seem outweighed by the sheer bother of requiring a second round of service — the certificate — whenever anything needs to be served. The waste may seem particularly unseemly in a two-party case. Or in a case with multiple parties, but only one attorney per "side."

E-service raises this question because of the prospect that some cases will involve some parties subject to e-service and others who are not. Although the notice of electronic filing seems an adequate certificate of service that need not be served on those who participate in e-service, should the e-serving party be required to serve either a certificate or a print-out of the notice on parties served by other means? If it is determined that service of the certificate or notice should be required, and that present practice may not be well-settled or well-known, Rule 5(a)(1)(E) could be amended to include "certificate of service or notice of electronic filing." The Note could observe that service of the notice of electronic filing would be automatically accomplished as to parties participating in e-service under a rule that equates the notice with service, while a copy of the notice or a certificate of e-service must be served on parties served by other means.

"3 Days Are Added"

As noted in the introduction, the Appellate, Bankruptcy, and Criminal Rules include provisions parallel to the Civil Rule 6(d) provision that adds 3 days to the time allowed to respond after service by, among others, "electronic means" under Civil Rule 5(b)(2)(E). It has been agreed that the 3-added days provision should be dropped for electronic service. The reasons are stated in the Committee Note that follows the rule text. It also has been agreed that it would be helpful to add parenthetical descriptions to illuminate the nature of the means of service that will continue to trigger the 3 added days.

Rule 6. Computing and Extending Time; Time for Motion Papers

* * *

(d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after being served[3] and service is made under Rule 5(b)(2)(C)(mail), (D)(leaving with the clerk), ~~(E),~~ or (F)(other means consented to),[4] 3 days are

[3] This anticipates adoption of the proposed amendment published in August, 2013.

[4] The naked cross-references to Rule 5(b)(2) may seem awkward. The parenthetical descriptions are

added after the period would otherwise expire under Rule 6(a).

Committee Note

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns. [If we eliminate consent from Rule 5(b)(2)(E), we can add that here.]

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Issues Peculiar to the Civil Rules

The Subcommittee project prompts a review of the Civil Rules to determine whether to recommend revisions that may not prompt parallel revisions in other sets of rules. A number of possibilities are described below. It will be helpful to have comments on the need to pursue them.

Rule 4(a)(1), (2); (b): These suggestions come from Laura Briggs.

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added to relieve much of the flipping back through the rules. It seems likely that e-service will dominate other modes, but absent some descriptions many anxious readers will track down the cross-references just to make sure e-service is not among the means listed. The risk that brief descriptions may mislead or confuse seems minimal. Anyone who wishes to be sure of what a Rule 5(b)(2) subparagraph says can easily find it.

The idea is that the clerk and attorneys can save time if the clerk can sign and seal a summons electronically. This happens now, but may not comport with the rule text:

Rule 4. Summons

(a) CONTENTS; AMENDMENTS.

(1) *Contents.* A summons must: * * *
(F) be signed by the clerk, either physically or electronically; and

(G) bear the court's seal, either physically or electronically.[5] * * *

(b) ISSUANCE. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. When issued on paper, a ~~A~~ summons — or a copy of a summons that is addressed to multiple defendants — must be issued for each defendant to be served [with a paper summons].

This form assumes that paper service is required. It is implicit that the plaintiff may present the summons to the clerk electronically, and that the clerk may sign, seal, and return the electronic version of the summons to the plaintiff. The plaintiff then prints out the summons. But if the plaintiff brings paper to the clerk, the clerk must issue a paper summons for each defendant to be served. At least some courts are already signing and sealing by electronic means.

Rule 7.1: Rule 7.1 requires a nongovernmental corporate party to "file 2 copies of a disclosure statement." Memory suggests that the purpose of requiring two copies was to have one for the judge. (Appellate Rule 26.1 was amended in 1994 to require 3 copies if the statement is filed before the principal brief; the Committee Note observed that there is no need for copies otherwise because the statement is included in each copy of the brief.) Notice to the judge is now accomplished by the ECF system, or should be. This suggests an amendment:

Rule 7.1. Disclosure Statement

(a) WHO MUST FILE; CONTENTS. A nongovernmental corporate party must file ~~2 copies of~~ a disclosure statement * * *.

[5] Of course drafting variations are possible: "be signed physically or electronically by the clerk"; "bear the court's physical or electronic seal."

Rule 11(a): As noted above, a proposed revision of Bankruptcy Rule 5005(a)(3) addressing electronic signatures was published for comment in August. It has been agreed that the other advisory committees will wait for the comments and testimony on this proposal before considering their own rules.

Rule 11(a) could be a good location for a general electronic signature provision, whether in competition with Rule 5(d)(3) or as a replacement. Rule 11 requires that a "pleading, written motion, and other paper" be signed. Instead of focusing on filing, as Rule 5(d)(3) does, Rule 11 would provide a more general requirement. A simple version would be:

Rule 11. Signing Pleadings, Motions, and other Papers; * * *

(a) SIGNATURE. Every pleading, written motion, and other paper [document?] must be signed — physically or electronically — by at least * * *."

This version may be too simple when it comes to a paper that must be signed by someone other than the person filing it. That problem will be held in abeyance pending public comments on the proposed Bankruptcy Rule.

Rule 33: Rule 33 now calls for written interrogatories, to "be answered separately and fully in writing under oath." The answers and objections, moreover, must be signed. It has been several years since outside suggestions have been made that Rule 33 should provide for submitting interrogatories in e-form, with provision for providing answers by filling in the same e-file. Are we there yet? Some doubts have been expressed. Perhaps it is enough for now to rely on the inventiveness of litigants — explicit or tacit consent to e-exchanges should be acceptable.

Rule 71.1(c)(5): Rule 71.1(c)(5) requires the plaintiff in an eminent domain action to give at least one copy of the complaint to the clerk for the defendants' use, "and additional copies at the request of the clerk or a defendant." Rule 71.1(d) requires the plaintiff to deliver to the clerk "joint or several notices directed to the named defendants." Additional notices must be delivered when the plaintiff adds defendants. (d)(3) calls for personal service of the notice, without a copy of the complaint, on each defendant (with exceptions). Rule 71.1(f) directs that notice of filing an amended pleading, but not the pleading, be served. At least one additional copy of the amendment must be filed with the clerk, with more at the request of the clerk, in parallel with the requirement of copies in 71.1(c)(5). All of these copies seem an unnecessary nuisance if the complaint is e-filed and the complaint and amended pleadings are not served anyway. We should find out, presumably from the Department of Justice, whether it is enough to carry forward the requirement that the notice and answer be

served.[6] All parties would have access to the court file to get the complaint and amended pleadings. (It also might be enlightening to see whether it would make better sense to require that service of notice under Rule 71(d) be supplemented by at least an e-mail link to the complaint on file with the court.)

Rule 72(b)(1):

> * * * The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly ~~mail~~ serve a copy ~~to~~ on each party.
>
> Self-explanatory. This is existing practice.

Rule 79(a)(2),(3): Rule 79(a)(2) and (3) refer to docketing requirements for papers. If we do not manage a generic resolution of this problem, here too "documents" might be substituted, still subject to the uneasiness generated by the Rule 34 distinction between documents and electronically stored information.

Rule 79(b):

> **(b)** CIVIL JUDGMENTS AND ORDERS. The clerk must keep a copy of every final judgment and appealable order; of every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept. The clerk must keep these, either physically or electronically, in the form and manner prescribed by the Director of the Administrative Office of the United States Courts with the approval of the Judicial Conference of the United States.

The purpose of this suggestion seems plain. But why is it not enough to ask the Director to approve electronic form and win approval of the Judicial Conference?

Rule 79(c):

> **(c)** INDEXES; CALENDARS. Under the court's direction, the clerk must:
>
> **(1)** keep indexes of the docket and of the judgments ~~and orders~~ described in Rule 79(b); * * *

The basic question is whether the clerk should be directed to keep an index of orders, or whether an index of judgments should suffice. The argument is that orders can be found electronically within a case, and a quick search can be made for all judgments issued within a particular date range. This might be a bit tricky. Rule 79(b), quoted above, requires the clerk to keep a copy of

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[6] A limited informal inquiry suggests that there is no need for multiple "copies."

every "appealable order," every order affecting title or a lien on property, and any other order the court directs to be kept. Rule 79(a)(2)(C) directs that all orders be marked with the file number and entered chronologically on the docket. Just to make matters more complicated, Rule 54(a) provides that "'Judgment'" as used in these rules includes * * * any order from which an appeal lies." Those orders still would be covered by the proposed Rule 79(c)(1), and the clerk still would be left to guess which orders may be appealable. One common example of uncertainty would be the collateral-order appealability of an order denying a motion for summary judgment on official-immunity grounds.

CM/ECF Issues

Two CM/ECF issues raised by the Committee on Court Administration and Case Management are noted above. One deals with preserving "wet" signature originals of things filed electronically, a matter left open pending comments and testimony on proposed Bankruptcy Rule 5005(a)(3). The other is addressed in the draft of Civil Rule 5(d)(1) that would allow a notice of electronic filing to be a certificate of service.

Other CACM Issues

CACM and the rules committees have been asked to consider the possibility that a district judge could use videoconferencing to preside at a bench trial physically occurring in a courtroom in another district. For the Civil Rules, this question implicates at least Rule 43(a) and Rule 77(b). Rule 43(a) allows testimony "in open court by contemporaneous transmission from a different location," but only "[f]or good cause in compelling circumstances and with appropriate safeguards." Rule 77(d) provides that "no hearing — other than one ex parte — may be conducted outside the district unless all the affected parties consent." Judge Julie A. Robinson, chair of CACM, has written that "an effort to amend the rules to encourage the use of videoconferencing may well not be necessary at this time." (August 21, 2013 letter appended to the CACM agenda item.)

Appendix: Vocabulary

The common question is how far various words imply physical paper, and how strong is each implication. Many of these words could be read to authorize action by electronic means. Most of them were used long before anyone was thinking about the question.

Listing these words does not imply that we should attempt to define them one-by-one. Nor does it imply that we should pursue some more global solution. It may be too early to attempt that. Or there may be no real need — sensible administration of rules written before the onslaught of e-information systems may adapt to new circumstances faster and better than formal amendments could do. The provisions in Rule 5 for electronic service and filing are a beginning. They can be expanded. Rule 5(b), for example, could provide that anything can be served electronically, and that there

is no need to provide a physical paper of anything that has been served electronically. Rule 5(d) is already close to electronic filing for documents and papers, but does not reach things that are not filed. And it prohibits filing discovery requests and responses until they are used in the proceeding. (Supplemental Rule F(8) allows a party to a limitation-of-liability proceeding to "question or controvert any claim without filing an objection thereto.")

affidavit: appears throughout the rules. ("Declaration" is used in Rule 56 to reflect 28 U.S.C. § 1746; the sense of "writing" in § 1746 probably is limited to physical embodiments.)

agree: parties can agree to a mode of sale in civil asset forfeiture proceedings, Supplemental Rule G(7)(b)(iii). Compare consent and stipulate.

appear: Rule 16(f)(1)(A) authorizes sanctions if a party or attorney "fails to appear" at a Rule 16 conference. How about Skype? Text messaging? (Presumably a court can authorize this; should the rules speak to it?)

appearance: The concept of "appearance" is more complex than "appear." E-acts often should count as an appearance for such purposes as timing a scheduling order, Rule 16(b)(2); signing a stipulation of dismissal, Rule 41(a)(1)(A)(ii); or a notice of an application for default judgment, Rule 55(b)(2).

certificate: e.g., "certificate of service," Rule 5(d)(1).

"Certification" is required before submitting some discovery motions. E.g., Rule 26(c), 37(a)(1), 37(d)(1)(B).

certify: As compared to the potential physical implications of "certificate," "certify" seems to direct an act. Why not acting by electronic means?

civil docket: Rule 79(a)(1) takes care of this — the form and manner are prescribed by the Director of the Administrative Office and approved by the Judicial Conference. E-dockets can be established without changing the Rule.

confer: Rule 26(f) requires the parties to confer. The original face-to-face requirement was deleted by amendment. Telephone will do. Surely Skype will do. Texting? E-mail by contemporary exchange?

consent: Rule 53(a)(1)(A) provides that a special master may perform duties "consented to by the parties." How does this differ from agree, or stipulate, in the world of e-communication? (See "written consent," Rule 15(a)(2).)

copy: E.g., Rule 44 on proving an official record.

Rule 26(b)(5)(B), and a parallel provision in Rule 45, direct that on notice of a claim of privilege or work-product protection for materials produced in discovery, the receiving party must return, sequester, or destroy the specified information and any copies. Surely e-copies are included.

deliver[ing]: E.g. Rule 4(e)(2)(C). E-mail could be seen to deliver the summons and complaint. It does not seem likely the rule would be read this way.

document: This is a longstanding issue. In the first round of amendments to address e-files, a deliberate choice was made to

partially separate "electronically stored information" from "document" in Rule 34. And it also was decided not to couple "electronically stored information" with "document" at every appearance of "document" in other rules. The seeming implication may be that "document" standing alone does not include electronically stored information. But it is possible to read Rule 34(a)(1)(A) to include electronically stored information in the definition of "document." Discovery extends to "any designated documents or electronically stored information – including * * * other data or data compilations stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form." That reading seems better; the question is whether it should be made explicit, a simple drafting task: "any designated documents ~~or electronically stored information~~ – including electronically stored information, writings, drawings * * *."

Without attempting a complete list, Rule 26(a)(3)(A)(iii) requires pretrial disclosure of "each document or other exhibit" the party may present at trial.

Rule 26(b)(5)(A) requires a privilege log that describes the "documents" not produced or disclosed.

Rule 30(f)(2)(A) addresses only "documents * * * produced for inspection during a deposition," and in (B) provides for attaching "the originals" to the deposition.

Rule 34(b)(2)(E) directs that a party "produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request." Why not ESI?? Will requests for ESI come to be made and negotiated in terms of key-word searches, predictive coding strategies, and the like that automatically sort responses by the categories in the request?

Rule 36 includes requests to admit "the genuineness of any described documents." Surely ESI should be included.

Rule 58 is an eccentric entry in this list. It requires entry of judgment "in a separate document." The tie to Appellate Rule 4 is direct and sensitive.

Rule 70(a) empowers a court to direct an appointed person "to deliver a deed or other document." (Think of electronic systems for recording security interests.)

enter: "The magistrate judge must enter a recommended disposition * * *." Rule 72(b)(1). Surely this can be done within the court's electronic system?

examination (physical or mental): Medical practice is moving toward on-line diagnosis. But it is likely too early to think of this for Rule 35.

exhibit: Rule 10(c): "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."

file: Appears continually. Rule 5(d)(3) may be broad enough to cover all variations. We should be sure.

hearing: E.g., Rule 32(a)(1) on use of a deposition "at a hearing or trial." Telephone "hearings" seem common. At least when the court can dispense with any hearing, can other modes of e-

communication be used, at least if simultaneous?
inform: The court must inform the parties of proposed instructions, Rule 51(b)(1).
leaving: E.g., Rule 4(e)(2)(B). Unlike "deliver," this carries a significant hint of physical paper. So Rule 5(b)(2)(B).
mailing: The means of serving papers after the summons and complaint include "mailing it to the person's last known address." Rule 5(b)(2)(C). Given the juxtaposition with e-service in (b)(2)(E), this likely does not mean e-mail. But what of other rules? Rule 15(c)(2), for example, provides for relation back of an amended pleading "if, during the stated period, process was delivered or mailed to" the United States Attorney, etc.

Supplemental Rule B(2)(b) provides for "any form of mail requiring a return receipt." Can e-mail "receipts" be made equally reliable?
make: With variations, appears throughout the rules. E.g., Rule 7(b)(1): "A request for a court order must be made by motion." Rule 12(b): a motion "must be made." The meaning for e-acts may depend on context. Rule 26(a)(1)(C), for example, sets the time to "make" initial disclosures. E-disclosures should be perfectly acceptable, subject to the interplay between 26(a)(4), which requires all disclosures to be "in writing" unless the court orders otherwise, and Rule 5(d)(3).
minute: How's this for an exotic one? Supplemental Rule E(5)(b) provides for a general bond to stay execution of process against a vessel in all pending actions. The bond "shall be indorsed by the clerk with a minute of the actions wherein process is so stayed."
newspaper: For notice of condemnation by eminent domain, Rule 71.1(3)(B), and notice of limitation-of-liability proceedings, Supplemental Rule F(4).
notice: "filing a notice of dismissal," Rule 41(a)(1)(A)(i).
offer: Rule 68(a) provides for serving an offer of judgment. Is paper implied?
paper: Is it enough that Rule 5(d)(3) provides: "A paper filed electronically in compliance with a local rule is a written paper for purposes of these rules"?

What of papers that are served, not filed? Rule 65.1 — a surety on a bond given to the court appoints the court clerk as its agent for service of "any papers * * *." Presumably the clerk files it; does that authorize electronic service?
publish: May be linked to newspaper, see Rule 71.1(d)(3)(B). Service by publication is subject to statutory provisions in proceedings to cancel citizenship certificates, Rule 81(a)(3). Published notice is required in civil asset forfeiture proceedings, Supplemental Rule G(4); publication on an official government forfeiture site can satisfy the requirement.
preserved: The order appointing a master must state "the nature of the materials to be preserved and filed." E-preservation?
produce: Rule 34 provides a request "to produce" documents. It clearly addresses the form for producing ESI. It seems likely that production of paper documents often is made by converting to an

electronic format.

record: When used in general references to the court record, e.g., Rule 60(a), it may be safe to rely on external definitions of what constitutes the court's record. So of the direction in Rule 73(a) that "A record must be made in accordance with 28 U.S.C. § 636(c)(5)" in a trial by consent before a magistrate judge.

record: official record: E.g., Rule 44 on proving an official record.

record: on the record: A party must object to jury instructions "on the record," Rule 51 (c)(1). Findings of fact and conclusions of law in a bench trial may be stated on the record.

seal: The question seems to involve only technology. E-files can be sealed.

"Seal" also appears in a different sense. Rule 30(f)(1) requires the officer to presides at a deposition to "seal the deposition in an envelope or package." That seems to require producing a physical recording — tape, disc, flash drive. Is this antique if the parties are content to have the record delivered electronically?

send: Does "send" embrace e-sending? Some rules elaborate in ways that may carry a stronger implication than "send" alone. Supplemental Rule G(4)(b)(iii)(A), for example, provides that notice of a civil forfeiture action "must be sent by means reasonably calculated to reach the potential claimant." The implication is bolstered by (b)(iv), providing that notice is sent on the date when it is sent by electronic mail.

serve: Rule 4.1, for example, simply provides that process other than a summons or a Rule 45 subpoena must be served by specified means. Does "serve" imply physical delivery? Probably.

Rule 71.1(f) provides for service of an amended pleading on "every affected party who has not appeared."

sign: Rule 5(d)(3) allows papers to be signed by electronic means. Does this dispense with any occasion for generating and signing a paper?

Rule 26(g)(2) and (3) specify consequences for failing to sign a disclosure, request, response, or objection, and for signing without substantial justification. Many of these things are not filed, so Rule 5(d)(3) does not cover them. The same holds for Rule 30(e)(1)(B), signing a statement of changes in a deposition transcript or recording.

Answers to interrogatories must be "signed." Same 5(d)(3) omission.

The clerk may deliver to a party a subpoena, "signed but otherwise in blank," Rule 45(a).

More generally, other rules require the clerk to "sign." E.g., Rule 58(b)(1) on entering judgment.

stenographically reported: Rule 80. Compare Rule 26(a)(3)(A)(ii), directing pretrial disclosure of witnesses whose testimony will be presented by deposition "and, if not taken stenographically, a transcript of the pertinent parts of the deposition."

stipulate: Stipulate and stipulation appear frequently.

Occasionally signing may be specified — Rule 41(a)(1)(A)(ii): "a stipulation of dismissal signed by all parties who have appeared."
submit: This seems to cover e-action. For example, Rule 11(b) provides that an attorney or party certifies several things "by filing, submitting, or later advocating" a pleading, written motion, or other paper.
transcript: Rule 32(c) calls for a transcript of any deposition testimony offered at trial, and allows non-transcript form "as well."
verify: Rule 5(d)(3) authorizes local rules allowing "papers to be filed, signed, or verified by electronic means." Verification does not appear frequently in the rules. See, e.g., Rules 23.1(b), 27, 65(b)(1)(A); Supplemental Rules B(1)(a), C(2)(a), C(6)(b), G(2)(a)
warrant: For arrest, Supplemental Rules C(3)(a), D, E(9)(b), G(3)(b)(i), etc.
writ: E.g., "writ of execution," Rule 69(a)(1); "every * * * writ issued," Rule 79(a)(3).
writing, written, in writing: Rule 5(d)(3) provides that a paper filed electronically in compliance with a local rule "is a written paper for purposes of these rules." How far does this extend to other settings? Rule 5(a)(1)(C), (D), and (E) require service of a written motion or a written notice, etc. Variations of writing appear regularly throughout the rules.

"written consent": Rule 15(a)(2).

"in writing": Rule 26(e)(1)(A) excuses the duty to supplement discovery responses if the new information was made known to other parties "in writing." This was drafted in 1991 or 1992. Surely e-mail notice or the like should do, even though there is no filing and no occasion to invoke Rule 5(d)(3).

"reasonable written notice": Rule 30(b)(1). Rule 5(d)(3) includes "depositions" in the list of "discovery requests and responses" that must not be filed. So does this fall outside the (d)(3) provision treating filed e-things as written papers?

"Written questions" for a Rule 31 deposition?

"Written interrogatories" for Rule 33? See "obvious issues."

"Written request to admit" for Rule 36.

"Written demand" for jury trial, Rule 38(b).

"pleading or other writing": notice of an issue of foreign law, Rule 44.1.

"written objection" to a subpoena

Rule 49 provides for special verdicts with written findings, submitting written questions, and submitting written forms. It provides for "written questions" to supplement a general verdict. When jurors get tablets or the like, will that do?

Rule 51 calls for written requests for jury instructions.

Rule 55(b)(2) provides "written notice" of an application for default judgment.

"certifies in writing," Rule 65(b)(1)(B).

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TAB 3

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TAB 3A

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Rule 17(c)(2)

The second sentence of Rule 17(c)(2) provides:"The court must appoint a guardian ad litem — or issue another appropriate order — to protect a minor or incompetent person who is unrepresented in an action."

The Third Circuit has asked the Committee to consider whether this provision should explicitly address the issue whether a court is obliged to raise the question of competence on its own. The materials that framed this question for the April 2013 meeting are set out below. The discussion at the April meeting is described at pages 31 - 34 of the April Minutes.

Judge Grimm assigned a summer intern to research this question. The intern, working with a law clerk, produced the memorandum and spread sheet that are set out immediately below.

The answer given by the courts that have addressed the question is clear. A court is not obliged to inquire on its own into the competence of an unrepresented person, not even if the person manifests strange behavior. The opinions seem to describe a duty that arises only when, for example, "substantial evidence of incompetence is presented." And the court is not bound even by a general adjudication of incompetence if the person seems capable of managing his affairs. There also is a thread of concern that a guardian should not be appointed simply because that will benefit other parties by ensuring more capable management of the litigation.

Once an inquiry into incompetence begins, the court has substantial discretion both in determining whether the party is incompetent and in deciding what measures to take on finding incompetence. There is little reason to think further study is needed on this score.

The duty-to-inquire question remains. Several approaches are possible.

