

**ADVISORY COMMITTEE  
ON  
CIVIL RULES**

**Norman, OK  
April 11-12, 2013**

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Agenda  
April 11-12, 2013  
Meeting of the Advisory Committee on Civil Rules

1. Welcome by the Chair  
Standing Committee Meeting and Judicial Conference
2. **ACTION ITEM:** Minutes for November meeting
3. Legislative Activity
4. **ACTION ITEM:** Report of Duke Conference Subcommittee: Proposal to Recommend Publication, Rules 1, 4, 16, 26, 30, 31, 33, 34, 36, and 37  
Report on Employment Case Discovery Protocol
5. Panel Presentation: "Technology Assisted Review"
6. **ACTION ITEM:** Revisions of Rule 37(e) as approved for publication
7. Rule 84 and Forms: Rule 84 Subcommittee Report
8. Pleading
9. Rule 23 Subcommittee Report
10. Emerging Topics:
  - Rule 17(c)(2)
  - Rule 41(a)(1)(A)(ii) Dismissal Without Prejudice
  - CACM Referrals:
    - Videoconference Hearings
    - Database for "restricted filers"
    - Notice of Electronic Filing as Certificate of Service
    - "Wet Signature" Records
  - Rule 62 Appeal Bonds
  - International Child Abduction: Prompt Return

Next Meeting: November 7-8, 2013, Washington D.C.

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Stuart F. Delery*	DOJ	Washington, DC	----	Open
Paul S. Diamond	D	Pennsylvania (Eastern)	2009	2015
Peter C. Folse	ESQ	Washington	2012	2015
Paul W. Grimm	M	Maryland	2009	2015
Peter D. Keisler	ESQ	Washington, DC	2008	2014
Robert Klonoff	ACAD	Oregon	2011	2014
John G. Koeltl	D	New York (Southern)	2007	2013
Scott M. Matheson, Jr.	C	Tenth Circuit	2012	2015
Michael W. Mosman	D	Oregon	2011	2013
David E. Nahmias	CJUST	Georgia	2012	2015
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# TAB 1

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 2, 2012

1           The Civil Rules Advisory Committee meeting scheduled for  
2 November 1 and 2, 2012, was held on November 2 at the  
3 Administrative Office of the United States Courts. The meeting was  
4 shortened in order to adjust to the transportation difficulties  
5 caused by Storm Sandy. Many participants and observers gathered at  
6 the Administrative Office. Others participated by video- or audio-  
7 conference systems. Participants included Judge David G. Campbell,  
8 Committee Chair, and Committee members John Barkett, Esq.;  
9 Elizabeth Cabraser, Esq.; Hon. Stuart F. Delery; Judge Paul S.  
10 Diamond; Judge Paul W. Grimm; Peter D. Keisler, Esq.; Dean Robert  
11 H. Klonoff; Judge John G. Koeltl; Judge Michael W. Mosman; Judge  
12 Solomon Oliver, Jr.; and Judge Gene E.K. Pratter. Justice Randall  
13 T. Shepard and Anton R. Valukas, Esq., whose second terms as  
14 Committee members concluded on October 1, also participated.  
15 Professor Edward H. Cooper participated as Reporter, and Professor  
16 Richard L. Marcus participated as Associate Reporter. Judge  
17 Jeffrey S. Sutton, Chair, Judge Diane P. Wood, and Professor Daniel  
18 R. Coquillette, Reporter, represented the Standing Committee.  
19 Judge Arthur I. Harris participated as liaison from the Bankruptcy  
20 Rules Committee. Laura A. Briggs, Esq., the court-clerk  
21 representative, also participated. The Department of Justice was  
22 further represented by Theodore Hirt, Jonathan F. Olin, and Allison  
23 Stanton. Joe Cecil and Emery Lee participated for the Federal  
24 Judicial Center. Peter G. McCabe, Jonathan C. Rose, Benjamin J.  
25 Robinson, and Julie Wilson represented the Administrative Office.  
26 Observers included Henry D. Fellows, Jr., Esq. (American College of  
27 Trial Lawyers); Joseph D. Garrison, Esq. (National Employment  
28 Lawyers Association); Rachel Hines, Esq. (Department of Justice);  
29 Brittany K.T. Kauffman, Esq. (Institute for the Advancement of the  
30 American Legal System); John K. Rabiej (Duke Center for Judicial  
31 Studies); Jerome Scanlan (EEOC); Alfred W. Cortese, Jr., Esq., and  
32 Alex Dahl (Lawyers for Civil Justice); John Vail, Esq. (American  
33 Association for Justice); Thomas Y. Allman, Esq.; William P.  
34 Butterfield, Esq., Richard Braman, Esq., Conor R. Crowley, Esq.,  
35 John J. Rosenthal, and Kenneth J. Withers, Esq. (Sedona  
36 Conference); Zviad V. Guruli, Esq.; and Jonathan M. Redgrave, Esq.

37           All participants' statements were recorded by audio means.

38           Judge Campbell opened the meeting by thanking all participants  
39 for joining the meeting in this unusual format. The meeting is just  
40 that, the meeting that was formally noticed for this day and place.  
41 Business will be conducted as usual, just as if all participants  
42 were physically present at the Administrative Office. Observers  
43 will be afforded opportunities to speak in the usual routine.

44           Judge Campbell also noted the death of Mark R. Kravitz, former  
45 chair of this Committee, who died on the last day of his first year

46 as chair of the Standing Committee. He was a beloved friend and  
47 leader. The Committee's thoughts and prayers are with his family.  
48 A memorial service will be held on November 17 in New Haven.  
49 Memorial funds have been established in Mark's name.

50 Judge Campbell introduced Judge Sutton as the new chair of the  
51 Standing Committee. He will make as formidable a team with Reporter  
52 Coquillette as former chairs have made.

53 This is the last meeting for outgoing members Shepard and  
54 Valukas, who have completed their terms. Judge Colloton has moved  
55 over to chair the Appellate Rules Committee, taking the position  
56 vacated by Judge Sutton. All three have made substantial  
57 contributions to the Committee. Lawyer Valukas brought rich  
58 experience, great expertise, and solid common sense to bear,  
59 particularly in his unstinting contributions to the work of the  
60 Discovery Subcommittee. Chief Justice Shepard has been a pillar of  
61 the judiciary for many years before serving on this Committee,  
62 serving prominently in the Conference of Chief Justices among many  
63 other positions, and regularly contributed the broad perspectives  
64 of state courts. Judge Colloton will fare well in the Appellate  
65 Rules Committee; if past experience is a guide, there is a strong  
66 prospect that joint projects will bring the Appellate and Civil  
67 Rules Committees together during his term.

68 The Judicial Conference approved the proposed amendments to  
69 Rule 45 at its September meeting. Rule 45 was on the consent  
70 calendar, suggesting that the Conference believes that the  
71 proposals are good. Rule 45 is headed next to the Supreme Court.

72 *March 2012 Minutes*

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

76 *Meeting Format*

77 Judge Campbell described the format for the meeting. The meeting is  
78 scheduled for four hours. The Discovery Subcommittee proposal for  
79 a revised Rule 37(e) on preservation and sanctions will be  
80 discussed first. If full discussion can be had in the time  
81 available, the goal will be to take a vote on the Subcommittee  
82 proposal to present the revised rule to the Standing Committee at  
83 its January meeting with a recommendation to approve publication in  
84 the summer of 2013. The sketches prepared by the Duke Subcommittee  
85 will come next. The proposal of the Rule 84 Subcommittee will  
86 follow, with the expectation that it will not require lengthy

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87 discussion. If time remains, two other matters will be presented  
88 for a vote. First are the proposals advanced by Attorney General  
89 Hood, of Mississippi, to adopt a rule requiring speedy disposition  
90 of motions to remand removed actions to state court and a rule  
91 requiring that the removing party pay all costs, including attorney  
92 fees, incurred by removal of an action that is remanded. The second  
93 is a proposal to correct a potential style misadventure in Rule  
94 6(d).

95 The procedure for the proposals of the Discovery Subcommittee,  
96 Duke Conference Subcommittee, and Rule 84 Subcommittee will begin  
97 with presentations by the Subcommittee chairs and the Reporter with  
98 first-line responsibility for each. Then each Committee member and  
99 liaison will be called on in turn for comments and advice. If time  
100 allows, observers will be invited to participate. Voting, when a  
101 matter requires a vote, will be by polling each member unless  
102 discussion shows apparent agreement that can be confirmed by asking  
103 whether there is any disagreement with the seeming consensus.

104 Comments on other matters reflected in the agenda materials,  
105 and also on matters that are discussed at the meeting, can be sent  
106 to Judge Campbell as committee chair and to the chairs of the  
107 subcommittees.

108 *New Rule 37(e)*

109 Judge Grimm introduced the Rule 37(e) proposal. The materials  
110 begin at page 121 of the agenda materials; the draft rule begins at  
111 page 127, followed by the draft Committee Note.

112 The proposal reflects nearly two and a half years of  
113 Subcommittee work, beginning soon after the Duke Conference and  
114 building on the unanimous recommendation of the panel that a  
115 preservation rule be adopted. A miniconference on advanced drafts  
116 was held in Dallas in September, 2011. Further work developed  
117 drafts that were presented to the Committee for discussion in  
118 March, 2012. The Subcommittee work continued through a series of  
119 seven conference calls held from July 5 through the end of  
120 September, each lasting for at least an hour. Subcommittee members  
121 accomplished an extraordinary amount of work. Submissions were  
122 received from the Sedona Conference in the form of a not-yet-final  
123 draft that included model rule language; from John Vail, who raised  
124 questions about the relationship between federal rules and state  
125 spoliation law as mediated through the Erie doctrine, issues that  
126 are being considered; Lawyers for Civil Justice has from the  
127 beginning provided helpful guidance and suggestions; Tom Allman has  
128 offered observations about local rules that might affect  
129 preservation of electronically stored information.

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130           The recommendation is to adopt the new provisions as a  
131 replacement for present Rule 37(e). Earlier drafts had been framed  
132 as a new Rule 37(g), but they have evolved to a point that protects  
133 everything that has been protected by present Rule 37(e) and  
134 protects much else as well.

135           The draft lists factors to aid in determining what is  
136 reasonable preservation, and what curative measures or sanctions to  
137 employ. The Subcommittee did not reach consensus on the factors  
138 listed in draft 37(e)(3)(C)(requests to preserve) and (D)(a party's  
139 resources and sophistication in litigation). Some feared that  
140 listing these factors might unintentionally increase burdens in  
141 litigation. Guidance will be asked on that.

142           Guidance also will be sought on Note language set out in  
143 brackets at lines 123-128 on page 131 of the agenda materials. This  
144 paragraph says that even an intentional attempt to destroy  
145 information does not support sanctions under the rule if the  
146 attempt fails. It does no more than state one of the things that is  
147 clear from the rule text – the rule applies only when a party fails  
148 to preserve information.

149           Several key features of proposed Rule 37(e) deserve note.

150           Unlike present Rule 37(e), the proposed rule applies to all  
151 forms of information, not only electronically stored information.

152           As compared to some threads in present case law, the rule  
153 provides more comprehensive protection for those who inadvertently  
154 and in good faith lose information.

155           The limitations of consequences for losing information are  
156 reflected in the distinction between proposed paragraphs (1) and  
157 (2). A distinction is drawn between remedies – curative measures –  
158 and sanctions. Remedies include such tools as additional discovery,  
159 restoring lost information or developing substitute information,  
160 and paying expenses (including attorney fees) caused by the failure  
161 to preserve. Sanctions are available under paragraph (2) only if  
162 the failure to preserve caused substantial prejudice in the  
163 litigation and was willful or in bad faith.

164           Rule 37(e) is intended to create a uniform national standard.  
165 Both at the Duke conference and the miniconference many  
166 participants complained that disuniformity among federal courts  
167 leads to vast over-preservation as they feel a need to comply with  
168 the most onerous standard identified by any one court.

169           Proposed 37(e)(2) authorizes use of any of the sanctions  
170 listed in Rule 37(b)(2) even though there is no order to preserve.

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171 But substantial prejudice plus willfulness or bad faith must be  
172 shown, except for the very limited circumstances described in  
173 (c)(2)(B) where the failure irreparably deprives a party of any  
174 meaningful opportunity to present a claim or defense. The working  
175 example of this category is destructive testing of a product that  
176 makes it impossible for other parties to perform their own tests.

177 Present Rule 37(e) is limited to regulating sanctions "under  
178 these rules." That limit is discarded in the proposal. The purpose  
179 is to make it unnecessary to resort to inherent authority. There is  
180 a lot of loose language in the cases about inherent authority.  
181 (e)(2)(A), requiring substantial prejudice and bad faith or  
182 willfulness, encompasses all the circumstances in which it would be  
183 appropriate to rely on inherent authority.

184 The several factors listed in proposed Rule 37(e)(3) stress  
185 reasonableness and proportionality. They apply only when there is  
186 a failure to preserve.

187 Professor Marcus added that the Subcommittee went through many  
188 issues at length. Andrea Kuperman provided an excellent memorandum  
189 on reported uses of current Rule 37(e), supporting the conclusion  
190 that the proposal does not take away any protection that has been  
191 important. He further noted that Judge Harris has suggested some  
192 possible wording changes in proposed (e)(3) that will be considered  
193 by the Subcommittee. And there was a high level of consensus in the  
194 Subcommittee on the proposal. Even as to the items that failed to  
195 achieve consensus there was not much dissent.

196 Judge Grimm reiterated that the Subcommittee is proposing that  
197 Rule 37(e) be recommended to the Standing Committee for  
198 publication. It seeks a Committee vote, subject to the  
199 Subcommittee's further consideration of the argument that there may  
200 be Erie problems in relation to state spoliation law, and to  
201 reviewing the wording suggested by Judge Harris. If the  
202 Subcommittee concludes that any significant change should be made  
203 in the proposal, it will seek a Committee vote by e-mail.

204 Judge Campbell summarized the most prominent issues for  
205 discussion: Should subparagraphs (e)(3)(C) and (D) go forward?  
206 Should the Note language about unsuccessful attempts to destroy  
207 information be omitted? If a draft proposal is approved by  
208 Committee vote, it will go to the Standing Committee at the January  
209 meeting with a recommendation to publish next summer. This schedule  
210 will be particularly helpful if a package of Duke Subcommittee  
211 proposals can be approved at the April meeting, so that both sets  
212 of recommendations can be published at the same time.

213 Committee members and liaisons spoke in order.

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214 The first member expressed concern that (e)(3)(C) and (D) "are  
215 not necessary." They are simply elaborations of factor (B), looking  
216 to the reasonableness of the party's efforts to preserve  
217 information. And for that matter, (B) should be cut short: "the  
218 reasonableness of the party's efforts to preserve the information;  
219 ~~including the use of a litigation hold and the scope of the~~  
220 ~~preservation effort~~; There is no need to elaborate the  
221 reasonableness requirement in (C) and (D), and there is a potential  
222 for mischief. Apart from these matters, the proposal "is fine."

223 The next Committee member offered "only a brief editorial. We  
224 will continue to face problems, but the rule will advance the  
225 courts' ability to solve the problems." It will not constrain  
226 desirable solutions. Sanctions will be focused.

227 Support was then offered for factor (C), dealing with requests  
228 to preserve. Participants in the miniconference focused on over-  
229 preservation resulting from a lack of guidance. It is wrong to  
230 assume that lawyers cannot talk to each other. We should encourage  
231 them to talk about preservation, to substitute dialogue for  
232 "gotcha" tactics. Factor (D), on the other hand, is a "rabbit  
233 hole." How should a court determine whether a lawyer or a party is  
234 "sophisticat[ed] in litigation"? This serves no purpose.

235 A judge tended to agree that (C) and (D) are not necessary,  
236 but thought that the package could be supported even if they are  
237 included.

238 Another member thought this is a "nicely constructed rule,"  
239 that offers good answers to difficult questions. An initial  
240 reaction that factor (C) on requests to preserve should be dropped  
241 has been discarded in favor of the arguments that lawyer dialogue  
242 should be encouraged. Factor (D) is an additional concern. As  
243 (e)(3) is framed, a party's resources and sophistication are  
244 considered both in determining what is reasonable preservation and  
245 in determining whether there is bad faith or willfulness. But  
246 resources and sophistication are relevant to bad faith or  
247 willfulness only in rare circumstances. If (D) is retained, courts  
248 may be misled to think it is relevant to bad faith or willfulness.  
249 The Note language on unsuccessful efforts to lose information is  
250 unnecessary; it should be dropped. Finally, the introductory  
251 language of (e) begins: "If a party fails to preserve discoverable  
252 information that reasonably should be preserved \* \* \*." The problem  
253 is that no one is a party until an action is filed. It would be  
254 better to say information "that reasonably should have been  
255 preserved."

256 The next member thought it difficult to determine which of  
257 factors (A) through (F) in (e)(3) bear on reasonableness, which on

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258 bad faith or willfulness. The Sedona Conference draft teases out  
259 factors that relate to good faith. Should we attempt to  
260 disaggregate the factors in (e)(3)? (It was noted that the  
261 Subcommittee had considered this problem and had been afraid that  
262 "more precision would generate unhelpful arguments." A further  
263 response was a reminder that these factors "are illustrative, not  
264 exhaustive." A court can find that some of them are irrelevant in  
265 a particular case, and can consider factors not listed. It is  
266 desirable to avoid complexity.)

267 A further note on drafting history observed that the  
268 Subcommittee began with the thought of attempting to define precise  
269 triggers for the duty to preserve. Draft (e)(3) is designed to  
270 suggest the things that bear both on the criteria for litigants  
271 and potential litigants to consider in undertaking preservation and  
272 on thinking when the duty to preserve arises.

273 The next member in the rotation supported both factors (C) and  
274 (D). (C) concerns, and will encourage, discussion among the  
275 lawyers. (D) reflects concern that individual parties lack  
276 sophistication on questions of preservation, frequently have little  
277 concept of what electronically stored information they have, and  
278 are particularly vulnerable to losing data from social media. But  
279 the note language on unsuccessful efforts to lose information  
280 should be deleted.

281 Continuing along the Committee roster, another member  
282 supported factor (C) in order to encourage discussions among the  
283 lawyers. Factor (D) is important not only for individuals, but also  
284 in dealing with the increasing frequency of litigation that  
285 involves municipalities and counties that are financially strapped.  
286 And it is good that the rule has been drafted in technologically  
287 neutral terms that are likely to survive the advances of technology  
288 over time.

289 A judge member reported that his initial view was that factors  
290 (C) and (D) should be deleted, but that the discussion had  
291 persuaded him otherwise. He had been worried about which of the  
292 factors address which issues, but (D) - sophistication and  
293 resources - goes to bad faith as well as reasonableness, and should  
294 be retained. The rule "seems slanted toward big litigation," as  
295 illustrated by the reference to "holds," but it will apply to all  
296 litigation. It is the normal-scale litigation that (D) will serve.  
297 The Note language on failed attempts to destroy information should  
298 be deleted.

299 The next judge member commended the draft as ready to take the  
300 next step to the Standing Committee. Shorter rules are better than  
301 longer rules. Factors (C) and (D) should be dropped for this

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302 reason, and (B) should be shortened by deleting the references to  
303 litigation holds and the scope of preservation. The value of  
304 encouraging professional cooperation can be served by putting  
305 factor (C) into the Committee Note. There is a drafting change that  
306 would improve (2)(a). A recent long argument about the possible  
307 ambiguity of antecedents in dealing with "and" "or" sequences  
308 points to the need to at least insert a comma, or better to  
309 rearrange it to read: "that the failure caused substantial  
310 prejudice in the litigation and was willful or in bad faith." This  
311 will make it clear that both willful or bad faith failures warrant  
312 sanctions only if there was substantial prejudice. The Note  
313 language on unsuccessful attempts to delete information should be  
314 omitted.

315 The Department of Justice recognized that much hard work has  
316 gone into developing proposed Rule 37(e), vigorously grappling with  
317 the issues. The draft makes progress. The Department has doubts  
318 about how widespread the sanctions problems are. And there are  
319 several reasons to conclude that it would be premature to vote on  
320 the proposal today. The Department has not had time to do a full  
321 review, nor have the agencies the Department represents. It must be  
322 remembered that the Department appears on all sides of all the  
323 varieties of litigation that come to federal courts - it is  
324 involved in about one-third of the civil actions. It has not yet  
325 come to a position on the proposal. Despite the real progress that  
326 has been made in the proposed draft, the Department is not in a  
327 position to vote for taking it forward with a recommendation for  
328 publication.

329 At the same time, The Department can make some observations.  
330 (1) It is right to address loss of all forms of information, not  
331 just electronically stored information. (2) Invoking proportionality  
332 as one of the factors to measure reasonable preservation is  
333 strongly supported. (3) Present Rule 37(e) should be preserved. It  
334 provides a safe harbor that has guided information technology  
335 professionals in addressing some of these issues. Still, the same  
336 considerations could be taken into account under the proposed rule.  
337 (4) The proposed rule refers to failure to preserve "discoverable  
338 information"; the Note should say expressly that Rule 26(b) defines  
339 the scope of what is discoverable. (5) Willfulness and bad faith  
340 can make sense as a concept for a standard, but achieving  
341 uniformity may be advanced by providing a better developed  
342 explanation in the Note. Without guidance, different courts will  
343 interpret these words in different ways. (6) Proposed (e)(3)(A)  
344 looks to "the extent to which the party was on notice that  
345 litigation was likely," etc. This should include "should have  
346 known"; a prospective party may "lose" information and claim lack  
347 of actual knowledge. (7) Both factors (C) and (D) should be  
348 omitted. (C), looking to requests to preserve, may encourage

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349 premature or very broad preservation demands early in the process.  
350 Government agencies already are receiving such demands, often early  
351 in the administrative process. "Dialogue is good, but this gets in  
352 the way." So factor (D), looking to a party's resources and  
353 sophistication in litigation, could be used against the government  
354 because it has what seem to be vast resources and has a high level  
355 of sophistication in litigation. (8) Factor (F), asking whether the  
356 party sought timely guidance from the court, raises a question of  
357 the relationship to dispositive motions. Is it expected that a  
358 party will ask the court for guidance on preservation obligations  
359 before rulings on dispositive motions, at a time when the scope of  
360 discovery may seem broader than it will be after the motions are  
361 resolved? (9) The Rule does not include a list of factors bearing  
362 on the determination of "substantial prejudice" in (e)(2)(A). It  
363 would help to describe such elements as materiality, the  
364 availability of information from alternative sources, and so on.  
365 (10) The note language on a failed attempt to destroy information  
366 should be deleted - it is not necessary, even while it is not  
367 objectionable.

368 Another Committee member expressed admiration for the work.  
369 Factors (e)(3)(C) and (D) seem useful. And it is wise to include  
370 factor (E), proportionality. Courts too often overlook the need for  
371 proportionality, both in preservation and in discovery.

372 A liaison expressed ambivalence about retaining factors (C)  
373 and (D), but suggested that "generally, shorter is better." The  
374 note language on failed attempts to destroy information should be  
375 removed. It is not clear which of the (e)(3) factors bear on  
376 determining reasonable preservation, which on determining  
377 willfulness or bad faith. Nor is it clear how they relate to the  
378 choice of remedies under (e)(1) or sanctions under (e)(2). The rule  
379 text might be studied further to see whether clarification is  
380 feasible.

381 Another liaison said that the note language on unsuccessful  
382 attempts to destroy information should be dropped.

383 A third liaison applauded the distinction between remedies,  
384 (e)(1), and sanctions, (e)(2). The questions raised by factor (C),  
385 requests for preservation, and (D), resources and sophistication,  
386 stem from the fact that many problems can be resolved without  
387 considering all of the suggested factors, and may require  
388 consideration of others. The text should be clear that the court is  
389 not required to consider all factors in every dispute. Perhaps  
390 "the court should consider all relevant factors where appropriate  
391 \* \* \*." Public comments may help in considering these questions.  
392 And the Note language on thwarted spoliation attempts should be  
393 deleted.

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394 Judge Sutton lauded the draft rule as a terrific product. He  
395 remained agnostic on factors (C) and (D) – they could be moved to  
396 the Note as illustrations of what is reasonable preservation. The  
397 Note language on extreme bad faith efforts that fail to lose  
398 information should be expunged. And as a matter of caution, one  
399 word might be added to (e)(2)(B): the failure to preserve, although  
400 not willful or in bad faith, "irreparably deprived a party of any  
401 meaningful opportunity to present a cognizable claim or defense \*  
402 \* \*."

403 Reporter Coquilletto observed that "This is a long Note.  
404 Delete anything you're not sure is necessary."

405 An observer agreed with the suggestion that (e)(3)(B) should  
406 be shortened by deleting "~~including the use of a litigation hold~~  
407 ~~and the scope of the preservation efforts.~~" A hold is a technical  
408 means of implementing preservation; probably it is not needed in  
409 less complex litigations. (C) and (D) could be relegated to the  
410 Note.

411 Another observer thought the draft "almost right." The  
412 distinction between remedies and sanctions "is key." This  
413 distinction is not well reflected in the case law, which generally  
414 is under-reasoned. But (e)(2) raises a serious concern. It  
415 precludes use of an adverse-inference instruction as a curative  
416 measure by treating it as a sanction. This conflicts with the law  
417 in many states. Under these state laws, preservation is a duty owed  
418 not only to the court but to other parties. In some of them an  
419 adverse inference instruction is available for a negligent failure  
420 to preserve. This is a substantive state duty, and a substantive  
421 state remedy. Erie doctrine and the limits of § 2072 forbid  
422 invoking the proposed rule to limit the remedy provided by state  
423 law when the federal court is resolving a state-law claim.

424 Yet another observer approved the drafting as "technology  
425 agnostic," so it can survive through the continual changes of  
426 technology. And it is good to cover all forms of information, not  
427 only electronically stored information. But explicit reference to  
428 a litigation hold as a factor in measuring reasonable preservation  
429 "is too detailed." There is a risk that some parties or courts may  
430 read this factor to require a written notice, when oral notice  
431 might suffice. This can be relegated to the Note. Factor (C),  
432 looking to requests to preserve, will generate overbroad – even  
433 form – demands to preserve. We do need to encourage dialogue  
434 between the parties, but this should be put in the Note on factor  
435 (A), looking to the extent to which the party was on notice that  
436 information would be discoverable in likely litigation. It also  
437 could bear on factor (F), whether the party sought guidance from  
438 the court. Factor (D), looking to a party's sophistication, may be

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439 misapplied as courts mistakenly attribute sophistication in  
440 litigation to small and medium-size companies that in fact are not  
441 sophisticated. Again, this can be explored in the Note, but does  
442 not belong in the rule. Still, there is room to be concerned that  
443 individual litigants will be "hammered" for ignorantly doing things  
444 that a business would not do. It is right to replace present 37(e)  
445 with the new provisions, but the Note should carry forward the  
446 protection for automatic processes that routinely destroy  
447 information. And the Note language on unsuccessful bad-faith  
448 attempts to destroy information is unnecessary.

449 Observers from the Sedona conference noted that the working  
450 group had submitted a draft proposal in response to the Advisory  
451 Committee's interest in receiving comments. A committee was formed.  
452 It has considered not only Rule 37 but other topics addressed by  
453 the Duke Subcommittee. The Rule 37 committee was formed as a  
454 balance of those who primarily represent plaintiffs, or primarily  
455 represent defendants, and corporate counsel. It did not achieve  
456 complete consensus. The draft is a compromise. It has four main  
457 characteristics: it provides a uniform sanctions standard; it is  
458 not a tort-based duty; it requires heightened culpability for more  
459 serious sanctions; and it avoids a false distinction between  
460 sanctions and remedies.

461 The Sedona views were amplified. The distinction drawn between  
462 remedies, proposed (e)(1), and sanctions, proposed (e)(2), is  
463 false. Most courts view as sanctions the measures that (e)(1) would  
464 characterize as remedies. Tying remedies to loss of evidence limits  
465 courts in the future. Remedies can be appropriate even when there  
466 is no loss of evidence. The focus in (e)(2)(A) on bad faith and  
467 willfulness "will perpetuate confusions the courts exhibit now."  
468 Bad faith is not the same as willfulness. The Sedona proposals take  
469 a better approach in providing a list of factors that bear on "good  
470 faith," moving away from a tort standard. Is the information  
471 available from other sources? Is there material prejudice? Is the  
472 motion for court action timely? The aim is to incentivize good  
473 behavior, to consider "intent" as bearing on the weight of the  
474 sanctions. For the "Silvestri" problem addressed by (e)(2)(B),  
475 Sedona relies on "absent exceptional circumstances." That is better  
476 than looking for irreparably depriving a party of any meaningful  
477 opportunity to present a claim or defense, a concept that will  
478 generate huge litigation. How does this differ from the  
479 "substantial prejudice" invoked in (e)(2)(A)?

480 The Sedona group also moved away from rule text addressing  
481 requests to preserve, the (e)(3)(C) factor, for reasons expressed  
482 by other participants. So too it rejected (D), looking to a party's  
483 sophistication and resources, because that will be unfair to  
484 corporations: consider the preservation burdens that might be

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485 imposed on a corporation with such far-flung activities as to be  
486 involved in 15,000 litigations, generating great sophistication.  
487 Factor (F), seeking guidance from the court, raises problems with  
488 information claimed to be privileged: how does the party seek, and  
489 the court give, meaningful guidance?

490 Finally, the Sedona draft approaches sanctions differently.  
491 Rather than incorporate Rule 37(b)(2), they specifically enumerate  
492 sanctions. Spoliation sanctions are available only on showing  
493 intent. And the rule text should incorporate a "least severe  
494 sanction" provision. Proportionality does not bear on choosing the  
495 "weight" of the sanction. It does bear on determining the degree of  
496 prejudice.

497 One of the Sedona observers added that speaking for himself,  
498 it would be useful to step back from the present Rule 37(e) draft.  
499 It will generate "a lot of litigation."

500 Judge Campbell suggested that the Committee needs to move  
501 toward a conclusion. The discussion has provided many helpful  
502 comments. There would be still more helpful comments if the  
503 discussion were continued for another three or four years. The  
504 Subcommittee has worked hard for two and a half years, including a  
505 miniconference. It would be useful to take this to the Standing  
506 Committee in January with a recommendation to approve publication.  
507 The Subcommittee will continue to polish the proposal for  
508 submission to the Standing Committee. Presenting a proposal for  
509 publication will support a thorough discussion in the Standing  
510 Committee. The Standing Committee can judge whether it is ready for  
511 publication. Of course the proposal could be deferred for further  
512 work at the April Advisory Committee meeting, to present it to the  
513 Standing Committee for the first time at its spring meeting.  
514 Perhaps the better course is to aim for the January meeting.

515 Judge Sutton noted that the Rule 37(e) proposal interacts with  
516 the Duke Conference Subcommittee drafts. The Standing Committee can  
517 devote more time to thorough discussion of the 37(e) proposal in  
518 January than can be found in the more crowded spring agenda. The  
519 Subcommittee can continue to work on the draft that will go to the  
520 January agenda. It makes sense to vote now.

521 Four Committee votes were taken. By vote of 7 to 4, the  
522 Committee voted to retain Rule 37(e)(3)(C), listing requests for  
523 preservation among the factors to be considered in determining what  
524 is reasonable preservation and whether there is bad faith or  
525 willfulness. By vote of 6 to 5, the Committee voted to delete the  
526 next factor, (D), looking to a party's resources and sophistication  
527 in litigation. The Committee voted unanimously to delete the draft  
528 Note language discussing a deliberate but unsuccessful effort to

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529 spoil discoverable information. The Department of Justice voted  
530 against sending the proposal to the Standing Committee in January;  
531 all other members voted in favor.

532 *Duke Conference Subcommittee*

533 Judge Koeltl introduced the report of the Duke Conference  
534 Subcommittee. The report to be considered is not the version that  
535 appears in the original agenda materials but a revised version  
536 circulated a week before this meeting. The revised version includes  
537 new sketches that reflect a Subcommittee conference call held after  
538 the October 8 miniconference in Dallas. The rules amendments  
539 sketched in the report constitute a package. Some are more  
540 important than others. Some still will be discarded, and perhaps  
541 others will be added. As a whole, the package is aimed to reduce  
542 expense and delay, to promote access to the courts, to serve the  
543 goals of Rule 1. "We have come far."

544 The sketches will be described in three groups, but there is  
545 no priority among the groups. And they will be discussed together.

546 The first group begins with a set of changes that would  
547 accelerate the first stages of an action. The time to serve process  
548 set out in Rule 4(m) would be reduced from 120 days to 60 days. The  
549 alternative times for issuing the scheduling order would be  
550 reduced. Rule 16(b) now sets the time as the earlier of 120 days  
551 after any defendant has been served or 90 days after any defendant  
552 has appeared. The proposals would reduce the 120-day period to 60  
553 days, or possibly 90; the 90-day period would be reduced to 45, or  
554 possibly 60. The extent of the reduction will be determined after  
555 hearing more advice. Discussion at the miniconference suggested  
556 that two further proposals be considered – carrying forward the  
557 authority for local rules that exempt categories of cases from the  
558 scheduling-order requirement, and allowing exceptions to the timing  
559 requirement for good cause.

560 The next change in the first group would change the scope of  
561 discovery defined by Rule 26(b)(1). Discovery would be limited to  
562 what is proportional to the needs of the case as measured by the  
563 cost-benefit calculus now required by Rule 26(b)(2)(C)(iii).  
564 Participants in the miniconference expressed ready acceptance of  
565 these factors. Further changes would delete the present authority  
566 to order discovery extending to the subject matter of the action,  
567 confining all discovery to what is relevant to the claims or  
568 defenses of the parties. In addition, the sentence allowing  
569 discovery of information that appears reasonably calculated to lead  
570 to the discovery of admissible evidence is shortened, so as to  
571 provide only that information need not be admissible in evidence to  
572 be discoverable. This change reflects experience, shared by the

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573 miniconference participants, that in operation many lawyers and  
574 judges read the "reasonably calculated" phrase to obliterate all  
575 limits on the scope of discovery; any information may lead to other  
576 evidence that is relevant and admissible. These changes result in  
577 a shorter, clearer rule that incorporates a concept of  
578 proportionality made workable by adopting the (b)(2)(C)(iii)  
579 factors.

580 The third set of changes in the first group look to limits on  
581 the numbers of discovery requests that are allowed. The presumptive  
582 number of Rule 33 interrogatories would be reduced from 25 to 15.  
583 A new limit of 25 Rule 36 requests for admissions would be added,  
584 with an exception for requests to admit the genuineness of  
585 documents. Another new limit would set 25 as the number of Rule 34  
586 requests; this limit has encountered objections that it would lead  
587 to a smaller number of broader requests, while other participants  
588 in the miniconference thought that real experience shows this is  
589 not a problem. The number of depositions allowed per side would be  
590 reduced from 10 to 5, and the time limit for each would be reduced  
591 from 7 hours to 4 hours. There was support for the deposition  
592 limits, but also some resistance from those who think the reduction  
593 is both unnecessary and unrealistic. But there seemed to be general  
594 agreement that a reduction of the presumptive time from 7 hours to  
595 6 hours per deposition would work.

596 The second group starts with a sketch that would allow  
597 discovery requests to be served before the parties' Rule 26(f)  
598 conference; the time to respond would run from the close of the  
599 conference. This sketch in part responds to a perception that the  
600 Rule 26(d) moratorium barring service of discovery requests before  
601 the parties have conferred is often ignored or not even known. Pre-  
602 conference requests would enhance both the parties' conference and  
603 the scheduling conference with the court by providing a specific  
604 focus on actual discovery requests. It may be wise to impose some  
605 hiatus after filing before the requests can be served.

606 The next set of proposals in the second group focuses on  
607 objections to Rule 34 requests to produce. Objections would become  
608 subject to the same specificity requirement as Rule 33 imposes on  
609 objections to interrogatories. An objecting party would be required  
610 to state whether any documents are being withheld under the  
611 objections. If a party elects to produce documents rather than  
612 permit inspection, the response must state a reasonable time when  
613 production will be made; this sketch recognizes the value of  
614 "rolling" production.

615 The third proposal in the second group focuses on encouraging  
616 cooperation among the parties. The Subcommittee favors a more  
617 modest sketch that would amend Rule 1 to make clear that the rules

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618 should be employed by the parties to achieve the Rule 1 goals of  
619 just, speedy, and inexpensive determination of the action. The  
620 Subcommittee feared the collateral consequences of a more  
621 aggressive sketch that would add to Rule 1 a new final sentence  
622 stating that the parties should cooperate to achieve these ends.

623 The third group of proposals includes some that have proved  
624 uncontroversial. One would add to the list of subjects suitable for  
625 a scheduling order a direction to seek a conference with the court  
626 before filing a discovery motion. Related sketches would expand the  
627 topics for the scheduling order, and for the parties' Rule 26(f)  
628 conference, to include preservation of electronically stored  
629 information and entry of court orders under Evidence Rule 502(e).  
630 Other sketches in the third group are likely to be deferred. One  
631 would adopt a uniform set of exemptions from Rule 26(a)(1) initial  
632 disclosures and from mandatory scheduling conferences. This topic  
633 will benefit from further research. Another set would defer the  
634 time to respond to contention discovery under Rules 33 and 36. The  
635 questions posed by initial disclosures under Rule 26(a)(1) reflect  
636 a significant difference of views about the practice that may be  
637 illuminated by developing practice in some states. Some sketches  
638 deal with cost-shifting in discovery; more work is required, but  
639 there is a consensus that the allocation of costs should be added  
640 as a possible provision of a protective order.

641 Professor Cooper added two points. A sketch that would amend  
642 Rule 26(g) to state specifically that a discovery objection or  
643 response is not evasive has been put aside in deference to the  
644 fears of many miniconference participants who thought this  
645 provision would generate much litigation as a "sanctions tort." The  
646 general certifications imposed by Rule 26(g) should embrace evasive  
647 responses and objections in any event. And it may be worthwhile to  
648 consider further a sketch that, omitting depositions, would allow  
649 discovery requests under Rules 33, 34, 35, and 36 to be served (or  
650 a Rule 35 motion to be made) at any time after the action is filed.  
651 The old practice that enabled a plaintiff to get a head start and  
652 claim priority in all discovery has been abandoned and, in light of  
653 Rule 26(d)(2), should not be a problem. This approach would avoid  
654 the awkward choices that must be made in drafting an initial no-  
655 discovery hiatus, to be followed by requests served before the Rule  
656 26(f) conference. Time to respond still would be measured from the  
657 Rule 26(f) conference. Some concerns would remain – it may not  
658 always be clear when the first 26(f) conference has been held, and  
659 the advance notice might make it more difficult for a responding  
660 party to persuade the court that it needs still more time to  
661 respond.

662 These multiple questions were again submitted to the Committee  
663 for a sequential "roll call" of the members.

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664 The first member thought that shortening the time for service  
665 and accelerating the timing of the scheduling conference makes  
666 sense. This will get the litigation going. Far more important, the  
667 proposal to make proportionality an express limit on the scope of  
668 discovery under Rule 26(b)(1) is right on target. More and more  
669 judges rely on proportionality in applying the cost-benefit  
670 analysis of Rule 26(b)(2)(C)(iii). The other changes in (b)(1) also  
671 are OK. There is no apparent problem with the present Rule 33  
672 presumptive limit to 25 interrogatories, but there also is likely  
673 to be no problem if the limit is reduced to 15. Adding numerical  
674 limits to Rule 36, with an exception for requests to admit the  
675 genuineness of documents, also is appropriate. Imposing a  
676 presumptive limit of 25 requests to produce under Rule 34 is not  
677 obviously right; it will be difficult, however, to define the right  
678 number. But it is clear from practice, and experience in mediating  
679 and arbitrating, that "Rule 34 can be handled in a smart way." As  
680 for the number of depositions, most cases now involve 5 or fewer  
681 per side; a reduction from 7 hours to 6 hours would be fine.  
682 Allowing discovery requests before the Rule 26(f) conference is  
683 good, but setting the time to respond from the conference may be  
684 difficult because it may not be clear when the conference has  
685 ended. It is good to require that Rule 34 objections be specific  
686 and that the responding party state whether anything is being  
687 withheld under the objections. Requiring the responding party to  
688 state a reasonable time when production will be made is good.  
689 Bringing the parties into Rule 1 is a good idea. But it may be  
690 better to refer to "collaboration" rather than "cooperation."

691 The next member said that it can work to reduce the  
692 presumptive limits on the number of discovery requests so long as  
693 it is clear that they are only presumptive, that the parties and  
694 court should be alert to the need for flexibility in making  
695 exceptions. Allowing discovery requests before the Rule 26(f)  
696 conference will be good - it will eliminate confusion about the  
697 Rule 26(d) discovery moratorium. Adding the concept of party  
698 cooperation to Rule 1 is good, but "collaboration" may be a better  
699 concept to use. "Anything that promotes Evidence Rule 502 is good."

700 Applauding the package, the next member said that it is  
701 important to keep within the § 2072 limit that bars abridging,  
702 enlarging, or modifying any substantive right. Many outside  
703 observers want changes that would violate that limit. These  
704 proposals do not. Litigation will, gas-like, expand to fill the  
705 available volume; the proposed acceleration of the first steps in  
706 an action reflect the reality of the smaller cases that are the  
707 staple of federal litigation and that do not need so much time.  
708 "The attempt to eliminate boilerplate objections is worthy." The  
709 Evidence Rules Committee believes that Evidence Rule 502 is  
710 underused by the bar; amending the Civil Rules to draw attention to

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711 it is good.

712 Another member expressed support for the package.

713 Two more members noted support for the package in the terms  
714 used by the earlier speakers. One suggested support for the "Utah"  
715 model that would set limits on depositions by allocating a finite  
716 number of hours per party or side, leaving it to the parties to  
717 divide the total time budget among depositions – one might be held  
718 to a single hour, while another might run far longer.

719 The next member offered comments in supporting the general  
720 package. The "not controversial" proposals are good. Requiring that  
721 Rule 34 objections be specific is good. Asserting that lawyers are  
722 responsible for achieving the goals of Rule 1 is good. As for  
723 allowing discovery requests to be served before the Rule 26(f)  
724 conference, "I haven't seen any problems, but if the Subcommittee  
725 sees them," the proposal is OK. Moving up the time for the 16(b)  
726 scheduling conference is attractive, but perhaps it should be 90  
727 days after any defendant is served or 60 days after any defendant  
728 appears. Limiting the presumptive number of discovery requests is  
729 appropriate if it is made clear that there is room for flexibility  
730 through judicial discretion. Incorporating proportionality into the  
731 Rule 26(b)(1) scope of discovery is good.

732 A Subcommittee member noted the need to focus on the  
733 "philosophical" question posed by the risk of making rules so  
734 specific as to interfere with the judge's case-management  
735 discretion. Should some of these issues be dealt with by educating  
736 the bench and bar, one of the initial efforts launched by the  
737 Subcommittee after the Duke Conference? That could reduce the need  
738 to incorporate numerical and time limits in the rules. But  
739 shortening the time periods for serving process and holding the  
740 first scheduling conference is obviously right.

741 The Department of Justice thinks the package is impressive,  
742 but is still thinking about some of the components. The Department  
743 wholeheartedly endorses incorporating the concept of  
744 proportionality in Rule 26(b)(1). There are practical problems for  
745 the Department in accelerating events at the beginning of an  
746 action. Federal government defendants are given more time to answer  
747 for reasons that also apply here. It takes time to get the case to  
748 the right lawyers, and then for the lawyers to get to the right  
749 people with the right information. Early discovery requests cut  
750 against the value of an initial conference with the court on what  
751 the scope of the case actually will be, and seem inconsistent with  
752 the values of initial disclosures. Accelerating the time when  
753 requests are actually reduced to writing "may make things worse."  
754 The question is how best to focus discovery on what the actual

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755 issues in the case will be. (In response to a question about the  
756 importance of initial disclosures in this process, it was repeated  
757 that they are helpful in the early discussions about what discovery  
758 is needed. Writing detailed requests before the initial discussion  
759 will lead to broader requests, or requests based on misinformation  
760 or misperception.) As to the presumptive numerical limits on  
761 discovery, "there is a bit of a division within the Department." It  
762 will be essential to ensure that courts understand their flexible  
763 authority to set appropriate parameters.

764 Another member thought it very attractive to permit discovery  
765 requests to be served before the initial conference, running the  
766 time to respond from the conference.

767 The last Committee member to speak said that the broad slate  
768 of proposals promises a good cumulative effect on the way discovery  
769 is conducted. "There is a possibility of significant improvement."

770 A liaison reminded the Committee that adoption of these  
771 proposals would create a need to make conforming amendments to the  
772 Bankruptcy Rules that incorporate the Civil Rules. Bankruptcy Rule  
773 1001, for example, incorporates Civil Rule 1.

774 The clerks-of-court representative stated that shortening the  
775 Rule 4(m) time for service to 60 days makes sense from the clerks'  
776 perspective. It is not clear whether it is feasible to shorten the  
777 time for the initial scheduling conference and order.

778 Another liaison thought the package "an amazing distillation  
779 of the Duke Conference." A cap on the total number of hours for all  
780 depositions seems attractive. As Professor Gensler observed, it is  
781 easier to manage up from a floor than to manage down. It is  
782 important that case-management discretion remain, and be well  
783 recognized.

784 Reporter Coquillette observed that any addition to Rule 1 that  
785 affects attorney conduct must confront the consequent impact on the  
786 rules of professional responsibility. These are matters of state  
787 law that present big issues.

788 Judge Campbell observed that the package of proposals remains  
789 a work in progress. The Subcommittee and Committee remain open to  
790 further suggestions.

791 An observer underlined the concern that applying Rule 1 to  
792 the parties "raises a vast array of questions that may be  
793 inconsistent with the adversary system of justice." Even speaking  
794 of "cooperation" among the parties in a Committee Note "is only  
795 slightly less objectionable" than putting it in a rule text. He

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796 further suggested that discovery requests before the Rule 26(f)  
797 conference are premature. The conference should be mostly about  
798 defining the issues in the action.

799 Another observer suggested that cooperation among the parties  
800 should be addressed in the Committee Note, not in rule text. The  
801 Sedona committee proposal is to amend Rule 1 to provide that the  
802 rules "should be construed, complied with, and administered" to  
803 achieve the Rule 1 goals.

804 Judge Koeltl expressed appreciation for all of these  
805 contributions. The Subcommittee will continue to work on the  
806 drafts. Further comments will be welcomed. "We have had a lot of  
807 supporters as we have gone forward." Detailed models will be  
808 helpful in addressing such matters as the number of depositions,  
809 the length of depositions, allowing discovery requests before the  
810 Rule 26(f) conference (including whether there should be a hiatus  
811 between initial filing and serving the requests), and other topics.  
812 The Subcommittee expects to have a package of proposals ready for  
813 consideration at the April Advisory Committee meeting. All  
814 proposals and comments will advance the work. The Subcommittee  
815 believes the package will have a significant beneficial effect on  
816 the conduct of litigation. But it is expected, and desirable, that  
817 there will be still more comments and suggestions as the package is  
818 scrutinized during the period for public comment. Earlier versions  
819 of the package put aside many initial drafts, and the package has  
820 been still further pruned. Detailed rule text and Committee Notes  
821 will be prepared. The Subcommittee hopes they will win as much  
822 enthusiastic response as the current drafts.

823 *Rule 84*

824 Judge Pratter introduced the report of the Rule 84  
825 Subcommittee by stating that the Subcommittee hopes to ask approval  
826 in April of a recommendation to the Standing Committee to publish  
827 a specific proposal on what, if anything, to do with Rule 84. The  
828 purpose today is to revisit the discussion at the March Advisory  
829 Committee meeting. The discussion then seemed to show interest in  
830 abrogating Rule 84. But later exchanges suggest some concern that  
831 all competing considerations should be carefully weighed once more,  
832 to ensure that we not move too fast.

833 Responding to this concern, the Subcommittee reached out to  
834 find out who uses the Forms, and for what purposes. This effort  
835 confirmed what had been suspected. Very few professionals or  
836 practitioners use the Rule 84 Forms. Some think the forms cause  
837 problems – the patent bar is agitated about the serious problems  
838 they find in the Form 18 complaint for patent infringement. Many of  
839 the lawyers who were contacted responded: "I don't use the Forms;

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840 perhaps someone else does." Lawyers instead use their own forms,  
841 their firms' forms, Administrative Office forms, local forms, forms  
842 provided by treatises, and forms from like sources.

843 The Forms have not received frequent attention from the  
844 Advisory Committee. There is little enthusiasm for taking on the  
845 task that would follow from assuming active responsibility for the  
846 Forms. Meanwhile, the Administrative Office working group on forms,  
847 composed of six judges and six court clerks, is doing a great deal  
848 of attentive and conscientious work on AO forms. They deal with a  
849 host of forms, including forms for civil actions. "They are really  
850 good."

851 Judge Colloton has expressed concern that abrogation of the  
852 pleading forms would bedevil the bench and bar in working out the  
853 impact on pleading practice. He is concerned that the forms will  
854 live on through the influence of decisions rendered while they  
855 stood as official guides to pleading practice.

856 Many options are open. The Committee could do nothing, leaving  
857 Rule 84 and the Forms to carry on as they are. Or it could  
858 undertake a complete overhaul of the Forms. Or it could retain Rule  
859 84 but shed all responsibility for ongoing maintenance and revision  
860 – but it is questionable whether it would be either legal or wise  
861 to delegate this Enabling Act responsibility. Or we could "defang"  
862 Rule 84 by deleting the provision that the Forms suffice under the  
863 rules, leaving them as mere illustrations. Or, as the Subcommittee  
864 currently prefers, Rule 84 can be abrogated. The Subcommittee asks  
865 advice on which direction it should pursue.

866 Judge Campbell elaborated Judge Colloton's concern that  
867 decisions that have relied on the Forms in developing pleading  
868 standards will live on, giving the Forms renewed life in the common  
869 law. Or courts might view the Forms, no longer official, as still  
870 a form of legislative history that illuminates the continuing  
871 meaning of Rule 8 pleading standards. But Judge Colloton also  
872 believes that the draft Committee Note does a good job of  
873 addressing these questions; his concern is to make sure that the  
874 Committee considers these things.

875 Reporter Cooper offered a few additional remarks. First, some  
876 of the lawyers surveyed by the Subcommittee reported that they do  
877 not use the Rule 84 Forms, but speculated that the Forms might be  
878 helpful to pro se parties. But there seems to be little indication  
879 that pro se parties often find the forms, much less use them. Some  
880 courts are making attempts to aid pro se litigants by developing  
881 local forms for common types of litigation, a process that may work  
882 better than attempting to fill the need through the Enabling Act.  
883 Second, abrogating the pleading Forms does not mean that none of

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884 them should remain adequate under developing pleading standards.  
885 Form 11, for example, may well suffice as a complaint for an  
886 automobile accident case even though it would not do as a complaint  
887 for negligence in more complicated settings. Finally, if Rule 84  
888 is abrogated, the Committee will need to establish a system for  
889 coordinating with the Administrative Office working group. It may  
890 be wise to begin with a relatively conservative approach that  
891 establishes a close connection, so that the Committee monitors the  
892 process and is enabled to participate when that seems desirable.  
893 This is one of the subjects that should be addressed when a  
894 proposal for publication is advanced next spring.

895 Discussion began with support for abrogating Rule 84. The goal  
896 should be to remove the Forms from the Enabling Act process. The  
897 process takes too long. "We're not nimble."

898 The next member noted the concern about carrying forward the  
899 effects of the common law that depended on the pleading forms, but  
900 agreed that there is no profit in attempting to revamp the process  
901 to force greater Advisory Committee involvement.

902 Another member asked how far back the forms go. It was noted  
903 that the original pleading forms were developed in 1938; Judge  
904 Clark explained that it is difficult to capture the intended new  
905 pleading practice in rule text, "but at least you can paint  
906 pictures." The forms were illustrative in the beginning, but in  
907 1946 Rule 84 was amended to state that they suffice under the  
908 rules. All of the forms were restyled as part of the Style Project  
909 that culminated in 2007, but much less attention was lavished on  
910 them than on the rules themselves. A few forms have been carefully  
911 developed by the Committee. Forms 5 and 6 were developed to  
912 implement the Rule 4(d) waiver-of-service provisions when the  
913 waiver procedure was created. Form 52, the Report of the Parties'  
914 Planning Meeting, was carefully revised in conjunction with Rule  
915 26(f) amendments. But for the most part the Forms have languished  
916 in benign neglect. With this background, the member observed that  
917 "too many subjects of federal litigation are missing" from the  
918 pleading forms. Either there should be wholesale revisions to make  
919 them reflect the forms of litigation that dominate the docket or  
920 they should be abrogated. "They will live on, but the half-life  
921 will be short." And the courts have had sufficient time to adjust  
922 to the pleading decisions in *Twombly* and *Iqbal*; abrogation of the  
923 pleading forms will not be seen as taking sides on pleading  
924 standards.

925 Several more members expressed support for abrogation. One  
926 summarized that the alternatives are clearly set out, and "the  
927 trail leads back to abrogation." A liaison supported abrogation,  
928 noting that the next-best alternative would be to divorce the

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929 Advisory Committee from the process of maintaining and revising the  
930 forms. The Administrative Office working group provides strong  
931 support and produces very good forms.

932 It was noted that further thought should be given to  
933 preserving the Form 5 request to waive service – Rule 4(d)(1)(D)  
934 specifically requires that it be used. Form 6, the waiver itself,  
935 is not required by Rule 4, but it too might be preserved, perhaps  
936 by incorporating it into Rule 4 as Form 5 is now incorporated. Some  
937 members urged that Form 6 be carried forward. The Subcommittee will  
938 consider the manner of preserving and perhaps revising Form 5, and  
939 also will consider possibly preserving Form 6.

940 And it was suggested that the Committee should not worry about  
941 the effect of abrogation on pleading precedents. The precedents may  
942 carry forward, but they will be treated in the same way as other  
943 precedents developed under the aegis of subsequently repealed  
944 statutes. These issues should not be addressed directly in the  
945 Committee Note since any comments might be read as comments on what  
946 the Committee thinks pleading standards should be. Another member  
947 agreed with this view.

948 Another member supporting abrogation noted that there is no  
949 sense that pro se plaintiffs are using the pleading forms. The  
950 courts that are working to help pro se plaintiffs are not using  
951 Rule 84 Forms for the purpose.

952 Turning to the Committee Note, it was suggested that it is too  
953 narrow to refer only to Administrative Office forms. It should be  
954 recognized that there are other excellent sources of forms as well.  
955 Another suggestion was that the draft Note is, as the agenda  
956 materials suggest, too long. It should be shortened.

957 Judge Campbell concluded the discussion by reminding observers  
958 that comments on Rule 84 can be sent to him and to Judge Pratter.

959 *Speedy Remand of Removed Actions*

960 Jim Hood, the Attorney General of Mississippi, has proposed  
961 that rules be adopted to deal with "the use of removal to federal  
962 court as a dilatory defense tactic" to interfere with the need for  
963 immediate protection of citizens "from corporate wrongdoing." The  
964 problem is aggravated by delays in ruling on motions to remand. In  
965 one recent case in his office the Fifth Circuit granted mandamus to  
966 compel prompt disposition of a remand motion that had languished  
967 for three years on the district court docket. In another case it  
968 took fifteen months to get a final ruling from the district court.

969 Two remedies are proposed. The first rule would require

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970 automatic remand if the district court fails to act on a motion to  
971 remand within 30 days. The second rule would provide that whenever  
972 a case is remanded the removing party must pay just costs and  
973 actual expenses, incurring attorney fees.

974 The long delays described by Attorney General Hood are cause  
975 for genuine sympathy and concern. But there are countervailing  
976 considerations that make each proposal ill-suited for cure by rules  
977 adopted under the Rules Enabling Act. Although the agenda materials  
978 do not make specific recommendations, the Reporter offered a  
979 summary of the reasons why each proposal is more properly  
980 considered in the legislative process than in the rulemaking  
981 process.

982 The automatic remand proposal encounters at least three  
983 obstacles. The first and most profound is that it would require  
984 remand for want of timely decision even though the action was  
985 properly removed and lies in the subject-matter jurisdiction of the  
986 federal court. The Rules Enabling Act should not be used to expand  
987 or to limit subject-matter jurisdiction. This point is emphasized  
988 by Rule 82: "These rules do not extend or limit the jurisdiction of  
989 the district courts." It is for Congress, not the courts – not even  
990 with the participation of Congress at the culmination of the  
991 Enabling Act process – to define subject-matter jurisdiction.

