

**ADVISORY COMMITTEE
ON
CIVIL RULES**

**Washington, DC
November 1-2, 2012**

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Agenda

November 1-2, 2012

Meeting of the Advisory Committee on Civil Rules

1. Welcome by the Chair
Standing Committee meeting and Judicial Conference
2. **ACTION ITEM:** Minutes for November meeting
3. Legislative Activity
4. **ACTION ITEM:** Rule 37(e): Proposal to Recommend Publication
5. Duke Conference Subcommittee Proposals
Employment Litigation Discovery Protocol (Oral Report)
6. Rule 84: Proposal to Abrogate
7. Pleading
FJC Report: Motions Study (Oral Report)
8. Rule 23 Subcommittee Report
9. Inter-Committee Committee on Uniform Terms (Oral report)
10. **ACTION ITEM:** Rule 6(d): Recommend Publication to Correct Style
11. Rule 17(c)(2): Powell v. Symons, 680 F.3d 301 (3d Cir.2012)
12. Time to Act and Expenses on Remand to State Court
13. Case Management Chapter, New Bench Book

Next Meeting: April 11-12, 2013

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Paul S. Diamond	D	Pennsylvania (Eastern)	2009	2015
Paul W. Grimm	M	Maryland	2009	2015
Peter D. Keisler	ESQ	Washington, DC	2008	2014
Robert Klonoff	ACAD	Oregon	2011	2014
John G. Koeltl	D	New York (Southern)	2007	2013
Michael W. Mosman	D	Oregon	2011	2013
Solomon Oliver, Jr.	D	Ohio (Northern)	2011	2014
Gene E. K. Pratter	D	Pennsylvania (Eastern)	2010	2013
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TAB 1

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TAB 1A

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

MARCH 22-23, 2012

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

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

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

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

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

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

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

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

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

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

79 *November 2011 Minutes*

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

83 *Legislative Activity*

June version

84 Benjamin Robinson reported on legislative activity. Since the
85 November meeting two more bills have appeared that bear attention
86 because of possible implications for the Civil Rules. They are the
87 Federal Consent Decree Fairness Act and the Sunshine in Regulatory
88 Decrees Act. They may raise questions whether Civil Rule 60 is
89 adequate to the occasional need to revise long-term institutional
90 reform decrees, particularly when interest groups may align with
91 agencies to secure results that they cannot obtain from a
92 legislative body. There is a provision requiring an expeditious
93 ruling on a motion to terminate a consent decree, and setting
94 specific times for scheduling orders. The Judicial Conference has
95 taken no position on these bills. The Federal-State Jurisdiction
96 Committee is monitoring them closely.

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

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

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

112 *Rule 45*

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

June version

126 Three hearings were scheduled. Each was cancelled for want of
127 interest. No one sought to testify at either of the first two.
128 The two witnesses who planned to testify at the final hearing
129 agreed to submit their comments in writing. In all, 25 written
130 comments were received. The Discovery Subcommittee held conference
131 calls to discuss the issues raised by the comments. The
132 Subcommittee recommends modest changes in the published proposal on
133 the basis of the comments. Professor Kimble, the Style Consultant,
134 suggested several style changes. The Subcommittee adopted some of
135 them, and Professor Kimble accepted the Subcommittee's reasons for
136 not adopting the others.

137 The remaining task is to agree on the precise version of Rule
138 45 that should be transmitted to the Standing Committee for its
139 recommendation for adoption.

140 RULE 45: SIMPLIFICATION

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

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

150 RULE 45: NOTICE

151 As published, Rule 45 transfers to a new subdivision (a)(4)
152 the requirement that notice be given to all parties before a
153 subpoena is served on a nonparty. Many lawyers complain that the
154 notice requirement is often ignored. The hope is that the transfer
155 will give it a more prominent place and engender better compliance.
156 In addition, it is made clear that a copy of the subpoena must be
157 served with the notice. Finally, the provision in present Rule
158 45(b)(1) is changed by deleting "before trial," so that notice must
159 be given before serving a subpoena to produce at trial as well as
160 before serving a subpoena to produce in pretrial discovery.

161 Several questions have been raised as to notice. Some
162 comments urged that notice should be served on the parties at a set
163 interval – perhaps 15 or 20 days – before the subpoena is served on
164 the witness. Without this advance period, service on the parties
165 could be made by means – most likely mail – that actually reach
166 them after the subpoena is actually served on the witness, perhaps

June version

167 leading to production before the other parties have any opportunity
168 to object or seek protection. Other comments urged that there
169 should not be any advance notice to other parties, for fear of
170 collusion that enables the nonparty witness to avoid service or
171 otherwise thwart production. The Subcommittee does not recommend
172 any change. The Committee accepted the Subcommittee position.

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

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

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

207 It was suggested that perhaps the Committee Note could deal
208 with this by observing that the notice requirement is not intended
209 to apply in post-judgment enforcement proceedings. But that might
210 well cross over the line into the forbidden territory of rulemaking

June version

211 by Note. This concern was underscored. The Committee has not
212 focused on the departure from present judgment enforcement practice
213 that would result from striking "before judgment" from the present
214 rule. Providing for advance notice of trial subpoenas seemed a
215 good idea, but it may not be so important as to disrupt the
216 opportunity to discover assets before they can be concealed. This
217 problem is important to all judgment creditors, not the government
218 alone.

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

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

235 Later Notices: Modify Subpoena, Documents Produced. Throughout the
236 process of developing Rule 45 amendments, suggestions have been
237 made that notice should be required of events after the subpoena is
238 served. The party who served the subpoena often negotiates
239 modifications with the person served. Notice of the modifications
240 to other parties would enable them to serve their own subpoenas for
241 information negotiated away by the party who first served a
242 subpoena. As materials are produced in response to the subpoena,
243 other parties are likely to want to inspect them. But the task of
244 asking for access can be burdensome, particularly when "rolling
245 production" involves production in installments over an
246 indeterminate period of time. And some lawyers refuse requests for
247 access, taking the position that nothing in Rule 45 directs that
248 other parties be given access to subpoenaed materials. The
249 Subcommittee discussed these problems repeatedly and at length. It
250 concluded that requiring notice of modifications or production
251 would create unnecessary problems. There is an all-too-real danger
252 of "gotcha" motions seeking to exclude evidence for failure to
253 comply with a notice obligation. "Less compliance with more rules
254 breeds satellite litigation." The notice changes were prompted by
255 the complaints that many lawyers do not comply even with the simple

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256 notice requirement in present Rule 45(b)(1). Notice of production,
257 further, could become a substantial burden when rolling production
258 requires multiple notices, increasing the risk of inadvertent
259 notice failures and motions for sanctions. Even limiting the
260 requirement to notice of the first production, alerting other
261 parties to the need to begin monitoring for subsequent production,
262 could be a problem. The result of these deliberations was a
263 statement in the Committee Note that parties desiring access to
264 subpoena materials need to follow up with the party who served the
265 subpoena, and that the party serving it should make reasonable
266 provision for prompt access.

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

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

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

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

295 It was agreed that the Subcommittee should prepare language
296 for the Committee Note, again in the vein of stating what the rule
297 text does not do. The rule does not cut off the court's power to
298 order that a party provide access to subpoenaed materials. The

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299 Note might also quote from the Note to the 2000 amendments: "In
300 general, it is hoped that reasonable lawyers can cooperate to
301 manage discovery without the need for judicial intervention." The
302 Subcommittee draft will be included in the Rule 45 e-mail review by
303 the Committee.

304 RULE 45: PARTY AND PARTY OFFICERS AS TRIAL WITNESSES

305 Present Rule 45 governs the place of compliance with a
306 subpoena by two subdivisions. Rule 45(b) defines the places where
307 a subpoena can be served. Rule 45(c) defines limits on the places
308 where compliance can be required. Rule 45(c)(3)(A)(ii) directs
309 that a court must quash or modify a subpoena that "requires a
310 person who is neither a party nor a party's officer to travel more
311 than 100 miles" from designated places, or to incur substantial
312 expense to travel more than 100 miles to attend trial. The Vioxx
313 decision described in the Committee Note found a negative
314 implication in this provision allowing a court to require a party
315 or a party's officer to attend as a trial witness no matter where
316 served. The Committee agrees that this is an incorrect reading of
317 the present rule. The proposed amendments published Rule 45 text
318 that simply overrules the Vioxx interpretation. Recognizing that
319 there is substantial support for something like the Vioxx result as
320 a matter of policy, however, the publication package included an
321 alternative that was expressly identified as not recommended. The
322 alternative would not restore the Vioxx ruling. It would not
323 authorize a party to subpoena another party or its officer to
324 attend trial. Instead, it would authorize the court to order a
325 party to appear, or to produce its officer to appear, as a trial
326 witness. The order could issue only for good cause and after
327 considering the alternatives of audiovisual deposition or testimony
328 by contemporaneous transmission under Rule 43(a). The court could
329 order reasonable compensation for expenses incurred to attend
330 trial. And sanctions could be imposed only on the party, not on
331 its officer.

332 Some of the public comments supported adoption of the "Vioxx
333 alternative." One Subcommittee member spoke in favor. There are
334 categories of cases that present choices in designating the place
335 of trial. Multidistrict litigation and CAFA class actions are the
336 prime examples. The defendants have an opportunity to argue for
337 trial in a place that is not "home town," and that is beyond the
338 limits on subpoenas for nonparty witnesses. Choice of the location
339 for a "bellwether" trial can be similarly affected. Some of the
340 comments, including those from employment lawyers, support the
341 alternative. The "good cause" standard in the alternative does not
342 call for exceptional circumstances, but it is likely that courts
343 will seldom use it to order a party or its officer to attend trial

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344 from a distant place. Often the parties will agree, or the court
345 will decide, that some other form of testimony is a satisfactory
346 substitute for live testimony at trial. But the option for live
347 testimony is important to fair management of complex cases.
348 Concerns about misuse or overuse are not warranted.

349 Another reaction was that all Committee members agree that
350 Vioxx misreads the present rule. Many participants in the 2010
351 miniconference that preceded formulation of the published proposal
352 agreed. The concerns expressed by those who support the
353 alternative are understandable. But there were not many comments
354 on the published proposal and alternative, and these comments were
355 split. Among others, the American College of Trial Lawyers and the
356 Lawyers for Civil Justice oppose the alternative. Before Vioxx was
357 decided, decades of litigation were conducted without the option of
358 compelling a party or its officer to travel beyond the Rule 45
359 limits for nonparties to testify at trial. No one thought trials
360 conducted in this regime were unfair. "Vioxx changed the
361 landscape." And experience showed that it could be used for
362 strategic purposes, threatening to drag to trial high-level
363 officers who in fact are not important witnesses. And video
364 depositions, or testimony by contemporaneous transmission from a
365 distant place, are usually as good as live testimony at trial. A
366 party will want to produce at trial any witness whose testimony is
367 truly important. "We should go back to the history."

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

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

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

391 RULE 45: TRANSFER OF MOTIONS AND ORDERS

392 The separation of the place where compliance is required from
393 the court where the action is pending is not new. But it focuses
394 attention on a set of problems that arise in present practice.
395 Motions directed to the subpoena may raise issues closely tied to
396 the merits of the pending action, or significantly affecting
397 management of the action by the court where it is pending. Or a
398 single action may give rise to discovery subpoenas calling for
399 compliance in several different courts. It may be that the same
400 compliance questions arise in more than one court. The published
401 proposal provides for transfer of subpoena-related motions from the
402 court where compliance is required to the court where the action is
403 pending. The standard requires "exceptional circumstances" or the
404 consent of the parties and the person subject to the subpoena. One
405 important issue is the standard for transfer.

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

418 Absent the nonparty's consent, the exceptional circumstances
419 criterion generated much disagreement in the comments. Several
420 alternatives were suggested: "good cause"; the version in the draft
421 prepared for the April 2011 meeting, "considering the convenience
422 of the person subject to the subpoena, the interests of the
423 parties, and the interests of effective case management"; or "finds
424 that the interests favoring transfer outweigh the interests of the
425 person subject to the subpoena [or any party opposing transfer]."
426 Support for the "exceptional circumstances" criterion focused
427 primarily on protecting a nonparty against the burdens of
428 contesting discovery issues in the often distant court where the
429 action is pending. Support for a more permissive standard began
430 with suggestions that the illustrations of "exceptional
431 circumstances" in the Committee Note are not exceptional at all.
432 The Magistrate Judges Association urged that transfer should be

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433 more freely available, and another comment suggested that transfer
434 should be virtually routine when the dispute focuses not on the
435 circumstances of the nonparty subject to the subpoena but on the
436 merits of the action or the relative importance of the information
437 in relation to other discovery in the action and the merits. The
438 Subcommittee divided on the standard, but did not recommend a
439 change.

440 Discussion began with support for the exceptional
441 circumstances test. Practical experience suggests focus on the
442 nonparty as the person we should be concerned about. "The nonparty
443 'has no skin in the game.'" In determining whether exceptional
444 circumstances warrant transfer, the court can take account of any
445 showing that the nonparty in fact has a close relationship with a
446 party, and even may be acting in order to increase burdens on other
447 parties. The parties would like to litigate where it is convenient
448 for them. The judge in the court where compliance is required also
449 has an interest in transfer, to avoid the inconvenience of being
450 involved with disputes arising from an action in another court.
451 "Courts often have an interest that favors transfer." Although
452 some comments favored a more lenient standard, there were not many
453 of them. Remember there was so little interest in the entire
454 proposal that the hearings were cancelled. The American Medical
455 Association, representing doctors who are often subjected to
456 nonparty discovery, strongly favors the exceptional circumstances
457 test. So do other groups. "Lawyers can take care of themselves."
458 Any lesser standard makes it too easy to transfer. "My experience
459 is that this issue can be resolved by focusing on the interests of
460 the nonparty. If there is a need for a ruling by the court where
461 the action is pending, transfer will happen."

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

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

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

494 An observer suggested that the Subcommittee report seemed to
495 favor relaxing the exceptional circumstances test, and asked what
496 happened? It was responded that the Subcommittee had not really
497 decided to support one view or the other. The seeming unanimity of
498 the discussion with the Committee was not anticipated.

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

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

516 One reaction to this discussion was that if transfer is to be
517 so tightly circumscribed it may not be right to say only that the
518 court "may" transfer. If the case for transfer is so compelling,
519 why not say that it must be transferred? An immediate response was
520 that "any judge will transfer if there are exceptional reasons to
521 transfer." A related suggestion by an observer was put as a

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522 question – can a judge of the court where the action is pending
523 arrange to be designated to sit in the court where compliance is
524 required so as to protect the nonparty’s interests while also
525 achieving the benefits of transfer? Another suggestion was that
526 judges will manage to confer with each other when there is a
527 substantial need for coordination, and reduce the costs of separate
528 proceedings by informal arrangements.

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

541 RULE 45: PLACE OF COMPLIANCE

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

558 A simple illustration was proposed. A New York law firm is
559 litigating an action in Arizona. It serves a subpoena on an
560 Arizona nonparty to produce documents at the law firm offices in
561 New York. The nonparty wishes to protest that production in New
562 York is not reasonably convenient within the meaning of Rule
563 45(c)(2)(A). As the rule is structured, the Arizona nonparty must
564 seek relief by motion in the court in New York. Or, to make it one
565 step more complicated, the subpoena requests production of

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566 documents that in fact are stored in a warehouse in Oregon.

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

576 RULE 45: OTHER ISSUES

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

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

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

599 RULE 45: RECOMMENDATION

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

605 *Discovery: Preservation and Spoliation*

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

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

628 The difficulties of the underlying questions are highlighted
629 by the number of comments from outside and by the disparity of
630 views expressed by the comments. The Department of Justice letter
631 suggests that it is premature to attempt to develop new rules
632 provisions. The ongoing studies by several groups will, when
633 complete, provide a better foundation. The Department itself has
634 carried out a survey but will extend the survey.

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

645 These uncertainties about actual current problems are
646 compounded by the common concerns about making new rules. Will
647 litigants comply with a new rule? What unintended consequences may
648 follow – including impact on state tort law, and interaction with
649 obligations to preserve evidence imposed by rules of professional

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650 responsibility? Remember that there are many constraints that
651 require preservation of vast amounts of information quite without
652 regard to the prospect of litigation. It may be that the increase
653 in total preservation caused by a duty to preserve for reasonably
654 anticipated litigation would be quite small.

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

671 The Subcommittee consensus, although not a unanimous view, is
672 that it would be difficult to create good rules that seek to define
673 the duty to preserve, either in detail or by simply exhorting
674 reasonable behavior. Detailed provisions, further, could easily be
675 superseded by advances in technology. Social media offer an
676 example of complex sources of information that likely would have
677 been overlooked in a detailed rule drafted even a few years ago.
678 It cannot be guessed what new sources of information will develop,
679 and become important, even in the near future. Work on the drafts
680 now presented looked to describing the basic concept, developing a
681 bedrock concept of proportionality, and such. Much of the focus is
682 on shaping a distinction between remedies designed to cure the loss
683 of information that should have been preserved by searching for
684 substitutes, and sanctions designed to provide some substitute for
685 vanished information in cases of serious fault and serious
686 prejudice.

687 Other questions have been considered. Should new rules
688 address the scope of discovery? There is general agreement that
689 the volume of information available for discovery, and thus
690 preservation, has exploded. The explosion is in the form of
691 electronically stored information; should any new rule address only
692 ESI? The Subcommittee reached no consensus on this question. It
693 considered the Federal Circuit presumptive limits on e-mail
694 discovery, but only asks the question whether this should be

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695 considered. The work of the Duke Subcommittee overlaps the work of
696 the Discovery Subcommittee in these dimensions. The two
697 subcommittees are working in tandem.

698 The Subcommittee has real reservations about some of the
699 details that are regularly suggested for new discovery rules.
700 Drafting in terms of limiting the number of "key words" for
701 searches, for example, could easily lead to choices that will yield
702 "100% recall and 0% precision." Predictive coding offers promise
703 as a means of sharpening the focus of search and preservation
704 efforts, but it is not yet fully developed - RAND is exploring this
705 approach. One RAND finding is not surprising: reviewing available
706 information for relevance, responsiveness, and privilege or other
707 grounds of protection accounts for 70% of the cost of preservation
708 and discovery.

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

716 Professor Marcus said that after the November 2011 Committee
717 meeting further work was devoted to developing a rule with more
718 "hard specifics," but that approach presented problems and is not
719 illustrated in the agenda materials for this meeting. Nor is there
720 full agreement whether to frame rules amendments by focusing on ESI
721 alone. For many years, many observers believed that the general
722 discovery rules provided all the tools needed to manage discovery
723 of ESI. But the 2006 amendments reflect a judgment that some
724 specific provisions for ESI are necessary. ESI is different both
725 in its nature and its extensiveness. Rule 37(e) is an example of
726 an ESI-specific rule. On the other hand, Rule 26(f) addresses all
727 discoverable information, and there continues to be a great deal of
728 discoverable information that is not stored in electronic form.
729 Non-ESI information likely continues to be important in many cases,
730 but this is an uncertain proposition and the situation may change
731 in the future. If the next set of amendments is limited to a focus
732 on ESI, they can be fit into the more recent amendments.

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

737 Beyond these now familiar questions, another question

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738 persists: can a duty to preserve be defined in terms that limit the
739 obligation to preserve by allowing destruction of information that
740 would be discoverable if litigation were actually in being? And
741 should the Subcommittee continue to work on rule provisions that
742 would define specific limits on the scope of ESI discovery, along
743 the lines sketched in the informal discussion draft Rule
744 26(b)(1)(B) set out in the agenda materials at p. 275?

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

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

770 Another question was whether anyone has done a survey to
771 determine whether preserving ESI is qualitatively different from
772 preserving paper, and why? One current debate is whether the §
773 1920 provision that allows recovery of costs for "exemplification
774 * * * of any materials where the copies are necessarily obtained
775 for use in the case" extends to the expense of producing ESI.

776 Turning to the relationship between severity of sanctions and
777 the degree of culpability in failing to preserve, should "case-
778 ending sanctions" be limited to cases of intentional destruction?
779 What of gross negligence? And what of merely negligent, or perhaps
780 innocent, loss of critically important information – the running
781 example is compacting a wrecked automobile before the defendant has

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782 an opportunity to examine it for claimed defects? The Lawyers for
783 Civil Justice suggest the test should be an intent to make
784 information unavailable for trial. That would prohibit an adverse
785 inference, or stronger sanctions, even when a non-intentional loss
786 of information defeats an adversary's ability to litigate the case.
787 Loss of ESI can have the same consequences as loss of physical
788 evidence.

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

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

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

810 An observer noted that there clearly are differences between
811 ESI and other forms of information. The rulemaking question is
812 whether rules that do not distinguish between ESI and other forms
813 of information provide sufficient guidance. The 2006 amendments
814 were shaped in light of information suggesting that judges were not
815 aware of distinctions that make a huge difference for sanctions,
816 and did not understand the loss of information in the routine
817 operation of ESI systems. Are we sufficiently confident now in the
818 case law, and in awareness of computers, to be able to go back to
819 an overarching rule that does not distinguish ESI from "physical
820 stuff"? If not confident, it may be better to distinguish ESI,
821 and not go for a generally applicable approach.

822 A related perspective was offered. Traditionally, common law
823 adapted to evolving technology through decisions. But sanctions
824 affect professional careers. "This affects professional

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825 responsibility by sanctions." We want rules that provide guidance.
826 Without rule guidance, lawyers will be very careful. And that can
827 mean costly over-preservation.

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

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

854 It was agreed that harmonizing the approaches to sanctions
855 will not solve all the problems, "but it can improve the
856 situation." And this can leave time for ongoing studies that may
857 help define and resolve some of the other problems. A like comment
858 was that "we may not be able to deal with trigger and scope any
859 time soon. These are difficult problems that cannot be solved as
860 quickly" as sanctions.

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

866 Judge Grimm summarized the discussion by suggesting an
867 apparent Committee view that the Subcommittee should focus first on

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868 sanctions, and should focus on tangible as well as intangible
869 information. And the tentative exploration of a separate discovery
870 standard for ESI should be deferred.

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

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

899 An observer noted that the letter from the Sedona Conference
900 reflects hard and continuing work on these problems. "This
901 demonstrates just how difficult this is." The working group
902 includes people from all sides, from all areas of practice, and is
903 finding it difficult even to find points of agreement. "The
904 process needs to be completely informed." "People have a sense the
905 Committee is about to do something. It would help for people in
906 the bar to hear it's a process."

907 Another observer agreed that it is a process. People have
908 thought the Committee is on the verge of action since the Duke
909 Conference two years ago. The Committee has an obligation to act
910 to clarify when there are clear conflicts in cases purporting to
911 interpret a Federal Rule of Civil Procedure. When conflicts appear

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912 in addressing questions not directly addressed by a Rule, the
913 Committee also should consider acting. There is a clear conflict
914 in correlating sanctions with levels of culpability in failing to
915 preserve discoverable information. The Committee must determine
916 whether it would be good to address this conflict while other
917 problems percolate and are studied further.

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

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

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

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

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

949 *Duke Subcommittee*

950 Judge Koeltl reported that the Duke Subcommittee has made
951 substantial progress in developing a set of rules sketches to
952 advance the primary goals identified at the Duke Conference.

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953 Proportionality, cooperation, and early hands-on case management
954 are central to reducing cost and delay. One initiative encouraged
955 by the Subcommittee was the development of the protocols for
956 initial discovery in employment cases. The protocols call for an
957 exchange of information 30 days after the defendant's responsive
958 pleading or motion. Every judge on the Committee has adopted the
959 protocols, and has urged their colleagues to adopt them. They work
960 extremely well.

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

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

979 Beginning-stage. One issue is the length of time it takes to get
980 actual litigation started in an action. The 120 days allowed by
981 Rule 4(m) to serve process, the 120- or 90-day periods set for a
982 scheduling order in Rule 16(b), draw things out. The first set of
983 proposals reduce the period in Rule 4(m) to 60 days, and likewise
984 reduce the Rule 16(b) periods by half, to 60 days after service or
985 45 days after an appearance. These periods were chosen simply for
986 illustration; the actual choice may be rather different.

987 Another set of questions addresses how the scheduling order
988 should be developed. The sketches carry forward current Rule
989 16(b)(1)(A), which allows the court to adopt an order after
990 receiving the parties' report under Rule 26(f) without an actual
991 conference. But otherwise, the means of holding a conference are
992 sharpened to require an in-person conference or contemporaneous
993 communication; the provision for consulting by "mail, or other
994 means" would be deleted. Another aspect of scheduling-order
995 practice addressed by the sketches is the provision in Rule
996 16(b)(1) that allows categories of actions to be exempted by local

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997 rule. Local-rule exemptions may differ from the exemptions
998 enumerated in Rule 26(a)(1)(B). Rule 26(a)(1)(B) exemptions also
999 apply to the Rule 26(f) meeting of the parties and the Rule 26(d)
1000 discovery moratorium. It seems desirable to establish a uniform
1001 set of exemptions. The simplest way to do this would be to
1002 eliminate the present provision for local-rule exemptions and
1003 replace it with adoption of the Rule 26(a)(1)(B) exemptions by
1004 cross-reference.

1005 The sketches also include alternative provisions aiming at
1006 encouraging a conference with the court before filing a discovery
1007 motion. The more modest approach would add to Rule 16(b)(3) a new
1008 item, providing that a scheduling order may direct the movant to
1009 request an informal conference with the court before filing a
1010 discovery motion. The more ambitious approach would add a new
1011 provision – perhaps in Rule 7 governing motions, or perhaps
1012 somewhere in Rule 26 – directing that the movant must request the
1013 informal conference before filing a discovery motion. It appears
1014 that about two-thirds of federal judges do not now require a pre-
1015 motion conference, so it can be anticipated that many would resist
1016 a rule making it mandatory.

1017 The Rule 26(d) discovery moratorium is addressed by another
1018 set of sketches. Many lawyers seem unaware of the moratorium now,
1019 as witnessed by frequent requests to determine whether discovery
1020 should be suspended pending disposition of a motion to dismiss made
1021 by lawyers who are subject to the moratorium because they have not
1022 yet had a Rule 26(f) meeting. The moratorium may make it more
1023 difficult to have an effective discussion at the Rule 26(f)
1024 meeting. These sketches provide that any party can make discovery
1025 requests at a stated time after service or after some other event,
1026 but defer the time to respond until a stated period after a
1027 scheduling order enters. The idea is that the parties can plan
1028 discovery more effectively at the 26(f) meeting if they have actual
1029 discovery requests to consider. This system is not intended to
1030 support arguments that the first party to serve requests is
1031 entitled to priority in discovery. The only purpose is to make the
1032 26(f) conference more productive. The hope is to expedite
1033 discovery at the outset and to make both the 26(f) meeting and the
1034 scheduling order conference more productive.

1035 Discovery proposals. The need for proportionality in discovery was
1036 repeatedly emphasized at the Duke Conference. The word
1037 "proportionality" does not now appear in the rules. Rule
1038 26(b)(2)(C) does impose proportionality limits, but parties and
1039 courts continue to speak of discovery in terms of the full sweep of
1040 the Rule 26(b)(1) scope provisions. Even appellate courts do this.
1041 The cross-reference to 26(b)(2)(C) at the end of present 26(b)(1)

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1042 does not seem to have any real effect.

1043 "Proportionality is important." The Subcommittee prefers to
1044 incorporate the concepts of present 26(b)(2)(C) into the (b)(1)
1045 definition of the scope of discovery. This can be done in various
1046 ways, as illustrated by alternative sketches. Still other sketches
1047 expressly incorporate "proportionality" into the (b)(1) scope
1048 provision, but this seems risky. It would introduce a new concept;
1049 with or without an attempt at further definition, the new concept
1050 would generate uncertainty and corresponding contention.

1051 Proportionality also is approached by reducing the numerical
1052 limits on the presumptively available numbers and length of
1053 depositions, and on the number of interrogatories. Numerical
1054 limits would be added for the first time to Rule 34 requests to
1055 produce and Rule 36 requests for admission. It is possible that
1056 the presumptive limits now in Rules 30, 31, and 33 encourage some
1057 lawyers to engage in more discovery than they would seek without
1058 these targets. The proposed numbers still exceed the level of
1059 discovery activity in the median of federal cases as reported by
1060 the FJC study for the Duke Conference. If lower presumptive limits
1061 encourage the parties to rein in unnecessary discovery, so much the
1062 better.

1063 Discovery problems are not confined to requests.
1064 Inappropriate objection behavior also can be a problem. The
1065 sketches aim to deal with evasive responses, particularly with
1066 respect to document requests. Rule 34 is drawn to require a
1067 response within 30 days, but the response may be either a statement
1068 that inspection and related activities will be permitted as
1069 requested or an objection to the request, "including the reasons."
1070 One narrow proposal is to add to Rule 34 the explicit statement in
1071 Rule 33 that an objection must be stated with specificity. A
1072 broader proposal addresses the common practice of framing a
1073 response to begin with broad boilerplate objections, followed by
1074 producing documents with a statement that the objections are not
1075 waived. This leaves the requesting party uncertain whether
1076 anything has in fact been withheld under the objections. A sketch
1077 addresses this phenomenon by directing that an objection must state
1078 whether anything is being withheld on the basis of the objection.

1079 Contention interrogatories have become a subject of some
1080 contention, particularly with respect to the time when answers
1081 should be provided. The sketches would emphasize a presumption
1082 that ordinarily answers need not be made until other discovery has
1083 been completed.

1084 The value of Rule 26(a)(1) initial disclosures was discussed

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1085 inconclusively at the Duke Conference. Some participants think the
1086 practice is useless. Others think it has some small value. Still
1087 others think it could be made truly useful if greater disclosures
1088 were required, perhaps going back to some version of the broader
1089 requirements in place from 1993 to 2000. The Subcommittee is
1090 agnostic on this subject; no sketches have been prepared to
1091 illustrate possible changes. But it is to be noted that the
1092 employment case protocols are designed to displace Rule 26(a)(1) by
1093 providing for initial disclosure of the materials each side
1094 routinely seeks in the first wave of discovery.

1095 The sketches also illustrate possible approaches to shifting
1096 discovery costs from the responding party to the requesting party.
1097 Congress has shown an interest in this topic. Cost shifting
1098 commands a continuing place on the Subcommittee agenda, and remains
1099 an open issue. The Subcommittee is convinced that judges have the
1100 power to order cost shifting now in appropriate cases, and doubts
1101 the need to add emphasis by new rule provisions, but will continue
1102 to consider these questions.

1103 Cooperation. It is difficult to legislate cooperation among
1104 adversary parties. But the sketches provide illustrations of ways
1105 in which parties could be brought into the aspirational provisions
1106 of Rule 1 by a direction to cooperate in seeking the just, speedy,
1107 and inexpensive determination of every action. The importance of
1108 cooperation is continually emphasized in Committee discussions of
1109 preserving discovery materials and shaping discovery more
1110 generally. Professor Gensler has long supported this Rule 1
1111 approach.

1112 Package. The sketches address many separate rules provisions. But
1113 they have been developed as a coherent package of interdependent
1114 changes that are designed to produce a whole greater than the sum
1115 of the parts. That is not to suggest that each part of the package
1116 is indispensable. Far from it. Specific sketches may deserve to
1117 be abandoned. Others may deserve to be added. But the target will
1118 continue to be a comprehensive package that advances the goals so
1119 clearly and repeatedly expressed at the Duke Conference.

1120 One distinct question is how to seek review by a broader
1121 audience. One possibility would be to attempt to recreate the Duke
1122 Conference by a similar, broad-gauged "Duke II." But it may be
1123 wiser to frame a more limited undertaking, perhaps a miniconference
1124 designed to focus specifically on a package of rules proposals
1125 somewhat like the current package. The Committee benefits
1126 continually from input from the bar and organized bar groups. It
1127 seems likely that real benefits would accrue to a conference held
1128 in some form before preparing rules proposals for publication and

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1129 general public comment.

1130 Cooperation became the first subject of Committee discussion.
1131 It was asked how litigation is possible without real efforts by
1132 lawyers to work together, to join in solving litigation problems.
1133 Cooperation is especially needed in discovery. Good lawyers
1134 cooperate automatically, without sacrificing representation of
1135 their clients. Courts insist on cooperation. Emphasizing the duty
1136 to cooperate in Rule 1 is a good idea. Another Committee member
1137 agreed that it will be useful to add party cooperation to Rule 1 –
1138 now it is common to find efforts to cooperate rebuffed by arguments
1139 that the Rules nowhere require it.

1140 More general enthusiasm was expressed for "what the
1141 Subcommittee is attempting to do. Judicial involvement at the
1142 earliest possible time is important." Judges who do this now get
1143 good results. Without judge involvement, delay and expense are
1144 increased by "weeks of letter writing" to iron out disputes. When
1145 there is judicial involvement, "you lose all credibility with the
1146 court by taking a bad position."

1147 Another Committee member offered similar support. "There is
1148 a sense of embarrassment that some judges are not doing their
1149 jobs." Time limits, and the reductions in the numbers of discovery
1150 requests, "are to be applauded."

1151 Another judge expressed support for adding cooperation among
1152 the parties to Rule 1. "If the court puts its weight and prestige
1153 behind cooperation, with a representative who is responsible, it
1154 can work."

1155 Further support for the package was expressed by describing it
1156 as "impressive." There is reason to worry about limiting the
1157 number of depositions in "megacases," but lawyers and the court can
1158 determine what is appropriate relief from the presumptive limit.
1159 "Complex litigation should not drive the train too much." The
1160 sketches incorporate a sufficient degree of flexibility.

1161 An observer agreed, but emphasized the need to be clear that
1162 the presumptive limits on discovery are only presumptive, and can
1163 be changed to meet the needs of particular litigation. This can be
1164 dealt with in the Committee Note.

1165 Another observer suggested that it makes sense to hold a
1166 conference on a specific set of proposals, more sense than another
1167 broad and general conference in the model of the Duke Conference.

1168 The same observer suggested that it would be useful to explore

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1169 the value of outside facilitators in the discovery process. Not an
1170 arbitrator, but a mediator, conciliator, or special master. The
1171 effort would be to help the parties toward agreed solutions. "The
1172 business of mediation has become very much part of our profession."
1173 A Committee member extended this observation by noting the
1174 formation of a new American College of e-Neutrals. He added that
1175 when he acts as special master in discovery matters he asks the
1176 court for authority to reapportion allocation of his fees by
1177 assessing more against a party who is unreasonable. This works.
1178 The parties do behave reasonably.

1179 The Committee was reminded that possible rules changes are
1180 only one focus of the Duke Subcommittee's work. It is important
1181 that judges be schooled in best practices, and reminded of them.
1182 Judge Fogel has incorporated case management into conferences for
1183 judges, and they will be emphasized in new judges school. The
1184 benchbook has been revised by adding a detailed explanation of
1185 Rules 16(b) and 26(f) prepared by Committee members, with an
1186 emphasis on the importance of management.

1187 An observer offered special support for the case-management
1188 proposals. "The bar is thirsting for this." The informal
1189 conference before any discovery motion is especially important. it
1190 avoids paperwork and saves time. But she expressed concern about
1191 reducing the presumptive number of depositions and Rule 34 requests
1192 to produce. There is not a significant problem now with excess
1193 numbers of depositions. The presumptive limit to 5 depositions of
1194 4 hours each is insufficient, especially when one party has all the
1195 information and the events in suit cover a broad period of time.
1196 One reaction in employment litigation will be to bring more cases,
1197 so as to be able to multiply the presumptive number of permitted
1198 depositions. In response to a question, she added that the
1199 employment case protocols focus primarily on exchanging documents.
1200 That diminishes the need for Rule 34 requests, and can help
1201 identify the persons who should be deposed, but it is not likely to
1202 reduce the number of depositions that should be taken. Many
1203 employment lawsuits focus on more than one action against the
1204 employee - first discipline, then demotion, then discharge.
1205 Although the proposals allow a request for more depositions, "why
1206 should I have to go to court to get it?" A response was that this
1207 is the beauty of Rule 1 cooperation, and the informal conference
1208 before a discovery motion: if you need 12 depositions, cooperation
1209 should generate authorization for them.

1210 A final question from an observer asked whether the
1211 Subcommittee had considered amending Rule 26(c) to focus on
1212 disproportionate preservation demands, or amending Rule 27 to allow
1213 prefiling requests for a preservation order. "Prelitigation

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1214 preservation is a hugely difficult problem. Consideration should
1215 be given to means of securing pre-litigation guidance from the
1216 court." Judge Koeltl responded that those questions are for the
1217 Discovery Subcommittee, or perhaps in some measure for the
1218 continuing study of pleading in the wake of the *Twombly* and *Iqbal*
1219 decisions. In this vein, it was added that two pre-litigation
1220 problems should be clearly distinguished. The preservation problem
1221 may seem analogous to a Rule 27 petition to preserve testimony, but
1222 there are great differences that suggest any rule-based solution
1223 should be approached independently. The problem of discovering
1224 information needed to frame a pleading with the fact specificity
1225 that may be required by new pleading standards is distinct from
1226 both these problems, and might be addressed by providing discovery
1227 in aid of a complaint already filed rather than discovery before
1228 any action is filed. In whatever form, however, these problems
1229 will not be lost from sight.

1230 *Panel Discussions: Professor Cooper's 20 Years as Reporter*

1231 The afternoon portion of the meeting was devoted to
1232 presentations of outlines of ten of the papers in a set celebrating
1233 the 75th birthday of the Civil Rules in 2013 and Professor Cooper's
1234 twenty years of service as Reporter for the Civil Rules Advisory
1235 Committee. The tribute was organized and carried out by present
1236 and former members of the Committee. The papers will be published
1237 in the Michigan Journal of Law Reform.

1238 Professor Marcus presided over the first panel. Papers were
1239 presented by Professors Burbank, Coquillet, Gensler, Rowe, and
1240 Struve. Collectively, they traced the concept of formal rules of
1241 procedure as far back as Francis Bacon and forward to such issues
1242 as the need to take advantage of what may be ever-increasing
1243 opportunities for rigorous empirical evaluation of the operation of
1244 rules in practice. The difficulties of matching rule direction to
1245 the importance of case-specific discretion were explored, as well
1246 as the difficulties of separating substance from procedure and the
1247 corresponding challenge of framing rules of procedure designed to
1248 transcend any particular substantive field and to be transported
1249 across all substantive subjects of litigation. It was urged that
1250 rulesmakers need to be particularly careful when framing rules that
1251 affect access to court.

1252 Judge Mosman presided over the second panel. Papers were
1253 presented by Judge Rosenthal and Professors Carrington, Kane,
1254 Marcus, and Mullenix. Again a broad range of topics was covered,
1255 beginning with the efforts to confirm the openness of Committee
1256 proceedings by legislation in 1988, and ranging through more recent
1257 and continuing work on class actions, discovery, and the Style

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1258 Project.

1259 Detailed summaries of the summaries presented in the panel
1260 discussions would be premature. The finished papers, along with
1261 other papers assessing the ways in which Rules Enabling Act
1262 responsibilities are being carried out, will provide far better
1263 accountings.

1264 *FJC: Early-Stages-of-Litigation Attorney Survey*

1265 Emery Lee presented a summary of his closed-case study of
1266 cases terminated in the last quarter of 2011. The study focused on
1267 categories of cases likely to have discovery activity. It excluded
1268 cases terminated less than 90 days after filing. A survey was sent
1269 to nearly 10,000 lawyers identified from the case files, divided
1270 equally between plaintiffs' lawyers and defendants' lawyers. About
1271 3,500 replied, giving a 36% response rate.

1272 The purpose was to explore actual timing, duration, and use of
1273 Rule 16(b)(2) scheduling conferences and orders, and of parties'
1274 Rule 26(f) meetings. The preliminary findings include these:

1275 Seventy-two percent of respondents reported that they met and
1276 conferred as required by Rule 26(f). But it is tricky to know just
1277 what this figure means, remembering that cases not likely to have
1278 any discovery were winnowed out of the survey sample. Seven
1279 percent could not answer this question – it may be that the "wrong"
1280 attorneys were asked because those who appeared in the docket had
1281 not been involved in the early stages of the litigation. The
1282 figure increased among attorneys involved in cases that had a
1283 scheduling conference with the judge – in those cases, 92% of the
1284 attorneys reported a Rule 26(f) meeting. (The 2009 case study
1285 found 26(f) meetings in 86% of the cases that had any discovery.
1286 The complex litigation survey in SDNY had only a 68% meeting rate;
1287 it is hard to be sure, but one reason for part of the lower rate
1288 may be a high rate of Private Security Litigation Reform Act cases
1289 in which discovery is suspended pending disposition of a motion to
1290 dismiss. The survey of the Seventh Circuit pilot e-discovery
1291 project has no direct question, but it may be possible to back out
1292 a 54% rate.)

1293 Rule 26(f) conferences were most often held by telephone or
1294 videoconference. 86% of the respondents who reported meeting used
1295 one of these means. 9% of the respondents reported in-person
1296 meetings. 25% reported there was some correspondence. 6% reported
1297 there was only correspondence or e-mail exchanges. 74% concluded
1298 the meeting in a single conversation. 96% reported that the
1299 meeting was held far enough in advance of the Rule 16(b) conference

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1300 to plan discovery. The modal response indicated that the 26(f)
1301 meeting took from 10 to 30 minutes. Only 8% lasted more than an
1302 hour. The meetings that discuss ESI tend to take longer. These
1303 responses suggest that whatever may be the failings of memory, the
1304 participants do not perceive that 26(f) meetings take a lot of
1305 time.

1306 The reasons for not having a 26(f) conference in cases where
1307 there were none varied. Some of the responses suggest behavior in
1308 defiance of the rule - "we agreed not to," "one side refused," or
1309 "I don't do that." 45% of the answers were "other"; perhaps not
1310 surprisingly, cases in the "other" category had the highest rate of
1311 "other" responses. "Probably Rule 26(f) is honored in most cases
1312 where it should be."

1313 Other questions asked whether the 26(f) meeting served various
1314 ends. 71% reported that the meeting assisted in making
1315 arrangements for initial disclosure; 60% reported it helped to
1316 develop a proportional discovery plan; 50% reported it helped
1317 better understand the opposing party's claims or defenses; 40%
1318 discussed discovery of ESI; and 30% reported that the meeting
1319 increased the likelihood of prompt resolution. Of the 40% that
1320 discussed discovery of ESI, 60% discussed preservation obligations.
1321 These rates suggest there is a lot of room to encourage parties to
1322 discuss ESI discovery and to clarify preservation obligations.
1323 They compare to the Department of Justice survey indicating that
1324 preservation was discussed in 48% of conferences; the rate in the
1325 Seventh Circuit project is 62%, but the project involves cases
1326 expected to have discovery issues. Lower rates were reported in
1327 the survey undertaken to establish a basis of comparison for
1328 studying the new Southern District of New York project for complex
1329 litigation.

1330 Fifty percent of all respondents reported a Rule 16(b)
1331 scheduling conference, either in person or by phone; the rate
1332 increased to 60% of those who had a Rule 26(f) meeting. 94% of
1333 those who reported a Rule 16(b) conference also reported a
1334 scheduling order. Table 12 of the report shows responses to a
1335 question asking the reasons for responses indicating that the Rule
1336 26(f) meeting did not clarify your client's preservation
1337 obligations. 89% answered that their clients' preservation
1338 obligations were clear prior to the conference. Only 7% of the
1339 answers were that opposing counsel was not adequately prepared to
1340 discuss preservation, and 4% reported opposing counsel was not
1341 cooperative.

1342 The cases that did not have a Rule 16(b) conference in person
1343 or by telephone involved various explanations. Of them, 40% stated

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1344 that the case was resolved before the conference took place. 12%
1345 reported that the conference was conducted by correspondence. 24%
1346 were cases exempted from the conference by local rule or judicial
1347 order. And 24% gave "other" as the reason.

1348 Proportionality of discovery requests relative to the stakes
1349 in litigation was discussed by the judge in 24% of the Rule 16(b)
1350 conferences, and not discussed in 76%.

1351 The parties' proposed discovery plan was approved without
1352 modification in 39% of the cases, with minor modifications in 57%,
1353 and with major modifications in 4%. But it is difficult to know
1354 how respondents drew the line between minor and major changes. The
1355 most common change appears to involve the time for discovery – are
1356 such changes major or minor?

1357 It has not been done yet, but it will be possible to correlate
1358 the length of the Rule 26(f) meeting with the respondents' views of
1359 how helpful the conference was. It also will be possible to
1360 correlate the length of the meeting with the amount of discovery.

1361 An attempt was made to separate complex cases from other
1362 cases. 25% of those who were asked reported that cases the
1363 researchers expected to be complex were not.

1364 It is not clear how much information can be drawn from the
1365 survey about the topics that were discussed in the Rule 26(f)
1366 meetings that did discuss discovery of ESI. The most commonly
1367 discussed question was the format of production.

1368 *Pleading*

1369 Pleading occupies less than one page in the agenda book. The
1370 page puts a single question. The Committee continues to pay close
1371 attention to the evolution of pleading practices as lower courts
1372 continue to work through the implications of the *Twombly* and *Iqbal*
1373 decisions. Although there is a sense that practices are converging
1374 and settling down, there also is a sense that there may be still
1375 closer convergence over the next year or two. In addition,
1376 empirical studies of pleading and motions to dismiss continue. The
1377 FJC, through Joe Cecil, is about to begin a comprehensive study of
1378 motions to dismiss that will extend beyond Rule 12(b)(6) motions to
1379 include other Rule 12 motions, and to extend beyond that to summary
1380 judgment. The study will be designed to facilitate comparison with
1381 the findings in earlier FJC studies, and to integrate findings on
1382 case terminations by all dispositive pretrial motions. The study
1383 is designed to involve members of the academic community, and to
1384 generate a data base that will be freely available for scholarly

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1385 use. This integration with the academic community was lauded as a
1386 very good development.

1387 A second impression supplements the potential values of
1388 deferring any decision whether to begin work toward publication of
1389 possible rules revisions. The potential advantages of delay are
1390 apparent. The potential costs also must be counted. The sense is
1391 that there is no present crisis in federal pleading practice.
1392 Hasty action is not compelled by a need to forestall frequent
1393 unwarranted denial of access to press worthy claims before the
1394 courts. There appears to be an increase in the frequency of
1395 motions to dismiss for failure to state a claim. There may be some
1396 increase in the number of cases terminated by these motions. But
1397 it is not clear whether, if so, the outcomes are good, bad, or
1398 neutral.

1399 So the question put to the Committee was whether this
1400 assessment is wrong. Is there reason to begin immediate work to
1401 refine the many possible alternatives that have been outlined in
1402 earlier meetings? Many of the alternatives focus directly on
1403 pleading standards. Some focus on motions practice. And some
1404 describe different approaches to discovery in aid of framing a
1405 complaint. Models abound and can proliferate. Should they be
1406 advanced now?

1407 Brief discussion concluded that while it is vitally important
1408 to maintain careful and continual study of pleading standards and
1409 practices, the topic is paradoxically too important to justify
1410 present action. It will continue to command a regular place in
1411 agenda materials.

1412 *Rule 23 Subcommittee*

1413 Judge Mosman, Subcommittee chair, led discussion of the Rule
1414 23 Subcommittee's initial work. The Subcommittee, helped by
1415 discussion at the November Committee meeting and the panel
1416 discussion at the January Standing Committee meeting, has
1417 identified five major topics for study. The most important present
1418 question is whether all five of them warrant further work, and
1419 whether there are other topics that also should be considered.
1420 Another question is timing: the Committee has a rather full agenda.
1421 And it will be important to decide on means of gathering
1422 information from outside the Subcommittee and Committee.

1423 The five topics at the front of the present agenda are these:
1424 (1) The role of considering the merits in ruling on class
1425 certification, as illuminated by *Ellis v. Costco*, *Hydrogen*
1426 *Peroxide*, and some parts of *WalMart v. Dukes*. Is there confusion,

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1427 or are there differences, in the role of rigorous analysis? (2)
1428 Should there be criteria for certifying a settlement class
1429 different from the criteria for certifying a litigation class? (3)
1430 What about issues classes, and the relationship between Rule
1431 23(b)(3) and (c)(4)? Is predominance always required, so (c)(4) is
1432 only a trial tool? (4) Are settlement reviews working properly
1433 under the 2003 revision of Rule 23(e)? (5) What is the proper role
1434 of individual monetary awards in Rule 23(b)(2) mandatory classes?

1435 Subcommittee members Klonoff and Cabraser were asked to
1436 describe their views on these subjects.

1437 Dean Klonoff began with the observation that "Hydrogen
1438 Peroxide has caused a sea change in conduct of the class-
1439 certification stage." Courts look to the merits and resolve fact
1440 disputes relevant to determining certification requirements.
1441 Hydrogen Peroxide directs the court to decide which parties'
1442 experts are more credible. Bifurcating class-certification
1443 discovery from merits discovery is more difficult.

1444 As to settlement, the Amchem decision says that certification
1445 of a settlement class does not require finding that the same class
1446 would be manageable as a litigation class. But all other class-
1447 action requirements must be satisfied. Courts refuse
1448 certification, for example, for want of predominance. As Judge
1449 Scirica noted in his opinion concurring in the DeBeers case, the
1450 Amchem decision has caused lawyers to shift to settling claims in
1451 non-class ways without any of the oversight that applies to class
1452 settlements. This development is troubling.

1453 As to issues classes, the Castano decision in the Fifth
1454 Circuit requires predominance for the case as a whole. The Second
1455 and Seventh Circuits, on the other hand, find certification proper
1456 if class disposition "materially advances the case as a whole."

1457 The ALI Principles of Aggregate Litigation attempted to refine
1458 the criteria for reviewing class settlements. Judicial opinions
1459 list a dozen factors or more to be considered, without assigning
1460 relative weights to the different factors. Courts have seized on
1461 the ALI Principles precepts for cy pres settlements, including a
1462 wonderful recent opinion by Judge Rosenthal. Section 3.07 has been
1463 adopted by a couple of courts.

1464 As to Rule 23(b)(2) classes, it would be premature to attempt
1465 to measure the impact of WalMart on some things. WalMart conflates
1466 commonality with predominance, but it is difficult to know how
1467 seriously lower courts will take all statements in the opinion.
1468 There is some question how far Rule 23 can be amended to allow

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1469 determination of individual backpay awards in a (b)(2) class, given
1470 the discussion of due process in WalMart. So the role of
1471 individual damages claims remains unsettled.

1472 Any attempt to reformulate the categories of Rule 23(b),
1473 whether along the lines sketched twenty years ago or some other
1474 lines, would be an aggressive move.

1475 In response to a question, Dean Klonoff expressed uncertainty
1476 whether due process can be satisfied by notice on a web site, or by
1477 e-mail. "Individual notice seems too expensive.

1478 Elizabeth Cabraser observed that the "jurisprudence is very
1479 active" in attempting to work through the extent to which the
1480 merits should be considered in deciding on certification. *Berry v.*
1481 *Comcast* in the Third Circuit, 655 F.3d 182, formulates a
1482 distinction between looking at the merits for certification and
1483 decision at trial. There are huge issues on how this affects expert
1484 analysis. Must it be done twice? Must discovery be done twice?
1485 The courts are attempting to clarify these issues, but they deserve
1486 Committee study. There is an extreme position that a class can
1487 include only those people who will win at trial; that asks for too
1488 much consideration of the merits at the certification stage.

1489 The developing law, such as the *Sullivan* case, suggests that
1490 courts can navigate the certification of settlement classes, but it
1491 would be good to develop express rule provisions.

1492 As to issues classes, some courts now fail to navigate the
1493 rule. A recent Seventh Circuit decision, *McReynolds v. Merrill*
1494 *Lynch*, is very good, an interesting source on Rule 23(c)(4). The
1495 central perception is that (c)(4) plays different roles at
1496 different stages of a case.

1497 As to settlement review, it would be good to have a "unified
1498 field theory," identifying the factors that can be considered. And
1499 it would be useful to clarify the role of *cy pres* settlements.

1500 Employment lawyers and civil rights groups are interested in
1501 clarifying Rule 23(b)(2). One approach is to view backpay as
1502 equitable relief. Or it may be that an opportunity to opt out
1503 should be provided; the issue may be the cost of notice. This
1504 could be combined with the issue-class question, recognizing a
1505 (b)(2) class for common issues, with a right to opt out for
1506 individual remedies.

1507 Professor Marcus, Reporter for the Subcommittee, offered
1508 comments on where the Committee has been in the past.

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1509 The first observation is that it takes a long time to become
1510 familiar, and then comfortable, with class-action issues. It will
1511 be useful to get to work now. But the WalMart decision is still
1512 recent. Its impact will be worked out only over time.

1513 The Hydrogen Peroxide decision "is a big, big deal," but it
1514 continues to evolve. It may develop into a terrific idea. Or it
1515 may lead to putting the entire cart before the horse, and lead to
1516 litigating the merits in full twice.

1517 Amchem says that the prerequisites to class certification
1518 cannot be bypassed in order to approve a good settlement. Perhaps
1519 that deserves consideration.

1520 There may be an inherent tension between Rules 23(b)(3) and
1521 (c)(4) on issues classes. The circuits have divided. That may be
1522 sufficient reason to take on this subject.

1523 Rule 23(e) as amended in 2003 provides more guidance on
1524 settlement review than its earlier form. Coming to agreement on a
1525 list of the real concerns that should shape review may be a
1526 challenge.

1527 The question of damages in a (b)(2) class is important, but it
1528 is too early to know what the impact of WalMart will be.

1529 Finally, "an academic might want to rethink the categories of
1530 (b), but this would stir controversy."

1531 Discussion began with an observation that review of Rule 23 is
1532 good to the extent of "real legal issues that we can nail down."
1533 The role of issues classes under Rule 23(c)(4) is an example. The
1534 five topics identified by the Subcommittee reflect what is going on
1535 in the courts. It will be useful to study settlement classes and
1536 issues classes. It is not so clear whether there is much for the
1537 Committee to do about Hydrogen Peroxide.

1538 A committee member suggested that it would be useful to
1539 address settlement classes. If often happens that defendants argue
1540 that class certification is impossible, and then switch and want to
1541 certify a class with a settlement already worked out. There is a
1542 temptation to get rid of the case by certifying a class for
1543 settlement.

1544 An observer suggested that the direction to decide on
1545 certification "as soon as practicable" generates enormously complex
1546 issues that make it difficult to decide when to propose Rule 23
1547 revisions. The requirement of strict scrutiny of all the Rule 23

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1548 factors before making a certification decision, combined with
1549 uncertainties as to the scope of pre-certification discovery, may
1550 contribute to an urge to settle without doing all the work needed
1551 to satisfy Hydrogen Peroxide standards. "Hydrogen Peroxide has
1552 made a huge difference in the amount of work before certification."
1553 Even if discovery begins with an attempt to bifurcate certification
1554 discovery from merits discovery, you find the plaintiff needs more
1555 information and defendants resist requests for more as involving
1556 merits discovery.

1557
1558 Another observer noted that he had been involved in the
1559 Hydrogen Peroxide litigation. The aftermath is that there is
1560 really no such thing as bifurcated discovery. This is particularly
1561 true as to ESI – it is not feasible to search only for information
1562 bearing on class certification. And much money is being spent on
1563 full expert damages analysis. It takes six months to a year longer
1564 to reach a certification decision than was required before Hydrogen
1565 Peroxide. In response to a question whether all that pre-
1566 certification discovery makes it easier to be ready for trial after
1567 certification, the observer stated that judges allow 90% of
1568 discovery before the certification decision. "Only clean-up is
1569 left."

1570 The first observer described experience in a current case with
1571 bifurcated certification discovery. The schedule sets a 2-month
1572 deadline. The information has not yet been provided. When it
1573 comes, it will be an "information dump." More time will be needed
1574 to explore it. Clarification of what is needed for certification
1575 is important. This is not an argument to delete the "as soon as
1576 practicable" requirement, but is an argument to clarify for the
1577 courts what it is that you need to win certification, and how you
1578 are to gather that information.

1579 When asked, these two observers said that these problems are
1580 both problems of discretion and problems of confusion about legal
1581 standards. The issues are resolved when an experienced judge has
1582 the case, but it takes too long. "Then there are judges who do not
1583 understand." The legal issues need to be clarified to guide them.

1584 Another observer suggested that the question whether rules can
1585 help depends on the source of the problems. If it is lack of
1586 clarity in the standard of proof – a preponderance of the evidence
1587 required for all certification elements, as in Hydrogen Peroxide –
1588 a rule might help. If the problem is that cases vary in case-
1589 specific ways, such as defining the scope of the class, the issues
1590 for certification, claims, or defenses, there is less room for
1591 rulemaking.

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1592 Objectors have been a source of concern in the past,
1593 especially as they affect the appeal process. Is this still a
1594 problem? If it is, can it be effectively addressed by a rule? One
1595 response was that this still is a problem.

1596 A different observer said that civil rights plaintiffs "are
1597 clamoring about (b)(2)." They do not know how to handle Title VII
1598 classes. The Seventh Circuit has provided some help. And it may
1599 help to make use of (c)(4) issues classes.

1600 This observation led to a statement that backpay "is a subset
1601 of a bigger problem." Class actions have been used for a long time
1602 to resolve liability, with follow-on individual proceedings. How
1603 does this work after WalMart? The question of commonality involves
1604 far more than (b)(2) classes and backpay. An extreme position
1605 would be that class actions cannot be certified when individual
1606 follow-on proceedings are needed. The observer agreed that Title
1607 VII cases can be seen as a subset. This also relates to scrutiny
1608 of the merits at the certification stage. One approach has been to
1609 require that each class member have "standing," and to limit
1610 standing to those who have valid claims on the merits. That could
1611 be crippling.

1612 A different approach to the issue-class question was
1613 suggested. The WalMart opinion makes assertions about the
1614 preclusive effects of class decisions on individual actions. This
1615 is a thorny set of problems. Will lower courts say that all
1616 individual claims must be resolved in full, so as to achieve claim
1617 preclusion foreclosing any later individual actions? Or will a
1618 narrower scope of preclusion suffice, as with a (c)(4) issue class?

1619 Returning to an earlier observation, it was said again that
1620 there have been many class certifications, such as those involving
1621 pharmaceuticals or other mass torts, that look for resolution of
1622 central liability issues on a class basis – something of an issue
1623 class, although often not conceived that way – to be followed by a
1624 claims resolution mechanism to determine individual awards. "What
1625 have we done with this structure"?

1626 One observer responded that, putting aside dicta on due
1627 process, the WalMart decision is, on its face, an interpretation of
1628 Rule 23. The biggest due process concern arises from issue and
1629 claim preclusion. Current Rule 23(b)(2) is cast in equitable terms
1630 because the cases finding it fair to bind an individual not
1631 personally present were decided in equity. It may be possible to
1632 fit into (b)(2) low-value consumer cases, cases with formulaic
1633 relief, cases in which individual awards can be determined by a
1634 spreadsheet.

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1635 A Committee member said that many courts use (b)(3) the same
1636 way others use (c)(4). A class is certified to deal with common
1637 issues, then the follow-on issues. There need not be an
1638 inescapable tension, a choice. Rule 23(c) requires definition of
1639 class claims, issues, or defenses, and the definition must be
1640 included in the class notice. This addresses due process concerns.
1641 So it would be possible to amplify (b)(2) notice requirements for
1642 some purposes.

1643 An observer suggested that "notice is something you can do
1644 quickly. Paper notice is not practical. People toss out the mail
1645 as junk."

1646 Judge Mosman asked how the Subcommittee should proceed in its
1647 next steps. One Committee member responded that these issues
1648 attract great attention. The Subcommittee should ask at the
1649 beginning what the questions will be, so that everyone can
1650 participate in providing information and points of view. The
1651 Subcommittee should reach out to groups that represent
1652 practitioners - the ABA, the American College, the American
1653 Association for Justice, and so on. It should describe the issues
1654 that are being considered, and ask whether there are other issues
1655 that should be considered. "There will be people with real
1656 information, and different views." And beyond the beginning, we
1657 want involvement in an ongoing way, so we can consider all the
1658 things that we are most likely to hear later if we do not hear them
1659 and react to them earlier.

1660 Another Committee member recalled the very useful initial Rule
1661 56 miniconference that was held while the drafts were still in a
1662 preliminary stage.

1663 An observer suggested that a miniconference would be good.
1664 She also noted that the Sedona Conference is hard at work on these
1665 issues.
1666

1667 Judge Koeltl thanked the Rule 23 Subcommittee for all its hard
1668 work, and urged that further comments be sent to them.

1669 *Rule 55*

1670 At the November meeting Judge Harris described a problem that
1671 some courts have encountered in understanding the
1672 interrelationships between Rules 54(b), 55(c), and Rule 60(b).
1673 Rule 55(c) states that a court may set aside a default judgment
1674 under Rule 60(b). The issue arises when a court enters a default
1675 "judgment" that disposes of less than all of the claims among all
1676 the parties in the case. Unless the court specifically directs

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1677 entry of final judgment, the default judgment is not final. Rule
1678 54(b) provides that the judgment may be revised at any time before
1679 entry of a judgment "adjudicating all the claims and all the
1680 parties' rights and liabilities." Rule 60(b), which sets demanding
1681 standards for relief from a final judgment, applies only to final
1682 judgments. A proper understanding of Rule 55(c) is that it invokes
1683 Rule 60(b) only as to a final default judgment. But some courts
1684 have had to struggle to reach this understanding.

1685 The proposal is to revise Rule 55(c) by adding a single word:
1686 "The court * * * may set aside a final default judgment under Rule
1687 60(b)."

1688 The proposal was described as "a simple fix." It adds
1689 clarity, and will spare confusion in the future.

1690 Agreement was expressed. This is a perfectly reasonable
1691 change, in keeping with the Style Project approach to adding
1692 clarity that merely expresses the rule's present meaning.

1693 The Committee unanimously approved a recommendation to publish
1694 this amendment of Rule 55(c) for comment. Because it is a simple
1695 clarification, there is no urgency about rushing to publication.
1696 It should be held until it can be included in a package with other
1697 published proposals.

1698 The draft Committee Note included three paragraphs. The second
1699 and third were enclosed in brackets, to indicate that they are
1700 subject to challenge as offering advice about practice in ways
1701 better avoided in Committee Notes. The Committee agreed. Only the
1702 first paragraph, explaining the "purpose to make plain the
1703 interplay between Rules 54(b), 55(c), and 60(b)," will remain.

1704 *Rule 84*

1705 Judge Pratter introduced the Subcommittee Report on Rule 84.
1706 Questions about the role of Rule 84 forms arose with the perception
1707 that the pleading forms seem inconsistent with the pleading
1708 standards described in the *Twombly* and *Iqbal* decisions. At the
1709 same time, concerns were expressed that it might be better to
1710 explore not only the pleading forms, but more general questions as
1711 to the continuing role of the full Enabling Act process in
1712 promulgating forms that "suffice under these rules."

1713 A subcommittee was formed with representatives from each of
1714 the advisory committees for rules that are in some way connected to
1715 forms. The Appellate Rules Committee and the Civil Rules
1716 Committees are the only committees that adopt forms through the

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1717 full Enabling Act process. Bankruptcy forms are approved by the
1718 Judicial Conference and do not proceed further in the Enabling Act
1719 process. Criminal Rules forms are developed by the Administrative
1720 Office; the Administrative Office occasionally consults with the
1721 Criminal Rules Committees.

1722 More importantly, it was decided that forms play different
1723 roles with respect to different sets of rules. There are only a
1724 few Appellate Rules forms. The bankruptcy forms play an integral
1725 role with much bankruptcy administration. The criminal forms are
1726 seldom used by defendants.

1727 More importantly still, it was concluded that - in light of
1728 different histories, present practices, and differing uses of
1729 rules-annexed forms - there is no need to adopt a common approach
1730 to forms among all of the advisory committees. Each advisory
1731 committee should be free to determine the approach most suitable
1732 for its set of rules, keeping the other advisory committees
1733 informed of any changes in basic approach.

1734 There are a lot of Rule 84 pleading forms. The beginning
1735 question was whether an attempt should be made to revise them to
1736 accord with new pleading standards. "We could choose to do nothing.
1737 That would make some people very unhappy. There is real concern
1738 that pleading forms - especially Form 18 for patent infringement
1739 cases - do not fit with *Twombly* and *Iqbal*."

1740 One approach would be to "manicure" the collection of forms.
1741 One possibility would be to cut off the pleading forms, retaining
1742 the others. (The alternative of drafting revised pleading forms is
1743 unattractive.)

1744 Another alternative would be to drop Rule 84 entirely. Or it
1745 could be retained, but modified to delete the statement that the
1746 forms suffice under the rules. The forms would become mere
1747 illustrations of possibilities.

1748 Or the Civil Rules Committee could adopt the approach followed
1749 for the Criminal Rules, relying on the Administrative Office as the
1750 primary source of forms. "Wonderful forms abound. The least
1751 wonderful are the Rule 84 forms." The Administrative Office rules
1752 group will meet next fall; the meeting could be scheduled next to
1753 the Civil Rules Committee meeting, affording an opportunity for
1754 Committee members to observe if that seems useful.

