

**ADVISORY COMMITTEE  
ON  
CIVIL RULES**

**Washington, DC  
November 7-8, 2013**



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Agenda  
November 7-8, 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 April meeting
3. Legislative Activity
4. E-Rules
5. Rule 17(c)(2): Duty to Inquire into Competence
6. Rule 82
7. Rule 67(b) and the Internal Revenue Service: Oral Report
8. Discovery Subcommittee: Requester Pays  
    Emery Lee, FJC
9. Duke Subcommittee Proposals: Oral Report
10. Committee on Court Administration and Case Management

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**ADVISORY COMMITTEE ON CIVIL RULES**

<b>Chair, Advisory Committee on Civil Rules</b>	<b>Honorable David G. Campbell</b> United States District Court 623 Sandra Day O'Connor U.S. Courthouse 401 West Washington Street Phoenix, AZ 85003-2146
<b>Reporter, Advisory Committee on Civil Rules</b>	<b>Professor Edward H. Cooper</b> University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215  <b>Professor Richard L. Marcus</b> University of California Hastings College of the Law 200 McAllister Street San Francisco, CA 94102-4978
<b>Members, Advisory Committee on Civil Rules</b>	<b>John M. Barkett, Esq.</b> Shook, Hardy & Bacon L.L.P. 3200 Miami Center 201 S. Biscayne Blvd. Miami, Florida 33131  <b>Elizabeth Cabraser, Esq.</b> Lieff, Cabraser, Heimann & Bernstein, LLP Embarcadero Center West 275 Battery Street - Suite 3000 San Francisco, CA 94111-3339  <b>Honorable Stuart F. Delery</b> Acting Assistant Attorney General Civil Division United States Department of Justice 950 Pennsylvania Avenue, N.W. - Room 3141 Washington, DC 20530  <b>Honorable Paul S. Diamond</b> United States District Court James A. Byrne United States Courthouse 601 Market Street, Room 6613 Philadelphia, PA 19106  <b>Honorable Robert Michael Dow, Jr.</b> United States District Court Everett McKinley Dirksen U.S. Courthouse 219 South Dearborn Street, Room 1978 Chicago, IL 60604

**Members, Advisory Committee  
on Civil Rules (cont'd.)**

**Parker C. Folse, Esq.**  
Susman Godfrey LLP  
1201 Third Avenue, Suite 3800  
Seattle, WA 98101

**Honorable Paul W. Grimm**  
United States District Court  
United States Courthouse  
6500 Cherrywood Lane  
Greenbelt, MD 20770

**Peter D. Keisler, Esq.**  
Sidley Austin, LLP  
1501 K Street, N.W.  
Washington, DC 20005

**Dean Robert H. Klonoff**  
Dean & Professor of Law  
Lewis & Clark Law School  
10015 S.W. Terwilliger Blvd.  
Portland, OR 97219-7799

**Honorable John G. Koeltl**  
United States District Court  
1030 Daniel Patrick Moynihan U.S. Courthouse  
500 Pearl Street  
New York, NY 10007-1312

**Honorable Scott M. Matheson, Jr.**  
United States Court of Appeals  
Wallace F. Bennett Federal Building  
125 South State Street, Room 5402  
Salt Lake City, UT 84138

**Honorable David E. Nahmias**  
Supreme Court of Georgia  
244 Washington Street  
Room 572, State Office Annex Building  
Atlanta, GA 20224

**Honorable Solomon Oliver, Jr.**  
Chief Judge  
United States District Court  
Carl B. Stokes United States Courthouse  
801 West Superior Avenue, Room 19A  
Cleveland, OH 44113



<p><b>Members, Advisory Committee on Civil Rules (cont'd.)</b></p>	<p><b>Honorable Gene E. K. Pratter</b>  United States District Court  James A. Byrne United States Courthouse  601 Market Street, Room 10613  Philadelphia, PA 19106-1797</p>
<p><b>Liaison Members, Advisory Committee on Civil Rules</b></p>	<p><b>Honorable Arthur I. Harris (Bankruptcy)</b>  United States Bankruptcy Court  Howard M. Metzenbaum U.S. Courthouse  201 Superior Avenue, Room 148  Cleveland, OH 44114-1238</p>
<p><b>Clerk of Court Representative, Advisory Committee on Civil Rules</b></p>	<p><b>Laura A. Briggs</b>  Clerk of Court  United States District Court  105 Birch Bayh Federal Building and U.S. Courthouse  46 East Ohio Street  Indianapolis, IN 46204</p>
<p><b>Secretary, Standing Committee and Rules Committee Officer</b></p>	<p><b>Jonathan C. Rose</b>  Secretary, Committee on Rules of Practice &amp; Procedure and Rules Committee Officer  Thurgood Marshall Federal Judiciary Building  One Columbus Circle, N.E., Room 7-240  Washington, DC 20544  Phone 202-502-1820  Fax 202-502-1755  Jonathan_Rose@ao.uscourts.gov</p>
<p><b>Chief Counsel</b></p>	<p><b>Andrea L. Kuperman</b>  Chief Counsel to the Rules Committees  11535 Bob Casey U.S. Courthouse  515 Rusk Ave.  Houston, TX 77002-2600  Phone 713-250-5980  Fax 713-250-5213  Andrea_Kuperman@txs.uscourts.gov</p>
<p><b>Deputy Rules Committee Officer and Counsel</b></p>	<p><b>Benjamin J. Robinson</b>  Deputy Rules Committee Officer and Counsel to the Rules Committees  Thurgood Marshall Federal Judiciary Building  One Columbus Circle, N.E., Room 7-240  Washington, DC 20544  Phone 202-502-1516  Fax 202-502-1755  Benjamin_Robinson@ao.uscourts.gov</p>

### Advisory Committee on Civil Rules

Members	Position	District/Circuit	Start Date	End Date
David G. Campbell Chair	D	Arizona	Member: 2005 Chair: 2011	---- 2014
John M. Barkett	ESQ	Florida		2012 2014
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Gene E.K. Pratter	D	Pennsylvania (Eastern)		2010 2016
Edward H. Cooper Reporter	ACAD	Michigan		1992 Open
Principal Staff: Jonathan C. Rose 202-502-1820				
* Ex-officio				

**LIAISON MEMBERS**

<b>Liaison for the Advisory Committee on Appellate Rules</b>	<b>Gregory G. Garre, Esq.</b> <i>(Standing)</i>
<b>Liaison for the Advisory Committee on Appellate Rules</b>	<b>Judge Adalberto Jordan</b> <i>(Bankruptcy)</i>
<b>Liaison for the Advisory Committee on Bankruptcy Rules</b>	<b>Roy T. Englert, Jr., Esq.</b> <i>(Standing)</i>
<b>Liaison for the Advisory Committee on Civil Rules</b>	<b>Judge Arthur I. Harris</b> <i>(Bankruptcy)</i>
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<b>Liaison for the Advisory Committee on Criminal Rules</b>	
<b>Liaison for the Advisory Committee on Evidence Rules</b>	<b>Judge Judith H. Wizmur</b> <i>(Bankruptcy)</i>
<b>Liaison for the Advisory Committee on Evidence Rules</b>	<b>Judge Paul S. Diamond</b> <i>(Civil)</i>
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<b>Liaison for the Advisory Committee on Evidence Rules</b>	<b>Judge Richard C. Wesley</b> <i>(Standing)</i>

**ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS**

<p><b>Jonathan C. Rose</b> Secretary, Committee on Rules of Practice &amp; Procedure and Rules Committee Officer Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Jonathan_Rose@ao.uscourts.gov</p>
<p><b>Benjamin J. Robinson</b> Deputy Rules Committee Officer and Counsel to the Rules Committees Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1516 Fax 202-502-1755 Benjamin_Robinson@ao.uscourts.gov</p>
<p><b>Julie Wilson</b> Attorney Advisor Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 4-250 Washington, DC 20544 Phone 202-502-3678 Fax 202-502-1766 Julie_Wilson@ao.uscourts.gov</p>
<p><b>James H. Wannamaker III</b> Senior Attorney Bankruptcy Judges Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 4-254 Washington, DC 20544 Phone 202-502-1900 Fax 202-502-1988 James_Wannamaker@ao.uscourts.gov</p>

**Scott Myers**

Attorney Advisor  
Bankruptcy Judges Division  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle, N.E., Room 4-250  
Washington, DC 20544  
Phone 202-502-1900  
Fax 202-502-1988  
Scott\_Myers@ao.uscourts.gov

**Bridget M. Healy**

Attorney Advisor  
Bankruptcy Judges Division  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle, N.E., Room 4-273  
Washington, DC 20544  
Phone 202-502-1900  
Fax 202-502-1988  
Bridget\_Healy@ao.uscourts.gov

**Frances F. Skillman**

Paralegal Specialist  
Thurgood Marshall Federal Judiciary Building  
One Columbus Circle, N.E., Room 7-240  
Washington, DC 20544  
Phone 202-502-3945  
Fax 202-502-1755  
Frances\_Skillman@ao.uscourts.gov

**FEDERAL JUDICIAL CENTER**

<p><b>Tim Reagan</b> <i>(Rules of Practice &amp; Procedure)</i> Senior Research Associate Federal Judicial Center Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 6-436 Washington, DC 20002 Phone 202-502-4097 Fax 202-502-4199</p>	<p><b>Marie Leary</b> <i>(Appellate Rules Committee)</i> Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4069 Fax 202-502-4199 mleary@fjc.gov</p>
<p><b>Molly T. Johnson</b> <i>(Bankruptcy Rules Committee)</i> Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 315-824-4945 mjohnson@fjc.gov</p>	<p><b>Emery G. Lee</b> <i>(Civil Rules Committee)</i> Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4078 Fax 202-502-4199 elee@fjc.gov</p>
<p><b>Laural L. Hooper</b> <i>(Criminal Rules Committee)</i> Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4093 Fax 202-502-4199 lhooper@fjc.gov</p>	<p><b>Catherine Borden</b> <i>(Evidence Rules Committee)</i> Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4090 Fax 202-502-4199 cborden@fjc.gov</p>

# TAB 1

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# TAB 1A

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 11-12, 2013

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

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

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

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

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

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

74 Judge Campbell reported on the Standing Committee's January  
75 meeting. The Committee approved Rule 37(e) for publication,  
76 understanding that some revisions would be made and presented for  
77 review at their June meeting. They like the rule. They also  
78 responded favorably to a presentation of the Duke Rules package.  
79 They approved for publication minor revisions of Rules 6(d) and  
80 55(c), and a technical correction of Rule 77. The Judicial  
81 Conference approved the Rule 77 correction as a consent calendar  
82 item.

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

86 *November 2012 Minutes*

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

90 *Legislative Activity*

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

94 *"Duke Rules" Package*

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

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

108 **CASE-MANAGEMENT PROPOSALS**

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

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

133           The need to better integrate Rule 4(m) with Rule 71.1 can be  
134 met by amending Rule 4(m)'s last sentence: "This subdivision (m)  
135 does not apply to service in a foreign country under Rule 4(f) or  
136 4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A)." The  
137 Department of Justice believes that this amendment will resolve the  
138 problem. The Department does not believe that there is any further  
139 need to consider the integration of Rule 4 with Rule 71.1(d)(3)(A).

140 Rule 16(b)(2): Time for Scheduling Order: Rule 16(b)(2) currently  
141 directs that a scheduling order must issue within the earlier of  
142 120 days after any defendant has been served or 90 days after any  
143 defendant has appeared. Several Subcommittee drafts cut these times  
144 in half, to 60 days and 45 days. The recommended revision, however,  
145 cuts the times to 90 days after any defendant is served or 60 days  
146 after any defendant appears. The reduced reductions reflect  
147 concerns that in many cases it may not be possible to be prepared  
148 adequately for a productive scheduling conference in a shorter  
149 period. These concerns are further reflected in the addition of a  
150 new provision that allows the judge to extend the time on finding  
151 good cause for delay. The Subcommittee believes that even this  
152 modest reduction in the presumed time will do some good, while  
153 affording adequate time for most cases.

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

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

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

179  
180 Rule 16(b)(1)(B): Contemporaneous Conference: Rule 16(b)(1)(B) now  
181 provides for a scheduling conference "by telephone, mail, or other  
182 means." The reference to mail is clear, but loses the advantages of  
183 direct contemporaneous communication. The reference to other means  
184 is unclear – resort to a ouija board is not contemplated, but other  
185 possibilities are vague. The proposal strikes these words, but the  
186 Committee Note makes it clear that "conference" includes any mode  
187 of direct simultaneous exchange. A conference telephone call  
188 suffices. Skype or other technologies also suffice. The  
189 Subcommittee considered the possibility of requiring an actual  
190 conference by these means in all cases subject to the scheduling  
191 order requirement, but in the end accepted the views of several  
192 participants in the Dallas miniconference that there are cases in  
193 which the parties' Rule 26(f) report provides a suitable foundation  
194 for an order without needing a conference with the court.

195 Rule 16(b)(3) [26(f)]: Preserving ESI, Evidence Rule 502: The  
196 proposals add two subjects to the "permitted contents" of a  
197 scheduling order and to the Rule 26(f) discovery plan. One is the  
198 preservation of electronically stored information. The other is  
199 agreements under Evidence Rule 502 on [non]waiver of privilege or  
200 work-product protection. Emphasizing the importance of discussing  
201 preservation of electronically stored information addresses a  
202 problem that touches on the broader issues addressed by the  
203 proposal to amend Rule 37(e) that has been approved for publication  
204 and will be discussed later in this meeting. Adding Evidence Rule  
205 502 responds to the concern of the Evidence Rules Committee that  
206 lawyers simply have not come to realize the value – or perhaps even  
207 the existence – of Rule 502.

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

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

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

225 a position to implement a mandatory rule.

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

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

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

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



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

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

282 **PROPORTIONALITY**

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

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

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

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

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

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

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

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

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

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

360 26(b)(2)(C) also should address proportional preservation. These  
361 rules should be embellished by detailed Committee Notes. The Rule  
362 26(f) proposal should be expanded to address not only preservation  
363 of ESI but to suggest the details of preservation that should be  
364 discussed, and also to include plans to terminate preservation. And  
365 the parties should be required to report any remaining disputes  
366 after the Rule 26(f) conference. So too, the Rule 16 proposals  
367 should be expanded to include a purpose to resolve disputes about  
368 preservation.

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

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

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

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

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

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

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

425 Rule 26(c): Allocation of Expenses: Another proposal adds to Rule  
426 26(c)(1)(B) an explicit recognition of the authority to enter a  
427 protective order that allocates the expenses of discovery. This  
428 power is implicit in Rule 26(c), and is being exercised with  
429 increasing frequency. The amendment will make the power explicit,  
430 avoiding arguments that it is not conferred by the present rule  
431 text.

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

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

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

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

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

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

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

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

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

525 An observer said that limiting discovery limits the ability to  
526 prove the case. As pleading standards become more demanding,  
527 limiting discovery risks premature decisions on the merits.  
528 Tightening numerical limits may be unnecessary – the statistics  
529 seem to show that generally people are behaving reasonably. "I am  
530 concerned there are many judges who are literalists, who will not  
531 let us negotiate upward." Six-hour depositions may lead to requests  
532 for an extra day; my own practice is to start early and finish on  
533 time. If tighter limits are adopted, depositions of expert trial  
534 witnesses and Rule 30(b)(6) depositions of an entity should be  
535 exempted from the limits. She was asked whether her experience with  
536 the present rules is that leave is readily given to take more than  
537 10 depositions. She replied that in most large cases leave is  
538 given. "But most of my cases are with forward-looking judges. I did  
539 not like the 10-deposition limit, but learned to live with it. But  
540 the lower the number, the more difficult it will be to negotiate  
541 upward."

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

544 involving the court.

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

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

561 Responding to a question about the basis for settling on 25 as  
562 the presumptive number of requests to admit, Judge Koeltl said that  
563 25 was chosen by analogy to present Rule 33, drawing from the  
564 thoughts of the Subcommittee and the experience of the Committee.  
565 The comments received so far support the number – indeed the letter  
566 from the leadership of the ABA Litigation Section suggests that  
567 requests to admit the genuineness of documents might be included in  
568 the limit. The employment lawyers have focused more on Rule 33, but  
569 some of them have supported the limit proposed for Rule 36. Emery  
570 Lee added that the FJC report for the Duke Conference found that  
571 plaintiffs and defendants both reported that plaintiffs requested  
572 22 admissions per case; defendants reported that defendants  
573 averaged 13.2 per case, while plaintiffs reported that defendants  
574 averaged 21 per case. The proposed presumptive limit of 25 is  
575 higher than average case experience.

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

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

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

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

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

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

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

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

628 **COOPERATION**

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



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

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

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

652 **PACKAGE**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

808 *Rule 37(e): Preservation and Sanctions*

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

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

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

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

852 (1) The argument that Erie doctrine requires that federal

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

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

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

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

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

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

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

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

896 concern, stating that Rule 37(e) does not address professional  
897 responsibility duties. The "sanctions" term is adopted from Rule  
898 37(b)(2), the rule incorporated here.

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

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

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

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

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

956 The Department renewed the suggestion to retain present Rule  
957 37(e) during later discussion. It has proved helpful in dealing  
958 with information technology systems specialists during the design  
959 of new information systems.

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

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

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

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



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

992 (2) The provision for curative measures was expanded by  
993 deleting these words: "order ~~the party to undertake~~ curative  
994 measures \* \* \*." The change was made to support curative actions  
995 taken without court order. A party, for example, could be permitted  
996 to introduce evidence of another party's failure to preserve, and  
997 to argue that adverse inferences should be drawn from the failure.  
998 The party's argument would not be an adverse-inference instruction  
999 subject to the limits imposed by (1)(B). Such measures can help to  
1000 level the playing field.

1001 Later discussion asked why an adverse-inference instruction is  
1002 treated as a sanction - why is it not also a curative measure? The  
1003 response was that there is a continuum of available tools along  
1004 this dimension. The most powerful is an instruction by the judge  
1005 that the jury must find the lost information was harmful to the  
1006 case of the party who lost it. A less powerful version instructs  
1007 the jury that it may infer the information was harmful. Still  
1008 another version may leave it to the jury to determine whether any  
1009 information was lost, and then to determine what inferences might  
1010 be drawn from the loss. These inferences logically flow only from  
1011 knowing that the information was harmful. They do not flow from  
1012 being sloppy or disorganized. Willfulness or bad faith is the key.  
1013 Another Committee member observed that Wigmore referred to "a  
1014 consciousness of a weak case." Another participant noted that an  
1015 adverse-inference instruction was given in the Zubulake case. The  
1016 fear of these instructions is one of the fears that drives  
1017 prospective parties to over-preserve. "We need to limit this  
1018 nuclear weapon."

1019 Another Committee member continued the discussion. There are  
1020 many possible versions of adverse-inference instructions or  
1021 arguments. It is difficult to define a precise line. It is  
1022 desirable to preserve flexibility that enables a court to avoid too  
1023 much direction. Although it has not proved possible to draft a  
1024 clear distinction between an instruction that amounts to a sanction  
1025 and lesser measures that qualify as curative measures, the  
1026 distinction remains important. "There should be no dispositive  
1027 inferences without fault."

1028 An observer suggested that asking the jury to decide what  
1029 inferences to draw "asks the jury to decide a side issue, not the  
1030 merits of the case."

1031 (3) "in the anticipation or conduct of litigation," an  
1032 important element of (e)(1), was added to the (e)(2) reference to  
1033 failure to preserve information that "should have been preserved in  
1034 the anticipation or conduct of litigation." The Subcommittee was  
1035 worried about failures to preserve information as required by  
1036 independent duties imposed by statute or regulation; such failures  
1037 might not reasonably bear on the duty to preserve for litigation.  
1038 The change helps to focus the (e)(2) factors on preservation for  
1039 litigation.

1040 "Act of God": Successive drafts have provided for sanctions when  
1041 discoverable information is lost without willfulness or bad faith,  
1042 but the effect is to irreparably deprive a party of any meaningful  
1043 opportunity to present or defend against the claims in the action.  
1044 This provision reflects situations that came, in Subcommittee  
1045 discussions, to be identified with the Silvestri case in the Fourth  
1046 Circuit. The owner of the automobile in which the plaintiff was  
1047 injured allowed it to be destroyed before the defendant  
1048 manufacturer had any opportunity to inspect it. The court of  
1049 appeals affirmed a dispositive sanction imposed by the district  
1050 court, finding there was no abuse of discretion. This decision, and  
1051 others like it, are part of the common law. The purpose of Rule  
1052 37(e) is to recognize the common-law duty to preserve. The  
1053 Subcommittee has believed that the rule text should reflect these  
1054 decisions. The Standing Committee, however, feared that as drafted  
1055 the rule would authorize sanctions when discoverable information  
1056 was destroyed without any fault, as by an "Act of God." The  
1057 Subcommittee agreed that while sanctions should not be imposed,  
1058 curative measures should be available. That created a drafting  
1059 problem. It would not do to suggest in the Committee Note that loss  
1060 by an Act of God does not amount to a party's failure to preserve,  
1061 since that interpretation of the rule text would bar not only  
1062 sanctions but also curative measures. The same difficulty arises  
1063 with any attempt to limit the meaning of "should have been  
1064 preserved. The solution was to add a limiting element: sanctions  
1065 could be imposed only if the failure to preserve "was negligent or  
1066 grossly negligent." The Subcommittee recognized that "grossly  
1067 negligent" was redundant - any grossly negligent failure also would  
1068 be negligent. But it thought that including these words in  
1069 (e)(1)(B)(ii) would help to prevent concepts of gross negligence  
1070 from bleeding into the "willfulness" that suffices to support  
1071 sanctions when loss of discoverable information causes substantial  
1072 prejudice.

1073 Discussion within the Subcommittee repeatedly reflected a  
1074 concern that any reference to negligence or gross negligence in the  
1075 rule text would suggest a sliding scale that balances degrees of  
1076 culpability against degrees of prejudice. A judge reluctant to  
1077 brand a lawyer with bad faith might "skitter off" into finding  
1078 negligence that irreparably deprived another party of any

1079 meaningful opportunity to litigate.