992 Another difficulty with the automatic remand period is that 30  
993 days often will not be enough to act responsibly on a motion to  
994 remand. Complicated questions of law or fact may arise. The court  
995 may be hard-pressed by many conflicting obligations. These  
996 difficulties would be reduced if the period were made longer,  
997 although even 90 or 120 days – still within the 6-month reporting  
998 period – may not be long enough, particularly in courts with  
999 especially crowded dockets. These concerns reflect a third  
1000 obstacle. The Judicial Conference has long opposed statutory or  
1001 rules requirements that give some disputes priority over others on  
1002 the court's docket. This policy is reflected in 28 U.S.C. § 1657,  
1003 which directs that "each court of the United States shall determine  
1004 the order in which civil actions are heard and determined," with  
1005 exceptions that are not relevant to the present question.

1006 The mandatory imposition of expenses, including attorney fees,  
1007 encounters at least two obstacles. The more fundamental is that it  
1008 would amend 28 U.S.C. § 1447(c), which makes the award of expenses  
1009 and fees a matter for district court discretion. Congress  
1010 considered these questions not so long ago, and opted for  
1011 discretion. Supersession by an Enabling Act rule should be  
1012 attempted only for compelling reasons, and even then might better  
1013 be left to a request by the Judicial Conference that Congress take  
1014 up the matter. A similar issue is presented by § 1446(a), which

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1015 requires that a notice of removal be signed pursuant to Civil Rule  
1016 11. The long-drawn battle over the choice between discretionary and  
1017 mandatory sanctions under Rule 11 is familiar; the choice for  
1018 discretion is relatively recent and firm.

1019 The second obstacle to making an award of expenses and fees  
1020 mandatory is that it is bad policy. Some removals may indeed be  
1021 dilatory. Others present legitimate arguments for federal  
1022 jurisdiction, even if in the end the arguments fail. It is not only  
1023 that the rules committees should defer to Congress. It is that  
1024 Congress got it right.

1025 A third but less important obstacle also was noted. Although  
1026 § 1447(d) bars review of most remand orders by appeal or otherwise,  
1027 the award of fees and expenses incident to remand is an appealable  
1028 final judgment. Review of the award commonly entails review of the  
1029 remand. The result may be reversal of the award because the remand  
1030 was wrong – nothing can be done about the remand, but the court of  
1031 appeals has been put the work of deciding the issue.

1032 Judge Campbell summarized these concerns from additional  
1033 perspectives. It is easy to understand Attorney General Hood's  
1034 frustration. But we should be reluctant to base rules amendments on  
1035 extreme cases. The 30-day automatic remand would in effect amend  
1036 the federal subject-matter jurisdiction statutes and the removal  
1037 statutes. That does not seem a sensible subject for the rulemaking  
1038 process. His own experience is that expenses and attorney fees are  
1039 often awarded on remanding an action; some removal attempts present  
1040 no colorable basis for removal or are dilatory. But other cases  
1041 present valid arguments; that the argument fails at the last point  
1042 of fine analysis does not mean that the removing party should have  
1043 to pay.

1044 Committee discussion reflected unanimous agreement that these  
1045 proposals are not proper subjects for consideration in the Rules  
1046 Enabling Act process. It was noted that extreme events should not  
1047 be brushed off. Sometimes the system fails, and the system should  
1048 attempt to do something to correct the failures. Whatever the  
1049 circumstances of the cases that Attorney General Hood has  
1050 encountered, however, resolution should be found in other sources.  
1051 Mandamus from the Fifth Circuit finally provided relief in one of  
1052 these cases. At least extraordinary cases may be subject to  
1053 correction by that process. It was agreed that Judge Sutton would  
1054 respond to Attorney General Hood.

1055 *Rule 6(d): "After Service"*

1056 Rule 6(d) was rewritten two years before the Style Project,  
1057 but in keeping with Style Project precepts. Before the revision, it

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1058 provided an additional 3 days to respond when service is made by  
1059 various described means. It provided the three extra days following  
1060 service "upon the party." The spirit of economy in style led to a  
1061 subtle change, allowing 3 extra days when a party must act within  
1062 a specified time "after service." The problem is that no one  
1063 thought of the rules that allow a party to act within a specified  
1064 time after making service, Rules 14(a)(1)(service of a third-party  
1065 complaint more than 14 days after serving the original answer);  
1066 15(a)(1)(A)(right to amend a complaint once as a matter of course  
1067 "within \* \* \* 21 days after serving it); and 38(b)(1)(jury demand  
1068 no more than 14 days after the last pleading is served). Time to  
1069 act "after service" could easily be read to include time to act  
1070 after making service. Thus a party who serves an answer could  
1071 extend the time to amend once as a matter of course from 21 days to  
1072 24 days by electing to make service by any of the means eligible  
1073 for the 3 added days.

1074 For reasons described in the agenda materials, this  
1075 misadventure does not seem grave. But it can be fixed easily:

1076 When a party may or must act within a specified time  
1077 after ~~service~~ being served and service is made under Rule  
1078 5(b)(2)(C), (D), (E), or (F), 3 days are added \* \* \*.

1079 The only reason for going slow is that Rule 6(d) may soon  
1080 require attention for other reasons. The question whether it is  
1081 appropriate to add 3 days after each of the various means of  
1082 service described in Rule 5(b)(2)(C), (D), (E), and (F) has  
1083 lingered for some time. The most pointed question may be whether  
1084 service by electronic means has matured to a point that warrants  
1085 treating it in the same way as direct personal service. This  
1086 question, however, is related to more general questions about  
1087 electronic filing and service that involve the other advisory  
1088 committees and that will take some time for further work.

1089 A recommendation to approve the "being served" amendment to  
1090 Rule 6(d) for publication as part of the next package of Civil  
1091 Rules published for comment was approved unanimously. It can be  
1092 paired with an earlier-approved amendment of Rule 55 and presented  
1093 to the Standing Committee for approval, with publication to await  
1094 a package of more important amendments. That can be next summer if  
1095 the Rule 37(e) proposal and perhaps the Duke Conference  
1096 Subcommittee proposals are approved for publication then.

1097 *Technical Cross-Reference Fix*

1098 The Administrative Office has just received a suggestion that  
1099 the cross-reference to Rule 6(a)(4)(A) in Rule 77(c)(1) is an  
1100 apparent oversight, probably made in the Time Computation Project.

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1101 The holidays defined in former 6(a)(4)(A) are now defined in Rule  
1102 6(a)(6)(A). It was agreed that if study of the suggestion proves it  
1103 to be as simple an oversight as it seems, the technical correction  
1104 can be made without publication for comment.

1105 *Closing*

1106 The meeting closed with a reminder that the next meeting will  
1107 be on April 11 and 12, 2013, in Norman, Oklahoma, hosted by the  
1108 University of Oklahoma Law School. Judge Koeltl thanked the  
1109 Administrative Office for making such successful arrangements to  
1110 carry on the meeting by electronic means. Judge Campbell thanked  
all participants.

Respectfully submitted

Edward H. Cooper  
Reporter

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# TAB 1B

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
Meeting of January 3-4, 2013  
Cambridge, Massachusetts

**Draft Minutes**

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Cambridge, Massachusetts, on Thursday and Friday, January 3 and 4, 2013. The following members were present:

Judge Jeffrey S. Sutton, Chair  
Dean C. Colson, Esq.  
Roy T. Englert, Jr., Esq.  
Gregory G. Garre, Esq.  
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

The Department of Justice was represented at various points at the meeting by Acting Assistant Attorney General Stuart F. Delery, Elizabeth J. Shapiro, Esq., and Allison Stanton, Esq.

Deputy Attorney General James M. Cole, Judge Neil M. Gorsuch, and Judge Jack Zouhary were unable to attend.

Also participating were former member Judge James A. Teilborg; Professor Geoffrey C. Hazard, Jr., consultant to the committee; and Peter G. McCabe, Administrative Office Assistant Director for Judges Programs. The committee's style consultant, Professor R. Joseph Kimble, participated by telephone.

On Thursday afternoon, January 3, Judge Sutton moderated a panel discussion on civil litigation reform initiatives with the following panelists: Judge John G. Koeltl, a member of the Advisory Committee on Civil Rules and Chair of its Duke Conference subcommittee; Rebecca Love Kourlis, Executive Director of the Institute for the Advancement of the American Legal System at the University of Denver and a former justice of the Colorado Supreme Court; Dr. Emery G. Lee, III, Senior Research Associate in the Research Division of the Federal Judicial Center; and Judge Barbara B. Crabb, U.S. District Court for the Western District of Wisconsin.

Providing support to the Standing Committee were:

Professor Daniel R. Coquillette	The Committee's Reporter
Jonathan C. Rose	The Committee's Secretary and Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman (by telephone)	Chief Counsel to the Rules Committees
Joe Cecil	Research Division, Federal Judicial Center

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

### INTRODUCTORY REMARKS

Judge Sutton opened the meeting by noting the extraordinary service to the rules committees by his predecessor Judge Mark Kravitz, which would be further commemorated at the committee's dinner in the evening. He praised Judge Kravitz's extraordinary ten years of service on both the Civil Rules Advisory Committee and the Standing Committee. Judge Kravitz served as chair of both committees.

Judge Sutton specifically called attention to the commendation of Judge Kravitz in Chief Justice Roberts's year-end report and asked that the following paragraph from that report be included in the minutes:

On September 30, 2012, Mark R. Kravitz, United States District Judge for the District of Connecticut, passed away at the age of 62 from amyotrophic lateral sclerosis—Lou Gehrig's Disease. We in the Judiciary remember Mark not only as a superlative trial judge, but as an extraordinary teacher, scholar, husband, father, and friend. He possessed the temperament, insight, and wisdom that all judges aspire to bring to the bench. He tirelessly volunteered those same talents to the work of the Judicial Conference, as chair of the Committee on Rules of Practice and Procedure, which oversees the revision of all federal rules of judicial procedure. Mark battled a tragic illness with quiet courage and unrelenting good cheer, carrying a full caseload and continuing his committee work up until the final days of his life. We shall miss Mark, but his inspiring example remains with us as a model of patriotism and public service.

Chief Justice John G. Roberts, Jr., 2012 Year-End Report on the Federal Judiciary 11 (2012).

Judge Sutton reported that at its September 2012 meeting, the Judicial Conference approved without debate all fifteen proposed rules changes forwarded to it by the committee for transmittal to the Supreme Court. Assuming approval by the Court and no action by Congress to modify, defer, or delay the proposals, the amendments will become effective on December 1, 2013.

## APPROVAL OF MINUTES OF THE LAST MEETING

**The committee without objection by voice vote approved the minutes of its last meeting, held on June 11 and 12, 2012, in Washington, D.C.**

## REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set forth in Judge Campbell's memorandum of December 5, 2012 (Agenda Item 3). Judge Campbell presented several action items, including the recommendation to publish for comment amendments to Rules 37(e), 6(d), and 55(c). Judge Campbell also presented the advisory committee's recommendation to adopt without publication an amendment to Rule 77(c)(1).

*Amendment for Final Approval*

## FED. R. CIV. P. 77(c)(1) – CROSS REFERENCE CORRECTION

The proposed amendment to Rule 77(c)(1) corrects a cross-reference to Rule 6(a) that should have been changed when Rule 6(a) was amended in 2009 as part of the Time Computation Project. Before those amendments, Rule 6(a)(4)(A) defined "legal holiday" to include 10 days set aside by statute, and Rule 77(c)(1) incorporated that definition by cross-reference.

As a result of the 2009 Time Computation amendment, the Rule's list of legal holidays remained unchanged, but became Rule 6(a)(6)(A). However, through inadvertence, the cross-reference in Rule 77(c) was not addressed at that time. The proposed amendment corrects the cross-reference.

**The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference without publication.**

*Amendments for Publication*

## FED. R. CIV. P. 37(e)

Judge Campbell first gave a short history behind the drafting of the proposed new Rule 37(e). He stated that the subject of the rule had been extensively considered at a mini-conference, as well as in numerous meetings of the advisory committee and conference calls of the advisory committee's discovery subcommittee. There was wide

agreement that the time had come for developing a rules-based approach to preservation and sanctions.

The Civil Rules Committee hosted a mini-conference in Dallas in September 2011. Participants in that mini-conference provided examples of extraordinary costs assumed by litigants, and those not yet involved in litigation, to preserve massive amounts of information, as a result of the present uncertain state of preservation obligations under federal law. In December 2011, a subcommittee of the House Judiciary Committee held a hearing on the costs of American discovery that focused largely on the costs of preservation for litigation.

The discovery subcommittee of the advisory committee had agreed for some time that some form of uniform federal rule regarding preservation obligations and sanctions should be established. The subcommittee initially considered three different approaches: (1) implementing a specific set of preservation obligations; (2) employing a more general statement of preservation obligations, using reasonableness and proportionality as the touchstones; and (3) addressing the issue through sanctions. The subcommittee rejected the first two approaches. The approach that would set out specific guidance was rejected because it would be difficult to set out specific guidelines that would apply in all civil cases, and changing technology might quickly render such a rule obsolete. The more general approach was rejected because it might be too general to provide real guidance. The subcommittee therefore opted for a third approach that focuses on possible remedies and sanctions for failure to preserve. This approach attempts to specify the circumstances in which remedial actions, including discovery sanctions, will be permitted in cases where evidence has been lost or destroyed. It should provide a measure of protection to those litigants who have acted reasonably in the circumstances.

After an extensive and wide ranging discussion of the proposed new Rule 37(e), the committee approved it for publication in August 2013, conditioned on the advisory committee reviewing at its Spring 2013 meeting the major points raised at this meeting. Judge Campbell agreed that the advisory committee would address concerns raised by Standing Committee members and make appropriate revisions in the draft rule and note for the committee's consideration at its June 2013 meeting.

During the course of the committee's discussion, the following concerns were expressed with respect to the current draft of proposed new Rule 37(e) and its note:

#### Displacement of Other Laws

One committee member expressed concern about the statement in the note that the amended rule "*displaces* any other law that would authorize imposing litigation sanctions in the absence of a finding of wilfulness or bad faith, including state law in diversity

cases.” (emphasis added).

The member pointed out that use of the term “displace” could be read as a possible effort to preempt on a broad basis state or federal laws or regulations requiring the preservation of records in different contexts and for different purposes, such as tax, banking, professional, or antitrust regulation. Judge Campbell stated that there had been no such intent on the part of the advisory committee. The advisory committee had been focused on establishing a uniform federal standard solely for the preservation of records for litigation in federal court (including cases based on diversity jurisdiction). The advisory committee intended to preserve any separate state-law torts of spoliation.

Judge Campbell believed the draft committee note could be appropriately clarified to make clear that the proposed rule on preservation sanctions had no application beyond the trial of cases. A committee member noted that a statutory requirement of records preservation for non-trial purposes should not require a litigant to make greater preservation efforts for trial discovery purposes than would otherwise be required by the amended rule.

#### Use of the Term “Sanction”

Another participant noted that the word “sanction” has particularly adverse significance in most contexts when applied to the conduct of a lawyer. In some jurisdictions, this might require reporting an attorney to the board of bar overseers. Thus, in using the term “sanction,” he urged that the advisory committee differentiate between its use when referring to the actions permitted under the rule in response to failures to preserve and its broader application to the general area of professional responsibility.

#### “Irreparable Deprivation”

Several committee members raised concerns about proposed language that would allow for sanctions if the failure to preserve “irreparably deprived a party of any meaningful opportunity to present a claim or defense.” These members stated that this language could potentially eliminate most of the rule’s intended protection for the innocent and routine disposition of records. Also, as a matter of style and precise expression, one committee member preferred substitution of the word “adequate” for the word “meaningful.”

#### Acts of God

Another concern was whether the proposed draft of Rule 37(e) would permit the imposition of sanctions against an innocent litigant whose records were destroyed by an “act of God.” The accidental destruction of records because of flooding during the recent

Hurricane Sandy was offered as a hypothetical example. Judge Campbell agreed that a literal reading of the current draft might lead to imposition of sanctions as the result of a blameless destruction of records resulting from such an event. Both he and Professor Cooper agreed that the question of who should bear the loss in an “act of God” circumstance was an important policy issue for the advisory committee to revisit at its spring meeting.

#### Preservation of Current Rule 37(e) Language

The Department of Justice and several committee members also recommended retention of the language of the current Rule 37(e), which protects the routine, good-faith operation of an electronic information system. Andrea Kuperman’s research showed that the current rule is rarely invoked. But the Department of Justice argued that in its experience, the presence of the Rule 37(e) has served as a useful incentive for government departments to modernize their record-keeping practices.

#### Expanded Definition of “Substantial Prejudice”

The Department also urged that the term “substantial prejudice in the litigation”—a finding required under the draft proposal in order to impose sanctions for failure to preserve—be given further definition. It suggested that “substantial prejudice” should be assessed both in the context of reliable alternative sources of the missing evidence or information as well as in the context of the materiality of the missing evidence to the claims and defenses involved in the case. The Department and several committee members suggested that publication for public comment might be helpful to the committee in developing its final proposed rule.

**By voice vote, the committee preliminarily approved for publication in August 2013 draft proposed Rule 37(e) on the condition that the advisory committee would review the foregoing comments and make appropriate revisions in the proposed draft rule and note for approval by the Standing Committee at its June 2013 meeting.**

#### FED. R. CIV. P. 6(d) – CLARIFICATION OF “3 DAYS AFTER SERVICE”

Professor Cooper reviewed the advisory committee’s proposed amendment to Rule 6(d), which provides an additional 3 days to act after certain methods of service. The purpose of the amendment is to foreclose the possibility that a party who must act within a specified time after making service could extend the time to act by choosing a method of service that provides the added time.

Before Rule 6(d) was amended in 2005, the rule provided an additional 3 days to

respond when service was made by various described means. Only the party being served, not the party making the service, had the option of claiming the extra 3 days. When Rule 6(d) was revised in 2005 for other purposes, it was restyled according to the conventions adopted for the Style Project, allowing 3 additional days when a party must act within a specified time “after service.” This could be interpreted to cover rules allowing a party to act within a specified time after making (as opposed to receiving) service, which is not what the advisory committee intended. For example, a literal reading of present Rule 6(d) would allow a defendant to extend from 21 to 24 days the Rule 15(a)(1)(A) period to amend once as a matter of course by choosing to serve the answer by any of the means specified in Rule 6(d). Although it had not received reports of problems in practice, the advisory committee determined that this unintended effect should be eliminated by clarifying that the extra 3 days are available only to the party receiving, as opposed to making, service.

**The committee without objection by voice vote approved the proposed amendment for publication.**

FED. R. CIV. P. 55(c) – APPLICATION TO “FINAL” DEFAULT JUDGMENT

Professor Cooper explained that the proposed amendment to Rule 55(c), the rule on setting aside a default or a default judgment, addresses a latent ambiguity in the interplay of Rule 55(c) with Rules 54(b) and 60(b) that arises when a default judgment does not dispose of all claims among all parties to an action. Rule 54(b) directs that the judgment is not final unless the court directs entry of final judgment. Rule 54(b) also directs that the judgment “may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.” Rule 55(c) provides simply that the court “may set aside a default judgment under Rule 60(b).” Rule 60(b) in turn provides a list of reasons to “relieve a party . . . from a final judgment, order, or proceeding . . . .”

A close reading of the three rules together establishes that relief from a default judgment is limited by the demanding standards of Rule 60(b) only if the default judgment is made final under Rule 54(b) or when there is a final judgment adjudicating all claims among all parties.

Several cases, however, have struggled to reach the correct meaning of Rule 55(c), and at times a court may fail to recognize the meaning. The proposed amendment clarifies Rule 55(c) by adding the word “final” before “default judgment.”

**The committee without objection by voice vote approved the proposed amendment for publication.**

*Information Items*

Judge Campbell reported on several information items that did not require committee action at this time.

## DUKE CONFERENCE SUBCOMMITTEE WORK

A subcommittee of the advisory committee formed after the advisory committee's May 2010 Conference on Civil Litigation held at Duke University School of Law ("Duke Conference subcommittee") is continuing to implement and oversee further work on ideas resulting from that conference. Judge Campbell and Judge Koeltl (the Chair of the Duke Conference subcommittee) presented to the committee a package of various potential rule amendments developed by the subcommittee that are aimed at reducing the costs and delays in civil litigation, increasing realistic access to the courts, and furthering the goals of Rule 1 "to secure the just, speedy, and inexpensive determination of every action and proceeding." This package of amendments has been developed through countless subcommittee conference calls, a mini-conference held in Dallas in October 2012, and discussions during advisory committee meetings. The discussions that have occurred will guide further development of the rules package, with a goal of recommending publication of this package for public comment at the committee's June 2013 meeting.

An important issue at the Duke Conference and in the work undertaken since by the Duke Conference subcommittee has been the principle that discovery should be conducted in reasonable proportion to the needs of the case. In an important fraction of the cases, discovery still seems to run out of control. Thus, the search for ways to embed the concept of proportionality successfully in the rules continues.

Current sketches of possible amendments to parts of Rule 26 exemplify this effort and include the following proposals:

**Rule 26**

\* \* \* \* \*

**(b) Discovery Scope and Limits.**

- (1)** *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and 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. Information [within this scope of discovery]{sought} need not be admissible in evidence to be discoverable. = including 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. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C). \* \* \*

**(2) *Limitations on Frequency and Extent.***

**(A) *When Permitted.*** By order, the court may alter the limits in these rules on the number of depositions, ~~and interrogatories, requests [to produce][under Rule 34], and requests for admissions,~~ or on the length of depositions under Rule 30. ~~By order or local rule, the court may also limit the number of requests under Rule 36.~~

**(C) *When Required.*** On motion or on its own, the court must limit the frequency or extent of discovery ~~otherwise allowed by these rules or by local rule~~ if it determines that: \* \* \*

(iii) ~~the burden or expense of the proposed discovery is outside the scope permitted by Rule 26(b)(1) outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

\* \* \* \* \*

**(c) *Protective Orders***

**(1) *In General.*** \* \* \* The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: \* \* \*

**(B)** specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; \* \* \*

The drafts are works in progress and will be revisited by the advisory committee at its spring meeting.

#### FED. R. CIV. P. 84 AND FORMS

Judge Campbell further reported that the subcommittee of the advisory committee formed to study Rule 84 and associated forms is inclined to recommend abrogating Rule 84. This inclination follows months of gathering information about the general use of the forms and whether they provide meaningful help to attorneys and pro se litigants. The advisory committee is evaluating the subcommittee's inclination and intends to make a recommendation to the committee concerning the future of Rule 84 at the June 2013 meeting. If Rule 84 is abrogated, forms will still remain available through other sources, including the Administrative Office. Although forms developed by the Administrative Office do not go through the full Enabling Act process, the subcommittee would likely recommend that the advisory committee plan to work with the Administrative Office in drafting and revising forms for use in civil actions.

The committee briefly discussed the feasibility of appointing a liaison member of the civil rules advisory committee to the Administrative Office forms committee. Several members of the committee praised the prior work of the Administrative Office forms committee, particularly its ready responsiveness to current judicial and litigant needs. Its flexibility and responsiveness to rapidly changing requirements were favorably compared to the more cumbersome process imposed by the Rules Enabling Act. Peter McCabe, who chairs the Administrative Office forms committee, expressed the willingness of that committee to respond to the needs of the civil rules advisory committee.

No significant concern was raised by the committee about the potential abrogation of Rule 84.

#### MOTIONS TO REMAND

Judge Campbell reported on a proposal from Jim Hood, Attorney General of Mississippi, to require automatic remand in cases in which a district court takes no action on a motion to remand within thirty days. Attorney General Hood also proposed that the removing party be required to pay expenses, including attorney fees, incurred as a result of removal when remand is ordered. While the advisory committee was sympathetic to the problems created by federal courts failing to act timely on removal motions, it did not believe the subject fell within the jurisdiction of the rules committees. Both subject matter jurisdiction and the shifting of costs from one party to another on removal and remand are governed by federal statutes enacted by Congress and not by rules promulgated under the Rules Enabling Act. Judge Sutton has conveyed the advisory committee's response to Attorney General Hood.

## PANEL ON CIVIL LITIGATION REFORM PILOT PROJECTS

Four panelists covered the topics outlined below.

### *Selected Federal Court Reform Projects*

Judge Koeltl outlined five litigation reform projects that the Duke Conference subcommittee is following. These include:

a. A set of mandatory initial discovery protocols for employment discrimination cases was developed as part of the work resulting from the Duke Conference. These protocols were developed by experienced employment litigation lawyers and have so far been adopted by the Districts of Connecticut and Oregon.

b. A set of proposals embodied in a pilot project in the Southern District of New York to simplify the management of complex cases.

c. A Southern District of New York project to manage section 1983 prisoner abuse cases with increased automatic discovery and less judicial involvement. The project's goal is to resolve these types of cases within 5.5 months using judges as sparingly as possible through the use of such devices as specific mandatory reciprocal discovery, mandatory settlement demands, and mediation.

d. A project in the Seventh Circuit inspired by Chief Judge James F. Holderman that seeks to expedite and limit electronic discovery. The project emphasizes concepts of proportionality and cooperation among attorneys. One specific innovation, Judge Koeltl noted, was the mandatory appointment of a discovery liaison by each litigant.

e. The expedited trial project being implemented in the Northern District of California. This project provides for shortened periods for discovery and depositions and severely limits the duration of a trial. The goal is for the trial to occur within six months after discovery limits have been agreed upon. Judge Koeltl acknowledged, however, that this entire procedure is an "opt in" one, and so far no litigant has "opted" to use it. As a result, the entire project is now under review to determine what changes will make it more appealing to litigants.

### *State Court Pilot Projects*

Justice Kourlis presented a summary of information compiled by the Institute for the Advancement of the American Legal System on state court pilot projects. She said

these projects fell into three basic categories, all with the common purpose of increasing access to the courts for all types of litigants. The three basic categories were:

a. Different rules for different types of cases

One category of pilot projects attempts to resolve issues of costs and delay by establishing different sets of rules for different types of cases, such as for complex (e.g., business) cases and simple cases amenable to short, summary, and expedited (“SES”) procedures. Complex case programs are currently underway in California and Ohio. In those projects, the emphasis appears to be on close judicial case management, frequent conferences, and cooperation by counsel. Substantial prior experience in complex business cases by participating judges appears to have contributed to the success of the projects.

SES programs for simple cases are currently underway in California, Nevada, New York, Oregon, and Texas. These programs emphasize streamlined discovery, strict adherence to tight trial deadlines, and, in at least one state, mandatory participation by litigants whose cases fall under a \$100,000 damages limit.

b. Proportionality in Discovery

A number of states have launched projects to achieve this objective. These projects have involved local rule changes to expedite and limit the scope of discovery, more frequent and earlier conferences with judges, and more active judicial case management to achieve proportionate discovery and encourage attorney cooperation.

c. Active Judicial Case Management

This third category of state projects overlaps with the first two categories. Some examples of the techniques employed include: (i) the assignment of a case to a single judicial officer from start to finish; (ii) early and comprehensive pretrial conferences; and (iii) enhanced judicial involvement in pretrial discovery disputes before the filing of any written motions.

*A “Rocket Docket” Court*

Judge Crabb gave a succinct presentation on the benefits of her “rocket docket” court (the Western District of Wisconsin) and how such a court can effectively manage its docket. She explained that litigants value certainty and predictability, and that the best way to achieve these goals is to set a firm trial date. Given her court’s current case volume, the goal is to complete a case within twelve to fifteen months after it is filed. Judge Crabb explained that this management style achieves transparency, simplicity, and

service to the public.

Once a case is filed in the Western District of Wisconsin, a magistrate judge promptly holds a comprehensive scheduling conference. At this conference, a case plan is developed and discovery dates are fixed. Although this court usually will not change pre-trial discovery deadlines, it will do so on application of both parties if the ultimate trial date is not jeopardized.

In Judge Crabb's district, the magistrate judges are always available for telephone conferences on motions or other pretrial disputes, but they do not seek to actively manage cases. The litigants know that they have a firm trial date and can be relied upon to seek judicial intervention whenever it is necessary. In Judge Crabb's view, this "rocket docket" approach permits both the rapid disposition of a high volume of cases and maintenance of high morale of the court staff.

*Federal Judicial Center Statistical Observations on Discovery*

Dr. Lee of the Federal Judicial Center then gave a short presentation on statistical observations about discovery. He noted that the Center's research shows that the cost of discovery is a problem only in a minority of cases. Indeed, various statistical analyses lead him to conclude that the problem cases are a small subset of the total number of cases filed and involve a rather small subset of difficult lawyers.

Dr. Lee cited a multi-variant analysis done in 2009 and 2010 for the Duke Conference. In that study, the Federal Judicial Center found that the costly discovery cases have several common factors:

1. High stakes for the litigants (either economic or non-economic);
2. Factual complexity;
3. Disputes over electronic discovery; and
4. Rulings on motions for summary judgment.

Other interesting statistical observations of the study included the fact that on average a 1% increase in the economic value of the case leads to a .25% increase in its total discovery cost. Other discovery surveys indicate that almost 75% of lawyers on average believe that discovery in their cases is proportionate and that the other side is sufficiently cooperative. Only in a small minority of the cases—approximately 6%—are lawyers convinced that discovery demands by the opposing side are highly unreasonable.

## REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Struve presented the report of the advisory committee, as set forth in Judge Colloton's memorandum of December 5, 2012 (Agenda Item 6). There were no action items for the committee.

### *Information Items*

#### SEALING AND REDACTION OF APPELLATE BRIEFS

Judge Colloton reported that the advisory committee had decided not to proceed with a proposal to implement a national uniform standard for sealing or redaction of appellate briefs. He explained that the circuits take varying approaches to sealing and redaction on appeal. During the advisory committee's discussions, several members had expressed support for the approach of the Seventh Circuit, where sealed items in the record on appeal are unsealed after a brief grace period unless a party seeks the excision of those items from the record or moves to seal them on appeal. This approach is based on the belief that judicial proceedings should be open and transparent. However, members also noted that each circuit currently seems satisfied with its own approach to sealed filings.

Given the division of opinion among the circuits, the advisory committee ultimately decided there was no compelling reason to propose a rule amendment on the topic of sealing on appeal. However, its members believed that each circuit might find it helpful to know how other circuits handle such questions; therefore, shortly after its meeting, Judge Sutton, in one of his last acts as the chair of the advisory committee, wrote to the chief judge and clerk of each circuit to summarize the concerns that have been raised about sealed filings, the various approaches to those filings in different circuits, and the rationale behind the approach of the Seventh Circuit.

#### MANUFACTURED FINALITY

The advisory committee also revisited the topic of "manufactured finality," which occurs when parties attempt to create an appealable final judgment by dismissing peripheral claims in order to secure appellate review of the central claim. A review of circuit practice found that virtually all circuits agree that an appealable final judgment is created when all peripheral claims are dismissed with prejudice. Many circuits also agree that an appealable final judgment is not created when a litigant dismisses peripheral claims without prejudice, although some circuits take a different view. But less uniformity exists for handling middle ground attempts to "manufacture" finality. For example, there is disagreement in the circuits as to whether an appealable judgment results if the appellant conditionally dismisses the peripheral claims with prejudice by

agreeing not to reassert the peripheral claims unless the appeal results in reinstatement of the central claim. A joint civil-appellate rules subcommittee was appointed to review whether “manufactured finality” might be addressed in the federal rules. On initial examination, members had divergent views.

Before last fall’s advisory committee meeting, the Supreme Court accepted for review *SEC v. Gabelli*, 653 F.3d 49 (2nd Cir. 2011), *cert. granted*, 133 S.Ct. 97 (2012). The Second Circuit’s jurisdiction in that case rested on “conditional finality.” Since the Court might clarify this issue in that case, the advisory committee decided to await the Court’s decision before deciding how to proceed.

#### LENGTH LIMITS FOR BRIEFS

The advisory committee is considering whether to overhaul the treatment of filing-length limits in the Appellate Rules. The 1998 amendments to the Appellate Rules set the length limits for merits briefs by means of a type-volume limitation, but Rules 5, 21, 27, 35, and 40 still set length limits in terms of pages for other types of appellate filings. Members have reported that the page limits invite manipulation of fonts and margins, and that such manipulation wastes time, disadvantages opponents, and makes filings harder to read. The advisory committee intends to consider whether the type-volume approach should be extended to these other types of appellate filings.

#### CLASS ACTION OBJECTORS

Finally, the advisory committee has received correspondence about so-called “professional” class action objectors who allegedly file specious objections to a settlement and then appeal the approval of the settlement with the goal of extracting a payment from class action attorneys in exchange for withdrawing their appeals. One proposed solution would amend Rule 42 to require court approval of voluntary dismissal motions by class action objectors, together with a certification by an objector that nothing of value had been received in exchange for withdrawing the appeal. Another proposed solution would require an appeal bond from class action objectors sufficient to cover the costs of delay caused by appeals from denials of non-meritorious objections. Judge Colloton suggested that collaboration with the Civil Rules Advisory Committee would likely be required to determine both the scope of and possible remedies for this problem.

#### REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi’s memorandum of November 26, 2012 (Agenda Item 8). As the committee’s fall meeting in Washington was canceled as a result of Hurricane Sandy,

there were no action items for the committee.

### *Information Items*

Judge Raggi reported that on the agenda for the advisory committee's Fall 2012 meeting and now high on the agenda for its Spring 2013 meeting is a Department of Justice proposal to amend Rule 4 to permit effective service of summons on a foreign organization that has no agent or principal place of business within the United States. The Department argues that its proposed change is necessary in order to prevent evasion of service by organizations committing offenses within the United States.

Judge Raggi also reported on the status of the proposed amendments to Rule 12, the rule addressing pleadings and pretrial motions. The proposed amendments were published for public comment in August 2011. The amendments clarify which motions must be raised before trial and the consequences if the motions are not timely filed. Numerous comments were received, including detailed objections and suggestions from various bar organizations. The committee's reporters prepared an 80-page analysis of these comments. In its consideration of the comments, the Rule 12 subcommittee reaffirmed the need for the amendment, but concluded that the public comments warranted several changes in its proposal. With those changes, the subcommittee has recommended to the advisory committee that an amended proposal be approved and transmitted to the Standing Committee for its approval. The advisory committee's consideration of the Rule 12 subcommittee's report will take place at its Spring 2013 meeting. Judge Raggi expressed her appreciation for the extended attention already devoted by Judge Sutton to the committee's work on Rule 12.

### REPORT OF THE ADVISORY COMMITTEE ON RULES OF EVIDENCE

Judge Fitzwater and Professor Capra delivered the report of the advisory committee, as set forth in Judge Fitzwater's memorandum of November 26, 2012 (Agenda Item 4). There were no action items for the committee.

### *Information Items*

#### SYMPOSIUM ON FED. R. EVID. 502

Professor Capra reported on a symposium the advisory committee hosted in conjunction with its Fall 2012 meeting. The purpose of the symposium was to review the current use (or lack of use) of Rule 502 (on attorney-client privilege and work product and waiver of those protections) and to discuss ways in which the rule can be better known and understood so that it can fulfill its original purposes of clarifying and limiting

waiver of privilege and work product protection, thereby reducing delays and costs in litigation. Panelists included judges, lawyers, and academics with expertise and experience in the subject matter of the rule, some of whom are also veterans of the rulemaking process. The symposium proceedings and a model Rule 502(d) order will be published in the March 2013 issue of the *Fordham Law Review*.

The panel attributed much of the lack of use of Rule 502 as a device to aid in pre-production review to a simple lack of knowledge of the rule by practitioners and judges. Part of this absence of knowledge was attributed to the rule's location in the rules of evidence as opposed to the rules of civil procedure. Various suggestions on promotion of the rule's visibility, including a model Rule 502 order, education through Federal Judicial Center classes and a possible informational letter to chief district judges, are in the process of being implemented or developed.

#### PROPOSED AMENDMENTS TO FED. R. EVID. 801(d)(1) AND 803(6)-(8)

A published proposed amendment to Rule 801(d)(1), the hearsay exemption for certain prior consistent statements, provides that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. This proposal has been the subject of only one public comment so far. Proposed amendments to Rule 803(6)-(8)—the hearsay exemptions for business records, absence of business records, and public records—would clarify that the opponent has the burden of showing that the proffered record is untrustworthy. No comments have been received yet on this proposal.

#### SYMPOSIUM ON TECHNOLOGY AND THE FEDERAL RULES OF EVIDENCE

Judge Fitzwater reported that the advisory committee is planning to convene a symposium to highlight the intersection of the evidence rules and emerging technologies and to consider whether the evidence rules need to be amended in light of technological advances. The symposium will be held in conjunction with the advisory committee's Fall 2013 meeting at the University of Maine School of Law in Portland.

These presentations concluded the first day of the meeting of the Standing Committee.

**FRIDAY, JANUARY 4, 2013**

**REPORT ON PACE OF RULEMAKING**

Benjamin Robinson gave a brief presentation on the timing and pace of federal rulemaking over the past thirty years. Judge Sutton had requested the report, noting that at various times in the past both the Federal Judicial Center and the committee have tackled this subject. He specifically pointed to the Easterbrook-Baker “self-study” report by the Standing Committee, 169 F.R.D. 679 (1995), contained in the agenda book.

Mr. Robinson presented a series of charts that demonstrated that over the past thirty years there have been several peaks and valleys in the pace of federal rulemaking. The charts demonstrated that the peaks were caused by legislative activity and to a lesser extent by several rules restyling projects.

For example, bankruptcy legislation in the mid-1980s created the occasion in 1987 for 117 bankruptcy rule changes. Similarly, bankruptcy legislation created the occasion for 95 bankruptcy rule changes in 1991. Additional bankruptcy legislation in 2005 produced a total of 43 bankruptcy rules amendments in 2008. The civil and evidence rules restyling projects also have required a considerable number of rule changes.

Mr. Robinson’s presentation initiated a broader discussion of the timing and pace of rulemaking by committee members.

Judge Sutton stated that he had placed this matter on the agenda in part to sensitize the Standing Committee to the work required by the Supreme Court on rule amendments.

At one point during the discussion, Judge Sutton advanced a theoretical proposal that perhaps rule changes could be made every two years instead of every year. For example, the civil and appellate rules committees could group their proposed changes in the even years, while the criminal, evidence, and bankruptcy rules committees could group their proposed changes in the odd years. Judge Sutton noted that such a scheme would have the advantage of predictability both for the Supreme Court and for the bar as to what types of rule changes could be expected in a particular year.

Judge Sutton asked for comments from several of those present, in particular, participants who have had extensive experience over the years in the rulemaking process. Several points emerged during the discussion. First, there is no question that the Supreme Court is very aware of the burden that the rulemaking process places upon it. Chief Justices Burger and Rehnquist were particularly conscious of it. Also, the current rules

calendar places a heavy burden on the Court in that the rule proposals arrive in the spring when the Court is busiest. However, no one argued that seeking a legislative change in the calendar made any sense. Instead, the idea was advanced that the Rules Committees could target the March meeting of the Judicial Conference for its major proposals, rather than the September meeting. This would mean that the rule changes could go to the Court at a more convenient time, such as late summer before its annual session begins on October 1. However, a correlative disadvantage would be the overall extension in the length of time required for a proposed amendment to the rules to be adopted.

Experienced observers pointed out that much of the timing of rulemaking is dictated by external factors such as legislation or decided cases. While the timing of such projects as the restyling of the evidence and civil rules might be discretionary, the need for new rules created by legislation or other external events often is not. All participants appeared to agree that keeping the Supreme Court involved in the rulemaking process is most important to its integrity and standing. Thus, all agreed at a minimum that greater sensitivity to the needs and desires of the Court as to the timing of proposed rules changes is highly advisable.

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff, Professor Gibson, and Professor McKenzie presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum of December 5, 2012 (Agenda Item 7). The report covered four major subjects: (1) revisions to the official forms for individual debtors; (2) a mini-conference on home mortgage forms and rules; (3) the development of a Chapter 13 form plan and related rule amendments; and (4) electronic signature issues.

### DRAFTS OF REVISED OFFICIAL FORMS FOR INDIVIDUAL DEBTORS

Judge Wedoff first reported on the restyled Official Bankruptcy Forms for individual debtors. These forms are the initial product of the forms modernization project, a multi-year endeavor of the advisory committee, working in conjunction with the Federal Judicial Center and the Administrative Office. The dual goals of the forms modernization project are to improve the official bankruptcy forms and to improve the interface between the forms and available technology.

In August 2012, the first nine forms were published for public comment. To date, few comments have been received; however, the advisory committee expects to receive more comments before the February 15, 2013, deadline, and it will review those comments before seeking approval at the June meeting to publish the following eighteen remaining forms for individual debtor cases that have not yet been published:

### Forms To Be Considered in June

- Official Form 101—Voluntary Petition for Individuals Filing for Bankruptcy
- Official Form 101AB—Your Statement About an Eviction Judgment Against You – Parts A and B
- Official Form 104—List in Individual Chapter 11 Cases of Creditors Who Have the 20 Largest Unsecured Claims Against You Who are not Insiders
- Official Form 106 – Summary—A Summary of Your Assets and Liabilities and Certain Statistical Information
- Official Form 106A—Schedule A: Property
- Official Form 106B—Schedule B: Creditors Who Hold Claims Secured by Property
- Official Form 106C—Schedule C: Creditors Who Have Unsecured Claims
- Official Form 106D—Schedule D: The Property You Claim as Exempt
- Official Form 106E—Schedule E: Executory Contracts and Unexpired Leases
- Official Form 106F—Schedule F: Your Codebtors
- Official Form 106 – Declaration—Declaration About an Individual Debtor’s Schedules
- Official Form 107—Your Statement of Financial Affairs for Individuals Filing for Bankruptcy
- Official Form 112—Statement of Intention for Individuals Filing Under Chapter 7
- Official Form 119—Bankruptcy Petition Preparer’s Notice, Declaration and Signature
- Official Form 121—Your Statement About Your Social Security Numbers
- Official Form 318—Discharge of Debtor in a Chapter 7 Case
- Official Form 423—Certification About a Financial Management Course
- Official Form 427—Cover Sheet for Reaffirmation Agreement

In anticipation of seeking publication in June, Judge Wedoff gave the committee an extensive preview of each of the above forms and took under advisement specific committee member comments on each of them with a plan to incorporate these comments in the preparation of the advisory committee’s ultimate proposals.

### MINI-CONFERENCE ON HOME MORTGAGE FORMS AND RULES

Judge Wedoff reported on a successful mini-conference held by the advisory committee on September 19, 2012, to explore the effectiveness of the new rules and forms concerning the impact of home mortgage rules and reporting requirements for chapter 13 cases, which went into effect on December 1, 2011. The mini-conference reflected a general acceptance of the disclosure requirements of the new rules, but pointed out various specific difficulties that will likely require some subsequent fine-tuning either

by the advisory committee or through case-law development.

#### CHAPTER 13 FORM PLAN AND RELATED RULE AMENDMENTS

Professor McKenzie reported on the advisory committee's development of a national form plan for chapter 13 cases. The working group presented a draft of the form plan for preliminary review at the advisory committee's Fall 2012 meeting. The group also proposed amendments to Bankruptcy Rules 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, specifically to require use of the national form plan and to establish the authority needed to implement some of the plan's provisions.

The advisory committee discussed the proposed form and rules amendments and accepted the working group's suggestion that the drafts be shared with a cross-section of interested parties to obtain their feedback on the proposals. Professor McKenzie reported that a mini-conference on the draft plan and proposed rule amendments was scheduled to take place in Chicago on January 18, 2013. The working group will make revisions based on the feedback received at the mini-conference and then present the model plan package to both the consumer issues and forms subcommittees for their consideration. The subcommittees will report their recommendations to the advisory committee at its Spring 2013 meeting. If a chapter 13 form plan and related rule amendments are approved at that meeting, the advisory committee will request that they be approved for publication in August 2013 at the June meeting of the Standing Committee.

#### CONSIDERATION OF ELECTRONIC SIGNATURE ISSUES

The last item of Judge Wedoff's report was an update on the advisory committee's consideration (at the request of the forms modernization project) of a rule establishing a uniform procedure for the treatment and preservation of electronic signatures. The advisory committee has requested Dr. Molly Johnson of the Federal Judicial Center to gather information on existing practices regarding the use of electronic signatures by nonregistered individuals and requirements for retention of documents with handwritten signatures. Her findings will be available by the end of this year and will be reported to the advisory committee at its Spring 2014 meeting.

#### NEXT MEETING

The Standing Committee will hold its next meeting in Washington, D.C., on June 3 and 4, 2013.

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## Duke Conference Rules Package

These materials advance the Duke Conference Subcommittee's recommendation that the Committee transmit a package of rules amendments to the Standing Committee with a recommendation that the rules be approved for publication this summer. This introduction briefly summarizes the context in which the proposals were developed and describes the proposals. The rules texts and Committee Notes follow.

The lessons learned at the Duke Conference in May 2010 have provided the impetus for education programs, revision of practice and management manuals, and pilot projects. The Federal Judicial Center has played important roles in these undertakings, including its involvement in helping to design pilot projects in forms that support rigorous analysis rather than less rigorous anecdotal information. Another project inspired by the Conference is the discovery protocol for individual employment claims. The protocol is complete and has been adopted by some courts; early signs are that it is a true success, spurring hopes that similar protocols may be developed for other categories of litigation.

Developing Civil Rules amendments based on the Conference has taken nearly three years. The Subcommittee has met frequently by conference calls to explore a broad initial menu of proposals, to winnow the choices down to the more important ones, and to work out the details in a process of continuing refinement. The attached notes on the two most recent conference calls are sets 13 and 14 in the series. The Subcommittee's deliberations also were greatly assisted by a miniconference with lawyers from a wide array of practices, judges, and academics held in October, 2012.

The goals of these rules proposals are to advance the three principal aspirations repeatedly embraced at the Conference, summarized as cooperation, proportionality, and early hands-on case management, while creating a balanced package that works toward reducing cost and delay for the advantage of all litigants. Although a unity of purpose underlies the package, most of the individual proposals are independent in the sense that one or more could be discarded without defeating the others. Yet the package as a whole is likely to be more effective; the parts are interrelated, even if not interdependent.

Rather than follow the numerical sequence of the Rules proposed for amendment, the proposals can be presented in three groups. Those that aim directly at delay at the start of an action come first. Then come those that aim at achieving proportionality and cost-effectiveness in discovery through a variety of means. Finally comes a single and simple proposal to encourage cooperation among the parties.

### ADVANCING EARLY AND EFFECTIVE CASE MANAGEMENT

The most direct aim at early case management is reflected in

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, setting the time to respond to begin at the first Rule 26(f) conference.

Rule 4(m) Time to Serve: Rule 4(m) would be amended to reduce the presumptive time for serving the summons and complaint to 60 days after filing, not the 120 days now allowed. The effect will be to get the action moving in half the time. The amendment responds to the commonly expressed view that four months to serve the summons and complaint is too long.

Four concerns have been identified in reducing the time to serve. The most direct is that more time may justifiably be needed. Rule 4(m) already addresses that concern. The court may extend the time, and must extend the time if the plaintiff shows good cause for the failure to serve within the specified time.

A second issue is that Rule 15(c)(1)(C) incorporates Rule 4(m) in the tests for relation back of an amendment that "changes the party or the naming of a party against whom a claim is served." Relation back is allowed only if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by the amendment received such notice of the action that it will not be prejudiced in defending and knew or should have known that but for some mistake it would have been made a defendant. Reducing the time to serve reduces in the same measure the time in which the party brought into the action must have received notice of the required quality. The Subcommittee does not believe that this concern should deter the adoption of a desirable change in Rule 4(m). Nor does it believe that Rule 15(c)(1)(C) should be amended to offset the Rule 4(m) amendment. The time for receiving notice is the same for the party to be brought in as for a party named in the original pleading.

A third concern also relates to statutes of limitations. One early comment has observed that individual employment plaintiffs often seek counsel close to the end of the time allowed to file. The response is to file and then deliberately withhold service, undertaking the inquiries required by Rule 11 so that the action can be dismissed without service if it does not at least surmount the Rule 11 threshold. There is some room to sympathize with disadvantaged parties who, whether from ignorance of limitations periods or hesitation to launch litigation, defer seeking counsel until the period is about to expire. On the other hand, there is room to be concerned with extending statutory limitations periods by court rules that allow a relatively lengthy extension – nearly one-third for a one-year period. Moreover, Rule 11 applies to the signing and filing, not the service, of a pleading.

A fourth concern has been raised by the Department of Justice. Rule 71.1(d)(3)(A) directs that notice of a condemnation action be served on each defendant "in accordance with Rule 4." The Department often finds it difficult to effect service on all

claimants even within the 120 days now allowed by Rule 4(m). Shortening the time to 60 days will aggravate these problems. Dismissal for failure to effect service within the prescribed time, however, is not consistent with the provisions for dismissal by court order in Rule 71.1(i)(C). At first blush, the problem seems to be something like this. Rule 71.1 is sufficiently self-contained that even as the rules now stand, the court cannot dismiss a condemnation action simply for failure to effect service within the time provided by Rule 4(m). Shortening the time thus should not make any difference. But it is an unnecessary burden to have to lead judges through the intricate interlocking provisions that establish this result. Shortening the time for service will aggravate the problem because it will increase the occasions for seeking dismissal. And, it is asserted, there are many cases in which practical reasons make it difficult to make prompt service on all "defendants." On the other hand, judges should have some basis of authority to support effective case management by directing that service be made without unnecessary delay. Working out a sensible reconciliation of these competing concerns will take some effort. But it is important to work out an answer that can be published for comment with this package. To be sure, dismissal can be avoided by demonstrating to a judge inexperienced with condemnation cases that incorporating Rule 4(m) does not include its provisions for dismissal when service is not timely made. To the extent that this problem will arise more frequently when the period for service is reduced from 120 days to 60 days, however, it is better to address the problem now. If possible, supplemental materials will be circulated before the meeting.

Rule 16(b): Time for Scheduling Order: Rule 16(b) now provides that the judge must issue the scheduling order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served or 90 days after any defendant has appeared. The proposed amendment reduces these periods to 90 days after service or 60 days after appearance. It also introduces, for the first time, authority to delay issuance of the order on finding good cause. The change responds to concerns that the length of time that elapses before a scheduling order is issued unnecessarily delays the litigation.

The Department of Justice has protested that it has special needs that make this acceleration of the scheduling order unwise. The reasons are much the same as those that underlie the Rule 12 provisions allowing it 60 days to answer. It is not just that the Department is a vast and intricate organization. Its clients often are other vast and intricate government agencies. The time required to designate the right attorneys in the Department is followed by the time required to identify the right people in the client agency to work with the attorneys and to begin gathering the information necessary to litigate.

Other attorneys have expressed similar concerns that there are cases in which it is not feasible to prepare for a meaningful scheduling conference on an accelerated schedule. A defendant may

take time to select its attorneys, compressing the apparent schedule. And some cases are inherently too complex to allow even a preliminary working grasp of likely litigation needs in the presumptive times allowed.

These concerns persuaded the Subcommittee to relax its initial proposal, which would have cut the present times in half, to 60 days after service or 45 days after an appearance. They also were responsible for adding the new provision that authorizes the court to delay the scheduling order beyond the specified times. This provision would provide more time than the current rule, but only in appropriate cases, and seems protection enough, both for complex cases in general and for the special needs of the Department of Justice.

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 Subcommittee believes that an actual conference by direct communication among the parties and court is very valuable. It considered a proposal that would require an actual conference in all actions, except those in exempted categories. This proposal was rejected in the end after hearing from several judges and lawyers at the miniconference that there are cases in which the judge is confident that a Rule 26(f) report prepared by able lawyers provides a sound basis for a scheduling order without further ado. But if there is to be a scheduling conference, the Subcommittee believes it should be by direct communication; "mail, or other means" are not effective. This change is effected by requiring consultation "at a scheduling conference," striking "by telephone, mail, or other means." The Committee Note makes it clear that a conference can be held face-to-face, by telephone, or by other means of simultaneous communication.

A separate issue has been held in abeyance. Rule 16(b)(1) exempts "categories of actions exempted by local rule" from the scheduling order requirement. It may be attractive to substitute a uniform national set of exemptions, uniform not only for Rule 16(b) but integrated with the exemptions from initial disclosure. Actions exempt from initial disclosure also are exempt from the discovery moratorium in Rule 26(d) and the parties' conference required by Rule 26(f). Exempting the same categories of actions from the scheduling order requirement would simplify the rules and should respond to similar concerns. But it has seemed better to await further inquiry into the categories now exempted by local rules, and to explore the reasons for exemptions not now made in Rule 26(a)(1)(B). This topic is being developed for possible future action.

Rules 16(b)(3), 26(f): Additional Subjects: Three subjects are proposed for addition to the Rule 16(b)(3) list of permitted contents of a scheduling order. Two of them are also proposed for

the list of subjects in a Rule 26(f) discovery plan. Those two are described here; the third is noted separately below.

The proposals would permit a scheduling order and discovery plan to provide for the preservation of electronically stored information and to include agreements reached under Rule 502 of the Federal Rules of Evidence. Each is an attempt to remind litigants that these are useful subjects for discussion and agreement. The Evidence Rules Committee is concerned that Rule 502 remains underused; an express reference in Rule 16 may promote its more effective use.

Rule 16(b)(3): Conference Before Discovery Motion: This proposal would add a new Rule 16(b)(3)(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."

Many courts, but less than a majority, now have local rules similar to this proposal. Experience with these rules shows that an informal pre-motion conference with the court often resolves a discovery dispute without the need for a motion, briefing, and order. The practice has proved highly effective in reducing cost and delay.

The Subcommittee considered an alternative that would have required a conference with the court before any discovery motion. In the end, it concluded that at present it is better simply to encourage this practice. Many judges do not require a pre-motion conference now. It is possible that local conditions and practices in some courts establish effective substitutes. Absent a stronger showing of need, it seems premature to adopt a mandate, but the consideration of this practice should encourage its use.

Rule 26(d)(1): Early Rule 34 Requests: The Subcommittee considered at length a variety of proposals that would allow discovery requests to be made before the parties' Rule 26(f) conference. The purpose of the early requests would not be to start the time to respond. Instead, the purpose is to facilitate the conference by allowing consideration of actual requests, providing a focus for specific discussion. In the end, the proposal has been limited to Rule 34 requests to produce.

The proposal adds a new Rule 26(d)(2), better set out in full than summarized:

(2) *Early Rule 34 Requests.*

(A) *Time to Deliver.* More than 21 days after the summons and complaint are served on any party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other

party that has been served.

(B) *When Considered Served.* The request is considered as served at the first Rule 26(f) conference.

A corresponding change would be made in 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.

Some participants in the miniconference – particularly those who typically represent plaintiffs – said they would take advantage of this procedure to advance the Rule 26(f) conference and early discovery planning. Concrete disputes as to the scope of discovery could then be brought to the attention of the court at a Rule 16 conference. Others expressed skepticism, wondering why anyone would want to expose discovery strategy earlier than required and fearing that initial requests made before the conference are likely to be unreasonably broad and to generate an inertia that will resist change at the conference.

After considering these concerns, the Subcommittee concluded that the opportunity should be made available to advance the Rule 26(f) conference by providing a specific focus for discussion of Rule 34 requests, which often involve heavy discovery burdens. Little harm will be done if parties fail to take advantage of the opportunity, and real benefit may be gained if they do.

#### PROPORTIONALITY: DISCOVERY PROPOSALS

Several proposals seek to promote responsible use of discovery proportional to the needs of the case. The most important address the scope of discovery directly by amending Rule 26(b)(1), and by promoting 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 explicitly recognizes the present authority to issue a protective order specifying an allocation of expenses incurred by discovery.

Rule 26(b)(1): Proportionality By Adopting Rule 26(b)(2)(C)(iii) Cost-Benefit Analysis: In 1983 the Committee thought to have solved the problems of disproportionate discovery by adding the provision that has come to be lodged in present Rule 26(b)(2)(C)(iii). This rule directs that "on motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that \* \* \* (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues."

Although the rule now directs that the court "must" limit discovery, on its own and without motion, it cannot be said to have realized the hopes of its authors. In most cases discovery now, as it was then, is accomplished in reasonable proportion to the realistic needs of the case. This conclusion has been established by repeated empirical studies, including the large-scale closed-case study done by the Federal Judicial Center for the Duke Conference. But at the same time discovery runs out of proportion in a worrisome number of cases, particularly those that are complex, involve high stakes, and generate particularly contentious adversary behavior. The number of cases and the burdens imposed present serious problems. These problems have not yet been solved.

Several proposals were considered to limit the general scope of discovery provided by Rule 26(b)(1) by adding a requirement of "proportionality." Addition of this term without definition, however, generated concerns that it would be too open-ended to support uniform or even meaningful implementation. Limiting it to "reasonably proportional" did not allay those concerns. At the same time, many participants in the miniconference expressed respect for the principle embodied in Rule 26(b)(2)(C)(iii), finding it suitably nuanced and balanced. The problem is not with the rule text but with its implementation – it is not often enough invoked to dampen excessive discovery demands.