One approach would be to amend the rule to direct the court to act on its own when there is reason to doubt a party’s "competence." The questions that must be addressed on this approach are intertwined. What events raise a question of competence depends on the concept that separates competence from incompetence in litigation. The memorandum quotes this from the Fourth Circuit: "Parties to a litigation behave in a great variety of ways that might be thought to suggest some degree of mental instability. Certainly the rule contemplates by ‘incompetence’ something other than mere foolishness or improvidence, garden-variety or even egregious mendacity or even various forms of the more common personality disorders." Some form of generic expression is possible:

> The court must inquire into a person’s competence on motion or when the person’s litigating behavior [strongly] suggests the person is incompetent to act without a representative [or other appropriate order].

This duty could protect the unrepresented, and also work to the advantage of their adversaries. But it would impose a heavy burden on the courts. The weight of the burden would depend on where the line is drawn between inept, overwhelmed, and totally bizarre. And it might be wondered whether courts should be required to investigate the competence of every unrepresented person who pursues a truly bizarre position.

A second approach would be to expand the rule to incorporate something like the approach reflected in the cases. One possibility would be to provide:

> "The court must inquire into a person’s competence when evidence is presented to it that [*alternative 1* the person has been adjudicated incompetent][*alternative 2* strongly suggests the person is incompetent][*alternative 3* the person is incompetent to manage the litigation without appointment of a guardian ad litem or other appropriate order].

This approach runs the common risks: it might impede desirable evolution of various approaches under the present rule, and it might generate unintended interpretations.

A third approach would be to leave matters where they lie in the cases. That would deny some measure of added comfort, but it is not apparent that it would do much harm.

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Memorandum

To: Judge Grimm
From: David Yellin; Matt Legg
Re: Fed. R. Civ. P. 17(c)(2)
Date: September 26, 2013

Pursuant to Federal Rule of Civil Procedure 17(c)(2):

> A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.

Fed. R. Civ. P. 17(c)(2).

We were asked to compile a national survey detailing how courts are approaching the requirements of the second sentence of Rule 17(c)(2). Specifically, this memo discusses two issues:

1) Under what circumstances is a district court required to make an examination into a litigant's competence under Rule 17(c)(2); and
2) When dealing with an incompetent litigant, what steps must a court take under Rule 17(c)(2) to ensure that the party is protected.

A circuit-by-circuit summary of the governing case law can be found in the attached chart. This memorandum summarizes the current state of the law with respect to Rule 17(c)(2).

I. When an Inquiry into Competency Is Required Under Rule 17(c)(2)

A determination of competency is left to the discretion of the district court. *See Powell v. Symons*, 680 F.3d 301, 307 (3d Cir. 2012) (analyzing ruling under abuse of discretion standard); *Ferrelli v. River Manor Health Care Center*, 323 F.3d 196, 201–03 (2d Cir. 2003) (same); *O'Brien v. Kline*, No. JD-12-443, 2013 WL 1737193, at *1 (D.N.H. Apr. 22, 2013) (noting that determinations of competency are within the discretion of the court); *see also Mohamed v. Gonzales*, 477 F.3d 522, 527 (8th Cir. 2007) (applying abuse of discretion review to ruling under analogous CFR provision in immigration proceedings).

Every court to consider the issue has found that a district court is rarely obligated to make a *sua sponte* determination of competency under Rule 17(c)(2). The principal case on the issue is *Ferrelli v. River Manor Health Care Ctr.*, 323 F.3d 196 (2d Cir. 2003), which has been adopted by several other circuits. *See, e.g., Powell v. Symons*, 680 F.3d 301 (3d Cir. 2012); *McLean v. GMAC Mortg. Corp.*, 398 F. App'x 467 (11th Cir. 2010); *Mohamed v. TeBrake*, 371 F. Supp. 2d 1043 (D. Minn. 2005), *aff'd on other grounds Mohamed v. Gonzales*, 477 F.3d 522 (8th Cir. 2007).

In *Ferrelli*, the Second Circuit held:

> Neither the language of Rule 17(c) nor the precedent of this court or other circuits imposes upon district judges an obligation to inquire *sua sponte* into a pro se plaintiff's mental competence, even when the judge observes behavior that may suggest mental incapacity.

323 F.3d at 201. Rather, "[t]he obligation imposed by the final sentence of Rule 17(c) . . . arises after a determination of incompetency." *Id.* (emphasis added). Thus a court would be required to consider the applicability of Rule 17(c) only if it were presented with evidence suggesting that the party had already been adjudicated incompetent or "is being or has been treated for mental illness of the type that would render him or her legally incompetent." *Id.*; *see also O'Brien*, 2013 WL 1737193, at *1 ("Evidence from a health care professional demonstrating that the person is incompetent due to mental illness or disability is sufficient to support a determination of incompetence.").

Ferrelli, in essence, appears to limit the instances in which a district court must engage in a *sua sponte* examination of competency only to those instances in which an individual has already been determined to be incompetent, either by a court or by a mental health professional capable of providing "verifiable evidence of mental incapacity." *Ferrelli*, 323 F.3d at 201. *But see Thomas v. Humfield*, 91 F.2d 1032, 1035 (5th Cir. 1990) (a federal court must conduct its own hearing even when a litigant is not competent under state law). Nevertheless,

> nothing in the rule *prevents* a district court from exercising its discretion to consider *sua sponte* the appropriateness of appointing a guardian ad litem for a litigant whose behavior raises a significant question regarding his or her mental competency. Indeed, such consideration may be particularly appropriate in the case of a defendant who shows signs of severe incapacity, in part because a judgment entered against a mentally incompetent defendant not represented by a guardian or a guardian ad litem may be subject to collateral attack at a later date.

Ferrelli, 323 F.3d at 203.

The Ninth Circuit has adopted a standard that may be somewhat more liberal. *But see id.* at 202 (finding Ninth Circuit precedent to be consistent with the Second Circuit's holding in *Ferrelli*). In *Allen v. Calderon*, the Ninth Circuit held that "A party proceeding *pro se* in a civil lawsuit is entitled to a competency determination when substantial evidence of competence is presented." 408 F.3d 1150 (9th Cir. 2005). It is unclear whether raising a "substantial question" differs from the need to present verifiable evidence of incompetency. *See Yoder v. Patla*, 234 F.3d 1275, 2000 WL 1225476, at *2–3 (7th Cir. 2000) (finding a "substantial question" raised where plaintiff had been declared legally incompetent). Further,

> [t]he failure of a person appearing *pro se* to move under Rule 17, or any other rule or statute, for relief based on his incompetence is not fatal. Quite obviously an incompetent person cannot be held to compliance with technical rules. Rather, if

> it should appear during the course of proceedings that a party may be suffering from a condition that materially affects his ability to represent himself (if *pro se*), to consult with his lawyer with a reasonable degree of rational understanding, or otherwise to understand the nature of the proceedings, that information should be brought to the attention of the court promptly.

United States v. 30.64 Acres of Land, 795 F.2d 796, 805 (9th Cir. 1986).

Courts have also wrestled with "[t]he practical problem presented by a case in which a presumably competent party might be thought to be acting oddly, or foolishly, or self-destructively in prosecuting or defending a civil lawsuit." *Hudnall v. Sellner*, 800 F.2d 377, 385 (4th Cir. 1986).

"Standing alone, however, a litigant's bizarre behavior is insufficient to trigger a mandatory inquiry into his or her competency." *Ferelli*, 23 F.3d at 202. As the Fourth Circuit has observed, "[p]arties to a litigation behave in a great variety of ways that might be thought to suggest some degree of mental instability. Certainly the rule contemplates by 'incompetence' something other than mere foolishness or improvidence, garden-variety or even egregious mendacity or even various forms of the more common personality disorders." *Hudnall*, 800 F.2d at 385.

Rather, incompetency under Rule 17(c)(2) is "that form of mental deficiency which—whether or not unaccompanied by other forms of personality disorder—affects the person's practical ability 'to manage his or her own affairs.'" *Hudnall*, 800 F.2d at 385. Appellate courts have not hesitated to reverse findings of incompetency where litigants, though suffering from severe mental disorders and acting irrationally, vindictively, or frivolously, nevertheless seemed to understand the nature of the legal proceedings and to manage their own affairs. *See Richards v. Duke Univ.*, 166 F. App'x 595, 598–99 (3d Cir. 2006) (reversing appointment of guardian where plaintiff was an attorney who appeared capable of taking care of herself, notwithstanding a mental disorder); *Gamble v. Rowles*, No. MTT-12-166, 2012 WL 2088927, at *4 (M.D. Ga. June 8, 2012) (finding plaintiff competent despite his statements that he is "'mentally incompetent' and has been 'civilly committed'" where he did not show verifiable evidence of incompetency and his complaint made it apparent that he was capable of managing his affairs). *But see Scannavino v. Fla. Dep't of Corr.*, 242 F.R.D. 662, 666 (M.D. Fla. 2007) (finding plaintiff incompetent based on expert psychiatrist testimony that she was unable "'to understand the nature and effect of the litigation she has instituted,'" notwithstanding lay testimony to the contrary).

II. Duties of Courts When Dealing with Incompetent Parties

Rule 17(c)(2) provides that "The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action." Fed. R. Civ. P. 17(c)(2). Although courts have rarely had the opportunity to decide when a competency determination is necessary, there are many more cases that discuss a court's obligations when dealing with a party who is a minor or has already been ruled incompetent.

As the Seventh Circuit has explained, "[t]he language [of Rule 17(c)(2) is mandatory, but the mandate is limited to cases where a minor (or incompetent) is a party to a suit and not represented. If he is a party and represented, the appointment of a guardian is not required, provided the representation is adequate . . . ." *In re Chi., Rock Island and Pacific R.R. Co.*, 788 F.2d 1280, 1282 (7th Cir. 1986); *see also Ferrelli*, 323 F.3d at 201 (explaining that the obligation under Rule 17(c) is "to 'appoint' or 'make such other order'"). Although it is within the discretion of the district court whether to appoint a guardian ad litem, the court cannot decline to take appropriate measures to ensure that an incompetent party's interests are protected. *See Gardner by Gardner v. Parson*, 874 F.2d 131, 140 (3d Cir. 1989) ("The decision as to whether to appoint a next friend or guardian ad litem rests with the sound discretion of the district court . . . . We have found no case, however, holding that a court may decline to appoint a guardian with the result of allowing the child's interests to go unprotected."); *see also Black v. Koch Transfer Co.*, 861 F.2d 719, 1988 WL 117115, at *2 (6th Cir. 1988) (holding that the appointment of a guardian is within the trial court's discretion); *Developmental Disabilities Advocacy Ctr., Inc. v. Melton*, 689 F.2d 281 (1st Cir. 1982) (same).

The Fifth Circuit (prior to its split into the current Fifth and Eleventh Circuits), presented the clearest explanation of a court's options when dealing with an incompetent person or a minor. The Fifth Circuit

> spell[s] out the rule to mean: (1) as a matter of proper procedure, the court should usually appoint a guardian ad litem; (2) but the Court may, after weighing all the circumstances, issue such order as will protect the minor [or incompetent person] in lieu of appointment of a guardian ad litem; (3) and may even decide that such appointment is unnecessary, *though only after the Court has considered the matter and made a judicial determination that the infant [or incompetent person] is protected without a guardian*.

Adelman v. Graves, 747 F.2d 986, 989 (5th Cir. 1984) (quoting *Roberts v. Ohio Cas. Ins. Co.*, 256 F.2d 35, 39 (5th Cir. 1958) (emphasis and alterations in original)); *see also Salomon Smith Barney, Inc. v. Harvey*, 260 F.3d 1302, 1309 (11th Cir. 2001) (same), *vacated on other grounds*, 537 U.S. 1085 (2002); *30.64 Acres of Land*, 795 F.2d at 805 ("Although the court has broad discretion and need not appoint a guardian ad litem if it determines the person is or can be otherwise adequately protected, it is under a legal obligation to consider whether the person is adequately protected.").

Courts have typically declined to appoint a guardian ad litem where a litigant already has a "next friend," guardian, or other person who is capable of protecting her interests. "Unless . . . the court finds the child's general representative to be inadequate, it should not allow the general representative to be bypassed by appointing a special representative to litigate on behalf of his ward." *T.W. by Enk v. Brophy*, 124 F.3d 893 (7th Cir. 1997); *see also Genesco v. Cone Mills Corp.*, 604 F.2d 281, 285 (4th Cir. 1979) (holding that a court must appoint a guardian "(or take equivalent protective action) when it appears that the next friend will not adequately protect the infant's interests").

Appellate courts rarely question the appointment of a guardian, *see, e.g.*, *Sturdza v. Gov't of United Arab Emirates*, 562 F.3d 1186 (2009) (affirming appointment of guardian where it was not an abuse of discretion); *Fonner v. Fairfax Cnty.*, 415 F.3d 325, and there are many more appellate cases finding an abuse of discretion to fail to make a competency determination and/or appoint a guardian, *see, e.g.*, *Berrios v. N.Y.C. Hous. Auth.*, 564 F.3d 130, 134 (2d Cir. 2009) ("What the court may not properly do [] is make a merits determination of claims filed on behalf of a minor or incompetent person who is not properly represented."); However, appellate courts have occasionally found the appointment of a guardian to be an abuse of discretion under some circumstances. *See Richards*, 166 F. App'x at 598–99 (reversing appointment of guardian over plaintiff where plaintiff was "'able to understand the meaning and effect of the legal proceedings [she] has instituted'" and the guardian had been appointed more to protect defendants than plaintiff (emendation in original)).

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Circuit	***Under what circumstances is a court required to make an inquiry into competency under Fed. R. Civ. P. 17(c)(2)?***	***What actions must a court taking after making a determination of incompetency?***
First	"The determination that a person is incompetent, for purposes of Rule 17(c), is left to the discretion of the court. Evidence from a health care professional demonstrating that the person is incompetent due to mental illness or disability is sufficient to support a determination of incompetence." *O'Brien v. Kline*, No. JD-12-443, 2013 WL 1737193, at *1 (D.N.H. Apr. 22, 2013).	"If a minor lacks a general guardian or a duly appointed representative, Rule 17(c)(2) directs the court either appoint a legal guardian or Next Friend, or issue an order to protect a minor or incompetent who is unrepresented in the federal suit. The appointment of a Next Friend or guardian ad litem is not mandatory. Thus, where a minor or incompetent is represented by a general guardian or a duly appointed representative, a Next Friend need not be appointed." However, a court may appoint someone other than an existing representative where it finds the representative is unable or unwilling to act on behalf of the minor or incompetent, or has a conflict of interest. *Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 85 (1st Cir. 2010) (citations omitted). "Rule 17(c), however, empowers the district court to 'make such other orders as it deems proper for the protection of the . . . incompetent person.' This language has been interpreted to confer authority to appoint a special guardian ad litem or next friend where it is clear that the interests of the 'duly appointed' guardian and the ward conflict. As is the case where an appointment is sought by a next friend because the incompetent is not 'otherwise represented,' however, the decision to appoint or not to appoint for 'protective' purposes is a matter of trial court discretion." *Developmental Disabilities Advocacy Ctr., Inc. v. Melton*, 689 F.2d 281 (1st Cir. 1982).
Second	Neither the language of Rule 17(c) nor the precedent of this court or other circuits imposes upon district judges an obligation to inquire *sua sponte* into a pro se plaintiff's mental competence, even when the judge observes behavior that may suggest mental incapacity. . . . . If a court were presented with evidence from an appropriate court of record or a relevant public agency indicating that the party had been adjudicated incompetent, or if the court received verifiable evidence from a mental health professional demonstrating that the party is being or has been treated for mental illness of the type that would render him or her legally incompetent, it likely	"The obligation imposed by the final sentence of Rule 17(c)-the duty to 'appoint' or 'make such other order'-arises after a determination of incompetency." *Ferrelli*, 323 F.3d at 201. "Federal courts have inherent, discretionary power to appoint a guardian ad litem when it appears that an incompetent person's general representative has interest which may conflict with those of the person he is supposed to represent." *James*, 415 F. App'x at 297.

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	would be an abuse of the court's discretion not to consider whether Rule 17(c) applied. Standing alone, however, a litigant's bizarre behavior is insufficient to trigger a mandatory inquiry into his or her competency. . . . . [Rule 17(c) does not require] the district court to determine a pro se litigant's competency simply because the litigant asserts her own incompetence or displays apparent signs of mental incapacity. Where a substantial question has already by identified by the district court, it is an error for the district court to fail to consider appointing a guardian ad litem. . . . . [W]e do not read Rule 17(c) to require a court to attempt to distinguish between the truly incompetent and those who—because of a personality disorder or other cause—behave in a foolish or bizarre way, hold irrational beliefs, or are simply inept. Although we do not find that Rule 17(c) requires courts to inquire into the necessity of appointing a guardian ad litem absent verifiable evidence of mental incapacity, we also note that nothing in the rule *prevents* a district court from exercising its discretion to consider *sua sponte* the appropriateness of appointing a guardian ad litem for a litigant whose behavior raises a significant question regarding his or her mental competency. Indeed, such consideration may be particularly appropriate in the case of a defendant who shows signs of severe incapacity, in part because a judgment entered against a mentally incompetent defendant not represented by a guardian or a guardian ad litem may be subject to collateral attack at a later date. *Ferrelli v. River Manor Health Care Center*, 323 F.3d 196, 201–03 (2d Cir. 2003). In *James v. New York*, 415 F. App'x 295, 297 (2d Cir. 2011), the Second Circuit found error where "the district court had reason to believe that [Plaintiff] had been determined incapable of managing her own affairs, [but] it did not establish that fact conclusively. . . . In light of the factual background before it, the district court should have first determined whether [Plaintiff] was in fact incompetent, whether she still had guardians, whether, if so, they were aware of her attempt to file suit, and whether they wished to undertake the suit on her behalf."	"Where the owner of a claim is a minor or incompetent person, [] unless that claimant is properly represented by a guardian ad litem, next friend, or other suitable fiduciary, and that representative either is, or is represented by, an attorney, the court should not issue a ruling as to whether the complaint states a claim on which relief may be granted." *Berrios v. New York City Housing Authority*, 564 F.3d 130, 134-35 (2d Cir. 2009). "The choice to appear *pro se* is not a choice for minors who under state law cannot determine their own legal actions . . . It is thus a well-established general rule in this Circuit that a parent not admitted to the bar cannot bring an action pro se in federal court on behalf of his or her child. *Tindall v. Poultney High School Dist.*, 414 F.3d 281 (2d Cir. 2005) (citations omitted). "This rule does not mandate that a guardian ad litem be appointed whenever an infant is a party to a suit. In fact, District Courts should attempt to decrease costs by refraining from appointing guardians unless there is a substantial likelihood that a conflict of interest may exist and an infant may need protection. A guardian does not have to be appointed if the infant's interests are amply represented and protected. The trial judge must, however, give due consideration to the 'propriety of an infant's representation by a guardian ad litem before he may dispense with the necessity of appointing the guardian.'" *Geddes v. Cessna Aircraft Co.*, 881 F. Supp. 94, 100 (E.D.N.Y. 1995) (citations omitted).

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Third	The Third Circuit has adopted the *Ferrelli* standard: "[A] district court need not inquire *sua sponte* into a pro se plaintiff's mental competence based on a litigant's bizarre behavior alone, even if such behavior may suggest mental incapacity. That is an important limiting factor" as "[t]he federal courts are flooded with pro se litigants with fanciful notions of their rights and deprivations." The "duty of inquiry involves a determination of whether there is verifiable evidence of incompetence." *Powell v. Symons*, 680 F.3d 301, 307 (3d Cir. 2012). In addition, if the court were alerted to evidence from a court or agency "indicating that the party had been adjudicated incompetent, or if the court received verifiable evidence from a mental health professional demonstrating that the party is being or has been treated for mental illness of the type that would render him legally incompetent," it is likely an abuse of discretion to fail to make a Rule 17(c) inquiry. *Id.* at 307. However, in *Richards v. Duke Univ.*, 166 F. App'x 595, 598–99 (3d Cir. 2006), the Third Circuit reversed the appointment of a guardian over a plaintiff diagnosed with a mental disorder, finding that "it is clear that Richards is not 'incapable of taking care of [herself].' According to the psychiatrist's report, she was employed as an attorney. The psychiatrist also stated that Richards presented as 'intelligent, articulate, and enthusiastic. She spoke with great facility and was analytical and organized. All cognitive functions were intact.' The psychiatrist noted that it appeared that Richards did not suffer from any perceptual disorders. Based on her pleadings, it is apparent that she can communicate her ideas effectively. *The purpose behind appointing a guardian is to protect the interests of the incompetent person, not the defendants.* Richards is clearly able to protect her interests in this litigation. She is 'able to understand the meaning and effect of the legal proceedings [she] has instituted.'" *Id.* (emphasis added)	"The decision as to whether to appoint a next friend or guardian ad litem rests with the sound discretion of the district court and will not be disturbed unless there has been an abuse of its authority. We have found no case, however, holding that a court may decline to appoint a guardian with the result of allowing the child's interests go unprotected. Rather, the cases and commentators appear unanimous in interpreting the above provision of Rule 17(c) to mean that, if a court declines to appoint a guardian, it must act in some other way to protect the child's interests in the litigation." *Gardner by Gardner v. Parson*, 874 F.2d 131, 140 (3d Cir. 1989) (citation omitted). In *Monroe v. Bryan*, the District of Delaware found a party to be competent notwithstanding a past diagnosis of, *inter alia*, paranoid-schizophrenic disorder, finding: "While there is evidence that plaintiff is being treated for mental illness, there is no medical opinion in the record that he [is] incompetent. Nor is there evidence that plaintiff has been adjudicated incompetent by any court. Moreover, in reviewing plaintiff's pleadings, it is apparent that he understands the nature of the action he has commenced. He has responded appropriately to orders entered by the court and his filings are coherent and logical." 881 F.Supp.2d 623, 628 (D. Del. 2012).

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Fourth	"Obviously if there has been a legal adjudication of incompetence and that is brought to the court's attention, the Rule's provision is brought into play." "The practical problem presented by a case in which a presumably competent party might be thought to be acting oddly, or foolishly, or self-destructively in prosecuting or defending a civil lawsuit, with or without counsel, is a real one." "Parties to litigation behave in a great variety of ways that might be thought to suggest some degree of mental instability. Certainly the rule contemplates by 'incompetence' something other than mere foolishness or improvidence, garden-variety or even egregious mendacity or even various forms of the more common personality disorders. What the rule undoubtedly contemplates is that form of mental deficiency which–whether or not unaccompanied by other forms of personality disorder–affects the person's practical ability 'to manage his or her own affairs.' This is the general test applied by the civil law for making adjudications of 'incompetency' for a variety of purposes." "In common experience, there is of course no necessary relationship between 'mental incompetence' in this special sense and various forms of mental derangement or personality disorder that may cause utterly bizarre and destructive conduct in litigation as in other realms." *Hudnall v. Sellner*, 800 F.2d 377, 385 (4th Cir. 1986).	"The federal district court may, of course, appoint a guardian Ad litem in its discretion, and it must do so (or take equivalent protective action) when it appears that the next friend will not adequately protect the infant's interests." *Genesco v. Cone Mills Corp.*, 604 F.2d 281, 285 (4th Cir. 1979). "There is no reason to prohibit the district court from appointing a guardian ad litem . . . simply because the State has not made a determination of competency. Thus, we find it entirely appropriate that the district court, recognizing that Fonner suffered from some degree of mental retardation, appointed a guardian ad litem to assist the court in determining the propriety of Fonner's continued participation in the litigation." *Fonner v. Fairfax County, VA*, 415 F.3d 325, 330 (4th Cir. 2005). "These provisions permit, but do not compel, a court to appoint a guardian ad litem for an unrepresented minor (citation omitted). However, once the matter has been brought to the Court's attention, it is required to consider and decide the issue. . . . . In an instance where the complaint or claim has been served on the parent of a minor, and there is no indication that the parent would not or could not represent the minor's interest, courts are not required to appoint a guardian ad litem to represent the minor even if the claim be lost by default." *Seibels, Bruce & Co. v. Nicke*, 168 F.R.D. 542, 543 (M.D.N.C. 1996).