1080           The cases that present the "no-fault" failure seem to involve  
1081 tangible evidence. The Subcommittee could not find a case where a  
1082 loss of electronically stored information effectively put another  
1083 party out of court unless there was willfulness or bad faith. "ESI,  
1084 like cockroaches and styrofoam, is something you cannot get rid  
1085 of." This thought suggested that it might be better to avoid the  
1086 question by addressing Rule 37(e) only to the loss of  
1087 electronically stored information and requiring willfulness or bad  
1088 faith, as well as substantial prejudice, and omitting any provision  
1089 addressing extreme prejudice but no willfulness or bad faith. Given  
1090 the speed of change in electronic information systems, however, the  
1091 Subcommittee was uncertain whether that is prudent. Accordingly it  
1092 chose to maintain the draft that allows sanctions for irreparable  
1093 deprivation if there is only negligence or gross negligence, but  
1094 also to prepare for publication of an alternative draft that  
1095 focuses only on electronically stored information and omits the  
1096 irreparable deprivation provision.

1097           The alternative draft is set out in an appendix to the draft  
1098 rule and Committee Note. It may be an advantage that it does not  
1099 attempt to regulate the loss of tangible evidence, or traditional  
1100 documents. Common-law sanctions would remain available for loss of  
1101 discoverable information that is not electronically stored. This  
1102 approach is less complete, less elegant. But this project was  
1103 launched in response to complaints that parties and prospective  
1104 parties feel forced to over-preserve electronically stored  
1105 information, in part for want of any common nationwide standards.  
1106 Public comments can test the hypothesis that ESI is so often  
1107 recoverable by curative measures that irreparable deprivation is  
1108 unlikely, apart from cases of willfulness or bad faith. This  
1109 alternative approach avoids any concern that no-fault losses of  
1110 information will be sanctioned. It avoids the risk that parallel  
1111 rule provisions would encourage a creeping tendency to import  
1112 negligence concepts into willfulness.

1113           The Committee was reminded that the Standing Committee has  
1114 approved publication of Rule 37(e) this summer. The questions open  
1115 for discussion are those that have not yet been explored in this  
1116 Committee, including the question whether the rule should be  
1117 limited to loss of electronically stored information.

1118           The Committee also was pointed to the list of questions that  
1119 will be flagged in transmitting the rule for public comment. Are  
1120 these the right questions? Are they properly framed?

1121           Discussion of the ESI-only alternative began with the  
1122 observation that usually the Committee publishes a preferred  
1123 version, raising questions about potential changes without

1124 publishing a full alternative draft. The question whether Rule  
1125 37(e) should be limited to loss of electronically stored  
1126 information was discussed repeatedly in the Subcommittee and with  
1127 the Committee, and the choice always has been to stick with a  
1128 comprehensive rule that applies to all forms of discoverable  
1129 information. One consideration is that the line between  
1130 electronically stored information and other information is  
1131 uncertain, and may become more uncertain with further advances in  
1132 technology. And it is better to adhere to general principles absent  
1133 some convincing reason to believe that different standards may  
1134 properly apply. Still, the most recent rounds of discussion may  
1135 shake faith in that conclusion. The problems encountered in  
1136 attempting to recognize problems of irreparable loss that do not  
1137 seem to be encountered with electronically stored information may  
1138 be so great as to narrow the focus to loss of electronically stored  
1139 information. The original concern was over-preservation of  
1140 electronically stored information. Publishing the alternative might  
1141 provoke comments showing instances in which loss of electronically  
1142 stored information has irreparably deprived a party of a meaningful  
1143 opportunity to litigate, contrary to the tentative belief that this  
1144 event is unlikely.

1145 Support for publishing the alternative was expressed in more  
1146 positive terms. "Residential Funding" is a problem with respect to  
1147 the pre-litigation duty to preserve. There is a serious risk that  
1148 concepts of negligence and gross negligence will prove expansive.  
1149 Adding them to proposed (e)(1)(B)(ii) threatens to expand the risk.

1150 A similar observation suggested the ESI-only version in the  
1151 appendix may be desirable. The reliance on negligence or gross  
1152 negligence is troubling. This project began to give clear guidance  
1153 in the use of curative measures and sanctions, and in the process  
1154 to overrule cases that employ sanctions for negligence or gross  
1155 negligence. The ESI-only version avoids the "Act of God" problem by  
1156 requiring willfulness or bad faith for any sanctions. Resort to the  
1157 negligence or gross negligence standard from concern that loss of  
1158 other forms of discoverable information may have more severe  
1159 consequences may cause problems.

1160 A more general observation was that it is important to seek  
1161 comment during the publication period on every alternative the  
1162 Committee sees as possible. Whether by publishing an appendix or  
1163 posing questions, the issues should be clearly identified so as to  
1164 reduce the risk that the comments will suggest changes so profound  
1165 as to require republication to ensure full opportunity to comment.

1166 Another observation expressed concern that the amendments give  
1167 judges tools to use if information is lost without fault. As  
1168 information storage moves into the cloud, there will be increasing  
1169 risks that information will be lost without fault. The main draft

1170 gives clear guidance, both as to curative measures and as to  
1171 sanctions.

1172 The Department of Justice understands the impetus to get away  
1173 from sanctions for negligence or gross negligence, but has thought  
1174 that a rule covering all types of evidence is preferable. It may be  
1175 best to publish the alternative rule addressing only ESI. Comments  
1176 may show a way to reconcile these concerns.

1177 Another comment suggested that another approach would be to  
1178 retain a rule that applies to all forms of information, not  
1179 electronically stored information alone, but to require willfulness  
1180 or bad faith for sanctions. That would overrule the negligence or  
1181 gross negligence cases even when the negligent behavior irreparably  
1182 deprived another party of any meaningful opportunity to litigate.  
1183 No one has wanted to do that. Adopting an ESI-only rule that  
1184 requires willfulness or bad faith would be defended on the ground  
1185 that loss of ESI will not have such irreparable consequences.

1186 An observer noted that after struggling with this problem, the  
1187 Sedona working group chose to rely on an "absent exceptional  
1188 circumstances" limit on sanctions. It would be a mistake to adopt  
1189 a negligence or gross negligence standard. Multiple standards will  
1190 generate incredible problems. No one thinks negligence or gross  
1191 negligence should be the standard.

1192 Another observer said that adopting a negligence or gross  
1193 negligence test would inject a tort standard into a rule of  
1194 procedure. The true issue is whether the rule should apply to ESI  
1195 only. Publishing an all-information rule that includes negligence  
1196 or gross negligence will focus comments on that problem, reducing  
1197 the level of comments on the question whether the rule should be  
1198 limited to loss of ESI alone.

1199 An interim summary was attempted. These are tough questions.  
1200 The "Act of God" concern led to incorporating a negligence or gross  
1201 negligence standard to ensure that sanctions are not available for  
1202 a no-fault loss of discoverable information, while sanctions remain  
1203 available if the loss irreparably deprived a party of a meaningful  
1204 opportunity to litigate. The hospital servers in a basement  
1205 inundated by Superstorm Sandy became a running example: should  
1206 sanctions be imposed when records are unavailable in the next  
1207 malpractice action? The January draft could be read to authorize  
1208 sanctions even absent negligence or gross negligence, imposing  
1209 liability because the information was lost and it was information  
1210 that "should" have been preserved. Subsequent discussions focused  
1211 mostly on loss of ESI, but it is difficult today to distinguish  
1212 between ESI and other forms of information, and the difficulty may  
1213 well increase as technology evolves. Is a print-out of information  
1214 lost from an electronic storage system ESI? What about the

1215 information recorder in an automobile damaged in a collision and  
1216 then scrapped?

1217 Would it do to omit any reference to negligence or gross  
1218 negligence, falling back to the January draft, and rely on a  
1219 statement in the Committee Note that loss to an Act of God is not  
1220 a party's failure to preserve? But how would that square with the  
1221 desire to allow curative measures in such circumstances?

1222 A Committee member agreed that it is artificial to distinguish  
1223 between ESI and other forms of information-evidence. The  
1224 distinction is difficult to explain in theory, and it may become  
1225 increasingly difficult to apply in practice. Another member was  
1226 enthusiastic about deleting any reference to negligence or gross  
1227 negligence, but retaining a rule that applies to all forms of  
1228 information. The Committee Note could provide assurance enough for  
1229 the Act of God situation.

1230 Discussion returned to the possibility that (e)(1)(B)(ii)  
1231 could be dropped entirely, even from a rule that applies to loss of  
1232 any form of discoverable information. That would mean that no  
1233 sanctions are available absent willfulness or bad faith, no matter  
1234 how severe the prejudice to the party who never had the information  
1235 and never had any opportunity to preserve it, and no matter how  
1236 negligent the party who had the information was. But it may be  
1237 better to publish (B)(ii); it will be easier to delete it in the  
1238 face of adverse comments than to add it back. The alternative of  
1239 adopting a rule limited to loss of ESI, requiring willfulness or  
1240 bad faith for any sanctions, can still be flagged in requesting  
1241 comments.

1242 An alternative to "negligent or grossly negligent" was  
1243 suggested as a way out of distaste for the tort-like aura of these  
1244 words. The failure to preserve irreparably depriving another party  
1245 of any meaningful opportunity to litigate might be described as  
1246 "culpable." The Committee Note could explain that culpability is  
1247 intended to distinguish the "Act of God" loss.

1248 These suggestions foundered on the reminder that curative  
1249 measures, unlike sanctions, should be available even when no fault  
1250 at all was involved in the loss of information that should have  
1251 been preserved. A Committee Note cannot give different meanings to  
1252 "failure to preserve" for curative measures than for sanctions. As  
1253 an example, loss of the servers flooded in the basement might be  
1254 cured by spending \$50,000 to retrieve the same information from a  
1255 backup system. Ordering restoration is an appropriate response.

1256 The concern persists: which party should bear the consequences  
1257 of an irreparable loss of information?

1258            Seeking ways to protect the party who had no opportunity to  
1259 preserve the information led to other suggestions. Would it be  
1260 possible to define loss by an "act" of a party, and distinguish an  
1261 Act of God? This could be done by revising (e)(1)(B): "impose any  
1262 sanction \* \* \* but only if the court finds that the failure actions  
1263 of the party \* \* \*." This rule text would provide a functional  
1264 foundation for Committee Note discussion of the no-fault loss of  
1265 information.

1266            Further discussion emphasized the importance of coming to rest  
1267 on the version that seems best to the Committee. That version can  
1268 be published for comment. All of the issues can be raised as  
1269 questions addressed to the rule text that is preferred for now.  
1270 There is no need to publish an alternative version that is limited  
1271 to electronically stored information – the rule text changes are  
1272 minimal, and the question can be clearly focused without cluttering  
1273 the proposal for comment. What is important is to raise all  
1274 foreseeable issues clearly, so that all participants have an  
1275 opportunity to comment. That will reduce the risk that dramatic  
1276 changes in response to public comments will require republication  
1277 for a second round of comments. There is continuing interest in  
1278 allowing sanctions, not mere curative measures, when loss of  
1279 information as a result of a party's negligence irreparably limits  
1280 another party's opportunity to litigate. This threshold of injury  
1281 is higher than the substantial prejudice that justifies sanctions  
1282 when information is lost because of willfulness or bad faith.  
1283 Despite some continuing support for dropping the irreparably  
1284 deprived provision entirely, it is better to publish it.

1285            Discussion of Rule 37(e) resumed on the second day of the  
1286 meeting. The Subcommittee convened early and explored several  
1287 alternatives. In the end, it agreed unanimously to abandon  
1288 publication of an ESI-only alternative as an appendix, and to  
1289 revise proposed (e)(1)(B) as follows:

1290            (B) impose any sanction listed in Rule 37(b)(2)(A) or give an  
1291            adverse-inference jury instruction, but only if the court  
1292            finds that the party's actions failure:  
1293            (i) caused substantial prejudice in the litigation and  
1294            was willful or in bad faith; or  
1295            (ii) irreparably deprived a party of any meaningful  
1296            opportunity to present or defend against the claims  
1297            in the litigation ~~action and was negligent or~~  
1298            ~~grossly negligent.~~

1299            The Subcommittee agreed that "actions" include inaction, a  
1300 failure to act. The focus is on what a party did or did not do, and  
1301 on "irreparably deprived." The Note will focus the "Act of God"  
1302 concern by discussing events beyond a party's control. Such events  
1303 as a fire, earthquake, or severe storm are not a party's act.

1304 Sanctions will not be available. But curative measures will remain  
1305 available.

1306 A motion to recommend that the Standing Committee approve  
1307 publication of proposed Rule 37(e) as thus revised was unanimously  
1308 approved.

1309 *Rule 84*

1310 The tentative conclusion that Rule 84 should be abrogated was  
1311 not listed as an action item on the agenda for this meeting in  
1312 deference to the other matters calling for prompt action. But it  
1313 would be useful to reconfirm the conclusion to prepare the way for  
1314 publication as part of a single package with the other proposals  
1315 that have been approved for publication this summer or that will be  
1316 recommended for approval for publication. The Standing Committee is  
1317 increasingly interested in assembling packages of proposals for  
1318 periodic publication, rather than confront the bench and bar with  
1319 smaller sets of amendments every year.

1320 Judge Pratter noted that the Rule 84 Subcommittee initially  
1321 thought that abrogation is the obvious right answer. But rather  
1322 than act quickly, it took a step back to make sure abrogation is  
1323 the right answer. One important consideration, as discussed in  
1324 earlier Committee meetings, is that the Rules Enabling Act process  
1325 is not well adapted to generating, maintaining, and revising a good  
1326 and useful set of forms. The Working Group on Forms working with  
1327 the Administrative Office does good work, with a more flexible  
1328 process. The Committee can support their work, perhaps with a  
1329 liaison to ensure a reliable means of communication.

1330 Andrea Kuperman has provided a careful analysis of the  
1331 question whether the Forms would continue to influence practice  
1332 after formal abrogation. She found that courts readily respond by  
1333 recognizing that abrogated rules no longer control. Habits of  
1334 thought formed under the Forms' influence may carry forward, but  
1335 there is nothing wrong with that. The most sensitive questions are  
1336 likely to involve pleading. The process of weaving together the  
1337 notice pleading traditions embodied in the pleading Forms and more  
1338 recent Supreme Court decisions will continue either way.

1339 Forms 5 and 6 present a unique question. Rule 4(d)(1)(D)  
1340 directs that a request to waive service must "inform the defendant,  
1341 using text prescribed in Form 5, of the consequences of waiving and  
1342 not waiving service." Although this text does not refer to Form 6,  
1343 Form 6 is embedded in Form 5. It likely will prove desirable to  
1344 maintain waiver forms that are, in some way, "official." The  
1345 Subcommittee will consider this question further and circulate a  
1346 proposed solution to the Committee in time for action to be  
1347 submitted to the Standing Committee in June.





1392 1915A or § 1915(e)(2) screening if applicable." It is uncertain  
1393 what amounts to "verifiable evidence of incompetence." The Ninth  
1394 Circuit appears to find a duty of inquiry when there is a  
1395 "substantial question." That may impose a greater obligation on the  
1396 district court. This question may arise with some frequency – the  
1397 Third Circuit opinion has already been cited by at least six  
1398 district courts. The question is whether it is better to leave this  
1399 question for further development in the genius of the common-law  
1400 process, or to take it into the Enabling Act process now?

1401 A Committee member suggested that as a practical matter, the  
1402 immediate reaction is to appoint counsel. That makes the issue go  
1403 away. Then counsel has to wrestle with the question whether the  
1404 party is competent to function as a client – there still may be a  
1405 need for an actual representative. It might help to survey lawyers  
1406 who represent pro se litigants to see whether a rule change is  
1407 needed.

1408 Another judge asked how the Committee could go about gathering  
1409 useful information. One example appears in the statutory command to  
1410 appoint a guardian for a child involved in a child pornography  
1411 case. The statute commands, but there is no money to pay for it.  
1412 "Learning more may suggest a rule."

1413 Yet another judge offered an analogy to the "fairly high  
1414 standard" for referring a criminal defendant for a determination of  
1415 competency. There will be a minefield of problems if some analogous  
1416 practice is adopted for pro se civil litigants.

1417 A Committee member suggested that the case law seems to  
1418 address the problem when a person who appears without a guardian  
1419 later appears to be not competent. Perhaps the common law should be  
1420 allowed to develop. At the same time, it might be useful to reach  
1421 out to groups who work with people who might become enmeshed in  
1422 this problem.

1423 A judge suggested that "there is a huge set of people out  
1424 there who are not known to be incompetent." The rulemaking problems  
1425 overlap with state law. Perhaps it is better to put these problems  
1426 aside for now?

1427 A different judge observed that the rule appears to be written  
1428 to say this is the court's responsibility. That can be onerous.

1429 Another analogy was offered. These problems arise in  
1430 proceedings to remove aliens to other countries. Screening for  
1431 incompetence is a real problem.

1432 The question was put by framing three alternatives: (1) These  
1433 issues could be left to continued development in the courts, a

1434 "common-law" solution. (2) We could undertake a thorough survey of  
1435 the cases to form a comprehensive understanding of the approaches  
1436 taken to define a standard for a duty of inquiry. Or (3) We could  
1437 undertake a broader inquiry by reaching out to others to attempt to  
1438 reach some understanding of the extent and frequency of litigation  
1439 by unrepresented incompetents.

1440 These alternatives were supplemented by a fourth: the question  
1441 could be kept on the long-term agenda for future consideration.

1442 A motion was made to take the topic up again in a year, after  
1443 doing a survey of the case law. One question to put to the cases is  
1444 how often the issue of competence is addressed "up front," compared  
1445 to how often it is raised only later in the proceedings.

1446 An earlier theme returned. "This is a world of limited  
1447 resources." There is no present proposal to change the rule. "We're  
1448 not likely to be able to do anything about it." It is best to  
1449 attempt nothing now, but to keep the question on the agenda.

1450 A similar view was expressed. The question should be kept on  
1451 the agenda, within a broader system that attempts to keep track of  
1452 everything on the agenda that affects pro se litigation.

1453 Another suggestion was that the Committee could ask for advice  
1454 from the Committee on Court Administration and Case Management.

1455 These questions returned on the second day of the meeting.  
1456 Three approaches were again suggested: (1) Take it off the table.  
1457 (2) Keep it in the cupboard, to be revisited next year. (3) Keep it  
1458 on a more active list, looking into the case law and perhaps asking  
1459 whether the Committee on Court Administration and Case Management  
1460 is interested.

1461 A Committee member confessed to reading 20 Rule 17(c)(2) cases  
1462 overnight. "The fact patterns are quite varied." And there are many  
1463 more cases. Courts recognize that there must be some basis to make  
1464 a decision, not just a party's assertion. Perhaps we should wait a  
1465 year.

1466 The Committee was reminded that the question is not the  
1467 standard for appointing a representative once the issue is raised.  
1468 The question is to identify the circumstances that oblige the court  
1469 to raise the issue of competence without a motion. Is there a duty  
1470 to inquire simply because a party is behaving in a way that  
1471 suggests issues about competence? How high should the threshold be?  
1472 Remember that at least as articulated, the Ninth Circuit threshold  
1473 may be lower, imposing the duty of inquiry more frequently, than in  
1474 at least some other circuits.

1475 Another member suggested that it would be helpful to have some  
1476 research to support further consideration of a problem that likely  
1477 goes by without being considered in many cases.

1478 The relation between screening and Rule 17(c)(2) was brought  
1479 back into the discussion. "There are cases that are delusional."  
1480 But "no one expects an amendment to be enacted in the near term. We  
1481 have many other things to do." There likely will be a tide of  
1482 comments on the proposals the Committee is recommending for  
1483 publication this summer. Why undertake further research now?

1484 A judge volunteered to commission research by a summer intern.  
1485 The research could help decide whether to move these questions up  
1486 for further attention in the near future. This offer was accepted.  
1487 The target will be to get a memorandum out to the Committee by late  
1488 summer.

1489 *Rule 41(a): Dismissal by All Parties*

1490 Judge Martone, District of Arizona, brought to the Committee's  
1491 attention a possible source of dissatisfaction with the provisions  
1492 of Rule 41(a)(1)(A)(ii) and (a)(1)(B) that combine to enable all  
1493 parties to a litigation to stipulate to dismissal without  
1494 prejudice. The parties in a case before him asked to vacate a firm  
1495 trial date so they could complete the details of anticipated  
1496 settlements. He refused. The parties then sought to reopen the  
1497 question and he again refused. Three days later the parties filed  
1498 a stipulation dismissing the action without prejudice.

1499 Judge Martone's order in that case directed the parties to  
1500 address two questions. First, is the district plan for setting firm  
1501 trial dates, adopted under the Civil Justice Reform Act, an  
1502 "applicable federal statute" that, under the express terms of Rule  
1503 41(a)(1)(A), limits the right to dismiss without prejudice by  
1504 stipulation of all the parties? And second, was the stipulation in  
1505 this case such improper conduct or collusion as to authorize an  
1506 exercise of inherent power to reject it?

1507 The express language of Rule 41 provides that the stipulation  
1508 is effective "without a court order." It responds to a long and  
1509 deep tradition of party control. Just as the parties can moot an  
1510 action by settlement, so they can agree to dismiss on terms that do  
1511 not bar a second action on the same claim. The simple acts of  
1512 filing an action and litigating it even deep into the pretrial  
1513 process do not create such court interests as to warrant denial of  
1514 the right to dismiss without prejudice.

1515 This traditional understanding may be subject to challenge in  
1516 an era of increasing judicial responsibility for case management.  
1517 Setting a firm trial date has proved a valuable and effective

1518 management tool. Increasing management responsibilities, moreover,  
1519 increase the court's investment in the action. Allowing the parties  
1520 to thwart the control exercised in setting a firm trial date, and  
1521 to waste the court's investment, might seem too high a price to pay  
1522 to preserve the traditional freedom to dismiss without prejudice  
1523 when all parties agree to do so.

1524 This introduction was elaborated by a description of the  
1525 litigation that confronted Judge Martone. Many parallel cases were  
1526 pending before other judges in the same court. The parties were  
1527 undertaking to settle some 500 cases. The circumstances made it  
1528 imperative to get all of the cases virtually settled before they  
1529 could reach final settlements in any. Other judges, confronted with  
1530 this problem, agreed to continue the cases, requiring periodic  
1531 progress reports every 60 days. Settlements actually were  
1532 accomplished. That approach worked.

