COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

To: Honorable Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

From: Honorable David G. Campbell, Chair
Advisory Committee on Federal Rules of Civil Procedure

Date: December 2, 2011

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on November 7 and 8, 2011. Draft Minutes of this meeting are attached. The minutes were prepared by the Committee's Reporter, Professor Edward H. Cooper, as was this report.

This Report presents several matters on the Committee agenda for information and possible discussion. In order, they include a possible rule regarding preservation of information for future litigation; initial responses to the proposal to amend Civil Rule 45 that was published for comment last summer; the activities of the Subcommittee that is pursuing issues raised during the conference held at Duke University School of Law in May, 2010, including a presentation on Civil Case Management Practices of the Eastern District of Virginia, Alexandria Division; pleading

standards; the role of Civil Rule 84 forms; class action issues; and action on accumulating agenda items.

Preservation for Litigation

A panel at the Duke Conference urged that there is a great and growing need for guidance on the obligation to preserve information that may be subject to future discovery requests. The primary source of concern seems to arise from electronically stored information. The panel presentation included a detailed list of issues that might be addressed by a preservation rule, and urged that the Committee should begin work toward developing a rule.

The panel invitation was accepted. The Discovery Subcommittee immediately set to work. Initial research by Andrea Kuperman showed that federal courts have a uniform approach to the events that trigger a duty to preserve — with only slight variations in expression, all agree that a duty to preserve can arise before litigation is actually filed. A reasonable expectation that litigation may be filed triggers the duty. There is no uniform case law on the scope, location, or age of information that must be preserved, and there are significant differences among the circuits on what conduct can lead to sanctions for failure to preserve. Some cases permit sanctions on a showing of mere negligence, while others require some form of willfulness or bad faith. One view, for example, is that failure to impose a "written" litigation hold constitutes gross negligence and warrants severe sanctions. Other decisions take different views. An adverse-inference instruction, for example, may be thought warranted only on showing intentional destruction of information for the purpose of preventing its use as evidence, reasoning that only intentional destruction supports a logical inference that the information was adverse to the party who destroyed it.

In addition to Ms. Kuperman's research, the Subcommittee arranged for an FJC study concerning the frequency of spoliation motions in federal court. That study, conducted by Emery Lee, found that spoliation motions were filed in 209 cases, less than one-half of one percent of the 131,992 civil cases filed in 19 districts between 2007 and 2008, and that barely more than half of these motions concerned electronically stored information.

The Subcommittee also conducted a survey of laws that already impose some kind of preservation obligation. The study found a wide array of federal and state statutes and regulations that require preservation of information in a variety of settings.

To aid in its evaluation of possible preservation rules, the Subcommittee developed initial drafts to illustrate three different possible approaches. The first, responding to the cues provided by the Duke panel, included detailed provisions describing the events that trigger a duty to preserve. This draft also describes the scope of the duty in time, backward from the time the trigger is

set, ongoing as information continues to accumulate, and terminating at some point after litigation is finished or the threat of litigation has passed. Scope is defined in other dimensions as well — how many "custodians" must be identified and told to preserve; what breadth of information must be preserved in relation to foreseeable discovery requests; what sources may be disregarded, such as deleted information or information that is difficult to access.

The second draft approach also addressed the duty to preserve directly, but in less detail. Trigger, scope, and duration were addressed, but the primary direction was only to behave reasonably in all dimensions.

The third draft did not directly impose a duty to preserve. Instead, it defined the limits on sanctions for failure to preserve discoverable information that reasonably should be preserved. It also sought to recognize a difference between "sanctions" and remedial measures designed to cure the consequences of a failure to preserve. The discovery sanctions listed in Rule 37(b) or adverse-inference instructions would be treated as sanctions. Allowing extra time for discovery, requiring the party who failed to preserve to pay the costs of seeking substitutes for the vanished information, and like steps would be treated as remedies rather than sanctions. The theory underlying this approach is that it speaks directly to the subject of greatest concern and greatest disagreement among federal cases — sanctions — and will indirectly relieve much uncertainty about the trigger and scope of the duty to preserve.

These drafts were sent to a diverse group of lawyers, technology experts, and e-discovery experts who then came together with the Subcommittee and other Committee members for a miniconference in Dallas on September 9. Many of the participants provided written submissions before the conference began. Other submissions have continued to flow after the conference concluded. The miniconference provided vigorous, wide-ranging, and richly valuable advice. In different ways, with different illustrations, many in-house counsel for large businesses — including one deeply engaged in software design — described present concerns and offered tentative solutions.

Many of the problems described at the miniconference involve costly over-preservation of potentially discoverable information. The participants recognize that the duty to preserve is triggered by a reasonable expectation of litigation. But they are very uncertain as to what it is they must preserve. They also described a great aversion to the risk of sanctions in whatever litigation might actually ensue. The risks feared go beyond the direct impact of sanctions in a particular action. There is great concern about the reputational effect of sanctions — reputable businesses do not want to be branded as evidence destroyers. One result is to preserve information for litigation that is never brought. One

anecdote described spending $5,000,000 to preserve information, with costs increasing by $100,000 a month, for litigation that had not yet been filed. Others, multiplied in different directions, described preserving far greater volumes of information than were ever sought in litigation that actually ensued. Part of the problem is that before an action is brought, there often is no opponent with whom to discuss the claims that may be made, what information should reasonably be preserved, and so on. Another part of the problem is that there is no court available to resolve pre-filing disputes: a letter demanding preservation, for example, may demand far more than is reasonable, and may not lead to an opportunity to work toward reasonable restrictions. It became clear that many highly responsible, sensible, and able lawyers believe that current uncertainties about the duty to preserve elicit costly and wasteful over-preservation.

There was an undercurrent of concern with costs apart from preservation costs. Although voiced indirectly, some participants were concerned that the cost of having preserved information is that it must be searched when discovery requests are made. More information available to search makes for greater search costs.

Participants also noted that preservation issues are not limited to large institutions that typically have massive volumes of information potentially subject to discovery. The obligations of individual parties as well will increasingly be recognized. A personal-injury plaintiff, for example, may talk of the event, injury, and aftermath in e-mail messages, social-network postings, and other media. Written or electronically stored records may be created. There may be no one to educate an individual about preservation obligations until a lawyer is consulted. Perhaps some account must be taken of this likely ignorance in crafting a rule. But it will be important that lawyers recognize the preservation obligation as soon as consulted, and instruct the client. The lawyer's failure may come to harm the client.

Discussion at the miniconference generated considerable disagreement about the steps that might be taken to address preservation problems, and even disagreement whether the time has come to begin to consider draft solutions. The Department of Justice, for an important example, believes that the law should be allowed to develop further, to provide a sounder foundation, before attempting to provide rule-based answers. There is a powerful tension between the desire to preserve information that will support the best possible basis for deciding an action on the merits and the great costs that flow from over-preservation. In addition, crafting a specific preservation rule must confront many specific difficulties. A few illustrations make the point.

Initial deliberations suggested that a preservation rule should begin with the present law that recognizes the duty when there is a reasonable expectation of litigation. But alternatives continue to be pressed, and must be considered. One alternative

would create a duty to preserve only when there is a "reasonable expectation of the certainty of litigation." Another, possessing the virtue of setting a bright line, would create a duty to preserve only on notice that an actual judicial or administrative complaint has been filed.

If a duty to preserve arises before litigation is actually filed, it becomes necessary to define the scope of preservation in relation to the scope of anticipated discovery. It seems natural to define preservation in terms of the Rule 26(b)(1) scope of discovery — not only information relevant to the claim or defense of any party, but also information relevant to the subject matter that becomes discoverable on showing good cause. Since there is no actual complaint as yet, there are no actual claims or defenses and it can be anticipated that anything that bears on the subject matter may become a claim. But that approach threatens to expand the scope of preservation beyond, perhaps far beyond, the claims that actually will be made (if any ever are made). A manufacturer learns that one of its automobiles has gone off the road: preserving all information relevant to the design, manufacture, and distribution of that make and model of automobile may go far beyond the scope of an eventual claim that a tire failed. And the question may arise in reverse. Rule 26(b)(2)(B) protects against discovery of electronically stored information from sources that are not reasonably accessible. But preserving that information may be relatively inexpensive, and events may show good cause for allowing discovery. The duty to preserve might reasonably extend to information not likely to be discoverable. (The same question could arise from communications between a lawyer and an expert that may become a trial witness: Rule 26(b)(4)(C) extends work-product protection to the communications, but work-product protection is defeasible.)

Consideration of specific triggers led to discussion of preservation-demand letters. There was concern that writing a rule that identifies a demand letter as a trigger for preservation obligations would encourage a proliferation of over-broad demands. Discussion wandered into the territory of possible claims for a tort of unreasonable preservation demands. The concern may be real; the possibility of finding effective remedies is less certain.

One last specific example from the conference: Discussion of the vexing question of culpability standards suggested the ambiguity of traditional phrases. A rule that requires a showing of gross negligence to support severe sanctions, for example, would have to confront the question whether it is grossly negligent to fail to create a written litigation hold, to identify the key players most likely to identify and direct preservation of important information, and to follow up to make sure suitable preservation measures are taken. Similarly, if the most severe sanctions could be imposed only for wilful behavior, may it be willful to fail to preserve obviously important information — if an

engine falls off an airplane, surely wilfulness could be found on post-event failure to preserve the engine, manufacturing and design records for engine and plane, service records, and the like. And even if there is no wilfulness — the manufacturer does not know about, and therefore fails to preserve, critical documents in the possession of a subcontractor — the severity of the prejudice to other parties might warrant some sanctions or remedial measures.

The Subcommittee met at the close of the miniconference and met again in two conference calls. In November, it reported to the Committee at length on the miniconference, described the three major alternatives it had been considering, and presented a draft of Rule 37 sanctions and remedial-measure provisions for consideration as a possible approach to developing a recommended rule for publication. Lengthy discussion by the Committee led to the conclusion that the Subcommittee should continue to consider all approaches. "This is a very important task. There is much yet to learn." It may be that approaching the problems through a sanctions rule is the best answer available, but the Subcommittee should assume that all issues remain open and report to the Committee again in March.

Discovery: Rule 45

Last June the Standing Committee approved publication for comment of a proposal to amend Civil Rule 45. The proposal simplifies the rule's structure, in large part by providing that discovery subpoenas issue from the court where the action is pending. The proposal, however, carries forward without substantial change the provisions that require the party serving the subpoena to go to the place where a nonparty witness is located to conduct a deposition or discover subpoenaed materials. Disposition of objections to the discovery begins in the court for the place of performance, but provision is made to transfer the motion to the court where the action is pending. Related provisions are made for enforcing a discovery order. The rule would also supersede a line of cases that interpret the present rule to authorize nationwide jurisdiction to enforce a trial subpoena against a party or a party's officer. At the same time, in deference to those cases and also to cases that seemed to regret the conclusion that present rule text does not support nationwide jurisdiction, the published materials asked for comment on an alternative that was explicitly not supported by the Committee but that would restore some measure of power to order a party to appear — or to produce an officer to appear — as a witness at trial. Finally, the rule relocates and clarifies the requirement that parties serving subpoenas give notice to other parties in the litigation.

Substantial debate was anticipated on at least three points: the "exceptional circumstances" test to transfer a discovery motion to the court where the action is pending may seem too restrictive, and indeed may not seem to describe the illustrations offered in

the Committee Note; the proposal does not include any requirement that the party who served a documents subpoena notify other parties as materials are received in response to the subpoena; and the determination to reject the decisions asserting nationwide authority to subpoena a party or its officer to appear as a witness at trial. Only a small number of written comments have been received. No one asked to testify at the first scheduled hearing in November; it was cancelled. But it is common experience that when there are extensive comments and requests to testify, they ordinarily begin to arrive late in the comment period.

Duke Conference Subcommittee

The Duke Conference Subcommittee was formed to respond to the welter of ideas produced by the Duke Conference sponsored by the Civil Rules Committee in May, 2010. Consideration of Civil Rules amendments is part of the Subcommittee's work, but several other paths have been followed as well.

One suggestion made repeatedly by Conference participants was that although present rules provide many opportunities for effective case management, there is a pressing need for more universal use of these rules. Early, continuing, hands-on case management is thought to solve many problems that linger and fester if left to the hope of responsible cooperation among the parties. The Subcommittee has worked with the Federal Judicial Center to improve judicial education programs and resources. Members also drafted portions of the new benchbook for judges, focusing particularly on Rule 16 conferences and the relationships between Rules 16 and 26.

Pilot projects testing new procedures will provide fertile sources of information for considering future rules amendments. The Subcommittee is working with the Federal Judicial Center to identify pilot projects in federal courts around the country and to encourage structuring the projects in ways that will support rigorous analysis of the results. The Seventh Circuit project on e-discovery, described at the Conference, is ongoing, and will be assessed by the FJC. The Northern District of California has adopted an expedited trial procedure. The Southern District of New York has launched a Pilot Project Regarding Case Management Techniques for Complex Civil Cases; the FJC is undertaking a survey to establish a base line of experience at the beginning of the project, establishing a foundation for evaluating experience at the end of the pilot period.

Another pilot project is just beginning. The Duke Conference inspired two employment lawyers who represent the National Employment Lawyers Association and the American College of Trial Lawyers at Civil Rules Committee meetings to undertake development of a protocol for initial discovery in employment cases. They formed a drafting group of experienced lawyers representing primarily plaintiffs and others representing primarily defendants.

After considerable hard work, and with the help of neutral brokers, they succeeded. The protocol will be made available to all federal courts, with encouragement to judges to adopt it for use in their employment cases. The district-judge members of the Committee have agreed to adopt the protocol in their cases and it is expected that many other judges will adopt it. If the protocol succeeds in its goals of speeding discovery, reducing costs, and supporting better early case evaluation by the parties, it may serve as an impetus for other groups to develop similar protocols for other types of litigation frequently encountered in federal courts. This work counts as an early and significant success for ideas advanced at the Conference.

In addition to pilot projects, the Subcommittee has also encouraged additional empirical work. The Committee is always eager to enlist the Federal Judicial Center in supporting Committee work, and the Subcommittee reflects that enthusiasm. The Center has begun an inquiry into actual practices at the outset of litigation, focusing on initial scheduling orders and Rule 16(b) conferences, and also on Rule 26(f) discovery-planning conferences. The work began with an extensive docket study focusing on scheduling orders, and will continue with a lawyer survey on Rule 26(f) practice.