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Fifth	"[W]e reject the notion that in determining whether a person is competent to sue in federal court a federal judge must use the state's procedures for determining competency or capacity." Even where a party would not be competent to be a party under state law, a federal court must conduct its own hearing. *Thomas v. Humfield*, 91 F.2d 1032, 1035 (5th Cir. 1990)	"[T]he rule does not mean that a trial judge may ignore or overlook such a fundamental requirement for the protection of infants [or incompetent persons]. We spell out the rule to mean: (1) as a matter of proper procedure, the court should usually appoint a guardian ad litem; (2) but the Court may, after weighing all the circumstances, issue such order as will protect the minor [or incompetent person] in lieu of appointment of a guardian ad litem; (3) and may even decide that such appointment is unnecessary, though only after the Court has considered the matter and made a judicial determination that the infant [or incompetent person] is protected without a guardian." *Adelman v. Graves*, 747 F.2d 986, 989 (5th Cir. 1984) (quoting *Roberts v. Ohio Cas. Ins. Co.*, 256 F.2d 35, 39 (5th Cir. 1958)).
Sixth	There are no cases on point dealing squarely with competency determinations, and relatively few that clearly discuss when to appoint a guardian over minors or in other circumstances.	"The decision as to whether or not to appoint a guardian ad litem rests with the sound discretion of the district judge and will not be disturbed unless there has been an abuse of discretion." *Black v. Koch Transfer Co.*, 861 F.2d 719, 1988 WL 117155, at *2 (6th Cir. Nov. 4, 1988).

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Seventh	"Here, a substantial question exists as to Yoder's mental competence. Yoder's second motion for appointment of a guardian ad litem alleged that the Randolph County Circuit Court had declared him legally disabled. This allegation should have apprised the district court of Yoder's condition, but the court did not inquire into the matter. Rather, the court—noting its 'familiar[ity] with the plaintiff through his litigation'—merely expressed its 'belie[f] that plaintiff retains the ability to prosecute this action without assistance of counsel.' . . . . Despite Yoder's allegation that he has been declared legally incompetent, the record in this case does not disclose whether the state has made any finding of legal incompetency. Yoder provided no documentation to support his allegation, and the district court took no action to ascertain the truth of the matter. We note, however, that at least one Illinois appellate court has considered Yoder's capacity to represent himself in court and upheld a trial court's finding that Yoder lacked the capacity to waive counsel during a hearing to determine whether he should be released from the Chester Mental Health Center. That finding, which occurred less than a year before Yoder filed the present complaint, provides at least some support for his allegations of legal incapacity, though obviously does not dispose of the matter. Significantly, if the state has in fact adjudged Yoder to be incompetent, that adjudication may not be overridden by the district court's subjective belief about Yoder's ability to prosecute his suit. [citing Illinois law] Because Yoder's allegation that he had been adjudicated legally disabled in state court raised a substantial question as to his competency, the district court should have inquired into the matter and is directed to do so on remand. If the district court determines that Yoder has not been adjudicated incompetent by an Illinois court, it should still assess whether Yoder may qualify as incompetent under Illinois' competency standards." *Yoder v. Patla*, 234 F.3d 1275, 2000 WL 1225476, at *2–3 (7th Cir. 2000).	In *In re Chicago, Rock Island and Pacific Railroad Company*, the court held that the district court was not obligated to appoint a guardian ad litem to represent a minor who had a personal injury claim against a railroad that was subject to bankruptcy reorganization proceedings because proof of the claim had been sent to the minor's mother, and the court was presented no evidence demonstrating that the mother could not adequately represent the minor's interests. "The language is mandatory, but the mandate is limited to cases where a minor (or incompetent) is a party to a suit and is not represented. If he is a party and represented, the appointment of a guardian is not required, provided the representation is adequate, as it would normally be if the party was being represented by a parent as 'next friend' and there was no conflict of interest between the party and his representative." *In re Chicago, Rock Island and Pacific Railroad Company*, 788 F.2d 1280, 1282 (7th Cir. 1986). "Rule 17(c) distinguishes between a guardian or other 'duly appointed representative,' on the one hand—in short, a *general* representative—and a guardian ad litem or next friend, on the other hand—a special representative. If the general representative has a conflict of interest . . . , or fails without reason to sue or defend (as the case may be), the child may with the court's permission sue by another next friend, or the court may appoint a guardian ad litem for the child. Yet even if the child's existing representative is in fact inadequate, another next friend can't jump into the case without first obtaining a court order disqualifying the existing representative from representing the child in the suit. Unless . . . the court finds the child's general representative to be inadequate, it should not allow the general representative to be bypassed by appointing a special representative to litigate on behalf of his ward." *T.W. by Enk v. Brophy*, 124 F.3d 893 (7th Cir. 1997).

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Eighth	In considering the applicability of analogous 8 C.F.R. § 1240.4 in immigration proceeding, adopted *Ferrelli* standard. "The [*Ferrelli*] court determined that the text of Rule 17(c) imposes no duty upon a district court 'to inquire *sua sponte* into a pro se [litigant's] mental competence, even when the judge observes behavior that may suggest mental incapacity. Nevertheless, the court observed that, when certain information is brought to the attention of the Court, 'it likely would be an abuse of the court's discretion not to consider whether Rule 17(c) applied.' Specifically, a district court must consider invoking Rule 17(c) when it receives 'evidence from an appropriate court of record or a relevant public agency indicating that the party had been adjudicated incompetent, or if the court received verifiable evidence from a mental health professional demonstrating that the party is being or has been treated for mental illness of the type that would render him or her legally incompetent.' *Ferrelli* suggests that the protections afforded to pro se litigants by Rule 17(c) would become a nullity if judges were permitted simply to ignore clear evidence of incompetency. The same proposition holds in removal proceedings with respect to section 1240.4. Incompetents cannot be relied upon to assert their own procedural rights. If, in the case of an unrepresented alien, an immigration judge is never obligated to inquire into the predicate fact of competency, section 1240.4 offers the alien no protection. In turn, without the protection afforded by section 1240.4, it becomes doubtful whether an incompetent alien truly receives the notice and opportunity for hearing demanded by due process. . . . . By analogy to *Ferrelli*, the court concludes that it is an abuse of discretion when an immigration judge, faced with evidence of a formal adjudication of incompetence or medical evidence that an alien has or is being treated for the sort of mental illness that would render him incompetent, fails to make at least some inquiry as to whether section 1240.4 ought be applied. *Mohamed v. TeBrake*, 371 F. Supp. 2d 1043, 1046–47 (D. Minn. 2005). The Eighth Circuit reversed, but did not take issue with the district court's legal conclusions: "At his hearings, Mohamed answered the charges against him, testified in support of his claim for withholding of removal, and arranged for two witnesses to appear on his behalf. The transcripts show an individual who is aware of the nature and object of the proceedings and who vigorously resists removal. The lack of a competency hearing was not an abuse of discretion and did not violate	"Appointment of a guardian ad litem is considered to be discretionary under the Federal Rules, provided the District Court enters a finding that the interests of the minor are adequately protected in the event it does not make such appointment. Regardless of whether state or federal law should be applied, the District Court was bound to consider the appointment of a guardian ad litem for the minor plaintiff and clearly has the power to appoint one in her behalf." *M.S. v. Wermers*, 557 F.2d 170, 174 (8th Cir. 1977).

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	Mohamed's right to procedural due process." *Mohamed v. Gonzales*, 477 F.3d 522, 527 (8th Cir. 2007).	
Ninth	"A party proceeding pro se in a civil lawsuit is entitled to a competency determination when substantial evidence of incompetence is presented. . . . Where a party's incompetence in fact caused him to fail to prosecute or meet a filing deadline, the action should not be dismissed on such grounds." *Allen v. Calderon*, 408 F.3d 1150 (9th Cir. 2005). "The failure of a person appearing *pro se* to move under Rule 17, or any other rule or statute, for relief based on his incompetence is not fatal. Quite obviously an incompetent person cannot be held to compliance with technical rules. Rather, if it should appear during the course of proceedings that a party may be suffering from a condition that materially affects his ability to represent himself (if *pro se*), to consult with his lawyer with a reasonable degree of rational understanding, or otherwise to understand the nature of the proceedings, that information should be brought to the attention of the court promptly." *United States v. 30.64 Acres of Land*, 795 F.2d 796, 805 (9th Cir. 1986).	"Federal Rules of Civil Procedure 17(c)(2) requires a court to take whatever measures it deems proper to protect an incompetent person during litigation. Although the court has broad discretion and need not appoint a guardian ad litem if it determines the person is or can be otherwise adequately protected, it is under a legal obligation to consider whether the person is adequately protected." *United States v. 30.64 Acres of Land*, 795 F.2d 796, 805 (9th Cir. 1986). "In the context of proposed settlements in suits involving minor plaintiffs, the district court's special duty to safeguard the interest of litigants who are minors requires a district court to conduct its own inquiry to determine whether the settlement serves the best interests of the minor." *Robidoux v. Rosengren*, 638 F.3d 1177, 1181 (9th Cir. 2011) (quotation omitted). "[W]hen a substantial question exists regarding the competence of an unrepresented party the court may not dismiss with prejudice for failure to comply with an order of the court." *Krain v. Smallwood*, 880 F.2d 1119, 1121 (9th Cir. 1989).

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Tenth	"Here, without addressing Mr. Maynard's alleged incompetence, the district court found that no appointment was necessary because the claims were premature under *Heck* and because Mr. Maynard had been able to prosecute this action to date without the appointment of a guardian ad litem with help from a fellow inmate. As we noted in the prior appeal of this case, "Mr. Maynard's complaint details a long history of mental illness." On remand, the district court should consider whether an inquiry into Mr. Maynard's mental competency is warranted." *Maynard v. Casebolt*, 221 F.3d 1352, 2000 WL 1005265, at *4 (10th Cir. 2000) (unpublished opinion)	In *T.H. v. Jones*, the District of Utah rejected defendant's attempt to require appointment of a guardian ad litem under Rule 17(c), observing that "[n]either the appointment of a guardian ad litem nor a protective order in lieu of such appointment is mandatory so long as we determine that the plaintiff is adequately protected in this litigation without a guardian. 425 F. Supp. 873 (D. Utah 1975).
Eleventh	"Neither the language of Rule 17(c) nor the precedent of [the Second Circuit] or other circuits imposes upon district judges an obligation to inquire *sua sponte* into a pro se plaintiff's mental competence, even when the judge observes behavior that may suggest mental incapacity." . . . [P]sychological and mental stress is not the equivalence of incompetence to proceed in court." Accordingly, where the plaintiff "understood the proceedings and was capable of protecting her interests," "the district court did not err by not appointing a guardian ad litem *sua sponte*." *McLean v. GMAC Mortg. Corp.*, 398 F. App'x 467, 470 (11th Cir. 2010). "Although Plaintiff states that he is 'mentally incompetent' and has been 'civilly committed' (notwithstanding his presently serving a criminal sentence), he has not referenced any court order or other verifiable evidence of his incompetency. . . . Moreover, the instant complaint, including Plaintiff's description therein of his earlier lawsuit, suggests that Plaintiff is competent to manage his affairs, including this lawsuit." *Gamble v. Rowles*, No. MTT-12-166, 2012 WL 2088927, at *4 (M.D. Ga. June 8, 2012). In *Scannavino v. Florida Department of Corrections*, the Middle District of Florida found plaintiff incompetent, crediting defendant's psychiatric expert over the plaintiff's lay witnesses, stating: "'[W]here, as here, the expert testimony so clearly and overwhelmingly points to a conclusion of incompetency, the [court] cannot arbitrarily ignore the experts in favor of the observations of laymen.' The defendants have established by clear and	"'Rule 17(c) does not make the appointment of a guardian ad litem mandatory. If the court feels that the [person's] interests are otherwise adequately represented and protected, a guardian ad litem need not be appointed.' The district court's decision as to whether to appoint a guardian ad litem is reviewed for abuse of discretion." *McLean*, 398 F. App'x at 470. "In *Roberts v. Ohio Cas. Ins. Co.*, 256 F.2d 35, 39 (5th Cir. 1958), the Fifth Circuit [prior to the circuit split] held that a court addressing a request for a guardian ad litem must either (1) appoint a guardian; (2) issue an order providing whatever protection might be required for the party in lieu of appointing a guardian; or (3) determine that the party is protected absent a guardian. It is clear that *Roberts* and Rule 17(c) require that some action be taken on the record before a court proceeds on the merits of the claims." *Salomon Smith Barney, Inc. v. Harvey*, 260 F.3d 1302, 1309 (11th Cir. 2001), *vacated on other grounds*, 537 U.S. 1085 (2002). "An incompetent litigant is 'not otherwise represented' under Rule 17(c) if she has no 'general guardian, committee, conservator, or other like fiduciary.' . . . The decision to appoint a 'next friend' or guardian ad litem rests

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	convincing evidence that the plaintiff is mentally incompetent 'to understand the nature and effect of the litigation she has instituted.' The evidence permits no other conclusion." 242 F.R.D. 662, 666 (M.D. Fla. 2007) (internal citations omitted).	with the sound discretion of the district court and will be disturbed only for an abuse of discretion. Unlike a determination of competency, a district court's decision whether to appoint a guardian ad litem is purely procedure and wholly uninformed by state law. . . . . Indeed, failure to appoint a guardian ad litem [in this case] undermines the plaintiff's interests and would default both the court's obligation under Rule 17(c) and the requirements of justice." *Scannavino*, 242 F.R.D. at 666–67 (citations omitted).
D.C.	No case has dealt with when an inquiry must be made into competence.	*Sturdza v. Gov't of United Arab Emirates*, 562 F.3d 1186 (2009), affirmed the appointment of a guardian but considered only whether doing so had been abuse of discretion, and not the standard for when 17(c)(2) comes into play.

TAB 3C

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Rule 17(c)(2): "Must appoint" a guardian

(This topic was included in the agenda for the November 2012 meeting. The shortening of that meeting caused by Superstorm Sandy prevented taking it up then.)

Rule 17(c)(2) reads:

> **(2)** *Without a Representative.* A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem — or issue another appropriate order — to protect a minor or incompetent person who is unrepresented in an action.

The court grappled with the second sentence in *Powell v. Symons*, 680 F.3d 301 (3d Cir.2012). Two cases were before the court. Each involved a pro se prisoner plaintiff. Each plaintiff requested appointment of counsel. Each was denied. One plaintiff, Powell, showed that he had been declared incompetent to plead guilty in a prosecution pending in federal court. He also presented the extensive psychiatric report and follow-up examination that led to this conclusion. The magistrate judge in that case thought it would be good to appoint counsel, but refused because of experience that it was difficult to find counsel to accept an appointment. The plaintiff in the other case, Hartmann, presented a letter from a psychiatrist stating that he was experiencing "major depression and attention deficit disorder. I do not feel that he is competent at this time to represent himself in court."

The court of appeals adopted the approach taken by the Second Circuit. Bizarre behavior by a pro se litigant does not alone trigger a duty to inquire into mental competence, even if the behavior suggests mental incapacity. The court is required to inquire into mental competence for purposes of the Rule 17(c)(2) duty to appoint a guardian or enter some other order only if there is "verifiable evidence of incompetence." A legal adjudication of incompetence that has been brought to the court's attention brings Rule 17(c)(2) into play. So too, "'verifiable evidence from a mental health professional demonstrating that the party is being or has been treated for mental illness of the type that would render him or her legally incompetent'" may suffice. Absent some such showing, the court is not required to inquire into competence on its own.

Applying this test, the determination that Powell lacked competence to enter a guilty plea required appointment of "an appropriate representative." The representative might be counsel, perhaps to be found by inquiring of bar associations or law school clinics, or another representative, perhaps a social worker from a senior center. As to Hartmann, the psychiatrist's letter triggered a duty of further inquiry.

What brings this case to the agenda is Judge Sloviter's opening lament that "[t]he Advisory Committee Notes do not elaborate on the requirement [of Rule 17(c)(2)] and there is but a paucity of reported decisions interpreting the provision. Although the language of the Rule makes the obligation mandatory, * * * there is no suggestion which factors should trigger the district court's duty of inquiry as to whether the individual at issue is incompetent. As a result, responsibility for Rule 17 appears generally to be left to the discretion of the district courts." Then, the final words of the opinion appear in footnote 10: "We will respectfully send a copy of this opinion to the chairperson of the Advisory Committee to call its attention to the paucity of comments on Rule 17."

The issue addressed by the Third Circuit is challenging in many respects. On the one hand, Rule 17(c)(2) recognizes that courts should be careful to protect those who cannot protect their own rights. On the other hand, federal courts — including some of the busiest courts in the country — are burdened by a very high volume of prisoner pro se cases, and other pro se cases as well. Imposing on the courts an obligation to inquire often into the mental capacity of pro se plaintiffs would substantially increase their burden in a time of dwindling resources. In addition, finding counsel to represent pro se litigants is often very difficult, and imposing the obligation on courts to find counsel in a large number of cases would further increase the burden.

Judge Sloviter served on the Standing Committee on Rules of Practice and Procedure. She knows that the rules committees issue committee notes only to explain a rule at the time it is adopted or amended. Earlier committee notes are not amended unless rule text is amended. Thus the question put to the Committee is whether something should be done to revise the text of Rule 17(c)(2).

Possible revisions could go in many different directions. The most obvious would be to address the questions reflected in the Powell case: In what circumstances is a court obliged to raise the Rule 17(c)(2) question without motion? What showings as to competence must be made when the question is raised, either by motion or on the court's own inquiry? The court does address that, and seems satisfied with adopting the approach framed by the Second Circuit. But this topic could be developed further.

Whether to consider the merits of the claim while considering a Rule 17(c)(2) issue presents challenging questions. What is the relationship between acting under Rule 17(c)(2) and screening the complaint for forma pauperis purposes? If the claim seems obviously fanciful, does it make any sense to appoint counsel or guardian, even if the litigant is found incompetent? Or would that defeat the very purpose of the rule by determining the merits of a claim the claimant is incompetent to present? Conversely, if the litigant has managed to state a claim, is that a sign of competence that forecloses further inquiry? Or is it instead a sign that diligent inquiry is required to ensure competence to develop the claim? Does

it make a difference whether the claim seems to present issues of real importance, rather than issues that are trivial even if they support a legally valid claim?

Further questions might be addressed. What circumstances call for appointing a guardian ad litem? What different circumstances call for "another appropriate order"? There can easily be circumstances in which a pro se party is competent to function as a client, requiring only appointment of counsel. Or the party might be so incompetent as to require an intermediary who can stand in the party's shoes to become an effective client. Or the party might be able, with some form of assistance short of appointed counsel, to function as a pro se litigant.

And there are still other possibilities. One would be to avoid these questions by reducing the command from "must" appoint a guardian or issue an appropriate order. "Should" might replace the ambiguous "shall" that was rendered as "must" in the 2007 Style amendments. That is an important question that cannot be addressed lightly.

Rule 17(c)(2) is not limited to actions brought by prison inmates. It may raise awkward issues in relation to state law as invoked by Rule 17(b), particularly 17(b)(3), on the capacity of a representative.

The immediate question is whether the problem encountered by the Third Circuit, and resolved by it, presents issues that justify consideration of possible Rule 17(c)(2) amendments. As the Third Circuit recognizes, Rule 17(c)(2) issues do not appear frequently in the case law. The relative dearth of decisions means there is little guidance in identifying significant problems, much less in crafting workable solutions. This may be an area where the Committee would be wise to await further development of the common law before venturing into rule making.

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claims, and remand for proceedings consistent with the foregoing opinion.

Kevin POWELL, Appellant

v.

Dr. SYMONS.

Detlef F. Hartmann, Appellant

v.

Warden Thomas Carroll; Commissioner Stanley Taylor; Jane Brady, Former Attorney General; Adult Bureau Chief Paul Howard; James Welsh; Warden Robert Snyder; Elizabeth Burris; Deputy Warden David Pierce; Francene Kobus; Mike Little; Edward Johnson; John Melbourne; Jane Thompson; Lisa M. Merson; R. Vargas; Evelyn Stevenson; Nikita Robbins; Janet Leban; Michael Knight; John Malaney; Jane Alie; Deborah Rodweller; Gail Eller; Oshenka Gordon; Brenda Heddinger; Nancy Doe; R.W. Doe, IV; Larry Linton; Kimberly Weigner; Dr. Anthony Cannuli; J. Doe(s) to LXIII; Joyce Talley; Carl Hazzard; Cap. J. Henry; Michael McCreanor; John Scranton; Ihuoma Chuks.

Nos. 10–2157, 10–3069.

United States Court of Appeals,
Third Circuit.

Argued Oct. 24, 2011.

Filed: March 30, 2012.

Background: State prisoner filed § 1983 action asserting Eighth Amendment claim that physician was deliberately indifferent to his medical needs. The United States District Court for the Middle District of Pennsylvania, James F. McClure, Jr., J., 2010 WL 1485675, granted summary judgment for defendant. Prisoner appealed. Another prisoner filed similar claim and the United States District Court for the District of Delaware, Sue L. Robinson, J., 719 F.Supp.2d 366, granted summary judgment for defendants. Prisoner appealed. Appeals were consolidated.

Holdings: The Court of Appeals, Sloviter, Circuit Judge, held that:

(1) district court abused its discretion as to one prisoner in not entering order appointing appropriate representative under guardian ad litem rule and

(2) letter from physician as to other prisoner sufficed to put district court on notice that prisoner possibly was incompetent.

Reversed and remanded.

1. United States Magistrates ⚿31

Court of Appeals could assert jurisdiction over state prisoner's pro se notice of appeal that listed date of magistrate judge's report and recommendation, rather than final order of district court, since those two documents were closely related, prisoner's intent clearly was to appeal final order adopting report and recommendation as that was only means of obtaining relief from summary judgment decision that he had challenged, and defendant had full opportunity to brief all issues and had not been prejudiced by prisoner's error. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

2. Federal Courts ⚿666

Notices of appeal, especially those filed pro se, are liberally construed, and the Court of Appeals can exercise jurisdiction over orders not specified in a notice of appeal if (1) there is a connection between

the specified and unspecified orders; (2) the intention to appeal the unspecified order is apparent; and (3) the opposing party is not prejudiced and has a full opportunity to brief the issues.

3. Federal Courts ⚿813

The Court of Appeals reviews for abuse of discretion both a district court's decision to appoint a guardian ad litem as well as its decision to deny counsel to an indigent civil litigant. Fed.Rules Civ.Proc. Rule 17(c), 28 U.S.C.A.

4. United States Magistrates ⚿31

Normally, a party who fails to object before the district court to a magistrate judge's ruling on a non-dispositive pretrial matter waives that objection on appeal.

5. United States Magistrates ⚿31

Court of Appeals had discretion to reach issue of magistrate judge's orders denying state prisoner's motions for counsel, where prisoner was proceeding pro se and magistrate judge's orders did not notify prisoner that he risked waiving his appellate rights by failing to object.

6. Mental Health ⚿488

District judges are not expected to do any more than undertake a duty of inquiry as to whether there may be a viable basis to invoke the guardian ad litem rule; that duty of inquiry involves a determination of whether there is verifiable evidence of incompetence, and in the context of unrepresented litigants proceeding in forma pauperis, this inquiry usually would occur after the preliminary merits screening. 28 U.S.C.A. § 1915A; Fed.Rules Civ.Proc. Rule 17, 28 U.S.C.A.

7. Mental Health ⚿488

A court is not required to conduct a sua sponte determination whether an unrepresented litigant is incompetent unless there is some verifiable evidence of incompetence; however, once the duty of inquiry is satisfied, a court may not weigh the merits of claims beyond the in forma pauperis screening if applicable. 28 U.S.C.A. §§ 1915(e)(2), 1915A; Fed.Rules Civ.Proc. Rule 17, 28 U.S.C.A.

