MINUTES

CIVIL RULES ADVISORY COMMITTEE

MARCH 22-23, 2012

The Civil Rules Advisory Committee met at the University of Michigan Law School in Ann Arbor, Michigan, on March 22-23, 2012. Judge David G. Campbell, Committee Chair, attended by telephone. The Committee members who attended are John Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Steven M. Colloton; Hon. Stuart F. Delery; Judge Paul S. Diamond; Judge Paul W. Grimm; Peter D. Keisler, Esq.; Dean Robert H. Klonoff; Judge John G. Koeltl; Judge Michael W. Mosman; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Justice Randall T. Shepard; and Anton R. Valukas, Esq. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Associate Reporter. Judge Mark R. Kravitz (by telephone), Chair, Judge Diane P. Wood, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris attended as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, attended by telephone. Peter G. McCabe, Jonathan C. Rose, Benjamin J. Robinson, Julie Wilson, Julie Yap, and Andrea Kuperman, Chief Counsel to the Rules Committees, represented the Administrative Office. Emery Lee represented the Federal Judicial Center. Ted Hirt, Esq., and Allison Stanton, Esq., Department of Justice, were present. Observers included Alfred W. Cortese, Jr., Esq.; Ellen Messing, Esq. (National Employment Lawyers Association liaison); Kenneth Lazarus, Esq.; John Vail, Esq. (American Association for Justice); Thomas Y. Allman, Esq.; Ariana J. Tadler, Esq.; William P. Butterfield, Esq.; John K. Rabiej, Esq.; Jerry Scanlon (EEOC liaison); Henry J. Kelston, Esq.; and others.

The meeting also was attended by several of the contributors to a forthcoming set of articles celebrating Professor Cooper's 20 years of service as Reporter for the Committee. They included Judge Lee H. Rosenthal (former chair of the Civil Rules and Standing Committees); Gregory Joseph, Esq.; and Professors Stephen B. Burbank; Paul D. Carrington; Daniel R. Coquillette; Steven S. Gensler; Geoffrey C. Hazard, Jr.; Mary Kay Kane; Richard L. Marcus; Linda S. Mullenix; Thomas D. Rowe, Jr.; and Catherine T. Struve.

Judge Grimm opened the meeting by reporting that Judge Campbell was attending the meeting by telephone because his wife's recent and successful back surgery required that he remain at home.

Judge Grimm read the March 12 letter to Chief Justice Roberts in which Judge Kravitz stated that for reasons of health he would take leave of the Standing Committee on October 1, 2012. Judge Grimm spoke for all in recognizing the letter as "classic Mark Kravitz, the man we all admire and love."

Dean Evan Caminker welcomed the Committee to Ann Arbor, giving it credit for the glorious early summer weather. He noted that for

many years now, the Law School curriculum has evolved continually toward an ever-increasing array of classroom, simulation, practicum, and clinical offerings designed to prepare students for the practice of law. At the same time, all the traditional national and international courses continue to thrive, and interdisciplinary offerings continue to grow both in the classroom and in the clinics. The rich combination of theory and practical knowledge that informs the Committee's work runs parallel to this educational mission.

Judge Grimm introduced two new Committee members. Stuart Delery is the Acting Assistant Attorney General for the Civil Division. General Delery came from private practice at Wilmer Hale to the Department of Justice in 2009, moving through several positions before taking his present position. He graduated from the University of Virginia and Yale Law School, then clerked for Judge Tjoflat and Justices White and O'Connor.

John Barkett has attended several Committee meetings as liaison from the ABA Litigation Section, and participated in the Duke Conference. He practices as a litigator in the Shook Hardy office in Miami. He devotes increasing amounts of time to serving as mediator, conciliator, and special master. He also teaches a law school course in electronic discovery.

Judge Grimm also noted that Judge Campbell reported the Committee's work to the Standing Committee in January. The January meeting included a panel discussion of class actions under Civil Rule 23, aiming to identify the most important problems that have emerged in practice and to advance consideration of the need to begin studying possible amendments. It was recognized that any Rule 23 project will require several years of hard and dedicated work if it is launched.

Judge Kravitz attended the Judicial Conference earlier this month. No items involving the Rules Committees were presented. There was a meeting of the mass torts group in conjunction with the Conference.

November 2011 Minutes

The draft minutes of the November 2011 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Legislative Activity

Benjamin Robinson reported on legislative activity. Since the November meeting two more bills have appeared that bear attention

because of possible implications for the Civil Rules. They are the Federal Consent Decree Fairness Act and the Sunshine in Regulatory Decrees Act. They may raise questions whether Civil Rule 60 is adequate to the occasional need to revise long-term institutional reform decrees, particularly when interest groups may align with agencies to secure results that they cannot obtain from a legislative body. There is a provision requiring an expeditious ruling on a motion to terminate a consent decree, and setting specific times for scheduling orders. The Judicial Conference has taken no position on these bills. The Federal-State Jurisdiction Committee is monitoring them closely.

House Bill 3487 is similar to the Lawsuit Abuse Reduction Act. It would amend Civil Rule 11 in several respects. It would require an award of reasonable expenses and attorney fees to the party who prevails on a Rule 11 motion; abolish the 21-day safe harbor; require state courts to apply Rule 11 in actions that affect commerce; and require special sanctions when an attorney accumulates three Rule 11 violations.

The Appeal Time Clarification Act has been signed. It grew out of the need to conform 28 U.S.C. § 2107 with amendments to Appellate Rule 4. It was signed one day before the effective date of the Rule 4 amendments, maintaining consistency between rule and statute.

The Federal Courts Jurisdiction and Venue Clarification Act also has been enacted. It does not appear to affect any of the Rules.

Rule 45

Proposed amendments to Rule 45 were published for comment in August 2011. The project began as an effort to simplify and clarify a rule that was difficult to navigate, particularly for those who used it infrequently. A number of significant changes also were made. The Committees invited comment on four specific topics. Is the effort to simplify successful? Should the proposal to emphasize notice requirements be expanded to require notice of events after the subpoena is served? What should be the standard that limits the newly added authority to transfer a motion related to a subpoena from the court where compliance is required to the court that issued the subpoena? Is it wise to apply to a party or its officer the same geographic limits on the reach of subpoenas to testify at trial as apply to nonparties?

Three hearings were scheduled. Each was cancelled for want of interest. No one sought to testify at either of the first two. The two witnesses who planned to testify at the final hearing agreed to submit their comments in writing. In all, 25 written

comments were received. The Discovery Subcommittee held conference calls to discuss the issues raised by the comments. The Subcommittee recommends modest changes in the published proposal on the basis of the comments. Professor Kimble, the Style Consultant, suggested several style changes. The Subcommittee adopted some of them, and Professor Kimble accepted the Subcommittee's reasons for not adopting the others.

The remaining task is to agree on the precise version of Rule 45 that should be transmitted to the Standing Committee for its recommendation for adoption.

RULE 45: SIMPLIFICATION

The simplification of Rule 45 begins by providing that all Rule 45 subpoenas issue from the court where the action is pending. The present rules that limit the place where the person served with the subpoena is required to comply are divorced from the place of service, and carried forward without other substantial change. The place to enforce the subpoena, or to seek relief from it, is the court where compliance is required.

The comments generally supported the simplification aspects of the Rule 45 proposal. It does not require further discussion.

RULE 45: NOTICE

As published, Rule 45 transfers to a new subdivision (a)(4) the requirement that notice be given to all parties before a subpoena is served on a nonparty. Many lawyers complain that the notice requirement is often ignored. The hope is that the transfer will give it a more prominent place and engender better compliance. In addition, it is made clear that a copy of the subpoena must be served with the notice. Finally, the provision in present Rule 45(b)(1) is changed by deleting "before trial," so that notice must be given before serving a subpoena to produce at trial as well as before serving a subpoena to produce in pretrial discovery.

Several questions have been raised as to notice. Some comments urged that notice should be served on the parties at a set interval — perhaps 15 or 20 days — before the subpoena is served on the witness. Without this advance period, service on the parties could be made by means — most likely mail — that actually reach them after the subpoena is actually served on the witness, perhaps leading to production before the other parties have any opportunity to object or seek protection. Other comments urged that there should not be any advance notice to other parties, for fear of collusion that enables the nonparty witness to avoid service or otherwise thwart production. The Subcommittee does not recommend any change. The Committee accepted the Subcommittee position.

Post-judgment Enforcement Proceedings. A separate question has been raised by the Department of Justice. Their concern is that in post-judgment enforcement proceedings notice to a party before a subpoena is served will enable the party to conceal assets. These problems arise in many enforcement settings, particularly in attempting to enforce restitution in favor of a crime victim. Although the debtor typically has notice of enforcement proceedings, there is no notice of the subpoena before it is served. Remember that present Rule 45(b)(1) applies only to a subpoena to produce before trial. Generally the subpoena is directed to a financial institution. "When we find a bank account, we freeze it." If the debtor gets advance notice of the subpoena, "we have trouble."

The Department initially proposed amending the rule by limiting advance notice to subpoenas commanding production "before judgment." But if the Rule 54(a) definition of "judgment" could create ambiguities in this formulation, then some other formulation might be found. The desire to have advance notice of trial subpoenas, for example, might be accommodated by referring to subpoenas commanding production "before [trial] or at trial."

It was asked why notice that a subpoena will be served aggravates the risk of concealment. Serving the subpoena does not of itself freeze the assets; the person served can notify the judgment debtor before execution. And there are statutory devices enabling the Department to freeze assets it knows of before launching discovery for other assets. The Department explained that it serves subpoenas, often on financial institutions, to discover assets, and then acts to freeze the assets once they are found. If notice of the subpoena must be given to the judgment debtor, the debtor may well move or conceal the assets before they can be frozen. It was suggested that the Department could apply for an ex parte order suspending a Rule 45 notice requirement on showing reason to fear concealment. The Department, however, views the need to apply for an ex parte order as a burdensome extra step.

It was suggested that perhaps the Committee Note could deal with this by observing that the notice requirement is not intended to apply in post-judgment enforcement proceedings. But that might well cross over the line into the forbidden territory of rulemaking by Note. This concern was underscored. The Committee has not focused on the departure from present judgment enforcement practice that would result from striking "before judgment" from the present rule. Providing for advance notice of trial subpoenas seemed a good idea, but it may not be so important as to disrupt the opportunity to discover assets before they can be concealed. This problem is important to all judgment creditors, not the government alone.