1755 Or the Committee could review the forms and decide which forms
1756 deserve to be retained in some form, apart from pleading. Forms
1757 may be desirable when addressing topics that seem particularly

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1758 important, or that seem to present special needs for uniformity.
1759 Forms 5 and 6, dealing with a request to waive service of process
1760 and waiver, are examples of important forms. Rule 4(d), indeed,
1761 requires use of Form 5. The form invitation to consent to trial
1762 before a magistrate judge may be another illustration - it is
1763 important to avoid any hint that the court encourages consent.
1764 Uniformity may be useful in dealing with such things as the caption
1765 of pleadings, the summons served at the beginning of an action, and
1766 possibly some others.

1767 If only a few forms deserve "official" status, they might be
1768 retained. Form 5 is an example of a form made mandatory; perhaps
1769 that approach should be followed for a few other forms. Rule 84
1770 might be used for that purpose, or the requirement could be
1771 expressed in rule text, as in Rule 4(d).

1772 Discussion began with the suggestion that "'do nothing' is not
1773 an option." Case law suggests that the pleading forms do not
1774 suffice under Rule 8, contrary to the statement in Rule 84. "No
1775 one would think we should have Rule 84 if we were starting today.
1776 We should disavow it." The Administrative Office forms can help.
1777 Any really important form can be adopted by specific rule
1778 provisions.

1779 Another Committee member agreed that the best step is to
1780 eliminate Rule 84.

1781 Some concern was expressed about the value of Forms 60 and 61,
1782 the Notice of Condemnation and a Complaint for Condemnation. The
1783 Department of Justice will review them.

1784 It was noted that going through the full Enabling Act process
1785 is time consuming. If the Committee wishes to retain
1786 responsibility for the Forms, it will be necessary to lavish more
1787 time on reviewing and maintaining them than has been devoted to
1788 them in the last many years. Diversion of Committee resources to
1789 this task could exact a high price in discharging more important
1790 responsibilities.

1791 It was suggested that the forms were adopted in 1938 for
1792 pedagogic purposes, to draw pictures of what the new rules
1793 contemplated. That is not a reason to continue them now.

1794 An observer described Judge Hamilton's dissent in a recent
1795 Seventh Circuit case pointing out the incongruity of the Rule 84
1796 forms with recent pleading decisions. That may suggest the need to
1797 act sooner, not later.

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1798 Other Committee members agreed that "people like
1799 simplification," and that it would be good to abrogate Rule 84, and
1800 all the forms with it. "There are other ways of getting forms out
1801 there." But it will remain important to retain, in some way, any
1802 form that is mandated by a specific rule outside Rule 84.

1803 The Rule 84 question has been on the agenda for some time. It
1804 may be that the pleading forms raise questions sufficiently awkward
1805 as to counsel prompt action. The Committee agreed that the Rule 84
1806 Subcommittee should consider these questions promptly, and
1807 determine whether the Committee should recommend publication of a
1808 proposal to the Standing Committee this spring. If the
1809 Subcommittee concludes that a recommendation should be made, it
1810 will circulate a proposal to the Committee. The Committee can then
1811 decide whether to carry the issue forward to the November meeting,
1812 or instead to recommend publication this summer.

1813 *Next Meeting*

1814 The next Committee meeting is scheduled for November 1, and 2
1815 at the Administrative Office in Washington, D.C.

1816 The Committee expressed all best wishes to Judge Kravitz, and
1817 to Judge and Mrs. Campbell. And it noted that the same thoughts
1818 and wishes were expressed in toasts at the Committee dinner.

1819 The Committee also expressed its thanks to all the panel
1820 members who traveled to Ann Arbor to deliver summaries of their
1821 papers. It is important to keep in mind, and to publicize, the
1822 achievements of the Committees over time and the importance of
1823 maintaining the Enabling Act tradition of open, deliberate,
1824 responsible rulemaking.

1825 Respectfully submitted,

1826 Edward H. Cooper
1827 Reporter.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 11-12, 2012
Washington, D.C.
Draft Minutes

Oct. 1, 2012

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Monday and Tuesday, June 11 and 12, 2012. The following members were present:

Judge Mark R. Kravitz, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Diane P. Wood

Deputy Attorney General James M. Cole was unable to attend. The Department of Justice was represented throughout the meeting by Elizabeth J. Shapiro, Esquire, and at various points by Kathleen A. Felton, Esquire; H. Thomas Byron III, Esquire; Jonathan J. Wroblewski, Esquire; Ted Hirt, Esquire; and J. Christopher Kohn, Esquire.

Judge Jeremy D. Fogel, Director of the Federal Judicial Center, participated in the meeting, as did the committee's consultants – Professor Geoffrey C. Hazard, Jr.; Professor R. Joseph Kimble; and Joseph F. Spaniol, Jr., Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Jonathan C. Rose	Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Chief, Rules Committee Support Office
Julie Wilson	Attorney, Rules Committee Support Office
Andrea L. Kuperman	Rules law clerk to Judge Kravitz
Joe Cecil	Research Division, Federal Judicial Center

Also attending were Administrative Office attorneys James H. Wannamaker III, Bridget M. Healy, and Holly T. Sellers, and the judiciary's Supreme Court fellows.

Representing the advisory committees were:

- Advisory Committee on Appellate Rules —
 - Judge Jeffrey S. Sutton, Chair
 - Professor Catherine T. Struve, Reporter
- Advisory Committee on Bankruptcy Rules —
 - Judge Eugene R. Wedoff, Chair
 - Professor S. Elizabeth Gibson, Reporter
 - Professor Troy A. McKenzie, Associate Reporter
- Advisory Committee on Civil Rules —
 - Judge David G. Campbell, Chair
 - Professor Edward H. Cooper, Reporter
 - Professor Richard L. Marcus, Associate Reporter
- Advisory Committee on Criminal Rules —
 - Judge Reena Raggi, Chair
 - Professor Sara Sun Beale, Reporter
- Advisory Committee on Evidence Rules —
 - Judge Sidney A. Fitzwater, Chair
 - Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Kravitz reported that he would retire as committee chair on September 30, 2012, and the Chief Justice had nominated Judge Sutton to succeed him. He congratulated Judge Sutton and thanked the Chief Justice for making an excellent selection.

Judge Kravitz reported that the Supreme Court in April 2012 had adopted the proposed amendments to the bankruptcy and criminal rules recommended by the Conference at its September 2011 session. The changes will take effect by operation of law on December 1, 2011, unless Congress acts to reject, modify, or defer them.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Robinson reported that there had been no further significant legislative action related to electronic discovery since the committee's January 2012 meeting.

He said that the House Judiciary Committee had held a hearing on the Class Action Fairness Act, at which no calls were made either for an overhaul of FED. R. CIV. P. 23 (class actions) or for dramatic changes to the rule. One witness, though, criticized the continuing reliance on *cy prè*s in class actions.

Mr. Robinson said that there had been no recent action on legislation addressing sunshine in regulatory decrees and settlements. He suggested that legislative attention now seemed to focus more on the criminal rules. A hearing, he reported, had been held before the Senate Judiciary Committee in June 2012 addressing the obligations of prosecutors to disclose exculpatory materials to the defense. At the hearing Senator Murkowski summarized her legislation on the subject, introduced in the wake of the prosecution of the late Senator Stevens and the ultimate dismissal of the criminal case.

Mr. Robinson reported that Judge Raggi had submitted a letter in connection with the hearing, in which she set out in broad terms the extensive work of the Advisory Committee on Criminal Rules over the last decade on FED. R. CRIM. P. 16 (discovery and inspection in criminal cases). The letter, he said, had a 909-page attachment describing that work in detail. In addition, Carol Brook, the federal defender for the Northern District of Illinois and a member of the advisory committee, testified at the hearing. He added that the legislators and witnesses appeared to agree that there were problems with non-disclosure of *Brady* materials that should be addressed, but most concluded that the pending legislation did not offer the right solution to the problems.

He reported that Senator Leahy had introduced legislation underscoring the nation's obligations under article 36 of the Vienna Convention to provide consular notification when foreign nationals are arrested. The legislation, he said, had been added to a State Department appropriations bill. He pointed out that language had been removed from the bill that would have duplicated the substance of proposed amendments to FED. R. CRIM. P. 5 and 58. The committee report accompanying the bill, moreover, encouraged the ongoing work of the rules committees and the Uniform Law Commission in facilitating compliance with the Vienna Convention by federal, state, and local law-enforcement officials. Mr. Robinson thanked the Judicial Conference's Federal-State Jurisdiction Committee for monitoring the legislation and informing the Senate of the activities of the rules committees.

He reported that the House Judiciary Committee had favorably reported out legislation to require bankruptcy asbestos trusts to report claimant filing information to the bankruptcy courts on a quarterly basis. The substance of the legislation, he noted, had previously been proposed as an amendment to the bankruptcy rules, but was not adopted by the Advisory Committee on Bankruptcy Rules. He added that the legislation would continue to be monitored.

Mr. Robinson noted that Magistrate Judge Paul W. Grimm, a member of the Advisory Committee on Civil Rules, had testified at the Senate hearing on his nomination to a district judgeship on the U.S. District Court for the District of Maryland. In addition, a Senate vote was expected shortly to confirm the nomination of Justice Andrew D. Hurwitz, a recent alumnus of the Advisory Committee on Evidence Rules, to a judgeship on the U.S. Court of Appeals for the Ninth Circuit.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 5 and 6, 2012.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of May 8, 2012 (Agenda Item 7).

Amendments for Final Approval

FED. R. APP. P. 13, 14, 24(b)

Judge Sutton reported that 26 U.S.C. § 7482(a)(2), enacted in 1986, authorizes permissive interlocutory appeals from the United States Tax Court to the courts of appeals. The Federal Rules of Appellate Procedure, however, were never amended to reflect this avenue for appellate review.

The proposed changes to FED. R. APP. P. 13 (review of a Tax Court decision) and FED. R. APP. P. 14 (applicability of other appellate rules to review of a Tax Court decision) would remedy this omission. The proposed change to FED. R. APP. P. 24(b) (leave to proceed in forma pauperis) would clarify the rule by recognizing that the Tax Court is not an administrative agency.

Judge Sutton reported that the advisory committee had consulted closely with the Tax Court and the Tax Division of the Department of Justice in developing the proposals. He added that no public comments had been received and no changes made in the proposals following publication.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. APP. P. 28 and 28.1(c)

Judge Sutton explained that the proposed change to FED. R. APP. P. 28(a) (appellant's brief) would revise the list of the required contents of an appellant's brief by combining paragraphs 28(a)(6) and 28(a)(7). Paragraph (a)(6) now requires a statement of the case, and (a)(7) a statement of the facts. The new, combined provision, numbered Rule 28(a)(6), would require "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." Conforming changes would be made in Rule 28(b), governing appellees' briefs, and Rule 28.1(c), governing briefs in cross-appeals.

Judge Sutton pointed out that most lawyers will choose to present the factual and procedural history of a case chronologically. The revised rule, though, gives them the flexibility to follow a different order. In addition, the committee note specifies that a statement of the case may include subheadings, particularly to highlight the rulings presented for review.

He reported that the proposed amendments had attracted six public comments, four of them favorable. Some comments expressed concern that deleting the current

rule's reference to "the nature of the case, the course of proceedings, and the disposition below" might lead some to conclude that the procedural history of a case may no longer be included in the statement of the case. Therefore, after publication, the committee inserted into proposed Rule 28(a)(6)'s statement of the case the phrase "describing the relevant procedural history." The committee note was also modified to reflect the addition. He noted, too, that the Supreme Court's rule – which similarly requires a single, combined statement – appears to have worked well.

A member noted that a prominent judge had argued in favor of maintaining separate statements of the case and of the facts, predicting that combined statements will require judges to comb through a great deal of detail to find the key procedural steps in a case – the pertinent rulings made by the lower court. She suggested that the judge's concern might be addressed by requiring that the combined statement begin with the ruling below.

Judge Sutton said that the committee note contemplates that approach, emphasizing that lawyers are given flexibility in presenting their statements. Most, he said, will state the facts first and then the issues for review. He suggested that the judge would have been pleased with simply reversing the order of current paragraphs (a)(6) and (a)(7) to set out the statement of facts first, followed by the statement of the case. Professor Struve added that a circuit could have a local rule that specifies a particular order of subheadings.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FORM 4

Judge Sutton explained that Questions 10 and 11 on the current version of Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) require an IFP applicant to provide the details of all payments made to an attorney or other person for services in connection with the case. The questions, he said, ask for more information than needed to make an IFP determination. In addition, some have argued that the form's disclosures implicate the attorney-client privilege. But, he said, research shows that the payment information is very unlikely to be subject to the privilege. Sometimes, though, it might constitute protected work product.

The proposed amendments, he pointed out, combine the two questions into one. The new question asks broadly whether the applicant has spent, or will spend, any money for expenses or attorney fees in connection with the lawsuit – and if so, how much. Only one public comment was received, which proposed an additional modification to the form to deal with the Prison Litigation Reform Act. The committee, he said, decided not to

incorporate the suggestion into the current amendment, but to add the matter to its study agenda as a separate item.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments for Publication

FED. R. APP. P. 6

Professor Struve noted that the advisory committee was proposing several amendments to FED. R. APP. P. 6 (appeals in bankruptcy cases from a district court or bankruptcy appellate panel to a court of appeals). The modifications dovetail with the simultaneous amendments being proposed to Part VIII of the Federal Rules of Bankruptcy Procedure, which govern appeals from a bankruptcy court to a district court or bankruptcy appellate panel.

Revised FED. R. APP. P. 6 would update the rule's cross-references to the new, renumbered Part VIII bankruptcy rules. New subdivision 6(c) will govern permissive direct appeals from a bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2), enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It specifies that the record on a direct appeal from a bankruptcy court will be governed by FED. R. BANKR. P. 8009 (record on appeal and sealed documents) and FED. R. BANKR. P. 8010 (completing and transmitting the record). New Rule 6(c) takes a different approach from Rule 6(b), where the record on appeal from a district court or bankruptcy appellate panel is essentially based upon the record in the mid-level appeal to the district court or panel.

She noted that proposed new Bankruptcy Rule 8010(b) deals with transmitting the record from the bankruptcy court. It specifies that the bankruptcy clerk must transmit to the clerk of the court where an appeal is pending "either the record or a notice that the record is available electronically."

In the proposed amendments to FED. R. APP. P. 6(b)(2)(C), she said, the clerk of the district court or bankruptcy appellate panel must number the documents constituting the record and "promptly make it available." The amended appellate rule, she said, is very flexible and works well with the revised Part VIII bankruptcy rules. It allows the clerk to make the record available either in paper form or electronically.

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

Informational Items

Judge Sutton reported that he had sent a letter to each chief circuit judge explaining that the advisory committee had decided to take no action at the present time to amend FED. R. APP. P. 29 (amicus briefs) to treat federally recognized Native American tribes the same as states. The proposal would allow tribes to file amicus briefs as of right and exempt them from the rule's authorship-and-funding disclosure requirement. The committee, he said, had informed the chief judges that the issue warrants serious consideration, will be maintained on the committee's agenda, and will be revisited in five years.

He noted that the advisory committee had removed from its agenda an item providing for introductions in briefs. Many of the best practitioners, he said, currently include introductions in their briefs to lay out the key themes of their argument. The committee's proposed amendment to FED. R. APP. P. 28(a)(6), he said, was sufficiently flexible to permit inclusion of an introduction as part of a brief's statement of the case. Moreover, it would be difficult to specify how an introduction differs from the statement of the issues presented for review in FED. R. APP. P. 28(a)(5).

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of May 14, 2012 (Agenda Item 5).

Judge Wedoff noted that the advisory committee had 14 action items to present, six of them for final approval by the Judicial Conference and eight for publication. He suggested that the most important were the amendments dealing with the Supreme Court's decision in *Stern v. Marshall*, the revision of the Part VIII bankruptcy appellate rules, and the modernization of the bankruptcy forms.

Amendments for Final Approval

FED. R. BANKR. P. 1007(b)(7) and 5009(b) and 4004(c)(1)

Judge Wedoff explained that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 has required virtually all individual debtors to complete a personal course in financial management as a pre-condition for receiving a discharge. He noted that FED. R. BANKR. P. 1007(b)(7) (required schedules and statements) and 5009(b) (case closing) implement the statute by requiring individual debtors to file an official form (Official Form 23) certifying that they completed the course before filing their petition. FED. R. BANKR. P. 1007(c) imposes deadlines for filing the certification. In Chapter 7 cases, for example, the debtor must file it within 60 days after the first date set for the meeting of creditors under 11 U.S.C. § 341.

If the debtor has not filed the form within 45 days after the first meeting of creditors, FED. R. BANKR. P. 5009(b) instructs the bankruptcy clerk to warn the debtor that the case will be closed without a discharge unless the certification is filed within Rule 1007's time limits. FED. R. BANKR. P. 4004(c) then specifies that the court may not grant a discharge if the debtor has not filed the certificate.

Judge Wedoff reported that the advisory committee recommended amending FED. R. BANKR. P. 1007(b) to allow the provider of the financial-management course to notify the court directly that the debtor has completed the course. This action would relieve the debtor of the obligation to file Official Form 23. FED. R. BANKR. P. 5009(b) would be amended to require the bankruptcy clerk to send the warning notice only if: (1) the debtor has not filed the certification; and (2) the course provider has not notified the court that the debtor has completed the course.

A conforming amendment to FED. R. BANKR. P. 4004(c)(1) (grant of discharge) specifies that the court does not have to deny a discharge if the debtor has been relieved of the duty to file the certification. In addition, language improvements would be made in the rule. Paragraph (c)(1) currently instructs a court to grant a discharge promptly unless certain acts have occurred. The amendment reformulates the text to instruct the court affirmatively not to grant a discharge if those acts have occurred.

Section 524(m) of the Bankruptcy Code, added in 2005, specifies that when a debtor files a reaffirmation agreement, the court must determine whether the statutory presumption that the agreement is an undue hardship for the debtor has been rebutted, *i.e.*, by finding that the debtor is apparently able to make payments under the agreement. A judge needs to make that determination before a discharge is granted. Therefore, FED. R. BANKR. P. 4004(c)(1)(K) tells the court to delay the discharge until the judge considers the debtor's ability to make the payments.

The proposed amendment to FED. R. BANKR. P. 4004(c)(1)(K) would make it clear that the rule's prohibition on entering a discharge due to a presumption of undue hardship ends when the presumption expires or the court concludes a hearing on the presumption. As a result, there would be no delay if the judge has already ruled on the matter.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference. The proposed amendments to FED. R. BANKR. P. 4004(c)(1) were approved without publication.

FED. R. BANKR. P. 9006(d), 9013, and 9014

Judge Wedoff noted that FED. R. BANKR. P. 9006 is entitled “computing and extending time,” but it also specifies the default time for filing motions and affidavits in response to motions. Unlike FED. R. CIV. P. 6 (computing and extending time; time for motion papers), the civil rules counterpart on which it is based, FED. R. BANKR. P. 9006 does not indicate by its title that it also addresses time periods for motions. Nor is it followed immediately by another rule that addresses the form of motions, as the civil rules do. FED. R. CIV. P. 7 (pleadings, motions, and other papers) specifies the pleadings allowed and the form of motions and other papers.

The advisory committee, he said, was proposing amendments to highlight Rule 9006(d). First, the rule’s title would be expanded to add a reference to “time for motion papers.” Second, cross-references to Rule 9006(d) would be added to both FED. R. BANKR. P. 9013 (form and service of motions) and FED. R. BANKR. P. 9014 (contested matters) to specify that motions must be filed “within the time determined under FED. R. BANKR. P. 9006(d).”

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

OFFICIAL FORM 7

Judge Wedoff explained that Official Form 7 (statement of financial affairs) is a lengthy form that details many of the debtor’s financial transactions. It makes frequent references to “insiders.” The current definition of “insider” on the form refers to any owner of 5% or more of the voting or equity securities of a corporate debtor. That definition, though, has no basis in law, and it is not clear why it was adopted. The advisory committee would replace it with the Bankruptcy Code’s definition of “insider,” which includes any “person in control” of a corporate debtor.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments for Final Approval Without Publication

OFFICIAL FORMS 9A-I and 21

Professor McKenzie noted that there are several variations of Official Form 9 (notice of a bankruptcy filing, meeting of creditor, and deadlines), based on the nature of the debtor and the chapter of the Bankruptcy Code under which a case is filed. Form 9 is directed at creditors, notifying them that a bankruptcy case has been filed and informing them of upcoming case events and what steps they need to take. The form includes identifying information about the debtor that allows recipients of the notice to determine

whether they are in fact a creditor of the debtor. In the case of individual debtors, the identifying information includes the debtor's social security number.

Debtors are required to provide their social security numbers to the bankruptcy clerk on Official Form 21 (statement of social security number). That form is submitted separately and not included in the court's public electronic records. The social security number is revealed to creditors on their personal copies of Form 9 purely for identification purposes, but only a redacted version of Form 9 is included in the case file.

The Court Administration and Case Management Committee expressed concern that bankruptcy forms may be mistakenly filed with the courts in ways that publicly reveal debtors' private identifying information. In some cases, creditors may file a copy of their unredacted Form 9 with their proofs of claim without redacting the debtor's social security number. Debtors, moreover, may file Form 21 with other case papers, rather than submit it to the clerk separately.

Professor McKenzie explained that the advisory committee would add prominent warnings on both Form 9 and Form 21 alerting users that the forms should not be filed with the court in a way that makes them publicly available. He pointed out that the advisory committee had made two minor changes in the language of Form 21's warning after the agenda book had been distributed. A corrected version was circulated to the members.

Judge Wedoff reported that the Court Administration and Case Management Committee had suggested that the debtor's full social security number be eliminated entirely from the forms to prevent any problems of inadvertent disclosure. But, he said, the advisory committee was convinced that social security numbers are still needed for some creditors to be able to identify the debtors. The full number, for example, is essential for the Internal Revenue Service. He added, though, that the committee will revisit the matter if the situation changes in the future.

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

OFFICIAL FORM 10

Professor McKenzie pointed out that the current version of Official Form 10 (proof of claim) contains a requirement at odds with FED. R. BANKR. P. 9010(c) (power of attorney). The form instructs an authorized agent of a creditor filing a proof of claim to attach to the claim a copy of its power of attorney. Rule 9010(c) generally requires an agent to give evidence of its authority to act on behalf of a creditor in a bankruptcy case by providing a power of attorney. But it does not apply when an agent files a proof of claim.

In addition, Form 10 would be amended to require additional documentation in certain cases. For claims based on an open-end or revolving consumer-credit agreement, the filer of the proof of claim will have to attach the information required by FED. R. BANKR. P. 3001(c)(3)(A) (proof of claim based on open-end or revolving consumer credit agreement), scheduled to take effect on December 1, 2012. If a claim is secured by the debtor's principal residence, the filer will have to attach the Mortgage Proof of Claim Attachment (Official Form 10, Attachment A), required as of December 1, 2011.

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

Amendments for Publication

FED. R. BANKR. P. 1014(b)

Professor McKenzie explained that Rule 1004(b) (dismissal and change of venue) deals with the procedure when petitions involving the same debtor or related debtors are filed in different districts. The current rule specifies that, upon motion, the court in which the petition is filed first may determine the district or districts in which the cases will proceed. All other courts must stay proceedings in later-filed cases until the first court makes its venue determination, unless the first court orders otherwise. As a result, later cases are stayed by default while the venue question is pending before the first court.

The rule, he said, has been the subject of game playing because it allows an attorney who wants to stay all further proceedings to do so by filing a motion, or threatening to file a motion, in the first case. Therefore, the advisory committee proposal would change the default requirement to state that proceedings in later-filed cases are stayed only on express order of the first court. The change, he said, will prevent disruption of the other cases unless the judge in the first court determines affirmatively that a stay of a related case is needed while he or she makes the venue determination. In addition, the advisory committee made style changes in the rule.

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

FED. R. BANKR. P. 7004(e)

Professor McKenzie reported that the proposed amendment to FED. R. BANKR. P. 7004(e) would reduce the amount of time that a summons remains valid after it is issued. Currently, a summons must be served within 14 days after issuance. The proposed amendment to Rule 7004(e) would reduce that time to seven days.

Under the civil rules, a defendant's time to respond to a summons and complaint (30 days) begins when the summons and complaint are actually served. Under the bankruptcy rules, however, the defendant's response time is calculated from the date that the summons is issued.

He noted that concern had been expressed that seven days may be too short a period to effect service. Nevertheless, he said, the advisory committee believed that the time is sufficient and will encourage prompt service after issuance of a summons. He added that bankruptcy service is relatively easy and may be effected anywhere in the United States by first-class mail. Moreover, the necessary paperwork is usually generated by computer.

He added that the bankruptcy system has a strong objective in favor of moving cases quickly. In addition, calculating the time for service from the date of issuance, rather than service, provides clarity because issuance is noted on the court's docket. Finally, he explained that the time for service had traditionally been 10 days in the bankruptcy rules, but was increased to 14 days as a result of the omnibus 2009 time-computation amendments.

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

FED. R. BANKR. P. 7008, 7012(b), 7016, 9027, and 9033(a)

Professor McKenzie reported that the advisory committee was recommending publishing proposed amendments to five bankruptcy rules to deal with the recent Supreme Court decision in *Stern v. Marshall*, 564 U.S. ___, 131 S.Ct. 2594 (2011). In *Stern*, the Court held that a non-Article III bankruptcy judge could not enter final judgment on a debtor's state common-law counterclaim against a creditor of the bankruptcy estate. Even though the governing statute, 28 U.S.C. § 157(b), specifies that the counterclaim is a "core proceeding" that a bankruptcy judge may hear and determine with finality, the Court held that it was unconstitutional for Congress to assign final adjudicatory authority over the matter to a bankruptcy judge.

Professor McKenzie noted that the Federal Rules of Bankruptcy Procedure incorporate the statutory distinction between "core" and "non-core" proceedings and

recognize that a bankruptcy judge's authority is much more limited in non-core proceedings than in core proceedings. Under the current rules, a party filing a motion has to state whether the proceeding is core or non-core, and a response must do the same.

Since *Stern*, however, a core proceeding under the statute may not be a core proceeding under the Constitution. Therefore, the advisory committee, he said, decided that it was necessary to remove the words "core" and "non-core" from the rules entirely.

Instead, the advisory committee would amend FED. R. BANKR. P. 7016 (pretrial procedures and formulating issues) to make clear that a bankruptcy judge must consider his or her authority to enter final orders and judgment in all adversary proceedings. The judge's decision, moreover, will be informed by the allegations of the parties as to whether the judge has that authority. This broad approach, he said, will allow the law to continue to develop without having to change the rules again in the future.

Judge Wedoff reported that it is unclear since *Stern* whether a bankruptcy judge may enter a final judgment in a preference action or avoidance action. He pointed out that under the proposed amendments, however, there will be no need to distinguish between core and non-core proceedings. Rather, the parties will only have to decide whether they consent to entry of final orders or judgment by the bankruptcy judge. The judge will then decide whether to: (1) hear and determine the proceeding; (2) hear it and issue proposed findings of fact and conclusions of law; or (3) take some other action.

A member commended the advisory committee for an elegant solution to a difficult problem. He suggested that the revised heading to revised Rule 7016 ("procedure") may be too limited.

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

FED. R. BANKR. P. 8001-8028

Judge Wedoff explained that the advisory committee's thorough revision of Part VIII of the Federal Rules of Bankruptcy Procedure – the bankruptcy appellate rules – was the result of a multi-year project to bring the rules into closer alignment with the Federal Rules of Appellate Procedure, to make the rules simpler and clearer, and to recognize that bankruptcy documents today are normally filed, served, and transmitted electronically, rather than in paper form.

He thanked Professor Gibson, emphasizing that she deserved enormous credit for having coordinated the huge forms project. He noted that she had immersed herself in all the details of appellate practice, had conducted considerable research, and had drafted a great many documents for the committee. He also thanked James Wannamaker and

Bridget Healy, attorneys in the Bankruptcy Judges Division of the Administrative Office, for their dedication and professional assistance to the project. In addition, he expressed the committee's appreciation to Professor Struve, Professor Kimble, and Mr. Spaniol for their incisive and important contributions to the project, often made on very short notice.

He and Professor Gibson proceeded to describe each Part VIII rule not previously presented to the Standing Committee (Rules 8013-8028) and some additional changes made in the rules presented at the January 2012 meeting (Rules 8001-8012).

Fed. R. Bankr. P. 8001

Professor Gibson reported that since the January 2012 Standing Committee meeting, the advisory committee had made two additional changes in Rule 8001 (scope of Part VIII, definition of "BAP," and method of transmitting documents). The draft rule presented in January had included a general definition of the term "appellate court" to mean either the district court or the bankruptcy appellate panel – the court in which the first-level bankruptcy appeal is pending or will be taken. It did not, though, include the court of appeals.

It was suggested at the last meeting that the term is misleading because "appellate court" in common parlance generally refers to the court of appeals. As a result, she said, the advisory committee had eliminated the general definition. Each of the revised rules now refers specifically to the district court or the "BAP." Despite the objections of the style consultants, she added, the advisory committee decided to use the universally recognized abbreviation for a bankruptcy appellate panel and to define BAP in Rule 8001(b).

She said that there was a need to highlight a strong presumption in the revised rule in favor of electronic transmission of documents. Accordingly, revised Rule 8001(c) states specifically that a document must be sent electronically under the Part VIII rules, unless: (1) it is being sent by or to a pro se individual; or (2) a local court's rule permits or requires mailing or other means of delivery. She added that the advisory committee was comfortable with using the term "transmitting."

Fed. R. Bankr. P. 8007

Professor Gibson stated that Rule 8007 (stay pending appeal, bonds, and suspension of proceedings) had been restyled and subheadings added. In addition, the advisory committee corrected the omission of a reference to the court of appeals in subdivision (c).

A member pointed out that under proposed Rule 8007(b), the showing required for making a motion for relief in the appellate court deals with two situations: (1) where

moving first in the bankruptcy court would be impracticable; and (2) where the bankruptcy court has already ruled. But, he said, the Federal Rules of Appellate Procedure cover a third possibility – where a motion was filed below but not ruled on.

Judge Wedoff agreed to revise Rule 8007(b)(2)(B) to require the moving party to state whether the bankruptcy court has ruled on the motion, and, if so, what the reasons were for the ruling.

Fed. R. Bankr. P. 8009

Professor Gibson noted that proposed Rule 8009 (record on appeal and sealed documents) was incorporated by reference in the proposed new FED. R. APP. P. 6(c), which will govern permissive direct appeals from a bankruptcy court to a court of appeals.

Fed. R. Bankr. P. 8010

Professor Gibson reported that the advisory committee had made several changes in Rule 8010 (completing and transmitting the record) since the January 2012 meeting after conferring with clerks of the bankruptcy courts, the clerk of a bankruptcy appellate panel, and Administrative Office staff. She noted that bankruptcy courts generally use recording devices to take the record. If a transcript of a proceeding is ordered, it is produced for the court from the electronic record, usually by a contract service provider.

The rule requires the “reporter” to prepare and file the transcript with the bankruptcy clerk, but there is some question as to the identity of the reporter when a recording device is used. The advisory committee, she said, decided that the “reporter” should be defined in Rule 8010(a) as the person or service that the bankruptcy court designates to transcribe the recording.

In addition, the rule requires reporters to file all documents with the bankruptcy clerk. In the Federal Rules of Appellate Procedure, by contrast, reporters file certain documents in the appellate court and others in the district court. The reporter in a bankruptcy case, though, may not know where an appeal is pending.

Fed. R. Bankr. P. 8011

Professor Gibson reported that a minor typographical error had been corrected in Rule 8011 (filing, service, and signature) since the last Standing Committee meeting.

With regard to proof of service, a member questioned whether affidavits of service still serve a useful purpose in light of the universal use of CM/ECF in the federal courts. He noted that service in virtually all his civil cases is accomplished through CM/ECF, and there is no need to make the parties file an affidavit of service. He suggested that the Advisory Committee on Civil Rules consider removing the requirement of a certificate of service in the future.

Fed. R. Bankr. P. 8013

Professor Gibson noted that proposed Rule 8013 (motions and intervention) would change current bankruptcy practice. Currently, a person filing a motion or response may file a separate brief. The new rule, however, would not permit briefs to be filed in support of or in response to motions. Instead, it adopts the practice in FED. R. APP. P. 27 (motions), requiring that legal arguments be included in the motion or response.

She reported that proposed FED. R. BANKR. P. 8013(g) is a new provision for the bankruptcy rules. It is also not included in the Federal Rules of Appellate Procedure. It will authorize motions for intervention in an appeal pending in a district court or bankruptcy appellate panel. The party seeking to intervene must state in its motion why it did not intervene below.

Fed. R. Bankr. P. 8014

Professor Gibson explained that Rule 8014 (briefs) largely tracks the Federal Rules of Appellate Procedure and incorporates the proposed amendment to FED. R. APP. P. 28(a)(6) (briefs), which combines the statements of the case and of the facts into a single statement. (See pages 5 and 6 of these minutes.) In a change from current bankruptcy practice, revised Rule 8014 follows the Federal Rules of Appellate Procedure and requires inclusion of a summary of argument in the briefs. New Rule 8014(f) adopts the provision of FED. R. APP. P. 28(j) regarding the submission of supplemental authorities. Unlike the appellate rule, the proposed Rule 8014(f) proposes a definite time limit of seven days for any response, unless the court orders otherwise.

She emphasized that the advisory committee was attempting to make the bankruptcy rules as similar as practicable to the Federal Rules of Appellate Procedure to make it easier for the bar to handle double appeals, *i.e.*, an appeal first to a district court or bankruptcy appellate panel, and then to the court of appeals.

Fed. R. Bankr. P. 8015

Professor Gibson noted that Rule 8015 (form and length of briefs, appendices, and other papers) was modeled on FED. R. APP. P. 32 (form and length of briefs, appendices, and other papers). The new bankruptcy rule adopts the provisions of the appellate rule governing the length of briefs, but not those prescribing the colors for brief covers. She added that the change is likely to attract comments during the publication period because new Rule 8015(a)(7) reduces the length of principal and reply briefs currently permitted in the bankruptcy rules. To achieve consistency with FED. R. APP. P. 32(a)(7), it reduces the page limits for a principal brief from 50 pages to 30, and those for a reply brief from 25 to 15.

Fed. R. Bankr. P. 8016

Professor Gibson reported that Rule 8016 (cross-appeals) was new to bankruptcy and modeled on FED. R. APP. P. 28.1 (cross-appeals). A member noted, though, that proposed Rule 8016(e) does not exactly parallel the appellate rule. Moreover, it does not include a provision, similar to that in Rule 8018(a), allowing a district court or bankruptcy appellate panel by local rule or order to modify the rule's time limits.

Judge Wedoff suggested that it would be possible to incorporate the Rule 8018 language on local court modifications into Rule 8016. He added that Rules 8016 and 8018 should be internally consistent, even though there may be some differences between them and the counterpart appellate rules. A participant recommended making both the bankruptcy and appellate rules internally consistent and consistent with each other. The same provisions should apply in both sets of rules.

Another participant recommended not including any provision in the bankruptcy rules allowing a local court to extend the time limits of the national rules. He suggested that it will only encourage extensions.

Fed. R. Bankr. P. 8017

Professor Gibson reported that Rule 8017 (amicus briefs) was new to bankruptcy and was derived from FED. R. APP. P. 29 (amicus briefs). She pointed out that proposed Rule 8017(a) would allow a bankruptcy court on its own motion to request an amicus brief.

Fed. R. Bankr. P. 8018

Professor Gibson reported that Rule 8018 (serving and filing briefs) would continue the existing bankruptcy practice that allows an appellee to file a separate appendix. It differs from FED. R. APP. P. 30 (appendix to briefs), which requires all the parties to file a single appendix. Rule 8018(a) lengthens the period for filing initial briefs from the current 14 days to 30. Since requests for extensions of time are very common, she said, it just makes sense to increase the deadline to 30 days.

Fed. R. Bankr. P. 8019

Professor Gibson noted that proposed Rule 8019 (oral argument) tracks FED. R. APP. P. 34(a)(1) (oral argument) and is more detailed than the current bankruptcy rule. Rule 8019(a) would alter the existing bankruptcy rule by: (1) authorizing the court to require the parties to submit a statement about the need for oral argument; and (2) permitting a statement to explain why oral argument is not needed, rather than only why it should be allowed. Rule 8019(f) gives the court discretion, when the appellee fails to appear for oral argument, either to hear the appellant's argument or to postpone it.

Fed. R. Bankr. P. 8020

Professor Gibson reported that Rule 8020 (frivolous appeal and other misconduct) was derived from FED. R. APP. P. 38 (frivolous appeals, damages and costs) and FED. R. APP. P. 46(c) (attorney discipline). It applies to misconduct both by parties and attorneys.

Fed. R. Bankr. P. 8021

Professor Gibson noted that Rule 8021 (costs) would continue the existing bankruptcy practice that gives the bankruptcy clerk the entire responsibility for taxing costs on appeal. The practice under FED. R. APP. P. 39 (costs), on the other hand, involves both the court of appeals and the district court in taxing costs.

Rule 8021(b) was added to govern costs assessed against the United States. Derived from FED. R. APP. P. 39(b), it is not included in the current bankruptcy rules.

Fed. R. Bankr. P. 8022

Professor Gibson reported that Rule 8022 (motion for rehearing) would continue the current bankruptcy practice of requiring that a motion for rehearing be filed within 14 days after entry of judgment on appeal. It differs from FED. R. APP. P. 40(a)(1) (time to file a petition for rehearing), which gives parties 45 days to file a rehearing motion in any civil case in which the United States is a party. She added that the Department of Justice reported that it had no problem with the rule.

Fed. R. Bankr. P. 8023

Professor Gibson reported that proposed Rule 8023 (voluntary dismissal) deviates from both the existing bankruptcy rule and the Federal Rules of Appellate Procedure. It would allow a voluntary dismissal while a case is still pending. Under the current rules, a case on appeal from a bankruptcy judge is not docketed in the district court or bankruptcy appellate panel until the record is transmitted. But under the new Rule 8023, the appeal will be docketed immediately after the notice of appeal is filed. The notice, moreover, will normally be transmitted electronically to the district court or bankruptcy appellate panel. The advisory committee, she said, concluded that it is very unlikely that an appeal will be voluntarily dismissed before it is docketed.

Fed. R. Bankr. P. 8024

Professor Gibson reported that Rule 8024 (clerk's duties on disposition of an appeal) contained virtually no changes, other than stylistic, from the current bankruptcy rule.

Fed. R. Bankr. P. 8025

Professor Gibson reported that Rule 8025 (stay of a district court or BAP judgment) contained only stylistic changes from the existing bankruptcy rule. She pointed out, though, that subdivision (c) was new. It specifies that if the district court or BAP affirms a bankruptcy court ruling and the appellate judgment is stayed, the bankruptcy court's order, judgment, or decree will be automatically stayed to the same extent as the stay of the appellate judgment.

Fed. R. Bankr. P. 8026

Professor Gibson reported that Rule 8026 (rules by circuit councils and district courts, and procedure when there is no controlling law) contained only stylistic changes from the current bankruptcy rule.

Fed. R. Bankr. P. 8027

Professor Gibson reported that Rule 8027 (notice of mediation procedure) was a new rule with no counterpart in the Federal Rules of Appellate Procedure. It provides that if a district court or bankruptcy appellate panel has a mediation procedure applicable to bankruptcy appeals, the clerk of the district court or the panel must notify the parties promptly after the appeal is docketed whether the mediation procedure applies, what its requirements are, and how it affects the time for filing briefs in the appeal.

Fed. R. Bankr. P. 8028

Professor Gibson explained that Rule 8028 (suspension of rules in Part VIII) was derived from current FED. R. BANKR. P. 8019 (suspension of rules in Part VIII) and FED. R. APP. P. 2 (suspension of rules). It authorizes a district court, bankruptcy appellate panel, or court of appeals to suspend the requirements or provisions of the Part VIII rules, except for certain enumerated rules. The new rule expands the current list of rules that may not be suspended.

Professor Gibson reported that the current FED. R. BANKR. P. 8013 (disposition of appeal and weight accorded fact findings) would be eliminated. The first part of that rule specifies what a district court or BAP may do on an appeal, *i.e.*, affirm, modify, reverse, or remand. She noted that there is no similar provision in the Federal Rules of Appellate Procedure. The second part of the current rule specifies the weight that must be given to a bankruptcy judge's findings of fact. She explained that the provision is not needed because it is already covered by FED. R. CIV. P. 52 (findings and conclusions) and incorporated by FED. R. BANKR. P. 7052 (findings by the court).

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

FED. R. BANKR. P. 9023 and 9024

Judge Wedoff explained that FED. R. BANKR. P. 9023 (new trials and amendment of judgments) and FED. R. BANKR. P. 9024 (relief from a judgment or order) would be amended to add a cross-reference in each rule to the procedure set forth in proposed new Rule 8008, governing indicative rulings.

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

MODERNIZATION OF THE OFFICIAL FORMS

Judge Wedoff explained that the bankruptcy process is driven in large measure by forms. Several of the current forms, however, are difficult to complete, especially for people unfamiliar with the bankruptcy system. In addition, the forms take little cognizance of electronic filing in the bankruptcy courts.

He explained that forms modernization has been a major, multi-year project of the advisory committee, working under the leadership of Judge Elizabeth L. Perris and in close coordination with the Administrative Office and the Federal Judicial Center. The major goals of the project have been: (1) to improve the quality and clarity of the forms in order to elicit more complete and accurate information from debtors and creditors; and

(2) to enhance the interface between the forms and modern technology, especially the “next generation” of CM/ECF currently under development.

He said that the advisory committee and the forms-project team had reached out extensively to users of the bankruptcy system to seek their input in redesign and testing of the forms. In addition, the committee had made an important policy decision at the outset to separate the forms used by individual debtors from those used by entities other than individuals.

He explained that the first nine forms, now presented for authority to publish, are a subset of the larger package of individual forms filed by debtors at the beginning of a case. He emphasized that the forms used by individuals need to be less technical in language because individuals are generally less sophisticated than other entities and may not have the assistance of experienced bankruptcy counsel. As a result, he said, the revised individual forms are written in more conversational language, have a more approachable format, and contain substantially more instructions.

OFFICIAL FORMS 3A AND 3B

Judge Wedoff explained that debtors who cannot pay the filing fee have two options – either to ask the court for permission to pay the fee in installments (Form 3A) or to waive the fee (Form 3B). The latter option is available only to individuals whose combined family monthly income is less than 150% of the official poverty guideline last published by the Department of Health and Human Services.

In addition to major stylistic and formatting changes common to all the new forms, three minor substantive changes were made in Form 3B. First, the opening question asks for the size of the debtor’s family, as listed on Schedule J. That information is currently required on Schedule I. Second, the income portion of the form was changed to specify that non-cash governmental assistance, such as food stamps or housing subsidies, will not count against the debtor as income in determining eligibility for a fee waiver. The information, though, will continue to be reported for purposes of determining the debtor’s ability to pay the filing fee. Third, the new form eliminates the declaration and signature section for non-attorney bankruptcy petition preparers because the same declaration is already required on Official Form 19.

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

OFFICIAL FORMS 6I and 6J

Judge Wedoff noted that some substantive changes had been made on Forms 6I (statement of the debtor's income) and 6J (statement of the debtor's expenses) to elicit more accurate and useful information from individual debtors. First, the debtor will have to provide more information on Form 6J about non-traditional living arrangements, such as living with an unmarried partner or living and sharing expenses in a household with non-relatives. The form asks for all financial contributions to the household. Second, Form 6J asks for separate information on dependents who live with the debtor, dependents who live separately, and other members of the household. Third, in Chapter 13 cases, Form 6J asks for the debtor's expenses at two different points in time – when the debtor files the bankruptcy petition and when the proposed Chapter 13 plan is confirmed. Fourth, a line has been added to the form setting out a calculation of the debtor's monthly net income.

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

OFFICIAL FORMS 22A-1, 22A-2, 22B, 22C-1, and 22C-2

Judge Wedoff explained that Form 22, commonly referred to as the “means test” form, has five variations. It is used to determine a debtor's “current monthly income” under 11 U.S.C. § 101(10A) and, in Chapter 7 and Chapter 13 cases, to determine the debtor's income remaining after deducting certain specified expenses.

In Chapter 7 cases, the form is used to assess whether the debtor qualifies under the statute to file a petition under Chapter 7. In Chapter 13, cases, it determines how much the debtor is able to pay under the plan. Other than stylistic changes, no changes were made in the form's Chapter 11 version (Form 22B). But four changes would be made in the Chapter 7 and Chapter 13 versions.

First, the advisory committee separated both the Chapter 7 and Chapter 13 forms into two distinct forms each because debtors with income below the median of their state do not have to list their expenses. As a result, the vast majority of debtors will only have to fill out the income portion. Thus, all debtors will complete an income form (Form 22A-1 or 22C-1), but only some will have to file the expense form (Form 22A-2 or 22C-2).

Second, the revised forms modify the deduction for cell phone and internet expenses to reflect more accurately the Internal Revenue Service allowances incorporated by the Bankruptcy Code.

Third, line 60 on the Chapter 13 expense form (Form 22C-2)) would be removed because it is rarely used. It allows debtors to list, but not deduct from income, “other necessary expense” items not included within the categories specified by IRS.

Fourth, Form 22C-2 reflects the Supreme Court’s decision in *Hamilton v. Lanning*, 560 U.S. ___, 130 S. Ct. 2464 (2010). *Lanning* requires taking a “forward-looking approach” in calculating a Chapter 13 debtor’s projected disposable income by considering changes in income or expenses that have occurred or are virtually certain to occur by the time the plan is confirmed. The changes may either increase or decrease the debtor’s disposable income. Part 3 of Form 22C-2 will require the debtor to report those changes.

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

Information Items

FED. R. BANKR. P. 3007(a)

Judge Wedoff reported that proposed amendments to FED. R. BANKR. P. 3007(a) (objections to claims), published in August 2011, would have specified the time and manner of serving objections to claims. The rule currently requires that notice of an objection be provided at least 30 days “prior to the hearing” on the objection. The proposal would have authorized a negative notice procedure – requiring notice of an objection to be made at least 30 days before “any scheduled hearing on the objection or any deadline for the claimant to request a hearing.”

He noted that at its March 2012 meeting, the advisory committee decided to withdraw the proposed amendments temporarily and consider them as part of its project to draft a national Chapter 13 form plan.

OFFICIAL FORM 6C

Judge Wedoff reported that the advisory committee had decided not to proceed with amending Form 6C (property claimed as exempt) by adding a box to give debtors the option of declaring that the value of property claimed as exempt is the “full fair market value of the exempted property.” The amendment, published in August 2011, was intended to reflect the Supreme Court’s decision in *Schwab v. Reilly*, 560 U.S. ___, 130 S. Ct. 2652 (2010).

He said that representatives of the Chapter 7 and Chapter 13 trustee associations had objected to the change on the grounds that it would encourage debtors to claim the full market value of property even when the exemption is capped by statute at a specific

dollar amount. They predicted that the revision would lead to gamesmanship and a “plethora of objections.” On the other hand, supporters of the amendment, including representatives of the consumer bankruptcy attorneys’ association, disputed the prediction. They argued that it was consistent with *Schwab* and would be beneficial to debtors.

Judge Wedoff reported that the advisory committee decided not to proceed with the amendment because: (1) it is unnecessary since debtors already incorporate the *Schwab* language into the existing form; and (2) courts are divided on whether it is always improper for a debtor to claim as exempt the full fair market value of property when the exemption is capped at a specific dollar amount. The advisory committee decided, therefore, that any amendment to the form should await further case law development. It might also be considered as part of the forms modernization project.

OFFICIAL FORMS 22A AND 22C

Judge Wedoff reported that the advisory committee had decided to defer final approval of proposed amendments to Forms 22A and 22C (the means test forms) that would have: (1) reflected changes in the IRS standards on telecommunication expenses; and (2) changed the Chapter 13 version of the form to respond to the Supreme Court’s decision in *Hamilton v. Lanning*, 560 U.S. ___, 130 S. Ct. 2464 (2010).

He said that it would be better to avoid having the proposed amendments take effect in 2012, only to have substantially reformatted versions of the same forms take effect in 2013 as part of the forms modernization project. The proposed amendments, he added, had been incorporated into the first set of modernized forms to be published for comment in August 2012. (See pages 21-23 of these minutes.)

OFFICIAL FORM FOR CHAPTER 13 PLAN AND RELATED RULE AMENDMENTS

Judge Wedoff explained that the advisory committee was working on drafting a national form for Chapter 13 plans. He pointed out that a wide variety of local forms and model plans are currently used in the bankruptcy courts. They impose different requirements and distinctive features from district to district. The lack of a national form, he said, makes it difficult for lawyers who practice in several districts, and it adds transactional costs that are passed on to debtors.

He reported that a recent survey of the bankruptcy bench had established that a majority of chief bankruptcy judges support developing a national form plan. Therefore, he said, the advisory committee had established a working group that expects to have a draft ready soon for informal circulation and comment. He added that it became apparent during the course of the group’s work that the effectiveness of a national form plan will

depend on making some simultaneous amendments to the bankruptcy rules to harmonize practice among the courts and clarify certain procedures.

MINI-CONFERENCE ON NEW MORTGAGE FORMS

Judge Wedoff reported that the advisory committee will hold a mini-conference in conjunction with its September 2012 meeting to discuss the effectiveness of the new mortgage-information disclosure forms that took effect on December 1, 2011.

ELECTRONIC SIGNATURES

Judge Wedoff noted that the advisory committee was considering the use of electronic signatures as part of its forms modernization project. In particular, it was focusing on whether, and under what circumstances, bankruptcy courts should accept for filing documents signed electronically without also requiring retention of a paper copy with an original signature. If retention of an original signature is required, moreover, who should maintain it? He noted that the committee was exploring a range of options and contemporary practices.

FORMS MODERNIZATION PROJECT

Judge Wedoff reported that the forms modernization project had nearly completed its work on all the individual-debtor forms and had begun its work on revising the non-individual forms.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professor Cooper presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of May 8, 2012 (Agenda Item 4).

Amendments for Final Approval

FED. R. CIV. P. 45 and 37

Judge Campbell reported that the advisory committee had undertaken a multi-year project to revise Rule 45 (subpoenas) by simplifying the rule and addressing several problems brought to its attention. He noted that during the course of its study, the advisory committee came to appreciate that Rule 45 is an important workhorse in civil litigation that governs virtually all discovery involving non-parties and accomplishes several other important procedural purposes.

After reviewing the pertinent literature on the rule and canvassing the bar, the committee developed a list of 17 concerns that might potentially be addressed through rule amendments. The list was eventually boiled down to four proposed changes: (1) simplification of the rule; (2) transfer of subpoena-related motions; (3) trial subpoenas for distant parties and party witnesses; and (4) notice of service of documents-only subpoenas. A revised rule incorporating those changes was published for public comment in August 2011, and some minor modifications were made after publication. The revised rule, he said, was now ready for final approval by the Judicial Conference.

1. Simplification of the rule

He noted that the first category of proposed changes would simplify an overly complex rule. As Rule 45 is now written, he explained, a lawyer has to look in three different parts of the rule to determine where a subpoena may be issued, where it may be served, and where performance may be required.

First, Rule 45(a)(2) specifies which court may issue a subpoena. It may be a different court for trial, for deposition discovery, or for document discovery. Second, Rule 45(b)(2) specifies four different possibilities for the place where a subpoena may be served. It may be within the district, outside the district but within 100 miles of the place of compliance, anywhere in the state where the district sits if state law permits, or anywhere in the United States if federal law authorizes it. Third, Rule 45(c) imposes limits on the place of enforcement. A non-party, for example, cannot be required to travel more than 100 miles to comply with a subpoena, except to attend a trial. In that case, attendance may be anywhere in the state if the the person does not have to incur “substantial expense” to travel. He said that it was the experience of all the judges on the advisory committee that even good lawyers get the various provisions of the rule wrong from time to time.

The advisory committee’s proposed simplification addresses those problems and should eliminate most of the confusion. First, revised Rule 45(a)(2) specifies that the court that issues a subpoena is the court that presides over the case. There are no other possibilities. Second, Rule 45(b)(2) specifies that a subpoena may be served at any place in the United States. Third, Rule 45(c)(3) specifies where performance may be required. Essentially, it preserves the performance requirements of the current rule, but eliminates its reference to state law.

There is, he said, precedent in the rules for authorizing nationwide service. Rule 45(b)(2)(D), he noted, currently authorizes service in another state if there is a federal statute that authorizes it. In addition, the Federal Rules of Criminal Procedure authorize nationwide service (FED. R. CRIM. P. 17)(e)).

Professor Marcus said that the public comments on simplification of the rule were very favorable, and some offered suggestions for additional clarification. As a result, the

committee made some changes in the committee note, dealing with depositions of party witnesses and subpoenas for remote testimony. In essence, though, the changes made after publication were very minor.

Professor Marcus pointed out that under the committee's proposal, as published, Rule 45(c)(2) would have left it essentially to the parties to designate the place for production of Rule 34 discovery materials. It provided that a subpoena could command production "at a place reasonably convenient for the person who is commanded to produce." But, he explained, that simplification did not work and could lead to mischief. Accordingly, the committee revised Rule 45(c)(2) to specify that a subpoena may command production "at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person." That formulation essentially preserves the current arrangements, but states them more clearly.

2. Transfer of subpoena-related motions

Judge Campbell explained that the modified rule, like the current rule, specifies that a party receiving a subpoena typically has to litigate the enforceability of the subpoena in the court in the district where the performance is required. The producing party, thus, enjoys the convenience of having its dispute handled locally and does not have to travel to a different part of the country to litigate.

Rule 45, however, does not currently allow the court where production is required to transfer a dispute back to the court having jurisdiction over the case. Yet, there are certain situations in which the court in the district of performance should be allowed to refer a dispute to the judge presiding over the case. There is, he said, a split in the case law on the matter, and some courts in fact transfer disputes. The current rule, though, does not authorize the practice expressly.

The proposed new Rule 45(f) would resolve the matter and explicitly allow certain disputes to be resolved by the judge presiding over the case. It would allow the local court to transfer the case either on the consent of the person subject to the subpoena or if the court finds "exceptional circumstances." He reported that some public comments questioned whether exceptional circumstances was the appropriate standard for authorizing a transfer, but the advisory committee ultimately concluded unanimously that it was.

The proposed amendment to FED. R. CIV. P. 37 (failure to make disclosures or cooperate in discovery) would conform that rule to the proposed amendments to Rule 45(f). A new second sentence in Rule 37(b)(1) deals with contempt of orders entered after a transfer. It provides that failure to comply with a transferee court's deposition-related order may be treated as contempt of either the court where the discovery is taken or the court where the action is pending..

Professor Marcus pointed out that the August 2011 publication had highlighted the new transfer provision and expressly invited comment on two questions: (1) whether consent of the parties should be required in addition to consent by the person served with the subpoena; and (2) whether “exceptional circumstances” should be the standard for transfer if the non-party does not consent. Considerable public comment argued that it was inappropriate to require party consent. As long as the recipient of the subpoenas consents to the transfer, the parties should have no veto over the matter. The advisory committee, he said, revised the rule to remove the party-consent feature.

With regard to the appropriate standard for authorizing a transfer in the absence of consent, considerable public support was voiced for a more flexible, less demanding standard. But formulating an appropriate lesser standard, while still protecting the primary interests of the producing party, had been very challenging. The advisory committee and its discovery subcommittee discussed the matter at considerable length and decided to retain the exceptional circumstances standard, but add some clarifying language to the committee note. The note was recast to state that if the local non-party served with a subpoena does not consent to a transfer, the court’s prime concern should be to avoid imposing burdens on that person. In some circumstances, though, a transfer may be warranted to avoid disrupting the issuing court’s management of the underlying litigation. In short, transfer is appropriate only if those case-management interests outweigh the interests of the producing party in obtaining local resolution of the dispute.

A member praised the work of the advisory committee and said that the proposed changes were long overdue. He noted that few rules of procedure are used more often, yet are harder to work with, than Rule 45. Nevertheless, he said, the “exceptional circumstances” standard may be too high. It may underestimate the needs of a judge presiding over a big, hotly disputed civil case to have flexibility in controlling the case. It may also underestimate how easy it is today to conduct hearings and resolve disputes by telephone or video-conference. He noted that when subpoena disputes arise, it is common for the judge in the district of compliance to call the judge having jurisdiction over the underlying case to discuss the matter.

In addition, he said, the language in the committee note stating that transfers should be “truly rare” events is much too restrictive. It tells judges, in essence, that transfers should almost never occur. He added that a more generous standard is warranted, and “good cause” should be considered as a substitute. He recommended combining a good cause standard with an appropriate explanation in the committee note to give judges the flexibility they need to decide what is best in each case.

Judge Campbell explained that some public comments had suggested a good cause standard, and the advisory committee considered them carefully. But it ultimately concluded that it had to err in favor of protecting third parties who receive subpoenas and

sparing them from assuming undue burdens and hiring counsel in other parts of the country. The exceptional circumstances standard, he said, will afford them more protection than the good cause standard.

He said that the committee was concerned that if the rule were to contain a “good cause” standard, many busy district judges faced with subpoena disputes in out-of-district cases would be readily inclined to transfer them routinely to the issuing court. The rule, he said, should make those busy district judges pause and carefully balance the reasons for a transfer against the burdens imposed on the subject of the subpoena. In essence, he explained, the committee concluded that it was essential to have a higher threshold than mere good cause.

Professor Marcus added that it is very difficult to achieve just the right balance in the rule. It is, he said, particularly difficult to draft a standard that falls somewhere between “exceptional circumstances,” which is very difficult to satisfy, and “good cause,” which is quite easy to satisfy. He added that the comments from the ABA Section on Litigation were very supportive of retaining the exceptional circumstances standard in order to protect non-party witnesses.

A member argued in favor of retaining the exceptional circumstances standard, and emphasized that it was important to resolve the current conflict in the law and explicitly authorize transfers in appropriate, limited circumstances. She added that the rule should be designed for the average civil case, not the exceptional case. The great majority of subpoena disputes, she said, involve local issues and should be resolved locally. As a practical matter, a good cause standard would lead to excessive transfers.

A participant spoke in favor of the good cause standard, but recommended that if the exceptional circumstances standard were retained, the committee note should be toned down and revised to eliminate the current language stating that transfers should be “truly rare.” In addition, it would be useful to refer in the note to the difference between the average case with a local third party and complex litigation in which the lawyers hotly dispute every aspect of a case, including the subpoenas. He added that not all subpoenaed persons are in fact uninvolved, uninterested third parties. Often, the subpoenaed person, although not a party to the case, may well have a direct financial interest in the litigation.

A member agreed that the word “truly” should be eliminated from the note, but supported the advisory committee’s decision to retain the exceptional circumstances standard. A member recommended resolving the matter by eliminating the second sentence in the third paragraph of the portion of the committee note dealing with Rule 45(f). As revised, it would read: “In the absence of consent, the court may transfer in exceptional circumstances, and the proponent of transfer bears the burden of showing that such circumstances are presented.”

A member expressed concern about the language added to the committee note after publication regarding the issuance of subpoenas to require testimony from a remote location. He suggested that the committee should consider amending Rule 45(c)(1) itself to clarify that it applies both to attendance at trial and testimony by contemporary transmission from a different location under Rule 43(a).

3. Trial subpoenas for distant parties and party officers

Judge Campbell explained that the third change in the rule resolves the split in the case law in the wake of *In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664 (E.D. La. 2006). The district court in that case read Rule 45 as permitting a subpoena to compel a party officer to testify at a trial at a distant location. Other courts, though, have ruled that parties cannot be compelled to travel long distances from outside the state to attend trial because they have not been served with subpoenas within the state, as required by Rule 45(b)(2).

The advisory committee, he said, was of the view that *Vioxx* misread Rule 45, in part because the current rule is overly complex. The proposed amendments, he said, would overrule the *Vioxx* line of cases and confirm that party officers can only be compelled to testify at trial within the geographical limits that apply to all witnesses. He noted that the committee had highlighted the matter when it published the rule by including in the publication an alternative draft text that would have codified the *Vioxx* approach.

The public comments, he said, were split, with no consensus emerging for either position. The advisory committee decided ultimately that it should not change the original intent of a rule that has worked well for decades. Professor Marcus added that the committee's concern was that if the rule were amended to codify *Vioxx*, subpoenas could be used to exert undue pressures on a party and its officers. Moreover, there are alternate ways of dealing with the problems of obtaining testimony from party witnesses, including the use of remote testimony under Rule 43(a).

4. Notice of service of documents-only subpoenas

Judge Campbell explained that the current Rule 45 requires parties to notice other parties that they are serving a subpoena. But the provision is hidden as the last sentence of Rule 45(b)(1), and many lawyers are unaware of it. The advisory committee proposal, he said, relocates the provision to a more prominent place as a separate new paragraph 45(a)(4), entitled "notice to other parties before service." In addition, the revised rule requires that a copy of the subpoena be attached to the notice.

Judge Campbell said that the advisory committee realized that many other reasonable notice provisions might have been added to the rule. For example, it could have required that: notice be given a specific number of days in advance of service of the subpoena; additional notice be given if the subpoena is modified by agreement; notice be given when documents are received; and copies of documents be provided by the receiving party to the other parties in the litigation. The rule could also have specified the sanctions for non-compliance with the notice requirements.

The advisory committee, however, concluded that those provisions, though sensible, should not be included because the primary purpose of the amendments is to get parties to give notice of subpoenas. Just accomplishing that objective should resolve most of the current problems. The remaining issues can generally be worked out if lawyers are left to their own devices to consult with opposing counsel to obtain copies of whatever documents they need. The committee, he said, was concerned about the length and complexity of the current rule and did not want to add to that length and complexity by dictating additional details. He added, though, that the committee could return to the rule in the future if problems persist.

Professor Marcus said that many competing suggestions had been received for additional provisions. He added that, at the urging of the Department of Justice, the committee had made a change in the rule following publication to restore the words “before trial” to the notice provision. It also added in Rule 45(c)(4) the word “pretrial” before “inspection of premises.”

Judge Campbell noted that the advisory committee had considered whether the time limit in current Rule 45(c) for serving objections to subpoenas was too short, but decided not to change it. He added that the matter rarely results in litigation, as courts allow extensions of time when appropriate. He agreed to a member’s suggestion that language in lines 43 and 44 of the committee note be deleted. It had suggested that parties may ask that additional notice requirements be included in a court’s scheduling order.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Information Items

PRESERVATION AND SPOILIATION

Judge Campbell reported that one of the panels at the committee’s 2010 Duke Law School conference had urged the committee to approve a detailed civil rule specifying when an obligation to preserve information for litigation is triggered, the scope of that obligation, the number of custodians who should preserve information, and

the sanctions to be imposed for various levels of culpability. After the conference, Judge Kravitz, then chair of the advisory committee, tasked the committee's discovery subcommittee with following up on the recommendations.

The subcommittee began its work in September 2010 by asking the Federal Judicial Center to study the frequency and nature of sanctions litigation in the district courts. The Center's research found that litigation is rare, as only 209 spoliation motions had been filed in more than 130,000 civil cases studied, only about half of which involved electronic discovery. The subcommittee also studied a large number of federal and state laws that impose various preservation obligations.

The subcommittee, he said, then drafted three possible rules to address preservation. The first was a very detailed rule that provided specific directives and attempted to prescribe which events trigger a duty to preserve, what the scope of the preservation duty is, and what sanctions may be imposed for a failure to preserve. The committee, however, found it exceedingly difficult to draft a detailed rule that could be applied across all the broad variety of potential cases and give any meaningful certainty to the parties.

The second rule also addressed the triggering events for preservation, the scope of retention obligations, and sanctions for violations, but it did so in a much more general way. Essentially it provided broad directions to behave reasonably and preserve information in reasonable anticipation of litigation.

The third rule focused just on sanctions under Rule 37 in order to promote national uniformity and constraint in imposing sanctions. Currently, there is substantial dispute among the circuits on what level of culpability gives rise to sanctions for failure to preserve. The prevailing standards now range from mere negligence to wilfulness or bad faith.

The third rule specified that a court may order curative or remedial measures without finding culpability. Imposition of sanctions of the kind listed in Rule 37(b), on the other hand, would require wilfulness or bad faith. The proposed rule identified the factors that a court should consider in assessing the need for sanctions. Those factors, moreover, should also provide helpful guidance to parties at the time they are considering their preservation decisions.

Judge Campbell said that the three draft rules had been discussed with about 25 very knowledgeable people at the committee's September 2011 mini-conference in Dallas. A wide range of views was expressed, but no consensus emerged. Many written comments were received by the committee and posted on the judiciary's website. They embrace a full range of proposals. Some groups argued that there is an urgent need for a very detailed rule on preservation and spoliation with bright-line standards. One, for

example, suggested that a duty to preserve should only be triggered by the actual commencement of litigation. Others contended that no rule is needed at all, as the common law should continue its development. The Department of Justice, he said, took the position that it is premature to write a rule on these subjects.

The subject area, he said, continues to be very dynamic. In April 2012, the RAND Corporation completed a study of large corporations, documenting that they spend millions of dollars in trying to comply with preservation obligations. About 73% of the costs are spent on lawyers reviewing materials and 27% on the preservation of information itself. A recent in-house study by the Department of Justice generally corroborated the conclusion of the Federal Judicial Center that spoliation disputes in court are rare. Another recent study, by Professor William Hubbard, found that the problem arises only in a small percentage of cases, but when it does it can be extraordinarily expensive.