8. Federal Civil Procedure ⚿1951.29

District courts have broad discretion to request an attorney to represent an indigent civil litigant. 28 U.S.C.A. § 1915(e).

9. Mental Health ⚿488

District court abused its discretion in not entering order appointing appropriate representative under guardian ad litem rule, in state prisoner's civil rights action asserting Eighth Amendment claim that physician was deliberately indifferent to his medical needs, where prisoner's psychiatric report was thorough as to his incapacity for purposes of criminal case and court's finding of incapacity was amply supported in record, and yet magistrate judge did not seek anyone who would be willing to undertake necessary representation, and court could not assume prisoner's competence in face of evidence to contrary. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 17(c), 28 U.S.C.A.; 20 Pa.C.S.A. § 5517; Rules Civ. Proc., Rule 2051, 42 Pa.C.S.A.

10. Mental Health ⚿19

Under Pennsylvania law, once a person is adjudicated incompetent, he is deemed incompetent for all purposes until, by court order, the status of incompetency is lifted. 20 Pa.C.S.A. § 5517; Rules Civ. Proc., Rule 2051, 42 Pa.C.S.A.

11. Mental Health ⚿488

Letter from physician, that state prisoner "is under my care for Major Depression and Attention Deficit Disorder. I do not feel he is competent at this time to represent himself in court. I would rec-

ommend that he be given a public defender, if at all possible," sufficed to put district court on notice that state prisoner possibly was incompetent, as required to invoke guardian ad litem rule, in prisoner's civil rights action asserting Eighth Amendment claim that physician was deliberately indifferent to his medical needs. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983; Fed. Rules Civ.Proc.Rule 17(c), 28 U.S.C.A.

12. Federal Civil Procedure ⚿1751, 1837.1

Where a plaintiff fails without good cause to effect service on a defendant within 120 days of the filing of a complaint, a district court does not abuse its discretion by dismissing the action against that defendant without prejudice. Fed.Rules Civ. Proc.Rule 4(m), 28 U.S.C.A.

Kevin Powell, LaBelle, PA, Pro Se Appellant in No. 10–2157.

Kathryn M. Kenyon (Argued), James W. Kraus, Pietragallo, Gordon, Alfano, Bosick & Raspanti, Pittsburgh, PA, Attorneys for Appellee in No. 10–2157.

Detlef F. Hartmann, Georgetown, DE, Pro Se Appellant in No. 10–3069.

Catherine C. Damavandi (Argued), Department of Justice, Wilmington, DE, James E. Drnec (Argued), Balick & Balick, Wilmington, DE, Attorneys for Appellees in No. 10–3069.

Karen C. Daly (Argued), Stephen J. McConnell, Dechert, Philadelphia, PA, Attorneys for Amicus Curiae.

Before: SLOVITER, GREENAWAY, JR., Circuit Judges and POLLAK,* District Judge.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

Rule 17(c)(2) of the Federal Rules of Civil Procedure provides that:

> A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. *The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.*

(emphasis supplied).

The Advisory Committee Notes do not elaborate on the requirement of the emphasized language above and there is but a paucity of reported decisions interpreting the provision. Although the language of the Rule makes the obligation mandatory, *see Berrios v. N.Y. City Hous. Auth.*, 564 F.3d 130, 134–35 (2d Cir.2009), there is no suggestion which factors should trigger the district court's duty of inquiry as to whether the individual at issue is incompetent. As a result, responsibility for Rule 17 appears generally to be left to the discretion of the district courts.

This consolidated appeal arises from two cases in which prisoners, proceeding pro se, sought damages from prison officials. The appeal calls on the court to decide whether the District Courts erred in failing to *sua sponte* inquire whether Powell or Hartmann were incompetent under Federal Rule of Civil Procedure 17(c)(2) or in declining to appoint counsel or some representative for them.

* Hon. Louis H. Pollak, Senior Judge, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

I.

Kevin Powell, a Pennsylvania state prisoner proceeding pro se and *in forma pauperis*, filed suit in the Middle District of Pennsylvania in 2007 pursuant to 42 U.S.C. § 1983 against Dr. John Symons, his treating physician at SCI–Rockview. Powell asserts an Eighth Amendment claim that Dr. Symons was deliberately indifferent to his medical needs. The District Court denied Dr. Symons' motion to dismiss for failure to state a claim. Dr. Symons subsequently filed a motion for summary judgment.

Powell filed a series of motions for extensions of time and for counsel. The Magistrate Judge, exercising his authority to resolve non-dispositive pre-trial motions, granted five of Powell's requests for extensions of time to file a response and denied one request as moot. In the last order extending Powell's time to respond, the Magistrate Judge directed him to respond by February 26, 2010 and informed Powell that no further extensions would be granted. Powell's seventh motion for an extension of time to respond to Dr. Symons' motion for summary judgment explained that the District Court presiding over his criminal proceeding had ordered him to a psychiatric facility for four months and he was there without his personal property. The Magistrate Judge denied the motion and reminded Powell that no further extensions would be granted. Powell never filed a response to the motion for summary judgment.

Powell's ten motions for counsel cited his rudimentary education and his difficulties obtaining legal assistance while in prison. The Magistrate Judge denied each of Powell's motions for counsel. In so doing, the Magistrate Judge wrote that he assumed Powell's claim to have potential merit and that several of the relevant factors, including Powell's education level and the need for expert testimony, weighed in favor of appointing counsel. Although the Magistrate Judge stated that he preferred to appoint counsel, he denied counsel primarily on the ground that, in his experience, it is difficult to find counsel willing to represent prisoners in civil rights cases.

At about the same time as Powell's civil proceeding, he was charged in a criminal proceeding in the Middle District of Pennsylvania for issuing threats against the President and mailing threatening communications in violation of 18 U.S.C. §§ 871 and 876(c), respectively.[1] Powell, who was represented in the criminal case by appointed counsel, pleaded guilty to those charges in January 2009. However, prior to sentencing, the District Court appointed a psychiatrist, Dr. Stefan Kruszewski, to examine Powell and prepare a written report of his findings.

Dr. Kruszewski, a graduate of Harvard Medical School, has written and spoken extensively about psychiatric issues. He has had at least 30 years of clinical practice experience in which he treated several thousand patients with a wide variety of psychiatric and neuropsychiatric conditions. He prepared an extensive report for the criminal case, setting forth details of his examination. Dr. Kruszewski concluded that Powell met the accepted diagnosis of delusional disorder, mixed subtypes, a diagnosis based on Powell's "repeated pattern of physical complaints without medical findings to support them, the somatic elements of his reported 'torture' and his simultaneously persistent

1. He subsequently explained that he sent those threats so he would be transferred to federal prison.

and episodic refusal of medication." S.A. at 42. The report continued, "[r]egardless of the cause of his symptoms and the origins of his delusional disorder, some of his conduct is beyond his willful control. That is the nature of an isolated psychotic system of relatively fixed delusional beliefs." *Id.*

Dr. Kruszewski wrote that Powell's "potential to act out violently against others, including those he named in his letters, is small," in part because he has "somewhat limited cognitive abilities." S.A. at 42. Dr. Kruszewski further noted that "there is a great deal of doubt that he had the capacity to form the criminal intent to harm because he has a persistent serious mental illness that chronically alters his reality and his ability to conduct himself within the confines of the law," and that "we can expect his delusional symptoms to wax and wane." *Id.* Notwithstanding this diagnosis, Dr. Kruszewski also found that "[a]lthough his testable fund of information was limited in certain ways . . ., Mr. Powell was able to satisfy my concern that he was able to understand the legal processes and cooperate with them to the best of his ability." S.A. at 32.

After reading and absorbing Dr. Kruszewski's diagnosis, the District Court acknowledged that Powell "may be suffering from a mental disease or defect that has rendered him mentally incompetent to the extent that he was previously unable to enter a knowing and voluntary guilty plea." S.A. at 49. However, the Court determined that Dr. Kruszewski's report did not provide the Court with sufficient information regarding Powell's competency when he pleaded guilty and ordered that Powell be committed to federal custody for further psychiatric evaluation.

In October 2009, on the basis of an additional psychiatric evaluation, the Court granted the motion of Powell's defense counsel to withdraw his guilty plea and enter a plea of not guilty to the charges in the indictment. The Court then issued an order finding that Powell "is presently suffering from a mental disease or defect rendering him mentally incompetent to understand the nature and the consequences of the proceedings now against him." S.A. at 52. Subsequently, the U.S. Attorney requested dismissal of the indictment, which the Court granted in July 2010.

Turning to the civil case, the Magistrate Judge, in his last two orders denying counsel, noted the criminal court's rulings and his own concerns about Powell's mental competence. In an order entered August 2009, the Magistrate Judge concluded that although "[Powell's] mental capacity could affect his ability to present his case in a clear and concise manner, he has thus far been able to preserve his interests by engaging in communication with the court. As evident in the documents that [Powell] has already filed with the court, it is clear that [Powell] is literate and more than capable of communicating effectively." J.A. at 22. In a later order entered in March 2010, the Magistrate Judge acknowledged that since his last order Powell had been adjudicated mentally incompetent in the criminal proceeding. The Magistrate Judge stated that "[t]he fact that [Powell] has been found incompetent, of course, weighs in favor of appointing counsel." J.A. at 27. He once again denied the motion, however, based on his conclusion that "it is unlikely that counsel could be found to represent [Powell]." J.A. at 28. The Magistrate Judge did not discuss his obligations under Rule 17 of the Federal Rules of Civil Procedure.

[1, 2] The same day, the Magistrate Judge issued a report and recommendation noting that Powell had not filed a response to the motion for summary judgment, but he recommended granting it on

the merits because Dr. Symons "presented evidence that [Powell] received extensive medical care and treatment including examinations, medications, lab tests, chest x-rays and an electrocardiogram." J.A. at 38. The Magistrate Judge noted that Powell "has not presented any evidence that [Dr. Symons] was deliberately indifferent to his medical needs or any evidence that [Dr. Symons'] actions or inactions caused him harm." J.A. at 39. The District Court adopted the recommendation in full. Powell appeals.[2]

[3–5] We review for abuse of discretion both a district court's decision to appoint a guardian ad litem under Rule 17(c) as well as its decision to deny counsel to an indigent civil litigant.[3] *See Montgomery v. Pinchak*, 294 F.3d 492, 498 (3d Cir.2002) (appointment of counsel); *Gardner ex rel. Gardner v. Parson*, 874 F.2d 131, 140 (3d Cir.1989) (Rule 17(c)). We exercise plenary review of a district court's grant of summary judgment, and apply the same standard as the district court. *See Tri–M Group, LLC v. Sharp*, 638 F.3d 406, 415 (3d Cir.2011); Fed.R.Civ.P. 56.

II.

This court consolidated the appeals filed by Powell and Detlef Hartmann (whose appeal raises similar issues of the obligation of district courts under Federal Rule 17(c)) and appointed amicus counsel to address the following: (1) whether, in light of Federal Rule of Civil Procedure 17(c), the District Courts should have *sua sponte* questioned the competence of Powell and Hartmann; (2) if so, what actions the Courts should have taken in that regard; and (3) whether the District Courts abused their discretion in denying the motions for appointment of counsel.[4]

Federal courts encounter the issue of appointment of counsel more frequently in

2. Because Powell asserts a claim under the Eighth Amendment and sued under 42 U.S.C. § 1983, the District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction over his appeal under 28 U.S.C. § 1291.

We reject Dr. Symons' argument that, because Powell cited the wrong order in his Notice of Appeal, this court is without jurisdiction over Powell's appeal. Notices of appeal, especially those filed pro se, are liberally construed, and we can exercise jurisdiction over orders not specified in a notice of appeal if "(1) there is a connection between the specified and unspecified orders; (2) the intention to appeal the unspecified order is apparent; and (3) the opposing party is not prejudiced and has a full opportunity to brief the issues." *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 184 (3d Cir.2010) (quotation marks and citation omitted). Those requirements are met here. In his Notice of Appeal, Powell listed the date of the Magistrate Judge's Report and Recommendation rather than the final order of the District Court. However, those two documents are closely related, as Dr. Symons concedes. Moreover, Powell's intent is clearly to appeal the final order adopting the Report and Recommendation as this is the only means of obtaining relief from the summary judgment decision he challenges. Moreover, Dr. Symons has had a full opportunity to brief all the issues and has not been prejudiced by Powell's error.

3. Powell did not object to the Magistrate Judge's orders denying his motions for counsel, as required by Middle District of Pennsylvania Rule 72.2. "Normally, a party who fails to object before the district court to a magistrate judge's ruling on a non-dispositive pretrial matter waives that objection on appeal." *Tabron v. Grace*, 6 F.3d 147, 153–54 n. 2 (3d Cir.1993). However, in light of Powell's pro se status and the fact that the Magistrate Judge's orders did not notify Powell that he risked waiving his appellate rights by failing to object, this court has discretion to reach the issue. *See Leyva v. Williams*, 504 F.3d 357, 364–65 (3d Cir.2007); *Tabron*, 6 F.3d at 153 n. 2.

4. We express our appreciation to counsel for amici Karen Daly and Stephen McConnell and their law firm, Dechert LLP, for undertaking this responsibility. It is in the best tradition of the Philadelphia bar.

civil cases under 28 U.S.C. § 1915(e), but only rarely consider the issue of appointment of a guardian ad litem under Rule 17(c).

[6] As noted at the outset of the opinion, it is the federal district court's obligation to issue an appropriate order "to protect a minor or incompetent person who is unrepresented in an action." Fed. R.Civ.P. 17(c)(2). This court has yet to set forth the factors that warrant *sua sponte* inquiry into a litigant's capacity to sue or be sued under Rule 17(c) and the Rule itself does not offer any commentary. However, the Second Circuit has set forth a well-reasoned standard that has been adopted elsewhere and that we adopt under the circumstances here. In *Ferrelli v. River Manor Health Care Center,* 323 F.3d 196, 201 (2d Cir.2003), that Court concluded that a district court need not inquire *sua sponte* into a pro se plaintiff's mental competence based on a litigant's bizarre behavior alone, even if such behavior may suggest mental incapacity. That is an important limiting factor as to the application of Rule 17. The federal courts are flooded with pro se litigants with fanciful notions of their rights and deprivations. We cannot expect district judges to do any more than undertake a duty of inquiry as to whether there may be a viable basis to invoke Rule 17. That duty of inquiry involves a determination of whether there is verifiable evidence of incompetence. In the context of unrepresented litigants proceeding *in forma pauperis,* this inquiry would usually occur after the preliminary merits screening under 28 U.S.C. § 1915A or 28 U.S.C. § 1915(e)(2).

With regard to the question of whether there is verifiable evidence of incompetence, the *Ferrelli* Court concluded that a district court would likely abuse its discretion if it failed to consider whether Rule 17(c) applied "[i]f a court were presented with evidence from an appropriate court of record or a relevant public agency indicating that the party had been adjudicated incompetent, or if the court received verifiable evidence from a mental health professional demonstrating that the party is being or has been treated for mental illness of the type that would render him or her legally incompetent." *Id.* We also agree with the Fourth Circuit in *Hudnall v. Sellner,* 800 F.2d 377, 385 (4th Cir.1986), that bizarre behavior alone is insufficient to trigger a mandatory inquiry into a litigant's competency but "if there has been a legal adjudication of incompetence and that is brought to the court's attention, the Rule's provision is brought into play." The *Ferrelli* Court noted that it was "mindful of the need to protect the rights of the mentally incompetent," but at the same time "in light of the volume of pro se filings in [the Second] Circuit," it could not "disregard the potential burden on court administration associated with conducting frequent inquiries into pro se litigants' mental competency." 323 F.3d at 201. We share the same concern. It follows that the district court must satisfy its duty of inquiry before it proceeds to determine if Rule 17 applies.

[7, 8] A court is not required to conduct a *sua sponte* determination whether an unrepresented litigant is incompetent unless there is some verifiable evidence of incompetence. However, once the duty of inquiry is satisfied, a court may not weigh the merits of claims beyond the § 1915A or § 1915(e)(2) screening if applicable. *Cf. Berrios v. N.Y.C. Hous. Auth.,* 564 F.3d 130, 134 (2d Cir.2009) (citing *Gardner,* 874 F.2d at 141) ("Because [the plaintiff, a severely mentally retarded teenager] was without a representative when the court dismissed her claims, and was otherwise unprotected, the court was without authority to reach the merits of those claims.");

cf. also Sam M. ex rel. Elliott v. Carcieri, 608 F.3d 77, 94 n. 15 (1st Cir.2010) (citing *Adelman ex rel. Adelman v. Graves,* 747 F.2d 986, 989 (5th Cir.1984), for the proposition that "the district court improperly dismissed the case without first determining whether the incompetent's interests were adequately represented").[5]

A. Kevin Powell

[9, 10] It appears that the District Court in Powell's case failed to consider whether Rule 17(c) applied, an issue raised first by this court rather than by anyone on Powell's behalf, or by the defendant. Most important, Powell had been adjudicated incompetent in the simultaneous criminal proceeding, and the Magistrate Judge was on notice of that adjudication. Under Pennsylvania law, the applicable law of Powell's domicile, *see* Fed.R.Civ.P. 17(b)(1), once a person is adjudicated incompetent, s/he is deemed incompetent "for all purposes until, by court order, the status of incompetency is lifted." *Syno v. Syno,* 406 Pa.Super. 218, 594 A.2d 307, 310 (1991) (citing 20 Pa. Cons.Stat. Ann. § 5517 and Pa. R. Civ. P.2051).[6]

Under ordinary circumstances, a determination as to whether Rule 17 applies is to be made in the first instance by the trial court. Here, however, the psychiatric report is so thorough as to Powell's incapacity for purposes of the criminal case and the Court's finding of incapacity so amply supported in the record, that we conclude that it was an abuse of discretion not to enter an order appointing an appropriate representative. There is nothing to show that the Magistrate Judge sought counsel, made inquiry of the bar associations, or inquired as to whether law schools that may have clinical programs or senior centers with social workers would be willing to undertake the necessary representation.

It appears that in Powell's case it may not be difficult to undertake this task. Dr. Symons' brief suggests that there is ample evidence that Powell's condition was seriously considered, but under the test we adopt from *Ferrelli,* we may not assume his competence in the face of evidence to the contrary. Therefore, we will reverse and remand with directions to the District

5. In a not dissimilar context, this court has previously had occasion to consider the standard for appointment of counsel under 28 U.S.C. § 1915(e), a statute that "gives district courts broad discretion to request an attorney to represent an indigent civil litigant." *Tabron v. Grace,* 6 F.3d 147, 153 (3d Cir.1993). In *Tabron,* we held that, after considering the merits of a plaintiff's claim as a threshold matter, a district court should consider additional factors that bear on the need for appointed counsel including: (1) plaintiff's ability to present his case; (2) the difficulty of the legal issues; (3) the degree to which factual investigation will be necessary and plaintiff's ability to pursue investigation; (4) plaintiff's capacity to retain counsel on his own behalf; (5) the extent to which the case will turn on credibility determinations; and (6) whether the case will require testimony from an expert witness. *Id.* at 155–57; *Montgomery v. Pinchak,* 294 F.3d 492, 499 (3d Cir.2002). Powell's complaint easily met the threshold issue of the merits of the putative claim because the District Court denied defendant's motion to dismiss, acknowledging that Powell's claim had sufficient merit to proceed. Nonetheless, the District Court denied Powell's request for counsel noting the scarcity of attorneys willing to take prisoner civil rights cases *pro bono.* We recognized that problem in *Tabron,* but we declined to make that issue determinative of appointment of counsel, 6 F.3d at 157, and we decline to do so here as well.

6. Pennsylvania defines an "incapacitated person" as "an adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that the person is partially or totally unable to manage financial resources or to meet the essential requirements for physical health and safety." Pa. R. Civ. P.2051.

Court to appoint a representative or counsel to proceed with the case.

B. Detlef Hartmann

[11] In 2006, while incarcerated at the James T. Vaughn Correctional Center ("Vaughn"), Detlef Hartmann filed a pro se suit under 42 U.S.C. § 1983 in the District of Delaware against the warden and members of the prison medical staff, among others.[7] Hartmann was granted leave to proceed *in forma pauperis*.

Hartmann's initial complaint listed twenty defendants and made a variety of claims concerning the circumstances of his incarceration, including the denial of medical services and inadequate access to legal materials. After screening under 28 U.S.C. §§ 1915 and 1915A and a series of amendments to the complaint, the District Court permitted Hartmann to proceed with his claims against Ihuoma Chuks, an employee of Correctional Medical Services, Inc., the contractor responsible for healthcare at Vaughn; Thomas Carroll, then warden of Vaughn; and David Pierce, then deputy warden of Vaughn. Hartmann alleged that Chuks, Carroll, and Pierce were deliberately indifferent to his medical needs. Specifically, Hartmann claimed that he was denied treatment for throat pain and thyroid disease and that, although he was referred to an endocrinologist, prison officials never transported him to one. Hartmann's other claims and other named defendants were dismissed for various reasons, including failure to serve, and are not the subject of this appeal.

Defendants Carroll and Pierce filed a motion to dismiss for insufficiency of process, which was denied by the District Court. Carroll subsequently served a set of interrogatories on Hartmann. Hartmann's response to those interrogatories, while somewhat discursive, demonstrated an impressive ability to organize his points, make rational arguments, and cite supporting legal authority.

During the course of this litigation, Hartmann also filed eight motions seeking appointment of counsel. Those motions listed a variety of reasons why counsel was necessary, including Hartmann's limited access to legal materials and unspecified "mental disabilities." J.A. at 217, 246. Attached to his final request for counsel, Hartmann filed a one-paragraph letter from Dr. Jeanette Zaimes, a psychiatrist, that states:

> To Whom It May Concern: Mr. Detlef Hartmann is under my care for Major Depression and Attention Deficit Disorder. I do not feel he is competent at this time to represent himself in court. I would recommend that he be given a public defender, if at all possible.

J.A. at 389. There is no other medical evidence of Hartmann's mental health in the record.

The District Court denied each of Hartmann's requests for counsel, repeatedly finding that Hartmann was capable of presenting his own case. In its order denying Hartmann's final request for counsel, the Court acknowledged Dr. Zaimes' letter, but found that "[u]pon consideration of the record, the court is not persuaded that appointment of counsel is warranted at this time. The court has thoroughly reviewed the file and, at every turn, [Hartmann] has ably represented himself. At this juncture of the case, there is no evidence that prejudice will result in the absence of counsel." J.A. at 89. However, the Court denied the motion without prejudice, to be renewed should any of his claims survive summary judgment. As in

7. Hartmann was released from custody in January 2009.

Powell's case, the District Court did not explicitly discuss its Rule 17 obligations.

[12] Thereafter, in April 2010, Chuks, Carroll, and Pierce moved for summary judgment, which the District Court granted. The Court concluded that the defendants were entitled to summary judgment because there was insufficient evidence that "the defendants had any personal involvement in the alleged constitutional violations." J.A. at 99. In addition, the Court found that the record demonstrated that Hartmann received medical care for his throat and thyroid conditions and that the evidence could not support a finding of deliberate indifference. In the same order the District Court dismissed, without prejudice, Hartmann's claims against two other defendants for failure to effect service.[8] Hartmann appeals this final order.

Under the rule we adopt in this case, the letter from Dr. Zaimes sufficed to put the district court on notice that Hartmann was possibly incompetent. When confronted with verifiable evidence from a mental health professional of an unrepresented litigant's incompetence, the district court has an obligation, pursuant to Rule 17, to inquire into the litigant's competency. But the letter from Dr. Zaimes is hardly overwhelming evidence of incompetency. It amounts to little more than a conclusory statement that Hartmann is incompetent, and it fails to specify what assessments Dr. Zaimes performed to arrive at that conclusion. It is thus quite unlike the careful and detailed analysis provided by Dr. Kruszewski as to Kevin Powell.