It was observed that advance notice of a trial subpoena might be preserved without jeopardizing post-judgment enforcement proceedings. One possibility would be to require notice of a subpoena to produce before trial or at trial. That rule text would support a Committee Note observation that the rule does not apply to post-judgment proceedings to discover assets. "It is common for a Note to say what a rule does not do."

It was agreed, with no contrary vote, that the Subcommittee would draft rule text to ensure that notice need not be given of discovery in aid of execution. The language will be reviewed by e-mail communication with the full Committee. [On the Subcommittee's recommendation, the Committee later decided to restore "before trial." This avoids any risk of thwarting discovery in aid of execution. And there seems to be little need to address trial subpoenas in Rule 45(a)(4), since notice ordinarily is accomplished by other preterial procedures.]

Later Notices: Modify Subpoena, Documents Produced. Throughout the process of developing Rule 45 amendments, suggestions have been made that notice should be required of events after the subpoena is served. The party who served the subpoena often negotiates modifications with the person served. Notice of the modifications to other parties would enable them to serve their own subpoenas for information negotiated away by the party who first served a subpoena. As materials are produced in response to the subpoena, other parties are likely to want to inspect them. But the task of asking for access can be burdensome, particularly when "rolling production" involves production in installments over an indeterminate period of time. And some lawyers refuse requests for access, taking the position that nothing in Rule 45 directs that other parties be given access to subpoenaed materials. The Subcommittee discussed these problems repeatedly and at length. It concluded that requiring notice of modifications or production would create unnecessary problems. There is an all-too-real danger of "gotcha" motions seeking to exclude evidence for failure to comply with a notice obligation. "Less compliance with more rules breeds satellite litigation." The notice changes were prompted by the complaints that many lawyers do not comply even with the simple notice requirement in present Rule 45(b)(1). Notice of production, further, could become a substantial burden when rolling production requires multiple notices, increasing the risk of inadvertent notice failures and motions for sanctions. Even limiting the requirement to notice of the first production, alerting other parties to the need to begin monitoring for subsequent production, could be a problem. The result of these deliberations was a statement in the Committee Note that parties desiring access to subpoena materials need to follow up with the party who served the subpoena, and that the party serving it should make reasonable provision for prompt access.

Discussion of the multiple notices issue began by noting that notice of receipt of documents is useful. To be sure, there is a danger of "gotcha" disputes, and good lawyers work out access to produced materials now. "But it is inescapably clear that many lawyers do not let their adversaries know" when production occurs. It is simple to add "and also give notice of receipt" to the rule. "We should expect this in practice, but it is not happening."

The response was that these issues have been discussed several times, both in the Subcommittee and in the Committee. The Subcommittee concluded that other parties have an obligation, once they know of the subpoena, to ask for access to materials produced in compliance. If cooperation is denied, the court can order that access be allowed.

An observer commented that some states require notice of production. Omitting a notice requirement is a mistake. At the least, the Committee Note should state there is an obligation to give notice. Otherwise, as now, we have trial by ambush. Key documents appear for the first time in the pretrial order.

But it was rejoined that "lawyers should pay attention." On the other hand, lawyers are concerned about the lack of notice when documents are produced. Still, "this is complicated." Production often occurs on a rolling basis: do you have to give multiple notices, generating multiple opportunities for collateral disputes? Would it help to say in the Committee Note that other parties can ask for access, and seek a court order if access is not given? Or is this question so important that a Committee Note is not protection enough, particularly given the limit that a Note cannot make a rule?

It was agreed that the Subcommittee should prepare language for the Committee Note, again in the vein of stating what the rule text does not do. The rule does not cut off the court's power to order that a party provide access to subpoenaed materials. The Note might also quote from the Note to the 2000 amendments: "In general, it is hoped that reasonable lawyers can cooperate to manage discovery without the need for judicial intervention." The Subcommittee draft will be included in the Rule 45 e-mail review by the Committee.

Rule 45: Party and Party Officers as Trial Witnesses

Present Rule 45 governs the place of compliance with a subpoena by two subdivisions. Rule 45(b) defines the places where a subpoena can be served. Rule 45(c) defines limits on the places where compliance can be required. Rule 45(c)(3)(A)(ii) directs that a court must quash or modify a subpoena that "requires a person who is neither a party nor a party's officer to travel more

than 100 miles" from designated places, or to incur substantial expense to travel more than 100 miles to attend trial. The Vioxx decision described in the Committee Note found a negative implication in this provision allowing a court to require a party or a party's officer to attend as a trial witness no matter where served. The Committee agrees that this is an incorrect reading of the present rule. The proposed amendments published Rule 45 text that simply overrules the Vioxx interpretation. Recognizing that there is substantial support for something like the Vioxx result as a matter of policy, however, the publication package included an alternative that was expressly identified as not recommended. The alternative would not restore the Vioxx ruling. It would not authorize a party to subpoena another party or its officer to attend trial. Instead, it would authorize the court to order a party to appear, or to produce its officer to appear, as a trial witness. The order could issue only for good cause and after considering the alternatives of audiovisual deposition or testimony by contemporaneous transmission under Rule 43(a). The court could order reasonable compensation for expenses incurred to attend trial. And sanctions could be imposed only on the party, not on its officer.

Some of the public comments supported adoption of the "Vioxx alternative." One Subcommittee member spoke in favor. There are categories of cases that present choices in designating the place of trial. Multidistrict litigation and CAFA class actions are the prime examples. The defendants have an opportunity to argue for trial in a place that is not "home town," and that is beyond the limits on subpoenas for nonparty witnesses. Choice of the location for a "bellwether" trial can be similarly affected. Some of the comments, including those from employment lawyers, support the alternative. The "good cause" standard in the alternative does not call for exceptional circumstances, but it is likely that courts will seldom use it to order a party or its officer to attend trial from a distant place. Often the parties will agree, or the court will decide, that some other form of testimony is a satisfactory substitute for live testimony at trial. But the option for live testimony is important to fair management of complex cases. Concerns about misuse or overuse are not warranted.

Another reaction was that all Committee members agree that Vioxx misreads the present rule. Many participants in the 2010 miniconference that preceded formulation of the published proposal agreed. The concerns expressed by those who support the alternative are understandable. But there were not many comments on the published proposal and alternative, and these comments were split. Among others, the American College of Trial Lawyers and the Lawyers for Civil Justice oppose the alternative. Before Vioxx was decided, decades of litigation were conducted without the option of compelling a party or its officer to travel beyond the Rule 45

limits for nonparties to testify at trial. No one thought trials conducted in this regime were unfair. "Vioxx changed the landscape." And experience showed that it could be used for strategic purposes, threatening to drag to trial high-level officers who in fact are not important witnesses. And video depositions, or testimony by contemporaneous transmission from a distant place, are usually as good as live testimony at trial. A party will want to produce at trial any witness whose testimony is truly important. "We should go back to the history."

Judge Kravitz noted that he had urged the Judicial Panel on Multidistrict Litigation to adopt a rule that would enable a multidistrict court to order an executive to travel to attend trial. He has done it himself twice. "Most of the travel cases are multidistrict litigation cases." Adoption of such a rule by the panel would go a long way toward meeting any need for a similar and more general provision in Rule 45.

Further support was offered for the alternative. It is true that historically litigation proceeded without any distinctive power to compel trial testimony by a party or its officer. Parties decided whether to produce witnesses on calculations of self-advantage. But Vioxx is not so much a departure from history as recognition of the new realities of centralization of federal court litigation. Judges should have the discretionary power proposed by the alternative. It is not clear that the MDL Panel has authority to adopt a rule without support in a Federal Rule of Civil Procedure. The alternative provides ample protection in focusing attention on the need to consider audiovisual depositions or contemporary transmission as satisfactory substitutes for live trial testimony. Added protection is provided in the authority to award expenses incurred to attend trial.

The Committee voted to recommend the published rule for adoption, without the alternative proposal, with two dissents.

Rule 45: Transfer of Motions and Orders

The separation of the place where compliance is required from the court where the action is pending is not new. But it focuses attention on a set of problems that arise in present practice. Motions directed to the subpoena may raise issues closely tied to the merits of the pending action, or significantly affecting management of the action by the court where it is pending. Or a single action may give rise to discovery subpoenas calling for compliance in several different courts. It may be that the same compliance questions arise in more than one court. The published proposal provides for transfer of subpoena-related motions from the court where compliance is required to the court where the action is pending. The standard requires "exceptional circumstances" or the

consent of the parties and the person subject to the subpoena. One important issue is the standard for transfer.

A simple illustration is provided by an action pending in the Eastern District of Michigan and a discovery subpoena issued by that court to a nonparty witness in the Southern District of New York. A motion directed to the subpoena is made in the Southern District of New York. In light of suggestions in several of the public comments, the Subcommittee decided to recommend that the consent of the parties should not be required to support transfer. Consent of the nonparty served with the subpoena enables — but does not require — the court to transfer a motion to the Eastern District of Michigan. It seems appropriate to subject the parties to the jurisdiction of the court in Michigan if the nonparty consents.

Absent the nonparty's consent, the exceptional circumstances criterion generated much disagreement in the comments. Several alternatives were suggested: "good cause"; the version in the draft prepared for the April 2011 meeting, "considering the convenience of the person subject to the subpoena, the interests of the parties, and the interests of effective case management"; or "finds that the interests favoring transfer outweigh the interests of the person subject to the subpoena [or any party opposing transfer]." Support for the "exceptional circumstances" criterion focused primarily on protecting a nonparty against the burdens of contesting discovery issues in the often distant court where the action is pending. Support for a more permissive standard began with suggestions that the illustrations of "exceptional circumstances" in the Committee Note are not exceptional at all. The Magistrate Judges Association urged that transfer should be more freely available, and another comment suggested that transfer should be virtually routine when the dispute focuses not on the circumstances of the nonparty subject to the subpoena but on the merits of the action or the relative importance of the information in relation to other discovery in the action and the merits. The Subcommittee divided on the standard, but did not recommend a change.

Discussion began with support for the exceptional circumstances test. Practical experience suggests focus on the nonparty as the person we should be concerned about. "The nonparty 'has no skin in the game.'" In determining whether exceptional circumstances warrant transfer, the court can take account of any showing that the nonparty in fact has a close relationship with a party, and even may be acting in order to increase burdens on other parties. The parties would like to litigate where it is convenient for them. The judge in the court where compliance is required also has an interest in transfer, to avoid the inconvenience of being involved with disputes arising from an action in another court.