Judge Campbell pointed out that the Seventh Circuit was conducting a pilot program on electronic discovery and preservation that emphasizes the need for the parties to cooperate and discuss preservation early in the litigation. The pilot, he said, was entering its third phase and producing a good deal of helpful information. The Southern District of New York recently launched a complex-case pilot program that also includes preservation as an element. The Federal Circuit promulgated clear guidelines on discovery of electronically stored information and has placed some important limits on discovery in patent cases. A Sedona Conference working group has been working for months on a consensus rule for the committee's consideration. The group, he noted, had not yet reached consensus on potential rule amendments. Finally, he said, the case law continues to evolve, as trial judges are taking imaginative steps to deal with preservation problems and restrain unnecessary costs.

Judge Campbell reported that the advisory committee was still leaning towards a sanctions-only rule, rather than a rule that tries to define trigger and scope. Nevertheless, the subcommittee was still absorbing and discussing the many sources of information coming before it. He suggested that the subcommittee may have a more concrete draft available for the advisory committee's consideration at its November 2012 meeting.

He noted that the advisory committee was aware that some are frustrated with the pace of the project. But, he said, the delay in producing a rule has not been for lack of effort. Rather, the issues are particularly difficult, and the views expressed to the subcommittee have been very far apart. He noted that even if the committee were to approve a rule at its next meeting, it could not take effect before December 2015.

He reported that in December 2011, the House Judiciary Subcommittee on the Constitution had held a hearing on the costs and burdens of civil discovery. The proceedings included substantial discussion on electronic discovery issues. The basic

message from the majority was that preservation obligations and electronic discovery cost corporations substantial money and are a drain on innovation and jobs. He pointed out that the witnesses testified that the federal rules process works well, and the rules committees should continue their efforts to solve the current problems. After the hearings, the subcommittee chair wrote a letter urging the advisory committee to approve a strong rule. The subcommittee minority, though, followed with a letter asking the committee to proceed slowly and let the common law work its course.

Professor Marcus pointed out that the advisory committee had not resolved two critical policy questions and invited input on them from the members. First, he said, a decision must be made on whether a new rule should be confined just to electronic discovery or apply to all discoverable information. Second, in light of the strikingly divergent views expressed to the committee on the subject, a basic decision must be made on how urgently a new rule is needed and how aggressive it should be.

A member argued that national uniformity is very important because preservation practices and litigation holds cost parties a great deal of money. The precise contents of the new rule may not be clear at this point, but the advisory committee should continue to proceed deliberately and carefully study the various pilot projects underway in the courts. Eventually, however, it needs to produce a national rule. A participant added that the primary risk of moving too slowly is that courts will develop their own local rules and become attached to them, making it more difficult to impose a uniform national rule.

A participant pointed out that efforts have been made, without much result so far, to prod the corporate community into developing a series of best practices to deal with preservation of information. Corporations, he said, need to balance their legitimate need to get rid of information in the normal course of business against the competing need to preserve certain information in anticipation of eventual litigation. There is, he said, reluctance on the part of corporate management even to consider the matter, but there may be some movement in that direction in the future.

He suggested that a sanctions-only rule is appropriate. It would also be desirable, he said, to include a more emphatic emphasis in Rules 16 and 26 on getting the parties and the judge to address preservation obligations more directly at the outset of a case.

A member expressed great appreciation for the advisory committee's work and agreed with its inclination to pursue a narrow rule that focuses just on Rule 37 sanctions. He emphasized that the Rules Enabling Act restricts the rules committees' authority to matters of procedure only. Preservation duties, though, generally go beyond procedure and simply cannot be fixed by a rule.

Moreover, he said, the committee cannot the preservation problems because most litigation is conducted in the state courts, not the federal courts. He suggested that the

more the committee sticks to procedure and avoids matters of substantive conduct, the more likely the states will follow its lead. A member added that there is an important opportunity for the committee to achieve greater national uniformity by working with the state courts. If the committee produces a good rule, he said, effective complementary state-court rules could be promoted with the support and encouragement of the Conference of Chief Justices.

DUKE CONFERENCE SUBCOMMITTEE

Judge Campbell pointed out that it is difficult to speak about preservation without considering more broadly what information should be permitted in the discovery process, especially electronically stored information. He reported that the advisory committee had established a separate subcommittee, chaired by Judge John G. Koeltl, to evaluate the many helpful ideas for discovery reform raised at the Duke conference and to recommend which should be proposed as rule amendments. Eventually, he said, the advisory committee will marry the work of the Duke Conference subcommittee with that of the discovery subcommittee on spoliation because the two are closely related.

He reported that Professor Cooper had produced very helpful and thought-provoking drafts of several potential rule amendments to implement the Duke recommendations. The proposals, he explained, can be categorized as falling into three sets of proposed changes.

The first set of proposals was designed to promote early and active case management. They include: reducing the time for service of a complaint from 120 days to 60; reducing the time for holding a scheduling conference from 120 days to 60 or 45; requiring judges to actually hold a scheduling conference in person or by telephone; no longer allowing local court rules to exempt cases from the initial case-management requirements; requiring parties to hold a conference with the court before filing discovery motions; and allowing written discovery to be sought before the Rule 26(f) conference is held, but providing that requests do not have to be answered until after the case-management conference. The latter provision would let the parties know what discovery is contemplated when they meet with the judge to discuss a discovery schedule. Those and other ideas were designed to get the courts more actively involved in the management of cases and at an earlier stage.

Judge Campbell noted that the second category of possible changes was designed to curtail the discovery process and make it more efficient. One set of proposals would take the concept of proportionality and move it into Rule 26(b)(1)'s definition of discoverable information. It is already there by cross-reference in the last sentence of that provision, but the proposals would make it more prominent. In essence, the revised definition would define discoverable information as relevant, non-privileged information that is proportional to the reasonable needs of the case.

In addition, he said, the subcommittee was considering limiting discovery requests by lowering presumptive numbers and time limits, such as reducing the number of depositions from 10 to 5, the time of depositions from 7 hours to 4, and the number of interrogatories from 25 to 15, and by imposing caps of 25 requests for production and 25 requests for admissions. Although courts may alter them, just reducing the presumptive limits may reduce the amount of discovery that occurs and change the prevailing ethic that lawyers must seek discovery of everything.

Another proposal, he noted, would require parties objecting to a request for production to specify in their objection whether they are withholding documents. A responding party electing to produce copies of electronically stored information, rather than permitting inspection, would have to complete the production no later than the inspection date in the discovery request. Rule 26(g) would be amended to require the attorney of record to sign a discovery response to attest that the response is not evasive. Another proposal would defer contention interrogatories and requests to admit until after the close of all other discovery. The subcommittee, he said, was also considering cost-shifting provisions and may make cost shifting a more prominent part of discovery. All these changes are designed to streamline the discovery process and reduce the expenses complained about at the Duke conference.

Judge Campbell reported that a third category of proposals was designed to emphasize cooperation among the attorneys. One amendment would make cooperation an integral part of Rule 1. The rule, thus, might specify that the civil rules are to be construed and used to secure the just, speedy, and inexpensive determination of cases, and the parties should cooperate to achieve these ends.

Judge Campbell said that the advisory committee will study these drafts at its November 2012 meeting. It will likely marry them with the proposed rule on preservation to produce a package of rule amendments to make litigation more efficient. Professor Cooper added that it would be very beneficial for the Standing Committee members to review the proposed drafts carefully and point out any flaws and make additional suggestions that the advisory committee might consider.

A member praised the comprehensive and impressive efforts of the committee. She noted, though, that several corporate counsel had expressed concern about giving proportionality a more prominent place in the rules. They fear that it would give attorneys an excuse to litigate more discovery disputes.

A participant pointed out that the objective of fostering cooperation among the parties is excellent, but specifying a cooperation requirement in the text of the rules is troublesome. Cooperation inevitably is entwined with attorney conduct, an area on the edge of the Rules Enabling Act that may impinge on the role of the states in regulating attorney conduct.

Another participant suggested that consideration be given to appointing special masters to handle discovery in complex cases because busy judges often do not have the time to devote undivided attention to overseeing discovery. Some way would have to be found to pay for masters, but at least in large corporate cases, the parties may be able to work it out. He also recommended reducing the presumptive limit for expert-witness depositions to 4 hours.

A member commended the advisory committee for undertaking the discovery project. He suggested that anything the committee can do to limit the number of discovery requests and reduce discovery time periods, at least in the average case, will be beneficial. He also commended the proposed modest recommendations on cost-shifting and proportionality. He urged the committee to carry on the work and move as quickly as possible.

His only reservation, he said, concerned adding a cooperation requirement to the rules. The concept, he said, was fine, but it may conflict with an attorney's ethical duty to pursue a client's interests zealously. He asked how much lawyers can be reasonably expected to cooperate in discovery when they are not expected to cooperate very much in other areas. The adversarial process, he said, is a highly valued attribute of the legal system, and the committee should avoid intruding into the states' authority over attorney conduct.

Members noted that some states have imposed effective, stricter limits on depositions that led lawyers to reassess how long they really need to take a deposition. A member added that depositions of expert witnesses have been eliminated completely in his state. It was noted that the original intent of Rule 26(a)(2)'s report requirement was to reduce the length of depositions of expert witnesses or even to eliminate them in many cases. That benefit, however, has not been realized.

PLEADING STANDARDS

Professor Cooper reported that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Iqbal v. Ashcroft*, 556 U.S. 662 (2009). There is, he said, no sense that the lower courts have unified around a single, identifiable pleadings standard for civil cases, but there is also no sense of a crisis or emergency. The committee, he said, was essentially biding its time and did not plan to move forward quickly. It has several potential proposals on the table, including directly revising the pleading standards in FED. R. CIV. P. 8 (general rules of pleading), addressing pleading indirectly through Rule 12(e) motions for a more definite statement, or integrating pleading more closely with discovery, particularly in cases where there is an asymmetry of information.

Dr. Cecil reported that the Federal Judicial Center had begun pilot work on its new study of all case-dispositive motions in the district courts. The study, he said, will be different from earlier studies because it will take a more comprehensive, holistic look at all Rule 12 motions and summary judgment issues and explore whether there are any tradeoffs, such as whether an increase in motions to dismiss has led to a reduction in motions for summary judgment. In addition, the Center is collaborating closely with several civil procedure scholars and hopes to reach a consensus with them about what is actually going on in the courts regarding dispositive motions. The study, he said, will be launched in September 2012 with the help of law professors and students in several schools.

FED. R. CIV. P. 84 AND FORMS

Judge Campbell reported that the advisory committee was examining FED. R. CIV. P. 84 (forms), which states that the forms appended to the rules “suffice” and illustrate the simplicity and brevity that the rules contemplate. He explained that many of the forms are outdated, and some are legally inadequate.

Professor Cooper pointed out that the Standing Committee had appointed an ad hoc forms subcommittee, chaired by Judge Gene E. K. Pratter of the civil committee, to review now the advisory committees develop and approve forms. The subcommittee, he said, made two basic observations: (1) in practice, the civil, criminal, bankruptcy, and appellate forms are used in widely divergent ways; and (2) the process for generating and approving forms differs substantially among the advisory committees.

The civil and appellate forms, for example, adhere to the full Rules Enabling Act process, including publication, approval by the Judicial Conference and the Supreme Court, and submission to Congress. The bankruptcy rules, on the other hand, follow the process partly, only up through approval by the Judicial Conference. At the other extreme, the criminal rules have no forms at all. Instead, the Administrative Office drafts the criminal forms, sometimes in consultation with the criminal advisory committee. He said that the subcommittee ultimately concluded that there is no overriding need for the advisory committees to adopt a uniform approach.

Professor Cooper explained that the civil advisory committee was now in the second phase of the forms project and was focusing on what to do specifically with the civil forms. He noted that the project had received an impetus from the Supreme Court’s *Twombly* and *Iqbal* decisions on pleading requirements and from the widely held perception that the illustrative civil complaint forms are legally insufficient. There is, he said, a clear tension between the simplicity of those forms and the pleading requirements announced in the Supreme Court decisions.

He noted that the advisory committee was considering several different options. One would be just to eliminate the pleading forms. An alternate would be to develop a set of new, enhanced pleading forms for each category of civil cases consistent with *Twombly* and *Iqbal*. There was, though, no enthusiasm in the committee for that approach. Going further, the committee could consider getting back into the forms business full-bore and spend substantial amounts of time on improving and maintaining all the forms. At the other extreme, the committee could eliminate all the forms and allow the Administrative Office to generate the forms, with appropriate committee consultation.

CLASS ACTIONS AND RULE 23 SUBCOMMITTEE

Judge Campbell reported that the advisory committee had appointed a Rule 23 subcommittee to consider several topics involving class-action litigation and whether certain amendments to the class-action rule were appropriate.

Professor Marcus said that the subcommittee had begun its work and was examining a variety of controversial issues that have emerged as a result of several Supreme Court decisions in the past couple of years, recent litigation developments, and experience under the Class Action Fairness Act. Among the topics being considered are: (1) the relationship between considering the merits of a case and determining class action certification, particularly with regard to the predominance of common questions; (2) the viability of issues classes under Rule 23(c)(4); (3) monetary relief in a Rule 23 (b)(2) class action; (4) specifying settlement criteria in the rule; and (5) revising Rule 23 to address the Supreme Court's announcement in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fairness and adequacy of a settlement are no substitute for full-dress consideration of predominance.

Professor Marcus noted that the list of issues continues to evolve and many were discussed at the panel discussion during the Standing Committee's January 2012 meeting. He pointed out that the project to consider appropriate revisions to Rule 23 will take time, since several topics are controversial and will pose drafting difficulties.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum and attachments of May 17, 2012 (Agenda Item 8).

Amendment for Final Approval

FED. R. CRIM. P. 11(b)

Judge Raggi reported that the proposed amendment to FED. R. CRIM. P. 11(b)(1) (pleas) would add a new subsection (o) to the colloquy that a court must conduct before accepting a defendant's guilty plea. It would require a judge to advise defendants who are not United States citizens that they may face immigration consequences if they plead guilty.

She noted that at every stage of the advisory committee's deliberations, a minority of members questioned whether it is wise or necessary to add further requirements to the already lengthy Rule 11 plea colloquy. Moreover, the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2012), addressed the duty of defense counsel, not the duty of courts, to provide information on immigration consequences to the defendant. Nevertheless, a majority of the advisory committee concluded that immigration is qualitatively different from other collateral consequences that may flow from a conviction. Moreover, a large number of criminal defendants in the federal courts are aliens who are affected by immigration consequences.

The committee, she said, recognized the importance of not allowing Rule 11(b) to become such a laundry list of every possible consequence of a guilty plea that the most critical factors bearing on the voluntariness of a plea do not get lost, *i.e.*, knowledge of the important constitutional rights that the defendant is waiving. She added that the only change made after publication was a modest change in the committee note.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 5(d) and 58(b)

Judge Raggi explained that the proposed amendments to FED. R. CRIM. P. 5(d) (initial appearance) and FED. R. CRIM. P. 58(b)(2) (initial appearance in a misdemeanor) dealt with advising detained foreign nationals that they may have their home country's consulate notified of their arrest.

The amendments had been approved by the Judicial Conference in September 2011, but returned by the Supreme Court in April 2012. The advisory committee then discussed possible concerns that the Court may have had, such as that the possibility that the language of the amendments could be construed to intrude on executive discretion or

confer personal rights on a defendant. She suggested that there may have been concern over the proposed language in Rule 5(d)(1)(F), which specified that a detained non-citizen be advised that an attorney for the government or law-enforcement officer will do either of two things: (1) notify a consular office of the defendant's country, or (2) make any other consular notification required by treaty or international agreement.

She suggested that use of the word "will" might have been seen as potentially tying the hands of the executive in conducting foreign affairs. In addition, despite language in the committee note that the rule did not create any individual rights that a defendant may enforce in a federal court, the rule might have been seen as taking a step in that direction,

After the rule was returned by the Court, the advisory committee went back to the drawing board and produced a revised draft of the amendments. As revised, the first part provides that the defendant must be told only that if in custody, he or she "may request" that an attorney for the government or law-enforcement officer notify a consular office. It does not guarantee that the notification will in fact be made. The second part of the amendments was not changed. It specifies that even without the defendant's request, consultation notification may be required by a treaty or other international agreement.

Judge Raggi pointed out that the primary concern in revising the amendments was to assuage any concerns that the Supreme Court may have had with the amendments as originally presented. She noted that the Department of Justice had been consulting closely with the Department of State, which is very eager to have a rule as an additional demonstration to the international community of the nation's compliance with its treaty obligations.

A member noted that the Vienna Convention only requires notification of a consular office if a defendant requests it. She said that the Supreme Court might have found the original language of proposed Rule 5(d)(1)(F)(i) too strong in stating that the government will notify a consular office if the defendant requests. But the new language in Rule 5(d)(1)(F)(ii) may go too far in the other direction by requiring notification without the defendant's request if required by a treaty or international agreement.

Ms. Felton explained that several bilateral treaties, separate from the Vienna Convention, require notification regardless of the defendant's request. She added that the Departments of Justice and State had proposed the amendments to Rules 5 and 58 primarily as additional, back-up insurance that consular notification will in fact be made.

The main thrust of the amendments, she said, was to inform defendants of their option to request consular notification. In the vast majority of cases, however, the notification will already have been made by a law-enforcement officer or government attorney at the time of arrest. That is what the Vienna Convention contemplates. The

proposed amendments, which apply at initial appearance proceedings, will help catch any cases that may have slipped through the cracks.

Judge Raggi noted that this factor was part of the discussion on whether a rule is needed at all because there are no court obligations under the Convention and treaties. The rule, essentially, is a belt-and-suspenders provision designed to cover the rare cases when a defendant has not been advised properly. It only states that a defendant may request notification, and that is as far as it can go. If were to imply that the notice will in fact be given, which is what some treaties actually require, there would be concern that the rule itself was creating an enforceable individual right in the defendant.

Professor Beale added that the revised amendments were acceptable to the Departments of Justice and State. They may be more acceptable to the Supreme Court because they do not in any way tie the hands of the executive and avoid creating any individual rights or remedies. A member noted that the last part of the committee notes makes that point explicitly.

Judge Raggi pointed out that it was up to the Standing Committee to decide whether to republish the rule. Although the changes made after the return from the Supreme Court simply clarify the intent of the amendments, the advisory committee had reason to think that they were different enough to warrant publishing the rule again for further comment.

The committee unanimously by voice vote approved the proposed amendments for republication.

Information Items

FED. R. CRIM. P. 12 and 34

Judge Raggi explained that the proposed amendments to FED. R. CRIM. P. 12 (pleadings and pretrial motions) and the conforming amendment to FED. R. CRIM. P. 34 (arresting judgment) deal with motions that have to be made before trial and the consequences of an untimely motion. The amendments, she said, had been prompted by a proposal by the Department of Justice to include motions objecting to a defect in the indictment in the list of motions that must be made before trial.

The proposal, she said, had now come to the Standing Committee for the third time. The last draft was published for public comment in August 2011. It generated many thoughtful comments, which led the advisory committee to make some additional changes. It is expected that the ad hoc subcommittee reviewing the rule will present a final draft to the advisory committee in October 2012, and it may be presented to the Standing Committee for final approval in January 2013.

FED. R. CRIM. P. 6(e)

Judge Raggi reported that the advisory committee had received a letter from the Attorney General in October 2011 recommending that FED. R. CRIM. P. 6(e) (grand jury secrecy) be amended to establish procedures for disclosing historically significant grand jury materials. She noted that applications to release historic grand jury materials had been presented to the district courts on rare occasions, and the courts had resolved them by reference to their inherent supervisory authority over the grand jury.

The Department of Justice, however, questioned whether that inherent authority existed in light of Rule 6(e)'s clear prohibition on disclosure of grand jury materials. Instead, it recommended that disclosure should be permitted, but only under procedures and standards established in the rule itself. The Department submitted a very thoughtful memo and proposed rule amendments that would: (1) allow district courts to permit disclosure of grand jury materials of historical significance in appropriate circumstances and subject to required procedures; and (2) provide a specific point in time at which it is presumed that materials may be released.

She noted that a subcommittee, chaired by Judge John F. Keenan, had examined the proposal and consulted with several very knowledgeable people on the matter. In addition, the advisory committee reporters prepared a research memorandum on the history of Rule 6(e), the relationship between the court and the grand jury and case law precedents on the inherent authority of a judge to disclose grand jury material. After examining the research and discussing the proposal, all members of the subcommittee, other than the Department of Justice representatives, recommended that the proposed amendment not be pursued.

The full advisory committee concurred in the recommendation and concluded that in the rare cases where disclosure of historic materials had been sought, the district judges acted reasonably in referring to their inherent authority. Therefore, there is no need for a rule on the subject.

Judge Raggi added that she had received a letter from the Archivist of the United States strongly supporting the Department of Justice proposal. She spoke with him at length about the matter and explained that it would be a radical change to go from a presumption of absolute secrecy, which is how grand juries have always operated, to a presumption that grand jury materials should be presumed open after a certain number of years. A change of that magnitude, she said, would have to be accomplished through legislation, rather than a rule change. She noted that the archivist has a natural, institutional inclination towards eventually releasing historical archived documents and might consider supporting a legislative change.

FED. R. CRIM. P. 16

Judge Raggi reported that a suggestion had been received from a district judge to amend FED. R. CRIM. P. 16(a) (government's disclosure) to require pretrial disclosure of all the defendant's prior statements. There was, however, a strong consensus on the advisory committee that there are no real problems in criminal practice that warrant making the change. The committee, accordingly, decided not to pursue an amendment.

Judge Raggi reported that the Senate Judiciary Committee was considering legislation addressing the government's obligations to disclose exculpatory materials under *Brady* and *Giglio*. The committee had asked the judiciary for comments and a witness at the hearings. She said that she had decided not to testify but wrote to the committee to document the work of the advisory committee and the Standing Committee on the subject over the last decade. Attached to the letter were 900 pages of the public materials that the committee had produced.

She explained in the letter that the advisory committee had tried to write a rule that would codify all the government's disclosure obligations under case law and statute, but concluded that it could not produce a rule that fully captures the obligations across the wide range of federal criminal cases. In addition, she said, her letter alluded to a Federal Judicial Center survey of federal judges showing, among other things, that judges see non-disclosure as a problem that only arises infrequently. Although the advisory committee decided not to pursue a rule change, she added, the subject is being addressed in revisions to the *Bench Book for U.S. District Court Judges*. She noted that the Federal Judicial Center's Bench Book Committee was close to completing that work.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of May 3, 2012 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Amendments for Final Approval

FED. R. EVID. 803(10)

Judge Fitzwater reported that the proposed amendment to FED. R. EVID. 803(10) (hearsay exception for the absence of a public record) was needed to address a constitutional infirmity as a result of the Supreme Court's decisions in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). It raised the concern that "testimonial" evidence is being allowed when a certificate that a public record does not exist is introduced in

evidence without the presence of the official who prepared the certificate. The proposed amendment would create a notice-and-demand procedure that lets the prosecution give written notice of its intention to use the information. Unless the defendant objects and demands that the witness be produced, the certificate may be introduced.

The proposed procedure, he said, had been approved in *Melendez-Diaz*. The advisory committee received two comments on the amendment, one of which endorsed it and the other approved it in principle with some comments.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. EVID. 801(d)(1)(B)

Judge Fitzwater reported that FED. R. EVID. 801(d) (declarant-witness's prior statement) specifies that certain prior statements are not hearsay. Under Rule 801(d)(1)(B), the proponent of testimony may introduce a prior consistent statement for its truth, *i.e.* to be admitted substantively, but not for another rehabilitative purpose, such as faulty recollection.

He said that two problems have been cited with the way the rule is now written. First, the prior consistent statement of the witness is of little or no use for credibility unless the jury actually believes the testimony to be true anyway. The jury instruction, moreover, is very difficult for jurors to follow, as it asks them to distinguish between prior consistent statements admissible for the truth and those that are not. Second, the distinction has little, if any, practical effect because the proponent of the testimony has already testified in the presence of the trier of fact.

The proposed amendment would allow a prior consistent statement to be admitted substantively if it otherwise rehabilitates the witness' credibility.

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

FED. R. EVID. 803(6)-(8)

Judge Fitzwater noted that FED. R. EVID. 803(6), (7), and (8) are the hearsay exceptions, respectively, for business records, the absence of business records, and public records. When the admissibility requirements of the rule are met, the evidence is admitted as an exception to the hearsay rule unless the source, method, or circumstances indicate a lack of trustworthiness.

During the restyling of the rules, he said, a question arose as to who has the burden on the issue of lack of trustworthiness. By far the vast majority of court decisions have held that the burden is on the opponent of the evidence, not the proponent. But a few decisions have placed the burden on the proponent. Since the case law was not unanimous, the advisory committee decided that it could not clarify the matter as part of the restyling project because a change would constitute a matter of substance.

Although the ambiguity was not resolved during the restyling project, the Standing Committee suggested that the advisory committee revisit the rule. The advisory committee initially was of the view that no further action was needed until it was informed that the State of Texas, during its own restyling project, had looked at the restyled federal rules and concluded that FED. R. EVID. 803(6)-(8) had placed the burden on the proponent of the evidence. This, clearly, was not the advisory committee's intention. At that point, it decided to make a change in the rules to make it clear that the burden is on the opponent of the evidence.

At members' suggestions, minor changes were made in the proposed committee notes. Line 34 of the note to Rule 806(8) was corrected to conform to the text of the rule, and an additional sentence was added to the second paragraph of the note to Rule 806(6).

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

Information Items

SYMPOSIUM ON FED. R. EVID. 502

Judge Fitzwater noted that the advisory committee's next meeting will be held on October 4 and 5, 2012, in Charleston, South Carolina. A symposium on Rule 502 will be held in conjunction with the meeting, with judges, litigators, and academics in attendance. There is concern, he said, that Rule 502 (limitations on waiver of attorney-client privilege and work product) is not being used as widely as it should be as a means of reducing litigation costs. He noted that Professor Marcus will be one of the speakers at the program, and he invited the members of the Standing Committee to attend.

REPORT OF THE E-FILING SUBCOMMITTEE

Judge Gorsuch noted that the ad hoc committee, which he chaired, was comprised of representatives from all the advisory committees. It was convened to consider appropriate terminology that the rules might use to describe activities that previously had only involved paper documents but now are often processed electronically. Although the

impetus for the subcommittee's formation arose in connection with the appropriate terminology to use in the pending amendments to Part VII of the bankruptcy rules and FED. R. APP. P. 6, the subcommittee took a comprehensive look at all the federal rules. Professor Struve served as the subcommittee reporter, and Ms. Kuperman compiled a comprehensive list of all the terms used in each set of federal rules to describe the treatment of the record and other materials that may be either in paper or electronic form.

He noted that the subcommittee had identified four possibilities for defining its work and listed them from the most aggressive to the least. First, he said, it could conduct a major review of all the federal rules in order to achieve uniformity in terminology across all the rules. That major project would be conducted along the lines of the recent restyling efforts. Second, the subcommittee could compile a glossary of preferred terms. Third, it could serve as a screen for all future rule amendments, and advisory committees would have to run their proposals through the subcommittee. And fourth, the subcommittee could simply make itself available for assistance at the request of the advisory committees.

He reported that the subcommittee opted for the last alternative, largely because the others would all take a great deal of time and effort. Moreover, it recognized that technology is changing so rapidly that it may not be timely to undertake a more aggressive approach at this juncture. At some point in the future, though, terminology will have to be addressed more comprehensively. He added that the most valuable result of the subcommittee's work was to make the reporters cognizant of the extraordinary number of synonyms currently in use in the rules and to encourage them to coordinate with each other on terminology.

INTERIM ASSESSMENT OF THE JUDICIARY'S STRATEGIC PLAN

Judge Kravitz noted that he would work with the advisory committees to prepare a response to Judge Charles R. Breyer, the Judicial Planning Coordinator, on the committee's progress in implementing the *Strategic Plan for the Federal Judiciary*.

NEXT MEETING

The committee will hold its next meeting on Thursday and Friday, January 3 and 4, 2013 in Boston, Massachusetts.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB 2

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TAB 2A

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PRESERVATION/SANCTIONS ISSUES

Since the March meeting, the Discovery Subcommittee has spent considerable time refining the draft it brought before the Committee as a new Rule 37(g). After extended discussion during numerous conference calls, it has refined the rule-amendment proposal as set forth below. Having so refined the proposal, it concluded that it should replace existing Rule 37(e) rather than become a new Rule 37(g), as previously denominated. The reasons for that conclusion are explained below.

Although there are still a few questions on which the Subcommittee was not able to reach consensus, it believes that the full Committee should be able to resolve those questions and therefore hopes that the rule proposal can be forwarded to the Standing Committee with an Advisory Committee recommendation that it be published for public comment. The Subcommittee recognizes that the timing of that recommendation could be influenced to some extent by the Advisory Committee's consideration of the Duke Subcommittee initiatives.

Besides this memorandum, the agenda book should include the following additional items related to this topic:

Notes of Sept. 27 conference call

Notes of Sept. 6 conference call

Notes of Aug. 27 conference call

Notes of Aug. 7 conference call

Notes of July 23 conference call

Notes of July 13 conference call

Notes of July 5 conference call

Memorandum dated Sept. 6, 2012, from John Barkett, on instances in which courts have addressed sanctions for loss of discoverable information not involving willfulness or bad faith

Memorandum dated Aug. 24, 2012, from Andrea Kuperman on Rule 37(e) case law

Memorandum from Judge Grimm's Law Clerks on Local Rules regarding preservation and sanctions

General Background

As should be apparent, the Subcommittee has spent a lot of time and energy discussing these issues; some background may

provide a useful context for the rest of the Advisory Committee.

The Committee's focus on preservation and sanctions was sparked by the E-Discovery panel at the Duke Conference in May, 2010. That panel discussion emphasized the large and growing burden of litigation holds in particular and preservation more generally. The panelists unanimously urged that the Committee attempt to develop a rule to deal with these problems. Rule 37(e), adopted in 2006 to provide some solace about preservation sanction risks, had not been sufficiently effective.

The Discovery Subcommittee began work during the summer of 2010 to evaluate and develop methods of addressing these difficulties, reporting back on its progress during full Committee meetings. Much of this work was done by conference call, and eventually it led to the conclusion that the Subcommittee would be greatly aided by a mini-conference addressing preservation issues.

In September, 2011, the Subcommittee held a mini-conference attended by about 30 participants with extensive background in dealing with these issues. Various participants and organizations also submitted extremely helpful written reports. It would be putting it mildly to say that their views were diverse; some urged immediate pursuit of a rule containing detailed preservation specifics, while others argued that no action at all was indicated.

During 2011, the Subcommittee developed three general models of possible rule-amendment approaches which it presented to the participants in its mini-conference and summarized as follows at the time:

Category 1: Preservation proposals incorporating considerable specificity, including specifics regarding digital data that ordinarily need not be preserved, elaborated with great precision. Submissions the Committee received from various interested parties provide a starting point in drafting some such specifics. A basic question is whether a single rule with very specific preservation provisions could reasonably apply to the wide variety of civil cases filed in federal court. A related issue is whether changing technology would render such a rule obsolete by the time it became effective, or soon thereafter. Even worse, it might be counter-productive. For example, a rule that triggers a duty to preserve when a prospective party demands that another prospective party begin preservation measures (among the triggers suggested) could lead to overreaching demands, counter-demands, and produce an impasse that could not be resolved by a court because no action had yet been filed.

Category 2: A more general preservation rule could address a variety of preservation concerns, but only in more general terms. It would, nonetheless, be a "front end" proposal that would attempt to establish reasonableness and proportionality as touchstones for assessing preservation obligations. Compared to Category 1 rules, then, the question would be whether something along these lines would really provide value at all. Would it be too general to be helpful?

Category 3: This approach would address only sanctions, and would in that sense be a "back end" rule. It would likely focus on preservation decisions, making the most serious sanctions unavailable if the party who lost information acted reasonably. In form, however, this approach would not contain any specific directives about when a preservation obligation arises or the scope of the obligation. By articulating what would be "reasonable," it might cast a long shadow over preservation without purporting directly to regulate it. It could also be seen as offering "carrots" to those who act reasonably, rather than relying mainly on "sticks," as a sanctions regime might be seen to do.

After the mini-conference, the Subcommittee decided to focus on the Category 3 approach, embodied at the time in a proposed Rule 37(g) dealing with sanctions for failure to preserve information. There were many questions about how to refine this proposal. Many of those questions remained when the same proposal was presented to the full Committee and discussed during the March 2012 meeting in Ann Arbor.

Since the March meeting, as the listing of conference calls above suggests, the Subcommittee has worked its way through the various language choices and questions raised in the drafts that the Committee has seen in the past. In the process, it has identified a number of additional issues that were not fully apparent before the detailed drafting process began. Full details of the evaluation of those issues are presented in the notes on the various conference calls.

The Subcommittee believes that the proposal below holds promise to provide significant benefits in dealing with the many problems that were identified during the Duke Conference and since, and also that it creates minimal risks of causing problems of the sort that some worried might result from rule amendment.

During the Committee's meeting, the Subcommittee would be happy to try to explain the drafting choices made. But it seems useful at least to outline some topics that have received considerable Subcommittee attention.

Replacing Rule 37(e)

In 2006, Rule 37(e) was added to provide some protection against sanctions for failure to preserve. At the time, some objected that it would not provide a significant amount of protection. Since then, as explored in Andrea Kuperman's memorandum (which should be in this agenda book), the rule has been invoked only rarely. Some say it has provided almost no relief from preservation burdens. The question whether this rule provision would serve any ongoing purpose if a better provision could be devised has been in the background since the beginning of the Subcommittee's efforts.

The proposed amendment is designed to provide more significant protection against inappropriate sanctions, and also to reassure those who might in its absence be inclined to over-preserve to guard against the risk that they would confront serious sanctions. Thus, Rule 37(e)(2)(A) permits sanctions only if the court finds that the failure to preserve was willful or in bad faith. One goal of this requirement is to overturn the decision of the Second Circuit in *Residential Funding Corp. v. DeGeorge Finan. Corp.*, 306 F.3d 99 (2d Cir. 2002), which authorized sanctions for negligence. Not only is the amendment designed to raise the threshold for sanctions, it is also meant to provide a uniform standard for federal courts nationwide and thereby to address the case law cacophony that many have reported causes difficulty for those trying to make preservation decisions.

Amended Rule 37(e), in short, provides better protection than current Rule 37(e). The Subcommittee has been unable to identify any activity that would be protected by the current Rule 37(e) but not protected under the proposed rule. The proposed rule is significantly broader than the current rule, providing more guidance to those who must make preservation and sanctions decisions. It also applies to all discoverable information, not just electronically stored information.

The Subcommittee therefore recommends that current Rule 37(e) be replaced with amended Rule 37(e). It reached this conclusion only after completing the long process of refining its amendment proposal, then called Rule 37(g). Having completed that refinement, it reflected on whether current 37(e) provides any useful protection beyond its proposed amendment and concluded that the current rule does not. The Subcommittee discussed abrogating current Rule 37(e) and also adopting its new proposal as 37(g), but that seems unnecessary and potentially confusing. If useful, the invitation for public comment could call attention to the question whether existing Rule 37(e) would have any ongoing value after adoption of the proposed amendment.

The Committee Note below addresses the replacement of current 37(e), but due to the press of time the full Subcommittee did not get a chance to review those portions of the Note before

preparation of these agenda materials.

Grant of authority to sanction;
 limitation on that authority to
 situations involving willfulness or bad faith

The proposed amendment (in 37(e)(2)) says that if a party fails to preserve information that should be preserved, "the court may impose any of the sanctions listed in Rule 37(g)(2)(A) or give an adverse-inference only if the court finds" that the loss was willful or in bad faith. This formulation differs from the formulation in current Rule 37(e) in that it is a grant of authority to impose sanctions of the sort listed in Rule 37(b)(2)(A). There is accordingly no need to worry (as the language of Rule 37(b) might suggest if the sanction were imposed directly under that rule) about whether failure to preserve violated a court order. The new rule provision is not limited (as is current Rule 37(e)) to "sanctions under these rules," so that the grant of authority should make it unnecessary for courts to rely on inherent authority to support sanctions for failure to preserve. At the same time, the limitation to situations involving willfulness or bad faith should correspond to what is normally said to be necessary to support inherent power sanctions. It is important to ensure that looser notions of inherent power are not invoked to circumvent the protections established by new Rule 37(e).

The limitation to situations in which the party to be sanctioned has acted willfully or in bad faith should provide significantly more protection than current Rule 37(e), as well as providing a uniform national standard.

Some thought was given to whether it would be helpful to try in the Note to define willfulness or bad faith, but the conclusion was that it would not be useful. The courts have considerable experience dealing with these concepts, and efforts to capture that experience in Note language seemed more likely to produce problems than provide help.

Sanctions in absence of willfulness or bad faith

Rule 37(e)(2)(B) does permit sanctions in the absence of willfulness or bad faith when the loss of the information "irreparably deprived a party of any meaningful opportunity to present a claim or defense." The Subcommittee means this authority to be limited to the truly exceptional case. It functions as something of a safety valve for the general directive that sanctions can only be imposed on one who has acted willfully or in bad faith. The point is that the prejudice is not only irreparable, but also exceptionally severe. Rule 37(e)(2)(B) comports with cases such as *Silvestri v. General Motors Corp.*, 273 F.3d 583 (4th Cir. 2001), which have recognized

the need for consequences when one side loses information or evidence that is clearly essential to the other side's case. The Subcommittee spent considerable time refining and discussing the proper way to phrase this authority and ultimately arrived at the recommended formulation.

Precise preservation rules

As mentioned above, the Subcommittee began its analysis of these problems with two possible amendment approaches that sought to provide guidance on when a preservation obligation arises and the scope of that obligation. The amendment recommended below does not contain such a provision.

But Rule 37(e)(3) attempts nonetheless to provide general guidance for parties contemplating their preservation obligations. It lists a variety of considerations that a court should take into account in making a determination both about whether the party failed to preserve information "that reasonably should be preserved" and also whether that failure was willful or in bad faith.

The Subcommittee has carefully reviewed the catalog of considerations, and not reached consensus on whether it should be shortened. In particular, as noted in a footnote, it has discussed whether paragraphs (C) and (D) could be omitted. Some feel that these considerations are adequately covered by others on the list. Other members of the Subcommittee feel that a more complete listing in the rule is useful for parties looking for guidance.

At the same time, the rule does not attempt to prescribe new or different rules on what must be preserved. As the Note states, the question whether given information "reasonably should be preserved" is governed by the common law. Given the wide variety of cases brought in federal court, the Subcommittee concluded that it was not possible to write a single rule that would specify the materials to be preserved in every case. The decision is necessarily case-specific.

In the same vein, the Subcommittee considered whether providing specifics in the Note on what might trigger a duty to preserve would be desirable. Some versions of proposed rules contained very specific specifications of this sort. The Subcommittee's eventual conclusion, however, was that no single rule could be written that would apply fairly and effectively to the wide variety of cases in federal court.

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

* * * * *

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

(e) FAILURE TO PRESERVE DISCOVERABLE INFORMATION. If a party fails to preserve discoverable information that reasonably should be preserved in the anticipation or conduct of litigation,

(1) The court may permit additional discovery, order the party to undertake curative measures, or require the party to pay the reasonable expenses, including attorney's fees, caused by the failure.

(2) The court may impose any of the sanctions listed in Rule 37(b)(2)(A) or give an adverse-inference jury instruction only if the court finds:

(A) that the failure was willful or in bad faith and caused substantial prejudice in the litigation; or

(B) that the failure irreparably deprived a party of any meaningful opportunity to present a claim or defense.

(3) In determining whether a party failed to preserve discoverable information that reasonably should have been preserved, and whether the failure was willful or in bad faith, the court should consider all relevant factors, including:

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

(B) the reasonableness of the party's efforts to

33 preserve the information, including the use of a
 34 litigation hold and the scope of the preservation
 35 efforts;

36

37 (C) whether the party received a request that
 38 information be preserved, the clarity and
 39 reasonableness of the request, and whether the
 40 person who made the request and the party engaged
 41 in good-faith consultation regarding the scope of
 42 preservation;¹

43

44 (D) the party's resources and sophistication in
 45 litigation;

46

47 (E) the proportionality of the preservation efforts to
 48 any anticipated or ongoing litigation; and

49

50 (F) whether the party sought timely guidance from the
 51 court regarding any unresolved disputes concerning
 52 the preservation of discoverable information.

53

DRAFT COMMITTEE NOTE

1

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

¹ The Subcommittee has discussed at some length whether it
is useful to include paragraph C and paragraph D, but has not
reached consensus on that question.

17 seem necessary due to the risk that very serious sanctions could
18 be imposed even for merely negligent, inadvertent failure to
19 preserve some information later sought in discovery.

20

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

36

37 Amended Rule 37(e) applies to loss of discoverable
38 information "that reasonably should be preserved in the
39 anticipation or conduct of litigation." This preservation
40 obligation arises from the common law, and may in some instances
41 be triggered by a court order in the case. Rule 37(e)(3)
42 identifies many of the factors that should be considered in
43 determining, in the circumstances of a particular case, when a
44 duty to preserve arose and what information should be preserved.

45

46 Except in very rare cases in which the loss of information
47 irreparably deprived a party of any meaningful opportunity to
48 present a claim or defense, sanctions for loss of discoverable
49 information may only be imposed on a finding of willfulness or
50 bad faith.

51

52 Unlike the 2006 version of the rule, amended Rule 37(e) is
53 not limited to "sanctions under these rules." It provides rule-
54 based authority for sanctions for loss of all kinds of
55 discoverable information, and therefore makes unnecessary resort
56 to inherent authority.

57

58 **Subdivision (e)(1)** When the court concludes that a party
59 failed to preserve information it should have preserved, it may
60 adopt a variety of measures that are not sanctions. One is to
61 permit additional discovery that would not have been allowed had

62 the party preserved information as it should have. For example,
63 discovery might be ordered under Rule 26(b)(2)(B) from sources of
64 electronically stored information that are not reasonably
65 accessible. More generally, the fact that a party has failed to
66 preserve information may justify discovery that otherwise would
67 be precluded under the proportionality analysis of Rule
68 26(b)(2)(C).

69

70 In addition to, or instead of, ordering further discovery,
71 the court may order the party that failed to preserve information
72 to take curative measures to restore or obtain the lost
73 information, or to develop substitute information that the court
74 would not have ordered the party to create but for the failure to
75 preserve. The court may also require the party that failed to
76 preserve information to pay another party's reasonable expenses,
77 including attorney fees, caused by the failure to preserve. Such
78 expenses might include, for example, discovery efforts caused by
79 the failure to preserve information.

80

81 **Subdivision (e)(2)(A).** This subdivision authorizes
82 imposition of the sanctions listed in Rule 37(b)(2)(A) for
83 failure to preserve information, whether or not there was a court
84 order requiring such preservation. Rule 37(e)(2)(A) is designed
85 to provide a uniform standard in federal court for sanctions for
86 failure to preserve. It rejects decisions that have authorized
87 the imposition of sanctions -- as opposed to measures authorized
88 by Rule 37(e)(1) -- for negligence or gross negligence.

89

90 This subdivision protects a party that has made reasonable
91 preservation decisions in light of the factors identified in Rule
92 37(e)(3), which emphasize both reasonableness and
93 proportionality. Despite reasonable efforts to preserve, some
94 discoverable information may be lost. Although loss of
95 information may affect other decisions about discovery, such as
96 those under Rule 26(b)(2)(B) and 26(b)(2)(C), sanctions may be
97 imposed only for willful or bad faith actions, except in the
98 exceptional circumstances described in Rule 37(e)(2)(B).

99

100 The threshold under Rule 37(e)(2)(A) is that the court find
101 that lost information should have been preserved; if so, the
102 court may impose sanctions only if it can make two further
103 findings. First, it must be established that the party that
104 failed to preserve did so willfully or in bad faith. This
105 determination should be made with reference to the factors
106 identified in Rule 37(e)(3).

107

108 Second, the court must also find that the loss of
109 information caused substantial prejudice in the litigation.
110 Because digital data often duplicate other data, substitute
111 evidence is often available. Although it is impossible to
112 demonstrate with certainty what lost information would prove, the
113 party seeking sanctions must show that it has been substantially
114 prejudiced by the loss. Among other things, the court may
115 consider the measures identified in Rule 37(e)(1) in making this
116 determination; if these measures can sufficiently reduce the
117 prejudice, sanctions would be inappropriate even when the court
118 finds willfulness or bad faith. Rule 37(e)(2)(A) authorizes
119 imposition of Rule 37(b)(2) sanctions in the expectation that the
120 court will employ the least severe sanction needed to repair the
121 prejudice resulting from loss of the information.

122
123 [There may be cases in which a party's extreme bad faith
124 does not in fact impose substantial prejudice on the opposing
125 party, as for example an unsuccessful attempt to destroy crucial
126 evidence. Because the rule applies only to sanctions for failure
127 to preserve discoverable information, it does not address such
128 situations.]²

129
130 **Subdivision (e)(2)(B).** Rule 37(e)(2)(B) permits the court
131 to impose sanctions without making a finding of either bad faith
132 or willfulness. As under Rule 37(e)(2)(A), the threshold for
133 sanctions is that the court find that lost information should
134 have been preserved by the party to be sanctioned.

135
136 Even if bad faith or willfulness is shown, sanctions may
137 only be imposed under Rule 37(e)(2)(A) when the loss of
138 information caused substantial prejudice in the litigation. Rule
139 37(e)(2)(B) permits sanctions in the absence of a showing of bad
140 faith or willfulness only if that loss of information deprived a
141 party of any meaningful opportunity to present a claim or
142 defense. Examples might include cases in which the alleged
143 injury-causing instrumentality has been lost before the parties
144 may inspect it, or cases in which the only evidence of a
145 critically important event has been lost. Such situations are
146 extremely rare.

² This paragraph is in brackets because it is unclear whether it is helpful. The Subcommittee discussed the problem of wicked but unsuccessful efforts to destroy evidence, and did not want to appear to limit the court's authority in responding to such conduct. But the rule only applies if information is lost, and would not then apply. Whether it is useful to make that point in the Note is uncertain.

147 Before resorting to sanctions, a court would ordinarily
148 consider lesser measures, including those listed in Rule
149 37(e)(1), to avoid or minimize the prejudice. If such measures
150 substantially cure the prejudice, Rule 37(e)(2)(B) does not
151 apply. Even if such prejudice persists, the court should employ
152 the least severe sanction.

153
154 **Subdivision (e)(3).** These factors guide the court when
155 asked to adopt measures under Rule 37(e)(1) due to loss of
156 information or to impose sanctions under Rule 37(e)(2). The
157 listing of factors is not exclusive; other considerations may
158 bear on these decisions, such as whether the information not
159 retained reasonably appeared to be cumulative with materials that
160 were retained. With regard to all these matters, the court's
161 focus should be on the reasonableness of the parties' conduct.

162
163 The first factor is the extent to which the party was on
164 notice that litigation was likely and that the information lost
165 would be discoverable in that litigation. A variety of events
166 may alert a party to the prospect of litigation. But often these
167 events provide only limited information about that prospective
168 litigation, so that the scope of discoverable information may
169 remain uncertain.

170
171 The second factor focuses on what the party did to preserve
172 information after the prospect of litigation arose. The party's
173 issuance of a litigation hold is often important on this point.
174 But it is only one consideration, and no specific feature of the
175 litigation hold -- for example, a written rather than an oral
176 hold notice -- is dispositive. Instead, the scope and content of
177 the party's overall preservation efforts should be scrutinized.
178 One focus would be on the extent to which a party should
179 appreciate that certain types of information might be
180 discoverable in the litigation, and also what it knew, or should
181 have known, about the likelihood of losing information if it did
182 not take steps to preserve. The fact that some information was
183 lost does not itself prove that the efforts to preserve were not
184 reasonable.

185
186 The third factor looks to whether the party received a
187 request to preserve information. Although such a request may
188 bring home the need to preserve information, this factor is not
189 meant to compel compliance with all such demands. To the
190 contrary, reasonableness and good faith may not require any
191 special preservation efforts despite the request. In addition,
192 the proportionality concern means that a party need not honor an
193 unreasonably broad preservation demand, but instead should make

194 its own determination about what is appropriate preservation in
195 light of what it knows about the litigation. The request itself,
196 or communication with the person who made the request, may
197 provide insights about what information should be preserved. One
198 important matter may be whether the person making the
199 preservation request is willing to engage in good faith
200 consultation about the scope of the desired preservation.

201

202 The fourth factor looks to the party's resources and
203 sophistication in relation to litigation. Prospective litigants
204 may have very different levels of sophistication regarding what
205 litigation entails, and about their electronic information
206 systems and what electronically stored information they have
207 created. Ignorance alone does not excuse a party that fails to
208 preserve important information, but a party's sophistication may
209 bear on whether failure to do so was either willful or in bad
210 faith. A possibly related consideration may be whether the party
211 has a realistic ability to control or preserve some
212 electronically stored information.

213

214 The fifth factor emphasizes a central concern --
215 proportionality. The focus should be on the information needs of
216 the litigation at hand. That may be only a single case, or
217 multiple cases. Rule 26(b)(2)(C) provides guidance particularly
218 applicable to calibrating a reasonable preservation regime. Rule
219 37(e)(3)(E) explains that this calculation should be made with
220 regard to "any anticipated or ongoing litigation." Prospective
221 litigants who call for preservation efforts by others (the third
222 factor) should keep those proportionality principles in mind.

223

224 Making a proportionality determination often depends in part
225 on specifics about various types of information involved, and the
226 costs of various forms of preservation. A party may act
227 reasonably by choosing the least costly form of information
228 preservation, if it is substantially similar to more costly
229 forms. It is important that counsel become familiar with their
230 clients' information systems and digital data -- including social
231 media -- to address these issues. A party urging that
232 preservation requests are disproportionate may need to provide
233 specifics about these matters in order to enable meaningful
234 discussion of the appropriate preservation regime.

235

236 Finally, the sixth factor looks to whether the party alleged
237 to have failed to preserve as required sought guidance from the
238 court if agreement could not be reached with the other parties.
239 Until litigation commences, reference to the court may not be
240 possible. In any event, this is not meant to encourage premature

241 resort to the court; Rule 26(f) directs the parties to discuss
242 and to attempt to resolve issues concerning preservation before
243 presenting them to the court. Ordinarily the parties'
244 arrangements are to be preferred to those imposed by the court.
245 But if the parties cannot reach agreement, they should not forgo
246 available opportunities to obtain prompt resolution of the
differences from the court.

TAB 2B

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Notes of Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Sept. 27, 2012

On Sept. 27, 2012, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Hon. Paul Grimm (Chair, Discovery Subcommittee); Hon. David Campbell (Chair, Advisory Committee); Hon. Michael Mosman; Hon. John Koeltl (Chair, Duke Subcommittee); Elizabeth Cabraser; John Barkett; Andrea Kuperman (Chief Counsel, Rules Committees); Prof. Edward Cooper (Reporter, Advisory Committee); and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

Judge Grimm introduced the call by acknowledging that the Sept. 6 conference call covered a lot of ground, with the result that there remains only a limited set of further decisions for the Subcommittee to make. The basic questions for today are whether the Subcommittee has a consensus view on various specific remaining issues.

(g)(2)(B) rule language

The materials for today's conference call set out two alternative formulations for (g)(2)(B), which permits a court to impose a sanction in the absence of finding willfulness or bad faith only upon finding:

- (B) that the failure irreparably deprived a party of [any meaningful] {the} opportunity to present a claim or defense [alternative 1]
- (B) that the failure irreparably impaired a party's ability to present a claim or defense [alternative 2]

The discussion was introduced with the recognition that these two preferred versions were selected from among four or five discussed on Sept. 6. The question for today's discussion is whether the Subcommittee wants to select and recommend one or the other to the full Committee. One possibility is that it could report out both alternatives, but it would probably be better if the Subcommittee could report only one version if it has a consensus view on that. That would be more helpful to the full Committee, although the question how to handle this difficult issue would of course remain open for decision during the full Committee's November meeting.

An initial reaction was that it might be that the way to go would be to present both alternatives to the full Committee and then have the Subcommittee make up its mind what to do shortly after the November meeting.

A reaction was that it is preferable for the Subcommittee to pick one approach. And this participant found alternative 2 troublesome. It says that the failure to preserve "irreparably impaired a party's ability to present" its claim or defense. We have already seen that it may often be possible to say that a party's ability to present its case may be "irreparably" impaired in ways that do not even constitute the "substantial prejudice" necessary to support sanctions under (g)(2)(A) when the court finds that the loss was intentional or due to bad faith. An irreparable but modest prejudice to a party's ability to present its case should not support sanctions under (g)(2)(B) even in the absence of a finding of intentional or bad faith loss of evidence. This standard could "swallow the rule." So alternative 1 should be the way to go. It suitably emphasizes the very serious prejudice we are focused on, and is consistent with the Committee Note, which says this situation is extremely rare.

Another participant agreed. Using alternative 2 could swallow the rule. This section is designed for the extreme case, and it should be available only in very limited circumstances. The Subcommittee has been working on this for a long time, and intensely. It should express its preference. And its preference should be for alternative 1.

The initial participant expressed comfort with those views.

Another participant expressed an ongoing but mild preference for having the rule focus on "impaired ability to present." The concern is that under alternative 1 the victim will have to argue in support of the sanctions motion that it is totally unable to present its claim or defense, an invitation to dismissal or entry of summary judgment against it unless the sanctions motion is granted. "Do I have to admit that I lose unless my sanctions motion is granted?" That's asking a lot, and provides an invitation to the other side to move to dismiss the claim or strike the defense unless sanctions are imposed. That's a very risky move, and perhaps we should not go that far.

A judge reacted that it seemed unlikely that a judge would really say "Yes you've lost your claim or defense because the other side failed to preserve material it that 'reasonably should be preserved' [as the rule requires for sanctions] but I'll not help you out and let the dire consequences of that failure to preserve fall on you."

A related reaction was that the dispute on the sanctions motion would often be about whether the dire consequences really have occurred. The issue on motions when there has been a culpable failure to preserve -- even a bad faith failure to preserve -- is whether it the victim has suffered substantial prejudice. In many cases, the court concludes that there has not

been substantial prejudice, or that whatever prejudice has occurred will be cured by certain measures.

Similarly under (g)(2)(B), the argument will likely be about whether the failure to preserve imposes such fatal consequences that it warrants the imposition of sanctions in the absence of bad faith or willfulness. Very often, courts are likely to conclude that the sanctions motion should be denied because the consequences are not so dire. Right now there seem to be instances in which overreaching sanctions arguments are made, and courts conclude that there remains plentiful evidence even though some potential evidence is lost. It is unlikely that a court would deny a motion for sanctions when it concluded that the loss of the information actually did cause the sort of harm (g)(2)(B) addresses, so the denial of the motion is not an invitation to a motion to dismiss or for summary judgment, but more consistent with saying "This case can still proceed."

Another judge reacted that "No judge would do this. The motion to dismiss would make me take another look at the sanctions motion."

Another judge reacted that "I can't imagine a party seriously saying 'Yes, we lost the crucial evidence and our loss of that evidence deprives the other side of any opportunity to prove its case, so we win.' How do you say that?"

Another participant agreed that this sort of argument is very unlikely.

Another judge said that it was unrealistic to worry about this possibility.

Yet another judge observed that a judge who so ruled would be courting reversal. Indeed, the Third Circuit case circulated by Mr. Barkett after the last conference call showed that appellate courts will find an abuse of discretion when a judge overdoes a sanction on the party that lost the evidence; to dismiss the party whose case was weakened by such a loss of evidence by the other side would more clearly invite reversal.

The consensus was to recommend alternative 1, referring to loss of "any meaningful" opportunity to present a claim or defense.

Addition of "ordinarily"
regarding least severe sanction

The issue deals with Committee Note language regarding (g)(2)(B) situations as follows:

Even if such prejudice persists, the court [ordinarily]

should employ the least severe sanction.

The question is whether to retain "ordinarily," which appears in brackets.

The issue was introduced as presenting a contrast to the treatment of a similar subject in the Committee Note to (g)(2)(A), which says:

Rule 37(g)(2)(A) authorizes imposition of Rule 37(b)(2) sanctions in the expectation that the court will employ the least severe sanction needed to repair the prejudice resulting from loss of the information.

If we add the word "ordinarily" with regard to (g)(2)(B), that suggests that judges can impose a greater sanction when there is no willfulness or bad faith than they can where that level of culpability is not proved.

The issue was introduced with a discussion of the cases cited in the memo circulated by Mr. Barkett after the last conference call:

In Vodusek, the judge did not decide the spoliation issue resulting from destructive testing by plaintiff's expert himself, but instructed the jury on it and left it to the jury to decide the weight it would ascribe to that action under the court's instructions. The jury returned a verdict for defendant, so it is not possible to be certain how it handled this specific issue. The point for present purposes is that the district court did not dismiss, did not instruct the jury to make any particular assumptions, and therefore used a less severe sanction than might have been used. The appellate court held that this was within the district judge's discretion.

In Silvestri, the district judge dismissed. The court of appeals clearly recognized a range of permissible sanctions. Against that background, it evaluated what the district judge could have done short of dismissal. Given the loss of the possibly faulty air bag, there seemed no finding or other measure the district judge could have taken. So in a sense the appellate court contented itself that the extreme sanction was used only because no other measure would have cured the prejudice.

In Schmid, the Third Circuit reversed a dismissal, emphasizing the need to consider lesser sanctions.

The basic goal of the rule provision and the Committee Note is to encourage the district judge to make a careful analysis. Adding "ordinarily" may not be entirely consistent with that attitude, particularly if contrasted to the parallel Note language regarding (g)(2)(A). So the question is whether there

is a consensus on whether to say "ordinarily" in (g)(2)(B).

An initial reaction was "Take it out."

Another reaction was the same. "As a judge, I'm not happy about the possibility that litigants will stress the absence of that word in relation to (g)(2)(A) when making arguments under (g)(2)(B)."

The consensus was to take out "ordinarily."

"in the case"

A final question about the 37(g) draft was raised: In the Committee Note introduction there appears the following sentence:

This preservation obligation arises from the common law, and may in some cases be triggered by a court order in the case.

The concern was with the last clause -- "in the case." Why include that clause? Should we leave it out and end at "court order"?

The explanation was a concern that a litigant might try to piggy-back on an order entered in some entirely unrelated case. The basic thrust of the Note is to recognize that the common law provides guidance on whether the duty to preserve has been triggered. The possibility of other cases is somewhat acknowledged in proposed (g)(3)(E), which refers to "anticipated or ongoing litigation." So preservation may be triggered by some other case rather than this one. But absent that, to say that the fact some other judge in some other unrelated case ordered preservation and that "I want that same stuff for my case" would be going too far.

A judge agreed that this was the seeming meaning of the phrase "in the case." The participant who raised the question agreed that this answered the question.

But another participant suggested the phrase "in some cases" might better be "in some instances." This was generally agreed to and the word will be changed.

Retain Rule 37(e)?

The Subcommittee has long had in the background the question of the ongoing utility of 37(e) if 37(g) is adopted. It has discussed but not resolved what it should recommend to the full Committee on that subject. Now that the full draft of 37(g) has been hammered out, we should turn to this one remaining question.

The issue was introduced as deriving from the limited

efforts on preservation in the 2006 amendment package. The starting point then was the automatic operation of electronic information systems, which could alter or delete information without the operator's knowledge. At least in those situations there should be some protection. But the Committee Note cautioned that this "safe harbor" was shallow, and also observed that after the duty to preserve was triggered a party might have to alter the routine operation of its system and inaugurate a litigation hold.

The question for the present is whether 37(e) serves any purpose if what we have drafted as 37(g) is adopted. And if it does not serve a purpose, what should we do with it? One possibility is to abrogate 37(e) and provide a Committee Note explaining that we have done so because it has been supplanted by 37(g), which offers a much more nuanced treatment of the issues. Another would be to substitute what we have been calling 37(g) for what is now in 37(e).

Beginning with the question whether 37(e) serves a function if 37(g) is adopted, the initial expression of opinion was that it does not. 37(e) is limited to the routine operation of an electronic information system, and 37(g) goes further. 37(e) provides no protection regarding a flawed litigation hold, and 37(g) does. 37(e) does not attend at all to culpability for loss of information and 37(g) does. Moreover, 37(g) provides a standard for loss of any sort of discoverable information, not just electronically stored information.

Arguably (g)(2)(B) provides less protection than 37(e). If information lost due to the routine operation of an electronic information system causes fatal harm to a party's case, it may be that 37(e) would forbid sanctions but 37(g)(2)(B) would permit them. But that is an exceptional situation. Moreover, 37(g) only permits sanctions with regard to failure to preserve information "that reasonably should have been preserved in the anticipation or conduct of litigation," so it may be information that would fall outside current 37(e) because the duty to preserve might trigger a duty to impose a litigation hold. Perhaps a faulty litigation hold would suffice to preserve 37(e) protection but permit 37(g)(2)(B) sanctions, but that seems unlikely. And since 37(g) merely permits and does not require sanctions the basic question is whether a court would impose them.

So the initial speaker's recommendation was to abrogate 37(e) as no longer necessary.

Two other speakers agreed with this analysis. But it would be important to make plain why 37(e) was being abrogated; this is not a change to take away protection 37(e) provided, but to substitute better protection that attends more closely to the

issues that experience has shown matter in this area.

One method that was suggested was to abrogate 37(e) with a Committee Note explaining that abrogation was done because 37(g) provided replacement and better protection, and then to include in the invitation for public comment a specific invitation to comment on whether there would be any reason to retain 37(e) after adoption of 37(g).

This suggestion prompted a question: What is the protocol on abrogating rule provisions? An answer was that one concern that has been raised is the effect on computer research. Computers simply look for something like "37(e)" and that sort of search can confuse people if the provisions are really different. But in this case the provisions are about the same basic subject, so that concern may not be as troubling, and therefore it seems not to be a big deal either way.

Another reaction was to ask whether there is any sense to insert the new material where 37(e) is now located. 37(f) is about failure to participate in framing a discovery plan; sanctions and preservation could certainly come before or after that.

Another reaction was the reminder that when current 37(e) was first adopted, it was 37(f), and it became 37(e) only later as a result of restyling, so the computer research point seems even less telling. Already we have a problem finding all the cases on this provision since it has had different names at different times.

The proposal was made to replace current 37(e) with what we have drafted as 37(g). That attracted a consensus, so 37(e) would be replaced with the new provision, and Committee Note discussion added to explain the deletion of current 37(e).

Inherent power

The question of inherent power, which has also surfaced repeatedly in Subcommittee discussions, was also raised. What should we say about inherent power? One reaction to Andrea Kuperman's memo on the history and case law under Rule 37(e) was that courts fairly often seem to take a rather aggressive attitude toward their inherent powers to impose sanctions. Perhaps something should be said in the rule or Note about that sort of activity if we mean to curtail it.

A reaction was that one thing a Note regarding the abrogation of existing 37(e) might say is that "New rule 37(e) is not limited to sanctions 'under these rules.'" One might take a further step and say something like "The consequence is that, by addressing specifically the question of sanctions for loss of

discoverable information the rule supplants any inherent power courts have employed in the past in addressing such issues."

A reaction was that our draft seems meant to circumscribe sanctions, whether "under these rules" or pursuant to "inherent power." Saying so may be in order.

That raised a question: Do the rulemakers have authority to limit inherent power of judges. One answer was that the Rules Enabling Act must to a considerable extent provide such authority. Otherwise judges might claim "inherent authority" to develop their own pleading standards without regard to what Rule 8(a)(2) says, etc. It should be sufficient to say this only in the Note.

Another reaction was that inherent authority is implicitly limited when a rule addresses a problem. Rules not only authorize actions by judges but also limit actions by judges. But on this subject, it does not seem that this matters because it's pretty widely recognized that inherent authority sanctions call for a finding of bad faith, a more exacting finding than our draft requires, so there simply is not a situation in which "inherent authority" could support sanctions that would not be permitted under our draft. There is no such thing as inherent authority to sanction for negligent loss of information.

Another participant reported being reassured by this discussion, but illustrated concerns with a hypothetical: In *Apple v. Samsung*, both parties made accusations of failure to preserve by the other side. Eventually they seemingly backed off their positions, but the case raises a question. Consistent with the new rule provision, would there be anything to prevent the court from telling the jury that certain evidence is now missing and instructing it on how to deal with circumstantial evidence in situations where there are gaps? Would that be foreclosed under the new provision?

A reaction was that this measure should not be a "sanction" or adverse inference instruction and therefore not affected by the new rule provision.

A different concern was that different circuits have different standards for "inherent authority" sanctions actions. Perhaps it would be desirable for the rule to address this question explicitly.

A reaction was that this is something we should expect to be raised during the full Committee meeting and more generally in connection with our rule proposal. It seems appropriate to say that the rule does address that. First, it says that "the court may impose sanctions * * * only if" it makes certain findings. That seems pretty clearly to say it may not otherwise. And the

Note says that the rule "authorizes imposition of the sanctions listed in Rule 37(b)(2)(A)," which seems to show that it supplants some "inherent authority" to do so because the problem is now explicitly addressed in the rule.

Another reaction was that it would be odd to say in the rule that inherent authority is curtailed. "We don't do that in other rules; why should we make a special provision for it here?" Making a statement in the Note should suffice.