1533 A broader question was asked: Is there a general problem  
1534 around the country with parties who stipulate to dismiss without  
1535 prejudice in order to escape a particular case-management program?  
1536 How frequently does this happen? And how often is the dismissal in  
1537 fact followed by a new action? If there is a new action, how often  
1538 is it possible to salvage much, or most, of the management invested  
1539 in the first action?

1540 A Committee member replied that he had never heard of a  
1541 stipulated dismissal followed by reinstatement. This is not like  
1542 the old practice of settling a case pending appeal and asking that  
1543 the district-court judgment be vacated. The judgment is a public  
1544 act that should not be subject to undoing by the parties. But  
1545 before judgment the case is the parties' property. "We can rely on  
1546 the defendant to protect the public interest. The defendant does  
1547 not want to be hit with another action."

1548 Another member agreed. It will be a rare event to find that  
1549 the parties "are in the same place" in a complex case. Stipulated  
1550 dismissals without prejudice do not happen often.

1551 A third member observed that statutes of limitations provide  
1552 a disincentive. The risk of losing the claim to a limitations bar  
1553 falls entirely on the plaintiff. "There is not a vast reservoir of  
1554 actions that will spring" back to life after a stipulated  
1555 dismissal.

1556 A fourth member said that the defendant's agreement to the  
1557 dismissal "should do it."

1558 A judge noted that the risk of judge shopping is reduced by  
1559 the rules in many courts that would reassign a refiled case to the  
1560 judge who was assigned to the original case.

1561 Another judge said that in nine years on the bench he had  
1562 never had a case where he thought the parties were colluding to  
1563 achieve an improper result through dismissal. There have been cases  
1564 where the parties need time to settle. They can be resolved by  
1565 placing the case in suspense and denying all pending motions  
1566 without prejudice.

1567 A third judge said he had never seen a problem. The right to  
1568 a stipulated dismissal is not abused. And it is important to  
1569 remember that courts are established to serve the public.

1570 And a fourth judge reported that sixteen years of experience  
1571 with settlement conferences shows many reasons why parties need to  
1572 suspend proceedings while working out a settlement. It works to  
1573 suspend the case while requiring regular progress reports. And it  
1574 may help to reflect that fewer than 2% of civil actions go to  
1575 trial. There will not be many cases in which a stipulated dismissal  
1576 is followed by revival in a new action that actually goes to trial.

1577 The Committee agreed that there is no need to explore this  
1578 question further. It will be removed from the agenda.

1579 *Questions Referred from CACM*

1580 The Committee on Court Administration and Case Management has  
1581 referred a number of questions about possible changes in the Civil  
1582 Rules.

1583 Videoconferencing for Civil Trials. Judge Sentelle, Chair of the  
1584 Judicial Conference Executive Committee, referred this question to  
1585 both the Committee on Court Administration and Case Management and  
1586 the Committee on Rules of Practice and Procedure. The question was  
1587 asked by a judge who helps out courts in other districts "by  
1588 handling civil cases remotely through our videoconferencing  
1589 facilities." He observes that videoconferencing can work to  
1590 "remotely handle the pre-trial aspects of a variety of civil cases  
1591 and even try jury waived cases \* \* \*." Any limits that may be  
1592 imposed by the statutes that define the places where a district  
1593 judge can exercise judicial functions are outside the Enabling Act  
1594 process. But it is a fair question whether the Civil Rules might be  
1595 amended to support this kind of cooperation.

1596 The most immediately relevant rule appears to be Rule 43(a).  
1597 Rule 43(a) directs that testimony be taken in open court, but  
1598 concludes: "For good cause in compelling circumstances and with  
1599 appropriate safeguards, the court may permit testimony in open  
1600 court by contemporaneous transmission from a different location."  
1601 This standard was deliberately set very high. Should it be relaxed  
1602 in some way to enable a judge in one district to better participate  
1603 in proceedings in another district without leaving the home

1604 district?

1605           The first observation was that the pending amendments of Rule  
1606 45 raised questions about the distance witnesses should be  
1607 compelled to travel to attend a hearing or trial. The Committee  
1608 concluded that the current limits should remain undisturbed, even  
1609 though the 100-mile rule goes back to the Eighteenth Century. Rule  
1610 43 is extremely cautious about the circumstances that justify live  
1611 testimony without travelling to the hearing or trial. Starting down  
1612 the road to greater use of remote transmission "is a big deal." We  
1613 should be careful.

1614           The next observation was that nothing in the rules inhibits  
1615 conferences with attorneys by telephone or video. That practice is  
1616 routine. District judges in Alaska and Hawaii regularly participate  
1617 in actions pending in Arizona by these means. Even in criminal  
1618 cases, where confrontation is an important consideration, video  
1619 hearings can be used in determining competence. It is a fair  
1620 question whether judges should be permitted to do anything that  
1621 rules now prevent.

1622           Another judge focused on the suggestion that a bench trial  
1623 might be held in one courtroom while the judge is in another  
1624 courtroom. That is quite different from using video or like means  
1625 when communicating directly with one person or with a few more in  
1626 a conference, not a contested proceeding.

1627           A similar observation was that remote witnesses are heard  
1628 regularly in criminal competency hearings.

1629           A Committee member with extensive arbitration experience said  
1630 that international arbitrations often involve participation by  
1631 people in all corners of the earth, and in circumstances that make  
1632 it prohibitively expensive to bring them all to one place. Remote  
1633 transmission has proved workable in such circumstances, and is  
1634 often useful in less complex situations.

1635           It was suggested that one useful step would be to foster an  
1636 exchange of techniques that courts are using now. The FJC could  
1637 gather the information and put it in a bench book or in educational  
1638 programs.

1639           The early stages of these topics means that CACM has not yet  
1640 determined whether there are things courts should be allowed to do  
1641 but that are prevented by current rules, or that could be guided  
1642 and encouraged by well-thought rules amendments. The Committee  
1643 concluded that a report should be made to CACM that current rules  
1644 seem sufficiently flexible to support many useful practices, but  
1645 that the Committee will be pleased to consider any recommendations  
1646 that CACM may advance.

1647  
1648 E-Filing Issues: CACM has urged consideration of two issues that  
1649 arise in conjunction with development of the next generation of the  
1650 CM/ECF system for case management and electronic case filing.

1651 The first issue is whether the Notice of Electronic Filing  
1652 that court systems automatically generate should be recognized as  
1653 a certificate of service. CACM endorses the concept and asks  
1654 consideration "whether the federal rules of procedure should be  
1655 amended to allow an NEF to constitute a certificate of service when  
1656 the recipient is registered for electronic filing and has consented  
1657 to receive notice electronically." This approach would not apply to  
1658 litigants that have not registered for electronic filing or have  
1659 not consented to electronic service.

1660 The second issue goes to retention of records requiring a  
1661 third party's "wet signature." A number of alternatives are  
1662 possible. CACM prefers "a national rule specifying that an  
1663 electronic signature in the CM/ECF system is *prima facie* evidence  
1664 of a valid signature." A person challenging the validity of the  
1665 signature would have the burden of proving invalidity.

1666 The introduction of these questions concluded by asking  
1667 whether the time has come to establish, under auspices of the  
1668 Standing Committee, an all-committees group to work on a variety of  
1669 issues that may arise with respect to e-filing. Rule 5(d)(3), for  
1670 example, provides for e-filing only according to a local court  
1671 rule, and further provides that a local rule may require e-filing  
1672 only if reasonable exceptions are allowed. Should this be  
1673 reexamined in conjunction with the new CM/ECF system and the  
1674 continuing development of electronic communication? Another example  
1675 that has been noted repeatedly is Rule 6(d), which allows an  
1676 additional 3 days to act after being served by electronic means.  
1677 Whatever the situation when this provision was added, is it still  
1678 sensible to add the 3 days? No doubt other issues will be  
1679 identified. Many of them will be common to several different sets  
1680 of rules. When the time comes to address them, a joint enterprise  
1681 seems valuable. And the time may be now, or soon.

1682 Discussion began with a report that the Bankruptcy Rules  
1683 Committee has proposed a rule on e-signatures that treats e-filings  
1684 as if signed in ink. A scanned copy of a paper document signed  
1685 under penalty of perjury has the same effect as a wet signature.  
1686 The filer does not have to retain the originals. "These are  
1687 sensitive issues." The Bankruptcy Rules Committee hopes for  
1688 guidance on a trans-committee level. There is a great value in  
1689 uniformity across the different sets of rules.

1690 It was further noted that there is a federal e-signing  
1691 statute, and a Uniform Act that has been adopted in 46 states. Many



1692 federal agencies have e-signature rules. There is a statute for the  
1693 IRS. One possibility may be that study by the rules committees will  
1694 show problems so general as to warrant a recommendation for  
1695 additional legislation. But that possibility lies in the future, as  
1696 something the joint enterprise may conclude is useful more than as  
1697 something to be pursued at the outset.

1698 The discussion of e-signing provoked a reminder that there are  
1699 many issues in addition to e-signatures. Changes in e-filing rules  
1700 may well prove desirable. Much will depend on the final shape of  
1701 the next-generation CM/ECF system.

1702 Discussion concluded by endorsing the value of launching a  
1703 project that brings all the advisory committees together under the  
1704 guidance of the Standing Committee.

1705 Restricted Filers: The next generation of the CM/ECF system will  
1706 include a national database, available only to "designated court  
1707 users," that identifies "restricted filers." Examples of restricted  
1708 filers are prisoners subject to restrictions under the Prisoner  
1709 Litigation Reform Act and attorneys who have been subject to  
1710 disciplinary action. The question arises from the requirement in  
1711 Rule 4(a)(1)(C) that a summons must "state the name and address of  
1712 the plaintiff's attorney or – if unrepresented – of the plaintiff."  
1713 Many restricted filers appear pro se. And many pro se plaintiffs  
1714 change addresses frequently. Changed addresses will frustrate  
1715 identification. A new address will mark the filer as "new" in the  
1716 system. CACM suggests that Rule 4(a)(1)(C) be amended to read: "(C)  
1717 state the name and address of the plaintiff's attorney or – if  
1718 unrepresented – the plaintiff's name, address, and last four digits  
1719 of the social-security number of the plaintiff."

1720 Discussion began with an expression of real concern about  
1721 requiring the plaintiff to disclose part of the social security  
1722 number. "We need to reflect on the mental makeup of pro se  
1723 plaintiffs." Many of them will resist this requirement. There also  
1724 is a risk with public availability: it is often easy to get the  
1725 first five digits of the number from public data. "We should  
1726 require redacting – it will be a real burden."

1727 Safer alternatives might be considered, such as part of a  
1728 passport number, or a driver's license number, or the number in a  
1729 state-issued identification card. This might be added to the face  
1730 of the complaint form. It might be feasible to ask the clerk to  
1731 inspect the document. And it may be feasible to find a work-around  
1732 for plaintiffs who lack any of these documents.

1733 The discomfort with using social-security numbers was  
1734 expressed by another participant, who suggested that it might help  
1735 to require a plaintiff to disclose all names the plaintiff has ever

1736 been known by. And better use of "match technology" might be part  
1737 of the solution.

1738  
1739 It was asked how often these problems arise: how many  
1740 disbarred attorneys attempt to file, how many prisoners who have  
1741 maxed-out?

1742 The clerk answered that her office always checks attorneys;  
1743 about once a year they catch one who has been disbarred. Her court  
1744 has not had much of a problem with maxed-out prisoners. A judge  
1745 agreed that his court has a much greater problem with disbarred  
1746 attorneys than with other restricted filers.

1747 It was pointed out that the Seventh Circuit's private site can  
1748 identify restricted filers with "the press of a button." This  
1749 feature could be nationalized. Or party identification can be  
1750 sought through PACER.

1751 Bankruptcy courts have similar problems, but they are dealt  
1752 with through such means as withdrawing e-filing privileges. It is  
1753 not apparent that there is a need for added protections.

1754 These questions seem best addressed initially to those who are  
1755 working directly with the next generation CM/ECF system. The  
1756 concerns about requiring disclosure of even part of a social-  
1757 security number can be conveyed to them. It seems premature to  
1758 attempt judgments about Civil Rules amendments before there is a  
1759 better sense of how the new CM/ECF system will work, what burdens  
1760 may be placed on clerks' offices, and what burdens may be placed on  
1761 plaintiffs. These reactions will be communicated to the Committee  
1762 on Court Administration and Case Management.

1763 *Rule 62*

1764 The Appellate Rules Committee is carrying forward work on  
1765 stays pending appeal and appeal bonds. It is recognized that the  
1766 work is likely to involve Rule 62. The questions involve such  
1767 matters as the fit between the 14-day automatic stay, the 28-day  
1768 period after judgment to move for relief under Rules 50, 52, and  
1769 59, and the 30-day period to file a notice of appeal. Other  
1770 questions also are being studied. There are not yet any specific  
1771 proposals to amend the Civil Rules.

1772 It was agreed that the Civil Rules Committee should designate  
1773 someone to work with the Appellate Rules Committee. Depending on  
1774 the choices of the Appellate Rules Committee, it may prove  
1775 desirable to appoint a joint subcommittee in the form that has  
1776 proved useful in past projects that require the integration of  
1777 Civil Rules with Appellate Rules.

1778 *International Child Abduction: Prompt Return*

1779 *Chafin v. Chafin*, 133 S.Ct. 1017 (2013), ruled that return of  
1780 a mother and child to the habitual residence determined by the  
1781 district court under the Hague Convention on the Civil Aspects of  
1782 International Child Abduction did not moot the father's appeal. The  
1783 Court's opinion emphasized that courts nonetheless "should take  
1784 steps to decide these cases as expeditiously as possible \* \* \*.  
1785 Many courts already do so." Justice Ginsburg also emphasized the  
1786 need for speedy decision, and in footnote suggested that "the  
1787 Advisory Committees on Federal Rules of Civil and Appellate  
1788 Procedure might consider whether uniform rules for expediting  
1789 [Convention] proceedings are in order." 133 S.Ct. at 1029 n. 3.

1790 Justice Ginsburg's suggestion was introduced with full  
1791 agreement that these cases should be treated with all possible  
1792 dispatch. The question is whether that goal is better furthered by  
1793 adopting encouraging provisions in court rules or by other means.

1794 The need for court rules may be examined in light of the  
1795 Court's recognition that most courts understand the need for prompt  
1796 decision and do their best to move these cases as quickly as  
1797 possible. The Court's encouragement will add force to this common  
1798 approach. Judicial education efforts can supplement the Court's  
1799 urging. The Federal Judicial Center International Litigation Guide,  
1800 for example, includes a 2012 volume on the Hague Convention; the  
1801 chapter on procedural issues begins with four pages stressing that  
1802 expeditious handling is required by Article 11 of the Convention  
1803 and provided by the courts.

1804 Given these alternative resources, there is added reason to  
1805 consider the reasons that may weigh against adopting a Convention-  
1806 specific court rule. State courts have concurrent jurisdiction of  
1807 these proceedings, so a federal court rule would not cover all  
1808 cases. More importantly, the Judicial Conference has a longstanding  
1809 and regularly renewed policy opposing statutes or rules that give  
1810 docket priority to specific types of litigation. One priority, or  
1811 a few priorities, could easily interfere with management of  
1812 conflicting needs for immediate attention by a court burdened by  
1813 many cases of many different types. The road from one priority to  
1814 many priorities, moreover, is all too easy to follow. Conflicting  
1815 priority commands would inevitably emerge, confusing and impeding  
1816 wise allocation of scarce judicial resources.

1817 Discussion began with a judge's suggestion that FJC education  
1818 of judges will work better than a court rule.

1819 Another judge recalled spending a year with a Hague Convention  
1820 case, involving two parents "who hate each other." The need for  
1821 prompt disposition is well understood. The problems with

1822 implementing it are not susceptible to resolution by court rule.  
1823 But at least one parent will provide constant reminders of the need  
1824 for speed. And a court of appeals can expedite matters by deciding,  
1825 "opinion to follow."

1826 Still another judge observed that "ten minutes of reading will  
1827 instruct any judge on the need for expedition. I cannot imagine a  
1828 judge who will not understand the need." His court gets these cases  
1829 constantly, and although it is one of the busiest courts in the  
1830 country the judges manage to resolve these cases promptly.

1831 Still another judge reported that discussion with the Mass  
1832 Torts group at the Judicial Conference meeting in March found  
1833 agreement that a rule will not help. The Supreme Court has resolved  
1834 the mootness problem. Any court of appeals will expedite the  
1835 appeals now that they are not open to dismissal for mootness if  
1836 return to the home country has been accomplished.

1837 The Committee decided that no action should be taken on this  
1838 matter.

1839 *Rule 23*

1840 Dean Klonoff reported for the Rule 23 Subcommittee. Last  
1841 November, the Subcommittee identified a list of issues that may  
1842 deserve study. The issues were divided between "front burner" and  
1843 "back burner" categories. The lists are tentative, both in  
1844 determining what issues deserve study and in assigning priorities  
1845 among whatever issues come to be studied. Further work has been  
1846 stayed pending disposition of the several class-action cases  
1847 pending in the Supreme Court.

1848 The 5:4 decision in the *Comcast* case rewrote the question  
1849 presented and went off on narrow grounds. It is a technical  
1850 decision, followed by a grant-vacate-remand disposition of a couple  
1851 of similar cases. It does not provide the guidance that some had  
1852 hoped to come from the Court. The Subcommittee will need to study  
1853 the impact of this decision. The *Amgen* decision is largely limited  
1854 to securities class actions. The Subcommittee will resume  
1855 deliberations, and at some point will want to consult with the  
1856 bench and bar on what issues should be studied in depth. A  
1857 miniconference is a likely means of gathering views. But a  
1858 miniconference or similar venture is not likely in the near future.

1859 A Subcommittee member pointed out that the Appellate Rules  
1860 Committee is considering whether rules should be adopted to govern  
1861 settlement by an objector pending appeal from a class-action  
1862 judgment. "This is a problem. There has been a lot of discussion.  
1863 The Subcommittee will want to work on this." And it will be  
1864 important to see what impact *Comcast* has, "if any."

1865

*Pleading*

1866           It was noted that the agenda continues to hold a place for  
1867 consideration of pleading standards as they evolve in reaction to  
1868 the *Twombly* and *Iqbal* decisions. The Federal Judicial Center is  
1869 working on a study of all dispositive motions, advancing – among  
1870 other things – its initial study of the impact of these decisions.  
1871 No decision has been made as to the appropriate time to return to  
1872 these questions.

1873

*Publicizing Rules Amendments*

1874           It has been suggested that the Committee should consider  
1875 whether more should be done to publicize rules amendments as they  
1876 happen. The seeming widespread disregard of Evidence Rule 502 in  
1877 its early years provides an object lesson on the occasional – or  
1878 perhaps more frequent – failure of rules amendments to be  
1879 recognized and implemented by the bar.

1880           A first effort might be made to draw attention to the pending  
1881 revisions of Rule 45. It will be important to help the bench and  
1882 bar understand how they will work. Technically, a lawyer who on  
1883 December 2 issues a subpoena from a district court in California  
1884 for discovery in an action pending in the district court in Arizona  
1885 will issue a nonbinding instrument. Under revised Rule 45 the  
1886 subpoena must issue from the Arizona court where the action is  
1887 pending.

1888           Another example of a rule change that will affect many lawyers  
1889 is the impending change of the Appellate Rules to collapse separate  
1890 statements of the case and of the facts into a single statement. It  
1891 will be important to educate lawyers in this change.

1892           Initial suggestions were that the Federal Judicial Center  
1893 might be helpful in communicating rules changes to the federal  
1894 courts. There might be some way for the Committee to draw attention  
1895 to new rules by an open letter, or by an article prepared by some  
1896 appropriate person or entity. The Evidence Rules Committee, for  
1897 example, became concerned that Evidence Rule 502 is underutilized.  
1898 It held a conference and the Reporter, Professor Capra, wrote it up  
1899 as a law review article. But any such efforts must be tempered by  
1900 concern about the Committee's proper role. There is a real risk  
1901 that works that seem to be sponsored by the Committee may generate  
1902 post hoc and spurious "legislative history," giving unintended  
1903 meaning to the new rules.

1904           A Committee member said that "web site practitioners"  
1905 regularly visit the sites of the FJC and the Judicial Panel on  
1906 Multidistrict Litigation. These lawyers would read new rules,  
1907 whether the full text is posted on the site or whether instead

1908 there is a simple "alert" that new rules have been adopted.

1909 Another member noted that the Civil Procedure ListServ can be  
1910 used to draw the attention of law professors.

1911 The ABA Litigation Section was suggested as another source to  
1912 reach many lawyers. The Litigation Section is the largest ABA  
1913 section, and regularly holds CLE programs. A Committee member said  
1914 that Rule 45 would be included in upcoming programs - that it is  
1915 easy to accomplish this form of education.

1916 Beyond the ABA, the Federal Bar Association could be notified  
1917 of rules changes, expecting that the chapters in large cities will  
1918 be an effective means of communication.

1919 The courts of appeals have regular conferences. It should be  
1920 possible to include a ten-minute identification of new rules on  
1921 their programs.

1922 A more adventuresome suggestion from an observer was that  
1923 perhaps CM/ECF systems could be programmed to provide an automatic  
1924 notice of rules changes to lawyers the first time each lawyer signs  
1925 into the system.

1926 A practical note was sounded by the observation that new rules  
1927 generally apply to pending cases. The Administrative Office Forms  
1928 Group has begun work on a new subpoena form for bankruptcy cases.  
1929 These forms have been sent to the Civil Rules Committee, and are  
1930 being considered here as well. And the bankruptcy courts have a  
1931 "blast e-mail" system that is sent to all e-filers whenever a rule  
1932 or form is changed, with links to the new version. All federal  
1933 courts could be urged to do this.

1934 The Administrative Office staff noted that the package of  
1935 rules amendments the Supreme Court sends to Congress is sent to all  
1936 federal judges. The Administrative Office can ask court clerks and  
1937 executives to send notice to all e-filers. The notice could simply  
1938 advise consulting the e-file versions of new rules on the AO web  
1939 site. And proposed amendments are sent to legal publishers.