A gentler form of empirical inquiry was arranged for the Committee meeting. The Subcommittee arranged for a panel presentation on Civil Case Management Practices of the Eastern District of Virginia, Alexandria Division. The panel, moderated by Committee member Peter Keisler, included Judge Leonie M. Brinkema, Judge Thomas Rawles Jones, Jr., and three practitioners — Dennis C. Barghaan, Jr., William D. Dolan, III, and Craig C. Reilly. The court prides itself on achieving times from filing to disposition that are consistently the shortest, or next to the shortest, in the country. The panelists emphasized that this accomplishment rests only in part on local rules governing the time for pretrial events. The judges share a common philosophy on case management, they work hard to implement it, and the bar has become skilled in working within it. The system has enough flexibility to recognize and account for the needs of specific cases that do not fit comfortably within general practices. Motions must be noticed for prompt hearing, responses are due shortly before the hearing, judges are prepared, and most rulings are made from the bench after argument. The former master docket system has been replaced by individual dockets without impeding the steady push toward final disposition. This experience provides a useful foundation for considering opportunities to guide other courts toward successful case management.

Of course possible rule amendments also have a place on the Subcommittee agenda. Consideration of the pleading rules has been placed on a separate track, noted briefly below. Many other suggestions at the Conference addressed discovery problems. The work undertaken by the Discovery Subcommittee to consider the

problems surrounding the duty to preserve electronically stored information is described above. Other discovery issues will be pursued by one subcommittee or the other depending on the interdependence between the issues and other discovery topics or nondiscovery topics. The time for the Rule 26(f) discovery conference of the parties is tied to the time for the Rule 16(b) scheduling conference and order. The two should be considered by a single subcommittee.

Several other discovery issues will be considered for possible proposed rules changes. It has been suggested that the Rule 26(d) moratorium should be revised to allow the parties to make discovery requests before the Rule 26(f) conference, delaying the time to respond to a point after the conference — the thought is that the conference could be better focused if the parties can consider actual initial discovery requests. When a discovery dispute arises after the Rule 26(f) conference, experience suggests that the dispute could be resolved more quickly, at less expense, by requiring a conference with the court before filing a formal motion. Present Rule 26(b)(2) provisions designed to hold discovery within limits proportional to the reasonable needs of the case have not had the impact that was hoped for. Some advantage might be found in adding a proportionality limit to the broad scope provisions in Rule 26(b)(1), superseding the codicil sentence of (b)(1) that simply cross-refers to (b)(2). It also might help to add explicit cost-shifting provisions to express the authority now implicit in the protective-order provisions of Rule 26(c) and in the "conditions" referred to in the (b)(2)(B) provisions for discovery of electronically stored information that is not reasonably accessible. Three interrelated proposals by a former Committee member are designed to reduce obstructive or confusing discovery responses.

Presumptive numerical limits on the numbers of discovery requests also have been suggested. The existing limits on depositions might be tightened — for example, to five depositions per side, with each deposition lasting no more than four hours. Limits could be added to rules that do not have them now, for example no more than 25 requests to produce or subpoenas under Rules 34 or 45, or 25 requests to admit under Rule 36.

Contention interrogatories also have become the subject of some contention. Although they may be useful at the outset of an action to focus the claims and issues more clearly than notice pleading often managed to do, there are arguments that ordinarily they should be allowed only after all other discovery concludes, subject to earlier use by agreement or on court order.

Other familiar discovery issues connect discovery to pleading. One asks whether discovery should be stayed, in whole or in part, pending disposition of a motion to dismiss for failure to state a claim. Renewed attention to pleading issues may bring this question up for consideration. For that matter, specific pleading

requirements have stirred concerns about potential plaintiffs who do not have access to information needed to frame a sustainable complaint. Enhanced opportunities for discovery before ruling on a motion to dismiss have been proposed as a possible solution.

Scheduling order practice is the subject of at least some suggestions. One is to expedite litigation by advancing the time for the order, perhaps to 60 days after any defendant is served (rather than the current 120 days). Experience in the Eastern District of Virginia suggests that this acceleration is feasible, at least for most cases. A related change might be to reduce the presumptive time for service in Rule 4(m) to 60 days after filing (rather than 120 days). The FJC study found that the median time for entry of a scheduling order is 106 days after filing. A second is to require an actual scheduling conference between court and parties, even if only by telephone, eliminating the "mail or other means" alternatives in Rule 16(b)(1). And a third is to add to the list of optional contents, Rule 16(b)(3), a provision for setting a date by which parties must abandon any claims or defenses that can no longer be asserted in good faith.

Cooperation of the parties and attorneys was a third strong concern of the Conference, along with strong case management and proportionality. Cooperation could be emphasized in the aspirational provisions of Rule 1, directing the parties to cooperate with the court and each other in seeking the just, speedy, and inexpensive determination of the action. It also could be added to Rule 16 pretrial conference provisions and at various places in the discovery rules.

The Subcommittee has reached the stage of drafting illustrative rule language to consider some of these possibilities. It does not expect to have concrete proposals ready to propose for publication by the time of the Committee's March meeting. It also holds open a continuing invitation for suggestions of other topics it should consider.

The Committee also is considering the possibility of holding a second Conference on the model of the 2010 conference, perhaps as early as spring 2013. One purpose would be to consider concrete rules proposals built on the 2010 conference. A second would be to renew opportunities like those offered at the 2010 conference, raising new and perhaps fundamental challenges for change.

Pleading Standards

Lower-court opinions deciphering and applying the *Twombly* and *Iqbal* decisions continue to command the Committee's attention. Two important avenues of investigation provide the primary focus of current discussions. Andrea Kuperman's survey of court opinions, focusing primarily on appellate decisions, has grown near the 700-page mark. Joe Cecil's empirical work at the Federal Judicial Center is well advanced, and includes careful study of empirical

studies undertaken by others. This work, and the experience of Committee members, suggest that pleading standards continue to present a vitally important subject for ongoing consideration. But the Committee does not believe that the time has come to begin deliberating the questions whether evolving practice should be entrenched, expanded, or restrained. There is no sign of widespread undesirable practices that might warrant hasty response. The subject is too important, and the target too indistinct, to move forward just yet.

The Kuperman survey provides an illuminating set of many pictures. Some stand out. Two were used as illustrations in Committee discussion. The first, reversing dismissal for failure to state a claim, described at length fact allegations detailed enough to seem a response to a motion for summary judgment. The other recognized that it was demanding that the plaintiff plead facts known only to the defendant, and that without discovery the plaintiff must fail, but concluded that language in the *Iqbal* opinion requires that a factually deficient complaint be dismissed without any opportunity for discovery. Each, in different ways, underscores the need to maintain a prominent place for pleading on the Committee agenda.

The FJC study has moved far into the second stage. The first stage found that motions to dismiss for failure to state a claim are being made more frequently in the aftermath of the *Twombly* and *Iqbal* decisions. It also concluded, after applying multinomial corrections to account for different types of cases, different practices in different courts, and the presence of an amended complaint, and apart from "financial instrument" cases, that there was no statistically significant increase in the rate of granting motions to dismiss. Because different sets of cases were used for the "before" and "after" periods, it was not possible to make a statistically valid assertion that more cases are dismissed on the pleadings simply because more motions to dismiss are made and the rate of granting the motions remains constant. The second phase explored the increase in the frequency of granting motions to dismiss with leave to amend by asking what happens next. Amended complaints were filed in many cases; renewed motions to dismiss were made in response to many, but not all amended complaints; and dismissal was again ordered on many, but not all, of the renewed motions. "Our conclusions remain the same. We found a statistically significant increase in motions granted only in cases involving financial instruments, and we found no statistically significant increase in plaintiffs excluded by such motions or in cases terminated by such motions." The work continues because the second stage uncovered anomalies in coding practices by court staff that, once identified, led to more orders resolving motions to dismiss. These orders will be included as the study is completed. There is some prospect that another study will be undertaken to explore practice on all motions to dismiss, not only motions addressed to failure to state a claim. This further work, if

undertaken, may provide important additional information for Committee study.

The FJC work has included review and appraisal of case studies done by others. Much of this work confirms the finding that the rate of filing motions to dismiss for failure to state a claim has increased. Much of it also suggests that the rate of granting these motions has increased. And much of it is subject to methodological challenge. All of it is important, and the FJC's help has proved important in this dimension as well.

This work suggests one fairly clear conclusion. An increase in the frequency of filing motions to dismiss means an increase in the frequency of responses. A plaintiff contemplating an action must count this prospect among the potential costs.

Another impact seems at least a fair surmise. Faced with new pleading opinions and more frequent motions to dismiss, complaints are likely to be longer, filled with greater fact detail, than formerly. This surmise is subject to the observation that before *Twombly* and *Iqbal* many good lawyers routinely pleaded far more detail than notice pleading required. "I have never seen a notice pleading" is a reasonable description of at least some areas of practice. And the increased detail, if provided, may reflect only the added work of including in the complaint more of the information that was gathered in deciding whether to file and in preparing for litigation after filing.

Beyond that point, counting the outcomes of motions to dismiss, while truly important, does not answer the central question. Suppose changed pleading standards lead to terminating more actions on the pleadings. Is that result good, bad, or neutral? The Supreme Court was manifestly concerned with the costs that may be imposed by allowing an action to move beyond the pleadings into discovery. On balance, across the universe of cases, what balance should be drawn between the different categories of error? Those who decry pleading dismissals focus on the costs of dismissing claims that, if admitted to the world of discovery and pretrial management, would have prevailed on the merits. Those who champion the need to maintain some measure of scrutiny on the pleadings focus on the costs inflicted by discovery and pretrial management in support of attempted claims that ultimately fail on summary judgment or at trial, or that succeed in settlement only because of the costs of litigation. These value judgments may be attempted in gross. They may be attempted instead as to particular categories of litigation. The eventual judgments, if they can be made at all, may be mixed: The Rule 8(a)(2) standard, or more specifically focused standards, may require different levels of fact specificity in pleading different kinds of claims.

The difficulty of the judgments that lie ahead is emphasized simply by articulating them in this way. It may be an exaggeration

to proclaim that heightened pleading standards threaten to undermine the role of private litigation in enforcing fundamental public policies. The structure created in 1938, moving responsibilities from the pleading stage into discovery and summary judgment, has developed over time. Further development need not portend disaster, even if it pulls back from more lenient pleading standards to substitute more demanding standards. But these are not idle concerns.

A responsible approach to Enabling Act responsibilities must be shaped by the importance of the issues. And it also is shaped by the responsibility of the courts to carry on the common-law process of ever-more nuanced interpretation of Rule 8(a)(2) as shaped by the *Twombly* and *Iqbal* decisions. The research that has been done shows that the courts generally are discharging their responsibility thoughtfully, with real care. Much remains to be learned from their work. The Committee will continue to study pleading standards carefully. Over the years it has studied many possible pleading rules, and related discovery rules, both before the Supreme Court spoke and since. But it is not likely to advance specific rules proposals for publication in 2012.

Pleading Forms

The *Twombly* and *Iqbal* decisions create serious tensions with the form pleadings included with the Civil Rules. Rule 84 says that these forms suffice under the rules. A footnote in the *Twombly* opinion observed that Form 11 is consistent with the Court's view of proper pleading. That footnote itself could be useful to illuminate one aspect of the full opinion. But it does not address the other forms. The Form 18 complaint for patent infringement has created particular difficulties for lower courts attempting to find some reconciliation with the Supreme Court's pronouncements.

Consideration of the pleading forms was initially deferred out of concern that it was too early to attempt to draft rule language to capture or revise whatever pleading standards emerge from the Supreme Court's opinions. The initial work, however, raised additional questions about the role of the Rule 84 forms. The forms cover an incomplete range of the rules. It is difficult to account for the selection of some subjects while others are excluded, although some forms have a clear history. Forms 5 and 6, the request to waive service and the waiver, were carefully drafted as part of creating the Rule 4(d) waiver provisions. Equal care has been taken with some other forms. But many forms have received scant attention, as witnessed by the prevalence of illustrative dates in 1936 that persisted until the forms were revised in the 2007 Style Rules.

The benign neglect that has attended most of the Rule 84 forms may rest in part on their general obscurity. But it also reflects implicit choices to devote Committee energies to more pressing

matters. It is fair to ask whether a choice must be made: Tend to the rules regularly and thoroughly, deploying the full resources of the Enabling Act, or demote them from official status as forms that suffice under the rules.

These questions led to formation of a Forms Subcommittee drawn from the Appellate, Bankruptcy, Civil, and Criminal Rules Committees. Early work by the Subcommittee has illuminated the differences between the treatment of forms in the different sets of rules. Differences appear in the process of adopting the rules. Only the Appellate and Civil Rules forms go through the full Enabling Act process. More importantly, the role played by forms differs greatly among the different sets of rules. Those differences may account in part for the choice whether to rely on the Enabling Act, but do not seem to provide a full explanation. For the moment, there does not appear to be a compelling reason to establish uniform practices across the advisory committees and sets of rules.

Work by the Subcommittee will continue, and the Civil Rules Committee will take account of it. It remains to determine whether any recommendations will be ready for action by the Standing Committee in 2012.

Class Actions

The Committee has opened the question whether class-action practice should claim a place on the agenda for consideration over the next few years. The most recent phase of class-action work began in 1991 and culminated with amendments that took effect in 1996 and 2003. It was a painstaking and lengthy process, undertaken after an interlude in which courts developed the 1966 Rule 23 amendments in many creative ways. Interpretations of Rule 23 have continued to evolve since 2003. The Class Action Fairness Act of 2005 has brought new and different kinds of class actions to the federal courts. And the Supreme Court has rendered a number of important class-action decisions in recent years. As difficult, protracted, and contentious as any project would be, it seems suitable to ask whether the Committee should prepare to make room for Rule 23 on its near-term agenda.

Brief initial discussion suggested several topics that might be raised if class actions are brought back to the agenda. One involves proof on the merits in determining whether to certify a class. In the most recent class-action work, the Committee recognized that measuring predominance and superiority for a (b)(3) class may justify consideration of a "trial plan" that predicts how the claims might be tried on the merits. Some preliminary sense of the merits is involved. This perception has been developed in different ways by different courts. Review may be appropriate to assess the depth of the preliminary consideration of the merits that may be suitable at the certification stage. Questions of preliminary discovery on the merits would be tied to this review.

Issues classes present a separate set of questions. Enthusiasm for issues classes rose and then diminished during the most recent work. Some observers fear that the predominance requirement for a (b)(3) class is being applied to defeat any use of class adjudication in circumstances that might benefit from at least class-wide resolution of important common issues.

The criteria for reviewing proposed class-action settlements vary among the circuits, at least in the length and content of the lists of factors to be considered. A list of factors was included in early drafts of the amendments finally made to Rule 23(e). The list grew to something like a dozen factors, several of them innovations on the case law. The Committee came to fear that the list would be treated as a simple check-off, perhaps encouraging rote application and discouraging serious case-specific review. The list was transferred to the draft Note. The same concerns led to dropping it even from the Note. Those judgments may have been wrong. Or, if right for the time, they may deserve further consideration now.

Cy pres settlement provisions have come in for substantial criticism, particularly to the extent that they provide remedies that the law would prohibit in an adjudicated judgment. It may prove tricky to draft a rule prohibiting cy pres provisions, but the effort could be launched.