But at the same time, it was observed, a review of the case law showed that many judges seem rather free in invoking "inherent authority," so some attention to that topic seems warranted.

The consensus was that Prof. Marcus would draft Note language not only explaining the abrogation of current 37(e)'s "under these rules" provision but adding -- perhaps in brackets - a further comment about inherent authority. That could be reviewed by Judge Grimm and Prof. Cooper, but would not be circulated to the full Subcommittee before the due date for agenda materials, which is next week.

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TAB 2C

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Notes of Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Sept. 6, 2012

On Sept. 6, 2012, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Hon. Paul Grimm (Chair, Discovery Subcommittee); Hon. David Campbell (Chair, Advisory Committee); Hon. John Koeltl (Chair, Duke Subcommittee); Elizabeth Cabraser; John Barkett; Andrea Kuperman (Chief Counsel, Rules Committees); Prof. Edward Cooper (Reporter, Advisory Committee); and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

Judge Grimm introduced the call by suggesting that the objective was in part to resolve as many things as possible for presentation to the full Committee at its November meeting. These issues were identified in Prof. Marcus's revised Rule 37(g) draft.

(g)(2)(B) rule language

During the Aug. 27 conference call, there was extensive discussion of improving the rule definition of circumstances in which sanctions may be imposed despite the absence of willfulness or bad faith. After the call, Prof. Marcus circulated a variety of possibilities, and various Subcommittee members offered reactions. From that, the revised draft offered four alternatives as follows:

that the failure irreparably deprived a party of [any meaningful] {the} opportunity to present a claim or defense [alternative 1]

that the failure irreparably deprived a party of the ability to present a claim or defense [alternative 2]

that the failure irreparably impaired a party's ability to present a claim or defense [alternative 3]

that the failure irreparably impaired a party's opportunity to present a claim or defense [alternative 4]

These alternatives presented various choices. One is the choice between saying that the loss of the information "deprived" a party of its ability to present its claim or defense, or "impaired" the ability to do so. Another is whether what is lost is the "opportunity" or the "ability" to present a claim or defense. Yet another goes to the severity of the deprivation -- besides being "irreparable," had the party lost "any meaningful" opportunity or ability?

The focus on these choices reflects the need to be as precise as possible in (g)(2)(B). That provision permits

imposition of sanctions even though the party to be sanctioned did not act willfully or in bad faith. The more expansively (g)(2)(B) is applied, the more it could undermine the reassurance (g)(2)(A) is designed to ensure that reasonable efforts to preserve will protect against sanctions. It is important, therefore, for (B) to be limited to exceptional cases involving extremely serious prejudice.

One participant noted that courts presently seem to use a variety of phrases to describe circumstances that call for imposition of sanctions when there is low or no culpability. Mr. Barkett circulated a very helpful report (attached to these notes as an Appendix) on what some courts had said before the call, and that report illustrated the variety:

Vodusek v. Bayliner Marine Corp., 71 F.3d 148 (4th Cir. 1995): "the destroyed portions [of the boat that caught fire] were significant to the effort to explain where and why the boat explosion occurred," particularly in light of the fact that plaintiff's expert's opinion on where the explosion occurred changed several times.

Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001): Due to defendant's inability to take crash measurements at several points on the vehicle involved in the crash, "there is little doubt that defendant has been highly prejudiced." "It denied General Motors access to the only evidence from which it could develop its defenses adequately," and "was so prejudicial that it substantially denied the defendant the ability to defend the claim."

Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76 (3d Cir. 1994): The Third Circuit held the district court improperly excluded the testimony of plaintiff's expert as a sanction for destructive testing because the district court did not find that plaintiff's expert "intended to impair the ability of the potential defendant to defend itself."

Sacramona v. Bridgestone/Firestone, Inc., 106 F.3d 444 (1st Cir. 1997): Summary judgment proper due to destructive testing by plaintiff's expert. Defendants' experts "have been deprived of the opportunity to examine relevant, possibly dispositive evidence before its material alternation."

What this shows is both that the courts focus on exactly what we are talking about -- very significant prejudice -- and that they use somewhat different words to describe that prejudice. It was not necessary to show that the loss of the evidence foreclosed all possible arguments, but was necessary to show that the loss had a highly prejudicial effect.

The question, then, is to choose among the various proposed rule provisions. The need is to emphasize the seriousness of the demonstrated prejudice.

One reaction was that the first alternative seems best suited to do that job. Another was that "we probably can't go wrong with any of the four," and that it might be useful to offer the full Committee some choices. There are things like the choice between "ability" and "meaningful opportunity" and "deprive" and "impair."

A question was asked: Why not say "prejudiced" instead of "impaired" or "deprived" -- "irreparably prejudiced in presenting a claim or defense."

A reaction was that (g)(2)(A) uses "prejudice" as a noun, and using it as the verb in (B) might cause confusion. Using a different word in (B) might serve to emphasize that this is a distinctive inquiry. Another participant agreed that it's good not to use the same word in both places. Another noted that the concern before was that "irreparable" prejudice could often exist in situations in which there was in fact no serious prejudice. The goal here is to make it clear that this provision applies only on proof of exceptional harm to a party's ability to present its case.

The consensus was to present the full Committee with two alternatives -- alternatives 1 and 3 from the draft. In addition, it was suggested that the report include as an Appendix Mr. Barkett's memorandum on how the courts have explained the impact of lost evidence in cases in which sanctions were imposed due to little or no culpability.

(g)(3)(C)

Another rule language choice was between two alternatives of (g)(2)(C):

- (C) whether the party received a request that information be preserved, the clarity and reasonableness of the request, and whether the person who made the request or the party offered to engage in good-faith consultation regarding the scope of preservation; [alternative 1]
- (C) whether the party received a request that information be preserved, the clarity and reasonableness of the request, and whether the person who made the request and the party engaged in good-faith consultation regarding the scope of preservation; [alternative 2]

The choice was introduced as depending on the emphasis to be placed on initiating a dialogue after receipt of a preservation demand. Such demands are becoming more common. In some cases they are far too broad or otherwise unjustified. In earlier discussions, one view has been that it is a good idea to prod parties to initiate discussions. There should certainly be no requirement to agree to any particular preservation demand, but the cost of making contact is very small. The benefits may be significant.

Another participant emphasized that this can be a very difficult area. Sending letters like this has become pretty standard. Sometimes the letters get ignored. Shutting down backup systems or recycling of media on those systems can be a very serious decision and companies are understandably resistant to doing so.

One reaction was that alternative 2 is preferable because it is shorter. Saying that the court ought to consider "whether the person who made the request and the party engaged in good-faith consultation" is sufficient to suggest attention to whether somebody took the initiative. Others agreed.

The consensus was to use alternative 2.

(g)(3)(D) -- "matters of"

It was suggested to delete "matters of" from draft (g)(3)(D):

(D) the party's resources and sophistication in [matters of] litigation;

The reason was that it adds nothing to the rule provision; shorter is better. All agreed to the deletion.

A different question was raised -- is "in litigation" needed? Many parties are sophisticated, and saying that alone should be sufficient -- "the party's resources and sophistication." A reaction was that people may be sophisticated in many things but innocent about litigation. The point here is to focus on sophistication about litigation, not other things. The consensus was to leave "in litigation" in the draft.

Introductory Note material

The introductory material in the Committee Note was redrafted after the Aug. 27 conference call. The only concern raised dealt with the reference to (g)(3) as it relates to "what information should be preserved." The concern was that there might be an implication that cumulative information must be

preserved. For example, must a potential party keep backup tapes even though they likely contain nothing important that is not also on active systems?

A reaction was that (g)(3) says the listed factors could be considered in determining "whether a party failed to preserve discoverable information that reasonably should have been preserved." So the rule says that these factors do apply. The concept of cumlulativeness seems implicit in this. Moreover, the Note says with regard to proportionality: "A party may act reasonably by choosing the least costly form of information preservation, if it is substantially similar to more costly forms." That implies that cumulative information need not be preserved. Another point was that no judge would sanction somebody for failure to preserve cumulative information.

A suggestion was that the introductory paragraph of the Committee Note on (g)(3) note that cumulativeness is a factor in assessing both the reasonableness of preservation and good faith. That solution received support; and the consensus was to add a reference to cumulativeness to the Note.

Mentioning bad faith actions
that fail to destroy evidence

A question was raised about the final paragraph in the Note discussion of (g)(2)(A):

There may be cases in which a party's extreme bad faith does not in fact impose substantial prejudice on the opposing party, as for example an unsuccessful attempt to destroy crucial evidence. Because the rule applies only to sanctions for failure to preserve discoverable information, it does not address such situations.

The question was whether this is useful. It is somewhat beside the point; this is a situation in which the rule does not apply.

The response was that this comment is derived from Subcommittee discussions of, for example, the possibility that efforts to destroy evidence demonstrating the most flagrant bad faith might be deemed immune to sanctions because they were unsuccessful. The court is not prevented from responding to such malicious behavior just because it is clumsy.

The resolution was to put this paragraph in brackets for the full Committee discussion.

(g)(2)(B) Note language

The (g)(2)(B) Committee Note revisions would need to be revised once a final decision is made about the rule standard for

application of this provision.

One question was raised about the reference to (g)(2)(A)'s "substantial prejudice" standard at the beginning of the second paragraph. Isn't this confusing, since the Note is about (B) here; why shift gears back to (A)?

A response was that this reference is designed to drive home the point made also by the rule language discussion earlier in the call -- (B) applies only in cases with very severe prejudice. Even if willfulness or bad faith are shown, sanctions are not allowed unless "substantial prejudice" resulted. The point here is to emphasize how remarkable the prejudice must be to permit imposition of sanctions in the absence of willfulness or bad faith.

A reaction was that the contrast is helpful in putting the standard in (B) into the context of Rule 37(g). Another participant agreed. The consensus was to leave the Note as drafted.

Least severe sanction

The draft Note on (g)(2)(B) ended with a bracketed sentence:

[Even if such prejudice persists, the court should employ the least severe sanction needed to undo the prejudice resulting from the loss of the information.]

The material was in brackets because it might seem inconsistent with the notion of extreme prejudice that underlies (B) to say that something less severe than the litigation death penalty would suffice. On the other hand, given the admonition to use the least severe sanction under (A), where willfulness or bad faith must be shown, it seems odd to say the same orientation does not apply where neither has been shown. And the cases found by Mr. Barkett showed that courts have in fact taken this approach in cases in which bad faith is not proven.

The consensus was to leave in the least severe sanction idea without brackets in (B) as well as (A). But it was objected that the end of the sentence seems problematical. It says that the sanction must "undo the prejudice." How can that be? We've concluded that the prejudice cannot be undone. The solution was to stop the sentence at "least severe sanction."

Another question was raised: Should we not say "ordinarily" before "employ"? A reaction was that the last conference call resolved not to include that word in the parallel sentence with regard to (g)(2)(A). Is it more appropriate here? The response was that there are extraordinary situations in which the most severe sanction may be warranted, so that adding the word here is

different and warranted. The consensus was to add "ordinarily" in brackets.

Prof. Cooper edits

Prof. Cooper had suggested several additional edits that were accepted. Thus, regarding (g)(3)(C) "reasonableness and" would be added before "good faith." In the last paragraph of the Note, the flat statement that reference to the court is not possible before suit is filed may be overbroad, and could be softened by saying that it "may not be" possible.

Defining resources

Another question was raised about the Note discussion of (g)(2)(D). It does not define "resources," although the rule says they can matter. Should something be said about that factor?

A reaction was that this seems implicit. The rule emphasizes proportionality. Earlier discussion in the call pointed out that some parties -- for example governmental agencies -- may have limited resources to commit to preservation efforts. The rule says "resources" matter, and it seemed that some amplification of that term would not be helpful.

Agreement was expressed: There is no need to tell judges what "resources" means in this context. The consensus was that no change to the Note was needed to define "resources."

Revisiting 37(e)

Another question that needs to be addressed at some point is the continued utility of Rule 37(e). Andrea Kuperman has prepared an very thorough memo on that subject, and various Subcommittee members have reacted to these issues. There is no time today to address the question, but it may be that 37(e) would not continue to serve a useful purpose if the rule we have been discussing were adopted. Whether that means that we should abrogate 37(e) and add a new (g) or replace (e) with our new rule is not certain. One consideration is that we must be clear in the record on what we are doing. This matter will need attention.

Further Conference Call

Agenda materials must be in by Oct. 5. The Subcommittee will have another conference call on **Thursday, Sept. 27, at 10:00 EDT**. Prof. Marcus will circulate a redraft before that time. Hopefully some issues can be resolved by email before the call.

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TAB 2D

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Notes of Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Aug. 27, 2012

On Aug. 27, 2012, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Hon. Paul Grimm (Chair, Discovery Subcommittee); Hon. David Campbell (Chair, Advisory Committee); Hon. John Koeltl (Chair, Duke Subcommittee); Anton Valukas; Elizabeth Cabraser; John Barkett; Andrea Kuperman (Chief Counsel, Rules Committees); Prof. Edward Cooper (Reporter, Advisory Committee); and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

Judge Grimm introduced the call by suggesting that the most expeditious method of proceeding would probably be to focus first on the issues that were less likely to require extended discussion and then turn to the more challenging issues.

Rule 37(g)(3)(C) revision

Footnote 1 raises the possibility that the bracketed clause set off by dashes could be removed as unnecessary. No dissent was offered to that idea. The clause will come out.

It was suggested, however, that the provision might be further simplified. Two possibilities were offered:

- (C) whether the party received a request that information be preserved, the clarity and reasonableness of the request, and whether the person who made the request or the party offered to engage in good-faith consultation regarding the scope of preservation; [current version without removed phrase]
- (C) whether the party received a request that information be preserved, the clarity and reasonableness of the request, and whether the person who made the request and the party engaged in good-faith consultation regarding the scope of preservation; [alternative language]¹

¹ During the call, another suggestion was made to simplify further along the following lines:

- (C) whether the party received a request that information be preserved, the clarity and reasonableness of the request, and whether there was good-faith consultation regarding the scope of preservation;

The topic was introduced with the observation that there is rarely dialogue about the scope of preservation after the request is made. But the language of the current version pressures prospective litigants to engage in such discussions. That is contrary to experience, however, and may not be appropriate in many instances. We should be cautious about insisting on something that is the rare exception. Very often, on reflection it seems that such demand letters are little short of harassment efforts.

Another reaction was that such discussion is presently rare, but that this current reality is not a reason we should not press the parties toward more discussion. Although the company that gets the preservation demand may often conclude that it's unjustified, it is not terribly difficult for the company's lawyer to have a 15-minute conversation with the lawyer who sent the demand. Indeed, one goal of our proposal is to encourage that sort of thing. If it leads nowhere, that's not a big loss. But it might produce insights or at least some constructive ideas about how to react. And if it shows that the demand is as unreasonable as originally seemed to be the case, that can be useful later to explain what the company did, even if that was to take no special measures to preserve.

Another participant agreed that encouraging exchange would be desirable. Too often problems arise later that could have been avoided by such an exchange.

A reaction to these points was "You are talking about cases in which there is no real question that there is a duty to preserve and the only question is about how broad the preservation should be." But small and mid-sized companies too often get preservation letters where the entire matter may not justify any action. That's just harassment, and we should be careful about pressing people into undertaking such discussions. Indeed, it might well be better to delete (C) and leave this consideration as one of the many that bear on (B) and current (E). A rule provision limited to suggesting consideration of whether there was such discussion would be preferable to something that seems designed to stimulate it.

This drew the response that there should be an affirmative obligation to try to initiate discussions, and that it should apply to both sides. The rule should say so. The party making the demand might wisely offer to discuss, and in any event the party receiving the demand should ordinarily give serious consideration to initiating contact whether or not the demand

The conference call discussion favored more emphasis on promoting discussion, however, and this alternative was accordingly withdrawn.

contains an invitation to do that. Another participant said that attitude ties in with Rule 26(f), which directs the parties to discuss preservation at their initial conference about discovery. It's entirely consistent with that to try to prompt earlier interaction.

The resolution was that Professor Marcus would try to include alternative language in a further draft or another circulation to the Subcommittee, but that the rule would continue to promote consultation.

Introductory paragraph
to Note

The draft raises the question whether the introductory sentence of the Note should be changed to reduce the emphasis on Rule 37(e) and offer a broader explanation for the Committee's decision to focus on preservation. That alternative was presented in braces in the pending Note draft. Professor Cooper also had circulated some proposed additional language that would elaborate on the overall goals of the amendments.

The consensus was to go with the revised language in braces in place of the carryover language in brackets. Prof. Marcus would send out Prof. Cooper's additional language and try to work those thoughts into the next draft. Prof. Cooper's language was:

Many litigants and prospective litigants are expressing growing concern about the uncertainty surrounding the obligation to preserve information for potential discovery, particularly before litigation is actually begun, and about the continually growing volume of information -- particularly electronically stored information -- that is available for preservation and eventual searching. They lament that uncertainty leads to needlessly preserving information that is never sought in discovery, for fear of the very serious sanctions that may be imposed for even merely negligent, inadvertent failure to preserve information later sought in discovery.

If any members have a problem or strong feeling on seeing Prof. Cooper's proposed language, they could let Prof. Marcus know.

Addition of "even"

The redraft of the introduction to the Note added "even" as follows " . . . the risk that very serious sanctions may be employed even for negligent failures to preserve." This addition was meant to emphasize one of the goals of the amendment -- to protect against such impositions of sanctions.

There was consensus that this word should be added. There

was also discussion of whether to add "or inadvertent" after "negligent" and before "failures." This prompted the reaction "I have not seen inadvertent destruction, as opposed to negligent destruction."

A possible example was offered: If there is a miscommunication between a lawyer and an expert about whether testing will destroy something, the destruction may be inadvertent. But that does not seem inadvertent; the testing is intended. The problem is a failure to communicate between the lawyer and the expert, which could be characterized as negligent. There was no consensus to add "or inadvertent."

Ftn. 5 -- added sentence

The redraft of the Note added the following bracketed sentence at the end of the introductory comments:

Except in very rare cases of "irreparable prejudice," negligence is not sufficient to support sanctions for failure to preserve.

The question was raised whether it should be added. Professor Cooper suggested expanding as follows: ". . . negligence is not sufficient to support sanctions under Rule 37(g)(2) for failure to preserve, while negligence is not required to support curative measures under Rule 37(g)(1)."

It was noted that this material does not seem to be about the same topic as the rest of the paragraph, which is about preservation rather than sanctions. It should be set forth as a separate paragraph.

Curative measures in absence of
showing of willfulness or bad faith

The draft Committee Note regarding subdivision (g)(2)(A) contained the following discussion:

This subdivision protects a party that has made reasonable preservation decisions in light of the factors identified in Rule 37(g)(3), which emphasize both reasonableness and proportionality. Despite reasonable efforts to preserve, some discoverable information may be lost. A court may take that circumstance into account in making discovery-management decisions, such as those under Rule 26(b)(2)(B) and 26(b)(2)(C), but it may not impose a sanction listed under Rule 37(b)(2)(A) or use an adverse-inference jury instruction.

Several concerns were raised about this language. One was that the phrase "under Rule 37(g)(2)(A)" should be added to the

last sentence to make clear that Rule 37(g)(2)(B) would permit sanctions in the unusual cases in which it applied. On this point, a different reaction was that we can "trust the reader to read on" and learn that in those rare cases sanctions are allowed despite the general requirement of a showing of willfulness or bad faith. That led this concern to be withdrawn.

Another reaction was that the "such as" clause should be stricken.

A third was the way the paragraph is written makes it sound too much like it's only about the initial scheduling order or management decisions at the outset of the case. Actually, this sort of control remains important throughout the case. The phrase "discovery-management decisions" makes it sound that way. Perhaps it should be rephrased to say something like "A court may take curative measures into account in managing discovery in the case."

The consensus was that Professor Marcus should reexamine this language in light of the concerns raised and see if revisions could improve it.

"ordinarily"

The word "ordinarily" appears in one place in the draft, and it was suggested that it be added in another place, as follows (existing use in boldface, proposed addition underlined):

Second, the court must also find that the loss of information caused substantial prejudice in the litigation. Because digital data often duplicate other data, substitute evidence is often available. Although it is impossible to demonstrate with certainty what lost information would prove, the party seeking sanctions must show that it has been prejudiced by the loss. Among other things, the court may consider the measures identified in Rule 37(g)(1) in making this determination; if these measures can cure the problem, sanctions would **ordinarily** be inappropriate even when the court finds willfulness or bad faith. Rule 37(g)(2)(A) authorizes imposition of Rule 37(b)(2) sanctions in the expectation that the court will ordinarily employ the least severe sanction needed to repair the prejudice resulting from loss of the information.

The background for this issue is that the draft rule at one point included a provision directing the court to use the least severe sanction. Then it was rewritten to remove that rule provision on the notion that courts are already doing that. Then the Note was rewritten to invoke practice under Rule 37(b), which usually involves consideration of less severe sanctions, but

there was some uncertainty about whether that case law entirely supported the idea (in part due to the Supreme Court's National Hockey League decision in 1976 that sanctions could be used for general deterrence).

Whether "ordinarily" is helpful could depend on what one views as "ordinary." Given the threshold requirement of a finding of willfulness or bad faith to support sanctions, the use of the word here may mean that only in cases of really exceptional bad faith could more severe sanctions be used (or sanctions used even though curative measures would seem to have solved the problem).

An initial reaction was "My reaction is not to use 'ordinarily.'" Another participant agreed; the extraordinary case should be so evident that we need not say so in the Note. The consensus was not to use the word "ordinarily" in this paragraph -- to remove it where it now appears and not to add it.

Irreparable prejudice

The redrafted Note on irreparable prejudice raised a variety of issues. As presented to the Subcommittee, the Note read as follows:

Rule 37(g)(2)(B) recognizes an exception permitting the court to impose sanctions in the absence of either bad faith or willfulness when "irreparable prejudice" results from the loss of the information. There are two features to this inquiry. One is that the prejudice is irreparable; if curative measures under Rule 37(g)(1) will substantially cure the prejudice, Rule 37(b)(2)(B) does not apply. Given uncertainty about what information was lost, it may often be unclear whether curative measures are entirely effective. But Rule 37(g)(2)(B) authorizes sanctions only when the loss of the information that should have been preserved is not only irreparable but so serious that it effectively deprives the opposing party of any meaningful opportunity to present its claim or defense. [See *Silvestri v. General Motors Co.*, 271 F.3d 583, 593-94 (4th Cir. 2001) (upholding dismissal, because plaintiff's failure to retain the allegedly defective airbags "denied General Motors access to the only evidence from which it could develop its defenses adequately," and therefore "substantially denied the defendant the ability to defend the claim").] Even though the loss of the information cannot be cured, unless such crippling prejudice is shown a court may not impose sanctions on a party that did not act willfully or in bad faith, but in those rare instances where such severe prejudice is proven, Rule 37(b)(2)(B) does authorize use of sanctions. [In such cases, however, the court should employ the least severe sanction needed to repair the prejudice

resulting from the loss of the information.]

One question was whether to quote the Silvestri case. There is considerable uneasiness about citing cases in Committee Notes because they may contain factors that the Committee does not endorse, and because such citation seems to "enact" the cases as the "law" pursuant to the Rules Enabling Act process. With Silvestri, as explained in the memo accompanying the redrafted Note, there are some features that the Subcommittee surely did not endorse. But the quotations from the case seemed very effectively to explain the sort of situation that would qualify under (g)(2)(B).

A second problem with the Note was that it may have gone beyond the rule language, which speaks only of "irreparable prejudice." In context, that must be stronger than the "substantial prejudice" that must be shown to support sanctions under (g)(2)(A) even if willfulness or bad faith is shown. The idea is to convey the sort of thing that the Silvestri quotation says -- crippling harm to the adversary's case. But the "irreparable" part might be said to be true in many cases; unless one can be certain all the "lost" material has been found or restored, some was lost irreparably. So one could say that unless there is no prejudice, there is irreparable prejudice. That is surely not what we want to say.

Maybe, therefore, we have to go back and look again at the rule language. Maybe "irreparable prejudice" is not sufficient in the rule. If so, we cannot engage in "rulemaking by Note" with the efforts reflected in the Note language above.

Regarding Silvestri, after discussion the consensus was that it should not be cited or quoted. It may be that a "generic" description of sorts of situations that involve what we are talking about would be helpful, but we should not tie ourselves to a specific case.

The more difficult question was what to do about the proper term in the rule. On analysis, it looks like "irreparable" is almost a red herring. Whether prejudice is "irreparable" tells us little about how severe it is. It could be almost inconsequential. That would not be the "substantial prejudice" required under (g)(2)(A), much less come near what we have in mind for (g)(2)(B).

One suggestion was that rule language like "irreparably impaired the ability to litigate on the merits" might address what we really have in mind. That phrasing drew support.

Another participant emphasized that it is important to make this clear so that the (g)(2)(A) limitation of sanctions to cases involving willful or bad faith loss of information is effective.

If (g)(2)(B) is routinely available, that would undermine what we are trying to do.

Another concern was raised -- we must be careful to make clear also that not all reactions to the loss of information are "sanctions." For example, a strengthened instruction on circumstantial evidence might be a way to deal with the problem, but that's not an adverse inference instruction.

The consensus was that Prof. Marcus should circulate alternative possible rule language for consideration of the Subcommittee. Then in the next draft that could be inserted into (g)(2)(B) and the Committee Note could be revised to take account of it.

After the conference call, the following possible alternatives were circulated for review by the Subcommittee:

that the failure caused irreparable prejudice [current proposal]

that the failure caused serious irreparable prejudice [alternative 1]

that the failure caused severe and irreparable prejudice [alternative 2]

that the failure irreparably impaired another party's ability to present its claim or defense [alternative 3]

that the failure irreparably impaired another party's ability to litigate on the merits [alternative 4]

that the failure irreparably deprived a party of any meaningful opportunity to present its claim or defense (alternative 5]

An additional issue was the bracketed sentence at the end of the note paragraph on (g)(2)(B). The idea that a lesser sanction could suffice may seem inconsistent with the severity of what the "irreparable prejudice" provision is designed to address. But it could be that the irreparable prejudice would apply only to certain claims, or only to certain issues, or at least not lead to entry of default or dismissal. And it would be odd not to say this in (g)(2)(B), which does not require a finding of willfulness or bad faith, while we do say it in relation to sanctions under (g)(2)(A), which does require such proof.

Next conference call

The Subcommittee will hold another conference call on

Thursday, Sept. 6 at 10:00 a.m. EDT. Before then, Prof. Marcus will circulate notes of this call and revised rule and Note language.

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Notes of Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Aug. 7, 2012

On Aug. 7, 2012, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Hon. Paul Grimm (Chair, Discovery Subcommittee); Hon. Mark Kravitz (Chair, Standing Committee); Hon. David Campbell (Chair, Advisory Committee); Hon. John Koeltl (Chair, Duke Subcommittee); Hon. Michael Mosman; Anton Valukas; Elizabeth Cabraser; John Barkett; Andrea Kuperman (Chief Counsel, Rules Committees); Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

Judge Grimm introduced the call by suggesting that the draft rule provision is now in pretty good shape, and that the focus of the call would be on the Note. Prof. Marcus had significantly shortened the Note, and Prof. Cooper (who could not participate in this conference call because he was out of the country) had provided a memorandum dealing with various issues raised by footnotes in Prof. Marcus's memo. The focus of the conference call would mainly be on those footnoted questions.

Supplanting Rule 37(e)?

Footnote 2 raises the question whether adoption of Rule 37(g) should supplant current Rule 37(e). The auto delete feature of electronic information systems can present serious sanctions issues, as illustrated by the ruling in the Apple v. Samsung trial that was circulated before the conference call. In that case, Samsung had not altered the operation of its auto delete feature for email of some employees, and the absence of those emails led to imposition of an adverse inference instruction.

A first reaction was that the case law indicates that Rule 37(e) has actually provided little protection. A second reaction was consistent -- there is a very small handful of reported cases. A third reaction was similar -- "I know of no cases using the rule." And a fourth agreed: There have not been cases because people deal with this problem when it arises.

A different sort of reaction was that ongoing research by Ms. Kuperman on the case law on Rule 37(e) was not yet complete, and that it would probably be important to see whether members of the full Committee had experiences supporting the continued utility of Rule 37(e). That provision is, unlike the ongoing draft of 37(g), limited to electronically stored information, and only about the "routine, good faith operation" of an electronic information system. Perhaps that good faith requirement would mean that 37(g) would occupy the entire area because it forbids sanctions in the absence of bad faith or willfulness. But hearing from others about that topic may be useful. Perhaps one could even invite public comment on that subject if it remains

open at this time.

Another view was that there seems to be reason to keep 37(e) in the rule. Even without examples in the cases of its application, the rule could be playing an important role in some cases. It provides an absolute safe harbor. Although that may be narrow and shallow, why take it away as part of an effort to deal with a problem of over-preservation? The fact there are no cases might result from the effect of the rule -- perhaps there are no motions because the rule makes it clear that they would be denied, or courts deny motions without producing reportable opinions because it's clear that sanctions cannot be imposed under the rule.

At the same time, another participant observed, it is important for the Subcommittee to take a position on whether Rule 37(e) has ongoing utility. This issue should not simply be punted to the full Committee without any recommendation. It's something which the Subcommittee should be able to resolve, at least for itself. And there seems a strong argument that there's no sense having both 37(e) and 37(g). Routine good faith operation (required for 37(e) to apply) simply could not be found in a situation subject to sanctions under 37(g), which requires a finding of bad faith or willfulness leading to loss of evidence.

These views drew agreement: As reformulated in our July 23 conference call, 37(g) is broad and addressed to the basic set of issues. "We have raised culpability for all cases." That includes cases that might now be handled under Rule 37(e).

A reaction was that we should flag the issue. The view that we no longer need 37(e) is understandable, but perhaps experience of others suggests that 37(e) has a continuing role to play. This brought the response "I have no problem with asking about others' experience with 37(e), but think that the Subcommittee should -- using the information it currently has available -- resolve what it thinks should be done. We should not say we have not decided."

It was noted that observers with a substantial background and keen interest in these issues may be at the November full Committee meeting, and that their views on this point could also be valuable. It would seem better to go to the full Committee with a Subcommittee position but open to reconsideration and revision. This drew agreement that even though 37(g) seems to do what 37(e) does the question could be preserved for further reflection. An example might be Olson v. Sax, 2010 WL 2639853 (E.D. Wis., June 25, 2010), one of the rare cases applying Rule 37(e). A testing question could be whether that decision would have been the same under proposed 37(g).

The resolution for the present was to carry forward the

question how 37(g) would interact or fit with 37(g).

Duty to court

Footnote 3 raises the issue whether it would be desirable for the Note to say the duty to preserve is owed to the court. The consensus was that the bracketed sentence on this subject did not add to the discussion and might raise issues best left untouched. It would be removed.

Relation between common law duty to preserve and (g)(3) factors

Footnote 4 in the memo raises the issue whether the current Note language is internally contradictory. The language in question is:

This rule provision is not intended to alter the longstanding and evolving common law regarding the duty to preserve in anticipation of litigation. The determinations whether the duty to preserve has arisen, and what information should be preserved, depend on the circumstances of each case and should be made under Rule 37(g)(3).

The problem is that one could say that the factors in (g)(3) could alter the common law in the sense, at least, that they channel attention in directions that the common law might not always provide. Prof Cooper suggested replacing this language with the following:

Rule 37(g)(3) identifies many of the factors that should be considered in determining, in the circumstances of a particular case, when a duty to preserve arose and what information should be preserved.

An initial reaction was "I like the Cooper language better." Another participant agreed. A third observed that this language highlights what we're trying to do but avoids challenges to our authority to do it.

A fourth reaction was that this was better language, but why is it necessary? Another reaction along this line was to ask whether this language prevents a challenge. A response to that question was that the first sentence (about not altering the common law) responded to Subcommittee discussions of the need to avoid seeming to supplant the common law on duty to preserve.

This discussion drew the reaction that the substitute language is accurate. "We should not be shy about our intent that the courts apply the listed factors." This drew agreement. We are talking here only about the imposition of certain sanctions, not the preservation duty itself. Perhaps there is an

argument that the handling of sanctions itself is a feature of the common law preservation duty. But even so that's different from saying that other consequences (for example, administrative penalties, etc.) of a party's actions were forbidden even though those actions would not warrant sanctions under Rule 37(g)(3). It's not as though nothing can be done. We need not wave a red flag, but should be forthright.

This drew the reaction "I like it. It has the virtue of honesty." The tension is there. We don't want to create a sanctions factory in federal court. We are trying to regulate that specific activity, not preservation in some more general way.

The consensus was to use the language proposed by Prof. Cooper.

Citing Residential Funding

Footnote 5 raises the question whether there should be a citation to Residential Funding after the Note sentence saying that the rule "rejects decisions that have authorized the imposition of sanctions * * * for negligence or 'gross' negligence." One suggestion is not to include this citation in the Note but to mention that the effect of the rule is to reject the Residential Funding permission for serious sanctions for negligence in the memorandum conveying the rule to the Standing Committee.

A first reaction was that we need to say something about Residential Funding somewhere. The case has been cited repeatedly in cases from across the country. Whether that's in the report or the Note is not important, but it is important to do it somewhere.

A second reaction was that it is indeed important to signal disapproval of Residential Funding.

The consensus was that a citation to this case need not be in the Note, but that it should be included in the report to the Standing Committee.

Cross-reference to 37(b)(2)

A question not raised by a footnote was raised: Is the cross reference to Rule 37(b)(2) at the end of the first paragraph of the Note about Rule 37(g)(2) needed? That sentence (at lines 64-65 of the draft) says: "Rule 37(b)(2) applies when a party fails to obtain a discovery order." In a sense it relates back to an earlier sentence in this paragraph saying that 37(g)(2)(A) authorizes imposition of the sanctions listed in Rule 37(b)(2)(A) for failure to preserve "whether or not there was a

court order requiring such preservation."

The explanation for the sentence was to remind those who refer to Rule 37(g) that 37(b)(2) is available if a discovery order is violated. But it was objected that few would be looking here in the Note to 37(g) to obtain guidance about the application of 37(b)(20).

The consensus was to remove the sentence at lines 64-65.

The problem of information lost
despite adequate preservation efforts

At lines 70-71, the draft Note observes that "Despite reasonable efforts to preserve, some discoverable information may be lost." The Note then says that the court may address that situation under 37(g)(1). But (g)(1) applies only if there was a failure to preserve, and footnote 6 points out this dissonance. Footnote 6 asks whether this is a problem?

Prof. Cooper suggested that a solution to this problem might be for the Note to observe that Rule 37(g) does not circumscribe the court's general authority to manage discovery. This issue may be esoteric, but the current Note language did not fit the rule.

An initial reaction was that this problem is not esoteric at all. Indeed, it's already coming up, as the pervasive importance of ESI means that more and more frequently some gets lost. What is increasingly called for is not an adverse inference instruction, but something curative, such as an instruction to the jury that it may weigh the loss of the information in making its decision using the information that's available. That's not a sanction, but it invites the factfinder to make a reasoned judgment.

Another participant cited a case involving a video that had been recorded over by mistake. The point is that one should not be left with a choice between using serious sanctions and doing nothing.

A refinement was that there may be two different types of issues here. One is whether something said to the jury might be "curative" within the meaning of (g)(1) and not a "sanction" within the meaning of (g)(2). A somewhat different issue is whether the good faith loss of information (not in violation of any duty to preserve, or despite reasonable efforts to preserve) could itself affect the judgment about whether to order more discovery or expand discovery. For example, consider a situation in which a responding party had declined based on Rule 26(b)(2)(B) to search certain electronically stored information on the ground that it was not reasonably accessible, and the

court initially agreed that the search was not needed. Often that ruling might contemplate reference first to the accessible information, and if that information were found inadequate that might provide a basis for going farther. Similarly here, the loss of information through nobody's fault could affect the determination whether it was justified in that case to order restoration or search of "inaccessible" information.

More generally, it is surely not true that the court will decline to order discovery merely because a party has complied with its preservation obligations.

Another participant agreed, and noted that the same sort of analysis could be pertinent to a decision under Rule 26(b)(2)(C).

The consensus was that this Note language needs attention, but that redrafting on the phone would not likely work. Prof. Marcus is to attempt to integrate these strands of thought together to deal more effectively with the problem of addressing loss of information by one who made reasonable efforts to preserve.

Defining willfulness or bad faith

Footnote 7 asks whether the Note could attempt a definition of "willful" or "bad faith" as used in 37(g)(2)(A). As introduced, it was a question whether we should rush in where angels fear to tread. It was noted that courts use one term or the other, but certainly view it as different from negligence, even "gross" negligence. One comment was that the key dividing line is that one, between what will support (g)(2)(A) sanctions and what will not. Defining the dividing line between willfulness and bad faith is less significant.

The consensus was that trying to offer a definition would be more likely to cause trouble than to solve it.

Least severe sanction Invocation of 37(b)(2) case law

For a time, the Rule 37(g) draft itself had a provision saying that the court must impose the least severe sanction. Because that provision was removed, the draft Note contained the following discussion:

Rule 37(g) authorizes imposition of Rule 37(b)(2) sanctions in the expectation that, as under Rule 37(b)(2), the court will employ the least severe sanction needed to repair the prejudice resulting from loss of the information.

But footnote 8 points out that, in part due to the 1976 Supreme Court decision in the National Hockey League case, there is at

least some difference among the courts of appeals on whether district judges must consider lesser sanctions before imposing the most severe ones. Given this divergence, is it useful to say "as under Rule 37(b)(2)" in the Note?

A starting point was the observation that National Hockey League was a 1970s decision, and that the tenor of more recent decisions seemed different. Certainly our present objective is to limit the use of sanctions; we are not "moral policemen."

The background for this comment in the Note was mentioned -- it is there because the assumption was that a rule provision was not needed because "the courts are already doing that." The problem is that the courts' actions are not quite so uniform as we may have been assuming.

Prof. Cooper had suggested saying that the court "ordinarily" will employ the least severe sanction. Building on that, one suggestion made was that the last sentence be shortened to say "The court should ordinarily employ the least severe sanction needed to repair the prejudice resulting from loss of the information."

This idea drew the reaction that some of the deleted portion of that sentence seemed useful for context. "I'm not sure shortening is a good thing." That drew the further observation that the phrase "as under Rule 37(b)(2)" seemed to be the source of the problem in the footnote; the reality is that the case law under that rule is less clear than we thought. Maybe the answer is simply not to say that, and instead to say only that the court should employ the least severe sanction.

The consensus was to take out phrase "as under Rule 37(b)(2)" and modify the remaining language to say that the court "should ordinarily employ" the least severe sanction.

Extreme bad faith;
inherent power

Footnote 9 raises two related questions. One is whether there should be some reference in the Note to the possibility that even if there is no demonstrated prejudice (as, for example, with a failed effort to destroy evidence) the court may impose sanctions due to the heinous nature of the effort to destroy evidence. The other, and related topic, is whether there should be some reference to the court's inherent power to deal with such wanton actions. The draft included a bracketed paragraph combining both subjects:

There may be cases in which a party's extreme bad faith does not in fact impose substantial prejudice on the opposing party, as for example an unsuccessful attempt to

destroy crucial evidence. Because the rule applies only to sanctions for failure to preserve discoverable information, it does not address such situations. In any event, the courts have inherent authority to address willful or wanton actions by litigants.

Prof. Cooper cautioned that getting into the topic of inherent power would cause difficulties and require a great deal more work. On the other hand, it was observed, many cases involving spoliation link together some statutory provisions like 28 U.S.C. § 1927, some rule provisions, and inherent authority. So there may be some reason to address inherent authority.

An initial reaction was that the inherent authority question is really a little corner of the area we are addressing with 37(g). It would be best to let district judges continue to develop precedent in the common law manner.

Another participant agreed. The concern is whether the courts will continue to understand that they have reservoirs of authority to deal with extreme situations. Without inherent authority, some judges may think they are powerless to deal with situations that call for action by the court. So there may be a value to making clear that there is inherent authority after adoption of this rule.

A response from a judge was that this is a serious question, but that this judge would not blink an eye to deal with outrageous conduct by a litigant. Another reaction was that this is an infrequent situation -- egregious but unsuccessful spoliation efforts.

It was suggested that the last sentence of the paragraph should be deleted, but that the Note should mention the failed spoliation situation for those rare situations in which it would apply.

A question was raised about the inclusion of the word "extreme" before "bad faith." Is that useful? What does it mean? The answer was that no sanctions are allowed at all unless the spoliation was willful or done in bad faith. Defining the difference between those two concepts is not easy, so one might be left with a situation in which sanctions may never be imposed in the absence of something like "bad faith." If so, it would seem that this paragraph is about something much more egregious. The response was that we should continue to think about whether the word "extreme" served a useful purpose.

The consensus was to take away the brackets around this paragraph, but to delete the last sentence (dealing with inherent authority), and also change "apply in" to "address" in the what would then be the last sentence.

Defining "irreparable prejudice"
Citing Silvestri

Footnote 10 asked whether a citation to Silvestri would be useful to at the end of the Note sentence "In rare circumstances the loss of the information may cripple another party's ability to present its case."

One view might be that this citation would be inconsistent with the general practice not to cite cases because citing them suggests that they are somehow "the law" because they were invoked in the rules process. Case law is entitled to respect and to be followed in accordance with rules of stare decisis, and citation in a Committee Note may alter that analysis by suggesting that the case is an authoritative interpretation of what the rule provides, or that the case is somehow "implemented" by the rule amendment and therefore declared binding on the courts through the Rules Enabling Act process.

A reaction was that the term "irreparable prejudice" in the rule may need more elaboration in the Note than currently is presented, and citation to Silvestri could be important for that purpose. Won't irreparable prejudice be relatively common in genuine spoliation cases? Consider, for example, the lost videotape cases discussed in email circulation last week. If there is an incident captured on videotape involving two people, and they disagree about what happened, does the loss of the videotape impose irreparable prejudice on the one not responsible for loss of the tape? We would still have two witnesses telling different stories, but maybe the videotape would provide a compelling "tie-breaker." Is that enough? Aren't we getting at something much more important, like the lost airbags in Silvestri? Shouldn't we be clearer about that?

The problem was summed up as involving two interrelated factors. First, can the paragraph be improved to convey the idea that only obviously critical evidence can constitute the sort of thing that would cause "irreparable prejudice" if lost. Second, whether it would be justified to include a citation to Silvestri as an illustration (not really as authority about a rule provision under discussion a decade after the court's decision) as a way of illustrating and emphasizing this point.

Prof. Marcus is to try to revise this paragraph to address these questions.

Specific form of litigation hold
Requirement of written notice

Footnote 11 explains that the following statement in the Note -- "it cannot be said that any particular preservation method is invariably required" -- is designed to negate any

"absolute" requirements such as arguments sometimes made that Pension Committee makes failure to issue a written litigation hold notice "gross negligence" in all cases. As some have noted, that seems unwarranted in some situations, such as a husband and wife partnership or an individual litigant. Must the plaintiff issue a written litigation hold to herself?

One answer to this problem is that one purpose of Rule 37(g) is to reject the idea that negligence, even "gross" negligence, is sufficient to support sanctions. In that sense, this question may be much less important. Nonetheless, it seems desirable to make clear that the court should be guided by a variety of factors in making this decision. A possible source of guidance on that is Chin v. Port Authority of New York, 2012 WL 2760776 (2d Cir., July 10, 2012), which discusses the part of Pension Committee on which we are focused.

The resolution was that Prof. Marcus should review the draft language for the Committee Note with an eye to clarifying on this point. One idea would be to emphasize that multiple factors should be used to guide the court, and that no single aspect is per se controlling. More specifically, it would be useful to say explicitly that such individual features as whether a written litigation hold was issued should not be considered decisive all by themselves.

Role of factor (D)

Ability of party to control material in "cloud"

Footnotes 12 and 13 are basically informational for the full Committee about matters dealt with in the Note. There is no need to discuss them at this time.

Ftn. 14 reference to duty to court

The last footnote was about the idea that the duty to preserve is owed to the court. It had already been decided that the duty to the court idea should not be inserted into the Note, and that meant this footnote required no discussion.

Next conference call

Prof. Marcus is to redraft in light of today's discussion and circulate a redrafted rule and notes of today's conference call. A further conference call will occur on **Monday, Aug. 27 at 10:00 a.m. EDT.**

TAB 2F

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Notes of Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
July 23, 2012

On July 23, 2012, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Hon. Paul Grimm (Chair, Discovery Subcommittee); Hon. David Campbell (Chair, Advisory Committee); Hon. John Koeltl (Chair, Duke Subcommittee); Anton Valukas; Elizabeth Cabraser; John Barkett; Andrea Kuperman (Chief Counsel, Rules Committees); Prof. Edward Cooper (Reporter, Advisory Committee); Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

Judge Grimm introduced the call by suggesting that the focus be on the redraft of the rule and Note circulated by Prof. Marcus after the July 13 call. The main goal of today's call is to complete discussion of rule provisions; a future call would address the draft Committee Note. For today, however, the purpose is to revisit the rule language as it has emerged from prior Subcommittee discussions.

"adverse-inference jury instruction"

An initial reaction was a statement of concern about how broadly the prohibition on an "adverse inference jury instruction" would sweep if willfulness/bad faith or prejudice could not be shown. What exactly does this forbid? Is it all evidence or comment on efforts to destroy or failures to preserve? Are attorney arguments affected, or only the judge's instructions? Would this provision prevent the judge from providing a general instruction to the jury about the possibility that some information may be missing, or indicating that a party may have had a responsibility for retaining information that is not available? Is the rule intended to prevent such measures? Parts of the rule and the draft Note suggest that it is the exclusive method of dealing with these problems. Those are troubling.

A response was that it seemed that trying to say more would be quite difficult and might not be helpful. At least sometimes it would be permissible in the absence of bad faith or prejudice to admit evidence of destruction of evidence or failure to preserve evidence. Sometimes that evidence of destruction might be important as proving consciousness of guilt. The assumption is that the courts can do a good job sorting these issues out without a rule provision attempting to elaborate on them. It's also worth noting that in some cases where there is a very great impact on the litigation -- the irreparable prejudice situation -- the rule does not require proof of bad faith or willfulness. There is, however, no perfect formula for sorting out these issues.

No change to the current draft rule language was proposed.

Limiting 37(g) to electronically stored information

For some time, the question whether Rule 37(g) should be limited to electronically stored information or applied to all discoverable information had been under consideration but not resolved. The full Committee had some discussion about this issue during its March 2012 meeting, but it was not resolved then. The question came up whether the Subcommittee's thinking had now reached a point that permitted resolution of this issue.

The first comment was from a participant who started off thinking the rule should be focused only on electronically stored information but has since come to a different view. The difficulties in determining what exactly is the dividing line between electronically stored information and other evidence could cause constant problems. During the Ann Arbor meeting, one consideration raised was whether an email message is still "electronically stored information" if it is printed off? Other similar questions might arise. Should the manner of retaining surveillance data -- stored, for example, either digitally or instead on a video tape -- matter to whether Rule 37(g) applies? If the retaining party may choose the form of retention, is that only true as to genuine "electronically stored information" and not as to information in other forms? It would be better not to try to make so much turn on something so difficult to apply. As another participant noted, "hybrid evidence" is frequently encountered in cases.

Another participant proposed deleting the limitation to electronically stored information that has been carried in brackets. The unanimous view was to take out the limitation; the rule should apply to all discoverable information, whether or not electronically stored.

Excluding contempt

The current draft includes a bracketed limitation excluding contempt from the list of authorized sanctions from Rule 37(b)(2)(A). This possible exclusion was explained as resulting from uneasiness about whether contempt could be imposed when no court order has been violated. Even in Rule 37(b)(2)(A) it is distinctive; it is the only sanction not authorized for violation of an order entered under Rule 35. More generally, including it on the list may be likely to draw objections like "Surely you're not saying the judge can send somebody to jail for failure to do something the judge did not order?" And contempt itself does not solve any problems for the victim of spoliation; instead, it is more in the nature of something to vindicate the integrity of the court. Furthermore, contempt was not among the concerns that those worried about preservation sanctions brought to our attention. Adverse inference instructions (not listed in Rule 37(b)(2)(A)) were much on the minds of such people and have been

included in 37(g) for that reason. Perhaps it would be better to leave contempt out.

A reaction was that it should be fairly widely appreciated among judges that contempt should not -- absent perhaps the most extraordinary circumstances -- be imposed on one who did not violate a court order. Yet the draft Note says that 37(g) is conferring the authority to enter such orders. Would it not seem to have withheld authority to use contempt in even the most outrageous situations if that sanction is left off the list. The implication of the rule with that limitation is that the court is powerless to use contempt. A reaction was that the Note could say that contempt is available, but perhaps that it should ordinarily be limited to situations involving violation of an order.

This comment drew agreement -- Why wouldn't contempt be available if there were a court order to preserve? We don't want to promote the entry of such orders, but do we mean that a party can escape being held in contempt for flagrantly violating such an order? This goes back to a point raised in an earlier call -- that 37(b)(2) is all about violation of a court order. Without an order, 37(b)(2) cannot apply.

A reaction was that the way 37(g)(2) is now drafted should sidestep the order problem because it's a positive grant of authority to sanction.

Another participant was somewhat indifferent on whether to include contempt. It is important that judges understand that it is only appropriate when a court order has been violated.

Another participant expressed a mild preference for including contempt. Failing to do so could lead to litigation about the meaning of the rule, or to circumscribe the court's authority to deal with flagrant behavior. Neither of those outcomes would be desirable.

The discussion was summed up as reaching a consensus to remove the bracketed provision that would exclude contempt from the list of authorized sanctions.

A related topic that will remain through further discussions is the extent of "borrowing" that results from invocation of Rule 37(b)(2)(A). 37(g) does not borrow the order requirement. "We need to make it clear that we are incorporating the list contained in 37(b)(2)(A), and not all subsidiary requirements." But that may complicate reliance on the general case law under 37(b) about preferring less severe sanctions.

The reaction was that it is important to be clear about these things. We are importing a list of sanctions, and not all

attendant procedures that do apply in the 37(b) context. This could helpfully be said in the Committee Note.

It was noted that some of the specifics in 37(b)(2) themselves use the word "order." Some thought should be given to that fact in relation to what the Note says.

The resolution was to take out the bracketed material excluding contempt from (g)(2).

37(g)(3)
Alternative 1 v. Alternative 2

Alternative 2 for 37(g)(3) differs from Alternative 1 in that it omits factors (C) and (D) from Alternative 1. The question was introduced as involving whether to include factors (C) and (D) in Alternative 1 in the rule. (C) might be seen as subsumed within (A), and (D) within (B).

A reaction about (C) was that it seemed desirable to have the rule give guidance on preservation demands. One goal of the rule is to provide guidance to potential litigants about how to handle these problems. Saying this in the rule ties in with things that may emerge from the Duke Subcommittee's work on cooperation. Taking this out, even though it is in the Note, would weaken the instructive value of the rule.

A response was that this is a very difficult problem in real life. What does one do when such a letter arrives? There are frequently disputes about clarity and scope. Often the reaction is "They are asking us to close down our business. We can't do that." And the case law on what is to be done is not consistent. What if the letter hints at a possible settlement? Does that mean the threat of litigation is contingent and nothing need yet be saved?

This discussion prompted the reaction that it's important to go back to the uncertainty that we have been told is so important and burdensome out there in the world. This provision seems to spell out something about what to do. It surely does not tell anyone exactly what to do, but it does identify this as a matter of potential importance. That is useful information.

A related observation was that this problem is most acute before there is any litigation on file. After suit is filed, there is at least a judge to turn to for guidance or resolution. Factor (F) directly addresses that.

Another reaction was that on first reading factor (D) sounded good. But perhaps on reflection it could lead to trouble. What does this mean to prospective plaintiffs -- that they must send a letter or expect there will be no preservation?

What can they do to be specific on what they want preserved when they don't have any way to know what there is to preserve? From the defendant's side, what does this mean for a prospective defendant who receives such a letter. Does it mean that the letter has to be treated as seriously as a Rule 34 discovery request after litigation has begun? Plaintiff can't craft a specific letter in most cases.

Another participant had a similar reaction. What does plaintiff have to do under this provision? One could applaud the impulse to deal with these problems but conclude that (D) does not actually improve things for parties confronting these issues. Perhaps it is better to leave this out.

But this drew the objection that just saying "act reasonably" is not giving any guidance. As pointed out earlier, this sort of guidance can be helpful.

Another reaction was to ask whether this means that there is no obligation to preserve if there's no written demand for preservation?

A proposal for current purposes was that the question be carried forward. The Subcommittee is not yet at consensus on this point; guidance from the full Committee would be useful. Current (C) and (D) should be preserved for that discussion, but flagged in some way that indicates that the Subcommittee continues to grapple with whether they are useful.

That meant that the Subcommittee had finished its discussion of the rule provisions and could turn to the Note.

Committee Note

This call would not permit careful review of the proposed Note language. Nonetheless, some general discussion would be possible.

One initial reaction was about the Note discussion of trigger events. It was modeled in significant part on the Category 1 listing for the Dallas mini-conference. In Dallas, several were concerned about the implications of including such a list in a rule. But on reflection, including them in the Note might produce problems too. For one thing, this looks like rulemaking by Note. But additionally, some of these specifics could cause problems. Consider, for example, treating hiring an expert as a trigger. What if a company concludes that it should investigate possible contamination on a site where it has a facility, and hires an expert to do so. That's not an unusual thing for a company to do. Does that mean the company's obligation to preserve has been triggered? Should the trigger depend on what the expert reports back? Isn't that specific

instance included in the Note likely to cause difficulties?

Another participant offered a similar sort of example -- an EEOC complaint. That sounds initially like the sort of thing that should trigger preservation; it's a presentation of a claim to a governmental body. But only a very small percentage of EEOC complaints are followed by actual litigation. Does the Note make it seem too necessary to treat each such complaint as triggering the duty to preserve?

Another participant agreed that the listing of examples (in lines 60-70 of the draft Note) is counterproductive. But the final sentence in the paragraph, saying that the rule does not intend to alter the existing and evolving case law on trigger should be retained.

Another participant agreed, both about dropping lines 60-70 and retaining lines 70-72.

Another reported initially liking lines 60-70, but on reflection had concerns. As yet another said, some of these specifics produced real heartburn for some participants in Dallas. For example, hospital representatives thought some specific trigger examples would severely complicate their obligations.

A consensus was reached to remove the material at lines 60-70 of the draft Note.

Prof. Marcus suggested that, in reviewing the Note, at least two topics to have in mind are

(1) The treatment of inherent power. At the end of the discussion of (g)(2), there is a single reference to inherent authority to deal with an unsuccessful effort to destroy evidence. Should there be any mention? Should the Note suggest that the rule limits, modifies, or channels use of inherent power to deal with failure to preserve?

(2) The way in which bad faith might affect the finding of prejudice. At least some cases suggest that bad faith could demonstrate prejudice. One can imagine cases in which bad faith fairly clearly does not. For example, an unsuccessful effort to destroy evidence presumably does not cause prejudice. But if prejudice is a factor the court must find in addition to bad faith, can it treat a finding of bad faith as establishing prejudice unless the attempt to destroy evidence was entirely unsuccessful?

Another thought was suggested about the Note -- "Shorter is better." It's hard to find something in the voluminous Notes to rule changes. Not only is it important to resist the urge to

make rules via the Note, it's also important to make what is properly in the Note accessible. Some of what's now in the Note seems better suited to a memo conveying a preliminary draft rule amendment to the Standing Committee.

Judge Grimm suggested that it would probably be useful to create another rule draft, and revised Note, for a future conference call. That call would focus on the Note rather than the rule. After discussion, it was agreed that the Subcommittee would have a conference call to discuss the Note on **Tuesday, Aug. 7, 2012, at 10:00 a.m. EDT**. This call probably would last 90 minutes.

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TAB 2G

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Notes of Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
July 13, 2012

On July 13, 2012, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Hon. Paul Grimm (Chair, Discovery Subcommittee); Hon. David Campbell (Chair, Advisory Committee); Hon. Michael Mosman; Hon. John Koeltl (Chair, Duke Subcommittee); John Barkett, Andrea Kuperman (Chief Counsel, Rules Committees); Prof. Edward Cooper (Reporter, Advisory Committee); Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

Alternative drafting approaches

Judge Grimm opened the call by expressing the hope that it would be possible today to complete initial review of the draft rule language for 37(g). He noted that Judge Campbell had earlier in the week circulated a proposed redraft of (g)(2) as follows:

Absent irreparable prejudice, the court may not impose any of the sanctions listed in Rule 37(b)(2), or give an adverse inference jury instruction, for failure to preserve discoverable information unless the court finds that the failure was willful or in bad faith and caused substantial prejudice in the litigation. The court ordinarily should use the least severe sanction necessary to cure the demonstrated prejudice.

In addition, Prof. Cooper had on the morning of the call circulated an alternative draft intended for consideration in the future:

A court may impose any of the sanctions listed in Rule 37(b)(2)[(i)-(vii)], or give an adverse inference jury instruction, for failure to preserve discoverable information only if:

- (A) the failure caused irreparable prejudice; or
- (B) the failure caused substantial prejudice [in the litigation] and
 - (i) the sanction is the least severe necessary to cure the demonstrated prejudice, and
 - (ii) a party or [nonparty] {other person} has violated an order to preserve the information or an order to provide or permit discovery, or the failure was willful or in bad faith, but contempt sanctions can be imposed only for violating an order.

In reaction to Judge Campbell's circulation, it seemed that several members of the Subcommittee had agreed to the reformulation. In terms of topics discussed in the prior conference call on July 5, this meant that the "irreparable prejudice" language would be used.

Elizabeth Cabraser was unable to participate in this call due to unforeseen developments, but had some reservations that might call for reexamination of points already discussed. For present purposes, the goal was to proceed subject to revisiting issues once she is able to address them.

An initial question prompted by Prof. Cooper's circulation was the shift in rule language from "may not impose . . . unless" (as in the current working draft) to "may impose . . . only if" (as in the Cooper redraft). Shifting to the affirmative ("may impose") would accomplish a couple of goals.

First, it would deal with the fact that Rule 37(b)(2) only addresses sanctions for violation of a court order. When the Subcommittee was considering drafting a preservation rule, this issue was addressed by focusing sanctions on violation of that preservation rule, not violating on an order. A rule that said (as an early draft did) that the only sanction for violation of the preservation rule was under a new Rule 37 provision did the job; the absence of a court order did not matter under that formulation. But the Subcommittee has stopped working on a preservation rule, so the need for an order to obtain 37(b)(2) sanctions might frustrate the current drafting effort.

Second, and relatedly, the affirmative formulation would deal with the absence in the rules of any authorization for such sanctions in the absence of violation of a court order. More generally, it would give an affirmative mooring in the rules for preservation sanctions.

The question was raised whether this is actually a problem; a contrast was drawn to Rule 37(e), which says "a court may not impose sanctions under these rules" for failure to preserve electronically stored information. There seemed no need then to worry about affirmatively granting the court authority to impose such sanctions, and the Committee Notes accompanying the 2006 amendments cautioned against routine entry of preservation orders.

More generally, it need not be true that saying in draft (g)(2) that the court "may not impose any of the sanctions listed in Rule 37(b)(2)" means that those sanctions are available only in the circumstances (e.g., after violation of a court order) that Rule 37(b)(2) requires. To the contrary, the (g)(2) draft seems to borrow a list of possible sanctions and specify that none of them may be used absent the findings the rule requires.

The "under these rules" proviso in Rule 37(e) was inserted by the Standing Committee to ensure that inherent authority would not be curtailed; it means that the prohibition there applies only to sanctions authorized under the rules, but does not address to recurrent reality that sanctions for failure to preserve may often be sought in cases where there is no antecedent order.

That recollection prompted the observation that most failure-to-preserve problems arise in situations in which there has been no order. Before suit is filed, there surely is no order, and even after suit is filed there is likely no order until the Rule 16(b) order is entered. Even then, any order may be quite general. So the most difficult problems are simply not covered by situations in which a court order is possible.

This discussion raised the question of inherent authority. It was noted that the ambit of inherent authority is sometimes uncertain, and that in different circuits there seems a qualitatively different attitude toward such authority. It may be that (g)(2) would displace inherent authority, but we can't displace it entirely. At a minimum, it might be wise to separate contempt (Rule 37(b)(2)(vii)) and require a court order for imposition of that sanction.

The Cooper alternative raises some basic issues, in particular whether a rule should be cast as an affirmative grant of authority (Cooper draft) or a limitation on sanctions (current Subcommittee draft). In addition, the question whether the need for a court order for sanctions imposed under 37(b)(2) might prompt preference for the Cooper approach. Finally, assuming it is desired to prevent contempt in situations in which a court order is not violated the affirmative grant of authority might have additional advantages because it could exclude such authority absent violation of an order.

Because Ms. Cabraser had been unable to be present, and Prof. Cooper's draft arrived only this morning, the resolution for the present was to proceed through the current 37(g) draft with the question whether to recast along the lines suggested by Prof. Cooper remaining open, as are the concerns of Ms. Cabraser.

"adverse inference jury instruction"

The discussion shifted to the term "adverse inference jury instruction." The question had been raised whether this term was too indefinite. A range of things might be included within it. Such instructions could be permissive ("the jury may") or mandatory ("the jury must"). The prohibition might bear on whether evidence of unsuccessful efforts to destroy evidence could be introduced to show consciousness of guilt. It might also bear on whether attorneys could argue to the jury that an

opposing party's failure to preserve supported the inference that the lost evidence would have hurt that party's case. The question is whether a prohibition on using "an adverse inference jury instruction" is too general.

An initial reaction was that "teasing out what that means could be a game that never ends." The range of ramifications could not all be foreseen, and trying to guess at them is not productive.

Another participant agreed. The difference between a rebuttable presumption and an irrebuttable one may matter a lot. Trying to catalogue all the specific variations of a "spoliation charge" would not prove helpful.

Another participant agreed that trying to catalogue in the rule would not be desirable. It may be that the Committee Note should address some of these questions, but not the rule.

It was noted that the (g)(2) limitation of sanctions to situations involving willful destruction or bad faith narrows the range of cases affected substantially.

It was agreed to leave "adverse inference jury instruction" as the language in the rule.

"the court finds"

Another issue was whether the rule should say sanctions may only be imposed if "the court finds" substantial prejudice and bad faith/willfulness. Alternatively, the rule might specify that the party seeking sanctions must prove these elements.

An initial observation was that various cases discuss the question of burden of proof, sometimes saying that various showings "shift" the burden to the other side. In Pension Committee, the court said that the innocent party had the burden of proof. But it also said that relevance and prejudice may be assumed when a party acted in bad faith, or perhaps only with gross negligence.

A reaction was that "the court finds" is a flexible term. Obviously the court must have some basis for making a finding; the starting point is that the court cannot find something until somebody presents a basis for making that finding.

The summary was that all the points made support using "the court finds." Teasing out details leads to complications and would make the rule cumbersome.

directive that the court use
the least severe sanction

The draft has a bracketed last sentence directing that the court use the least severe sanction necessary to cure the demonstrated prejudice. One question is whether this sentence ought to say "must" or "should." Another is whether the sentence is useful.

An initial reaction was that the case law is fairly clear that one should tailor the sanction to the degree of harm suffered by the victim.

Another initial reaction was that perhaps this sentence should be dropped. There is a lot of case law under Rule 37(b) saying that the court should use the least severe sanction; one could say it is almost implicit. Saying it in 37(g) might suggest that the same notion does not apply to 37(b)(2) because that rule does not say this explicitly. We do not want to send a message that this restraint only applies to 37(g)(2) sanctions. An alternative might be to discuss this existing case law only in the Committee Note.

It was noted that the 1976 Supreme Court National Hockey League case said that sanctions could be used for purposes of general deterrence, meaning that they need not be limited to the minimum amount necessary to cure the harm. But this drew the response that a lot has changed since 1976. That was around the time when the Court said that the responding party must shoulder all costs of providing discovery, and that view has been moderated since. So also has the embrace of more aggressive sanctions.

Another concern voiced was that many who have urged the Committee to take action worry about sanctions that are not tailored to the harm caused by loss of information. If that is not in the rule, have we unduly limited the rule?

A response was that leaving that out of the rule would not undermine its value. "We are giving guidance. We are saying to look to Rule 37(b)(2). The existing case law under that rule emphasizes this restraint even though the rule does not explicitly say so."

Additionally, it was noted that the bad faith requirement in (g)(2) screens out a lot of cases. That screening function should go a long way towards reassuring those who were worried about disproportionate sanctions.

Another reaction was that this may be a reason for favoring the Cooper approach to casting (g)(2) in terms of a grant of authority to impose 37(b)(2) sanctions, for that leads fairly automatically to invoking this existing body of Rule 37(b)(2) case law.

The consensus was to leave the sentence in the rule regarding using the least harsh sanction, and to address this issue only in the Committee Note, perhaps with a footnote for the present pointing up the tension with the broad statement of the 1976 National Hockey League case.

(g)(3) draft

Discussion shifted to the draft (g)(3) provisions.

An initial question was whether the rule ought to say "must" or "should" regarding consideration of the factors involved. A comparison was to Rule 23(g), on appointment of class counsel. As published for public comment, that rule said the court "must" consider three factors and "may" consider any other relevant factors. This formulation produced uncertainty among those who felt that the three were unbalanced; as ultimately adopted the rule added a fourth factor to the "must" list. This experience illustrates the problem -- to say "must" means that the court is required to weigh matters that it may regard as unimportant.