"Courts often have an interest that favors transfer." Although some comments favored a more lenient standard, there were not many of them. Remember there was so little interest in the entire proposal that the hearings were cancelled. The American Medical Association, representing doctors who are often subjected to nonparty discovery, strongly favors the exceptional circumstances test. So do other groups. "Lawyers can take care of themselves." Any lesser standard makes it too easy to transfer. "My experience is that this issue can be resolved by focusing on the interests of the nonparty. If there is a need for a ruling by the court where the action is pending, transfer will happen."

This position was tested by drawing from illustrations in the Committee Note. Is it an exceptional circumstance that the court where the action is pending has resolved a substantive dispute, and a party is asking for a different resolution of the dispute by the court where compliance is required? Or if subpoenas are served that require compliance by nonparties in fifteen different states, all presenting the same issues of compliance? The response was that multiple subpoenas are not an exceptional circumstance. And if there has been a substantive ruling by the court where the action is pending, that ruling will be taken into account by the court where compliance is required.

It was noted that the American Bar Association Litigation Section proposed the exceptional circumstances test, and continues to support it. The Department of Justice also supports it. Parties often seek discovery from nonparty government witnesses. It is better to litigate the disputes where the witnesses are.

In response to a question whether any Committee member favors relaxing the exceptional circumstances test, it was observed that it is "incoherent" to offer examples in the Committee Note of circumstances that many observers describe as not exceptional, indeed nearly routine. Reliance on "exceptional" as a standard seems to raise an empirical question: how common are the "circumstances" offered to support transfer? And the empirical response seems to be that these illustrations are not exceptional. On the other hand, it was suggested that "in the full federal caseload," not many cases will present these problems. This view was repeated from a slightly different perspective. In the overall federal caseload, not many cases involve discovery from nonparties away from the court where the action is pending. Distant nonparty discovery is itself exceptional. Circumstances that warrant transfer will themselves be exceptional even within this category of exceptional cases.

An observer suggested that the Subcommittee report seemed to favor relaxing the exceptional circumstances test, and asked what happened? It was responded that the Subcommittee had not really

decided to support one view or the other. The seeming unanimity of the discussion with the Committee was not anticipated.

The focus on the Committee Note examples led to asking how to integrate the task of articulating a transfer standard in rule text with the task of offering helpful illustrations in the Committee Note. If there is to be a transfer text, "transfer should at least be possible. Judges who encounter these problems find it difficult to deal with a piece of a broader picture."

It was suggested that the Committee Note must be changed. The paragraph that begins by stating that it is difficult to define exceptional circumstances should be revised, first, by moving the final sentence to become the first sentence: "The rule contemplates that transfers will be truly rare events." Beyond that, the Note should attempt to reduce the risk that transfer will "become the rule." The standard might be explained as involving circumstances so compelling as to make it contrary to the interests of justice to resolve the dispute in the court where compliance is required. That could reduce the perceived incoherence between the rule standard and the present examples.

One reaction to this discussion was that if transfer is to be so tightly circumscribed it may not be right to say only that the court "may" transfer. If the case for transfer is so compelling, why not say that it must be transferred? An immediate response was that "any judge will transfer if there are exceptional reasons to transfer." A related suggestion by an observer was put as a question — can a judge of the court where the action is pending arrange to be designated to sit in the court where compliance is required so as to protect the nonparty's interests while also achieving the benefits of transfer? Another suggestion was that judges will manage to confer with each other when there is a substantial need for coordination, and reduce the costs of separate proceedings by informal arrangements.

It was agreed that the exceptional circumstances test should remain in rule text, and that the Committee Note should be revised to reflect better the exacting standard that is intended. One possibility would be to suggest a distinction between disputes that focus on considerations specific to the local witness and disputes that focus on the main action. But it was responded that the nonparty witness should not be subjected to this distinction. A nonparty should not be dragged around the country merely because the dispute is between the parties and focuses on the merits of the action. It was left to the Subcommittee to prepare a revised Committee Note, to be circulated to the full Committee for review and approval.

RULE 45: PLACE OF COMPLIANCE

The published proposal, Rule 45(c)(2)(A), provided that a subpoena may command production of documents, tangible things, or electronically stored information at a place reasonably convenient for the person who is commanded to produce. As in the present rule, the place is designated by the party serving the subpoena, not the person subject to the subpoena. This formulation reflected at least two concerns. The more prominent concern was that discovery increasingly includes production of electronically stored information by transmission to the requesting party. Production by transmission is equally convenient to any electronic address. A subsidiary concern was the ambiguity of applying present Rule 45 to nonparty entities who are subject to service, and who transact business, in many places. So far, so good. But it was asked how this provision plays into the provisions in proposed Rule 45(d) that call for motions to enforce a subpoena, or for relief from it, in the court where compliance is required.

A simple illustration was proposed. A New York law firm is litigating an action in Arizona. It serves a subpoena on an Arizona nonparty to produce documents at the law firm offices in New York. The nonparty wishes to protest that production in New York is not reasonably convenient within the meaning of Rule 45(c)(2)(A). As the rule is structured, the Arizona nonparty must seek relief by motion in the court in New York. Or, to make it one step more complicated, the subpoena requests production of documents that in fact are stored in a warehouse in Oregon.

The Committee agreed that Rule 45(c)(2)(A) should be revised to delete the published provision looking for production at a place reasonably convenient for the person who is commanded to produce. The starting point will be to adopt the 100-mile provisions that apply to nonparty depositions, unless the parties agree on a different place for production. Agreement is very likely to be reached as to electronically stored materials. The Subcommittee will propose new language to be included in the package of Rule 45 revisions for e-mail review by the Committee.

Rule 45: Other Issues

One of the comments, from a lawyer in Hawaii, observed that difficulty had been encountered in persuading courts on the mainland to enforce subpoenas to testify at trials in Hawaii by means of contemporaneous transmission under Rule 43(a). The Subcommittee agrees that a Rule 45 subpoena is properly used for this purpose — a witness outside the reach of a subpoena from the court where the action is pending can be compelled to testify from a place within the limits imposed by Rule 45. The Committee agreed that the Committee Note should be revised to confirm this plain reading of the revised Rule 45 text.

The comments also raised a concern that Rule 45 will somehow be read to limit the present practice that supports discovery from parties outside the Rule 45 limits. Rule 37(d) authorizes sanctions when a party or its officer, director, or managing agent fails to appear for a deposition after being served proper notice. Rule 37(d) extends as well to Rule 33 and Rule 34 requests. There is no need for a subpoena. Limits are imposed as a matter of reasonableness. The Subcommittee and Committee agreed that the Committee Note should be revised to include a reminder that the revisions do not change this established practice.

Other changes made to the published Committee Note were identified and accepted.

RULE 45: RECOMMENDATION

The Committee voted, without dissent, to recommend to the Standing Committee that revised Rule 45 be recommended for adoption upon Committee approval by e-mail submission of the revisions adopted at this meeting. [The Committee approved the revisions. Rule 45, as revised, was submitted to the Standing Committee.]

Discovery: Preservation and Spoliation

Judge Grimm introduced the Discovery Subcommittee report of its work on preservation of materials for future discovery requests and spoliation sanctions for failure to preserve. The report describes the status of Subcommittee deliberations and requests guidance.

The immediate source of concern is the costs associated with the duty to preserve evidence relevant to a claim, particularly when a foreseeable claim has not yet become the subject of litigation. This concern was brought to the fore by panel discussion at the Duke Conference. Initial Subcommittee work was considered at a miniconference in September 2011, and the Committee reviewed the topic at its November 2011 meeting. In December the Subcommittee on the Constitution of the House Judiciary Committee held a hearing. Congressman Franks has submitted a letter on the costs of discovery and preservation that will be considered by the Advisory Committee at this meeting and in future deliberations. Others also have provided valuable information, including Lawyers for Civil Justice, the RAND Institute for Civil Justice, the Department of Justice, and regular observers Allman, Butterfield, and Tadler, all present today. The Sedona Conference continues to work on these issues. The Subcommittee has continued to work by conference call.

The difficulties of the underlying questions are highlighted by the number of comments from outside and by the disparity of

views expressed by the comments. The Department of Justice letter suggests that it is premature to attempt to develop new rules provisions. The ongoing studies by several groups will, when complete, provide a better foundation. The Department itself has carried out a survey and will undertake additional analysis.

These sources of information are valuable. But it is difficult to locate them along the line from anecdote to an accumulation of anecdotes to hard numbers. "Getting numbers in a helpful way is hard." The Department of Justice survey shows that few adversaries request — or even threaten to request — sanctions against Department lawyers or against the United States, and that Department lawyers seldom threaten to request or actually request sanctions against their adversaries. Most cases do not seem to involve the sanctions that are said to drive many institutional litigants to overpreserve in costly and disruptive ways.

These uncertainties about actual current problems are compounded by the common concerns about making new rules. Will litigants comply with a new rule? What unintended consequences may follow — including impact on state tort law, and interaction with obligations to preserve evidence imposed by rules of professional responsibility? Remember that there are many constraints that require preservation of vast amounts of information quite without regard to the prospect of litigation. It may be that the increase in total preservation caused by a duty to preserve for reasonably anticipated litigation would be quite small.

The Subcommittee initially developed draft rules to illustrate three different approaches. The first set included detailed provisions governing the events that trigger a duty to preserve; the scope of the information that must be preserved in terms of subject matter, number of sources or "key custodians" that must be drafted into the preservation, the reach back in time for information to be preserved, the duration of the duty to preserve; and more. The second set described the same dimensions of the duty, but in general terms that mostly exhorted reasonable behavior. The third set focuses on the occasions for remedies and sanctions, affecting the duty to preserve only by reflection from the circumstances that justify remedies or sanctions. The approach by way of remedies and sanctions derives from the legions of statements that the fear of sanctions leads to vast over-preservation, at great cost. This approach aims "to give some shelter from the storm."