These considerations frame the proposal to revise the scope of discovery defined in Rule 26(b)(1) by transferring the analysis required by present Rule 26(b)(2)(C)(iii) to become a limit on the scope of discovery, so that 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's 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): 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 as well are made in Rule 26(b)(1). The rule was amended in 2000 to introduce a distinction between party-controlled discovery and court-controlled discovery. Party-controlled discovery is now limited to "matter that is relevant to any party's claim or defense." That provision is carried forward in proposed Rule 26(b)(1). Court-controlled discovery is now authorized to extend, on court order for good cause, to "any matter relevant to the subject matter involved in the action." The Committee Note made it clear that the parties' claims or defenses are those identified in the pleadings. The proposed amendment deletes the "subject matter involved in the action" from the scope of discovery. Discovery should be limited to the parties' claims or defenses. If

discovery of information relevant to the claims or defenses identified in the pleadings shows support for new claims or defenses, amendment of the pleadings may be allowed when appropriate.

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." This provision traces back to 1946, when it was added to overcome decisions that denied discovery solely on the ground that the requested information would not be admissible in evidence. A common example was hearsay. Although a witness often could not testify that someone told him the defendant ran through a red light, knowing who it was that told that to the witness could readily lead to admissible testimony. This sentence was amended in 2000 to add "Relevant" as the first word. The Committee Note reflects concern that the "reasonably calculated" standard "might swallow any other limitation on the scope of discovery." "Relevant" was added "to clarify that information must be relevant to be discoverable \* \* \*." Many judges still encounter arguments based on the assumption that this provision still swallows up the limits that Rule 26(b)(1) defines as the scope of discovery. A similar argument has been advanced in an early comment on the proposal.

To offset the risk that the provision addressing admissibility may defeat the limits otherwise defining the scope of discovery, the proposal is to revise this sentence to read: "Information within this scope of discovery need not be admissible in evidence to be discoverable." The limits defining the scope of discovery are thus preserved.

A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule adds: "including 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 it is no longer necessary to clutter the rule text with these examples.

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 (b)(2)(C)(iii) to become part of (b)(1) makes it appropriate to revise the cross-references to include both (b)(1) and (b)(2). The revisions are shown throughout the proposed rules.

Proportionality: 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 1 day of 7 hours 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. A presumptive limit of 25 requests to produce was studied at length but ultimately abandoned.

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)."

Reducing the presumptive limit on the number of depositions was considered at length. Some judges at the Duke Conference expressed the view that civil litigators over-use depositions, apparently holding the view that every witness who testifies at trial must be deposed beforehand. These judges noted that they regularly see lawyers effectively cross-examine witnesses in criminal trials without the benefit of depositions, a practice widely viewed as sufficient to satisfy the demands of due process. The judges also observed that they rarely, if ever, see witnesses effectively impeached with deposition transcripts. At the same time, many parties are opting to resolve their disputes through private arbitration or mediation services that are less expensive than civil litigation because they do not involve depositions, and yet these alternatives are thought sufficient to reach resolution of important disagreements.

Research by the FJC further supports these concerns, and also suggests that a presumptive limit of 5 depositions will have no effect in most cases. Emery Lee has returned to the data base compiled for the 2010 FJC study to measure the frequency of cases with more than 5 depositions by plaintiffs or by defendants. The data base itself was built by excluding several categories of actions that are not likely to have discovery. The data for numbers of depositions were further limited by counting only cases in which there was at least one deposition. Drawing from reports by plaintiffs of how many depositions the plaintiffs took and how many depositions the defendants took, and parallel reports by defendants, the numbers ranged from 14% to 23% of cases with more than 5 depositions by the plaintiff or by the defendant. With one exception, the estimates were that 78% or 79% of these cases had 10 or fewer. Other findings are that each additional deposition increases the cost of an action by about 5%, and that estimates that discovery costs were "too high" increase with the number of depositions.

On the other hand, the Subcommittee has heard that the present limit of 10 depositions works well – that leave is readily granted when there is good reason to take more than 10, and that parties do not wantonly take more than 5 depositions simply because the presumptive limit is 10. More pointedly, the Subcommittee also has

heard from several lawyers who represent individual plaintiffs in employment discrimination cases, arguing that they commonly need more than 5 depositions to establish their claims.

In short, there are a number of cases with more than five depositions, and most of them involve 10 or fewer. The question is whether it will be useful to revise Rules 30 and 31 to establish a lower presumptive threshold for potential judicial management. Setting the limit at 5 does not mean that motions and orders must be made in every case that deserves more than 5 – the parties can be expected to agree, and should manage to agree, in most of these cases. But the lower limit can be useful in inducing reflection on the need for depositions, in prompting discussions among the parties, and – when those avenues fail – in securing court supervision. The Committee Note addresses the concerns expressed by those who oppose the new limit by stressing that leave to take more than five depositions must be granted when appropriate. The fear that lowering the threshold will raise judicial resistance seems ill-founded. Courts are willing now to grant leave to take more than 10 depositions per side in actions that warrant a greater number. The argument that they will become reluctant to grant leave to take more than 5, or more than 10, is not persuasive.

Considering judicial experience and the FJC findings, and aiming to decrease the cost of civil litigation, making it more accessible for average citizens, the Subcommittee is persuaded that the presumptive number of depositions should be reduced. Hopefully, the change will result in an adjustment of expectations concerning the appropriate amount of civil discovery.

The Committee Note emphasizes the court's responsibility to grant leave to exceed 5 depositions, "recognizing that the context of particular cases often will justify more."

Shortening the presumptive length of a deposition from 7 hours to 6 hours reflects revision of earlier drafts that would have reduced the time to 4 hours. The four-hour limit was prompted by experience in some state courts. Arizona, for example, adopted a 4-hour limit several years ago. Judges in Arizona federal courts often find that parties stipulate to 4-hour limits based on their favorable experience with the state rule. But several comments have suggested that for many depositions, 4 hours do not suffice. At the same time, several others have observed that squeezing 7 hours of deposition time into one day, after accounting for lunch time and other breaks, often means that the deposition extends well into the evening. Judges also have noted that 6 hours of trial time makes for a very full day when lunch and breaks are considered. The reduction to 6 hours is intended to reduce the burden of deposing a witness for 7 hours in one day, but without sacrificing the opportunity to conduct a complete examination.

The proposal to reduce the presumptive number of Rule 33 interrogatories to 15 has not attracted much concern. There has been some concern that 15 interrogatories are not enough even for

some relatively small-stakes cases. As with Rules 30 and 31, the Subcommittee has concluded that 15 will meet the needs of most cases, and that it is advantageous to provide for court supervision when the parties cannot reach agreement in the cases that may justify a greater number.

Rule 36 requests to admit are an established part of the rules, whether they be regarded as true "discovery" devices or as a device for framing the issues more directly than is accomplished even by contention interrogatories. The proposal to add a presumptive limit of 25 expressly exempts requests to admit the genuineness of documents, avoiding any risk that the limit might cause problems in document-heavy litigation. This proposal has not drawn much criticism from those who have commented on Subcommittee deliberations. (The Subcommittee also considered provisions that would generally defer the time for admissions to the completion of other discovery, but in the end decided that early requests can be useful.)

Proportionality: 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 Subcommittee considered adding to Rule 26(g) a provision that signing a discovery request, response, or objection certifies that it is "not evasive." That proposal has been put aside in the face of concerns that "evasive" is a malleable concept, and that malleability will invite satellite litigation.

More specific concerns underlie Rule 34 proposals addressing objections and actual production. 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. This language is borrowed from Rule 33(b)(4), where it has served well. 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 lament 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. Providing that information can aid the decision whether to contest the objections. The Committee Note addresses a particular question: it is proper to state limits on the extent of the search without further elaboration – for example, that the search was limited to documents created on or after a specified date.

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, electronically stored information, or tangible things and actually producing copies. The distinction, however, is not clearly developed in the rule. 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 directs that a party electing to produce must 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. The Committee Note recognizes the value of "rolling production" that makes production in discrete batches. Rule 37 is amended by adding authority to move for an order to compel production if "a party fails to produce documents."

#### 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 hyperadversary behavior and wished for some rule that would enhance cooperation.

It would be possible to impose a duty of cooperation by direct rule provisions. The provisions might be limited to the discovery rules alone, since discovery behavior gives rise to many of the laments, or could apply generally to all litigation behavior. Consideration of drafts that would impose a direct and general duty of cooperation faced several concerns. Cooperation is an open-ended concept. It is difficult to identify a proper balance of cooperation with legitimate, even essential, adversary behavior. A general duty might easily generate excessive collateral litigation, similar to the experience with an abandoned and unlamented version of Rule 11. And there may be some risk that a general duty of cooperation could conflict with professional responsibilities of effective representation. These drafts were abandoned.

What is proposed is a modest addition to Rule 1. The parties are made to share responsibility 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." The Note observes that most lawyers and parties conform to this expectation, and notes that "[e]ffective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure."

As amended, Rule 1 will encourage cooperation by lawyers and parties directly, and will provide useful support for judicial efforts to elicit better cooperation when the lawyers and parties fall short. It cannot be expected to cure all adversary excesses, but it will do some good.

DUKE RULES PACKAGE

1                                   **Rule 1 Scope and Purpose**

2                   \* \* \* [These rules] should be construed, ~~and~~  
3                   administered, and employed by the court and the parties  
4                   to secure the just, speedy, and inexpensive determination  
5                   of every action and proceeding.

6                                   Committee Note

7                   Rule 1 is amended to emphasize that just as the court should  
8                   construe and administer these rules to secure the just, speedy, and  
9                   inexpensive determination of every action, so the parties share the  
10                  responsibility to employ the rules in the same way. Most lawyers  
11                  and parties cooperate to achieve these ends. But discussions of  
12                  ways to improve the administration of civil justice regularly  
13                  include pleas to discourage over-use, misuse, and abuse of  
14                  procedural tools that increase cost and result in delay. Effective  
15                  advocacy is consistent with – and indeed depends upon – cooperative  
16                  and proportional use of procedure.

17                                   **Rule 4 Summons**

18                                   \* \* \*

19                  (m) TIME LIMIT FOR SERVICE. If a defendant is not served within ~~120~~ 60  
20                  days after the complaint is filed, the court \* \* \* must  
21                  dismiss the action without prejudice against that defendant or  
22                  order that service be made within a specified time. But if  
23                  the plaintiff shows good cause \* \* \*

24                                   Committee Note

25                  The presumptive time for serving a defendant is reduced from  
26                  120 days to 60 days. This change, together with the shortened times  
27                  for issuing a scheduling order set by amended Rule 16(b)(2), will  
28                  reduce delay at the beginning of litigation.

29                                   **Rule 16 Pretrial Conferences; Scheduling; Management**

30                  (b) SCHEDULING.

31                  (1) *Scheduling Order.* Except in categories of actions  
32                  exempted by local rule, the district judge – or a  
33                  magistrate judge when authorized by local rule – must  
34                  issue a scheduling order:

35                                  (A) after receiving the parties' report under Rule  
36                                  26(f); or

37                                  (B) after consulting with the parties' attorneys and  
38                                  any unrepresented parties at a scheduling  
39                                  conference ~~by telephone, mail, or other means.~~

40                  (2) *Time to Issue.* The judge must issue the scheduling order  
41                  as soon as practicable, but ~~in any event~~ unless the judge  
42                  finds good cause for delay the judge must issue it within  
43                  the earlier of ~~120~~ 90 days after any defendant has been  
44                  served with the complaint or ~~90~~ 60 days after any

45 defendant has appeared.

46 (3) *Contents of the Order.* \* \* \*

47 (B) *Permitted Contents.* The scheduling order may: \* \* \*

48 (iii) provide for disclosure, ~~or~~ discovery, or  
49 preservation of electronically stored  
50 information;

51 (iv) include any agreements the parties reach for  
52 asserting claims of privilege or of protection  
53 as trial-preparation material after  
54 information is produced, including agreements  
55 reached under Federal Rule of Evidence 502;

56 (v) direct that before moving for an order relating  
57 to discovery the movant must request a  
58 conference with the court;

59 [present (v) and (vi) would be renumbered] \* \* \*

60 Committee Note

61 The provision for consulting at a scheduling conference by  
62 "telephone, mail, or other means" is deleted. A scheduling  
63 conference is more effective if the court and parties engage in  
64 direct simultaneous communication. The conference may be held in  
65 person, by telephone, or by more sophisticated electronic means.

66 The time to issue the scheduling order is reduced to the  
67 earlier of 90 days (not 120 days) after any defendant has been  
68 served, or 60 days (not 90 days) after any defendant has appeared.  
69 This change, together with the shortened time for making service  
70 under Rule 4(m), will reduce delay at the beginning of litigation.  
71 At the same time, a new provision recognizes that the court may  
72 find good cause to extend the time to issue the scheduling order.  
73 In some cases it may be that the parties cannot prepare adequately  
74 for a meaningful Rule 26(f) conference and then a scheduling  
75 conference in the time allowed. Because the time for the Rule 26(f)  
76 conference is geared to the time for the scheduling conference or  
77 order, an order extending the time for the scheduling conference  
78 will also extend the time for the Rule 26(f) conference. But in  
79 most cases it will be desirable to hold at least a first scheduling  
80 conference in the time set by the rule.

81 Three items are added to the list of permitted contents in  
82 Rule 16(b)(3)(B).

83 The order may provide for preservation of electronically  
84 stored information, a topic also added to the provisions of a  
85 discovery plan under Rule 26(f)(3)(C). Parallel amendments of Rule  
86 37(e) recognize that a duty to preserve discoverable information  
87 may arise before an action is filed, and may be shaped by pre-filing  
88 requests to preserve and responses to them.

89 The order also may include agreements incorporated in a court  
90 order under Evidence Rule 502 controlling the effects of disclosure

91 of information covered by attorney-client privilege or work-product  
92 protection, a topic also added to the provisions of a discovery  
93 plan under Rule 26(f)(3)(D).

94 Finally, the order may direct that before filing a motion for  
95 an order relating to discovery the movant must request a conference  
96 with the court. Many judges who hold such conferences find them an  
97 efficient way to resolve most discovery disputes without the delay  
98 and burdens attending a formal motion, but the decision whether to  
99 require such conferences is left to the discretion of the judge in  
100 each case.

101 **Rule 26. Duty to Disclose; General Provisions; Governing**  
102 **Discovery**

103 (b) DISCOVERY SCOPE AND LIMITS.

104 (1) *Scope in General.* Unless otherwise limited by court order,  
105 the scope of discovery is as follows: Parties may obtain  
106 discovery regarding any nonprivileged matter that is  
107 relevant to any party's claim or defense and proportional  
108 to the needs of the case considering the amount in  
109 controversy, the importance of the issues at stake in the  
110 action, the parties' resources, the importance of the  
111 discovery in resolving the issues, and whether the burden  
112 or expense of the proposed discovery outweighs its likely  
113 benefit. Information within this scope of discovery need  
114 not be admissible in evidence to be discoverable. -  
115 including the existence, description, nature, custody,  
116 condition, and location of any documents or other  
117 tangible things and the identity and location of persons  
118 who know of any discoverable matter. For good cause, the  
119 court may order discovery of any matter relevant to the  
120 subject matter involved in the action. Relevant  
121 information need not be admissible at the trial if the  
122 discovery appears reasonably calculated to lead to the  
123 discovery of admissible evidence. All discovery is  
124 subject to the limitations imposed by Rule 26(b)(2)(C).

125 (2) *Limitations on Frequency and Extent.*

126 (A) *When Permitted.* By order, the court may alter the  
127 limits in these rules on the number of depositions,  
128 and interrogatories, and requests for admissions,  
129 or on the length of depositions under Rule 30. By  
130 order or local rule, the court may also limit the  
131 number of requests under Rule 36.

132 \* \* \*

133 (C) *When Required.* On motion or on its own, the court  
134 must limit the frequency or extent of discovery  
135 otherwise allowed by these rules or by local rule  
136 if it determines that: \* \* \*

137 (iii) the burden or expense of the proposed  
138 discovery is outside the scope permitted by

139 ~~Rule 26(b)(1) outweighs its likely benefit,~~  
140 ~~considering the needs of the case, the amount~~  
141 ~~in controversy, the parties' resources, the~~  
142 ~~importance of the issues at stake in the~~  
143 ~~action, and the importance of the discovery in~~  
144 ~~resolving the issues.~~

145 \* \* \*

146 (c) PROTECTIVE ORDERS.

147 (1) *In General.* \* \* \* The court may, for good cause, issue an  
148 order to protect a party or person from annoyance,  
149 embarrassment, oppression, or undue burden or expense,  
150 including one or more of the following: \* \* \*

151 (B) specifying terms, including time and place or the  
152 allocation of expenses, for the disclosure or  
153 discovery; \* \* \*

154 (d) TIMING AND SEQUENCE OF DISCOVERY.

155 (1) *Timing.* A party may not seek discovery from any source  
156 before the parties have conferred as required by Rule  
157 26(f), except:

158 (A) in a proceeding exempted from initial disclosure  
159 under Rule 26(a)(1)(B) ~~7~~<sub>i</sub> or

160 (B) when authorized by these rules, including Rule  
161 26(d)(2), by stipulation, or by court order.

162 (2) Early Rule 34 Requests.

163 (A) Time to Deliver. More than 21 days after the summons  
164 and complaint are served on a party, a request  
165 under Rule 34 may be delivered:

166 (i) to that party by any other party, and

167 (ii) by that party to any plaintiff or to any other  
168 party that has been served.

169 (B) When Considered Served. The request is considered as  
170 served at the first Rule 26(f) conference.

171 (2) *Sequence.* Unless, on motion, the parties stipulate or the  
172 court orders otherwise for the parties' and witnesses'  
173 convenience and in the interests of justice:

174 (A) methods of discovery may be used in any sequence;  
175 and

176 (B) discovery by one party does not require any other  
177 party to delay its discovery.

178 \* \* \*

179 (f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.

- 180 (1) *Conference Timing*. Except in a proceeding exempted from  
181 initial disclosure under Rule 26(a)(1)(B) or \* \* \*
- 182 (3) *Discovery Plan*. A discovery plan must state the parties'  
183 views and proposals on: \* \* \*
- 184 (C) any issues about disclosure, or discovery, or  
185 preservation of electronically stored information,  
186 including the form or forms in which it should be  
187 produced;
- 188 (D) any issues about claims of privilege or of  
189 protection as trial-preparation materials,  
190 including – if the parties agree on a procedure to  
191 assert these claims after production – whether to  
192 ask the court to include their agreement in an  
193 order under Federal Rule of Evidence 502;

194 Committee Note

195 The scope of discovery is changed in several ways. Rule  
196 26(b)(1) is revised to limit the scope of discovery to what is  
197 proportional to the needs of the case. The considerations that bear  
198 on proportionality are moved from present Rule 26(b)(2)(C)(iii).  
199 Although the considerations are familiar, and have measured the  
200 court's duty to limit the frequency or extent of discovery, the  
201 change incorporates them into the scope of discovery that must be  
202 observed by the parties without court order.

203 The amendment deletes the former provision authorizing the  
204 court, for good cause, to order discovery of any matter relevant to  
205 the subject matter involved in the action. Proportional discovery  
206 relevant to any party's claim or defense suffices. Such discovery  
207 may support amendment of the pleadings to add a new claim or  
208 defense that affects the scope of discovery.

209 The former provision for discovery of relevant but  
210 inadmissible information that appears reasonably calculated to lead  
211 to the discovery of admissible evidence is also amended. Discovery  
212 of nonprivileged information not admissible in evidence remains  
213 available so long as it is otherwise within the scope of discovery.  
214 Hearsay is a common illustration. The qualifying phrase – "if the  
215 discovery appears reasonably calculated to lead to the discovery of  
216 admissible evidence" – is omitted. Discovery of inadmissible  
217 information is limited to matter that is otherwise within the scope  
218 of discovery, namely that which is relevant to a party's claim or  
219 defense and proportional to the needs of the case. The discovery of  
220 inadmissible evidence should not extend beyond the permissible  
221 scope of discovery simply because it is "reasonably calculated" to  
222 lead to the discovery of admissible evidence.

223 Rule 26(b)(2)(A) is revised to reflect the addition of  
224 presumptive limits on the number of requests for admission under  
225 Rule 36. The court may alter these limits just as it may alter the  
226 presumptive limits set by Rules 30, 31, and 33.

227 Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of

228 the considerations that bear on proportionality to Rule 26(b)(1).  
229 The court still must limit the frequency or extent of proposed  
230 discovery, on motion or on its own, if it is outside the scope  
231 permitted by Rule 26(b)(1). Rule 26(b)(2)(C) is further amended by  
232 deleting the reference to discovery "otherwise allowed by these  
233 rules or local rule." Neither these rules nor local rules can  
234 "otherwise allow" discovery that exceeds the scope defined by Rule  
235 26(b)(1) or that must be limited under Rule 26(b)(2)(C).

236 Rule 26(c)(1)(B) is amended to include an express recognition  
237 of protective orders that specify terms allocating expenses for  
238 disclosure or discovery. Authority to enter such orders is included  
239 in the present rule, and courts are coming to exercise this  
240 authority. Explicit recognition will forestall the temptation some  
241 parties may feel to contest this authority.

242 Rule 26(d)(1)(B) is amended to allow a party to deliver Rule  
243 34 requests to another party more than 21 days after that party has  
244 been served even though the parties have not yet had a required  
245 Rule 26(f) conference. Delivery may be made by any party to the  
246 party that has been served, and by that party to any plaintiff and  
247 any other party that has been served. Delivery does not count as  
248 service; the requests are considered to be served at the first Rule  
249 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs  
250 from service. This relaxation of the discovery moratorium is  
251 designed to facilitate focused discussion during the Rule 26(f)  
252 conference. Discussion at the conference may produce changes in the  
253 requests. The opportunity for advance scrutiny of requests  
254 delivered before the Rule 26(f) conference should not affect a  
255 decision whether to allow additional time to respond.

256 Rule 26(d)(2) is amended to recognize that the parties may  
257 stipulate to case-specific sequences of discovery.

258 Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add  
259 two items to the discovery plan – issues about preserving  
260 electronically stored information and court orders on agreements to  
261 protect against waiver of privilege or work-product protection  
262 under Evidence Rule 502. Parallel amendments of Rule 37(e)  
263 recognize that a duty to preserve discoverable information may  
264 arise before an action is filed, and may be shaped by prefiling  
265 requests to preserve and responses to them.

## 266 **Rule 30 Depositions by Oral Examination**

267 (a) WHEN A DEPOSITION MAY BE TAKEN. \* \* \*

268 (2) *With Leave*. A party must obtain leave of court, and the  
269 court must grant leave to the extent consistent with Rule  
270 26(b)(1) and (2):

271 (A) if the parties have not stipulated to the deposition  
272 and:

273 (i) the deposition would result in more than 10 5  
274 depositions being taken under this rule or  
275 Rule 31 by the plaintiffs, or by the

276 defendants, or by the third-party defendants;  
277 \* \* \*

278 (d) DURATION; SANCTION; MOTION TO TERMINATE OR LIMIT.

279 (1) *Duration.* Unless otherwise stipulated or ordered by the  
280 court, a deposition is limited to one day of 7 6 hours.  
281 The court must allow additional time consistent with Rule  
282 26(b)(1) and (2) if needed to fairly examine the deponent  
283 or if the deponent, another person, or any other  
284 circumstance impedes or delays the examination.

285 Committee Note

286 Rule 30 is amended to reduce the presumptive number of  
287 depositions to 5 by the plaintiffs, or by the defendants, or by the  
288 third-party defendants. Rule 30(a)(2), however, continues to direct  
289 that the court must grant leave to take more depositions to the  
290 extent consistent with Rule 26(b)(1) and (2). And Rule 30(a)(2)(A)  
291 continues to recognize that the parties may stipulate to a greater  
292 number. Just as cases frequently arise in which one or all sides  
293 reasonably need more than 10 depositions, so there will be still  
294 more cases that reasonably justify more than 5. First-line reliance  
295 continues to rest on the parties to recognize the cases in which  
296 more depositions are required, acting in accord with Rule 1. But if  
297 the parties fail to agree, the court is responsible for identifying  
298 the cases that need more, recognizing that the context of  
299 particular cases often will justify more. The court's determination  
300 is guided by the scope of discovery defined in Rule 26(b)(1) and  
301 the limiting principles stated in Rule 26(b)(2).

302 Rule 30(d) is amended to reduce the presumptive limit of a  
303 deposition to one day of 6 hours. Experience with the present 7-  
304 hour presumptive limit suggests that a deposition begun in the  
305 morning often runs into evening hours after accounting for breaks.  
306 Six hours should suffice for most depositions, and encourage  
307 efficient use of the time while providing a less arduous experience  
308 for the deponent.

309 **Rule 31 Depositions by Written Questions**

310 (a) WHEN A DEPOSITION MAY BE TAKEN. \* \* \*

311 (2) *With Leave.* A party must obtain leave of court, and the  
312 court must grant leave to the extent consistent with Rule  
313 26(b)(1) and (2):

314 (A) if the parties have not stipulated to the deposition  
315 and:

316 (i) the deposition would result in more than ~~10~~ 5  
317 depositions being taken under this rule or  
318 Rule 30 by the plaintiffs, or by the  
319 defendants, or by the third-party defendants;  
320 \* \* \*

321 Committee Note

322 Rule 31 is amended to adopt for depositions by written  
323 questions the same presumptive limit of 5 depositions by the  
324 plaintiffs, or by the defendants, or by the third-party defendants  
325 as is adopted for Rule 30 depositions by oral examination.

### 326 Rule 33 Interrogatories to Parties

327 (a) IN GENERAL.

328 (1) *Number*. Unless otherwise stipulated or ordered by the court, a  
329 party may serve on another party no more than ~~25~~ 15  
330 interrogatories, including all discrete subparts. Leave to  
331 serve additional interrogatories may be granted to the extent  
332 consistent with Rule 26(b)(1) and (2).

#### 333 Committee Note

334 Rule 33 is amended to reduce from 25 to 15 the presumptive  
335 limit on the number of interrogatories to parties. As with the  
336 reduction in the presumptive number of depositions under Rules 30  
337 and 31, the purpose is to encourage the parties to think carefully  
338 about the most efficient and least burdensome use of discovery  
339 devices. There is no change in the authority to increase the number  
340 by stipulation or by court order. As with other numerical limits on  
341 discovery, the court should recognize that some cases will require  
342 a greater number of interrogatories, and set a limit consistent  
343 with Rule 26(b)(1) and (2).

### 344 Rule 34 Producing Documents, Electronically Stored Information, 345 and Tangible Things, or Entering onto Land, for Inspection and 346 Other Purposes \* \* \*

347 (b) PROCEDURE. \* \* \*

348 (2) *Responses and Objections*. \* \* \*

349 (A) *Time to Respond*. The party to whom the request is  
350 directed must respond in writing within 30 days  
351 after being served or – if the request was  
352 delivered under Rule 26(d)(1)(B) – within 30 days  
353 after the parties' first Rule 26(f) conference. A  
354 shorter or longer time may be stipulated to under  
355 Rule 29 or be ordered by the court.

356 (B) *Responding to Each Item*. For each item or  
357 category, the response must either state that  
358 inspection and related activities will be  
359 permitted as requested or state the grounds  
360 for objecting to the request with specificity,  
361 including the reasons. If the responding party  
362 states that it will produce copies of  
363 documents or of electronically stored  
364 information instead of permitting inspection,  
365 the production must be completed no later than  
366 the time for inspection stated in the request  
367 or a later reasonable time stated in the  
368 response.

369 (C) Objections. An objection must state whether any  
370 responsive materials are being withheld on the  
371 basis of that objection. An objection to part of a  
372 request must specify the part and permit inspection  
373 of the rest. . \* \* \*

374 Committee Note

375 Several amendments are made in Rule 34, aimed at reducing the  
376 potential to impose unreasonable burdens by objections to requests  
377 to produce.

378 Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(1)(B).  
379 The time to respond to a Rule 34 request delivered before the  
380 parties' Rule 26(f) conference is 30 days after the first Rule  
381 26(f) conference.

382 Rule 34(b)(2)(B) is amended to make it clear that objections  
383 to Rule 34 requests must be stated with specificity. This provision  
384 adopts the language of Rule 33(b)(4), eliminating any doubt that  
385 less specific objections might be suitable under Rule 34.

386 Rule 34(b)(2)(B) is further amended to reflect the common  
387 practice of producing copies of documents or electronically stored  
388 information rather than simply permitting inspection. The response  
389 to the request must state that copies will be produced. The  
390 production must be completed either by the time for inspection  
391 stated in the request or by a later reasonable time specifically  
392 identified in the response. When it is necessary to make the  
393 production in stages the response should specify the beginning and  
394 end dates of the production.

395 Rule 34(b)(2)(C) is amended to provide that an objection to a  
396 Rule 34 request must state whether anything is being withheld on  
397 the basis of the objection. This amendment should end the confusion  
398 that frequently arises when a producing party states several  
399 objections and still produces information, leaving the requesting  
400 party uncertain whether any relevant and responsive information has  
401 been withheld on the basis of the objections. An objection that  
402 states the limits that have controlled the search for responsive  
403 and relevant materials qualifies as a statement that the materials  
404 have been "withheld." Examples would be a statement that the search  
405 was limited to materials created during a defined period, or  
406 maintained by identified sources.

407 **Rule 36 Requests for Admission**

408 (a) SCOPE AND PROCEDURE.

409 (1) *Scope.* A party may serve on any other party a written  
410 request to admit, for purposes of the pending action  
411 only, the truth of any matters within the scope of Rule  
412 26(b)(1) relating to:

413 (A) facts, the application of law to fact, or opinions  
414 about either; and

415 (B) the genuineness of any described document.

416 (2) Number. Unless otherwise stipulated or ordered by the  
417 court, a party may serve no more than 25 requests to  
418 admit under Rule 36(a)(1)(A) on any other party,  
419 including all discrete subparts. The court may grant  
420 leave to serve additional requests to the extent  
421 consistent with Rule 26(b)(1) and (2). \* \* \*

422 [Present (2), (3), (4), (5), and(6) would be renumbered]

423 Committee Note

424 For the first time, a presumptive limit of 25 is introduced  
425 for the number of Rule 36(a)(1)(A) requests to admit the truth of  
426 facts, the application of law to fact, or opinions about either.  
427 "[A]ll discrete subparts" are included in the count, to be  
428 determined in the same way as under Rule 33(a)(1). The limit does  
429 not apply to requests to admit the genuineness of any described  
430 document under Rule 36(a)(1)(B). As with other numerical limits on  
431 discovery, the court should recognize that some cases will require  
432 a greater number of requests, and set a limit consistent with the  
433 limits of Rule 26(b)(1) and (2).

434 **Rule 37 Failure to Make Disclosures or to Cooperate in Discovery;**  
435 **Sanctions**

436 (a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY. \* \* \*

437 (3) *Specific Motions.* \* \* \*

438 (B) *To Compel a Discovery Response.* A party seeking  
439 discovery may move for an order compelling an  
440 answer, designation, production, or inspection.  
441 This motion may be made if: \* \* \*

442 (iv) a party fails to produce documents or fails  
443 to respond that inspection will be permitted –  
444 or fails to permit inspection – as requested  
445 under Rule 34.

446 Committee Note

447 Rule 37(a)(3)(B)(iv) is amended to reflect the common practice  
448 of producing copies of documents or electronically stored  
449 information rather than simply permitting inspection. This change  
450 brings item (iv) into line with paragraph (B), which provides a  
451 motion for an order compelling "production, or inspection."

1

**Rule 1 Scope and Purpose**

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\* \* \* [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 and proceeding.

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**Rule 4 Summons**

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\* \* \*

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- (m) TIME LIMIT FOR SERVICE. If a defendant is not served within ~~120~~ 60  
 days after the complaint is filed, the court \* \* \* must  
 dismiss the action without prejudice against that defendant or  
 order that service be made within a specified time. But if  
 the plaintiff shows good cause \* \* \*

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**Rule 16 Pretrial Conferences; Scheduling; Management**

14

- (b) SCHEDULING.

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- (1) *Scheduling Order.* Except in categories of actions  
 exempted by local rule, the district judge – or a  
 magistrate judge when authorized by local rule – must  
 issue a scheduling order:

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- (A) after receiving the parties' report under Rule  
 26(f); or

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21

- (B) after consulting with the parties' attorneys and  
 any unrepresented parties at a scheduling  
 conference ~~by telephone, mail, or other means.~~

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- (2) *Time to Issue.* The judge must issue the scheduling order  
 as soon as practicable, but ~~in any event~~ unless the judge  
finds good cause for delay the judge must issue it within  
 the earlier of ~~120~~ 90 days after any defendant has been  
 served with the complaint or ~~90~~ 60 days after any  
 defendant has appeared.

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- (3) *Contents of the Order.* \* \* \*

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- (B) *Permitted Contents.* The scheduling order may: \* \* \*

32

- (iii) provide for disclosure, ~~or~~ discovery, or  
preservation of electronically stored  
 information;

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- (iv) include any agreements the parties reach for  
 asserting claims of privilege or of protection  
 as trial-preparation material after  
 information is produced, including agreements  
reached under Federal Rule 502 of Evidence  
502;

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- (v) direct that before moving for an order relating  
to discovery the movant must request a  
conference with the court;

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43

[present (v) and (vi) would be renumbered] \* \* \*

**Rule 26. Duty to Disclose; General Provisions; Governing Discovery**

(b) DISCOVERY SCOPE AND LIMITS.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and 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. Information within this scope of discovery need not be admissible in evidence to be discoverable. = ~~including 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. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions, and interrogatories, and requests for admissions, or on the length of depositions under Rule 30. ~~By order or local rule, the court may also limit the number of requests under Rule 36.~~

\* \* \*

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery ~~otherwise allowed by these rules or by local rule~~ if it determines that: \* \* \*

(iii) ~~the burden or expense of the proposed discovery is outside the scope permitted by Rule 26(b)(1) outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

\* \* \*

(c) PROTECTIVE ORDERS.

91 (1) *In General.* \* \* \* The court may, for good cause, issue an  
92 order to protect a party or person from annoyance,  
93 embarrassment, oppression, or undue burden or expense,  
94 including one or more of the following: \* \* \*

95 (B) specifying terms, including time and place or the  
96 allocation of expenses, for the disclosure or  
97 discovery; \* \* \*

98 (d) TIMING AND SEQUENCE OF DISCOVERY.

99 (1) *Timing.* A party may not seek discovery from any source  
100 before the parties have conferred as required by Rule  
101 26(f), except:

102 (A) in a proceeding exempted from initial disclosure  
103 under Rule 26(a)(1)(B); or

104 (B) when authorized by these rules, including Rule  
105 26(d)(2), by stipulation, or by court order.

106 (2) Early Rule 34 Requests.

107 (A) Time to Deliver. More than 21 days after the summons  
108 and complaint are served on a party, a request  
109 under Rule 34 may be delivered:

110 (i) to that party by any other party, and

111 (ii) by that party to any plaintiff or to any other  
112 party that has been served.

113 (B) When Considered Served. The request is considered as  
114 served at the first Rule 26(f) conference.

115 (2) *Sequence.* Unless, ~~on motion,~~ the parties stipulate or the  
116 court orders otherwise for the parties' and witnesses'  
117 convenience and in the interests of justice:

118 (A) methods of discovery may be used in any sequence;  
119 and

120 (B) discovery by one party does not require any other  
121 party to delay its discovery.

122 \* \* \*

123 (f) CONFERENCE OF THE PARTIES; PLANNING FOR DISCOVERY.

124 (1) *Conference Timing.* Except in a proceeding exempted from  
125 initial disclosure under Rule 26(a)(1)(B) or \* \* \*

126 (3) *Discovery Plan.* A discovery plan must state the parties'  
127 views and proposals on: \* \* \*

128 (C) any issues about disclosure, ~~or~~ discovery, or  
129 preservation of electronically stored information,  
130 including the form or forms in which it should be  
131 produced;

132 (D) any issues about claims of privilege or of  
133 protection as trial-preparation materials,  
134 including – if the parties agree on a procedure to  
135 assert these claims after production – whether to  
136 ask the court to include their agreement in an  
137 order under Federal Rule of Evidence 502;

### 138 **Rule 30 Depositions by Oral Examination**

139 (a) WHEN A DEPOSITION MAY BE TAKEN. \* \* \*

140 (2) *With Leave*. A party must obtain leave of court, and the  
141 court must grant leave to the extent consistent with Rule  
142 26(b)(1) and (2):

143 (A) if the parties have not stipulated to the deposition  
144 and:

145 (i) the deposition would result in more than ~~10~~ 5  
146 depositions being taken under this rule or  
147 Rule 31 by the plaintiffs, or by the  
148 defendants, or by the third-party defendants;  
149 \* \* \*

150 (d) DURATION; SANCTION; MOTION TO TERMINATE OR LIMIT.

151 (1) *Duration*. Unless otherwise stipulated or ordered by the  
152 court, a deposition is limited to one day of 7 6 hours.  
153 The court must allow additional time consistent with Rule  
154 26(b)(1) and (2) if needed to fairly examine the deponent  
155 or if the deponent, another person, or any other  
156 circumstance impedes or delays the examination.

### 157 **Rule 31 Depositions by Written Questions**

158 (a) WHEN A DEPOSITION MAY BE TAKEN. \* \* \*

159 (2) *With Leave*. A party must obtain leave of court, and the  
160 court must grant leave to the extent consistent with Rule  
161 26(b)(1) and (2):

162 (A) if the parties have not stipulated to the deposition  
163 and:

164 (i) the deposition would result in more than ~~10~~ 5  
165 depositions being taken under this rule or  
166 Rule 30 by the plaintiffs, or by the  
167 defendants, or by the third-party defendants;  
168 \* \* \*

### 169 **Rule 33 Interrogatories to Parties**

170 (a) IN GENERAL.

171 (1) *Number*. Unless otherwise stipulated or ordered by the court, a  
172 party may serve on another party no more than ~~25~~ 15  
173 interrogatories, including all discrete subparts. Leave to  
174 serve additional interrogatories may be granted to the extent  
175 consistent with Rule 26(b)(1) and (2).

176 **Rule 34 Producing Documents, Electronically Stored Information,**  
177 **and Tangible Things, or Entering onto Land, for Inspection and**  
178 **Other Purposes \* \* \***

179 (b) PROCEDURE. \* \* \*

180 (2) *Responses and Objections.* \* \* \*

181 (A) *Time to Respond.* The party to whom the request is  
182 directed must respond in writing within 30 days  
183 after being served or – if the request was  
184 delivered under Rule 26(d)(1)(B) – within 30 days  
185 after the parties' first Rule 26(f) conference. A  
186 shorter or longer time may be stipulated to under  
187 Rule 29 or be ordered by the court.

188 (B) *Responding to Each Item.* For each item or  
189 category, the response must either state that  
190 inspection and related activities will be  
191 permitted as requested or state the grounds  
192 for objecting to the request with specificity,  
193 including the reasons. If the responding party  
194 states that it will produce copies of  
195 documents or of electronically stored  
196 information instead of permitting inspection,  
197 the production must be completed no later than  
198 the time for inspection stated in the request  
199 or a later reasonable time stated in the  
200 response.

201 (C) *Objections.* An objection must state whether any  
202 responsive materials are being withheld on the  
203 basis of that objection. An objection to part of a  
204 request must specify the part and permit inspection  
205 of the rest. . \* \* \*

206 **Rule 36 Requests for Admission**

207 (a) SCOPE AND PROCEDURE.

208 (1) *Scope.* A party may serve on any other party a written  
209 request to admit, for purposes of the pending action  
210 only, the truth of any matters within the scope of Rule  
211 26(b)(1) relating to:

212 (A) facts, the application of law to fact, or opinions  
213 about either; and

214 (B) the genuineness of any described document.

215 (2) *Number.* Unless otherwise stipulated or ordered by the  
216 court, a party may serve no more than 25 requests to  
217 admit under Rule 36(a)(1)(A) on any other party,  
218 including all discrete subparts. The court may grant  
219 leave to serve additional requests to the extent  
220 consistent with Rule 26(b)(1) and (2). \* \* \*

221 [Present (2), (3), (4), (5), and(6) would be renumbered]

222 **Rule 37 Failure to Make Disclosures or to Cooperate in Discovery;**  
223 **Sanctions**

224 (a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY. \* \* \*

225 (3) *Specific Motions.* \* \* \*

226 (B) *To Compel a Discovery Response.* A party seeking  
227 discovery may move for an order compelling an  
228 answer, designation, production, or inspection.  
229 This motion may be made if: \* \* \*

230 (iv) a party fails to produce documents or fails  
231 to respond that inspection will be permitted –  
232 or fails to permit inspection – as requested  
under Rule 34.

# TAB 2B

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## DUKE SUBCOMMITTEE MEETING NOTES: FEBRUARY 1, 2013

The Duke Conference Subcommittee met by conference call on February 1, 2013. The call was attended by Judge John G. Koeltl, Subcommittee Chair; Judge Paul W. Grimm, Judge Gene E.K. Pratter, and Peter D. Keisler, Esq., Subcommittee members; Judge Jeffrey S. Sutton, Standing Committee Chair and Judge Diane P. Wood, Standing Committee Liaison; Ted Hirt, Department of Justice representative; and Jonathan Rose, Esq., Andrea Kuperman, Esq., and Benjamin Robinson, Esq., Administrative Office representatives. Edward Cooper and Richard Marcus participated as Reporters.

Judge Koeltl introduced the subjects of the meeting. Tentative draft rules were presented to the Standing Committee in January. The Committee reacted favorably, and offered suggestions that will be considered today and as the work progresses. In addition, the first set of draft Committee Notes has been prepared. The Notes are straight-forward, "quite clean." They avoid efforts to justify the proposed amendments. This approach should reduce the risk of distractions during the public comment stage.

### Rule 34 Limits

The drafts that would adopt a presumptive numerical limit of 25 for the number of requests to produce under Rule 34 have gradually lost favor in the Subcommittee. There has seemed to be an emerging consensus to abandon this effort, although some observers still find it attractive. Should it be abandoned? The first reaction was that some experts are beginning to believe that practices in discovering electronically stored information will develop to make Rule 34 obsolete. As "technology assisted review," at times known as "predictive coding," increases its sway, Rule 34 requests may be reduced to a preliminary role to identify the subjects of inquiry. "Why limit what's on the way out"? A second reaction recalled the warning that a presumptive limit would lead to broader requests. "They will over-ask." So the Federal Circuit "5 key words" to searching electronically stored information is calculated to provoke one key word that effectively asks for everything that might be relevant. This judge observed that he regularly includes presumptive numerical limits in scheduling orders, but invites the parties to discuss the matter and makes it clear that when warranted, departures will be allowed. The practice works under supervision. But it is better not to attempt to embody it in Rule 34 text.

The Subcommittee unanimously agreed to drop the draft provisions that would implement a presumptive limit on the number of Rule 34 requests.

### Rules 30, 31: Number and Duration Limits

Limits on Rule 30 and 31 depositions present a second set of questions that have been held for further discussion. The drafts would reduce the presumptive limit on the number of depositions

from 10 to 5 "per side." Early versions would have reduced the presumptive duration of any one deposition from one day of 7 hours to one day of 4 hours, but a less dramatic reduction to one day of 6 hours has been gaining favor. The Committee on Court Administration and Case Management (CACM) supports the 5-deposition and 6-hour limit. Representatives of the ABA Litigation Section Federal Practice Task Force supported the 6-hour limit; their position is not clear, but they may come to prefer the present 10-deposition limit. Emery Lee at the Federal Judicial Center is working with the data gathered in the "closed-case" study done for the Duke Conference; the effort is to find the most meaningful way to measure the number of cases that involve more than 5 depositions per side. But it was clear from the original analysis, and remains clear, that the level of dissatisfaction with the overall burdens of discovery increases in cases that involve more than 5 depositions per side.

Discussion focused on the several helpful comments offered by CACM. Judge Koeltl noted that he had served as a member of CACM for seven years. "They're good." They want to work with the rules committees on topics that involve case management, to cooperate to achieve the best possible results. After they had essentially completed work on the Civil Litigation manual they welcomed input from the Civil Rules Committee. They also are interested in fostering programs on issues that are better served by education than by rule changes or other official directions. They encourage use of the employment litigation protocols for initial discovery. Having a liaison from CACM to the Civil Rules Committee is a welcome development.

With this, the Subcommittee unanimously agreed to reduce the Rule 30 and 31 presumptive limit on the number of depositions from 10 per "side" to 5 per "side," and to reduce the presumptive duration from one day of 7 hours to one day of 6 hours.

#### Discovery of Information Not Admissible in Evidence

A third initial issue is new to the Subcommittee. The package of rules presented to the Standing Committee includes a revised version of Rule 26(b)(1) that redefines the scope of discovery. The major change is to limit discovery to what is proportional to the needs of the case. Proportionality is measured by moving into the text of Rule 26(b)(1) the factors that have defined the cost-benefit analysis mandated by present Rule 26(b)(2)(C)(iii). As part of this revision, the text deletes part of the next-to-last sentence in present (b)(1): "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The substitute language provided a choice of wording: "Information [within this scope of discovery][sought] need not be admissible in evidence to be discoverable." The change rested on experience with lawyers who somehow assume that the "reasonably calculated"

language effectively removes all limits on discovery – that because there is no way to tell whether requested information might somehow lead to relevant and admissible evidence, everything is discoverable. It was thought that the new rule text plainly defeats this approach. But at the Standing Committee, two participants noted that on first reading the proposed amendments they inferred that the new "information \* \* \* need not be admissible" actually broadens the scope of discovery. They each came to realize that the first reading was wrong, but were concerned that others who remember the "reasonably calculated" limitation would also infer that deleting this limitation had expanded the scope of discovery.

Discussion began by suggesting that the first alternative wording in the proposal should lay the matter to rest. "Information within this scope of discovery" clearly invokes the "scope of discovery" defined by the revised first sentence of (b)(1). The information must be relevant to any party's claim or defense, and proportional to the needs of the case. Agreement was expressed, with a renewed observation that the "reasonably calculated" provision has been almost inverted, used by some to expand rather than limit the scope of inquiry.

Another reaction asked whether there is any remaining need for a sentence reassuring litigants that discovery can reach beyond information that would be admissible in evidence in the form discovered. The present sentence was added to the rule to reject several decisions that had denied discovery of inadmissible information, most often hearsay. Perhaps everyone understands the need for such discovery and a reminder is no longer needed. But the answer was that Rule 26(b)(1), now and as it would be revised, begins the definition of scope by referring to "matter that is relevant." Without a statement that admissibility is not required, some will argue that relevance is measured by admissibility. It was further noted that participants in the Dallas Miniconference thought it necessary to carry forward the reassurance that discoverability is not limited by admissibility. Another note was that there is a lot of hearsay in electronically stored information. And it was agreed that it is better to address this point by a separate sentence rather than attempt to incorporate it directly into the first sentence defining the scope of discovery.

The Subcommittee unanimously agreed that the revised sentence should read: "Information within this scope of discovery need not be admissible in evidence to be discoverable." The draft Committee Note will be revised to reflect this choice.

#### Rule 1: Committee Note

The proposal to amend Rule 1 adds a provision that the rules should be "employed by the court and parties" to secure the just, speedy, and inexpensive determination of every action and proceeding. The first paragraph of the draft Committee Note was

found to be concise and direct. Modest changes were made in the last sentence, which referred to "zealous" advocacy. This old phrase risks an appearance of endorsing the occasional efforts to justify extreme adversarial behavior by claiming an obligation of zealous representation. The sentence will be revised to read: "Effective advocacy is consistent with – and indeed depends upon – cooperative and proportional use of procedure."

The draft second paragraph is an attempt to address concerns that any express reference to the parties in Rule 1 will invite motions for sanctions, and possibly even invocation of professional discipline. Those concerns have been expressed, but seemed to be triggered primarily by earlier drafts of rule text that expressly imposed a duty of cooperation on the parties. This paragraph "raises more questions than it answers." The change in rule text is "mild," and so is the first paragraph of the Note. Elizabeth Cabraser wrote a paper for the Duke Conference to explore the ways in which courts are beginning to enforce Rule 1 in its present form. And it could be counterproductive to begin discussing sanctions in the Note; other present rules impose obligations to cooperate, and any reference to sanctions here could prove contagious. This paragraph will be dropped.

#### Uniform Rule 16, 26 Exemptions

Draft Rule 16(b)(1) carries forward the provision that authorizes local rules that exempt categories of cases from the scheduling-order requirement. Earlier discussions explored the possibility of adopting a uniform set of exemptions for Rule 16(b) and Rule 26. Rule 26(a)(1)(B) now lists several categories of cases that are exempt from initial disclosure requirements. Those cases are also exempt from the Rule 26(f) parties' conference and, in turn, from the Rule 26(d) moratorium that postpones discovery to the end of the conference. Symmetry of the rules would be good. But it has been suggested that there may be reasons to have different exemptions. This suggestion has been entrenched by the plea that nothing be done with these exemptions until lessons are learned from various pilot projects around the country. It may be that the present Rule 26(a)(1)(B) set of exemptions is not as good as could be achieved for any of these purposes.

This question has been put on a back burner. Discussion suggested that it should stay there. The Administrative Office has begun to study local rules to see what categories of cases have been exempted from Rule 16(b). Several years have passed since a similar study informed the drafting of Rule 26(a)(1)(B). Carrying this study forward may provide a sound basis for coming back to these questions. But there is no need to attempt to resolve them as part of the present rules package.

#### Preserving ESI, Referring to Evidence Rule 502

The drafts include recently added provisions that expand the Rule 16(b)(3)(B) permitted contents of a scheduling order to include providing for preservation of electronically stored information and agreements under Evidence Rule 502. Parallel provisions are added to the Rule 26(f)(3) provisions for discovery plans. Why should these be limited to electronically stored information? Is it because they are fit into provisions of Rule 16(b) and 26(f) that already are limited to electronically stored information? Because ESI has been the specific impetus behind suggestions for these provisions? There has been support for these provisions, and little opposition. There may be some concern that these provisions will encourage courts to enter preservation orders too freely – during the work that prepared the 2006 ESI discovery amendments, several participants expressed fear that courts might be encouraged to enter overbroad preservation orders with little sound basis in the reasonable needs of the case. The 2006 Committee Note cautioned against routine use of preservation orders. But it may be that as issues about preservation continue to grow – consider the current proposal to amend Rule 37(e) – parties who have vast amounts of potentially preservable information will come to welcome specific preservation orders that free them from overpreservation.

Further discussion noted that the factors in proposed Rule 37(e) for determining whether information should have been preserved include whether the parties sought guidance from the court. Consideration at the beginning of an action can be important. As matters stand now, it too often happens that a party may wait to raise spoliation until the end of discovery. Dealing with failures to preserve at that point is awkward. It may become necessary to reopen discovery, explore alternative paths to recreate lost information or discover substitute sources of information, and so on. "This is an area where lawyers should talk more." And it is important to begin the discussion at the scheduling conference so that preservation can be tied to proportionality, another of the factors identified in proposed Rule 37(e).

Draft Rule 16(b)(3)(B)(iv) refers to agreements reached under Evidence Rule 502(e), with a footnote asking whether this should include 502(d) as well. Draft Rule 26(f)(3)(D) refers to both subdivisions (d) and (e). Rule 502(d) provides for a court order that privilege or protection is not waived. (e) describes agreements on the effect of disclosures in federal proceedings and states that the agreements are binding only among the parties unless incorporated in a court order. Brief discussion agreed that rather than attempt to make a drafting choice that selects particular subdivisions, the rules should both refer simply to "Rule 502." The reason for including these references to the Evidence Rules lies with the concern of the Evidence Rules Committee that too few litigants have become familiar with the advantages of reaching agreements under Rule 502. Explicit

reference in the pretrial provisions of the Civil Rules may prod parties to remember this opportunity.

#### Pre-Discovery Motion Conference

Draft Rule 16(b)(3)(v) adds to the list of permitted contents a scheduling order provision directing that before filing a motion for an order relating to discovery the movant must request an "informal" conference with the court. The letter from CACM suggests that this provision should be more general, perhaps directing only that the parties should discuss the issues before a motion is filed. It also suggests that the reference to an "informal" conference is likely to raise a host of questions. It was noted that there are many variations on informal conference formats; one judge observed that he tells the parties they should understand it is a bad sign if he directs that a court reporter record the conference. More fundamentally, it was suggested that this scaled-back proposal has been chosen over an alternative draft that would have required a pre-motion conference for all discovery motions. Experience shows that many judges still do not employ the pre-motion conference, but it also shows that the conference has been a resounding success for the many judges who follow this practice. Another judge reported that he uses the pre-motion conference, and has persuaded colleagues to do it. "It's a great management tool. To try it is to like it." This is an important device. A telephone conference can be followed up by an order if need be.

The possibility of extending the pre-motion conference to all motions was discussed briefly. It was agreed that different considerations apply to other motions, most obviously motions to dismiss and motions for summary judgment. The proposal will remain as it is, limited to discovery motions.

The Subcommittee agreed unanimously to retain the proposal as revised by striking "informal."

#### Scope of Discovery: Rule 26(b)(1)

The draft Committee Note for Rule 26(b)(1) includes four sentences shown with overstriking. They recognize that discovery works well in most cases when measured by the total docket, but describe the need to restrain runaway discovery in the cases that – although a small fraction of the total docket – add up to substantial problems. No one yet has suggested that the scope-of-discovery provision in the draft rule is a bad idea. Many participants and observers have thought it a good idea. Is there any need for this defense, which seems directed more at anticipated academic reactions than anything else? "The more you say, the more you invite." These sentences were described as an editorial, or as vigorous advocacy, more than something appropriate for the Note. The Subcommittee agreed to delete them.

The draft Note includes another sentence: "Discovery that expands beyond matter relevant to the actual claims and defenses in the case is no more than the oft-decried 'fishing expedition.'" This reference may incite collateral arguments. Long ago, in establishing the work-product doctrine in *Hickman v. Taylor*, the Supreme Court observed that the time-honored cry of "fishing expedition" no longer can be used to thwart discovery. But contemporary usage still uses this term as an epithet describing improper discovery attempts. The sentence is interesting, but it does not seem necessary to explain the new scope of discovery. The Subcommittee agreed to delete it.

#### Pre-Rule 26(f) Conference Rule 34 Requests

Draft Rule 26(d)(1)(B) amends the discovery moratorium to allow a party to deliver Rule 34 requests to a defendant 21 days after that defendant has been served. The requests are considered to have been "served" at the Rule 26(f) conference, starting the time to respond. Discussions of this provision have reflected concern that there are many reasons why a defendant should be excused from beginning the hard work of responding until the conference has been had and there is an opportunity to agree on the scope of the Rule 34 requests and their role in all discovery. The draft Committee Note says that the early delivery of Rule 34 requests "[often][usually?]" should not affect a decision whether to allow additional time to respond." Discussion suggested that "often" implies both often yes and often no. Even "usually" does not provide enough protection against impatience to force rapid discovery responses. "We do not want to penalize the party who has not responded to excessive requests by suggesting that the party should have begun to respond before the Rule 16 conference." The Subcommittee agreed to forgo a qualifying word. The Note will simply say "should not affect."

#### Rule 34 Objections

Rule 34(b)(2)(B) describes the requirements for objecting to a request in language that is less focused than the Rule 33(b)(4) language for objections to interrogatories. The Rule 34 draft rule provides a choice between language that tracks Rule 33 closely and language that may seem somewhat cleaner. It was noted that the case law says the provision in present Rule 34 should be read in *pari materia* with Rule 33. The Subcommittee concluded to go forward with the Rule 34 version that essentially tracks Rule 33: "or state the grounds for objecting {to the request} with specificity, including the specific reasons."

#### Numerical Limits on Rule 36 Requests to Admit

Draft Rule 36 adopts presumptive numerical limits on requests to admit matters other than the genuineness of described documents. The Committee Note observes that the court "should recognize that

some cases will reasonably require a greater number." The Subcommittee concluded that "reasonably" should be deleted.

#### Rule 4(m) Time to Serve

Draft Rule 4(m) reduces the presumptive time to serve summons and complaint from 120 days to 60 days. This may cause difficulties for pro se plaintiffs. It was noted that the Committee should always consider the impact of proposed rule changes on pro se litigants. But it also was noted that courts routinely grant extensions for pro se litigants. The Subcommittee agreed to retain the 60-day period.

#### Postscript

Finally, it was noted that the Department of Justice is working on a letter commenting on this package of proposals. And the federal practice task force of the ABA Litigation section also is working on comments. These comments will be considered as they come in.

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## DUKE SUBCOMMITTEE MEETING NOTES: MARCH 1, 2013

The Duke Conference Subcommittee met by conference call on March 1, 2013. The call was attended by Judge John G. Koeltl, Subcommittee Chair; Judge David G. Campbell, Advisory Committee Chair; Judge Paul W. Grimm, Judge Gene E.K. Pratter, and Peter D. Keisler, Esq., Subcommittee members; Judge Jeffrey S. Sutton, Standing Committee Chair and Judge Diane P. Wood, Standing Committee Liaison; Ted Hirt, Department of Justice representative; and Andrea Kuperman, Esq., and Benjamin Robinson, Esq., Administrative Office representatives. Edward Cooper and Richard Marcus participated as Reporters.