1940 A still more intriguing observation was that the Advisory  
1941 Committee may have submitted an amicus brief to the Supreme Court  
1942 in the case considering the validity of Rule 35, *Sibbach v. Wilson*.

1943 Cautions were sounded about the extent to which the FJC might  
1944 be involved. The FJC regularly engages in many efforts to keep  
1945 federal judges current on new developments, including rules  
1946 amendments. Court attorneys are included in these efforts. But it  
1947 has not taken on the role of continuing education for the bar in  
1948 general.

1949

*Impending Publication*

1950 Educating bench and bar on newly adopted rules is important.  
1951 It also is important to the process to encourage widespread  
1952 participation in the public comment process when proposed rules are  
1953 published for comment. Notices are sent to all state bars, and to  
1954 a goodly number of other groups and individuals that have indicated  
1955 interest in the process. Committee members were encouraged to think  
1956 of ways to stimulate interest that might be adopted if, as  
1957 recommended, extensive sets of amendments are approved for  
1958 publication this summer.

1959

*Technology Assisted Review*

1960 Computers are being put to the task of sorting through vast  
1961 amounts of computer-based information to reduce the burdens of  
1962 discovery. Much attention focuses on retrieving information to  
1963 respond to discovery requests, but computers can be used for other  
1964 discovery-related purposes as well. A party receiving responses to  
1965 discovery requests, for example, may use computer searches to  
1966 extract the useful information from the produced documents and also  
1967 to search for leads to other responsive and relevant materials that  
1968 were not included in the responses. The most sophisticated of these  
1969 computer-assisted methods have come to be referred to as  
1970 "technology assisted review." One of these methods, called  
1971 "predictive coding," relies on humans familiar with the litigation  
1972 to "teach" a computer how to identify relevant and responsive  
1973 documents.

1974 To assist the Committee in becoming familiar with the  
1975 opportunities to advance the cause of proportional discovery  
1976 through advanced computer search techniques, The Duke Law School  
1977 Center for Judicial Studies presented a panel on predictive coding.  
1978 The panel presentation was an introduction to a day-long program to  
1979 be presented by the Center on April 19. The panel was moderated by  
1980 John K. Rabiej, Director of the Center, and included Gordon V.  
1981 Cormack, Maura R. Grossman, John J. Rosenthal, and Ian J. Wilson.

1982 The panel presentation was followed by questions. The  
1983 questions and answers reflected several points. Many lawyers,  
1984 litigants, and courts are unfamiliar with TAR or uneasy about it.  
1985 At its best, it can recall a higher fraction of relevant documents  
1986 than human reviewers find, and at lower cost. One source of cost  
1987 saving can be greater precision in selecting only relevant  
1988 documents; fewer documents to review for privilege,  
1989 confidentiality, or other protections means lower cost for a  
1990 process that most litigants prefer to conduct by human review. It  
1991 is important to recognize that properly implemented search methods  
1992 are at least as good as human review, but to accept that neither  
1993 approach achieves perfection. It is important that courts

1994 understand the limits of human review in comparison to technology  
1995 assisted review. Human review typically achieves about 70% recall.  
1996 If computer-aided review does that well or better, it should be  
1997 accepted even though it does not achieve 100% recall. And it must  
1998 be recognized that not every process that may be labeled as  
1999 technology assisted review is equal to every other process. The  
2000 market of providers is likely to sort itself out in the coming  
2001 years.

2002 *Next Meeting*

2003 The next meeting is set for November 7 and 8 in Washington,  
2004 D.C. If the recommendations to publish rules proposals are approved  
2005 – Rule 37(e) changes and some less important proposals have already  
2006 been approved – that will be a good time to schedule the first  
2007 public hearing on the proposals. Given the history of past November  
2008 hearings, and the likelihood that the November agenda will be  
2009 relatively light in order to conserve energy for the work that will  
2010 remain in digesting comments and testimony on the published  
2011 proposals, it seems safe to set aside the first day, November 7,  
2012 for the hearing. If the hearing occupies the first full day, it may  
2013 be necessary to anticipate a full day for the meeting on November  
2014 8.

2015 *A Thank You*

2016 Judge Campbell concluded the meeting by expressing warm thanks  
2017 to the University of Oklahoma and the Law School for being  
wonderful hosts.

Respectfully submitted

Edward H. Cooper  
Reporter



**TAB 1B**

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

**Draft Minutes as of September 12, 2013**

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**ATTENDANCE**

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

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

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

Providing support to the Standing Committee were:

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

Representing the advisory committees were:

- Advisory Committee on Appellate Rules —
  - Judge Steven M. Colloton, Chair
  - Professor Catherine T. Struve, Reporter (by telephone)
- Advisory Committee on Bankruptcy Rules —
  - Judge Eugene R. Wedoff, Chair
  - Professor S. Elizabeth Gibson, Reporter
  - Professor Troy A. McKenzie, Associate Reporter
- Advisory Committee on Civil Rules —
  - Judge David G. Campbell, Chair
  - Judge Paul W. Grimm, Chair of Discovery Subcommittee (by telephone)
  - Judge John G. Koeltl, Chair of Duke Subcommittee (by telephone)
  - Professor Edward H. Cooper, Reporter
  - Professor Richard L. Marcus, Associate Reporter
- Advisory Committee on Criminal Rules —
  - Judge Reena Raggi, Chair
  - Professor Sara Sun Beale, Reporter
  - Professor Nancy King, Associate Reporter

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

### **INTRODUCTORY REMARKS**

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

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

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

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

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

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

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

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

### **APPROVAL OF MINUTES OF THE LAST MEETING**

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

### **REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES**

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

### **ACTION ITEMS**

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

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

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

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

Case Management Proposals

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

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

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

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

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

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

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

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

#### *Proposals to Incorporate Proportionality*

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

#### Enhancing Cooperation

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

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

#### Standing Committee Discussion of Proposed Duke Conference Amendments

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

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

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

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

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

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

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

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

management.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The questions for public comment are:

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

### INFORMATION ITEMS

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

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

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

### ACTION ITEMS

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

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

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

amendment represented a small step in that direction.

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

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

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

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

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

### INFORMATION ITEMS

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

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

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

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

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

1. Approval to transmit to the Judicial Conference a proposed amendment to Rule 12 (pretrial motions), and a conforming amendment to Rule 34;
2. Approval to transmit to the Judicial Conference proposed amendments to Rules 5 and 58 (adding consular notification); and
3. Approval to transmit to the Judicial Conference a technical and conforming amendment to Rule 6 (the Grand Jury).

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

### **ACTION ITEMS**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (b) Proposed Rule 12(c)(2) explicitly acknowledges district court discretion to extend or reset motion deadlines at any time before trial. This discretion, which is implicit in the current rule, permits district courts to entertain late-filed motions at any time before jeopardy attaches as warranted. It also allows district courts to avoid subsequent claims that defense counsel was constitutionally ineffective for failing to meet a filing deadline.
- (c) Proposed Rule 12(c)(3)(A) retains current Rule 12(e)'s standard of "good cause" for review of untimely motions (with the exception of failure to state an offense discussed separately in submitted Rule 12(c)(3)(B)). At the same time, the submitted rule does not employ the word "waiver" as in the current rule because that term, in other contexts, is understood to mean a knowing and affirmative surrender of rights.

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

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

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

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

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

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

*Standing Committee Discussion of Proposed Amendments to Rule 12*

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

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

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

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

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

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

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

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

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

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

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

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

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



with treaty provisions.<sup>1</sup>

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### INFORMATION ITEM

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

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

### **REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES**

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

#### **ACTION ITEM**

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

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

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

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

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

### INFORMATION ITEMS

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

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

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

### **REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES**

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

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

## ACTION ITEMS

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

1. Approval for transmission to the Judicial Conference of amendments to Rules 1014, 7004, 7008, 7012, 7016, 7054, 8001-8028, 9023, 9024, 9027, and 9033, and Official Forms 3A, 3B, 6I, and 6J;
2. Approval for transmission to the Judicial Conference without publication of a conforming amendment to Official Form 23;
3. Approval for republication in August 2013 of amendments to the means test forms – Official Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2 – along with the initial publication of Official Form 22A-1Supp; and
4. Approval for publication in August 2013 of amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5005, 5009, 7001, 9006, and 9009, and Official Forms 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 113, 119, 121, 318, 423, 427, 17A, 17B, and 17C.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**N. Proposed Action: Publication of Individual Debtor Forms**

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

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

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

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

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

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

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

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

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

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

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

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



## **REPORT OF THE ADMINISTRATIVE OFFICE**

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

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

## **CONCLUDING REMARKS**

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

## **NEXT MEETING**

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

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## E-Rules

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

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

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

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

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

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

## **E-RULES AMENDMENTS**

### **Introduction**

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

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

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

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

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

A third common question is described in the next section.

### **Issues Common Across the Sets of Rules**

#### *Generic "e=p[aper]" Provision*

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

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

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

- (a) INFORMATION IN ELECTRONIC FORM. In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.
- (b) ACTION BY ELECTRONIC MEANS. In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

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

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

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

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

#### **Rule 5. Serving and Filing Pleadings and Other Papers**

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

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

(2) is transmitted by authorized means.

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

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

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



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

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

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

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

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

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

*Service After Initial Process*

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

(b) Service: How Made. \* \* \*

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

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

*Electronic Filing*

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

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

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

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

**(d) FILING. \* \* \***

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

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

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

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

**(d) FILING.**

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

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

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

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

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

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

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

parties that all other parties indeed were served.

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

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

*"3 Days Are Added"*

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

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

\* \* \*

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

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<sup>3</sup> This anticipates adoption of the proposed amendment published in August, 2013.

<sup>4</sup> The naked cross-references to Rule 5(b)(2) may seem awkward. The parenthetical descriptions are

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

#### Committee Note

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

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

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

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

#### **Issues Peculiar to the Civil Rules**

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

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

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

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

#### **Rule 4. Summons**

**(a) CONTENTS; AMENDMENTS.**

(1) *Contents.* A summons must: \* \* \*

(F) be signed by the clerk, either physically or electronically; and

(G) bear the court's seal, either physically or electronically.<sup>5</sup> \* \* \*

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

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

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

#### **Rule 7.1. Disclosure Statement**

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

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

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

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

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

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

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

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

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



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

Rule 72(b)(1):

\* \* \* The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly ~~mail~~ serve a copy ~~to~~ on each party.

Self-explanatory. This is existing practice.

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

Rule 79(b):

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

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

Rule 79(c):

**(c)** INDEXES; CALENDARS. Under the court's direction, the clerk must:

**(1)** keep indexes of the docket and of the judgments ~~and orders~~ described in Rule 79(b); \* \* \*

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

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<sup>6</sup> A limited informal inquiry suggests that there is no need for multiple "copies."

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

#### **CM/ECF Issues**

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

#### **Other CACM Issues**

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

#### **Appendix: Vocabulary**

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

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

is no need to provide a physical paper of anything that has been served electronically. Rule 5(d) is already close to electronic filing for documents and papers, but does not reach things that are not filed. And it prohibits filing discovery requests and responses

until they are used in the proceeding. (Supplemental Rule F(8) allows a party to a limitation-of-liability proceeding to "question or controvert any claim without filing an objection thereto.")

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

communication be used, at least if simultaneous?

inform: The court must inform the parties of proposed instructions, Rule 51(b)(1).

leaving: E.g., Rule 4(e)(2)(B). Unlike "deliver," this carries a significant hint of physical paper. So Rule 5(b)(2)(B).

mailing: The means of serving papers after the summons and complaint include "mailing it to the person's last known address." Rule 5(b)(2)(C). Given the juxtaposition with e-service in (b)(2)(E), this likely does not mean e-mail. But what of other rules? Rule 15(c)(2), for example, provides for relation back of an amended pleading "if, during the stated period, process was delivered or mailed to" the United States Attorney, etc.

Supplemental Rule B(2)(b) provides for "any form of mail requiring a return receipt." Can e-mail "receipts" be made equally reliable?

make: With variations, appears throughout the rules. E.g., Rule 7(b)(1): "A request for a court order must be made by motion." Rule 12(b): a motion "must be made." The meaning for e-acts may depend on context. Rule 26(a)(1)(C), for example, sets the time to "make" initial disclosures. E-disclosures should be perfectly acceptable, subject to the interplay between 26(a)(4), which requires all disclosures to be "in writing" unless the court orders otherwise, and Rule 5(d)(3).

minute: How's this for an exotic one? Supplemental Rule E(5)(b) provides for a general bond to stay execution of process against a vessel in all pending actions. The bond "shall be indorsed by the clerk with a minute of the actions wherein process is so stayed."

newspaper: For notice of condemnation by eminent domain, Rule 71.1(3)(B), and notice of limitation-of-liability proceedings, Supplemental Rule F(4).

notice: "filing a notice of dismissal," Rule 41(a)(1)(A)(i).

offer: Rule 68(a) provides for serving an offer of judgment. Is paper implied?

paper: Is it enough that Rule 5(d)(3) provides: "A paper filed electronically in compliance with a local rule is a written paper for purposes of these rules"?

What of papers that are served, not filed? Rule 65.1 - a surety on a bond given to the court appoints the court clerk as its agent for service of "any papers \* \* \*." Presumably the clerk files it; does that authorize electronic service?

publish: May be linked to newspaper, see Rule 71.1(d)(3)(B). Service by publication is subject to statutory provisions in proceedings to cancel citizenship certificates, Rule 81(a)(3). Published notice is required in civil asset forfeiture proceedings, Supplemental Rule G(4); publication on an official government forfeiture site can satisfy the requirement.

preserved: The order appointing a master must state "the nature of the materials to be preserved and filed." E-preservation?

produce: Rule 34 provides a request "to produce" documents. It clearly addresses the form for producing ESI. It seems likely that production of paper documents often is made by converting to an

electronic format.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

stipulate: Stipulate and stipulation appear frequently.

Occasionally signing may be specified – Rule 41(a)(1)(A)(ii): "a stipulation of dismissal signed by all parties who have appeared."  
submit: This seems to cover e-action. For example, Rule 11(b) provides that an attorney or party certifies several things "by filing, submitting, or later advocating" a pleading, written motion, or other paper.

transcript: Rule 32(c) calls for a transcript of any deposition testimony offered at trial, and allows non-transcript form "as well."

verify: Rule 5(d)(3) authorizes local rules allowing "papers to be filed, signed, or verified by electronic means." Verification does not appear frequently in the rules. See, e.g., Rules 23.1(b), 27, 65(b)(1)(A); Supplemental Rules B(1)(a), C(2)(a), C(6)(b), G(2)(a)  
warrant: For arrest, Supplemental Rules C(3)(a), D, E(9)(b), G(3)(b)(i), etc.

writ: E.g., "writ of execution," Rule 69(a)(1); "every \* \* \* writ issued," Rule 79(a)(3).

writing, written, in writing: Rule 5(d)(3) provides that a paper filed electronically in compliance with a local rule "is a written paper for purposes of these rules." How far does this extend to other settings? Rule 5(a)(1)(C), (D), and (E) require service of a written motion or a written notice, etc. Variations of writing appear regularly throughout the rules.

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

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

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

"Written questions" for a Rule 31 deposition?

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

"Written request to admit" for Rule 36.

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

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

"written objection" to a subpoena

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

Rule 51 calls for written requests for jury instructions.

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

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

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**TAB 3**

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**TAB 3A**

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## Rule 17(c)(2)

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

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

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

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

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

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

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

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

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

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

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

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

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

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**Memorandum**

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

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

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

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

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

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

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

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

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

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

In *Ferrelli*, the Second Circuit held:

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

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

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

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

*Ferrelli*, 323 F.3d at 203.

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

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

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

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

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

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

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

## **II. Duties of Courts When Dealing with Incompetent Parties**

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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



**TAB 3C**

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

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

Rule 17(c)(2) reads:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



**Kevin POWELL, Appellant**

v.

**Dr. SYMONS.**

**Detlef F. Hartmann, Appellant**

v.

**Warden Thomas Carroll; Commissioner Stanley Taylor; Jane Brady, Former Attorney General; Adult Bureau Chief Paul Howard; James Welsh; Warden Robert Snyder; Elizabeth Burris; Deputy Warden David Pierce; Francene Kobus; Mike Little; Edward Johnson; John Melbourne; Jane Thompson; Lisa M. Merson; R. Vargas; Evelyn Stevenson; Nikita Robbins; Janet Leban; Michael Knight; John Malaney; Jane Alie; Deborah Rodweller; Gail Eller; Oshenka Gordon; Brenda 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. Pincihak*, 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.

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## RULE 82

Rule 82 must be amended to reflect 2011 legislation revising the venue statutes. Former 28 U.S.C. § 1392, governing local actions, has been repealed. A new § 1390 has been added, including a subsection (b) described below. With the help of the Maritime Law Association, it appears that the best amendment would be:

### **Rule 82. Jurisdiction and Venue Unaffected**

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1390-1391~~=1392~~.

#### *Background*

Traditionally actions brought in the admiralty or maritime jurisdiction have not been subject to the general venue provisions, apart from the transfer sections. This rule has been confirmed by new § 1390(b):

(b) Exclusion of Certain Cases.—Except as otherwise provided by law, this chapter shall not govern the venue of a civil action in which the district court exercises the jurisdiction conferred by section 1333, except that such civil actions may be transferred between district courts as provided in this chapter.

Section 1333 "establishes original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. \* \* \*"

An intricate body of lore establishes that there are cases that must be brought within the exclusive jurisdiction as necessarily admiralty cases. But there are others that may be brought in the admiralty jurisdiction but also may be brought in federal court by invoking some other basis of subject-matter jurisdiction. At this point, Rule 9(h) enters the picture:

#### **(h) Admiralty or Maritime Claim.**

- (1) *How Designated.* If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated.

The purpose of the second sentence of Rule 82 is to make good the reassurance that the rules do not interfere with the venue statutes. Invoking Rule 9(h) accomplishes that purpose. The second sentence recognizes that an action that lies only in admiralty jurisdiction is an admiralty claim, one as to which the court, in the language of § 1390(b), exercises the jurisdiction conferred by § 1333. The first sentence gives the claimant an option to choose to invoke an exercise of § 1333 jurisdiction when an alternative basis of subject-matter jurisdiction is also available. Designating the claim as an admiralty or maritime claim "for purposes of Rule[\* \* \* 82]" brings it within § 1390(b) and takes it outside the general venue statutes. Choosing not to designate it as an admiralty or maritime claim leaves it within the general venue statutes – the court does not then exercise § 1333 jurisdiction.

The revised Rule 82 set out above leaves matters where they have been. When the claimant has a choice whether to invoke admiralty jurisdiction, Rule 9(h) provides the procedural means to make the choice. Rule 82 recognizes the consequences of the choice – and it will be made better by enactment of § 1390(b) and the opportunity to refer explicitly to a statute that now explicitly recognizes that admiralty claims are not governed by the general venue statutes.

Deletion of the present reference to § 1392 is required by its repeal.

The resolution of the Maritime Law Association recommending this change, and the Working Group paper explaining the resolution, are attached.



**TAB 4B**

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THE MARITIME LAW ASSOCIATION  
OF THE UNITED STATES

**ROBERT B. PARRISH**

PRESIDENT  
501 W. BAY STREET  
JACKSONVILLE, FL 32202  
904-421-8436 FAX: 904-421-8437  
[BPARRISH@MPPKJ.COM](mailto:BPARRISH@MPPKJ.COM)

**ROBERT G. CLYNE**

FIRST VICE PRESIDENT  
16855 NORTHCHASE DRIVE  
HOUSTON, TX 77060  
281-877-5989 FAX: 281-877-5803  
[RCLYNE@EAGLE.ORG](mailto:RCLYNE@EAGLE.ORG)

**HAROLD K. WATSON**

SECOND VICE PRESIDENT  
801 TRAVIS STREET, SUITE 1910  
HOUSTON, TX 77002  
713-343-2952 FAX: 713-546-9806  
[WATSON@CHAFFE.COM](mailto:WATSON@CHAFFE.COM)



**DAVID J. FARRELL, JR.**

SECRETARY  
2355 MAIN STREET, P.O. BOX 186  
S CHATHAM, MA 02659  
508-432-2121 FAX: 508-432-2334  
[FARRELL@SEALAW.ORG](mailto:FARRELL@SEALAW.ORG)

**WILLIAM R. CONNOR III**

TREASURER  
88 PINE STREET, FLOOR 21  
NEW YORK, NY 10005-1801  
212-376-6417 FAX: 212-376-6490  
[WRCONNOR@MDWCG.COM](mailto:WRCONNOR@MDWCG.COM)

**BARBARA L. HOLLAND**

MEMBERSHIP SECRETARY  
1191 SECOND AVE, SUITE 1800  
SEATTLE, WA 98101-2939  
206-816-1307 FAX: 206-464-0125  
[BHOLLAND@GSBLAW.COM](mailto:BHOLLAND@GSBLAW.COM)

September 16, 2013

Professor Edward H. Cooper  
The University of Michigan Law School  
625 South State Street  
Ann Arbor, MI 48109-1215

RE: Resolution Concerning Proposed Change to Rule 82 of Federal Rules of Civil Procedure

Dear Professor Cooper:

Ed Powers, Chair of the Practice and Procedure Committee of the Maritime Law Association of the United States, asked me to write to you regarding the above. At the Association's annual meeting in New York last May that committee proposed a resolution regarding a proposed change to Rule 82 of the Federal Rules of Civil Procedure, that was necessitated by the 2011 changes to 28 U.S.C. Chapter 87.