The Subcommittee consensus, although not a unanimous view, is that it would be difficult to create good rules that seek to define the duty to preserve, either in detail or by simply exhorting reasonable behavior. Detailed provisions, further, could easily be superseded by advances in technology. Social media offer an

example of complex sources of information that likely would have been overlooked in a detailed rule drafted even a few years ago. It cannot be guessed what new sources of information will develop, and become important, even in the near future. Work on the drafts now presented looked to describing the basic concept, developing a bedrock concept of proportionality, and such. Much of the focus is on shaping a distinction between remedies designed to cure the loss of information that should have been preserved by searching for substitutes, and sanctions designed to provide some protection from the consequences of inability to substitute for the lost information in cases of serious fault and serious prejudice.

Other questions have been considered. Should new rules address the scope of discovery? There is general agreement that the volume of information available for discovery, and thus preservation, has exploded. The explosion is in the form of electronically stored information; should any new rule address only ESI? The Subcommittee reached no consensus on this question. It considered the Federal Circuit presumptive limits on e-mail discovery, but only asks the question whether this should be considered. The work of the Duke Subcommittee overlaps the work of the Discovery Subcommittee in these dimensions. The two subcommittees are working in tandem.

The Subcommittee has real reservations about some of the details that are regularly suggested for new discovery rules. Drafting in terms of limiting the number of "key words" for searches, for example, could easily lead to choices of key words that will yield "100% recall and 0% precision." Predictive coding offers promise as a means of sharpening the focus of search and preservation efforts, but it is not yet fully developed — RAND is exploring this approach. One RAND finding is not surprising: reviewing available information for relevance, responsiveness, and privilege or other grounds of protection accounts for 70% of the cost of preservation and discovery.

One of the current drafts pursues an approach urged by Thomas Allman, focusing a preservation sanctions rule on ESI alone. Drafting may be easier on this approach, which can be framed as a revision of Rule 37(e) rather than a new Rule 37(g). Some Subcommittee members are attracted to this approach, while others think litigants should not be forced into the nightmare of different preservation regimes for ESI and all other information.

Professor Marcus said that after the November 2011 Committee meeting further work was devoted to developing a rule with more "hard specifics," but that approach presented problems and is not illustrated in the agenda materials for this meeting. Nor is there full agreement whether to frame rules amendments by focusing on ESI alone. For many years, many observers believed that the general

discovery rules provided all the tools needed to manage discovery of ESI. But the 2006 amendments reflect a judgment that some specific provisions for ESI are necessary. ESI is different both in its nature and its extensiveness. Rule 37(e) is an example of an ESI-specific rule. On the other hand, Rule 26(f) addresses all discoverable information, and there continues to be a great deal of discoverable information that is not stored in electronic form. Non-ESI information likely continues to be important in many cases, but this is an uncertain proposition and the situation may change in the future. If the next set of amendments is limited to a focus on ESI, they can be fit into the more recent amendments.

The choice of focus will affect how the rules are shaped, and perhaps also when they should be adopted. The development of concept searching by such means as predictive coding, for example, is difficult to predict.

Beyond these now familiar questions, another question persists: can a pre-litigation duty to preserve be defined in terms that limit the obligation to preserve by allowing destruction of information that would be discoverable if litigation were actually in being? And should the Subcommittee continue to work on rule provisions that would define specific limits on the scope of ESI discovery, along the lines sketched in the informal discussion draft Rule 26(b)(1)(B) set out in the agenda materials at p. 275?

The first of these questions to be discussed was whether preservation provisions should focus only on ESI, or should encompass all discoverable information. Some Subcommittee members think ESI presents all the significant problems, that only minor problems are presented by other forms of information. Others think it unwise to focus on ESI alone.

The first question asked how to draw a line between ESI and other information. What is a print-out copy of ESI? Many people recycle the hard copy, relying on the electronic storage. But where would this fall within an ESI rule: must it be preserved as one form of the ESI? Under present rules, preservation in one form should suffice. But if the rules start to distinguish between ESI and other forms of information, the distinction could become difficult. This is an aggravation of a current problem — if you have both hard-copy and ESI forms, can you satisfy a request for ESI by producing only in the hard-copy form? If a rule is drafted to protect against adverse consequences from a failure to produce, it does not say you can discard other forms of the same information. But the Subcommittee does not intend or recommend creation of more onerous preservation requirements. The focus is on relevance and prejudice. If the information remains available in one form, there is no problem. But then it was asked whether creating a safe harbor for some kinds of destruction — most

apparently ESI — may cause difficulty for other kinds of information outside the safe harbor category.

Another question was whether anyone has done a survey to determine whether preserving ESI is qualitatively different from preserving paper, and why? One current debate is whether the § 1920 provision that allows recovery of costs for "exemplification * * * of any materials where the copies are necessarily obtained for use in the case" extends to the expense of producing ESI.

Turning to the relationship between severity of sanctions and the degree of culpability in failing to preserve, should "case-ending sanctions" be limited to cases of intentional destruction? What of gross negligence? And what of merely negligent, or perhaps innocent, loss of critically important information — the running example is compacting a wrecked automobile before the defendant has an opportunity to examine it for claimed defects? The Lawyers for Civil Justice suggest the test should be an intent to make information unavailable for trial. That would prohibit an adverse inference, or stronger sanctions, even when a non-intentional loss of information defeats an adversary's ability to litigate the case. Loss of ESI can have the same consequences as loss of physical evidence.

The FJC survey found that about half of sanctions motions involve loss of ESI. Half involve loss of other forms of information. That suggests an attempt should be made to address all forms of information. And there is sufficient controversy about preservation obligations and sanctions to warrant continuing work now. The continuing development of information in various projects, including the Seventh Circuit e-discovery work, the Southern District of New York complex litigation project, and the like, will provide help as the drafts mature, but the work will be prolonged in any event. Ongoing work elsewhere weighs against precipitous action, but precipitous action is not likely in this project.

It was further urged that new provisions should not be limited to ESI. "The problems are shared." For that matter, the very concept of ESI is bound to change.

A distinctive consequence of ESI was then urged. "Everyone is a filekeeper in the era of ESI. There is no central file as in a paper world." The culpability standard, however, should be the same. "It is easy to delete very quickly." Identifying the trigger for preservation before litigation is filed is important, especially for individuals.

An observer noted that there clearly are differences between ESI and other forms of information. The rulemaking question is

whether rules that do not distinguish between ESI and other forms of information provide sufficient guidance. The 2006 amendments were shaped in light of information suggesting that judges were not aware of distinctions that make a huge difference for sanctions, and did not understand the loss of information in the routine operation of ESI systems. Are we sufficiently confident now in the case law, and in awareness of computers, to be able to go back to an overarching rule that does not distinguish ESI from "physical stuff"? If not confident, it may be better to distinguish ESI, and not go for a generally applicable approach.

A related perspective was offered. Traditionally, common law adapted to evolving technology through decisions. But sanctions affect professional careers. "This affects professional responsibility by sanctions." We want rules that provide guidance. Without rule guidance, lawyers will be very careful. And that can mean costly over-preservation.

Another observer reported urging the ABA Business Law section to set up standards of good preservation practice. What preservation features should be incorporated as an entity develops an overall efficient information system? This is a very dynamic field. "The techniques for penetrating into systems to get information are evolving and unstable." A focus on the sanctions problem seems appropriate. Gross negligence may be the right standard for ESI and other forms of information. A general standard can adjust to changing technology.

Agreement with this view was expressed. The culpability standard should be the same for ESI and other forms of information. Today we can identify four or five different standards in different circuits. "We need a rule to give us a uniform standard. We can do that more readily than a rule defining trigger and scope." "Residential Funding changed the rules of the game." And the culpability standards should be consistent across all information forms. To be sure, attention to these issues increased exponentially with ESI. But a lot of cases "focus on what individuals have done, and they were things that might have been done with paper files." The ESI cases have simply magnified the disparities around the country. Consider a personal injury victim. To be careful, the victim would have to consider how to respond to inquiries from friends and relatives: is it safe to put a brave face on it, to say "I'm much improved," when the e-mail record may be used to challenge the seriousness of the injury? It will be important to define a culpability standard.

It was agreed that harmonizing the approaches to sanctions will not solve all the problems, "but it can improve the situation." And this can leave time for ongoing studies that may help define and resolve some of the other problems. A like comment

was that "we may not be able to deal with trigger and scope any time soon. These are difficult problems that cannot be solved as quickly" as sanctions.

An observer noted that many kinds of actors are involved in preservation. There is the lawyer in court, house counsel, corporate staff, "the e-mail sitter." It can be hard to figure out who is in a position to do something. The Qualcomm case shows how difficult it can be to pinpoint responsibility.

Judge Grimm summarized the discussion by suggesting an apparent Committee view that the Subcommittee should focus first on sanctions, and should focus on tangible as well as intangible information. And the tentative exploration of a separate discovery standard for ESI should be deferred.

It was noted that the Department of Justice continues to believe that it is premature to undertake rule revisions even with regard to sanctions. "The time may come for sanctions, but not too soon." In response it was asked whether the desire for more pilot projects reflects a view that the Department encounters problems different from other litigants. The United States is plaintiff or defendant in about one-third of all cases in federal courts. "The jury is still out on exactly what are the problems we need to address. Ongoing studies may shed light. But the United States is not in a distinctive position as compared to other litigants."

Observing that some districts have local e-discovery rules, it was asked whether we know about experience with those rules? The Discovery Subcommittee is aware of them, but has not yet attempted to look for a synthesis of experience. It will be good to look when there seems to be a sufficient basis of experience. The Seventh Circuit project, which focuses heavily on cooperation among lawyers by conferring at the beginning of a case, is being studied by the FJC. The FJC also is studying the still young complex litigation project in the Southern District of New York. Eventually there will be information more rigorous than an accumulation of anecdotes. But in the meantime it is useful to continue working on a sanctions rule. A rule will not be developed overnight. The Duke Conference panel said this is an area where the bar really needs guidance. They urged the Committee to take courage. But it also takes time. The Sedona Conference, for example, has been working on these problems for a long time. Meanwhile, "the Subcommittee is doing a great job and should continue."

An observer noted that the letter from the Sedona Conference reflects hard and continuing work on these problems. "This demonstrates just how difficult this is." The working group includes people from all sides, from all areas of practice, and is

finding it difficult even to find points of agreement. "The process needs to be completely informed." "People have a sense the Committee is about to do something. It would help for people in the bar to hear it's a process."