Judge Koeltl announced four segments for the meeting: (1) Consider the Rule 26(d) moratorium amendment providing for delivery of Rule 34 requests before the parties' Rule 26(f) conference; (2) the remaining quantitative limits proposed for depositions (reducing the presumptive number from 10 to 5, and shortening the presumptive length from 7 hours to 6 hours), interrogatories (reducing the presumptive number from 25 to 15), and requests to admit (adopting a presumptive number of 25, apart from requests to admit the genuineness of documents).

### Early Rule 34 Requests

Judge Koeltl noted that the Rule 26(d) provision allowing delivery of Rule 34 requests before the Rule 26(f) conference won support at the Dallas miniconference, at least from plaintiffs' lawyers who do civil rights and employment litigation. As Rule 26(d) stands now, discovery cannot begin "before" the conference; "it's open season" after that. The new provision would give the parties as much time to respond as if they were served at the conference, and, by giving them more time to consider what would need be done to respond to the early-delivered request, would provide a better basis for the conference. Early drafts did not clearly identify the limits on which parties might deliver early requests to which other parties. It seems fair to allow delivery only to a defendant that has been served, and that at a minimum a defendant should be able to respond by delivering early requests to the plaintiff. How much broader should it be? The current draft allows a plaintiff to deliver to any party more than 21 days after that party has been served, and allows that party to deliver to any plaintiff or to any other party that has been served. A narrower option is illustrated in a footnote.

It was observed that the broader draft did not extend full reciprocity because it does not address what happens when one defendant delivers requests to another defendant. Discussion observed that views have differed on how widely available early requests should be. It may be better to publish a broader version to see what information it generates. To be sure, it seems likely that most of the early requests will be delivered by plaintiffs to

defendants without much further action before the Rule 26(f) conference. But the purpose of this provision is "to get the show on the road," to make the Rule 26(f) conference as productive as it can be. Many lawyers believe that the conference "is where you should work it all out."

The draft will be broadened to allow delivery "by any party" more than 21 days after service on the party to whom delivery is made. That party in turn may deliver early requests to any plaintiff and to any other party that has been served.

The draft further provides that a request delivered under Rule 26(d)(2)(A) is considered as served at the "first" Rule 26(f) conference. This expression reflects the prospect that a Rule 26(f) conference may be held in stages, and in such a way that it is not clear whether there is a single continuing conference or more than one conference. Other drafting choices are possible. One would be to consider the request as served when the first Rule 26(f) conference "begins." For the time being, however, the draft will simply refer to the first conference.

#### Numerical limits

Judge Koeltl noted that the Department of Justice opposes numerical limits. And there has been a lot of correspondence from employment lawyers objecting particularly to the reduction of the presumptive number of depositions from 10 per side to 5. They also object to the earlier draft that would have reduced the presumptive length of a deposition from 7 hours to 4 hours; the change that resets the time at 6 hours should address that concern in large part. The volume of correspondence is "somewhat surprising." The FJC study shows that the median number of depositions is below 5 per side, yet the writers describe many cases in which they need between 5 and 10, or even more. The argument is that reducing the number will increase motions practice. Emery Lee has agreed to ask additional questions of the data base the Federal Judicial Center gathered for the 2010 Duke Conference study. That work is not complete. The work is skewed toward cases with more discovery rather than less. Categories of cases that usually have little or no discovery were excluded from the beginning. The current project is limited to cases that have at least some discovery. The results show that in cases with at least one deposition, plaintiffs took more than 5 depositions in about 20%, while defendants took more than 5 in about 15%. Many other numbers are given. About 78% of the cases with more than 5 depositions involved 10 or fewer. The data also show that the participating lawyers were more likely to think that the costs of discovery were too high in cases involving more than 5 depositions. All of this suggests that a fair number of cases involve more than 5 depositions in current practice.

The question whether to pursue a 5-deposition target was framed in these terms: Will the parties behave sensibly, agreeing

to increase the number in cases that deserve more than 5 depositions, while perhaps thinking more carefully about the need than if the limit remains at 10? Will courts continue to recognize that it is proper to exceed the specified limit, and indeed recognize that there are more cases that need more than 5 depositions than there have been cases that need more than 10? Rule 30(a) provides now, and will continue to provide, that the court must grant leave to take more than the specified number of depositions to the extent consistent with Rule 26(b)(1) and (2).

It was predicted that there will continue to be strong opposition to the 5-deposition target. "There is a profound lack of confidence on the part of some that courts will follow the rule" that mandates leave for more depositions when warranted by the general scope of discovery.

A reminder was provided that "discovery reform packages are packages." Commonly a package will involve some elements pleasing to lawyers who litigate in particular areas, and other elements they find displeasing. The range of reactions may be reversed for lawyers who practice in other fields. It can be important to publish the full package that seems sensible, expecting to gather valuable information in the public comments. If the comments provide persuasive evidence that a 5-deposition limit is too low, the number can be left at 10.

It also was pointed out that parties regularly stipulate to more than 10 depositions. And at least in many courts, leave is routinely granted to take more than 10 depositions in cases that deserve more. In fact at least one employment-plaintiff lawyer has applauded the 5-deposition limit, even while resisting lower limits in Rule 33 and any limit in Rule 36.

A judge observed that employment-plaintiff lawyers may seek to limit the number of depositions taken by defendants, protesting such things as depositions of the plaintiff's family members or large numbers of coworkers. This judge routinely sets limits in scheduling orders that are more severe than the proposal. It works. The parties often agree to raise the limits. If they do not agree, they come to the judge and the matter is worked out.

It also was noted that the Subcommittee thought the 5-deposition limit a good idea after discussing it thoroughly at the Dallas miniconference. The employment-plaintiff bar has reacted strongly, but that is only one segment of the bar. And the fact that other segments of the bar have not weighed in does not suggest much. These lawyers appear to have much more detailed information about the Subcommittee's work than most of the bar. It would be a mistake to react to their views as if there is nothing to learn from the rest of the bar.

The Subcommittee concluded that all of the proposed limits

should remain. Five depositions per side, of 6 hours each. Fifteen interrogatories, no longer 25. And 25 requests to admit, without counting requests to admit the genuineness of documents.

The next question was whether rule text or Committee Note should encourage "free" or "liberal" expansion of the limits. In the current drafts, the Note for Rule 36 explicitly suggests that courts should recognize that some cases will require more than 25 requests to admit. A similar suggestion will be added to the Note for Rule 33. This sort of language sets a tone: it recognizes the need to "manage up" from the limit, but does not seek to undercut the gravitational pull of the limit.

Further discussion noted that the Department of Justice is concerned that the new limits will make it harder to get what they need in discovery. The 5-deposition limit is a matter of concern. "The hurdle is now different." But the direction that the court "must" grant a higher number when consistent with Rule 26(b)(1) and (2) may help. The new limits are proposed because of concern that too many lawyers cannot be trusted to do this reasonably on their own. Should we do something more in the Notes to emphasize the value of increased discovery, lest parties and even courts give the limits greater presumptive weight than they deserve? But urging that exceptions be made freely or liberally might undermine the value of the limits.

In a somewhat different direction, it was noted that both Rule 33 and Rule 36 texts say that the court "may" order an increased number of interrogatories or requests to admit, while Rules 30(a)(2) and 31(a)(1) say that the court "must" grant leave. Is the difference the result of mere inadvertence? If so, they should be made consistent. That would leave the choice whether to use "may" or "must" in all four rules. Or is there some reason for the difference? The limits in Rules 30, 31, and 33 were all introduced at the same time, in 1993. It may be that depositions are thought a more essential discovery device. Periodically lawyers advise the Committee that interrogatories are useful mostly at the beginning of a case to identify the people who should be deposed and documents that should be requested, and perhaps later to help define the issues. And requests to admit are often seen as less a discovery device than a supplement to the pleadings and other devices for narrowing the issues to be tried.

This discussion failed to identify any clear reason for the choice to use "must" in Rules 30 and 31, and "may" in Rule 33. Changing Rules 30 and 31 to "may" seemed likely to engender vigorous opposition. But there is no clear reason to change Rule 33, and revising the Rule 36 draft, to "must." It was concluded that "must" will remain in Rules 30 and 31, while "may" will be used in Rules 33 and 36. The Committee Notes will be made to parallel each other.

The Committee Note to Rule 30 also will be revised to delete references to the information provided by the Federal Judicial Center. This information is better suited to the reports that will explain the reasons for the proposed amendments.

Finally, the cross-references in the provisions for expanding the numerical limits were discussed. The changes in Rules 26(b)(1) and (2), incorporating in Rule 26(b)(1) the cost-benefit analysis currently set out in Rule 26(b)(2)(C)(iii), make it appropriate to cross-refer to Rule 26(b)(1) and (2) in Rules 30, 31, 33, and 36.

#### Other Matters

Footnote 1 explores the relationship between the Rule 4(m) time to serve the summons and the provisions in Rule 15(c)(1)(C) governing the relation back of amendments changing defendants. It was agreed that this is a subject to be noted in future reports. The footnote can be deleted.

Comments have supported the Rule 34 provisions on objections to request to produce. The draft of Rule 34(b)(2)(C) was simplified by stripping out many bracketed alternative words, and by shifting the new material to become the first sentence. The Note will be revised to add these observations: "When it is necessary to make the production in stages the response should specify the beginning and end dates of the production." And "An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been "withheld." Examples would be a statement that the search was limited to materials created during a defined period, or to identified sources."

Judge Koeltl turned to the lengthy letter from the Department of Justice. The Subcommittee has considered the letter carefully, and has accepted several – but not all – of the suggestions. The Subcommittee appreciates the hard work and careful thought that have gone into framing these suggestions, and also appreciates the many points at which the Department expresses agreements with the proposals.

The Department of Justice continues to believe that the current 120- and 90-day periods set by Rule 16(b) for the scheduling conference should be retained at least for cases to which the United States is a party, including cases against United States officers, agencies, and employees. But the reduction to 90- and 60-day periods is not great, and the rule for the first time will include a safety valve that allows the judge to extend the time for good cause. Since judges frequently extend the Rule 16(b) times now, there is every reason to believe they will be at least as flexible under the new rule.

Discussion of the Rule 16(b) time limits reflected the

Department's continuing concerns. But it was noted that in the kinds of complex cases that involve the Department it is not hard to get leave to take more than 10 depositions under the present rule, and it should not be hard to get leave to take more than 5 under the proposed rule. The response was that the Department's concern is based on experience in different courts all across the country. A different reaction was that many of the problems faced by the Department may be little different from the problems faced by huge organizations of any sort - just as the Department has to work with client agencies who themselves need to resolve intricate internal organizational complexities, so a mammoth multinational corporation may have to deal with substantially independent entities in the same family. But there may be special problems with Bivens actions, where it may take some time to get a decision from the committee that determines whether the Department will represent individual defendants. Is that something that might be the subject of comment in the Committee Note? A judge responded that the same issues arise in the much more frequent actions under § 1983. In New York, for example, the Corporation Counsel's office must decide whether to represent an individual police officer, and often must postpone that decision pending proceedings in a civilian review board. It is common to put off the scheduling conference, often for months, to account for this.

The Department of Justice has raised a specific question about the interplay between Rule 4(m) provisions governing the time for service and dismissals under Rule 71.1. These questions will require further attention. They have been framed in terms that likely are clear to people who are immersed in Rule 71.1 practice, but there is no clear guide yet as to just what the problem may be or what the resolution should be.

The meeting concluded with a consensus that, with the revisions made during the meeting, the rules package is ready to go to the Advisory Committee with a recommendation that it be transmitted to the Standing Committee for approval to publish this summer.

# TAB 2D

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# memorandum

DATE: March 15, 2013  
TO: Duke Subcommittee  
FROM: Emery G. Lee III, Senior Research Associate  
SUBJECT: Deposition Counts

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## **Executive Summary**

Considering amendments to the rules governing depositions, the Duke Subcommittee of the Judicial Conference Advisory Committee on Civil Rules requested an analysis of the percentage of federal civil cases in which more than five depositions are taken by one or both sides. The following analyses are based on attorney survey data collected in 2009. Results:

- Plaintiff attorneys reported taking more than five total depositions (expert and non-expert) in 13% of closed cases in which there was any discovery activity. Defendant attorneys reported that plaintiffs took more than five depositions in 9% of such cases.
- In cases with at least one deposition, plaintiff attorneys reported taking more than five total depositions in 23% of closed cases. Defendant attorneys reported that plaintiffs took more than five depositions in 17% of closed cases with at least one deposition.
- In cases that terminated at trial, plaintiff attorneys reported taking more than five depositions in 38% of closed cases. Defendant attorneys reported that plaintiffs took more than five depositions in 34% of closed cases that terminated at trial.

- Defendant attorneys reported taking more than five total depositions in about 7% of closed cases in which there was any discovery activity, and plaintiff attorneys reported that defendants took more than five depositions in 8% of such cases.
- In cases with at least one deposition, defendant attorneys reported taking more than five depositions in 14% of closed cases. Plaintiff attorneys reported that defendants took more than five depositions in 16% of closed cases with at least one deposition.
- In cases that terminated at trial, defendant attorneys reported taking five or more depositions in 24% of closed cases. Plaintiff attorneys reported that defendants took more than five depositions in 20% of cases that terminated at trial.
- Respondents were more likely to evaluate the discovery costs as disproportionate to their client’s stakes in cases in which one or both sides took more than five depositions.

## **Background**

Concerned with the cost of litigation, the Duke Subcommittee is considering recommending new presumptive limits on certain types of discovery, including depositions. At present, the presumptive limit on depositions is 10 per side.<sup>1</sup> The proposal under consideration would reduce that limit to five per side.

The Subcommittee asked me to analyze data from the 2009 Civil Rules Survey<sup>2</sup> to answer a relatively straightforward question: In what percentage of civil cases are more than five

<sup>1</sup> Federal Rule of Civil Procedure 30(a)(2)(A)(i) (“A party must obtain leave of the court . . . if the parties have not stipulated to the deposition and the deposition would result in more than 10 depositions being taken . . .”).

<sup>2</sup> See Emery G. Lee III & Thomas E. Willging, Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules (Federal Judicial Center, 2009). The 2009 Civil Rules Survey was a nationwide survey of attorneys in recently closed cases on a range of issues related to discovery. The respondents were attorneys of record in a sample of civil cases closed in the last quarter of calendar year 2008. The sample excluded case types in which discovery is rare (e.g., prisoner civil rights cases) and cases that closed in 60 days or less. For much more information, see *id.* at 77–78.

depositions per side taken? The Subcommittee was interested in whether a lower limit would substantially affect the typical civil case in federal court.

### **Percentage of Civil Cases with Depositions**

In addressing that question, the first step is determining in what percentage of civil cases are any depositions taken.<sup>3</sup> We found that 14% of plaintiff attorneys and 13% of defendant attorneys reported at least one expert deposition in the closed case, and that 55% and 54%, respectively, reported at least one deposition of a non-expert in the named case.<sup>4</sup> Not surprisingly, respondents reporting an expert deposition in the closed case were very likely to also report at least one non-expert deposition: 14% of plaintiff attorneys and 13% of defendant attorneys reported both deposition types in the closed case. In short, very few respondents (nine total) reported only an expert deposition in the closed case. Fully 40% of plaintiff attorneys and 41% of defendant attorneys reported at least one non-expert deposition but no expert deposition in the closed case.

The 2009 Civil Rules Survey also asked respondents who indicated that there was deposition activity in the case how many depositions (of each type) were taken by each side. In the following section, I present a new analysis of that data focused on the percentage of cases with more than five total depositions taken by one or both sides.

<sup>3</sup> The following figures are limited to cases in which respondents indicated that there was any discovery activity (i.e., that the parties engaged in at least one of 12 activities). *See id.* at 8. The 12 types of discovery activity covered in the survey were: initial disclosures; informal exchange of documents; informal exchange of other materials; interrogatories; requests for production of documents; expert disclosure; expert depositions; non-expert depositions; requests for admission; physical or mental examination; inspection of property; and third-party subpoena. Fully 86.3% of all respondents (2,371 attorneys in total) reported at least one type of discovery in the closed case.

<sup>4</sup> *See id.* at 9–10. Interestingly, these figures are lower than in the Center’s previous work on discovery practices. A 1997 survey, which was in many ways the model for the 2009 Civil Rules Survey, found that 67% of respondents reported the taking of at least one deposition in a recently closed case. *See* Thomas E. Willging, et al., *Discovery and Disclosure Practice, Problems, and Proposals for Change: A Case-Based National Survey of Counsel in Closed Federal Civil Cases* (Federal Judicial Center 1997), at 32 (Table 2).

## Percentage of Civil Cases with More than Five Depositions

As can be seen in Table 1, plaintiff attorneys ( $n = 1,147$ ) reported taking more than five total depositions in 13% of closed cases with any discovery activity, and defendant attorneys reported that plaintiffs took more than five depositions in 9% of such cases. Defendant attorneys ( $n = 1,157$ ) reported taking more than five total depositions in 7% of closed cases with any discovery activity, and plaintiff attorneys reported that defendants took more than five depositions in 8% of such cases. Not surprisingly, respondents in closed cases with both expert and non-expert depositions were much more likely than respondents in other cases to report that one side or the other exceeded five total depositions. With the exception of defendant attorneys reporting on the number of depositions taken by the plaintiffs (34%), these estimates all suggest that more than five total depositions are taken by one side or the other in approximately two in five cases involving expert and non-expert depositions. To the extent that a presumptive limit of five total depositions will affect civil cases, those effects are likely to be felt in cases with expert depositions.

**Table 1:** Percentage of Respondents Reporting More than Five Total Depositions (Cases with Any Discovery Activity) ( $N = 2,304$ ).<sup>5</sup>

<i>All cases with discovery</i>		
Reported by	<u>Plaintiff exceeded</u>	<u>Defendant exceeded</u>
Plaintiff attorney	13%	8%
Defendant attorney	9%	7%
<i>Both types of deposition</i>		
Reported by		
Plaintiff attorney	44%	43%
Defendant attorney	34%	43%
<i>Non-expert only</i>		
Reported by		
Plaintiff attorney	16%	7%
Defendant attorney	11%	5%

<sup>5</sup> Table 1 does not report percentages for two categories of cases—those with expert depositions only (only nine total cases) and those in which there were no reported depositions (for obvious reasons). These cases were included in calculating the “All cases with discovery” percentages, however.

By comparison, respondents reporting only non-expert depositions were much less likely to report more than five depositions per side. Plaintiff attorneys reported taking more than five depositions in 16% of these cases and reported that defendants took more than five depositions in 7%. Defendant attorneys reported taking more than five depositions in just 5% of these cases and reported that plaintiffs took more than five depositions in 11%. This category of cases is much more common (about 40% of respondents) than the cases involving both expert and non-expert depositions (13%–14%).

### Percentage of Deposition Cases with More than Five Depositions

This analysis can be focused on only those cases in which a respondent reported that at least one deposition was taken (“deposition cases”). As can be seen in Table 2, plaintiff attorneys ( $n = 730$ ) reported that their side took more than five depositions in 23% of the cases with depositions. In 5% of cases, plaintiff attorneys reported taking more than 10 depositions (and thus exceeding the current presumptive limit); a large majority of deposition cases with more than five depositions fall into the 6–10 deposition range. (Note that the second and third columns sum to the first column.) This pattern is repeated in every other category of respondent/report.

**Table 2:** Percentage of Respondents Reporting More than Five Depositions and More than 10 Depositions (Cases with Any Reported Depositions) ( $N = 1,478$ ).

	<u><math>\geq 5</math></u>	<u>6–10</u>	<u><math>\geq 10</math></u>
Reported by Plaintiff Attorneys			
Taken by Plaintiff	23%	18%	5%
Taken by Defendant	16%	11%	5%
Reported by Defendant Attorneys			
Taken by Plaintiff	17%	13%	4%
Taken by Defendant	14%	11%	3%

Plaintiff attorneys reported that defendants took more than five depositions in 16% of deposition cases, with 11% falling into the 6–10 deposition range. Defendant attorneys ( $n = 738$ ) reported taking more than five depositions in 14% of deposition cases, with 11% falling into the

6–10 deposition range. Defendant attorneys reported that plaintiffs took more than five depositions in 17% of deposition cases, with 13% falling into the 6–10 deposition range.

### **Percentage of Trial Cases with More than Five Depositions**

The 2009 Civil Rules Survey over-sampled cases with trial dispositions. A simple random sample of civil cases closing in a single quarter would produce very few cases that actually went to trial (1–2%), and thus little data on, for example, the costs of trial.<sup>6</sup> The 2009 Civil Rules Survey sampling design included every case that closed in the last quarter of 2008 and that court records indicated had terminated by a bench trial, directed verdict, or jury verdict.<sup>7</sup>

Table 3 shows the percentage of respondents in trial cases reporting that one side took more than five depositions, breaking those respondents into those reporting that one side took 6–10 depositions and those reporting that one side took more than 10 (the existing presumptive limit). Not surprisingly, the percentage of respondents in trial cases reporting more than five depositions by one side or the other is higher than in deposition cases generally. Fully 38% of plaintiff attorneys in trial cases reported taking more than five depositions, with the majority of those reports falling in the range of 6–10 depositions. The percentages provided by defendant attorneys reporting on the other side’s deposition count are close to the plaintiff attorneys’ self-reports—34% of defendant attorneys in trial cases reported that plaintiffs took more than five depositions, with about a quarter (24%) falling in the 6–10 depositions range.

<sup>6</sup> See Emery G. Lee III & Thomas E. Willging, *Litigation Costs in Civil Cases: Multivariate Analysis: Report to the Judicial Conference Advisory Committee on Civil Rules* (Federal Judicial Center 2010). This analysis found that, all things equal, costs estimates were much higher in trial cases—53% higher for plaintiff attorneys and 24% for defendant attorneys. *See id.* at 5, 7.

<sup>7</sup> See Lee & Willging, *supra* note 2, at 77. The stratified sample design required that respondents’ responses be weighted for analysis—otherwise, the results would be very untypical, given the relatively large number of trial dispositions to the actual population of civil cases. In this report, all percentages (except those for the trial dispositions in Table 3) are the weighted percentages; the *n*’s reported are not weighted to provide a sense for the actual number of respondents represented in each table.

**Table 3:** Percentage of Respondents Reporting More than Five Depositions and More than 10 Depositions (Cases with Trial Disposition) (*N* = 429).

	<u>≥ 5</u>	<u>6–10</u>	<u>≥10</u>
Reported by Plaintiff Attorneys			
Taken by Plaintiff	38%	27%	12%
Taken by Defendant	20%	12%	8%
Reported by Defendant Attorneys			
Taken by Plaintiff	34%	24%	10%
Taken by Defendant	24%	15%	9%

Defendant attorney respondents in trial cases reported taking more than five depositions in about a quarter of trial cases (24%), and, again, the majority of these were in the range of 6–10 depositions. Plaintiff attorneys reported that defendants took more than five depositions in 20% of the trial cases, with 12% falling in the 6–10 depositions range.

### **Respondent Evaluation of Proportionality and Number of Depositions**

The 2009 Civil Rules Survey also asked respondents to evaluate, on a seven-point scale, the proportionality of discovery costs in the closed case relative to their client’s stakes in the litigation.<sup>8</sup> Cross-tabulating responses to this question with deposition counts can provide some information on the relationship between depositions and attorneys’ perceptions of the proportionality of discovery. Two caveats are in order, however. First, the proportionality question asked about the costs of discovery in general and not about deposition costs specifically. Respondents reporting disproportionately high costs may have responded based on the cost of other types of discovery, even in deposition cases. Second, the relationship between the number of depositions and attorney perceptions of the proportionality of discovery is not necessarily causal in nature. Instead, it is possible that one or more antecedent variables underlie the relationship between these two variables.

<sup>8</sup> See Lee & Willging, *supra* note 2, at 27–28, fig. 14 (“On a scale of 1 to 7, with 1 being too little, 4 being just the right amount, and 7 being too much, how did the costs of discovery to your side in the named case compare to your client’s stakes?”).

Table 4 displays the results for plaintiff attorneys, and Table 5 displays the results for defendant attorneys. For the sake of simplicity, responses on the seven-point scale used in the survey have been collapsed into three categories: those who reported that the discovery costs were “too little” relative to their client’s stakes (1–3 on the scale); those who reported the discovery costs were “just right” relative to their client’s stakes (4); and those who reported the discovery costs were “too much” relative to their client’s stakes (5–7). The analysis is limited to deposition cases.

**Table 4:** Plaintiff Attorneys’ Evaluation of Proportionality of Discovery Costs Cross-Tabulated with Number of Depositions in Deposition Cases (*N*= 717)

	Percentage of respondents evaluating discovery costs relative to client’s stakes			Total percentage in each row
	<u>“Too low”</u>	<u>“Just right”</u>	<u>Too much”</u>	
Neither side exceeded 5 depositions	15%	59%	26%	70%
Only one side exceeded 5 depositions	8%	54%	38%	21%
Both sides exceeded 5 depositions	6%	51%	43%	9%
Total percentage in each column	13%	57%	30%	100%

About a quarter of plaintiff attorneys in deposition cases in which neither side exceeded five depositions evaluated the discovery costs as “too much” relative to their client’s stakes (26%). This group accounts for 70% of plaintiff attorney respondents. For respondents in cases in which one side exceeded five depositions (21% of respondents), the comparable percentage is 38%, and for respondents in cases in which both sides exceeded five depositions (only 9% of respondents), 43%. It is important to keep in mind that even in cases in which both sides exceeded five depositions, a majority of plaintiff attorney respondents indicated that the discovery costs were “just right” relative to their client’s stakes in the litigation. But the group

reporting “just right” (51%) is only eight percentage points larger than the group reporting “too much” (43%).

The pattern in Table 5 is similar in most respects. Defendant attorney respondents in deposition cases in which neither side exceeded five depositions (76% of respondents) reported the discovery costs “too much” relative to stakes 27% of the time. In cases in which only one side exceeded five depositions (16% of respondents), that figure increases to 40%, and, in cases in which both sides exceeded five depositions (7% of respondents), it increases to 45%. Note here that the percentage of defendant attorney respondents reporting “just right” is equal to the percentage reporting “too much” (45%).

**Table 5:** Defendant Attorneys’ Evaluation of Proportionality of Discovery Costs Cross-Tabulated with Number of Depositions in Deposition Cases (*N*= 722)

	Percentage of respondents evaluating discovery costs relative to client’s stakes			Total percentage in each row
	<u>“Too low”</u>	<u>“Just right”</u>	<u>Too much”</u>	
Neither side exceeded 5 depositions	14%	59%	27%	76%
Only one side exceeded 5 depositions	10%	50%	40%	16%
Both sides exceeded 5 depositions	10%	45%	45%	7%
Total percentage in each column	13%	57%	30%	100%

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March 22, 2013

Memorandum

TO: Professor Edward Cooper

FROM: Ted Hirt

RE: Response to Questions Concerning Proposed Clarification of Rule 4(m) as inapposite to service under Rule 71.1(d)

This memo responds to questions raised in the recent email exchanges among Judge Campbell, Peter Keisler, and Professor Cooper concerning the Department's recommendation that the Civil Rules Committee clarify that Rule 4(m) is not applicable to service effectuated under Rule 71.1(d).

1. Judge Campbell has suggested that the recommended change to Rule 4(m) "appears to be inconsistent with the intent of Rule 71.1(d)(3), which requires personal service 'in accordance with Rule 4.'" Judge Campbell instead suggests amending Rule 71.1(d)(3) by changing the last phrase to state "personal service of the notice (without a copy of the complaint) must be made in accordance with Rule 4 within 120 days after the complaint is filed."

We conclude that Judge Campbell's proposed revision to Rule 71.1 would be a significant change to the rule, *i.e.*, it would conflict with the procedures regarding dismissal of eminent domain actions, which are governed by Rule 71.1(i). If the Subcommittee concludes that amending Rule 4(m) to specifically exempt Rule 71.1 is not warranted at this time, then we agree with Peter Keisler's suggestion that more study is necessary before any change is made.

2. The conflict arises because a condemnation is *in rem*. Rule 71.1 explicitly distinguishes between "property" and "parties." The property itself is the initially-named defendant. *See* Rule 71.1(c)(1). In an *in rem* action, "there are no indispensable parties. The failure to join a party does not defeat the condemnor's title to the land, though the party will retain his right to compensation." *United States v. 416.81 Acres of Land*, 525 F.2d 450, 452 (7th Cir. 1975) (citations omitted) (Clark, J., sitting by designation). If the United States has

taken property, it must pay just compensation, as required by the Fifth Amendment. Dismissal of a case due to failure to comply with Rule 4(m) could deny a landowner such compensation. For example, consider what would happen if the United States took a temporary leasehold in property for 30 days, but after 120 days service had not been effectuated and the case was dismissed. The landowner would necessarily still be entitled to just compensation, but then would have to resort to an inverse condemnation claim under the Tucker Act.

Rule 71.1(i) recognizes this constitutional right to just compensation. If the United States has “taken title, a lesser interest, or possession as to any part of” a piece of property, the court must instead award just compensation for that which was taken. *See* Rule 71.1(i)(1)(C). Thus, once a court has determined that condemnation is authorized and statutory requirements complied with, it has no power to dismiss. *See United States v. 162.20 Acres of Land*, 639 F.2d 299, 303 (5th Cir. 1981). *See also* Note to Subdivision (i), Original Committee Report, Rule 71A, Fed. R.Civ.P. (An action may not be dismissed and the property owner sent to another court, such as the [former] Court of Claims when compensation is required). Requiring payment of just compensation for a taken interest thus avoids circuity of action, *see id.*, and is consistent with principles of finality and judicial economy. In accord with this concept, distinguishing between the property and a defendant, Rule 71.1(i)(1)(A) refers to the property itself, not to the landowner defendants (“the plaintiff may, without a court order, dismiss the action as to that *property*.”) (emphasis added). In contrast, subpart (2) allows a court “at any time [to] dismiss a defendant who was unnecessarily or improperly joined.”

3. For these reasons, we recommend that the Subcommittee clarify that Rule 4(m) does not apply to service of a notice under Rule 71.1(d). In the alternative, if the Subcommittee is not prepared to make that change at this time, we recommend that the Subcommittee leave the text of Rule 71.1 unchanged, *i.e.*, that it not amend Rule 71.1(d)(3) along the lines suggested by Judge Campbell.<sup>1</sup> Making that amendment would be inconsistent with Rule 71.1(i) and would create additional service problems in condemnation cases.

cc. Judge David G. Campbell, Judge John G. Koeltl, Peter Keisler, Esq.

<sup>1</sup> Our position is wholly consistent with Rule 71.1(d)(3). I note that, while language referencing Rule 4 was in the original Rule 71A(d), the mandatory dismissal provision in Rule 4 was added in 1983 and modified in 1993.

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## **RULE 37(e) PROPOSAL**

At its November, 2012, meeting the Committee approved the amendment to Rule 37(e) proposed by the Discovery Subcommittee and recommended that it be approved by the Standing Committee for publication and public comment. The Committee also asked the Subcommittee to reflect further on several points raised during the November meeting. The Subcommittee did so on Nov. 28.

The Rule 37(e) proposed draft was reviewed by the Standing Committee's Style Consultant before presentation to the Standing Committee. This review resulted in changes to the text, but not the substance, of the proposed rule that was presented to the Standing Committee. Those changes are reflected in the draft rule language below.

At its January, 2013, meeting, the Standing Committee approved publication of the Rule 37(e) draft. Several members also raised questions that the Discovery Subcommittee was to consider. Those questions led to some revisions to the rule and Note that were approved by the Subcommittee in conference calls on Feb. 12 and 18. Notes on the Subcommittee's Nov. 28, Feb. 12, and Feb. 18 conference calls are included with these agenda materials.

Questions raised by some members of the Standing Committee have prompted the Subcommittee to look more closely at the exception to the willfulness and bad faith requirements found in Rule 37(b)(2)(B)(ii). That reexamination has resulted in a recommendation by the Subcommittee that two versions of Rule 37(e) be published to prompt the fullest public comment on these issues. That proposal is set forth below.

The purpose of this memorandum is to introduce the issues that have been resolved since the full Committee's meeting in November as a result of comments at the November meeting and comments from the Standing Committee. In brief, the revisions to the rule should express more clearly four basic propositions: First, curative measures should be available without any need to find fault in the failure to preserve. Second, "sanctions" should not be imposed on a party that acted reasonably even though information was nevertheless lost. Third, sanctions are proper when loss of information imposes substantial prejudice on a party and resulted from willful or bad-faith failure to preserve. And fourth, sanctions may be imposed when the loss of information completely stymies a party's ability to litigate, but only when the failure to preserve resulted from some fault of the party on whom sanctions are imposed.

Discovery Subcommittee Resolution of Remaining Issues  
After the November Meeting

The Committee's approval of Rule 37(e) for presentation to

the Standing Committee called for the Subcommittee to consider several issues raised during the Nov. 2 meeting. The Subcommittee did so by conference call on Nov. 28, 2012. In brief, the remaining issues were resolved as follows:

Erie concerns: The Subcommittee evaluated the concerns about rulemaking authority and the impact of the Erie Doctrine, and concluded that these concerns did not appear to be a significant impediment to adoption of Rule 37(e). One new point was raised, however. In a few states, there is an independent tort claim for spoliation. The Rule 37(e) proposal was not designed to affect the viability in federal court of such claims when they are cognizable under state law. The resolution was to add a sentence to the Note: "But the rule does not affect the validity of an independent tort claim for relief for spoliation if created by the applicable law."

Changing the introduction to the factors to be considered: During the November meeting, it was suggested that the list of factors (now in proposed Rule 37(e)(2)) might be modified to make them applicable to other issues raised by the rule, perhaps including whether a party had suffered such harm that it could not effectively litigate, or the question whether to employ curative measures rather than sanctions. But the list of factors was specifically compiled to assist in determining whether a party had failed to preserve discoverable information that should have been preserved, and whether the party acted willfully or in bad faith. The Subcommittee concluded that changing the introduction would suggest that the list is broader than was intended, and expanding the list to include all possible factors on all possible issues that might arise under the rule would make it unwieldy, and could invite consideration of inappropriate factors regarding some issues.

Punctuation to clarify findings requirement: During the Nov. 2 meeting, Judge Pratter pointed out that the lack of punctuation in relation to the findings necessary to support sanctions (willfulness or bad faith plus substantial prejudice) risked creating ambiguity. This problem has been solved by reorganization of the wording: "caused substantial prejudice in the litigation and was willful or in bad faith."

Adding "when appropriate" with regard to the factors to be considered: The Subcommittee discussed whether to add "when appropriate" to the prologue to the list of factors now contained in Rule 37(e)(2). The Subcommittee concluded that adding this phrase was not necessary. The rule, as drafted, says that the court "should consider all relevant factors." So additional factors may matter, and the listed ones may not be relevant.

Explicit reference to a litigation hold among the factors: During the Committee's Nov. 2 meeting, there was discussion about including explicit reference to a litigation hold in the list of factors. After considerable discussion, the Subcommittee

concluded that explicitly referring to litigation holds in the rule might unduly emphasize them, and this rule language was removed. Revised Note language seemed adequate to address the litigation hold issue.

Standing Committee Approval,  
and Members' Expressions of Concern

During the Boston meeting, the Standing Committee approved the draft rule for publication, subject to Advisory Committee consideration of several points raised by members of the Standing Committee. Changes that result from these points will be presented to the Standing Committee at its June, 2013, meeting.

As noted in the draft minutes of the Standing Committee meeting, the concerns raised by the Standing Committee members included (1) concern that reference in the Note to "displacement" of other laws might suggest that the rule preempts other preservation requirements; (2) concern that the use of the word "sanction" might suggest that lawyers whose clients were subject to sanctions under this rule might themselves be required to report the sanctions to bar authorities in some states; (3) concern that the "irreparable deprivation" provision might weaken or eliminate the rule's protections because this provision could be triggered on proof that a peripheral claim or defense was defeated by loss of the information even though the main claims and defenses could be fully litigated; (4) concern that the "irreparable deprivation" provision might be used to authorize sanctions even if the loss of information were caused by an Act of God or other event outside the control of the party with the information; (5) concern with whether the word "meaningful" in the "irreparable deprivation" provision might be replaced with a different word, such as "reasonable" or "adequate"; (6) concern about whether current Rule 37(e) should be preserved, a concern raised by the Department of Justice; and (7) concern about possible need for an expanded definition in the rule of "substantial prejudice," also raised by the Department of Justice.

Subcommittee Consideration of Standing  
Committee Concerns; Alternative  
Draft 37(e)

After the Standing Committee's meeting, the Subcommittee had two further conference calls to address the Standing Committee's concerns. See notes of Subcommittee conference calls on Feb. 12 and 18, 2013. Most of them presented no significant difficulties, but the Act of God concern led to development of an alternative draft. The conclusion was that what the Committee needs is public comment, and that providing two drafts on which to comment would be the most effective way to achieve that goal.

Before turning to the Act of God issue, therefore, it may be expedient to address the other concerns:

"Displacement": The Note language on this subject was revised as follows:

This preservation obligation was not created by Rule 37(e), but has been recognized by many court decisions. ~~arises from the common law, and It~~ may in some instances be triggered or clarified by a court order in the case.

In addition, further revisions removed "displacement" from the Note:

The amended rule therefore forecloses reliance on inherent authority or state law to impose litigation sanctions in the absence of the findings required under Rule 37(e)(1)(B). It is not limited, as is the current rule, to "sanctions under these rules." ~~displaces any other law that would authorize imposing litigation sanctions in the absence of a finding of wilfulness or bad faith, including state law in diversity cases.~~

"Sanction": The following additional sentence was added to the Note:

It [the new rule] borrows the term "sanctions" from Rule 37(b)(2), and does not attempt to prescribe whether such measures would be so regarded for other purposes, such as an attorney's professional responsibility.

Peripheral claim or defense: Two changes were made to address this concern. First, the rule itself was revised as follows:

irreparably deprived a party of any meaningful opportunity to present or defend against the a claims or defense in the action.

The point is reinforced by the following new Note language making a comparison to the "substantial prejudice" that will permit sanctions on a finding of willfulness or bad faith:

This is more severe than the "substantial prejudice" that permits sanctions under Rule 37(e)(1)(B)(i) on a showing of bad faith or willfulness.

In addition, the following additional language was added to the Note:

The rule focuses on whether the loss of information was so severe that it deprived a party of any meaningful ability to present or defend against "the claims in the action." Lost information may appear critical to a given claim or defense, but that claim or defense may not be central to the overall action.

To drive home the point that only losses of information that

cripple a party's entire ability to litigate will trigger this exception, the following opening sentence was added to the next paragraph in the Note after the material quoted just above:

In those rare cases in which the court finds this rigorous standard satisfied, resort to sanctions should not be automatic.

Concern about "meaningful": In response to questions during the Standing Committee meeting, the Subcommittee reexamined use of "meaningful" in Rule 37(e)(1)(B)(ii). But it concluded that this word best expresses what the rule addresses -- those extraordinary situations in which the loss of information "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the action."

Concern about current 37(e): Besides intending to invite comment on whether there is any reason to retain current Rule 37(e), the Subcommittee approved adding the following explanatory paragraph to the Note:

Amended Rule 37(e) supersedes the current rule because it provides protection for any conduct that would be protected under the current rule. The current rule provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." The routine good faith operation of an electronic information system should be respected under the amended rule. As under the current rule, the prospect of litigation may call for altering that routine operation. And the prohibition of sanctions in the amended rule means that any loss of data that would be insulated against sanctions under the current rule would also be protected under the amended rule.

This additional Note language is intended to respond to a concern expressed during the Standing Committee meeting about abrogating current Rule 37(e) with no explanation why this is being done.

"Substantial prejudice": The conclusion was that public comment should be invited on whether a rule provision along the lines proposed by the Department of Justice would be a useful addition to the rule. It is worth mentioning, however, that the Note already emphasizes that the court should scrutinize the extent of the harm, and mentions in particular that digital information is often duplicated and available from a number of sources:

Although it is impossible to demonstrate with certainty what lost information would prove, the party seeking sanctions must show that it has been substantially prejudiced by the loss. Among other things, the court may consider the

measures identified in Rule 37(e)(1)(A) in making this determination; if these measures can sufficiently reduce the prejudice, sanctions would be inappropriate even when the court finds willfulness or bad faith. Rule 37(e)(1)(B) authorizes imposition of Rule 37(b)(2) sanctions in the expectation that the court will employ the least severe sanction needed to repair the prejudice resulting from loss of the information.

Other revisions proposed by Subcommittee

(e)(1) -- removing "reasonably": The Subcommittee decided to remove the word "reasonably" from Rule 37(e)(1) ("discoverable information that ~~reasonably~~ should have been preserved") because it seemed duplicative of the provisions of 37(e)(2), which emphasize the focus on reasonable behavior. In addition, it might be seen as inconsistent with the idea that the preservation obligation is created by case law, not Rule 37(e), as emphasized in the revised Note language quoted above. Finally, curative measures under 37(e)(1)(A) should be available even if reasonable efforts were made to preserve.

(e)(1)(A) -- removing "the party to undertake": The Subcommittee decided that the removal of this language would improve the flexibility available in dealing with curative measures for lost information. The effect of the removal is that something more than an order to the party that lost the information could be regarded as a curative measure:

permit additional discovery, order the party to undertake curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure;

In addition, Note language has been added to address this point:

Additional curative measures might include permitting introduction at trial of evidence about the loss of information or allowing argument to the jury about the possible significance of lost information.

These changes also respond to comments made by several members of the Standing Committee, who thought that the court should be permitted to use "curative measures" short of an "adverse-inference jury instruction" (for which a finding of willfulness or bad faith is necessary).

(e)(2) -- adding "in the anticipation or conduct of litigation": This phrase formerly appeared only in (e)(1), but Standing Committee commentary about the possible effect of the rule on other preservation duties, and the possible implications of those duties for application of the preservation-for-litigation duty with which this rule deals, warranted putting it into (e)(2) as well. In addition, responding in part to a Standing Committee comment emphasizing that such additional

preservation requirements may be appropriate considerations in connection with the issues addressed by 37(e), the following Note language was added:

Although the rule focuses on the common law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation.

Addressing the Act of God Concern  
Adding "negligent or grossly negligent"  
to Rule 37(e)(1)(B)(ii)

The one topic on which there was disagreement within the Subcommittee had to do with the proper response to the Act of God concern. The proposed solution was to add a further finding requirement of negligence or gross negligence to (e)(1)(B)(ii):

irreparably deprived a party of any meaningful opportunity to present or defend against the a claims or defense in the action and was negligent or grossly negligent.

This language was addressed in new Note language:

Even if the court finds that the loss of information deprived a party of a meaningful opportunity to present its claims or defenses in the action, sanctions under Rule 37(e)(1)(B)(ii) may only be imposed on a finding of negligence or gross negligence; the rule does not authorize sanctions on a party without fault in the loss of the information.

These changes address the concern that a crippling loss of evidence caused by an Act of God could be the subject of sanctions. They serve the collateral purpose of showing in the rule that "gross negligence" is different from willfulness; courts might otherwise be tempted to regard them as the same.

But this proposal prompted serious concerns among some Subcommittee members that adding negligence might suggest there is a "sliding scale" regarding sanctions and that judges who feel they cannot find bad faith or willfulness might be inclined to take an expansive view of the sort of grievous harm that would permit use of (B)(ii), thereby "swallowing" the otherwise protective provisions of the rule and undermining the goal of permitting prospective litigants to adopt more realistic preservation strategies.

One reaction was that the provision in (e)(1) that sanctions may only be imposed on a party that "failed to preserve

information that should have been preserved" would avoid the Act of God problem because no judge would conclude that a party whose records were destroyed by Superstorm Sandy failed to preserve information; that is the nature of an Act of God. But some were concerned that this phrase is not explicit enough to notify courts that sanctions should not be imposed when information is lost through an Act of God, and making that point only in the Note may not be clear enough either. Moreover, if there has been no failure to preserve under (e)(1), the curative measures of (e)(1)(A) would also be unavailable.

After considerable discussion of these issues, an alternative possibility was suggested: limit the rule to electronically stored information and delete the (e)(1)(B)(ii) exception for losses that irreparably deprive a party of any meaningful opportunity to present or defend against the claims in the action. This alternative possibility appears below as a proposed Appendix to the revised rule draft. The Subcommittee recommends that the Committee publish and invite commentary on the version in the Appendix. The alternative in the Appendix has two features of note:

(1) It is limited to electronically stored information, which probably excludes the vast majority, if not all, of the cases in which the sort of cataclysmic loss of evidence that would trigger (B)(ii) presently arise. A review of the case law has shown that case-destroying losses of evidence have virtually always arisen in the context of lost tangible evidence -- the airbag, tire, automobile, toaster, or other device at the heart of the lawsuit. By limiting Rule 37(e) to ESI, the Committee would not affect those cases or restrict the flexibility of courts when key tangible evidence is lost. The common law could continue to evolve for cases involving loss of tangible or documentary evidence. At the same time, some hold the view that the loss of ESI will rarely, if ever, destroy a party's ability to litigate its case, although others foresee that loss of essential ESI may occur with greater frequency in the future. ESI tends to proliferate and usually can be found on many computers and servers, reducing the chance that its loss would have the same dire consequences as loss of the key piece of tangible evidence in a case.

(2) It does not include (B)(ii), and therefore does not authorize sanctions unless there is a finding of willfulness or bad faith. This eliminates the concern about sanctions being imposed when information is lost through an Act of God, and also eliminates the concern that the (B)(ii) exception could swallow the rule. And yet an ESI-only rule continues to address the key concern that gave rise to this drafting initiative in the first place -- excessive and extremely costly preservation of electronically stored information.

The Subcommittee did not try to choose between these two alternatives. Instead, the conclusion was that public comment on this choice would assist the Committee in deciding which route to take. It may be that the alternative in the Appendix would avoid significant problems with the main proposal. But adopting that approach comes with its own problems. Public comment on that choice would have great informational value for the Committee.

Accordingly, the Subcommittee proposes (a) to publish the version of Rule 37(e) set forth below, and (b) to publish also an Appendix with the alternative draft described just above. The invitation for public comment, meanwhile, would focus attention on a variety of considerations. At the end of this memorandum is the current list of those topics for invitation for public comment.

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

\* \* \* \* \*

~~(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION.

(1) Curative measures; sanctions. If a party failed to preserve discoverable information that reasonably should have been preserved in the anticipation or conduct of litigation, the court may

(A) permit additional discovery, order the party to undertake curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and

(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 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 a claims or defense in the action and was negligent or grossly negligent.

(2) Factors to be considered Determining reasonableness and willfulness or bad faith. In determining whether a party failed to preserve discoverable information that reasonably should have been preserved in the anticipation or conduct of litigation, and whether the failure was willful or in bad faith, and whether the failure was negligent or grossly negligent, the court should consider all relevant factors, including:

- 35           (A) the extent to which the party was on notice that  
36           litigation was likely and that the information  
37           would be discoverable;
- 38
- 39           (B) the reasonableness of the party's efforts to  
40           preserve the information;
- 41
- 42           (C) whether the party received a request to preserve  
43           information, whether the request was clear and  
44           reasonable, and whether the person who made it and  
45           the party engaged in good-faith consultation about  
46           the scope of preservation;
- 47
- 48           (D) the proportionality of the preservation efforts to  
49           any anticipated or ongoing litigation; and
- 50
- 51           (E) whether the party timely sought the court's  
52           guidance on any unresolved disputes about  
53           preserving discoverable information.

\* \* \* \* \*

DRAFT COMMITTEE NOTE

1

2           In 2006, Rule 37(e) was added to provide protection against  
3           sanctions for loss of electronically stored information under  
4           certain limited circumstances, but preservation problems have  
5           nonetheless increased. The Committee has been repeatedly  
6           informed of growing concern about the increasing burden of  
7           preserving information for litigation, particularly with regard  
8           to electronically stored information. Many litigants and  
9           prospective litigants have emphasized their uncertainty about the  
10          obligation to preserve information, particularly before  
11          litigation has actually begun. The remarkable growth in the  
12          amount of information that might be preserved has heightened  
13          these concerns. Significant divergences among federal courts  
14          across the country have meant that potential parties cannot  
15          determine what preservation standards they will have to satisfy  
16          to avoid sanctions. Extremely expensive overpreservation may  
17          seem necessary due to the risk that very serious sanctions could  
18          be imposed even for merely negligent, inadvertent failure to  
19          preserve some information later sought in discovery.

20

21 This amendment to Rule 37(e) addresses these concerns by  
22 adopting a uniform set of guidelines for federal courts, and  
23 applying them to all discoverable information, not just  
24 electronically stored information. The amended rule ~~it~~ is not  
25 limited, as is the current rule, to information lost due to "the  
26 routine, good-faith operation of an electronic information  
27 system." The amended rule is designed to ensure that potential  
28 litigants who make reasonable efforts to satisfy their  
29 preservation responsibilities may do so with confidence that they  
30 will not be subjected to serious sanctions should information be  
31 lost despite those efforts. It does not provide "bright line"  
32 preservation directives because bright lines seem unsuited to a  
33 set of problems that is intensely context-specific. Instead, the  
34 rule focuses on a variety of considerations that the court should  
35 weigh in calibrating its response to the loss of information.

36  
37 Amended Rule 37(e) supersedes the current rule because it  
38 provides protection for any conduct that would be protected under  
39 the current rule. The current rule provides: "Absent  
40 exceptional circumstances, a court may not impose sanctions under  
41 these rules on a party for failing to provide electronically  
42 stored information lost as a result of the routine, good-faith  
43 operation of an electronic information system." The routine good  
44 faith operation of an electronic information system should be  
45 respected under the amended rule. As under the current rule, the  
46 prospect of litigation may call for altering that routine  
47 operation. And the prohibition of sanctions in the amended rule  
48 means that any loss of data that would be insulated against  
49 sanctions under the current rule would also be protected under  
50 the amended rule.

51  
52 Amended Rule 37(e) applies to loss of discoverable  
53 information "that ~~reasonably~~ should have been preserved in the  
54 anticipation or conduct of litigation." This preservation  
55 obligation was not created by Rule 37(e), but has been recognized  
56 by many court decisions. arises from the common law, and It may  
57 in some instances be triggered or clarified by a court order in  
58 the case. Rule 37(e)(2) identifies many of the factors that  
59 should be considered in determining, in the circumstances of a  
60 particular case, when a duty to preserve arose and what  
61 information should have been ~~be~~ preserved.

62  
63 Except in very rare cases in which Rule 37(e)(1)(B)(ii)  
64 permits sanctions on a showing of negligence because the loss of  
65 information irreparably deprived a party of any meaningful  
66 opportunity to present or defend against the a claims in the  
67 action, or defense, sanctions for loss of discoverable  
68 information may only be imposed under Rule 37(e)(1)(B)(i) on a  
69 finding of willfulness or bad faith, combined with substantial  
70 prejudice.

71           The amended rule therefore forecloses reliance on inherent  
72 authority or state law to impose litigation sanctions in the  
73 absence of the findings required under Rule 37(e)(1)(B). It is  
74 not limited, as is the current rule, to "sanctions under these  
75 rules." ~~displaces any other law that would authorize imposing~~  
76 ~~litigation sanctions in the absence of a finding of wilfulness or~~  
77 ~~bad faith, including state law in diversity cases.~~ But the rule  
78 does not affect the validity of an independent tort claim for  
79 relief for spoliation if created by the applicable law. The law  
80 of some states authorizes a tort claim for spoliation. The  
81 cognizability of such a claim in federal court is governed by the  
82 applicable substantive law, not Rule 37(e).

83  
84           ~~Unlike the 2006 version of the rule, amended Rule 37(e) is~~  
85 ~~not limited to "sanctions under these rules." It provides rule-~~  
86 ~~based authority for sanctions for loss of all kinds of~~  
87 ~~discoverable information, and therefore makes unnecessary resort~~  
88 ~~to inherent authority.~~

89  
90           **Subdivision (e) (1) (A)** When the court concludes that a party  
91 failed to preserve information that should have been preserved in  
92 anticipation or conduct of litigation, it reasonably should have  
93 preserved, it may adopt a variety of measures that are not  
94 sanctions. One is to permit additional discovery that would not  
95 have been allowed had the party preserved information as it  
96 should have. For example, discovery might be ordered under Rule  
97 26(b)(2)(B) from sources of electronically stored information  
98 that are not reasonably accessible. More generally, the fact  
99 that a party has failed to preserve information may justify  
100 discovery that otherwise would be precluded under the  
101 proportionality analysis of Rule 26(b)(2)(C).

102  
103           In addition to, or instead of, ordering further discovery,  
104 the court may order ~~the party that failed to preserve information~~  
105 ~~to take~~ curative measures, such as requiring the party that  
106 failed to preserve information to restore or obtain the lost  
107 information, or to develop substitute information that the court  
108 would not have ordered the party to create but for the failure to  
109 preserve. The court may also require the party that failed to  
110 preserve information to pay another party's reasonable expenses,  
111 including attorney fees, caused by the failure to preserve. Such  
112 expenses might include, for example, discovery efforts caused by  
113 the failure to preserve information. Additional curative  
114 measures might include permitting introduction at trial of  
115 evidence about the loss of information or allowing argument to  
116 the jury about the possible significance of lost information.

117  
118           **Subdivision (e) (1) (B) (i).** This subdivision authorizes  
119 imposition of the sanctions listed in Rule 37(b)(2)(A) for

120 failure to preserve information, whether or not there was a court  
121 order requiring such preservation. Rule 37(e)(1) is designed to  
122 provide a uniform standard in federal court for sanctions for  
123 failure to preserve. Except in the narrowly confined  
124 circumstances of (e)(1)(B)(ii), it rejects decisions that have  
125 authorized the imposition of sanctions -- as opposed to measures  
126 authorized by Rule 37(e)(1) -- for negligence or gross  
127 negligence. It borrows the term "sanctions" from Rule 37(b)(2),  
128 and does not attempt to prescribe whether such measures would be  
129 so regarded for other purposes, such as an attorney's  
130 professional responsibility.

131  
132 This subdivision protects a party that has made reasonable  
133 preservation decisions in light of the factors identified in Rule  
134 37(e)(2), which emphasize both reasonableness and  
135 proportionality. Despite reasonable efforts to preserve, some  
136 discoverable information may be lost. Although loss of  
137 information may affect other decisions about discovery, such as  
138 those under Rule 26(b)(2)(B) and 26(b)(2)(C), sanctions may be  
139 imposed only for willful or bad faith actions, unless the  
140 exceptional circumstances described in Rule 37(e)(1)(B)(ii) are  
141 shown.

142  
143 The threshold under Rule 37(e)(1)(B)(i) is that the court  
144 find that lost information ~~reasonably~~ should have been preserved;  
145 if so, the court may impose sanctions only if it can make two  
146 further findings. ~~First, it must be established that the party~~  
147 ~~that failed to preserve did so willfully or in bad faith. This~~  
148 ~~determination should be made with reference to the factors~~  
149 ~~identified in Rule 37(e)(3).~~

150  
151 ~~Second, the court must also find that the loss of~~  
152 ~~information caused substantial prejudice in the litigation.~~  
153 ~~Because digital data often duplicate other data, substitute~~  
154 ~~evidence is often available. Although it is impossible to~~  
155 ~~demonstrate with certainty what lost information would prove, the~~  
156 ~~party seeking sanctions must show that it has been substantially~~  
157 ~~prejudiced by the loss. Among other things, the court may~~  
158 ~~consider the measures identified in Rule 37(e)(1)(A) in making~~  
159 ~~this determination; if these measures can sufficiently reduce the~~  
160 ~~prejudice, sanctions would be inappropriate even when the court~~  
161 ~~finds willfulness or bad faith. Rule 37(e)(1)(B) authorizes~~  
162 ~~imposition of Rule 37(b)(2) sanctions in the expectation that the~~  
163 ~~court will employ the least severe sanction needed to repair the~~  
164 ~~prejudice resulting from loss of the information.~~

165  
166 Second, it must be established that the party that failed to  
167 preserve did so willfully or in bad faith. This determination  
168 should be made with reference to the factors identified in Rule

169 37(e)(2).

170

171 **Subdivision (e) (1) (B) (ii).** Rule 37(e)(1)(B)(ii) permits the  
172 court to impose sanctions for negligence or gross negligence,  
173 without making a finding of either bad faith or willfulness. As  
174 under Rule 37(e)(2)(A), the threshold for sanctions is that the  
175 court find that lost information ~~reasonably~~ should have been  
176 preserved by the party to be sanctioned.