The Supreme Court decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 130 S.Ct. 1431 (2010), authorizes use of Rule 23 to provide a class-action remedy for a state-law claim despite a specific state-law prohibition on enforcing the claim by class actions. It would be relatively easy to disclaim this role for Rule 23. The task may be worthy, if not as a stand-alone project then as part of any more general project that might be undertaken.

Another suggestion was that it might be useful to review the American Law Institute Principles of Aggregate Litigation to determine whether worthy subjects of reform can be found there.

The Committee has formed a subcommittee to begin initial consideration of these issues, and looks forward to the advice that will be generated by the panel discussion at this Standing Committee meeting.

Other Docket Items

The Committee reviewed a number of proposals based on suggestions made to the Committee by members of the public, bar, bench, and another Judicial Conference committee. The proposals and dispositions are reflected in the draft Minutes. One is that a rule should be adopted to allow appeal by permission from an order granting or denying discovery of materials claimed to be protected by attorney-client privilege. This proposal intersects

the responsibilities of at least the Appellate, Civil, and Evidence Rules Committees. The Bankruptcy Rules Committee might have an independent interest. The Criminal Rules Committee also would be interested if there is any thought that the proposal should reach criminal prosecutions as well as civil actions. The Civil Rules Committee will defer any work on this subject pending expressions of interest or a lack of interest in other committees.

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 7-8, 2011

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on November 7 and 8, 2011. The meeting was attended by Judge David G. Campbell, Chair; Elizabeth Cabraser, Esq.; Judge Steven M. Colloton; Professor Steven S. Gensler; Judge Paul W. Grimm; Peter D. Keisler, Esq.; Dean Robert H. Klonoff; Judge John G. Koeltl; Judge Michael W. Mosman; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Anton R. Valukas, Esq.; and Hon. Tony West. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Associate Reporter. Judge Mark R. Kravitz, Chair, Judge Lee H. Rosenthal, outgoing Chair, Judge Diane P. Wood, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris attended as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., was the court-clerk representative. Peter G. McCabe, Jonathan C. Rose, Benjamin Robinson, and Andrea Kuperman, Chief Counsel to the Rules Committees, represented the Administrative Office. Judge Jeremy Fogel, Joe Cecil, and Emery Lee represented the Federal Judicial Center. Ted Hirt, Esq., and Allison Stanton, Esq., Department of Justice, were present. Observers included Alfred W. Cortese, Jr., Esq.; Joseph Garrison, Esq. (National Employment Lawyers Association liaison); John Barkett, Esq. (ABA Litigation Section liaison); Chris Kitchel, Esq. (American College of Trial Lawyers liaison); Kenneth Lazarus, Esq.; John Vail, Esq. (American Association for Justice); Thomas Y. Allman, Esq.; Robert Levy, Esq.; Ariana J. Tadler, Esq.; William P. Butterfield, Esq.; Jonathan Redgrave, Esq.; John K. Rabiej, Esq. (Sedona Conference); Jerry Scanlon (EEOC liaison); Professor Lonny Hoffman; and Andrew Bradt, Esq.

Judge Campbell opened the meeting by greeting Committee members, committee support staff, and observers. The Committee appreciates the interest shown by the observers in the Committee's work, and welcomes the presence of several staff lawyers for the House Judiciary Committee.

Two new Committee members were also greeted. Dean Klonoff is a graduate of the University of California at Berkeley, and the Yale Law School. He clerked for the Chief Judge of the Fifth Circuit, practiced with Jones Day for many years, took a chair on the law faculty at the University of Missouri, was a Reporter for the ALI Principles of Complex Litigation, and is Dean of the Lewis and Clark Law School. Judge Oliver is a graduate of Worcester College and NYU Law School; he also has a masters degree. He clerked for Judge Hastie in the Third Circuit. As Assistant United States Attorney he served as chief of both civil and appellate divisions. He also was in private practice, and has taught at the Cleveland-Marshall College of the Law. He has been a judge since

1994, and now is Chief Judge of the Northern District of Ohio.

Jonathan Rose was welcomed as the new Rules Committee Support Officer; most recently he has been a partner at Jones Day, and has served in a variety of federal government positions. Benjamin Robinson is the Deputy Rules Officer and Counsel; he too comes to the Administrative Office from Jones Day.

This is the final meeting for Professor Gensler, who has completed serving his two terms. He has provided much wise counsel during his time as member, and can be expected to continue to help the Committee in other roles. Judge Kravitz will return to the Standing Committee, this time as Chair. The Civil Rules Committee gained immediate benefit from his earlier years on the Standing Committee, and will benefit from his wise guidance as Chair. Judge Rosenthal has been CEO, presiding judge, chief architect, and mother superior of the rules process. As difficult as it will be to succeed her, Judge Kravitz will carry forward the outstanding tradition of her work. Andrea Kuperman, who began as Rules law clerk for Judge Rosenthal, will transition to serving in the same role for Judge Kravitz.

Judge Fogel, of the Northern District of California, is the new head of the Federal Judicial Center. The Committee has depended on support by the FJC research staff for many important projects. Several ongoing research projects attest to the role the FJC has played; the Committee will continue to draw as heavily on the FJC as can be fit into the many competing demands for its work.

STANDING COMMITTEE REPORT

Judge Kravitz reported on the June Standing Committee meeting and the September Judicial Conference meeting. There were no rules items on the Judicial Conference calendar. The Standing Committee considered the current Rule 45 proposal, liked it, and approved publication for comment. The Standing Committee also discussed the activities of the Duke Conference Subcommittee and other Civil Rules projects.

Judge Kravitz added that while chair of this Committee he had achieved outstanding results by delegating the most important work. Judge Campbell did a great job in leading the Discovery Subcommittee through, among other things, the Rule 45 proposal and the initial stages of the work on preservation, spoliation, and sanctions. Judge Koeltl did a masterful job in orchestrating the Duke Conference, and has followed through with the Duke Conference Subcommittee. Other Subcommittee chairs have done as well, albeit with less onerous tasks. It is good to turn the reins of the Committee over to Judge Campbell.

APRIL 2011 MINUTES

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

LEGISLATIVE ACTIVITY

Andrea Kuperman reported on legislative activity that bears on the Civil Rules.

The Law Abuse Reduction Act, introduced in both the House and the Senate, is the latest in a long string of bills that would restore the 1983 version of Civil Rule 11, superseding the changes made in 1993. Professor Hoffman testified against the bill at a House hearing in March. The FJC did extensive research on the 1983 version, finding it caused many problems. There is no indication that the 1993 version has called any problems. The American Bar Association Litigation Section and the American College of Trial Lawyers oppose the bills. The bill has been reported by the House Judiciary Committee. There has been no activity in the Senate.

The Sunshine in Litigation Act is similar to prior bills dating back through several Congresses. The common feature is to require specified findings of fact before entering a protective order, or approving a settlement, to ensure that the order does not prevent dissemination of information relevant to the public health and safety. The new version is different from earlier bills because it is limited to actions in which the pleadings show issues relevant to the public health and safety. The rules Committees have opposed these bills over the years. The Senate Judiciary Committee has favorably reported a bill, but it has not yet been taken up in the Senate. The House bill has not been taken up.

There is no legislation currently pending to address the *Twombly* and *Iqbal* decisions.

HR 3401, the Consent Decree Fairness Act, would establish term limits on injunctive relief against state and local officials. It would require scheduling order timing and content different from Civil Rule 16(b). It would apply in only a narrow set of cases.

DUKE CONFERENCE SUBCOMMITTEE

Judge Koeltl delivered the report of the Duke Conference Subcommittee. The Subcommittee was formed to deal with many of the questions addressed at the May, 2010 Conference at Duke Law School. Pleading issues have been left on a separate track, and issues relating to preservation and spoliation of discoverable information have been left with the Discovery Subcommittee. This Subcommittee deals with the "great other."

A wide variety of proposals have been advanced to serve the cause of greater speed, efficiency, and justice. These are the

goals of Rule 1.

Many paths are open to pursue better results under present rules without need for any rules amendments. The Federal Judicial Center is developing several means of improving judicial education programs and resources by emphasizing the flexible and powerful management tools available today. Committee members, particularly Judges Kravitz and Rosenthal and Professor Gensler, drafted important portions of the new benchbook for judges, focusing particularly on Rule 16 conferences and the relationships between Rules 16 and 26. The Sedona Conference has added the advice that it is really important to encourage chief district judges to urge effective use of these rules.

Pilot programs also can be encouraged. They will work best when they are framed from the beginning in ways that will enable the Federal Judicial Center to provide rigorous evaluation of the results. The Seventh Circuit e-discovery pilot program was already under way, and was described at the Conference. Since then the Northern District of California has adopted an expedited Trial Procedure.

Another project has just been launched in the Southern District of New York, the Pilot Project Regarding Case Management Techniques for Complex Civil Cases. The Project had its genesis in the Duke Conference. Judge Scheindlin chaired the Judicial Improvements Committee that drafted the program, with the help of a very distinguished advisory committee that was widely representative of the bar and clients. The lawyers were really enthusiastic about the project. The full Board of Judges, including all active and all senior judges, adopted the program. Not every judge was enthusiastic — the program includes things that some had not been doing. But the board decided to adopt the project as a court project; all judges are participating. The procedures reflect the court's trust of the bar. The court respects the recommendations, and will attempt to do what the lawyers asked. The program will run for 18 months. The FJC is surveying lawyers in closed cases to provide a baseline for studying the project's impact. They are asking questions on such matters as whether there was a Rule 16 conference? A Rule 26(f) conference? Were they useful? The FJC will conduct another survey at the end of the project. The second survey will be facilitated by adopting a set of docket flags to be used by court clerks for cases handled under the project.

The Southern District procedures include shortening the time set by Rule 16(b) for the scheduling order from 120 days after service to 45 days after service. The court is to do more than "consult" with the lawyers; there must be an actual conference, although it can be accomplished by phone or other means short of a physical meeting. There is a long list of subjects to discuss at the Rule 26(f) conference, and then at the Rule 16 conference.

Discovery disputes are resolved by letter submissions, not motion; "we don't have discovery motions." A Rule 12(b)(6) motion stops all discovery other than Rule 34 discovery of documents and electronically stored information. The number of Rule 36 requests to admit is limited to 50. A lawyer who wishes to file a motion must have a pre-motion conference with the court. Attorneys were unhappy with the Local Rule 56.1 statement, thinking it too long and too expensive; if the parties request and the court approves, the statement need not be filed. If the court requires a statement, it must not exceed 20 pages per party.

A pretrial report by the lawyers is required after fact discovery, and before expert discovery.

It will be important to attempt to measure how effective these innovations are. The court has some reservations about the ability to achieve rigorous measurement.

The Committee has encouraged another endeavor, development of a discovery protocol for employment cases. The project was fostered by the bar. The drafting group included plaintiffs lawyers, headed by Joe Garrison, and defendant lawyers, headed by Chris Kitchel. They inspired wonderful work, despite initial obstacles: "with litigators, you know"? Many of the participants began by opposing elements favored by the other side: "never." But ultimately, after a series of meetings and conference calls, and with the help of the IAALS and Judge Courlis, they finished the job "in the best spirit of the bar." The resulting protocol is endorsed by the plaintiff lawyers and the defendant lawyers. It is an intelligent, thoughtful way to begin the litigation. It recognizes the information that reasonably will be produced, and aims to get it produced more directly than the usual discovery process, and early in the litigation. This will enable the parties to evaluate the case, and to move it ahead to the second wave of discovery if it is fit to move ahead. The second wave itself will be better focused.

Chris Kitchel noted that the protocol was developed through vigorous debate. Judge Koeltl and Judge Courlis were a great help. And it was a great committee. The work began with discussion by Judge Rosenthal with Kitchel and Garrison at the Duke Conference. The protocol itself identifies the information lawyers should really want at the beginning of the action, the information that will enable the case to go forward before formal discovery. The protocol will replace initial disclosures. The group worked hard to make sure the obligations are mutual.

Joe Garrison repeated the observation that Judge Courlis was a very good facilitator in resolving what seemed to be intractable disputes.

Further discussion described some aspects of the protocol.

The information is to be exchanged 30 days after the first response to the complaint. The protocol will work better if there are no extensions. No objections are allowed, other than to preserve privilege. The ban on objections is the most important part; the protocol will not work if objections are allowed. The materials also include a proposed protective order, but it is a "check-the-box" form because the participants could not agree on a single uniform order. There is a difference of opinion on whether discovery can be stayed on filing a Rule 12(b)(6) motion, but it is accepted that a stay may be appropriate if the action seems frivolous on the face of the pleadings. The protocol applies to pro se parties as well as to represented parties.

Although the protocol does not address the Rule 26(f) conference, the conference will be important. It can help, for example, in forging agreement on a proposed protective order.

Joe Garrison stated that the effort now should be to implement the protocol. The work can begin by persuading the FJC and IAALS to post the protocol on their web sites. It also would be desirable to post a list of the judges who are using the protocol around the country. This information will make it much easier to adopt the protocol in other courts. Adoption can be accomplished by a standing order, entered by an individual judge. The order should be entered before the Rule 16 conference. It also will be good to encourage judges to comment on what is working, and on what can be improved. A volunteer committee of three judges was later formed to help Joe Garrison and Chris Kitchel with monitoring and implementing the protocol. They are Judges Koeltl, Mosman, and Rosenthal. Judge Fogel has agreed to send out a message from the FJC notifying chief district judges of the protocol, and urging adoption. The letter will note that all the district judges on the Civil Rules Committee are adopting the protocol. Those judges also will urge adoption by other judges in their districts.

New pilot projects in other courts will be encouraged. Emery Lee has agreed to be the clearing house for other projects. Judge Kravitz noted that Judge Fogel had sent a message to all chief district judges asking that they identify all pilot projects, and thanked Judge Fogel for doing that. All projects that are identified will be listed on the FJC web site.

Beyond judicial education, ongoing empirical work, and pilot projects, the Duke Subcommittee also has an agenda of possible rules amendments. The list has been whittled down over time, but additions also have been made and observers are invited to make suggestions. One of the relatively recent additions is a proposal to add new limits on the numbers of discovery events, adding numerical limits to Rule 34 and Rule 36, and perhaps reducing the limits in at least Rules 30 and 31. The limits could be set to reflect the median experience revealed in the FJC survey for the Duke Conference, perhaps with a slight margin. For example, the

limit to 10 depositions per side might be reduced to 5, better reflecting the fact that in a majority of cases the parties take only 2 or 3 per side.

The focus of rules proposals has been on the beginning of litigation. The time for the Rule 16(b) scheduling order could be accelerated, and an actual conference could be required. The need to actually hold a Rule 26(f) conference could be underscored. The Rule 26(d) discovery moratorium could be changed by providing that discovery requests can be made before the Rule 26(f) conference, although responses are not required until a time after the conference. The conference would then be better focused on at least the initial discovery requests actually made in the case. (It was noted that even good lawyers seem to forget the moratorium, as shown by requests to stay discovery before the 26(f) conference. And they may forget that in many cases the moratorium obviates any occasion to seek a stay of discovery pending disposition of a Rule 12(b)(6) motion because there has not yet been a Rule 26(f) conference.)