A reaction was that "should" is sufficient. Judges will look to this rule for guidance; they are not seeking shackles. Using "must" could lead to complication. Using "must" could be a bit of a trap.

The consensus was for use of "should."

A different question was whether the rule should refer to "all relevant factors, including" (A) through (F). Is such an open-ended directive useful to courts? It does not say that anything is irrelevant. The list originated in the efforts to devise a preservation rule, and some versions of that rule sought to have a closed set of triggers for preservation, for example. As soon as one says the list is only illustrative one may have opened the door too wide.

The reaction was that the draft formulation was appropriate. The variety of circumstances of given cases is too large to try to anticipate them all. The goal is to give some general direction to parties trying to make sensible preservation decisions. This rule will do so.

The consensus was to leave the draft as written.

Turning to the enumeration of factors, an initial point was that the list could be shortened considerably. One could delete (C) and (D) and end (B) with "information," leaving out the reference to a litigation hold. (E) on proportionality was probably valuable, although that seemed to fit into (B) also. (F) would rarely be of use because the hard questions arise before there is a judge to apply to for guidance. With a

shortened list, a Committee Note could elaborate in ways that the rule draft now addresses.

These points drew the reaction that the more extensive list was included in the rule in order to provide the sort of guidance the Committee has frequently been told potential litigants need and value in making preservation decisions. That desire prompted the numerous efforts to devise a preservation rule. Although those efforts were eventually discontinued, these provisions can serve some of the same purpose here. The rule begins in (g)(1) by referring to failure to preserve "information that reasonably should be preserved." The goal here is to put some meat onto the bones of that basic orientation in a way that will assist people out there in the field.

Another reaction was that this listing somewhat resembles the Category 1 preservation rule we discussed during the mini-conference in Dallas. At a minimum we should bring forward a version like this for discussion with the full Committee. It might then be appropriate to discuss also a streamlined alternative.

Another reaction was to call attention to (D) -- the resources and sophistication of the party. This factor may be particularly important for plaintiffs. Consider the Title VII plaintiff who is unlikely to appreciate that changing her Facebook page might be regarded as spoliation. But it seems that defendants are increasingly focusing on the preservation efforts of individual plaintiffs. It may well be that plaintiffs and plaintiff lawyers don't intuitively appreciate these things. Keeping this one on the list tells them "This means you." That is useful information.

Another recollection of the various rule approaches to preservation discussed in the Dallas mini-conference was that the second one, in effect, told potential litigants to "be reasonable." The reaction of almost all was that this is not helpful. Paring the list too much might lead in the direction of telling potential litigants nothing more.

A response was to focus on (C). The case law on how to react to a notice letter is quite varied. Often this is a very frustrating challenge for the recipient of such a letter. One reaction is "That essentially tells us to shut down our business. We can't do that. If you want to sue, go ahead and file your suit." This point prompted the question whether it wouldn't be useful to have a rule that says the court would focus on whether there was a demand to preserve, and whether the party seeking preservation was willing to engage in good-faith consultation regarding scope, provided some solace, however incomplete, to parties confronting such preservation decisions.

Another question was whether (E), regarding "proportionality" was sufficiently focused. Does everyone know what "proportionality" is? The Duke Subcommittee is considering adding the term to Rule 26(b)(1). It might be useful here to invoke 26(b)(2)(C). Are these things different?

A first reaction was that using "proportionality" all by itself seemed workable. That is the sort of thing under discussion for Rule 26(b)(1).

Another reaction was that courts are now saying that 26(b)(2)(C) is what "proportionality" is about.

A cautionary note was offered: There is a difference between what 26(b)(2)(C) is talking about what we have here. 26(b)(2)(C) is about limiting discovery burdens. Preservation is arguably different in the sense that it may often involve considerably less effort. True, we have heard that the effort required to preserve can be very large. But the RAND study showed that there may be reason to think that the largest expense of discovery is actually review before production. Preservation, by itself, does not involve that effort.

A different set of observations focused on the pre-litigation situation: Then the potential defendant does not know much of what the dispute is about. In an auto accident case, can the manufacturer safely conclude that the concern is the braking system based on what the lawyer says? What if the suit eventually filed also targets that steering and other features of the car?

Another possibility is that there will be multiple suits. It was noted that this judgment is inherently comparative. It will be important in the Committee Note to say something more about the ways in which this set of considerations differ in the preservation context from the discovery context. There are differences between the burdens of preservation and the burdens of production. There is a difference between confronting only one suit and facing 31 suits.

* * * * *

As the hour allotted for the call was elapsing, the need for another call became apparent. Between now and that call, it would be good to get another redraft of the rule language, and refine the Committee Note language to correspond to that revised rule language. At the same time, an effort to pare down the factors listed in (g)(3) would be in order. In addition, Ms. Cabraser might then present her concerns.

After discussion, the focus was on holding another

conference call on **Monday, July 23** at **10:30 a.m. EDT**. Before then, Prof. Marcus would circulate notes on this call and attempt to circulate a revised rule draft that could be the focus of discussion.

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Notes of Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
July 5, 2012

On July 5, 2012, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Hon. Paul Grimm (Chair, Discovery Subcommittee); Hon. Mark Kravitz (Chair, Standing Committee); Hon. David Campbell (Chair, Advisory Committee); Hon. John Koeltl (Chair, Duke Subcommittee); Anton Valukas, Elizabeth Cabraser, John Barkett, Andrea Kuperman (Chief Counsel, Rules Committees); Prof. Edward Cooper (Reporter, Advisory Committee); Prof. Richard Marcus (Assoc. Reporter, Advisory Committee).

Judge Grimm introduced the call by noting that since the Subcommittee had last talked about preservation issues, three items bearing generally on the topic had arrived. First, Jonathan Redgrave, a Washington lawyer who had frequently provided the Committee with helpful advice in the past, had submitted his ideas for a rule change. This proposal would shortly be circulated to the full Subcommittee. On March 15, John Vail of the AAJ had submitted a proposal about handling cases governed by state law. An example of that sort of problem might be Florida, where the courts evidently say that there is no duty to preserve until suit is filed. Finally, the New York State Bar Ass'n had submitted a proposal very much like what it submitted before the Dallas mini-conference in September, 2011. None of these sets of proposals seemed markedly different from the Subcommittee's ongoing draft, but all were different in some ways. They might be borne in mind as we begin to work through the drafting choices before the Subcommittee.

The goal of this conference call and the one on Friday, July 13, is to try to resolve the drafting choices on a Rule 37(g) proposal that we have not addressed in significant detail. It would defer resolution of the question whether to make the rule applicable to all discoverable information or limit its effect to electronically stored information.

"curative" v. "remedial"

The first drafting choice was whether to refer to "curative" or "remedial" measures in 37(g)(1)(B). A question was asked about what either meant. Examples were a requirement to restore backup tapes or engage in forensic efforts to retrieve information that would not have been required absent the failure to preserve.

The concern was expressed that "curative" suggests that the failure to preserve is curable. How is one ever sure that all that was lost has been found? Does this language suggest that the court may impose severe sanctions whenever it cannot be confident that all that was lost has been found? The answer was

that it does not; the goal of the measure taken by the court is the focus of this rule provision. A pure "sanction" is not designed to "cure" the problem created by the loss of the information. 37(g)(1) is designed to affirm that the culpability or prejudice requirements of (g)(2) do not apply to an order requiring the party that failed to preserve to make a "curative" or "remedial" effort; when used in this way, the order does not impose a sanction.

A concern was expressed about using "remedial." The term "remedy" is used in many contexts. Money damages are a "remedy" in many cases. The term "curative" is closer to what we are getting at; whether or not it can be done in a fully effective way, the notion is not that the court is granting damages for failure to preserve. Instead, it is trying to cure the proof problems that may have resulted.

Another concern was illustrated with a case from the District of New Jersey in which there was a failure to preserve, but it seemed that still-available sources contained all that might have been found in the sources that became unavailable. The response was that in that case the court was confronting the question whether to require the restoration of backup tapes. Plaintiffs sought the restoration of the backup tapes on the ground that defendants had failed to preserve certain materials. The judge determined that -- despite the failure to preserve -- the criteria in Rule 26(b)(2)(B) did not call for restoring backup tapes, in part because it seemed unlikely that the effort would produce additional important information. In this sort of situation one must rely on the court's judgment.

The consensus was that "curative" was the better choice.

attorney's fees payment

Another concern was whether the inclusion of an attorney's fees award in 37(g)(1)(C) would prompt parties to try to get a "free ride" on needed discovery on the ground that the opposing party had not preserved everything it should have preserved. An initial reaction was that imposing the costs of curative efforts on the party that failed to preserve is a commonplace judicial reaction.

Another reaction was that the inclusion of attorney fee shifting in this provision is not likely to act as an incentive to seek a free ride. This is the least favored activity of litigators. The courts are very good about limiting such awards to the discovery activities made necessary by the failure to preserve.

Another reaction was that there are fee provisions elsewhere in the rules, and those do not seem to prompt free-riding

behavior.

Another participant noted that the rule says such fees may be shifted only when "caused by the failure" to preserve. That should protect against the concern.

The consensus was that (g)(1)(C) should be left as drafted.

"discoverable information" too broad?

Another question was raised about (g)(1) -- whether it is too broad in applying to any "discoverable" information. Rule 26(b)(1) is extremely broad. Often it will appear that a party has not retained all "discoverable information" it once had; in a number of circumstances a court may conclude that it should have retained things it did not retain. But that does not mean that one of the measures spelled out in (b)(1) should ordinarily be undertaken. Perhaps it would be good to add a (D) -- "take no action." The explanation for that in the Note could be that courts need take no action if they conclude there has been no impact.

A first reaction was that (g)(1) is designed to affirm that the court retains authority to do the listed things despite the limitation later in 37(g) on "sanctions." The verb is "may," and that surely recognizes that the court may decide to do none of these things.

Another reaction was that one could achieve much the same result by adding "when appropriate" at the end of (g)(1). But that is implicit, and would likely draw objections from the Standing Committee's Style Consultant. Another participant noted that (g)(1) is "inherently discretionary" and not a command to do anything.

A response was that we will likely hear about this issue as we proceed. True, we are perhaps going to be discussing some further modifications to the scope of discovery, but that is presently extremely broad.

The consensus was not to add a (D) reminding the court that it need not take any action.

(g)(2) -- "exceptional circumstances" v.
"irreparable prejudice"

The question was introduced as frequently illustrated by the Silvestri case in which plaintiff failed to preserve the allegedly defective airbags. Perhaps "irreparable prejudice" is closest to describing that situation. Using "exceptional circumstances," on the other hand, may be too broad.

An initial reaction was that "exceptional circumstances" is fine. That is the term used in Rule 37(e). It can work here also.

Another reaction was that using "exceptional circumstances" leaves the judge room to justify sanctions that "irreparable prejudice" does not leave. The Silvestri example is one in which irreparable prejudice seemed to have occurred. Perhaps it would be best to focus narrowly on that.

Another participant observed that there may well be more and more cases in which the loss of electronically stored information is prejudicial. Using "irreparable prejudice" captures that.

Another participant agreed that "irreparable prejudice" is what we're getting at. The focus is on whether the failure to preserve has had a severe impact on the truth-seeking process.

This discussion prompted a question: What happens if there was unquestioned bad faith, but no prejudice? For example, the most outrageous effort to destroy the evidence might be bungled. Is there nothing the judge can do in the face of such conduct?

One reaction was that the court surely has abundant inherent authority to respond to such behavior. Another was that there are cases that say prejudice can be presumed if there has been bad faith activity. A third was that the courts surely have inherent authority to punish outrageous conduct.

This discussion prompted reference to the inherent authority question that hovers in the background of the discussions. Is the goal of this amendment to curtail the court's use of inherent authority to punish egregious conduct?

A reaction was that the proposed rule as drafted requires that both culpability and prejudice be shown before a "sanction" is imposed. To exclude "exceptional circumstances" would permit sanctions for an outrageous but unsuccessful effort to destroy information. To limit the court's authority to situations of "irreparable prejudice" focuses only on one portion of the two-part test in the rule. If there is no prejudice, there can be no "sanction." But if there is no culpability, there can still be a "sanction" if the prejudice is serious enough. What's missing is attention to the situation in which there is no prejudice but severe culpability.

One reaction was that the Committee Note for "exceptional circumstances" could specify that what is meant is (1) irreparable prejudice as in Silvestri or (2) intentional but ineffective or incomplete efforts to destroy evidence.

A reaction was that we are coming full circle. The goal was

to ensure that serious sanctions would not be imposed absent proof of prejudice. The notion that really culpable behavior permits sanctions even if nothing was lost undercuts the protection we are seeking to provide.

A response was that this is not a circle. For one thing, you are usually not able to be certain that nothing was lost. In any event, there must be a way for the court to respond if a party acts outrageously. The reply to this point was that there can be cases in which 100% of the information is available despite the outrageous effort of a party to destroy that information.

One suggested possible reconciliation of these views was that it might be possible to carve out contempt -- to provide that the court could find a party in contempt even though sanctions going to the merits would not be available. But that drew the observation that contempt usually requires a court order. Can a party held be in contempt of court even though it did not violate a court order?

Absence of court order;
inherent authority

Another issue that might warrant language change is that the current provision -- "the court may not impose any of the sanctions listed in Rule 37(b)(2) . . . unless" fails to take account of the fact that 37(b)(2) does not apply absent a court order. A better way might be to expand 37(b)(2) affirmatively, as by saying that "the court may impose sanctions under 37(b)(2) only if . . ." That is pointed up by the discussion of a possible contempt carve-out, but is a more general issue. It also goes to the question of inherent authority; courts have often invoked inherent authority to deal with situations in which there was no court order.

The basic question raised was whether there is a desire to restrain use of inherent authority. One reaction was that the reference in 37(g) to 37(b)(2) made clear that this provision was calling for action under the rules. But by borrowing the list of sanctions in 37(b)(2), one need not borrow the court-order prerequisite also. On the other hand, contempt is not a good fit unless there is a predicate court order.

A related issue in the background is whether the goal is to curtail the court's ability to use severe sanctions for purposes of general deterrence. In the NHL case in 1976, the Court had upheld dismissal as a discovery sanction even in the absence of a finding that the wrongdoer might again violate the discovery rules. (The infraction was filing a set of supplemental interrogatory answers one day late.) Particularly in cases of egregious conduct, general deterrence might be a partial

justification for a severe sanction, including contempt.

Whether contempt would ever be necessary prompted an example -- the parties settle the case after the misconduct, in part because the wrongdoer fears the consequence at trial of an adverse inference instruction. Is the court powerless to do something about the egregious conduct? Maybe the best idea is to say in the Committee Note that we do not mean to have any impact on inherent authority.

A different reaction was "We can't solve this." We should focus on the real question we started with -- overpreservation due to fear of severe sanctions. Another participant agreed. The Committee may be trying to do more than it should if it is attempting to limit inherent power. Short of that, it can try to cure the principal problems that have been raised. For one thing, it can solve the problem of nonuniformity, particularly that resulting from the Redidential Funding decision.

A proposal was that the Committee Note simply say "This rule does not speak to inherent authority." Another participant expressed agreement with that idea, and noted that there are due process protections against imposition of contempt that don't apply to other sanctions.

Another participant favored a carve out for contempt in instances involving what is tantamount to a criminal violation.

Striking concern with prejudice?

Another reaction to this discussion was that one could simply strike the remainder of the first sentence of (g)(2) after "bad faith," thereby removing concern whether the culpable conduct actually caused prejudice. The effect of that language is to say that, even if the conduct was willful, it still does not justify sanctions unless prejudice is proved. Perhaps there is a case in which a party did something truly outrageous but failed to destroy the evidence.

Another participant observed that "willful" and "bad faith" are elusive terms. We have seemingly been assuming that they will be clear. But they may not be clear. It is not incoherent to leave the exclusion of "exceptional circumstances" in the rule with these terms.

As the time for this call was running out, the suggestion was that Prof. Marcus take a crack at language to respond to the issues raised, perhaps in time for the next conference call -- Friday, July 13 -- and that the Subcommittee move forward at that time.

TAB 2I

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SHOOK HARDY & BACON LLP

MEMORANDUM

To: Rick Marcus, Esq. cc: Hon. Dave Campbell
Hon. Paul Grimm
From: John M. Barkett, Esq. Date: September 6, 2012
Re: Preservation Cases

I am following up on Paul Grimm's and your request to put the case law I offered up for our September 6, 2012 conference call into memorandum form.

I identified four decisions from Courts of Appeals on characterizations of the nature of a deprivation or impairment resulting in sanctions in the absence of bad faith. I discuss them below, highlighting language (1) used by the lower court, (2) used by the court of appeals, or (3) referenced in other cases cited in the decisions, that relates to the nature of the deprivation.

Vodusek v. Bayliner Marine Corp., 71 F.3d 148 (4th Cir. 1995) affirmed a judgment for the defendant. Plaintiff's husband died as a result of a fire on a boat. An expert for plaintiff examined the boat in destructive ways. Hence, defendant was unable to conduct its own inspection of the alleged defect. The trial court sanctioned the plaintiff by allowing the jury to draw an adverse inference if the jury found that the plaintiff or her agents caused the destruction or loss of relevant evidence. The court of appeals affirmed the judgment entered on the jury verdict for the defendant saying that the district court acted within its discretion.

This was an adverse inference case, not a dismissal or default judgment matter. And there was no bad faith. This was the court's formulation on the nature of the deprivation:

While Vodusek may be correct in concluding that she and her expert did not act in bad faith in destroying portions of the boat, she does not dispute that those portions were permanently destroyed as part of Halsey's deliberate investigative efforts. While Halsey may have decided that the destroyed portions of the boat were not relevant to his theory of the case, that conclusion ignored the possibility that others might have entertained different theories to which the destroyed portions might have been relevant. In this case, both the defendants and the district court concluded that the destroyed portions were significant to the effort to explain where and why the boat explosion occurred. Indeed, throughout the course of this case, even Halsey's opinion of where the explosion occurred

changed several times.

We conclude that the district court acted within its discretion in permitting the jury to draw an adverse inference if it found that Vodusek or her agents caused destruction or loss of relevant evidence. Rather than deciding the spoliation issue itself, the district court provided the jury with appropriate guidelines for evaluating the evidence.

In *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001), plaintiff never got to the jury. Plaintiff claimed that a GM vehicle was defective and that the defect caused the accident in issue. Plaintiff had his experts inspect the vehicle. One of the experts told plaintiff to advise GM of the accident so GM could inspect it. But GM was not notified of the accident until three years later and by then the vehicle had been repaired and resold. The district court dismissed the case as a sanction. The Fourth Circuit affirmed. "In sum, we agree with the district court that Silvestri failed to preserve material evidence or to notify GM of the availability of the evidence, thus breaching his duty not to spoliage evidence." 271 F.3d at 592.

In discussing the nature of the deprivation, the Court of Appeals first described the district court's decision in these terms:

After recognizing that the determination of whether the airbag should have deployed could only be determined by a reconstruction of the accident, the court explained that General Motors was denied the opportunity to reconstruct the accident accurately because of its inability to take the necessary crush measurements. As the court said:

"Therefore, Defendant is now forced to rely on the few measurements taken by Plaintiff's experts, Carlsson and Godfrey. As to these measurements, Carlsson admitted, during his deposition, that he only took one crush measurement-that of what he believed to be the area of "maximum crush." ... Not only was this lone measurement uncorroborated, but it was also inadequate. Defendant's expert opines, and plaintiff does not dispute, that crush measurements are generally taken at numerous points on the vehicle.... Based on the inability to take crush measurements alone, there is little doubt that defendant has been highly prejudiced.

In addition, the court noted that General Motors was prejudiced in its examination of the sensing and diagnostic module which monitored the airbag deployment system because Silvestri's expert challenged the

results of the examination. As the court explained:

"In his second report, Carlsson cast doubt on whether or not the airbag system inspected in 1998, which indicated no system faults, was, in fact, the same system in the car at the time of the accident.... Defendant, at this late date, has no way of proving that the systems are the same. This is critical to Defendant's case as their defense rests, in large part, on the fact that, because the airbag system showed no faults, the conditions of the accident must not have met the threshold requirement to deploy the airbag."

In the analysis of New York case law (which governed), the Fourth Circuit explained that even the negligent loss of evidence can justify dismissal:

In fashioning an appropriate sanction, the New York courts have focused not only on the conduct of the spoliator but also on the prejudice resulting from the destruction of the evidence. See, e.g., *Squitieri v. New York*, 248 A.D.2d 201, 669 N.Y.S.2d 589, 590-91 (N.Y.App.Div.1998) (finding dismissal appropriate where a party negligently disposed of the street sweeper at issue in the litigation, preventing the opposing party from countering the design defect claim with evidence of misuse, alteration, or poor maintenance of the sweeper); *Kirkland*, 236 A.D.2d at 173-74, 666 N.Y.S.2d 609 (finding dismissal appropriate where a party unintentionally failed to preserve the crucial piece of evidence, a stove alleged to be defective, and, therefore, no actual inspection of the item at issue could be performed because "[i]ts loss 'irrevocably stripped'[the defendant] of useful defenses").

At bottom, to justify the harsh sanction of dismissal, the district court must consider both the spoliator's conduct and the prejudice caused and be able to conclude either (1) that the spoliator's conduct was so egregious as to amount to a forfeiture of his claim, or (2) that the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.

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When we turn to the prejudice suffered by General Motors, we agree with the district court's finding that the spoliation was "highly prejudicial." It denied General Motors access to the only evidence from which it could develop its defenses adequately. First, by not

having access to the vehicle, General Motors could not develop a "crush" model to prove that the airbag properly failed to deploy. In order to establish this model, General Motors needed crush measurements taken at several places on the automobile. These measurements would reveal not only the speed at impact, but also the direction of forces imposed on the car. This information would lead to an ability to determine whether the airbag device acted as designed and therefore was critical to the central issue in the case.

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Thus, not only was the evidence lost to General Motors, but the evidence that was preserved was incomplete and indefinite. To require General Motors to rely on the evidence collected by Silvestri's experts in lieu of what it could have collected would result in irreparable prejudice. Short of dismissal, the district court would have been left to formulate an order that created facts as established or that created presumptions. But when Silvestri presents vehicle data as his only evidence of a product defect and that data is incomplete and perhaps inaccurate, the court would have no basis for determining what facts should be taken as established. On the other hand, if the court denied Silvestri's experts from testifying, as would be an alternative, then Silvestri would have no case at all.

In *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3d Cir. 1994), plaintiff's counsel, before suit was filed or determination made that there was a basis for suit, had an expert examine a circular saw that had caused plaintiff's injury. The expert examined the saw and "noted that the guard was closing sluggishly and that there was a grating noise. He disassembled the guard to find out why. This disassembly, according to [the expert], revealed particles trapped in the guard mechanism, some of which fell out during the course of the examination. Some of the trapped particles had caused scoring of the metal on the mating areas of the blade guard. [The expert] took photos of the assembled saw, the disassembled saw, the scoring, and the debris." The particles that fell out of the saw were not kept. Based on this conduct, the district court excluded the expert's testimony as a sanction. The Third Circuit reversed because it felt that the sanction was too drastic. "We believe the key considerations in determining whether such a sanction is appropriate should be: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing

party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future."

On the nature of the deprivation, the Court of Appeals used these terms:

The district court made no finding that Dr. Bratspies intended to impair the ability of the potential defendant to defend itself and we do not think the record before the district court would support such a finding. The most that can be said based on the evidence before the district court is that Dr. Bratspies failed to time or videotape the closing of the guard and did not attempt to arrange for the potential defendant to have its own expert present during his investigation.

In *Sacramona v. Bridgestone/Firestone, Inc.*, 106 F.3d 444, 447 (1st Cir. 1997), *Sacramona*, a manager at a gas station, was injured when a tire he was attempting to mount exploded. *Sacramona* sued the manufacturer of the tire, asserting tort and warranty claims. *Sacramona's* attorney obtained the tire and gave it to an expert engineer, who examined the tire in a somewhat destructive examination. The district court granted summary judgment in favor of the defendants, ruling that evidence of the tire should be excluded, because defendants' "experts have been deprived of the opportunity to examine relevant, possibly dispositive evidence before its material alteration." The First Circuit ultimately affirmed. There was no bad faith here; and the Court of Appeals held that "bad faith is not essential." ("If such evidence is mishandled through carelessness, and the other side is prejudiced, we think that the district court is entitled to consider imposing sanctions, including exclusion of the evidence.")

In the context of discussing whether the sanction was appropriate, the Court of Appeals gave some insight into a way to characterize a more severe deprivation:

But neither the district court nor the defendants explain why any broader sanction was needed to undo the harm caused by the wheel's cleaning. In fact, one defendant apparently urged the more limited sanction - precluding *Sacramona's* claim that the original tire was 16 inches - as an alternative to dismissal. And there is no finding that the damage was willfully intended to deprive the defendants of helpful evidence, arguably a basis for a sanction that does more than undo the harm.

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MEMORANDUM

DATE: August 24, 2012

TO: Discovery Subcommittee

FROM: Andrea L. Kuperman

CC: Judge David G. Campbell
Professor Edward H. Cooper
Professor Daniel R. Coquillette
Judge Mark R. Kravitz
Professor Richard L. Marcus

SUBJECT: Rule 37(e) case law

The Discovery Subcommittee is currently analyzing the best means for addressing growing concerns about preservation for litigation and associated sanctions for failure to preserve. The current thinking of the Subcommittee is to take a sanctions-only approach to addressing these concerns. The Civil Rules were amended in 2006 to address electronic discovery issues. At that time, concerns about preservation and sanctions with respect to electronically stored information (“ESI”) were addressed in Rule 37(e),¹ which provides: “Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” FED. R. CIV. P. 37(e).

To help assess the best course for proceeding on a preservation/sanction rule, the Discovery Subcommittee asked me to look into the case law on Rule 37(e). Specifically, I have been asked to look into the following questions:

¹The text now appearing in Rule 37(e) was originally added in 2006 as subsection (f). However, when the Civil Rules were restyled in 2007, the provision became subdivision (e). This memo will refer to the subdivision as Rule 37(e), unless a case or article refers to it as Rule 37(f).

- Has Rule 37(e) made a difference?
- How does the case law interpret “routine, good-faith operation of an electronic information system”? Does it encompass individual decisions to delete information?
- Has the “exceptional circumstances” clause in Rule 37(e) ever been used?
- How has Rule 37(e) been interpreted in terms of litigation holds?
- What is a “sanction” that may not be imposed under Rule 37(e)? Does it include curative measures?

I have reviewed the cases that discuss Rule 37(e), as well as some legal commentary, and I conclude that Rule 37(e) has had very limited impact. There are only a handful of cases that seem to apply it. Many disregard it because it is limited to sanctions under the Rules, and Rule 37(b) only provides for sanctions for violation of a court order. Others find it does not apply because the party failed to institute an adequate litigation hold, which many courts view as required, or at least strongly encouraged, by the advisory committee notes. Still others find it does not apply because the alleged destruction arose before the preservation duty applied (bringing in both the issue of the lack of a court order and the fact that Rule 37(e) is not necessary to address failures to preserve before the duty to do so arises). Many of the cases denying sanctions and citing Rule 37(e) seem likely to have reached the same result even without the provision.

In short, the rule was intended to do something quite limited: to clarify for courts and parties that the world of electronic discovery could not be treated the same in terms of preservation and related sanctions as the world of paper discovery, given the volume of electronic documents and the fact that electronic systems operate in ways that may destroy data unintentionally and often even without a party’s knowledge. It was meant to provide limited protection so that parties could be comforted that they would not be sanctioned for good faith destruction done by electronic systems.

As a practical matter, however, this has proven to be a truly narrow area of protection, as most courts seem to find plenty of other reasons for denying sanctions in instances of good-faith destruction. To the extent litigants sought a true safe harbor for failure to preserve, Rule 37(e) does not appear to have provided much comfort.

This memo will first explore the history behind the adoption of Rule 37(e), to gain a better understanding of the Committee's goals in enacting that provision. It will then examine the case law on each of the questions listed above.

I. The History of Rule 37(e)

Amendments to add the provision in Rule 37(e) were published for public comment in August 2004. The brochure accompanying the proposals explained that the proposed amendments to Rule 37 would place a limit on sanctions for the loss of ESI as a result of the routine operation of computer systems. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, SUBMITTED FOR PUBLIC COMMENT, A SUMMARY FOR BENCH AND BAR 2 (Aug. 2004), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/comment2005/CompleteBrochure.pdf>. The brochure further explained that the new provision would create a limited “safe harbor” that would address “a unique and necessary feature of computer systems — the automatic recycling, overwriting, and alteration of electronically stored information.” *Id.* at 3. As published, the rule was meant to address only a small subset of issues involving sanctions for the loss of electronic information. At the time of publication, the Committee seemed to believe that the rule would require reasonable preservation efforts, including, in many instances, a litigation hold. The Committee report stated: “Proposed Rule 37(f) requires that a party seeking to invoke the ‘safe harbor’ must

have taken reasonable steps to preserve electronically stored information when the party knew or should have known it was discoverable in the action. Such steps are often called a ‘litigation hold.’” See Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure, to Hon. David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure, Report of the Civil Rules Committee, at 18 (May 17, 2004, rev. Aug. 3, 2004), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/comment2005/CVAug04.pdf> [hereinafter Civil Rules 2004 Report].

At the time of publication, the Advisory Committee was continuing to examine the appropriate degree of culpability or fault that would preclude application of the limited safe harbor. *Id.* at 19. The Advisory Committee’s report submitting the proposal for public comment noted that “[s]ome have voiced concern that the proposed amendment to Rule 37 is inadequate because it only provides protection from sanctions for conduct unlikely to be sanctioned under the current rules: when information is lost despite a party’s reasonable efforts to preserve the information and no court order is violated.” *Id.* But “[o]thers have voiced concern that raising the culpability standard would provide inadequate assurance that relevant information is preserved for discovery.” *Id.* The Committee requested comments “on whether the standard that makes a party ineligible for a safe harbor should be negligence, or a greater level of culpability or fault, in failing to prevent the loss of electronically stored information as a result of the routine operation of a computer system.” *Id.* The published proposal used a negligence standard, but set out a possible alternative amendment that would be framed in terms of intentional or reckless failure to preserve ESI lost as a result of ordinary operation of a computer system. *Id.* The Committee also sought public comment on whether the proposed amendment accurately described the type of automatic computer operations that should

be covered. *Id.* at 20. The Committee explained that it intended “that the phrase, ‘the routine operation of the party’s electronic information system,’ identifies circumstances in which automatic computer functions that are generally applied result in the loss of information.” *Id.*

As published, the proposal stated:

(f) Electronically Stored Information. Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:

(1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and

(2) the failure resulted from loss of the information because of the routine operation of the party’s electronic information system.

Id. at 51–52.²

After considering the extensive public comments, the Advisory Committee ultimately went with an intermediate standard for the degree of culpability — “good faith.” The Advisory Committee noted that many comments urged that the negligence standard would provide no meaningful protection, but would only protect against conduct unlikely to be sanctioned in the first place, while others urged that the more restrictive standard in the footnote went too far in the other

²The alternative version that was set out as a possible example of a proposal that would impose a higher degree of culpability before excluding the conduct from the safe harbor stated:

(f) Electronically Stored Information. A court may not impose sanctions under these rules on a party for failing to provide electronically stored information deleted or lost as a result of the routine operation of the party’s electronic information system unless:

(1) the party intentionally or recklessly failed to preserve the information; or

(2) the party violated an order issued in the action requiring the preservation of information.

Civil Rules 2004 Report, *supra*, at 53.

direction by insulating conduct that should be subject to sanctions. *See* Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Comm. on the Federal Rules of Civil Procedure, to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure, Report of the Civil Rules Advisory Committee, at 74 (May 27, 2005, rev. Jul. 25, 2005), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1105/Excerpt_CV_Report.pdf [hereinafter Civil Rules 2005 Report]. The Advisory Committee viewed the “good faith” standard as an intermediate option between the two published options. *See id.* at 74–75. The Advisory Committee’s report indicated that it believed that the adequacy of a litigation hold would often bear on whether the party acted in good faith, but the Committee did not view it as a dispositive factor. *See id.* at 75 (“[G]ood faith may require that a party intervene to suspend certain features of the routine operation of an information system to prevent loss of information subject to preservation obligations. . . . The steps taken to implement an effective litigation hold bear on good faith, as does compliance with any agreements that the parties have reached regarding preservation and with any court orders directing preservation.”). After publication, the Advisory Committee also decided to add the “exceptional circumstances” provision that appears in the final rule, explaining that it “adds flexibility not included in the published drafts.”³

³No further explanation of the addition of the “exceptional circumstances” provision is provided in the Civil Rules 2005 Report, but there is evidence that the Advisory Committee originally intended it to mean “severe prejudice” and that the Standing Committee revised the committee note to remove that explanation, prompting the Advisory Committee to revise its report to the Standing Committee before it was attached as an appendix to the Standing Committee’s report to the Judicial Conference. (It is standard practice for an advisory committee to submit a report to the Standing Committee and then to revise the report to take account of Standing Committee actions after the Standing Committee’s meeting and before the report is included as an attachment to the Standing Committee’s report to the Judicial Conference.) For example, the original Advisory Committee report to the Standing Committee, before the June 2005 Standing Committee meeting, provided a fuller explanation of the “exceptional circumstances” exception. That report stated, with respect to the “exceptional circumstances” provision:

The revised rule also includes a provision that permits sanctions in “exceptional circumstances” even when information is lost because of a party’s routine good-faith operation of a computer system. As the Note explains, an important consideration in determining whether exceptional circumstances are present is whether the party seeking sanctions can demonstrate that the loss of the information is highly prejudicial to it. In such circumstances, a court has the discretion to require steps that will remedy such prejudice. The exceptional circumstances provision adds flexibility not included in the published drafts. The Note is revised, also in response to public commentary, to provide further guidance by stating that severe sanctions are ordinarily appropriate only when the party has acted intentionally or recklessly.

Memorandum from Hon. Lee H. Rosenthal, Chair, Advisory Comm. on the Federal Rules of Civil Procedure, to Hon. David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure, Report of the Civil Rules Committee, at 85 (May 27, 2005), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV5-2005.pdf> [hereinafter May 2005 Civil Rules Report]. The underlined provisions do not appear in the version of the report that was revised after the June 2005 Standing Committee meeting and ultimately submitted to the Judicial Conference.

The committee note that was originally proposed after publication to the Standing Committee for final approval stated: “In exceptional circumstances, sanctions may be imposed for loss of information even though the loss resulted from the routine, good faith operation of the electronic information system. If the requesting party can demonstrate that such a loss is highly prejudicial, sanctions designed to remedy the prejudice, as opposed to punishing or deterring discovery conduct may be appropriate.” *Id.* at 88. But at the Standing Committee’s June 2005 meeting, there were objections to the note language on severe prejudice. *See, e.g.*, COMM. ON RULES OF PRACTICE AND PROCEDURE, MINUTES, JUN. 15–16, 2005, at 28 (2005), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-2005-min.pdf> (“One member stated that the amendment was very beneficial, but reiterated that the language of the note is troublesome. The rule focuses on good faith, but the note says there can be sanctions, even if the party acted in good faith, if the opposing party suffers ‘severe prejudice.’”). The Standing Committee voted to adopt the amendment, but to delete the parts of the committee note that were troubling some of the members. *Id.* at 29. The deletion of the note language on severe prejudice is likely what led to the revision of the portion of the Advisory Committee’s report that originally indicated that prejudice bears heavily on whether exceptional circumstances are present. Notably, the “Changes Made after Publication and Comment Report,” or “GAP Report,” which was part of the Advisory Committee’s report to the Standing Committee and which was part of an appendix to the Standing Committee’s report to the Judicial Conference that transmitted the rule for final approval, stated, even after the June 2005 Standing Committee meeting, that the “exceptional circumstances” provision “recognizes that in some circumstances a court should provide remedies

Id. at 75. Finally, the Advisory Committee decided to remove the provision in the published rule that would have prevented application of the safe harbor if the party had violated a court order requiring preservation, noting that many comments had persuasively argued that the provision would create an incentive to obtain a preservation order to prevent operation of the safe harbor.⁴ *Id.*

to protect an entirely innocent party requesting discovery against serious prejudice arising from the loss of potentially important information.” *See* Civil Rules 2005 Report, *supra*, at 78; *see also* May 2005 Civil Rules Report, *supra*, at 89 (original, unrevised report of the Civil Rules Committee from May 2005, containing the same language on “exceptional circumstance” in the GAP report as the revised report included as an appendix to the Standing Committee’s report to the Judicial Conference).

It is worth noting, however, that it is not clear that the Advisory Committee, even before revision by the Standing Committee, intended exceptional circumstances to be limited to situations involving severe prejudice. The minutes of the Advisory Committee’s meeting after the public comment period closed seem to suggest that the “exceptional circumstances” phrase was merely meant to allow for some degree of flexibility. It was added in place of “ordinarily” at the beginning of the proposed rule. As published, the rule began, “Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions” After the public comment period, the Advisory Committee decided to abandon the provision excepting violation of a preservation order. During the course of its deliberations, a suggestion was made to have the rule state that “[o]rdinarily, a court may not impose sanctions” CIVIL RULES ADVISORY COMMITTEE, MINUTES, APR. 14–15, 2005, at 41 (2005), *available at* <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CRAC0405.pdf> [hereinafter CIVIL RULES MINUTES APR. 2005] (emphasis added). But “[o]rdinarily was questioned as not a good word, either in terms of general rule drafting or in terms of a rule that sets up a presumption.” *Id.* at 42. Then, “[d]rawing from Rule 11(c)(1)(A), it was suggested that it may be better to say ‘Absent exceptional circumstances.’” *Id.* The minutes do not mention “absent exceptional circumstances” necessarily meaning “severe prejudice.”

⁴Notably, the minutes of the Advisory Committee’s meeting following the close of the public comment period emphasize the Committee’s decision to have this amendment address the narrow issue of routine operation of an electronic information system, and not preservation issues generally. The minutes state:

A broader question was introduced: should the rule be revised to protect against sanctions imposed for failure to take reasonable steps to preserve information that was lost for reasons other than routine operation of an electronic storage system? The response was that a rule this broad would directly address the duty to preserve

In its report to the Standing Committee, the Advisory Committee set out examples of current systems that it thought would fall within the limited safe harbor, including: “programs that recycle storage media kept for brief periods against the possibility of a disaster that broadly affects computer operations; automatic overwriting of information that has been ‘deleted’; programs that change metadata (automatically created identifying information about the history or management of an electronic file) to reflect the latest access to particular electronically stored information; and programs that automatically discard information that has not been accessed within a defined period or that exists beyond a defined period without an affirmative effort to store it for a longer period.” *Id.* at 73. The Advisory Committee’s report clearly indicated that the Committee intended to encompass automatic features of electronic systems, rather than individual decisions to delete data. *See, e.g., id.* (“many database programs automatically create, discard, or update information without specific direction from, or awareness of, users”; “the proposed rule recognizes that such automatic features are essential to the operation of electronic information systems.”). This was confirmed in the Standing Committee’s report to the Judicial Conference, recommending the rule for final approval. *See* COMM. ON RULES OF PRACTICE AND PROCEDURE, EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE, TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, at 13 (Sept. 2005), available at

information. As much as many litigants would welcome an explicit preservation rule, the Committee has concluded that the difficulties of drafting a good rule would be so great that there is no occasion even to consider the question whether a preservation rule would be an authorized or wise exercise of Enabling Act authority.

CIVIL RULES MINUTES APR. 2005, *supra*, at 30.

http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/supct1105/Excerpt_STReport_CV.pdf [hereinafter STANDING COMM. REPORT SEPT. 2005] (“The proposed amendment to Rule 37(f) responds to a distinctive and necessary feature of computer systems — the recycling, overwriting, and alteration of electronically stored information that attends normal use. This is a different problem from that presented by information kept in the static form that paper represents; such information is not destroyed without affirmative, conscious effort. By contrast, computer systems lose, alter, or destroy information as part of routine operations, making the risk of losing information significantly greater than with paper.”).

Based on the history, I think it is safe to say that the Advisory Committee and the Standing Committee intended the addition of Rule 37(e) to address a very limited scenario — where the automatic features of an electronic system overwrite or otherwise destroy discoverable information without the party’s knowledge — thus providing a limited security to litigants that they will not be sanctioned for such unintentional destruction that would not have occurred in the paper world. *See* STANDING COMM. REPORT SEPT. 2005, *supra*, at 14 (“The proposed amendment provides limited protection against sanctions under the rules for a party’s failure to provide electronically stored information in discovery.”).⁵

II. The Application of Rule 37(e)

There are only a few cases in which Rule 37(e) can be said to have been truly applied by the

⁵The “legislative history” of the proposal repeatedly emphasizes that it is meant to protect parties from sanctions due to routine recycling, overwriting, or changed information due to the operation of an electronic storage system. At the same time, the advisory committee notes clearly indicate that litigation holds are often required in order for a party to comply with the good faith requirement. Courts seem to have struggled with reconciling the need for a litigation hold with the safe harbor for routine operation of an electronic information system. One possibility is that the amendment was meant to get at truly mistaken deletion, such as where a party institutes a litigation hold, but the electronic system nonetheless overwrites some relevant data.

court. See Philip J. Favro, *Sea Change or Status Quo: Has the 37(e) Safe Harbor Advanced Best Practices for Records Management?*, 11 MINN. J. L. SCI. & TECH. 317, 333 (2010) (“In very few instances have courts invoked the rule to shield parties from sanctions.”). The commentary published on the rule generally concludes that the rule has not been applied by courts in a way that provides much solace to those concerned about escalating costs associated with electronic discovery. See, e.g., Thomas Y. Allman, *Preservation Rulemaking After the 2010 Litigation Conference*, 11 SEDONA CONF. J. 217, 227–28 (2010) (noting that “some courts have interpreted an ambiguous Committee Note to Rule 37(e) as a mandatory duty to take specific action, regardless of the need to [do] so to effectuate preservation, thereby barring application of [the] Rule when a duty to preserve is identified and the action is not taken,” and concluding that “‘if the party cannot avail itself of the safe harbor because it had a duty to preserve data in the first instance, then Rule 37 does little to change the state of the pre-existing common law’” (quoting Emily Burns, Michelle Greer Galloway & Jeffrey Gross, *E-Discovery: One Year of the Amended Federal Rules of Civil Procedure*, 64 N.Y.U. ANN. SURV. AM. L. 201, 217 (2008))); Thomas Y. Allman, *Inadvertent Spoliation of ESI After the 2006 Amendments: The Impact of Rule 37(e)*, 3 FED. CTS. L. REV. 25, 26 (2009) [hereinafter Allman, *Impact of Rule 37(e)*] (“To say that Rule 37(e) has been met with intellectual disdain since its enactment is putting it mildly. To many it evokes ‘a low standard [which] seems to protect against sanctions only in situations where [they] were unlikely to occur.’ . . . Many commentators have characterized Rule 37(e) as ‘illusory’ and a ‘safe’ harbor in name only.” (alterations in original) (footnotes omitted)); John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 590–91 (2010) (“Although well-intentioned, this rule fails to provide adequate protection for a variety of reasons. First, it does not

account for the possibility that even the most careful attempts to locate and preserve electronic data may not succeed in preserving all potentially relevant information. For example, if a party deletes electronic data in good faith but not as part of routine operations, Rule 37(e) would not protect it. Second, the phrase ‘routine, good-faith operation of an electronic information system’ is too vague to provide clear guidance as to a party’s preservation obligations. It is unclear whether sanctions would be available against a party that fails to suspend a deleting or overwriting program that routinely rids the company’s information system of data that are not reasonably accessible. Third, the rule fails to explain what exceptional circumstances might warrant the imposition of sanctions even when data are lost through the routine, good-faith operation of a computer system. Finally, the rule applies only to parties, and thus provides no protection to nonparties, who play an increasingly important role in litigation.”); Robert Hardaway, Dustin D. Berger & Andrea Defield, *E-Discovery’s Threat to Civil Litigation: Reevaluating Rule 26 for the Digital Age*, 63 RUTGERS L. REV. 521, 566 (2011) (“[F]ederal courts have all but read this safe harbor provision out of the rules. They have generally concluded that once the duty to preserve arises—and it arises as soon as litigation becomes foreseeable—any deletion of relevant data is, by definition, not in good faith. These safety valve provisions not only fail to adequately control the costs associated with e-discovery, they sometimes increase it by fostering ancillary litigation on the producer’s entitlement to the protection of these safety valves.”);⁶ Andrew Hebl, *Spoilation of Electronically Stored Information, Good Faith, and*

⁶This article suggests several problems with the rule, including that a party seeking to rely on it “must show that it ‘act[ed] affirmatively to prevent the system from destroying or altering information, even if such destruction would occur in the regular course of business’”; that the rule contains an exception for exceptional circumstances; that the rule is limited to “‘sanctions under these rules’” and therefore probably does not protect a party from sanctions pursuant to inherent authority; and that the term “electronic information system” may limit protection if a litigant, as operator of the system, directed deletion through configuration or programming of the system. Hardaway et al., *supra*, at 586–87.

Rule 37(e), 29 N. ILL. U. L. REV. 79, 85 (2008) (“Despite the fact that courts should be prohibited from imposing sanctions for spoliation of electronically stored information which occurs after a preservation obligation has arisen, as a result of the good faith, routine operation of a party’s electronic information system, this has not been the case. Instead, courts have in some cases limited their analysis to whether a preservation obligation has arisen at all, imposing sanctions per se if one has, and failing to consider the extent to which a party acted in good faith or not.” (footnote omitted));⁷ John H. Jessen, Charles R. Kellner, Paul M. Robertson & Lawrence T. Stanley, Jr., *Digital Discovery*, MA-CLE 10-1 (2010) (arguing that courts have interpreted the advisory committee notes to mean that the rule is inapplicable once the duty to preserve arises and that “[i]n view of the lack of protection and clarity provided by Rule 37(e) and the cases construing the rule, a litigant is well served to use the procedures currently recognized by the courts as adequate steps for the preservation of electronic data”); Dan H. Willoughby, Jr., Rose Hunter Jones & Gregory R. Antine, *Sanctions for E-Discovery Violations: By the Numbers*, 60 DUKE L.J. 789, 791, 828 (2010) (“[T]he safe harbor provisions of Rule 37(e) of the Federal Rules of Civil Procedure have provided little protection to parties or counsel.”; “[T]he safe harbor was intended to provide limited protection, and it has. Parties or counsel seeking refuge from the increasing sanction-motion practice will be able to reach Rule 37(e)’s refuge only in very limited situations. Since the rule’s

⁷The author argues that this is “tantamount to strict liability, in that the state of mind of the spoliating party plays no role in determining whether sanctions should be imposed.” Hebl, *supra*, at 85. He also notes that “negligent conduct has been sufficient to support the imposition of sanctions, despite the fact that the rule clearly requires a reckless or intentional state of mind. As a result, concerns about the intersection of electronically stored information and spoliation are not being addressed, and Rule 37(e) has been rendered largely superfluous.” *Id.* He suggests that “courts have imposed sanctions for considerably less-culpable conduct than the rule was meant to target.” *Id.*

adoption, approximately two cases per year have met its requirements.”);⁸ Gal Davidovitch, Comment, *Why Rule 37(e) Does Not Create a New Safe Harbor for Electronic Evidence Spoliation*, 38 SETON HALL L. REV. 1131, 1131–32 (2008) (“Rule 37(e) will not, in most cases, offer any protection that the federal rules did not already provide. And in those few cases where 37(e) will deliver a novel safe harbor, it will be the result of a jurisdictional idiosyncrasy rather than the rule drafters’ policy.”);⁹ Nicole D. Wright, Note, *Federal Rule of Civil Procedure 37(e): Spoiling the Spoliation Doctrine*, 38 HOFSTRA L. REV. 793, 815 (2009) (“The language of Rule 37(e) is problematic because, once put into practice, it offers little constructive guidance as to precisely when a party will be relieved from sanctions due to its failure to produce evidence. Additionally, it provides the opportunity for corporate defendants to utilize the Rule’s safe harbor provision as a cushion and allow those who are ‘inclined to obscure or destroy evidence of any sort . . . to hide behind the shield of good faith and undue burden to protect themselves from sanctions.’” (footnote omitted) (omission in original));¹⁰ cf. Timothy J. Chorvat, *E-Discovery and Electronic Evidence in*

⁸The authors found that between the rule’s promulgation in 2006 and January 1, 2010, it had been cited in only 30 federal court decisions, three of which did not relate to discovery of ESI in civil cases, two of which involved paper documents, and one of which was a criminal case. Willoughby et al., *supra*, at 825. Of the remaining 25 cases, they found, at most, 7.5 that invoked Rule 37(e) to protect a party from sanctions. *Id.* In two of those cases, the court mentioned 37(e) and denied sanctions, but it was unclear whether the court relied on the rule in making its decision. *Id.* at 825–26.

⁹Davidovitch argues that the circumstances in which Rule 37(e) applies are quite narrow, especially when coupled with the “exceptional circumstances” exception, and that Rule 37 already included various requirements that effectively functioned similarly to the safe harbor created under Rule 37(e). Davidovitch, *supra*, at 1132. Nonetheless, Davidovitch believes that Rule 37(e) “is not entirely irrelevant” because “[i]t organizes the pre-existing exceptions into one rule and thus provides guidance to litigants and judges on how to deal with electronic information loss.” *Id.*

¹⁰Wright concludes that “[t]he absence of guidance for parties that are following document retention policies and for when a party may expect to incur spoliation sanctions leads one to believe parties are, in fact, worse off since Rule 37(e) was enacted.” Wright, *supra*, at 816. She argues: “In

the Courtroom, 17 BUS. L. TODAY 13, 15 (2007) (“Rule 37(f) will protect truly routine deletions of data such as when data in a computer’s RAM memory is erased and a file is saved to a hard disk, or when a file is moved from one storage medium to another. But those ‘routine, good-faith’ actions have not been the source of clients’ concern. If Rule 37(f) protects only conduct that never would have been sanctioned, then it is not a safe harbor in any useful sense.”); *but see* Favro, *supra*, at 319 (“[O]ne rule is helping to clarify preservation and production burdens for electronically stored information: Federal Rule of Civil Procedure 37(e).”). While the legal commentary has generally concluded that Rule 37(e) has had very minimal impact, Allman notes that “even if it were true that ‘Rule 37(e) [does] not, in most cases, offer any protection that the Federal Rules did not already provide,’ there is, as a member of the Advisory Committee noted at the time, a ‘real benefit in reassuring parties that if they respond to [challenges] reasonably, they will be protected.’” Allman, *Impact of Rule 37(e)*, *supra*, at 37 (alterations in original) (footnote omitted).

A. Cases Applying or Influenced by Rule 37(e)

Only a handful of cases seem to have been directly influenced by Rule 37(e) in precluding sanctions.¹¹ Even in those cases, it is not clear that the result would have been different without the

light of the multitude of factors to be taken into account, Rule 37(e) is ineffective. The considerations that a court must make prior to imposing sanctions on a party already encompass the concern that fueled the implementation of the Rule, rendering it unnecessary. Therefore, Rule 37(e) should be removed from the FRCP.” *Id.* at 820. She concludes that “the Rule, as evidenced in its interpretation and application, does no more than reiterate the policies behind the traditional spoliation doctrine,” and that as a result “Rule 37(e) should be removed from the FRCP, and the traditional spoliation doctrine should instead govern the imposition of these sanctions.” *Id.* at 823–24.

¹¹The cases that seem to have applied Rule 37(e) most directly include *Kermode v. University of Mississippi Medical Center*, No. 3:09-CV-584-DPJ-FKB, 2011 WL 2619096 (S.D. Miss. Jul. 1, 2011), *Miller v. City of Plymouth*, No. 2:09-CV-205 JVB, 2011 WL 1458491 (N.D. Ind. Apr. 15, 2011), and *Olson v. Sax*, No. 09-C-823, 2010 WL 2639853 (E.D. Wis. Jun. 25, 2010).

rule. A number of other cases have discussed the rule or been influenced by it, but have not seemed to directly apply it. The cases purporting to directly apply the rule or to have been influenced by it are described below in reverse chronological order.

2012 Cases

In *FTC v. Lights of America Inc.*, No. SACV 10-1333 JVS (MLGx), 2012 WL 695008 (C.D. Cal. Jan. 20, 2012), the court found Rule 37(e) inapplicable because there was no court order, but precluded sanctions pursuant to inherent authority, with reference to Rule 37(e). The defendants sought terminating sanctions or an adverse inference for the plaintiff's failure to institute a litigation hold when litigation became reasonably foreseeable, including failure to suspend the plaintiff's 45-day auto-delete policy for all email. *Id.* at *1, *3. The court noted that the defendants "have not asserted that the FTC failed to obey a discovery order. Absent a failure to obey a discovery order, the Court does not have authority under Rule 37 to sanction a party." *Id.* (citing *Kinnally v. Rogers Corp.*, 2008 WL 4850116 (D. Ariz. Nov. 6, 2008)). The court concluded that the motion was governed by the court's inherent authority to sanction. *Id.* Nonetheless, the court stated that "given that the Rule 37 sanctions and sanctions levied under the Court's inherent power both analyze the same factors, the Court finds case law regarding Rule 37 sanctions persuasive." *Id.* at *2 n.3. The court concluded that the FTC's e-discovery policy, which provides that relevant ESI must be preserved in an archive, while duplicates must be deleted, was consistent with its duty to preserve relevant material. *Id.* at *5. The court then noted that "to the extent that the auto-delete policy caused the inadvertent loss of any relevant email correspondence, that is not a sanctionable offense," and cited Rule 37(e). *FTC*, 2012 WL 695008, at *5. The court explained that Rule 37(e) "instructs that "[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the *routine, good-faith*

operation of an electronic information system,” id. (alteration in original), and concluded that “[s]imilarly, the inadvertent deletion of some emails due to the good-faith operation of an electronic information system is not a ground for issuing [] sanctions under this Court’s inherent power to sanction,” *id.* There was no evidence that the plaintiff’s retention policy was operated in bad faith, and “[t]he auto-delete system is a function of the computer information system’s finite storage capacity and the desire to avoid needless retention of documents, which slows the system.” *Id.* The court did not refer to the advisory committee note’s reference to the possible need to suspend auto-delete functions if they are likely to result in the destruction of discoverable ESI.

2011 Cases

In *Webb v. Jessamine Cty. Fiscal Court*, No. 5:09-CV-314-JMH, 2011 WL 3652751, at *5 (E.D. Ky. Aug. 19, 2011), the court denied a request for sanctions based on the loss of video recordings because there was no bad faith and the duty to preserve did not arise until the suit was filed a year later. The court found that its decision was further supported by Rule 37(e) because the recordings were overwritten in the normal course of business after three months due to limited storage space, and “[a]s a result, these recordings were lost ‘as a result of the routine, good-faith operation of an electronic information system.’” *Id.* at *6. The court then noted, however, that even assuming the plaintiff could have shown that the defendant had a duty to preserve evidence, the recordings at issue would not have been relevant because they would have captured activity in areas that had no bearing on the plaintiff’s claims. *Id.* at *6 n.6.

In *Kermode v. University of Mississippi Medical Center*, No. 3:09-CV-584-DPJ-FKB, 2011 WL 2619096 (S.D. Miss. Jul. 1, 2011), the court relied on Rule 37(e), at least in part, to preclude sanctions for automatic email purging. The plaintiff requested default judgment as a sanction for the defendants’ alleged failure to preserve certain email communications, failure to produce others

in native format as part of the defendants' pre-discovery disclosures, and failure to produce the emails in response to written discovery requests. *Id.* at *2. The court first noted that the sanctions request faced several procedural hurdles, including that it was raised after the close of discovery and after the motions deadline expired, and that it violated both local and national rules. *Id.* at *2–3. Besides the procedural defects, the court noted that Rule 37(e) presented “a more serious impediment” to the motion for sanctions because “the subject e-mails were apparently deleted as part of the e-mail system before reason existed to preserve them in another format.” *Id.* at *3. As a result, the court concluded that “Rule 37(e) sanctions [we]re not available.” *Id.* Although the court stated that Rule 37(e) precluded the default judgment, it is unclear that Rule 37(e) necessitated this result. First, since the court noted that the emails were deleted before a reason to preserve them existed, it is unclear that sanctions could be imposed anyway. Rule 37(e) presumably provides some protection after the duty to preserve has arisen; the common law generally precludes sanctions for failure to preserve before the duty to preserve arises. Second, it seems likely that the denial of sanctions would have occurred in any event in this case because of the procedural defects in the plaintiffs' motion.

The *Kermode* court also considered an alternative request for an evidentiary hearing, and ultimately an adverse inference, but concluded that neither prong of the spoliation test in the Fifth Circuit had been met because the plaintiff failed to show either that there were any missing relevant emails or that the defendants acted in bad faith. *Id.* at *4. The court noted that the plaintiff “acknowledges facts establishing that Defendants' duty to preserve electronically stored information did not arise until after much of the information had been automatically deleted from the University's e-mail server.” *Kermode*, 2011 WL 2619096, at *5. The potentially missing emails would have been in the time period of June or July 2008, at which time the defendants' email system

automatically deleted emails that were not saved after 60 days. *Id.* The court determined that the very earliest the defendants would have anticipated litigation would have been September 2008, and concluded that “it does not appear the e-mails in question—if they ever existed—would have survived the automatic purging.” *Id.* The court concluded that even if a litigation hold had been immediately implemented at the time litigation was anticipated, it would only have preserved emails from the end of July 2008 and later. *Id.* The court held that “[s]ince the events of which Park complained transpired prior to this date, the allegedly relevant correspondence would have already been deleted.” *Id.* Notably, however, the court’s discussion of this automatic deletion was in the context of its determination that there was no bad faith, as required under Fifth Circuit law to impose an adverse inference, and did not reference Rule 37(e). It is unclear that Rule 37(e) could have had much force here, since the court determined that the alleged deletion occurred before a duty to preserve existed. Presumably destruction before the duty to preserve exists is protected behavior with or without Rule 37(e).

In *Miller v. City of Plymouth*, No. 2:09-CV-205 JVB, 2011 WL 1458491 (N.D. Ind. Apr. 15, 2011), Rule 37(e) seemed to make a difference in the court’s decision not to impose sanctions. In that case, the plaintiffs filed a suit based on a 2008 incident in which a police officer pulled over and detained the plaintiffs while using a dog to search their car and person for contraband. The court ordered the defendants to produce any reports and audio or video recordings detailing incidents where the officer had ordered his dog to sniff a detained vehicle since January 1, 2004. *Id.* at *2. The police department apparently had a video recording policy that dated back to 1993, when VHS cassettes were still used. *Id.* That policy required officers to retain recordings for at least seven days, after which they could be reused. “If an officer believed the tape would be useful ‘in the judicial process,’ the officer could choose to save the video.” *Id.* In 2006, the police department

began using digital recording systems instead of VHS devices, but the digital recording system frequently malfunctioned. *Id.* The officer involved in the incident at issue did preserve a DVD copy of the plaintiff's traffic stop. The system in his car worked by continuously recording onto an embedded hard drive, which automatically burned video footage onto a DVD every time the officer turned on his police lights. *Id.* When the DVD was full, the system asked the user if he wished to save the entries made on the DVD or reformat the disk, which would erase the content and allow the DVD to be reused. *Miller*, 2011 WL 1458491, at *2. Although the hard drive could store up to 30 days of traffic stops, the DVD could be filled in a single shift. *Id.* At some point in 2010, the officer's camera malfunctioned and thereafter only worked off and on. *Id.* The police department installed a new video system, and the officer testified that he did not have any video recordings dating back to 2004. *Id.*

The plaintiffs argued that the magistrate judge's order denying sanctions was erroneous "because the recording device in this case did not *automatically* record over previously stored videos. Rather, the hard drive was knowingly and willfully 'reformatted' . . . at the prompting of the equipment operator." *Id.* at *3 (omission in original). The plaintiffs further asserted that the defendants were precluded from using Rule 37(e)'s safe harbor because "the choice not to burn relevant video footage to DVD was a policy, practice, or custom of the Defendants, not a routine operation of an electronic information system." *Id.* The court rejected this interpretation of Rule 37(e) as too narrow, noting that the advisory committee's note to Rule 37(e) "explain[s] that the routine operation of computer systems 'includes the alteration and overwriting of information, often without the operator's specific direction or awareness,'" and that "[s]uch features are essential to the operation of electronic information systems." *Miller*, 2011 WL 1458491, at *3 n.1. The court noted that in this case, "it was essential to the operation of Defendants' cameras that the user either

save the recordings on the DVD or rewrite the information on it.” *Id.* The court found that “by noting that routine operations ‘often’ occur without the operator’s specific direction, the drafters acknowledge[d] that ‘routine operations’ can still occur despite the direct involvement of a system user.” *Id.* The court rejected the plaintiff’s argument that the camera user’s minimal involvement took the loss of electronic information outside of Rule 37(e). *Id.* The court concluded that the defendants had not acted in bad faith, explaining that they “kept no ‘video library’ of past police stops, and its policy since the early 1990s had been to record over old footage—except when an individual officer exercised her discretion to preserve the footage. Thus, pursuant to departmental policy, the Defendants recorded over some of the desired footage long before Plaintiffs’ stop on May 18, 2008.” *Id.* at *4. The court further emphasized that the magistrate judge had noted that the defendants had no control over the fact that the hard drives were recorded over every 30 days and that there was no evidence that any DVD copies were destroyed. *Id.* at *5.

Although the *Miller* court rejected the argument that Rule 37(e) did not apply, it is not clear that the rule was necessary to the result. The opinion indicates that the tape of the incident itself had been preserved (and that there was no evidence that any DVDs were destroyed), so presumably the plaintiffs sought sanctions based on the defendants’ inability to comply—due to the automatic overwriting of hard drives every 30 days—with the court’s order to produce recordings from incidents dating back to 2004. But it is unclear that there would have been any obligation to preserve recordings before the incident in question, at which time the failure to save the recordings would have arguably been protected behavior even without Rule 37(e).¹² Perhaps Rule 37(e)

¹²The fact that Rule 37(e) operates only for sanctions issued under the rules, which in turn require the violation of a court order, supports the conclusion that Rule 37(e) was not meant to operate before the preservation duty arose. That is, Rule 37(e) seems to come into play only after the violation of a court order, which would not occur before the duty to preserve arose. *See* Civil

operated to protect the later destruction of hard drives that occurred after the court's order in 2010, or after a 2009 post-suit letter from the plaintiff requesting any video evidence the department had of the officer and his dog.

2010 Cases

In *Streit v. Electronic Mobility Controls, LLC*, No. 1:09-cv-0865-LJM-TAB, 2010 WL 4687797 (S.D. Ind. Nov. 9, 2010), the court found that Rule 37(e) precluded sanctions where electronic data was inadvertently deleted, without any bad faith. The case involved a car accident in which a vehicle control system manufactured by the defendant allegedly malfunctioned. *Id.* at *1. The vehicle control system had a “black box” that logged data from the system in two different ways.

The operations log records all “events,” such as a problem with the wiring of the steering system, a low battery, or an impact to a vehicle. The datalogger continuously records all of the vehicle control system's inputs and outputs, including all events recorded in the operations log.

When the datalogger detects an event, it stores the corresponding data on a block. At any time, there are fifteen blocks in which data is stored temporally. The datalogger is refreshed by a three block rotation that consists of 1) the oldest block, which is overwritten, 2) the block that is in use, and 3) the block that was previously in use. If an impact, or “G-event,” is detected, the corresponding block is locked, so that it cannot be overwritten.

Id. (internal citations omitted). The defendant's practice after an accident involving a vehicle equipped with the control system was to download the vehicle's datalogger. *Id.* After the incident

Rules 2004 Report, *supra*, at 18 (“[P]roposed Rule 37(f) addresses only sanctions under the Civil Rules and applies only to the loss of electronically stored information after commencement of the action in which discovery is sought. The proposed amendment does not define the scope of a duty to preserve and *does not address the loss of electronically stored information that may occur before an action is commenced.*” (emphasis added))

at issue, one of the defendant's employees attempted to start the vehicle a number of times because the battery was very low. *Id.* However, every time a vehicle with this system starts, the datalogger grabs the oldest of the three blocks in rotation and, if an event occurs, overwrites the oldest block with new data. *Id.* In this case, because the vehicle had a low battery, every time the employee attempted to restart the vehicle, the datalogger recorded the event of the low battery. *Streit*, 2010 WL 4687797, at *1. As a result, the blocks that would have recorded all events and inputs and outputs more than about 2.5 minutes before the accident were overwritten. *Id.* But the block recording any events within 2.5 minutes of the accident and the accident itself were not overwritten. *Id.* It was undisputed that any event that occurred before the accident would have been recorded in the operations log, which was fully preserved and produced. *Id.* There were no events recorded on the operations log before the accident, but the plaintiff alleged that at some point before the accident, she pulled her vehicle over because the steering felt abnormal. *Id.* at *1–2. The plaintiff alleged that the defendants intentionally deleted information from the vehicle's datalogger, specifically the information from when the plaintiff pulled her vehicle over after feeling a steering abnormality. *Id.* at *2. The defendant argued that the information on the datalogger was overwritten during the ordinary course of recovery procedures and that the only relevant information would have been an “event,” which would have been preserved on the operations log. *Streit*, 2010 WL 4687787, at *2.