177

178 ~~Even if bad faith or willfulness is shown, sanctions may~~  
179 ~~only be imposed under Rule 37(e)(1)(B)(i) when the loss of~~  
180 ~~information caused substantial prejudice in the litigation. Rule~~  
181 ~~37(e)(1)(B)(ii) permits sanctions in the absence of a showing of~~  
182 ~~bad faith or willfulness only if that loss of information~~  
183 ~~deprived a party of any meaningful opportunity to present or~~  
184 ~~defend against the a claims in the action. or defense. This is~~  
185 ~~more severe than the "substantial prejudice" that permits~~  
186 ~~sanctions under Rule 37(e)(1)(B)(i) on a showing of bad faith or~~  
187 ~~willfulness. Examples might include cases in which the alleged~~  
188 ~~injury-causing instrumentality has been lost before the parties~~  
189 ~~may inspect it, or cases in which the only evidence of a~~  
190 ~~critically important event has been lost. Such situations are~~  
191 ~~extremely rare. The rule focuses on whether the loss of~~  
192 ~~information was so severe that it deprived a party of any~~  
193 ~~meaningful ability to present or defend against "the claims in~~  
194 ~~the action." Lost information may appear critical to a given~~  
195 ~~claim or defense, but that claim or defense may not be central to~~  
196 ~~the overall action.~~

197

198 In those rare cases in which the court finds this rigorous  
199 standard satisfied, resort to sanctions should not be automatic.  
200 Before resorting to sanctions, a court would ordinarily consider  
201 lesser measures, including those listed in Rule 37(e)(1), to  
202 avoid or minimize the prejudice. Particularly with  
203 electronically stored information, alternative sources may often  
204 exist. If such measures substantially cure the prejudice, Rule  
205 37(e)(1)(B)(ii) does not apply. When ~~Even if~~ such prejudice  
206 persists, the court should employ the least severe sanction.

207

208 Even if the court finds that the loss of information  
209 deprived a party of a meaningful opportunity to present its  
210 claims or defenses in the action, sanctions under Rule  
211 37(e)(1)(B)(ii) may only be imposed on a finding of negligence or  
212 gross negligence; the rule does not authorize sanctions on a  
213 party without fault in the loss of the information.

214

215 **Subdivision (e) (2).** These factors guide the court when

216 asked to adopt measures under Rule 37(e)(1) due to loss of  
217 information or to impose sanctions under Rule 37(e)(1)(B). The  
218 listing of factors is not exclusive; other considerations may  
219 bear on these decisions, such as whether the information not  
220 retained reasonably appeared to be cumulative with materials that  
221 were retained. With regard to all these matters, the court's  
222 focus should be on the reasonableness of the party's conduct.

223

224 The first factor is the extent to which the party was on  
225 notice that litigation was likely and that the information lost  
226 would be discoverable in that litigation. A variety of events  
227 may alert a party to the prospect of litigation. But often these  
228 events provide only limited information about that prospective  
229 litigation, so that the scope of discoverable information may  
230 remain uncertain.

231

232 The second factor focuses on what the party did to preserve  
233 information after the prospect of litigation arose. The party's  
234 issuance of a litigation hold is often important on this point.  
235 But it is only one consideration, and no specific feature of the  
236 litigation hold -- for example, a written rather than an oral  
237 hold notice -- is dispositive. Instead, the scope and content of  
238 the party's overall preservation efforts should be scrutinized.  
239 One focus would be on the extent to which a party should  
240 appreciate that certain types of information might be  
241 discoverable in the litigation, and also what it knew, or should  
242 have known, about the likelihood of losing information if it did  
243 not take steps to preserve. The court should be sensitive to the  
244 party's sophistication with regard to litigation in evaluating  
245 preservation efforts; some litigants, particularly individual  
246 litigants, may be less familiar with preservation obligations  
247 than other litigants who have considerable experience in  
248 litigation. Although the rule focuses on the common law  
249 obligation to preserve in the anticipation or conduct of  
250 litigation, courts may sometimes consider whether there was an  
251 independent requirement that the lost information be preserved.  
252 The court should be sensitive, however, to the fact that such  
253 independent preservation requirements may be addressed to a wide  
254 variety of concerns unrelated to the current litigation. The  
255 fact that some information was lost does not itself prove that  
256 the efforts to preserve were not reasonable.

257

258 The third factor looks to whether the party received a  
259 request to preserve information. Although such a request may  
260 bring home the need to preserve information, this factor is not  
261 meant to compel compliance with all such demands. To the  
262 contrary, reasonableness and good faith may not require any  
263 special preservation efforts despite the request. In addition,  
264 the proportionality concern means that a party need not honor an  
265 unreasonably broad preservation demand, but instead should make

266 its own determination about what is appropriate preservation in  
267 light of what it knows about the litigation. The request itself,  
268 or communication with the person who made the request, may  
269 provide insights about what information should be preserved. One  
270 important matter may be whether the person making the  
271 preservation request is willing to engage in good faith  
272 consultation about the scope of the desired preservation.

273

274 The fourth factor emphasizes a central concern --  
275 proportionality. The focus should be on the information needs of  
276 the litigation at hand. That may be only a single case, or  
277 multiple cases. Rule 26(b)(2)(C) provides guidance particularly  
278 applicable to calibrating a reasonable preservation regime. Rule  
279 37(e)(2)(D) explains that this calculation should be made with  
280 regard to "any anticipated or ongoing litigation." Prospective  
281 litigants who call for preservation efforts by others (the third  
282 factor) should keep those proportionality principles in mind.

283

284 Making a proportionality determination often depends in part  
285 on specifics about various types of information involved, and the  
286 costs of various forms of preservation. The court should be  
287 sensitive to party resources; aggressive preservation efforts can  
288 be extremely costly, and parties (including governmental parties)  
289 may have limited resources to devote to those efforts. A party  
290 may act reasonably by choosing the least costly form of  
291 information preservation, if it is substantially as effective as  
292 more costly forms. It is important that counsel become familiar  
293 with their clients' information systems and digital data --  
294 including social media -- to address these issues. A party  
295 urging that preservation requests are disproportionate may need  
296 to provide specifics about these matters in order to enable  
297 meaningful discussion of the appropriate preservation regime.

298

299 Finally, the fifth factor looks to whether the party alleged  
300 to have failed to preserve as required sought guidance from the  
301 court if agreement could not be reached with the other parties.  
302 Until litigation commences, reference to the court may not be  
303 possible. In any event, this is not meant to encourage premature  
304 resort to the court; Rule 26(f) directs the parties to discuss  
305 and to attempt to resolve issues concerning preservation before  
306 presenting them to the court. Ordinarily the parties'  
307 arrangements are to be preferred to those imposed by the court.  
308 But if the parties cannot reach agreement, they should not forgo  
309 available opportunities to obtain prompt resolution of the  
differences from the court.

APPENDIX

Possible alternative Rule 37(e)

During the Subcommittee's extensive consideration of Rule 37(e), one suggestion was that many difficulties might be avoided if the new rule were limited to electronically stored information. Below is a draft rule provision so limited. This alternative draft rule is included in this package to invite comment on whether it would be preferable to the main proposal, which is not limited to electronically stored information.

One important question is whether the dividing line between electronically stored information and other evidence is and will remain clear enough for such a rule to focus only on electronically stored information. The draft below is different from the broader proposed rule in that it does not include a provision parallel to Rule 37(e)(1)(B)(ii) in the main proposal - - permitting sanctions in the absence of a finding of willfulness or bad faith when the loss of information "irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the action." Would there be situations in which loss of electronically stored information would produce such severe prejudice for litigants? If so, would limiting sanctions to cases of willfulness or bad faith unduly limit the rule?

**Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions**

\* \* \* \* \*

~~(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

1  
2  
3  
4  
5  
6

**(e) FAILURE TO PRESERVE DISCOVERABLE ELECTRONICALLY STORED INFORMATION.**

**(1) Curative measures; sanctions. If a party failed to preserve discoverable electronically stored information**

7 that should have been preserved in the anticipation or  
8 conduct of litigation, the court may

9  
10 (A) permit additional discovery, order curative  
11 measures, or order the party to pay the reasonable  
12 expenses, including attorney's fees, caused by the  
13 failure; and

14  
15 (B) impose any sanction listed in Rule 37(b)(2)(A) or  
16 give an adverse-inference jury instruction, but  
17 only if the court finds that the failure caused  
18 substantial prejudice in the litigation and was  
19 willful or in bad faith.

20  
21 (2) *Factors to be considered.* In determining whether a  
22 party failed to preserve discoverable electronically  
23 stored information that should have been preserved in  
24 the anticipation or conduct of litigation and whether  
25 the failure was willful or in bad faith, the court  
26 should consider all relevant factors, including:

27  
28 (A) the extent to which the party was on notice that  
29 litigation was likely and that the information  
30 would be discoverable;

31  
32 (B) the reasonableness of the party's efforts to  
33 preserve the information;

34  
35 (C) whether the party received a request to preserve  
36 information, whether the request was clear and  
37 reasonable, and whether the person who made it and  
38 the party engaged in good-faith consultation about  
39 the scope of preservation;

40  
41 (D) the proportionality of the preservation efforts to  
42 any anticipated or ongoing litigation; and

43  
44 (E) whether the party timely sought the court's  
45 guidance on any unresolved disputes about  
preserving discoverable information.

COMMITTEE NOTE

[To be adapted from Note for main proposal]

## Issues on Which Public Comment Can Be Invited

Public comment is welcome, of course, on any question raised by a published rule-amendment proposal. But the Subcommittee feels that input should be sought on some specific issues. In the actual invitation for public comment, there would likely be some elaboration on the subjects on which comment is sought. And the ordering here might well be revised before the actual public comment invitation is sent out. Nonetheless, it may be of value to have in mind the current list of topics:

1. Is the rule draft in the Appendix preferable to the main rule proposal, and why?

2. Should (e)(1)(B)(ii) be retained in the main rule proposal? If so, should the required finding of negligence or gross negligence be dropped?

3. Should the provisions of current Rule 37(e) be retained if the amendment is adopted?

4. Should the amended rule include an additional definition of "substantial prejudice" (as the Department of Justice has suggested)?

5. Should the amended rule include an additional definition of willfulness and bad faith?

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# TAB 3B

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Notes of Conference Call  
Discovery Subcommittee  
Advisory Committee on Civil Rules  
Nov. 28, 2012

On Nov. 28, 2012, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Hon. Paul Grimm (Chair, Discovery Subcommittee); Hon. David Campbell (Chair, Advisory Committee); Hon. John Koeltl (Chair, Duke Subcommittee); Anton Valukas; Elizabeth Cabraser; John Barkett; Peter Keisler; Prof. Edward Cooper (Reporter, Advisory Committee); and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

Judge Grimm introduced the call as a follow-up to the full Committee Nov. 2 meeting, convened to resolve issues remaining after that meeting on details left for further Subcommittee consideration in preparation of the Rule 37(e) proposal to the Standing Committee.

#### Erie Issues

Both before the Nov. 2 meeting and during the meeting, issues about the application of the Erie Doctrine to 37(e) were raised. But an analysis of rulemaking authority seems to make it clear that the authority extends far enough to include what's in proposed 37(e). An initial question, then, is whether there is an Erie Doctrine problem.

A reaction was that the chief concern seems to be with whether adoption of proposed 37(e) would nullify tort claims in states that permit tort-type claims for spoliation. That would be a substantive spoliation doctrine, and there is concern that adoption of 37(e) might raise questions about whether such claims could be asserted in federal court. So it would seem desirable to make clear that the rule provision is not focused on, and does not affect, a cognizable cause of action for spoliation recognized by state law.

A reaction was that the rule is only about sanctions for failure to preserve -- the kind of thing that Rule 37 ordinarily addresses -- not about independent causes of action created by state law.

Another reaction was agreement -- Rule 37(e) does not do anything to limit such state-law claims. There might be an interesting issue about whether state law properly could create a spoliation claim for destruction of evidence that was relevant only to a federal claim, in other words whether state law overreaches when it seeks to implement federal claims in this manner. But that is surely beyond the scope of what we have been discussing doing.

The original speaker agreed, but said that it would be wise

and politic to say something about these points either in the transmittal letter or in the Note.

A reaction was that this probably should be in the Note. If there is a concern that arguments might be made that 37(e) somehow stymies the assertion of a tort claim for spoliation in federal court, the Committee Note is the place to put the answer so that the Note can be used for guidance if the issue arises in a case. A statement in the transmittal memo would likely be too obscure to be used for that sort of guidance.

Another participant elaborated on the existence of such claims. It seems that they are recognized in Alaska, New Mexico, Ohio and possibly Connecticut. In West Virginia, there may be both first-party and third-party claims. As to most of these, however, one must prove intent to support the claim.

A reaction to this catalog was that in California such claims may in some circumstances survive a demurrer.

Another participant observed that we need to deal with these issues in the Note -- to say as clearly as we can that (a) we preempt reliance on state law in the non-tort sanctions setting, and (b) we do not intend to have any effect on the assertion in federal court of a state-law tort claim for spoliation.

This point drew agreement, and the suggestion that it could be expressed as displacing "procedural" but not "substantive" state law. But that characterization drew concerns about the uncertain meaning of those words in different contexts.

A further response was that we need to be clear that the federal-court cases relying on state law to determine the extent or availability of sanctions must be disapproved, but that goal should be distinguished from displacing independent claims created by state law.

A concurring opinion was expressed, noting that states may express this as a matter of common law or by legislative enactment. It should be made clear that Rule 37(e) does not affect the viability of claims, whether based on common law or legislation.

Attention was drawn to two possible locations in the current Note, where possible language dealing with Erie issues was suggested in the materials for the call. The question was whether there was a need to tweak one or the other of those possible additions.

A reaction was that the second addition (accompanying footnote 8) seemed to be the right location, but to be too brief. A suggestion was instead to include a new paragraph at this point addressing both the positive and negative points. The positive point is that the rule displaces state law on sanctions that is

different. The negative point is that the rule has no effect on state-law causes of action for spoliation, whether based on common law or statute and whether considered a separate "tort" or otherwise.

Another expression of agreement emphasized that it would be desirable to avoid entering into the thicket of possible issues about the extent of the Rules Enabling Act authority to define "remedies" in federal court that vary from what state courts might do in similar circumstances. In addition, it was noted that because Rule 37(e) could be applied in situations in which the activity on which the sanctions are based occurred before suit was filed, it might be uncertain at the time the action was taken whether a case would be in state or federal court.

The consensus was that Note language should be added to address both aspects of the Erie concern, and that Professor Marcus should draft this language and circulate the draft to the Subcommittee by email seeking an expedited "last look" (in an effort to deliver agenda materials in to the A.O. on schedule).

Judge Harris's suggested  
revision of Rule 37(e)(3)

This issue was introduced as looking desirable at first blush, but raising questions after further consideration. As outlined in Prof. Marcus's memorandum for this conference call (attached hereto as an Appendix), the change would actually seem to raise possible concerns about focusing attention for some matters on factors that really should not be considered pertinent. On balance, it may be that making the change could create risks of mischief.

A first reaction was similar. "I don't quite understand Judge Harris's concern." For example, consider the issue whether (e)(2)(B) might apply in a given case. Is it really true that the factors in (e)(3) should be brought to bear on whether the loss of the information "deprived a party of any meaningful opportunity to present a claim or defense"?

Another participant agreed -- "these factors could be a distraction in addressing (e)(2)(B)."

Another participant noted that (e)(3) was not designed to address all issues that could arise under new 37(e). For example, they are not particularly pertinent to whether to apply a sanction or instead to use a curative measure under (e)(1). If one wanted to identify factors pertinent to that choice, one would probably add a number of things that are not in current (e)(3), such as whether the party that failed to preserve had been guilty of other discovery misconduct, the degree of prejudice, etc.

That drew agreement -- this is a "very complicated matrix."

The consensus was to make no change in 37(e)(3).

Judge Pratter's concern

The issue was introduced as pointing out the risk that current (e)(2)(A) might be read to call for reference to the prejudice factor only when bad faith is shown, and not when willfulness is shown. Whether this is a problem might be debated. Prof. Marcus' memo suggested three alternative ways of clarifying to avoid the risk.

The consensus was to adopt alternative one -- adding a comma after "bad faith," to make clear (as the Committee Note does also) that prejudice must be proved to support sanctions even if willfulness is shown.

Adding "when appropriate"  
to 37(e)(3)

The issue was introduced as focusing on the language of (e)(3), which says that the court "should consider all relevant factors, including [the listed factors]." The concern is whether the command ("should") could require a court to consider factors that ought not bear on the questions actually before the court. Alternatively, the use of "relevant" and "including" may make it clear that this list does not include all factors that might bear on decisions in a given case, and that some on the list might not be relevant in a given case.

An initial reaction was that adding "when appropriate" is not necessary. Another participant agreed.

Another participant expressed misgivings, however. "Linguistically, when I first read this, I was concerned about whether all factors are always relevant." Might it be better to say "consider all relevant factors, which may includeing"? Another participant expressed support for this revision.

A reaction to both the use of "when appropriate" and "which may include" was that either would likely raise style questions. The assumption is that judges are to do only appropriate things under the rules, and also that they are to consider only appropriate things.

Another reaction was that, under the current language, any judge going down this list would be likely to react to some as being irrelevant to the particular case before the court. The reaction would be "This one does not apply."

Another reaction was that this issue is one on which we might be focused during the public comment period; we could await comments about whether this causes a problem.

Based on this discussion, the participant who originally

expressed concerns retracted them; "I'm happy to leave the language as it is, pending public comment."

The consensus was to leave the language as it is.

Reference to litigation hold in 37(e)(3)(B)

The Subcommittee has discussed this issue before and retained the reference in the rule to litigation holds. The issue was raised again by many comments during the Nov. 2 meeting. The question is whether to end the reasonableness of preservation efforts factor at ". . . preserve the information."

The issue was introduced as sparked by the question whether "litigation hold" is something of a lightning rod. Is it too specific and controversial (and perhaps uncertain) to warrant mention in rule language?

An initial reaction was "I think it should stay in. It's a positive factor." People are aware of what a litigation hold is. Putting it into the rule recognizes that such an effort is desirable, and should be acknowledged if sanctions issues arise.

A competing view was "I continue to think that it should go out." Individual litigants don't do things like big companies. "Am I supposed to send myself a written litigation hold?" This participant had recently had extended discussions with several individual clients in which the topic of preservation had been explored at length. But there would be no formal "litigation hold" in these instances. In addition, putting it into the rule raises issues about whether privilege or work-product protection applies to such documents. Is it always required to turn over such a document?

Another participant sees the question as cutting both ways. For large companies, some litigation hold procedure is fairly routine by now. They would perhaps benefit from inclusion of the explicit factor so that they can emphasize "We did what the rule says." But the reference to the litigation hold in (B) is jarring because it is much more specific than the rest of the matters listed in (e)(3), raising the concern that it is receiving disproportional emphasis. Smaller entities and individual litigants are much less likely to have "litigation hold" practices than large entities.

Attention was drawn to the existing Committee note on the second factor, as expanded a bit by Prof. Marcus to note the relevance of the party's sophistication in matters of litigation. Is there a problem with that reference to a litigation hold, and is there a need to mention it also in the rule provision itself?

A reaction from one concerned with the reference in the rule is that "Having it there in the Note is o.k."

Another participant said there was no problem with mentioning "litigation holds" in the rule. But it would surely suffice to do so in the Note. There is no universally recognized or accepted definition of what a hold involves. Moreover, the greater the emphasis, the greater the pressures on privilege and work product issues.

A summary was that we seem to be reaching the conclusion that the rule's reference to a litigation hold should be removed. If it were, would it not be proper also to continue with the same Committee Note language (expanded as Prof. Marcus did for the removal of former (D))?

A question was raised: There are a number of other issues that could be raised but are not addressed in relation to litigation holds. For example, questions arise about whether counsel must follow up regularly, whether a collection effort must be undertaken, what should be done with computers that are going to be replaced, whether one can entrust collection to the individuals at the company who were involved in the actions that might lead to corporate liability, etc. Should these topics be mentioned?

A reaction was that many of those topics are heavily disputed in given cases, and some of them relate to "cutting edge" questions. Getting into those could be very problematical.

Another reaction was that the revised Note language in Prof. Marcus' memo seems fine. In particular, judges are sensitive to the sophistication of litigants, even governmental litigants. Another point was that some mention of individual litigants seems important. More than once we have been reminded that "People change their Facebook pages and discard their diaries without thinking about preservation." We should acknowledge that somewhere.

It was also noted that, in relation to proportionality, the Note had been augmented to call attention to litigant resources, particularly with regard to governmental litigants.

The consensus was to remove the rule's reference to litigation holds but and to retain the Note as revised by Prof. Marcus in the materials for the conference call.

#### Department of Justice concerns

As the time for ending the call was approaching, attention turned to the various concerns raised by the Department of Justice. The Department is certainly an important source of input on civil litigation in federal courts, as it appears in far more cases than any other litigant, and is involved in cases running the gamut of types of litigation. It is unfortunate that the Department was not able to complete its internal review of the rule with all the agencies with which it works in time for

the Nov. 2 meeting.

An overall reaction was that although the Department made many comments and raised questions about several aspects of the rule, it was surely not entirely negative. At least four of its comments supported decisions reached in the long drafting process, and four more seemed to seek a more expansive rule. It did urge retention of current Rule 37(e), but the Subcommittee has concluded that the amended rule would provide protection in any instance in which the current rule does so. And Andrea Kuperman's memo shows at length that the current rule is rarely invoked. Moreover, the Committee has actually done one of the things the Department recommended -- removing the reference in proposed 37(e)(3) to the resources and sophistication of a party as bearing on sanctions decisions. And the Committee Note has also been modified to note that governmental entities may actually have limited resources for preservation efforts. Finally, the Committee voted also to delete the draft Note language on failed bad-faith efforts to destroy evidence. On balance, the rule proposal responds to most of the Department's concerns.

One specific was raised, however: The Department expressed concern that proposed (e)(3)(A) might be interpreted to permit a party accused of spoliation to avoid the consequences by claiming lack of knowledge, so that some sort of "should have known" formulation should be used instead. Is that concern troubling?

A reaction was that the current language -- "the extent to which the party was on notice that litigation was likely and that the information would be discoverable" -- should provide a suitable method for dealing with such issues. In particular, "the extent to which the party was on notice" standard seems clearly to adopt a "constructive notice" attitude. It provides no handholds for a litigant trying to escape responsibility because "I did not realize" if the court is persuaded the party should have appreciated that litigation was likely.

A judge agreed: "This objection did not resonate with me; I think the current language is preferable."

Others agreed; the consensus was to retain 37(e)(3)(A) as currently written.

## APPENDIX

### Memo considered by Subcommittee during Conference call

Nov. 28 Conference Call  
Issues after Nov. 2 Committee meeting  
Redraft of 37(e)

This memorandum addresses issues remaining after the Nov. 2 meeting of the full Committee, which can be discussed during the Nov. 28 Conference Call. It also presents the version of the rule that was presented to the Committee, with changes responsive to the vote of the Committee. The revised rule proposal shows changes to rule language either with strikeover (for language removed) or double underlining (for language added). In the Note underline and strikeover is used for the same purpose. A couple of very small fixes to the Note that occurred to the Reporter are also so indicated.

The Committee voted (a) to remove our proposed 37(e)(3)(D) factor from the rule, (b) to remove the bracketed paragraph in the Note regarding unsuccessful but heinous efforts to destroy evidence, (c) to retain factor 37(e)(3)(C), and (d) to recommend publication of the rule for public comment. It made this vote subject to the Subcommittee's further consideration of the Erie issues raised by John Vail and Judge Harris's suggested rewording of Rule 37(e)(3). During the meeting, Judge Pratter raised a question about the wording (or punctuation) of 37(e)(2)(A), and that is addressed below as well. Additional issues raised during the meeting discussed below were whether to add a "when appropriate" to Rule 37(e)(3) and whether to remove the reference to a litigation hold from Rule 37(e)(3)(B). These possible changes are discussed below, but the redraft does not currently include them. The Note also includes underlined language reflecting concerns formerly addressed in factor (D).

A set of draft minutes of the Nov. 2 online "meeting" of the full Committee should accompany this memorandum.

This memorandum attempts to introduce the issues remaining for Subcommittee decision. The full Committee's vote was to authorize the Subcommittee to make modest improvements before forwarding the rule to the Standing Committee, and the small changes in the Note below respond to that invitation. The Subcommittee may also decide whether there is any need to poll the full Committee about revisions after reaching conclusions about what more needs to be done now. It's worth noting that, for logistical reasons, that polling might present some difficulties in terms of submitting Standing Committee agenda materials by the beginning of December.

It is also worth noting that the full Committee will certainly have an opportunity to revisit these issues if the

Standing Committee authorizes publication at its January meeting. For one thing, if the Duke Subcommittee proposals go forward after the full Committee's Spring meeting, this proposal will need to be integrated with those proposals.<sup>1</sup> For example, one of those proposals is to add emphasis to preservation in the Rule 26(f)/Rule 16(b) process. More importantly, the process of public comment will afford the Subcommittee and the full Committee an abundant opportunity to reflect on the Rule 37(e) amendment proposal before a decision is made whether to recommend adoption to the Judicial Conference. It is likely that this proposal will draw much more interest than our Rule 45 amendment proposal; there will be abundant commentary.

#### Transmittal to Standing Committee

Eventually we will need to prepare a memorandum for the Standing Committee transmitting the rule proposal. That will likely be done by the Chairs and the Reporters, so it seems useful to preface the discussion of remaining issues for the Subcommittee with some mention of what that transmittal memorandum would likely contain.

It would likely contain an introduction like the introduction presented to the full Committee in the agenda materials at pp. 121-26. Among other things, that makes clear that the goal is to displace Residential Funding.

It would also report the full Committee's action, and any revisions made by the Subcommittee after the meeting in light of the full Committee discussion.

#### Erie Doctrine Concerns

John Vail has argued that the Erie Doctrine or the Rules Enabling Act constitute serious obstacles to going forward with 37(e). Frankly, those issues do not appear to be weighty. Certainly the Rules Enabling Act authorizes adoption of rules about how to handle federal-court litigation in relation to failure to provide through discovery materials that would assist in the resolution of the case before the court. Under the Supreme Court's decisions, such a rule is permissible if it is "arguably procedural." Thus, one could say that the issue is what "remedy" the federal court should grant when presented with a failure to respond to discovery on the ground that the material sought no longer exists. Rule 37 addresses exactly that sort of issue, and revising it so it more suitably handles this problem should not tax the Enabling Act authority.

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<sup>1</sup> As noted again below, to the extent the Duke proposals affect the content to Rule 26(b)(2)(C), that would require another look at this proposal, which refers to 26(b)(2)(C) in the Note.

Under 28 U.S.C. § 2072(b), a rule should not be applied if doing so would "abridge, enlarge or modify any substantive right." It may be that a wholesale effort through a rule to define and limit or expand the duty to preserve could raise concerns on this score. But 37(e) does not do that. And the Supreme Court has been quite circumspect about the application of § 2072(b). In Burlington Northern R.R. v. Woods, 480 U.S. 1 (1987), it recognized that this provision was "an additional requirement" when competing state law is invoked against application of a Federal Rule, but the Court's actual holding in that case seems to provide strong support for our 37(e).

The issue in Burlington Northern was whether an Alabama statute that required that 10% be added to a money judgment if defendant appealed and the judgment was affirmed could be applied to a federal-court diversity judgment entered in Alabama. One could make a fairly strong argument that this right was a "substantive right," perhaps somewhat like postjudgment interest. But the Court held that the Alabama statute conflicted with Fed. R. App. 38, which permits the court of appeals to impose a sanction on a party that brings a groundless appeal and grants the court discretion to decide whether or not to impose a sanction, and also to determine the amount of any sanction. The Court said the mandatory nature of the Alabama statute conflicted with the discretionary operation of Rule 38. That finding of a conflict was also arguable; Alabama had its own Appellate Rule 38, modeled on the federal rule, and seemed perfectly able to apply both without problems of conflict between them.

Nonetheless, the Court's decision was a relatively ringing endorsement of rules adopted pursuant to the Enabling Act, even when they come up against state laws that could be said to create substantive rights (480 U.S. at 5-6):

The cardinal purpose of Congress in authorizing the development of a uniform and consistent system of rules governing federal practice and procedure suggests that Rules which incidentally affect litigants' substantive rights do not violate this provision if reasonably necessary to maintain the integrity of that system of rules. Moreover, the study and approval given each proposed Rule by the Advisory Committee, the Judicial Conference, and this Court, and the statutory requirement that the Rule be reported to Congress for a period of review before taking effect, give the Rules presumptive validity under both the constitutional and statutory constraints.

In Business Guides, Inc. v. Chromatic Communications Ent., Inc. 498 U.S. 533 (1991), the Court upheld imposition of Rule 11 sanctions on a party despite Justice Kennedy's argument in dissent that doing so "creates a new tort of 'negligent prosecution' or 'accidental abuse of process.'" The majority concluded that "[t]here is little doubt that Rule 11 is reasonably necessary to maintain the integrity of the system of

federal practice and procedure, and that any effect on substantive rights is incidental."

Lower courts have recognized that state law is not controlling in this area even in the absence of a rule directly addressing the questions addressed by new 37(e). For example, here is the analysis of the Sixth Circuit en banc in *Adkins v. Woelever*, 554 F.3d 650, 652 (6th Cir. 2008), abandoning that court's prior reference to state law regarding spoliation:

In contrast to our persistent application of state law in this area, other circuits apply federal law for spoliation sanctions. See, e.g., *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir. 2001); *Reilly v. Natwest Mkts. Group, Inc.*, 181 F.3d 253, 267 (2d Cir. 1999); *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993). We believe that this is the correct view for two reasons. First, the authority to impose sanctions for spoliated evidence arises not from substantive law but, rather "from a court's inherent power to control the judicial process. *Silvestri*, 271 F.3d at 590. Second, a spoliation ruling is evidentiary in nature and federal courts generally apply their own evidentiary rules in both federal question and diversity matters. These reasons persuade us now to acknowledge the district court's broad discretion in crafting a proper sanction for spoliation.

The goal of amended 37(e) is to achieve uniformity in the federal courts in their handling of failures to preserve. One of the chief stimuli behind the proposed amendment is the diversity of treatment of preservation sanctions across the country. So there seems little reason to expect that it would run afoul of § 2072(b), as interpreted by the Supreme Court.

Indeed, one could instead argue that the real problem of judicial power exists now, and that the proposed rule would solve it. Until now, many courts have invoked "inherent authority" to address the handling of these issues. Our Committee Note tries to make clear that new Rule 37(e) would make resort to inherent authority unnecessary. There may be an argument that these judges were overstepping their authority in doing so with regard to pre-litigation preservation.<sup>2</sup> That argument seems strained, but no more so than the argument that adopting 37(e) would exceed the Enabling Act or transgress Erie (which really has no application to rules adopted pursuant to the Enabling Act). Acting to regularize matters through the Enabling Act process seems preferable in many ways. Indeed, if there were Enabling Act problems, it would seem that they apply relatively equally to current Rule 37(e).

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<sup>2</sup> On this issue, see Joshua M. Koppel, *Federal Common Law and the Courts' Regulation of Pre-Litigation Preservation*, 1 *Stan. J. Complex Lit.* 171 (2012).

Law professors have an almost insatiable enthusiasm for discussing Erie issues that the rest of the world understandably finds perplexing, so it's best to stop here. It's worth noting, however, that one possibility would be to invite comment on whether any perceive a serious Enabling Act problem. That may, however, be an odd topic on which to invite comment. But if there is reason to foresee that many comments will decry the rule as exceeding Enabling Act authority, it may be useful to invite others to react with contrary views. As noted above, the careful consideration the Advisory Committee gives to rule revision is one of the things that the Supreme Court has cited as contributing to the presumptive validity of rules.

By way of contrast, particularly given some comments during the full Committee meeting, it is likely desirable to invite public comment on whether anything would be lost due to discarding current Rule 37(e). Andrea Kuperman's research and our thorough discussion suggest there is no reason to retain the current rule if our proposal is adopted in its stead. But to be extra certain, specifically inviting comment on that point could be desirable. Whether it is also desirable to invite comments on Enabling Act concerns is perhaps best left to the Standing Committee. But it is dubious to add a more explicit focus to the rule or Note presently.

#### Judge Harris's suggestion

Judge Arthur Harris suggested revising our proposed Rule 37(e)(3) as follows:

(3) In determining whether to adopt measures under Rule 37(e)(1) or to impose sanctions under Rule 37(e)(2), a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith, the court should consider all relevant factors, including:

Judge Harris offered the following explanation for this suggestion:

It seems to me that the factors are relevant to more than just the two items listed -- failure to preserve discoverable information and whether failure was willful or in bad faith. For example, the factors could also be relevant in determining whether the failure irreparably deprived a party of any meaningful opportunity to present a claim or defense or what, if any, sanctions should be imposed.

Possibly relevant to this suggestion is the discussion during the Nov. 2 Committee meeting about whether it would be desirable to identify which issues various factors actually address. Thus, some speakers favored more precision directing

the reader to employ various factors only with regard to certain criteria important under the rule, seemingly cutting in a direction different from -- possibly opposite to -- the direction of Judge Harris's suggestion.

Turning first to the Nov. 2 discussion of focusing more precisely than we do now, it is worth recalling that some suggestions the Subcommittee has received (the N.Y. State Bar Ass'n submission comes to mind) have urged considerable precision in culpability calibrations, but those efforts at precision have seemed to tend in the direction of trying to create Sanctioning Guidelines. Rule 37(e)(3) was not designed this way.

At the same time, it is not necessarily true that these factors (as revised by the Nov. 2 vote of the full Committee) really bear on everything and anything raised pertinent to decisions under new Rule 37(e).

To take as an example the use suggested by Judge Harris -- determining whether Rule 37(e)(2)(B) applies -- there seems a strong argument that inviting broader use of the factors in (e)(3) would be dubious. True, loss of essential information due to events entirely beyond the control of a party (such as a hurricane) probably does not provide support for the conclusion that "a party failed to preserve information that reasonably should have been preserved." As currently written, 37(e)(3) would make it appropriate to employ its factors on that point. But it's not at all clear whether those factors should be employed in determining whether the loss of the information "irreparably deprived a party of any meaningful opportunity to present a claim or defense." Using them might create rather than solve problems.

To take a different example, consider the question whether to employ measures identified in Rule 37(e)(1). As the Committee Note explains, that decision resembles any case-management discovery decision by a court, with the added ingredient that a party has failed to retain discoverable information it should have retained. The Note therefore addresses how that additional factor should come into play; it recognizes that it could alter the calculus under Rule 26(b)(2)(B) or 26(b)(2)(C).<sup>3</sup> But to say that the reasonableness of the party's efforts to preserve (factor B) somehow has more importance than under the normal case-management evaluation because that is on the list in 37(e)(3) seems peculiar. And with regard to Rule 37(e)(2), the Committee Note says that the court should use the least severe measure needed. So it seems that the rule and Note as written adequately address the issues without change.

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<sup>3</sup> This brings to mind one possible outcome of Duke Subcommittee proposals. They may affect the content or composition of Rule 26(b)(2)(C). To the extent they do, that might affect what 37(e) should say.

On the other hand, making the revision recommended by Judge Harris probably would not do mischief, and there may be situations in which leaving the language as we drafted it could seem unduly constraining.

In short, it is probably not a matter of enormous importance either way, but it should be resolved.

Judge Pratter's Suggestion on Rule 37(e)(2)(A)

Judge Pratter (probably a fan of Lynne Truss's book *Eats, Shoots & Leaves: The Zero Tolerance Approach to Punctuation*) raised an issue about the "or . . . and" sequence in Rule 37(e)(2)(A) as we drafted it:

- (A) that the failure was willful or in bad faith and caused substantial prejudice in the litigation; or

She is worried that without at least some further punctuation there may be arguments that the substantial prejudice element applies only to bad faith failures to preserve and not to willful ones.

Whether this is a serious risk might be debated, but several easy solutions seem to exist:

- (A) that the failure was willful or in bad faith, and caused substantial prejudice in the litigation; or [Alternative 1]
- (A) that the failure (i) was willful or in bad faith; and (ii) caused substantial prejudice in the litigation; or [Alternative 2]<sup>4</sup>
- (A) that the failure caused substantial prejudice in the litigation, and was willful or in bad faith ~~and caused substantial prejudice in the litigation~~; or [Alternative 3]

Alternative 1 seems the simplest solution to the problem, if it is a problem. Alternative 2 should make it absolutely clear that substantial prejudice must be shown separately whether or

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<sup>4</sup> It may be that this alternative should be presented somewhat differently:

- (A) that the failure:
  - (i) was willful or in bad faith; and
  - (ii) caused substantial prejudice in the litigation; or

not willfulness or bad faith is shown. Alternative 3 seems to make that clear, but also to put the less important concern -- substantial prejudice -- before the more important one.

"when appropriate"

During the Nov. 2 meeting, several participants urged that we consider adding "when appropriate" to Rule 37(e)(3) as follows:

- (3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith, the court should consider all relevant factors, including when appropriate:

It appears that the reason for this suggestion is that the verb in the rule is "should," but that in given cases the court should not consider certain factors. One response to this concern (and a reaction that the Standing Committee's Style Consultant might have) is that all the rules call for judges to do only "appropriate" things. Another response is that the rule as proposed to the Committee does say that the court should consider "all relevant factors," so it takes account of the question whether given factors are relevant. But one reading of the rule is to say that the listed factors must always be considered, while other factors may be considered if relevant.

One possible comparison is Rule 23(g)(1), which lists four factors that the court "must" consider in appointing class counsel and then authorizes the court also to consider "any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." The original version of this rule published for comment had only three mandatory factors, prompting objection that they were slanted in favor of certain law firms, and eventually a fourth was added. The comparison could stress the use of "must" in 23(g)(1) and "should" in 37(e). But it is valid to argue that what's on a possibly "mandatory" list matters.

In any event, the question whether to add these words to the rule prompted sufficient comment during the meeting to justify including it as a potential topic for discussion during the Nov. 28 conference call.

Removing the reference to litigation  
holds from 37(e)(3)(B)

The Subcommittee has already discussed this issue at some length, but it is included here because it received considerable attention during the Nov. 2 meeting. The change would be as follows:

(B) the reasonableness of the party's efforts to preserve the information, ~~including the use of a litigation hold and the scope of the preservation efforts;~~

One reason for making this change would be that it is undesirable to emphasize litigation holds by referring to them in the rule. The Committee Note to current Rule 37(e) refers to litigation holds, and there seems little doubt that the basic concept is recognized widely. At least some judges may be tempted to insist on specific sorts of litigation holds (e.g., written ones), which may be a different reason for avoiding mention of litigation holds in the rule itself. If this change were made, probably the reference to use of a litigation hold should be retained in the Committee Note; otherwise there might be an argument that litigation holds are irrelevant under new 37(e) because they are nowhere mentioned, while they were mentioned in the Note to the 2006 version of 37(e).

It may be that this worry overemphasizes the importance of including the term "litigation hold" in the rule. The Committee Note tries to defuse worries about the term becoming a talisman:

The second factor focuses on what the party did to preserve information after the prospect of litigation arose. The party's issuance of a litigation hold is often important on this point. But it is only one consideration, and no specific feature of the litigation hold -- for example, a written rather than an oral hold notice -- is dispositive. Instead, the scope and content of the party's overall preservation efforts should be scrutinized.

The next-to-last sentence quoted above attempts to deflect arguments that only a written hold satisfies preservation responsibilities.

A competing consideration is that including specific reference to a litigation hold is a good thing for parties whose preservation efforts are challenged. All current (B) says is that a litigation hold is a consideration in assessing the party's overall preservation efforts. The inclusion of a specific reference to a litigation hold, coupled with the Note's effort to avoid having the rule's reference mean something specific in all cases, means that parties that do something like a hold can point to that fact and emphasize the rule's recognition that this is responsible behavior of the sort that should dissuade the court from finding that the party was guilty of bad faith or willful destruction of evidence.

So the tradeoff between leaving (B) as currently written and shortening it does not seem invariably to favor or disfavor entities that are called upon to preserve evidence. Indeed, it may be more likely that companies and other organizational

litigants than individual litigants would (and do now) in fact undertake some sort of litigation hold.

My understanding is that the Committee authorized us to go to the Standing Committee with (B) as it was, including the reference to the litigation hold. If that paragraph does go forward and is eventually published for public comment, one question that might be illuminated is whether the reference to litigation holds in the rule is likely to do mischief.

**Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions**

\* \* \* \* \*

~~(e) **FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

1  
2 **(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION.** If a party failed  
3 fails to preserve discoverable information that reasonably  
4 should have been be preserved in the anticipation or conduct  
5 of litigation,<sup>5</sup>

6  
7 **(1)** The court may permit additional discovery, order the  
8 party to undertake curative measures, or require the  
9 party to pay the reasonable expenses, including  
10 attorney's fees, caused by the failure.

11  
12 **(2)** The court may impose any of the sanctions listed in  
13 Rule 37(b)(2)(A) or give an adverse-inference jury  
14 instruction only if the court finds:

15  
16 **(A)** that the failure was willful or in bad faith and  
17 caused substantial prejudice in the litigation; or

18  
19 **(B)** that the failure irreparably deprived a party of  
20 any meaningful opportunity to present a claim or  
21 defense.

22  
23 **(3)** In determining whether a party failed to preserve  
24 discoverable information that reasonably should have  
25 been preserved, and whether the failure was willful or  
26 in bad faith, the court should consider all relevant  
27 factors, including:<sup>6</sup>

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<sup>5</sup> This revision of verb tense responds to Peter Keisler's  
comment during the meeting. The verb tenses would, as he noted,  
now match up with those in Rule 37(e)(3).

<sup>6</sup> The introductory memorandum discussed Judge Harris'  
suggestion for amendment to this paragraph. If the Subcommittee  
decides to adopt that change, the Committee Note may need to be

- 28            (A) the extent to which the party was on notice that  
29            litigation was likely and that the information  
30            would be discoverable;
- 31
- 32            (B) the reasonableness of the party's efforts to  
33            preserve the information, including the use of a  
34            litigation hold and the scope of the preservation  
35            efforts;
- 36
- 37            (C) whether the party received a request that  
38            information be preserved, the clarity and  
39            reasonableness of the request, and whether the  
40            person who made the request and the party engaged  
41            in good-faith consultation regarding the scope of  
42            preservation;
- 43
- 44            ~~(D) the party's resources and sophistication in~~  
45            ~~litigation;~~
- 46
- 47            (DE) the proportionality of the preservation efforts  
48            to any anticipated or ongoing litigation; and
- 49
- 50            (EF) whether the party sought timely guidance from the  
51            court regarding any unresolved disputes concerning  
52            the preservation of discoverable information.
- 53

DRAFT COMMITTEE NOTE

1

2            In 2006, Rule 37(e) was added to provide protection against  
3            sanctions for loss of electronically stored information under  
4            certain limited circumstances, but preservation problems have  
5            nonetheless increased. The Committee has been repeatedly  
6            informed of growing concern about the increasing burden of  
7            preserving information for litigation, particularly with regard  
8            to electronically stored information. Many litigants and  
9            prospective litigants have emphasized their uncertainty about the  
10           obligation to preserve information, particularly before  
11           litigation has actually begun. The remarkable growth in the  
12           amount of information that might be preserved has heightened  
13           these concerns. Significant divergences among federal courts

---

revised as well.

14 across the country have meant that potential parties cannot  
15 determine what preservation standards they will have to satisfy  
16 to avoid sanctions. Extremely expensive overpreservation may  
17 seem necessary due to the risk that very serious sanctions could  
18 be imposed even for merely negligent, inadvertent failure to  
19 preserve some information later sought in discovery.

20

21 This amendment to Rule 37(e) addresses these concerns by  
22 adopting a uniform set of guidelines for federal courts,<sup>7</sup> and  
23 applying them to all discoverable information, not just  
24 electronically stored information. It is not limited, as is the  
25 current rule, to information lost due to "the routine, good-faith  
26 operation of an electronic information system." The amended rule  
27 is designed to ensure that potential litigants who make  
28 reasonable efforts to satisfy their preservation responsibilities  
29 may do so with confidence that they will not be subjected to  
30 serious sanctions should information be lost despite those  
31 efforts. It does not provide "bright line" preservation  
32 directives because bright lines seem unsuited to a set of  
33 problems that is intensely context-specific. Instead, the rule  
34 focuses on a variety of considerations that the court should  
35 weigh in calibrating its response to the loss of information.

36

37 Amended Rule 37(e) applies to loss of discoverable  
38 information "that reasonably should be preserved in the  
39 anticipation or conduct of litigation." This preservation  
40 obligation arises from the common law, and may in some instances  
41 be triggered or clarified by a court order in the case. Rule  
42 37(e)(3) identifies many of the factors that should be considered  
43 in determining, in the circumstances of a particular case, when a  
44 duty to preserve arose and what information should be preserved.

45

---

<sup>7</sup> This is a point at which Note language could be added to affirm that adoption of this rule does not raise an *Erie* problem, along the following lines:

This amendment to Rule 37(e) addresses these concerns by adopting a uniform set of guidelines for federal courts, displacing disparate federal decisions and state law as well. It applies and applying them to all discoverable information, not just electronically stored information.

Another possible place for a comment along these lines is in a later footnote. The question whether including anything along these lines is debatable; it may be best simply to present the Standing Committee with an explanation like the one in the introductory memorandum about why the *Erie* Doctrine does not seem like a problem rather than trying to put something along those lines into the Note.

46 Except in very rare cases in which the loss of information  
47 irreparably deprived a party of any meaningful opportunity to  
48 present a claim or defense, sanctions for loss of discoverable  
49 information may only be imposed on a finding of willfulness or  
50 bad faith, combined with substantial prejudice.<sup>8</sup>

51  
52 Unlike the 2006 version of the rule, amended Rule 37(e) is  
53 not limited to "sanctions under these rules." It provides rule-  
54 based authority for sanctions for loss of all kinds of  
55 discoverable information, and therefore makes unnecessary resort  
56 to inherent authority.

57  
58 **Subdivision (e) (1)** When the court concludes that a party  
59 failed to preserve information it should have preserved, it may  
60 adopt a variety of measures that are not sanctions. One is to  
61 permit additional discovery that would not have been allowed had  
62 the party preserved information as it should have. For example,  
63 discovery might be ordered under Rule 26(b)(2)(B) from sources of  
64 electronically stored information that are not reasonably  
65 accessible. More generally, the fact that a party has failed to  
66 preserve information may justify discovery that otherwise would  
67 be precluded under the proportionality analysis of Rule  
68 26(b)(2)(C).

69  
70 In addition to, or instead of, ordering further discovery,  
71 the court may order the party that failed to preserve information  
72 to take curative measures to restore or obtain the lost  
73 information, or to develop substitute information that the court  
74 would not have ordered the party to create but for the failure to  
75 preserve. The court may also require the party that failed to  
76 preserve information to pay another party's reasonable expenses,  
77 including attorney fees, caused by the failure to preserve. Such  
78 expenses might include, for example, discovery efforts caused by  
79 the failure to preserve information.

80  
81 **Subdivision (e) (2) (A)**. This subdivision authorizes  
82 imposition of the sanctions listed in Rule 37(b)(2)(A) for  
83 failure to preserve information, whether or not there was a court

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<sup>8</sup> This is another point at which additional language could be added to address the question whether there is an *Erie* problem with our rule proposal. For example, we could continue with something like: "The rule therefore displaces any other law that would authorize imposing sanctions in the absence of a showing of willfulness or bad faith, including state law applied in diversity cases." That statement seems like saying "We really mean it." As noted in the prior footnote, it is not clear this adds usefully to the Note.

84 order requiring such preservation. Rule 37(e)(2)(A) is designed  
85 to provide a uniform standard in federal court for sanctions for  
86 failure to preserve. It rejects decisions that have authorized  
87 the imposition of sanctions -- as opposed to measures authorized  
88 by Rule 37(e)(1) -- for negligence or gross negligence.

89  
90 This subdivision protects a party that has made reasonable  
91 preservation decisions in light of the factors identified in Rule  
92 37(e)(3), which emphasize both reasonableness and  
93 proportionality. Despite reasonable efforts to preserve, some  
94 discoverable information may be lost. Although loss of  
95 information may affect other decisions about discovery, such as  
96 those under Rule 26(b)(2)(B) and 26(b)(2)(C), sanctions may be  
97 imposed only for willful or bad faith actions, except in the  
98 exceptional circumstances described in Rule 37(e)(2)(B).

99  
100 The threshold under Rule 37(e)(2)(A) is that the court find  
101 that lost information should have been preserved; if so, the  
102 court may impose sanctions only if it can make two further  
103 findings. First, it must be established that the party that  
104 failed to preserve did so willfully or in bad faith. This  
105 determination should be made with reference to the factors  
106 identified in Rule 37(e)(3).

107  
108 Second, the court must also find that the loss of  
109 information caused substantial prejudice in the litigation.  
110 Because digital data often duplicate other data, substitute  
111 evidence is often available. Although it is impossible to  
112 demonstrate with certainty what lost information would prove, the  
113 party seeking sanctions must show that it has been substantially  
114 prejudiced by the loss. Among other things, the court may  
115 consider the measures identified in Rule 37(e)(1) in making this  
116 determination; if these measures can sufficiently reduce the  
117 prejudice, sanctions would be inappropriate even when the court  
118 finds willfulness or bad faith. Rule 37(e)(2)(A) authorizes  
119 imposition of Rule 37(b)(2) sanctions in the expectation that the  
120 court will employ the least severe sanction needed to repair the  
121 prejudice resulting from loss of the information.

122  
123 ~~[There may be cases in which a party's extreme bad faith~~  
124 ~~does not in fact impose substantial prejudice on the opposing~~  
125 ~~party, as for example an unsuccessful attempt to destroy crucial~~  
126 ~~evidence. Because the rule applies only to sanctions for failure~~  
127 ~~to preserve discoverable information, it does not address such~~  
128 ~~situations.]~~

129  
130 **Subdivision (e) (2) (B).** Rule 37(e)(2)(B) permits the court

131 to impose sanctions without making a finding of either bad faith  
132 or willfulness. As under Rule 37(e)(2)(A), the threshold for  
133 sanctions is that the court find that lost information should  
134 have been preserved by the party to be sanctioned.

135

136 Even if bad faith or willfulness is shown, sanctions may  
137 only be imposed under Rule 37(e)(2)(A) when the loss of  
138 information caused substantial prejudice in the litigation. Rule  
139 37(e)(2)(B) permits sanctions in the absence of a showing of bad  
140 faith or willfulness only if that loss of information deprived a  
141 party of any meaningful opportunity to present a claim or  
142 defense. Examples might include cases in which the alleged  
143 injury-causing instrumentality has been lost before the parties  
144 may inspect it, or cases in which the only evidence of a  
145 critically important event has been lost. Such situations are  
146 extremely rare.

147

148 Before resorting to sanctions, a court would ordinarily  
149 consider lesser measures, including those listed in Rule  
150 37(e)(1), to avoid or minimize the prejudice. If such measures  
151 substantially cure the prejudice, Rule 37(e)(2)(B) does not  
152 apply. Even if such prejudice persists, the court should employ  
153 the least severe sanction.

154

155 **Subdivision (e) (3).** These factors guide the court when  
156 asked to adopt measures under Rule 37(e)(1) due to loss of  
157 information or to impose sanctions under Rule 37(e)(2). The  
158 listing of factors is not exclusive; other considerations may  
159 bear on these decisions, such as whether the information not  
160 retained reasonably appeared to be cumulative with materials that  
161 were retained. With regard to all these matters, the court's  
162 focus should be on the reasonableness of the parties' conduct.

163

164 The first factor is the extent to which the party was on  
165 notice that litigation was likely and that the information lost  
166 would be discoverable in that litigation. A variety of events  
167 may alert a party to the prospect of litigation. But often these  
168 events provide only limited information about that prospective  
169 litigation, so that the scope of discoverable information may  
170 remain uncertain.

171

172 The second factor focuses on what the party did to preserve  
173 information after the prospect of litigation arose. The party's  
174 issuance of a litigation hold is often important on this point.  
175 But it is only one consideration, and no specific feature of the  
176 litigation hold -- for example, a written rather than an oral  
177 hold notice -- is dispositive. Instead, the scope and content of

178 the party's overall preservation efforts should be scrutinized.  
179 One focus would be on the extent to which a party should  
180 appreciate that certain types of information might be  
181 discoverable in the litigation, and also what it knew, or should  
182 have known, about the likelihood of losing information if it did  
183 not take steps to preserve. The court should be sensitive to the  
184 party's sophistication with regard to litigation in evaluating  
185 preservation efforts; some litigants, particularly individual  
186 litigants, may be less familiar with preservation obligations  
187 than other litigants who have considerable experience in  
188 litigation.<sup>9</sup> The fact that some information was lost does not  
189 itself prove that the efforts to preserve were not reasonable.

190

191 The third factor looks to whether the party received a  
192 request to preserve information. Although such a request may  
193 bring home the need to preserve information, this factor is not  
194 meant to compel compliance with all such demands. To the  
195 contrary, reasonableness and good faith may not require any  
196 special preservation efforts despite the request. In addition,  
197 the proportionality concern means that a party need not honor an  
198 unreasonably broad preservation demand, but instead should make  
199 its own determination about what is appropriate preservation in  
200 light of what it knows about the litigation. The request itself,  
201 or communication with the person who made the request, may  
202 provide insights about what information should be preserved. One  
203 important matter may be whether the person making the  
204 preservation request is willing to engage in good faith  
205 consultation about the scope of the desired preservation.

206

~~207 The fourth factor looks to the party's resources and~~  
~~208 sophistication in relation to litigation. Prospective litigants~~  
~~209 may have very different levels of sophistication regarding what~~  
~~210 litigation entails, and about their electronic information~~  
~~211 systems and what electronically stored information they have~~  
~~212 created. Ignorance alone does not excuse a party that fails to~~  
~~213 preserve important information, but a party's sophistication may~~  
~~214 bear on whether failure to do so was either willful or in bad~~  
~~215 faith. A possibly related consideration may be whether the party~~  
~~216 has a realistic ability to control or preserve some~~  
~~217 electronically stored information.~~

218

219 The fourth ~~fourth~~ fifth factor emphasizes a central concern --  
220 proportionality. The focus should be on the information needs of  
221 the litigation at hand. That may be only a single case, or  
222 multiple cases. Rule 26(b)(2)(C) provides guidance particularly  
223 applicable to calibrating a reasonable preservation regime. Rule

---

<sup>9</sup> This is an effort to include in the Note considerations like those in our factor (D).

224 37(e)(3)(E) explains that this calculation should be made with  
225 regard to "any anticipated or ongoing litigation." Prospective  
226 litigants who call for preservation efforts by others (the third  
227 factor) should keep those proportionality principles in mind.

228

229 Making a proportionality determination often depends in part  
230 on specifics about various types of information involved, and the  
231 costs of various forms of preservation. The court should be  
232 sensitive to party resources; aggressive preservation efforts can  
233 be extremely costly, and parties (including governmental parties)  
234 may have limited resources to devote to those efforts.<sup>10</sup> A party  
235 may act reasonably by choosing the least costly form of  
236 information preservation, if it is substantially similar to more  
237 costly forms. It is important that counsel become familiar with  
238 their clients' information systems and digital data -- including  
239 social media -- to address these issues. A party urging that  
240 preservation requests are disproportionate may need to provide  
241 specifics about these matters in order to enable meaningful  
242 discussion of the appropriate preservation regime.

243

244 Finally, the fifth ~~sixth~~ factor looks to whether the party  
245 alleged to have failed to preserve as required sought guidance  
246 from the court if agreement could not be reached with the other  
247 parties. Until litigation commences, reference to the court may  
248 not be possible. In any event, this is not meant to encourage  
249 premature resort to the court; Rule 26(f) directs the parties to  
250 discuss and to attempt to resolve issues concerning preservation  
251 before presenting them to the court. Ordinarily the parties'  
252 arrangements are to be preferred to those imposed by the court.  
253 But if the parties cannot reach agreement, they should not forgo  
254 available opportunities to obtain prompt resolution of the  
differences from the court.

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<sup>10</sup> This is an effort to introduce into the Note considerations raised by what was our factor (D).

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Notes on Conference Call  
Discovery Subcommittee  
Advisory Committee on Civil Rules  
Feb. 12, 2013

On Feb. 12, 2013, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Hon. Paul Grimm (Chair, Discovery Subcommittee), Hon. David Campbell (Chair, Advisory Committee), Hon. John Koeltl (Chair, Duke Subcommittee), Elizabeth Cabraser, John Barkett, Peter Keisler, Parker Folse, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Assoc. Reporter, Advisory Committee), Andrea Kuperman (Chief Counsel, Rules Committees), Benjamin Robinson (A.O.), and Julie Wilson (A.O.). Theodore Hirt (DOJ) was an observer.