Emery Lee described ongoing and pending FJC research projects to support these efforts. A docket study aims at measuring the frequency of scheduling orders, the time entered, the typical length of discovery cut-offs, and the holding of Rule 26(f) conferences. They are surveying lawyers in the Southern District of New York as the foundation for measuring the effects of the complex case management pilot project. Next February a questionnaire will go out to lawyers seeking information about the second phase of the Northern District of Illinois e-discovery pilot project.

So far there have not been many responses to the FJC message asking about local experiments. It is not yet clear what should be done with the information as it accumulates.

The work on scheduling orders and Rule 26(f) conferences has progressed to the point of an initial report on scheduling orders and discovery cut-offs. It has proved difficult to identify scheduling orders in the CM/ECF system. Courts use different codes for scheduling orders. Some of the codes bury this information "deep in the docket leaves." Many can be found by searching for a discovery cut-off. But not all. The search has turned up more than 11,000 scheduling orders. The median date of entry is 106 days from filing the action; the mean is 120 days. The median discovery cut-off is 6.2 months, or approximately 10 months from filing to the first discovery cut-off. This initial search will be followed by a nationwide closed-case survey. A closed-case survey, however, encounters difficulties. Lawyers' memories often fade as to closed cases. Even identifying the attorneys who were involved in a case at the time for a scheduling order or Rule 26(f) conference may prove elusive because the lawyers who were on the case when it concluded may not be the same as those who filed it,

particularly in complex cases.

Judge Koeltl noted that the Duke Subcommittee agenda also includes three proposals by former Committee member Dan Girard to reduce evasion and stonewalling. One frequent problem is that a party objects to document requests in broad blanket terms at the outset, then produces documents "subject to the objections," but does not say whether some document have been withheld from production because of the objections. The Lawyers for Civil Justice group opposes the Girard proposals; he has responded to their objections. The proposals continue to command a place on the agenda.

Other rules topics include adding express provisions requiring cooperation among lawyers. Rule 1 could be amended to require the parties as well as the court to act to achieve the just, speedy, and inexpensive determination of every action or proceeding. Cooperation also could be built into Rule 16 or the discovery rules in various ways; all that exists now is a reference in the title of Rule 37, a remnant of an abandoned proposal to insert a duty to cooperate into rule text.

Proportionality continues to be an object of concern, particularly with respect to discovery. Proportionality is made an explicit requirement in Rule 26(b)(2), and Rule 26(b)(1) — as well as other rules — expressly invokes (b)(2). Proportionality also can be implemented through Rule 26(c) protective orders. And the FJC survey for the Duke Conference suggests that for a great many cases, discovery is held within appropriate limits proportional to the needs of the case. But it also seems clear that discovery can run beyond what is reasonable. When courts of appeals discuss the scope of discovery, they seldom mention proportionality. New rule provisions might yet provide some help, perhaps as part of Rule 26(b)(1) defining the scope of discovery.

Much of the Subcommittee's focus will be on the beginning of litigation. As already noted, Rule 16(b) might be revised to require an actual conference among the attorneys and a judicial officer, whether or not in person. The time for the scheduling order could be advanced. The scheduling order provisions might be expanded to include a date for explicitly abandoning claims or defenses that a party has decided not to press further. A provision might be added to address stays of discovery pending a motion to dismiss. And as also already noted the Rule 26(d) moratorium might be reconsidered, perhaps to allow discovery requests to be made — but not answered — before the Rule 26(f) conference.

Discovery cost-shifting also may be considered. And the time for serving contention interrogatories might be considered, creating a presumption that they are appropriate only after fact discovery has closed.

Discussion began with an observation that the case law on cost taxation for discovery is growing. The amendment of 28 U.S.C. § 1920 to allow costs for "exemplification" has led some courts to expansive awards of costs for responding to discovery of electronically stored information. The conduct of e-discovery could be dramatically affected by a string of cost awards in the hundreds of thousands of dollars.

Judge Campbell noted that Arizona sets a presumptive 4-hour limit to depositions. About half the lawyers who appear before him stipulate to adopting this limit. The result is better-focused depositions. And his Rule 16 order limits the parties to 25 requests to produce under Rule 34 and 25 requests to admit under Rule 36. Requests to expand these limits are made in about 5% of his cases. They work.

Another observed that the Sedona Conference is discussing the interplay between Rule 16 and Rule 26, and will have some suggestions.

It also was noted that the panel discussion of the "rocket docket" practices in the Eastern District of Virginia to be held at this meeting is part of the Duke Conference Subcommittee program.

The possibility of holding a second "Duke" Conference in the spring of 2013 is being considered. At least one purpose would be to present concrete proposals for rule amendments for discussion and evaluation. To do that, concrete proposals must be developed. The goal would be to present a package of changes that work well together, and that will be acceptable to lawyers "on both sides of the v." There also should be room to hear "bigger picture" proposals. No final decision has been made whether, or when, to hold a second conference of this magnitude.

The final part of the Duke Conference Subcommittee report addressed a "mailbox" suggestion by Daniel J. DeWit proposing adoption of a new Rule 33(e). This rule would authorize a party who serves a request to admit under Rule 36 to serve with the request an interrogatory asking whether the response was an unqualified admission. If not an unqualified admission, the responding party should state all facts on which the response is based, identify each person who has knowledge of those facts, and identify all documents and tangible things that support the response. The Subcommittee recommends that this suggestion be dropped from the Committee agenda. The proposed provision would "add clutter" to the rules; it would generate disputes; and the described information can better be got by other means. The Committee unanimously approved a motion to drop this item from the agenda.

DISCOVERY: PRESERVATION AND SANCTIONS

Judge Campbell began the discussion of preservation and sanctions by observing that these questions were raised by a very distinguished panel at the Duke Conference. The panel presented a unanimous recommendation that the Committee do something to address these problems. The recommendation included a list of issues that might be addressed by rules provisions. The Discovery Subcommittee began work in the fall of 2010. It has had several meetings and conference calls. It held a miniconference in Dallas on September 9, 2011, hearing a wide range of views from many lawyers, technology experts, and others. Suggestions continue to arrive from many groups, down to a November 6 letter from Ariana J. Tadler and William P. Butterfield. The flow of additional information will continue, and is encouraged.

Judge Grimm introduced the Subcommittee report by praising the September 9 miniconference as tremendously educational for everyone involved. There were many submissions before the conference began. Some presented empirical work. Others were based on experience. There were formal papers and other submissions. This wealth of material is included in the agenda book for this meeting; along with a few pages of notes on Subcommittee discussions, the material runs from page 87 through page 516. The round-table discussion involved many people. The Subcommittee has held two conference calls after that.

One submission, by Robert Owen, a private practice attorney, presents 26 pages of specific recommendations for radical reform. The views expressed reflect the concerns of many. Current law is inconsistent and imprecise. There seems to be an assumption that there is a lot of destruction. Current rules on proportionality in discovery are not adequate to the need to protect against requiring preservation of disproportionately large volumes of information before litigation is even filed. The operating regime has changed from "do not destroy" to "preserve everything." The suggestions include these: (1) Carry forward the prohibition against intentional destruction. (2) The trigger for a duty to preserve should be actual notice of the filing of an action or a petition to a government agency. (3) Rule 27 should be amended to permit courts to enter a prefiling order to preserve information, on a showing of good cause. (4) The scope of preservation should be limited to the claims pleaded in the complaint. The duty should be confined to materials in the possession, custody, or control of a party and used in its regular affairs. (5) Punitive sanctions should be available only on a showing of bad faith.

The Lawyers for Civil Justice proposals made after the Dallas miniconference discuss the economic benefits that would be achieved by clear rules on preservation and sanctions. There should be a clear trigger for the duty to preserve: a reasonable expectation of the certainty of litigation. The duty should be defined by concise scope and boundaries. It should be limited to information in a party's possession, custody, or control and used in the ordinary

conduct of business or personal affairs. Non-active information need be preserved only on a showing of good cause. No more than 10 key custodians need be required to preserve, and preservation is required only for a period of two years preceding the preservation trigger. The information should be that relevant and material to a claim or defense. Sanctions should be awarded only for willful and prejudicial conduct intended to prevent use in litigation.

The Sedona Working Group 1 has devoted much time and energy to discussing the issues explored in Dallas. The Subcommittee is grateful for their work.

The materials for the Dallas miniconference sketched three different approaches to drafting a preservation rule. The first, taking many of its cues from the Duke panel suggestions, provided comprehensive and specific rules for triggering the duty to preserve, defining its scope and duration, and establishing sanctions. The miniconference discussion suggested several difficulties with the specifics, and the Subcommittee concluded that this approach would require a great deal of work to generate specific provisions that might soon be superseded by advancing technology. The second approach also addressed trigger, scope, duration, and sanctions, but only in general terms: reasonable scope, and so on. This approach offered so little guidance as to be of little apparent use. The third approach focused on sanctions, in part because the fear of sanctions is said to drive many companies to preserve far more information than reasonably should be preserved, and in part because of the wide differences among the circuits in setting the levels of culpability required for different sanctions. This approach would not directly define a duty to preserve, but limiting the definition of conduct that supports sanctions would provide implied directions about what preservation is required. It won the Subcommittee's tentative support as the most promising path to be pursued. But the Sedona group thinks it premature to attempt even this approach. They think it better to attempt to strengthen Rules 16 and 26(f), and to pursue further education of bench and bar.

Opponents of adopting any preservation rule argue that Enabling Act authority does not extend to a rule that would require preservation before an action is filed in a federal court. The Subcommittee decided to carry this question forward in a general way. It seems best to attempt to draft the best rule that can be crafted, and then to focus the Enabling Act inquiry on this specific model.

Professor Hubbard, at the University of Chicago, provided a thought-provoking article. He begins with the reflection that judges and lawyers evaluate preservation decisions in hindsight, while actual preservation decisions must be made ex ante. Judgments should be based on what was reasonable in prospect, not on what seems reasonable with the benefit of hindsight.

Proportionality cannot be measured by the judge, who often will not have the information needed to measure preservation in reasonable proportion to the needs of the case. It is better to place responsibility on the parties. And the responsibilities must be distinguished: not to spoliate; to preserve; to retain in light of the obligations imposed by law independent of preservation for litigation; to produce. A duty to preserve is not the same thing as a duty to not spoliate. When there is a duty to preserve, it should be defined by setting a presumptive limit on the number of custodians who must be directed to preserve. With even a generous limit such as 15 custodians, having a limit will provide a focal point for bargaining between the parties. Without giving at least this much presumptive protection to the party that has a disproportionate share of the information, the party who has little information has no incentive to bargain to a reasonable preservation regime. Sanctions should be imposed for loss of information only on showing a guilty state of mind. The rules should be amended.

The Tadler-Butterfield letter urges it is too early to adopt comprehensive rules changes. The 2006 amendments addressing discovery of electronically stored information are only 5 years old. Important questions have been raised, but there is no need for the level of change recommended in any of the models.

The Subcommittee now seeks direction from the Committee. What direction should be followed? Do nothing? Is it time to draft a proposed rule, or should more information be gathered? What should a proposed preservation rule look like? If not a preservation rule, would it be better to draft a sanctions rule that backs into preservation and indirectly reduces the fears of those who are over-preserving?

Professor Marcus carried the discussion on, stating that the basic message is one of caution "in dealing with things we do not fully appreciate or understand." The Committee first began thinking about these sorts of problems more than 15 years ago. From 1997 to 2003 it was uncertain what approach to take. Preservation was a concern then, as now. After a temporary impasse, the Committee moved ahead toward adoption of what now is Rule 37(e). "Facebook did not exist then." And new technologies continually appear that require consideration. One recent example is news of a program that sends and receives e-mail messages without leaving any record. But it may be that for the time and the problems that were addressed, "we got it about right." The letter from RAND in the materials argues that the law may be relatively stable vis-a-vis technology with respect to the part of the discovery cycle that involves actual production of information.

Preservation law and practice is not stable. The agenda book summarizes the many divergent thoughts that have been expressed to the Subcommittee. Fifteen years ago the Committee proceeded

cautiously, with deliberation. How fast should we move now? Proliferating social media, smart phones, all sorts of hard- and software developments raise all sorts of questions. But there is a "very much enhanced concern" with preservation that may justify attempts to move toward rules changes.

Judge Campbell recounted the Dallas conference descriptions of the problems corporations face. A big corporation with 200,000 employees may lose or transfer 10,000 of them every year. We heard of a corporation that had 10,000 employees under a litigation hold. One company told of spending $5,000,000, increasing at a rate of $100,000 a month, preserving information against the prospect of litigation that had not yet even been filed. There is a great concern about differences in the standard of fault that supports sanctions. The consequence is that people over-preserve.

As serious as the problems are, there are many ongoing efforts to develop more information to support better-informed rules proposals. The problem is real. The risks in addressing it prematurely are real. Should the Subcommittee at least work toward developing a draft or drafts that might be considered for a recommendation for publication at the March meeting?

Discussion began with agreement that these are really tough questions. But does the prospect that technology will change continually justify a failure to do anything, ever? People are very concerned about the ex ante duty to preserve. "The trigger is very important." It is all very difficult. "But perhaps we should do something now."

A committee member expressed similar troubles about the trigger, but suggested that "sanctions is the area where we can do something now." Attempting to define a trigger would be hard. No reputable corporation will chance sanctions. The result is to preserve under the most severe view. "I would not defer a uniform rule on sanctions."

The Committee was reminded that these questions overlap the rules of conduct for lawyers. Professional obligations also will engender very conservative behavior. The Committee should proceed with great caution. This theme recurred. "Everything comes down to attorney conduct." Years ago, the Standing Committee worked on developing federal rules of attorney conduct. It held three major conferences, and then gave up. Although the Committee was concerned about Enabling Act limits, interested members of Congress thought the subject is within the Act. The result today is that most districts adopt a dynamic conformity to local state rules. Local rules usually are the ABA Model Rules, with some local adaptations. The rules forbid unlawfully obstructing another party's access to evidence, and speak in other ways to issues that bear on preservation. Sanctions can be imposed under the state systems of attorney regulation. "This is very difficult. But that

is not to argue we should do nothing." Responding to an observation that the attorney discipline rules do not command federal courts to impose Rule 37 sanctions, it was noted that lawyers do have to worry about state sanctions. But it was suggested that state sanctions may be a source of "angst that we cannot do anything about." The Code of Conduct for judges, indeed, obligates judges to notify disciplinary authorities of lawyers' violations of professional responsibility requirements.

Another member suggested that the attempt to focus on spoliation as the easier target cannot really succeed because preservation is so tightly tied to spoliation. And a rule on sanctions will lead to emergence of new specialists in how to litigate spoliation issues. Who will decide those issues? "We cannot escape" defining triggers for the duty to preserve.