Another observer agreed that it is a process. People have thought the Commmittee is on the verge of action since the Duke Conference two years ago. The Committee has an obligation to act to clarify when there are clear conflicts in cases purporting to interpret a Federal Rule of Civil Procedure. When conflicts appear in addressing questions not directly addressed by a Rule, the Committee also should consider acting. There is a clear conflict in correlating sanctions with levels of culpability in failing to preserve discoverable information. The Committee must determine whether it would be good to address this conflict while other problems percolate and are studied further.

This question was fit into a broader framework. The Committee is charged by § 331 to carry on a continuous study of the operation of Enabling Act rules. "We can study local rules. We can learn from them. But there is a problem. It is difficult to get rid of deeply rooted local rules."

Judge Kravitz echoed these views. The law is inconsistent as to sanctions. We know that the Second Circuit has one approach, while other circuits take different approaches. There is no reason not to have a uniform rule. Sanctions — as compared to remedial or curative measures — should be available only for bad behavior. This work was started in 2010. We should be able to continue working toward a rule on sanctions that establishes uniformity, displacing a circuit-by-circuit regime.

A Committee member agreed that the primary focus should first be on sanctions. "It will take time." It may be possible to fold the lessons of ongoing studies into the process. "Trigger and scope are not going to go away," but they are not problems for now.

Another Committee member also urged a "look at sanctions. Human nature is constant. Duties of lawyers and clients should be constant. Cooperation should be constant." But ESI has a relationship to this. The ongoing studies by the Sedona Conference, the Department of Justice, and others are valuable. For a long time we thought there is a problem of symmetry, that some categories of litigants have far greater stores of information than others have. "But all of us have lots of information." It would be good to focus, through sanctions, on preserving the information that is needed to present a case. "This topic addresses the totality of what happens in court today. The Subcommittee should not work on sanctions in isolation."

Judge Grimm expressed the Subcommittee's gratitude for the helpful Committee discussion.

Duke Subcommittee

Judge Koeltl reported that the Duke Subcommittee has made substantial progress in developing a set of rules sketches to advance the primary goals identified at the Duke Conference. Proportionality, cooperation, and early hands-on case management are central to reducing cost and delay. One initiative encouraged by the Subcommittee was the development of the protocols for initial discovery in employment cases. The protocols call for an exchange of information 30 days after the defendant's responsive pleading or motion. Every judge on the Committee has adopted the protocols, and has urged their colleagues to adopt them. They work extremely well.

Ellen Messing, who was involved in drafting the protocols, observed that the protocols, shaped with great help from Judge Koeltl, provide a great boost in streamlining employment actions. They replace current initial disclosures under Rule 26(a)(1), providing information expected to have a significant effect on the parties' ability to get through a case with better focus and efficiency. But there has not been as widespread adoption "as we had fantasized." Direct judicial involvement in promoting use of the protocols will be helpful. Judge Koeltl responded that he and Judge Rosenthal had urged adoption of the protocols to a group of some 70 judges at a recent program at NYU. And the FJC has informed all chief judges of the protocols.

Judge Koeltl continued by noting that the Subcommittee would meet the next morning, and would welcome both general and specific discussion of the rules sketches. Are they wise or unwise? Do they go too far, or not far enough? "The book is open." The sketches fall into three categories, focusing on the beginning stages of an action; revising discovery rules; and cooperation.

Beginning-stage. One issue is the length of time it takes to get actual litigation started in an action. The 120 days allowed by Rule 4(m) to serve process, the 120- or 90-day periods set for a scheduling order in Rule 16(b), draw things out. The first set of proposals reduce the period in Rule 4(m) to 60 days, and likewise reduce the Rule 16(b) periods by half, to 60 days after service or 45 days after an appearance. These periods were chosen simply for illustration; the actual choice may be rather different.

Another set of questions addresses how the scheduling order should be developed. The sketches carry forward current Rule 16(b)(1)(A), which allows the court to adopt an order after receiving the parties' report under Rule 26(f) without an actual

conference. But otherwise, the means of holding a conference are sharpened to require an in-person conference or contemporaneous communication; the provision for consulting by "mail, or other means" would be deleted. Another aspect of scheduling-order practice addressed by the sketches is the provision in Rule 16(b)(1) that allows categories of actions to be exempted by local rule. Local-rule exemptions may differ from the exemptions enumerated in Rule 26(a)(1)(B). Rule 26(a)(1)(B) exemptions also apply to the Rule 26(f) meeting of the parties and the Rule 26(d) discovery moratorium. It seems desirable to establish a uniform set of exemptions. The simplest way to do this would be to eliminate the present provision for local-rule exemptions and replace it with adoption of the Rule 26(a)(1)(B) exemptions by cross-reference.

The sketches also include alternative provisions aiming at encouraging a conference with the court before filing a discovery motion. The more modest approach would add to Rule 16(b)(3) a new item, providing that a scheduling order may direct the movant to request an informal conference with the court before filing a discovery motion. The more ambitious approach would add a new provision — perhaps in Rule 7 governing motions, or perhaps somewhere in Rule 26 — directing that the movant must request the informal conference before filing a discovery motion. It appears that about two-thirds of federal judges do not now require a pre-motion conference, so it can be anticipated that many would resist a rule making it mandatory.

The Rule 26(d) discovery moratorium is addressed by another set of sketches. Many lawyers seem unaware of the moratorium now, as witnessed by frequent requests to determine whether discovery should be suspended pending disposition of a motion to dismiss made by lawyers who are subject to the moratorium because they have not yet had a Rule 26(f) meeting. The moratorium may make it more difficult to have an effective discussion at the Rule 26(f) meeting. These sketches provide that any party can make discovery requests at a stated time after service or after some other event, but defer the time to respond until a stated period after a scheduling order enters. The idea is that the parties can plan discovery more effectively at the 26(f) meeting if they have actual discovery requests to consider. This system is not intended to support arguments that the first party to serve requests is entitled to priority in discovery. The only purpose is to make the 26(f) conference more productive. The hope is to expedite discovery at the outset and to make both the 26(f) meeting and the scheduling order conference more productive.

Discovery proposals. The need for proportionality in discovery was repeatedly emphasized at the Duke Conference. The word "proportionality" does not now appear in the rules. Rule

26(b)(2)(C) does impose proportionality limits, but parties and courts continue to speak of discovery in terms of the full sweep of the Rule 26(b)(1) scope provisions. Even appellate courts do this. The cross-reference to 26(b)(2)(C) at the end of present 26(b)(1) does not seem to have any real effect.

"Proportionality is important." The Subcommittee prefers to incorporate the concepts of present 26(b)(2)(C) into the (b)(1) definition of the scope of discovery. This can be done in various ways, as illustrated by alternative sketches. Still other sketches expressly incorporate "proportionality" into the (b)(1) scope provision, but this seems risky. It would introduce a new concept; with or without an attempt at further definition, the new concept would generate uncertainty and corresponding contention.

Proportionality also is approached by reducing the numerical limits on the presumptively available numbers and length of depositions, and on the number of interrogatories. Numerical limits would be added for the first time to Rule 34 requests to produce and Rule 36 requests for admission. It is possible that the presumptive limits now in Rules 30, 31, and 33 encourage some lawyers to engage in more discovery than they would seek without these targets. The proposed numbers still exceed the level of discovery activity in the median of federal cases as reported by the FJC study for the Duke Conference. If lower presumptive limits encourage the parties to rein in unnecessary discovery, so much the better.

Discovery problems are not confined to requests. Inappropriate objection behavior also can be a problem. The sketches aim to deal with evasive responses, particularly with respect to document requests. Rule 34 is drawn to require a response within 30 days, but the response may be either a statement that inspection and related activities will be permitted as requested or an objection to the request, "including the reasons." One narrow proposal is to add to Rule 34 the explicit statement in Rule 33 that an objection must be stated with specificity. A broader proposal addresses the common practice of framing a response to begin with broad boilerplate objections, followed by producing documents with a statement that the objections are not waived. This leaves the requesting party uncertain whether anything has in fact been withheld under the objections. A sketch addresses this phenomenon by directing that an objection must state whether anything is being withheld on the basis of the objection.

Contention interrogatories have become a subject of some contention, particularly with respect to the time when answers should be provided. The sketches would emphasize a presumption that ordinarily answers need not be made until other discovery has been completed.

The value of Rule 26(a)(1) initial disclosures was discussed inconclusively at the Duke Conference. Some participants think the practice is useless. Others think it has some small value. Still others think it could be made truly useful if greater disclosures were required, perhaps going back to some version of the broader requirements in place from 1993 to 2000. The Subcommittee is agnostic on this subject; no sketches have been prepared to illustrate possible changes. But it is to be noted that the employment case protocols are designed to displace Rule 26(a)(1) by providing for initial disclosure of the materials each side routinely seeks in the first wave of discovery.

The sketches also illustrate possible approaches to shifting discovery costs from the responding party to the requesting party. Congress has shown an interest in this topic. Cost shifting commands a continuing place on the Subcommittee agenda, and remains an open issue. The Subcommittee is convinced that judges have the power to order cost shifting now in appropriate cases, and doubts the need to add emphasis by new rule provisions, but will continue to consider these questions.

Cooperation. It is difficult to legislate cooperation among adversary parties. But the sketches provide illustrations of ways in which parties could be brought into the aspirational provisions of Rule 1 by a direction to cooperate in seeking the just, speedy, and inexpensive determination of every action. The importance of cooperation is continually emphasized in Committee discussions of preserving discovery materials and shaping discovery more generally. Professor Gensler has long supported this Rule 1 approach.

Package. The sketches address many separate rules provisions. But they have been developed as a coherent package of interdependent changes that are designed to produce a whole greater than the sum of the parts. That is not to suggest that each part of the package is indispensable. Far from it. Specific sketches may deserve to be abandoned. Others may deserve to be added. But the target will continue to be a comprehensive package that advances the goals so clearly and repeatedly expressed at the Duke Conference.

One distinct question is how to seek review by a broader audience. One possibility would be to attempt to recreate the Duke Conference by a similar, broad-gauged "Duke II." But it may be wiser to frame a more limited undertaking, perhaps a miniconference designed to focus specifically on a package of rules proposals somewhat like the current package. The Committee benefits continually from input from the bar and organized bar groups. It seems likely that real benefits would accrue to a conference held in some form before preparing rules proposals for publication and general public comment.