Judge Grimm introduced the topics for discussion by focusing on what has already been done with draft Rule 37(e). It was approved by the Advisory Committee at its Nov. 2012 meeting and submitted to the Standing Committee. Before the Standing Committee meeting, Joe Kimble, the Standing Committee's Style Consultant, made a number of recommendations on restyling the rule in accord with style conventions used in the rules process. After a consultation involving Judges Campbell and Grimm and Reporters Cooper and Marcus, most of those proposed changes were accepted. There may be further style issues in the future, but the restyled rule was presented to the Standing Committee at the time of its meeting in Boston.

At the Standing Committee meeting, the rule was approved for publication for public comment. But because some members of the Standing Committee had raised some specific questions, the approval was done with the expectation that the Discovery Subcommittee would consider these questions and determine whether any adjustments to deal with these issues were in order. In addition, because there seemed a considerable likelihood that further discovery amendments would emerge from the Duke Subcommittee process, there might be a need to make adjustments to the 37(e) proposal to fit with those other proposals.

After the Standing Committee meeting, Prof. Marcus drafted a set of possible modifications to the restyled rule and the Note that would respond to the concerns raised by the Standing Committee. A call involving Judges Campbell and Grimm and Reporters Cooper and Marcus produced consensus to present the draft in the conference call memo to the Subcommittee.

The time line for proceeding is keyed largely to the need to complete work in time for the Advisory Committee's Spring meeting. The A.O. has set a new objective of allowing Advisory Committee members three weekends to review agenda materials before a meeting. Owing to scheduling difficulties, that means that the agenda materials must be submitted by early March, and accordingly that there is limited time to make final adjustments.

In addition, on Monday, Feb. 11, the Lawyers for Civil Justice submitted comments on the 37(e) draft raising some concerns about the first matter on the "agenda" for this conference call -- the standard for 37(e)(1)(B)(ii). But LCJ did not have the further draft that is before the Subcommittee for this call.

The (B)(ii) issue

The conference call materials presented a revised draft of (b)(ii):

(ii) irreparably deprived a party of any meaningful opportunity to present or defend against the a claims or defense in the action and was negligent or grossly negligent.

These revisions were designed to address two concerns raised at the Standing Committee meeting. First, there was much concern about the "Act of God" possibility -- that sanctions could be imposed on a fault-free litigant due to loss of information caused by an Act of God such as Hurricane Sandy. The way to deal with that was to add a requirement that there be a finding the party to be sanctioned had been negligent or grossly negligent. The second concern was that permitting sanctions whenever any claim or defense was defeated due to loss of information fails to take account of the reality that many litigants make a plethora of claims or raise a large number of defenses, and that many of those are really of little consequence. So the rule was changed to focus on whether the loss of information deprived the party of "any meaningful opportunity to present or defend against the claims in the action." That focuses on the action as a whole, rather than a single claim or defense.

Some questions were raised at the Standing Committee about whether "meaningful" was a good word to use, but it seemed on reflection that it was.

A first reaction on (e)(1)(B)(ii) was "My overall reaction is to take it out." Leave the common law where it was concerning prejudice under serious that it was crippling, and don't address that in the rule. Adding in negligence muddies the waters. "I would take it out."

A second reaction was that (B)(ii) "will provoke negative reactions to the whole rule." Indeed, it almost establishes a sliding scale under the whole rule meaning that negligence is sufficient to support sanctions if the judge thinks the prejudice is significant enough. This "puts gross negligence back into the rule." Also, the rule is mainly about "information," but the Silvestri problem is mainly about physical evidence. ESI is not likely to produce similar problems. If we want to get public comment, there are other ways to do so without injecting this

possibility into the new rule. Too many may react by saying that "They haven't done anything because this amendment won't cause a change."

A third participant saw three possibilities on this score:

(1) Take out (ii). Doing that would mean, however, that the Silvestri line of cases is no longer valid. The Note says that this rule occupies the space formerly occupied by "inherent authority," so the "common law" would no longer permit sanctions in the absence of willfulness or bad faith.

(2) Leave in (ii), but without the addition of a negligence or gross negligence finding. That would mean that the Act of God situation can result in sanctions.

(3) Recognize the Silvestri line of cases, but limit it to a very remarkable case due to the high standard of prejudice, and require some culpability also. That's the goal of the current attempt. Both changes address this effort, by making it clear that peripheral claims or defenses do not invoke its provisions, and that fault must be shown to justify sanctions under this provision even if extreme prejudice is shown.

A reaction was that it's not so clear that these are the only options. For example, the rule speaks of "information." Maybe the lost airbag is not "information," but an "instrumentality." The cases in the Silvestri line involve such instrumentalities -- a tire, a toaster, a boat, etc. They are not about ESI.

That observation prompted the point that Rule 26(f) now directs the parties to discuss "preserving discoverable information." Does that not include the tire, toaster, boat, etc.?

A response was that the focus should be on the beginning of the draft -- "failure to preserve." That's not really what happens when a hurricane destroys the evidence. That's not a "failure" by a party. By definition it's an act outside a party's control. Perhaps all we need to do is to say that in the Note and drop (B)(ii) altogether.

An added point came up: The introduction of negligence also raises issues about who was negligent. Is it the lawyer? Are we getting into defining legal malpractice here?

Another concerned participant found none of the three tracks described above attractive; all have downsides. One issue is the Act of God problem. The more attractive approach to that sort of problem is to think about curative measures that could overcome it rather than sanctions where nobody is at fault. The greatest concern now should be about putting out a rule with negligence or

gross negligence in the rule itself. Leaving (ii) out altogether, or leaving it in without negligence would be preferable.

Another participant observed that "I've always been more concerned with decisions on the merits than punishing people. I favor broader curative measure provisions. This is a balancing act to me."

Another member recommended putting the rule out for comment as circulated. That is the "least bad alternative." The Standing Committee concerns show that there is a need to tighten (B)(ii). There is a risk it could swallow the rule. It is useful to try to allocate the burden of such serious loss of evidence. But that can happen with digital information just as with physical evidence. There may be critical data that are lost. We can't put all the weight on the reference to "information" in (e)(1). Given the nature of sanctions, there should be some element of fault. The right answer is not absolutely clear now, but the public hearing process should shed considerable light on it.

Another member reacted that the three-alternative approach makes sense. If (B)(ii) is taken out, that would eliminate the ability to issue sanctions even where the loss of information resulted from a party's failure to preserve. It is unfair to inflict that catastrophe on the party disabled from litigating. Relying entirely on the "failed to preserve information" provision is not a satisfactory way of dealing with these issues. Adding a requirement to find at least negligence or gross negligence is a good idea. Will this open Pandora's Box? It's important to keep in mind that it's very difficult to prove irreparable damage to a case. What was lost can't be known. How do you prove that the loss of this unknown material inflicted such serious harm on your ability to litigate? This is a very difficult standard to satisfy. Having a special provision for that very rare situation is important, but it must be tied to some finding of fault. "I have less concern about opening the floodgates."

On a different subject, the elimination of a reference to "claims or defenses" (also in the changes prompted by the Standing Committee concerns) seems wise. People plead a raft of throw-away claims and defenses, and the loss of one of those should not be a ground (even with negligence) for a serious sanction. But what about the flip side -- what if the claim or defense that was lost is a central or important one? Is there a risk that the court may nonetheless feel that sanctions are not allowed because there are other claims or defenses still standing? How does the judge make this distinction?

Another participant reported having reread the Silvestri opinion today in preparation for this conference call. The court there found the loss of the air bag "so prejudicial that

[defendant] was denied the ability to defend" the case. That seems like a circumstance that should permit serious consequences (called "sanctions" or something else) on a showing less culpable than bad faith or willfulness. But the concerns raised about (B)(ii) are important also. It is not clear that the game is worth the candle. But it does not seem a good idea to remove (B)(ii) now. After public comment, we can remove that provision if the comment shows it creates undue risk of diluting the protection we seek to provide for reasonable behavior. If we take it out now, we will be denying ourselves a way to receive that public comment. And we will create the risk that courts will, at least in such extreme cases, begin to treat negligence as "willful." That could produce worse effects than leaving it in.

Another reaction to the discussion was that all the points raised were good points. This member nevertheless favors publishing the draft as written now, including the revisions after the Standing Committee meeting. Other possibilities that come to mind are: (1) limiting the rule to ESI. Most Silvestri cases don't involve loss of ESI. (2) Change the introduction to say that the rule applies when a party "fails to take reasonable steps to preserve discoverable information." Then the references to reasonableness now in (e)(2) would be removed. This way, the Act of God problem would be solved; steps that are defeated by the Act of God could still be reasonable. But would that mean that even curative measures are not allowed? As presently written, the rule seems to limit curative measures to the situation where the party fails to preserve as should be done. All things considered, therefore, sticking with the current draft seems the wisest choice through the public comment period. After that, there will be a chance to revisit these issues with much more information.

A reaction was that a "quick mental survey of the cases" that might come within (B)(ii) suggests that they do not involve ESI. They are almost all destructive testing cases; all involve a device or instrumentality.

That prompted the reminder that another participant has pointed out that it can happen that ESI is equally crucial. And with the passage of time that may become more true. This will surely generate comment during the public comment period, and we will be much better able to address these issues after we get that comment.

Another reaction was that the discussion about the difference between ESI and "instrumentalities" may be obsolete soon, or even now. For example, today a considerable number of operations are actually performed by robots controlled by computers. The robot is surely the "instrumentality" by which the surgical incisions were made, but what if the controlling software is lost? Does that mean this is in the ESI category or the "instrumentality" category?

A judge remarked that it would not be wise to try to resolve these issues on this call, given the value of reflection and the press of time today. It was agreed that the Subcommittee would reconvene on Monday, Feb. 18, at the same time as today's call.

Curative measures -- change to (e)(1)(A)

In the time that remained, attention turned to the proposed revision to (e)(1)(A):

(A) permit additional discovery, order the party to undertake curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and

This change was also reflected in proposed new Note language:

Additional curative measures might include permitting introduction at trial of evidence about the loss of information, allowing argument to the jury about the possible significance of lost information, or comment by the court about these topics.

The background is that several judges on the Standing Committee reacted to the prohibition on using an "adverse-inference jury instruction" absent a finding of willfulness or bad faith as too limiting on appropriate "curative" responses to these problems. But as written then, the rule was limited to ordering the party to undertake curative measures; the court could not do any itself.

The removal of the words "the party to undertake" removes that limitation, and the Note language elaborates.

This raised the question "What is a judge's comment? How do you do this without actually giving an instruction?"

A judge responded: "We don't comment too much on the evidence." This prompted the further concern -- "Any indication from the judge about evidence might be more forceful than a rote adverse-inference instruction."

Another participation observed that "I thought of a comment during the trial. This will be very fact-specific. But at the jury instruction point, the main example is a possible instruction about the need to understand the use of circumstantial evidence, particularly in the absence of more direct evidence. That's not an adverse-inference instruction, but only an instruction about how the jury might approach the evidence actually presented in the case."

Another reaction was that this is "different from a comment by the court. The structure of the rule means something less

significant than an adverse-inference instruction. A comment is not a jury instruction."

A judge reacted: "That's the answer. The adverse-inference instruction is an instruction. This is not about an instruction."

The original questioner observed that there was no problem with the rule language, but the explanation should be sharpened.

The resolution was that the rule language should remain as modified, but that clarification should be attempted for the Note language.

#### Note on removal of existing 37(e)

Another concern at the Standing Committee was that the proposal would delete current Rule 37(e), but that the Note contained no explanation why. The draft therefore offered an explanation:

Amended Rule 37(e) supersedes the current rule because it should provide protection for any conduct that would be protected under the current rule. The routine good faith operation of an electronic information system should be respected under the amended rule. As under the current rule, the prospect of litigation may call for altering that routine operation. And the prohibition of sanctions in the amended rule unless there is a finding of bad faith or willful behavior, or negligence if exceptional prejudice is shown, means that any loss of data that would be insulated against sanctions under the current rule would also be protected under the amended rule.

It was asked whether anyone had a problem with that explanation. Nobody had a problem; we would retain it.

#### "Secondary" matters

The agenda for the meeting identified several "secondary" issues: (1) invoking preservation requirements other than the common law requirement for possible use in litigation; (2) deleting the word "reasonable" in (e)(1); and (3) addressing attorney discipline concerns in the Note. Those would have to be addressed during the follow-up conference call, but if members had concerns it might be useful to circulate them before the next call.

#### Next conference call

The Subcommittee would have a follow-up conference call on **Monday, Feb. 18, at 2:00 EST**. Ideally, it will be possible then to wrap up remaining matters.

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Notes on Conference Call  
Discovery Subcommittee  
Advisory Committee on Civil Rules  
Feb. 18, 2013

On Feb. 18, 2013, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Hon. Paul Grimm (Chair, Discovery Subcommittee), Hon. David Campbell (Chair, Advisory Committee), Hon. Jeffrey Sutton (Chair, Standing Committee), Elizabeth Cabraser, John Barkett, Peter Keisler, Prof. Edward Cooper (Reporter, Advisory Committee), Prof. Richard Marcus (Assoc. Reporter, Advisory Committee), Andrea Kuperman (Chief Counsel, Rules Committees), Benjamin Robinson (A.O.), and Julie Wilson (A.O.). Theodore Hirt (DOJ) was an observer.

Judge Grimm introduced the topics for discussion by focusing on four alternative courses forward from the point we reached during the Feb. 12 conference call:

(1) Limit the 37(e) proposal to ESI, along the lines of Alternative 1 Prof. Marcus circulated yesterday. (Copies of these alternatives are attached hereto in the Appendix.)

(2) Go with the version circulated before the Feb. 12 conference call, which contained modifications to the rule responsive to the issues raised by the Standing Committee, including the addition to (B)(ii) of the requirement to find negligence or gross negligence to justify sanctions even in cases involving the extraordinary prejudice covered by that rule.

(3) Stick with the version of (B)(ii) sent to the Standing Committee, essentially adopting Alternative 2 circulated on Feb. 17 by Prof. Marcus.

(4) Proceed with 37(e) without limiting to ESI, but remove (B)(ii) from the package. This would, in effect, remove the authority to impose sanctions in the Silvestri line of cases.

The goal of the conference call would be to have all participants weigh in on these choices. But it is important at the outset to recognize that there are advantages and disadvantages to each of the four courses noted above. At this juncture, the key point to keep in mind is that we don't have to make a final decision among these four alternatives now. Presently, the only issue is what to put out for public comment, and we can reflect on that comment and make a decision later on what exact rule should be adopted. One important consideration, therefore, is which published proposal will generate the most useful public comment. It is important to ensure that the published draft directs attention to the topics on which we need comment. Thus, one who is inclined to favor eliminating (B)(ii),

for example, might prefer to publish a proposal that includes it but invites comment on whether it should be dropped from the amendment package.

The first participant agreed that a main objective should be to ensure informed and informative comment during the public comment phase. But trying to limit the rule to ESI seems unworkable, and likely to produce problems.

A second participant had always been reluctant to try to develop separate rules for ESI. True, current 37(e) is basically about ESI, but that is because it focuses on the operation of an electronic information system. Trying to have rules that apply only to electronically stored information invites litigation about where the boundary line is or adopting arbitrary distinctions. Nonetheless, there is appeal to limiting this rule to ESI and thus sidestepping much of the problem presented by (B)(ii). Then the common law could continue to develop as to other forms of evidence, including "instrumentalities." The whole reason we embarked on this effort to develop a sanctions/preservation rule was ESI; it may be that we should reach no further. But the goal now should be to get the most informative commentary. For that purpose, it seems best to proceed with the draft that was before us during the Feb. 12 conference call, including the requirement of a negligence or gross negligence finding in (B)(ii).

The third participant would not publish the draft that was before the Subcommittee on Feb. 12. The negligence or gross negligence prong of (B)(ii) should be eliminated. It would be fine to go with Alternative 2 circulated yesterday by Professor Marcus. We can prompt public comment without the negligence/gross negligence prong. Regarding the ESI only draft, it might be desirable to add "documents" to ESI, leaving out only "tangible things." This participant's main concern is to keep the negligence/gross negligence prong out of the published draft.

The fourth speaker approached things with "reverse logic." Using that approach leads first to eliminating the last option outlined by Judge Grimm at the beginning of the call. It would eliminate (B)(ii) entirely and apply the rule to all discoverable information. That would overrule the Silvestri line of cases. That should not be done.

Then the third possibility -- the rule as proposed to the Standing Committee -- seems deficient due to the Act of God problem. True, a Committee Note could try to deal with that concern by saying that information lost due to an Act of God is not a situation in which a party failed to retain information, which is what (e)(1) focuses upon. But then this situation is not within 37(e) at all, and the authority for curative measures is also gone. That is not desirable. And trying to "legislate by Note" seems inherently undesirable and is too likely to be ineffective. The Standing Committee rightly resists Note

language that tries to do something the rule language does not do. And the level of attention to what's in the Note is hard to predict. It often seems that lawyers and judges look only to the rule, and do not even read the Note. Putting something only in the Note is not a way to do business.

That leaves the first two options identified at the beginning of the call -- limiting the rule to ESI only (thereby making (B)(ii) largely unnecessary), or going with the draft that was before us on Feb. 12. For purposes of public comment, the right solution is to go with that Feb. 12 draft -- option 2 outlined at the beginning of the call. Then we can invite comment on whether we should instead limit the rule to ESI and, after we receive that input, make our decision. It should be easy to ask for public comment about this subject.

Another participant offered an "intuition" that ultimately the preferred solution will be option (1) outlined at the outset -- something like Prof. Marcus's Alternative 1 circulated on Feb. 17. The current rule is limited to ESI, and the easiest course (and best method of responding to preservation concerns raised with the Committee) is to proceed down that road.

The views of a judge who could not participate were relayed to the group: This judge also believes that the ESI only version would be desirable. That would allow the Silvestri line to continue to develop. And the addition of the negligence/gross negligence prong to (B)(ii) causes this judge substantial concern. "The exception would swallow the rule."

Another participant agreed that the ESI only option had appeal, but emphasized that drawing the line between ESI and other discoverable information seems presently to be difficult and likely will become more so as time goes by and technological change occurs. Other participants have spoken forcefully about both the difficulty of that distinction and the likely centrality of electronic evidence in some cases, so that a rule that permitted sanctions only on a showing of willfulness or bad faith may constrict judicial authority too much.

A review of "lots of sanctions cases" suggested that none involving lost ESI exhibited the sorts of characteristics that would make (B)(ii) necessary -- the lost evidence could either be replicated or wasn't that important. But trying to make that decision today seems risky. Public comment and education about this topic would be extremely valuable. So for purposes of public comment the best option seems to go with the draft that was before us on Feb. 12. That way we can get fully educated on the risk that (B)(ii) will actually swallow the rule. And to get the most useful public comment, we should leave in the negligence/gross negligence prong in (B)(ii). The notion of trying to deal with the Act of God issue only in the Note is not a satisfactory alternative. The real goal now is to get the most useful public comment, and this course is the most effective way

to get that comment. We can focus people on what we want them to address.

Another participant said "I can live with this." But this participant worried that including the negligence/gross negligence prong "makes us look silly." It would be better to leave that out. "I would never sign onto" a rule with that prong included.

That discussion seemed to narrow choices to the first two options outlined at the beginning of the call. The question was posed: Which should we use?

The first participant recognized that this question is a "tough one." If we want to "draw fire," it is best to take Option 2 and include the negligence/gross negligence prong. But it does not make sense to have a proposed rule that includes provocative provisions that we are unlikely actually to adopt. "I am torn by it. Will it be useful?" The most productive goal should be to emphasize (e)(1)(A) -- relying on practical curative measures rather than measures that punish. At the same time, the worry that we may be putting out a "sliding scale" standard is a valid one.

A judge asked whether it would be possible to put out two options in the published draft. That certainly is not ideal. Advisory Committees should make up their own minds before they invite public comment. But it seems that this Subcommittee had grappled long and hard with these issues, and justifiably regards the questions presented as needing further illumination of the sort that public comment can supply. Further efforts by Subcommittee members to "bang their heads against a brick wall" to try to come to one resolution likely are not going to work. So maybe the thing to do is to put out the "ESI only" alternative as in somewhat the same way the Rule 45 proposal included an alternative with an additional provision that the Advisory Committee did not actually endorse, but on which it sought input.

Another judge agreed that this approach held promise. The "ESI only" proposal could be offered as an alternative suggested by some to avoid difficulties with the "full" rule developed by the Advisory Committee. Then the Committee could receive comments on both.

Another participant expressed a preference for that approach over anything like putting out only the draft before us on Feb. 12.

A reaction was that we should not be held hostage by the idea that alternative language is forbidden. It worked well in the Rule 45 package.

Another participant said this will guarantee feedback, if that is what we want. But it may not get us that much closer to

resolving the question, unless the public comment is very one-sided.

Another participant pointed out that the current discussion was prompted by the Standing Committee concerns, which have led the Subcommittee to grapple vigorously with extremely difficult issues. That effort has not led to a final resolution of those issues, so this may be a good time to relax the general preference for a single proposal.

A judge said that "The Rule 45 experience was not a bad experience at all." So the two proposals included in the package should be options (1) and (2) outlined at the beginning of the call. That should be a way to receive comment on all the issues on which we want comment.

There was consensus on recommending the "two draft" publication idea.

At the same time, a judge noted, it is important to keep in mind that the Standing Committee has already approved our original draft for publication, with further reflection by the Subcommittee on points it raised. That was what the draft before us on Feb. 12 did. That should be the starting point for present purposes -- both the Advisory Committee and Standing Committee have approved this draft. The "only ESI" option can be expressed as just that -- an alternative published to enhance public comment. For that reason, there is no need to try to do a draft Committee Note keyed to that version; instead we need only indicate that if the Committee ultimately decides to prefer the "only ESI" version the existing Note would need to be adapted to it.

There was consensus on this approach.

#### Other issues

The discussion shifted to other matters.

One question was about the draft Note at lines 52-53 and the relation to the Note draft at lines 245-52. Why was "common law" removed at line 53? What is the significance of the discussion of other requirements to preserve mentioned at lines 245-52? There are cases in which courts have attached importance to such things as SEC preservation requirements in making sanctions decisions.

The explanation harkened back to concerns raised during the Standing Committee meeting. There was concern during that meeting with calling this a "common law" obligation, and also with seeming not to address other preservation requirements. But as the research done by Kate David showed, there is a huge variety of preservation requirements from wide variety of lawmakers ranging from Congress to municipal governments. And

those preservation requirements may have no bearing on the preservation requirement with which we have been dealing. We have been informed that the litigation-anticipation preservation requirement results in extremely burdensome over-production. Nobody has told us that these other preservation requirements have produced that sort of difficulty. That was the reason for adding "in the anticipation or conduct of litigation" to (e)(2) at lines 30-31 of the draft. It shows there that we are talking only about that requirement. The mention in the Note at lines 245-52 addresses whether a court might refer to such other requirements in making a reasonableness determination, and the Note says that may be useful. But it also cautions that those other requirements may have not significant bearing to the preservation obligation our rule addresses, and therefor cautions against over-easy adoption of them.

Another question was about the draft Note language about additional "curative measures" at lines 112-15 of the draft. Concern was raised last time about including mention of "comment by the court about these topics." The consensus was to take mention of comment by the court out, so the Note would read:

Additional curative measures might include permitting introduction at trial of evidence about the loss of information and allowing argument to the jury about the possible significance of lost information.

Another question was about the added Note language at lines 124-28 about the relationship between "sanctions" under Rule 37(e) and the obligation of lawyers to report to their state bar when they are subject to "sanctions." A reaction was that this should not occur, and the comment seems unnecessary. A response was that different states have difference approaches. In some, there is a requirement to report whenever a "sanction" exceeds a certain dollar amount. This caution seems useful to deal with that possibility wherever it might exist.

Another question related to lines 181-84 of the Note -- should that say that (B)(ii) requires proof of prejudice that is "much" more severe than the "substantial prejudice" required to justify sanctions when bad faith or willfulness is proved, or should "much" be left out. The consensus was not to add the word "much."

The conference all ended, with Prof. Marcus to undertake to draft agenda materials.

#### APPENDIX

The following is the message circulated by Prof. Marcus on Feb. 17:

Feb. 16 thoughts on revisions to  
37(e) draft in light of Feb. 12 call

ALTERNATIVE 1

(e) FAILURE TO PRESERVE DISCOVERABLE ELECTRONICALLY STORED INFORMATION.

(1) Curative measures; sanctions. If a party failed to preserve discoverable electronically stored information that reasonably should have been preserved in the anticipation or conduct of litigation, the court may

(A) permit additional discovery, order the party to undertake curative measures, or order the party to pay the reasonable expenses, including attorney's fees, caused by the failure; and

(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 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 a claim or defense.~~

(2) Factors to be considered Determining reasonableness and willfulness or bad faith. In determining whether a party failed to preserve discoverable electronically stored information that reasonably should have been preserved in the anticipation or conduct of litigation and whether the failure was willful or in bad faith, the court should consider all relevant factors, including:

(A) the extent to which the party was on notice that litigation was likely and that the information would be discoverable;

(B) the reasonableness of the party's efforts to preserve the information;

(C) whether the party received a request to preserve

43 information, whether the request was clear and  
44 reasonable, and whether the person who made it and  
45 the party engaged in good-faith consultation about  
46 the scope of preservation;

47

48 (D) the proportionality of the preservation efforts to  
49 any anticipated or ongoing litigation; and

50

51 (E) whether the party timely sought the court's  
52 guidance on any unresolved disputes about  
53 preserving discoverable information.

## ALTERNATIVE 2

1

2

### (e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION.

3

4 (1) Curative measures; sanctions. If a party failed to  
5 preserve discoverable information that reasonably  
6 should have been preserved in the anticipation or  
7 conduct of litigation, the court may

8

9 (A) permit additional discovery, order the party to  
10 undertake curative measures, or order the party to  
11 pay the reasonable expenses, including attorney's  
12 fees, caused by the failure; and

13

14 (B) impose any sanction listed in Rule 37(b)(2)(A) or  
15 give an adverse-inference jury instruction, but  
16 only if the court finds that the failure:

17

18 (i) caused substantial prejudice in the  
19 litigation and was willful or in bad faith;  
20 or

21

22 (ii) irreparably deprived a party of any  
23 meaningful opportunity to present or defend  
24 against the a claims in the action or  
25 defense.

26

27 (2) Factors to be considered ~~Determining reasonableness and~~

28 willfulness or bad faith. In determining whether a  
29 party failed to preserve discoverable information that  
30 reasonably should have been preserved in the  
31 anticipation or conduct of litigation, and whether the  
32 failure was willful or in bad faith, the court should  
33 consider all relevant factors, including:

34  
35 (A) the extent to which the party was on notice that  
36 litigation was likely and that the information  
37 would be discoverable;

38  
39 (B) the reasonableness of the party's efforts to  
40 preserve the information;

41  
42 (C) whether the party received a request to preserve  
43 information, whether the request was clear and  
44 reasonable, and whether the person who made it and  
45 the party engaged in good-faith consultation about  
46 the scope of preservation;

47  
48 (D) the proportionality of the preservation efforts to  
49 any anticipated or ongoing litigation; and

50  
51 (E) whether the party timely sought the court's  
52 guidance on any unresolved disputes about  
53 preserving discoverable information.

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## Rule 84 and Forms

The prospect that a recommendation might be made to abrogate Rule 84 and abandon the official Rule 84 forms was presented to the Standing Committee at the January meeting. Brief discussion provided strong support for abrogation, but also some cautionary points.

One point, made by different participants, was that the Forms were adopted in 1938 to support the change from Code pleading. Rule 8 represented a "culture shift," and the Forms played an important role in supporting the move. That purpose has been fully served. The Forms are no longer needed to encourage simple pleading. Indeed many lawyers want to go beyond the minimum required to state a claim, preferring to plead the facts to support the claim and to tell a persuasive story. "People do not do Rule 8 pleading, not before the decisions in *Twombly* and *Iqbal*, and not since."

A second point was that "it is hard to say the Forms suffice. There is no process to keep them up to date."

Concern was expressed, however, that abandoning the forms might seem an implied rebuke of the *Twombly* and *Iqbal* decisions, reflecting a judgment that they departed from the original meaning of Rule 8. It was suggested that this concern can be met by a clear explanation that Rule 84 and the official forms are being abandoned for other reasons.

A related concern was that abandoning the official forms would not end their influence. Decisions upholding pleadings that conform to the Forms "will linger on." The courts have used the Forms to give meaning to Rule 8. This has been so since 1946. "Are we amending Rule 8(a)(2)" by abandoning the forms? Abandonment is an explicit statement that the courts are no longer obliged to construe Rule 8 according to the Forms. This concern met the observation that Rule 8 has evolved since the Forms were promulgated. Abandonment conforms to current reality; it will not create a new reality.<sup>1</sup>

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<sup>1</sup> The concern that the Forms have influenced pleading practice in ways that will live on beyond abrogation has been discussed in earlier Advisory Committee meetings. Andrea Kuperman's research on the effects of abrogating a rule is summarized in her July 6, 2012 memorandum set out in the appendix.

Abrogation of Rule 84 deprives the Forms of any authoritative force. Withdrawing the Forms deprives them of any continuing direct influence. The Forms, however, have surely influenced the course of pleading practice from the beginning. That was their purpose. The body of practice that had evolved by 2007 was neither simple nor uniform, but it expressed an overall approach that was generally shared. That approach subsists in a

The excellent work of the Administrative Office forms committee was noted. It was suggested that if Rule 84 is abandoned the Civil Rules Committee will likely appoint a liaison to work with the forms committee and to keep the Advisory Committee informed of its projects.

The Subcommittee has continued to deliberate, focusing on the specific questions raised by Rule 4(d)(1)(D). This rule directs that a request to waive service of the summons "inform the defendant, using text prescribed in Form 5, of the consequences of waiving and not waiving service." Although the rule text refers only to Form 5, Form 5, the request to waive, is in many ways interdependent with Form 6, a waiver. If Rule 84 and all its Forms are abandoned without more, Rule 4(d)(1)(D) will have to be amended.

A wide range of approaches to Form 5 are being considered. One pole is to continue Rule 84 and Forms 5 and 6, no more. The opposite pole is to strike from Rule 4(d)(1)(D) any requirement that a particular form be used. Several possibilities lie between these poles. Form 5 and perhaps Form 6 could be revised to become Rule 4 forms, attached at the end of Rule 4 and mandated by an amended Rule 4(d)(1)(D). Or the rule text could be expanded to add still more detail to the several elements of the request already specified. Or the rule could mandate use of any form for request and waiver that might be approved by the Judicial Conference. Still other variations may be developed.

Continued deliberations do not reflect second thoughts about the strong support found in the Subcommittee and the full Committee for abrogating Rule 84 and the Forms. It has seemed better not to rush the process of deciding what to do about Form 5. More importantly, important topics have converged on the Committee agenda. Revised Rule 37(e) on preservation and spoliation issues, and the package of Duke Subcommittee proposals, are presented at this meeting with recommendations that the Standing Committee be asked to approve the Duke subcommittee proposals for publication this summer and confirm its approval of Rule 37(e) for publication. If all goes as hoped, there will be a full menu for public comments and testimony. Rule 84 can safely be withheld for the next cycle.

All thoughts and suggestions are welcome.

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gradually evolving – and perhaps diminishing – tension with the emergence of "plausible fact" pleading in the *Twombly* and *Iqbal* decisions. It is better to allow this dialogue to carry forward free from the potentially misleading implications that might be drawn by analogy to the Forms.

# TAB 4B

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## MEMORANDUM

**DATE:** July 6, 2012

**TO:** Judge Gene E.K. Pratter

**FROM:** Andrea L. Kuperman

**CC:** Judge Mark R. Kravitz  
Judge David Campbell  
Professor Daniel R. Coquillette  
Professor Edward H. Cooper  
Professor Richard L. Marcus

**SUBJECT:** Potential Effects of Case Law Under Rule 84 if Rule 84 is Abrogated

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The Rule 84 Subcommittee is considering several possibilities for handling the official forms that appear in the Appendix to the Civil Rules going forward. One of the possibilities under consideration is abrogating Rule 84, which provides that the forms “suffice under the[] rules and illustrate the simplicity and brevity that the[] rules contemplate.” FED. R. CIV. P. 84. The Subcommittee raised the concern that there is a substantial body of case law that approves of the forms, which suggests that withdrawal of the forms, at least from official status, could have a significant impact. The question was raised as to whether the decisions that rely on the forms will linger after the rule is abrogated, leading to confusion.

The Subcommittee asked me to research whether the case law approving of the forms will continue to have validity if the rule is abrogated. While it is not possible to predict exactly what courts will do if Rule 84 is abrogated, based on how courts have dealt with prior rule abrogations and amendments, it is very unlikely that the case law approving of the forms under Rule 84 will continue to have validity.

The Subcommittee also requested that I look into whether the case law has continued to

approve of the pleading forms after the Supreme Court's decisions interpreting pleading standards in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009). The majority of courts that have looked at this issue seem to say that the forms continue to suffice under the Rules because the courts are still bound by Rule 84, although a few have disregarded particular forms (usually Form 18 for patent infringement) in light of *Twombly* and *Iqbal*. Based on language used in the cases, it is reasonable to assume that most of those courts upholding the validity of the forms after *Twombly* and *Iqbal* would not do so if not bound by Rule 84. I think it is unlikely that many of the forms would continue to be upheld if Rule 84 were abrogated. Moreover, based on the conclusion that case law relying on an abrogated rule would no longer be good law after abrogation, it seems very unlikely that cases holding that the forms are valid under Rule 84 would continue to have much precedential or persuasive value after abrogation of the rule.

**I. It is Unlikely that Case Law Relying on Rule 84 Would Continue to Have Validity After Abrogation of Rule 84**

It is very unlikely that case law upholding the forms under Rule 84 would continue to have validity if Rule 84 is abrogated.<sup>1</sup> There is not much case law on following precedent developed under abrogated rules. However, there is some evidence that absent some particular indication that

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<sup>1</sup> The case law discussing the sufficiency of the forms tends to rely on Rule 84 in finding pleadings conforming to the forms sufficient. To the extent Rule 84 is no longer in place, it seems unlikely that courts would find that such pleadings automatically suffice, and would instead rely on other rules and case law in determining the appropriate form for particular types of pleadings. To the extent the Subcommittee's concern might have related to the continuing validity of case law that upheld pleadings conforming to the forms without relying on Rule 84, it does not appear that there is much case law to this effect. To the extent such case law does exist, it may persist even in the absence of Rule 84 since its rationale would not rely on the rule in upholding pleadings conforming to the forms. The result may depend on what is ultimately done with the official forms. If they are demoted from official status, but still made available through the Administrative Office or otherwise, courts may find them persuasive, even if not bound to find that conforming pleadings suffice.

an abrogated rule should continue to be followed (examples discussed below), where rules have been abrogated, courts will decline to look to case law under the abrogated rule. *See, e.g., Talbot v. Village of Sauk Village*, No. 97 C 2281, 1999 WL 286089, at \*1 (N.D. Ill. Apr. 27, 1999) (rejecting a party's suggestion to look at cases under abrogated Civil Rule 43(b), which had since been superseded by the adoption of Federal Rule of Evidence 611(c), because "like newspapers of the 1950s, 1960s, and early 1970s, those cases may be of historical interest but have no current force"). Similarly, where rules have been amended, courts generally look at the amended rule going forward and do not rely on case law under prior versions of the rule. *See, e.g., Yost v. Stout*, 607 F.3d 1239, 1244 n.6 (10th Cir. 2010) (declining to rely on an earlier Fifth Circuit case because "in a case quite similar to this one, the Fifth Circuit discarded the rule of *Ramsey*, finding it to be abrogated by revisions to the federal rules." (citation omitted)); *United States v. Rowe*, 92 F.3d 928, 933 (9th Cir. 1996) (affirming the district court's denial of a pretrial motion for leave to impeach a victim even though the ruling "unquestionably would have been incorrect under *United States v. Nevitt*, 563 F.2d 406, 408 (9th Cir. 1977)" because "that case was expressly abrogated by the 1990 amendments to the Federal Rules of Evidence," and relying instead on the present version of the rule (citing FED. R. EVID. 609 Advisory Committee's Note (1990))); *Williams v. Dist. of Columbia*, 806 F. Supp. 2d 44, 48 (D.D.C. 2011) (stating that the circuit's previous strict approach to waiver of attorney-client privilege upon inadvertent disclosure was partially abrogated by the enactment of Federal Rule of Evidence 502(b), which addresses the extent to which a waiver may be found based upon an inadvertent disclosure in a federal proceeding); *United States v. Young*, 14 F.R.D. 406, 407 (D.D.C. 1953) ("Even if, prior to the adoption of the Federal Rules of Criminal Procedure, 18 U.S.C.A., there existed a common law rule or a statutory provision that the name of the person who administered

the oath must be stated in an indictment for perjury,—which we do not decide,—this requirement must be deemed to have been abrogated by the new Rules.”<sup>2</sup>

Although the general practice when rules are amended or abrogated is to no longer follow case law under the earlier version of the rule, I did come across two instances in which courts continued to follow practice under an abrogated rule. However, both instances are distinguishable from the potential abrogation of Rule 84.

Before abrogation, Federal Rule of Civil Procedure 43(b) had provided: “A party may call an adverse party . . . and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party . . . .” *Patrick v. City of Detroit*, 906 F.2d 1108, 1113 (6th Cir. 1990) (quoting FED. R. CIV. P. 43(b) (abrogated in 1975)). That rule was abrogated in 1975, at the same time the Federal Rules of Evidence went into effect. *Id.* at 1112. Practice under that rule had allowed “[t]he calling and cross-examining of the plaintiff . . . when the plaintiff ha[d] testified concerning liability on direct examination, ha[d] been cross-examined on liability immediately thereafter, and ha[d] been recalled by the defendant to question him further concerning liability.” *Id.* at 1113 (citing *Gallis v. Peelle Co.*, 264 F.2d 663 (2d Cir. 1959)). But “[t]he Advisory Committee Notes relating to the 1972 Amendment to Rule 43 indicated that subdivision (b) no longer would be needed because the matters with which it dealt would be treated

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<sup>2</sup> The court explained that “[o]ne of the purposes of the new rules [of Criminal Procedure] was to abrogate the technicalities which all too often had led to dismissal of indictments and to reversals of convictions on grounds that had no connection with the guilt or innocence of the defendant.” *Young*, 14 F.R.D. at 407. The court further stated that “[o]ne of the chief purposes of the new rules was to jettison this superfluous cargo, which interfered with the determination of the basic question whether the defendant committed the crime with which he was charged.” *Id.* at 407–08. It seems quite likely that after the abrogation of Rule 84, courts would make an analogous assessment of the abrogated rule and associated case law, finding that the purpose of abrogation was to preclude the practice that existed before abrogation of allowing pleadings conforming to the forms to gain automatic approval. This seems especially likely if a committee note explains this purpose.

in the Federal Rules of Evidence, particularly Rules 607 and 611(b) and (c).” *Id.* The court concluded that “these rules of evidence, combined with the advisory comments concerning the abrogation of Rule 43(b), resulted in a subsumption into the Federal Rules of Evidence of the right that had been established by this procedural rule.” *Id.* The court explained that “the right continues to exist, simply as a matter of evidence rather than as a matter of procedure.” *Id.*

The situation with Rule 43(b) seems quite different from the potential abrogation of Rule 84. First, another case discussed earlier rejected case law applying more restrictive standards under abrogated Rule 43(b) after it was superseded by Evidence Rule 611(c). *See Talbot*, 1999 WL 286089, at \*1. In addition, Rule 84 would not be subsumed in another rule. Particularly if the committee notes explain that the purpose of the abrogation is to remove the forms from the Rules Enabling Act process, taking them out of official status as sufficient under the rules, it seems very unlikely that a court would take the same approach the *Patrick* court took with respect to Rule 43(b).

The other instance I saw where courts followed an abrogated rule deals with former Rule 73 on determining the amount of a bond to stay an appeal.<sup>3</sup> That rule, though abrogated, has been determined by the courts to have been supplanted by the Appellate Rules. Although the Appellate Rules do not directly cover the same subject matter as former Rule 73(d), courts have determined that the former rule codified judicial practice and that the intent of the abrogation was not to get rid

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<sup>3</sup> I also came across a case that noted in a footnote that it would analyze a motion to amend under both Rule 15 and Rule 13(f), despite the abrogation of Rule 13(f). *See High Voltage Beverages, L.L.C. v. Coca-Cola Co.*, No. 3:08-CV-367, 2010 WL 2342458, at \*1 n.2 (W.D.N.C. Jun. 8, 2010). The court explained: “Although the Order analyzes the amendment primarily in the context of Rule 15, it also examines the amendment for compliance with Rule 13(f). On December 1, 2009, . . . Rule 13(f) was abrogated because it was redundant and caused confusion. Analysis of a motion requesting leave to amend a counterclaim—before, and after the amendments to the Federal Rules—is conducted under Rule 15.” *Id.* (citation omitted). This seems quite different from the scenario if Rule 84 is abrogated because Rule 84 is not redundant.

of that practice. One court explained it this way:

Our only explicit guidance on the matter of supersedeas bonds appeared in former FED. R. CIV. P. 73(d), 383 U.S. 1061–62 (1966), which provided that when an appellant entitled thereto desired a stay on appeal he could present to the court for its approval a supersedeas bond, fixed in an amount to satisfy the judgment in full, together with costs, interest, and damages for delay, in the event the appeal was dismissed or the judgment affirmed. The district court could, however, “fix( ) a different amount or order( ) security other than the bond” “after notice and hearing and for good cause shown.” *Id.* at 1062. Although Rule 73 was among the rules abrogated and supplanted in 1968 by the Federal Rules of Appellate Procedure, *see* 389 U.S. at 1065–66, and although the appellate rule covering the subject matter of old Rule 73(d) (FED. R. APP. P. 8) does not repeat Rule 73(d)’s detail, the substance of Rule 73(d) retains vitality inasmuch as it had simply codified judicial practice. *See Poplar Grove Planting & Refining Co. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979); 9 MOORE’S FEDERAL PRACTICE P 208.05 at 8-14 (2d ed. 1980).

*Fed. Prescription Serv., Inc. v. Am. Pharm. Assoc.*, 636 F.2d 755, 758–59 (D.C. Cir. 1980) (footnote omitted). Other courts have taken a similar approach. *See, e.g., Thompson v. Florida Wood Treaters, Inc.*, No. 2006-224, 2010 WL 3119918, at \*5 (D.V.I. Aug. 4, 2010) (“The form and amount of the contemplated supersedeas bond is not specified in current Rule 62(d), but former Rule 73(d) provided that such a bond should normally be fixed to satisfy the judgment in full, plus interest, costs, and damages for delay. Though Rule 73(d) was abrogated when the Federal Rules of Appellate Procedure were established, its standard is still vital.” (internal citations omitted)); *N. River Ins. Co. v. Greater N.Y. Mutual Ins. Co.*, 895 F. Supp. 83, 84 (E.D. Pa. 1995) (“Prior to 1968, the amount of a supersedeas bond was governed by Rule 73(d), which required the posting of a bond sufficient to cover the amount of the judgment in full, as well as post-judgment interest and costs. Although the rule was abrogated in 1968 when the Federal Rules of Appellate Procedure were promulgated, there is no current civil or appellate rule that specifies the required amount of a

supersedeas bond. Nevertheless, most courts quite properly continue to apply the standard of former Rule 73(d).” (footnote and citations omitted)); *Kalman v. Berlyn Corp.*, No. 82-0346-F, 1991 WL 340644, at \*3 (D. Mass. Oct. 3, 1991) (“It is generally agreed that former Federal Rule of Civil Procedure 73(d) remains a reliable guide in these matters [related to supersedeas bonds].”);<sup>4</sup> *Cal Dive Int’l, Inc. v. M/V Tzimin*, 743 F. Supp. 813, 815 (S.D. Ala. 1990) (“As F. R. Civ. P. 62(d) does not precisely define the amount and condition of the supersedeas bond, courts and commentators all agree that former Civil Rule 73(d) should be followed.” (footnote omitted));<sup>5</sup> *J. Perez & Cia, Inc. v. United States*, 578 F. Supp. 1318, 1320 n.2 (D.P.R. 1984) (“Although Rule 73(d) was abrogated when the Federal Rules of Appellate Procedure were established, its standard is still vital.”); *United States v. Kurtz*, 528 F. Supp. 1113, 1114–15 (E.D. Pa. 1981) (same).

Unlike Rule 73(d), Rule 84 will not have a successor rule. *Cf. Fed. Prescription Serv.*, 636 F.2d at 759 (“We find in both former Rule 73(d) and in its successor, FED. R. APP. P. 8, a recognition of the district court’s discretionary power to stay execution of a money judgment without requiring bond.”). Moreover, it will likely be difficult for a party to successfully argue that Rule 84 was a mere codification of underlying practice and that no change in practice was intended by its abrogation, as has been noted with respect to Rule 73(d), particularly if the abrogation is coupled

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<sup>4</sup> The court noted that MOORE’S FEDERAL PRACTICE explains that “former Rule 73(d) was a codification of the general underlying practice and its abrogation was not intended to effect any change in practice.” *Kalman*, 1991 WL 340644, at \*3 (citing J. Moore & J. Lucas, MOORE’S FEDERAL PRACTICE, ¶ 62.06 at 62–32 (1991)).

<sup>5</sup> The court noted that “[a]lthough former Civil Rule 73(d) was abrogated, the practice that it seemed to ordain was grounded in the very nature of a supersedeas bond, and it should continue to be followed.” *Cal Dive Int’l*, 743 F. Supp. at 816. The court cited MOORE’S FEDERAL PRACTICE: “Former Rule 73 was abrogated at the time of the adoption of the Appellate Rules, but its subject matter was not picked up in either the Civil Rules [ ] or the Appellate Rules. The subject is sometimes covered by local rules, and in any event since former Rule 73(d) was a codification of the general underlying practice, its abrogation was not intended to effect any change in the practice.” *Id.* (quoting 7 MOORE’S FEDERAL PRACTICE § 62.06).

with a committee note explaining that the intent of the abrogation is that the forms are no longer automatically considered sufficient under the rules.

## **II. Validity of the Forms After *Twombly* and *Iqbal***

Most courts continue to find the forms valid under Rule 84, even after *Twombly* and *Iqbal*, although some have found that particular forms no longer suffice despite the continued existence of Rule 84. Many courts seem to think that the forms conflict with these cases but continue to give the forms validity because they feel constrained by Rule 84. This has most often come up in the context of the form for pleading a patent infringement claim, Form 18.<sup>6</sup>

In a case decided after *Twombly*, but before *Iqbal*, the Federal Circuit approved of Form 18 (then Form 16) as sufficient for pleading direct infringement. The court in *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356–57 (Fed. Cir. 2007), examined Form 16 and the decision in *Twombly*, and concluded that a plaintiff in a patent infringement case is not required to specifically include each element of the claims of the asserted patent. The court concluded that the pro se plaintiff's complaint had enough detail to allow the defendant to answer, and therefore met the requirements to survive a motion to dismiss. *Id.* at 1357. However, Judge Dyk dissented in part, arguing that the bare allegations in the form were not sufficient to provide adequate notice to a defendant:

In my view, a bare allegation of literal infringement using the form is inadequate to provide sufficient notice to an accused infringer under a theory of literal infringement. The form fails to state which claims are asserted and which features of the accused device are alleged to infringe the limitations of those claims. In alleging that the

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<sup>6</sup> Form 18, formerly Form 16 before restyling, requires only the following: “1) an allegation of jurisdiction; 2) a statement that the plaintiff owns the patent; 3) a statement that defendant has been infringing the patent ‘by making, selling, and using [the device] embodying the patent’; 4) a statement that the plaintiff has given the defendant notice of its infringement; and 5) a demand for an injunction and damages.” *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1357 (Fed. Cir. 2007) (alteration in original) (quoting Form 16 (2006)).

“electric motors embod[y] the patented invention” the form fails to recognize that a patent is only infringed when the accused product satisfies all of the limitations of the claims. However, I agree that under Rule 84 of the Federal Rules of Civil Procedure, we would be required to find that a bare allegation of literal infringement in accordance with Form 16 would be sufficient under Rule 8 to state a claim. One can only hope that the rulemaking process will eventually result in eliminating the form, or at least in revising it to require allegations specifying which claims are infringed, and the features of the accused device that correspond to the claim limitations.

*Id.* at 1360 (Dyk, J., concurring in part and dissenting in part) (footnotes omitted) (alteration in original). Judge Dyk also emphasized that while the court was required under Rule 84 to find a claim for literal infringement that mirrored Form 16 sufficient, *Twombly* suggested that forms should not be interpreted as going beyond the facts described in the form, and that therefore Form 16 should not be interpreted to apply to an infringement claim made under the doctrine of equivalents. *Id.* at 1361.

Courts have split as to whether *McZeal*'s holding, which was made before *Iqbal* in the context of a direct infringement claim made by a pro se litigant, continues to have validity after *Iqbal* and in other contexts. Courts have expressed frustration at the apparent discrepancy between Form 18 and *Twombly* and *Iqbal*. See, e.g., *Ingeniador, LLC v. Interwoven*, --- F. Supp. 2d ---, 2012 WL 1712492, at \*9 (D.P.R. May 15, 2012) (“On the one hand, the Federal Rules of Civil Procedure state, ‘the Forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.’ FED. R. CIV. P. 84. On the other hand, Form 18 titled ‘Complaint for Patent Infringement’ simply requires a notice pleading standard.”); *id.* at \*10 (“[I]t is worth stating that, as this court and many others have held, the forms accompanying the Federal Rules of Civil Procedure should be updated to include the specificity required by *Twombly* and *Iqbal*. The forms, created to exemplify a sufficient, clear and concise version of pleading, no longer serve this mission.

It furthers no purpose to have Rules and Forms, sanctioned by Congress and the courts, that inaccurately describe the pleading standards for civil complaints.”); *Tyco Fire Prods. LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 895 (E.D. Pa. 2011) (“Rule 84 and the forms to which it provides safe harbor should be modified or repealed to the extent they are incompatible with *Twombly* and *Iqbal*.”); see also *McCauley v. City of Chicago*, 671 F.3d 611, 623–24 (7th Cir. 2011) (Hamilton, J., dissenting in part) (“*Iqbal* did not purport to overrule or amend Rule 84 or the forms, but it is difficult to reconcile the new ‘plausibility’ standard with those forms.”);<sup>7</sup> cf. *Armstrong Pump, Inc. v. Hartman*, No. 10-CV-445S (Sc), 2012 WL 1029645, at \*2 (W.D.N.Y. Mar. 26, 2012) (declining to resolve tension that may exist between *Twombly/Iqbal* and the forms because the challenged counterclaims for invalidity failed under either standard).

Some courts have continued to uphold Form 18. See, e.g., *Motivation Innovations, LLC v. Express, Inc.*, No. 11-615-SLR-MPT, 2012 WL 1415412, at \*3 (D. Del. Apr. 24, 2012) (FED. R. CIV. P. Form 18 sets forth a sample complaint for patent infringement, which meets the *Twombly* pleading standard.”), *report and recommendation adopted*, 2012 WL 1835757 (D. Del. May 17, 2012); *Cascades Computer Innovation, LLC v. Sony-Ericsson Mobile Commc’ns (USA) Inc.*, No. 11-CV-7223, 2012 WL 1377053, at \*3 (N.D. Ill. Apr. 18, 2012) (rejecting an argument that Form 18 is

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<sup>7</sup> The *McCauley* dissent explained that “[m]any of the forms require virtually no explanation of the underlying facts as long as the defendant is informed of the event or transaction that gave rise to the claim, according to the broad notice purpose of the federal rules.” 671 F.3d at 624 (Hamilton, J., dissenting in part). The court gave examples of the Form 15 complaint for conversion of property, which it described as “remarkably ‘conclusory’” but “sufficient according to Rule 84”; Form 11 for negligence, which it described as “quite ‘conclusory,’” but sufficient under Rule 84; and Form 21 for a claim to set aside a fraudulent conveyance, which it described as “remarkably terse.” *Id.* The dissent stated that “[o]ne could go on with parallel analysis of the other form complaints.” *Id.* The dissent concluded that “[u]nless one can plausibly explain away the tension between *Iqbal* and Rule 9(b) and the Rule 84-endorsed form complaints, then *Iqbal* conflicts with the Rules Enabling Act, and the prescribed process for amending the Federal Rules of Civil Procedure.” *Id.* (internal citation omitted).

outdated because “[t]hrough the sufficiency of Form 18 has been questioned, *post-Iqbal*, by a few district courts and by the Federal Circuit itself in an unpublished opinion, *McZeal* and its analysis based on Form 18 remains good law in that circuit until overruled.” (citation omitted)); *Netgear, Inc. v. Ruckus Wireless, Inc.*, --- F. Supp. 2d ---, No. 10-999-SLR, 2012 WL 1118773, at \*2, \*5 (D. Del. Mar. 28, 2012) (finding that a claim for direct infringement “must mimic Form 18 and identify a general category of products” and that no more detail than Form 18 was required for pleading willful infringement); *Lodsys, LLC v. Brother Int’l Corp.*, No. 2:11-cv-90-JRG, 2012 WL 760729, at \*3 (E.D. Tex. Mar. 8, 2012) (“A patent infringement complaint that pleads at least the facts in Form 18 must be sufficient to state a claim under Rule 8(a) because to hold otherwise would render Federal Rule of Civil Procedure 84 a nullity.”); *Elen IP LLC v. Arvinmeritor, Inc.*, No. C11-140-RSM, 2011 WL 3651113, at \*4–5 (W.D. Wash. Aug. 18, 2011) (“Pursuant to Rule 84, the Court is bound to accept a form pleading as sufficiently stating a claim for which relief can be granted”; the plaintiff’s compliance with Form 18 sufficed despite the addition of the additional words “on information and belief”); *W.L. Gore & Assoc., Inc. v. Medtronic, Inc.*, 778 F. Supp. 2d 667, 675 (E.D. Va. 2011) (“It is difficult to reconcile the pleading standards set forth in *Twombly* and *Iqbal* with the legally conclusive form of pleading found in Form 18. However, the Court agrees with the post-*Twombly* holding in *McZeal* that a litigant who complies with the provisions of Form 18 has sufficiently stated a claim for direct infringement as contemplated by Rule 12(b)(6). In reaching this conclusion the Court relies on the language of Rule 84 and statements made by the Supreme Court in *Twombly*.”);<sup>8</sup> *Clear With Computers, LLC v. Hyundai Motor Am., Inc.*, No. 6:09 CV 479, 2010

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<sup>8</sup> The court explained:

Rule 84 unequivocally states that the forms found in the Appendix “suffice under these

WL 3155885, at \*3–4 (E.D. Tex. Mar. 29, 2010) (“A patent complaint that complies with Form 18 will suffice to state a claim that is plausible on its face.” (citing FED. R. CIV. P. 84); rejecting argument that Form 18 is no longer sufficient under *Twombly/Iqbal* because that would “render Rule 84 and Form 18 invalid,” which “cannot be the case”); *Mark IV Indus. Corp. v. Transcore, L.P.*, No. 09-418 GMS, 2009 WL 4828661, at \*4 (D. Del. Dec. 2, 2009) (“TransCore argues that *Iqbal* supercedes all previous jurisprudence on the issue of pleading requirements, including Form 18 of the Federal Rules of Civil Procedure. Again this court is not persuaded that *Iqbal* has such far reaching implications. *Iqbal* did not squarely address the continued validity of the pleading forms appended to the Federal Rules of Civil Procedure. Absent an explicit abrogation of these forms by the Supreme Court, this court presumes that they are ‘sufficient to withstand attack under the rules under which they are drawn’ and ‘practitioner[s] using them may rely on them to that extent.’” (quoting FED. R. CIV. P. 84 advisory committee’s note (1946 Amendment) (alteration in original) (internal record citation omitted)); *see also* Rex Mann, *What the Federal Rules of Civil Procedure Forms Say About Twombly and Iqbal: Implications of the Forms on the Supreme Court’s Standard*, 41 U. MEM. L. REV. 501, 510–11 (2011) (arguing that the legislative history and the plain text of

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rules.” FED. R. CIV. P. 84. Moreover, in *Twombly*, the Supreme Court stated that the alteration of the Federal Rules can only be accomplished “‘by the process of amending the Federal Rules, and not by judicial interpretation.’” *Twombly*, 550 U.S. at 569 n.14, 127 S. Ct. 1955. Since the Federal Rules state that compliance with the forms is sufficient, and the Supreme Court’s decisions in *Twombly* and *Iqbal* could not have amended the Federal Rules, a complaint alleging literal infringement that tracks Form 18 is sufficient to withstand a motion to dismiss under Rule 12(b)(6).