A Subcommittee member noted that at the end of the September miniconference he had suggested the Committee should think hard about the advantages of doing nothing. But that probably is not the best answer. "At least a sanctions rule is necessary." And it may prove that a workable sanctions rule cannot be completely divorced from trigger and preservation issues. A rule must attempt to hit a rapidly moving target. The proposal that the obligation to preserve should be triggered by a "reasonable expectation of the certainty of litigation," for example, does not provide real certainty in the current landscape.

Another Committee member observed that although it is possible to think about a sanctions rule rather than an express preservation rule, the separation is difficult. If different courts have different concepts of trigger, scope, and duration, the outcomes will be different. "How do you plan to avoid sanctionable behavior"?

Yet another Committee member thought the submissions to the Subcommittee are impressive. Some urge that we do nothing, implementing the principle that the first thing is to do no harm. Others urge that attempting specific or general rules on trigger, scope, and duration is too risky, but that a sanctions rule may be feasible. There are variations on the level of detail that might wisely be incorporated in a sanctions-only approach. It is possible to craft a sanctions rule that incorporates an idea of reasonable conduct that should not be sanctioned. "The number of cases where this actually comes up is limited. People self-regulate for fear of extreme cases." At the end, it seems likely that an explicit preservation rule, whether one that expresses detailed obligations or one that simply directs reasonable behavior, will not repay the effort of creating it. But a creative sanctions rule may be useful to protect against extreme behavior. "People will talk more and that will reduce problems."

Committee discussion continued with the view that a sanctions

rule will provide only limited help with the preservation obligation. The guidance "will be hard to build on." "But a uniform rule on sanctions is important even if it does not address preservation." The rule is likely to come up short of the most demanding present standards, and in this way will provide some comfort. Preservation is important. The Committee should continue to work on it as a highly significant problem.

An observer suggested that there is a "big Erie problem." The source of the duty to preserve bears on the cure; is it state law? federal procedure? substantive law? There also is a nomenclature issue — what *is* a "sanction"? A curative order is not a sanction, and any rule must draw the distinction. An order directing additional discovery, or shifting costs, to compensate for the loss of information is not punitive. "Negligence is better fit for curative orders than for sanctions."

The diversity of present law was explained in part by looking to the charts breaking the questions down by circuit. Most of the decisions are district-court decisions. Courts of appeals do not often get these cases. That may provide added reason for adopting a rule, achieving greater national uniformity.

The value of working toward a sanctions rule was further underscored by urging that success would produce national harmony, "replacing present cacophony." It is not good to have many different standards in different courts. Negligence, for example, might support cost-shifting, but not adverse inferences. It may not ever be possible to create a satisfactory preservation rule, but it makes sense to move ahead on sanctions. In any event, the Standing Committee may incline toward a conservative approach, welcoming a uniform sanctions rule, recognizing a preservation rule as presenting an ongoing challenge that deserves continued attention but may not yield to early answers.

The Committee was reminded that the 2006 amendment of Rule 37 was narrow. It was conceived as a first step. "It was an essential first step because of the degree of anxiety that had already developed." It was an attempt to catch up with the fact that with automated information systems, "doing nothing can cause the destruction of information." It was understood that the Committee would continue to study the problem. Electronically stored information is different from paper information in these dimensions. Are more changes needed? Reducing the fear of sanctions may reduce the extent of over-preservation. "It can be good to do something, rather than risk never doing anything."

Turning to scope, it was suggested that the preservation obligation leads to discovery. Should the scope of the duty to preserve be tied to the scope of discovery? Or should it be something less than everything that can be anticipated to fall within the scope of discovery after litigation is filed? It might

prove awkward to define a scope of preservation different than the scope of discovery. And it may be that the Duke Subcommittee will recommend that the scope of discovery be narrowed; that would bear on the scope of preservation, reducing the burdens.

All of this discussion, initially focused on whether to attempt anything, clearly moved in the direction of counsel about what to do. A transitional summary was offered. Defining the trigger for a preservation duty is the subject most likely to raise concerns about making changes to the common law. The notion of spoliation goes back a long way; it is anchored in an 1817 Supreme Court decision, which in turn has roots in the common law. But would it help to have a rule that identifies conduct that is sheltered? Is it possible to address proportionality in preservation, compare the present discovery rules? As Professor Hubbard's article points out, the parties have to make preservation decisions, and courts enforce proportionality. A sanctions rule can address reasonable care, proportionality, attempts at discussion among parties or intending parties to solve the problem (as compared to an over-reaching preservation demand letter). Is it indeed legitimate to build into a sanctions rule factors that will protect reasonable behavior?

The Committee was reminded of the recommendation that it will work best to devise the most attractive rule that can be drafted, and then to determine whether it can be squared with the Enabling Act. A sanctions rule could be more detailed than any of the drafts yet devised. And "Rule 37 sanctions in a case actually before the court seem to fall in the heartland of § 2072."

The Subcommittee began with the view that it should restate the generally accepted definition of the events that trigger a duty to preserve: a reasonable expectation of litigation. But recent discussion has suggested that the common and general rule should be changed, that it creates problems that should be addressed. The Department of Justice, on the other hand, disagrees.

Defining the scope of the duty to preserve also is a problem. Actual rulings on actual questions are not easy to predict. That makes it difficult to decide on what to preserve, particularly before litigation is filed. Specifics could be built into a sanctions rule, such as a presumptive upper limit on the number of custodians to be directed to preserve, but this approach might encounter difficulties. Or the limit could be built into "Rule 26." The number of custodians could be set, for example, at 15, requiring good cause to raise the number. The attorneys would be required to confer before making or opposing a motion to raise the number. And the presumptive limits would tie back to measuring what it is reasonable to preserve. Still, it is not clear whether such a rule would make a difference. The proposal that became Rule 26(b)(2)(B) caused consternation when it was published; it is not clear whether it has made any difference in practice.

The concept that Rule 37 limits on sanctions may be appropriate was said to rest on the belief that inherent authority is what authorizes sanctions under present practice. If a sanctions rule gets it right on the level of culpability for different sanctions, the Chambers v. NASCO, Inc. [501 U.S. 32 (1991)] concept of inherent authority would likely not be a serious threat.

Concern was expressed that this discussion reinforces the fear that it is premature to begin drafting. The position of the Department of Justice has been described as "do nothing," but that is not accurate. Instead the Department believes it is important to work toward a careful approach. With pleading, the Committee has declined to rush into rule drafting. It is wise to wait to sense the scope of any problems, so as to draft a workable solution. What we have now is a snapshot. We need a better sense of the direction of the law, about effects on pro se litigants, about access to information, and about access to justice. "There is a lot to do. Drafting language is premature."

Another Committee member suggested that "there is a real problem." A sanctions rule would not get directly to preservation. Thought should be given to developing a preservation rule. "We should not give up on that, even if we do sanctions first."

The virtues of going slowly about the task were suggested from a different perspective. There are choices intermediate between creating a rule now and doing nothing. Education of bench and bar might accomplish something. "If huge numbers of litigants do not experience preservation as a big problem," immediate drafting efforts may not be justified. A similar thought was that there is room to go forward with drafting a rule, but it is unclear whether it is reasonable to aim to achieve a proposal for publication at the March meeting.

An observer said that "there is a vacuum. It is filled by judges deciding cases. A sanctions rule would be some help, but it would not help businesses to understand what they have to do. We need guidance."

Identifying the trigger for a duty to preserve came back for discussion. The first comment was that the RAND study discussed at the Dallas miniconference found that in-house people find the law clear. The Sedona Conference agrees. So does the chart of decisions prepared by Judge Grimm. A reasonable expectation of litigation triggers the duty to preserve. The differences arise in evaluating the established trigger. Some think it works. Others think it too broad, urging scaling it back to a reasonable anticipation of the certainty of litigation. And yet others would narrow it further, to arise only on the filing of an action or service of a subpoena. There have been strong reservations about proceeding with a rule in the shape of the specific model that

lists a number of specific triggers, such as receipt of a letter demanding preservation.

The next observation was that the common law "is causing the preservation of information far out of proportion to its value in litigation." If we have authority to do so, it would be good to limit the trigger. An observer challenged this view, opposing any change. Seizing on the "reasonable expectation of the certainty of litigation," this comment asked how this standard would work when a statute of limitations may extend for years into the future?

Examples given at the Dallas miniconference were recalled. A duty to preserve may properly arise "before there is a lawyer even in sight." "A patient dies in the operating room; an engine falls off an airplane." "We have to continue to work on preservation, even though we may never succeed in crafting a workable rule." Judge Scheindlin, who has dealt with these issues extensively, believes it would be sensible to adopt a rule.

A district judge offered several thoughts. Some companies now have specialists in e-discovery on staff. One case illustrates a special problem — it is a patent infringement action pending in Delaware and California; the different courts have different preservation standards. The resulting costs run in the tens of millions of dollars. Technology is changing rapidly; "you can store almost anything easily in the cloud." And the Supreme Court decision in the MedImmune case changes the trigger — it is not the certainty of litigation, but something much looser.

It was asked what policies should be followed in defining the trigger. Is it to save money? Protect access to information? A firm has many reasons to preserve information, including state and federal regulation and business reasons. What problems are we trying to solve in adopting an independent duty to preserve for litigation? In patent cases, for example, there will be a huge preservation endeavor independent of any rule-based duty to preserve. "We need a better sense of the reasons to move toward adopting a rule."

A Committee member responded that there *is* a class of corporations spending a lot of money on what they think is unnecessary preservation. "The value of uniform standards for sanctions is real. This is a significant problem. Can we address it"? Identifying the trigger is a problem. Most firms assume the common-law trigger. The disparate standards for sanctions also present problems.

Preservation duties and sanctions affect plaintiffs as well as defendants. The problem is important. Whether or not a publishable proposal can be drafted by March, it is important that work on a sanctions rule should go forward.

A broader conceptual approach was suggested. "Over-preservation is an error. So is under-preservation. We cannot build an error-free system. So how do we define success"? Is it an acceptable error rate for parties acting in good faith? Should we weight differently the costs of over- and under-preservation? The best we can achieve will be clarity. Certainty is not within reach.

The first response to this question was that it would be a success to reduce the consequences of under-preservation, to reduce the tendency to over-preserve. A rule change will not give certainty. But there is a chorus of people who request information — mostly plaintiffs — who fear that needed information will not be there. And those who are called upon to produce information fear sanctions, and the reputational effect of sanctions. Neither side can be fully protected by a rule.

So a Committee member agreed that it is good to conserve resources, to avoid wasting time and resources on litigation. But "it's not just about the parties, or the court system." There is also a public interest in deciding controversies on the merits. "We cannot easily monetize that." Preservation entails cost, but the cost is constantly diminishing. "The cost of error on the merits will not diminish." The goal of certain guidance to litigants should not be reached by creating a loophole for non-preservation. And the trigger for preserving information in anticipation of federal-court litigation should not be different from the rules and practices that guide real-world preservation of information in other ways.

The suggestion that the cost of preserving electronically stored information is small was met by observing that although the cost seems to fall continually per unit of information, there is an unending supply in the number of units. "We cannot say that the cost of preservation is de minimis." On the other hand, there is an independent reason to be wary of adopting a trigger based on the actual filing of an action — "we will have more cases filed."

Discussion of preservation obligations concluded by agreeing that this is a very important task. There is much yet to learn. The Committee and Subcommittee can expect to receive continuing submissions of new information and views; the submissions will be much appreciated. The Subcommittee will look for near-term solutions, such as sanctions. But "it should work as if all issues are still in play." The Subcommittee will report to the Committee at the March meeting.

RULE 45

Professor Marcus said that work on the proposed Rule 45 amendments that were published for comment in August could command an important part of the agenda for the March meeting. No one

asked to testify at the hearing that was scheduled for this morning; it was cancelled. It remains to be seen how many people will appear for the two hearings scheduled in January.

The published proposal sought to simplify Rule 45; to revise the notice provisions and make them more prominent; to reject the Vioxx approach to commanding a party or its officer to appear at trial; and to establish authority to transfer a nonparty subpoena dispute to the court where the action is pending. The Vioxx proposal was accompanied by a request for comment on an alternative that was not endorsed by the Committee, granting the court authority to command a party to appear as a witness at trial.

Modification of the notice provision expanded it to include trial subpoenas as well as discovery subpoenas. But it did not include any requirement of subsequent notice as information is produced in response to the subpoena. The American Bar Association Litigation Section feels strongly that notice of production should be required. There are likely to be extensive comments on that subject.

The standard to transfer a discovery dispute was set at consent of all, or "exceptional circumstances." There have been two written comments so far, pointing in different directions.

Another comment has suggested that a provision akin to Rule 30(b)(6) be adopted for trial subpoenas, so that a party could subpoena a corporation or other entity with a direction that it provide witnesses to testify on designated subjects. The Subcommittee considered this possibility early on, and rejected it for a variety of reasons. But it has been brought back and will be considered further.

The relative paucity of early comments was not seen as a sign that there will be few comments overall. The rate of submitting comments commonly accelerates toward the deadline. Early hearings often are cancelled; they tend to be held, and to be useful, when a proposal stirs deep controversy. These issues are presented in some pending MDL proceedings, providing an added incentive to comment.

CASE MANAGEMENT PRACTICES, EASTERN DISTRICT OF VIRGINIA

Peter Keisler chaired a panel presentation on the "rocket docket" practices in the Eastern District of Virginia. Panel members included Judge Leonie M. Brinkema; Judge Thomas Rawles Jones, Jr.; Dennis C. Barghaan, Jr., Assistant United States Attorney; William D. Dolan, III, Esq.; and Craig C. Reilly, Esq.

Judge Brinkema opened the presentation by summarizing: "The heart of the matter is not to waste time." The court has local rules and practices. But it also has "a shared judicial

philosophy." The court takes pride in being one of the fastest courts in the country. That helps the court. There are no "renegade judges," an essential part of making it work. It also helps the bar. The bar have become accustomed to the practice.

The practice begins with an early scheduling order. The order is one page long. It provides the structural framework. There is an early date for a Rule 16 conference with a Magistrate Judge. There is an early discovery cut-off, set for the second Friday of the month — usually about 16 weeks. Most lawyers know that when you file a case, "you need to be ready to try it soon." Final pretrial conferences are set for the third Thursday of the month. Lawyers file plans for these conferences, and know that trial will be held approximately eight weeks after the conference.

The scheduling order sets the time for objecting to exhibits. This cuts out a lot of work. The order limits the number of nonparty, nonexpert depositions to five. It also limits the number of interrogatories. "We are extremely strict about enforcing the order. But there is some flexibility."

"We do not let lawyers dictate the schedule." They cannot agree to extend the discovery cut-off or the like. They can agree to submit a joint motion, but the court may deny it.

"Another technique is to rule from the bench as much as possible." With adequate briefs and bench memos, the court should be able to rule on most motions after brief argument. "I do it on about 85% of motions." This saves a lot of time as compared to writing opinions.