Under the circumstances, the evidence of incompetency is not so strong that we may conclude that the district court necessarily should have found Hartmann to be incompetent and should have appointed a guardian or counsel to represent his interests. Instead, we hold only that the district court abused its discretion in failing to at least consider the possible application of Rule 17(c). We are sensitive to the potential burden imposed by such a holding on the district courts. It might be that some evidence of incompetence (such as, perhaps, Dr. Zaimes's letter) is sufficiently unpersuasive as to be rebutted by other evidence in the record, or by the district court's own experience with an unrepresented litigant, without the need for a full blown hearing. But there ought to have been at least some consideration of the Rule under these circumstances. We shall remand for the district court to determine, in its discretion, whether Hartmann is competent within the meaning of Rule 17(c), as well as the degree and form of process required to answer that question. If he is determined to be incompetent and remains unrepresented, Rule 17(c) requires that a guardian be appointed or some other remedial step taken.[9]

8. It is not clear whether Hartmann intends to challenge the dismissal of his claims against Paul Howard and Edward Johnson on appeal. However, to the extent that Hartmann challenges that ruling, we will affirm. The District Court waited over two years after Hartmann filed his revised amended complaint before dismissing Hartmann's claims against Howard and Johnson for failure to serve. Hartmann was given an opportunity to state good cause for the delay, but he failed to do so. Where a plaintiff fails without good cause to effect service on a defendant within 120 days of the filing of a complaint, a district court does not abuse its discretion by dismissing the action against that defendant without prejudice. *See* Fed.R.Civ.P. 4(m); *Rance v. Rocksolid Granit USA, Inc.,* 583 F.3d 1284, 1286–87 (11th Cir.2009) (explaining that an incarcerated pro se plaintiff is entitled to rely on service by the U.S. Marshals, but only after the plaintiff has taken reasonable steps to identify the defendants).

9. In denying Hartmann's motions for appointment of counsel, the District Court stated that appointment of counsel is warranted "only 'upon a showing of special circumstances in-

III.

The fact that we remand does not suggest that either District Judge erred in the procedure each followed. Each Judge was conscientious in his or her review. We had not previously turned our attention, and therefore theirs, to Rule 17. Only after the issue of the propriety of appointing a representative on behalf of each of these plaintiffs is considered can we be satisfied that the process required by Rule 17 has been satisfied.[10]

Florencio ROLAN, Appellant

v.

Brian V. COLEMAN; The District Attorney of the County of Philadelphia; The Attorney General of the State of Pennsylvania.

No. 10–4547.

United States Court of Appeals,
Third Circuit.

Argued Jan. 23, 2012.

Opinion Filed: May 17, 2012.

Background: Following affirmance on direct appeal of petitioner's state-court convictions for first degree murder and possession of an instrument of crime and his life imprisonment sentence, after a second jury trial, 2008 PA Super 291, 964 A.2d 398, he filed a petition for a writ of habeas corpus. The United States District Court for the Eastern District of Pennsylvania, Berle M. Schiller, J., denied the petition. Petitioner appealed.

Holdings: The Court of Appeals, Greenaway, Jr., Circuit Judge, held that:

(1) habeas claim that prosecutor's comments on absence of key defense witness from petitioner's first trial constituted prosecutorial misconduct was not procedurally defaulted;

(2) claim that prosecutor's alleged misstatements of evidence during closing argument amounted to prosecutorial misconduct was not procedurally defaulted;

(3) prosecutor's comments during closing argument on absence of key defense witness from first trial did not constitute reversible prosecutorial misconduct;

(4) prosecutor's comments on petitioner's failure to previously raise self-defense theory did not amount to reversible prosecutorial misconduct;

(5) prosecutor's comment during closing argument about petitioner's post-arrest statement to police did not violate privilege against self-incrimination; and

(6) reading of transcript of deceased prosecution witness's testimony from first murder trial during second murder trial did not violate Confrontation Clause.

Affirmed.

dicating the likelihood of substantial prejudice to [plaintiff] resulting from [plaintiff's] probable inability without such assistance to present the facts and legal issues to the court in a complex but arguably meritorious case.' '' J.A. at 88–89 (quoting *Smith–Bey v. Petsock,* 741 F.2d 22, 26 (3d Cir.1984)). We note, however, that in *Tabron* this court repudiated the ''special circumstances'' requirement. *See* 6 F.3d at 155. In light of that fact we will remand for the District Court to reconsider the request for counsel in addition to the Rule 17(c) issue.

10. We will respectfully send a copy of this opinion to the chairperson of the Advisory Committee to call to its attention the paucity of comments on Rule 17.

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RULE 82

Rule 82 must be amended to reflect 2011 legislation revising the venue statutes. Former 28 U.S.C. § 1392, governing local actions, has been repealed. A new § 1390 has been added, including a subsection (b) described below. With the help of the Maritime Law Association, it appears that the best amendment would be:

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1390-1391~~-1392~~.

Background

Traditionally actions brought in the admiralty or maritime jurisdiction have not been subject to the general venue provisions, apart from the transfer sections. This rule has been confirmed by new § 1390(b):

> (b) Exclusion of Certain Cases.—Except as otherwise provided by law, this chapter shall not govern the venue of a civil action in which the district court exercises the jurisdiction conferred by section 1333, except that such civil actions may be transferred between district courts as provided in this chapter.

Section 1333 "establishes original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. * * *"

An intricate body of lore establishes that there are cases that must be brought within the exclusive jurisdiction as necessarily admiralty cases. But there are others that may be brought in the admiralty jurisdiction but also may be brought in federal court by invoking some other basis of subject-matter jurisdiction. At this point, Rule 9(h) enters the picture:

> **(h) Admiralty or Maritime Claim.**
>
> (1) *How Designated.* If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

The purpose of the second sentence of Rule 82 is to make good the reassurance that the rules do not interfere with the venue statutes. Invoking Rule 9(h) accomplishes that purpose. The second sentence recognizes that an action that lies only in admiralty jurisdiction is an admiralty claim, one as to which the court , in the language of § 1390(b), exercises the jurisdiction conferred by § 1333. The first sentence gives the claimant an option to choose to invoke an exercise of § 1333 jurisdiction when an alternative basis of subject-matter jurisdiction is also available. Designating the claim as an admiralty or maritime claim "for purposes of Rule[] * * * 82" brings it within § 1390(b) and takes it outside the general venue statutes. Choosing not to designate it as an admiralty or maritime claim leaves it within the general venue statutes — the court does not then exercise § 1333 jurisdiction.

The revised Rule 82 set out above leaves matters where they have been. When the claimant has a choice whether to invoke admiralty jurisdiction, Rule 9(h) provides the procedural means to make the choice. Rule 82 recognizes the consequences of the choice — and it will be made better by enactment of § 1390(b) and the opportunity to refer explicitly to a statute that now explicitly recognizes that admiralty claims are not governed by the general venue statutes.

Deletion of the present reference to § 1392 is required by its repeal.

The resolution of the Maritime Law Association recommending this change, and the Working Group paper explaining the resolution, are attached.

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September 16, 2013

Professor Edward H. Cooper
The University of Michigan Law School
625 South State Street
Ann Arbor, MI 48109-1215

RE: Resolution Concerning Proposed Change to Rule 82 of Federal Rules of Civil Procedure

Dear Professor Cooper:

Ed Powers, Chair of the Practice and Procedure Committee of the Maritime Law Association of the United States, asked me to write to you regarding the above. At the Association's annual meeting in New York last May that committee proposed a resolution regarding a proposed change to Rule 82 of the Federal Rules of Civil Procedure, that was necessitated by the 2011 changes to 28 U.S.C. Chapter 87.

I am pleased to report that the following was considered and adopted on May 3, 2013, by the Maritime Law Association of the United States:

RESOLUTION CONCERNING A PROPOSED CHANGE TO
RULE 82 OF THE FEDERAL RULES OF CIVIL PROCEDURE

WHEREAS, Public Law 112063, Title II, § 205 (Dec. 7, 2011) amended Chapter 87 of Title 28 of the United States Code by adding 28 U.S.C. § 1390(b) and repealing 28 U.S.C. § 1392; and

WHEREAS, Rule 82 of the Federal Rules of Civil Procedure currently provides:

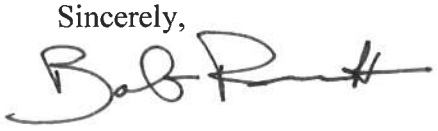
> These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for the purposes of 28 U.S.C. §§ 1391-1392; and

WHEREAS, the statutory change makes necessary a revision to Rule 82 to reflect, *inter alia*, the repeal of 28 U.S.C.§ 1392,

NOW, THEREFORE, BE IT RESOLVED that, to conform to changes to the venue provisions of Chapter 87 of 28 U.S.C., specifically, the adoption of 28 U.S.C. § 1390(b) and the repeal of 28 U.S.C. § 1392, The Maritime Law Association of the United States recommends that Rule 82 of the Federal Rules of Civil Procedure be amended to read:

> These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for the purposes of 28 U.S.C. §§ 1390 - 1391.

Sincerely,



Robert B. Parrish
President

Cc: Edward J. Powers

Report to the Practice & Procedure Committee on Proposed Change to Rule 82

Professor Edward Cooper (of the University of Michigan School of Law) is the Reporter of the Judicial Council's Advisory Committee on the Federal Rules of Civil Procedure. He requested input from The Maritime Law Association concerning changes to Rule 82 of the Federal Rules of Civil Procedure made necessary by the 2011 changes to 28 U.S.C. Chapter 87 (District Courts; Venue). Specifically, Pub. L. 112063, Title II, § 205 (Dec. 7, 2011) amended Chapter 87 by adding 28 U.S.C. § 1390(b) and repealing 28 U.S.C. § 1392.[1]

New 28 U.S.C. § 1390(b) conforms to existing admiralty law in excluding admiralty cases from the general venue provisions of Chapter 87, except the transfer provisions. It provides:

> (b) Exclusion of certain cases. – Except as otherwise provided by law, this chapter shall not govern the venue of a civil action in which the district court exercises the jurisdiction conferred by section 1333, except that such civil actions may be transferred between district courts as provided in this chapter.

Rule 82 of the Federal Rules of Civil Procedure currently provides:

> These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for the purposes of 28 U.S.C. §§ 1391-1392.

Because of the repeal of § 1392, a change to Rule 82 is required. The Advisory Committee seeks advice on how best to change the Rule to conform to the statutory change and admiralty practice.

Chair Edward J. Powers of the Practice & Procedure Committee (the "Committee") appointed a Working Group of the Committee to address the issue. The Working Group consists of Chair Powers; Past Chairs of the Committee James W. Bartlett III, Joshua Force, and Robert J. Zapf (current Chair of the Committee's Subcommittee on Federal Rules & Statutes); Professor Robert Force of Tulane University School of Law; and Committee Member, Samuel P. Blatchley.

The Working Group considered the statutory language and the language in Rule 82. New 28 U.S.C. § 1392(b) speaks of "civil actions" in which the district court "exercises" admiralty jurisdiction; Rule 82 speaks of an "admiralty or maritime claim" designated as such under Rule 9(h) of the Federal Rules of Civil Procedure as not being a "civil action for the purposes of 28 U.S.C. §§ 1391-1392."

---

[1] Former 28 U.S.C. § 1392 provided that "[a]ny civil action, of a local nature, involving property located in different districts in the same State, may be brought in any of such districts.'' Because amended 28 U.S.C. § 1391(a)(2) abolished the local-action rule, § 1392 was repealed as unnecessary.

28 U.S.C. § 1391 is the general venue provision addressing venue for federal civil actions that generally would apply should a plaintiff not make a Rule 9(h) designation of a claim falling within both admiralty and another basis of federal jurisdiction. New 28 U.S.C. § 1390(b) is a statutory recognition that admiralty has its own venue rules and requirements, but that admiralty and maritime claims can be transferred to other districts.

The Working Group was in agreement that a district court exercises admiralty jurisdiction over a civil action (and therefore 28 U.S.C. §1390(b) applies) when the only basis for the district court's jurisdiction is admiralty (e.g., a purely *in rem* action), whether or not there is a specific designation under Rule 9(h). However, the Working Group also recognized that a district court "exercises" other jurisdiction when there is an admiralty and maritime claim which would be cognizable under a separate basis of federal jurisdiction but there is no Rule 9(h) election. The Working Group recognized that in such cases, the general venue provisions of Chapter 87 would apply (e.g., § 1391, or in the cases of interpleader, § 1397).

Accordingly, the Working Group concluded that the simplest "fix" to the required change to Rule 82 was the best: change the identification of the statutory provisions in Rule 82 from "28 U.S.C. §§ 1391 – 1392" to "28 U.S.C. §§ 1390 - 1391." Thus, the revised Rule 82 would read:

> These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for the purposes of 28 U.S.C. §§ 1390 - 1391.

This leaves intact the distinction between a "admiralty or maritime claim" and a "civil action." It maintains the conformity of the use of the term "civil action" in the rule and the statute. It recognizes the distinction made in the new 28 U.S.C. § 1390(b) between when a district court "exercises" admiralty jurisdiction (in which civil actions the venue provisions other than the transfer provisions of Chapter 87 will not govern), and when a district court simply has admiralty jurisdiction but doesn't "exercise" it (in which civil actions the venue provisions including the transfer provisions of Chapter 87 will govern). The recognition in Rule 82 that an "admiralty or maritime claim" designated as such under Rule 9(h) is not a "civil action" to which the general venue provisions of Chapter 87 will apply is preserved. It also permits those general venue provisions to apply when the district court does not "exercise" admiralty jurisdiction in situations where a Rule 9(h) designation is not made. It also permits the transfer provisions of Chapter 87 to apply even when a Rule 9(h) designation is made (and thus the district court "exercises" admiralty jurisdiction). The proposed change does not affect so called "hybrid" cases involving multiple claims or multiple parties where no Rule 9(h) designation is made.

The Working Group submits this report and recommendation for consideration of the full Practice & Procedure Committee at its Wednesday May 1, 2013 meeting. Should the Committee unanimously agree with this recommendation, the Committee will be asked to adopt the following Resolution to be reported to the Board of Directors and to be submitted to the General Membership Meeting on Friday, May 3, 2013:

RESOLUTION CONCERNING A PROPOSED CHANGE TO
RULE 82 OF THE FEDERAL RULES OF CIVIL PROCEDURE

WHEREAS, Public Law 112063, Title II, § 205 (Dec. 7, 2011) amended Chapter 87 of Title 28 of the United States Code by adding 28 U.S.C. § 1390(b) and repealing 28 U.S.C. § 1392; and

WHEREAS, Rule 82 of the Federal Rules of Civil Procedure currently provides:

> These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for the purposes of 28 U.S.C. §§ 1391-1392; and

WHEREAS, the statutory change makes necessary a revision to Rule 82 to reflect, *inter alia*, the repeal of 28 U.S.C.§ 1392,

NOW, THEREFORE, BE IT RESOLVED that, to conform to changes to the venue provisions of Chapter 87 of 28 U.S.C., specifically, the adoption of 28 U.S.C. § 1390(b) and the repeal of 28 U.S.C. § 1392, The Maritime Law Association of the United States recommends that Rule 82 of the Federal Rules of Civil Procedure be amended to read:

> These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for the purposes of 28 U.S.C. §§ 1390 - 1391.

Should such a resolution be adopted by The Maritime Law Association, the President will be asked to forward the Resolution to Professor Cooper for consideration by the Advisory Committee.

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"REQUESTER PAYS" ISSUES

The purpose of this memorandum is to introduce for general discussion a collection of issues that bear on a topic that has repeatedly arisen over the years in discussion of discovery concerns. The topic is whether the rules ought to include some "requester pays" provisions. The Discovery Subcommittee presents this topic for general discussion because it has been raised by several sources (including communications from Congress) and seems to present basic issues. It is not recommending any further rulemaking at this time, but instead responding to expressions of support for serious consideration of such rulemaking.

Besides this memo, the agenda book should also include several additional items bearing on this topic:

Judge Grimm's Discovery Order, which he uses in all or almost all cases in which discovery is expected.

Notes of the Discovery Subcommittee's Sept. 16, 2013, conference call discussing these issues.

Introduction to Proposals for Cost-Bearing Provisions in the Rules, a memorandum prepared by Prof. Marcus to provide background for the Sept. 16 conference call.

The idea behind considering some sort of explicit requester pays provision is that there may, in the absence of such a provision, be a significant number of instances in which discovery requests are made even though the likely importance of the information being sought is dwarfed by the cost of complying with the discovery request. Indeed, there are even assertions that some may deploy broad discovery requests precisely to impose costs on adversaries. In instances where that may be occurring, requester pays could be a useful tool.

But it is not at all clear that "cost infliction" happens with significant frequency, even though there probably are instances in which one might say it has occurred. And (particularly in the Digital Age, during which huge amounts of data may be requested through discovery) self interest could prompt those seeking discovery to try to avoid asking for too much. In addition, it is surely true that those seeking discovery must be concerned about narrowing their requests so much that critical information can be withheld on the ground it was not requested. Modulating the use of cost-bearing in this environment is accordingly a challenging task.

One starting point is to focus on the current amendment package, which includes provisions that may assist the court and parties in performing that task. Since 1983, Rule 26(b)(2) has directed judges to limit discovery that is disproportionate, and

a reminder of that directive was included in Rule 26(b)(1) in 2000. The current amendment package imports the proportionality provision directly into the scope definition. Additionally, it contains an amendment to Rule 26(c) that would make explicit that "allocation of expenses" could be a feature of a protective order. Whether these proposed changes will actually be approved for inclusion in the rules is, of course, impossible to say at present. But if significant parts of the current package are actually adopted, it may take some time to see whether they ameliorate actual problems of over-discovery.

Another starting point is to recognize "the presumption is that the responding party must bear the expense of complying with the discovery requests." Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978). This starting point seems implicit in several current rules:

> Rule 26(g)(1)(B) says that the signature of a lawyer on a discovery request certifies that the request has not been made for an improper purpose such as increasing the cost of litigation and that the request is not unduly burdensome or expensive.
>
> Rule 26(b)(2)(C)(iii) requires the court to limit or prohibit discovery that would disproportionately burden the responding party.
>
> Rule 26(c) now authorizes a protective order to protect a party from "undue burden or expense." In *Oppenheimer Fund*, the Supreme Court recognized that Rule 26(c) provided authority for "orders conditioning discovery on the requesting party's payment of the costs of discovery."
>
> Rule 26(b)(2)(B) explicitly authorizes the court to condition discovery from sources of electronically stored information that are not reasonably accessible due to burden or expense, and the Committee Note confirms that cost-bearing is one such condition.

A third starting point is to recognize that past rulemaking efforts present background for the current consideration of these issues. That background (including the summary of commentary during the public comment period in 1998-99 on one such proposal) is presented in Prof. Marcus's memo that should be included in this agenda book. It is clear that the public comment in 1998-99 showed that there are strong views on these subjects in some sectors of the bar.

It is critical that any approach to these issues include close attention to access to justice concerns. Discovery is an important source of evidence for litigants. At the same time, it may sometimes be an important cost for litigants that could

actually impede access to justice by deterring some potential litigants from seeking relief in court due to the cost of discovery that effort would entail. Already, significant numbers of litigants seem to be priced out of hiring lawyers, so the prospect that lawyers would have to bear additional discovery costs might compound that concern. Recent concern about patent "trolls" could illustrate this concern.

At the same time, the recent development of protocols for discovery in individual employment discrimination cases could indicate that it may be possible in other significant categories of litigation to develop an idea of what constitutes "core" discovery. If so, one could perhaps consider cost bearing for discovery beyond that "core" information. Alternatively, even without developing protocols for other whole categories of litigation it may be that judicial management along the lines of Judge Grimm's Discovery Order (also included in this agenda book) could facilitate the handling of cost-bearing possibilities in individual cases.

The goal of raising these issues during this meeting is to canvas the Committee's views on how further exploration should be pursued. Disciplined examination of these issues would depend on developing a substantial information base, and that in turn depends partly on identifying the issues that should be pursued. There should be no assumption that this effort will lead to actual rule-change proposals; as noted below, drafting any such proposals would involve many tough questions. But at the same time it seems important for the Committee to examine these issues seriously; even if it concludes that no further changes to the rules are indicated it will be important that it have a solid information base for its conclusion.

A problem in addressing any of these concerns is that discussion often seems to be dominated by what some call "anecdata" -- horror stories that, however accurate they may be, do not suitably portray the broad realities of most litigation. So one aspect of this discussion should be to identify methods to develop better information than we currently have. Preliminary discussions with Emery Lee of the FJC have begun to explore these issues. And ideas about how to involve bar groups and others who may be able to shed light on these issues using a solid data-base rather than anecdotes would be welcomed.

Similarly, ideas about which issues seem most important and promising would be welcome. Examples of local rules, practices, standing orders, or guidelines that have seemed to yield good results would be helpful and might provide a basis for further inquiry.

If the Subcommittee decides to move forward, a likely step would be to convene some sort of mini-conference, but that seems

quite premature now. For one thing, the Committee is likely to be fully occupied for a considerable time addressing the issues arising during the public comment period concerning the current amendment package. For another, it has other issues (such as class actions) that may become important and time-consuming. For a third, it could conclude that it is necessary to learn how the current set of amendment proposals work (assuming they go forward) before venturing to propose further significant changes to the discovery rules.

So in the spirit of getting discussion going, rather than suggesting any conclusion, here are some thoughts that have received attention in Subcommittee discussions:

(1) Is there a serious problem of over-discovery that might be solved by some form of requester pays rule? We know that in much litigation it seems that the discovery is roughly proportional to the stakes. We know also that in a significant number of cases high discovery costs are reported. How should one try to identify over-discovery? How can one evaluate the potential utility of requester pays approaches to dealing with those problem cases?

(2) Should any rules along this line focus mainly on certain kinds of cases, or on certain kinds of discovery?

(a) In general, the rules are to be "transsubstantive," applying to all cases with relative equality. But there are rules that are keyed to specific types of cases, such as Rule 9(b), with its specific pleading requirements for fraud.

(b) In 1998 a cost-bearing proposal was published as an addition to Rule 34, dealing only with discovery of that sort, but an alternative of placement in Rule 26 was included in the invitation for comment, and the Advisory Committee eventually decided that the more appropriate placement would be in Rule 26.

(c) Since discovery regarding electronically stored information has assumed such great importance, should a "requester pays" idea be considered only for that sort of discovery? The current Rule 37(e) proposed amendment is not so limited, although current Rule 37(e) is so limited. Current Rule 26(b)(2)(B), with its cost-bearing possibility, is also only about electronically stored information.

(3) Should cost-bearing ever be mandatory? All models of possible rule changes that have been actively considered so far have essentially been discretionary. That means that the court must become involved before cost-bearing is a

possibility. Perhaps cost bearing could be presumed in certain situations unless the court directed otherwise. But if so, how would one define those situations? Defining them could be quite difficult, and disputes about whether given discovery fell on one side or the other side of such a line could themselves impose significant costs on the litigants and burdens on judges.

(4) Could introduction or emphasis on these issues itself justify substantial discovery? If the question is whether providing requested discovery will be highly burdensome, or would not provide useful evidence, it may be that some parties will seek to explore these issues using discovery. One method for making Rule 26(b)(2)(B) determinations about whether to order discovery from "inaccessible" sources of electronically stored information is to see what can be found in a sample of those sources, and at what cost. Perhaps that is a model that would be useful, but it might also suggest "discovery about discovery," something that may be unnerving.