*W.L. Gore*, 778 F. Supp. 2d at 675. The court noted that “Form 18’s continuing viability post *Twombly* and *Iqbal* in contexts other than literal infringement claims is an open question,” but it did not decide that issue since the complaint at issue alleged only literal infringement and did not involve a design patent, and therefore could survive a motion to dismiss as long as it complied with Form 18. *Id.* at 676.

Rule 84 support the conclusion that the forms provide a safe harbor for pleadings pled consistently with the forms, regardless of what the Supreme Court says about the pleading standard).

Some courts have continued to follow the approach taken in *McZeal*, but have done so with reservations or declined to expand it. *See, e.g., Auburn Univ. v. Int'l Bus. Machines Corp.*, --- F. Supp. 2d ---, No. 3:09-cv-694-MEF, 2012 WL 1986682, at \*2–3 (M.D. Ala. Jun. 4, 2012) (concluding that although the Federal Circuit had noted in dicta that Form 18 had not been updated since *Iqbal*, and although *McZeal* was decided before *Iqbal*, the *McZeal* holding that form pleading satisfied the *Twombly* standard remained the law, and therefore “until the Federal Circuit explicitly says otherwise, the law allows for a pleading of a doctrine of equivalents infringement theory though a bare-bones allegation of direct infringement”); *Selex Commc'ns, Inc. v. Google Inc.*, No. 1:09-CV-2927-TWT, 2012 WL 1681824, at \*4, \*6 n.3 (N.D. Ga. May 11, 2012) (requiring the plaintiff to plead facts supporting a theory of joint infringement because Form 18 sets forth a sufficient complaint only for direct patent infringement, and not deciding whether Form 18 applies to indirect infringement because the complaint at issue plausibly alleged the additional elements); *DR Sys., Inc. v. Avreo, Inc.*, No 11-CV-0932 BEN (WVG), 2012 WL 1068995, at \*1 (S.D. Cal. Mar. 29, 2012) (noting that the Federal Circuit has held that Form 18 suffices for stating a claim for direct infringement, but that “because Form 18 does not address induced infringement or contributory infringement, the heightened pleading standard of *Twombly* and *Iqbal* apply to allegations of induced infringement and contributory infringement.” (citations omitted)); *Gradient Enters., Inc. v. Skype Techs. S.A.*, --- F. Supp. 2d ---, 2012 WL 864804, at \*2–3 (W.D.N.Y. Mar. 13, 2012) (noting split of authority as to whether *Twombly* applies to direct patent infringement claims in light of Form 18 and Rule 84, that it was unclear “whether the Federal Circuit would, post-*Iqbal*, hold that a

complaint for patent infringement that tracks Form 18 is necessarily sufficient to withstand a motion to dismiss,” that, “[n]ot surprisingly, . . . the combination of *Twombly*, *Iqbal*, *McZeal*, Form 18, and Rule 84, has led to differing conclusions among the lower courts about whether a complaint that complies with the minimum requirements of Form 18 suffices to state a claim for direct patent infringement,” and that claims for indirect infringement are not addressed by Form 18 and therefore not necessarily sufficient for mere compliance with the form); *Memory Control Enter., LLC v. Edmunds.com, Inc.*, No. CV 11-7658 PA (Jcx), 2012 WL 681765, at \*2–3 (C.D. Cal. Feb. 8, 2012) (concluding that *Twombly/Iqbal* apply to counterclaims for patent invalidity, even though infringement claims need only comply with Form 18 under Rule 84, in part because “[j]ust as *Twombly* and *Iqbal* did not rewrite the Federal Rules of Civil Procedure—thus, Rule 84 still applies, and Form 18 still suffices—a court cannot write into the Federal Rules a form for a claim for declaratory judgment of patent invalidity.”); *Discflo Corp. v. Am. Process Equip., Inc.*, No. 11cv00476 BTM (RBB), 2011 WL 6888542, at \*1 (S.D. Cal. Dec. 29, 2011) (“[W]hile Form 18 shields direct infringement claims from *Iqbal*’s heightened pleading standard [because of Rule 84], it is ‘silent as to any other theory of patent infringement besides direct infringement’ and therefore does not apply to claims of indirect infringement raised under §§ 271(b) and (c).” (citations omitted)); *Nielsen Co. (US), LLC v. Comscore, Inc.*, 819 F. Supp. 2d 589, 600 (E.D. Va. 2011) (noting that the rules require that compliance with Form 18 be considered sufficient for direct, literal infringement, but that “claims of indirect infringement must be evaluated under the standard set forth in *Twombly* and *Iqbal*, without reference to the language of Form 18, which only relates to claims of direct infringement”); *Tech. Licensing Corp. v. Technicolor USA, Inc.*, No. 2:03-1329 WBS EFB, 2010 WL 4070208, at \*2 (E.D. Cal. Oct. 18, 2010) (noting that *McZeal* had allowed conclusory

allegations for a claim of direct patent infringement because of Form 18, but holding that *Twombly* and *Iqbal* must be applied to indirect infringement claims because “[n]o adequate justification exists for holding indirect infringement claims, which contain additional elements not found in direct infringement claims, to the standard of *McZeal* and Form 18” (footnotes omitted); *Automated Transactions, LLC v. First Niagara Fin. Group, Inc.*, No. 10-CV-00407(A)(M), 2010 WL 5819060, at \*3–5 (W.D.N.Y. Aug. 31, 2010) (concluding that “reconciling the dictates of *Twombly* and *Iqbal* with the Appendix Forms is not merely difficult, it is impossible” because “*Iqbal* decrees that ‘conclusions or a formulaic recitation of the elements of a cause of action will not do,’” while “the Appendix Forms allege conclusions which fail to even mention the elements of a cause of action,” but concluding that in light of the conflict the court must apply the “authority which ‘more closely adheres to the traditional view,’” and that “[t]he ‘traditional view’ recognizes that ‘[c]ourts are not free to amend a rule outside the process Congress ordered’”; “unless or until Rule 84 is amended, I conclude that the sufficiency of Automated Transactions’ direct infringement allegations is governed by Appendix Form 18, not by the requirements of *Twombly* and *Iqbal*” (footnote and citations omitted)),<sup>9</sup> *report and recommendation adopted*, 2011 WL 601559 (W.D.N.Y. Feb. 11, 2011); *Elan Microelectronics Corp. v. Apple, Inc.*, No. 09-01531, 2009 WL 2972374, at \*2 (N.D.

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<sup>9</sup> The court discussed examples of forms that contain mere conclusions, including Form 11 (Complaint for Negligence), Form 15 (Complaint for the Conversion of Property), and Form 19 (Complaint for Copyright Infringement and Unfair Competition). *See Automated Transactions*, 2010 WL 5819060, at \*3–4. The court held that “[a]bsent an explicit abrogation of these [pleading] forms by the Supreme Court, this court presumes that they are ‘sufficient to withstand attack under the rules under which they are drawn’ and ‘practitioner[s] using them may rely on them to that extent.’” *Id.* at \*5 n.5 (third alteration in original) (quoting Rule 84 advisory committee’s note (1946 Amendment)). The court went even further, holding that conclusory allegations would suffice for a claim of willful infringement, despite the lack of a form addressing such a claim, because “the better view is that the conclusory style of pleading in the Appendix Forms (which according to Rule 84 ‘illustrate the simplicity and brevity that these rules contemplate’ (emphasis added)) is not limited to the particular claims alleged in the Forms.” *Id.* at \*7 (citation omitted).

Cal. Sept. 14, 2009) (noting that it is “not easy to reconcile Form 18 with the guidance of the Supreme Court in *Twombly* and *Iqbal*” because “while the form undoubtedly provides a ‘short and plain statement,’ it offers little to ‘show’ that the pleader is entitled to relief,” but concluding that “[u]nder Rule 84 of the Federal Rules of Civil Procedure . . . a court must accept as sufficient any pleading made in conformance with the forms”; concluding that Form 18 is an example only of how to plead direct infringement and that claims for indirect infringement are governed by *Twombly* and *Iqbal* because there is no corresponding form that is binding through Rule 84); *cf. Wells Fargo & Co. v. United States*, 750 F. Supp. 2d 1049, 1051, 1052 (D. Minn. 2010) (holding that *Twombly* and *Iqbal* do not apply to pleading affirmative defenses, in part because “nothing in the text of the Federal Rules of Civil Procedure or in the Appendix of Forms even hints that a defendant must plead sufficient facts to establish the ‘plausibility’ of an affirmative defense,” and that even if *Twombly/Iqbal* applied to affirmative defenses, the answer sufficed because it conformed to the standard set forth in Form 11); *Mann, supra*, 41 U. MEM. L. REV. at 541–42 (“Assuming that Form 18 cannot be squared with *Iqbal* and *Twombly*, the form should be interpreted narrowly to keep inconsistencies to a minimum. . . . A narrow scope of the Form 18 safe harbor would certainly support the theory that the safe harbor only applies to literal and direct infringement pleadings, and many courts have agreed with this conclusion.” (footnote omitted)).

Other courts have decided that Form 18 no longer suffices, even for direct infringement claims. *See, e.g., Proxycorr Inc. v. Microsoft Corp.*, No. SACV 11-1681 DOC (ANx), 2012 WL 1835680, at \*3–4 (C.D. Cal. May 16, 2012) (noting split of authority as to whether parroting Form 18 is sufficient to state a claim for direct infringement, and noting that Rule 84 states that the forms “suffice,” but nonetheless agreeing with those authorities that hold that threadbare recitations of the

language of Form 18 are insufficient to state a claim because “the forms purporting to illustrate what level of pleading is required do not reflect the sea change of *Twombly* and *Iqbal*” (quoting *Tyco Fire Products LP v. Victaulic Co.*, 777 F. Supp. 2d 893, 905 (E.D. Pa. 2011)); *Ingeniador, LLC v. Interwoven*, --- F. Supp. 2d ---, 2012 WL 1712492, at \*9 (D.P.R. May 15, 2012) (noting “inherent tension between the more recent precedents from the [Supreme] Court, Rule 84 and the forms accompanying the rules,” and concluding that “the better rule is to hold all of Plaintiff’s claims to the higher pleading standard set out in *Twombly*, rather than applying one legal standard to the direct infringement claim and another to the indirect and contributory infringement claims”); *Avocet Sports Tech., Inc. v. Garmin Int’l, Inc.*, No. C 11-04049 JW, 2012 WL 1030031, at \*3 (N.D. Cal. Mar. 22, 2012) (“Plaintiff’s reliance on conformity of its Complaint with Form 18 [wa]s misguided” because “[i]n the aftermath of *Twombly* and *Iqbal*, a number of district courts in the Ninth Circuit have addressed this very argument, and have concluded that Form 18 does not provide adequate notice under the heightened pleading standards articulated in those cases.”); *PageMelding, Inc. v. ESPN, Inc.*, No. C 11-06263 WHA, 2012 WL 851574, at \*1, \*3 (N.D. Cal. Mar. 13, 2012) (“While it is true that the Federal Circuit has held that Form 18 complies with the pleading standard set forth in *Twombly*, there has been no similar ruling subsequent to the Supreme Court’s decision in *Iqbal* which further clarified Rule 8’s pleading requirements.”; also rejecting argument that Form 18 covers claims for indirect infringement); *Rovi Corp. v. Hulu, LLC*, No. 11-665, 2012 WL 261982, at \*2–3 (D. Del. Jan. 27, 2012) (noting that *McZeal* was not controlling because a motion to dismiss is governed by the law of the regional circuit, not the Federal Circuit; that “[t]he Supreme Court’s decision in *Iqbal* requires adherence, and undermines the precedential value of *McZeal*”; and that because *McZeal* was driven in part by the fact that the plaintiff was proceeding pro se, it “cannot

properly be read as a blanket rule governing all infringement actions”); *Medsquire LLC v. Spring Med. Sys., Inc.*, No 2:11-cv-04504-JHN-PLA, 2011 WL 4101093, at \*2 (C.D. Cal. Aug. 31, 2011) (rejecting the argument that *McZeal* dictates that pleading in conformance with Form 18 is sufficient because *McZeal* was decided before *Iqbal* and there is “no reason to believe that the Supreme Court intended to exclude patent infringement claims from the ‘plausibility’ requirement of Rule 8(a),” and because *McZeal* dealt with a pro se plaintiff).<sup>10</sup>

The courts finding that Form 18 no longer suffices explain that “notwithstanding the suggestion in Form 18 that specificity is not necessary, most courts have, in the wake of *Twombly* and *Iqbal*, required some level of specificity.” *Proxycorr*, 2012 WL 1835680, at \*4 (quoting *Winstron Corp. v. Phillip M. Adams & Assoc., LLC*, C-10-4458 EMC, 2011 WL 4079231, at \*4 (N.D. Cal. Sept. 12, 2011)). One court explained its rejection of the plaintiff’s argument that its complaint survived under Rule 84 and Form 18 as follows:

[P]laintiff’s argument fails for two reasons. *First*, Form 18 provides for nothing more than the type of “defendant-unlawfully-harmed-me accusation” expressly rejected in *Iqbal*. *See* FRCP Appendix of Forms, Form 18 (recommending in a “Complaint for Patent Infringement” a statement that “defendant has infringed and is still infringing the Letters Patent by making, selling, and using [the accused products] that embody the patented invention”). *Second*, the Supreme Court surely was aware of existing precedent, the Federal Rules of Civil Procedure, and the forms contained within. Absent any evidence that it intended to exempt patent infringement claims from the standard set forth in *Iqbal*, this order concludes that *McZeal* was disapproved to the extent that compliance with Form 18 was sufficient to withstand a motion to dismiss for failure to state a claim. To do otherwise would require blatant disregard for the Supreme Court’s holding.

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<sup>10</sup> After concluding that *Iqbal*’s plausibility standard applied to claims of direct infringement, despite Form 18, the court also found Form 18 inapplicable to claims of indirect or contributory infringement. *Medsquire*, 2011 WL 4101093, at \*3.

*PageMelding*, 2012 WL 851574, at \*2 (second alteration in original). The courts rejecting Form 18 after *Twombly/Iqbal* have also sometimes noted that the Federal Circuit has stated in dicta that “Form 18 is a sample pleading for patent infringement, but is not tailored to design patents and was last updated before the Supreme Court’s *Iqbal* opinion.” *Colida v. Nokia, Inc.*, 347 F. App’x 568, 571 n.2 (Fed. Cir. 2009) (unpublished) (per curiam).

The Federal Circuit may have helped to clear up much of the conflicting law on whether Form 18 still applies and in which contexts in its very recent opinion in *R+L Carriers, Inc. v. DriverTech LLC (In re Bill of Lading Transmission and Processing System Patent Litig.)*, 681 F.3d 1323, 2012 WL 2044605 (Fed. Cir. Jun. 7, 2012).<sup>11</sup> The court explained that the Supreme Court’s recent decisions on the plausibility standard, including *Matrixx Initiatives, Inc. v. Siracusano*, *Iqbal*, and *Twombly*, all “address the civil pleading standards in a variety of civil contexts,” but “[n]one address the sufficiency of a complaint alleging patent infringement or causes of action for which there is a sample complaint in the Appendix of Forms to the Federal Rules of Civil Procedure . . . .” *Id.* at \*6. Because the complaint at issue in *Bill of Lading* was governed at least in part by a form complaint, specifically Form 18, that form governed. *See id.* The court explained:

The sample complaint in the Appendix of Forms is relevant because Federal Rule of Civil Procedure 84 states that “the forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.” FED. R. CIV. P. 84. The Advisory Committee Notes to the 1946 amendment of Rule 84 state[ ] that “[t]he amendment serves to emphasize that the forms contained in the Appendix of Forms are sufficient to withstand attack under the rules under which they are drawn, and that the practitioner using them may rely on them to that extent.” *Id.* The language of Rule 84 and the Advisory Committee Notes make “clear that a pleading, motion, or other paper that follows one of the Official Forms cannot be

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<sup>11</sup> Pinpoint citations in the Federal Reporter are not yet available, so Westlaw pinpoints are used.

successfully attacked.” 12 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3162 (2d ed. 1997). As the Supreme Court has noted, moreover, any changes to the Federal Rules of Civil Procedure “must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.” *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993); *see also Twombly*, 550 U.S. at 569 n.14, 127 S. Ct. 1955 (acknowledging that altering the Federal Rules of Civil Procedure cannot be accomplished by judicial interpretation). Accordingly, to the extent the parties argue that *Twombly* and its progeny conflict with the Forms and create differing pleadings requirements, the Forms control. *See McZeal*, 501 F.3d at 1360 (Dyk, J., concurring-in-part and dissenting-in-part) (acknowledging that, while the bare allegations contemplated by Form 18 appear deficient under *Twombly*, we are “required to find that a bare allegation of literal infringement in accordance with Form [18] would be sufficient under Rule 8 to state a claim.”).

*Id.* at \*7 (alteration in original). The court noted that “[w]hile there may be criticism of the text of Form 18, it is not within our power to rewrite it; only an act of Congress can revise the Federal Rules.” *Id.* at \*7 n.7 (citing *Leatherman*, 502 U.S. at 168). With respect to the claims of direct infringement, the court concluded that “[a]s long as the complaint in question contains sufficient factual allegations to meet the requirements of Form 18, the complaint has sufficiently pled direct infringement.” *Id.* at \*8. However, with respect to indirect infringement, the court concluded that *Twombly* and *Iqbal* applied, explaining that “[t]he Forms are controlling only for causes of action for which there are sample pleadings.” *Id.* at \*9.

Judge Newman dissented in part, arguing that “[n]o support can be found for the panel majority’s theory that all ‘causes of action for which there is a sample complaint in the Appendix of Forms,’ are immunized from the general pleading rules, as established under Rule 8(a) and elaborated by precedential rulings of the Supreme Court.” *Id.* at \*20 (Newman, J., concurring in part and dissenting in part). The dissent argued that “[i]t is apparent that minimalist compliance with

Form 18 may not sufficiently ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at 570). The dissent described the varying approaches to Form 18 after *Twombly* and *Iqbal*:

The district courts have responded to Form 18 in irregular ways. A few district courts have, like the panel majority, restricted Form 18 by holding that it applies only to direct infringement. Others have stated that exceptions may be made for pro se plaintiffs, citing *McZeal*, 501 F.3d at 1356. Others have measured the adequacy of the complaint by whether the information is sufficient to permit a reasoned response by the defendant. Others have held that *Twombly* and *Iqbal* apply, to the exclusion of Form 18. *See, e.g., Rovi Corp. v. Hulu, LLC*, 2012 WL 261982, at \*2 (D. Del. Jan. 27, 2012) (holding that Form 18 does not satisfy the pleading standards, which require that “to survive a motion to dismiss, a plaintiff must plead ‘factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged’”); *Illinois Tool Works Inc. v. Elektromanufaktur Zangenstein Hanauer GmbH & Co. KGaA*, 2011 WL 6002967, at \*2–\*3 (E.D. Wis. Nov. 30, 2011) (holding that Form 18 does not control and that the complaint must “contain enough specificity to give the defendant notice of what products or aspects of products allegedly infringe the plaintiff’s patent”); *Medsquire LLC v. Spring Med. Sys. Inc.*, 2011 WL 4101093, at \*1–\*2 (C.D. Cal. Aug. 31, 2011) (the “main issue here is whether a pleading that follows Form 18 . . . is sufficient in light of the Supreme Court’s decisions in *Twombly* and *Iqbal*,” and ruling that to be sufficient the pleading must contain enough factual content “that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”). The D.C. Circuit has recognized that the forms are to be read along with Supreme Court guidance, and not as a separate pleading standard. *See Aktieselskabet AF 21 v. Fame Jeans Inc.*, 525 F.3d 8, 17 (D.C. Cir. 2008) (stating that the forms, including Form 18, “illustrate the concept of fair notice,” and quoting *Twombly* for the requirement that “a complaint should simply identify the ‘circumstances, occurrences, and events’ giving rise to the claim.”).

Some courts have not quibbled about Form 18. *See Clear With Computers, LLC v. Hyundai Motor Am., Inc.*, 2010 WL 3155885, \*4 (E.D. Tex. Mar. 29, 2010) (“Hyundai’s argument—that the generic pleading of patent cases as shown in Form 18 is no longer sufficient under *Iqbal* and *Twombly* would render Rule 84 and Form

18 invalid. This cannot be the case.”); *Traffic Info., LLC v. YAHOO! Inc.*, 2010 WL 2545500, \*2 (E.D. Tex. Apr. 13, 2010) (“The Supreme Court’s decisions in *Twombly* and *Iqbal* have not affected the adequacy of complying with Form 18.”).

*Id.* at \*20–21. The dissent recounts the history of the forms and concludes that there is no support for the majority’s determination to “evaluate the charges of direct and indirect infringement, in the same count of the complaint, under entirely separate pleading standards.” *Id.* at \*23.

The *Bill of Lading* decision may provide some clarity as to the continued validity of Form 18 in the context of direct infringement (and its lack of validity in the context of indirect infringement). However, motions to dismiss are considered procedural motions by the Federal Circuit and thus are controlled by regional circuit law, rather than Federal Circuit law. *See, e.g., Ingeniador*, 2012 WL 1712492, at \*7 (citing *C & F Packing Co. v. IBP, Inc.*, 224 F.3d 1295, 1306 (Fed. Cir. 2000)); *Nielsen Co.*, 819 F. Supp. 2d at 592 (“[I]n the absence of a post-*Twombly/Iqbal* decision by the United States Court of Appeals for the Fourth Circuit on a Rule 12(b)(6) motion to dismiss in a patent case, other courts in this District have relied on the United States Court of Appeals for the Federal Circuit’s decision in *McZeal* in considering motions to dismiss in patent cases.”). As a result, while the Federal Circuit’s holding on this issue is certainly persuasive authority, it does not necessarily bind courts in other circuits.

Although the majority of cases addressing the adequacy of the forms after *Twombly* and *Iqbal* involve Form 18, a couple of other forms are occasionally discussed. For example, in one case, the court held that Form 30, which covers affirmative defenses, survives because of Rule 84. *See Tiscareno v. Frasier*, No. 2:07-CV-336, 2012 WL 1377886, at \*15 (D. Utah Apr. 19, 2012) (concluding that the *Twombly/Iqbal* pleading standard does not apply to affirmative defenses, in part because “Form 30, in the forms appended to the Federal Rules of Civil Procedure, indicates that an

affirmative 12(b)(6) defense can be properly pled with a one-sentence statement: ‘The complaint fails to state a claim upon which relief can be granted,’ and Rule 84 states that the forms suffice); *see also Tyco Fire Prods.*, 777 F. Supp. 2d at 900 (noting that an affirmative defense pleading need only provide fair notice of the issue involved, and “as the undetailed recitations of affirmative defenses illustrated in Form 30 show, [this] is not an exacting standard even remotely approaching the type of notice required of a claim under *Twombly* and *Iqbal*.” (footnote omitted) (citing FED. R. CIV. P., App. of Forms, Form 30)); *Teirstein v. AGA Med. Corp.*, No. 6:08cv14, 2009 WL 704138, at \*2 n.2, \*3, \*5 (E.D. Tex. Mar. 16, 2009) (favorably citing Form 30 and noting that the forms in the appendix suffice to meet Rule 8’s requirements under Rule 84 and *Twombly*). The *Tyco Fire Products* case noted that “[w]hile the Court believes *Twombly* and *Iqbal* cast doubt on the propriety of some of the forms, they do so because of their interpretation of Rule 8(a)’s requirements—not Rule 8(c)’s. Thus, Form 30 remains an accurate illustration of what Rule 8(c) requires of an affirmative defense.” *Tyco Fire Prods.*, 777 F. Supp. 2d at 900 n.6. As a result, the court determined that the counterclaim had to be evaluated under *Twombly*’s plausibility standard, while the affirmative defense would be sufficient unless it failed to provide fair notice of the issue.<sup>12</sup> *Id.* at 901. The court also expressed frustration at the lack of compatibility between *Twombly/Iqbal* and Form 18:

The Court acknowledges this [requirement of pleading more specifically for invalidity counterclaims] may place a burden on patent defendants, who will have to plead counterclaims in accordance with *Twombly* but will often be tasked with answering

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<sup>12</sup> The court disapproved of some other cases that had allowed minimal pleading of invalidity counterclaims because of local patent rules that required invalidity contentions to be filed shortly after pleadings. The court explained that local patent rules could not modify the pleading standard for counterclaims under the national rules. *Tyco Fire Prods.*, 777 F. Supp. 2d at 904 (citing FED. R. CIV. P. 83(a)(1)).

conclusory complaints of direct infringement. *Cf. Microsoft Corp.*, 741 F. Supp. 2d at 1159 (declining to apply *Twombly* to invalidity counterclaims because doing so “would be incongruous” in consideration of a patent plaintiff’s pleading burden). Form 18 permits as much, and courts, following Rule 84, have accepted that pleadings in accordance with Form 18 are sufficiently pled to withstand a motion to dismiss. *See McZeal*, 501 F.3d at 1356–57 (looking to Form 16 in evaluating the pleading requirements for direct patent infringement); *id.* at 1360 (Dyk, J., concurring in part and dissenting in part) (suggesting that the pleading in Form 16 would not provide sufficient notice under *Twombly*, but acknowledging that “we would be required to find that a bare allegation of literal infringement in accordance with Form 16 would be sufficient . . . to state a claim”).

As courts have acknowledged, “[i]t is not easy to reconcile Form 18 with the guidance of the Supreme Court in *Twombly* and *Iqbal*.” Nor is it easy to accept that the other forms pertaining to the pleading of claims would survive a motion to dismiss under *Twombly* and *Iqbal*. *See, e.g.*, FED. R. CIV. P., App. of Forms, Form 11 (outlining a three-paragraph complaint for negligence); *but see Twombly*, 550 U.S. at 565 n.10, 127 S. Ct. 1955 (suggesting that Form 9, the model form for a negligence pleading at the time, would suffice because a “defendant wishing to prepare an answer . . . would know what to answer”).

Put simply, the forms purporting to illustrate what level of pleading is required do not reflect the sea change of *Twombly* and *Iqbal*. Rule 84, however, instructs that the forms “suffice” such that pleaders who plead in accordance with the forms are subject to a safe harbor. This inconsistency between the Supreme Court’s interpretation of Rule 8(a) and the forms Rule 84 validates should be remedied: either by modifying or eliminating Rule 84 or by updating the forms to clearly comply with existing law.

*Id.* at 905 (footnotes and internal citations omitted).<sup>13</sup>

In another case, a court found a breach of contract complaint sufficient in part because the

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<sup>13</sup> The court noted: “The form demonstrating a negligence pleading has been changed since *Twombly* was decided. It previously included more specific details regarding how the plaintiff was injured and the type of injury sustained. The present iteration of this form, which appears at Form 11, omits these details.” *Tyco Fire Prods.*, 777 F. Supp. 2d at 905 n.12.

relevant form does not require much detail. *See Comfort Inn Oceanside v. Hertz Corp.*, No. 11-CV-1534 (JG)(JMA), 2011 WL 5238658, at \*7–8 (E.D.N.Y. Nov. 1, 2011) (noting that “[c]ourts have generally recognized that relatively simple allegations will suffice to plead a breach of contract claim even post-*Twombly* and *Iqbal*,” and that “[t]he relative simplicity of pleading a breach of contract is also evident from the model complaints included in the Appendix of Forms attached to the Federal Rules of Civil Procedure,” which suffice under Rule 84). The *Comfort Inn* court looked at Forms 10 and 17 as examples, and noted that they “require little more than a statement that, for example, the defendant promised to pay a certain amount by a certain date and has not paid the amount by that date, or that ‘the plaintiff tendered the purchase price and requested a conveyance of . . . land but the defendant refused to accept the money or make a conveyance.’” *Id.* at \*8 (internal citations omitted) (omission in original). The court stated that it need not address whether Rule 84 controlled because the forms’ content supported a holding that the complaint survived, but noted that “[m]any courts have recognized the tension between the Supreme Court’s interpretation of Rule 8(a) in *Iqbal* and *Twombly* and Rule 84’s provision that the form complaints are sufficient pleadings.” *Id.* at \*8 and n.11 (collecting cases). The court went further and noted that “[s]ome of the forms—such as the form negligence and patent infringement complaints—would plainly fail the *Iqbal/Twombly* standard as they consist entirely of legal conclusions.”<sup>14</sup> *Id.* at \*8 n.11. The court also noted that “neither *Twombly* nor *Iqbal* abrogated Rule 84’s provision that use of the forms is sufficient compliance with the Rules,” and that “[i]n attempting to reconcile Rule 84 with *Iqbal* and *Twombly*, many courts have upheld complaints modeled on the forms only if they plead the exact type of claim as those in the

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<sup>14</sup> The court did note that *Twombly* had suggested that the negligence complaint was adequate because of the simple fact pattern involved. *Comfort Inn*, 2011 WL 5238658, at \*8 n.11 (citing *Twombly*, 550 U.S. at 565 n.10).

forms.” *Id.*

### **III. Conclusion**

There is little reason to think that the case law validating the forms under Rule 84 would continue to be followed if Rule 84 is abrogated. The cases often reluctantly uphold forms because courts feel obligated to do so under Rule 84, and most courts would be unlikely to uphold them as automatically sufficient if Rule 84 no longer existed. With limited exceptions, where rules have been abrogated or amended, courts have usually declined to follow case law under the prior versions of the rules, and there is no reason to think courts would do otherwise here.

Courts have reached varying conclusions as to whether the pleading forms continue to suffice after *Twombly* and *Iqbal*, with most of the case law focusing on the form for a claim of patent infringement. Many of the courts that have continued to uphold the forms have done so with reluctance, stating that they are bound by Rule 84. If Rule 84 is abrogated, it is unlikely that the cases upholding the pleading forms after *Twombly* and *Iqbal* would continue to be followed, at least to the extent that they upheld the forms as automatically sufficient. If the forms continue to be available, either through the AO or otherwise, courts might still look to them, but it seems unlikely that they would feel bound to find them automatically sufficient in the absence of Rule 84, particularly if a committee note specified the reason for the abrogation and stated that the forms no longer had the official approval of the rules.

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## Pleading

Lower courts continue to develop responses to the invitation extended by the *Twombly* and *Iqbal* decisions to refine pleading practices and standards. Developing responses were closely monitored for several years, starting in 2007 with the *Twombly* decision. No reason for immediate action was found in studying reported opinions. Routine examination of reported decisions has been relaxed accordingly. All Committee members should remain alert for signs of distress that may indicate a need to consider possible rules amendments. Amendments might go directly to pleading standards, but they also might aim at the process for challenging the sufficiency of a pleading or extend to more explicit integrations of pleading motion practice with discovery.

The Federal Judicial Center study of pretrial dismissals remains ongoing. Its conclusion may well provide an occasion for deciding whether to move pleading practice forward for detailed consideration.

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# TAB 6

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## Rule 23 Subcommittee

The Supreme Court has several Rule 23 cases on its docket this Term. The Rule 23 Subcommittee is awaiting decisions in those cases to determine whether to revise the range of topics for first priority consideration. The current set of topics remains as reported to the November Advisory Committee meeting.

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# TAB 7

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## **EMERGING TOPICS**

Interested observers continue to provide suggestions for possible rules amendments. These suggestions ordinarily are held for consideration at irregular intervals as the pace of Committee work allows. But some may be advanced for earlier consideration, particularly when it seems useful to discover whether the collective experience of Committee members suggests reasons to advance a topic toward full development. The following topics are described for this purpose.

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# TAB 7A

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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.

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 Hedding; 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 incom-

petence; 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.

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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.

\* Hon. Louis H. Pollak, Senior Judge, United States District Court for the Eastern District

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.

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.<sup>1</sup> 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.<sup>2</sup>

[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.<sup>3</sup> 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

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

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.<sup>4</sup>

Federal courts encounter the issue of appointment of counsel more frequently in

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”).<sup>5</sup>

#### 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).<sup>6</sup>

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. Pinc-hak*, 294 F.3d 492, 499 (3d Cir.2002). Powell’s complaint easily met the threshold issue

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

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.<sup>7</sup> 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 health-care 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 Zaines, 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. Zaines’ 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.<sup>8</sup> 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.<sup>9</sup>

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.<sup>10</sup>



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

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.

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.

*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.

# TAB 7B

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*Dismissal by Stipulation: Rule 41(a)(1)(A)(ii)*

Rule 41(a)(1)(A)(ii) provides that "the plaintiff may dismiss an action without a court order by filing \* \* \* (ii) a stipulation of dismissal signed by all parties." Rule 41(a)(1)(B) provides that "[u]nless the \* \* \* stipulation provides otherwise, the dismissal is without prejudice." Nothing on the face of the rule authorizes the court to deny dismissal, or to order that the dismissal be with prejudice. The common run of decisions supports this conclusion:

A voluntary dismissal by stipulation under Rule 41(a)(1)(A)(ii) is effective immediately upon filing and does not require judicial approval. The district court does not have the power to condition a dismissal by stipulation. 9 Wright & Miller, Federal Practice & Procedure: Civil 3d, § 2363, pp. 448-450.

The attached order by Judge Frederick J. Martone reflects dissatisfaction with the prospect that the parties to an action may be able to disrupt the progress of a carefully managed case by an eleventh-hour stipulation to dismiss without prejudice. The dismissal may leave them free to resume the dispute in a new action, requiring wasteful duplication of the work that has gone into managing the case. And if nothing else, the dismissal may be a means of shirking a firm trial date that was set for the express purpose of forcing efficient preparation for trial or settlement.

The reasons that support absolute party control are traditional. The plaintiff need not have filed the action. The plaintiff is free to abandon it at any time – the court cannot insist that an unwilling plaintiff go to trial. So if the parties agree to settle the action, it is mooted; the court lacks authority to proceed. Protection of the defendant justifies the tight limits on the plaintiff's opportunity to dismiss unilaterally without prejudice reflected in Rule 41(a)(1). But if all parties agree that they are better off abandoning the action, even though they are not able to settle, the court should not be able to compel continuing litigation.

These reasons may be subject to reconsideration in an era of case management. Courts today often invest heavily in managing an action, and may rely on a firm trial date to support effective management. A court may well insist that the trial date must be observed unless the parties reach a firm settlement. If the parties represent that they have agreed on settlement in principle, but need time to resolve the final details, the court may order dismissal with prejudice subject to reinstatement if a full settlement has not been reached by a stated date. The question raised by this proposal is whether the court should have a still greater authority, authority to insist that the parties continue with this litigation, although all would prefer to dismiss without prejudice.

If amendment is desirable, the most obvious approach would be to amend Rule 41(a). The opportunity to dismiss without prejudice by stipulation of all parties could be made subject to court approval. (Likely it would not be wise to require court approval for a stipulation dismissing with prejudice.) It might be possible to provide a list of at least some of the factors that might be considered in deciding whether to approve, but the effort could easily misfire.

A less direct approach – which also could be seen as a more convoluted approach – would be to extend the Rule 16(b)(3)(B) list of elements that may be included in a scheduling order. The order might provide an end-date for stipulating to dismiss without prejudice.

If anything is done along these lines, it will be important to remember the recent consideration of "manufactured finality." The treatise quoted above mingles in its footnotes descriptions of cases that deal with attempts to achieve appealable final judgments by stipulations to dismiss. Unless this topic is to be revived, care should be taken to avoid any new provisions that might unexpectedly bear on it.

One important consideration must be informed by actual experience. How often are dismissals by stipulation, without prejudice, followed by new actions? When a new action follows, is it possible to salvage some or much of the work that went into the original action?

All advice is welcome.

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IN THE UNITED STATES DISTRICT COURT

7

FOR THE DISTRICT OF ARIZONA

8

9

Catherine Johnson,

)

No. CV 10-2690-PHX-FJM

10

Plaintiff,

)

**ORDER**

11

vs.

)

12

Wyeth LLC, Pfizer Inc., Wyeth  
Pharmaceuticals,

)

13

Defendant.

)

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The court has before it a "Stipulated Agreement of Voluntary Dismissal Without Prejudice" (doc. 144). It is signed by all the parties who have appeared and thus appears to satisfy Rule 41(a)(1)(A)(ii), Fed. R. Civ. P. which allows the parties to dismiss their case without a court order, subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute.

22

This action is quite ripe. Although the case was filed here on December 15, 2010 (and is thus nearly 19 months old), it was once part of an MDL and goes back to at least 2004, making it about 8 years old. See Order of April 19, 2011 at 1 (doc. 13). According to the parties, it is part of "the national hormone therapy litigation." Proposed Case Management Plan at 2 (doc. 16). The Judicial Panel on Multidistrict Litigation issued an order "remanding this action to this Court from the Eastern District of Arkansas." *Id.* See Order attached to Doc. 2.

28

1           We entered our Rule 16 Order on June 3, 2011 (doc. 25), and at this point, discovery  
2 has closed, the dispositive motion deadline has passed (and as of June 4, there has been a  
3 fully briefed motion for summary judgment pending), and the case is set for trial on a firm  
4 basis on September 18, 2012, with an estimated length of 18 days.

5           On June 13, 2012, the parties filed a notice that they settled the case "in principle" but  
6 needed to the end of the year to consummate it (doc. 140). They asked us to vacate our Rule  
7 16 Order. On June 20, we entered an order declining their request, advising them that  
8 settlement negotiations obviously do not constitute "good cause" within the meaning of Rule  
9 16(b)(4), Fed. R. Civ. P. to modify a Scheduling Order (doc. 141). The parties then filed a  
10 "Joint Motion for Telephonic Status Conference" to "clarify the settlement status . . . and .  
11 . . . answer any questions or concerns from the Court" (doc. 142). We then entered an order  
12 indicating that we had no questions or concerns and that unless the parties filed a true notice  
13 of settlement or a stipulation of dismissal, all deadlines remained in place (doc. 143). The  
14 Stipulation to Dismiss *without prejudice* followed three days later (doc. 144).

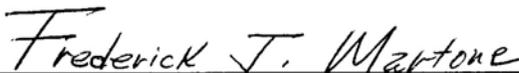
15           A stipulation to dismiss without prejudice means an action can be re-filed. There is  
16 a tension between the parties' near unilateral right to dismiss a case without prejudice at any  
17 time under Rule 41(a)(1)(A)(ii), and Rule 1 which requires that the Rules be "construed and  
18 administered to secure the just, speedy, and inexpensive determination of every action," Rule  
19 16 which requires comprehensive case management by the trial judge, Rule 41(b), which  
20 allows for dismissal with prejudice for lack of prosecution, and the Civil Justice Reform Act,  
21 28 U.S.C. §§ 471-82, which among other things requires a District Plan that adopts early and  
22 ongoing judicial control of the process and the setting of "early, firm trial dates, such that the  
23 trial is scheduled to occur within eighteen months after the filing of the complaint," absent  
24 unusual complexity. *Id.* § 473(a)(2)(B). This District adopted such a Plan. General Order  
25 98-29, dated Nov. 22, 1993. Voluntary dismissal without prejudice by stipulation is simply  
26 incompatible with all of this. The expiration of a statute of limitations will be no deterrent  
27 to parties who enter into a tolling agreement. Nevertheless, a stipulation of dismissal is  
28 usually automatic.

1 We are thus presented with two questions. Is the Civil Justice Reform Act an  
2 "applicable federal statute" within the meaning of Rule 41(a)(1)(A), such that a court order  
3 is required to dismiss? Second, is the stipulation of dismissal here "improper conduct" or  
4 "collusion" within the meaning of *United States v. Mercedes-Benz of North America, Inc.*,  
5 547 F. Supp. 399, 400 (N.D. Cal. 1982), such that the court has inherent power to reject it?

6 It is ORDERED that the parties shall file a Joint Memorandum addressed to these two  
7 issues, not to exceed 10 pages on or before July 16, 2012.

8 No matter what we do here, we think the JCUS Advisory Committee on Civil Rules  
9 should study this matter and consider whether Rule 41(a)(1)(A)(ii) should be amended to  
10 require that stipulations to dismiss after a certain point in the life of a case be with prejudice.  
11 Scarce judicial resources ought not to be made available to litigants more than once.

12 DATED this 5th day of July, 2012.

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14   
15 \_\_\_\_\_  
16 Frederick J. Martone  
17 United States District Judge  
18

19 cc: The Honorable David G. Campbell, Chair,  
20 JCUS Advisory Committee on Civil Rules  
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# TAB 7C

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### *Issues Referred by CACM*

As often happens, the Committee on Court Administration and Case Management has referred a number of issues to the rules committees for consideration of possible rules amendments. Three current sets of issues are briefly described here, supplemented by the materials from CACM.

Videoconference Hearings: Cf. Rule 43(a): The attached letter from Judge David B. Sentelle to Judge Julie A. Robinson suggests that the Committee on Court Administration and Case Management consider a suggestion by Judge William G. Young for the expanded use of videoconferencing in civil cases. The suggestion focuses on situations in which a judge in one district seeks to alleviate the pressures of overloaded dockets in another district. It appears that CACM will take up the suggestion. But Judge Sutton has suggested that the Civil Rules Committee may wish to add this topic to the agenda.

The most nearly relevant Rule is 43(a), which directs that testimony be taken in open court, but further provides: "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." At least two questions may be put of this rule. Suppose a judge of the District of Massachusetts agrees to help with work in a different district, whether within the First Circuit or in a different circuit. Is a videoconference based on witnesses and lawyers physically present in a courtroom in Philadelphia one that involves an "open court" in Philadelphia or an "open court" in Boston? If the open court is in Philadelphia, is the situation simply outside Rule 43(a)? Or if the open court is in Boston, is the "good cause" and "compelling circumstances" test automatically met? Should Rule 43(a) be revised to provide a clear answer, and perhaps a different standard to justify the practice?

A different set of questions arise from integrating any rule approach with the statutes that govern the places in which a district judge may exercise judicial authority. At least 28 U.S.C. §§ 141 and 292 address these questions. It seems likely that there is an established body of customary understanding of these statutes, and perhaps others, that should be taken into account if these questions are pursued further. And CACM may well be the best place to begin that inquiry.

CM/ECF Issues: Two issues are covered by a referral made on August 20, 2012. They grow out of development of the next generation CM/ECF system.

The first suggests consideration of a rules amendment "to allow an NEF (Notice of Electronic Filing) to constitute a certificate of service when the recipient is registered for electronic filing and has consented to receive notice electronically."

The second suggestion is to "explore creating a federal rule regarding electronic signatures and the retention of paper documents containing original signatures." Three alternatives are suggested; the preferred approach "is 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 signature would have the burden to prove invalidity.

Both of these proposals involve other sets of rules, not only the Civil Rules. Other e-filing issues also involve several rules committees. The "3 days are added" provision of Civil Rule 6(d) is an example that has been hanging fire for some time. It may be that the time has come to recommend establishing a joint subcommittee under the Standing Committee that explores these and other e-filing issues that have emerged since a joint subcommittee last explored other e-filing questions.

A referral made on January 16, 2013, raises a third CM/ECF issue. The next generation "will include a national database where courts may share information about restricted filers." Examples are prisoners subject to filing limitations under the Prisoner Litigation Reform Act and attorneys who have been subject to disciplinary action. The data base would be restricted from the public; only designated court users would be able to access it. The catch is that experience shows that pro se litigants frequently move. Each new address marks the filer as "new," preventing identification as a restricted filer. The proposed cure is consideration of an amendment to Civil Rule 4(a)(1)(C) that would require pro se filers to state not only name and address but also the last four digits of their social security numbers: "(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. (This might be improved by making greater drafting changes: "(C) state the name and address of the plaintiff's attorney or the name, address, and last four digits of the social-security number of an unrepresented plaintiff." It might be desirable to account also for plaintiffs that do not have a social-security number.)

**COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT  
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WASHINGTON, D.C. 20544**

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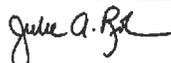
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August 20, 2012

To: Mark Kravitz, Chair, Judicial Conference Committee on Rules of Practice and Procedure

From: Julie A. Robinson, Chair, Judicial Conference Committee on Court Administration and Case Management 

RE: REFERRAL OF CM/ECF POLICY ISSUES TO THE RULES COMMITTEE

Dear Judge Kravitz:

I am writing to ask the Rules Committee to consider two recommendations for Rules changes that arose in our policy discussions regarding the Next Generation of the Case Management/Electronic Case Files (CM/ECF) system. As you know, our Committee has been handling policy issues relating to the development of the new CM/ECF system, including, when appropriate, referring issues to other Conference committees for their input. At our meeting in June, our Committee agreed to ask your Committee to consider the two issues presented below.

**Notice of Electronic Filing as Certificate of Service**

Currently, the CM/ECF system automatically sends a Notice of Electronic Filing (NEF) to a filer such as an attorney, each time a document is entered in CM/ECF. The NEF contains the case name and number, docket text, the names and email addresses of recipients as well as those not receiving electronic transmissions, and includes a unique identification code called an electronic document stamp. Since 2006, when the Judicial Conference first endorsed Model Local Rules for Electronic Case Filing, courts have rules that permit, but do not require, the acceptance of the NEF as a certificate of service. Some courts apply the model rule, which

permits the NEF to constitute a certificate of service, while others require a certificate of service as an attachment to a pleading or require litigants to file a certificate of service as a separate document.

Many outside users of the CM/ECF system, including federal agencies and attorneys practicing in multiple jurisdictions, have asked for more consistency in CM/ECF procedures. Specifically, the users have noted the impact of the lack of uniformity regarding certificate of service requirements, and that the NEF could be used to provide sufficient information to establish proof of service.

Our Committee endorsed the concept and asked your Committee to consider 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. Our subcommittee emphasized, however, that it does not expect that the NEF will serve as a certificate of service for litigants that are not registered for electronic filing or have not consented to electronic service.

#### **Retention of Records Requiring “Wet” Signatures of Third Parties**

Our Committee also requests your Committee explore creating a federal rule regarding electronic signatures and the retention of paper documents containing original signatures. Currently, courts’ local rules vary in their requirements to retain original paper documents bearing “wet” signatures. Some rules require retention until the end of the appeal period, others require retention until the applicable statute of limitations for perjury expires, and still others require retention in perpetuity (The Judicial Conference’s Model Local Rules, mentioned above, include a requirement that filers retain a paper document after electronic filing if the document contains an original signature). These varying practices have posed problems for attorneys that file in multiple districts, change law firms, and for law firms that merge. In addition, the Executive Branch has adopted procedures relying on an electronic signature as the original signature.

Our Committee suggests three alternative approaches. First (and our preferred approach) is a national rule specifying that an electronic signature in the CM/ECF system is *prima facie* evidence of a valid signature. Under this proposal, the burden would be placed on persons opposing the validity of the signature to prove with appropriate evidence that an electronic signature was not valid. The second approach would be to require the courts to retain copies of all originally-signed, paper documents that are electronically filed. This method addresses problems with law firms retaining such records, but would require a substantial amount of work for the courts.<sup>1</sup> A third alternative would be a policy option – our Committee could ask the

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<sup>1</sup> For example, over 1.7 million bankruptcy petitions are filed each year, each of which contains an original signature page that the courts would need to scan and retain.

Judicial Conference to specify the retention period for documents with wet signatures. Such a policy, however, would not address the problems for external users because of lack of uniformity in local rules, and would not encourage the reliance on electronic signatures.

I enclose the relevant papers presented to the subcommittee by Administrative Office staff on these issues, and a copy of our subcommittee's minutes which contain our recommendations on the requests. Thank you for your consideration of these issues. Our two Committees have worked on rules and policy issues related to the implementation of CM/ECF for the past decade, and I look forward to continuing this important work. If you have any questions, please do not hesitate to contact me.

Best regards,

A handwritten signature in black ink, appearing to read "Julie A. Robinson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Julie A. Robinson

Enclosures

cc: Noel Augustyn  
Peter McCabe  
Jonathan Rose  
Benjamin Robinson



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

DAVID BRYAN SENTELLE  
CHAIRMAN, EXECUTIVE COMMITTEE

(202) 216-7330  
(202) 273-0174 FAX  
david\_sentelle@cadc.uscourts.gov

January 14, 2013

Honorable Julie A. Robinson  
United States District Court  
Frank Carlson Federal Building and  
United States Courthouse  
444 Southeast Quincy Street, Room 405  
Topeka, KS 66683

Dear Judge Robinson:

I write on behalf of the Executive Committee to refer to the Committee on Court Administration and Case Management the enclosed letter that I received from Judge William G. Young (D. Mass.), which, among other things, suggests the expanded use of video conferencing technology in civil cases. The suggestion appears on page three, number 3:

3. Videoconferencing civil cases: Like many districts judges, I try and help out other courts by handling civil cases remotely through our videoconferencing facilities. This is a proven technology and it works wonders. Any district judge can remotely handle the pre-trial aspects of a variety of civil cases and even try jury waived cases via videoconference. This frees up the resident judges to address criminal matters and break log jams where massive summary judgment motions are slowing things down.

\* \* \* \*

The Executive Committee requests that your Committee, in consultation with the Committee on Intercircuit Assignments, the Committee on Judicial Resources, and the Committee on Rules of Practice and Procedure, review the suggestion and make the appropriate recommendation.

Sincerely,

David B. Sentelle

Enclosure

cc: Members, Executive Committee  
Honorable Frederick J. Motz  
Honorable Jeffrey S. Sutton  
Honorable Timothy M. Tymkovich



COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT  
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January 16, 2013

To: Jeffrey Sutton, Chair, Judicial Conference Committee on Rules of Practice and Procedure

From: Julie A. Robinson, Chair, Judicial Conference Committee on Court Administration and Case Management

RE: REFERRAL OF CM/ECF POLICY ISSUE TO THE RULES COMMITTEE

Dear Judge Sutton:

On behalf of our Committee, I am requesting that the Rules Committee consider a proposal to amend the Federal Rules of Civil Procedure to require unrepresented litigants to provide additional personal identifying information when filing a civil case. The recommendation arose in our policy discussions regarding the Next Generation of the Case Management/Electronic Case Files (CM/ECF) system. (As you know, our Committee has been making recommendations on policy issues relating to the development of the new CM/ECF system, including, when appropriate, referring issues to other Conference committees – including your Committee.)

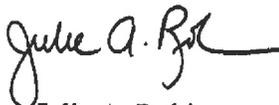
The Next Generation of CM/ECF system will include a national database where courts may share information about restricted filers, such as prisoners who are implicated by the filing restrictions under the Prisoner Litigation Reform Act (PLRA), and attorneys who have been subject to disciplinary action. Only designated court users would be able to access the database, which would be restricted from the public.

Currently, *pro se* filers are only required to provide their name and address. *See* Fed. R. Civ. P. 4(a)(1)(C) (requiring that the summons contain the “name and address of the plaintiff’s attorney or – if unrepresented – of the plaintiff”). The civil cover sheet that generally accompanies each complaint filed in district court also requires only the plaintiff’s name and city of residence.<sup>1</sup> Courts have noted that some restricted *pro se* litigants move frequently, and each time they file a case with a new address, they appear as a “new” filer in CM/ECF. In addition, if a restricted *pro se* filer uses an altered version of his or her name (e.g., a middle name in one filing, but not in a subsequent filing) CM/ECF currently records these filings as having originated from two different people, one for each name. Requiring additional personal data identifiers from *pro se* litigants could enable courts to better track restricted filers in their courts, and could help such tracking nationally.

In balancing the Committee’s concerns about privacy and the courts’ need to track *pro se* litigants, the Committee agreed that collecting one piece of additional information from *pro se* filers – the last four digits of their Social Security numbers – would help courts track restricted *pro se* filers without violating the Judiciary’s privacy policy. In addition, we were concerned that *pro se* litigants may become distrustful of the court if required to submit too much personal information not related to the case, and thus may not provide accurate information, particularly if they are restricted filers. Thus, our Committee endorsed the proposal and agreed to ask your Committee to consider amending Fed. R. Civ. P. 4(a)(1)(C) to require unrepresented litigants to provide courts with the last four digits of their social security numbers.

I enclose the relevant paper presented to our Next Generation CM/ECF subcommittee by Administrative Office staff on this issue. If you have any questions, please do not hesitate to contact me.

Best regards,



Julie A. Robinson

Enclosure

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<sup>1</sup> In contrast, bankruptcy courts collect social security numbers from all debtors, whether represented or *pro se*, as required by the Federal Rules of Bankruptcy Procedure.

# TAB 7D

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*Rule 62(b), (d): Security for Stays of Execution*

The Appellate Rules Committee has begun to consider Civil Rule 62. Their deliberations have not yet advanced to a point that warrants establishing a formal procedure for joint work, but it is useful to provide some advance notice of the possibility. A comprehensive description of possible topics is provided by the attached memorandum prepared by Professor Catherine Struve as Reporter for the Appellate Rules Committee. Not all of the topics described in the memorandum will advance for joint consideration.

The purpose of this notice is in part to discover whether Committee members have experiences that will help guide the initial decisions whether to take up any of these topics, and which topics seem most deserving if the project is to be developed. As often happens, identification of abstract shortcomings in a rule is less justification for amendment than identification of real problems that arise in application.

Among the questions that seem obviously intriguing on the face of Rule 62 are these: (1) With stated exceptions, Rule 62(a) provides an automatic stay for 14 days after judgment is entered. Rule 62(b) provides for stay of execution on order of the court and "[o]n appropriate terms for the opposing party's security," pending disposition of post-judgment motions under Rules 50, 52, 59, and 60. Motions under Rules 50, 52, and 59 may be made up to 28 days after judgment is entered. (Rule 60 is more flexible). What happens during the 14-day gap that may open between expiration of the automatic stay and filing a post-judgment motion? In November 2011 this Committee concluded that Rule 62(a) and (b) does not impliedly defeat the court's manifestly desirable authority to extend the Rule 62(a) stay, if need be by entering an independent stay, pending the filing of an anticipated post-judgment motion. If Rule 62 is taken up for other reasons, would it be desirable to make this conclusion explicit?

(2) Rules 62(a) and (b) allow a seamless transition from the automatic stay to a stay pending disposition of a post-judgment motion, at least if the motion is filed within the 14-day period prescribed by Rule 62(a). If a judgment is amended on the post-judgment motion, Rule 62(a) seems to provide a renewed 14-day stay; thereafter a stay must be obtained by filing a notice of appeal – in most cases up to 30 days after judgment – and winning approval of a supersedeas bond. Would it be useful to develop some more obvious way to maintain a stay throughout the period allowed for deciding whether to appeal?

(3) Discussion in the Appellate Rules Committee has suggested that experienced appeals lawyers address these questions by obtaining a single bond at the outset, covering both the period for post-judgment motions and any appeal that may be taken after that. Would it help to recognize this possibility in rule text?

## MEMORANDUM

**DATE:** August 29, 2012  
**TO:** Advisory Committee on Appellate Rules  
**FROM:** Catherine T. Struve, Reporter  
**RE:** Item No. 12-AP-D

At the Committee's spring 2012 meeting, Kevin Newsom suggested that it might be useful to consider the possibility of adopting amendments that would clarify practice under Appellate Rule 8 and Civil Rule 62 concerning procedures for appeal bonds.

Any treatment of this area of law and practice would require close coordination with the Civil Rules Committee. As an initial matter, it may be helpful to decide what topics warrant attention. This memo surveys some possible topics; my goal in this memo is not to treat any of them comprehensively, but rather to generate discussion of these and other possible questions. I have limited the scope of the memo to questions implicated by stays of damages judgments; stays of injunctions pose separate issues and are not addressed here.

Part I discusses bonds that secure stays of execution pending the disposition of post-judgment motions. Part II takes up the topic of appeal bonds. Part III notes a few issues that are common to both types of bonds.

### **I. Stays pending disposition of post-judgment motions**

A defendant who wishes to make a post-judgment motion and who wishes to avoid execution of the judgment pending the determination of that motion will need to seek a stay of that judgment. In Part I.A, I discuss questions relating to the timing of such stay motions; Part I.B discusses the terms on which a stay will be granted.

#### **A. Timing**

Rule 62(a)'s automatic stay covers the first 14 days after entry of the judgment. Before that automatic stay expires, the defendant should seek a further stay.

Civil Rule 62(b) provides:

On appropriate terms for the opposing party's security, the court may stay the

execution of a judgment – or any proceedings to enforce it – pending disposition of any of the following motions:

- (1) under Rule 50, for judgment as a matter of law;
- (2) under Rule 52(b), to amend the findings or for additional findings;
- (3) under Rule 59, for a new trial or to alter or amend a judgment; or
- (4) under Rule 60, for relief from a judgment or order.

Prior to the 2009 amendments to the Civil Rules, the length of the automatic stay and the time period for making post-judgment motions under Civil Rules 50, 52(b), and 59 were the same – namely, 10 days.<sup>1</sup> In 2009, the deadlines for those post-judgment motions were lengthened to 28 days, but the automatic stay period was changed to 14 days (a change that merely reflected the shift to a days-are-days approach to counting time).