The court stated that federal law applied and was “mindful” of Rule 37(e). *Id.* at *2. The court stated that bad faith was required to impose sanctions for destruction of ESI, and that bad faith means destruction for the purpose of hiding adverse information, but it was not clear if this was based on Rule 37(e) or the common law. *See id.* The court noted in a footnote after its citation to Rule 37(e) that “[o]f course, the Court's power to sanction is inherent and, therefore, not governed

by rule or statute.” *Id.* at *2 n.1. The court concluded that the request for sanctions failed because the plaintiffs had not shown bad faith. Specifically, the plaintiffs had not shown that the defendant instructed its employee to start and restart the vehicle, much less that it did so with the intent to overwrite data, or that the datalogger would have recorded the alleged steering malfunction, when it was not recorded in the operations log. *Id.* While the court seemed influenced by Rule 37(e), it seems likely that the court would have reached the same result even without the rule because it implied that it was not bound by the rule and seemed to require bad faith regardless of the safe harbor in the rule.

In *Coburn v. PN II, Inc.*, No 2:07-cv-00662-KJC-LRL, 2010 WL 3895764 (D. Nev. Sept. 30, 2010), the court awarded monetary sanctions for spoliation, but also found that certain behavior did not warrant sanctions, relying in part on Rule 37(e). The plaintiff had engaged in various acts of alleged spoliation. First, in analyzing the plaintiff’s home computer pursuant to a court order, the forensic expert found that the computer’s operating system had overwritten portions of files and data, and the expert suggested that some of the files were deleted by CCleaner, but that it was likely that many of the files had been manually deleted. *Id.* at *1. The expert’s report indicated that CCleaner was run on the plaintiff’s computer two days before the court-ordered forensics examination and that the default configuration settings were manually modified at that time. *Id.* at *2. The program was not set to run automatically and had only been run twice since its installation two years earlier. *Id.* The plaintiff asserted that she did not even know CCleaner existed on her computer until after the forensic exam, after which she learned it was installed as part of service package she purchased. *Id.* The defendants sought sanctions on the basis of the running of CCleaner just before the forensics exam; the existence on the plaintiff’s computer of nearly 4,000

“non-standard files” containing keywords relevant to litigation, allegedly indicating that the plaintiff had regularly destroyed evidence; and the alleged destruction of relevant emails on the plaintiff’s home computer. *Id.* The plaintiff argued that she never deleted a large volume of files from her computer and that the normal operation of CCleaner would be protected under Rule 37(e). *Coburn*, 2010 WL 3895764, at *2.

The court noted that monetary sanctions are available either under Rule 37(b) or the court’s inherent authority, and that willfulness is not required to impose monetary sanctions under Rule 37, but bad faith is required to use inherent authority to sanction. *Id.* at *3. The court noted that Rule 37(e) provides a “safe harbor” for failure to provide ESI, and explained that “[t]he destruction of emails as part of a regular good-faith function of a software application may not be sanctioned absent exceptional circumstances.” With respect to the running of CCleaner two days before the forensic exam, the court declined to impose sanctions because there was no evidence that the plaintiff had run it herself or directed someone else to do so, and therefore the court could not conclude that the plaintiff “destroyed relevant evidence ‘in bad faith, vexatiously, wantonly, or for oppressive reasons.’” *Id.* at *4 (citation omitted). The quoted language was from a case the court cited for the prerequisites to using its inherent powers to sanction, and the court did not cite Rule 37(e) in this section of its opinion.

The court also denied sanctions based on the existence of nearly 4,000 irregular files on the plaintiff’s computer. The plaintiff submitted expert testimony that “while many such files are technically ‘intentionally deleted,’ they are not necessarily *volitionally* deleted; meaning that the computer may delete the files without any user intervention.” *Id.* at *5. The court concluded that levying sanctions based on the irregular files “would be to levy sanctions on the basis of an

evidentiary estimate or ‘hunch.’” *Id.* With respect to the deleted emails, the plaintiff testified that she regularly sent email from her work email to her home email, and that her practice was to download whatever files she sent to her home computer and then delete the email and any duplicative files. *Id.* at *6. Although the emails were deleted, it was undisputed that the files themselves were saved and produced. *Coburn*, 2010 WL 3895764, at *6. The court acknowledged that the wiser decision would have been not to delete the emails and that this was a close case, but given that the information was actually produced in the form of the files saved on the plaintiff’s hard drive, the court found sanctions to be unwarranted. The court did impose sanctions for the plaintiff’s destruction of audio tapes of conversations with co-workers, which was allegedly done because the tapes were of poor quality. *Id.* at *7. The court found no bad faith in the destruction, even though it was done intentionally, and awarded attorneys’ fees as a sanction, pursuant to its inherent authority. In sum, although the court discussed Rule 37(e) in its discussion of the legal standards, it did not seem to actually apply it.

In *Olson v. Sax*, No. 09-C-823, 2010 WL 2639853 (E.D. Wis. Jun. 25, 2010), the court applied Rule 37(e) to preclude sanctions for routine overwriting of surveillance video. In that employment discrimination suit, the plaintiff filed a motion for sanctions, accusing the defendant employer of failing to preserve a video tape, made just over a week before the plaintiff’s termination, of her alleged theft of property from the employer. *Id.* at *1. The video tape was created on July 22, 2008; the plaintiff was terminated on July 31, 2008; and the plaintiff requested to see the videotape on the day of her termination. *Id.* Her attorney also requested the tape through formal discovery requests, although the date of that particular request was unclear. *Id.* The plaintiff requested that the defendants be barred from producing any evidence of the alleged theft and an

award of expenses incurred in bringing the sanctions motion, unless the defendants showed good cause for the destruction. *Id.* The defendants invoked Rule 37(e), arguing that the court could not impose sanctions where ESI was lost as the result of the routine, good faith operation of an electronic storage system. *Id.* Specifically, the defendants stated that they were not aware of the possibility of litigation until February 24, 2009, when they received a letter from the plaintiff's attorney, but that the video was created using a recorder that recorded footage on a 500 gigabyte hard drive that holds about 29 days of video and records in a loop. *Olson*, 2010 WL 2639853, at *1. Once the hard drive is full, it records over the oldest footage. *Id.* The defendants argued that the alleged theft would have been recorded over around August 20, 2008, well before the letter from the plaintiff's attorney. *Id.* The defendants "assert that the subject video recording was recorded over as a part of Goodwill's routine good faith operation of its video electronic system—a system that is in place at all Goodwill retail stores and is commonly used throughout the retail industry." *Id.*

The *Olson* court noted that the common law required "wilfulness, bad faith or fault" in order to impose sanctions, and that Rule 37(e) precluded sanctions for failing to provide ESI lost as the result of routine, good-faith operation of an electronic storage system. *Id.* at *2. But after citing Rule 37(e), the court stated that "[t]he rules do not state the limits of judicial power . . . [j]udges retain authority, long predating the Rules of Civil Procedure." *Id.* at *2 n.1 (alterations and omission in original) (citing *Langley by Langley v. Union Elec. Co.*, 107 F.3d 510, 514 n.4 (7th Cir. 1997)). The court then stated that bad faith was required, but did not clarify whether the bad faith was required as a prerequisite to precluding application of Rule 37(e) or as a prerequisite to using inherent authority to sanction under the common law. *See Olson*, 2010 WL 2639853, at *2. The court concluded that the defendants were aware of possible litigation by August 11, 2008, and that

as of that date, the video recording had not been overwritten and the defendants had a duty to preserve the evidence. *Id.* But the court denied sanctions because of Rule 37(e), stating:

Nonetheless, the only evidence before the Court indicates that the recording over of the video record from July 22, 2008, was part of Goodwill's routine good faith operation of its video system. There is no evidence that Goodwill engaged in the "bad faith" destruction of evidence for the purpose of hiding adverse evidence. *See Trask-Morton*, 543 F.3d at 681. Therefore, pursuant to Rule 37(e) of the Federal Rules of Civil Procedure, the Court denies Olson's motion for sanctions. Neither party is awarded the fees and expenses incurred with respect to the motion.

Id. at *3.¹³

2009 Cases

In *Mohrmeyer v. Wal-Mart Stores East, L.P.*, No. 09-69-WOB, 2009 WL 4166996 (E.D. Ky. Nov. 20, 2009), the court analogized to Rule 37(e) in finding that the destruction of temporary documents before litigation did not warrant sanctions. The case arose out of a slip-and-fall accident in a Wal-Mart store, which was alleged to have resulted from Wal-Mart's negligent failure to maintain the restroom. *Id.* at *1. Wal-Mart had a practice of maintaining a log or chart of maintenance and inspection of the restroom, but the log was not ordinarily preserved in the ordinary course of business and was destroyed on a weekly basis. *Id.* Wal-Mart asserted that it destroyed the log at issue long before it became aware of the possibility of litigation from the fall. *Id.* The court stated:

The law does not and should not require businesses to preserve any

¹³Although the court purported to apply Rule 37(e) to preclude sanctions, it is unclear whether the result would have been different in the absence of the rule, given the court's note that it was not bound by the rules in terms of imposing sanctions and its imposition of a bad faith requirement under the common law. On the other hand, perhaps Rule 37(e) operated to preclude sanctions under the rules, while the common law's bad-faith requirement operated to preclude sanctions under inherent authority.

and all records that may be relevant to future litigation for any accidental injury, customer dispute, employment dispute, or any number of other possible circumstances that may give rise to a claim months or years in the future, when there is absolutely no contemporaneous indication that a claim is likely to result at the time records are destroyed pursuant to a routine records management policy.

Id. at *2. Because the log was a temporary document that was routinely discarded on a weekly basis, the court found no basis for imposing sanctions for its destruction. The court rejected the plaintiff's reliance on a Sixth Circuit case that held: "It is beyond question that a party to civil litigation has a duty to preserve ESI when that party has notice that the evidence is relevant to litigation or should have known that the evidence may be relevant to future litigation." *Id.* at *3 (quoting *John B. v. Goetz*, 531 F.3d 448 (6th Cir. 2008)). The court concluded that "[i]t is debatable whether the principle recently articulated by the Sixth Circuit in *Goetz* concerning ESI can be generalized to establish a broader pre-litigation 'duty to preserve' all evidence no matter how speculative future litigation may be," and that a narrow reading of that case was suggested by Rule 37(e). *Mohrmeyer*, 2009 WL 4166996, at *3. The court held that "[b]y analogy, it would be improper for this court to impose any type of sanction upon Walmart on the facts presented, where evidence was discarded as a result of its routine good-faith records management practices long before Walmart received any notice of the likelihood of litigation." *Id.* The court emphasized that it was not implying that formal notice of litigation is required in every case before the duty to preserve arises, but was "merely hold[ing] that on the facts presented, the 'trigger date' requiring Walmart to preserve evidence arose well after [the date the log was destroyed]." *Id.* at *3 n.1. While Rule 37(e) seemed to support the court's determination not to award sanctions, it seems likely that the result would have been the same even without that rule. The court seemed to frame its

holding in terms of when the duty to preserve arose, not in terms of destruction of ESI after the duty arose, and it is not clear that the log at issue was electronically stored.

In *Southeastern Mechanical Services v. Brody*, No. 8:08-CV-1151-T-30EAJ, 2009 WL 2242395, at *1 (M.D. Fla. Jul. 24, 2009), the defendant alleged spoliation based on the plaintiff's failure to suspend the automatic overwriting of its backup tapes that archive employee emails and other electronic information. The plaintiff's company policy was to retain emails on its server until an employee deletes the emails, to backup the server daily to backup tapes, and to overwrite the backup tapes every two weeks. *Id.* After Brody, a defendant and former employee of the plaintiff, had his last day of employment with the plaintiff, the plaintiff inspected Brody's account and discovered that emails, contacts, and tasks were deleted from his computer. *Id.* The plaintiff waited more than two weeks after Brody's departure before checking the backup tapes of Brody's account. *Id.* The defendants argued that the plaintiff spoliated evidence by failing suspend the automatic overwriting of the backup tapes, which destroyed the only evidence of the plaintiff's claim that Brody improperly deleted data from his work computer before his termination. *Id.* The plaintiff argued that it did not act in bad faith in failing to retain its backup tapes and that the automatic overwriting was part of its regular data management policy. *Id.* at *2. The court noted that bad faith is required to impose sanctions pursuant to its inherent authority. *S.E. Mech. Servs.*, 2009 WL 2242395, at *2. It also noted that Rule 37 provides authority for imposing sanctions for failure to comply with the court's rules, and that Rule 37(e) provides a limited safe harbor for failure to preserve ESI. *Id.*

The court held that the plaintiff had a duty to turn off the overwriting function at least by the time it received a demand letter a week after Brody's termination. *Id.* at *3. Despite finding it

“baffling” that the plaintiff would not have put a litigation hold in place that would have suspended the overwriting of the backup tapes a week after the termination, the court found no sanctions were appropriate because the automatic overwriting did not involve bad faith and “was part of the company’s routine document management policy.” *Id.* The court then noted that “[i]n accordance with the traditional view that spoliation must be predicated on bad faith, Rule 37(e) sanctions have been deemed inappropriate where 1) electronic communications are destroyed pursuant to a computer system’s routine operation and 2) there is no evidence that the system was operated in bad faith.” *Id.* (citing *Escobar v. City of Houston*, No. 04-1945, 2007 WL 2900581, at *18 (S.D. Tex. Sept. 29, 2007)).¹⁴ Thus, the court cited Rule 37(e) in support of its conclusion that no sanctions were warranted, but it seems to have reached its conclusion first based on the common law requirement in its circuit of bad faith to impose spoliation sanctions, presumably pursuant to inherent authority.

In *In re Kessler*, No. 05 CV 6056(SJF)(AKT), 2009 WL 2603104, at *3 (E.D.N.Y. Mar. 27, 2009), the court implicitly applied Rule 37(e) in rejecting, on de novo review, the magistrate judge’s award of attorneys’ fees for the negligent destruction of video footage. That case arose out of a fire on a vessel that was docked at a marina. *Id.* at *1. The petitioner sought sanctions based on the marina’s destruction of a critical video tape showing the main dock where the vessel was docked just before the fire. *Id.* at *4. The marina used a digital video recorder that recorded data from the

¹⁴ See also *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 628 n.13 (D. Colo. 2007) (“Consistent with this general rule [that ‘[a] litigation hold does not apply to inaccessible back-up tapes . . . which may continue to be recycled on the schedule set forth in the company’s policy’], newly enacted Rule 37(f) provides limited protection against sanctions where a party fails to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system” (quoting *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 431 (2007) (alterations and omission in original))). This statement seems to imply that routine deletion of backup tapes amounts to routine operation of an electronic storage system.

camera onto a hard drive. *Id.* at *16. Once the hard drive was full, which occurred every 24 hours, the hard drive overwrote the old data in recording new data. *Id.* The marina did not do anything to preserve the footage from the day of the fire and it was taped over in the normal course of the video camera's operation. *Id.* The magistrate judge noted, without explanation, that Rule 37(e) was not applicable to preclude sanctions where surveillance video had been overwritten in the normal course of business, but found it useful to determine the steps necessary to preserve electronic evidence. *Kessler*, 2009 WL 2603104, at *18. The magistrate judge declined to impose an adverse inference instruction because the proponent had failed to show bad faith, but found that the opponent's negligent conduct warranted monetary sanctions, including an award of attorney's fees in connection with the motion for sanctions and the cost of a forensic examination of the surveillance system to determine if any lost data could be retrieved. *Id.* at *20. The district court rejected the portion of the magistrate judge's report and recommendation that awarded attorney's fees as a sanction. The court concluded: "Petitioner has not met his burden of showing that the Marina 'had an obligation to preserve [the surveillance footage], acted culpably in destroying it, and that the [surveillance footage] would have been relevant to [Petitioner's] case.'" *Id.* at *3 (alterations in original) (citation omitted). The court further explained that "the surveillance footage from the date of the fire self-destructed approximately twenty-seven (27) hours after it was recorded" "[i]n accordance with the routine operation of the Marina's surveillance system." *Id.* The court did not cite Rule 37(e) in coming to this conclusion, but may have implicitly accepted it in rejecting the portion of the magistrate judge's opinion that rejected the application of the rule. Nonetheless, the court's notation that there was no obligation to preserve, no culpability in destruction, and no showing of relevance, coupled with its lack of citation to Rule 37(e), suggests that the court would have reached the same

conclusion even without the existence of Rule 37(e).

2008 Cases

In *Liquidating Supervisor for Riverside Healthcare, Inc. v. Sysco Food Services of San Antonio, LP (In re Riverside Healthcare, Inc.)*, 393 B.R. 422 (Bankr. M.D. La. 2008), the court declined to sanction the routine deletion of email. In that case, the plaintiff alleged that the defendant's deletion of email relating to the defendant's dealings with the debtors supported an adverse inference sanction. *Id.* at 428. The court noted that the Fifth Circuit requires a showing of bad faith to impose an adverse inference instruction and that the plaintiff did not prove that the defendant intentionally deleted or allowed deletion of email to frustrate litigation. *Id.* Instead, the email was deleted routinely before the lawsuit, pursuant to the computer system's routine deletion of email after 60 to 90 days (and retention of deleted email on the server for an additional 14 days). *Id.* at 429. By the time the defendant had been joined as a party, the email from the relevant time period had been deleted pursuant to the automatic deletion routine. *Id.* The plaintiff also complained that it could not get email from a particular employee's work station, but because the employee testified that her hard drive had failed and was replaced three times since the relevant bankruptcy filing, the court concluded that the loss of information "was not the result of SSA's 'fraudulent intent and a desire to suppress the truth.'" *Id.* (citing *Consol. Aluminum v. Alcoa*, 244 F.R.D. 335, 343-44 (M.D. La. 2006)). The court also noted that the plaintiff had not shown prejudice. *Riverside Healthcare*, 393 B.R. at 429. Because the plaintiff failed to show bad faith, the court concluded that sanctions were not warranted. *Id.* at 430. The court noted in a footnote that Rule 37(e) limits the ability to sanction "where loss of information results from good faith operation of [an] electronic information system," but did not seem to rely on that provision to preclude

sanctions. *See id.* at 429 n.21.

In *Gippetti v. United Parcel Service, Inc.*, No. C07-00812 RMW (HRL), 2008 WL 3264483 (N.D. Cal. Aug. 6, 2008), the court rejected sanctions when certain records were destroyed under the party's routine document retention policy. In that case, the plaintiff sued for employment discrimination and sought production of tachograph records for other UPS drivers, which show a vehicle's speed and the length of time it is moving or stationary. *Id.* at *1. UPS produced some of these, but many had been destroyed under its policy of preserving such records for only 37 days due to the large volume of data. *Id.* The court rejected sanctions for this destruction, finding that the records were not clearly relevant, that there was no clear notice to the defendants to preserve the tachograph records of other employees, and that the plaintiff was not prejudiced by destruction as similar information was available through the production of other employees' time cards. *See id.* at *3–4. The court concluded that the record “shows only that the tachographs were maintained and then destroyed several years ago in the normal course of UPS's business in accordance with the company's document retention policy.” *Id.* at *4. In the “legal standards” section of the opinion, the court mentioned the ability to sanction pursuant to its inherent authority, but did not mention sanctioning power under Rule 37. *See id.* at *2. The court noted that bad faith was not required for sanctions, but that the party's degree of fault was relevant to what sanction should be imposed. *Gippetti*, 2008 WL 3264483, at *2. The court cited common law for these principles, but added a “see also” citation to Rule 37(e) in support of its statement that the degree of fault is relevant to the determination of the sanction imposed. *Id.* The court did not mention Rule 37(e) anywhere else in the opinion. The court may have been influenced by Rule 37(e) in its decision not to impose sanctions where documents were destroyed under a routine document retention policy, but given the

court's findings of lack of relevance, prejudice, duty to preserve, and culpability, it seems quite likely that the same result would have occurred without Rule 37(e).

2007 Cases

In another case, the court deferred a sanctions motion based on an entire year's worth of emails lost due to a server move, but noted that Rule 37(e) requires good faith, which depends on the circumstances. *See U&I Corp. v. Adv. Med. Design, Inc.*, No. 8:06-CV-2041-T-17EAJ, 2007 WL 4181900, at *5–6 (M.D. Fla. Nov. 26, 2007). The court deferred a decision on the request for sanctions because it lacked information on whether the computer error that caused the lost emails was made in good faith and whether the emails were truly forever lost. *Id.* Because Rule 37(e) requires good-faith operation, which in turn depends on the circumstances of each case, the court could not yet determine whether sanctions were warranted, although it did leave open the possibility of Rule 37(e) precluding sanctions if the emails were lost in good faith. *Id.* at *6.

In *Escobar v. City of Houston*, No. 04-1945, 2007 WL 2900581 (S.D. Tex. Sept. 29, 2007), the court denied sanctions for the loss of emails, but it was unclear whether this was based on the Fifth Circuit's requirement of bad faith for imposing an adverse inference or based on Rule 37(e). The lawsuit arose out of a city police officer's deadly shooting of a teenage boy. The plaintiffs alleged that the City failed to preserve records of the police department's electronic communications in the 24 hours after the death. *Id.* at *17. The plaintiffs argued that they notified the City of their claim within 60 days of the shooting and that the police department's policy was to keep "mobile digital terminal transmissions" for 90 days. *Id.* The plaintiffs argued that destruction of electronic communications after their notice constituted spoliation; they requested an adverse inference jury instruction. *Id.* The court noted that the Fifth Circuit requires bad faith before imposing severe

spoliation sanctions, including adverse inference instructions. *Id.* The court also noted that federal courts may impose sanctions for failing to obey discovery orders under Rule 37 (and that Rule 37(f) applies to ESI), or they may impose sanctions for conduct that abuses the judicial process pursuant to their inherent authority. *Id.* at *17 n.5. But the court explained that inherent power applies only when the parties' conduct is not controlled by other mechanisms. *Escobar*, 2007 WL 2900581, at *17 n.5. The court concluded that although the duty to preserve existed, an adverse inference instruction was not warranted because there was no showing that relevant electronic communications were destroyed or that the destruction was in bad faith, citing Fifth Circuit case law from before the 2006 e-discovery amendments. *Id.* at *18 (citing *Condrey v. Suntrust Bank of Ga.*, 431 F.3d 191, 203 (5th Cir. 2005); *King v. Ill. Cent. R.R.*, 337 F.3d 550, 556 (5th Cir. 2003)).

The court found further support for its conclusion in Rule 37(e), stating: "And under Rule 37(f) of the Federal Rules of Civil Procedure, if the electronic communications were destroyed in the routine operation of the HPD's computer system, and if there is no evidence of bad faith in the operation of the system that led to the destruction of the communications, sanctions are not appropriate." *Id.* The court also found a lack of prejudice, noting that "[t]he record shows that the officers involved in the shooting were not likely to have used e-mail to communicate about the event in the day after it occurred. *Id.* at *19. The court concluded that because the plaintiffs had not shown bad faith or the loss of relevant information, no sanctions were warranted, again citing a pre-2006 Fifth Circuit case. *Id.* (citing *Toon v. Wackenhut Corrections Corp.*, 250 F.3d 950, 952 (5th Cir. 2001)). Thus, while Rule 37(e) supported the court's decision, given the lack of bad faith, as required by circuit precedent, and lack of showing of loss of relevant evidence, the court might have

reached the same conclusion even without Rule 37(e).¹⁵ See Hebl, *supra*, at 110 (arguing that *Escobar* is the only court that has arguably applied Rule 37(e) correctly, but noting that the case is not dispositive on the issue because there were grounds independent of Rule 37(e) for not granting sanctions). Another possibility is that the court ruled out sanctions under Rule 37 because of the safe harbor in Rule 37(e), and ruled out sanctions under inherent authority based on the common law requirement of bad faith.

Finally, in *Columbia Pictures Industries v. Bunnell*, No. 06-1093FMCJXC, 2007 WL 2080419 (C.D. Cal. May 29, 2007), the court denied sanctions for failure to preserve data stored temporarily in RAM because there was no prior preservation order or request for such temporary data. The court noted Rule 37(e), but it was unclear if it specifically applied. The court denied sanctions because the “failure to retain the Server Log Data in RAM was based on a good faith belief that preservation of data temporarily stored only in RAM was not legally required.” *Id.* at *14. The court mentioned that Rule 37(e) precludes sanctions for the good-faith operation of an electronic information system, and that “good faith” may require suspending certain features of routine operation once a duty to preserve arises, but it was not clear if that rule was the basis for the court’s decision not to impose sanctions. See *id.* at *13–14.

B. Cases Finding Rule 37(e) Inapplicable

The remaining cases citing Rule 37(e) have either determined that the rule did not apply or mentioned it but did not seem to directly apply it.

Some courts find that Rule 37(e) does not apply because sanctions have been requested

¹⁵The Fifth Circuit’s requirement of bad faith provided an additional layer of protection here that might not have been present in circuits that do not require bad faith. Rule 37(e) might have had a greater impact on the same facts in circuits without a bad faith requirement.

pursuant to the court's inherent authority rather than Rule 37 or because there is no prior court order to bring the conduct within Rule 37 sanctions. *See Stanfill v. Talton*, --- F. Supp. 2d ---, No. 5:10-CV-255(MTT), 2012 WL 1035385, at *8 n.12, *9–11 (M.D. Ga. Mar. 29, 2012) (after portions of a video recording were lost because the recording system automatically overwrote old video, the court denied sanctions because even if the duty to preserve existed, it was not clear that it was owed to the plaintiff and there was no showing of bad faith (as required under circuit law); the court noted that Rule 37(e) did not apply because the plaintiff had not moved for sanctions under Rule 37 and it would not have applied anyway because the plaintiff's argument was that the video was not lost as part of the good-faith operation of an electronic storage system, but because of the defendants' knowing failure to preserve the video before it was overwritten); *Tech. Sales Assocs., Inc. v. Ohio Star Forge Co.*, Nos. 07-11745, 08-13365, 2009 WL 728520, at *8 (E.D. Mich. Mar. 19, 2009) (rejecting application of Rule 37(e) both because lost ESI was deleted intentionally and because sanctions were sought under the court's inherent authority); *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 429 n.30, 431 n.31 (S.D.N.Y. 2009) (Rule 37(e) did not apply because there was no violation of a previous court order and sanctions were requested under the court's inherent authority);¹⁶ *Johnson v. Wells Fargo Home Mortg., Inc.*, No. 3:05-CV-0321-RAM, 2008 WL 2142219, at *2, *3 n.1 (D. Nev. May 16, 2008) (relying on inherent authority to analyze sanctions because although the defendant brought the motion under Rule 37 and inherent authority, the plaintiff's conduct did not violate any discovery order under Rule 37 because it occurred before the filing of the motion to compel production of the hard drives at issue, and rejecting application of Rule 37(e) for the same reason); *Nucor Corp. v. Bell*, 251 F.R.D. 191, 196 n.3 (D.S.C. 2008)

¹⁶Although Rule 37(e) did not apply, the court found it instructive in understanding the steps parties should take to preserve electronic evidence. *Arista Records*, 608 F. Supp. 2d at 431 n.31.

(imposing an adverse inference for intentional destruction of a USB thumb drive with relevant evidence and for allowing employees' continued use of a computer, which resulted in loss of relevant data, and noting that Rule 37(e) did not apply because sanctions were imposed pursuant to inherent authority, not the rules);¹⁷ *see also* Allman, *The Impact of Rule 37(e)*, *supra*, at 27 ("Rule 37(e) applies only to mitigation of 'rule-based' spoliation sanctions, despite the fact that sanctions can also be imposed under the inherent power of courts. Some have concluded that this limitation implies approval to avoid the impact of the Rule by simply relying on a court's inherent powers." (footnote omitted)); *cf. Lee v. Max Int'l, LLC*, 638 F.3d 1318, 1321 (10th Cir. 2011) (affirming dismissal of plaintiff's action for "thrice repeated failure to produce materials that have always been and remain within its control" because such behavior was "strong evidence of willfulness and bad faith, and in any event is easily fault enough," as required under circuit law for severe spoliation sanction, but also noting that Rule 37(e) protects from sanctions those who have discard materials as a result of good-faith business procedures); *Northington v. H&M Int'l*, No. 08-CV-6297, 2011 WL 663055, at *12 (N.D. Ill. Jan. 12, 2011) ("[W]hether or not defendant's conduct is sanctionable under any subdivision of Rule 37 is an academic issue, as the analysis for imposing sanctions under that Rule or our inherent power is 'essentially the same.'" (citations omitted)); *Grubb v. Bd. of Trustees of the Univ. of Ill.*, 730 F. Supp. 2d 860, 865–66 (N.D. Ill. 2010) (denying sanctions where third party destroyed the relevant computer without the plaintiff's knowledge, and where the plaintiff inadvertently altered/destroyed ESI by simply using his computer, because there was no bad

¹⁷The court stated: "Assuming arguendo that defendants['] conduct would be protected under the safe-harbor provision, Rule 37(e)'s plain language states that it only applies to sanctions imposed under the Federal Rules of Civil Procedure (e.g., a sanction made under Rule 37(b) for failing to obey a court order). Thus, the rule is not applicable when the court sanctions a party pursuant to its inherent powers." *Nucor*, 251 F.R.D. at 196 n.3.

faith as required for sanctions in that circuit; the court noted that the request was brought pursuant to inherent authority, but was “mindful” of Rule 37(e), which also seemed to weigh in favor of denying sanctions).

One court explained that the reason many courts might look to inherent authority to impose sanctions for failure to preserve is that Rule 37 sanctions do not easily apply to pre-litigation conduct:

Several courts have held that Rule 37 sanctions are available even where evidence is destroyed before the issuance of a discovery request, with a few going so far as to apply the rule to conduct that occurred before the lawsuit was filed, provided the party was on notice of a claim. But, the majority view—and the one most easily reconciled with the terms of the rule—is that Rule 37 is narrower in scope and does not apply before the discovery regime is triggered. *See Beil v. Lakewood Eng’g & Mfg. Co.*, 15 F.3d 546, 552 (6th Cir. 1994); *Dillon v. Nissan Motor Co.*, 986 F.2d at 268–69; *Unigard Sec. Ins. Co.*, 982 F.2d at 368; *see also* Iain D. Johnson, “Federal Courts’ Authority to Impose Sanctions for Prelitigation or Pre-order Spoliation of Evidence,” 156 F.R.D. 313, 318 (1994) (“it is questionable whether Rule 37 provides a federal court with authority to impose sanctions for spoliating evidence prior to a court order concerning discovery or a production request being served”). If that is true, the court must look to its inherent authority to impose, if at all, sanctions for evidence destruction that occurs between the time that the duty to preserve attaches and, at the least, the filing of a formal discovery request. But, this approach begs yet another question—what sort of intent requirement ought to apply in this non-rule context?

United Med. Supply Co. v. United States, 77 Fed. Cl. 257, 268 (Fed. Cl. 2007).¹⁸ However, the court

¹⁸The court described the complicated circuit split on the degree of culpability required for particular sanctions:

[A]s startling[] as it might seem, the *mens rea* issue confronting this court appears to be an open question in this circuit. There is, in fact, a division of authority among the circuits on this issue. While the tendency is to view that split in terms of whether *vel non* a showing of bad faith is required, in fact, the diverging views cover a much

broader spectrum. On one end of that spectrum, actually representing a distinct minority, are courts that require a showing of bad faith before any form of sanction is applied. Other courts expect such a showing, but only for the imposition of certain more serious sanctions, such as the application of an adverse inference or the entry of a default judgment. Further relaxing the scienter requirement, some courts do not require a showing of bad faith, but do require proof of purposeful, willful or intentional conduct, at least as to certain sanctions, so as not to impose sanctions based solely upon negligent conduct. On the other side of the spectrum, we find courts that do not require a showing of purposeful conduct, at all, but instead require merely that there be a showing of fault, with the degree of fault, ranging from mere negligence to bad faith, impacting the severity of the sanction. If this continuum were not complicated enough, some circuits initially appear to have adopted universal rules, only to later shade their precedents with caveats. Other times, the difference between decisions appear to be more a matter of semantics, perhaps driven by state law, with some courts, for example, identifying as “bad faith” what others would call “recklessness” or even “gross negligence.”

United Med. Supply Co., 77 Fed. Cl. at 266–67 (footnotes omitted). The court noted that United States Court of Federal Claims Rule 37, which is modeled after Civil Rule 37, does not require bad faith to impose sanctions. *Id.* at 267. The court explained:

The omission of any *mens rea* requirement in this rule is not an oversight. Indeed, in 1970, FED.R.CIV.P. 37(d) was modified to eliminate the requirement that the failure to comply with a discovery request be ‘willful,’ with specific indication in the drafters’ notes that, under the modified rule, sanctions could be imposed for negligence. Under the revised rule, wilfulness instead factors only into the selection of the sanction. As such, it is apparent that ‘bad faith’ need not be shown in order to impose even the most severe of the spoliation sanctions authorized by RCFC 37(b) and (d). And courts construing the Federal rule counterpart to this rule have so held.

Id. at 267–68 (internal citations and footnote omitted).

The court also noted that Rule 37(e)’s safe harbor’s protection for good-faith preservation implies that sanctions are permitted under Rule 37 for conduct less culpable than bad faith. *See United Med. Supply Co.*, 77 Fed. Cl. at 270 n.24 (“That the Advisory Committee would need to adopt a limited ‘good faith’ . . . exception to the imposition of sanctions belies the notion such

noted that many courts have taken a flexible approach to when Rule 37 sanctions can be triggered. *See id.* at 271 n.26 (“Courts have held that, for purposes of Federal Rule 37(b)(2), a party fails to obey a court ‘order’ whenever it takes conduct inconsistent with the court’s expressed views regarding how discovery should proceed. As such, the court need not issue a written order compelling discovery for RCFC 37 to be triggered.” (internal citations omitted)); *see also Domanus v. Lewicki*, --- F.R.D. ----, 2012 WL 2072866, at *4 (N.D. Ill. Jun. 8, 2012) (“In other words, the Court may sanction a party pursuant to Rule 37 for discovery violations; however these sanctions are limited to circumstances in which a party violates a court order or discovery ruling.’ ‘Courts have broadly interpreted what constitutes an ‘order’ for purposes of imposing sanctions.’” (citations omitted));¹⁹ Wright, *supra*, at 816 (“[W]hen a violation of the duty [to preserve] occurs before litigation commences, it is less clear as to whether or not Rule 37(e) may be invoked. Therefore, Rule 37(e) is problematic in that it ‘addresses only sanctions under the federal rules, which generally do not apply prior to commencement of litigation.’” (footnote omitted)).

Other courts have found the rule inapplicable because the conduct did not amount to “routine, good-faith operation of an electronic storage system.” *See, e.g., Domanus*, 2012 WL 2072866, at *6 & n.4 (Rule 37(e) did not apply because intentional destruction of a hard drive during litigation (after it crashed and the party had already allegedly recovered and produced what it could) was neither “routine” or “ordinary,” and Rule 37(e) does not apply once a preservation duty

sanctions should be imposed only upon a more traditional finding of ‘bad faith.’”).

¹⁹Some courts note that while Rule 37 requires a court order, the difference between imposing sanctions under Rule 37 or under inherent authority is immaterial because the sanctions analysis is the same under either source of authority. *See Domanus*, 2012 WL 2072866, at *4 (“Nevertheless, the Court need not determine whether it is exercising its statutory or inherent authority. ‘Under either Rule 37 or under the Court’s inherent authority, the analysis for imposing sanctions is essentially the same.’” (citation omitted)).

arises);²⁰ *Bootheel Ethanol Invest., L.L.C. v. Semo Ethanol Coop.*, No. 1:08-CV-59 SNLJ, 2011 WL 4549626, at *4 (E.D. Mo. Sept. 30, 2011) (rejecting application of Rule 37(e) after the plaintiff threw away a hard drive because Office Depot said it would not start, explaining that “it cannot now be said that information was lost due to routine, good-faith operation of the computer” because it was not even known whether ESI was lost at all, since all that was known was that Office Depot confirmed that the computer would not boot up); *United States v. Universal Health Servs., Inc.*, No. 1:07cv00054, 2011 WL 3426046, at *5 (W.D. Va. Aug. 5, 2011) (Rule 37(e) did not apply when a party’s electronic data became much less accessible due to its failure to implement a litigation hold until two years after the duty to preserve arose because this was negligent and not routine, good-faith operation of an electronic storage system);²¹ *Wilson v. Thorn Energy, LLC*, No. 08 Civ. 9009(FM), 2010 WL 1712236, at *3 (S.D.N.Y. Mar. 15, 2010) (rejecting Rule 37(e) argument based on loss of flash drive after duty to preserve arose because the Advisory Committee notes explain that “‘routine operation’ relates to the ‘ways in which such systems are designed, programmed, and implemented to meet the party’s technical and business needs,’” but “the flash drive was not

²⁰It seems clear that some courts believe that Rule 37(e) does not apply once a duty to preserve arises. This may not comport with the Committee’s original intent in enacting Rule 37(e). Since sanctions are not generally available for failing to preserve before the duty to preserve arises, and since Rule 37(e) was meant to alleviate some of the concerns about excessive sanctions for lost ESI, presumably it was meant to apply in some respects after the duty to preserve arises. *See Allman, The Impact of Rule 37(e), supra*, at 26 (“[S]ome courts ‘have completely ignored the clear implication of Rule 37(e)—namely that it applies after the duty to preserve has arisen,’ thereby ‘render[ing] the rule largely superfluous.’” (second alteration in original) (footnote omitted)); *id.* at 30 (“The mere fact that the loss occurs after a preservation duty has already attached is, of course, not decisive.”); Hebl, *supra*, at 84 (“Rule 37(e) creates a safe harbor for parties after the preservation obligation has arisen, whether it is due to a court order or a party’s reasonable anticipation of litigation.”).

²¹The court ordered the production of back-up tapes to remedy the failure to preserve, but it was not clear whether this was considered a “sanction” under Rule 37 or a determination that inaccessible data should be produced based on a finding of good cause under Rule 26(b)(2)(B).

overridden [sic] or erased as part of a standard protocol; rather it was lost because the Defendants failed to make a copy”; also concluding that the failure to make a copy of the drive meant that the party failed to act in good faith, which also precluded application of Rule 37(e)); *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F. Supp. 2d 598, 642 (S.D. Tex. 2010) (“[A] policy put into place after a duty to preserve had arisen, that applies almost exclusively to emails subject to that duty to preserve, is not a routine, good-faith operation of a computer system”); *KCH Servs., Inc. v. Vanaire, Inc.*, No 05-777-C, 2009 WL 2216601, at *1 (W.D. Ky. Jul. 22, 2009) (after the plaintiff accused the defendant of misappropriating the plaintiff’s software (pre-litigation), the defendant instructed employees to delete all such software from their computers; this, coupled with failure to put a litigation hold on any electronic correspondence, led the court to conclude there was not routine, good-faith operation, and to impose an adverse inference instruction); *Stratienko v. Chattanooga-Hamilton Cty. Hosp. Auth.*, No. 1:07-CV-258, 2009 WL 2168717, at *4 (E.D. Tenn. Jul. 16, 2009) (reimaging of employee’s hard drive after employee’s retirement did not fall within Rule 37(e) because the defendant had been on notice that information on the hard drive could be at issue and the reimaging took place immediately after the employee’s retirement); *Phillip M. Adams & Assocs., L.L.C. v. Dell, Inc.*, 621 F. Supp. 2d 1173, 1191–92 (D. Utah 2009) (Rule 37(e) did not apply to destruction of evidence when the defendant had no document destruction/retention policy and left it to employees to save documents they thought important); *Tech. Sales Assocs.*, 2009 WL 728520, at *8 (one relevant computer had approximately 70,000 files deleted with a tool known as “Eraser” in just one month during the discovery period; another computer had email files moved into the “recycle bin” the day before a scheduled forensic examination; the court held Rule 37(e) “is intended to protect a party from sanctions where the routine operation of a computer system inadvertently

overwrites potentially relevant evidence, not when the party intentionally deletes electronic evidence”); *Pandora Jewelry, LLC v. Chamilia, LLC*, No. CCB-06-3041, 2008 WL 4533902, at *8 n.7 (D. Md. Sept. 30, 2008) (“To the extent the lack of production results from deletion of emails, Chamilia’s failure to prevent the loss does not fall within the routine, good faith exception of Rule 37(e), which protects parties ‘for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.’”);²² *Meccatech, Inc. v. Kiser*, No. 8:05CV570, 2008 WL 6010937, at *9 (D. Neb. Apr. 2, 2008) (imposing severe sanctions for intentional and bad faith discovery conduct and noting that intentional destruction is “not ‘lost as a result of the routine, good-faith operation of an electronic information system’” (citing FED. R. CIV. P. 37(e))); *Doe v. Norwalk Cmty. Coll.*, 248 F.R.D. 372, 378 (2007) (“[I]n order to take advantage of the good faith exception, a party needs to act affirmatively to prevent the system from destroying or altering information, even if such destruction would occur in the regular course of business. Because the defendants failed to suspend it at any time, . . . the court finds that the defendants cannot take advantage of Rule 37(f)’s good faith exception. . . . This Rule therefore appears to require a routine *system* in order to take advantage of the good faith exception, and the court cannot find that the defendants had such a system in place.”);²³ *Peskoff v. Faber*, 244 F.R.D.

²²The court also implied that Rule 37(e) could not apply once the duty to preserve had arisen. See *Pandora Jewelry*, 2008 WL 4533902, at *8 n.7 (“[B]ecause Chamilia had a duty to preserve documents when it sent the January 8 and 15, 2007 communications and the October 2, 2007 communication, Chamilia’s failure to preserve documents does not fall within the protective scope of Rule 37(e).”).

²³The court explained that at one point emails were backed up for one year, and at an earlier point were only backed up for six months or less. The defendants did not have “one consistent, ‘routine’ system in place,” and did not follow a State Librarian’s policy of retaining electronic documents for two years. Further, the defendants did nothing to stop the destruction of backup tapes after the duty to preserve arose. *Doe*, 248 F.R.D. at 378. Because the Rule 37(e) advisory committee notes indicate that “the Rule only applies to information lost ‘due to the ‘routine

54, 60–61 (D.D.C. 2007) (sanctions were permitted for failure to turn off auto-delete features after the preservation duty arose and Rule 37(f) did not provide protection because that rule requires a litigation hold and turning off auto-delete features; sanctions were precluded for the period before notice of litigation because Rule 37(f) does not require auto-delete features to be disabled in that period and no exceptional circumstances were present);²⁴ *United States v. Krause (In re Krause)*, 367 B.R. 740, 767–68 (Bankr. D. Kan. 2007) (Rule 37(f) did not apply because the installation of the GhostSurf program, a program designed to wipe or eradicate data or files, on one computer after the court ordered turning over electronic evidence and on another the day before turning it over, was not routine, good-faith operation of an electronic information system; there was an obligation to disable the wiping feature once the preservation duty arose and certainly to not reinstall and run the program, as the debtor did here);²⁵ *cf. Disability Rights Council of Greater Wash. v. Wash. Metro. Transit Auth.*, 242 F.R.D. 139, 145–46 (D.D.C. 2007) (defendant failed to stop its email system from automatically deleting all emails after 60 days until at least more than two years after suit was filed;

operation of an electronic information system’—the ways in which such systems are generally designed, programmed, and implemented to meet the party’s technical and business needs,’” it could not apply in this case, where there was no routine system in place. *Id.*

²⁴Although the court found that sanctions were precluded for continuing the auto-delete feature before notice of litigation was received, the court stated that “[n]onetheless, Rule 37(f) must be read in conjunction with the discovery guidelines of Rule 26(b).” *Peskoff*, 244 F.R.D. at 61. The court concluded that the balancing factors in Rule 26(b)(2)(C) authorized requiring the defendant to participate in a process to ascertain whether a forensic examination was justified. *Id.*

²⁵The court noted that “[j]ust as a litigant may have an obligation to suspend certain features of a ‘routine operation,’ the Court concludes that a litigant has an obligation to suspend features of a computer’s operation that are not routine if those features will result in destroying evidence.” *In re Krause*, 367 B.R. at 768. The court held that in this case “that obligation required Krause to disable the running of the wiping feature of GhostSurf as soon as the preservation duty attached. And it certainly obligated Krause to refrain from reinstalling GhostSurf when his computers crashed and he restored them.” *Id.*

court held that “it is clear that [Rule 37(e)] does not exempt a party who fails to stop the operation of a system that is obliterating information that may be discoverable in litigation”; court also found Rule 37(e) inapplicable because the plaintiffs did not seek sanctions but rather that the defendant be required to search backup tapes for discoverable information previously deleted).²⁶

And other courts have found that sanctions were not appropriate without the need to specifically apply Rule 37(e). *See, e.g., Denim N. Am. Holdings, LLC v. Swift Textiles, LLC*, 816 F. Supp. 2d 1308, 1311–12, 1328–30 (M.D. Ga. 2011) (refusing sanction of dismissal or adverse inference based on individual employees’ practice of manually deleting emails because circuit law required bad faith, and citing Rule 37(e), but not seeming to rely on it in denying sanctions (and not mentioning Rule 37(e) in denying reconsideration)); *Bryden v. Boys and Girls Club of Rockford*, No. 09 C 50290, 2011 WL 843907, at *5 (N.D. Ill. Mar. 8, 2011) (the court denied a motion for sanctions without prejudice when the defendant’s third-party contractor that hosted the defendant’s domain and email accounts upgraded their server without the defendant’s knowledge and deleted all prior emails, a year after the preservation duty began, but did so because it did not yet have enough information on prejudice to the plaintiff or on the defendant’s efforts to preserve; the court cited Rule 37(e) in its description of the legal standard, but did not say whether it applied); *Viramontes v. U.S. Bancorp*, No. 10 C 761, 2011 WL 291077, at *3–5 (N.D. Ill. Jan. 27, 2011) (denying request for adverse inference as a sanction for the defendant’s destruction of emails pursuant to its routine document retention policy because the emails were destroyed before the duty

²⁶The court noted: “I am anything but certain that I should permit a party who has failed to preserve accessible information without cause to then complain about the inaccessibility of the only electronically stored information that remains. It reminds me too much of Leo Kosten’s definition of chutzpah: ‘that quality enshrined in a man who, having killed his mother and his father, throws himself on the mercy of the court because he is an orphan.’” *Disability Rights Council of Greater Wash.*, 242 F.R.D. at 147.

to preserve arose and there was no bad faith given the routine operation of the document destruction policy; mentioned Rule 37(e) in the statement of legal standards, but did not seem to directly apply it); *Sue v. Milyard*, No. 07-cv-01711-REB-MJW, 2009 WL 2424435, at *2 (D. Colo. Aug. 6, 2009) (after video footage of a strip search at issue was recorded over within five to seven days due to the normal operating process of the camera's computer system, and the request to retain it was not received until after the normal process deleted it, the court denied sanctions, but although Rule 37(e) was cited in the legal standards section of the opinion, there was no indication that it was actually applied and the court seemed to rely on lack of intentional destruction, as required for use of inherent authority); cf. *Northington v. H & M Int'l*, No. 08-CV-6297, 2011 WL 663055, *8–9, *14, *16, *21 (N.D. Ill. Jan. 12, 2011) (the defendant was grossly negligent and reckless in preserving ESI related to the discrimination claim, which eventually led to email accounts and other ESI being destroyed as part of routine business operations; the court imposed some, but not all, requested sanctions and noted Rule 37(e) in the legal standards but did not seem to apply it); *Keithley v. Home Store.com, Inc.*, No. C-03-04447 SI (EDL), 2008 WL 383384, at *1, *4–5, *16 (N.D. Cal. Aug. 12, 2008) (discussing Rule 37(e) but not whether it applied; discovery misconduct included failure to properly administer a litigation hold on electronic documents; court imposed monetary sanctions and an adverse inference for what it described as reckless and egregious discovery misconduct, seemingly under both inherent authority and Rule 37); *Okla. ex rel. Edmondson v. Tyson Foods, Inc.*, No. 05-CV-329-GKF-SAJ, 2007 WL 1498973, at *6 (N.D. Okla. May 17, 2007) (advising the parties, without explanation, that “they should be very cautious in relying upon any ‘safe harbor’ doctrine as described in new Rule 37(f)”).

II. Meaning of “routine, good-faith operation of an electronic storage system”

“Routine” has been described as “actions taken ‘according to a standard procedure’ or those which are ‘ordinary.’” Allman, *Impact of Rule 37(e)*, *supra*, at 28. “The Committee Note to Rule 37(e) speaks of ‘the ways in which such [electronic storage] systems are generally designed, programmed, and implemented’” *Id.* at 28–29; *see also* Davidovitch, *supra*, at 1136 (noting that the Rules Committees defined “routine” as “the ‘ways in which such systems are generally designed, programmed, and implemented to meet the party’s technical and business needs’” and that “[s]uch features are essential to the operation of electronic information systems.” (alteration in original)). Davidovitch argues that the Committee’s “choice of language indicates that the Judicial [Conference] Committee believes that a system’s ‘routine’ operation is more than just an operation which is periodic or habitual, but rather one that has a purpose linked to the party’s particular ‘technical and business needs.’” Davidovitch, *supra*, at 1136. “In essence, a determination of whether a system is ‘routine’ should focus on how the system was operated generally, without regard to the particular facts surrounding the lost information in question.” *Id.* Relatedly, some have pointed out that a document retention policy is critical to being able to take advantage of the rule. *See* Jacquelyn A. Caridad & Stephanie A. Blair, *Electronic Discovery Decisions Relating to the Amended Federal Rules*, 80 PA. B. ASS’N Q. 158, 171 (2009) (describing a case that “elevates the importance of establishing a thorough retention program with sufficient oversight,” and that “indicates that organically derived retention and storage practices that almost solely rely on employees for retention of important company documents and data are no longer acceptable”); Rachel Hytken, Comment, *Electronic Discovery: To What Extent Do the 2006 Amendments Satisfy Their Purposes?*, 12 LEWIS & CLARK L. REV. 875, 893 (2008) (“In other words, to receive the benefits of a safe harbor, a party must have a functioning and enforced records management

system.”).

Another commentator has explained “routine operation” as used in Rule 37 as follows:

Turning first to the Rule’s requirement that the party lose the information during the “routine operation” of its electronic information systems, little debate exists regarding whether an individual’s actions may fall within this provision. The routine operation of a computer system includes more than simply a “periodic or habitual” operation of an electronic system. In particular, the Judicial Conference suggests that to be routine, the operation must be “designed, programmed, and implemented to meet the party’s technical and business needs.” To this end, the court must examine the electronic system as a whole and determine whether the system operated to generally serve the technical and business needs of the party. As such, the court will evaluate the computer system as a whole and not consider how the system operated in the specific instance that resulted in the loss of responsive information.

Alexander B. Hastings, Note, *A Solution to the Spoliation Chaos: Rule 37(e)’s Unfulfilled Potential to Bring Uniformity to Electronic Spoliation Doctrine*, 79 GEO. WASH. L. REV. 860, 874–75 (2011) (footnotes omitted).

There is some evidence that manual deletion of ESI would not qualify as routine operation under the rule. See John M. Barkett, *Help Has Arrived . . . Sort Of: The E-Discovery Rules*, SN082 ALI-ABA 201 (2008) (“Rule 37(e) does not seem to provide a safe harbor for the electronic storage habit of individuals”); Emily Burns, Michelle Greer Galloway & Jeffrey Gross, *E-Discovery: One Year of the Amended Federal Rules of Civil Procedure*, 64 N.Y.U. ANN. SURV. AM. L. 201, 220 (2008) (noting that in *Doe*, the court stated that Rule 37(e) requires a “routine system,” which is “a system which is ‘generally designed, programmed, and implemented to meet the party’s technical and business needs,’” and that the court “suggested that the deletion of the defendant’s emails was not the result of an established system, but rather of ad hoc deletions by individual custodians”); Favro, *supra*, at 326–27 (“The Safe Harbor only applied to data that was destroyed due to the

ordinary functions of a computer system. It did not prevent sanctions when data was manually deleted. For example, the Safe Harbor afforded no protection to a company that relied on its individual employees to manually archive and delete electronic data.” (footnotes omitted)); *see also* Favro, *supra*, at 333 (describing a case that held that programming server to automatically delete all mail not manually archived by employees was unreasonable because “[w]hile a party may design its information management practices to suit its business purposes, one of those business purposes must be accountability to third parties” (quoting *Philip M. Adams*, 621 F. Supp. 2d at 1191, 1195)) *cf. Coburn*, 2010 WL 3895764, at *3 (“The destruction of emails as part of a regular good-faith *function of a software application* may not be sanctioned absent exceptional circumstances.” (emphasis added)).²⁷ The cases focus heavily on electronic systems and auto-delete functions, not on the involvement of individual decisions to delete, even if the individuals have a regular practice of deleting or preserving material. And the Advisory Committee seemed to contemplate automated functions that had little, if any manual involvement. *See* Civil Rules 2005 Report, *supra*, at 73 (explaining that the rule responds to “a distinctive feature of electronic information systems, the routine modification, overwriting, and deletion of information that attends normal use,” and that “[e]xamples of this feature in present systems include programs that recycle storage media kept for brief periods against the possibility of a disaster that broadly affects computer operations; automatic overwriting of information that has been ‘deleted’; programs that change metadata (automatically created identifying information about the history or management of an electronic file) to reflect the latest access to particular electronically stored information; and programs that automatically discard

²⁷*Coburn* also indicated that Rule 37(e) can apply to electronic information systems of any size. *Id.* at *3 n.3 (“While Rule 37(e) is more readily applicable to larger scale ‘electronic information systems,’ *Coburn* asserts, and *Pulte* does not dispute, that the Rule is also applicable to her home use of an electronic information system.”).

information that has not been accessed within a defined period or that exists beyond a defined period without an affirmative effort to store it for a longer period. . . . [T]he proposed rule recognizes that such automatic features are essential to the operation of electronic information systems.”).

Nonetheless, there is some evidence that minimal individual intervention in an electronic system may not take a protected activity out of Rule 37(e)’s protections. *See Miller*, 2011 WL 1458491, at *3 (rejecting argument that denial of sanctions was erroneous because the recording device did not automatically overwrite previous videos but instead required a decision by the user to reformat the hard drive). As the *Miller* court pointed out, the committee notes state that routine operation “includes the alteration and overwriting of information, *often* without the operator’s specific direction or awareness,” FED. R. CIV. P. 37(e), Advisory Comm. Note (2006 Amendments) (emphasis added), and this suggests that while the Advisory Committee contemplated that the routine operations covered by the rule would usually occur without the operator’s direction, it was not limited to such situations and might also include instances of deletion at the operator’s direction. *See Miller*, 2011 WL 1458491, at *3 n.1 (“Here, it was essential to the operation of Defendants’ cameras that the user either save the recordings on the DVD or rewrite the information on it. Critically, by noting that routine operations ‘often’ occur without the operator’s specific direction, the drafters acknowledge that ‘routine operations’ can still occur despite the direct involvement of a system user. Accordingly, Plaintiffs’ contention that the activity of the camera user—which was extremely minimal in this case—takes the electronic information outside of Rule 37(e)’s safe harbor construes Rule 37(e) too narrowly.”). Thus, a party has some basis for arguing that some manual intervention in an electronic system does not necessarily mean that the system is not operating “routinely,” but given that Rule 37(e) has really only been applied in a handful of cases not

involving the additional complication of manual intervention, it is safe to assume that the more manual intervention or individual decisionmaking involved, the less likely it is that the rule will be applied.

With respect to defining “good faith,” Allman explains that “[t]he absence of ‘bad faith’ plays a decisive role in defining the presence of ‘good faith.’ The cases typically hold that ‘bad faith’ is ‘when a thing is done dishonestly and not merely negligently.’” Allman, *Impact of Rule 37(e)*, *supra*, at 29 (footnotes omitted); *see also* Wright, *supra*, at 819 (“[A]s a general principle, [‘good faith’] is commonly understood to be the absence of bad faith.”). Clearly, “[a] party which utilizes a system involving routine destruction for the purpose of eliminating information believed to be disadvantageous is not operating in ‘good faith.’” Allman, *supra*, at 31.

Another commentator has suggested that “the good faith standard limits the imposition of spoliation sanctions for failure to provide electronically stored information to a showing of reckless or intentional conduct.” Hebl, *supra*, at 83. Hebl suggests that “[g]ood faith is generally understood to be the absence of bad faith, so if a spoliating party can show that its actions were not in bad faith, it will have met the state of mind standard required by Rule 37(e).”²⁸ *Id.* at 96. According to Hebl, “it is well settled that ‘bad faith’ does in fact mean intentional or reckless conduct,” and therefore

²⁸The good-faith standard in Rule 37(e) may be more nuanced and flexible than just the absence of bad faith. Clearly a party cannot act in bad faith and take advantage of the safe harbor, but the rule seems to go further than that, requiring affirmative good-faith operation of an electronic information system. The *Cache La Poudre* case may illustrate this. In that case, the party did take some actions to ensure that ESI was not destroyed. But because the party relied on employees to implement most of its preservation obligations, the court imposed sanctions. The party most likely was not acting in bad faith, with the intent to hide information from the other side. But if the party clearly did not take sufficient actions to preserve, even if they were not intentionally hiding information, it seems there is a good argument that the party did not act in good faith. Perhaps the “good faith” standard was meant to provide courts with flexibility for dealing with situations somewhere between negligent and intentional or reckless conduct.

the ‘good faith’ standard in Rule 37(e) requires acting without intentional or reckless conduct, despite the Advisory Committee’s assertions that it was stopping short of an reckless standard by adopting an “intermediate standard.” *Id.* at 97. Hebl concludes: “[A]lthough the Advisory Committee suggested that it was adopting an ‘intermediate standard,’ the adoption of language which already had a well-settled meaning in the spoliation context, in combination with the Advisory Committee’s own statements, leads to the inevitable conclusion that Rule 37(e)’s good faith standard requires a showing of intent or recklessness.” *Id.* at 98–99. He suggests several types of conduct that would constitute bad faith and take the party’s conduct outside the scope of Rule 37(e):

To summarize, if a party consciously and purposefully downloads software that targets and deletes relevant information from its storage system, bad faith is present and Rule 37(e)’s protection will be unavailable. Second, if a party is subjectively aware that its document deletion policy will result in the destruction of relevant evidence, and that party does not intervene to stop this policy, its conduct is willfully blind, the party is acting in bad faith, and Rule 37(e)’s protection will be unavailable. Finally, the intentional destruction of evidence in direct response to pending litigation does not, under any circumstances, receive Rule 37(e)’s protection.

Id. at 103.

Another commentator has noted that “by itself, . . . the good-faith clause does not reveal the level of mens rea at which a party may still claim protection under the safe harbor provision. . . . [T]he Judicial Conference intended the good-faith standard to serve as a middle ground between the alternative of a strict intentional or narrow reasonableness standard.” Hastings, *supra*, at 875. He suggests that the good-faith standard represented a compromise between the “reasonableness” standard proposed in the proposal published for public comment and the intentional standards in the

footnoted version of the published proposal. *Id.* at 876. As a result, he concludes that “[t]he hesitancy of the Judicial Conference to fully adopt an intentional or reasonableness standard demonstrates that the good-faith standard should not be read as a firm standard, but rather should be interpreted as a malleable approach to mens rea.” *Id.* He also suggests that courts have “erred on the side of caution and have narrowly interpreted the protections of Rule 37(e),” but that “the varying interpretations of the Rule prevent parties from developing ‘routine’ computer systems that appropriately maintain and delete electronic information.” *Id.*

The case law has also provided examples of certain actions that do not qualify as routine, good-faith operation of an electronic storage system. *See, e.g., Bootheel*, 2011 WL 4549626, at *4 (throwing away computer that had crashed after Office Depot confirmed it would not reboot was not routine, good-faith operation of an electronic storage system); *Wilson*, 2010 WL 1712236 (“routine, good-faith operation” does not encompass failure to make a copy of relevant ESI, but rather is directed to overwriting as part of standard protocol); *Rimkus*, 688 F. Supp. 2d at 642 (concluding that “a policy put into place after a duty to preserve had arisen, that applies almost exclusively to emails subject to that duty to preserve, is not a routine, good-faith operation of a computer system,” and that the selective and manual deletion of emails was not covered by Rule 37(e)).²⁹

III. Use of the “absent exceptional circumstances” clause

The courts have not defined this term and I did not find any cases in which the court utilized this exception to avoid application of Rule 37(e). As noted in the section above on the history of Rule 37(e), there is some evidence that the Advisory Committee intended this provision to apply to instances of severe prejudice, but it ended up leaving flexibility for courts to interpret the exception.

²⁹For more examples, see the section above on cases declining to apply Rule 37(e) due to the lack of “routine, good-faith operation.”

The courts have not done so. *See Hytken, supra*, at 895 (“Neither the Committee nor the courts have attempted to define [‘exceptional circumstances’]; there is no sense of when, if, or how this term will take on meaning.”).

According to one commentator, the exceptional circumstances exception “allows a party seeking sanctions to override the safe harbor if it can establish that the circumstances under which the information was lost necessitate sanctions, even though the party responsible for the loss has satisfied the three elements of Rule 37(e).” Davidovitch, *supra*, at 1140. Davidovitch indicates that although the Rules Committees did not specify what constitutes an exceptional circumstance, they did indicate that “it is one in which ‘a court should provide remedies to protect an entirely innocent party requesting discovery against serious prejudice arising from the loss of potentially important information.’”³⁰ *Id.*; *see also* Hardaway et al., *supra*, at 586 (concluding that the exception for “exceptional circumstances” “suggests that a showing of extreme prejudice to the requesting party’s case might overcome the safe harbor”). Davidovitch predicted that “if courts choose to apply the ‘exceptional circumstances’ provision in the same way that the courts [have interpreted that language in other contexts], then they withhold the benefit of the rule from parties which are found to repeatedly lose information, without the appearance of bad faith, or from parties that have a history of dishonesty.” Davidovitch, *supra*, at 1141.

IV. Litigation Holds

Many courts have held that a party must have implemented an adequate litigation hold in

³⁰Davidovitch cites the GAP report included in the Civil Rules Committee’s report, which was eventually attached to the Standing Committee’s report to the Judicial Conference. However, as noted earlier in the section on the history of Rule 37(e), it appears that there was some concern at the Standing Committee level about the language relating to prejudice and it was removed from the committee note.

order to take advantage of the protection of Rule 37(e). *See, e.g., Webb v. Jessamine Cty. Fiscal Court*, No. 5:09-CV-314-JMH, 2011 WL 3652751, at *6 (E.D. Ky. Aug. 19, 2011) (“Good-faith operation requires a party intervene to prevent the elimination of information on the system ‘because of pending or reasonably anticipated litigation.’” (citing FED. R. CIV. P. 37 (2006 Advisory Committee’s Note))); *Cannata v. Wyndham Worldwide Corp.*, No. 2:10-cv-00068-PMP-LRL, 2011 WL 3495987, at *3 (D. Nev. Aug. 10, 2011) (“The Advisory Committee’s comments to Rule 37(e) provide that any automatic deletion feature should be turned off once a litigation hold is imposed.”); *Point Blank Solutions, Inc. v. Toyobo Am., Inc.*, No. 09-61166-CIV, 2011 WL 1456029, at *11 (S.D. Fla. Apr. 5, 2011) (citing Rule 37(e) advisory committee note for proposition that “[a] party has an obligation to retain relevant documents, including emails, once litigation is reasonably anticipated”); *Coburn*, 2010 WL 3895764, at *3 (“If the routine operation of the computer system is likely to destroy electronically stored information that is relevant and not otherwise available on another source, a party must place a litigation hold suspending the destruction.”); *S.E. Mech. Servs.*, 2009 WL 2242395, at *2 (noting that Rule 37(e) contains a limited safe harbor, but that “[o]nce a party files suit or reasonably anticipates doing so, however, it has an obligation to make a conscientious effort to preserve electronically stored information that would be relevant to the dispute.” (citing *Peskoff v. Faber*, 251 F.R.D. 59, 62 (D.D.C. 2008); FED. R. CIV. P. 37, advisory committee notes (2006 amendments))); *Kessler*, 2009 WL 2603104, at *18 (“The Advisory Committee notes [to Rule 37(e)] make clear, however, that ‘[w]hen a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system’ is *required*.” (emphasis added) (second alteration in original) (quoting Advisory Committee Note to the 2006 Amendment to Federal Rule of Civil Procedure 37(e))); *Major Tours, Inc. v.*

Colorel, No. 05-3091, 2009 WL 2413631, at *4 (D.N.J. Aug. 4, 2009) (“The Advisory Committee comments to FED. R. CIV. P. 37(e) further prescribe that any automatic deletion feature should be turned off and a litigation hold imposed once litigation can be reasonably anticipated.”); *KCH Servs.*, 2009 WL 2216601, at *1 (failure to implement litigation hold after notice fell “beyond the scope of ‘routine, good faith operation of an electronic information system’”); *Arista Records*, 608 F. Supp. 2d at 431 n.31 (“The Advisory Committee notes make clear, however, that ‘[w]hen a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system’ is required.”);³¹ *Peskoff*, 244 F.R.D. at 60 (“The Advisory Committee comments to amended Rule 37(f) make it clear that any automatic deletion feature should be turned off and a litigation hold imposed once litigation can be reasonably anticipated.”); *Disability Rights Council of Greater Wash.*, 242 F.R.D. at 146 (“[I]t is clear that this Rule does not exempt a party who fails to stop the operation of a system that is obliterating information that may be discoverable in litigation.”); *see also* Burns et al., *supra*, at 220 (“Other courts have taken the producing party’s ‘shield’ embodied in Rule 37(e) and turned it into a ‘sword’ to be used by the requesting party to prove spoliation of evidence. At least one well-respected e-discovery jurist has interpreted the advisory committee’s notes to Rule 37(e) as actually imposing a separate affirmative obligation on parties to disable any routine systems that would eliminate discoverable information after the duty to preserve had attached.”); Favro, *supra*, at 327 (“Most courts applying Rule 37(e) have issued sanctions for spoliation when a party has failed to suspend particular aspects of its computer systems after a preservation duty attached. Thus, the Advisory Committee did impose a duty to stop the routine destruction of electronic data in certain

³¹The court did not apply Rule 37(e) because sanctions were requested pursuant to its inherent authority, but found Rule 37(e) instructive on the parties’ duty to preserve ESI.

circumstances despite its earlier misgivings about doing so.”); Hardaway et al., *supra*, at 585–86 (“Courts have generally concluded that, when the duty to preserve attaches to evidence, the safe harbor of Rule 37(e) does not apply because a party cannot, in good faith, delete this relevant evidence, even as part of a records management program. Indeed, once a party is aware of or should reasonably anticipate litigation, the party has a duty to implement a litigation hold. A party who fails to implement the litigation hold cannot take advantage of the safe haven.” (footnotes omitted)); Joanna K. Slusarz, *No Fishing Poles in the Office*, 78 DEF. COUNS. J. 450, 461 (Oct. 2011) (“A party must show that it has modified or suspended the routine operation of computer systems to prevent loss of data that is subject to a preservation requirement” in order to take advantage of Rule 37(e).); Wright, *supra*, at 814–15 (“Under Rule 37(e), good faith requires that a party adhere to its preservation obligation, whereby it *must* intervene with any document destruction policy and ‘modify or suspend certain features of that routine operation to prevent the loss’ of potentially relevant documentation when litigation is reasonably foreseeable.” (emphasis added)); *cf.* Hytken, *supra*, at 892 (“The safe harbor discourages a judge from levying sanctions against a party who disposes of E.S.I. as part of their regular information management system in good faith and *before their litigation hold responsibilities arise*. A producing party benefits from Rule 37 when 1) acting in ‘good faith’, 2) *it implements a litigation hold*, and 3) the loss of E.S.I. resulted from ‘the routine operation of . . . an electronic information system.’” (emphases added)).³²

The courts that have indicated that Rule 37(e) requires a litigation hold often focus on the following language in the committee note:

³²Hytken argues that “[t]he second requirement of the safe harbor, implementing a proper litigation hold, has great importance because a court may presume when a party has taken proper steps to put a litigation hold in place that it has acted in good faith.” Hytken, *supra*, at 893.

Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. . . . The good faith requirement of Rule 37(f) means that a party is not permitted to exploit the routine operation of any information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold."

FED. R. CIV. P. 37 Advisory Committee Note (2006 Amendment). The Advisory Committee's report submitting the final proposed rule to the Judicial Conference indicated that implementation of a litigation hold would often bear on the court's determination of a party's good faith, but would not be dispositive: "As the Note explains, good faith *may require* that a party intervene to suspend certain features of the routine operation of an information system to prevent loss of information subject to preservation obligations. Such intervention is often called a 'litigation hold.' . . . The steps taken to implement an effective litigation hold *bear on good faith*, as does compliance with any agreements the parties have reached regarding preservation and with any court orders directing preservation." Civil Rules 2005 Report, *supra*, at 75 (emphases added). The Advisory Committee did not seem to put the same emphasis on a litigation hold as the courts subsequently interpreting the rule.

Although numerous cases have read the advisory committee notes to Rule 37(e) to require a litigation hold in order to take advantage of the rule's protections, at least some commentators have recognized that this is an inaccurate reading of the note. *See* Hebl, *supra*, at 105 (noting that the court's holding in *Peskoff* that the committee note requires a litigation hold "is not what the note says Rather the note merely provides that failure to turn off an automatic deletion feature may

be one factor to consider in determining whether good faith is present and . . . , if the failure to turn this feature off is not the result of reckless or intentional conduct, a sanction cannot be imposed”); Douglas L. Rogers, *A Search for Balance in the Discovery of ESI since December 1, 2006*, 14 RICH. J. L. & TECH. 8, 22 (2008) (disagreeing with the conclusion reached by some courts that the advisory committee notes require the implementation of a litigation hold in all circumstances in order to take advantage of the rule).

V. What is a “sanction”?

Courts and commentators have not directly addressed what constitutes a “sanction” that cannot be entered if a party’s actions fall under the protections of Rule 37(e). The rule text limits its application to only sanctions provided for under the rules. The advisory committee notes reflects the same: “The protection provided by Rule 37(f) applies only to sanctions ‘under these rules.’ It does not affect other sources of authority to impose sanctions or rules of professional responsibility.” FED. R. CIV. P. 37 Advisory Committee Note (2006 Amendment). Thus, a party who meets the requirements for applying Rule 37(e) would clearly be exempt from the specific sanctions under Rule 37(b), for example. Courts that have applied Rule 37(e) have precluded requested sanctions including dismissal or default, an adverse inference instruction, and monetary expenses. *See, e.g., Kermode*, 2011 WL 2619096, at *2 (denying default judgment and an evidentiary hearing for an adverse inference); *Olson*, 2010 WL 2639853, at *3 (denying request for an order barring production of any evidence of an alleged theft and an award of expenses incurred in bringing the motion for sanctions).

The case law does not clearly indicate whether Rule 37(e) would preclude a separate category of curative measures, remedies, or discovery management tools, as opposed to punitive

sanctions, but a couple of cases may be instructive. In *Disability Rights Council of Greater Wash.*, 242 F.R.D. at 146, the court found Rule 37(e) inapplicable in part because the plaintiffs did not seek sanctions, but instead requested that the defendant be ordered to search backup tapes for information that was deleted pursuant to the defendant’s automatic email deletion policy, which had not been suspended during litigation. This seems to imply that requiring searching backup tapes for inaccessible information that might have been reasonably accessible had an appropriate litigation hold been put in place is not a “sanction” barred by Rule 37(e).³³ Relatedly, in *Peskoff*, 244 F.R.D. at 60–61, the court found that Rule 37(e) did not require disabling automatic deletion features before litigation is anticipated, but still utilized Rule 26(b)(2)(C) to require the defendant to participate in a process to ascertain whether a forensic examination was justified. The court explained that “Rule 37(f) must be read in conjunction with the discovery guidelines of Rule 26(b). . . . I find that balancing the factors in Rule 26(b)(2)(C) authorizes me to require Faber to participate in a process designed to ascertain whether a forensic examination is justified because the emails are relevant, the results of the search that was conducted are incomprehensible, and there is no other way to try to find the emails.” *Id.* at 61. It was not clear that the court was directly considering sanctions, but instead, in the context of discovery deficiencies, the questions of “whether it is time to appoint a forensic analyst who can search the network server and the individual hard drives of [relevant people] to see if any additional information can be retrieved . . .” and “who shall pay for such a forensic examination.” *Id.* at 59. But the court’s discussion of Rule 37(e) and its potential

³³However, the court found Rule 37(e) inapplicable anyway because of the party’s failure to stop its automatic email deletion feature during litigation. *See Disability Rights Council of Greater Wash.*, 242 F.R.D. at 146. If Rule 37(e) had come into play because of the routine, good-faith operation of an electronic storage system, perhaps ordering searching of backup tapes might have been precluded.

interaction with Rule 26(b)(2)(C) may imply that Rule 37(e) may not preclude curative measures even if other “sanctions” are precluded.

In sum, there is not enough case law applying Rule 37(e) to determine whether application of the rule would preclude curative measures.

VI. Conclusion

Rule 37(e) was intended to provide a narrow protection for loss of ESI subject to a preservation duty. The history of the rule provision indicates that the Advisory Committee was primarily concerned with ensuring that courts distinguish between the loss of information in the world of paper discovery and the loss of information in the electronic world. The Advisory Committee wanted to ensure that courts and parties understood that because of both the volume of ESI and the potential for inadvertent loss of ESI, both of which were exponentially greater than in the world of paper discovery, the loss of ESI could not be treated in the same manner as the loss of information kept in static form. The application of the rule has been extremely narrow. It has only been applied in a handful of cases, and even in those cases it is not clear that the court would have reached a different result without the rule. I did not find any cases where it was clear that Rule 37(e) precluded sanctions and that a different result would have been reached without the rule.

In addition, while the rule was intended to address a narrow set of circumstances, many courts may have interpreted the rule even more narrowly than intended, by, for example, finding it inapplicable once a duty to preserve arises, finding a strict requirement of a litigation hold in the advisory committee notes, or relying on inherent authority for sanctions analysis. Nonetheless, the rule’s principles may have influenced even those courts analyzing sanctions under inherent authority. The rule seems to have been a first step in the direction of providing comfort to parties

in their efforts to adequately preserve ESI, but it appears to only apply in a narrow set of circumstances.

TAB 2K

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To: Heather Williams
 From: Matthew Bosak
 Re: Local Rules on Preservation/Sanctions

Generally:

No district has a specific rule regarding a party’s duty to preserve or sanctions for breaching that duty. Of those districts that do have rules beyond the Federal Rules of Civil Procedure, most simply acknowledge the existence of potential discovery issues involving electronically stored information and require the parties to confer over the proper methods of handling ESI to properly preserve the necessary relevant data and prevent future spoliation claims (for example see Mississippi Northern, New York Western, Oklahoma Western, Pennsylvania Middle, Pennsylvania Western¹ and Tennessee Western *infra*). However, no district goes so far as to implement its own specific rules for preservation of ESI, and sanctions tend to take shape through broad implementations of FRCP 37 (e.g. D.C., Florida Southern, Maryland, and Mississippi Northern, to name a few).

In brief summary, it appears that one-half to two-thirds of the districts have deferred to the Federal Rules entirely and have elected not to write *any* local rule addressing the matter at hand. Of those districts which do have relevant local rules, none set specific standards in place regarding preservation of evidence, and sanctions appear to follow the same guidelines established through the FRCP. My own analysis leads me to believe that the individual districts are hesitant to approach the complexity of trying to create bright-line standards for preservation and sanctions—especially regarding ESI. In my opinion, those that have tried have created (for the most part) vague guidelines which in the end are left to similar discretion granted to the courts by the FRCP.

<u>District</u>	<u>Local Rule</u> <u>Y/N</u>	<u>Text of Rule</u>
Alabama Middle District Court	No sanction listed	Federal rules are controlling. U.S. Dist. Ct. Rules M.D. Ala. LR 26.1 Once a court order is obtained compelling discovery, unexcused failure to provide a timely response is treated by the court with the special gravity which it deserves; violation of a court order is always serious and may be treated as contempt, or judgment may be entered, or some other appropriate and measured sanction used. “Guidelines to Civil Discovery Practice in the Middle District of Alabama.” 1(G).
Alabama Northern District Court	No, defer to Federal rules	A party shall, without awaiting a discovery request, (B) make available to other parties for inspection and copying, as under Fed.R.Civ.P. 34, all documents, data compilations, and tangible things in its possession, custody or control that may be used by it (other than solely for

¹ PA Western has a particularly relevant comment (shown below) which reiterates parties’ implied duty to preserve evidence and specifically enumerates that each party reserves the right to move for an appropriate preservation order. This district is unique in that I did not find any similar comments made in any of the other 93 districts’ rules.

		<p>impeachment purposes) to support its contentions with respect to any significant factual issue in the case;</p> <p>(C) provide to other parties a computation of any category of damages claimed by it, making available for inspection and copying, as under Fed.R.Civ.P. 34, the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered...</p> <p>U.S.Dist.Ct.Rules N.D.Ala., LR 26.1</p> <p>The court may impose a sanction for the violation of any local rule. Imposition of sanctions will lie within the sound discretion of the judge whose case is affected.</p> <p>Local Rule 1.2</p>
Alabama Southern District Court	No, defer to FRCP	<p>Party shall disclose that information described in FRCP 26(a)(1)(A-D) within twenty days after the meeting of the parties...</p> <p>U.S.Dist.Ct.Rules S.D.Ala., LR 26.1</p>
Alaska District Court	No rule on prsv., but sanction standard laid out	<p>Sanctions may include: [A] fines, costs, and attorney's fees awards; [B] establishment and preclusion orders; [C] default; [D] dismissal; and [E] other appropriate sanctions.</p> <p>(2) for matters of form not affecting substance or prejudicing parties or the court, sanctions will generally be limited to fines, costs, or attorney's fees awards.</p> <p>D. Ak. LR 1.3(1-2)</p> <p>Standard for Imposition of Sanctions: Prior to entering an order imposing sanctions under Rule 37, Federal Rules of Civil Procedure, the court will consider:</p> <p>(1) the nature of the violation, including the willfulness of the conduct and the materiality of the information the party refused to disclose</p> <p>(2) the prejudice to the opposing party;</p> <p>(3) the relationship between the information the party refused to disclose and the proposed sanction;</p> <p>(4) whether a lesser sanction would adequately protect the opposing party and deter other discovery violations; and</p> <p>(5) other factors deemed appropriate by the court or required by law.</p> <p>D. Ak. LR 37.1(b)</p>
Arizona District Court	No, defer to FRCP 26-37	<p>(a) When a motion for an order compelling discovery is brought pursuant to Rule 37(a)(3)(B) of the FRCP, the moving party shall set forth, separately from a memorandum of law, the following in separate, distinct, numbered paragraphs:</p>

		<p>(1) the question propounded, the interrogatory submitted, the designation requested or the inspection requested;</p> <p>(2) the answer, designation or response received; and</p> <p>(3) the reason(s) why said answer, designation or response is deficient.</p> <p>(b) the foregoing requirement shall not apply where there has been a complete and total failure to respond to a discovery request or set of discovery requests</p>
Arkansas Eastern District Court	prsv. standards established through 26(f) conference, no mention of sanctions	<p>The Fed.R.Civ.P. 26(f) report filed with the court must contain the parties' views and proposals regarding the following:</p> <p>(1) Any changes in timing, form or requirements of mandatory disclosures under FRCP 26(a)</p> <p>(2) Date when mandatory disclosures were or will be made.</p> <p>(3) Subjects on which discovery may be needed</p> <p>(4) Whether any party will likely be requested to disclose or produce information from electronic or computer-based media.</p> <p>If so:</p> <p>(a) whether disclosure or production will be limited to data reasonably available to the parties in the ordinary course of business;</p> <p>(b) the anticipated scope, cost and time required for disclosure or production of data beyond what is reasonably available to the parties in the ordinary course of business:</p> <p>(c) the format and media agreed to by the parties for the production of such data as well as agreed procedures for such production;</p> <p>(d) whether reasonable measures have been taken to preserve potentially discoverable data from alteration or destruction in the ordinary course of business or otherwise;</p> <p>(e) other problems which the parties anticipate may arise in connection with electronic or computer-based discovery.</p> <p>Uniform U.S.Dist.Ct.Rules Ark., LR 26.1</p>
Arkansas Western District Court	Same as above	Same as above
California Central District Court	No standard for sanctions	<p>Counsel for the parties shall confer in a good faith effort to eliminate the necessity for hearing the motion or to eliminate as many of the disputes as possible. Local Civ Rule 37-1.</p> <p>If counsel are unable to settle their differences, they shall formulate a written stipulation.</p> <p>-Stipulation contains all issues in dispute and the points made by each party.</p> <p>-After the stipulation, each side can file a supplemental memorandum on the motion.</p> <p>-Only after a stipulation and a failure to resolve the issue will</p>

		<p>the court rule on the motion. Local Civ Rule 37-2.</p> <p>The failure of any counsel to comply with or cooperate in the foregoing procedures may result in the imposition of sanctions. Local Civ Rule 37-4.</p>
California Eastern District Court	No standard for sanctions	<p>A motion made pursuant to FRCP 26-37... shall not be heard unless</p> <ol style="list-style-type: none"> (1) the parties have conferred and attempted to resolve their differences (2) the parties have set forth their differences and the bases therefor in a joint statement re discovery disagreement. <p>U.S.Dist.Ct.Rules E.D.Cal., Civ L.R. 251(b)</p> <p>The requirement for a joint statement re discovery disagreement shall not be required</p> <ol style="list-style-type: none"> (1) when there has been a complete and total failure to respond to a discovery request or order, or (2) when the only relief sought by the motion is the imposition of sanctions. <p>In either instance, the aggrieved party may bring a motion for relief for hearing on fourteen days' notice.</p> <p>U.S.Dist.Ct.Rules E.D.Cal., Civ L.R. 251</p>
California Northern District Court	No rule on point	<p>Court will not entertain a request or motion to resolve a disclosure or discovery dispute unless counsel have previously conferred for the purpose of attempting to resolve all disputed issues. U.S.Dist.Ct.Rules N.D.Cal., Civil L.R. 37-1(a).</p> <p>(b) If good faith negotiations [during a discovery event] fail to resolve the matter, and if disposition of the dispute during the event likely would result in substantial savings of expense or time, counsel or a party may contact the chambers of the assigned District Judge or Magistrate Judge to ask if the Judge is available to address the problem through a telephone conference during the discovery event.</p> <p>A motion to compel discovery must set forth each request in full, followed by the objections and/or responses thereto. The motion must show how the proportionality and other requirements of FRCP 26(b)(2) are satisfied. 37-2.</p> <p>When a party moves for an award of attorney fees or other form of sanction under FRCP 37, the motion must:</p> <ol style="list-style-type: none"> (b) be accompanied by competent declarations which: <ol style="list-style-type: none"> (1) set forth the facts and circumstances that support the motion; (2) describe in detail the efforts made by the moving party to

		secure compliance without intervention by the court; and (3) If attorney fees or other costs or expenses are requested, itemize with particularity the otherwise unnecessary expenses, including attorney fees, directly caused by the alleged violation or breach, and set forth an appropriate justification for any attorney-fee hourly rate claimed. 37-4.
California Southern District Court	No rule on point. Vague rules on sanction standards	a. Conference Required b. Certificate of compliance with this rule required before filing a motion with respect to rules 26-37 d. In the disposition of any motion made under rules 37(a) or 26(c), the court will be guided by the rule of construction contained in Local rule 1.1c to secure the just, efficient and economical determination of every action and proceeding. e. All motions to compel discovery are referred to the magistrate judge assigned to the case. The magistrate judge maintains discretion to waive all or part of the requirements of Civil Local Rule 7.1.f in deciding discovery motions. CivLR 26.1
Colorado District Court	No rules on sanctions for spoliage	All deference to rules 26-37
Connecticut District Court	No rule on point. Sanctions focus on attorney fees.	(a) No motion pursuant to rules 26-37 shall be filed unless counsel making the motion has conferred with opposing counsel and discussed the discovery issues between them in detail in a good faith effort to eliminate or reduce the area of controversy, and to arrive at a mutually satisfactory resolution. In the event they do not resolve the issue, counsel making a motion shall file with the court an affidavit certifying that conference with opposing counsel. ... (b)(2) Where a discovery motion seeks disclosure of documents on electronically stored information, and the moving party believes in good faith that there is a significant risk that material information will be destroyed before the motion is decided in accordance with normal procedure, the moving party shall have good cause to seek expedited consideration of the motion... (c) Where a party has sought or opposed discovery which has resulted in the filing of a motion, and that party's position is not warranted under existing law and cannot be supported by good faith argument for extension, modification or reversal of existing law, sanctions will be imposed in accordance with applicable law. If a sanction consists of or includes a reasonable attorney's fee, the amount of such attorney's fee shall be calculated by using the normal hourly rate of the

		<p>attorney for the party in whose favor a sanction is imposed, unless the party against whom a sanction is imposed can demonstrate that such amount is unreasonable in light of all the circumstances.</p> <p>U.S.Dist.Ct.Rules D.Conn., L.Civ.R. 37(a-c).</p>
DC District Court	No, but some sanction standards laid out	<p>(a) Unless otherwise provided by the court in its scheduling order, the rule 26 requirement for initial disclosure of information is applicable in all cases except certain exceptions.</p> <p>-A party that without substantial justification fails to disclose information required by this rule or rule 26, or to amend a prior response to discovery as required, is not (unless such failure is harmless) permitted to use as evidence any witness or information not so disclosed.</p> <p>-In addition to or in lieu of this, the court (on motion and after affording an opportunity to be heard) may impose other appropriate sanctions.</p> <p>-These sanctions may include any of the actions authorized under rule 37(b)(2)(A),(B), and (C), in addition to requiring payment of reasonable expenses including attorney's fees caused by the failure, and may also include informing the jury of the failure to make the disclosure.</p> <p>-A party may not seek discovery from any sources before the parties have conferred as required by rule 26(f).</p> <p>U.S.Dist.Ct.Rules D.C., LCvR 26.2</p>
Delaware District Court	No standards for sanctions	<p>Any discovery motion filed pursuant to FRCP 26-37 shall include a verbatim recitation of each interrogatory, request, answer, response, or objection which is the subject of the motion or shall have attached a copy of the actual discovery document which is the subject of the motion. D. Del. LR 37.1.</p>
Florida Middle District Court	No standards for sanctions	<p>A motion to compel pursuant to rule 36 or 37 shall include quotation in full of each interrogatory, question on deposition, request for admission, or request for production to which the motion is addressed; each of which shall be followed immediately by quotation in full of the objection and grounds therefor as stated by the opposing party; or answer or response which is asserted to be insufficient, immediately followed by a statement of the reason the motion should be granted.</p> <p>Local Rule 3.04</p>
Florida Northern District Court	No standard for sanctions	<p>Motions to compel discovery in accordance with FRCP 33, 34, 36 and 37 shall</p> <ol style="list-style-type: none"> (1) quote verbatim each interrogatory, request for admission, or request for production to which objection is taken, (2) quote in full the opponent's specific objection, and (3) state the reasons such objection should be overruled and the motion granted. <p>U.S.Dist.Ct.Rules N.D.Fla. Loc. R. 26.2</p>

Florida Southern District Court	No standard for sanctions	Because lawyers are expected to respond when the Federal Rules of Civil Procedure require, Federal Rule of Civil Procedure 37 provides that if an opposing lawyer must go to Court to make the recalcitrant party answer, the moving party may be awarded counsel fees incurred in compelling the discovery. Federal Rule of Civil Procedure 37 is enforced in this District. Further, if a Court order is obtained compelling discovery, unexcused failure to provide a timely response is treated by the Court with the gravity it deserves; willful violation of a Court order is always serious and may be treated as contempt. U.S. Dist. Ct. Rules S.D. Fla. Appendix A(D)(4).
Georgia Middle District Court	No rule to supplement FRCP	
Georgia Northern District Court	No rule to supplement FRCP	All disclosures must be answered fully in writing in compliance with Fed.R.Civ.P. 26. See also Fed.R.Civ.P. 37 regarding failure to make disclosures. U.S. Dist. Ct. Rules N.D. GA Loc. R. 26.1(B)(1)
Georgia Southern District Court	No rule to supplement FRCP	
Guam District Court	No Rule	If the discovery disputes are found to be frivolous or based on counsel's failure to cooperate with each other in good faith, sanctions will be imposed at the discretion of the Court. U.S. Dist. Ct. Rules Guam Loc. R. 37.1(d)
Hawaii District Court	No Rule	
Idaho Bankruptcy and District Courts	No Rule	
Illinois Central District Court	No Rule	
Illinois Northern District Court	No Rule	
Illinois Southern District Court	No Rule	
Indiana Northern District Court	No Rule	
Indiana Southern District Court	No Rule	

Iowa Northern District Court	No Rule	
Iowa Southern District Court	Same as Northern	
Kansas District Court	No Rule	
Kentucky Eastern District Court	No Rule	
Kentucky Western District Court	Same as Eastern	
Louisiana Eastern District Court	No Rule	
Louisiana Middle District Court	No Rule	
Louisiana Western District Court	Hint at duty to preserve, no sanctions mentioned.	If disclosure or pretrial discovery materials will be used at trial or are necessary to a pretrial motion which might result in a final order on any issue, the portions to be used shall be filed with the clerk at the outset of the trial or at the filing of the motion insofar as their use can be reasonably anticipated. Nothing in this rule is intended to preclude use of disclosure or discovery materials for impeachment if the attorney could not reasonably anticipate that it would be used at trial. LR 26.7
Maine District Court	No Rule	
Maryland District Court	Duty to preserve not directly stated, but strict protocol suggested for ESI.	Counsel are expected to have read the Federal Rules of Civil Procedure, Local Rules of the Court, these Guidelines, and, with respect to discovery of electronically stored information (—ESI), the Suggested Protocol for Discovery of ESI, posted on the Court’s website, www.mdd.uscourts.gov. Compliance with these Guidelines will be considered by the Court in resolving discovery disputes, including whether sanctions should be awarded pursuant to Fed. R. Civ. P. 37, or the Court’s inherent powers. Appendix A Guideline 1.c. Supplemented with suggested protocol—which is very specific on procedure for Rule 26 conferences, but does not provide sanction guidelines.
Massachusetts District Court	No Rule	

Michigan Eastern District Court	No Rule	
Michigan Western District Court	No Rule	
Minnesota District Court	No Rule	
Mississippi Northern District Court	Rule that mentions spoliation specifically	<p>To withhold materials without [notice of privilege] subjects the withholding party to sanctions under FED.R.CIV.P. 37 and may be viewed as a waiver of the privilege or protection. -LR 26(a)(1)(C)</p> <p>If a party fails to make a disclosure required by this section, any other party must move to compel disclosure and for appropriate sanctions under FED.R.CIV.P. 37(a). The failure to take immediate action and seek court intervention when a known fact disclosure violation other than as to expert witnesses occurs will be considered by the court in determining the appropriate sanctions to be imposed regarding a subsequent motion filed under FED.R.CIV.P.37(c). -LR 26(a)(3)</p> <p>The attorneys and any unrepresented parties must confer by telephone or in person as soon as is practicable and no later than the deadline established by the court and discuss, at a minimum, the following: (ii) Steps the parties will take to identify and preserve discoverable ESI to avoid a claim of spoliation . . . -LR 26(e)(2)(B)(ii)</p>
Mississippi Southern District Court	Same as Northern	
Missouri Eastern District Court	No Rule	
Missouri Western District and Bankruptcy Courts	No Rule	
Montana District Court	No Rule	
Nebraska District Court	No Rule	

Nevada District Court	No Rule	
New Hampshire District Court	No Rule	
New Jersey District Court	No mention of sanctions	(3) Duty to Meet and Confer. During the Fed. R. Civ. P. 26(f) conference, the parties shall confer and attempt to agree on computer-based and other digital discovery matters, including the following: (a) Preservation and production of digital information; procedures to deal with inadvertent production of privileged information; whether restoration of deleted digital information may be necessary; whether back up or historic legacy data is within the scope of discovery; and the media, format, and procedures for producing digital information; (b) Who will bear the costs of preservation, production, and restoration (if necessary) of any digital discovery. LR 26.1(d)(3)(a-b)
New Mexico District Court	No Rule	
New York Eastern	No Rule	
New York Northern	No Rule	
New York Southern	Same as Eastern (No Rule)	
New York Western	Nothing on sanctions	Electronically Stored Information. The Court expects the parties to cooperatively reach agreement on how to conduct discovery of electronically stored information (“ESI”). ¹ Prior to the Federal Rule of Civil Procedure 26(f) conference, counsel should become knowledgeable about their clients’ information management systems and their operation, including how information is stored and retrieved. In addition, counsel should make a reasonable attempt to ascertain the contents of their client’s ESI, including backup, archival, and legacy data (outdated formats or media) and ESI that may not be reasonably accessible. In particular, prior to or at the Federal Rule of Civil Procedure 26(f) conference, the parties should confer regarding the following matters: Preservation. Counsel should attempt to agree on steps the parties will take to segregate and preserve ESI in order to avoid accusations of spoliation. LR 16(b)(2)(A)

North Carolina Eastern	No Rule	
North Carolina Middle	Nothing on Sanctions	<p>(f) Meeting on the Scope of Retention of Potentially Relevant Documents.</p> <p>At any time prior to the meeting of parties required by LR 16.1(b), the parties by consent may schedule a meeting relating to the scope of retention of potentially relevant documents, including but not limited to documents stored electronically and the need to suspend any automatic deletion or electronic documents or overwriting of backup material tapes which may contain potentially relevant information. If any party requests a meeting pursuant to LR 16.1(f) and does not obtain consent to such a meeting, the party may file a motion with the Court asking for the entry of an Order requiring a LR 16.1(f) meeting. If such a meeting occurs, by consent or by order, and no retention agreement can be reached, a party may file a motion within 10 days of the Rule 16.1(f) conference with the Court seeking an order on retention. A party's use of, or failure to use, the procedures contained herein, and any negotiations between the parties pursuant to this subparagraph shall be inadmissible.</p> <p>LR 16.1(f)</p>
North Carolina Western	Nothing on Sanctions	<p>Matters which may be considered during the IPC may include . . . production of electronically stored information ("ESI").</p> <p>LR 16.1(2)(G)</p>
North Dakota	No Rule	
Northern Mariana Islands	No Rule	
Ohio Northern	Nothing on Sanctions	<p>Initial Discovery Conference required to establish anticipated e-discovery and the procedures involved.</p> <p><i>See LR – Appendix K</i></p>
Ohio Southern	No Rule	
Oklahoma Eastern	No Rule	
Oklahoma Northern	No Rule	
Oklahoma Western	Nothing on Sanctions	<p>Joint status report and discovery plan requires parties to consider issues related to ESI and the forms in which it should be produced.</p> <p><i>See LR – Appendix II</i></p>
Oregon District Court	No Rule	

Pennsylvania Eastern	No Rule	
Pennsylvania Middle	Rule on prsv., sanctions mentioned but not specifically enumerated	<p>LR 26.1 Duty to Investigate and Disclose.</p> <p>(a) Prior to the conference of attorneys required by Local Rule 16.3, counsel for the parties shall inquire into the computerized information-management systems used by their clients so that they are knowledgeable about the operation of those systems, including how information is stored and how it can be retrieved. At the same time, counsel shall inform their clients of the duty to preserve electronically stored information.</p> <p>(b) In making the disclosures required by Fed. R. Civ. P. 26(a)(1), the parties must disclose electronically stored information to the same extent they would be required to disclose information, files or documents stored by any other means.</p> <p>(c) During the conference of attorneys required by Local Rule 16.3(a), in addition to those matters described in that rule, counsel shall discuss and seek to reach agreement on the following:</p> <p>(1) Electronically stored information in general. Counsel shall attempt to agree on steps the parties will take to segregate and preserve electronically stored information in order to avoid accusations of spoliation.</p> <p>(2) E-mail information. Counsel shall attempt to agree on the scope of e-mail discovery and e-mail search protocol.</p> <p>(3) Deleted information. Counsel shall attempt to agree on whether deleted information still exists, the extent to which restoration of deleted information is needed, and who will bear the costs of restoration.</p> <p>(4) Back-up and archival data. Counsel shall attempt to agree on whether back-up and archival data exists, the extent to which back-up and archival data is needed, and who will bear the cost of obtaining such data.</p> <p>(5) Costs. Counsel shall discuss the anticipated scope, cost, and time required for disclosure or production of data beyond what is reasonably available to the parties in the ordinary course of business, and shall attempt to agree on the allocation of costs.</p> <p>(6) Format and media. Counsel shall discuss and attempt to agree on the format and media to be used in the production of electronically stored information.</p> <p>(d) In the event the parties cannot agree on the matters described in subparagraph (c), counsel shall note the issue of disagreement in Section 10 (“Other Matters”) of the joint case management plan so that the court may, if appropriate, address</p>

		<p>the matter during the case management conference.</p> <p>LR 37.1 Discovery Abuse, Sanctions for. In addition to the application of those sanctions specified in Local Rule 83.3, the court may impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and attorney's fees, if any party or attorney abuses the discovery 23 process in seeking, making or resisting discovery. In an appropriate case, the court may, in addition to other remedies, notify the Attorney General of the United States in a public writing that the United States, through its officers or attorneys, has failed without good cause to cooperate in discovery or has otherwise abused the discovery process.</p>
Pennsylvania Western	Nothing on Sanctions	<p>Rule requires attorneys to understand their client's ESI storage and parties have a duty to meet and confer in order to attempt to agree on procedures for preserving ESI.</p> <p><i>See</i> LR 26.2</p> <p>Comment 1 (June 2008): 1. LCvR 26.2.A.1 imposes a duty for counsel to discuss ESI with their client. It does not, in any way, alter a party's and counsel's obligations under law to preserve evidence, including ESI, when litigation is reasonably anticipated. Nothing in this section precludes a party from moving the Court for an appropriate preservation order.</p>
Puerto Rico	No Rule	
Rhode Island	No Rule	
South Carolina	No Rule	
South Dakota	No Rule	
Tennessee Eastern	No Rule	
Tennessee Middle	No Rule	
Tennessee Western	Rule regarding prsv., nothing on sanctions	<p>During the 26(f) conference, the parties should work toward an agreed preservation Order that outlines the steps that each party shall take to segregate and preserve the integrity of all relevant electronically stored information. In order to avoid later accusations of spoliation, a Fed. R. Civ. P. 30(b)(6) deposition of each party's retention coordinator may be appropriate.</p> <p>LR 26.1(e)(7)</p>
Texas Eastern	No Rule	
Texas Northern	No Rule	
Texas Southern	No Rule	

Texas Western	No Rule	
Utah	No Rule on prsv., sanctions mentioned	Defer to FRCP 37 The magistrate judge may award expenses, costs, attorneys' fees, or other sanctions under a motion under Fed. R. Civ. P. 37(a). LR 37-1(c)
Vermont	No Rule	
Virgin Islands	No Rule	
Virginia Eastern	No Rule	Sanctions for failure to comply as outlined in FRCP 37 <i>See</i> LR 37(H)
Virginia Western	No Rule	
Washington Eastern	No Rule	
Washington Western	General rule on expedition of court business	(d) An attorney or party who without just cause fails to comply with any of the Federal Rules of Civil or Criminal Procedure, or these rules, or orders of the court, or who presents to the court unnecessary motions or unwarranted opposition to motions, or who fails to prepare for presentation to the court, or who otherwise so multiplies or obstructs the proceedings in a case as to increase the cost thereof unreasonably and vexatiously, may, in addition to, or in lieu of the sanctions and penalties provided elsewhere in these rules, be required by the court to satisfy personally such excess costs, and may be subject to such other sanctions as the court may deem appropriate. Local Rules W.D. Wash., GR 3(d)
West Virginia Northern	Broad rule on sanctions for bad faith	LR Civ P 37.01. Sanctions. Counsel and parties are subject to sanctions for failures and lack of preparation specified in Fed. R. Civ. P. 16(f) respecting pretrial conferences or orders. Counsel and parties are also subject to the payment of reasonable expenses, including attorney's fees, as provided in Fed. R. Civ. P. 37(g) for failure to participate in good faith in the development and submission of a proposed discovery plan as required by Fed. R. Civ. P. 26(f) and LR Civ P 16.01(b) and (c).
West Virginia Southern	Same as northern	See above (LR 16.5 in this district as opposed to 37.01 as listed above).
Wisconsin Eastern	Rule on prsv., no sanctions mentioned	Parties required to confer on measures to preserve potentially discoverable ESI from alteration or destruction. <i>See</i> LR 26(a)(3)

Wisconsin Western	No Rule	
Wyoming	No sanctions mentioned	26(f) Conference requires parties to discuss relevant ESI as well as the methods to use for collecting and processing it. U.S.Dist.Ct.Rules Wyo., Civ. Rule 26.2

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TAB 3

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DUKE CONFERENCE SUBCOMMITTEE

The Duke Conference Subcommittee held a mini-conference in Dallas on October 8, 2012. The package of rules sketches discussed at the mini-conference and notes of the discussion are attached. The set of questions that guided the discussion is also attached. Additional materials will be circulated separately.

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TAB 3A

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DUKE CONFERENCE SUBCOMMITTEE

Miniconference Notes, 8 October 2012

The Duke Conference Subcommittee held a "miniconference" at the Dallas Airport on October 8, 2012. The list of participants is attached.

Judge Koeltl welcomed the participants, noting that the group had been carefully selected to include judges, lawyers from a wide array of practices, house counsel positions, the academy, and research institutions.

The shared goal is to improve the workings of the judicial system. Some think there is a need for substantial change; among them are at least a few who believe we have reached a crisis that requires fundamental changes. Others think the situation is not so dire. All recognize that we can always find ways to do things better.

The proposals sketched in the conference materials seek to advance the just, speedy, and less costly disposition of litigation. The hope is that adopting a number of changes all at once, as part of an integrated package, can have an important impact. Each individual proposal must be scrutinized, both for its intrinsic quality standing alone and for its place in the overall package.

The goal is a better system of justice for plaintiffs, defendants, and the public. Access to court is advanced by reducing costs and delay. The participants have been invited knowing that they will leave their clients at the door, and will provide their frank views. Advice is particularly important on how things will work in practice.

Judge Campbell joined in thanking the participants for taking the time, effort, and expense to attend. The Advisory Committee knows that it does not have all the answers. But it does have one goal, to improve the civil justice system. Serving that goal means that participants must not be sensitive about hurting committee feelings. Full criticism of the sketches in the materials is one main goal of the conference. But it also is important to suggest alternatives, whether or not closely related to the sketches. Suggestions after the meeting are welcome.

Judge Campbell also recognized and acknowledged the death, a week earlier, of Judge Mark Kravitz, who served as a member of the Standing Committee, then Chair of the Civil Rules Committee, and then as Chair of the Standing Committee. He completed his service as Chair of the Standing Committee on September 30, the day he died. The Duke Conference, whose work provided the impetus for the present project and many other projects – both as rules amendments and as other work – was organized under his leadership. He was an immensely talented individual of good will, and a dear friend.

Participants made initial observations about the overall package.

Judge Rosenthal urged that attention be paid to the intersection of the rules with case-management techniques.

Judge Facciola said that the first step must be achieving proportionality and cooperation in discovery of electronically stored information.

Judge Scheindlin noted that some of the ideas presented in the sketches are being tested in the Southern District of New York Pilot Project for complex cases.

Professor Steven S. Gensler offered three points. Active case management should be emphasized as strongly as possible, just one step short of "must." Imposing a presumptive numerical limit on Rule 34 document requests is a good idea, although there will be problems in applying it. Cooperation should be encouraged, but it cannot be required because it cannot be defined.

Professor E. Donald Elliott observed that "we've been doing many of the same things for the last 30 years." The same approaches encouraging active case management carry on. We should not expect to accomplish new things by continuing to polish the old techniques. New approaches must be found. Criminal discovery offers a useful model - it works well. Rule 34 production requests now offer a free ride. Attempts to change discovery practice have not worked. That is because of the process - judges who do not know much about the case cannot tell whether requested information is needed. Courts do have power to allocate costs. But the rules are not grants of power to judges. The problem is regulating the behavior of lawyers. Lawyers respond to incentives. We need to reduce the incentives to over-discover. The incentives are both to get information and to impose costs on the adversary. The fundamental problem will be solved when we set limits on the amount of discovery that can be had for free, and require the requesting party to pay the costs of responding to requests beyond those limits.

Dennis Suplee, Esq., invoked the "Hawthorn effect." A New England mill operator hired an efficiency consultant who advised him to turn up the lights because workers are more productive when they can see better. The lights were turned up and for six weeks production went up. Then, curious as to what would happen, the operator turned the lights back down. Production went up still more. "What matters is the fact that you're paying attention to them." Discovery "takes a certain amount of poking around." Each lawyer thinks he does not take too much discovery, but also thinks that every other lawyer does. We should be suspicious of litigation about litigation. It results in part from the fact that we no

longer actually try cases. All that is left to litigate about is Rule 11 sanctions, spoliation, disqualification of counsel, and the like. "All of this is bad."

Amy W. Shulman, Esq., said that the Duke Conference "was a notably honest discussion." It is nice to think of more judicial management, and more cooperation. "Those are good, but not enough." There are gaps. Some of the rules are inept. "Discovery has a great impact on corporations. It seems impossible to get to trial — too much gets in the way." The proposals to reduce presumptive limits on the number of discovery requests, and to impose new limits, are good. And there should be more fee shifting.

John P. Relman, Esq., found three elements of the package particularly troubling. These are introducing the concept of "proportionality" to rule language; the numerical limits on discovery requests; and cost shifting. Balance is needed. Rights are not only a matter of dollar awards. Some litigants come to the system with disadvantages; cost shifting can deter them. The Civil Rights laws recognize this problem. As for proportionality, the plaintiff has the burden of proving the case. It can be time-consuming to find the facts. There may be no other way in housing discrimination or credit discrimination cases, but damages may be low. There are limits on money damages in Title VII cases. The dollars are not the only measure of importance, but proportionality is likely to be measured by comparing probable dollars of recovery to the probable dollar cost of discovery. Some of the other proposals are good. Allowing discovery requests before the Rule 26(f) conference will get the issues on the table for the conference. Discovery can be abusive, but generally "the more the better. Parties understand better what the case is about. The facts come out. The faster, the better."

Michele A. Roberts, Esq., began practice in criminal defense and had no concept of discovery when she switched to civil litigation. "There are lawyers who ask for everything and anything. This is a complete and utter waste of time in most of my cases," which tend to be large commercial cases. Judges do nothing to encourage coming to them. With no one watching, lawyers often behave badly. Discovery costs millions and millions in large cases, and is used in abusive ways. It forces small companies to settle because that is cheaper than discovery. "Civil discovery is out of control. Judges lack the time to control." Requiring proportionality, reinforced by presumptive limits on the number of requests, is a start.

Parker C. Folse, III, Esq., practices mainly on the plaintiff's side in commercial cases with high economic stakes. "About half my cases are patent cases." Such cases are a big slice of federal civil litigation. "I do not argue that one size fits all." Perhaps the rules should differentiate cases. Discovery, even from a plaintiff's perspective, is excessive. But the excess

may not be caused by the rules, and may not be cured by amending them. One reason for excessive discovery is that in much big litigation it is turned over to young lawyers who have never gone to trial, or to senior lawyers who have little trial experience and who do not understand what is needed or useful for trial. Making requests is costless. Lots of time is spent in debating things that, in the end, do not matter. "People start to get reasonable when there is a threat to go to the judge." It would help to have serious conversations between the most senior lawyers on all sides. Rules changes are not likely to change these phenomena very much. Close supervision by the court is important. The Rule 26(f) conference happens too early for the lawyers to know what the issues will be; they hedge their bets, and often fail to come to grips with each other. They do not want to be fenced in. They waive limits. Often the court does not hold an in-person conference. No one focuses on the issues. There should be more than one Rule 26(f) conference – the second one with the judge or some kind of experienced monitor – to induce serious discussion of what the case is really about. At some point there should be an actual conference with the judge. Even then things will change as the case goes on. Perhaps we should institutionalize a second Rule 16 conference three or four months, or a bit later, in the case.

James M. Finberg, Esq., does plaintiffs' civil rights cases. There are some good ideas in the sketches, such as reducing the time for service in Rule 4(m), allowing discovery requests before the Rule 26(f) conference, and governing Rule 34 responses to state whether anything is being withheld under general objections and to require actual production. But the proposed limits on the numbers of depositions and Rule 34 requests are a matter of concern. Plaintiffs are not in a position to know what really happened. Ethics bar us from speaking to those who do know. The 5-deposition limit would be really hard to live with. The present 7-hour limit is good; 4 hours would be too little. With Rule 34 requests, "I'm shooting in the dark, asking for things that may not exist." Those requests are easy to answer by saying it does not exist; much of the limited budget of requests may be used up without imposing any real burden. And Rule 36 requests to admit are valuable in moving the case. Limiting discovery to what is proportional to the needs of the case is likely to be thought of in dollar terms; that is not the right way to look at civil rights cases. The existing rules should be left alone. And the concept of proportionality is so vague as to encourage collateral fights. Rule 26(a)(1) initial production is a good idea, but we didn't push it far enough; the 1993 version was better. For employment cases we have a protocol for pattern discovery that functions as initial disclosures; it could be extended, for example to class actions for employment discrimination.

Daniel C. Girard, Esq., said that discovery is *not* too expensive. The argument that it is too expensive looks at only one side of the equation. Arguments that civil litigation and the cost

of civil discovery are the reason that United States businesses are not competitive fail to recognize that other countries impose direct government regulation in place of the enforcement provided here by private litigation. Still, there are some inefficiencies that can be fixed. Allowing requests before the Rule 26(f) conference is a good thing. On the other hand, a conference before making a discovery motion is not useful; rarely is it more than a dress rehearsal for the motion. It might make sense if the judge is prepared to really engage, but that kind of judge is doing it now. Pattern discovery makes sense; one helpful rule is reflected in the local rules in the Southern District of New York that provide definitions for terms commonly used in discovery. Fights over Rule 34 requests early in discovery are more and more important, often in connection with Rule 23 certification. Numerical limits on the number of requests have appeal, but the present rule allowing 10 depositions of 7 hours each works well – though perhaps it would be even better to allot a total "hours of deposition time" to each side, to be expended on some longer and some shorter depositions. Imposing a numerical limit on the number of Rule 34 requests may be counterproductive: more may be achieved, at less cost, by a greater number of narrow requests than by a smaller number of very broad requests. Proportionality and cost shifting are important, two sides of the same coin. It will help to put still more discretion in the hands of the judge. But it's bad if a hostile judge controls the facts in this way. Pay-as-you-go is not desirable.

Jeffrey J. Greenbaum, Esq., began by noting that the Duke Conference was exciting, showing recognition that the e-discovery explosion has made the system too costly. He had hoped for more adventuresome changes in the paradigm. The scope of discovery should be narrowed to what you need, not what you want. We should experiment with a separate track for complex cases. Initial disclosures under Rule 26(a)(1) should be eliminated as a waste of time. Trial judges should manage discovery. Rule 36 requests to admit should be coupled to Rule 12(b)(6) to help show what the case is about. Proportionality and cost shifting are promising ideas. Making Rule 16 mandatory is good. The idea of a conference before filing a discovery motion is good, as are the proposed numerical limits on interrogatories, requests to produce, and requests to admit. The 7-hour limit for depositions has to be pruned down to make clear that it applies to the total time available to all participants. It is not helpful to shorten the time available up front for serving process and the scheduling conference. Early rule 34 requests before the Rule 26(f) conference will not be helpful – they will lead to posturing by the plaintiff before the defendant can figure out what the case is about, although they might be suitable for simple cases on a 2-track system.

John J. Jablonski, Esq., said he was attending as representative of the Defense Research Institute. He does commercial litigation defense, and counsels on compliance, particularly with e-discovery. "We have an explosion of available

information. Yet the court system seems to focus on a default rule that discovery extends to everything anyone suggests. This default position allows all requested discovery, with costs mounting into the millions, when the case is assigned to a judge who is not actively engaged with the discovery process. "We can reach reasonable limits under the current rules, but there are those who abuse the system." The idea that all should be discoverable, with the fruits to be sorted out at trial, does not work in a system with a 2% trial rate. There is no economic incentive to be reasonable – indeed the lawyer is rewarded for imposing excessive discovery costs. \$1,000,000 of discovery is allowed in a \$100,000 case. We should shift the paradigm. There should be limits on the amount of discovery that is available, requiring permission for anything more. The test should be discovery needed to make the parties able to try the case, on what is needed to prosecute the case. The default rule should be that the requester pays. The argument that you cannot monetize rights masks the fact that plaintiffs' lawyers monetize in deciding what cases they will even bring.

Alexander Dimitrief, Esq., Vice President and Senior Counsel of the General Electric Company, began – "at the risk of rabble rousing" – by quoting the observation that a crisis is a terrible thing to waste. "Everything today is about e-discovery." The preservation and sanctions rule being developed by the Discovery Subcommittee is laudable, and for the most part will make incremental advances. We are plagued by overpreserving largely marginal or irrelevant information. We preserve for 100 custodians, not the 10 that really matter. The specter of spoliation is terrifying. We spend \$15,000,000 a year simply to store documents at Iron Mountain. This is not a problem of discovering legitimately useful information. We need brighter line limits on the kinds of information to preserve, the number of custodians involved, and the like. Our executives believe that competitors in other countries with different litigation systems are more efficient. When our system works it is the best. But it is not working. We do cooperate. The problem is those who do not. Those who abuse discovery. In one case we spent \$2,000,000 litigating the consequences of delay in producing a document that was actually produced – a delay caused by the failure of someone in Denmark to search through one drawer of a file cabinet. And the scope of discovery is a more fundamental problem than the duty to preserve. "We're distressed by the lack of the fundamental changes the system needs." The fast pace of changes in technology means things will only get worse. "Simplicity and bright-line rules are critical." And the idea of adding "not evasive" to the Rule 26(g) certifications implicit in making discovery requests, objections, or responses is unattractive.

Gregory P. Joseph, Esq., said that numerical and time limits are excellent, but not for Rule 34 requests. A conference before filing a discovery motion is good if it is done right, and is

better if it is essentially an accelerated motion practice. Early discovery requests may make sense, unless it reverts to the older practice that effectively allowed the plaintiff to go first. The concept of proportionality is good. Cooperation is a nice idea, but "I don't want to litigate a duty." And why not stick with Rule 26(a)(1) initial disclosures?

Wayne B. Mason, Esq., President of Lawyers for Civil Justice, has a national trial practice – meaning actual trials – focusing on mass disaster, catastrophic injury, and commercial cases. The package of sketches has some positive elements, but does not address the fundamental issues caused by changing times. E-discovery has created a huge problem. One anecdote based on a recent case illustrates the problem: e-discovery alone cost my client \$5,000,000, including \$66,000 a month just for storage and access. All of this when, at trial, most cases come down to 10 or 12 documents. We need senior lawyers to confer on what is really important. Discovery should be limited to what is "material"; relevance is not an adequate shield. Paranoia about sanctions leads to over-preservation. The answer lies in limiting the scope of discovery. Judges do not have time for more conferences. Numerical limits on discovery requests are useful; they will encourage lawyers to get down to what is needed. The ultimate problem is the dearth of jury trials: the costs of getting to trial suffocate our companies. Plaintiffs will not be closed out of court if we adopt rules requiring them to pay for discovery.

Jocelyn D. Larkin, Esq., practices civil rights litigation, trains lawyers, and provides grants for expenses incurred by others to bring impact litigation (mostly class actions). These experiences provide a lot of information about underfunded litigation. In human rights cases, poverty cases, civil rights cases, injunctive relief is often more important than dollars. "I love all front-end speed-up." A rule calling for actual production on the due date avoids the long-drawn trickle of production. Experience shows that a conference before a discovery motion is filed works very well – usually the problem is disposed of by a 1- or 2-page letter and a phone call. Cost shifting is a real problem. Plaintiffs in class actions often get pro bono help from big firms. But the firms carefully limit the costs they are willing to pay. Cost shifting would deter pro bono representation. Numerical limits on discovery requests are a problem. The need for discovery is enhanced by current practices in litigating class certification, and motions to dismiss under Twombly and Iqbal. And we need to do more to train lawyers: even today, remarkably few lawyers know anything about Evidence Rule 502(d) motions. Finding the "top 10 ways to streamline discovery" would be good.

Samuel F. Abernethy, Esq., does commercial litigation in New York. He helped generate the New York State Bar Association report on case management and e-discovery. The Discovery Subcommittee's ongoing work to revise Rule 37(e) on preservation, spoliation, and

sanctions is applauded. The New York State Bar would require an early conference with the court within 60 days of filing the complaint; this is aggressive, but thought useful. Court involvement at an early stage is important. It can help get rid of specific claims and counterclaims that otherwise would burden the court. Another benefit is to encourage cooperation. The conference can take the case a long way if it is serious. Then there should be a second conference to develop a full and complete discovery plan. They would eliminate both initial document disclosures under Rule 26(a)(1) and expert witness disclosures under Rule 26(a)(2). Most of the time these disclosures are an unnecessary expense. But perhaps they should be the subject of an early conference of the parties, and available on court order. They also provide guidelines for privilege logs, following the lead of Judge Facciola. Reducing the time limit on depositions is good, because it forces lawyers to figure out ahead of time what they actually need. Cost shifting is sound "after a point," but implementing it will be difficult. It is good to have a conference with the court before filing a discovery motion.

Professor Robert G. Bone thought many of the proposals sound, but not all. They do not go far enough, even though it is necessary to observe practical limits. There is a need to focus on incentives; that is difficult in a strategic environment. "We cannot hope to get it right in every case. As right as we can is the goal." In shaping the rules, we must think hard about the effects on settlement – not just the frequency of settlement, but the quality of the settlements that may be induced by the pressure of procedure without settlement. We should be willing to recognize substance-specific exceptions to the rules – employment cases, civil rights cases, and others are examples. Judicial case management has limits that result from the difficulty in getting the information needed for effective management. Staged discovery should be practiced more often. Numerical limits on discovery requests can be useful, but only if they are related to specific substantive areas. Cost shifting is important, within limits. Rule 26(a)(1) disclosures should be expanded or eliminated. Proportionality is difficult to understand – one sketch talks about proportional to the reasonable needs of the case, but cases do not have needs. "It's all about marginality."

Hon. Rebecca L. Kourlis, Institute for the Advancement of the American Legal System, generally favors the proposals, but measures them by different criteria. One goal is to simplify the rules and resolve the litigation. Practices need to be differentiated for different types of litigation; one size does not fit all. Case management should be aimed at trial, not settlement, imposing firm time lines subject to some flexibility. More fundamentally, it must be asked whether the Rules Enabling Act is the right vehicle for addressing fundamental problems. The Rules Committees' work is granular, and at times glacial. Should there be a separate process for looking at these problems? Not to generate rules that will

become real rules, but to provide models? The American Law Institute Transnational Litigation project is a good example.

Judge Hodges noted that the Committee on Court Administration and Case Management has not reviewed these sketches. His comments are his own, not for CACM. We have to bear in mind that the Rules apply to all cases, apart from the exclusions from initial disclosure listed in Rule 26(a)(1)(B). The discussion today has focused on complex cases. Most cases are not complex. These proposals would increase the cost of garden-variety cases. But there is merit in the effort to strengthen the concept of proportionality under Rule 26, even though it cannot lead to a bright-line rule.

Judge Gonzalez participated as co-chair of the ABA Task Force on Federal Procedure, which has been asked for comments. She echoed Judge Hodge's observation that one size does not fit all. We need a different track for complex cases. The Southern District of California is a "patent pilot" district, and is refining local rules for patent cases. These are the type of cases that would benefit from discussion of these proposals. Magistrate judges handle all Rule 16 and discovery work in her district. This leaves the trial judge out of the loop on the issues in the case. The trial judge addresses only dispositive motions and trial. It would be "out of our culture" to have the trial judge implement these proposed procedures. The court does have early evaluation conferences within 45 days of filing. The parties must be present, and settlement is discussed. This happens before the scheduling conference. It can help.

Judge Koeltl concluded the initial discussion by noting that the Subcommittee recognizes that the timing provisions are complex and cover a wide range of cases. The cases brought to federal courts include a small fraction that involve large amounts of money and range down to cases that involve only a few dollars. They also include cases that affect interests and rights that are not easily measured by dollar values. Improvement of practice involves many strategies. Changes in "culture" can be important. Education of judges and lawyers can accomplish much. The benchbook for judges has been revised to emphasize the importance of early involvement of the judge. Pilot projects are under way. The protocols for initial discovery in employment cases are being adopted by many judges, and should become a model for developing similar protocols for other types of litigation. The Discovery Subcommittee is working on proposals to address the deep concerns expressed by many parties about the pressures to preserve far more information than is reasonably needed for possible litigation.

The Subcommittee has approached its work mindful of the precept that its first responsibility is to do no harm. Discussion of the specific proposals should ask which of the proposals, taken one by one, is an advance? Which will work well together? What

other proposals, not yet developed, should be considered? Today's discussion will be an invaluable beginning, but it cannot accomplish a full expression of every participant's views. Further submissions after the meeting will be welcome.

I.

A. Rules 16(b) and 4(m): Scheduling Order Timing and Conference

These proposals reduce the time for service under Rule 4(m) from 120 days to 60 days, and shorten the time to issue the Rule 16(b) scheduling order. The simple version of the time for issuing a scheduling order is the earlier of 60 days after any defendant has been served or 45 days after any defendant has appeared. A more complex version, reflecting concerns of the Department of Justice, sets the time at 100 days after serving a defendant that is allowed 60 days to answer the complaint. In addition, they would require that a scheduling conference proceed by simultaneous communication – ideally in person, but at least by conference call or similar means. At the same time, the alternative that allows a scheduling order to issue without a conference after receiving the parties' Rule 26(f) report is preserved.

Are the time limits reasonable?

The first question asked whether we have any idea how many defendants accept service? Is it important to know whether shortening the time to the scheduling conference would affect willingness to accept service?

It was observed that requiring an actual conference will improve the ways in which lawyers prepare for the conference. They will take it more seriously. And benefits will flow from that. This judge holds a real conference "in every case with a real-world plaintiff and defendant," and it works well.

Another judge also thinks it important to hold in-person Rule 16 conferences, and does so. Experience shows that in the average case, the conference is pro forma. Ninety percent of our cases do not need in-depth discussion of discovery costs, proportionality, and like topics. Requiring an in-person conference will increase costs in many cases without real benefit. But it still seems a good proposal. And for complex cases, an in-person conference – indeed more than one – is imperative. Indeed it would be good to have a separate set of rules for complex cases. (Later, this judge emphasized that she favors in-person conferences, even in small cases.)

The first judge said that she had anticipated that in-person conferences would produce little benefit in average cases, but had found that they are in fact useful. "It is possible to define discovery."

Another participant suggested that a staged discovery plan adopted at the front end would be a good thing. And there should be a budget for discovery expressed in total hours. Or, perhaps better, a budget expressed in dollars of expense that can be imposed, recognizing that the dollar budget must take account of

the importance of rights that involve more than just money. Trying to get an agreement in a conference that involves the judge, recognizing that the budget can be adjusted, would make sense. And that would support cost-bearing for discovery once the budget has been exceeded. "Paying for the extra discovery would abolish a lot of the present disputes."

A corporate counsel said that "economic harm is not the only cost to a corporation." It is not merely that plaintiffs are not in a position to know what really happened. It is that document discovery is a very blunt instrument. It draws in peripheral things that tend to be less relevant, but more sensational. Proportionality is not just the money it costs the company. "We are not putting dollars over lives." It makes sense to have separate rules for complicated cases. Pattern discovery is a good thing.

Caution was expressed about accelerating the scheduling conference. The purpose is to get the parties' best view of what the case is about. "That will be difficult if it is too early." We should not accelerate the very beginning of case management.

Strong support was expressed for direct judicial management in the scheduling conference. The lawyers may not grapple in the Rule 26(f) conference with the issues that will involve the judge later on. It would be desirable to mandate an actual conference, not to rely on the 26(f) report, at least in any case in which a party – or even all parties – request to be relieved from the default limits on discovery. This will provide a laboratory for experiment; what judges do around the country will reveal good ways of doing things.

Further support for in-person conferences was voiced by noting that this may be the first time the lawyers see each other. And it may be the only time they see the judge. But it is only effective if all parties are there. The time should not be set from service on the first defendant, or appearance by the first defendant. Even if there is only one defendant, the defendant often takes a few weeks shopping law firms to ask how they would defend the case, how much it would cost, and so on. The time should be set by the answer. And if there is a dispositive motion, that conference might be further deferred: why start discovery in a case that may be resolved by motion?

A judge noted that for many years he had delayed the Rule 16(b) conference until he had ruled on motions to dismiss. But he has found that he can resolve about half the motions at the conference. The conference focuses on the real issues in the case. Often the result is leave to amend the complaint. A lawyer responded that this is a good idea, but in the District of New Jersey the scheduling conference is held by magistrate judges who cannot resolve the motions. A conference with a judge who can

decide the motions would be a good thing. Responding to a question whether he wanted the conference always to be with a district judge, not a magistrate judge, the lawyer said yes: "The judge can cut through a lot of motions." But it was observed that a magistrate judge can "resolve" the motion by report and recommendation. A different judge noted that "we do not have magistrate judges do that." She grants leave to amend with "99%" of motions to dismiss. But the rules should retain the option to authorize magistrate judges to issue scheduling orders.

Another judge lamented that "our profession is turning into a business that deals in commodities." We should recognize that "one size" procedure does not fit all cases. And we should not dumb down our expectations – some judges seem not even to expect lawyers to know the federal rules. The hope that senior lawyers will guide them is misplaced. "There are a lot of lawyers who are completely unsupervised by anyone. They do not know what they're expected to do next." A conference can eliminate unnecessary steps. An example is provide by Rule 26(f) plans that set a schedule for deposing experts in a case that will not involve expert witnesses. We should work toward having two or three "tracks" of rules, including one for pro se cases.

Another lawyer thought it difficult to find any disadvantage in jump-starting the case by holding the scheduling conference after "60 days." A judge agreed. If that seems too early, the answer is to hold another conference. "It's an iterative process in a big case. There is no reason to stop at one." The link to the moratorium on discovery is a good reason to accelerate the timing.

A corporate lawyer agreed that when lawyers know a judge will pay attention, the lawyers take the Rule 26(f) conference more seriously. Early involvement by a judge is important. "I tell lawyers who represent us that it is malpractice not to use Rule 26(f) to full advantage. Really work it." Sixty days will be fine in most cases.

It was suggested that there should be a "good cause" exception to the "60-day" time, so that the judge can adjust when desirable for cases that involve defendants who have not been served, or who have been served toward the end of the 60-day period that would be allowed by proposed Rule 4(m).

A judge predicted that "anything that limits a district judge's discretion, as this seems to, won't fly in the Judicial Conference." Anything that encourages district-judge involvement will have to provide some discretion not to have a conference. There are a lot of routine cases in which requiring a face-to-face conference with a judge imposes costs on the parties without compensating benefits. But it was noted that the rule sketch retains the authority to issue an order based on the Rule 26(f) report, and allows for consulting with the attorneys by conference

call.

B. Uniform Exemptions: Rules 16(b), 26(a)(1)(B), 26(d), 26(f)

Rule 16(b)(1) provides that local rules may exempt categories of actions from the scheduling order requirement. The sketch incorporates instead the Rule 26(a)(1)(B) exemptions from initial disclosure. That makes uniform the categories of actions exempted from scheduling orders, initial disclosure, Rule 26(f) conference, and the Rule 26(d) discovery moratorium.

Discussion began with the suggestion that this question of exemptions from regular procedural requirements raises the philosophical question whether differentiation among categories of cases should be embodied in the rules. Should there be special rules for complex cases? Three tracks, including one for simpler cases? Should tracking depend on the choice whether to require a scheduling order? On abstract categories? There should be flexibility to move actual cases from one track to another. "One size does not fit all."

The tracking model is used in the Southern District of New York for criminal cases. The prosecution chooses among Wheel A, for trials expected to run up to one week; Wheel B, for trials from one to four weeks; and Wheel C, for longer trials. It works. The Southern District also had a simple-case track in its CJRA plan; no one chose it. And it was noted that the RAND report on CJRA experience found that tracking did not reduce cost or expense. A further suggestion was that "tracking is a very different concept from the current rule structure."

Support was expressed for national standards, not local rules. But it was asked whether room should be left for additional exemptions by local rules. Local rulemaking may make sense if there is a high degree of variance among districts in the way different categories of cases are handled. It could make sense as a means of fostering natural experiments. But neither reason seems convincing here. The Rule 26(a)(1)(B) list "is a no-brainer." The hard question is whether there should be additional categories.

One reason for allowing local rules to exempt additional categories of cases was found in the Eastern District of Pennsylvania. As with other courts near a state border, the court has a number of diversity auto collision cases. They are all sent to arbitration, and are subject to distinctive local rules.

C. Informal Conference With Court Before Discovery Motion

Two sketches are provided. One would expand the list of permitted contents for a scheduling order to include a direction that before filing a discovery motion the movant must request an informal conference with the court. The second would impose the

pre-motion requirement on all cases.

The sketches were introduced by noting that a survey by the Administrative Office found that about one-third of federal districts have a local rule requiring a pre-motion conference. Judges who do this find it very effective. Disputes ordinarily are resolved at the conference without the need for a formal motion. The volume of motions is much reduced. But the Subcommittee has thought it unrealistic to attempt to force this practice on judges who do not now adopt it. Listing the conference as a subject for scheduling orders means the lawyers will have to discuss it with each other and with the judge.

The first reaction – from a judge whose court requires a pre-motion conference – was that it is too weak to simply add this to the list of scheduling-order topics. "This is just efficient." Judges who do not do it now can be persuaded it is a good practice. It should be required. It will go a long way toward reducing the need to dispose of motions that have accumulated for nearly six months.

A lawyer agreed. "Why not write a rule to incorporate best practices"? We have done it for other things.

A different judge "rose to speak in favor of the weak-kneed approach." It is better with this practice to recognize the discretion of individual judges within a framework of rules that promote good practice. We should trust judges to do what is efficient for the case. And it would be over-promising to claim dramatic effects on the "six-month list." The pressure exerted by the list will remain. A lawyer agreed. The scheduling-order approach is calibrated to reality. Judges are not always able to do this. But adding it to the list of scheduling-order subjects will encourage it.