Cooperation became the first subject of Committee discussion. It was asked how litigation is possible without real efforts by lawyers to work together, to join in solving litigation problems. Cooperation is especially needed in discovery. Good lawyers cooperate automatically, without sacrificing representation of their clients. Courts insist on cooperation. Emphasizing the duty to cooperate in Rule 1 is a good idea. Another Committee member agreed that it will be useful to add party cooperation to Rule 1 — now it is common to find efforts to cooperate rebuffed by arguments that the Rules nowhere require it.

More general enthusiasm was expressed for "what the Subcommittee is attempting to do. Judicial involvement at the earliest possible time is important." Judges who do this now get good results. Without judge involvement, delay and expense are increased by "weeks of letter writing" to iron out disputes. When there is judicial involvement, "you lose all credibility with the court by taking a bad position."

Another Committee member offered similar support. "There is a sense of embarrassment that some judges are not doing their jobs." Time limits, and the reductions in the numbers of discovery requests, "are to be applauded."

Another judge expressed support for adding cooperation among the parties to Rule 1. "If the court puts its weight and prestige behind cooperation, with a representative who is responsible, it can work."

Further support for the package was expressed by describing it as "impressive." There is reason to worry about limiting the number of depositions in "megacases," but lawyers and the court can determine what is appropriate relief from the presumptive limit. "Complex litigation should not drive the train too much." The sketches incorporate a sufficient degree of flexibility.

An observer agreed, but emphasized the need to be clear that the presumptive limits on discovery are only presumptive, and can be changed to meet the needs of particular litigation. This can be dealt with in the Committee Note.

Another observer suggested that it makes sense to hold a conference on a specific set of proposals, more sense than another broad and general conference in the model of the Duke Conference.

The same observer suggested that it would be useful to explore the value of outside facilitators in the discovery process. Not an arbitrator, but a mediator, conciliator, or special master. The effort would be to help the parties toward agreed solutions. "The business of mediation has become very much part of our profession."

A Committee member extended this observation by noting the formation of a new American College of e-Neutrals. He added that when he acts as special master in discovery matters he asks the court for authority to reapportion allocation of his fees by assessing more against a party who is unreasonable. This works. The parties do behave reasonably.

The Committee was reminded that possible rules changes are only one focus of the Duke Subcommittee's work. It is important that judges be schooled in best practices, and reminded of them. Judge Fogel has incorporated case management into conferences for judges, and they will be emphasized in new judges school. The benchbook has been revised by adding a detailed explanation of Rules 16(b) and 26(f) prepared by Committee members, with an emphasis on the importance of management.

An observer offered special support for the case-management proposals. "The bar is thirsting for this." The informal conference before any discovery motion is especially important. it avoids paperwork and saves time. But she expressed concern about reducing the presumptive number of depositions and adopting limits on Rule 34 requests to produce. There is not a significant problem now with excess numbers of depositions. The sketch imposing a presumptive limit to 5 depositions of 4 hours each is insufficient, especially when one party has all the information and the events in suit cover a broad period of time. One reaction in employment litigation will be to bring more cases, so as to be able to multiply the presumptive number of permitted depositions. In response to a question, she added that the employment case protocols focus primarily on exchanging documents. That diminishes the need for Rule 34 requests, and can help identify the persons who should be deposed, but it is not likely to reduce the number of depositions that should be taken. Many employment lawsuits focus on more than one action against the employee — first discipline, then demotion, then discharge. Although the proposals allow a request for more depositions, "why should I have to go to court to get it?" A response was that this is the beauty of Rule 1 cooperation, and the informal conference before a discovery motion: if you need 12 depositions, cooperation should generate authorization for them.

A final question from an observer asked whether the Subcommittee had considered amending Rule 26(c) to focus on disproportionate preservation demands, or amending Rule 27 to allow prefiling requests for a preservation order. "Prelitigation preservation is a hugely difficult problem. Consideration should be given to means of securing pre-litigation guidance from the court." Judge Koeltl responded that those questions are for the Discovery Subcommittee, or perhaps in some measure for the continuing study of pleading in the wake of the *Twombly* and *Iqbal*

decisions. In this vein, it was added that two pre-litigation problems should be clearly distinguished. The preservation problem may seem analogous to a Rule 27 petition to preserve testimony, but there are great differences that suggest any rule-based solution should be approached independently. The problem of discovering information needed to frame a pleading with the fact specificity that may be required by new pleading standards is distinct from both these problems, and might be addressed by providing discovery in aid of a complaint already filed rather than discovery before any action is filed. In whatever form, however, these problems will not be lost from sight.

Panel Discussions: Professor Cooper's 20 Years as Reporter

The afternoon portion of the meeting was devoted to presentations of outlines of ten of the papers in a set celebrating the 75th birthday of the Civil Rules in 2013 and Professor Cooper's twenty years of service as Reporter for the Civil Rules Advisory Committee. The tribute was organized and carried out by present and former members of the Committee. The papers will be published in the Michigan Journal of Law Reform.

Professor Marcus presided over the first panel. Papers were presented by Professors Burbank, Coquillette, Gensler, Rowe, and Struve. Collectively, they traced the concept of formal rules of procedure as far back as Francis Bacon and forward to such issues as the need to take advantage of what may be ever-increasing opportunities for rigorous empirical evaluation of the operation of rules in practice. The difficulties of matching rule direction to the importance of case-specific discretion were explored, as well as the difficulties of separating substance from procedure and the corresponding challenge of framing rules of procedure designed to transcend any particular substantive field and to be transported across all substantive subjects of litigation. It was urged that rulesmakers need to be particularly careful when framing rules that affect access to court.

Judge Mosman presided over the second panel. Papers were presented by Judge Rosenthal and Professors Carrington, Kane, Marcus, and Mullenix. Again a broad range of topics was covered, beginning with the efforts to confirm the openness of Committee proceedings by legislation in 1988, and ranging through more recent and continuing work on class actions, discovery, and the Style Project.

Detailed summaries of the summaries presented in the panel discussions would be premature. The finished papers, along with other papers assessing the ways in which Rules Enabling Act responsibilities are being carried out, will provide far better accountings.

FJC: Early-Stages-of-Litigation Attorney Survey

Emery Lee presented a summary of his closed-case study of cases terminated in the last quarter of 2011. The study focused on categories of cases likely to have discovery activity. It excluded cases terminated less than 90 days after filing. A survey was sent to nearly 10,000 lawyers identified from the case files, divided equally between plaintiffs' lawyers and defendants' lawyers. About 3,500 replied, giving a 36% response rate.

The purpose was to explore actual timing, duration, and use of Rule 16(b)(2) scheduling conferences and orders, and of parties' Rule 26(f) meetings. The preliminary findings include these:

Seventy-two percent of respondents reported that they met and conferred as required by Rule 26(f). But it is tricky to know just what this figure means, remembering that cases not likely to have any discovery were winnowed out of the survey sample. Seven percent could not answer this question — it may be that the "wrong" attorneys were asked because those who appeared in the docket had not been involved in the early stages of the litigation. The figure increased among attorneys involved in cases that had a scheduling conference with the judge — in those cases, 92% of the attorneys reported a Rule 26(f) meeting. (The 2009 case study found 26(f) meetings in 86% of the cases that had any discovery. The complex litigation survey in SDNY had only a 68% meeting rate; it is hard to be sure, but one reason for part of the lower rate may be a high rate of Private Security Litigation Reform Act cases in which discovery is suspended pending disposition of a motion to dismiss. The survey of the Seventh Circuit pilot e-discovery project has no direct question, but it may be possible to back out a 54% rate.)

Rule 26(f) conferences were most often held by telephone or videoconference. 86% of the respondents who reported meeting used one of these means. 9% of the respondents reported in-person meetings. 25% reported there was some correspondence. 6% reported there was only correspondence or e-mail exchanges. 74% concluded the meeting in a single conversation. 96% reported that the meeting was held far enough in advance of the Rule 16(b) conference to plan discovery. The modal response indicated that the 26(f) meeting took from 10 to 30 minutes. Only 8% lasted more than an hour. The meetings that discuss ESI tend to take longer. These responses suggest that whatever may be the failings of memory, the participants do not perceive that 26(f) meetings take a lot of time.

The reasons for not having a 26(f) conference in cases where there were none varied. Some of the responses suggest behavior in defiance of the rule — "we agreed not to," "one side refused," or

"I don't do that." 45% of the answers were "other"; perhaps not surprisingly, cases in the "other" category had the highest rate of "other" responses. "Probably Rule 26(f) is honored in most cases where it should be."

Other questions asked whether the 26(f) meeting served various ends. 71% reported that the meeting assisted in making arrangements for initial disclosures; 60% reported it helped to develop a proportional discovery plan; 50% reported it helped better understand the opposing party's claims or defenses; 40% discussed discovery of ESI; and 30% reported that the meeting increased the likelihood of prompt resolution. Of the 40% that discussed discovery of ESI, 60% discussed preservation obligations. These rates suggest there is a lot of room to encourage parties to discuss ESI discovery and to clarify preservation obligations. They compare to the Department of Justice survey indicating that preservation was discussed in 48% of conferences; the rate in the Seventh Circuit project is 62%, but the project involves cases expected to have discovery issues. Lower rates were reported in the survey undertaken to establish a basis of comparison for studying the new Southern District of New York project for complex litigation.

Fifty percent of all respondents reported a Rule 16(b) scheduling conference, either in person or by phone; the rate increased to 60% of those who had a Rule 26(f) meeting. 94% of those who reported a Rule 16(b) conference also reported a scheduling order. Table 12 of the report shows responses to a question asking the reasons for responses indicating that the Rule 26(f) meeting did not clarify your client's preservation obligations. 89% answered that their clients' preservation obligations were clear prior to the conference. Only 7% of the answers were that opposing counsel was not adequately prepared to discuss preservation, and 4% reported opposing counsel was not cooperative.

The cases that did not have a Rule 16(b) conference in person or by telephone involved various explanations. Of them, 40% stated that the case was resolved before the conference took place. 12% reported that the conference was conducted by correspondence. 24% were cases exempted from the conference by local rule or judicial order. And 24% gave "other" as the reason.

Proportionality of discovery requests relative to the stakes in litigation was discussed by the judge in 24% of the Rule 16(b) conferences, and not discussed in 76%.

The parties' proposed discovery plan was approved without modification in 39% of the cases, with minor modifications in 57%, and with major modifications in 4%. But it is difficult to know

how respondents drew the line between minor and major changes. The most common change appears to involve the time for discovery — are such changes major or minor?

