MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 11-12, 2013

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

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

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

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

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

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

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

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

November 2012 Minutes

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

Legislative Activity

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

"Duke Rules" Package

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

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

CASE-MANAGEMENT PROPOSALS

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

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

The need to better integrate Rule 4(m) with Rule 71.1 can be met by amending Rule 4(m)'s last sentence: "This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or

4(j)(1) or to service of a notice under Rule 71.1(d)(3)(A)." The Department of Justice believes that this amendment will resolve the problem. The Department does not believe that there is any further need to consider the integration of Rule 4 with Rule 71.1(d)(3)(A).

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

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

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

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

Rule 16(b)(1)(B): Contemporaneous Conference: Rule 16(b)(1)(B) now provides for a scheduling conference "by telephone, mail, or other means." The reference to mail is clear, but loses the advantages of direct contemporaneous communication. The reference to other means

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

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

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

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

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

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

Rule 26(d), 34(b)(2)(A): Early Requests to Produce: This proposal

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

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

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

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

its education efforts.

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

PROPORTIONALITY

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

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

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

Proportionality Factors: The proposals limit the scope of discovery to matter "proportional to the reasonable needs of the case," considering the factors described in present Rule 26(b)(2)(C)(iii). "People never get to Rule 26(b)(2)(C)(iii)." Experience shows that it is left to the judge to invoke these limits. Rule 26(b)(2) imposes a duty on the judge to raise these issues without motion, but it is important that they be directly incorporated in the scope of discovery to reinforce the parties' obligations to conduct proportional discovery. Rule 26(g)(1)(B)(iii) will continue to further reinforce the parties' obligations in these directions. Some early comments have addressed this proposal. One question, reflecting comments on earlier drafts that simply referred to proportionality, is how to define proportionality. Related questions seem to ask for reconsideration of the factors now included in (b)(2)(C)(iii) — should account be taken of the parties' resources? Of the balance between burden or expense and likely benefit? Judges have been required to consider these elements since 1983. They are better brought directly into the scope of discovery defined by (b)(1).

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

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

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

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

An observer who worked with the Sedona Working Group # 1 recalled that the Group spent two years in discussing these issues. They submitted a proposal to the Committee last October. For now, comments seem most important on proportionality and preservation. Rule 26(b)(1) should refer to proportionality in preservation. Rule 26(b)(2)(C) also should address proportional preservation. These rules should be embellished by detailed Committee Notes. The Rule 26(f) proposal should be expanded to address not only preservation of ESI but to suggest the details of preservation that should be discussed, and also to include plans to terminate preservation. And the parties should be required to report any remaining disputes after the Rule 26(f) conference. So too, the Rule 16 proposals should be expanded to include a purpose to resolve disputes about preservation.

The proportionality proposal was questioned. The rules have had a proportionality requirement in Rule 26(b)(2)(C)(iii) for nearly 30 years. It has become routine to protest that requested

discovery is "too much." Proportionality is a rough measure. The proposed rule changes the burden — under it, the proponent of discovery must prove the requests are proportionate in order to be entitled to discovery. "That's a wrong step. 'Proportionality' will become the new 'burdensomeness.'" It will be the requester's duty to establish proportionality. There are many problems with that. Consider an action with one or two natural persons as plaintiffs suing a large entity. One deposition is enough to glean all the discoverable information a natural person has. Many depositions may be needed to retrieve the information held by an entity.

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

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

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

The Department of Justice believes that the "reasonably calculated" formula should be retained as it is in the present rule. This is a familiar phrase. Even though some courts may misread this sentence now, amending it will be seen by many as

narrowing the scope of discovery. That perception should be addressed in the Committee Note if the proposal carries through, but there still may be unintended limiting effects.

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

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

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

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

Emery Lee described his research on the numbers of depositions in practice. He used the data base for the 2009 Civil Rules Survey. The survey drew from all cases closed in the final quarter of 2008. the sample excluded cases that concluded in less than 60 days, and categories of cases that typically have no discovery. He looked for counts of depositions in cases that had any discovery, in cases that had at least one deposition (fact depositions were more common than expert-witness depositions), and in cases that actually went to trial (trial cases were over-sampled in the whole set, so as to have a meaningful number for evaluation). The report is set out at pages 125 to 133 of the agenda materials. Table 1 reflects the number of cases with more than 5 depositions from the group of cases that had any discovery. The estimates by plaintiffs and defendants are close enough to conclude with some confidence that

more than 5 depositions were taken in about 10% of these cases. The numbers increase dramatically for cases with depositions of expert trial witnesses. Table 2 shows that among the cases with any depositions, fewer than 5 depositions was the most common count, with 6 to 10 not far behind. More than 10 depositions were taken in no more than 5% of this group of cases. Table 3 shows that still higher numbers of depositions were taken in cases that went to trial — the range from 6 to 10 was around 25% for depositions taken by plaintiffs, and close to 15% for depositions taken by defendants. The ranges were around 10% for more than 10 depositions by plaintiffs, and somewhat less for 10 depositions taken by defendants. Tables 4 and 5 show that as the number of depositions increased, attorneys were more likely to think that discovery costs were disproportionate to the stakes. But it is fair to suspect that as compared to lawyers' estimates, clients are rather more likely to think the costs of discovery are disproportionate to the stakes.