I am pleased to report that the following was considered and adopted on May 3, 2013, by the Maritime Law Association of the United States:

RESOLUTION CONCERNING A PROPOSED CHANGE TO  
RULE 82 OF THE FEDERAL RULES OF CIVIL PROCEDURE

WHEREAS, Public Law 112063, Title II, § 205 (Dec. 7, 2011) amended Chapter 87 of Title 28 of the United States Code by adding 28 U.S.C. § 1390(b) and repealing 28 U.S.C. § 1392; and

WHEREAS, Rule 82 of the Federal Rules of Civil Procedure currently provides:

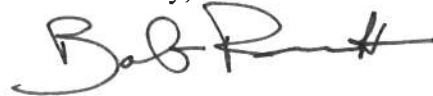
These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for the purposes of 28 U.S.C. §§ 1391-1392; and

WHEREAS, the statutory change makes necessary a revision to Rule 82 to reflect, *inter alia*, the repeal of 28 U.S.C. § 1392,

NOW, THEREFORE, BE IT RESOLVED that, to conform to changes to the venue provisions of Chapter 87 of 28 U.S.C., specifically, the adoption of 28 U.S.C. § 1390(b) and the repeal of 28 U.S.C. § 1392, The Maritime Law Association of the United States recommends that Rule 82 of the Federal Rules of Civil Procedure be amended to read:

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for the purposes of 28 U.S.C. §§ 1390 - 1391.

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Parrish", with a stylized flourish at the end.

Robert B. Parrish  
President

Cc: Edward J. Powers

## Report to the Practice & Procedure Committee on Proposed Change to Rule 82

Professor Edward Cooper (of the University of Michigan School of Law) is the Reporter of the Judicial Council's Advisory Committee on the Federal Rules of Civil Procedure. He requested input from The Maritime Law Association concerning changes to Rule 82 of the Federal Rules of Civil Procedure made necessary by the 2011 changes to 28 U.S.C. Chapter 87 (District Courts; Venue). Specifically, Pub. L. 112063, Title II, § 205 (Dec. 7, 2011) amended Chapter 87 by adding 28 U.S.C. § 1390(b) and repealing 28 U.S.C. § 1392.<sup>1</sup>

New 28 U.S.C. § 1390(b) conforms to existing admiralty law in excluding admiralty cases from the general venue provisions of Chapter 87, except the transfer provisions. It provides:

(b) Exclusion of certain cases. – Except as otherwise provided by law, this chapter shall not govern the venue of a civil action in which the district court exercises the jurisdiction conferred by section 1333, except that such civil actions may be transferred between district courts as provided in this chapter.

Rule 82 of the Federal Rules of Civil Procedure currently provides:

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for the purposes of 28 U.S.C. §§ 1391-1392.

Because of the repeal of § 1392, a change to Rule 82 is required. The Advisory Committee seeks advice on how best to change the Rule to conform to the statutory change and admiralty practice.

Chair Edward J. Powers of the Practice & Procedure Committee (the "Committee") appointed a Working Group of the Committee to address the issue. The Working Group consists of Chair Powers; Past Chairs of the Committee James W. Bartlett III, Joshua Force, and Robert J. Zapf (current Chair of the Committee's Subcommittee on Federal Rules & Statutes); Professor Robert Force of Tulane University School of Law; and Committee Member, Samuel P. Blatchley.

The Working Group considered the statutory language and the language in Rule 82. New 28 U.S.C. § 1392(b) speaks of "civil actions" in which the district court "exercises" admiralty jurisdiction; Rule 82 speaks of an "admiralty or maritime claim" designated as such under Rule 9(h) of the Federal Rules of Civil Procedure as not being a "civil action for the purposes of 28 U.S.C. §§ 1391-1392."

---

<sup>1</sup> Former 28 U.S.C. § 1392 provided that "[a]ny civil action, of a local nature, involving property located in different districts in the same State, may be brought in any of such districts." Because amended 28 U.S.C. § 1391(a)(2) abolished the local-action rule, § 1392 was repealed as unnecessary.

28 U.S.C. § 1391 is the general venue provision addressing venue for federal civil actions that generally would apply should a plaintiff not make a Rule 9(h) designation of a claim falling within both admiralty and another basis of federal jurisdiction. New 28 U.S.C. § 1390(b) is a statutory recognition that admiralty has its own venue rules and requirements, but that admiralty and maritime claims can be transferred to other districts.

The Working Group was in agreement that a district court exercises admiralty jurisdiction over a civil action (and therefore 28 U.S.C. §1390(b) applies) when the only basis for the district court's jurisdiction is admiralty (e.g., a purely *in rem* action), whether or not there is a specific designation under Rule 9(h). However, the Working Group also recognized that a district court "exercises" other jurisdiction when there is an admiralty and maritime claim which would be cognizable under a separate basis of federal jurisdiction but there is no Rule 9(h) election. The Working Group recognized that in such cases, the general venue provisions of Chapter 87 would apply (e.g., § 1391, or in the cases of interpleader, § 1397).

Accordingly, the Working Group concluded that the simplest "fix" to the required change to Rule 82 was the best: change the identification of the statutory provisions in Rule 82 from "28 U.S.C. §§ 1391 – 1392" to "28 U.S.C. §§ 1390 - 1391." Thus, the revised Rule 82 would read:

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for the purposes of 28 U.S.C. §§ 1390 - 1391.

This leaves intact the distinction between a "admiralty or maritime claim" and a "civil action." It maintains the conformity of the use of the term "civil action" in the rule and the statute. It recognizes the distinction made in the new 28 U.S.C. § 1390(b) between when a district court "exercises" admiralty jurisdiction (in which civil actions the venue provisions other than the transfer provisions of Chapter 87 will not govern), and when a district court simply has admiralty jurisdiction but doesn't "exercise" it (in which civil actions the venue provisions including the transfer provisions of Chapter 87 will govern). The recognition in Rule 82 that an "admiralty or maritime claim" designated as such under Rule 9(h) is not a "civil action" to which the general venue provisions of Chapter 87 will apply is preserved. It also permits those general venue provisions to apply when the district court does not "exercise" admiralty jurisdiction in situations where a Rule 9(h) designation is not made. It also permits the transfer provisions of Chapter 87 to apply even when a Rule 9(h) designation is made (and thus the district court "exercises" admiralty jurisdiction). The proposed change does not affect so called "hybrid" cases involving multiple claims or multiple parties where no Rule 9(h) designation is made.

The Working Group submits this report and recommendation for consideration of the full Practice & Procedure Committee at its Wednesday May 1, 2013 meeting. Should the Committee unanimously agree with this recommendation, the Committee will be asked to adopt the following Resolution to be reported to the Board of Directors and to be submitted to the General Membership Meeting on Friday, May 3, 2013:

RESOLUTION CONCERNING A PROPOSED CHANGE TO  
RULE 82 OF THE FEDERAL RULES OF CIVIL PROCEDURE

WHEREAS, Public Law 112063, Title II, § 205 (Dec. 7, 2011) amended Chapter 87 of Title 28 of the United States Code by adding 28 U.S.C. § 1390(b) and repealing 28 U.S.C. § 1392; and

WHEREAS, Rule 82 of the Federal Rules of Civil Procedure currently provides:

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for the purposes of 28 U.S.C. §§ 1391-1392; and

WHEREAS, the statutory change makes necessary a revision to Rule 82 to reflect, *inter alia*, the repeal of 28 U.S.C. § 1392,

NOW, THEREFORE, BE IT RESOLVED that, to conform to changes to the venue provisions of Chapter 87 of 28 U.S.C., specifically, the adoption of 28 U.S.C. § 1390(b) and the repeal of 28 U.S.C. § 1392, The Maritime Law Association of the United States recommends that Rule 82 of the Federal Rules of Civil Procedure be amended to read:

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for the purposes of 28 U.S.C. §§ 1390 - 1391.

Should such a resolution be adopted by The Maritime Law Association, the President will be asked to forward the Resolution to Professor Cooper for consideration by the Advisory Committee.

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## "REQUESTER PAYS" ISSUES

The purpose of this memorandum is to introduce for general discussion a collection of issues that bear on a topic that has repeatedly arisen over the years in discussion of discovery concerns. The topic is whether the rules ought to include some "requester pays" provisions. The Discovery Subcommittee presents this topic for general discussion because it has been raised by several sources (including communications from Congress) and seems to present basic issues. It is not recommending any further rulemaking at this time, but instead responding to expressions of support for serious consideration of such rulemaking.

Besides this memo, the agenda book should also include several additional items bearing on this topic:

Judge Grimm's Discovery Order, which he uses in all or almost all cases in which discovery is expected.

Notes of the Discovery Subcommittee's Sept. 16, 2013, conference call discussing these issues.

Introduction to Proposals for Cost-Bearing Provisions in the Rules, a memorandum prepared by Prof. Marcus to provide background for the Sept. 16 conference call.

The idea behind considering some sort of explicit requester pays provision is that there may, in the absence of such a provision, be a significant number of instances in which discovery requests are made even though the likely importance of the information being sought is dwarfed by the cost of complying with the discovery request. Indeed, there are even assertions that some may deploy broad discovery requests precisely to impose costs on adversaries. In instances where that may be occurring, requester pays could be a useful tool.

But it is not at all clear that "cost infliction" happens with significant frequency, even though there probably are instances in which one might say it has occurred. And (particularly in the Digital Age, during which huge amounts of data may be requested through discovery) self interest could prompt those seeking discovery to try to avoid asking for too much. In addition, it is surely true that those seeking discovery must be concerned about narrowing their requests so much that critical information can be withheld on the ground it was not requested. Modulating the use of cost-bearing in this environment is accordingly a challenging task.

One starting point is to focus on the current amendment package, which includes provisions that may assist the court and parties in performing that task. Since 1983, Rule 26(b)(2) has directed judges to limit discovery that is disproportionate, and

a reminder of that directive was included in Rule 26(b)(1) in 2000. The current amendment package imports the proportionality provision directly into the scope definition. Additionally, it contains an amendment to Rule 26(c) that would make explicit that "allocation of expenses" could be a feature of a protective order. Whether these proposed changes will actually be approved for inclusion in the rules is, of course, impossible to say at present. But if significant parts of the current package are actually adopted, it may take some time to see whether they ameliorate actual problems of over-discovery.

Another starting point is to recognize "the presumption is that the responding party must bear the expense of complying with the discovery requests." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358 (1978). This starting point seems implicit in several current rules:

Rule 26(g)(1)(B) says that the signature of a lawyer on a discovery request certifies that the request has not been made for an improper purpose such as increasing the cost of litigation and that the request is not unduly burdensome or expensive.

Rule 26(b)(2)(C)(iii) requires the court to limit or prohibit discovery that would disproportionately burden the responding party.

Rule 26(c) now authorizes a protective order to protect a party from "undue burden or expense." In *Oppenheimer Fund*, the Supreme Court recognized that Rule 26(c) provided authority for "orders conditioning discovery on the requesting party's payment of the costs of discovery."

Rule 26(b)(2)(B) explicitly authorizes the court to condition discovery from sources of electronically stored information that are not reasonably accessible due to burden or expense, and the Committee Note confirms that cost-bearing is one such condition.

A third starting point is to recognize that past rulemaking efforts present background for the current consideration of these issues. That background (including the summary of commentary during the public comment period in 1998-99 on one such proposal) is presented in Prof. Marcus's memo that should be included in this agenda book. It is clear that the public comment in 1998-99 showed that there are strong views on these subjects in some sectors of the bar.

It is critical that any approach to these issues include close attention to access to justice concerns. Discovery is an important source of evidence for litigants. At the same time, it may sometimes be an important cost for litigants that could

actually impede access to justice by deterring some potential litigants from seeking relief in court due to the cost of discovery that effort would entail. Already, significant numbers of litigants seem to be priced out of hiring lawyers, so the prospect that lawyers would have to bear additional discovery costs might compound that concern. Recent concern about patent "trolls" could illustrate this concern.

At the same time, the recent development of protocols for discovery in individual employment discrimination cases could indicate that it may be possible in other significant categories of litigation to develop an idea of what constitutes "core" discovery. If so, one could perhaps consider cost bearing for discovery beyond that "core" information. Alternatively, even without developing protocols for other whole categories of litigation it may be that judicial management along the lines of Judge Grimm's Discovery Order (also included in this agenda book) could facilitate the handling of cost-bearing possibilities in individual cases.

The goal of raising these issues during this meeting is to canvas the Committee's views on how further exploration should be pursued. Disciplined examination of these issues would depend on developing a substantial information base, and that in turn depends partly on identifying the issues that should be pursued. There should be no assumption that this effort will lead to actual rule-change proposals; as noted below, drafting any such proposals would involve many tough questions. But at the same time it seems important for the Committee to examine these issues seriously; even if it concludes that no further changes to the rules are indicated it will be important that it have a solid information base for its conclusion.

A problem in addressing any of these concerns is that discussion often seems to be dominated by what some call "anecdota" -- horror stories that, however accurate they may be, do not suitably portray the broad realities of most litigation. So one aspect of this discussion should be to identify methods to develop better information than we currently have. Preliminary discussions with Emery Lee of the FJC have begun to explore these issues. And ideas about how to involve bar groups and others who may be able to shed light on these issues using a solid data-base rather than anecdotes would be welcomed.

Similarly, ideas about which issues seem most important and promising would be welcome. Examples of local rules, practices, standing orders, or guidelines that have seemed to yield good results would be helpful and might provide a basis for further inquiry.

If the Subcommittee decides to move forward, a likely step would be to convene some sort of mini-conference, but that seems

quite premature now. For one thing, the Committee is likely to be fully occupied for a considerable time addressing the issues arising during the public comment period concerning the current amendment package. For another, it has other issues (such as class actions) that may become important and time-consuming. For a third, it could conclude that it is necessary to learn how the current set of amendment proposals work (assuming they go forward) before venturing to propose further significant changes to the discovery rules.

So in the spirit of getting discussion going, rather than suggesting any conclusion, here are some thoughts that have received attention in Subcommittee discussions:

(1) Is there a serious problem of over-discovery that might be solved by some form of requester pays rule? We know that in much litigation it seems that the discovery is roughly proportional to the stakes. We know also that in a significant number of cases high discovery costs are reported. How should one try to identify over-discovery? How can one evaluate the potential utility of requester pays approaches to dealing with those problem cases?

(2) Should any rules along this line focus mainly on certain kinds of cases, or on certain kinds of discovery?

(a) In general, the rules are to be "transsubstantive," applying to all cases with relative equality. But there are rules that are keyed to specific types of cases, such as Rule 9(b), with its specific pleading requirements for fraud.

(b) In 1998 a cost-bearing proposal was published as an addition to Rule 34, dealing only with discovery of that sort, but an alternative of placement in Rule 26 was included in the invitation for comment, and the Advisory Committee eventually decided that the more appropriate placement would be in Rule 26.

(c) Since discovery regarding electronically stored information has assumed such great importance, should a "requester pays" idea be considered only for that sort of discovery? The current Rule 37(e) proposed amendment is not so limited, although current Rule 37(e) is so limited. Current Rule 26(b)(2)(B), with its cost-bearing possibility, is also only about electronically stored information.

(3) Should cost-bearing ever be mandatory? All models of possible rule changes that have been actively considered so far have essentially been discretionary. That means that the court must become involved before cost-bearing is a



possibility. Perhaps cost bearing could be presumed in certain situations unless the court directed otherwise. But if so, how would one define those situations? Defining them could be quite difficult, and disputes about whether given discovery fell on one side or the other side of such a line could themselves impose significant costs on the litigants and burdens on judges.

(4) Could introduction or emphasis on these issues itself justify substantial discovery? If the question is whether providing requested discovery will be highly burdensome, or would not provide useful evidence, it may be that some parties will seek to explore these issues using discovery. One method for making Rule 26(b)(2)(B) determinations about whether to order discovery from "inaccessible" sources of electronically stored information is to see what can be found in a sample of those sources, and at what cost. Perhaps that is a model that would be useful, but it might also suggest "discovery about discovery," something that may be unnerving.

In sum, there are many things that might profitably be pursued, and the Subcommittee invites suggestions about how best to proceed. Hopefully this brief introduction adequately highlights some of the considerations.

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**TAB 5B**

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**UNITED STATES DISTRICT COURT  
DISTRICT OF MARYLAND**

CHAMBERS OF  
PAUL W. GRIMM  
UNITED STATES DISTRICT JUDGE

101 W. LOMBARD STREET  
BALTIMORE, MARYLAND 21201  
(410) 962-4560  
(410) 962-3630 FAX

**DISCOVERY ORDER**

Fed. R. Civ. P. 26(b)(2)(c) and 26(g)(1)(B)(iii) require that discovery in civil cases be proportional to what is at issue in the case, and require the Court, upon motion or on its own, to limit the frequency or extent of discovery otherwise allowed to ensure that discovery is proportional. This Discovery Order is issued in furtherance of this obligation. Having reviewed the pleadings and other relevant docket entries, the Court enters the following Discovery Order that will govern discovery in this case, absent further order of the Court or stipulation by the parties. This Discovery Order shall be read in conjunction with the Scheduling Order in this case, which provides discovery deadlines. *With respect to the limitations imposed in paragraphs 2 a & b, 5, 6 and 8, counsel are encouraged to confer and propose to the Court for approval any modifications that are agreeable to all counsel.*

1. ***Disclosure of Damage Claims and Relief Sought.*** Within fourteen (14) days of this Order, any party asserting a claim against another party shall serve on that party and provide to the Court the information required by Fed. R. Civ. P. 26(a)(1)(A)(iii) regarding calculation of damages. The party also shall include a particularized statement regarding any non-monetary relief sought. Unless otherwise required by the Scheduling Order, the disclosures required by Fed. R. Civ. P. 26(a)(1)(A)(i), (ii), and (iv) need not be made.
2. ***Scope of Discovery – Proportionality.*** Pursuant to Fed. R. Civ. P. 26(b)(2)(C) and 26(g)(1)(B)(ii)–(iii), the discovery in this case shall be proportional to what is at issue in the case. To achieve this goal, and pursuant to Fed. R. Civ. P. 26(b)(1), discovery will be conducted in phases, as follows.
  - a. ***Phase 1 Discovery.*** The first phase of discovery should focus on the facts that are most important to resolving the case, whether by trial, settlement or dispositive motion. Accordingly, the parties’ Phase 1 Discovery may seek facts that are not privileged or work product protected, and that *are likely to be admissible* under the Federal Rules of Evidence and material to proof of claims and defenses raised in the pleadings. Phase 1 Discovery is intended to be narrower than the general scope of discovery stated in Rule 26(b)(1) (“discovery regarding any nonprivileged matter that is *relevant* to any party’s claim or defense,” even if not admissible, if “reasonably calculated to lead to the discovery of admissible evidence” (emphasis added)). Discovery sought during Phase 1 Discovery may not be withheld on the basis that the producing party contends that it is not admissible under the Federal Rules of Evidence, if it otherwise is within the scope of discovery permitted by Rule 26(b)(1), as modified by this Order. Rather, a party from whom discovery is sought (“Producing Party”) by an adverse party (“Requesting Party”)

must produce requested Phase 1 Discovery subject to any evidentiary objections, which must be stated with particularity.

- b. ***Phase 2 Discovery.*** Unless the parties stipulate otherwise, the Court, upon a showing of good cause, may permit discovery beyond that obtained under Phase 1 Discovery. In Phase 2 Discovery, the parties may seek discovery of facts that are not privileged or work product protected, are *relevant* to the claims and defenses pleaded or more generally to the subject matter of the litigation, and are not necessarily admissible under the Federal Rules of Evidence, but are likely to lead to the discovery of admissible evidence. A showing of good cause must demonstrate that any additional discovery would be proportional to the issues at stake in the litigation, taking into consideration the costs already incurred during Phase 1 Discovery and the factors stated in Rule 26(b)(2)(C)(i)–(iii). If the Court determines that additional discovery is appropriate, the Requesting Party will be required to show cause why it should not be ordered to pay all or a part of the cost of the additional discovery sought.
3. ***Cooperation During Discovery.*** As required by Discovery Guideline 1 of the Discovery Guidelines for the United States District Court for the District of Maryland, D. Md. Loc. R. App. A (July 1, 2011), <http://www.mdd.uscourts.gov/localrules/LocalRules.pdf>, the parties and counsel are expected to work cooperatively during all aspects of discovery to ensure that the costs of discovery are proportional to what is at issue in the case, as more fully explained in *Mancia v. Mayflower Textile Services Co.*, 253 F.R.D. 354, 357–58 (D. Md. 2009). The failure of a party or counsel to cooperate will be relevant in resolving any discovery disputes, including whether the Court will permit discovery beyond Phase 1 Discovery and, if so, who shall bear the cost of that discovery. Whether a party or counsel has cooperated during discovery also will be relevant in determining whether the Court should impose sanctions in resolving discovery motions.
4. ***Discovery Motions Prohibited Without Pre-Motion Conference with the Court.***
  - a. No discovery-related motion may be filed unless the moving party attempted in good faith, but without success, to resolve the dispute and has requested a pre-motion conference with the Court to discuss the dispute and to attempt to resolve it informally. If the Court does not grant the request for a conference, or if the conference fails to resolve the dispute, then upon approval of the Court, a motion may be filed.
  - b. Unless otherwise permitted by the Court, discovery-related motions and responses thereto will be filed in letter format and may not exceed five, single-spaced pages, in twelve-point font. Replies will not be filed unless requested by the Court following review of the motion and response.
5. ***Interrogatories.*** Absent order of the Court upon a showing of good cause or stipulation by the parties, Rule 33 interrogatories shall be limited to fifteen (15) in number. Contentious interrogatories (in which a party demands to know its adversary’s position with respect to claims or defenses asserted by an adversary) may be answered within fourteen (14) days of the discovery cutoff as provided in the Scheduling Order. All other interrogatories will be answered within thirty (30) days of service. Objections to interrogatories will be stated with particularity. Boilerplate objections (e.g., objections without a particularized basis, such as “overbroad, irrelevant, burdensome, not reasonably calculated to identify admissible

evidence”), as well as incomplete or evasive answers, will be treated as a failure to answer pursuant to Fed. R. Civ. P. 37(a)(4).