It has not been done yet, but it will be possible to correlate the length of the Rule 26(f) meeting with the respondents' views of how helpful the conference was. It also will be possible to correlate the length of the meeting with the amount of discovery.

An attempt was made to separate complex cases from other cases. 25% of those who were asked reported that cases the researchers expected to be complex were not.

It is not clear how much information can be drawn from the survey about the topics that were discussed in the Rule 26(f) meetings that did discuss discovery of ESI. The most commonly discussed question was the format of production.

Pleading

Pleading occupies less than one page in the agenda book. The page puts a single question. The Committee continues to pay close attention to the evolution of pleading practices as lower courts continue to work through the implications of the *Twombly* and *Iqbal* decisions. Although there is a sense that practices are converging and settling down, there also is a sense that there may be still closer convergence over the next year or two. In addition, empirical studies of pleading and motions to dismiss continue. The FJC, through Joe Cecil, is about to begin a comprehensive study of motions to dismiss that will extend beyond Rule 12(b)(6) motions to include other Rule 12 motions, and will extend beyond that to summary judgment. The study will be designed to facilitate comparison with the findings in earlier FJC studies, and to integrate findings on case terminations by all dispositive pretrial motions. The study is designed to involve members of the academic community, and to generate a data base that will be freely available for scholarly use. This integration with the academic community was lauded as a very good development.

A second impression supplements the potential values of deferring any decision whether to begin work toward publication of possible rules revisions. The potential advantages of delay are apparent. The potential costs also must be counted. The sense is that there is no present crisis in federal pleading practice. Hasty action is not compelled by a need to forestall frequent unwarranted denial of access to press worthy claims before the courts. There appears to be an increase in the frequency of motions to dismiss for failure to state a claim. There may be some increase in the number of cases terminated by these motions. But it is not clear whether, if so, the outcomes are good, bad, or

neutral.

So the question put to the Committee was whether this assessment is wrong. Is there reason to begin immediate work to refine the many possible alternatives that have been outlined in earlier meetings? Many of the alternatives focus directly on pleading standards. Some focus on motions practice. And some describe different approaches to discovery in aid of framing a complaint. Models abound and can proliferate. Should they be advanced now?

Brief discussion concluded that while it is vitally important to maintain careful and continual study of pleading standards and practices, the topic is paradoxically too important to justify present action. It will continue to command a regular place in agenda materials.

Rule 23 Subcommittee

Judge Mosman, Subcommittee chair, led discussion of the Rule 23 Subcommittee's initial work. The Subcommittee, helped by discussion at the November Committee meeting and the panel discussion at the January Standing Committee meeting, has identified five major topics for study. The most important present question is whether all five of them warrant further work, and whether there are other topics that also should be considered. Another question is timing: the Committee has a rather full agenda. And it will be important to decide on means of gathering information from outside the Subcommittee and Committee.

The five topics at the front of the present agenda are these: (1) The role of considering the merits in ruling on class certification, as illuminated by Ellis v. Costco, Hydrogen Peroxide, and some parts of WalMart v. Dukes. Is there confusion, or are there differences, in the role of rigorous analysis? (2) Should there be criteria for certifying a settlement class different from the criteria for certifying a litigation class? (3) What about issues classes, and the relationship between Rule 23(b)(3) and (c)(4)? Is predominance always required, so (c)(4) is only a trial tool? (4) Are settlement reviews working properly under the 2003 revision of Rule 23(e)? (5) What is the proper role of individual monetary awards in Rule 23(b)(2) mandatory classes?

Subcommittee members Klonoff and Cabraser were asked to describe their views on these subjects.

Dean Klonoff began with the observation that "Hydrogen Peroxide has caused a sea change in conduct of the class-certification stage." Courts look to the merits and resolve fact disputes relevant to determining certification requirements.

Hydrogen Peroxide directs the court to decide which parties' experts are more credible. Bifurcating class-certification discovery from merits discovery is more difficult.

As to settlement, the Amchem decision says that certification of a settlement class does not require finding that the same class would be manageable as a litigation class. But all other class-action requirements must be satisfied. Courts refuse certification, for example, for want of predominance. As Judge Scirica noted in his opinion concurring in the DeBeers case, the Amchem decision has caused lawyers to shift to settling claims in non-class ways without any of the oversight that applies to class settlements. This development is troubling.

As to issues classes, the Castano decision in the Fifth Circuit requires predominance for the case as a whole. The Second and Seventh Circuits, on the other hand, find certification proper if class disposition "materially advances the case as a whole."

The ALI Principles of Aggregate Litigation attempted to refine the criteria for reviewing class settlements. Judicial opinions list a dozen factors or more to be considered, without assigning relative weights to the different factors. Courts have seized on the ALI Principles precepts for cy pres settlements, including a wonderful recent opinion by Judge Rosenthal. Section 3.07 has been adopted by a couple of courts.

As to Rule 23(b)(2) classes, it would be premature to attempt to measure the impact of WalMart on some things. WalMart conflates commonality with predominance, but it is difficult to know how seriously lower courts will take all statements in the opinion. There is some question how far Rule 23 can be amended to allow determination of individual backpay awards in a (b)(2) class, given the discussion of due process in WalMart. So the role of individual damages claims remains unsettled.

Any attempt to reformulate the categories of Rule 23(b), whether along the lines sketched twenty years ago or some other lines, would be an aggressive move.

In response to a question, Dean Klonoff expressed uncertainty whether due process can be satisfied by notice on a web site, or by e-mail. "Individual notice seems too expensive.

Elizabeth Cabraser observed that the "jurisprudence is very active" in attempting to work through the extent to which the merits should be considered in deciding on certification. Berry v. Comcast in the Third Circuit, 655 F.3d 182, formulates a distinction between looking at the merits for certification and decision at trial. There are huge issues on how this affects expert

analysis. Must it be done twice? Must discovery be done twice? The courts are attempting to clarify these issues, but they deserve Committee study. There is an extreme position that a class can include only those people who will win at trial; that asks for too much consideration of the merits at the certification stage.

The developing law, such as the Sullivan case, suggests that courts can navigate the certification of settlement classes, but it would be good to develop express rule provisions.

As to issues classes, some courts now fail to navigate the rule. A recent Seventh Circuit decision, McReynolds v. Merrill Lynch, is very good, an interesting source on Rule 23(c)(4). The central perception is that (c)(4) plays different roles at different stages of a case.

As to settlement review, it would be good to have a "unified field theory," identifying the factors that can be considered. And it would be useful to clarify the role of cy pres settlements.

Employment lawyers and civil rights groups are interested in clarifying Rule 23(b)(2). One approach is to view backpay as equitable relief. Or it may be that an opportunity to opt out should be provided; the issue may be the cost of notice. This could be combined with the issue-class question, recognizing a (b)(2) class for common issues, with a right to opt out for individual remedies.

Professor Marcus, Reporter for the Subcommittee, offered comments on where the Committee has been in the past.

The first observation is that it takes a long time to become familiar, and then comfortable, with class-action issues. It will be useful to get to work now. But the WalMart decision is still recent. Its impact will be worked out only over time.

The Hydrogen Peroxide decision "is a big, big deal," but it continues to evolve. It may develop into a terrific idea. Or it may lead to putting the entire cart before the horse, and lead to litigating the merits in full twice.

Amchem says that the prerequisites to class certification cannot be bypassed in order to approve a good settlement. Perhaps that deserves consideration.

There may be an inherent tension between Rules 23(b)(3) and (c)(4) on issues classes. The circuits have divided. That may be sufficient reason to take on this subject.

Rule 23(e) as amended in 2003 provides more guidance on

settlement review than its earlier form. Coming to agreement on a list of the real concerns that should shape review may be a challenge.

The question of damages in a (b)(2) class is important, but it is too early to know what the impact of WalMart will be.

Finally, "an academic might want to rethink the categories of (b), but this would stir controversy."

Discussion began with an observation that review of Rule 23 is good to the extent of "real legal issues that we can nail down." The role of issues classes under Rule 23(c)(4) is an example. The five topics identified by the Subcommittee reflect what is going on in the courts. It will be useful to study settlement classes and issues classes. It is not so clear whether there is much for the Committee to do about Hydrogen Peroxide.

A committee member suggested that it would be useful to address settlement classes. If often happens that defendants argue that class certification is impossible, and then switch and want to certify a class with a settlement already worked out. There is a temptation to get rid of the case by certifying a class for settlement.

An observer suggested that the direction to decide on certification "as soon as practicable" generates enormously complex issues that make it difficult to decide when to propose Rule 23 revisions. The requirement of strict scrutiny of all the Rule 23 factors before making a certification decision, combined with uncertainties as to the scope of pre-certification discovery, may contribute to an urge to settle without doing all the work needed to satisfy Hydrogen Peroxide standards. "Hydrogen Peroxide has made a huge difference in the amount of work before certification." Even if discovery begins with an attempt to bifurcate certification discovery from merits discovery, you find the plaintiff needs more information and defendants resist requests for more as involving merits discovery.

Another observer noted that he had been involved in the Hydrogen Peroxide litigation. The aftermath is that there is really no such thing as bifurcated discovery. This is particularly true as to ESI — it is not feasible to search only for information bearing on class certification. And much money is being spent on full expert damages analysis. It takes six months to a year longer to reach a certification decision than was required before Hydrogen Peroxide. In response to a question whether all that pre-certification discovery makes it easier to be ready for trial after certification, the observer stated that judges allow 90% of discovery before the certification decision. "Only clean-up is

left."

The first observer described experience in a current case with bifurcated certification discovery. The schedule sets a 2-month deadline. The information has not yet been provided. When it comes, it will be an "information dump." More time will be needed to explore it. Clarification of what is needed for certification is important. This is not an argument to delete the "as soon as practicable" requirement, but is an argument to clarify for the courts what it is that you need to win certification, and how you are to gather that information.

When asked, these two observers said that these problems are both problems of discretion and problems of confusion about legal standards. The issues are resolved when an experienced judge has the case, but it takes too long. "Then there are judges who do not understand." The legal issues need to be clarified to guide them.

Another observer suggested that the question whether rules can help depends on the source of the problems. If it is lack of clarity in the standard of proof — a preponderance of the evidence required for all certification elements, as in Hydrogen Peroxide — a rule might help. If the problem is that cases vary in case-specific ways, such as defining the scope of the class, the issues for certification, claims, or defenses, there is less room for rulemaking.