The court uses its magistrate judges very efficiently. It avoids referring matters that call for a report and recommendations; that procedure uses the time of two judges.

Friday is motions day. Criminal motions are scheduled for 9:00, civil motions for 10:00. Lawyers know to notice motions for a Friday.

Judge Jones began his presentation by noting that from the perspective of a magistrate judge, the district judges "have not given up their independence." They agree with the docket practices. Empirical evidence shows that these practices achieve efficiencies and economies in managing their own dockets.

The standard management of pretrial matters is left to the magistrate judges up to the close of discovery. "The predictability for the bar enables us to move at the pace we do."

At the end of the pretrial schedule, each district judge sets up his or her own calendar for dispositive motions, motions in limine, other matters, and trial dates.

Several aspects of magistrate-judge management were described.

All nondispositive motions automatically go to the magistrate judge, with few exceptions. This enables lawyers to keep things moving. "An attorney cannot slow things down."

The magistrate judges work closely with the district judges on what they expect, and know when to consult with the district judge. A consent motion to enlarge time, for example, comes to the magistrate judge — and often is not granted.

There is a quick Rule 16(b) conference in every case. It may be held by telephone conference when the attorneys are experienced. The conference leads to a more detailed Rule 16 order. An effort is made to resolve problems in advance of the Rule 16 conference, addressing such matters as the number of depositions, known privilege issues, and production of documents and electronically stored information. This drastically cuts down on motions practice.

The court does not allow general objections. This works so well that it would be good to amend Rules 33 and 34 to disallow them. Lawyers, if allowed, often file general objections at the beginning of their responses, and then, addressing specific requests, provide answers "without waiving objections." That leaves no idea whether anything is being withheld. The court allows only specific objections.

The court encourages streamlined privilege logs.

A judge is available by telephone to rule on problems at depositions.

Final expert witness depositions are frequently allowed after the final pretrial conference. This works, and does not interfere with the trial date. "The goal is to get the case packaged for trial."

Peter Keisler introduced the lawyer members of the panel. Judge Brinkema and Judge Jones had extensive experience practicing in the Eastern District before going on the bench. "The current practitioners are essential to make the docket work." A lawyer from outside the district immediately associates an experienced Eastern District practitioner. "It *is* a different culture." "Justice Delayed Is Justice Denied" is carved over the courthouse door. Etchings inside the courthouse illustrate the fable of the tortoise and the hare — the court does not think of itself as the erratically speedy hare, but instead sees itself as moving at the steady, inexorable march of the tortoise.

At the beginning, there was some question whether to divide the presentation into two panels, lest practitioners be inhibited

in speaking frankly to their experiences. But that proved unnecessary. The court has a tradition of open and robust candor between bench and bar. The practitioners do not hesitate to speak freely.

Craig Reilly began by saying that the court has a spare set of local rules. Its practice is rooted in judicial philosophy. Routine cases are governed by standard practices. Exceptions are made on a case-by-case basis, not by relying on complicated rules that attempt to provide guidance.

The benefit of these practices is immediate and sustained attention to the case. "30 days to answer Rule 33 interrogatories means 30 days." Less time is less expense, although you may need more lawyers and cost to bring them up to speed.

More discovery does not lead to more truth at trial. Often less.

Patent cases are brought to the Eastern District to avoid the costly wheel-spinning of preliminary-injunction practice in other districts. There is little reason to spend months arguing over a preliminary injunction when you can get to trial on the merits in six months. The joint discovery plan, prepared under Rule 26(f), works well; it is followed by the Rule 16(b) conference with the magistrate judge, leading to specific tasks with a time table that suits that case. Disclosure practices are like those in the Northern District of California — there is an early disclosure of detailed infringement and invalidity contentions; noninfringement contentions are put off until discovery is completed. A protective order is presented early; it can be complex; and information is exchanged on a "counsel-eyes-only" basis until the order is entered. The role of in-house counsel in the protective order is often disputed, particularly in litigation that involves source-code discovery, and implementation of the order may be difficult.

Discovery of electronically stored information often is addressed. The issues typically involve form of production; timing; volume and rolling production; and whether e-mail messages should be discovered at all — often discovery is sought, but there have been cases where discovery is bypassed.

Deposition disputes may extend to who counts as a party — how to count different witnesses designated under Rule 30(b)(6). The resolution may be to measure deposition limits in the number of hours per side, perhaps 100 hours or 150 hours, and not to consider the number of depositions at all.

Expert discovery is often postponed. Parties reserve the right to supplement earlier responses to meet new expert opinions.

Motion practice is frequent and contentious.

Extensions of discovery cut-offs can be had on a case-specific basis.

Claim construction is done late, so the case is mature. It can be a few-week process.

Summary-judgment practice is done in one round, with one brief. There used to be a series of motions. The court is not shy; many defenses are stricken on summary judgment.

The court offers excellent mediation opportunities, including with magistrate judges, third parties, or sometimes a second district judge. The court does not engage in "head banging"; it does not seek to force bad settlements.

Securities fraud class actions are a second distinctive group. They do not arise that often. The PSLRA gets these cases off the ordinary track because of the discovery stay. But the delay is not great, because judges rule quickly on the motion to dismiss. These cases are subject to the discovery cutoff; usually discovery is all one way. The case might be stayed for mediation.

Securities fraud, patent cases, and class actions involve highly skilled and motivated counsel. That makes it easier to get things resolved despite the complex nature of the litigation.

Dennis Barghaan said that as a civil litigator on the United States Attorney's office he finds two big advantages in the rocket docket. Often he is the only attorney for the government in the case, as compared to the four or five lawyers Craig Reilly described. The docket practices allow him to move his cases forward: "I can say 'no' to my client." Beyond that, the government is a large repository of documents, giving adversaries an incentive to demand everything. The docket practices force them to cut back.

The docket practices also pose challenges for cases that typically involve the government. Administrative Procedure Act cases often are esoteric, and can be very complicated. They span the full range of subject matters confided to federal agencies. The government lawyer often comes into the case knowing nothing about the subject matter, confronting lawyers who specialize and know this particular subject inside-out. "There is an incentive to file here to take advantage." But the judges are good at providing leeway. It works, but only if the judge is an active participant.

Bivens cases also present problems. There is no discovery until immunity questions are resolved. So the defendant's motion to dismiss is met by a Rule 16(b) order that discovery is to begin now — "We need a ruling from the bench on Friday morning," although judges often do a pre-screening Rule 16(b) order for *Bivens* and sovereign-immunity cases that stays discovery pending a ruling on

the motion to dismiss.

William Dolan observed that in litigating in other districts around the country, some judges have a notion that speed means a lack of substantive attention to nuances of law and fact. Not so. The judges in the Eastern District of Virginia work hard. Not all judges do. In a case now pending in another district a 12(b)(6) motion to dismiss has been pending for 8 months. The cost is high; in retrospect, it would have been better not to file the motion.

The money spent on discovery "is scandalous." Speed in moving the case reduces the costs. On Friday morning the judge ruling on a motion knows what the case is about. The first question from the bench shows that the judge has read the motion and briefs; the arguments go quickly. The lawyer has the obligation to point out what is unusual to justify departure from the regular docket practices. "It is a paper court. They read first." They rule promptly, so the case can move on.

There are local rules. But there is also a culture. Lawyers look to the culture as what the judges really look to. This makes the lawyer's task easier; "you can explain to your client what's going to happen."

"Unless you've been there, you can't believe how it's going to happen." As local counsel, a lawyer has to be true co-counsel. "We have to argue the motion, or conduct the trial, if you're not there."

If you lose in this court, "you've got bad facts or a bad lawyer."

People are always calling for preliminary injunctions. Given the speed of the docket, preliminary injunctions are seldom necessary. It is better to get on to the merits. "I had an injunction motion in another court with a 4-day hearing; the court never ruled on it."

Lawyers want to persuade and please the judge. It is good to go to court on a Friday when you do not have a motion and listen. The judges will explain what they are doing: "The framework is A, B, C; B is missing. Motion denied. The judges distill it to the essence." A good lawyer, like Craig Reilly, "goes straight for it."

"In-house lawyers are playing a more aggressive game. They insist I find the smoking gun. 'Argue this.' 'Approach it that way.' Younger lawyers are subject to this pressure. I can tell them to bug off" because the docket practices force more sensible behavior.

There is a risk that we will have a generation of lawyers and

judges who do not know how to try cases. But courts are there for trials. "Trial is not a failure of administration."

Discussion began with a judge's observation that a lot of solo practitioners in his court cannot meet a 16-week schedule for discovery; they want to have other cases. Do solo practitioners in the Eastern District file in state courts to avoid the rocket docket? Judge Jones responded that this *is* a cultural phenomenon. Tell them they have to do it, they do it. "In private practice as a solo, I did it. And nothing says it has to be 16 weeks; it could work with equal effect in a longer period." Craig Reilly added that except for employment cases, there are few cases in federal court that can be handled by a solo lawyer. One federal case could take as much time as 20 in state courts. But the state courts are moving toward the federal practices. "Still, it does not prove easy for a solo." William Dolan added that a plaintiff waits to file the action until ready to go. Then the rocket docket can be an advantage.

The same question was asked about excessive force cases, where "discovery is all in the police department." Judge Jones said that "we do them, with solo practitioners for the plaintiffs." Dennis Barghaan added that "it does force you to think more carefully about how to narrow discovery, about what really is at issue in the case."

In response to a question about briefing practices on summary-judgment motions and about how many cases go to trial, Judge Brinkema said that most civil cases settle. The court has a great mediation program. For summary-judgment motions, the court limits the opening brief to 30 pages, including the statement of facts. The answering brief is also limited. The court strongly believes in these limits because they force lawyers to make the best arguments. But the court does get some really complex cases. The court has a 3- to 4-week lead time on Rule 56 motions. They are discussed in chambers. The briefs are read before the hearing, and so is the bench memo. "When I go to argument, 95% of the time I know how I'm going to rule and I rule from the bench."

Dennis Barghaan added that litigants have to think about summary judgment ahead of time, during discovery. This helps the plaintiff to realize what information it needs, and helps the defendant to know what facts are troubling.

Craig Reilly pointed out that the number of trials per judge in the Eastern District is 32, compared to a national average of 20. The national average time from filing to trial is 24.7 months; in the Eastern District it is 11.5 months. "We're way faster." The national average case filings per judge is 428, in the Eastern District it is 312. But the national weighted average is 505, while it is 497 in the Eastern District.

A judge asked whether the benefits of the Eastern District practices can be transferred to other courts if the only common element is strong management? How far does it depend on the division of responsibilities between magistrate judges and district judges, on early and continued strong judicial control, on prompt rulings, on a collegial bar, on a bench that works to the same judicial philosophy? Judge Brinkema responded that there are interesting anecdotes about experiences when Eastern District judges sit in other districts — they impose Eastern District practices, the local lawyers yell and scream, and then they find out that it really works.

Another question asked whether lawyers will work together when the court imposes discipline. William Dolan said "absolutely. But if there is one judge who will give you relief, on a court where the other 15 judges will not, the lawyers will somehow wind up on the forgiving judge's doorstep."

A judge asked whether scheduling works better if the first conference has a real exchange with the lawyers — "can you do this on paper"? Judge Jones answered that the default is an in-person conference. "I do it in chambers." But if a participant is from out of town, it can be done by conference call. "Paper cases are normally those with agreement among lawyers I know. Everything that can be dealt with early has been. I'm not looking for excuses to do it on paper."

The question of "drive-by" Rule 26(f) conferences was raised by asking what is the culture in the Eastern District. Craig Reilly answered that knowing what judges are likely to do if a dispute arises means the conferences usually are not contentious. They are never a "drive-by." "Many of my cases have counsel eager to be involved in scheduling, not that we always agree." When agreement fails, competing proposals are submitted for resolution at the Rule 16(b) conference. Judge Jones added that the initial order requires a real Rule 26(f) conference, and a real plan at least 7 days before the 16(b) conference.

A judge observed that the discussion suggested that the real time saving comes between the close of discovery and trial. How is this accomplished? By setting trials a lot more quickly? By ruling on dispositive motions? Judge Brinkema observed that motions are noticed for the next Friday, and that the reply brief comes in on Wednesday or Thursday. Judge Jones added that the time for filing a summary-judgment motion varies from judge to judge on the court, "but it's quick."

The question then turned to scheduling trials: if the time from the close of discovery to trial is compressed, does the court stack up trials for the same day? Judge Brinkema said that that does not often happen, but there is always a judge available. "I do set two trials for the same day. We set strict time limits for

trial — no cumulative witnesses, or the like — so there is no problem that one trial lasts long enough to run into the time set for the next trial. Dennis Barghaan added that the time for the final pretrial conference means it is necessary to ask for some delay in the trial setting; "I don't have the deposition transcripts yet. Collegiality of the bench with the bar is necessary."

Another judge asked whether the Rule 56 timing means the parties have to prepare for trial before the ruling on summary judgment? The panel's common response was "yes." But if you can file the summary-judgment motion, you should be able to prepare an exhibit list for trial. "There is a window — the case should be ready for trial. It will not be a 6-week trial." There is no reason to think that the court gets fewer summary-judgment motions because of its speed. Craig Reilly said "I've never given up the chance to move for this reason."

The Committee thanked the panel warmly for a thoroughly prepared and fascinating presentation.

PLEADING

Judge Campbell noted that the continuing study of pleading practice has stemmed from the decisions in the *Twombly* and *Iqbal* cases. The subject continues to command close attention, including ongoing empirical work by the Federal Judicial Center.

Joe Cecil summarized the ongoing FJC study. The first phase found an increase in the rate of making motions to dismiss for failure to state a claim. The only measurable change in the rate of granting the motions occurred in financial instrument cases. And orders granting the motion more often grant leave to amend.

The second phase is looking into experience when a motion to dismiss is granted with leave to amend. An amended complaint is filed in two-thirds of these cases. The amended complaint often is followed by a renewed motion to amend. There is no significant increase in the rates of granting dismissal. Pro se cases and prisoner cases have been added to the study.

This second phase reveals that some data are missing. An effort is under way to find the missing data.

The first-phase report "was received less than warmly by some." Focused criticisms have been made in articles by Professor Lonny Hoffman and by Professor Hatamayr-Moore. A response to those criticisms is being prepared, and will be posted on the FJC site.

In other research, Professor Hubbard could not find a change in the rate at which motions are granted. Others find a shift in the way judges assess complaints — there is an increased focus on

a demand for detailed fact pleading. Professor Dodson finds a small but significant shift in grant rates, based on much more reliance on the sufficiency of pleading facts.

The rate of granting dismissal for amended complaints was about the same as for original complaints. A supplemental report will be prepared to elaborate on these findings.