In sum, there are many things that might profitably be pursued, and the Subcommittee invites suggestions about how best to proceed. Hopefully this brief introduction adequately highlights some of the considerations.

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UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
PAUL W. GRIMM
UNITED STATES DISTRICT JUDGE

101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201
(410) 962-4560
(410) 962-3630 FAX

DISCOVERY ORDER

Fed. R. Civ. P. 26(b)(2)(c) and 26(g)(1)(B)(iii) require that discovery in civil cases be proportional to what is at issue in the case, and require the Court, upon motion or on its own, to limit the frequency or extent of discovery otherwise allowed to ensure that discovery is proportional. This Discovery Order is issued in furtherance of this obligation. Having reviewed the pleadings and other relevant docket entries, the Court enters the following Discovery Order that will govern discovery in this case, absent further order of the Court or stipulation by the parties. This Discovery Order shall be read in conjunction with the Scheduling Order in this case, which provides discovery deadlines. ***With respect to the limitations imposed in paragraphs 2 a & b, 5, 6 and 8, counsel are encouraged to confer and propose to the Court for approval any modifications that are agreeable to all counsel.***

1. ***Disclosure of Damage Claims and Relief Sought.*** Within fourteen (14) days of this Order, any party asserting a claim against another party shall serve on that party and provide to the Court the information required by Fed. R. Civ. P. 26(a)(1)(A)(iii) regarding calculation of damages. The party also shall include a particularized statement regarding any non-monetary relief sought. Unless otherwise required by the Scheduling Order, the disclosures required by Fed. R. Civ. P. 26(a)(1)(A)(i), (ii), and (iv) need not be made.

2. ***Scope of Discovery – Proportionality.*** Pursuant to Fed. R. Civ. P. 26(b)(2)(C) and 26(g)(1)(B)(ii)–(iii), the discovery in this case shall be proportional to what is at issue in the case. To achieve this goal, and pursuant to Fed. R. Civ. P. 26(b)(1), discovery will be conducted in phases, as follows.

    a. ***Phase 1 Discovery.*** The first phase of discovery should focus on the facts that are most important to resolving the case, whether by trial, settlement or dispositive motion. Accordingly, the parties' Phase 1 Discovery may seek facts that are not privileged or work product protected, and that *are likely to be admissible* under the Federal Rules of Evidence and material to proof of claims and defenses raised in the pleadings. Phase 1 Discovery is intended to be narrower than the general scope of discovery stated in Rule 26(b)(1) ("discovery regarding any nonprivileged matter that is *relevant* to any party's claim or defense," even if not admissible, if "reasonably calculated to lead to the discovery of admissible evidence" (emphasis added)). Discovery sought during Phase 1 Discovery may not be withheld on the basis that the producing party contends that it is not admissible under the Federal Rules of Evidence, if it otherwise is within the scope of discovery permitted by Rule 26(b)(1), as modified by this Order. Rather, a party from whom discovery is sought ("Producing Party") by an adverse party ("Requesting Party")

must produce requested Phase 1 Discovery subject to any evidentiary objections, which must be stated with particularity.

b. ***Phase 2 Discovery.*** Unless the parties stipulate otherwise, the Court, upon a showing of good cause, may permit discovery beyond that obtained under Phase 1 Discovery. In Phase 2 Discovery, the parties may seek discovery of facts that are not privileged or work product protected, are *relevant* to the claims and defenses pleaded or more generally to the subject matter of the litigation, and are not necessarily admissible under the Federal Rules of Evidence, but are likely to lead to the discovery of admissible evidence. A showing of good cause must demonstrate that any additional discovery would be proportional to the issues at stake in the litigation, taking into consideration the costs already incurred during Phase 1 Discovery and the factors stated in Rule 26(b)(2)(C)(i)–(iii). If the Court determines that additional discovery is appropriate, the Requesting Party will be required to show cause why it should not be ordered to pay all or a part of the cost of the additional discovery sought.

3. ***Cooperation During Discovery.*** As required by Discovery Guideline 1 of the Discovery Guidelines for the United States District Court for the District of Maryland, D. Md. Loc. R. App. A (July 1, 2011), http://www.mdd.uscourts.gov/ localrules/LocalRules.pdf, the parties and counsel are expected to work cooperatively during all aspects of discovery to ensure that the costs of discovery are proportional to what is at issue in the case, as more fully explained in *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354, 357–58 (D. Md. 2009). The failure of a party or counsel to cooperate will be relevant in resolving any discovery disputes, including whether the Court will permit discovery beyond Phase 1 Discovery and, if so, who shall bear the cost of that discovery. Whether a party or counsel has cooperated during discovery also will be relevant in determining whether the Court should impose sanctions in resolving discovery motions.

4. ***Discovery Motions Prohibited Without Pre-Motion Conference with the Court.***

a. No discovery-related motion may be filed unless the moving party attempted in good faith, but without success, to resolve the dispute and has requested a pre-motion conference with the Court to discuss the dispute and to attempt to resolve it informally. If the Court does not grant the request for a conference, or if the conference fails to resolve the dispute, then upon approval of the Court, a motion may be filed.

b. Unless otherwise permitted by the Court, discovery-related motions and responses thereto will be filed in letter format and may not exceed five, single-spaced pages, in twelve-point font. Replies will not be filed unless requested by the Court following review of the motion and response.

5. ***Interrogatories.*** Absent order of the Court upon a showing of good cause or stipulation by the parties, Rule 33 interrogatories shall be limited to fifteen (15) in number. Contention interrogatories (in which a party demands to know its adversary's position with respect to claims or defenses asserted by an adversary) may be answered within fourteen (14) days of the discovery cutoff as provided in the Scheduling Order. All other interrogatories will be answered within thirty (30) days of service. Objections to interrogatories will be stated with particularity. Boilerplate objections (e.g., objections without a particularized basis, such as "overbroad, irrelevant, burdensome, not reasonably calculated to identify admissible

evidence"), as well as incomplete or evasive answers, will be treated as a failure to answer pursuant to Fed. R. Civ. P. 37(a)(4).

6. ***Requests for Production of Documents.***

   a. Absent order of the Court upon a showing of good cause or stipulation by the parties, Rule 34 requests for production shall be limited to fifteen (15) in number. An answer to these requests shall be filed within thirty (30) days of service, and any documents shall be produced within thirty (30) days thereafter, absent Court order or stipulation by the parties. Any objections to Rule 34 requests shall be stated with particularity. Boilerplate objections (*see* ¶ 5 above) and evasive or incomplete answers will be deemed to be a refusal to answer pursuant to Rule 37(a)(4).

   b. Requests for production of electronically-stored information (ESI) shall be governed as follows:

      i. Absent an order of the Court upon a showing of good cause or stipulation by the parties, a party from whom ESI has been requested shall not be required to search for responsive ESI:

         a. from more than ten (10) key custodians;

         b. that was created more than five (5) years before the filing of the lawsuit;

         c. from sources that are not reasonably accessible without undue burden or cost; or

         d. for more than 160 hours, ***inclusive*** of time spent identifying potentially responsive ESI, collecting that ESI, searching that ESI (whether using properly validated keywords, Boolean searches, computer-assisted or other search methodologies), and reviewing that ESI for responsiveness, confidentiality, and for privilege or work product protection. The producing party must be able to demonstrate that the search was effectively designed and efficiently conducted. A party from whom ESI has been requested must maintain detailed time records to demonstrate what was done and the time spent doing it, for review by an adversary and the Court, if requested.

      ii. Parties requesting ESI discovery and parties responding to such requests are expected to cooperate in the development of search methodology and criteria to achieve proportionality in ESI discovery, including appropriate use of computer-assisted search methodology.

7. ***Duty to Preserve Evidence, Including ESI, that is Relevant to the Issues that Have Been Raised by the Pleadings.***

   a. The parties are under a common-law duty to preserve evidence relevant to the issues raised by the pleadings.

   b. In resolving any issue regarding whether a party has complied with its duty to preserve evidence, including ESI, the Court will consider, *inter alia*:

      i. whether the party under a duty to preserve ("Preserving Party") took measures to comply with the duty to preserve that were both reasonable and proportional to what

was at issue in known or reasonably-anticipated litigation, taking into consideration the factors listed in Fed. R. Civ. P. 26(b)(2)(C);

ii. whether the failure to preserve evidence was the result of culpable conduct, and if so, the degree of such culpability;

iii. the relevance of the information that was not preserved;

iv. the prejudice that the failure to preserve the evidence caused to the Requesting Party;

v. whether the Requesting Party and Producing Party cooperated with each other regarding the scope of the duty to preserve and the manner in which it was to be accomplished; and

vi. whether the Requesting Party and Producing Party sought prompt resolution from the Court regarding any disputes relating to the duty to preserve evidence.

8. ***Depositions.*** Absent further order of the Court upon a showing of good cause or stipulation by the parties, depositions of witnesses other than those deposed pursuant to Fed. R. Civ. P. 30(b)(6) shall not exceed four (4) hours. Rule 30(b)(6) depositions shall not exceed seven (7) hours.

9. ***Non-Waiver of Attorney–Client Privilege or Work Product Protection.*** As part of their duty to cooperate during discovery, the parties are expected to discuss whether the costs and burdens of discovery, especially discovery of ESI, may be reduced by entering into a non-waiver agreement pursuant to Fed. R. Evid. 502(e). The parties also should discuss whether to use computer-assisted search methodology to facilitate pre-production review of ESI to identify information that is beyond the scope of discovery because it is attorney–client privileged or work product protected.

In accordance with Fed. R. Evid. 502(d), except when a party intentionally waives attorney–client privilege or work product protection by disclosing such information to an adverse party as provided in Fed. R. Evid. 502(a), the disclosure of attorney–client privileged or work product protected information pursuant to a non-waiver agreement entered into under Fed. R. Evid. 502(e) does not constitute a waiver in this proceeding, or in any other federal or state proceeding. Further, the provisions of Fed. R. Evid. 502(b)(2) are inapplicable to the production of ESI pursuant to an agreement entered into between the parties under Fed. R. Evid. 502(e). However, a party that produces attorney–client privileged or work product protected information to an adverse party under a Rule 502(e) agreement without intending to waive the privilege or protection must promptly notify the adversary that it did not intend a waiver by its disclosure. Any dispute regarding whether the disclosing party has asserted properly the attorney–client privilege or work product protection will be brought promptly to the Court, if the parties are not themselves able to resolve it.

/S/
Paul W. Grimm
United States District Judge

TAB 5C

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Notes on Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Sept. 16, 2013

The Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call on Sept. 16, 2013. Participating were Judge Paul Grimm (Chair, Discovery Subcommittee), Judge David Campbell (Chair, Advisory Committee), Judge John Koeltl (Chair, Duke Subcommittee), Elizabeth Cabraser, Peter Keisler, John Barkett, Parker Folse, Andrea Kuperman (Chief Counsel, Rules Committees), Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

Judge Grimm introduced the call as focused on an initial consideration of a set of issues often raised in recent years that are separate from the current package of amendment proposals. The current package contains a small change to Rule 26(c) explicitly authorizing the court to enter a protective order addressing allocation of discovery expenses. That explicit authorization really adds little to already recognized judicial authority in the area. Indeed, when the Supreme Court recognized that the cost of responding to discovery is customarily borne by the responding party in Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978), it also recognized that a protective order could alter that customary arrangement.

Prof. Marcus circulated a memorandum before the call sketching the Committee's past activity on cost-bearing issues. Most recently, in 1998-99, it published alternative proposals for adding explicit cost-bearing authority to Rule 34 or to Rule 26(b)(2). The proposals elicited much vigorous commentary, highlighting the sensitivity of the subject. One argument made often was that everyone agreed that the court already had this authority, so there seemed no value in saying so. Another point was that amending the rules might be taken to encourage increased use of the existing authority, a move that many who commented thought ill-advised.

Though this background is important, the main focus of today's discussion is on how or whether to proceed to serious consideration of further amendment possibilities. Many issues are on the table, and many possible ways to approach these issues in the rules exist.

Initially, it is worth appreciating that one school of thought is that parties will approach discovery in a more responsible manner if they know that they have to pay part of the resulting cost of production. On the other hand, there are important access to justice issues to be kept constantly in mind.

Therefore, one set of issues would be the extent to which one could properly identify types of cases that might be exempted

from rule provisions authorizing cost-bearing. Of course, doing something like that cuts against the grain of the Civil Rules, which are supposed to be the same for all kinds of cases. Another sort of question is like an issue raised in 1998-99 -- whether any such provision should be limited to Rule 34 discovery or applicable to all discovery. In 1998-99, there was concern that a provision limited to Rule 34 might seem to favor defendants, or at least those litigants with large quantities of discoverable information, while other types of discovery (notably depositions) might impose more costs on other litigants. Whether these concerns remain the same in the Digital Age, and with the introduction of numerical and time limits for depositions, remains to be explored.

Another set of concerns emerges from the summary of the comments and testimony submitted on the 1998-99 proposals. Much of that commentary was premised on empirical assumptions about the consequences of any cost-bearing rule that few could illuminate with real data. Instead, anecdotes or hyperbole seemed to predominate. The Committee's more recent experience has suggested that this sort of advocacy my reappear. It would be very useful to have more informative data to address these issues.

With all that in mind, the participants were invited to offer initial reactions. This discussion is just that -- initial -- and the only issue now is to develop a plan for proceeding in a methodical manner to evaluate the issues raised.

An attorney offered the view that "I'm still mulling this over." A good deal of reading on the history of the adoption of the Federal Rules has brought home the fact that the Framers of the Rules were very concerned about "fishing expeditions" using discovery. So that concern has been with us from the beginning. On the other hand, we do not want to interfere with the ability of litigants to obtain needed information. If the pending amendment proposals are adopted, it may be that they will make a significant difference and that these changes alone could be sufficient to redress the balance, to the extent it has gotten out of balance. In data rich cases, the problem is that parties will seek huge amounts of information. But rules are blunt instruments to deal with the challenges of such cases. Instead, we need an order like the one Judge Grimm uses in his cases. The real problem in some other cases is disproportionate costs, and it's not clear that cost shifting is a solution to the real problem. Again, informed judicial management seems a better way than revised rules. With leadership provided (as by Judge Grimm), the pending proposed rule changes may do as much as should be done.

A second attorney agreed. All U.S. lawsuits impose nonrecoverable costs. That is the American way of handling these

things. Discovery can, however, create a unique problem of strategic imposition of costs. This risk means that the discovery process requires some degree of policing. Judge Grimm's order is very interesting in this context. It means that core information is produced at the cost of the producing party, but further discovery may be reviewed with some cost-bearing in mind. Nonetheless, it is not clear that putting something of this sort into the rules will produce desirable results, and there might be a risk of undesirable consequences from adding some such provision to the rules. For one thing, there could be very energetic disputes about what is "core" or collateral information. The real emphasis should on proportionality, and that's already in the rules, with a boost in its profile if the current proposed amendments are adopted. Translating these concerns into more focused rule language would be very difficult.

A judge reacted that it would be quite tough to draft a rule with presumptions that could be applied across the full range of cases in federal court. This may best be handled as a practice subject, not by a rule provision.

Another attorney reacted along the same general lines. Given the history (partly outlined in Prof. Marcus's memorandum), the reactions a proposal might prompt are fairly predictable. "This will be opposed on a very profound level." It would be best to see if there are other ways to go about it. And it should not be forgotten that the party seeking discovery bears costs when enormous amounts of information are forthcoming. This attorney has never seen an instance where some lawyer thought "I'll ask for a lot to impose expenses on the other side." People seek information to prove their cases, not to impose expenses on the other side. It's not surprising that some may seek a magic method of limiting discovery to what's really needed. But that may be a chimera, at least if sought by rule. Moreover, cost allocation probably won't do much to deter the really bad actors, to the extent they exist. And cost allocation would be a new and significant additional burden for the courts; it would not save them time or energy.

Another attorney agreed that the review of past rulemaking experiences on this subject is a good reminder that many people will react strongly based on their perceived advantage or disadvantage. "It all depends on where you are sitting." The real challenge is whether the existence or extent of this problem can be objectively identified. We will need to focus on whether a rule change can provide needed focus. One size fits all won't serve here. An effort to try to draw baselines on costs presents very tough policy issues. Perhaps a rule that distinguishes some types of cases (or exempts them) would raise even tougher policy issues. It will be important to keep in mind that excessive discovery (or responses) impose costs on both sides. At the same time, the commentary during the 1998-99 public comment period

suggests that any change will prompt comments fueled by perceived self-interest. Right now, the realities compel lawyers on both sides of the "v." to think long and hard about how much to seek through discovery. This attorney's inclination is to let the present proposed changes have time to sink in before giving serious thought to something more aggressive on cost-bearing.

These thoughts prompted a question: Had the careful calibration of amount of discovery this attorney reported resulted from rules or from orders like the one used by Judge Grimm, or from other factors such as the simple cost of getting too much information? The answer is that it is not prompted by rules or orders, but rather by the dynamics of contemporary litigation. That leads to voluntary discovery parameters, such as limiting the number of custodians whose materials must be reviewed, and/or limiting the search terms to be used.

Another attorney agreed. "The notion of an asymmetry -- of one-way discovery -- is misleading." Being data-poor is also a cost factor, because one has to rely on discovery and wants only an amount that makes sense and is tailored to the case. "You don't want to be the dog that catches the pick-up truck." Lawyers are acutely aware of this risk in today's environment, but it is very difficult to quantify this concern even on a case-by-case basis. Putting it into a rule would be even more difficult.

Another attorney reacted: Actually, the place where the cost disparity looms largest nowadays is not on cost of production but cost of preservation. That cost can be enormous, but it's not what we are discussing here.

Another attorney agreed that in larger cases this is a fair description of the current situation. But there are a significant number of other cases where fishing expeditions occur often. Mega-cases may actually not be the model we should have in mind.

A judge commented that he agreed with much the attorneys had said. He was not optimistic that a rule could be devised that would be appropriate for the broad range of litigation in federal courts today. It remains unclear where, or how frequently, there are real abuses. And the current amendment package has features that ideally will facilitate identifying and dealing with those cases. It would be important to find out whether the current package can do what it is designed to do. At the same time, cost allocation is something the Committee should examine. And it would be wisest to do this with data instead of anecdotes. It will be important to talk to the FJC about developing data that go beyond anecdotes. Although rule changes in the near term would be premature, careful study would take time and could be initiated soon. True, some may be distressed to see the

Committee even examining this subject, but it is an important one that deserves careful evaluation. In somewhat the same vein, the British experience with costs bears looking at.

A reaction was that the U.K. experience may be significantly different. For example, lawyers there have pushed back against the most recent reforms, seeking to exempt all cases involving claims of more than £1 million. And the U.K. experience is heavily affected by the availability of insurance against the cost of paying the other side's cost bill, and by the success incentive fees allowed there, which are paid by the other side but negotiated between the client and lawyer (who know that the only one who will actually have to pay this fee is the other side).

Another judge noted that there has been very strong support for expanded cost-bearing from some who have commented, and that a hearing was held in Congress on this general subject in December, 2011. The chair of a Subcommittee of the House Judiciary Committee that held this hearing supported inquiry into cost-bearing in a letter to the Committee. It is important for the Committee to be responsive to such interest. The hearing in Congress signifies the breadth of interest in this subject. The suggestion that the Committee should look seriously at the issues is what the Rules Enabling Act contemplates it should do. It may be that we begin with some skepticism about whether or how a useful rule change could be identified, but inaction would be quite difficult to justify. Instead, there seem to be several avenues that offer promise:

(1) It would be good to do a literature search to identify what has been written about the effects of cost-bearing provisions.

(2) It would be good to look carefully at Lord Jackson's study of costs in the U.K. That look should take account, however, of the very significant differences between the U.K. system and ours. It has a "full indemnity" system, very different from the American Rule that each litigant bears its own costs. It consequently has a fairly elaborate and longstanding system of cost masters who apportion costs after the case is over. And (as noted above) the entire handling of these issues has recently been affected by the availability of insurance.

(3) The FJC should be approached. Like other governmental units, it is operating under significant fiscal constraints. We must be cautious about asking for help that would overstretch FJC Research. But perhaps the data from the 2009 closed case survey can be mined to provide some insights, and it would be valuable to try to determine now if there are cost-effective ways to gather data more closely

calibrated to these specific issues.

(4) It might be good to solicit input from outside groups. If we were to proceed with a rule proposal, we could expect those groups to offer their views then. It may be best to try to involve them now, both in terms of what they can offer in the way of data, and (perhaps) in terms of ways to generate more data.

This would not be a wasted effort; even if the result is that the Committee concludes that the current package of amendments sufficiently addresses these concerns, it may be very important for us to have a full explanation of why we reached this conclusion. Without a firm basis in data, we cannot assume that everyone will accept our conclusion.

Another judge asked how we could get beyond the anecdotal. Certainly the 2009 and 1997 closed case studies by the FJC did not show a widespread problem of over-discovery. In the Digital Age in which we now operate, would those results still obtain? It was particularly striking how varied the bar group responses to the 1998-99 proposal proved to be. Two sections of the ABA even came out on different sides of the issue. It would be ideal if there were a way to get input from bar groups and the like on the design of a research effort. We need not follow all proposals, but it is probably more useful to find out about them in advance than only later, when the same sort of thing might be an objection to the data-gathering method actually adopted. On the other hand, it could be that inviting suggestions now about how to design a research effort would prompt more objections later from all those whose suggestions were not followed.

It is not yet time to consider a mini-conference, even though such an event might be extremely helpful if this effort moves forward. For the present, the main issue is what to tell the full Committee at the November meeting. It will be useful then to have a full discussion along the lines of this conference call with the full Committee. It may be useful some time to try to arrange a conference call with U.K. judges experienced in dealing with the issues presented there. Though the institutional attributes of the U.K. system are significantly different from ours, it is likely that proportionality will be the first word out of their mouths. That was the byword of the Lord Woolf reforms in the U.K. in the late 1990s.

Another judge agreed. We should defer serious work on any amendment ideas a reasonable way into the future, in large part to find out how our current package works. And before doing a mini-conference we will need to think about concrete possible amendment ideas. It will be important to make clear then that any such proposals are only intended to be a focus for discussion, and that they are not on their way to inevitable

adoption. In order to have the broadest possible views, it will be important to include those unlikely to embrace the general idea of cost-bearing.

A reaction from an attorney was that reliance on the U.K. system could become a "flash point." To shift to something like that could even rise to the level of requiring a constitutional change. At some point, the intensity of debate might deter clear thought. "Don't issue a call to arms any time soon."

It was noted that Texas has had a rule that appears to embrace cost-bearing for some time; perhaps data could be gathered on the results of that rule. In addition, IAALS has been gathering data on related topics; maybe it has data of the sort we are seeking.

A further caution about avoiding anything that could become a flash point was emphasized. The goal now is to obtain the broadest sort of real data. For the November meeting, the necessary ingredients in the agenda book probably include Prof. Marcus's background memo, the notes on this conference call, and a short memo introducing the issues. There should be sufficient time in November for a full discussion with the full Committee. And before that, perhaps a week or two before the meeting, it would be good for the Subcommittee to confer by phone again to touch bases on where things stand.

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INTRODUCTION TO PROPOSALS FOR COST-BEARING PROVISIONS IN THE RULES

Rick Marcus
(Sept. 6, 2013)

The purpose of this memorandum is to provide some additional background for the Sept. 16 exploratory conference call about addressing cost-bearing in the rules. Judge Grimm has already introduced the issues. The goal of this memorandum is to provide some additional background about the way the rules have addressed (or not addressed) these issues, and the reaction in 1998-99 to a proposal then to add a cost-bearing provision regarding disproportionate discovery requests. As an Appendix, the memo includes the public comments on that 1998 proposal.

As things develop on the cost-bearing front, the inquiry into past experience may expand. But as an introduction, some information may be helpful.