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

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

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

wants to take more than 10. Usually the need is obvious. A 5-deposition limit will work as well as the 10-deposition limit works.

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

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

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

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

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

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

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

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

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

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

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

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

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

COOPERATION

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

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

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

PACKAGE

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

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

It was noted that this package has stimulated an unusual number of pre-publication comments by some groups that have been closely following the Committee's work. The most recent tally counts 249 comments. Most of them come from plaintiffs' employment lawyers, with some reflecting concerns for civil-rights litigation more generally. They have not yet been distributed to the Committee. It seems unwise to start revising a carefully developed package in response to comments from one segment of the bar that has been more diligent than others. These comments of course will be considered. Many of them focus on the presumptive limitations on depositions and other discovery. A frequent theme is that "the system is not broken, and does not need to be fixed." Plaintiffs' lawyers say that employers have most of the information needed to litigate discrimination claims. They fear that judges will see presumptive limits as firm limits. They note that when providing representation on a contingent-fee basis they have built-in incentives to limit the costs of discovery. They fear that stricter limits on discovery will leave them unable to survive summary judgment. And they respond to the suggestion that it is easier to manage up than to manage down by arguing that the limits will generate more disputes and increase the need for judicial management in place of responsible self-regulation by the parties. All of these concerns will be taken into account, but after publication provides a spur to other segments of the bench and bar that may provide offsetting views.

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

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

A judge member of the Committee observed that the package is good. "A lot of this is common sense." Many of the proposals reflect practices that have been adopted by local rules or in standing orders. The Committee will continue to balance all

comments that come in, as it has balanced everything it has heard so far. Some of the early letters seem to reflect a fear that there would be no public hearings; these concerns will be assuaged as the public comment period plays out in its usual full course.

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

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

Yet another committee member observed that "If we don't figure out ways to address cooperation, proportionality, and increased management, we're in trouble." The package seems to make real strides. It is exciting to have proposals to recommend for publication just three years after the Duke Conference, even if it is only in the context of careful rulemaking that three years seems like speed.

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

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

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

in this race." Initial reactions may be overblown. It will be important to allow the dust to settle to provide a better picture.

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

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

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

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

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

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

the pragmatic hopes for the conference.

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

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

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

Rule 37(e): Preservation and Sanctions

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

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

Four principles shape the proposal. Curative measures are available to address the loss of information even if no fault was involved in the loss. Sanctions are not appropriate if the party acted reasonably and proportionally. Sanctions are appropriate if the party acted willfully or in bad faith and the loss causes substantial prejudice. And sanctions also are proper if the loss irreparably deprives another party of a meaningful opportunity to present or defend against the claims in the action, meaning the core of the action rather than incidental claims or defenses, and if the loss resulted from some measure of fault, described in the proposal as negligence or gross negligence. It is this final provision that has caused continuing debate, in large part because

it stirs fears that some judges will find a party has been irreparably deprived of a meaningful opportunity to claim or defend in circumstances that would not even support a finding of substantial prejudice, all for the purpose of imposing sanctions for negligence or gross negligence. What is intended to require super-prejudice as a condition for sanctions absent willfulness or bad faith might come to restore the negligence standard the Committees intend to reject. At the least, uncertainty in predicting implementation of this exception could defeat the purpose to provide reassurance against the uncertainties of present practice that cause many large enterprises to overpreserve vast amounts of information for fear of sanctions rested on hindsight evaluations of what was reasonable.

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

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

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

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

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

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

method.

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

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

(2) It was suggested that the very word "sanctions" is risky because it overlaps the duty of professional responsibility to self-report "sanctions." The Note was revised to address this concern, stating that Rule 37(e) does not address professional responsibility duties. The "sanctions" term is adopted from Rule 37(b)(2), the rule incorporated here.

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

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

above. Some courts might seize on this provision as an excuse to impose sanctions for merely negligent behavior in circumstances that at worst involve only substantial prejudice, and that might come to involve still lower levels of harm.