Professor Hoffman addressed the committee. He began by noting that he testified in a congressional hearing that the prospect of amending Rule 8(a) by legislation is a bad idea. But he has been concerned that readers of the FJC first-phase study would be confused into thinking there is no change in dismissal practices, or would be confused about the cause of changes. The findings as to filing rates are significant and interesting. A plaintiff is 50% more likely to face a motion to dismiss. There is a whole new class of cases in which defendants who would not have moved to dismiss before the *Twombly* and *Iqbal* decisions are now moving to dismiss. And the FJC data show that a motion to dismiss is more likely to be granted. But that does not show whether the Supreme Court decisions cause the increase. Except for financial instrument cases, the FJC reports that the increase is not statistically significant. "But the 'null hypothesis' is difficult to understand." To say that fact pattern is not significant at the 0.05 level is to say there is a greater than 5% chance the changes were random. It is better to ask whether we should demand so high a level of confidence. It is a two-edged sword. "We're not likely to be wrong in concluding that *Twombly* and *Iqbal* had an effect; we can be wrong in thinking they had no effect." It would be unwise to move too quickly. But we should remain concerned that they are having an effect. One study shows a 20% reduced chance a case will survive to discovery. Others are finding statistically significant increases in dismissal rates. "Results very much depend on the inputs." The two biggest case categories in the study are "other" and "civil rights." There is not a 95% level of confidence of changes in those categories, but the level is greater than 90%. "That's pretty good odds." But that does not say what should be done.

A judge noted that the circuit courts have taken a much harder look at pleading than the Supreme Court did. The message is getting to the district courts — they cannot throw out claims willy-nilly. The Supreme Court "kind of made the same point" in this year's *Skinner* decision. It has been observed that the Court is cyclical in its approaches to pleading; there may be a pull-back. An exhaustive source of information about emerging approaches is provided by Andrea Kuperman's study.

Joe Cecil said that he and Professor Hoffman agree on more and more points. There are more motions to dismiss being filed. As to the grant rate, page 7 of the report shows the overall numbers, but that does not tell the whole story. Using multivariate analysis to

account for other factors that affect the outcome, such as the type of case, the numbers of cases in different courts in the study, whether there has been an amended complaint, reduces any change in grant rate below a statistically significant level, apart from financial instrument cases. As to statistical significance, "we cannot prove no effect. We could never prove that. But the patterns of findings we see could easily have happened by chance." There is other research going on. Some of it assumes that there will be no amendment if dismissal is granted without leave to amend. "That is not always so."

So there are differences in patterns among the districts studied. The Southern District of New York has a low rate of filing motions to dismiss, but a high grant rate. But the patterns do not show identifiable differences among the circuits; there are differences between districts in the same circuit.

It was noted that the Second Circuit has established a program to decide quickly on appeals from pleadings dismissals. The records are compact, enabling prompt decision.

It was asked whether at a 90% level of confidence we can find an effect in civil rights cases? Joe Cecil said yes. But it is important to set the significance level before doing the research. The rate chosen will depend on whether you're exploring or whether you want to test a theory. To test a theory, there should be a higher level of significance. But the choice of the level of significance is for the Committee.

A judge noted that from a district judge's perspective, it is important to know the extent to which *Twombly* and *Iqbal* lead to ending cases without an opportunity to get the information needed to frame the complaint. Dismissal of only part of a complaint leaves open the opportunity for discovery, and the discovery may reveal information that enables the plaintiff to reinstate the parts that were initially dismissed. The bite is in the cases where the plaintiff cannot get the necessary information. There is important work left to be done, and it must be based on a wide foundation of information.

It was asked whether the high dismissal rates in financial instrument cases are linked to the mortgage foreclosure crisis. Joe Cecil responded that the pattern is in cases in areas where the crisis appeared to be particularly acute. The common pattern is that a case is filed in state court, removed to federal court, dismissed as to the federal claims, and survives to be remanded to state court on the state claims. That is especially common in the Northern and Eastern Districts of California.

Discussion then turned to the question whether the time has come to begin actively developing specific proposals to revise pleading practice or, perhaps, discovery practices integrated with

pleading practice. A wide variety of illustrative proposals have been sketched during the years since the *Twombly* and *Iqbal* decisions turned the Committee's attention from the question whether heightened pleading standards should somehow be incorporated in the rules to the question whether pleading standards have been heightened in a desirable way — whether too high, about right, or not high enough. All of them have been carried forward as worthy possibilities. But none has yet generated confidence that the time has come for active advancement.

Familiar themes were recalled. The Supreme Court's opinions can easily be seen as a call for help from the lower courts. The Court is concerned that three decades of effort have not succeeded in sufficiently reducing the burdens that discovery imposes in an improperly high portion of federal cases. But it is not sure whether pleading standards can be developed to provide a sophisticated screen that dismisses unfounded claims before discovery, while letting worthy claims through to discovery. The opinions are multi-faceted, offering many different cues that can be selected to support substantial changes or relatively modest changes.

The common-law process opened by the Court is working thoroughly. Pleading questions can be raised across the entire spectrum of federal litigation, yielding many opportunities to confront and develop pleading standards. The great outpouring of decisions in the appellate courts may be working toward some degree of uniformity, but consensus has not yet been reached. Among the welter of opinions, two recent decisions singled out by Andrea Kuperman's work provide nice illustrations. One is a First Circuit decision reversing dismissal for failure to state a claim. What is remarkable about the opinion is the intense fact detail set out in the complaint; in many ways it is more extensive than the facts that likely would be singled out on a motion for summary judgment. The opinion, moreover, deals with claims of discharge from public service for political reasons; it may reflect the "judicial experience" component of the "judicial experience and common sense" formula in the *Iqbal* opinion, since the First Circuit has had frequent experience with cases of this sort. The other decision is a Sixth Circuit decision in a case urging an "indirect purchaser" claim of price discrimination under the Robinson-Patman Act. The court affirmed dismissal for failure to plead sufficient facts to show the manufacturer-supplier's control of the prices charged by the plaintiff's competitor, a distributor who both sold in direct competition with the plaintiff and acted as the plaintiff's exclusive source of supply. The most notable part of the opinion responded to the plaintiff's argument that because the defendants controlled access to information about their pricing practices, discovery should be allowed before dismissing for failure to plead facts inaccessible to the plaintiff. The court invoked part IV C 3 of the *Iqbal* opinion, which discussed at length the need to protect public officials claiming official immunity against the

burdens of discovery. The Supreme Court concluded: "Because [the] complaint is deficient under Rule 8, [the plaintiff] is not entitled to discovery, cabined or otherwise." Generalizing this observation, extending it from the special concerns that treat immunity as conferring a right not to be tried, is a ground for real concern. It may be that the Sixth Circuit was responding to a different kind of "judicial experience" — the common view of economists and many lawyers that the Robinson-Patman Act is an obsolete artifact of the 1930s that should be interpreted narrowly to prevent becoming a tool to suppress efficient competition. However that may be, the seemingly flat rule barring discovery to support an amended and sufficient complaint is cause for concern.

These observations led to the suggestion that matters remain in the stage of waiting to see what is happening and how practice will develop. Discussion agreed that pleading proposals should remain on the agenda, with continuing active study, but should not yet be brought to the point of developing proposals for publication and comment. A Committee member "did not disagree," but asked whether very modest changes could be made in the rules that would discourage "the inevitable tendency to cite *Twombly* and *Iqbal* in every case, whether or not on point." One useful practice might be to adopt a limit on the length of motions to dismiss.

A judge observed that motions to dismiss come in infinite variety. His own practice is to ask the plaintiff whether the plaintiff would like to amend. If the plaintiff accepts the invitation, the motion to dismiss is denied without prejudice. "Most times the amended complaint works — there is no renewed motion to dismiss."

The Committee agreed to keep pleading topics on the agenda for continuing active study and attention, but to continue to stay active development of specific proposals.

CIVIL-APPELLATE SUBCOMMITTEE

Judge Colloton delivered the report of the Civil-Appellate Subcommittee. The Subcommittee has carried two items on its agenda.

The first subject involved a question that could lead to amending Civil Rule 58 to complement an amendment of Appellate Rule 4(a). The question was stirred by considering hypothetical circumstances in which it could be argued that appeal time might expire before the period allowed by an order for remittitur, or to draft an injunction. The remittitur example, for instance, was an order granting a new trial unless the plaintiff would accept remittitur within 40 days. The Appellate Rules Committee has concluded that amending Rule 4(a) is not warranted. That means there is no need to consider Rule 58 amendments. These questions have been dropped from the Subcommittee agenda.

The other subject involves "manufactured finality." This tactic may prove attractive to a plaintiff who suffers dismissal of the principal claim while peripheral claims remain alive. A variety of means have been attempted to achieve a final judgment so as to win immediate appeal from dismissal of the principal claim. Dismissal of the remaining claims with prejudice works to establish finality. Most courts agree that dismissal of the remaining claims without prejudice does not establish finality, although a couple of circuits have accepted this strategy. The more interesting question is presented by dismissal with "conditional prejudice" — the remaining claims are dismissed with prejudice, but on the condition that they may be resurrected if dismissal of the principal claim is reversed. The Second Circuit has accepted this practice; it has been disallowed in two others. The Subcommittee could not reach any consensus as to the need to act on this subject. Barring renewed enthusiasm from an advisory committee, the Subcommittee is not likely to recommend action. A judge agreed that it is "good to do nothing."

The Subcommittee continues in existence as a vehicle should new questions arise — as has happened with some regularity — involving integration of the Civil Rules with the Appellate Rules.

RULE 23: CLASS ACTIONS

The Standing Committee has planned a panel on class-actions for the January meeting. The broad question is whether sufficient problems have emerged in practice to warrant beginning work toward amending Rule 23.

The Committee was reminded that Rule 23 was deliberately put off limits between the 1966 amendments and 1991. The 1991 report of the ad hoc Judicial Conference Committee on asbestos litigation suggested that perhaps Rule 23 might be amended to improve the disposition of asbestos claims. The Committee set to work. After considering a top-to-bottom restructuring of Rule 23, more modest proposals were published in 1996. The only one that survived to adoption was Rule 23(f), a provision for appeal from orders granting or denying class certification that has proved successful. Work continued, resulting in a variety of amendments that took effect in 2003. That experience suggests that any class-action project will endure for many years. The only prospect for a relatively short-term project would be identification of one, or perhaps a few, small changes that command general consensus support. Any significant change is likely to stir deep controversy, and any package of significant changes surely will stir broad controversy. This prospect makes it important to weigh whatever needs for reform may be identified against the need to allocate Committee resources to the projects that most need attention. Discovery work continues apace. Pleading may come on for development of specific proposals. The Duke Conference Subcommittee is preparing a package of amendments. There is enough

on the agenda to keep the Committee well occupied for some time.

The agenda materials presented a summary of recent Supreme Court decisions bearing on class actions, a reminder of past proposals that failed of adoption, and a general request for advice based on the continuing experience of Committee members. Have problems emerged with administration of Rule 23, perhaps influenced by experience with the kinds of cases being brought to the federal courts by the Class Action Fairness Act, that justify launching a class-action project?

The first response suggested four topics that deserve study.

One topic is the extent of considering evidence on the merits of class claims to inform the determination whether to certify a class. The Seventh Circuit decision in the *Szabo* case has been picked up in most circuits. The problem is that some courts are moving toward basing the certification decision on a determination whether there is enough evidence to go to the jury on the merits. There is a thread of a view that the district court has to choose which competing expert witness is correct in making a certification decision whether common questions predominate in the case as it will be tried. There are real variations among the circuits on these questions.

A second question relates to issues classes. Should predominance in the Rule 26(b)(3) inquiry be measured by the case as a whole? Or should it be measured by looking only to the issues that will be tried on a class basis? The Third Circuit has looked to a balancing test, considering a variety of factors.

The criteria for reviewing a proposed class settlement also vary. Courts establish different lists of factors, some longer, some shorter. (The Committee was reminded that the process that amended Rule 23(e) began with enumerating some 16 factors, some of them innovations over case law, in rule text. The Committee became concerned that the factors would become a mere check-list, a laundry list that would encourage rote recitals without actual thought. The list was moved to the Committee Note, and then discarded entirely.) It also should be established whether there is a presumption in favor of a settlement supported by all parties.

Finally, there has been a lot of reconsideration of the value of cy pres settlements. This topic seems ripe for consideration.

Another Committee member agreed that these four issues are worthy of consideration. That does not mean that it will be easy to agree on the solutions. Consideration of the merits as part of the certification decision is addressed by many cases, but there is no clear path. There is a real tension with summary judgment and the right to jury trial, a risk that the court will decide jury issues in the guise of a certification decision.

A separate possibility is to study the American Law Institute Principles of Aggregate Litigation to see whether some of the principles should be incorporated in Rule 23.

An observer agreed that these topics deserve study, and added that consideration of the merits in the certification process intersects discovery. "We need to have discovery" to the extent that predictions about the merits influence certification.

These suggestions led to the question whether Rule 23 is working well enough as a whole. Class actions are so consequential, and so hard fought, that there will always be disagreements among the circuits. Amendments will produce new litigation. Has the time come to take on these consequences?

A Committee member suggested that it may be better not to tinker with Rule 23 at this point, although cy pres settlements have become a more prevalent issue. (It was later noted that legislation addressing cy pres settlements has been introduced; there is no sense whether it will be adopted.)

The Standing Committee panel in January will look at the proper time for the Committees to address Rule 23. It has not been considered since 2003. The Class Action Fairness Act may have had an impact on administration of Rule 23. And the change in overall litigation contexts affects class actions. "There is no predetermined answer."

It was asked whether the ALI Principles "have a gravitational pull"? An answer was that they do. And the "Hydrogen Peroxide" issue [In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305 (3d Cir.2008)] has been percolating for years.

A more specific note was that the agenda materials include two alternative approaches that might be taken to overruling the ruling that federal courts can certify a class action to enforce a state-law claim even though state law specifically denies class-action enforcement of the claim. This is a valid subject of consideration if a Rule 23 project moves forward.

There is a prospect that the Standing Committee will ask the Civil Rules Committee to consider some aspects of Rule 23. But the Civil Rules Committee will have to decide independently whether it has the capacity to tackle this work immediately.

It was decided that some clear issues have been identified, and there may be others that deserve study. A subcommittee will be formed to explore the issues.

RULE 84 FORMS

Judge Pratter reported on launching the Forms Subcommittee.

The Subcommittee is composed of representatives from the advisory committees for the Appellate, Bankruptcy, Civil, and Criminal Rules, and the Standing Committee. The focus is on the way in which "official" forms are used in the contexts of the different sets of rules, and on the ways in which they are generated.

For the Civil Rules, a source of growing concern has been the pleading forms. Rule 84 says they suffice under the rules. But they were generated long ago. Many judges think they are inconsistent with the pleading standards directed by the *Twombly* and *Iqbal* decisions. Judge Hamilton's recent dissent in a Seventh Circuit case lists Forms 11, 15, and 21 as inadequate under present pleading doctrine.

The Subcommittee has met by phone conference. The Notes provide a good summary of the discussion.