Objectors have been a source of concern in the past, especially as they affect the appeal process. Is this still a problem? If it is, can it be effectively addressed by a rule? One response was that this still is a problem.

A different observer said that civil rights plaintiffs "are clamoring about (b)(2)." They do not know how to handle Title VII classes. The Seventh Circuit has provided some help. And it may help to make use of (c)(4) issues classes.

This observation led to a statement that backpay "is a subset of a bigger problem." Class actions have been used for a long time to resolve liability, with follow-on individual proceedings. How does this work after WalMart? The question of commonality involves far more than (b)(2) classes and backpay. An extreme position would be that class actions cannot be certified when individual follow-on proceedings are needed. The observer agreed that Title VII cases can be seen as a subset. This also relates to scrutiny of the merits at the certification stage. One approach has been to require that each class member have "standing," and to limit standing to those who have valid claims on the merits. That could be crippling.

A different approach to the issue-class question was suggested. The WalMart opinion makes assertions about the preclusive effects of class decisions on individual actions. This is a thorny set of problems. Will lower courts say that all individual claims must be resolved in full, so as to achieve claim preclusion foreclosing any later individual actions? Or will a narrower scope of preclusion suffice, as with a (c)(4) issue class?

Returning to an earlier observation, it was said again that there have been many class certifications, such as those involving pharmaceuticals or other mass torts, that look for resolution of central liability issues on a class basis — something of an issue class, although often not conceived that way — to be followed by a claims resolution mechanism to determine individual awards. "What have we done with this structure"?

One observer responded that, putting aside dicta on due process, the WalMart decision is, on its face, an interpretation of Rule 23. The biggest due process concern arises from issue and claim preclusion. Current Rule 23(b)(2) is cast in equitable terms because the cases finding it fair to bind an individual not personally present were decided in equity. It may be possible to fit into (b)(2) low-value consumer cases, cases with formulaic relief, cases in which individual awards can be determined by a spreadsheet.

A Committee member said that many courts use (b)(3) the same way others use (c)(4). A class is certified to deal with common issues, then the follow-on issues. There need not be an inescapable tension, a choice. Rule 23(c) requires definition of class claims, issues, or defenses, and the definition must be included in the class notice. This addresses due process concerns. So it would be possible to amplify (b)(2) notice requirements for some purposes.

An observer suggested that "notice is something you can do quickly. Paper notice is not practical. People toss out the mail as junk."

Judge Mosman asked how the Subcommittee should proceed in its next steps. One Committee member responded that these issues attract great attention. The Subcommittee should ask at the beginning what the questions will be, so that everyone can participate in providing information and points of view. The Subcommittee should reach out to groups that represent practitioners — the ABA, the American College, the American Association for Justice, and so on. It should describe the issues that are being considered, and ask whether there are other issues that should be considered. "There will be people with real information, and different views." And beyond the beginning, we

want involvement in an ongoing way, so we can consider all the things that we are most likely to hear later if we do not hear them and react to them earlier.

Another Committee member recalled the very useful initial Rule 56 miniconference that was held while the drafts were still in a preliminary stage.

An observer suggested that a miniconference would be good. She also noted that the Sedona Conference is hard at work on these issues.

Judge Koeltl thanked the Rule 23 Subcommittee for all its hard work, and urged that further comments be sent to them.

Rule 55

At the November meeting Judge Harris described a problem that some courts have encountered in understanding the interrelationships between Rules 54(b), 55(c), and Rule 60(b). Rule 55(c) states that a court may set aside a default judgment under Rule 60(b). The issue arises when a court enters a default "judgment" that disposes of less than all of the claims among all the parties in the case. Unless the court specifically directs entry of final judgment, the default judgment is not final. Rule 54(b) provides that the judgment may be revised at any time before entry of a judgment "adjudicating all the claims and all the parties' rights and liabilities." Rule 60(b), which sets demanding standards for relief from a final judgment, applies only to final judgments. A proper understanding of Rule 55(c) is that it invokes Rule 60(b) only as to a final default judgment. But some courts have had to struggle to reach this understanding.

The proposal is to revise Rule 55(c) by adding a single word: "The court * * * may set aside a <u>final</u> default judgment under Rule 60(b)."

The proposal was described as "a simple fix." It adds clarity, and will spare confusion in the future.

Agreement was expressed. This is a perfectly reasonable change, in keeping with the Style Project approach to adding clarity that merely expresses the rule's present meaning.

The Committee unanimously approved a recommendation to publish this amendment of Rule 55(c) for comment. Because it is a simple clarification, there is no urgency about rushing to publication. It should be held until it can be included in a package with other published proposals.

The draft Committee Note included three paragraphs. The second and third were enclosed in brackets, to indicate that they are subject to challenge as offering advice about practice in ways better avoided in Committee Notes. The Committee agreed. Only the first paragraph, explaining the "purpose to make plain the interplay between Rules 54(b), 55(c), and 60(b)," will remain.

Rule 84

Judge Pratter introduced the Subcommittee Report on Rule 84. Questions about the role of Rule 84 forms arose with the perception that the pleading forms seem inconsistent with the pleading standards described in the *Twombly* and *Iqbal* decisions. At the same time, concerns were expressed that it might be better to explore not only the pleading forms, but more general questions as to the continuing role of the full Enabling Act process in promulgating forms that "suffice under these rules."

A subcommittee was formed with representatives from each of the advisory committees for rules that are in some way connected to forms. The Appellate Rules Committee and the Civil Rules Committees are the only committees that adopt forms through the full Enabling Act process. Bankruptcy forms are approved by the Judicial Conference and do not proceed further in the Enabling Act process. Criminal Rules forms are developed by the Administrative Office; the Administrative Office occasionally consults with the Criminal Rules Committees.

More importantly, it was decided that forms play different roles with respect to different sets of rules. There are only a few Appellate Rules forms. The bankruptcy forms play an integral role with much bankruptcy administration. The criminal forms are seldom used by defendants.

More importantly still, it was concluded that — in light of different histories, present practices, and differing uses of rules-annexed forms — there is no need to adopt a common approach to forms among all of the advisory committees. Each advisory committee should be free to determine the approach most suitable for its set of rules, keeping the other advisory committees informed of any changes in basic approach.

There are a lot of Rule 84 pleading forms. The beginning question was whether an attempt should be made to revise them to accord with new pleading standards. "We could choose to do nothing. That would make some people very unhappy. There is real concern that pleading forms — especially Form 18 for patent infringement cases — do not fit with *Twombly* and *Iqbal*."

One approach would be to "manicure" the collection of forms.

One possibility would be to cut off the pleading forms, retaining the others. (The alternative of drafting revised pleading forms is unattractive.)

Another alternative would be to drop Rule 84 entirely. Or it could be retained, but modified to delete the statement that the forms suffice under the rules. The forms would become mere illustrations of possibilities.

Or the Civil Rules Committee could adopt the approach followed for the Criminal Rules, relying on the Administrative Office as the primary source of forms. "Wonderful forms abound. The least wonderful are the Rule 84 forms." The Administrative Office rules group will meet next fall; the meeting could be scheduled next to the Civil Rules Committee meeting, affording an opportunity for Committee members to observe if that seems useful.

Or the Committee could review the forms and decide which forms deserve to be retained in some form, apart from pleading. Forms may be desirable when addressing topics that seem particularly important, or that seem to present special needs for uniformity. Forms 5 and 6, dealing with a request to waive service of process and waiver, are examples of important forms. Rule 4(d), indeed, requires use of Form 5. The form invitation to consent to trial before a magistrate judge may be another illustration — it is important to avoid any hint that the court encourages consent. Uniformity may be useful in dealing with such things as the caption of pleadings, the summons served at the beginning of an action, and possibly some others.

If only a few forms deserve "official" status, they might be retained. Form 5 is an example of a form made mandatory; perhaps that approach should be followed for a few other forms. Rule 84 might be used for that purpose, or the requirement could be expressed in rule text, as in Rule 4(d).

Discussion began with the suggestion that "'do nothing' is not an option." Case law suggests that the pleading forms do not suffice under Rule 8, contrary to the statement in Rule 84. "No one would think we should have Rule 84 if we were starting today. We should disavow it." The Administrative Office forms can help. Any really important form can be adopted by specific rule provisions.

Another Committee member agreed that the best step is to eliminate Rule 84.

Some concern was expressed about the value of Forms 60 and 61, the Notice of Condemnation and a Complaint for Condemnation. The Department of Justice will review them.

It was noted that going through the full Enabling Act process is time consuming. If the Committee wishes to retain responsibility for the Forms, it will be necessary to lavish more time on reviewing and maintaining them than has been devoted to them in the last many years. Diversion of Committee resources to this task could exact a high price in discharging more important responsibilities.

It was suggested that the forms were adopted in 1938 for pedagogic purposes, to draw pictures of what the new rules contemplated. That is not a reason to continue them now.

An observer described Judge Hamilton's dissent in a recent Seventh Circuit case pointing out the incongruity of the Rule 84 forms with recent pleading decisions. That may suggest the need to act sooner, not later.

Other Committee members agreed that "people like simplification," and that it would be good to abrogate Rule 84, and all the forms with it. "There are other ways of getting forms out there." But it will remain important to retain, in some way, any form that is mandated by a specific rule outside Rule 84.

The Rule 84 question has been on the agenda for some time. It may be that the pleading forms raise questions sufficiently awkward as to counsel prompt action. The Committee agreed that the Rule 84 Subcommittee should consider these questions promptly, and determine whether the Committee should recommend publication of a proposal to the Standing Committee this spring. If the Subcommittee concludes that a recommendation should be made, it will circulate a proposal to the Committee. The Committee can then decide whether to carry the issue forward to the November meeting, or instead to recommend publication this summer.

Next Meeting

The next Committee meeting is scheduled for November 1, and 2 at the Administrative Office in Washington, D.C.

The Committee expressed all best wishes to Judge Kravitz, and to Judge and Mrs. Campbell. And it noted that the same thoughts and wishes were expressed in toasts at the Committee dinner.

The Committee also expressed its thanks to all the panel members who traveled to Ann Arbor to deliver summaries of their papers. It is important to keep in mind, and to publicize, the achievements of the Committees over time and the importance of maintaining the Enabling Act tradition of open, deliberate, responsible rulemaking.

Respectfully submitted,

Edward H. Cooper
Reporter.