1980 amendments -- cost-bearing aspect to discovery conference

In 1978, a proposed set of amendments to the rules was published for public comment. Probably the most prominent among those proposals was a change to Rule 26(b)(1) that was later withdrawn. Also included was a new Rule 26(f), regarding a discovery conference. The Committee Note said that "[i]t is not contemplated that requests for discovery conferences will be made routinely." Instead, counsel were to try to confer among themselves to avoid the need for such a meeting with the judge, and the Note suggested that "[s]anctions may be imposed upon counsel who initiates a request without good cause as well as upon counsel who fails to cooperate with counsel who seeks agreement." It added:

> The Committee is extremely reluctant even to appear to suggest additional burdens for the district court. It proposes the discovery conference for the exceptional case in which counsel are unable to discharge their responsibility for conducting discovery without intervention by the court. In such a case, early intervention by the court appears preferable to a series of motions to compel or to limit discovery.

So this was a very different creature from the Rule 26(f) conference we know today, which is to occur in most cases and be followed by entry of the scheduling order. Indeed, neither the proportionality provisions nor the requirement of more active judicial management (both added in 1983) were yet in the rules.

The 1980 version of Rule 26(f) included the following provisions:

> Following the discovery conference, the court shall enter an order identifying the issues for discovery purposes, establishing a plan and schedule of discovery, setting limitations upon discovery if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the case.
>
> The court may exercise powers under Title 28 U.S.C. § 1927 and Rule 37(e) to impose sanctions for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan by agreement.

These particular features did not receive attention in the Committee Note, but it should be apparent that the thrust was that the entire discovery conference apparatus was to apply only to exceptional cases. See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 624-25 (1978).

The initial public reaction to the Rule 26(b)(1) scope proposal was quite vigorous, and the Advisory Committee published a revised package in 1979 that omitted that amendment but retained the new Rule 26(f). See Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 80 F.R.D. 323 (1979). For more general background, see Marcus, Discovery Containment Redux, 39 Bos. Col. L. Rev. 747, 756-60 (1998).

The 1979 Committee Note still said that "[i]t is not contemplated that requests for discovery conferences will be made routinely," and it added the following (which may indicate that feedback from the first round of public comment suggested greater receptivity on the bench to the idea of supervising discovery):

> A number of courts routinely consider discovery matters in preliminary pretrial conferences held shortly after the pleadings are closed. This subdivision does not interfere with such a practice. It authorizes the court to combine a discovery conference with a pretrial conference under Rule 16 if a pretrial conference is held sufficiently early to secure judicial intervention to prevent or curb abuse.

The 1979 Rule 26(f) proposal was adopted as published. See Amendments to the Federal Rules of Civil Procedure, 80 F.R.D. 521 (1980). Justice Powell, joined by Justices Stewart and Rehnquist, dissented from the adoption of the amendment package, not because there was anything wrong with these "modest amendments," id. at 523, but rather because they did not do enough. Justice Powell argued that "the changes embodied in the amendments fall short of those needed to accomplish reforms in civil litigation that are long overdue." Id. at 521. He added

(id. at 523):

> Lawyers devote an enormous number of "chargeable hours" to the practice of discovery. We may assume that discovery usually is conducted in good faith. Yet all too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate. Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system.

So far as I am aware, the 1980 discovery conference was not much used, and the cost-allocation provisions even less used. So this is a cost-bearing model that was intended for the exceptional case and was not much used in such cases.

1983 -- Proportionality and case management

In 1983, further amendments implemented much of what we find now in the rules regarding case management; the Rule 16 changes that continue to this day (with revisions) were installed then. In addition, the 1983 amendments introduced into Rule 26 the concept of proportionality.

Not too long after the new rules became effective, Magistrate Judge Wayne Brazil (soon to become a member of the Advisory Committee) gave voice to the goal of proportionality in In re Convergent Technologies, 108 F.R.D. 328, 331 (N.D. Cal. 1985):

> Discovery is not now and never was free. Discovery is expensive. The drafters of the 1983 amendments to sections (b) and (g) of Rule 26 formally recognized that fact by superimposing the concept of proportionality on all behavior in the discovery arena. It is no longer sufficient, as a precondition for conducting discovery, to show that the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." After satisfying this threshold requirement counsel also *must* make a common sense determination, taking into account all the circumstances, that the information sought is of sufficient potential significance to justify the burden the discovery probe imposes, that the discovery tool selected is the most efficacious of the means that might be used to acquire the desired information (taking into account cost effectiveness and the nature of the information being sought), and that the timing of the probe is sensible, i.e., that there is no

other juncture in the pretrial period when there would be a clearly happier balance between the benefit derived from and the burdens imposed by the particular discovery effort.

This articulation of the responsibilities counsel must assume in conducting or responding to discovery may make it appear that the 1983 amendments require counsel to conduct complex analyses each time they take action in the discovery arena. Not so. What the 1983 amendments require is, at heart, very simple: good faith and common sense.

1993 amendments
Initial disclosure and routine
Rule 26(f) conferences

In 1991, the Advisory Committee published another package of amendment proposals. Included were a proposed initial disclosure requirement and a new Rule 26(f) (replacing the 1980 version) that directed the parties to meet and confer in most cases to formulate a discovery plan that they would then submit to the court as part of the Rule 16 case management effort. As most are likely to recall, the initial disclosure proposal provoked a strong reaction. For discussion, see Marcus, Of Babies and Bathwater: The Prospects for Procedural Progress, 59 Brook. L. Rev. 761, 805-12 (1993) (describing the initial disclosure controversy).

1998 cost-bearing proposal

In 1996, the Advisory Committee inaugurated its Discovery Project, which was intended to undertake a comprehensive review of discovery issues. After considerable study (including a mini-conference at Hastings in January, 1997, and a two-day conference at Boston College in September, 1977, and based on an extensive study of recently closed cases by FJC Research), the Advisory Committee produced a package of amendment proposals that was published for public comment in 1998. Among those proposals was the revision of Rule 26(b)(1) into essentially its present form (now proposed to be changed again in the package of proposed amendments published in August).

The published package included a proposal to add the following provision to Rule 34(b):

> On motion under Rule 37(a) or Rule 26(c), or on its own motion, the court shall -- if appropriate to implement the limitations of Rule 26(b)(2)((i), (ii), or (iii) [current Rule 26(b)(2)(C)(i), (ii), and (iii)] -- limit the discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party.

Civil Procedure and Evidence, 181 F.R.D. 18, 65-66 (1998).

The Committee Note accompanying this proposal provided (id. at 89-91):

> The amendment makes explicit the court's authority to condition document production on payment by the party seeking discovery of part or all of the reasonable costs of that document production if the request exceeds the limitations of Rule 26(b)(1)(i), (ii), or (iii). This authority was implicit in the 1983 adoption of Rule 26(b)(2), which states that in implementing its limitations the court may act on its own initiative or pursuant to a motion under Rule 26(c). The court continues to have such authority with regard to all discovery devices. If the court concludes that a proposed deposition, interrogatory, or request for admission exceeds the limitations of Rule 26(b)(2)(i), (ii), or (iii), it may, under authority of that rule and Rule 26(c), deny discovery or allow it only if the party seeking it pays part or all of the reasonable costs.
>
> This authority to condition discovery on cost-bearing is made explicit with regard to document discovery because the Committee has been informed that in some cases document discovery poses particularly significant problems of disproportionate cost. Cf. Rule 45(c)(2)(B) (directing the court to protect a nonparty against "significant expense" in connection with document production required by a subpoena). The Federal Judicial Center's 1997 survey of lawyers found that "[o]f all the discovery devices we examined, document production stands out as the most problem-laden." T. Willging, J. Shapard, D. Stienstra & D. Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change, at 36 (1997). These problems were "far more likely to be reported by attorneys whose cases involved high stakes, but even in low-to-medium stakes cases . . . 36% of the attorneys reported problems with document production." *Id* at 35. Yet it appears that the limitations of Rule 26(b)(2) have not been much implemented by courts, even in connection with document discovery. See 8 Federal Practice & Procedure § 2008.1 at 121. Accordingly, it appears worthwhile to make the authority for a cost-bearing order explicit in regard to document discovery.
>
> Cost-bearing might most often be employed in connection with limitation (iii), but it could be used as well for proposed discovery exceeding limitation (i) or (ii). It is not expected that this cost-bearing would be used routinely; such an order is only authorized when proposed discovery exceeds the limitations of subdivision (b)(2). But it cannot be said that such excesses might occur only in certain types of cases; even in "ordinary" litigation it is

possible that a given document request would be disproportionate or otherwise unwarranted.

The court may employ this authority if doing so would be "appropriate to implement the provisions of Rule 26(b)(2)(i), (ii), or (iii." In any situation in which a document request exceeds these limitations, the court may fashion an appropriate order including cost-bearing. When appropriate it could, for example, order that some requests be fully satisfied because they are not disproportionate, excuse compliance with certain requests altogether, and condition production in response to other requests on payment by the party seeking the discovery of part or all of the costs of complying with the request. In making the determination whether to order cost-bearing, the court should ensure that only reasonable costs are included, and (as suggested by Rule 26(b)(2)(iii)) it may take account of the parties' relative resources in determining whether it is appropriate for the party seeking discovery to shoulder part or all of the cost of responding to the discovery.

The court may enter such a cost-bearing order in connection with a Rule 37(a) motion by the party seeking discovery, or on a Rule 26(c) motion by the party opposing discovery. The responding party may raise the limits of Rule 26(b)(2) in its objection to the document request or in a Rule 26(c) motion. Alternatively, as under Rule 26(b)(2), the court may act on its own initiative, either in a Rule 16(b) scheduling order or otherwise.

The invitation for public comment offered an alternative provision to be inserted directly into Rule 26(b)(2) (id. at 37):

> The court shall limit the frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule ~~shall be limited by the court~~, or require a party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party, if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

The invitation for comment also offered the following explanation for this alternative to the Rule 34(b) proposal (id.

at 38):

> There are two arguments for inclusion of this cost-bearing provision in Rule 26(b)(2). First, as a policy matter it is more evenhanded and complete to include the provision there. Treatment in Rule 34(b) may be seen as primarily benefitting defendants, who are usually the parties with large repositories of documentary information. Depositions, on the other hand, may be exceedingly burdensome to plaintiffs, and the placement of the provision in Rule 26(b)(2) would make explicit its application to other forms of discovery, including depositions.
>
> Second, as a matter of drafting, the cost-bearing provision fits better in Rule 26(b)(2). Including it in Rule 34(b) creates the possibility of a negative implication about the power of the court to enter a similar order with regard to other types of discovery. The draft Committee Note to Rule 34(b) tries to defuse that implication, but this risk remains. Moreover, there is a dissonance between Rule 26(b)(2), which says that if there is a violation of (i), (ii), or (iii) the discovery shall be limited, and Rule 34(b), which says it does not have to be limited if the party seeking discovery will pay. It is true that, in a way, this dissonance points up the apparent authority to enter such an order under the current provision with regard to other types of discovery, but that is also another way of recognizing the tension that dealing with the problem in Rule 34(b) creates.

As noted above, the summaries of the resulting public commentary are included as an Appendix.

After the public comment period, the Advisory Committee decided to include the cost-bearing provision in Rule 26(b)(2) rather than Rule 34(b), and the Standing Committee approved it for submission to the Judicial Conference, but the Judicial Conference removed it from the package of amendments that went into effect in 2000. See the Communication from the Chief Justice to Congress transmitting the 2000 amendments to the rules, 192 F.R.D. 340 (2000), including the Memorandum from Judge Paul Niemeyer to Judge Anthony Scirica, 192 F.R.D. 354, 360 n.* (2000) ("At its September 15, 1999, session the Judicial Conference of the United States did not approve the proposed cost-bearing provision").

Rule 26(b)(2)(B) in 2006

In 2006, Rule 26(b)(2)(B) was added to address discovery of sources of electronically stored information that are not reasonably accessible due to burden or cost. Even if the showing is made that the sources are not reasonably accessible, the party

seeking discovery may ask the court to order production by showing good cause. The rule adds that: "The court may specify conditions for the discovery." The Committee Note explains:

> The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

Current Rule 26(c) proposal

It seems worth noting that our current proposed amendment package includes an amendment to Rule 26(c)(1)(B) to authorize that a protective order issued for good cause could include a provision "specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery." The draft Committee Note observes:

> Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that specify terms allocating expenses for disclosure or discovery. Authority to enter such orders is included in the present rule, and courts are coming to exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority.

* * * * *

Going forward, we will address new issues as well as enduring ones. But familiarity with prior experience, at least in general terms, seems useful.

APPENDIX

Summary of public comments on proposed
cost-bearing amendment to Rule 34(b)
1998-99

8. Rule 34(b)

(a) General desirability

Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Supports the addition of explicit cost-bearing provisions.

N.Y. St. Bar Assoc. Comm. & Fed. Lit. Sec, 98-CV-012: This change is unnecessary and misleading. The authority to shift costs already exists under Rule 26(b)(2). Thus, there is no real change. The Section disagrees with the assertion that Rule 26(b)(2) has rarely been applied, citing four cases. The FJC Study found that document requests generated the largest number of discovery problems, but these were not generally in the overproduction area. Thus, if there were a change it would not address the problems identified. The FJC Survey does not show that the cost of document production is a problem; even in the high-stakes cases in which such costs are relatively high, they are commensurate with the stakes involved. Moreover, the proposed amendment is unclear on what costs may be shifted. If attorneys' fees, client overhead and the like are included, the proposal involves funding an adversary's case.

Maryland Defense Counsel, Inc., 98-CV-018: Supports the proposed amendment. Document production is not only the most expensive, but also the most institutionally disruptive aspect of discovery for the clients represented by this organization's lawyers. Suggests that the Note stress that an outright bar on proposed discovery often may be preferable to simply shifting its overtly quantifiable costs.

J. Ric Gass, 98-CV-031: (individually and as President of Fed. of Ins. & Corp. Counsel) "The burden of the cost of production of documents should be on the party initiating the request. That burden will make 'discovery initiators' think before making abusive document requests."

Assoc. of the Bar of the City of N.Y., 98-CV-039: Endorses the change, so long as either the rule itself or the Committee Note makes it clear that the power granted should be applied only in the unusual or exceptional case. This is consistent with the general trend of making discovery more efficient. It would give the party requesting discovery an incentive to limit requests and

lessen the financial burden on the producing party. But the provision should be used only in the unusual or exceptional case. Liberal application of the proposed rule would unfairly tilt the playing field in favor of litigants with larger financial resources.

James A. Grutz, 98-CV-040: Opposes the change. If costs become onerous, a litigant can request the court's aid. The provision is unnecessary.

Thomas J. Conlin, 98-CV-041: Opposes the change. If a document request is excessive, it should be limited in accordance with the current rules. The court already can protect parties against excessive expenses, and it should not be permitting or requiring a response to excessive requests even if the requesting party has to pay some of the cost.

John Borman, 98-CV-043: Opposes the change. It deters parties seeking discovery from being aggressive in pursuing information, and it will encourage responding parties to employ this new device to resist. It places the burden of proving that the benefit of the discovery sought outweighs its burden or expense on the party who does not even know what is in the material.

Michael J. Miller, 98-CV-047: This proposal will be used as a weapon by corporations who seek to prevent the discovery of relevant information under the guise of cost.

ABA Section of Litigation, 98-CV-050: Supports the proposal because it encourages courts to overcome their reluctance to apply existing limitations on excessive discovery, and it offers courts an alternative when they view a complete denial of excessive discovery as too harsh. The cost-bearing proposal will not deter legitimate discovery because, by definition, it applies only when a document demand exceeds the limitations of Rule 26. The court's power to shift these costs is already implicit in Rule 26(c). The Antitrust Section opposes this proposal because it believes that it could create a new standard for discovery that is dependent an a party's financial ability to pay for discovery as opposed to the current standard based on relevance, etc. Because of this important concern, the Litigation Section suggests that the Note urge that the courts be particularly sensitive to this issue.

Richard L. Duncan, 98-CV-053: Opposes this proposal. It will create more litigation.

Charles F. Preuss, 98-CV-060: Supports this explicit authorization to impose part or all of the costs of document discovery that exceeds the limits of Rule 26(b)(2).

Lawyers' Club of San Francisco, 98-CV-061: The probable impact

of the proposed amendment would be to increase the prevalence of cost-bearing orders. Doing so would increase financial disincentives for individuals to conduct litigation against corporate and institutional defendants. As such, it would impede and restrict discovery unnecessarily by individual claimants.

Jay H. Tressler, 98-CV-076: Applauds this proposal.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Opposes the proposal. The provision is unnecessary, because the courts already have the power to do this. At the same time, cost-bearing is not to be applied routinely. Given these two propositions, the Committee can't comprehend the benefit of the amendment. More generally, the Committee would favor a direct limitation on discovery as opposed to cost-shifting, which may favor deep-pocket litigants. It might even further use of discovery to harass.

Michael S. Allred, 98-CV-081: Opposes the change. This is biased in favor of not making discovery, but gives no remedy if discovery is unjustifiably refused.

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: Supports the change. Document production is where the most serious problems currently are found. It is appropriate that if a party wishes to pursue broad and unlimited forms of document production, it should pay the reasonable expenses that result.

National Assoc. of Consumer Advocates, 98-CV-120: Opposes the change. It will lead to additional delay, ancillary litigation, and increased costs. Objections by defendants that document production costs too much are full of sound and fury but not based on valid concerns. Usually the parties can reach an equitable solution to the costs of document production. If that doesn't happen, the current rules provide adequate tools for the problem. Since this is a power the courts already have under Rule 26(c) and 26(b)(2), the change is not needed. It may cause judges to cast an especially jaundiced eye on requests for documents, above and beyond the limits that already exist. Because defendants have most of the documents in the cases handled by N.A.C.A. members, this change will have a disparate impact on plaintiffs.

National Assoc. of Railroad Trial Counsel, 98-CV-155: Supports the changes. They will assist the trial court in controlling discovery abuses in document production.

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: Endorses the change. Courts already have the power to do this, but there is no harm in saying so expressly.

Federal Practice Section, Conn. Bar Ass'n, 98-CV-157: Endorses the rule, understanding it to say that everything beyond the

"claims and defenses" scope would be allowed only on payment of costs.

Penn. Trial Lawyers Ass'n, 98-CV-159: Supports the amendment as written because it permits the court to reasonably limit discovery and gives the judge discretion to extend the limits on a good cause showing, providing that the cost is to be borne by the party seeking discovery.

Richard C. Miller, 98-CV-162: Opposes the change. It "strikes at the heart of our juridical system by eliminating access to justice." Defendants already have an incentive to draw things out and increase expense to defeat claims. This change will magnify that tendency.

William C. Hopkins, 98-CV-165: The cost shifting proposal means that plaintiffs will face a price tag on the first discovery request. This is not desirable.

Timothy W. Monsees, 98-CV-165: He is afraid this will extend to more than simple copying costs, which no one has a problem with paying. He envisions getting a bill for a couple of thousand dollars for defendants to hire people to search their records. Why should a party have to pay for production of relevant material?

Mary Beth Clune, 98-CV-165: This change would be very unfair to plaintiffs. In employment cases, the defendant has all the documents, and such defendants often produce files of meaningless documents in an effort to bury the relevant documents. Requiring the plaintiff to finance the "reasonable expenses" of discovery will likely lead to abuse by defendants.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) Supports the change. In pharmaceutical litigation, plaintiffs routinely seek discovery of all reported adverse events, clinical trials and other documents not relevant to the core issues in the case. It would be preferable if the discovery of these materials were not permitted. The company strongly opposes cost shifting with respect to depositions. The appropriate cost control measure there is to limit the duration of the deposition.

Gary M. Berne, 98-CV-175: The change is unnecessary, for courts already have the authority to take needed measures. The FJC report shows that the main problem is not overproduction, but failure to produce, which the amendments don't address.

Public Citizen Litigation Group, 98-CV-181: Does not support. The rule provision is not needed, and may lead to the incorrect negative inference that cost-bearing is only authorized in connection with document discovery.

Association of Trial Lawyers of America, 98-CV-183: Opposes the change. ATLA generally opposes proposals to institute cost-shifting measures as leading to abrogation of the American Rule that parties bear their own costs of litigation. Even if the proposal only makes explicit authority that was already in the rules, it appears a move in the wrong direction.

James B. Ragan, 98-CV-188: Concerned about the proposed change. It purports to shift the burden to the party seeking discovery in some instances. In fact, this should be a situation that never occurs. Rule 26(b)(2) directs the court to limit excessive discovery, so the circumstance identified in the proposed amendment should not happen.

Ohio Academy of Trial Lawyers, 98-CV-189: Opposed. This is not needed, since the court already has the power under Rule 37 to impose this sanction.

Hon. Carl J. Barbier (E.D. La.), 98-CV-190: Although the Committee Note says that this cost-shifting should not be a routine matter, this will certainly result in additional motions to determine in any particular case whether or not the costs should be shifted to the requesting party.

Philadelphia Bar Assoc., 98-CV-193: Supports the amendment. Placing an explicit cost-bearing provision in Rule 34 might clarify and reinforce the judge's ability to condition discovery on payment of costs. This might encourage more negotiation and cooperation in cases where large document productions are involved.

James C. Sturdevant, 98-CV-194: The Committee does not say that this authority is only to be used in "extraordinary" cases or "massive discovery cases." There is a very real potential that it will be invoked in many cases to support cost-bearing, which would be undesirable. The courts already have adequate authority to deal with abuse.

Maryland Trial Lawyers Assoc., 98-CV-195: Urges rejection. Often the injured party is at an economic disadvantage to the opposing entity, which is usually insured. Coupled with the limitation of disclosure to supporting information, this change will work a harsh result. It is unnecessary and unduly restrictive.

James B. McIver, 98-CV-196: (98-CV-203 is exactly the same as no. 196 and is not separately summarized) This will have the effect of harming victims, consumers, and other plaintiffs.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Opposes the change. This will establish what some judges will view as a presumption that documents should only be produced on payment of

the other party's costs of production. It would also establish a two-track system of justice based on wealth.

Trial Lawyers for Public Justice, 98-CV-201: Courts already have this power, and the proposal is therefore redundant. But the signal to judges is obviously that they should impose sanctions more frequently against parties who ask for too much information, and that they have not imposed such sanctions with sufficient regularity in the past. This will strengthen the hands of defendants and encourage stonewalling.

Minn. State Bar Assoc. Court Rules and Admin. Comm. Subcommittee on Federal Rules, 98-CV-202: Supports the change.

Sharon J. Arkin, 98-CV-204: Opposes the change. The defense deliberately engages in dump truck tactics. If this change is adopted, the rules will impose on the consumer the obligation to pay for the costs of such productions, and they will be further victimized by corporate defendants.

Nicholas J. Wittner, 98-CV-205: (on behalf of Nissan North America) Supports the proposal. It will reduce needless discovery requests and related expense.

F.B.I., 98-CV-214: Supports the change.

Michigan Trial Lawyers Assoc., 98-CV-217: Opposes the proposal. Courts already have the power to impose this sanction. But making it explicit in the rules will send a signal to judges to impose sanctions more frequently. This will encourage responding parties to stonewall.

Stuart A. Ollanik, 98-CV-226: A general rule promoting cost-shifting is an invitation to evidence suppression. It will be in the responding party's best interests to exaggerate the cost of production, in order to make access to relevant information prohibitively expensive. It will be one more tool for hiding the facts.

Jon B. Comstok, 98-CV-228: This is an excellent idea. He realizes it is somewhat redundant because the authority already exists in Rule 26. But it is laudable to make modifications that will somehow get the judge to become more involved in discovery.