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

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

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

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

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

The Subcommittee worked out the present proposal through a great number of conference calls. The level of participation by

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

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

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

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

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

Another Committee member continued the discussion. There are many possible versions of adverse-inference instructions or arguments. It is difficult to define a precise line. It is desirable to preserve flexibility that enables a court to avoid too

much direction. Although it has not proved possible to draft a clear distinction between an instruction that amounts to a sanction and lesser measures that qualify as curative measures, the distinction remains important. "There should be no dispositive inferences without fault."

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

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

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

prejudice.

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

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

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

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

The Committee also was pointed to the list of questions that

will be flagged in transmitting the rule for public comment. Are these the right questions? Are they properly framed?

Discussion of the ESI-only alternative began with the observation that usually the Committee publishes a preferred version, raising questions about potential changes without publishing a full alternative draft. The question whether Rule 37(e) should be limited to loss of electronically stored information was discussed repeatedly in the Subcommittee and with the Committee, and the choice always has been to stick with a comprehensive rule that applies to all forms of discoverable information. One consideration is that the line between electronically stored information and other information is uncertain, and may become more uncertain with further advances in technology. And it is better to adhere to general principles absent some convincing reason to believe that different standards may properly apply. Still, the most recent rounds of discussion may shake faith in that conclusion. The problems encountered in attempting to recognize problems of irreparable loss that do not seem to be encountered with electronically stored information may be so great as to narrow the focus to loss of electronically stored information. The original concern was over-preservation of electronically stored information. Publishing the alternative might provoke comments showing instances in which loss of electronically stored information has irreparably deprived a party of a meaningful opportunity to litigate, contrary to the tentative belief that this event is unlikely.

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

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

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

Another observation expressed concern that the amendments give judges tools to use if information is lost without fault. As information storage moves into the cloud, there will be increasing risks that information will be lost without fault. The main draft gives clear guidance, both as to curative measures and as to sanctions.

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

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

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

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

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

and the difficulty may well increase as technology evolves. Is a print-out of information lost from an electronic storage system ESI? What about the information recorder in an automobile damaged in a collision and then scrapped?

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

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

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

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

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

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

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

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

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

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

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

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

Rule 84

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

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

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

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

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

Rule 17(c)(2)

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

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

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

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

Another judge echoed the concern that this is a difficult question. The rate of pro se filings continues to grow. It has reached 40% in the District of Arizona, including many actions by prisoners. The rate approaches 50% in the Eastern District of California. Inquiring into competence is a difficult undertaking. The Third Circuit recognizes that "once the duty of inquiry is satisfied, a court may not weigh the merits of claims beyond the § 1915A or § 1915(e)(2) screening if applicable." It is uncertain what amounts to "verifiable evidence of incompetence." The Ninth Circuit appears to find a duty of inquiry when there is a "substantial question." That may impose a greater obligation on the district court. This question may arise with some frequency — the Third Circuit opinion has already been cited by at least six

district courts. The question is whether it is better to leave this question for further development in the genius of the common-law process, or to take it into the Enabling Act process now?

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

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

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

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

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

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

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

The question was put by framing three alternatives: (1) These issues could be left to continued development in the courts, a "common-law" solution. (2) We could undertake a thorough survey of the cases to form a comprehensive understanding of the approaches taken to define a standard for a duty of inquiry. Or (3) We could undertake a broader inquiry by reaching out to others to attempt to reach some understanding of the extent and frequency of litigation by unrepresented incompetents.

These alternatives were supplemented by a fourth: the question

could be kept on the long-term agenda for future consideration.

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

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

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

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

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

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

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

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

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

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

Rule 41(a): Dismissal by All Parties

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

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

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

This traditional understanding may be subject to challenge in an era of increasing judicial responsibility for case management. Setting a firm trial date has proved a valuable and effective management tool. Increasing management responsibilities, moreover, increase the court's investment in the action. Allowing the parties to thwart the control exercised in setting a firm trial date, and to waste the court's investment, might seem too high a price to pay to preserve the traditional freedom to dismiss without prejudice when all parties agree to do so.

This introduction was elaborated by a description of the litigation that confronted Judge Martone. Many parallel cases were pending before other judges in the same court. The parties were undertaking to settle some 500 cases. The circumstances made it imperative to get all of the cases virtually settled before they could reach final settlements in any. Other judges, confronted with

this problem, agreed to continue the cases, requiring periodic progress reports every 60 days. Settlements actually were accomplished. That approach worked.

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

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

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

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

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

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

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

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

And a fourth judge reported that sixteen years of experience with settlement conferences shows many reasons why parties need to suspend proceedings while working out a settlement. It works to

suspend the case while requiring regular progress reports. And it may help to reflect that fewer than 2% of civil actions go to trial. There will not be many cases in which a stipulated dismissal is followed by revival in a new action that actually goes to trial.