Last fall, the Civil Rules Committee discussed a question posed by Judge Eric Melgren concerning the time period after expiration of the automatic stay and prior to the filing of a post-judgment motion:

.... The question is whether the court can stay execution more than 14 days after judgment is entered if there is no pending motion under Rule 50, 52, 59, or 60 but time remains to make such a motion.

Discussion began with the suggestion that the rule recognizes authority to grant a stay if a party seeks a stay before filing a motion under Rules 50, 52, 59, or 60, but represents that a timely motion will be filed. The time for Rule 50, 52, and 59 motions was extended to recognize that the former 10-day period was often inadequate to frame a motion, even as computed under the former rules that made a 10-day period equal to at least 14 calendar days. This opportunity should be preserved, without forcing an accelerated motion in order to avoid a gap after the automatic stay expires. This conclusion is easily supported by finding that a stay ordered before a promised motion is filed is one “pending disposition of” the motion. If there is concern about procedural maneuvering, the stay can readily be ordered to expire automatically if a timely motion is not filed under Rule 50, 52, 59, or 60.

Incidental discussion reflected the belief that it makes sense to have an automatic stay. The alternative of forcing an immediate motion could not always

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<sup>1</sup> Under the pre-2009 method for computing time, ten days always meant at least 14 days because intermediate weekends and holidays were skipped.

protect against immediate execution before the judgment debtor learns of the judgment and takes steps to seek a stay. There may be many good reasons for a stay, including both the prospect of post-judgment motions in the trial court and appeal. (Other provisions deal with stays once an appeal has been taken.) And forcing an immediate motion would generate hasty drafting and argument. On the other hand, there may be good reasons to deny a stay even when a post-judgment motion has been filed.

Committee members agreed that a court has authority to stay execution of its own judgment, and that judges will realize this power as an essential safeguard. Unless misunderstanding becomes common enough to show a real problem, there is no need to amend Rule 62. This proposal will be removed from the agenda.

Minutes of the Advisory Committee on Civil Rules 36-37 (November 7-8, 2011).

The fact that the court has authority to stay execution prior to the filing of a promised post-judgment motion does not entirely answer the question of optimal defense strategy. Such stays are discretionary, and the level of clarity with which the defendant can articulate the nature of its intended-but-not-yet-filed motion may influence the court's exercise of its discretion.

Another question that might arise – if the automatic stay expires prior to the entry of a Rule 62(b) stay – is whether the latter can operate retroactively and thus can undo enforcement efforts that occurred prior to the grant of the stay.<sup>2</sup>

## **B. Standard**

Rule 62(b)'s language indicates that the grant of a stay pending disposition of a post-judgment motion lies within the district court's discretion: the Rule uses the term "may" and refers to "appropriate terms for the opposing party's security."<sup>3</sup> The question, then, is how to

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<sup>2</sup> See *Newburgh/Six Mile Ltd. Partnership II v. Adlabs Films USA, Inc.*, 2010 WL 3582542, at \*5 (E.D.Mich. Sept. 10, 2010) (unreported decision) (after noting uncertainty in the caselaw and performing an equitable analysis, imposing stay retroactive to the date of the expiration of the automatic stay so that "[a]ll collection efforts thus far are nullified"). The analysis likely differs with respect to a stay under Civil Rule 62(d). See, e.g., *Phansalkar v. Andersen Weinroth & Co., L.P.*, 211 F.R.D. 197, 200-01 (S.D.N.Y. 2002) (noting variation in caselaw on potential retroactive effect of supersedeas bonds).

<sup>3</sup> Three districts' local rules invert the presumption set by Civil Rule 62(a) and (b) by providing that

[u]nless otherwise directed by the Court, all proceedings to enforce a judgment

define what constitutes appropriate terms and what factors should guide the district court's exercise of discretion.

Discussions of those questions appear more frequently in district-court caselaw than in appellate decisions or treatises. A decision by Judge Kravitz sums up relevant principles:

Rule 62(b) is intended to protect the prevailing party's interest in the judgment while preserving the status quo pending the disposition of post-trial motions.... Normally, the party seeking a stay under Rule 62(b) is required to post a bond sufficient to protect the prevailing party's interest in the judgment.... However, the Court may grant a stay without requiring the judgment debtor to post a bond if the judgment debtor can show that in the absence of standard security, the judgment creditor will be properly secured against the risk that the judgment debtor will be less able to satisfy the judgment after the disposition of the post-trial motions.<sup>4</sup>

As Judge Kravitz notes, an alternative to a bond may provide “appropriate ... security” under Rule 62(b); caselaw illustrates that such alternatives might include letters of credit, the use of cash or other property as collateral, and/or a commitment not to dissipate assets.<sup>5</sup> Some courts

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are stayed pending the disposition of the following motions:

- (a) new trial or to alter or amend a judgment made pursuant to Fed. R. Civ. P. 59;
- (b) relief from judgment or order made pursuant to Fed. R. Civ. P. 60;
- (c) judgment as a matter of law made pursuant to Fed. R. Civ. P. 50; or
- (d) to amend the findings or for additional findings made pursuant to Fed. R. Civ. P. 52(b).

E.D. Okla. Local Civil Rule 62.1; N.D. Okla. Local Civil Rule 62.1; W.D. Okla. Local Civil Rule 62.1.

<sup>4</sup> *Lawyers Title Ins. Corp. v. Singer*, 2011 WL 1827268, at \*1 (D. Conn. March 7, 2011) (unreported decision).

<sup>5</sup> *See, e.g., Newburgh/Six Mile Ltd. Partnership II*, 2010 WL 3582542, at \*1, \*3 (granting stay based on provision of an “irrevocable letter of credit”); *Slip N' Slide Records, Inc. v. Teevee Toons, Inc.*, 2007 WL 1489810, at \*3 (S.D. Fla. May 18, 2007) (unpublished decision) (“To preserve the status quo in the case, and taking into account TVT's financial condition, the Court will require the pledge not to dissipate assets *in addition* to the posting as security of 100% of the compensatory damage portion of the judgment, \$2,279,200. That security can be in the form of a surety bond, the posting of cash in escrow, or a secured pledge of assets that are not

may accord special treatment to governmental defendants.<sup>6</sup>

## **II. Stays pending appeal**

Rules and cases concerning supersedeas bonds address a number of issues. Part II.A discusses the amount of the supersedeas bond, while Part II.B discusses the possibility of alternatives to a surety bond. Part II.C discusses authorities that treat governmental appellants specially. Part II.D considers the division of authority, with respect to supersedeas bonds, between the judge and the district clerk. Part II.E notes a circuit split concerning whether an appeal by the judgment winner permits the judgment debtor to obtain a stay of execution without a supersedeas bond. Part II.F observes that the Rules do not address questions concerning the terms or interpretation of a surety bond.

### **A. Amount of supersedeas bond**

With respect to money judgments, Civil Rule 62(d) provides that “[i]f an appeal is taken, the appellant may obtain a stay by supersedeas bond.” Rule 62(d) does not specify the amount of the bond, but that question has been addressed both in caselaw and in the local rules of some district courts. In Part II.A.1, I survey those authorities. Part II.A.2 makes a brief comparison to state laws concerning supersedeas bonds.

#### **1. Federal caselaw and rules**

Ordinarily, to supersede a federal-court damages judgment, the supersedeas bond must cover the full amount of the judgment. *See Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1559 (10th Cir. 1996). However, the appellant may be able to convince the court to approve a lower amount:

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already encumbered.”); *Gallatin Fuels v. Westchester Fire Ins. Co.*, 2006 WL 952203, at \*2 (W.D. Pa. April 12, 2006) (unreported decision) (“In deciding whether to order an unsecured stay, the court should consider the movant's justification for granting a stay without security, as well as the movant's financial position, including whether the movant has shown whether posting a bond or otherwise providing adequate security is impossible or impractical.”), *underlying judgment aff'd in part & rev'd in part on other grounds*, 244 Fed. Appx. 424 (3d Cir. 2007) (unpublished decision).

<sup>6</sup> *See, e.g., Johnston v. School District of Philadelphia*, 2006 WL 563003, at \*1 (E.D. Pa. March 7, 2006) (unreported decision) (staying monetary portion of judgment against school district without requiring a bond); *United States ex rel. Garibaldi v. Orleans Parish School Bd.*, 1998 WL 774172, at \*1 (E.D. La. Oct. 30, 1998) (unreported decision) (citing state law in support of determination that defendant school board “is not required to post bond pending the post-trial motions”).

The purpose of the supersedeas bond is to secure the appellee from loss resulting from the stay of execution. Because the stay operates for the appellant's benefit and deprives the appellee of the immediate benefits of his judgment, a full supersedeas bond should be the requirement in normal circumstances, ... such as where there is some reasonable likelihood of the judgment debtor's inability or unwillingness to satisfy the judgment in full upon ultimate disposition of the case and where posting adequate security is practicable. In unusual circumstances, however, the district court in its discretion may order partially secured or unsecured stays if they do not unduly endanger the judgment creditor's interest in ultimate recovery.

*Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n*, 636 F.2d 755, 760-61 (D.C. Cir. 1980). The Seventh Circuit has reasoned “that an inflexible requirement of a bond would be inappropriate in two sorts of case: where the defendant's ability to pay the judgment is so plain that the cost of the bond would be a waste of money; and – the opposite case, one of increasing importance in an age of titanic damage judgments – where the requirement would put the defendant's other creditors in undue jeopardy.” *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 786 F.2d 794, 796 (7th Cir. 1986). The caselaw on this topic, however, is hardly uniform.<sup>7</sup>

Local rules addressing the amount of the bond vary. Some courts' rules set a presumptive amount for the bond; such rules provide that, unless the court otherwise orders, the bond must be a particular percentage of the judgment (with percentages ranging from 110 to 125 percent – or, in one case, 150 percent for small judgments).<sup>8</sup> One court's local rules set the

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<sup>7</sup> See David M. Axelrad & Peder K. Batalden, *Staying Enforcement of a Money Judgment Pending Appeal: An Overview*, 76 DEF. COUNS. J. 140, 144 (2009) (“[M]ost courts take a much harder line, generally rejecting unsecured stays that a defendant requests simply because he cannot post a bond or provide other security.”); JOSEPH M. McLAUGHLIN, McLAUGHLIN ON CLASS ACTIONS § 7:19 (listing factors considered by courts in deciding whether to relax “the traditional bond requirements”); Edward Mullins & Annette C. Escobar, *Staying a Money Judgment in Federal Court Without Posting a Supersedeas Bond*, 77-DEC FLA. B.J. 45, 45 (2003) (“[T]he general consensus is that, although the posting of a supersedeas bond guarantees the appellant a stay ‘as a matter of right,’ the discretion to grant or deny a stay in the absence of a bond always belongs to the trial court.... While this is the predominant view, some circuits have yet to declare an official position.”).

<sup>8</sup> See E.D. Cal. General Rule 151(d) (125 percent); S.D. Fl. General Rule 62.1(a) (110 percent); D. Kan. Rule 62.2 (125 percent); E.D. La. Local Civil Rule 62.2 (120 percent); M.D. La. Local Civil Rule 62.2 (120 percent); W.D. La. Local Civil Rule 62.2 (120 percent); D. Maine Civil Rule 65.1(c) (110 percent, plus \$ 500 “to cover costs”); D. Md. Civil Rule 110.1(a) (120 percent, plus \$ 500 “to cover costs on appeal”); D. Mass. Rule 62.2 (110 percent, plus \$ 500 “to cover costs”); N.D.N.Y. Local Rule 67.1(d) (111 percent, “plus \$250 to cover costs”); D.R.I.

presumptive bond amount at the amount of the judgment plus a year's worth of interest and a set amount for costs.<sup>9</sup> Some other local rules specify the types of items that the bond must cover (such as interest and costs) but do not specify amounts or a percentage of the judgment.<sup>10</sup>

## 2. A comparison to state laws concerning supersedeas bonds

A brief comparison to state-court practice concerning supersedeas bonds may be valuable as context. Prior to about the year 2000, state laws appear to have followed two approaches; some states flatly required a supersedeas bond in the full amount of the judgment, while other states gave the court discretion to approve a smaller bond or an alternative type of security.<sup>11</sup> Defendants have decried the hardship posed by the full-amount approach in cases involving enormous damages awards, and these criticisms have led to changes in the laws of many states.

The facts of the famous Texaco-Pennzoil dispute illustrate that, where a monetary judgment is huge, there is a need for flexibility in the determination of the bond amount. Douglas Laycock has summarized Texaco's argument in that litigation:

Texaco's claim ... ran as follows: The Texas trial court entered judgment against Texaco for more than \$11 billion – \$10.5 billion plus interest. Pennzoil could begin executing on that judgment thirty days after its entry, unless Texaco filed a supersedeas bond in the full amount of the judgment. It was impossible for Texaco to file an \$11 billion bond. Consequently, Texaco claimed that the bond requirement would result in a forfeiture of its right to appeal. Moreover, the bond was unnecessary and served no purpose, because Texaco had a net worth of \$23

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Local Civil Rule 62 (110 percent, “plus an amount established by law or directed by the Court to cover costs”); D.S.C. Local Civil Rule 62.01(A) (“150% of the amount of the judgment if the judgment does not exceed ten thousand dollars (\$10,000) or 125% if the judgment exceeds ten thousand dollars (\$10,000)”); N.D. Tex. Local Civil Rule 62.1 (120 percent “plus \$250.00 to cover costs”); E.D. Tex. Local Civil Rule 62(a) (same); E.D. Wis. Civil Local Rule 62(a) (115 percent “plus \$500.00 to cover costs”).

<sup>9</sup> See N.D. Ill. Local Rule 62.1 (setting presumptive amount of bond at “the judgment plus one year's interest at the rate provided in 28 U.S.C. § 1961, plus \$500 to cover costs,” and noting that any party can “seek timely judicial determination of a higher or lower amount”).

<sup>10</sup> See D.N.H. Civil Rule 62.1 (bond “shall be in the amount of the judgment, plus interest at a rate consistent with 28 U.S.C. § 1961(a), plus an amount to be set by the court to cover costs and any award of damages for delay”); D.N.M. Local Civil Rule 65.1(d)(1) (“The amount of a supersedeas bond must cover the judgment, interest and allowable costs. Interest will be computed at the current rate of United States Treasury obligations.”).

<sup>11</sup> See Doug Rendleman, *A Cap on the Defendant's Appeal Bond?: Punitive Damages Tort Reform*, 39 AKRON L. REV. 1089, 1099-1101 (2006).

billion and a liquidation value of \$22 billion. Thus, Texaco could pay the judgment, but it could not post a bond. Because the bond requirement would deprive Texaco of its appeal without benefitting Pennzoil, the bond requirement was arbitrary, irrational, and a violation of the due process and equal protection clauses.<sup>12</sup>

Those arguments were sufficiently persuasive that the Second Circuit affirmed a preliminary injunction restraining enforcement of the Texas state-court judgment (after Texaco had posted \$ 1 billion worth of security); the Supreme Court, reversing on abstention grounds, did not reach the merits of the challenge to the Texas bond requirement. *See Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1136, 1141, 1145, 1157 (2d Cir. 1986) (reasoning that “the automatic enforcement of the Texas lien and bond requirements against Texaco's property to the extent of \$12 billion lacks any rational basis, since it would destroy Texaco and render its right to appeal in Texas an exercise in futility”), *reversed*, *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10 (1987) (holding that federal courts should have abstained, under *Younger v. Harris*, 401 U.S. 37 (1971), from enjoining enforcement of Texas state-court judgment). Ultimately, Texaco reached a settlement with Pennzoil after filing for bankruptcy.<sup>13</sup>

Concerns about state-law appeal-bond requirements have made their way into the debate over tort reform. A recent study by Doug Rendleman describes two “waves” of state legislation concerning appeal bonds. “[T]he first wave of appeal-bond tort reform originated in the ‘tobacco’ states, largely in response to huge punitive damages in a jury award in smokers’ litigation in Florida.... [and] provided relief to a judgment debtor by limiting the amount of an appeal bond that could be required for the punitive damages part of the award.”<sup>14</sup> Professor Rendleman describes a “second wave” of legislation that encompassed additional states: “This second-wave development included (1) the widespread adoption of the appeal bond caps in states other than the ‘tobacco’ states; and (2) the expansion of areas of coverage under the statutes.”<sup>15</sup> The American Tort Reform Association, which “supports appeal bond reform legislation that limits the size of an appeal bond when a company is not liquidating its assets or attempting to flee from justice,” has compiled a list of state legislation relating to appeal bonds; I

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<sup>12</sup> Douglas Laycock, *The Remedies Issues: Compensatory Damages, Specific Performance, Punitive Damages, Supersedeas Bonds, and Abstention*, 9 REV. LITIG. 473, 501-02 (1990) (footnotes omitted).

<sup>13</sup> *See* Rendleman, *supra* note 11, at 1106 (“In the shadow of the bankruptcy court's automatic stay, Texaco and Pennzoil settled for about 20% of the jury verdict while Texaco paid its other creditors in full.”).

<sup>14</sup> Rendleman, *supra* note 11, at 1108.

<sup>15</sup> *Id.* at 1116.

enclose a copy.<sup>16</sup>

As discussed in Part II.A.1 of this memo, Civil Rule 62(d) does not specify the size of the bond required in order to supersede a federal-court money judgment, but the federal caselaw commences with a presumption that the bond will equal the amount of the judgment (plus, perhaps, an allowance for interest and costs), and recognizes the court's discretion to stay execution based on a lesser amount or alternative form of security when circumstances warrant. An interesting question, which I leave untouched in this memo due to space and time constraints, is the extent (if any) to which a state-law cap on appeal bonds would operate in a federal diversity suit.<sup>17</sup>

## **B. Alternative forms of security**

Courts are sometimes willing to approve a stay on the basis of an alternative to a surety bond, but the judgment debtor will have the burden of convincing the court that such an alternative is needed and appropriate.<sup>18</sup> Some local district court rules authorize the use of other

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<sup>16</sup> The list is available online at <http://www.atra.org/issues/appeal-bond-reform> (last visited August 18, 2012).

<sup>17</sup> Compare, e.g., *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 2, 7 (1987) (holding that Appellate Rule 38's discretionary standard for sanctions for frivolous appeals "occupie[d] the ... field" and prevented the application in a diversity case of "a state statute that imposes a fixed penalty on appellants who obtain stays of judgment pending unsuccessful appeals"), with *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 437-38 & n.22 (1996) (holding that when assessing a Civil Rule 59 motion for a new trial on grounds of excessiveness of a damages award on a claim under New York state law, the court should apply New York state law concerning the standard for excessiveness).

<sup>18</sup> The Fifth Circuit has sketched the following examples:

If a judgment debtor objectively demonstrates a present financial ability to facilely respond to a money judgment and presents to the court a financially secure plan for maintaining that same degree of solvency during the period of an appeal, the court may then exercise a discretion to substitute some form of guaranty of judgment responsibility for the usual supersedeas bond. Contrariwise, if the judgment debtor's present financial condition is such that the posting of a full bond would impose an undue financial burden, the court similarly is free to exercise a discretion to fashion some other arrangement for substitute security through an appropriate restraint on the judgment debtor's financial dealings, which would furnish equal protection to the judgment creditor.

*Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979).

measures in lieu of a surety bond. Such measures include the deposit with the court of cash or federal government obligations<sup>19</sup> or the encumbrance of real or personal property,<sup>20</sup> or the provision of a letter of credit.<sup>21</sup> Some rules expressly disallow certain forms of security.<sup>22</sup>

As a practical matter, if it is possible to reach agreement with the judgment winner concerning the nature and amount of security, that will address the issue. Some local rules include a general provision by which the parties can employ a stipulation in lieu of a supersedeas bond.<sup>23</sup>

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<sup>19</sup> See E.D. Cal. General Rule 151(h) (“lawful money or negotiable bonds of the United States”); N.D. Ill. Local Rule 65.1(b)(1) (“cash or obligations of the United States in the amount of the bond”); E.D. La. Local Civil Rule 65.1.1 (cash or U.S. government obligation); M.D. La. Local Civil Rule 65.1.1 (same); W.D. La. Local Civil Rule 65.1.1 (same); D. Mass. Rule 67.1(c)(1) (cash or U.S. government obligations); W.D. Mich. Local Civil Rule 65.1 (cash); N.D.N.Y. Local Rule 65.1.1(b) (“cash or government bonds”); E.D. Okla. Local Civil Rule 62.2(d) (cash); N.D. Okla. Local Civil Rule 62.2(d) (cash); W.D. Okla. Local Civil Rule 62.2(d) (“lawful money or negotiable bonds of the United States”); D.R.I. Local Civil Rule 65.1(a)(1) (“cash or obligations of the United States”).

<sup>20</sup> See E.D. Cal. General Rule 151(i) (“If personal property is provided as security, it shall be accompanied by a security agreement and a financing statement, executed in conformity with the California Commercial Code. If real property is provided as security, a trust deed naming the Clerk as beneficiary and describing the property shall be deposited with the Clerk.”); *id.* Rule 151(j) (requiring “[a]ffidavit of [o]wnership”).

<sup>21</sup> See N.D. Ill. Local Rule 65.1(b)(4) (“[A]n unconditional letter of credit is an approved form of security and shall be submitted on LR65.1 Form of Letter of Credit, or on a form agreed to by the parties.”).

<sup>22</sup> See E.D. Okla. Local Civil Rule 62.2(h) (“This Court will not accept real estate as security.”); N.D. Okla. Local Civil Rule 62.2(h) (same).

<sup>23</sup> See E.D. La. Local Civil Rule 65.1.1 (setting surety requirement for bonds and providing that “[b]y stipulation of the parties or order of the court, some other form of surety [may] be posted”); M.D. La. Local Civil Rule 65.1.1 (setting surety requirement for bonds and stating that “[o]nly by stipulation of the parties or by order of the court may some other form of surety be permitted”); W.D. La. Local Civil Rule 65.1.1 (same); D.N.H. Civil Rule 62.1 (The parties may waive the supersedeas bond by stipulation without order of the court.”); N.D. Tex. Local Civil Rule 62.1 (“The parties may waive the requirement of a supersedeas bond by stipulation.”); E.D. Tex. Local Civil Rule 62(a) (same); E.D. Va. Local Civil Rule 62(B) (“In lieu of any supersedeas bond, the parties may stipulate with respect to any agreement or undertaking.... The prevailing party in the District Court should seriously consider this subdivision as, in the event of a reversal, the premium of any bond will be taxed as a part of the costs. All such stipulations must be approved by the Court and filed in the record.”).

### C. Exemption of some governmental litigants

Civil Rule 62(e) provides that “[t]he court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government.” Local rules in some federal districts extend a similar exemption to certain other government litigants.<sup>24</sup>

### D. Authority of the clerk

Civil Rule 62(d) does not specify whether a supersedeas bond requires a judge’s approval or whether the Clerk’s approval suffices. *See* Civil Rule 62(d) (providing that “[t]he stay takes effect when the court approves the bond”). Some local district court rules authorize the clerk to approve supersedeas bonds; sometimes these rules provide that to qualify for approval by the clerk, the bond must conform to certain default requirements.<sup>25</sup>

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<sup>24</sup> *See* D. Md. Civil Rule 110.1(b) (“Unless otherwise ordered by the Court, the state of Maryland, any of its political subdivisions, and any agents thereof shall not be required to post a supersedeas or appeal bond.”); D.N.M. Local Civil Rule 65.1(d)(2) (“The United States, any state, or any of their political subdivisions, officers or agents need not post a supersedeas bond or other undertaking to secure payment of costs on appeal.”); E.D. Va. Local Civil Rule 62(A) (“The Commonwealth of Virginia, or any political subdivision or any office or agent thereof, shall not be required, unless otherwise ordered by the Court, to post a supersedeas bond or other undertaking which includes security for the payment of costs on appeal.”).

<sup>25</sup> *See* S.D. Cal. Civil Local Rule 65.1.2(f)(1) (“If eligible under Civil Local Rule 65.1.2, the bond may be approved and filed by the clerk.”); *id.* Rule 65.1.2(f)(2) (“The court must determine objections to the form of the bond or sufficiency of the surety.”); D. Idaho Local Civil Rule 62.2(a) (“If eligible under Dist. Idaho Loc. Civ. R. 67.1, the bond may be approved and filed by the Clerk.”); *id.* Rule 62.2(b) (“The Court will determine objections to the form of the bond or sufficiency of the surety.”); N.D. Ill. Local Rule 62.1 (“If in conformance with LR65.1, the bond may be approved by the clerk.”); D. Maine Civil Rule 65.1(a) (“The Clerk is authorized to approve the form of, and the sureties on, all bonds and undertakings required in any proceeding in this Court and approve any other security offered in lieu of sureties as provided by law; but the Clerk’s action may be suspended or altered or rescinded by the Court upon cause shown.”); D. Mass Rule 67.1(f) (“Except as otherwise provided by law, the Clerk of Court may approve a bond in the amount fixed by the court or by statute or rule, and secured in the manner provided by subsections (c)(1) or (2) [i.e., with cash, U.S. government obligations, or a corporate surety].”); D.R.I. Local Civil Rule 65.1(e) (“Except as otherwise provided by law, the Clerk may approve a bond the amount of which has been fixed by the Court or by statute or rule and which is secured in the manner provided by subsections (a)(1)-(a)(3) of this Rule.”); D.S.C. Local Civil Rule 62.01 (“The approval of the supersedeas bond by the Clerk of Court, unless contested by the opposing party, shall constitute a stay of the judgment when the judgment is for the payment of money only ....”); E.D. Wis. Civil Local Rule 62(a) (“If eligible under Civil L.R. 77(b) [which

### **E. Effect of appeal by judgment winner**

There appears to be a lopsided circuit split concerning the effect of an appeal by a judgment winner on the judgment winner's ability to execute on the judgment. *Compare Tennessee Valley Authority v. Atlas Mach. & Iron Works, Inc.*, 803 F.2d 794, 797 (4th Cir. 1986) (stating in dictum that "where the prevailing party is the first to take an appeal, no supersedeas bond can be required of the losing party when it subsequently files its own appeal, because the execution of the judgment has already been superseded by the prevailing party's appeal"), *with BASF Corp. v. Old World Trading Co.*, 979 F.2d 615, 617 (7th Cir. 1992) ("[A] prevailing party's appeal suspends enforcement of the judgment only when the theory of the appeal is inconsistent with enforcement in the interim."); *Enserch Corp. v. Shand Morahan & Co., Inc.*, 918 F.2d 462, 464 (5th Cir. 1990) (reasoning that "a lower court judgment may be suspended without bond when the relief sought by the prevailing party on appeal is inconsistent with enforcement of the lower court's judgment"); *Trustmark Ins. Co. v. Gallucci*, 193 F.3d 558, 559 (1st Cir. 1999) (following *BASF Corp.*).

### **F. The terms and interpretation of the surety bond**

The national Rules have nothing to say about the terms or interpretation of the surety bond.<sup>26</sup> "No federal statute or provision of the Federal Rules of Civil Procedure or the Federal Rules of Appellate Procedure defines the conditions that must occur to trigger an appellant's obligation under a supersedeas bond.... Instead, the extent of the appellant's liability is governed by the terms of the bond itself." *Atlas Machine*, 803 F.2d at 798. The Restatement (First) of Security addressed various questions relating to appeal bonds. *See* Restatement (First) of Security, §§ 189-93 (1941). The recent Restatement (Third) of Suretyship and Guaranty does not give specific treatment to appeal bonds; rather, it treats such bonds under the general topic of "legally mandated bonds." *See* Restatement (Third) of Suretyship & Guaranty § 71 (1996) cmt. d.

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refers to bonds "of corporate sureties holding certificates of authority from the Secretary of the Treasury"], the supersedeas bond may be approved by the Clerk of Court."). *Compare* D. Idaho Civil Rule 65.1.2(b) ("All personal surety bonds must be presented to the judge for approval.").

<sup>26</sup> Such issues are sometimes addressed in local rules. *See, e.g.*, N.D. Ill. Local Rule 62.1 ("The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award.").

### **III. Issues common to stays pending disposition of post-judgment motions and stays pending appeal**

As I noted in Parts I and II, stays of execution pending post-judgment motions and stays of execution pending appeal pose some distinct issues and are sometimes treated separately in the rules and caselaw. However, those two types of stays also share some commonalities. This section briefly surveys three of the issues that appear to be treated similarly as to both types of stay. Part III.A discusses requirements for sureties. Part III.B considers the possibility that a court will afford the judgment debtor an additional grace period during which to get the necessary bond in place. Part III.C notes Civil Rule 62(f)'s incorporation, under certain circumstances, of state law concerning stays of execution.

#### **A. Sureties**

A number of local district court rules require that corporate sureties comply with federal-law and/or state-law requirements for sureties.<sup>27</sup> Some local rules disqualify (or presumptively disqualify) certain groups of people – such as lawyers or court personnel – from serving as

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<sup>27</sup> See E.D. Cal. General Rule 151(f) (requiring “compliance with the provisions of 31 U.S.C. §§ 9304-06”); S.D. Cal. Civil Local Rule 65.1.2(b) (requiring authorization under either 31 U.S.C. §§ 9301-9306 or California state law); D. Idaho Civil Rule 65.1.2(a)(2)(A) (requiring authorization under either federal or Idaho state law); E.D. La. Local Civil Rule 65.1.1 (one option to secure a bond is “a corporation authorized by the Secretary of the Treasury of the United States to act as surety on official bonds, pursuant to 31 U.S.C. 9303-9309”); M.D. La. Local Civil Rule 65.1.1 (same); W.D. La. Local Civil Rule 65.1.1 (same); N.D. Ill. Local Rule 65.1(b)(2) (one option for securing a bond is an undertaking by “a corporate surety holding a certificate of authority from the Secretary of the Treasury”); W.D. Mich. Local Civil Rule 65.1 (one acceptable type of surety is “a surety company approved by the United States Department of Treasury”); D.N.M. Local Civil Rule 65.1(c) (“A surety company must be duly qualified to conduct business in New Mexico and hold a certificate of authority from the United States Secretary of the Treasury.”); E.D. Okla. Local Civil Rule 62.2(c) (requiring, *inter alia*, “compliance with the provisions of 31 U.S.C. §§ 9301-09”); N.D. Okla. Local Civil Rule 62.2(c) (same); W.D. Okla. Local Civil Rule 62.2(c) (same); D.R.I. Local Civil Rule 65.1(a)(2) (security can be provided by “the guaranty of a company or corporation holding a certificate of authority from the Secretary of the Treasury pursuant to 31 U.S.C. § 9304 et seq.”); E.D. Tex. Local Civil Rule 62(a) (“The bond shall: (1) confirm that the insurance company is on the Treasury Department's list of certified bond companies, unless the court orders otherwise (a link to this list may be found on the court's website); and (2) confirm the underwriting limitation.”); E.D. Va. Local Civil Rule 65(A)(2) (listing, among possible sources of security, “a corporate surety doing business in Virginia and holding a certificate of authority from the Secretary of the Treasury”).

personal sureties,<sup>28</sup> or impose other requirements for personal sureties.<sup>29</sup> Other surety-related

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<sup>28</sup> See E.D. Cal. General Rule 151(g) (“No Clerk, Marshal or deputy marshal, member of the Bar, or other officer or employee of the Court will be accepted as surety in this Court, absent express Court approval.”); S.D. Cal. Civil Local Rule 65.1.2(c) (“No clerk, marshal or other employee of the court, nor any member of the bar representing a party in the particular action or proceeding will be accepted as surety on any bond ....”); D. Idaho Civil Rule 65.1.2(a)(3) (“No clerk, marshal, or other employee of the Court nor any member of the bar representing a party in the particular action or proceeding, shall be accepted as surety on any bond or other undertaking in any action or proceeding in this Court.”); N.D. Ill. Local Rule 65.1(a) (“No member of the bar nor any officer or employee of this Court shall act as surety in any action or proceeding in this court.”); E.D. La. Local Civil Rule 65.1.2 (“No clerk, marshal, member of the bar, or other officer of this court may qualify as surety on any bond or undertaking in any action or proceeding in this court.”); M.D. La. Local Civil Rule 65.1.2 (“No clerk, marshal, member of the bar, or other officer of this court will be accepted as surety on any bond or undertaking in any action or proceeding in this court.”); W.D. La. Local Civil Rule 65.1.2 (same); D. Maine Civil Rule 65.1(b) (“No Clerk, Marshal, member of the bar, or other officer of this Court shall be approved as surety on any bond or undertaking.”); D. Mass. Rule 67.1(a) (“No judge, clerk, marshal, member of the bar or other officer or employee of the court may be surety or guarantor of any bond or undertaking in any proceeding in this court.”); W.D. Mich. Local Civil Rule 65.1 (“Attorneys or other officers of this Court shall not serve as sureties.”); D.N.M. Local Civil Rule 65.1(a) (“An attorney may not act as a surety for any cost or bond in a case where the attorney has entered an appearance.”); N.D.N.Y. Local Rule 65.1.1(d) (“Members of the bar, administrative officers or employees of this Court, the Marshal, or the Marshal's deputies or assistants shall not act as sureties in any suit, action or proceeding pending in this Court.”); E.D. Okla. Local Civil Rule 62.2(g) (“Unless a party to the action, no clerk, marshal, member of the bar, or other officer of this Court will be accepted as surety, either directly or indirectly, on any bond or undertaking in any action or proceeding in this Court.”); N.D. Okla. Local Civil Rule 62.2(g) (same); W.D. Okla. Local Civil Rule 62.2(g) (same); D.R.I. Local Civil Rule 65.1(c) (“No member of the bar or officer or employee of the Court may be surety or guarantor of any bond or undertaking in any proceeding in this Court.”); E.D. Tex. Local Civil Rule 65.1(a) (“No attorney, clerk, or marshal, nor the deputies of any clerk or marshal shall be received as security on any cost, bail, attachment, forthcoming or replevy bond, without written permission of a judge of this court.”); E.D. Va. Local Civil Rule 65(B) (“Members of the bar, administrative officers or employees of this Court, and the United States Marshal, his deputies or assistants, shall not act as a surety in any civil action. A member of the bar may execute a bond as attorney-in-fact upon presenting a properly executed power of attorney.”).

<sup>29</sup> See S.D. Cal. Civil Local Rule 65.1.2(b) (if bond is to be secured by personal surety, requiring that the sureties be “two individual residents of the district, each of whom owns real or personal property within the district of value sufficient to justify the full amount of the suretyship”); D. Idaho Civil Rule 65.1.2(a)(2)(A)(iii) (security can be provided by, inter alios, “two individual residents of the District, each of whom owns real or personal property within the

issues are addressed in caselaw.<sup>30</sup>

## **B. Stays to permit time to obtain a bond**

One district court has a local rule that presumptively extends the automatic stay for an additional period of time (upon the filing of a post-judgment motion or a notice of appeal) to enable the judgment loser to put in place a supersedeas bond.<sup>31</sup> Even absent such a local rule,

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District of sufficient equity value to justify twice the amount of the bond”); N.D. Ill. Local Rule 65.1(b)(3) (one option for securing a bond is an “undertaking or guaranty of two individual residents of the Northern District of Illinois, provided that each individual surety shall file an affidavit of justification” showing, inter alia, ownership of property within the district “valued at no less than twice the amount of the bond”); D. Mass. Rule 67.1(c)(3) (permitting personal surety based on the “guaranty of two (2) individual residents of this district each of whom owns unencumbered real or personal property within the district worth the amount of the bond, in excess of legal obligations and exemptions”); W.D. Mich. Local Civil Rule 65.1 (personal surety must reside within the district and “must qualify as the owner of real estate within this district of the full net value of twice the face amount of the bond”); N.D.N.Y. Local Rule 65.1.1(b) (one option for securing a bond is “the undertaking or guaranty of two individual residents of the Northern District of New York, each of whom owns real or personal property within the District worth double the amount of the bond, undertaking or stipulation, over all the debts and liabilities of each of the residents, and over all obligations assumed by each of the residents on other bonds, undertakings or stipulations, and exclusive of all legal exemptions”); D.R.I. Local Civil Rule 65.1(a)(3) (providing that security can take the form of “the guaranty of an individual resident of this District who owns and pledges as security real property in which such individual has equity that exceeds the amount of the bond”); *id.* Rule 65.1(b) (listing requirements for affidavit by individual surety); E.D. Va. Local Civil Rule 65(A)(3) (permissible sources of security include “sufficient solvent sureties, residents of Virginia, who own real or personal property within the State of Virginia worth double the amount of the bond, undertaking, or stipulation over all debts and liabilities, and over all obligations assumed on other bonds, undertakings or stipulations, and exclusive of all legal exemptions”); *id.* (“A husband and wife may act as surety on a bond, but they shall be considered as only one surety.”).

<sup>30</sup> See, e.g., *Aunt Sally's Praline Shop, Inc. v. United Fire & Cas. Co.*, 2008 WL 4776947, at \*1 (E.D. La. Oct. 29, 2008) (unreported decision) (rejecting contention “that the supersedeas bond does not constitute appropriate security because United Fire and Indemnity Company is a subsidiary of defendant United Fire and Casualty Company,” and reasoning that “[n]either the Federal Rules of Civil Procedure nor the Local Rules of the Eastern District require that the entity posting security be independent of the party for which security is being posted”).

<sup>31</sup> See S.D. Fl. General Rule 62.1(b) (“If within the fourteen (14) day period established by Federal Rule of Civil Procedure 62(a), a party files any of the motions contemplated in Federal Rule of Civil Procedure 62(b), or a notice of appeal, then unless otherwise ordered by

courts may apply a similar approach in an individual case, as illustrated by one decision concerning a stay under Rule 62(b).<sup>32</sup>

### C. Stays under Rule 62(f)

Rule 62(f) provides an alternative means for obtaining a stay of execution. It provides: “If a judgment is a lien on the judgment debtor’s property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give.” A literal reading of this provision would indicate that the Rule 62(f) stay is available only when the judgment automatically constitutes a lien on the judgment debtor’s property under the relevant state’s law. In fact, the caselaw spans a range of views, from taking this very strict position,<sup>33</sup> to determining whether Rule 62(f)’s lien requirement is met by examining how difficult it would be to obtain a lien based on the judgment under state law,<sup>34</sup> to holding that the lien requirement is met by the provision of some other, equivalently protective, form of security,<sup>35</sup> to ignoring the lien requirement altogether.<sup>36</sup> Rule 62(f) does not explicitly

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the Court, a further stay shall exist for a period not to exceed thirty (30) days from the entry of the judgment or order.”).

<sup>32</sup> See *Ssangyong (U.S.A.), Inc. v. Innovation Group, Inc.*, 2000 WL 1339229, at \*1 (S.D. Iowa Aug. 10, 2000) (unreported decision) (“After consulting with its insurance carriers ... Ssangyong has learned it may be thirty days before the full amount can be posted. In view of the size of the judgments, the Court finds such a delay to be reasonable.”); *id.* at \*1 n.1 (noting counsel’s assurance that the movant “will post either a \$100,000 bond, or cash in the same amount, on or before Friday, August 11, 2000 as evidence of its good faith”).

<sup>33</sup> See *Acevedo-Garcia v. Vera-Monroig*, 296 F.3d 13, 17 (1st Cir. 2002) (“Since, under Puerto Rico law, a judgment becomes a lien upon property only after the judgment creditor applies to the court and the court issues a writ of attachment ... , Rule 62(f) does not appear to apply.”).

<sup>34</sup> See *F.D.I.C. v. Ann-High Associates*, 1997 WL 1877195, at \*4 (2d Cir. 1997) (unpublished per curiam decision) (“[I]n order to avoid posting a supersedeas bond a judgment debtor must demonstrate not only (1) that state law entitles it to appeal without a bond and (2) that a judgment can be made a lien against a judgment debtor’s property under the state’s lien law, but also (3) that the circumstances are such that the judgment creditor can readily establish a lien that will be adequate to secure the judgment.”); *Rodriguez-Vazquez v. Lopez-Martinez*, 345 F.3d 13, 14 (1st Cir. 2003) (per curiam) (arguing that *Acevedo-Garcia* “rested on a mistaken premise” concerning Puerto Rico law and suggesting “that where a lien can be procured by minor ministerial acts, this minor burden on the judgment-creditor should not preclude a stay under Rule 62(f)”).

<sup>35</sup> In *Castillo v. Montelepre, Inc.*, 999 F.2d 931 (5th Cir. 1993), the panel majority held that a medical malpractice fund established under Louisiana law was entitled to a stay under

address whether the value of the property subject to the lien must be as great as amount of the judgment.

#### IV. Conclusion

As Mr. Newsom pointed out, the topic of stays of execution of money judgments presents a number of interesting questions, the answers to which are more likely to be found in caselaw and local rules than in Civil Rule 62 or Appellate Rule 8. Civil Rule 62 currently affords federal trial judges substantial discretion in these matters; district court local rules provide some guidance to litigants but leave the judge's discretion largely intact. One area of complexity is the interaction between Civil Rule 62 and state law.

Encl.

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Civil Rule 62(f) even though the judgment did not constitute a lien on the fund corpus under Louisiana law. *See id.* at 933, 942. The court reasoned that “[i]n this diversity action, great deference must be given to the manifest desire of the Louisiana legislature to allow the Fund to appeal without bond,” and that Louisiana’s statutory scheme “provides sufficient security to judgment creditors so as to satisfy the purpose behind the Rule 62(f) judgment as a lien requirement.” *Id.* at 942. *But see, e.g., Federal Ins. Co. v. County of Westchester*, 921 F. Supp. 1136, 1138-39 (S.D.N.Y. 1996) (reasoning that Rule 62(f) “reflects a federal policy determination that judgment creditors must be afforded security by *all* judgment debtors, not just by those from whom state law requires security, and that the security must take the form of a lien, and not some lesser or different security”).

<sup>36</sup> *See Urban Developers, LLC v. City of Jackson*, 227 F.R.D. 464, 465-66 (S.D. Miss. 2005) (reasoning based on *Castillo* that “Defendants / Appellants in this case must be afforded the same treatment that they would receive in Mississippi state court” and holding that a stay was appropriate under Rule 62(f) without analyzing whether the judgment would give rise to a lien under Mississippi law).

# TAB 7E

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*International Child Abduction: Prompt Return*

A footnote in a concurring opinion by Justice Ginsburg suggests that:

For the federal courts, the Advisory Committees on Federal Rules of Civil and Appellate Procedure might consider whether uniform rules for expediting [Hague Convention on the Civil Aspects of International Child Abduction] proceedings are in order.

Chafin v. Chafin, No. 11-1347, slip at 3, n. 3 (February 19, 2013).

The Chafin case came to the Court on a question of mootness. After the district court determined that the child's habitual residence was in Scotland, mother and child returned to Scotland. The court of appeals dismissed the father's appeal as moot on the theory that the return defeated the ability of federal courts to award any meaningful relief. The Supreme Court reversed, offering several reasons to deny mootness.

The Court's opinion by Chief Justice Roberts concluded with this observation:

Importantly, whether at the district or appellate court level, courts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation. Many courts already do so. Slip at 13.

Justice Ginsburg began her concurring opinion by noting that the Convention itself "instructs Contracting States to use 'the most expeditious procedures available' to secure the return of a child wrongfully removed or retained away from her place of habitual residence." Slip at 1. She also noted that expedited procedures for briefing and handling return-order appeals have become common in most circuits. Slip at 3.

There are powerful reasons to treat these cases with all possible dispatch. Chief Justice Roberts made the point poignantly by observing that a typical two-year period from start to finish is one-third the life of a 6-year old child.

The question is whether it would be desirable to add specific provisions in the Civil and Appellate Rules to encourage or mandate speedy disposition. A variety of concerns urge caution.

Initially, the caution at the beginning of Justice Ginsburg's footnote must be observed. State courts have concurrent jurisdiction under the Convention. Provisions in the Civil and Appellate Rules would apply only to the federal courts.

The tradition of enacting general, transsubstantive rules also must be considered. The Enabling Act surely authorizes rules that

give priority to specific kinds of litigation. But the clear examples are transsubstantive. Two examples appear in Rule 65. Rule 65(b)(3) directs that after issuing a TRO, the motion for a preliminary injunction "must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character." A softer alternative appears in Rule 65(b)(4), directing that the court must hear and decide a motion to dissolve a TRO "as promptly as justice requires."

A more important concern lies in the perils that await ventures down the road of setting docket priorities by court rule. Crowded dockets present many pressing issues, often in unpredictable patterns. There is a real prospect that different provisions, enacted at different times, could lead to conflicting and eventually self-defeating directives. In theory, that problem could be addressed by adopting a new rule that lists cases entitled to priority in order of preference. In practice, woe betide the rules committees that undertake that responsibility. It is for such reasons that the Judicial Conference has adopted a policy against establishing docket priorities by court rule. A memorandum by Benjamin Robinson tracing the development of this policy is attached.

The concerns that weigh against the urge to do something to ensure prompt disposition of child abduction cases may be mollified by at least two considerations. One is that judges recognize the obvious human needs involved and will do all that responsibly can be done, in the context of any particular docket, to expedite these proceedings. Second, and similarly, the opinions in the Chafin case provide strong support for advocates pressing for prompt disposition.

Justice Ginsburg's footnote is strong reason to treat these issues with great care. Whether they can carry the burden of justifying Convention- and statute-specific rules provisions, however, is not clear.

**TO:** EHC  
**FROM:** BJR  
**DATE:** September 27, 2012 (rev. Oct. 3, 2012)  
**RE:** Background on Judicial Conference Position Opposing Fixed Civil Litigation Deadlines

The Mississippi Attorney General has suggested civil rules amendments that would, among other things, “requir[e] the automatic remand of cases in which the district court takes no action on a motion to remand within 30 days.” *Civil Rules Suggestion 12-CV-C*. This memorandum briefly summarizes (1) the Judicial Conference position on statutorily imposed litigation priority, expediting, or time-limitation rules; and (2) recent, related legislative proposals that have drawn the Conference’s opposition.

When faced with legislation seeking to prioritize types of civil actions and decision-making, the Judicial Conference has consistently opposed provisions imposing litigation priority, expediting, or time-limitation rules on specified cases brought in the federal courts. The Conference views 28 U.S.C. § 1657 as sufficiently recognizing the appropriateness of federal courts generally determining case management priorities and the desire to expedite consideration of limited types of actions. *Rpt. of the Comm. on Federal-State Jurisdiction A-5* (Sept. 1998); JCUS-SEP 90, p. 80.

Since 1990, legislation setting docket and case management priorities has been studied most closely by the Conference’s Committee on Federal-State Jurisdiction. But, as detailed below, the Conference’s position on this issue was firmly established by 1981. The position developed from concerns that:

- (1) proliferation of statutory priorities means there will be no priorities;
- (2) individual cases within a class of cases inevitably have different priority treatment needs;
- (3) priorities are best set on a case-by-case basis as dictated by the exigent circumstances of the case and the status of the court docket; and
- (4) mandatory priorities, expedition, and time limits for specific types of cases are inimical to effective case management.

Letter from James C. Duff, Secretary, Judicial Conf. of the United States, to Lamar Smith (R-TX), Ranking Member, Comm. on the Judiciary, U.S. House of Representatives (Nov. 10, 2009) (expressing Judicial Conference views concerning the *Tribal Law and Order Act* of 2009).<sup>1</sup> The

<sup>1</sup> Section 103(b) of that Act authorized and encouraged each U.S. Attorney serving a district that includes Indian country “to coordinate with the applicable United States magistrate and district courts...to ensure the provision of docket time for prosecutions of Indian country crimes.” *Tribal Law and Order Act of 2009*, H.R. 1924.

In 2010, the Judicial Conference’s Executive Committee approved a recommendation from the Judicial Conference Committee on Criminal Law to “oppose the establishment of statutory litigation priorities that would call for the expediting of certain types of criminal cases.” *Rpt. of the Comm. on Crim. Law* 16 (Mar. 2010). Like its approach to legislation affecting the civil docket, the Conference takes the position that the *Speedy Trial Act*, 18

Conference's formal opposition to statutory civil litigation priorities developed in part from judicial improvements and legislative reforms first called for by the American Bar Association (ABA). In February 1977, the ABA House of Delegates adopted the following resolution:

BE IT RESOLVED, That the American Bar Association endorses the repeal by the Congress of all statutory provisions which require that any class or category of civil cases, other than habeas corpus matters, be heard by the United States Courts of Appeals and the United States District Courts on a priority basis; and

BE IT FURTHER RESOLVED, That the American Bar Association endorses the principle that the Circuit Council of each United States Courts of Appeals set calendar priorities for that Circuit.

*See Mandatory Appellate Jurisdiction of the Supreme Court—Abolition of Civil Priorities—Jurors Rights: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 74 (1982) [hereinafter Hearing] (prepared statement of Benjamin L. Zelenko). Following this resolution, the U.S. Department of Justice's Office for Improvements in the Administration of Justice pursued several attempts to develop reform legislation that same year. Hearing at 82.*

On August 4, 1981, Congressman Robert W. Kastenmeier (D-WI) introduced H.R. 4396 (97th Cong.), the Federal Courts Civil Priorities Act, observing that because of the large caseloads in the federal courts, the number of priority cases had increased to the extent that many non-priority civil cases could not be docketed for hearings at all, or suffered inordinate delays. *See Rpt. of the Comm. on Court Admin. and Case Mgmt.* 11 (Sept. 1981); *Hearing* 26. Consistent with the ABA resolutions, Rep. Kastenmeier's bill sought to repeal virtually all of the civil expediting provisions applicable to either the district or appellate courts. The bill's initial phrase, "[n]otwithstanding any law to the contrary," sought to ensure prospectively that any priority provision later slipped into the code would be of no effect. *Hearing* at 96.

The Judicial Conference welcomed the legislation and at its September 1981 session approved the bill based on a recommendation from the Committee on Courts Administration. JCUS-MAR 1981, p. 68. In June 1982, on behalf of the Judicial Conference, Judge Elmo B. Hunter, U.S. District Judge for the Western District of Missouri and Chairman of the Committee on Court Administration, testified in support of the bill before the House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice. *See Hearings* 29-30 (recommending that all civil case priorities "be placed in a single section in the judiciary title of the United States Code . . . under proposed new section, 1657."). Judge Hunter noted that Chief Justice Warren E. Burger had previously expressed to the same subcommittee concerns about the welter of acts requiring expedited case handling. *Id.* at 43. And representatives from the U.S. Department of Justice, ABA, and the Association of the Bar of the City of New York echoed Judge Hunter's testimony supporting the bill. *See, e.g., id.* at 110-12, 121-26 (testimony of Deputy Assistant Attorney General Timothy J. Finn). Ultimately, the *Federal Courts Civil*

U.S.C. § 3161, establishes the appropriate time limits for all criminal cases. *Id.* Prior to H.R. 1924, it appears the Conference had not been called upon to articulate opposition to the prioritization of certain types of criminal cases.

*Priorities Act* was read and referred to the House Judiciary Committee but did not become law. It was reintroduced as H.R. 5645 (98th Cong.) on May 10, 1984, and was passed only by the House.

But, in November 1984, Congress added Section 1657 to Title 28 using language substantively identical to that used in H.R. 4396. *See* 28 U.S.C § 1657 (“Notwithstanding any other provision of law . . .”). The enactment of Section 1657(a) directed “each court of the United States to determine the order in which civil actions are heard and determined,” with limited exceptions for (1) habeas corpus actions; (2) actions concerning recalcitrant grand jury witnesses; (3) any action for temporary or preliminary injunctive relief; and (4) other actions if “good cause” for calendar priority is shown (for purposes of the statute, good cause is shown if a federal Constitutional right or a federal statutory right, including rights under 5 U.S.C. § 552 (FOIA), would benefit from expedited treatment). Before Section 1657 became law, more than eighty separate federal statutes authorized civil actions and, at the same time, gave the authorized civil actions calendar priority, making it difficult to obey one statute without violating another. *See Hearing* 181-90 (collecting statutes). Its addition to the United States Code abrogated most of these individual prioritizing statutes.

A temporary and apparently voluntary moratorium on legislative proposals to impose litigation priorities followed the enactment of Section 1657. But in 1990, the Committee on Federal-State Jurisdiction revisited the issue because a pending Department of Interior appropriations bill sought to give priority over all other civil actions to any federal court action that challenged a timber sale in a forest with the northern spotted owl. The legislation also required the courts to render a final decision on the merits in such cases within forty-five days. *Rpt. of the Comm. on Federal-State Jurisdiction* 3-4 (Mar. 1990). At its March 1990 session, the Conference voted to oppose reenactment of these provisions, observing that “[e]stablishing civil priorities, and imposing time limits on the judicial decision-making process, are inimical to effective civil case management and unduly hamper exercise of the necessary discretion in the performance of judicial functions.” JCUS-MAR 1990, p. 19.

The Conference focused further attention on the issue of litigation priorities and expediting provisions in legislation at its next meeting, in September 1990. At the time, the Senate had incorporated into S. 1970 (101st Cong.), the major crime legislation passed by the Senate on July 11, 1990, litigation priority provisions concerning habeas corpus and Section 2255 motions in capital cases and thrift institution bailout litigation. The legislation sought to impose the following time limits for resolving habeas corpus petition litigation in capital cases: the district court would have to determine any such petition within 110 days of filing; a court of appeals would have to determine an appeal of a grant, denial, or partial denial of such a petition within ninety days after the notice of appeal is filed; and the Supreme Court would have to act on any petition for a writ of certiorari within ninety days after the petition is filed. The bill also contained priority provisions for judicial handling of Section 2255 motions in federal capital cases.

With respect to the thrift institution bailout litigation, the amendments to S. 1970 specified that (1) consistent with 28 U.S.C. § 1657, a court of the United States shall expedite the consideration of any case brought by the Federal Deposit Insurance Corporation against

directors, officers, employees, and those providing services to an insured institution, stating that “[a]s far as practicable the court shall give such a case priority on its docket;” (2) the hearing in an appeal in such a case “shall be conducted not later than 60 days after the date of filing of the notice of appeal” and “the appeal shall be decided not later than 90 days after the date of the notice of appeal;” and (3) the court may modify these schedules and limitations in a particular case “based on a specific finding that the ends of justice that would be served by making such a modification would outweigh the best interest of the public in having the case resolved expeditiously.” See *Rpt. of the Comm. on Federal-State Jurisdiction* 4 (Sept. 1990) (discussing S. 1970 and past Judicial Conference positions on statutory civil priority issues). Responding to the bill, the Conference “reiterated its strong opposition to legislative provisions imposing statutory litigation priority, expediting, or time limitation rules on specified classes of civil cases [and] strongly opposed any attempt to impose statutory time limits for disposition of specified cases in the district courts, the courts of appeals or the Supreme Court.” JCUS-SEP 1990, p. 80.

The “Judicial Improvement Act of 1998” (S. 2163, 105th Congress) again resurrected the docket prioritization issue. That legislation was introduced in June 1998, by Senator Orrin Hatch (R-UT), Chair of the Senate Judiciary Committee, and Senators John Ashcroft (R-MO), Spencer Abraham (R-MI), Strom Thurmond (R-SC), Jeff Sessions (R-AL), and Jon Kyl (R-AZ). Section 3(a) of the bill included an automatic termination provision modeled upon the Prison Litigation Reform Act and provided for the automatic termination of any court ordered relief or decree, if the federal district court failed to rule on a motion to terminate within sixty days. The Federal-State Jurisdiction Committee determined that the sixty-day time limit included in section 3(a) was inconsistent with previous Conference positions regarding the statutory imposition of litigation priorities and recommended that the Judicial Conference oppose the time limit because it would likely “impede the effective administration of justice.” *Rpt. of the Comm. on Federal-State Jurisdiction* A-9 (Sept. 1998).

Most recently, in March 2005, Senator Lamar Alexander (R-TN) introduced the “Federal Consent Decree Fairness Act,” S. 489 (109th Congress). The purpose of the bill was to create “term limits” for consent decrees and to narrow them to “encourage the courts to get the decision-making back in the hands of the elected officials as soon as possible.” 151 Cong. Rec. S2064 (daily ed. Mar. 4, 2005). The legislation would have created a new section 1660 of Title 28, to allow state or local officials sued in their official capacities to file a motion to modify or vacate a consent decree (limited to those involving state or local officials and not private settlements) upon the earlier of four years after it was originally entered, or at the expiration of the term of office of the highest elected state or local official who authorized the government to consent. Section (b)(3) of the new section 1660 would have required the court to rule on such motions within 90 days. If the court did not, then pursuant to section (b)(4), the consent decree would have no force or effect beginning on the ninety-first day after the motion was filed until the date on which the court enters a ruling on the motion. Consistent with past opposition, the Committee on Federal-State Jurisdiction requested that the Director of the AO send a letter to Congress opposing the ninety-day deadline in the legislation. That letter was transmitted to selected members of the House and Senate Judiciary Committees, as well as the primary sponsors of the legislation, on June 22, 2005. *Rpt. of the Comm. on Federal-State Jurisdiction* 14-15 (Sept. 2005).