Edward D. Robertson, 98-CV-230: Opposes the proposal. It is a first, and ill-advised, step by the representatives of corporate America toward the English system that requires losers to pay. Defendants are the primary violators of reasonable discovery and the chief advocates of discovery limitation. If the proposed rule is adopted defendants will file for costs to pay for their excessive responses to reasonable discovery requests.

Martha K. Wivell, 98-CV-236: The rule is unnecessary because there is already authority to do this. Nonetheless, defendants will seek to shift costs in almost every products liability case, for they always say the costs are too high. Then the proof of the benefit of discovery is placed on the party who does not even know what there is to be discovered.

Jeffrey P. Foote, 98-CV-237: Opposes the change. This will simply lead to further litigation.

Eastman Chem. Corp., 98-CV-244: Strongly favors the amendment. It notes, however, that a better course would be forbidding discovery altogether.

Anthony Tarricone, 98-CV-255: Opposes the change. There is no need to revise the rule in this manner.

New Mexico Trial Lawyers Ass'n, 98-CV-261: Finds the change troublesome. It appears to be an invitation to increased litigation about what constitutes an excessive request.

Robert A. Boardman, 98-CV-262: (Gen. Counsel, Navistar Int'l Corp.) The cost-bearing provision will hopefully encourage a litigant to think twice before requesting every conceivable document, no matter how attenuated its relevancy. Navistar has been an easy target for burdensome discovery about information remote in time from the events in suit.

U.S. Dep't of Justice, 98-CV-266: Because this proposal reinforces the proposed amendment to Rule 26(b)(1) limiting access to information relevant to the "subject matter of the litigation," it is subject to the same concerns the Department presented about that change. The Department would be less concerned about the proposed change to Rule 34 if the "subject matter" standard of current Rule 26(b)(1) were retained. Thus, if the current Rule 26(b)(1) is retained, and if the proposed amendment retains its reference to Rule 26(b)(2)(i)-(iii), the Department supports this proposal.

Courts, Lawyers and Administration of Justice Section, Dist. of Columbia Bar, 98-CV-267: The Section agrees with this proposal. The Committee should make it clear, however, that the change is not intended to change the standard that judges should apply in deciding whether to condition discovery on payment of reasonable expenses.

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee supports the amendment. It is apparent that the court already has this power, but the amendment makes the authority clear. Perhaps even more beneficial is the Committee Note, which provides considerable guidance to everyone as to when and how these costs may be assessed.

Thomas E. Willging (Fed. Jud. Ctr.), 98-CV-270: Based on a further review of the data collected in the FJC survey, prompted by concerns about the potential impact of cost-bearing on civil rights and employment discrimination litigation, this comment reports the results of the further examination of the FJC survey data. It includes tables providing the relevant data in more detail, and generally provides more detail than can easily be included in a summary of this sort. The study found "few meaningful differences between civil rights cases and non-civil rights cases" that might bear on the operation of proposed Rule 34(b). Discovery problems and expenses related to those problems differed little between the two groups of cases, and the percentage of document production expenses deemed unnecessary, and document production expenses as a proportion of stakes, were comparable in both sets of cases (civil rights and non-civil rights). The differences that were observed included that defendants in non-employment civil rights cases were more likely to attribute discovery problems to pursuit of discovery disproportionate to the needs of the case; civil rights cases had a modestly higher proportion of litigation expenses devoted to discovery; nonmonetary stakes were more likely to be of concern to clients in civil rights cases; and total litigation expenses were a higher proportion of stakes in civil rights cases (but stakes were considerably lower in such cases). Complex cases have higher expenses than non-complex cases, but for complex civil rights cases the dollar amounts of discovery expenses, especially for document production, were far lower than in complex non-civil rights cases. Overall, the report offers the following observations: "First, because discovery and particularly document production expenses are relatively low in complex civil rights cases, defendants would have less room to argue that a judge should impose cost-bearing or cost-sharing remedies on the plaintiff. Second, our finding that total litigaton expenses were a higher proportion of litigation stakes in civil rights cases may give defendants some basis for arguing that discovery requests are disproportionate to the stakes in the case and that cost-bearing or cost-sharing should be ordered. On the other hand, our finding that nonmonetary stakes are more likely to be of concern in civil rights cases may give plaintiffs a counterargument in some cases. Third, one might read our finding that defendants are more likely to attribute discovery problems to pursuit of disproportionate discovery as suggesting that defendants' attorneys will look for opportunitites to act on that attribution by moving for cost-bearing remedies."

Testimony

Baltimore Hearing

Robert E. Scott, Jr., prepared stmt. and Tr. 4-18: (president of Defense Research Institute and representing it) This is a

positive step, giving litigants the opportunity to obtain items to which they are not entitled by right under Rule 26(b)(2) by paying the costs of production. This will not shift the costs of document discovery related to the core allegations of the case, but recognizes that the court should not allow expansive discover on tangential matters without consideration of reallocating the costs and burdens involved in ordering production.

Allen D. Black, prepared stmt. and Tr. 18-30: Opposes the change. This will favor well-heeled litigants, whether plaintiffs or defendants. It thus runs against the basic democratic underpinnings of the American judicial system. It will also add a new layer of litigation to a substantial number of cases--to determine who should pay what portion of the costs of document production. Yet the proposal provides no standards whatsoever to guide the court's decision about whether and how to shift these discovery costs. The invocation of Rule 26(b)(2) aggravates the problem because it contains no objective standard and instead asks the court to make an impossible prediction concerning the potential value of the proposed discovery. Virtually every producing party will argue vehemently that the burdens and costs outweigh the possible benefit of the proposed discovery. Should the court take evidence on the likely cost of discovery to decide these disputes? Even if it could do that, how could it determine the "likely benefit" of proposed discovery? This will produce a whole new layer of litigation about who will pay and how much. (Tr. 25-26)

Robert Klein (Tr. 45-58): (on behalf of Maryland Defense Counsel) Supports the change. The policy of proportionality has been overlooked, and this should re-awaken the parties to the existence of this limitation on discovery. Notes that document discovery is the only type of discovery that cannot have numerical limitations. Interrogatories and depositions do in the national rules, and requests for admissions can be limited by local rule, but not document requests.

F. Paul Bland, Tr. 89-106: (on behalf of Trial Lawyers for Public Justice) Opposes the proposal. The authority already exists without the change. The goal, then, is again to send a signal that the problem judges should address is over-discovery even though the evidence does not support that concern.

Prof. Edward D. Cavanaugh, prepared stmt. and Tr. 116-26: Opposes the change. Courts already have this power, and the Committee Note acknowledges that the power is not to be used routinely. He would favor a direct limitation on discovery as opposed to a cost-shifting limitation.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: Supports the proposal. Believes that emphasis on the proportionality provisions is essential since they have been overlooked or

misapplied in the past. Believes that the impecunious plaintiff argument is specious. In his entire career as a defendant's lawyer, he has never encountered a case in which a plaintiff in a personal injury case reimbursed counsel for costs in an unsuccessful case. The real issue is that this is an investment decision for counsel for plaintiffs, and this is not a violation of professional responsibility rules. This might be different in other sorts of cases -- employment discrimination, for example, with pro se plaintiffs. But in those cases the proposed change allows the judge to take the ability of the plaintiff's side to bear the expense into account. His own experience, however, has been limited to cases involving plaintiffs with lawyers who took the case on a contingency fee basis.

San Francisco Hearing

Maxwell M. Blecher, prepared stmt. and Tr. 5-14: Together with the proposed change to Rule 26(b)(1), this is pernicious and gives a collective message that there should be less discovery to plaintiff at increased cost. The standards set forth in Rule 26(b)(2) are so vague that the court can't sensibly apply them. Moreover, if costs are shifted and the documents contain a "silver bullet" there should be another hearing to seek reimbursement. This is not worth it. The basic message is that even if plaintiff manages to persuade the judge to expand discovery to the subject matter scope, plaintiff must pay for the additional discovery to that point. He has nothing against making plaintiff pay if the specific discovery foray is unduly expensive. For example, if defendant usually has e-mail messages deleted upon receipt and plaintiff wants to require a hugely expensive effort to locate these deleted messages, there is nothing wrong with presenting plaintiff with the option of paying for that material. But that is different from institutionalizing the process of shifting costs every time plaintiff goes beyond a claim or defense. This is how he reads the current proposal. He feels that the judge could both find that there is good cause and that the plaintiff has to pay for the added discovery. In the real world, judges will be likely to link the two and think that as soon as plaintiff gets beyond claims and defenses it's pay as you go. At present, the limitations of Rule 26(b)(2) are only applied in the most exceptional cases, where a party does a huge and marginal search, such as reconstructing electronic data. But the rule will encourage the same sort of thing in many cases. This will institutionalize a process that is already available today. It will up the stakes in antitrust litigation, which is already very expensive. (Tr. 7-10)

Kevin J. Dunne, prepared stmt. and Tr. 14-23: (President of Lawyers for Civil Justice) This change can work in tandem with the revision of Rule 26(b)(1), and the court could shift costs if it found good cause to allow discovery to the subject matter limit. But courts should be admonished not to assume that a

party is automatically entitled to discovery it will pay for. There are now plaintiffs' law firms which are as wealthy as small corporations, and their willingness to pay should not control whether irrelevant discovery is allowed. The rich plaintiffs' lawyers won't hesitate to put up the money for such discovery forays, so their willingness to pay should not be determinative. They will continue going after the same stuff whether or not they have to pay.

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Shell emphatically endorses the proposed change. Document production abuses are at the core of most discovery problems, particularly in larger or more complex matters. Shell strongly urges that the rule or the Note state that "court-managed" discovery on a good cause showing under Rule 26(b)(1) presumptively be subject to cost shifting, absent a showing of bad faith on the part of the responding party.

H. Thomas Wells, prepared stmt. and Tr. 47-60: This change is more of a clarification of the existing rule's intent than a new rule change. The authority has always been present in the existing rule, and the problem is that it was rarely invoked in the manner originally intended. The proposed change adequately recognizes the original intent of the provisions.

Hon. Owen Panner (D. Ore.), prepared stmt. and Tr. 74-87: In every speech he makes to young lawyers or bars, he talks about Rule 26(b)(2) and seldom gets anyone to bring such concerns to him. He likes this change to encourage attention to this. Notes that he had Shell in his court and did not hear from it on this score. (See testimony of G. Edward Pickle, above.)

Larry R. Veselka, Tr. 99-108: Does not see this change as a particular problem. That's the way to solve problems about costs. (Tr. 107-08)

Mark A. Chavez, prepared stmt. and Tr. 108-17: Opposes the change. It would encourage further resistance to discovery, result in extensive litigation over cost-bearing issues, and inhibit plaintiffs from adequately investigating their claims.

Weldon S. Wood, Tr. 140-46: Supports the change. Document production is where the problems are found. Most discovery is reasonable. It is the exceptional case that causes the problems.

Alfred W. Cortese, Jr., prepared stmt. and Tr. 174-82: Because of the enormous cost that litigants can impose on adversaries, it is essential that the rules recognize the power to require a party seeking non-essential, discretionary discovery to bear the cost of it. At the same time, there should be a limit on a party's ability to impose discovery on an adversary just because it is willing to pay the cost of the discovery.

Chicago Hearing

Elizabeth Cabraser, Tr. 4-16: She fears that this change may lead to a repeat of the kind of collateral litigation that occurred under Rule 11, where every motion was accompanied with a motion for sanctions. The courts already have authority to shift costs in cases where it's truly necessary. She believes there is not a large volume of unnecessary discovery, so that this "solution" may be more of a problem than the problem it seeks to solve. She doesn't think that what we now know about discovery of electronic materials shows that some power like this is needed for that sort of discovery. The problem is that too often what's permissive becomes mandatory.

James J. Johnson, Tr. 47-63: (Gen. Counsel, Procter & Gamble) To date he has not found the existing cost-bearing possibilities helpful to Procter because when judges find out that it is a multi-billion dollar company they don't have any interest in shifting any of its substantial costs of document preparation. (For details on these, see supra section 3(a).) This is at the heart of the unevenness of cost between the discovering party and the producing party. This sort of activity takes place even when both sides are large entities with considerable documents to produce. (Tr. 57-58) He suggests that the Note to this rule suggest cost-bearing as an effective tool for discovery management.

Robert T. Biskup, prepared stmt. and Tr. 73-84: (Ford Motor Co.) This is integrally linked with the proposed Rule 26 scope change because it calls for an ex ante determination about the proper allocation of costs. This would avoid the risk of a new brand of satellite litigation, as with Rule 11. If it works the way Ford thinks it should, the fee shifting issue would be before the court at the time that the issue of expanding to the subject matter limit is also before the court.

John Mulgrew, Jr., prepared stmt. and Tr. 98-101: He agrees with the cost-bearing provision. Documentary discovery requests are among the most costly and time-consuming efforts for defendants. For peripheral materials, courts should have explicit authority to condition discovery on cost-bearing.

David C. Wise, Tr. 113-19: There is already a mechanism in place to deal with these problems when they arise. What this change would do would be to send a message to the defendants to make plaintiffs pay for their discovery. And plaintiffs simply can't pay. Companies like Ford aren't paying anything for their document production; they are simply passing the cost along to the consumer. If there were no link to expanding discovery beyond the claims and defenses, suggesting that if expansion occurs the plaintiff must pay, his opposition to the proposed amendment would be less vigorous.

John M. Beal, prepared stmt. and Tr. 119-26: (Chair, Chi. Bar Assoc. Fed. Civ. Pro. Comm.) The CBA has no objections to this amendment.

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: Opposes the change. This will result in motion practice and satellite litigation. The court already has sufficient authority to deal with problems.

Todd Smith, Tr. 134-47: (on behalf of Assoc. of Tr. Lawyers of America) Opposes the change. This is another proposal to impose costs on individuals, and ATLA is opposed to that.

John H. Beisner, prepared stmt. and Tr. 147-54: Without doubt, this is a positive change. But the Note does not go far enough in stressing that there may be circumstances in which a court should say "no" to proposed discovery. The Note should stress that there should be no presumption that the court should authorize discovery that the propounding party wants, even if it will pay for it.

Jonathan W. Cuneo, prepared stmt. and Tr. 160-65: This change will disadvantage plaintiffs and could restrict the types of cases lawyers in small firms like his could undertake. The existing rules provide adequate protections for defendants. There is no reason to provide more.

Lloyd H. Milliken, prepared stmt. and Tr. 211-17: (president-elect of Defense Res. Inst.) Favors the change. This will not be a sword to be held over the plaintiffs' heads or a shield for defendants. The Note is perfectly clear that this is to happen only in extreme cases, where the discovery is essentially tenuous.

Michael J. Freed, prepared stmt. and Tr. 226-35: The proposal will favor litigants, whether plaintiffs or defendants, that have significant financial resources, over other litigants. It will create a new layer of litigation in a significant number of cases. The reference to the standards in Rule 26(b)(2) really provides no guidance on when this authority should be used.

Douglas S. Grandstaff, prepared stmt. and Tr. 245-51: (Senior Lit. Counsel, Caterpillar, Inc.) Although Caterpillar believes that use of Rule 26(b)(2) to bar excessive discovery altogether would be preferable, this change should give judges a tool to put a quick end to incrementally escalating discovery abuses. However, the Note's statement that the court should take account of the parties' relative resources is at odds with the goal of limiting unnecessary and irrelevant discovery. This comment suggests that a party with few resources is entitled to demand discovery beyond the limitations set by Rule 26 at no cost.

Kevin E. Condron, Tr. 259-67: This may be the most meritorious of the proposals. Document discovery is where the cost is, and it should be curtailed if there is no reason for it.

Robert A. Clifford, prepared stmt.: Opposes the change. The court already has powers to deal with abuse, and it is unnecessary to amend the rule in this way.

Thomas Demetrio, prepared stmt.: This is nothing more than a surreptitious attempt to push the cost of litigation so high that individual citizens will not be able to exercise their rights or seek redress for wrongdoing. "Business builds the 'cost' of legal defense into the 'cost of doing business.' That cost is passed on to the consumer. We already bear our share of the burden of defense costs. By requiring individual litigants to bear the cost again, industry gets not only a free ride but a windfall."

John G. Scriven, prepared stmt.: (Gen. Counsel, Dow Chem. Co.) This change is well worth making, but it is important to recognize that many plaintiffs will only be able to pay a fraction, if any,of the attendant financial costs in any event. Accordingly, the Note should stress that the primary goal should be for the judge to carefully scrutinize any discovery beyond the initial disclosure, and that the presumption should be toward barring that discovery.

(b) Placement of provision

Comments

ABA Section of Litigation, 98-CV-050: The Litigation Section favors including the cost-bearing proposal in Rule 26(b)(2) rather than Rule 34. This would avoid the negative implication that cost shifting is not available for all forms of discovery. It would also avoid an otherwise seeming inconsistency with Rule 26(b)(2), which merely permits courts to "limit" discovery, without mentioning the court's power to shift the cost of discovery.

Philip A. Lacovara, 98-CV-163: Supports the change, but would go further. He believes that the change should be in Rule 26 because document discovery is not the only place where problems exist that should be remedied by this method. Even though the Note says that inclusion in Rule 34 does not take away the power to make such an order in relation to other sorts of discovery, there is a significant risk that it will be so read. But he thinks it should be in Rule 26(b)(1), not Rule 26(b)(2), and that it should go hand in hand with decisions to expand to the "subject matter" limit. As the proposals presently read, it would not seem that a court could find good cause to expand, but then conclude that Rule 26(b)(2) is violated. He would therefore add the following to Rule 26(b)(1):

> If the court finds good cause for ordering discovery of information relevant to the subject matter of the action, the court may require the party seeking this discovery to pay part or all of the reasonable expenses incurred by the responding party.

This kind of provision would protect plaintiffs as well as defendants, for plaintiffs are often burdened by excessive depositions. Unless there is some further provision on recovery of these costs, it would seem that some of them might be taxable under 28 U.S.C. § 1920; in that sense, the discovering party's willingness to press forward is a measure of that party's confidence in the merits of its case as well as the value of the discovery.

Prof. Ettie Ward, 98-CV-172: For the reasons expressed in Judge Niemeyer's transmittal memorandum, suggests that any reference to cost-bearing should be in Rule 26(b)(2) rather than Rule 34(b). That placement is more evenhanded, and it fits better as a drafting matter. Including it in Rule 34 appears to favor defendants and deep-pocket litigants. In addition, the standards for shifting costs are not as clear as they would be if the provision were in Rule 26(b)(2).

Public Citizen Litigation Group, 98-CV-181: Does not support.

But if additional language is to be added, favors the alternative proposal to amend Rule 26(b)(2).

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee recommends that the cost-bearing provision be included in Rule 26(b)(2) rather than in Rule 34(b). This would make it explicit that the authority applies to all types of discovery, including depositions. Additionally, placement in Rule 26(b)(2) eliminates the possibility of a negative implicaton about the power of a court to enter a similar order with regard to other types of discovery, notwithtanding the Committee Note that tries to defuse that implication.

Testimony

Baltimore Hearing

F. Paul Bland, Tr. 89-106: (on behalf of Trial Lawyers for Public Justice) Moving the provision to Rule 26(b)(2) would not be desirable, because that would stress the same message. If that would make the message even broader, it would be worse.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: This provision should be in Rule 34 because that's the only type of discovery that creates the serious problem of disproportionate costs. Both sides do depositions, roughly in equal numbers, and so also with interrogatories. But in personal injury cases, one side has documents and the other does not. That's the way it is.

San Francisco Hearing

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Placing the cost-shifting provision in Rule 34 rather than Rule 26 places the emphasis where it belongs.

H. Thomas Wells, prepared stmt. and Tr. 47-60: Regarding placement of the provision, in his experience a provision limited to document production would reach the most abusive and expensive discovery problems, and that the rule should be so limited.

Alfred W. Cortese, Jr., prepared stmt. and Tr. 174-82: The placement of this provision in Rule 34 is correct, as opposed to Rule 26. The real need for the provision is in Rule 34.

Chicago Hearing

Robert T. Biskup, prepared stmt. and Tr. 73-84: Rule 34 is the right place for this sort of provision to be, rather than Rule 26. This would avoid the risk of a new brand of satellite litigation, as with Rule 11.

Todd Smith, Tr. 134-47: (on behalf of Assoc. of Tr. Lawyers of America) Because ATLA is adamantly opposed to cost shifting, there was no discussion about whether it might be preferable to put such a provision in Rule 26(b)(2) rather than in Rule 34.

Lorna Schofield, Tr. 193-202: (speaking for ABA Section of Litigation) The Section of Litigation favors that the cost-bearing provision be included in Rule 26 rather than Rule 34. There is already implicit power to make such an order, and if the provision is only explicit in Rule 34 that might support the argument that it can't be used for other types of discovery.

Rex K. Linder, prepared stmt.: Suggests that the provision should be included in Rule 26(b)(2), for it should be readily applicable to all discovery and will correspond to the concept of proportionality. It implicitly exists already under Rule 26(b)(2), and there seems no logical reason not to make it express.

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TAB 6A

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Committee on Court Administration and Case Management

At the April meeting this Committee discussed several issues referred by the Committee on Court Administration and Case Management. The discussion is described toward the end of the Minutes. The attached letter from Judge Julie A. Robinson, Chair of CACM, describes reactions to the April discussion.

One of these issues is the possibility that pro se filers might be required to provide the last four digits of their Social Security numbers. The April discussion reflected serious concerns about this possibility. The letter notes that the new CM/ECF system does not currently include fields for Social Security numbers or other personal identifiers. But "The courts and the Administrative Office may consider enhancing this technology at a later date." It may suffice for present purposes to make arrangements to be informed if this subject is brought forward for possible implementation.

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TAB 6B

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COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

August 21, 2013

Honorable David G. Campbell
United States District Court
Sandra Day O'Connor
United States Courthouse
401 West Washington Street, SPC 58
Phoenix, AZ 85003-2156

Dear Judge Campbell:

Thank you for your recent letter providing your Committee's views on the recommendations for civil rules changes that arose in the Court Administration and Case Management (CACM) Committee's policy discussions regarding the Next Generation of the Case Management/Electronic Case Files (CM/ECF) system. You noted that, at Judge Sutton's suggestion, a subcommittee has been formed with members from the various rules committees that will address issues referred by our Committee, including whether a uniform national rule should be adopted regarding the use of notices of electronic filing as certificates of service and the proper handling of records requiring "wet" signatures from third parties. I understand that the subcommittee has already begun its work, and our Committee looks forward to working together with the subcommittee (through our liaison, Judge Coody), to address these issues.

I also appreciate the concerns raised by your Committee regarding our Committee's proposal to amend Federal Rule of Civil Procedure 4(a)(1)(C) to require unrepresented litigants to provide courts with the last four digits of their Social Security numbers and your suggestion that other identifiers be utilized in conjunction with some form of matching technology. At this juncture, the new CM/ECF system envisions providing courts with the option to track these filers, through a database comprised of information manually added by judges and court staff. It does not, however, contemplate any automated technology to match or process this information

provided by pro se filers. Nor does the new system currently include fields for Social Security numbers (or indeed other personal identifiers not currently included on the summons or the civil cover sheet). The courts and the Administrative Office may consider enhancing this technology at a later date.

Finally, thank you for sharing your Committee's views on Judge William G. Young's cost-containment suggestion to expand the use of videoconferencing technology in civil cases, particularly for visiting judges, to save travel funds. Since there is already widespread availability and use of videoconferencing, as well as other technologies, such as electronic files and teleconferences, and CACM and the Intercircuit Assignment Committees continue to encourage the use of all these technologies, I agree that an effort to amend the rules to encourage the use of videoconferencing may well not be necessary at this time.

Sincerely,

Julie A. Robinson

cc: Judge Jeffrey Sutton
Jonathan Rose
Benjamin Robinson
Mark S. Miskovsky