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

Questions Referred from CACM

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

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

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

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

The next observation was that nothing in the rules inhibits conferences with attorneys by telephone or video. That practice is routine. District judges in Alaska and Hawaii regularly participate in actions pending in Arizona by these means. Even in criminal

cases, where confrontation is an important consideration, video hearings can be used in determining competence. It is a fair question whether judges should be permitted to do anything that rules now prevent.

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

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

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

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

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

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

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

The second issue goes to retention of records requiring a third party's "wet signature." A number of alternatives are possible. CACM prefers "a national rule specifying that an

electronic signature in the CM/ECF system is *prima facie* evidence of a valid signature." A person challenging the validity of the signature would have the burden of proving invalidity.

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

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

It was further noted that there is a federal e-signing statute, and a Uniform Act that has been adopted in 46 states. Many federal agencies have e-signature rules. There is a statute for the IRS. One possibility may be that study by the rules committees will show problems so general as to warrant a recommendation for additional legislation. But that possibility lies in the future, as something the joint enterprise may conclude is useful more than as something to be pursued at the outset.

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

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

Restricted Filers: The next generation of the CM/ECF system will include a national database, available only to "designated court users," that identifies "restricted filers." Examples of restricted filers are prisoners subject to restrictions under the Prisoner

Litigation Reform Act and attorneys who have been subject to disciplinary action. The question arises from the requirement in Rule 4(a)(1)(C) that a summons must "state the name and address of the plaintiff's attorney or — if unrepresented — of the plaintiff." Many restricted filers appear pro se. And many pro se plaintiffs change addresses frequently. Changed addresses will frustrate identification. A new address will mark the filer as "new" in the system. CACM suggests that Rule 4(a)(1)(C) be amended to read: "(C) state the name and address of the plaintiff's attorney or — if unrepresented — the plaintiff's name, address, and last four digits of the social-security number of the plaintiff."

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

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

The discomfort with using social-security numbers was expressed by another participant, who suggested that it might help to require a plaintiff to disclose all names the plaintiff has ever been known by. And better use of "match technology" might be part of the solution.

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

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

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

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

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

Rule 62

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

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

International Child Abduction: Prompt Return

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

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

The need for court rules may be examined in light of the Court's recognition that most courts understand the need for prompt decision and do their best to move these cases as quickly as possible. The Court's encouragement will add force to this common approach. Judicial education efforts can supplement the Court's

urging. The Federal Judicial Center International Litigation Guide, for example, includes a 2012 volume on the Hague Convention; the chapter on procedural issues begins with four pages stressing that expeditious handling is required by Article 11 of the Convention and is provided by the courts.

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

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

Another judge recalled spending a year with a Hague Convention case, involving two parents "who hate each other." The need for prompt disposition is well understood. The problems with implementing it are not susceptible to resolution by court rule. But at least one parent will provide constant reminders of the need for speed. And a court of appeals can expedite matters by deciding, "opinion to follow."

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

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

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

Rule 23

Dean Klonoff reported for the Rule 23 Subcommittee. Last November,the Subcommittee identified a list of issues that may deserve study. The issues were divided between "front burner" and

"back burner" categories. The lists are tentative, both in determining what issues deserve study and in assigning priorities among whatever issues come to be studied. Further work has been stayed pending disposition of the several class-action cases pending in the Supreme Court.

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

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

Pleading

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

Publicizing Rules Amendments

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

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

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

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

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

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

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

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

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

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

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

or form is changed, with links to the new version. All federal courts could be urged to do this.

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

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

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

Impending Publication

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

Technology Assisted Review

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

To assist the Committee in becoming familiar with the opportunities to advance the cause of proportional discovery

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

The panel presentation was followed by questions. The questions and answers reflected several points. Many lawyers, litigants, and courts are unfamiliar with TAR or uneasy about it. At its best, it can recall a higher fraction of relevant documents than human reviewers find, and at lower cost. One source of cost saving can be greater precision in selecting only relevant documents; fewer documents to review for privilege, confidentiality, or other protections means lower cost for a process that most litigants prefer to conduct by human review. It is important to recognize that properly implemented search methods are at least as good as human review, but to accept that neither approach achieves perfection. It is important that courts understand the limits of human review in comparison to technology assisted review. Human review typically achieves about 70% recall. If computer-aided review does that well or better, it should be accepted even though it does not achieve 100% recall. And it must be recognized that not every process that may be labeled as technology assisted review is equal to every other process. The market of providers is likely to sort itself out in the coming years.

Next Meeting

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

A Thank You

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

Respectfully submitted

Edward H. Cooper
Reporter