**6. *Requests for Production of Documents.***

- a. Absent order of the Court upon a showing of good cause or stipulation by the parties, Rule 34 requests for production shall be limited to fifteen (15) in number. An answer to these requests shall be filed within thirty (30) days of service, and any documents shall be produced within thirty (30) days thereafter, absent Court order or stipulation by the parties. Any objections to Rule 34 requests shall be stated with particularity. Boilerplate objections (*see* ¶ 5 above) and evasive or incomplete answers will be deemed to be a refusal to answer pursuant to Rule 37(a)(4).
- b. Requests for production of electronically-stored information (ESI) shall be governed as follows:
  - i. Absent an order of the Court upon a showing of good cause or stipulation by the parties, a party from whom ESI has been requested shall not be required to search for responsive ESI:
    - a. from more than ten (10) key custodians;
    - b. that was created more than five (5) years before the filing of the lawsuit;
    - c. from sources that are not reasonably accessible without undue burden or cost; or
    - d. for more than 160 hours, *inclusive* of time spent identifying potentially responsive ESI, collecting that ESI, searching that ESI (whether using properly validated keywords, Boolean searches, computer-assisted or other search methodologies), and reviewing that ESI for responsiveness, confidentiality, and for privilege or work product protection. The producing party must be able to demonstrate that the search was effectively designed and efficiently conducted. A party from whom ESI has been requested must maintain detailed time records to demonstrate what was done and the time spent doing it, for review by an adversary and the Court, if requested.
  - ii. Parties requesting ESI discovery and parties responding to such requests are expected to cooperate in the development of search methodology and criteria to achieve proportionality in ESI discovery, including appropriate use of computer-assisted search methodology.

**7. *Duty to Preserve Evidence, Including ESI, that is Relevant to the Issues that Have Been Raised by the Pleadings.***

- a. The parties are under a common-law duty to preserve evidence relevant to the issues raised by the pleadings.
- b. In resolving any issue regarding whether a party has complied with its duty to preserve evidence, including ESI, the Court will consider, *inter alia*:
  - i. whether the party under a duty to preserve (“Preserving Party”) took measures to comply with the duty to preserve that were both reasonable and proportional to what

was at issue in known or reasonably-anticipated litigation, taking into consideration the factors listed in Fed. R. Civ. P. 26(b)(2)(C);

- ii. whether the failure to preserve evidence was the result of culpable conduct, and if so, the degree of such culpability;
  - iii. the relevance of the information that was not preserved;
  - iv. the prejudice that the failure to preserve the evidence caused to the Requesting Party;
  - v. whether the Requesting Party and Producing Party cooperated with each other regarding the scope of the duty to preserve and the manner in which it was to be accomplished; and
  - vi. whether the Requesting Party and Producing Party sought prompt resolution from the Court regarding any disputes relating to the duty to preserve evidence.
8. **Depositions.** Absent further order of the Court upon a showing of good cause or stipulation by the parties, depositions of witnesses other than those deposed pursuant to Fed. R. Civ. P. 30(b)(6) shall not exceed four (4) hours. Rule 30(b)(6) depositions shall not exceed seven (7) hours.
9. **Non-Waiver of Attorney–Client Privilege or Work Product Protection.** As part of their duty to cooperate during discovery, the parties are expected to discuss whether the costs and burdens of discovery, especially discovery of ESI, may be reduced by entering into a non-waiver agreement pursuant to Fed. R. Evid. 502(e). The parties also should discuss whether to use computer-assisted search methodology to facilitate pre-production review of ESI to identify information that is beyond the scope of discovery because it is attorney–client privileged or work product protected.

In accordance with Fed. R. Evid. 502(d), except when a party intentionally waives attorney–client privilege or work product protection by disclosing such information to an adverse party as provided in Fed. R. Evid. 502(a), the disclosure of attorney–client privileged or work product protected information pursuant to a non-waiver agreement entered into under Fed. R. Evid. 502(e) does not constitute a waiver in this proceeding, or in any other federal or state proceeding. Further, the provisions of Fed. R. Evid. 502(b)(2) are inapplicable to the production of ESI pursuant to an agreement entered into between the parties under Fed. R. Evid. 502(e). However, a party that produces attorney–client privileged or work product protected information to an adverse party under a Rule 502(e) agreement without intending to waive the privilege or protection must promptly notify the adversary that it did not intend a waiver by its disclosure. Any dispute regarding whether the disclosing party has asserted properly the attorney–client privilege or work product protection will be brought promptly to the Court, if the parties are not themselves able to resolve it.

\_\_\_\_\_  
/S/  
Paul W. Grimm  
United States District Judge



**TAB 5C**

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Notes on Conference Call  
Discovery Subcommittee  
Advisory Committee on Civil Rules  
Sept. 16, 2013

The Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call on Sept. 16, 2013. Participating were Judge Paul Grimm (Chair, Discovery Subcommittee), Judge David Campbell (Chair, Advisory Committee), Judge John Koeltl (Chair, Duke Subcommittee), Elizabeth Cabraser, Peter Keisler, John Barkett, Parker Folsie, Andrea Kuperman (Chief Counsel, Rules Committees), Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

Judge Grimm introduced the call as focused on an initial consideration of a set of issues often raised in recent years that are separate from the current package of amendment proposals. The current package contains a small change to Rule 26(c) explicitly authorizing the court to enter a protective order addressing allocation of discovery expenses. That explicit authorization really adds little to already recognized judicial authority in the area. Indeed, when the Supreme Court recognized that the cost of responding to discovery is customarily borne by the responding party in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), it also recognized that a protective order could alter that customary arrangement.

Prof. Marcus circulated a memorandum before the call sketching the Committee's past activity on cost-bearing issues. Most recently, in 1998-99, it published alternative proposals for adding explicit cost-bearing authority to Rule 34 or to Rule 26(b)(2). The proposals elicited much vigorous commentary, highlighting the sensitivity of the subject. One argument made often was that everyone agreed that the court already had this authority, so there seemed no value in saying so. Another point was that amending the rules might be taken to encourage increased use of the existing authority, a move that many who commented thought ill-advised.

Though this background is important, the main focus of today's discussion is on how or whether to proceed to serious consideration of further amendment possibilities. Many issues are on the table, and many possible ways to approach these issues in the rules exist.

Initially, it is worth appreciating that one school of thought is that parties will approach discovery in a more responsible manner if they know that they have to pay part of the resulting cost of production. On the other hand, there are important access to justice issues to be kept constantly in mind.

Therefore, one set of issues would be the extent to which one could properly identify types of cases that might be exempted

from rule provisions authorizing cost-bearing. Of course, doing something like that cuts against the grain of the Civil Rules, which are supposed to be the same for all kinds of cases. Another sort of question is like an issue raised in 1998-99 -- whether any such provision should be limited to Rule 34 discovery or applicable to all discovery. In 1998-99, there was concern that a provision limited to Rule 34 might seem to favor defendants, or at least those litigants with large quantities of discoverable information, while other types of discovery (notably depositions) might impose more costs on other litigants. Whether these concerns remain the same in the Digital Age, and with the introduction of numerical and time limits for depositions, remains to be explored.

Another set of concerns emerges from the summary of the comments and testimony submitted on the 1998-99 proposals. Much of that commentary was premised on empirical assumptions about the consequences of any cost-bearing rule that few could illuminate with real data. Instead, anecdotes or hyperbole seemed to predominate. The Committee's more recent experience has suggested that this sort of advocacy may reappear. It would be very useful to have more informative data to address these issues.

With all that in mind, the participants were invited to offer initial reactions. This discussion is just that -- initial -- and the only issue now is to develop a plan for proceeding in a methodical manner to evaluate the issues raised.

An attorney offered the view that "I'm still mulling this over." A good deal of reading on the history of the adoption of the Federal Rules has brought home the fact that the Framers of the Rules were very concerned about "fishing expeditions" using discovery. So that concern has been with us from the beginning. On the other hand, we do not want to interfere with the ability of litigants to obtain needed information. If the pending amendment proposals are adopted, it may be that they will make a significant difference and that these changes alone could be sufficient to redress the balance, to the extent it has gotten out of balance. In data rich cases, the problem is that parties will seek huge amounts of information. But rules are blunt instruments to deal with the challenges of such cases. Instead, we need an order like the one Judge Grimm uses in his cases. The real problem in some other cases is disproportionate costs, and it's not clear that cost shifting is a solution to the real problem. Again, informed judicial management seems a better way than revised rules. With leadership provided (as by Judge Grimm), the pending proposed rule changes may do as much as should be done.

A second attorney agreed. All U.S. lawsuits impose nonrecoverable costs. That is the American way of handling these

things. Discovery can, however, create a unique problem of strategic imposition of costs. This risk means that the discovery process requires some degree of policing. Judge Grimm's order is very interesting in this context. It means that core information is produced at the cost of the producing party, but further discovery may be reviewed with some cost-bearing in mind. Nonetheless, it is not clear that putting something of this sort into the rules will produce desirable results, and there might be a risk of undesirable consequences from adding some such provision to the rules. For one thing, there could be very energetic disputes about what is "core" or collateral information. The real emphasis should be on proportionality, and that's already in the rules, with a boost in its profile if the current proposed amendments are adopted. Translating these concerns into more focused rule language would be very difficult.

A judge reacted that it would be quite tough to draft a rule with presumptions that could be applied across the full range of cases in federal court. This may best be handled as a practice subject, not by a rule provision.

Another attorney reacted along the same general lines. Given the history (partly outlined in Prof. Marcus's memorandum), the reactions a proposal might prompt are fairly predictable. "This will be opposed on a very profound level." It would be best to see if there are other ways to go about it. And it should not be forgotten that the party seeking discovery bears costs when enormous amounts of information are forthcoming. This attorney has never seen an instance where some lawyer thought "I'll ask for a lot to impose expenses on the other side." People seek information to prove their cases, not to impose expenses on the other side. It's not surprising that some may seek a magic method of limiting discovery to what's really needed. But that may be a chimera, at least if sought by rule. Moreover, cost allocation probably won't do much to deter the really bad actors, to the extent they exist. And cost allocation would be a new and significant additional burden for the courts; it would not save them time or energy.

Another attorney agreed that the review of past rulemaking experiences on this subject is a good reminder that many people will react strongly based on their perceived advantage or disadvantage. "It all depends on where you are sitting." The real challenge is whether the existence or extent of this problem can be objectively identified. We will need to focus on whether a rule change can provide needed focus. One size fits all won't serve here. An effort to try to draw baselines on costs presents very tough policy issues. Perhaps a rule that distinguishes some types of cases (or exempts them) would raise even tougher policy issues. It will be important to keep in mind that excessive discovery (or responses) impose costs on both sides. At the same time, the commentary during the 1998-99 public comment period

suggests that any change will prompt comments fueled by perceived self-interest. Right now, the realities compel lawyers on both sides of the "v." to think long and hard about how much to seek through discovery. This attorney's inclination is to let the present proposed changes have time to sink in before giving serious thought to something more aggressive on cost-bearing.

These thoughts prompted a question: Had the careful calibration of amount of discovery this attorney reported resulted from rules or from orders like the one used by Judge Grimm, or from other factors such as the simple cost of getting too much information? The answer is that it is not prompted by rules or orders, but rather by the dynamics of contemporary litigation. That leads to voluntary discovery parameters, such as limiting the number of custodians whose materials must be reviewed, and/or limiting the search terms to be used.

Another attorney agreed. "The notion of an asymmetry -- of one-way discovery -- is misleading." Being data-poor is also a cost factor, because one has to rely on discovery and wants only an amount that makes sense and is tailored to the case. "You don't want to be the dog that catches the pick-up truck." Lawyers are acutely aware of this risk in today's environment, but it is very difficult to quantify this concern even on a case-by-case basis. Putting it into a rule would be even more difficult.

Another attorney reacted: Actually, the place where the cost disparity looms largest nowadays is not on cost of production but cost of preservation. That cost can be enormous, but it's not what we are discussing here.

Another attorney agreed that in larger cases this is a fair description of the current situation. But there are a significant number of other cases where fishing expeditions occur often. Mega-cases may actually not be the model we should have in mind.

A judge commented that he agreed with much the attorneys had said. He was not optimistic that a rule could be devised that would be appropriate for the broad range of litigation in federal courts today. It remains unclear where, or how frequently, there are real abuses. And the current amendment package has features that ideally will facilitate identifying and dealing with those cases. It would be important to find out whether the current package can do what it is designed to do. At the same time, cost allocation is something the Committee should examine. And it would be wisest to do this with data instead of anecdotes. It will be important to talk to the FJC about developing data that go beyond anecdotes. Although rule changes in the near term would be premature, careful study would take time and could be initiated soon. True, some may be distressed to see the

Committee even examining this subject, but it is an important one that deserves careful evaluation. In somewhat the same vein, the British experience with costs bears looking at.

A reaction was that the U.K. experience may be significantly different. For example, lawyers there have pushed back against the most recent reforms, seeking to exempt all cases involving claims of more than £1 million. And the U.K. experience is heavily affected by the availability of insurance against the cost of paying the other side's cost bill, and by the success incentive fees allowed there, which are paid by the other side but negotiated between the client and lawyer (who know that the only one who will actually have to pay this fee is the other side).

Another judge noted that there has been very strong support for expanded cost-bearing from some who have commented, and that a hearing was held in Congress on this general subject in December, 2011. The chair of a Subcommittee of the House Judiciary Committee that held this hearing supported inquiry into cost-bearing in a letter to the Committee. It is important for the Committee to be responsive to such interest. The hearing in Congress signifies the breadth of interest in this subject. The suggestion that the Committee should look seriously at the issues is what the Rules Enabling Act contemplates it should do. It may be that we begin with some skepticism about whether or how a useful rule change could be identified, but inaction would be quite difficult to justify. Instead, there seem to be several avenues that offer promise:

- (1) It would be good to do a literature search to identify what has been written about the effects of cost-bearing provisions.
- (2) It would be good to look carefully at Lord Jackson's study of costs in the U.K. That look should take account, however, of the very significant differences between the U.K. system and ours. It has a "full indemnity" system, very different from the American Rule that each litigant bears its own costs. It consequently has a fairly elaborate and longstanding system of cost masters who apportion costs after the case is over. And (as noted above) the entire handling of these issues has recently been affected by the availability of insurance.
- (3) The FJC should be approached. Like other governmental units, it is operating under significant fiscal constraints. We must be cautious about asking for help that would overstretch FJC Research. But perhaps the data from the 2009 closed case survey can be mined to provide some insights, and it would be valuable to try to determine now if there are cost-effective ways to gather data more closely

calibrated to these specific issues.

(4) It might be good to solicit input from outside groups. If we were to proceed with a rule proposal, we could expect those groups to offer their views then. It may be best to try to involve them now, both in terms of what they can offer in the way of data, and (perhaps) in terms of ways to generate more data.

This would not be a wasted effort; even if the result is that the Committee concludes that the current package of amendments sufficiently addresses these concerns, it may be very important for us to have a full explanation of why we reached this conclusion. Without a firm basis in data, we cannot assume that everyone will accept our conclusion.

Another judge asked how we could get beyond the anecdotal. Certainly the 2009 and 1997 closed case studies by the FJC did not show a widespread problem of over-discovery. In the Digital Age in which we now operate, would those results still obtain? It was particularly striking how varied the bar group responses to the 1998-99 proposal proved to be. Two sections of the ABA even came out on different sides of the issue. It would be ideal if there were a way to get input from bar groups and the like on the design of a research effort. We need not follow all proposals, but it is probably more useful to find out about them in advance than only later, when the same sort of thing might be an objection to the data-gathering method actually adopted. On the other hand, it could be that inviting suggestions now about how to design a research effort would prompt more objections later from all those whose suggestions were not followed.

It is not yet time to consider a mini-conference, even though such an event might be extremely helpful if this effort moves forward. For the present, the main issue is what to tell the full Committee at the November meeting. It will be useful then to have a full discussion along the lines of this conference call with the full Committee. It may be useful some time to try to arrange a conference call with U.K. judges experienced in dealing with the issues presented there. Though the institutional attributes of the U.K. system are significantly different from ours, it is likely that proportionality will be the first word out of their mouths. That was the byword of the Lord Woolf reforms in the U.K. in the late 1990s.

Another judge agreed. We should defer serious work on any amendment ideas a reasonable way into the future, in large part to find out how our current package works. And before doing a mini-conference we will need to think about concrete possible amendment ideas. It will be important to make clear then that any such proposals are only intended to be a focus for discussion, and that they are not on their way to inevitable



adoption. In order to have the broadest possible views, it will be important to include those unlikely to embrace the general idea of cost-bearing.

A reaction from an attorney was that reliance on the U.K. system could become a "flash point." To shift to something like that could even rise to the level of requiring a constitutional change. At some point, the intensity of debate might deter clear thought. "Don't issue a call to arms any time soon."

It was noted that Texas has had a rule that appears to embrace cost-bearing for some time; perhaps data could be gathered on the results of that rule. In addition, IAALS has been gathering data on related topics; maybe it has data of the sort we are seeking.

A further caution about avoiding anything that could become a flash point was emphasized. The goal now is to obtain the broadest sort of real data. For the November meeting, the necessary ingredients in the agenda book probably include Prof. Marcus's background memo, the notes on this conference call, and a short memo introducing the issues. There should be sufficient time in November for a full discussion with the full Committee. And before that, perhaps a week or two before the meeting, it would be good for the Subcommittee to confer by phone again to touch bases on where things stand.

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**TAB 5D**

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INTRODUCTION TO PROPOSALS FOR  
COST-BEARING PROVISIONS IN THE RULES

Rick Marcus  
(Sept. 6, 2013)

The purpose of this memorandum is to provide some additional background for the Sept. 16 exploratory conference call about addressing cost-bearing in the rules. Judge Grimm has already introduced the issues. The goal of this memorandum is to provide some additional background about the way the rules have addressed (or not addressed) these issues, and the reaction in 1998-99 to a proposal then to add a cost-bearing provision regarding disproportionate discovery requests. As an Appendix, the memo includes the public comments on that 1998 proposal.

As things develop on the cost-bearing front, the inquiry into past experience may expand. But as an introduction, some information may be helpful.

1980 amendments -- cost-bearing  
aspect to discovery conference

In 1978, a proposed set of amendments to the rules was published for public comment. Probably the most prominent among those proposals was a change to Rule 26(b)(1) that was later withdrawn. Also included was a new Rule 26(f), regarding a discovery conference. The Committee Note said that "[i]t is not contemplated that requests for discovery conferences will be made routinely." Instead, counsel were to try to confer among themselves to avoid the need for such a meeting with the judge, and the Note suggested that "[s]anctions may be imposed upon counsel who initiates a request without good cause as well as upon counsel who fails to cooperate with counsel who seeks agreement." It added:

The Committee is extremely reluctant even to appear to suggest additional burdens for the district court. It proposes the discovery conference for the exceptional case in which counsel are unable to discharge their responsibility for conducting discovery without intervention by the court. In such a case, early intervention by the court appears preferable to a series of motions to compel or to limit discovery.

So this was a very different creature from the Rule 26(f) conference we know today, which is to occur in most cases and be followed by entry of the scheduling order. Indeed, neither the proportionality provisions nor the requirement of more active judicial management (both added in 1983) were yet in the rules.

The 1980 version of Rule 26(f) included the following provisions:

Following the discovery conference, the court shall enter an order identifying the issues for discovery purposes, establishing a plan and schedule of discovery, setting limitations upon discovery if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the case.

The court may exercise powers under Title 28 U.S.C. § 1927 and Rule 37(e) to impose sanctions for the failure of a party or counsel without good cause to have cooperated in the framing of an appropriate discovery plan by agreement.

These particular features did not receive attention in the Committee Note, but it should be apparent that the thrust was that the entire discovery conference apparatus was to apply only to exceptional cases. See Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 77 F.R.D. 613, 624-25 (1978).

The initial public reaction to the Rule 26(b)(1) scope proposal was quite vigorous, and the Advisory Committee published a revised package in 1979 that omitted that amendment but retained the new Rule 26(f). See Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 80 F.R.D. 323 (1979). For more general background, see Marcus, Discovery Containment Redux, 39 Bos. Col. L. Rev. 747, 756-60 (1998).

The 1979 Committee Note still said that "[i]t is not contemplated that requests for discovery conferences will be made routinely," and it added the following (which may indicate that feedback from the first round of public comment suggested greater receptivity on the bench to the idea of supervising discovery):

A number of courts routinely consider discovery matters in preliminary pretrial conferences held shortly after the pleadings are closed. This subdivision does not interfere with such a practice. It authorizes the court to combine a discovery conference with a pretrial conference under Rule 16 if a pretrial conference is held sufficiently early to secure judicial intervention to prevent or curb abuse.

The 1979 Rule 26(f) proposal was adopted as published. See Amendments to the Federal Rules of Civil Procedure, 80 F.R.D. 521 (1980). Justice Powell, joined by Justices Stewart and Rehnquist, dissented from the adoption of the amendment package, not because there was anything wrong with these "modest amendments," *id.* at 523, but rather because they did not do enough. Justice Powell argued that "the changes embodied in the amendments fall short of those needed to accomplish reforms in civil litigation that are long overdue." *Id.* at 521. He added

(id. at 523):

Lawyers devote an enormous number of "chargeable hours" to the practice of discovery. We may assume that discovery usually is conducted in good faith. Yet all too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate. Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system.

So far as I am aware, the 1980 discovery conference was not much used, and the cost-allocation provisions even less used. So this is a cost-bearing model that was intended for the exceptional case and was not much used in such cases.

#### 1983 -- Proportionality and case management

In 1983, further amendments implemented much of what we find now in the rules regarding case management; the Rule 16 changes that continue to this day (with revisions) were installed then. In addition, the 1983 amendments introduced into Rule 26 the concept of proportionality.

Not too long after the new rules became effective, Magistrate Judge Wayne Brazil (soon to become a member of the Advisory Committee) gave voice to the goal of proportionality in *In re Convergent Technologies*, 108 F.R.D. 328, 331 (N.D. Cal. 1985):

Discovery is not now and never was free. Discovery is expensive. The drafters of the 1983 amendments to sections (b) and (g) of Rule 26 formally recognized that fact by superimposing the concept of proportionality on all behavior in the discovery arena. It is no longer sufficient, as a precondition for conducting discovery, to show that the information sought "appears reasonably calculated to lead to the discovery of admissible evidence." After satisfying this threshold requirement counsel also *must* make a common sense determination, taking into account all the circumstances, that the information sought is of sufficient potential significance to justify the burden the discovery probe imposes, that the discovery tool selected is the most efficacious of the means that might be used to acquire the desired information (taking into account cost effectiveness and the nature of the information being sought), and that the timing of the probe is sensible, i.e., that there is no

other juncture in the pretrial period when there would be a clearly happier balance between the benefit derived from and the burdens imposed by the particular discovery effort.