The Subcommittee is collecting the history of the several advisory committees, looking to the ways in which forms have been developed and how they are used. It will move on to consider recommendations for possible revisions of Rule 84, to be shaped in part by exploring the desirability of revising and amending the forms through the full Enabling Act process. If the advisory committee cannot find time enough to ensure that the forms remain relevant and useful, it may prove wise to find new ways to develop suggested forms. And if resort is not had to the full Enabling Act process, it may be wise to back away from endorsing them by the Rule 84 statement that the forms suffice under the rules.

A further subject may be working toward features in the forms that will make it easier to track issues through FJC docket research.

OTHER AGENDA ITEMS

The agenda book includes brief descriptions of several proposals submitted by members of the public. As happens periodically, it seems useful to determine whether any of them should be moved ahead for active consideration.

09-CV-D: This question arises from changes made by the Time Computation Project amendments that took effect in 2009. Rule 62(a) provided a 10-day automatic stay of execution on a judgment. Rule 62(b) provided that a court could stay execution "pending disposition of" motions under Rules 50, 52, 59, or 60. Those motions also must be made within 10 days after entry of judgment. Then the Time Computation Project changed the automatic stay under Rule 62(a) to 14 days, but extended the time to move under Rules 50, 52, or 59 to 28 days. The question is whether the court can stay execution more than 14 days after judgment is entered if there is no pending motion under Rule 50, 52, 59, or 60 but time remains to make such a motion.

Discussion began with the suggestion that the rule recognizes authority to grant a stay if a party seeks a stay before filing a motion under Rules 50, 52, 59, or 60, but represents that a timely motion will be filed. The time for Rule 50, 52, and 59 motions was extended to recognize that the former 10-day period was often inadequate to frame a motion, even as computed under the former rules that made a 10-day period equal to at least 14 calendar days. This opportunity should be preserved, without forcing an accelerated motion in order to avoid a gap after the automatic stay expires. This conclusion is easily supported by finding that a stay ordered before a promised motion is filed is one "pending disposition of" the motion. If there is concern about procedural maneuvering, the stay can readily be ordered to expire automatically if a timely motion is not filed under Rule 50, 52, 59, or 60.

Incidental discussion reflected the belief that it makes sense to have an automatic stay. The alternative of forcing an immediate motion could not always protect against immediate execution before the judgment debtor learns of the judgment and takes steps to seek a stay. There may be many good reasons for a stay, including both the prospect of post-judgment motions in the trial court and appeal. (Other provisions deal with stays once an appeal has been taken.) And forcing an immediate motion would generate hasty drafting and argument. On the other hand, there may be good reasons to deny a stay even when a post-judgment motion has been filed.

Committee members agreed that a court has authority to stay execution of its own judgment, and that judges will realize this power as an essential safeguard. Unless misunderstanding becomes common enough to show a real problem, there is no need to amend Rule 62. This proposal will be removed from the agenda.

09-CV-B: This proposal suggests adoption of detailed rule provisions for agreements governing e-service among counsel. They would govern such matters as specific e-mail addresses, subject-line identifications, types of attachment formats, and so on.

Discussion began with recognition that details at this level are not commonly included in the national rules. But it was asked whether the proposal should be tracked in some way so that it will remain as a prompt when the general subjects of e-filing and e-notification come up for renewed study. The conclusion was that when those questions are taken up, the process will stimulate suggestions like this one, and likely many variations. This proposal will be removed from the agenda.

09-CV-A: This proposal provides alternative suggestions. One is that Rule 4(d)(2) sanctions for refusal to waive service should be made available as to foreign defendants, as they are now available as to domestic defendants. The suggestion rests on the perception

that the opposition to sanctions emanated not so much from a genuine sense of affront to foreign sovereignty as from the desire of defendants to make it difficult and costly to drag a foreign defendant into a United States court. As an alternative, it was suggested that improvements might be made in the Rule 4(f) provisions for serving an individual in a foreign country.

Discussion began with the observation that foreign countries really do hold a serious view that service is a sovereign act. They take offense, much as they would take offense if a United States police officer attempted to make an arrest in a foreign country. And there are international conventions for service. These questions are very sensitive. At a minimum, these subjects would require careful study.

A Committee member noted that there is a particular cost problem that arises in complex litigation. The Hague convention requires translation of the documents. Translating a *Twombly-Iqbal* complaint can cost $50,000 to $100,000. In some cases counsel do waive service in an effort to be cooperative, but in other cases service is not waived. The court does not have authority to coerce waiver. A refusal to waive can be one tactic of attrition.

A similar observation was made: sending a letter is not likely to induce waiver.

Another member noted that the Department of State views these matters as sensitive. Foreign sovereigns would view service by mail as inconsistent with their sovereignty. Sanctions for refusing to waive service would come close to that.

The Committee determined to remove this proposal from the agenda.

10-CV-G: This proposal echoes the common lament that the Form 18 model of a complaint for patent infringement is woefully inadequate. It proposes a more detailed substitute, tuned to the real needs of litigation. It will be held on the docket for consideration by the Rule 84 Subcommittee, and will be considered carefully if the Subcommittee concludes both that form complaints should be carried forward and that one of them should be a complaint for patent infringement.

10-CV-F, 10-CV-E: These suggestions, provided by the same person, address a question triggered by recent amendments of the Rule 15(a)(1) right to amend a pleading once as a matter of course. Before the amendments, the right was cut off immediately on service of a responsive pleading, but was unaffected by a motion to dismiss. The amendments establish a uniform approach to the effects of a responsive pleading or a motion under Rule 12(b), (e), or (f). The right to amend once survives for 21 days after service of either the responsive pleading or the motion, but no longer.

The new question is what happens if the time to respond to a motion to dismiss is extended beyond 21 days. The Committee concluded that any problem can be addressed by requesting an extension of the time to amend once as a matter of course, and it is better to give the court control of the timing question.

A related proposal would amend Rule 12(f) so that a motion to strike can be used to challenge a motion as well as to challenge a pleading. The Committee concluded that there is no need to expand the motion to strike. These motions are overused as it is.

These proposals will be removed from the agenda.

10-CV-D: This proposal offers several changes in the offer-of-judgment provisions in Rule 68. One of them addresses an issue that has not been considered in earlier Committee deliberations on Rule 68. The suggestion is that a complaint may seek only nominal damages, perhaps $1. The offer of judgment is then for $1.01, or perhaps a more generous $10. The problem is that the purpose of the litigation is not to win a dollar, but to win the implicit declaratory value of a judgment on the merits. These problems are similar to those that arise when comparing an offer of judgment to the terms of injunctive or declaratory relief.

The Committee has undertaken two major efforts to reconsider Rule 68. The first generated a storm of critical comment on published proposals and was abandoned. The second led to ever-more-elaborate draft rules, and was abandoned before seeking public comment. Proposals for amendments continue to be made, most commonly to add "teeth" to the rule so that it will become a more powerful vehicle for promoting settlement. The Committee has not yet been willing to enter the fray once more.

This proposal will be removed from the agenda.

10-CV-C: This proposal would amend Rule 41(a)(1)(A) to expand the category of motions that would cut off a plaintiff's right to dismiss an action without prejudice. The expressed concern is that a motion to dismiss may become a de facto motion for summary judgment when the court considers materials outside the pleadings. Concern also is expressed about fairness to a defendant who has paid a filing fee to remove, and then is confronted by a dismissal without prejudice that leaves the plaintiff free to begin anew.

The proposal raises a broader question. Rule 15(a)(1) was amended to establish that a motion to dismiss cuts off the right to amend once as a matter of course. Would it be useful to adapt the same change to Rule 41(a)(1)(A), so that the plaintiff can dismiss without prejudice "before the opposing party files ~~either~~ an answer, a motion under Rule 12(b), (e), or (f), or a motion for summary judgment"? There is an abstract symmetry, but does it make sense?

Discussion suggested that it would be a bad idea to expand the category of events that terminate the right to dismiss without prejudice. There is an opportunity for gamesmanship that should not be expanded.

This proposal will be removed from the agenda.

10-CV-B: This proposal would amend Rule 23 to incorporate provisions similar to the parens patriae provisions that recognize the authority of state attorneys general to bring suit for pricefixing. The statute allows calculation of damages by statistical or sampling means or other reasonable systems. The discretion to calculate aggregate damages includes authority to dispense with proving the individual claims of persons on whose behalf the action is brought. The proposal is designed to counter decisions ruling that class certification is appropriate only if each and every member of a plaintiff class is harmed in the same way.

This proposal was advanced at the Duke Conference and was on the initial menu of proposals considered by the Duke Conference Subcommittee. It was not advanced for further discussion. It raises obvious questions of Enabling Act Authority.

Discussion asked whether the proposal is consistent with the decision in the Wal-Mart case dealing with the Rule 23(a)(2) prerequisite of common questions. This question would be debated vigorously, even though it remains possible to amend Rule 23 to supersede a Supreme Court interpretation. And it was noted that there is a big difference between authorizing an action in the public interest by a state attorney general and authorizing a similar action in a private form of group litigation. And it would be improper to adopt a rule provision limited to antitrust actions; that would become too far entangled with a specific set of substantive rights.

The Committee concluded that this proposal should be considered by the Rule 23 Subcommittee.

10-CV-A: This proposal would create a rule allowing interlocutory appeal by permission from an order granting or denying discovery of materials claimed to be protected by attorney-client privilege. In refusing to allow collateral-order appeal from an order directing discovery on finding that the privilege had been waived, the Supreme Court suggested that the Enabling Act process is the appropriate forum for considering these questions.

It was noted that the courts of appeals would resist any effort to create a right to appeal whenever a district court grants permission. But the model contemplated by the proposal seems to be Rule 23(f), which requires permission only from the court of appeals.

The possible attraction of the proposal lies in the same pressures that led to several decisions allowing collateral-order appeal before the Supreme Court spoke. Once privileged information is disclosed, "the bell cannot be unrung." And the discovery order can become a pressure point that encourages a reluctant party to settle rather than disclose or chance the uncertain path of disobeying the order and hoping for a contempt sanction in a form that supports appeal. (A nonparty can appeal either civil or criminal contempt; a party can appeal only a criminal contempt order.)

This question clearly involves topics that involve the Appellate and Evidence Rules as well as the Civil Rules, even if the outcome might be adoption of a Civil Rule modeled more or less closely on Rule 23(f). The Committee voted to refer the question to the Appellate and Evidence Rules Committees without recommendation.

11-CV-C: This proposal would allow pro se litigants an extra 7 days to submit a Rule 26(f) report to the court. It may be that the Committee should go back to earlier efforts to devise alternative and simplified rules for some kinds of cases. Pro se cases might be included in those rules, either generally or as the subject of specific provisions. But until then, the Committee believes it inappropriate to depart from the long tradition that refuses to make specific exceptions for pro se litigants.

This proposal will be removed from the agenda.

11-CV-A: This proposal would amend Rule 55 to provide guidance for circumstances in which a default judgment is entered as to part of a case. It might be a judgment that leaves some claims pending among all parties, or it might be a judgment that disposes of all claims against one party while leaving claims pending against others. Questions arise as to coordination between judge and court clerk when the clerk is authorized to enter default judgment as to one part, while action by the court is required as to another. Questions also arise as to execution on a money judgment, and as to default judgments on claims for declaratory or injunctive relief.

Discussion began by noting that Rule 54(b) provides that a judgment as to fewer than all claims among all parties becomes final only on express direction for entry of judgment. Absent entry of a partial final judgment, the order may be revised at any time before entry of a complete final judgment. Rule 55(c), which provides that a default judgment may be set aside under Rule 60(b), should be read in light of Rule 54(b). Rule 60(b) itself applies only to relief "from a final judgment, order, or proceeding." Until a default judgment becomes final under Rule 54(b), Rule 60(b) is inapposite.

The first reaction was that Rule 55 is administered by the

court clerk as well as by the judge. Adding complexity would make it more difficult.

A judge added that he always tells the parties that a default judgment in a multiparty or multiclaim case is not a final judgment, unless made so under Rule 54(b). It cannot be enforced. The court retains authority to set it aside. One good reason for relief is illustrated by a claim against two defendants; one is subject to a default judgment, while the other wins on merits grounds that show the defaulted defendant also is not liable. Another judge agreed with these views.

There was a suggestion that there may be special problems in bankruptcy cases, perhaps tied to the special and expansive view of "finality" that applies on appeals to the court of appeals. There might be reasons of bankruptcy administration to establish forever-finality that do not apply in ordinary civil proceedings.

The Committee concluded that this proposal will be removed from the agenda unless further investigation shows special problems in bankruptcy proceedings that need to be addressed.

Failed Notice of Judgment: This question arises from the Judicial Conference work designing the next generation of the CM/ECF system. Rule 77(d)(1) directs the clerk to serve notice of entry of an order or judgment "as provided in Rule 5(b)." Most courts make service by electronic means under Rule 5(b)(2)(E). The problem arises when the notice bounces back to the court as undeliverable. Rule 5 provides that e-service "is not effective if the serving party learns that it did not reach the person to be served." The question is what features should be built into the CM/ECF system to address this problem.

A proposal under study would require a party agreeing to e-service to provide a secondary address. When notice to the primary address bounces back, the system would automatically send an "alert" to the secondary address. The alert would not include the text of the judgment or order, nor would it include a link. The attorney would be responsible to go to the docket to find out what had happened.

Laura Briggs expressed skepticism about the value of the "alert." In her court, at least, the original notice goes to both the primary address and the secondary address. Why send a second notice to the secondary address? And why only to that address, if there is to be duplication? Although some lawyers' systems automatically reject messages with big attachments, the Rule 77(d)(1) notice does not include an attachment. The first thing her office does when notice bounces back is to call the attorney. That works most of the time.

It was noted that the CM/ECF project has found that lawyers

often have full e-mail boxes, causing messages to be rejected. Most courts follow up by postal mail.

In response to the question whether any member thought it would be useful to provide advice on these questions, a member thought not, but added a question about pro se cases. How many attempts at notice are required in pro se actions? Apparently some courts use e-notice in pro se actions, while others do not. And it may happen that repeated efforts fail. A conscientious judge may devote considerable time to writing an explanation to the litigant of how many attempts have been made. There should be a reasonable limit.

This discussion led to the question whether there should be some formalized system to ensure that rules proposals are considered from the perspective of pro se litigants. Emery Lee noted that the Committee on Court Administration and Case Management is thinking about pro se litigation. And the rules committees are working with that Committee to make sure that the new generation CM/ECF system is consistent with the Rules. And perhaps this could be tied to the simplified rules effort. It was also noted that docket item 11-CV-C provided a refreshing perspective on the ability of a pro se litigant to wade through the rules, a task made easier by the Style Project.

NEXT MEETING

The next meeting is scheduled for March 22-23, 2012, in Ann Arbor, Michigan, at the University of Michigan Law School.

Respectfully submitted,

Edward H. Cooper
Reporter