This articulation of the responsibilities counsel must assume in conducting or responding to discovery may make it appear that the 1983 amendments require counsel to conduct complex analyses each time they take action in the discovery arena. Not so. What the 1983 amendments require is, at heart, very simple: good faith and common sense.

1993 amendments  
Initial disclosure and routine  
Rule 26(f) conferences

In 1991, the Advisory Committee published another package of amendment proposals. Included were a proposed initial disclosure requirement and a new Rule 26(f) (replacing the 1980 version) that directed the parties to meet and confer in most cases to formulate a discovery plan that they would then submit to the court as part of the Rule 16 case management effort. As most are likely to recall, the initial disclosure proposal provoked a strong reaction. For discussion, see Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 *Brook. L. Rev.* 761, 805-12 (1993) (describing the initial disclosure controversy).

1998 cost-bearing proposal

In 1996, the Advisory Committee inaugurated its Discovery Project, which was intended to undertake a comprehensive review of discovery issues. After considerable study (including a mini-conference at Hastings in January, 1997, and a two-day conference at Boston College in September, 1977, and based on an extensive study of recently closed cases by FJC Research), the Advisory Committee produced a package of amendment proposals that was published for public comment in 1998. Among those proposals was the revision of Rule 26(b)(1) into essentially its present form (now proposed to be changed again in the package of proposed amendments published in August).

The published package included a proposal to add the following provision to Rule 34(b):

On motion under Rule 37(a) or Rule 26(c), or on its own motion, the court shall -- if appropriate to implement the limitations of Rule 26(b)(2)(i), (ii), or (iii) [current Rule 26(b)(2)(C)(i), (ii), and (iii)] -- limit the discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party.

Preliminary Draft of Proposed Amendments to the Federal Rules of



Civil Procedure and Evidence, 181 F.R.D. 18, 65-66 (1998).

The Committee Note accompanying this proposal provided (id. at 89-91):

The amendment makes explicit the court's authority to condition document production on payment by the party seeking discovery of part or all of the reasonable costs of that document production if the request exceeds the limitations of Rule 26(b)(1)(i), (ii), or (iii). This authority was implicit in the 1983 adoption of Rule 26(b)(2), which states that in implementing its limitations the court may act on its own initiative or pursuant to a motion under Rule 26(c). The court continues to have such authority with regard to all discovery devices. If the court concludes that a proposed deposition, interrogatory, or request for admission exceeds the limitations of Rule 26(b)(2)(i), (ii), or (iii), it may, under authority of that rule and Rule 26(c), deny discovery or allow it only if the party seeking it pays part or all of the reasonable costs.

This authority to condition discovery on cost-bearing is made explicit with regard to document discovery because the Committee has been informed that in some cases document discovery poses particularly significant problems of disproportionate cost. Cf. Rule 45(c)(2)(B) (directing the court to protect a nonparty against "significant expense" in connection with document production required by a subpoena). The Federal Judicial Center's 1997 survey of lawyers found that "[o]f all the discovery devices we examined, document production stands out as the most problem-laden." T. Willging, J. Shapard, D. Stienstra & D. Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change, at 36 (1997). These problems were "far more likely to be reported by attorneys whose cases involved high stakes, but even in low-to-medium stakes cases . . . 36% of the attorneys reported problems with document production." *Id.* at 35. Yet it appears that the limitations of Rule 26(b)(2) have not been much implemented by courts, even in connection with document discovery. See 8 Federal Practice & Procedure § 2008.1 at 121. Accordingly, it appears worthwhile to make the authority for a cost-bearing order explicit in regard to document discovery.

Cost-bearing might most often be employed in connection with limitation (iii), but it could be used as well for proposed discovery exceeding limitation (i) or (ii). It is not expected that this cost-bearing would be used routinely; such an order is only authorized when proposed discovery exceeds the limitations of subdivision (b)(2). But it cannot be said that such excesses might occur only in certain types of cases; even in "ordinary" litigation it is

possible that a given document request would be disproportionate or otherwise unwarranted.

The court may employ this authority if doing so would be "appropriate to implement the provisions of Rule 26(b)(2)(i), (ii), or (iii)." In any situation in which a document request exceeds these limitations, the court may fashion an appropriate order including cost-bearing. When appropriate it could, for example, order that some requests be fully satisfied because they are not disproportionate, excuse compliance with certain requests altogether, and condition production in response to other requests on payment by the party seeking the discovery of part or all of the costs of complying with the request. In making the determination whether to order cost-bearing, the court should ensure that only reasonable costs are included, and (as suggested by Rule 26(b)(2)(iii)) it may take account of the parties' relative resources in determining whether it is appropriate for the party seeking discovery to shoulder part or all of the cost of responding to the discovery.

The court may enter such a cost-bearing order in connection with a Rule 37(a) motion by the party seeking discovery, or on a Rule 26(c) motion by the party opposing discovery. The responding party may raise the limits of Rule 26(b)(2) in its objection to the document request or in a Rule 26(c) motion. Alternatively, as under Rule 26(b)(2), the court may act on its own initiative, either in a Rule 16(b) scheduling order or otherwise.

The invitation for public comment offered an alternative provision to be inserted directly into Rule 26(b)(2) (*id.* at 37):

The court shall limit the frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court, or require a party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party, if it determines that (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

The invitation for comment also offered the following explanation for this alternative to the Rule 34(b) proposal (*id.*

at 38):

There are two arguments for inclusion of this cost-bearing provision in Rule 26(b)(2). First, as a policy matter it is more evenhanded and complete to include the provision there. Treatment in Rule 34(b) may be seen as primarily benefitting defendants, who are usually the parties with large repositories of documentary information. Depositions, on the other hand, may be exceedingly burdensome to plaintiffs, and the placement of the provision in Rule 26(b)(2) would make explicit its application to other forms of discovery, including depositions.

Second, as a matter of drafting, the cost-bearing provision fits better in Rule 26(b)(2). Including it in Rule 34(b) creates the possibility of a negative implication about the power of the court to enter a similar order with regard to other types of discovery. The draft Committee Note to Rule 34(b) tries to defuse that implication, but this risk remains. Moreover, there is a dissonance between Rule 26(b)(2), which says that if there is a violation of (i), (ii), or (iii) the discovery shall be limited, and Rule 34(b), which says it does not have to be limited if the party seeking discovery will pay. It is true that, in a way, this dissonance points up the apparent authority to enter such an order under the current provision with regard to other types of discovery, but that is also another way of recognizing the tension that dealing with the problem in Rule 34(b) creates.

As noted above, the summaries of the resulting public commentary are included as an Appendix.

After the public comment period, the Advisory Committee decided to include the cost-bearing provision in Rule 26(b)(2) rather than Rule 34(b), and the Standing Committee approved it for submission to the Judicial Conference, but the Judicial Conference removed it from the package of amendments that went into effect in 2000. See the Communication from the Chief Justice to Congress transmitting the 2000 amendments to the rules, 192 F.R.D. 340 (2000), including the Memorandum from Judge Paul Niemeyer to Judge Anthony Scirica, 192 F.R.D. 354, 360 n.\* (2000) ("At its September 15, 1999, session the Judicial Conference of the United States did not approve the proposed cost-bearing provision").

#### Rule 26(b)(2)(B) in 2006

In 2006, Rule 26(b)(2)(B) was added to address discovery of sources of electronically stored information that are not reasonably accessible due to burden or cost. Even if the showing is made that the sources are not reasonably accessible, the party

seeking discovery may ask the court to order production by showing good cause. The rule adds that: "The court may specify conditions for the discovery." The Committee Note explains:

The good-cause inquiry and consideration of the Rule 26(b)(2)(C) limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

#### Current Rule 26(c) proposal

It seems worth noting that our current proposed amendment package includes an amendment to Rule 26(c)(1)(B) to authorize that a protective order issued for good cause could include a provision "specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery." The draft Committee Note observes:

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

\* \* \* \* \*

Going forward, we will address new issues as well as enduring ones. But familiarity with prior experience, at least in general terms, seems useful.

## APPENDIX

Summary of public comments on proposed  
cost-bearing amendment to Rule 34(b)  
1998-998. Rule 34(b)(a) General desirability

## Comments

Alfred W. Cortese, 98-CV-001: (See Rule 26(a)(1) for list of organizations represented) Supports the addition of explicit cost-bearing provisions.

N.Y. St. Bar Assoc. Comm. & Fed. Lit. Sec, 98-CV-012: This change is unnecessary and misleading. The authority to shift costs already exists under Rule 26(b)(2). Thus, there is no real change. The Section disagrees with the assertion that Rule 26(b)(2) has rarely been applied, citing four cases. The FJC Study found that document requests generated the largest number of discovery problems, but these were not generally in the overproduction area. Thus, if there were a change it would not address the problems identified. The FJC Survey does not show that the cost of document production is a problem; even in the high-stakes cases in which such costs are relatively high, they are commensurate with the stakes involved. Moreover, the proposed amendment is unclear on what costs may be shifted. If attorneys' fees, client overhead and the like are included, the proposal involves funding an adversary's case.

Maryland Defense Counsel, Inc., 98-CV-018: Supports the proposed amendment. Document production is not only the most expensive, but also the most institutionally disruptive aspect of discovery for the clients represented by this organization's lawyers. Suggests that the Note stress that an outright bar on proposed discovery often may be preferable to simply shifting its overtly quantifiable costs.

J. Ric Gass, 98-CV-031: (individually and as President of Fed. of Ins. & Corp. Counsel) "The burden of the cost of production of documents should be on the party initiating the request. That burden will make 'discovery initiators' think before making abusive document requests."

Assoc. of the Bar of the City of N.Y., 98-CV-039: Endorses the change, so long as either the rule itself or the Committee Note makes it clear that the power granted should be applied only in the unusual or exceptional case. This is consistent with the general trend of making discovery more efficient. It would give the party requesting discovery an incentive to limit requests and

lessen the financial burden on the producing party. But the provision should be used only in the unusual or exceptional case. Liberal application of the proposed rule would unfairly tilt the playing field in favor of litigants with larger financial resources.

James A. Grutz, 98-CV-040: Opposes the change. If costs become onerous, a litigant can request the court's aid. The provision is unnecessary.

Thomas J. Conlin, 98-CV-041: Opposes the change. If a document request is excessive, it should be limited in accordance with the current rules. The court already can protect parties against excessive expenses, and it should not be permitting or requiring a response to excessive requests even if the requesting party has to pay some of the cost.

John Borman, 98-CV-043: Opposes the change. It deters parties seeking discovery from being aggressive in pursuing information, and it will encourage responding parties to employ this new device to resist. It places the burden of proving that the benefit of the discovery sought outweighs its burden or expense on the party who does not even know what is in the material.

Michael J. Miller, 98-CV-047: This proposal will be used as a weapon by corporations who seek to prevent the discovery of relevant information under the guise of cost.

ABA Section of Litigation, 98-CV-050: Supports the proposal because it encourages courts to overcome their reluctance to apply existing limitations on excessive discovery, and it offers courts an alternative when they view a complete denial of excessive discovery as too harsh. The cost-bearing proposal will not deter legitimate discovery because, by definition, it applies only when a document demand exceeds the limitations of Rule 26. The court's power to shift these costs is already implicit in Rule 26(c). The Antitrust Section opposes this proposal because it believes that it could create a new standard for discovery that is dependent on a party's financial ability to pay for discovery as opposed to the current standard based on relevance, etc. Because of this important concern, the Litigation Section suggests that the Note urge that the courts be particularly sensitive to this issue.

Richard L. Duncan, 98-CV-053: Opposes this proposal. It will create more litigation.

Charles F. Preuss, 98-CV-060: Supports this explicit authorization to impose part or all of the costs of document discovery that exceeds the limits of Rule 26(b)(2).

Lawyers' Club of San Francisco, 98-CV-061: The probable impact

of the proposed amendment would be to increase the prevalence of cost-bearing orders. Doing so would increase financial disincentives for individuals to conduct litigation against corporate and institutional defendants. As such, it would impede and restrict discovery unnecessarily by individual claimants.

Jay H. Tressler, 98-CV-076: Applauds this proposal.

E.D.N.Y. Comm. on Civil Lit, 98-CV-077: Opposes the proposal. The provision is unnecessary, because the courts already have the power to do this. At the same time, cost-bearing is not to be applied routinely. Given these two propositions, the Committee can't comprehend the benefit of the amendment. More generally, the Committee would favor a direct limitation on discovery as opposed to cost-shifting, which may favor deep-pocket litigants. It might even further use of discovery to harass.

Michael S. Allred, 98-CV-081: Opposes the change. This is biased in favor of not making discovery, but gives no remedy if discovery is unjustifiably refused.

Amer. Coll. of Trial Lawyers Fed. Cts. Comm., 98-CV-090: Supports the change. Document production is where the most serious problems currently are found. It is appropriate that if a party wishes to pursue broad and unlimited forms of document production, it should pay the reasonable expenses that result.

National Assoc. of Consumer Advocates, 98-CV-120: Opposes the change. It will lead to additional delay, ancillary litigation, and increased costs. Objections by defendants that document production costs too much are full of sound and fury but not based on valid concerns. Usually the parties can reach an equitable solution to the costs of document production. If that doesn't happen, the current rules provide adequate tools for the problem. Since this is a power the courts already have under Rule 26(c) and 26(b)(2), the change is not needed. It may cause judges to cast an especially jaundiced eye on requests for documents, above and beyond the limits that already exist. Because defendants have most of the documents in the cases handled by N.A.C.A. members, this change will have a disparate impact on plaintiffs.

National Assoc. of Railroad Trial Counsel, 98-CV-155: Supports the changes. They will assist the trial court in controlling discovery abuses in document production.

Chicago Chapter, Fed. Bar Ass'n, 98-CV-156: Endorses the change. Courts already have the power to do this, but there is no harm in saying so expressly.

Federal Practice Section, Conn. Bar Ass'n, 98-CV-157: Endorses the rule, understanding it to say that everything beyond the

"claims and defenses" scope would be allowed only on payment of costs.

Penn. Trial Lawyers Ass'n, 98-CV-159: Supports the amendment as written because it permits the court to reasonably limit discovery and gives the judge discretion to extend the limits on a good cause showing, providing that the cost is to be borne by the party seeking discovery.

Richard C. Miller, 98-CV-162: Opposes the change. It "strikes at the heart of our juridical system by eliminating access to justice." Defendants already have an incentive to draw things out and increase expense to defeat claims. This change will magnify that tendency.

William C. Hopkins, 98-CV-165: The cost shifting proposal means that plaintiffs will face a price tag on the first discovery request. This is not desirable.

Timothy W. Monsees, 98-CV-165: He is afraid this will extend to more than simple copying costs, which no one has a problem with paying. He envisions getting a bill for a couple of thousand dollars for defendants to hire people to search their records. Why should a party have to pay for production of relevant material?

Mary Beth Clune, 98-CV-165: This change would be very unfair to plaintiffs. In employment cases, the defendant has all the documents, and such defendants often produce files of meaningless documents in an effort to bury the relevant documents. Requiring the plaintiff to finance the "reasonable expenses" of discovery will likely lead to abuse by defendants.

Frederick C. Kentz, III, 98-CV-173: (Gen. Counsel, and on behalf of, Roche) Supports the change. In pharmaceutical litigation, plaintiffs routinely seek discovery of all reported adverse events, clinical trials and other documents not relevant to the core issues in the case. It would be preferable if the discovery of these materials were not permitted. The company strongly opposes cost shifting with respect to depositions. The appropriate cost control measure there is to limit the duration of the deposition.

Gary M. Berne, 98-CV-175: The change is unnecessary, for courts already have the authority to take needed measures. The FJC report shows that the main problem is not overproduction, but failure to produce, which the amendments don't address.

Public Citizen Litigation Group, 98-CV-181: Does not support. The rule provision is not needed, and may lead to the incorrect negative inference that cost-bearing is only authorized in connection with document discovery.



Association of Trial Lawyers of America, 98-CV-183: Opposes the change. ATLA generally opposes proposals to institute cost-shifting measures as leading to abrogation of the American Rule that parties bear their own costs of litigation. Even if the proposal only makes explicit authority that was already in the rules, it appears a move in the wrong direction.

James B. Ragan, 98-CV-188: Concerned about the proposed change. It purports to shift the burden to the party seeking discovery in some instances. In fact, this should be a situation that never occurs. Rule 26(b)(2) directs the court to limit excessive discovery, so the circumstance identified in the proposed amendment should not happen.

Ohio Academy of Trial Lawyers, 98-CV-189: Opposed. This is not needed, since the court already has the power under Rule 37 to impose this sanction.

Hon. Carl J. Barbier (E.D. La.), 98-CV-190: Although the Committee Note says that this cost-shifting should not be a routine matter, this will certainly result in additional motions to determine in any particular case whether or not the costs should be shifted to the requesting party.

Philadelphia Bar Assoc., 98-CV-193: Supports the amendment. Placing an explicit cost-bearing provision in Rule 34 might clarify and reinforce the judge's ability to condition discovery on payment of costs. This might encourage more negotiation and cooperation in cases where large document productions are involved.

James C. Sturdevant, 98-CV-194: The Committee does not say that this authority is only to be used in "extraordinary" cases or "massive discovery cases." There is a very real potential that it will be invoked in many cases to support cost-bearing, which would be undesirable. The courts already have adequate authority to deal with abuse.

Maryland Trial Lawyers Assoc., 98-CV-195: Urges rejection. Often the injured party is at an economic disadvantage to the opposing entity, which is usually insured. Coupled with the limitation of disclosure to supporting information, this change will work a harsh result. It is unnecessary and unduly restrictive.

James B. McIver, 98-CV-196: (98-CV-203 is exactly the same as no. 196 and is not separately summarized) This will have the effect of harming victims, consumers, and other plaintiffs.

Lawyers' Committee for Civil Rights Under Law, 98-CV-198: Opposes the change. This will establish what some judges will view as a presumption that documents should only be produced on payment of

the other party's costs of production. It would also establish a two-track system of justice based on wealth.

Trial Lawyers for Public Justice, 98-CV-201: Courts already have this power, and the proposal is therefore redundant. But the signal to judges is obviously that they should impose sanctions more frequently against parties who ask for too much information, and that they have not imposed such sanctions with sufficient regularity in the past. This will strengthen the hands of defendants and encourage stonewalling.

Minn. State Bar Assoc. Court Rules and Admin. Comm. Subcommittee on Federal Rules, 98-CV-202: Supports the change.

Sharon J. Arkin, 98-CV-204: Opposes the change. The defense deliberately engages in dump truck tactics. If this change is adopted, the rules will impose on the consumer the obligation to pay for the costs of such productions, and they will be further victimized by corporate defendants.

Nicholas J. Wittner, 98-CV-205: (on behalf of Nissan North America) Supports the proposal. It will reduce needless discovery requests and related expense.

F.B.I., 98-CV-214: Supports the change.

Michigan Trial Lawyers Assoc., 98-CV-217: Opposes the proposal. Courts already have the power to impose this sanction. But making it explicit in the rules will send a signal to judges to impose sanctions more frequently. This will encourage responding parties to stonewall.

Stuart A. Ollanik, 98-CV-226: A general rule promoting cost-shifting is an invitation to evidence suppression. It will be in the responding party's best interests to exaggerate the cost of production, in order to make access to relevant information prohibitively expensive. It will be one more tool for hiding the facts.

Jon B. Comstok, 98-CV-228: This is an excellent idea. He realizes it is somewhat redundant because the authority already exists in Rule 26. But it is laudable to make modifications that will somehow get the judge to become more involved in discovery.

Edward D. Robertson, 98-CV-230: Opposes the proposal. It is a first, and ill-advised, step by the representatives of corporate America toward the English system that requires losers to pay. Defendants are the primary violators of reasonable discovery and the chief advocates of discovery limitation. If the proposed rule is adopted defendants will file for costs to pay for their excessive responses to reasonable discovery requests.

Martha K. Wivell, 98-CV-236: The rule is unnecessary because there is already authority to do this. Nonetheless, defendants will seek to shift costs in almost every products liability case, for they always say the costs are too high. Then the proof of the benefit of discovery is placed on the party who does not even know what there is to be discovered.

Jeffrey P. Foote, 98-CV-237: Opposes the change. This will simply lead to further litigation.

Eastman Chem. Corp., 98-CV-244: Strongly favors the amendment. It notes, however, that a better course would be forbidding discovery altogether.

Anthony Tarricone, 98-CV-255: Opposes the change. There is no need to revise the rule in this manner.

New Mexico Trial Lawyers Ass'n, 98-CV-261: Finds the change troublesome. It appears to be an invitation to increased litigation about what constitutes an excessive request.

Robert A. Boardman, 98-CV-262: (Gen. Counsel, Navistar Int'l Corp.) The cost-bearing provision will hopefully encourage a litigant to think twice before requesting every conceivable document, no matter how attenuated its relevancy. Navistar has been an easy target for burdensome discovery about information remote in time from the events in suit.

U.S. Dep't of Justice, 98-CV-266: Because this proposal reinforces the proposed amendment to Rule 26(b)(1) limiting access to information relevant to the "subject matter of the litigation," it is subject to the same concerns the Department presented about that change. The Department would be less concerned about the proposed change to Rule 34 if the "subject matter" standard of current Rule 26(b)(1) were retained. Thus, if the current Rule 26(b)(1) is retained, and if the proposed amendment retains its reference to Rule 26(b)(2)(i)-(iii), the Department supports this proposal.

Courts, Lawyers and Administration of Justice Section, Dist. of Columbia Bar, 98-CV-267: The Section agrees with this proposal. The Committee should make it clear, however, that the change is not intended to change the standard that judges should apply in deciding whether to condition discovery on payment of reasonable expenses.

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee supports the amendment. It is apparent that the court already has this power, but the amendment makes the authority clear. Perhaps even more beneficial is the Committee Note, which provides considerable guidance to everyone as to when and how these costs may be assessed.

Thomas E. Willging (Fed. Jud. Ctr.), 98-CV-270: Based on a further review of the data collected in the FJC survey, prompted by concerns about the potential impact of cost-bearing on civil rights and employment discrimination litigation, this comment reports the results of the further examination of the FJC survey data. It includes tables providing the relevant data in more detail, and generally provides more detail than can easily be included in a summary of this sort. The study found "few meaningful differences between civil rights cases and non-civil rights cases" that might bear on the operation of proposed Rule 34(b). Discovery problems and expenses related to those problems differed little between the two groups of cases, and the percentage of document production expenses deemed unnecessary, and document production expenses as a proportion of stakes, were comparable in both sets of cases (civil rights and non-civil rights). The differences that were observed included that defendants in non-employment civil rights cases were more likely to attribute discovery problems to pursuit of discovery disproportionate to the needs of the case; civil rights cases had a modestly higher proportion of litigation expenses devoted to discovery; nonmonetary stakes were more likely to be of concern to clients in civil rights cases; and total litigation expenses were a higher proportion of stakes in civil rights cases (but stakes were considerably lower in such cases). Complex cases have higher expenses than non-complex cases, but for complex civil rights cases the dollar amounts of discovery expenses, especially for document production, were far lower than in complex non-civil rights cases. Overall, the report offers the following observations: "First, because discovery and particularly document production expenses are relatively low in complex civil rights cases, defendants would have less room to argue that a judge should impose cost-bearing or cost-sharing remedies on the plaintiff. Second, our finding that total litigation expenses were a higher proportion of litigation stakes in civil rights cases may give defendants some basis for arguing that discovery requests are disproportionate to the stakes in the case and that cost-bearing or cost-sharing should be ordered. On the other hand, our finding that nonmonetary stakes are more likely to be of concern in civil rights cases may give plaintiffs a counterargument in some cases. Third, one might read our finding that defendants are more likely to attribute discovery problems to pursuit of disproportionate discovery as suggesting that defendants' attorneys will look for opportunities to act on that attribution by moving for cost-bearing remedies."

#### Testimony

#### Baltimore Hearing

Robert E. Scott, Jr., prepared stmt. and Tr. 4-18: (president of Defense Research Institute and representing it) This is a

positive step, giving litigants the opportunity to obtain items to which they are not entitled by right under Rule 26(b)(2) by paying the costs of production. This will not shift the costs of document discovery related to the core allegations of the case, but recognizes that the court should not allow expansive discovery on tangential matters without consideration of reallocating the costs and burdens involved in ordering production.

Allen D. Black, prepared stmt. and Tr. 18-30: Opposes the change. This will favor well-heeled litigants, whether plaintiffs or defendants. It thus runs against the basic democratic underpinnings of the American judicial system. It will also add a new layer of litigation to a substantial number of cases--to determine who should pay what portion of the costs of document production. Yet the proposal provides no standards whatsoever to guide the court's decision about whether and how to shift these discovery costs. The invocation of Rule 26(b)(2) aggravates the problem because it contains no objective standard and instead asks the court to make an impossible prediction concerning the potential value of the proposed discovery. Virtually every producing party will argue vehemently that the burdens and costs outweigh the possible benefit of the proposed discovery. Should the court take evidence on the likely cost of discovery to decide these disputes? Even if it could do that, how could it determine the "likely benefit" of proposed discovery? This will produce a whole new layer of litigation about who will pay and how much. (Tr. 25-26)

Robert Klein (Tr. 45-58): (on behalf of Maryland Defense Counsel) Supports the change. The policy of proportionality has been overlooked, and this should re-awaken the parties to the existence of this limitation on discovery. Notes that document discovery is the only type of discovery that cannot have numerical limitations. Interrogatories and depositions do in the national rules, and requests for admissions can be limited by local rule, but not document requests.

F. Paul Bland, Tr. 89-106: (on behalf of Trial Lawyers for Public Justice) Opposes the proposal. The authority already exists without the change. The goal, then, is again to send a signal that the problem judges should address is over-discovery even though the evidence does not support that concern.

Prof. Edward D. Cavanaugh, prepared stmt. and Tr. 116-26: Opposes the change. Courts already have this power, and the Committee Note acknowledges that the power is not to be used routinely. He would favor a direct limitation on discovery as opposed to a cost-shifting limitation.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: Supports the proposal. Believes that emphasis on the proportionality provisions is essential since they have been overlooked or

misapplied in the past. Believes that the impecunious plaintiff argument is specious. In his entire career as a defendant's lawyer, he has never encountered a case in which a plaintiff in a personal injury case reimbursed counsel for costs in an unsuccessful case. The real issue is that this is an investment decision for counsel for plaintiffs, and this is not a violation of professional responsibility rules. This might be different in other sorts of cases -- employment discrimination, for example, with pro se plaintiffs. But in those cases the proposed change allows the judge to take the ability of the plaintiff's side to bear the expense into account. His own experience, however, has been limited to cases involving plaintiffs with lawyers who took the case on a contingency fee basis.

#### San Francisco Hearing

Maxwell M. Blecher, prepared stmt. and Tr. 5-14: Together with the proposed change to Rule 26(b)(1), this is pernicious and gives a collective message that there should be less discovery to plaintiff at increased cost. The standards set forth in Rule 26(b)(2) are so vague that the court can't sensibly apply them. Moreover, if costs are shifted and the documents contain a "silver bullet" there should be another hearing to seek reimbursement. This is not worth it. The basic message is that even if plaintiff manages to persuade the judge to expand discovery to the subject matter scope, plaintiff must pay for the additional discovery to that point. He has nothing against making plaintiff pay if the specific discovery foray is unduly expensive. For example, if defendant usually has e-mail messages deleted upon receipt and plaintiff wants to require a hugely expensive effort to locate these deleted messages, there is nothing wrong with presenting plaintiff with the option of paying for that material. But that is different from institutionalizing the process of shifting costs every time plaintiff goes beyond a claim or defense. This is how he reads the current proposal. He feels that the judge could both find that there is good cause and that the plaintiff has to pay for the added discovery. In the real world, judges will be likely to link the two and think that as soon as plaintiff gets beyond claims and defenses it's pay as you go. At present, the limitations of Rule 26(b)(2) are only applied in the most exceptional cases, where a party does a huge and marginal search, such as reconstructing electronic data. But the rule will encourage the same sort of thing in many cases. This will institutionalize a process that is already available today. It will up the stakes in antitrust litigation, which is already very expensive. (Tr. 7-10)

Kevin J. Dunne, prepared stmt. and Tr. 14-23: (President of Lawyers for Civil Justice) This change can work in tandem with the revision of Rule 26(b)(1), and the court could shift costs if it found good cause to allow discovery to the subject matter limit. But courts should be admonished not to assume that a

party is automatically entitled to discovery it will pay for. There are now plaintiffs' law firms which are as wealthy as small corporations, and their willingness to pay should not control whether irrelevant discovery is allowed. The rich plaintiffs' lawyers won't hesitate to put up the money for such discovery forays, so their willingness to pay should not be determinative. They will continue going after the same stuff whether or not they have to pay.

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Shell emphatically endorses the proposed change. Document production abuses are at the core of most discovery problems, particularly in larger or more complex matters. Shell strongly urges that the rule or the Note state that "court-managed" discovery on a good cause showing under Rule 26(b)(1) presumptively be subject to cost shifting, absent a showing of bad faith on the part of the responding party.

H. Thomas Wells, prepared stmt. and Tr. 47-60: This change is more of a clarification of the existing rule's intent than a new rule change. The authority has always been present in the existing rule, and the problem is that it was rarely invoked in the manner originally intended. The proposed change adequately recognizes the original intent of the provisions.

Hon. Owen Panner (D. Ore.), prepared stmt. and Tr. 74-87: In every speech he makes to young lawyers or bars, he talks about Rule 26(b)(2) and seldom gets anyone to bring such concerns to him. He likes this change to encourage attention to this. Notes that he had Shell in his court and did not hear from it on this score. (See testimony of G. Edward Pickle, above.)

Larry R. Veselka, Tr. 99-108: Does not see this change as a particular problem. That's the way to solve problems about costs. (Tr. 107-08)

Mark A. Chavez, prepared stmt. and Tr. 108-17: Opposes the change. It would encourage further resistance to discovery, result in extensive litigation over cost-bearing issues, and inhibit plaintiffs from adequately investigating their claims.

Weldon S. Wood, Tr. 140-46: Supports the change. Document production is where the problems are found. Most discovery is reasonable. It is the exceptional case that causes the problems.

Alfred W. Cortese, Jr., prepared stmt. and Tr. 174-82: Because of the enormous cost that litigants can impose on adversaries, it is essential that the rules recognize the power to require a party seeking non-essential, discretionary discovery to bear the cost of it. At the same time, there should be a limit on a party's ability to impose discovery on an adversary just because it is willing to pay the cost of the discovery.

## Chicago Hearing

Elizabeth Cabraser, Tr. 4-16: She fears that this change may lead to a repeat of the kind of collateral litigation that occurred under Rule 11, where every motion was accompanied with a motion for sanctions. The courts already have authority to shift costs in cases where it's truly necessary. She believes there is not a large volume of unnecessary discovery, so that this "solution" may be more of a problem than the problem it seeks to solve. She doesn't think that what we now know about discovery of electronic materials shows that some power like this is needed for that sort of discovery. The problem is that too often what's permissive becomes mandatory.

James J. Johnson, Tr. 47-63: (Gen. Counsel, Procter & Gamble) To date he has not found the existing cost-bearing possibilities helpful to Procter because when judges find out that it is a multi-billion dollar company they don't have any interest in shifting any of its substantial costs of document preparation. (For details on these, see supra section 3(a).) This is at the heart of the unevenness of cost between the discovering party and the producing party. This sort of activity takes place even when both sides are large entities with considerable documents to produce. (Tr. 57-58) He suggests that the Note to this rule suggest cost-bearing as an effective tool for discovery management.

Robert T. Biskup, prepared stmt. and Tr. 73-84: (Ford Motor Co.) This is integrally linked with the proposed Rule 26 scope change because it calls for an ex ante determination about the proper allocation of costs. This would avoid the risk of a new brand of satellite litigation, as with Rule 11. If it works the way Ford thinks it should, the fee shifting issue would be before the court at the time that the issue of expanding to the subject matter limit is also before the court.

John Mulgrew, Jr., prepared stmt. and Tr. 98-101: He agrees with the cost-bearing provision. Documentary discovery requests are among the most costly and time-consuming efforts for defendants. For peripheral materials, courts should have explicit authority to condition discovery on cost-bearing.

David C. Wise, Tr. 113-19: There is already a mechanism in place to deal with these problems when they arise. What this change would do would be to send a message to the defendants to make plaintiffs pay for their discovery. And plaintiffs simply can't pay. Companies like Ford aren't paying anything for their document production; they are simply passing the cost along to the consumer. If there were no link to expanding discovery beyond the claims and defenses, suggesting that if expansion occurs the plaintiff must pay, his opposition to the proposed amendment would be less vigorous.



John M. Beal, prepared stmt. and Tr. 119-26: (Chair, Chi. Bar Assoc. Fed. Civ. Pro. Comm.) The CBA has no objections to this amendment.

Bruce R. Pfaff, prepared stmt. and Tr. 126-34: Opposes the change. This will result in motion practice and satellite litigation. The court already has sufficient authority to deal with problems.

Todd Smith, Tr. 134-47: (on behalf of Assoc. of Tr. Lawyers of America) Opposes the change. This is another proposal to impose costs on individuals, and ATLA is opposed to that.

John H. Beisner, prepared stmt. and Tr. 147-54: Without doubt, this is a positive change. But the Note does not go far enough in stressing that there may be circumstances in which a court should say "no" to proposed discovery. The Note should stress that there should be no presumption that the court should authorize discovery that the propounding party wants, even if it will pay for it.

Jonathan W. Cuneo, prepared stmt. and Tr. 160-65: This change will disadvantage plaintiffs and could restrict the types of cases lawyers in small firms like his could undertake. The existing rules provide adequate protections for defendants. There is no reason to provide more.

Lloyd H. Milliken, prepared stmt. and Tr. 211-17: (president-elect of Defense Res. Inst.) Favors the change. This will not be a sword to be held over the plaintiffs' heads or a shield for defendants. The Note is perfectly clear that this is to happen only in extreme cases, where the discovery is essentially tenuous.

Michael J. Freed, prepared stmt. and Tr. 226-35: The proposal will favor litigants, whether plaintiffs or defendants, that have significant financial resources, over other litigants. It will create a new layer of litigation in a significant number of cases. The reference to the standards in Rule 26(b)(2) really provides no guidance on when this authority should be used.

Douglas S. Grandstaff, prepared stmt. and Tr. 245-51: (Senior Lit. Counsel, Caterpillar, Inc.) Although Caterpillar believes that use of Rule 26(b)(2) to bar excessive discovery altogether would be preferable, this change should give judges a tool to put a quick end to incrementally escalating discovery abuses. However, the Note's statement that the court should take account of the parties' relative resources is at odds with the goal of limiting unnecessary and irrelevant discovery. This comment suggests that a party with few resources is entitled to demand discovery beyond the limitations set by Rule 26 at no cost.

Kevin E. Condron, Tr. 259-67: This may be the most meritorious of the proposals. Document discovery is where the cost is, and it should be curtailed if there is no reason for it.

Robert A. Clifford, prepared stmt.: Opposes the change. The court already has powers to deal with abuse, and it is unnecessary to amend the rule in this way.

Thomas Demetrio, prepared stmt.: This is nothing more than a surreptitious attempt to push the cost of litigation so high that individual citizens will not be able to exercise their rights or seek redress for wrongdoing. "Business builds the 'cost' of legal defense into the 'cost of doing business.' That cost is passed on to the consumer. We already bear our share of the burden of defense costs. By requiring individual litigants to bear the cost again, industry gets not only a free ride but a windfall."

John G. Scriven, prepared stmt.: (Gen. Counsel, Dow Chem. Co.) This change is well worth making, but it is important to recognize that many plaintiffs will only be able to pay a fraction, if any, of the attendant financial costs in any event. Accordingly, the Note should stress that the primary goal should be for the judge to carefully scrutinize any discovery beyond the initial disclosure, and that the presumption should be toward barring that discovery.

(b) Placement of provision

## Comments

ABA Section of Litigation, 98-CV-050: The Litigation Section favors including the cost-bearing proposal in Rule 26(b)(2) rather than Rule 34. This would avoid the negative implication that cost shifting is not available for all forms of discovery. It would also avoid an otherwise seeming inconsistency with Rule 26(b)(2), which merely permits courts to "limit" discovery, without mentioning the court's power to shift the cost of discovery.

Philip A. Lacovara, 98-CV-163: Supports the change, but would go further. He believes that the change should be in Rule 26 because document discovery is not the only place where problems exist that should be remedied by this method. Even though the Note says that inclusion in Rule 34 does not take away the power to make such an order in relation to other sorts of discovery, there is a significant risk that it will be so read. But he thinks it should be in Rule 26(b)(1), not Rule 26(b)(2), and that it should go hand in hand with decisions to expand to the "subject matter" limit. As the proposals presently read, it would not seem that a court could find good cause to expand, but then conclude that Rule 26(b)(2) is violated. He would therefore add the following to Rule 26(b)(1):

If the court finds good cause for ordering discovery of information relevant to the subject matter of the action, the court may require the party seeking this discovery to pay part or all of the reasonable expenses incurred by the responding party.

This kind of provision would protect plaintiffs as well as defendants, for plaintiffs are often burdened by excessive depositions. Unless there is some further provision on recovery of these costs, it would seem that some of them might be taxable under 28 U.S.C. § 1920; in that sense, the discovering party's willingness to press forward is a measure of that party's confidence in the merits of its case as well as the value of the discovery.

Prof. Ettie Ward, 98-CV-172: For the reasons expressed in Judge Niemeyer's transmittal memorandum, suggests that any reference to cost-bearing should be in Rule 26(b)(2) rather than Rule 34(b). That placement is more evenhanded, and it fits better as a drafting matter. Including it in Rule 34 appears to favor defendants and deep-pocket litigants. In addition, the standards for shifting costs are not as clear as they would be if the provision were in Rule 26(b)(2).

Public Citizen Litigation Group, 98-CV-181: Does not support.

But if additional language is to be added, favors the alternative proposal to amend Rule 26(b)(2).

Federal Magistrate Judges Ass'n Rules Committee, 98-CV-268: The Committee recommends that the cost-bearing provision be included in Rule 26(b)(2) rather than in Rule 34(b). This would make it explicit that the authority applies to all types of discovery, including depositions. Additionally, placement in Rule 26(b)(2) eliminates the possibility of a negative implication about the power of a court to enter a similar order with regard to other types of discovery, notwithstanding the Committee Note that tries to defuse that implication.

#### Testimony

##### Baltimore Hearing

F. Paul Bland, Tr. 89-106: (on behalf of Trial Lawyers for Public Justice) Moving the provision to Rule 26(b)(2) would not be desirable, because that would stress the same message. If that would make the message even broader, it would be worse.

Stephen G. Morrison, prepared stmt. and Tr. 126-42: This provision should be in Rule 34 because that's the only type of discovery that creates the serious problem of disproportionate costs. Both sides do depositions, roughly in equal numbers, and so also with interrogatories. But in personal injury cases, one side has documents and the other does not. That's the way it is.

##### San Francisco Hearing

G. Edward Pickle, prepared stmt and Tr. 36-47: (Gen. counsel, Shell Oil Co.) Placing the cost-shifting provision in Rule 34 rather than Rule 26 places the emphasis where it belongs.

H. Thomas Wells, prepared stmt. and Tr. 47-60: Regarding placement of the provision, in his experience a provision limited to document production would reach the most abusive and expensive discovery problems, and that the rule should be so limited.

Alfred W. Cortese, Jr., prepared stmt. and Tr. 174-82: The placement of this provision in Rule 34 is correct, as opposed to Rule 26. The real need for the provision is in Rule 34.

##### Chicago Hearing

Robert T. Biskup, prepared stmt. and Tr. 73-84: Rule 34 is the right place for this sort of provision to be, rather than Rule 26. This would avoid the risk of a new brand of satellite litigation, as with Rule 11.

Todd Smith, Tr. 134-47: (on behalf of Assoc. of Tr. Lawyers of America) Because ATLA is adamantly opposed to cost shifting, there was no discussion about whether it might be preferable to put such a provision in Rule 26(b)(2) rather than in Rule 34.

Lorna Schofield, Tr. 193-202: (speaking for ABA Section of Litigation) The Section of Litigation favors that the cost-bearing provision be included in Rule 26 rather than Rule 34. There is already implicit power to make such an order, and if the provision is only explicit in Rule 34 that might support the argument that it can't be used for other types of discovery.

Rex K. Linder, prepared stmt.: Suggests that the provision should be included in Rule 26(b)(2), for it should be readily applicable to all discovery and will correspond to the concept of proportionality. It implicitly exists already under Rule 26(b)(2), and there seems no logical reason not to make it express.

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**TAB 6A**

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COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

At the April meeting this Committee discussed several issues referred by the Committee on Court Administration and Case Management. The discussion is described toward the end of the Minutes. The attached letter from Judge Julie A. Robinson, Chair of CACM, describes reactions to the April discussion.

One of these issues is the possibility that pro se filers might be required to provide the last four digits of their Social Security numbers. The April discussion reflected serious concerns about this possibility. The letter notes that the new CM/ECF system does not currently include fields for Social Security numbers or other personal identifiers. But "The courts and the Administrative Office may consider enhancing this technology at a later date." It may suffice for present purposes to make arrangements to be informed if this subject is brought forward for possible implementation.

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**TAB 6B**

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COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES

**Julie A. Robinson, Chair**

Richard J. Arcara  
Marcia A. Crone  
Charles S. Coody  
Gregory L. Frost  
Thomas B. Griffith  
Wm. Terrell Hodges

Daniel L. Hovland  
Joseph N. Laplante  
Ronald B. Leighton  
Robert E. Littlefield, Jr.  
Sean J. McLaughlin  
Amy J. St. Eve  
Roger W. Titus

Mark S. Miskovsky, Staff

August 21, 2013

Honorable David G. Campbell  
United States District Court  
Sandra Day O'Connor  
United States Courthouse  
401 West Washington Street, SPC 58  
Phoenix, AZ 85003-2156

Dear Judge Campbell:

Thank you for your recent letter providing your Committee's views on the recommendations for civil rules changes that arose in the Court Administration and Case Management (CACM) Committee's policy discussions regarding the Next Generation of the Case Management/Electronic Case Files (CM/ECF) system. You noted that, at Judge Sutton's suggestion, a subcommittee has been formed with members from the various rules committees that will address issues referred by our Committee, including whether a uniform national rule should be adopted regarding the use of notices of electronic filing as certificates of service and the proper handling of records requiring "wet" signatures from third parties. I understand that the subcommittee has already begun its work, and our Committee looks forward to working together with the subcommittee (through our liaison, Judge Coody), to address these issues.

I also appreciate the concerns raised by your Committee regarding our Committee's proposal to amend Federal Rule of Civil Procedure 4(a)(1)(C) to require unrepresented litigants to provide courts with the last four digits of their Social Security numbers and your suggestion that other identifiers be utilized in conjunction with some form of matching technology. At this juncture, the new CM/ECF system envisions providing courts with the option to track these filers, through a database comprised of information manually added by judges and court staff. It does not, however, contemplate any automated technology to match or process this information

Hon. David G. Campbell

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provided by pro se filers. Nor does the new system currently include fields for Social Security numbers (or indeed other personal identifiers not currently included on the summons or the civil cover sheet). The courts and the Administrative Office may consider enhancing this technology at a later date.

Finally, thank you for sharing your Committee's views on Judge William G. Young's cost-containment suggestion to expand the use of videoconferencing technology in civil cases, particularly for visiting judges, to save travel funds. Since there is already widespread availability and use of videoconferencing, as well as other technologies, such as electronic files and teleconferences, and CACM and the Intercircuit Assignment Committees continue to encourage the use of all these technologies, I agree that an effort to amend the rules to encourage the use of videoconferencing may well not be necessary at this time.

Sincerely,

A handwritten signature in blue ink that reads "Julie A. Robinson". The signature is written in a cursive style with a long horizontal flourish at the end.

Julie A. Robinson

cc: Judge Jeffrey Sutton  
Jonathan Rose  
Benjamin Robinson  
Mark S. Miskovsky