A judge asked how good is the information about practices of judges whose districts do not have local rules requiring a pre-motion conference? Do we know how many of them do it anyway? And why those who do not do it refrain – is it because they have not tried or thought about it, or is it because they find it a bad idea? It was noted that the last time the FJC sent a questionnaire to district judges about discovery practices was in 1992. "We're shooting in the dark." We have only the count of local rules.

A lawyer objected to the draft rule that would require a pre-motion conference, finding it "completely inarticulate." The rule should describe the process that is contemplated. A 3-page brief, or whatever.

Another lawyer spoke in favor of the scheduling-order approach. Imposing a mandatory pre-motion conference would slow down cases in front of the judges who do not move their cases and

who will not tend to the request for a conference. That will mean that parties are discouraged from seeking the conference, or from making proper motions. There is an alternative. Some judges in the Eastern District of Pennsylvania schedule a conference immediately after a motion is filed, before the response. This practice works very well.

A different approach was suggested: a new rule should be directed to the judge, directing the judge to consider this as part of the scheduling order.

Further support was offered for the mandatory approach. The objective is to eliminate written discovery motions. This will avoid the delay that can subvert the processing of the case. "We could make it mandatory, leaving it to the judge to work out the way it is done." Delay in ruling shifts the costs of discovery. And if we default to a narrower scope of discovery, the focus of the conference will be on "why do you need more"? That makes the conference more meaningful.

Making the conference mandatory was further supported by a lawyer who "does not take mere squabbles to the judge." A discovery dispute is taken to the judge only when it is something really essential to the case. In an individual employment case, for example, it is often essential to discover the records of similarly situated employees who were treated differently, showing that the employer's proffered reason for adverse action is a pretext. There is a risk that a judge hostile to these claims will make a snap decision in an informal conference without having the benefit of reading the cases that support discovery. "I want to have an assurance I can brief it."

Some reservations were expressed about the pre-conference motion on either approach. "There are defendants who will not produce until there is an order. An over-emphasis on informality confers a tactical advantage on that class of defendants." An informal conference is OK, but it will not be a full answer.

A broader reservation was offered. "The reluctance of judges to resolve discovery disputes shows the system is not working, and judicial management is not the answer.

D. Discovery Requests Before Parties' Conference

This proposal would modify the current Rule 26(d) moratorium that delays the start of discovery to a point after the Rule 26(f) conference. It would allow a party to seek discovery after a brief interval from filing or from serving a defendant, but defer responses to a point after the scheduling order issues. The thoughts are that many lawyers are not even aware of the present moratorium; that having the requests out there will help focus the Rule 26(f) conference; and if disputes emerge from the conference

the Rule 16(b) conference will be advanced.

A participant suggested concerns. The purpose of focusing the Rule 26(f) conference can be served by an informal exchange without actually serving discovery requests. "A signal to encourage sending discovery requests before the Rule 26(f) conference could do as much" as providing for actual service. A response suggested some skepticism: not all lawyers and judges are perfect. This does not happen now. What can be done when education and exhortation fail? But perhaps lawyers could be successfully encouraged to do this. Maybe.

A different reservation was raised. What is the benefit to serving early requests? Why would a lawyer tip off the adversary, particularly if the adversary has not done it? A judge asked the same question: why would a lawyer make a discovery request when an answer is not required soon?

A lawyer responded that questions would be asked. "You need to get it rolling. This gets it started. It puts defendants in a position to discuss it." "I don't expect prompt responses" to discovery now, so there would be little difference on that score.

Another lawyer agreed. Serving early requests created a strong incentive to negotiate. Another lawyer agreed that this will provide a basis for negotiation. The Committee Note could make it clear that not only does the early request not start the rule time clock for responding, but that failure to take advantage of the early-request opportunity should not be counted against a later request to extend the time for discovery.

A different lawyer provided a different response. The early requests will create an "opportunity for mischief and posturing." They will drag the judge into a debate about specific requests. They will be used more by plaintiffs than by defendants. The scheduling conference should focus on global issues, not specific discovery disputes. And it is unclear what the defendant is supposed to do when the time to respond has not begun to run.

Skepticism was expressed from a different perspective. "You don't need actual discovery requests for the Rule 26(f) conference. Counsel can figure it out from the pleadings or in the conference itself." The initial conference with the court should be about case management, not specific discovery disputes." This is not a good idea.

A supporter of early requests thought they will support early discussion about what information exists and what is the burden of discovering it. "I would use it."

A corporate counsel thought an early request would provide an opportunity for the judge to ask whether proposed discovery is

connected to what you need for the case, looking to the issues involved, not just the number of dollars at stake. What is central to the issues, what is at the periphery? These matters can be worked out in an initial conference.

One participant said it makes sense to ask lawyers to have a front-end discovery plan before the conference with the judge. This is not to look for what is the right number of requests, but to weed out what seems grossly disproportional. The judge can revisit the question. "It is an iterative process."

A more technical question was raised. Although the early requests seem to provide an early start on discovery, the structure actually is different. Under present Rule 26(d), real discovery can begin, and the times to respond start to run, as soon as the parties have had the Rule 26(f) conference. The proposal defers the time to respond to a point after the scheduling order. And it should be asked whether the scheduling-order conference is the occasion to "get into the weeds of specific document requests." The defendant may have a lot of problems; can the court make a difference at this point?

The relationship to initial disclosures under Rule 26(a)(1) also should be considered. Interest in early discovery requests seems to imply a sense that initial disclosures are not working as an automatic first phase of discovery. In practice, initial disclosures are routinely made after the Rule 26(f) conference. Allowing discovery requests before the conference may seem at war with initial disclosure practice.

A judge asked what happens when a defendant makes an immunity motion? That automatically stops discovery. For that matter, institutional defendants routinely make motions to dismiss, hoping to stay discovery while the motion remains pending. A response was that if actual discovery responses are stayed, it can be more useful to allow requests to be served.

II. Other Discovery Issues

A. Proportionality: Rule 26(b)(1)

Judge Koeltl introduced the "other discovery issues" by noting that the Subcommittee had devoted a lot of time to these issues. Courts and lawyers talk a lot about the very broad scope of discovery, but commonly leave Rule 26(b)(2)(C) limits out of the discussion. (b)(2)(C) "is a proportionality limit, without using the word." The Subcommittee thought it would be useful to incorporate the concept of proportionality in the Rule 26(b)(1) definition of the scope of discovery. The cross-reference in the final sentence of present (b)(1) is not only redundant, but apparently is ineffectual as well.

The sketches are not carved in stone. The first would amend Rule 26(b)(1) to allow discovery "proportional to the reasonable needs of the case." (b)(2)(C) talks of the needs of the case, without the qualifying "reasonable."

Beyond that, further questions can be asked of the scope of discovery. Is it time to delete the provision that allows discovery to expand beyond the claims and defenses of the parties when good cause is shown to explore "the subject matter involved in the action"? And would it be desirable to narrow the reach and seeming effects of the third sentence: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence"? And if "proportionality" is added to the first sentence of (b)(1) with a cross-reference to (b)(2)(C), should the redundant cross-reference be deleted?

A judge observed that in dealing with discovery disputes he finds that many lawyers rely on the theory that discovery "may lead to the discovery of admissible evidence" as justification for fishing through all the information that anyone has. "It is a mind set." They even ignore the requirement of relevance.

The hopes leading to the 2000 amendments of (b)(1) were recalled. "Relevant" was added for the purpose of eliminating such arguments. Perhaps it has not worked. Many feel that the 2000 amendments have not significantly narrowed discovery practice.

A lawyer thought the "need not be admissible" sentence "undercuts the whole 2000 change." It should be dropped.

Another lawyer agreed that "'relevant' has been broadened to include everything. It would be good to drop the sentence. The provision for expanding discovery to the subject matter of the action also should be dropped.

Yet another lawyer thought it good to add "proportionality" to

rule text, and to delete both the "subject-matter" and "admissible" sentences. The hope that the 2000 amendments would limit discovery was not fulfilled. "We need a 'noisy change' in the scope of discovery." We should publicize that this *is* a change. And education programs will be necessary.

A lawyer thought that an explicit reference in (b)(1) to (b)(2)(C) makes sense. It underscores what is there. Some people want to do more. "But what does 'proportional' mean if not what is already set out in (b)(2)(C)"? Corporate defendants will argue the court should weigh the dollar costs of responding to discovery against the dollars at stake in the litigation. "It will monetize rights – but many rights are not subject to this. 'Proportionality' is an unbounded term. People will read it to mean that discovery that is relevant and that does not impose undue burdens still is not proportional."

Another lawyer agreed. "I don't take issue with (b)(2)(C)." The burden is on the court or the party seeking relief to justify a limitation on discovery. That rule is well drafted. But proportionality is a vague term.

An employment lawyer feared the consequence of a proportionality limit on discovery would be that an individual with no resources can no longer appear in court to prove discrimination. The defendant will always argue that the cost of discovery is more important than the relatively low stake in dollars. Rarely is there a "smoking gun" document in a discrimination case. There are strong cases that support a firm belief that discrimination occurred, but discovery of the files is needed to establish that the explanation given for adverse action is pretext. You have to show how similarly situated people were treated. This is true with other forms of discrimination, such as housing or credit. And so it is with a sexual harassment claim that may realistically be worth \$50,000 – the judge may not think the claim warrants discovery costing the defendant that much or more. Although (b)(2)(C) has not caused this problem over the years, adopting it as part of (b)(1) changes the message.

A corporate counsel responded that no one is asking to compare the cost of discovery to the value of the claim. The question is the value of the discovery in proving the claim. The connection to (b)(2)(C) has been lost. Proportionality bears on the quality of the evidence in the case. Another lawyer agreed. "I would never argue that relevant material is too expensive" to be discovered. Can we narrow discovery to what is relevant?

A participant confessed that he has made overly broad discovery requests for the purpose of putting pressure on an adversary. "I'm entitled to it, though I don't need it." I seek the "impositional benefits of discovery" to affect settlement. That is what a judge can eliminate – "discovery grossly disproportionate to

the realistic needs of the case should be stopped," even if I think I have a duty to my client to request it. A judge can police the strategic use of discovery. Clarifying rule text in some way to qualify the scope of discovery by invoking the proportionality principle now implicit in (b)(2)(C) is useful, but it is not a big change. It will affect only disproportionate requests, and then only if lawyers and judges are confused by the present rules. And the strategic incentives to make disproportionate requests will remain. Putting it up front in (b)(1) may help, but it would be more effective if coupled with incentives to counter the strategic incentives to make overbroad requests. Cost bearing would be effective.

A judge said she would not know how to set a meaningful discovery dollar budget. A judge responded that you can tell the lawyers to give the clients a dollar budget. The judge does not need to know what the lawyers are charging.

A transitional summary began by asking whether "proportional to the reasonable needs of the case" is an attempt to quantify things that cannot be quantified? Is it simply not understandable? The concept is already there in Rule 26(b)(2)(C), but litigants do not follow it, and judges do not cite it. The Subcommittee considered the alternative sketch that simply brings 26(b)(2) into the first sentence of (b)(1) without using the "proportionality" word. Could the word be saved by defining the scope as "proportional discovery as defined in Rule 26(b)(2)(C)"? That approach might support deleting the provision for expanding discovery beyond the parties' claims and defenses to include the subject matter of the action. It also might support deleting the "need not be admissible" sentence, or part of it. "No one is objecting to 26(b)(2)(C)."

A judge observed that experience shows that when one rule cross-refers to another rule, "not everyone stops to go" to the cross-referred rule. "Proportional" captures the principle. What will happen is that everyone will come to know what it means. And this will affect behavior. If we perform the marriage of the concepts, so (b)(1) invokes "proportional discovery as defined in rule 26(b)(2)(C)," we would allay the concerns about vagueness. Another judge agreed that this approach "makes a lot of difference. It connects" the concepts.

A third judge agreed that "proportional" is troubling when it stands alone. "It takes one factor from 26(b)(2)(C) and elevates it above the others." It would be good to follow the sketch that adds "proportional" to 26(b)(2)(C)(iii) itself: "The burden or expense of the proposed discovery outweighs its likely benefit and is not proportional to the reasonable needs of the case * * *." But a judge responded that one issue is that there are many court decisions on the scope of discovery that do not refer to (b)(2)(C), and lawyers do not raise it.

A participant suggested that proportionality "is a principle, not a rule." It will be good to address it in (b)(1); it might be most effective to incorporate the language of (b)(2)(C)(iii) directly into (b)(1). Even then, presumptive limits on the numbers of requests and cost shifting are crucial.

A counter suggestion was that "scope is horizontal. Proportionality is vertical, and does not belong in the (b)(1) provisions for scope." We should simply change the caption of (b)(2) to include proportionality in the tag line.

Discussion turned to the second and third sentences of (b)(1). The real-world problem is the understanding of scope that thinks anything and everything is subject to discovery because something might turn up that is relevant to the dispute. "We need a paradigm shift." The discovery described for discrimination claims should be available. "But there are ridiculous requests." The second and third sentences should be dropped. "A reference to (b)(2)(C) in (b)(1), in conjunction with proportionality," would be good.

It was protested that if the third sentence is omitted, people will start objecting to discovery requests by making admissibility arguments. A response was that perhaps the rule should say "need not be admissible to be discoverable." Or "at trial" could be eliminated. But the protest continued: "reasonably calculated" is useful.

A counter was offered: discovery should be limited to what is "material," meaning necessary as directly relevant to the case.

Common concerns were repeated. "[P]roportional to the resonable needs of the case" "is not rule language." We should incorporate (b)(2)(C) into (b)(1), but it is not clear that the word "proportional" adds anything. We should aim for concise drafting. A similar view was offered. "(b)(2)(C)(iii) has five elements. It is nuanced. We risk a separate, quantitative meaning for 'proportional.' The cost of responding to discovery will be compared to the dollar stakes. Very important low-dollar cases will be fenced out." But it was noted that (b)(2)(C)(iii) takes account of the parties' resources and the importance of the issues at stake. The concern is that adding "proportional" will become a catch word that adds something different.

A judge observed that everyone seemed agreed that (b)(2)(C) is not doing the job. "You cannot make a good lawyer by writing a rule." At some point it's the lawyer's job to know the rules and invoke them. The target of discovery should be what is animating the case. It may be best to leave (b)(2)(C) alone, but perhaps incorporate it more directly in (b)(1).

Further support was offered for "proportional discovery as defined in 26(b)(2)(C)." The third sentence might be shortened to

"Relevant evidence need not be admissible at the trial." That is the intent of the rules. Yet another participant agreed that it is important to incorporate (b)(2)(C) in (b)(1), and that this language seems to do it.

A judge asked whether this means that relevant evidence cannot be discovered if the discovery is not proportional? A corporate counsel answered that it depends on the circumstances. Cumulative or repetitive information need not be discovered. Nor should there be discovery that is too expensive. "Judges grant protective orders all the time." A judge agreed that a court can deny relevant discovery.

Proportionality returned during the discussion of cooperation. One participant said that preservation and sanctions are part of proportionality. We need bright lines on preservation. The standard for sanctions should be willful destruction. Another said that preservation is tied to predictability and the scope of discovery. It is critical to narrow the scope of discovery.

This discussion concluded with the observation of a judge that (b)(2)(C) "defines what is disproportional, not what is proportional." Some drafting work is still needed. Perhaps something like "proportional within the limits of Rule 26(b)(2)(C)"?

Some discussion was had of approaches that dramatically reduce the use of discovery in favor of prompt access to trial. The Northern District of California has an early trial project that promises trial in 4 months in exchange for limiting discovery. Reports differ on whether any parties have actually taken up the opportunity. The concern is that the restrictions on discovery may be too severe. One of the judges at the conference offers prompt trial in exchange for limited discovery; only three cases out of 400 offers have taken up the offer. A lawyer suggested that it might work better to work out such programs by conference for the individual case, or by encouraging agreement of the parties. A menu of options might work better. We need to find the right formula.

B. Limiting the Number of Discovery Requests

Judge Koeltl introduced this part of the package. Utah has introduced an aggregate limit on the number of hours of deposition time a party can request. The sketch setting a presumptive limit of 5 depositions of four hours each is similar to the 20-hour total set by Utah for complex cases. The sketches would reduce the presumptive number of interrogatories to 15, and for the first time would add presumptive limits to 25 Rule 34 requests to produce and 25 Rule 36 requests to admit. These could be tied to the possibility of cost-shifting as a condition for exceeding the limits.

The proposed limits are higher than the amount of discovery sought in most cases in federal court. The FJC closed-case survey, for example, found the mean number of depositions was 2 or 3 per side. At the other end, the present limit of 10 depositions is often exceeded in complex cases. Setting the limit down to 5 may change attitudes.

A judge said that the 4-hour limit works. Arizona state courts adopted a 4-hour limit. Most of the lawyers in his cases stipulate to adhere to this limit; they like it. He uses time limits for trial. Time limits make the lawyers more efficient. By analogy, a total time limit for all depositions could improve efficiency.

A lawyer said "if it ain't broke, don't fix it." The FJC finds far fewer depositions in most cases than the present limit of 10. Squeezing it down to a limit of 5 will generate lots of arguments for cases in which 6, 7, or 8 depositions are desirable. "Efficient trials are made possible by effective depositions."

But another lawyer supported a total time budget for all depositions. The total can be tailored to each case. "One size never fits all for deposition discovery. A firm limit will produce good results." And the appropriate limits may be asymmetrical. In a case with one plaintiff and 10 defendants, for example, the plaintiff may need more total time – for example to depose each of the defendants – than the defendants need – for example to depose the plaintiff. The time budget approach will put a lot of weight on the Rule 16 conference. The lawyers must provide good information so the judge can figure out the appropriate times. But the result will respond to the need to incentivize people not to waste time, not to burden other parties. He also supported the reduction to 15 interrogatories.

Another lawyer said he had not considered the concept of a total time budget for depositions, but it seems worth doing. "20 hours is a fine presumptive number." And there may be problems when document production is delayed: efficient depositions require prior access to the documents.

A judge said it would be difficult to set a total time budget early in a litigation. But at some later point a reasonable number of hours could be set.

A corporate counsel was attracted to the concept of a total hour budget for depositions. "Allocating the time among corporate defendants in a single case is something we should be able to work out."

Another judge observed that total hour limits work for trial, but was skeptical about setting total limits for depositions. The focus of the case can shift as discovery progresses. Time spent on an early deposition may turn out to have been unproductive, and it

may be important to exceed the budget for depositions that remain, including those that were not anticipated.

A different lawyer responded by observing that the presumptive limit now is 70 hours, with 10 depositions at 7 hours each. A similar concern was that the number of depositions depends on the substance of the claims. Claims that depend on motive and intent may require more. And in many cases the defendants can talk to people – their own employees – that are off limits to plaintiffs. Plaintiffs can get the information only by deposition, and need more depositions than defendants need. A defense lawyer agreed that 10 depositions seems a reasonable limit.

Further support was expressed for a clear presumptive limit of 4 hours per deposition. But what happens when there are multiple parties, and one uses 3.5 hours? The time limit should be hours per party. A different lawyer noted that a 4-hour limit "is troubling with obnoxious witnesses and obstructionist lawyers." Another lawyer said that 7 hours of actual deposition time makes for a long day, usually running into the evening hours. Perhaps the limit should be cut back to 6.5 hours or 6 hours. But you need it; everyone has to be squeezed into this time.

A judge opposed the 5-deposition, 4-hour limit. "I get few calls to extend the 7-hour limit; some to extend the 10-deposition limit. The FJC study shows people generally do not take too many.

A corporate counsel said that plaintiffs and defendants should be able to agree on which witnesses they need to depose. "If we do it in front of the court, we will be held accountable."

Another judge said that expert witness depositions are a colossal waste. The report should to the job. There is no need to worry about them in setting a presumptive limit. But the big battles are fought under Rule 30(b)(6): what will the topics be? What happens when the entity "deponent" identifies 6 or 7 people to be its deposition witnesses?

A response was that deposing the expert witness can be critical. And it is not clear that it can be fit into 4 hours.

A judge said that hostility to the limits in present Rules 30 and 33 has been overcome. But there is excessive use of Rule 34 and Rule 36 requests. It is easier to use them tactically. "We should adopt limits to stop this."

One lawyer was concerned that limiting the number of Rule 34 requests will encourage broader requests. This thought was expanded: it is better to have a larger number of sharply focused requests than a smaller number of overbroad requests. And another asked what happens when you exceed the limit.

Another participant thought that a limit to 25 Rule 34 requests can work if they are focused on this case. A corporate counsel agreed. When dealing with good plaintiff's lawyers, we can agree to focus on the documents associated with a small number of identified individuals, the core group involved with the subject. This also helps with preservation.

A judge said that with respect to electronically stored information he imposes a limit on the number of "custodians" whose information must be searched, and also an initial limit on the number of hours that must be spent on the search. For example, the order might set 40 hours of search time as the initial cap. The cap helps focus on which search should come first. Seeing what that search yields helps in determining what comes next. "I've gone as high as 160 hours." But perhaps this approach cannot be written into a rule.

The constant references to "custodians" led a lawyer to say that a rule should not refer to custodians. Separate terms must be found for ESI. Search terms, for example, must be worked out in a collaborative process. Practice has diverged from Rule 34, which was written for paper documents.

A judge asked how a rule setting a presumptive number of custodians in searches for ESI would work with cloud computing. There is only one storage system. What does "custodian" mean? A corporate counsel agreed that "it's all there in the cloud, in one place." That facilitates easy access. But the amount of time it takes to search one source for the records of 30 people is greater than the time it takes to search for 15 people. And the time required for review also is longer. The focus should be on e-mails and "folders" involving a particular person, on identifying the persons whose files should be searched. "It is an issue of control." We track ESI by people. ESI is created for many purposes other than litigation, and much of it is stored without reference to any particular litigation.

A corporate counsel supported presumptive limits in Rule 34, but suggested that rather than focusing on the number of requests the limit should be expressed in terms of the number of witnesses whose information must be preserved, searched, and produced. A presumptive limit of 10 witnesses would be good.

Addressing Rule 36 requests to admit, a lawyer said they are not helpful for authenticating documents. Other approaches are better. There is little need to impose a limit on other requests to admit and not on these.

Another lawyer responded that Rule 36 requests "incentivize cutting things out of the case." Relief from abuse can be sought from the court. So why impose limits?

It was observed that there seemed to be little disagreement with the sketches reducing the presumptive number of Rule 33 interrogatories to 15, and imposing limits on the number of Rule 36 requests to admit.

A participant thought the project of setting presumptive numerical limits in the rules may run afoul of the notion that one size procedure fits all cases. The "three wheels" system of tracking criminal cases in the Southern District of New York was described. Steve Susman has a similar proposal for civil actions: the court would promise that a 2-day trial can be scheduled in 6 months; a one-week trial can be scheduled in one year; and the attorneys will have to work out a schedule for cases with longer anticipated trials. That approach imposes on attorneys a duty to talk, to cooperate, to make the best use of their time.

Overall support for presumptive limits was expressed by suggesting that they establish a platform for case management, "a thing judges can manage against." The proposed limits set the default closer to the normal case. "It is a lot easier to manage up than to manage down" - no litigant likes to be told that this case is not worth even the effort justified for a normal case.

Discussion concluded with the observation that the Subcommittee will study further the questions of presumptive limits on Rule 34 requests, including the potential need to distinguish ESI discovery from paper discovery and the ambiguities that inhere in the still common references to "custodians" and "key custodians."

C. Discovery Objections and Responses

This package of sketches aims at the converse of excessive discovery. It aims to reduce some of the problems that are found with responses. It seeks to elicit more specific objections, to require a statement whether any responsive material is being withheld on the basis of an objection, to recognize the common practice of actually producing documents rather than permitting inspection and to provide for an order to make the production foretold in a response. It also would add "not evasive" to the certifications that Rule 26(g) attaches to discovery requests, responses, and objections.

The first question was what happens if the response is that "no documents created before the year 2000 are relevant, so we will not search for them." The intent is to recognize this response as sufficiently specific, and something that need not be repeated in the responses to each individual request. The target is the common boilerplate response that each request is "overbroad, irrelevant, burdensome," etc., etc., and saying that production will be made to the extent the request is not objected to. Perhaps that can be said more clearly. The intent is to sharpen the Rule 34 provision for

objections to mirror Rule 33(b)(4), which requires that the grounds for objecting "must be stated with specificity." If there is a valid basis for asserting that nothing created before 2000 is relevant, one statement of that objection should cover each request. That is "specific." A lawyer emphasized that a party should not be required to continually repeat "nothing created before 2000 is relevant."

Adding "produce[d]" to rule text requires care because it is not possible to produce all documents at once, and at the time specified for the response. The time set for stating objections or for stating that inspection will be permitted does not carry over to actual production. A lawyer agreed with this observation, but said the problem with "rolling production" is that there never is an end date.

It was suggested that rolling production should be addressed by requiring the party promising production to set a schedule for producing at the time required for the response. The requesting party can determine whether the schedule is workable, or whether negotiation is needed. This should "cabin the endless trickle of documents, the 4 boxes that arrive at the 6th hour of a deposition." This suggestion was repeated by a judge.

Another lawyer, who commonly represents plaintiffs, observed that rolling production is a good thing. It should be made clear that the deadline for responding to the request is not the deadline for completing production. But there is no reason to defer all production to a time when it can be made completely in a single package. If a date certain for completion cannot be set by agreement, it can be set by court order. Progress reports should be required, identifying how much remains to be done. Delays in document production delay depositions, delay Rule 56 motions, delay Rule 56 responses. The best means of reducing cost and delay is to set a short time for completing discovery. A longer time not only leads to delay; by increasing the amount of work that tends to be done when there is more time, it also increases cost.

A judge agreed that the practice should be a statement in the response setting a date for production, to be followed by negotiation when the date seems too far off, and to be regulated by court order when required.

Another judge said she often gets a letter complaining that the producing party will not say when production will be made. She sets a pre-motion conference. "That works."

Opposition was expressed to the sketch that would add "not evasive" to the certifications listed in Rule 26(b)(1)(B)(i). But another lawyer protested that "evasion is now the first response." The requesting party points out the evasiveness. The response is withdrawn and a different evasion is provided. "In complex cases

now we take three years to get to discovery."

Adding "not evasive" to Rule 26(g) was opposed on the ground that it adds another "sanction tort." A judge agreed – "judges do not need this." Another participant agreed that we do not need to expand the range of sanction torts. "Evasive" is a vague concept that will generate satellite litigation. It is not needed, and it will come at some cost.

But another judge observed that Rule 26(g) already entails certification that a request, objection, or response is consistent with the rules; is not interposed for any improper purpose such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and is neither unreasonable nor unduly burdensome or expensive. Beyond that, Rule 37(a)(4) provides that for purposes of a court order to provide discovery, an evasive response must be treated as a failure to respond. The concept of an evasive response is already familiar in the rules.

The reference to Rule 37(a)(4) led another judge to observe that he has never encountered a motion to treat an evasive answer or response as a failure to answer or respond. The fear of opening the floodgates to satellite litigation may be overstated. But it was suggested that Rule 26(g) is a different context.

A lawyer who has written extensively on sanctions observed that there is almost no case law under Rule 26(g). There is no floodgate problem. "[N]ot evasive" should be added.

D. Rules 33 and 36: Contention Discovery

Judge Koeltl noted that the Subcommittee has not spent as much time on the timing of contention discovery as on other topics in the package. The sketches would allow the requests to be made at any time during discovery, but would postpone the time to answer.

The time for answers set by the sketches as the end of all discovery was questioned. The time should be the end of fact discovery; responses to the contention questions can help in framing discovery of expert witnesses.

Another lawyer suggested a need to recognize the value of early contention discovery. Perhaps the rule should allow up to five contention interrogatories at the beginning of discovery, "to clarify what the case really is about." Responses to the others could be deferred to the end of fact discovery. The problem may take care of itself in any event if the presumptive limit on interrogatories is reduced to 15. Another lawyer responded that early contention discovery is no help.

E. Initial Disclosures

Judge Koeltl noted that reactions to Rule 26(a)(1) disclosure practice vary. At the Duke Conference some participants thought the practice helpful enough, often enough, to warrant maintaining it. Others thought it could be made useful by expanding it to require greater disclosures, along the lines initially adopted in 1993 and cut back in 2000. Still others think it should be abandoned. The Subcommittee has not reached any view on this.

A participant noted that Arizona has had a sweeping initial disclosure requirement for 15 years. When enforced, it works really well. The problem is that it is not really enforced. Colorado has a pilot project that requires disclosure of witnesses and documents, both favorable and unfavorable. We can learn from studying these practices. Mandatory disclosure in criminal cases works. This is an important opportunity. More information will become available from studying current state-court practices. "Do not eliminate it now."

A judge suggested that "too often lawyers waive it, and judges let them. This generates discovery motions."

The New York State Bar committee, composed of a very diverse group of lawyers, was not opposed to initial disclosure. But it is often ill-advised and should be discussed early. It can impose costs on parties who may get out of the case early and who would not have to bear any discovery costs. Or it may force work on issues that will disappear. Rather than require initial disclosures, they should be a subject of discussion with the court and used only in some cases. The problems arise with respect to disclosure of documents. The other disclosure requirements in Rule 26(a) are OK.

Another participant suggested that initial disclosure may have symbolic value as a tie to cooperation. But if that is the objective, it is "rather lost" in the rules. Apart from that, Rule 26(a)(1)(A) and (B) should be dropped or enhanced.

A judge asked about the mandatory disclosure of unfavorable information, as required under the 1993 rule. The Brady obligation of prosecutors to disclose unfavorable information works well. The government generally discloses, and generally discloses on time. The Arizona practice was seen as a civil Brady rule. But the fact is that it did not happen. Lawyers argued it was unethical to comply. And they did not comply. Is it possible to change practice in the civil system? Great efficiency could be achieved.

A variation was advocated by a lawyer who agreed that it would be very difficult to turn the clock back to the 1993 rule requiring disclosure of unfavorable information. "It is antithetical to the role of counsel." And the present option to describe or to produce favorable documents that may be used is always exercised by choosing only to describe them. It should be changed to require

actual production. Often the most important favorable documents will be found early in the case. Producing them can help induce settlement. Additional documents can be produced as further investigation finds them. A routine of automatically supplementing production as you come to consider using newly uncovered documents will alleviate the fear of missing something. Another lawyer responded that "production is as bad as describing. Both are burdensome."

A lawyer said the Arizona experience shows why initial disclosure was cut back in the 2000 amendments. Disclosure of unfavorable information often means that a lawyer who has created a theory of the other side's case is required to disclose unfavorable information supporting a theory the other side has not even thought of. One lawyer should not be forced to generate work product for another. Another lawyer agreed: "The better a lawyer you are, the better you prove your adversary's case. Civil lawyers do not do this." Yet another agreed that it is part of a lawyer's DNA not to disclose.

A judge observed that there is an analogy in using "predictive coding" to search electronically stored information in responding to discovery requests. The requesting party wants to know the words that were used for an initial search, the documents that were produced, and the criteria used to sort out relevant and responsive documents and then to explore them to generate new and refined search terms. Work-product objections are made.

Another lawyer spoke in favor of initially disclosing unfavorable information. There clearly are settings in which unfavorable documents are not disclosed. They are discovered, but only after wasting time and expense. Initial disclosure would promote early settlement.

This observation was supplemented by referring to the rules in Britain that mandate disclosures even before litigation is filed, and then by noting that the employment litigation protocol includes automatic disclosure of unfavorable information. It is a good system that should be adopted, and that will support development of similar protocols for other categories of litigation. This experience provides a clear caution: it is too early to consider giving up on initial disclosures. At the least, Rule 26(a)(1) should be retained for now.

F. Cost Shifting (Discovery Only)

The Subcommittee has not developed the prospect of adding further provisions for cost shifting in discovery. But it recognizes the importance of the question and the strong views of some institutional litigants that greater use of cost shifting is important.

A judge said that several cases in the last few years, mostly in the context of discovering electronically stored information, recognize a securely established power to condition discovery on cost shifting. "They do it. Why do we need to make it more explicit in the rules"?

A lawyer expressed fear that adding more rule provisions would be an important start down a slippery slope. "Courts will move quickly to order a party who wants discovery to pay for it. The chill on pro bono lawyers will be enormous." The chill also will be enormous for lawyers who take cases under fee-shifting statutes. The prospect of out-of-pocket expense is a big deterrent. The history of 42 U.S.C. § 1988 makes it clear that Congress finds a need to protect plaintiffs who lack resources to bring these cases. And the reality is that some judges are not sympathetic to these claims.

A judge suggested that the sketch adding "allocation of expenses" to the list of provisions in a protective order is a conservative approach. This power has been recognized in the case law for at least a decade, primarily in cases involving electronically stored information. Judges do it. The other sketches are heavy handed.

Another participant suggested that cost-shifting "is the most important change we could make." It might be adopted with an exception for fee-shifting cases. Another exception might be made for cases in which information is not symmetrically available to all parties. Drafting a balanced rule presents "a huge number of challenges. But it is well worth the effort."

G. Preservation in Rules 16(b)(3), 26(f)

No one responded to the invitation to comment on the sketches that would add "preservation" to the list of scheduling order contents and to the mandatory subjects of a Rule 26(f) discovery plan.

III. Cooperation: Rule 1

Judge Koeltl introduced the sketches that would apply Rule 1 to lawyers as well as judges. This is an illustration of one approach to adopting a duty of cooperation. Other approaches can be devised. The Southern District of New York has a local rule that requires cooperation. Does the Rule 1 approach make sense, either as sketched or in some other way?

The first response was that partial cost allocation could facilitate cooperation. There is a lot of literature on the effects of cost allocation as enhancing cooperation. Judges would have authority in gray areas. "Proportionality, allocating the costs of joint activity, and cooperation are crucial."

Another participant thought it would be good to create a two-part Rule 1. The first part would, as now, provide a standard of interpreting the rules to guide judges. The second part would provide principles of cooperation and proportionality to guide lawyers, but should describe lawyer duties in more specific terms.

A corporate counsel noted that it is hard to argue against cooperation. Perhaps Rule 1 could be revised to read: "construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding, and to promote cooperation among the parties."

A judge sounded a note of caution. Rule 1 has been in place since the beginning, 1938. It is an anchor for the rules. "It is iconic." We should be careful about inscribing it with graffiti. It is more troubling that we cannot define "cooperation" very well. Professor Gensler has written a whole article that does a good job, but it takes a whole article. The concept has no support in other rules, as compared to the concept of proportionality that does. Changing Rule 1 will not advance cooperation. We should not intrude on Rule 1 until we are ready to tie it to more fundamental changes.

Another judge, invoking practices in the Western District of Wisconsin and the Eastern District of Virginia, observed that what plaintiffs want most is to get to trial. Defendants have a corresponding interest in avoiding the costs of delay. "If we set a firm trial date we coerce cooperation." That works better than a mandate in the rules. It will get to many of the other concerns we have been talking about.

A different judge was attracted to the first part of the sketch, providing that the rules "should be construed, administered, and employed by the court and parties" to achieve good things. She also was attracted to the ACTL/IAALS proposal that would substitute more realistic goals: "to secure the just, ~~speedy,~~ and ~~inexpensive~~ timely, efficient, and cost-effective determination
* * *."

Still another judge said that we should have "up-front trial dates." Discovery and motion cut-offs are important. The problem is that lawyers continually agree to extend the deadlines, and judges go along. Often the enticement is the representation that the parties are very close to settlement.

A lawyer observed that the reason the Eastern District of Virginia rocket docket works is because they have a weekly motion day and most motions are decided from the bench on motion day. "The speed with which judges decide motions – and how close they hold lawyers' feet to the fire – determines how quickly cases get resolved."

A corporate counsel said that reasonable limits on discovery would lead to trial of more cases. "How much it costs to get to trial is the central problem. Ninety-five percent of settlement decisions are based on discovery concerns, not the merits of the case."

Another participant suggested that "active case management is critical to make it realistic to get to trial." The clutter must be eliminated. The second option in the Rule 1 sketch is useful, with a slight revision: "and the parties ~~should~~ are encouraged to cooperate to achieve these goals." "'Should' implies a 'then what.'" The Committee Note could elaborate on what is entailed by cooperation. Much of it would focus on discovery – targeted discovery, agreement on search terms, staging, and so on. "You have to know what you're shooting at." Elaborating what "cooperation" means is essential.

A judge observed that her standing order in every case says that the lawyers are expected to cooperate.

A lawyer suggested that it would be a mistake to amend Rule 1 without a stronger empirical foundation to support more specific elements of the duty to cooperate. The "rocket docket" has consequences. Lawyers are over-committed, and are trying to manage their practices. "It can be destructive to deny a joint motion for a continuance." Confronting a rocket docket, lawyers will take fewer but bigger cases. "More people would go without lawyers." "You just need to know what the system will be. If you don't have decisions from the judge, you cannot survive."

Another participant suggested that cooperation could be worked into a Committee Note explaining a rule embodying proportionality. The Note could advise that the parties are expected to cooperate with each other and with the judge to develop a discovery plan proportional to the needs of the case.

It was observed that all of this concern "is directed to changing the culture of judge and lawyers to better serve the litigants, not the needs of the lawyers or judge. That should be

the touchstone."

Another lawyer agreed with the view that Rule 1 is too much an icon to be amended. But if it is to be amended, the word in rule text should not be "cooperation." Perhaps it would be safe to mention cooperation in the Committee Note.

Judge Koeltl suggested an overall consensus that the Subcommittee should go forward with the sketch that adds "and employed by the court and parties," but should put aside the bracketed addition – that "the parties should cooperate to achieve these ends."

Judge Koeltl closed the meeting with expressions of thanks to all who had made the effort to participate so helpfully in the work of the Subcommittee and Advisory Committee. Time clearly did not allow for a full expression of everyone's views. "Do not hesitate to write."

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TAB 3B

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DUKE SUBCOMMITTEE MINI-CONFERENCE
OCTOBER 8, 2012**

(Dallas, TX)

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TAB 3C

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DUKE SUBCOMMITTEE RULES SKETCHES

The most prominent themes developed at the 2010 Duke Conference are frequently summarized in two words and a phrase: cooperation, proportionality, and "early, hands-on case management." Most participants felt that these goals can be pursued effectively within the basic framework of the Civil Rules as they stand. There was little call for drastic revision, and it was recognized that the rules can be made to work better by renewing efforts to educate lawyers and judges in the opportunities already available. It also was recognized that many possible rules reforms should be guided by empirical work, both in the form done by the Federal Judicial Center and other investigators and also in the form of pilot projects. Many initiatives have been launched in those directions. Rules amendments remain for consideration. Some of them are being developed independently. The Discovery Subcommittee has come a long way in considering preservation of information for discovery and possible sanctions. Pleading standards are the subject of continual study. Other rules, however, can profitably be considered for revision. The sketches set out here reflect work by the Duke Conference Subcommittee after the Conference concluded. The early stages generated a large number of possible changes, both from direct suggestions at the Conference and from further consideration of the broad themes. More recently the Subcommittee has started to narrow the list, discarding possible changes that, for one reason or another, do not seem ripe for present consideration.

The proposals presently being considered are grouped in three roughly defined sets. They involve several rules and different parts of some of those rules. Standing alone, some may seem relatively inconsequential. But they have been developed as part of an integrated package, with the thought that in combination they may encourage significant reductions in cost and delay. The package can survive without all of the parts – indeed, choices must eventually be made among a number of alternatives included for purposes of further discussion.

The first topics look directly to the early stages of establishing case management. These changes would shorten the time for making service after filing an action; reduce the time for issuing a scheduling order; emphasize the value of holding an actual conference of court and parties before issuing a scheduling order; and establish a nationally uniform set of exceptions from the requirements for issuing a scheduling order, making initial disclosures, holding a Rule 26(f) conference, and observing the discovery moratorium. They also would look toward encouraging an informal conference with the court before making a discovery motion. The last item in this set would modify the Rule 26(d) discovery moratorium by allowing discovery requests to be served at some interval after the action is begun, but deferring the time to answer for an interval after the scheduling order issues.

The next set of changes look more directly to the reach of discovery. They begin with alternative means of emphasizing the

principles of proportionality already built into the rules. More specific means of encouraging proportionality are illustrated by models that reduce the presumptive number of depositions and interrogatories, and for the first time incorporate presumptive limitations on the number of requests to produce and requests for admissions. Another approach is a set of provisions to improve the quality of discovery objections and the clarity of responses. Other approaches do not rank as important parts of the overall package and are set out more tentatively. They can survive or fall away based on individual merit. These include emphasizing the value of deferring contention discovery to the end of the discovery period; reexamining the role of initial disclosures; a more express recognition of cost-shifting as a condition of discovery; and adding preservation to the provisions of Rules 16(b)(B)(3)(iii) and 26(f)(3)(C) that refer to electronically stored information.

The last proposal is really one item – a reflection on the possibility of establishing cooperation among the parties as one of the aspirational goals identified in Rule 1.

These proposals are illustrated by sketches of possible rules text. The sketches are just that, sketches. Variations are presented for several of them, and footnotes identify some of the more obvious questions that will need to be addressed as the sketches develop into specific recommendations for adoption.

These proposals have benefited from guidance provided in discussions with the full Advisory Committee. Both Committee and Subcommittee have devoted more time to some of these proposals than to others. Some will deserve further refinement, while others will deserve to be discarded. And the books remain open for additions of new topics. Suggestions are welcome.

The Subcommittee will continue to refine these sketches. The next step is likely to involve some form of informal outreach to bar groups, perhaps including a miniconference, to gather perspectives on how the proposals are likely to play out in the trenches of adversary litigation. If all goes well, a package of proposals will be presented to the Advisory Committee with a recommendation that it seek the Standing Committee's approval for publication.

I. SCHEDULING ORDERS AND MANAGING DISCOVERY

A. Rules 16(b) and 4(m): Scheduling Order Timing & Conference

Two changes in Rule 16(b) scheduling-order practice can be presented together in one draft, along with a parallel change in Rule 4(m). The purpose of these changes is to reduce delay and enhance the process of managing a case.

One change is to accelerate the time when the court enters a scheduling order. The purpose is to speed the progress of a case. The change is illustrated by two provisions, one shortening the time allowed by Rule 4(m) to serve process, the other shortening the time to enter the order after service (or appearance).

The other change emphasizes the value of holding an actual conference, at least by telephone, before issuing a scheduling order. There has been some discussion of eliminating Rule 16(b)(1)(A), foreclosing entry of a scheduling order based on the parties' Rule 26(f) report without a conference. Subcommittee members believe a conference should be held in every case. "Effective management requires a conference." Even if the parties agree on a scheduling order, the court may wish to change some provisions, and it may be important to address issues not included in the report. But there are counter-arguments that the court should be free, if it finds it appropriate, to dispense with the conference. The thought is that although in most cases there are important advantages to having a conference even after the parties have presented an apparently sound discovery plan, there may be cases in which the court is satisfied that an effective management order can be crafted without a conference.¹

Whether or not Rule 16(b)(1)(A) is carried forward, it is desirable to eliminate the (b)(1)(B) provision allowing a conference to be held by "mail, or other means." Whatever "other means" are contemplated, it is better to require an actual face-to-face or voice-to-voice conference.

Rule 4(m)

(m) Time Limit for Service. If a defendant is not served within ~~±20~~ 60 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or

¹ Peter Keisler "would be disinclined to eliminate Rule 16(b)(1)(A)." The judge may not see any need for a conference, particularly if the Rule 26(f) report is prepared by attorneys known to be reliable and seems sound. The judge might ignore a requirement that a conference be held in all cases, or might hold a pro forma conference.

order that service be made within a specified time. But if the plaintiff shows good cause * * *.

Rule 16(b)

(b) SCHEDULING.

- (1) *Scheduling Order.* Except in categories of actions exempted by local rule,² the district judge – or a magistrate judge when authorized by local rule – must issue a scheduling order:
- (A) after receiving the parties' report under Rule 26(f); or
 - (B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means.~~³
- (2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but in any event within the earlier of ~~120~~ 60 days after any defendant has been served with the complaint or ~~90~~ 45 days after any defendant has appeared.

The Department of Justice has expressed concern about accelerating the times in this fashion, advancing the reasons that allow it extra time to answer under Rule 12(a)(2) and (3). Similar reasons might be urged as part of the incentives to waive service, reflected in 12(a)(1)(A)(ii). The following alternative draft is written in terms of a defendant who is allowed 60 days to answer, picking up all of these variations.⁴

² The question whether to adopt a uniform national set of exemptions modeled on Rule 26(a)(1)(B) is addressed in part I B.

³ The provision that the conference may be "by telephone, mail, or other means" is deleted. The intent is to require that the conference involve direct contemporaneous communication among the parties and court. "Conference" is used to imply such communication. The Committee Note can observe that telephone, videoconferencing, Skype, or other means of direct communication are proper.

An alternative would be to adopt rule text that specifies direct contemporaneous communication. Something like: "at a scheduling conference with the court [in person] or by a means of contemporaneous communication."

⁴ The 60 and 45 day periods have been adopted only for illustration. Each period has an impact on timing the Rule 26(f) conference. Rule 26(f)(1) sets the conference "as soon as practicable – and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule

- (2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but in any event:
- (A) within the earlier of 60 days after any defendant has been served with the complaint or 45 days after any defendant has appeared; or
 - (B) in a case in which these rules⁵ allow a defendant 60 days to answer the complaint, within 100 days after that⁶ defendant has been served with the complaint or 45 days after that defendant has appeared.

Resetting the time to issue the scheduling order invites trouble when the time comes before all defendants are served. Later service on additional defendants may lead to another conference and order. Revising Rule 4(m) to shorten the presumptive time for making service reduces this risk. Shortening the Rule 4(m) time may also be desirable for independent reasons, encouraging plaintiffs to be diligent in attempting service and getting the case under way. There may be some collateral consequences – Rule 15(c)(1)(C) invokes the time provided by Rule 4(m) for determining relation back of pleading amendments that change the party against whom a claim is asserted. But that may not deter the change.

16(b)." It seems likely that the parties should have more time to prepare for the 26(f) conference. That could be accomplished by setting the time for the conference, and for the 26(f) report, closer to the time for the scheduling order. The need to consider a longer period in cases that allow a defendant 60 days to answer is framed by the illustrative 60- and 45-day periods. If they are lengthened, there may be less reason to make specific provision for cases with a longer period to answer.

⁵ This could be "in which a defendant is allowed 60 days." That might seem ambiguous because a defendant normally allowed 21 days might win an extension. The time for issuing a scheduling order might better be addressed when the extension of time to answer is granted.

⁶ "that" defendant is used deliberately. Even with a reduced Rule 4(m) period, one defendant might be served on the day of filing, while the 60-days-to-answer defendant might be served on the 60th day, or even later. But there may be complications when there is more than one 60-days-to-answer defendant. Is this good enough?

B. Uniform Exemptions: Rules 16(b), 26(a)(1)(B), 26(d), 26(f)

Rule 16(b) provides that scheduling orders are not required "in categories of actions exempted by local rule." This bow to local practices may have been important when the rule was adopted in 1983, a time when active case management was less familiar than it is today. A survey of the local rules was made in developing the 2000 amendments that, by Rule 26(a)(1)(B), added exemptions that excuse nine categories of proceedings from the initial disclosure requirements. Cases exempted from initial disclosure are further exempted from the Rule 26(f) conference and from the Rule 26(d) discovery moratorium, which is geared to the 26(f) conference. The FJC reported at the time that the exempted categories accounted for 30% of the federal docket.

It may be time to substitute a uniform set of exemptions from Rule 16(b) for the present reliance on local rules. There are obvious advantages in integrating exemption from the scheduling order requirement with the exemptions from initial disclosure, parties' planning conference, and discovery moratorium. Even if most local rules have come into close congruence with Rule 26(a)(1)(B), it could be useful to have a uniform national standard.⁷ At the same time, it is not yet apparent whether any serious losses flow from whatever degree of disuniformity persists.

If a uniform set of exemptions is to be adopted, it seems sensible simply to rely on the initial disclosure exemptions now in place. No dissatisfaction with the list has appeared, although that may be in part a function of ambivalence about initial disclosure practice. The main question may be location: should the list remain where it has been for several years, relying on incorporation by cross-reference in Rule 16(b)? That may be the conservative approach. On the other hand, there is an aesthetic attraction to placing the list in Rule 16(b), so all cross-references are backward. But several counters appear. The first is familiarity - people are accustomed to the present system. Changing Rule 16(b) to adopt a cross-reference is simple, and avoids amending Rules 26(a)(1)(B), (d), and (f) to cross-refer to Rule 16(b). And little harm is done - indeed some good may come of

⁷ The uniform standard might be supplemented by allowing for additional exemptions by local rule to account for local variations in discovery practice. If local experience shows little discovery and little need for management in a category of cases, an additional exemption might not seem to be a threat to uniformity. It is easy to add a local-rule option to Rule 16(b). But that might add clutter to Rules 26(d) and (f) if the categories exempt from scheduling orders by local rule are also to be exempt from the discovery moratorium and the parties' conference.

it - if a court inadvertently enters a scheduling order where none is required. If pursued, the change would look like this:

(b) SCHEDULING.

- (1) *Scheduling Order.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) ~~categories of actions exempted by local rule~~, the district judge - or a magistrate judge when authorized by local rule - must issue a scheduling order: * * *

C. Informal Conference With Court Before Discovery Motion

Participants at the Duke Conference repeated the running lament that some judges – too many from their perspective – fail to take an active interest in managing discovery disputes. They repeated the common observation that judges who do become involved can make the process work well. Many judges tell the parties to bring discovery disputes to the judge by telephone, without formal motions. This prompt availability to resolve disputes produces good results. There are not many calls; the parties work out most potential disputes knowing that pointless squabbles should not be taken to the judge. Legitimate disputes are taken to the judge, and ordinarily can be resolved expeditiously. Simply making the judge available to manage accomplishes effective management. A survey of local rules showed that at least a third of all districts have local rules that implement this experience by requiring that the parties hold an informal conference with the court before filing a discovery motion.

It will be useful to promote the informal pre-motion conference for discovery motions. The central question is whether to encourage it or to make it mandatory. Encouragement is not likely to encounter significant resistance. Making it mandatory, even with an escape clause, is likely to encounter substantial resistance from some judges. Both approaches are sketched here, although the mandatory approach drew little support in Subcommittee discussion. The first illustration adds the conference to the Rule 16(b)(3) list of subjects that may be included in a scheduling order. This reminder could serve as a gentle but potentially effective encouragement, particularly when supplemented by coverage in judicial education programs. The second illustration imposes on the parties an obligation to request a pre-motion conference, but leaves the court free to deny the request. This approach could be strengthened further by requiring the court to hold the conference, but it likely is not wise to mandate an informal procedure against a judge's preferred management style. The sketch places this approach in Rule 7, but it could instead be added to Rule 26, perhaps as a new subdivision (h). That choice need not be made now.

Rule 16(b) (3) (B) (v)

(3) * * *

(B) *Permitted Contents.* The scheduling order may: * * *
(v) direct that before filing a motion for an order relating to discovery the movant must request an informal conference with the court.
[present (v) and (vi) would be renumbered]

Rule 7(b) (3) [or 26(h)]

(3) Conference for Discovery Motion. Before filing a motion for an order relating to [disclosure or] discovery⁸ the movant must [attempt to resolve the questions raised by the motion by meeting and conferring with other parties when required by these Rules and]⁹ request [an informal conference with the court][a Rule 16 conference with the court]. The motion may be filed if the request is denied

⁸ Many rules refer to "discovery" without embellishment. It may be better to use this generic term than to attempt to refer to the discovery rules by number – e.g., "a motion under Rules 26 through 37 or 45." A Rule 27 proceeding to perpetuate testimony, for example, is commenced by a "petition." At the same time, it expressly provides for a motion to perpetuate testimony pending appeal, Rule 27(b). A catalogue of discovery rules would also have to wrestle with such matters as Rule 69(a)(2) discovery in aid of execution, which may invoke "the procedure of the state where the court is located." On the other hand, a generic reference to "discovery" might seem to invoke procedures for getting information from persons in foreign countries, or for providing discovery in aid of foreign proceedings. E.g., 28 U.S.C. §§ 1782, 1783. This might be "discovery under these rules." In a related vein, RLM asks whether these puzzles justify reconsideration of the decision in the Style Project to abandon the index section, most recently Rule 26(a)(5), that provided a list of discovery methods. That would provide an indirect definition, distinguishing discovery from disclosure and shortcircuiting arguments that, for example, Rule 36 requests to admit are not a "discovery" device.

RLM also asks whether this language covers submission to the court for a determination of privilege or protection as trial-preparation material after receiving the information in discovery and then receiving a Rule 26(b)(5) notice of the claimed protection. If Rule 26(b)(5) contemplates that the "determination" is itself an order, then the submission is a request for an order and, by Rule 7(b)(1), is a "motion." If the "determination" is something less than an order, then we need decide whether we want to require a pre-submission conference.

⁹ RLM asks how this relates to the requirement that parties meet and confer before making a discovery motion. There is much to be said for requiring the meet-and-confer before the pre-motion conference. This presents a tricky drafting issue. The attempt in rule text is a place-keeper, no more. Some motions relating to discovery do not seem to require a pre-motion "meet and confer." In addition to Rule 26(b)(5)(B), noted above, Rule 26(b)(3)(C) provides a request to produce a witness statement and a motion to compel if the request is refused.

or if the conference fails to resolve the issues [that would be] raised by the motion.¹⁰

¹⁰ There may be an ambiguity in "resolve." What should a "losing party who feels the need to protect the record on appeal by filing something in writing justifying its position" do? As framed, this describes a situation in which one party is dissatisfied with the disposition offered by the judge at the conference but – apart from the desire to preserve the issue for appeal – would accept it rather than risk offending the judge by pressing ahead with a motion. It may be that the losing party should be forced to the choice. It can accept its position as loser, reject the resolution, and make a motion. Or it can surrender the issue, abandoning any hope of appeal. Why allow a tactical choice to carry ahead with the litigation without a formal challenge, but planning to resurrect the issue on appeal in the event of defeat?

D. Discovery Before Parties' Conference

These changes would enable a party to launch discovery requests before the Rule 26(f) conference, but defer the obligation to respond to a time after the conference. The idea is that the conference may work better if the parties have some idea of what the actual first wave of discovery will be. In addition, there are signs that at least some lawyers simply ignore the Rule 26(d) moratorium, perhaps because of ignorance or possibly because of tacit agreement that it is unnecessary. The Subcommittee has rejected an approach that would enable a party to serve a deposition notice, interrogatories, production requests, and requests to admit with the complaint. That form might operate primarily for the advantage of plaintiffs; defendants might not have enough time to develop discovery requests, particularly if the times for the Rule 26(f) conference and Rule 16(b) conference and order are shortened. The surviving approach introduces some delay between filing – or, more likely, service or appearance by a defendant – and the first discovery requests. Drawing careful time lines will be an important part of this approach.

Rule 26(d): Waiting Period

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before [20 days after service of the summons and complaint on any defendant,] {45 days after the complaint is filed or 20 days after any defendant appears, whichever is later}¹¹ ~~the parties have conferred as required by Rule 26(f),~~ except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Sequence. Unless the parties stipulate, or, ~~on motion,~~¹² the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

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

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

¹¹ The suggested periods are first approximations. If we set the scheduling conference at 60 days after any defendant is served, and set the Rule 26(f) conference 14 days before the scheduling conference, the window for initiating discovery requests is reduced. Some workable compromise must be found.

¹² This change was suggested during general discussion of discovery before the Rule 26(f) conference. The only purpose is to make clear the general understanding that ordinarily parties may stipulate to something the court can order.

Rule 30(a)

* * *

- (2) **With Leave.** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):
- (A) if the parties have not stipulated to the deposition and:
- (i) the deposition would result in more than [10][5] depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;
 - (ii) the deponent has already been deposed in the case; or
 - (iii) the party seeks to take the deposition at a time before the time specified in Rule 26(d) a scheduling order enters under Rule 16(b), unless the proceeding is exempted from initial disclosure under Rule 26(b)(1)(B) or unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and to be unavailable for examination in this country after that time; or * * * ¹³

¹³ These choices suggest several questions. Early drafts provided that "A party must obtain leave of court * * * if * * * the party seeks to take the deposition less than 14 days after a scheduling order is entered under Rule 16(b) * * *." The snag is that a notice of deposition served before the Rule 26(f) conference and before the scheduling order cannot identify a date that will be at least 14 days after the scheduling order. The current draft text seeks to circumvent that problem, bypassing any attempt to specify the means of setting the date for the deposition. The thought is that the parties should be able to work this out at the 26(f) conference, at the scheduling conference, or after the scheduling order is entered. The Committee Note could point this out.

An alternative could be a bit more direct, but also more than a bit more awkward: "if * * * before a scheduling order is entered under Rule 16(b), the party seeks to set the date for the deposition, unless * * *." This alternative says directly that court permission is required to set any specific date in an early deposition notice.

The draft does not set any specific delay after the scheduling order enters. It would be possible to set a specific period – the deposition may not be taken until [14] days after the scheduling order is entered. But this complication may not be necessary. In many circumstances the parties will prefer to defer depositions until after substantial discovery by other means, particularly Rule 34 document discovery. And depositions used to identify the

Rule 31(a)(2)(A)(iii)

Rule 31(a)(2)(A) would, as now, mirror Rule 30(a)(2)(A), except that, as now, Rule 31 would not include a provision for deponents departing the country. A party must obtain leave of court if:

(iii) the party seeks to ~~take the deposition before the time specified in Rule 26(d)~~ commence the process for serving additional questions under Rule 31(a)(5) before a scheduling order is entered under Rule 16(b), unless the proceeding is exempted from initial disclosure under Rule 26(a)(1)(B);¹⁴ or * * *

Rule 33(b)(2)

(2) **Time to Respond.** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories or within 30 days after any scheduling order is entered under Rule 16(b),

subjects and sources of other discovery may be useful at an early time. (Under present practice, a notice of deposition can be served at any time after the Rule 26(f) conference, setting a reasonable time to comply if a Rule 45 subpoena is used.)

A proceeding exempted from initial disclosures by Rule 26(a)(1)(B) is exempt from the discovery moratorium in present Rule 26(d). That exemption is carried forward in the draft. Those proceedings also are exempt from the Rule 26(f) parties' conference and would be exempt from the scheduling order requirement under proposed Rule 16(b). The same exemption appears in proposed Rules 31. The current sketches propose a simpler drafting approach to Rules 33, 34, and 36, but that requires further thought.

¹⁴ This is a first attempt to integrate the Rule 31 process for framing cross questions, redirect questions, and recross questions with early discovery requests. Focusing on the time for taking the deposition seems awkward in this context. Forcing the other parties to frame cross questions, and so on, before the 26(f) conference or the scheduling order, seems out of keeping with the general plan to permit early requests as a means of enhancing early cooperation and management without forcing premature responses.

whichever is later.¹⁵ A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 34(b) (2) (A)

(2) Responses and Objections.

(A) Time to Respond. The party to whom the request is directed must respond in writing within 30 days after being served or within 30 days after any scheduling order is entered under Rule 16(b), whichever is later. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 35

There is no apparent need to revise Rule 35 for this purpose.

Rule 36(a) (3)

(3) Time to Respond; Effect of Not Responding. A matter is admitted unless, within 30 days after being served or within 30 days after any scheduling order is entered under Rule 16(b), whichever is later, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

¹⁵ The reference to "any" scheduling order is a questionable attempt to simplify the drafting. Present Rule 26(d) clearly exempts all modes of discovery from the discovery moratorium in cases exempt from initial disclosures. The drafts for Rule 30 and 31 explicitly adopt this exemption. The drafts of Rules 33, 34, and 36 short-circuit this formula, on the premise that if there is no scheduling order there is no reason for setting a time to respond measured by a scheduling order. But there is at least one potential complication: a court may enter a scheduling order even though not required to do so. If that happens after Rule 33, 34, or 36 requests are served – whether before or after the initial 30-day period has expired – questions could arise as to the time to respond. The scheduling order should resolve those questions. But it may not.

One alternative: "answers and objections must be served within 30 days after being served with the interrogatories or – in a proceeding not exempt from Rule 16(b)(1) – within 30 days after a scheduling order is entered, whichever is later."

Rule 45

Earlier drafts asked whether Rule 45 should be amended in parallel with the provisions for discovery between the parties. One parallel would be to set limits on the time to respond to early discovery requests authorized by draft Rule 26(d)(1). Another would be to impose numerical limits on the number of requests, similar to those proposed for requests to produce documents. The Subcommittee has concluded that there is no apparent need to add these complications to Rule 45. Courts know how to prevent a party from resorting to Rule 45 as a means of attempting to shorten the time to respond to Rule 34 requests to produce. Rule 45 subpoenas addressed to nonparties seem to be more clearly focused than the broad or overbroad requests that sometimes characterize Rule 34 practice. And Rule 45 specifically protects a nonparty who objects against significant expense resulting from compliance.

II. OTHER DISCOVERY ISSUES

A. *Proportionality: Rule 26(b)(1)*

Both at the Duke Conference and otherwise, laments are often heard that although discovery in most cases is conducted in reasonable proportion to the nature of the case, discovery runs out of control in an important fraction of all cases. The rules provide for this. Rule 26(b)(2) is the most explicit provision, and also the most general. Rule 26(b)(2)(C) says that "On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed * * * if it determines * * * that the burden or expense outweigh the likely benefit." Rule 26(g)(1)(B)(iii) provides that signing a discovery request, response, or objection certifies that it is "neither unreasonable nor unduly burdensome or expensive," considering factors that parallel Rule 26(b)(2)(C). Rule 26(b)(1), after describing the general scope of discovery, concludes: "All discovery is subject to the limitations imposed by Rule 26(b)(2)(C)." This sentence was adopted as a deliberate redundancy, and preserved in the Style Project despite valiant efforts by the style consultants to delete it. Rules 30, 31, 33, and 34 expressly incorporate Rule 26(b)(2). Rule 26(c), in addition, provides for an order that protects against "undue burden or expense."

The question is whether still greater prominence should be accorded the proportionality limit, hoping that somehow one more rule behest to behave reasonably will revive a faltering principle. There is ample reason to doubt the efficacy of revising or adding to concepts that already are belabored in deliberately redundant rule text. And there is always a risk that any variation in rule language will provoke arguments – even successful arguments – that the meaning has changed. Adding an express reference to "proportionality," moreover, could easily lead to one more class of blanket objections and an increase in nonproportional arguments about proportionality. If "proportionality" is added to rule text, it will be important to state in the Committee Note that a proportionality objection must be supported by specific reasons informed by the calculus of Rule 26(b)(2)(C).

Despite these possible grounds for pessimism, the Subcommittee believes that it is important to attempt to give proportionality a more prominent role in defining the scope of discovery. The concept is important, and should be more vigorously implemented in practice.

Many approaches are possible, ranging from simple attempts to incorporate Rule 26(b)(2)(C) concepts more prominently in Rule 26(b)(1) to adding explicit references to "proportionality" in rule text. It is even possible to think about revising Rule 26(b)(2)(C)

itself, although the present text seems a good expression of the factors that shape the calculus of proportionality.

The fate of earlier efforts to emphasize Rule 26(b)(2)(C), including the deliberately redundant cross-reference retained as the final sentence of Rule 26(b)(1), suggests that a relatively bold approach may be needed to accomplish much. The Subcommittee is attracted to a revision of Rule 26(b)(1) that would introduce "proportionality" as an express limit on the scope of discovery:

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery, proportional to the reasonable needs of the case, regarding any nonprivileged matter that is relevant to any party's claim or defense * * *.

This approach courts the risks that inhere in adopting any new word in rule text. It seems likely that the new word will provoke litigation about its meaning, and litigation about discovery is seldom a good thing. But the Committee Note can note the relationship to Rule 26(b)(2)(C) concepts, drawing from the express incorporation of (b)(2)(C) at the end of (b)(1).

The mildest approaches considered by the Subcommittee would emphasize the principles of Rule 26(b)(2)(C) without seeking to add "proportionality" to rule text. The first alternative sketched below seems the mildest and may be desirable for that reason. Other sketches are preserved, however, to prompt further discussion.

The simplest strategy is to move proportionality into a more prominent place in Rule 26(b)(1). That could be done in many ways. The simple cross-reference could be moved up, perhaps to the first sentence:

Unless otherwise limited by court order, and subject to [the limitations imposed by] Rule 26(b)(2)(C),¹⁶ the scope of discovery is as follows:

This approach could be seen as no more than a style change. But it is more. It expressly qualifies the broad general scope of discovery. Invoking present (b)(2)(C) reduces the risk of unintended consequences. But it may stand a good chance of producing the intended consequences.

¹⁶ It might be objected that it is the judge, not Rule 26(b)(2)(C) itself, that imposes proportionality limits. More importantly, merely moving around the clause that refers generally to 'the limitations' may not seem adequate to address the problem of widespread misunderstanding.

Much the same thing could be done in a slightly different style form, and with the same observations:

* * * the scope of discovery is as follows: Parties may obtain discovery, within the limitations imposed by Rule 26(b)(2)(C), regarding any nonprivileged matter that is relevant to any party's claim or defense * * *.

This approach seems to tie (b)(2)(C) more directly to the scope of discovery. Either alternative could encourage courts to view proportionality as an essential element in defining the proper scope of discovery.

"Proportionality" also could be added to the text of Rule 26(b)(2)(C)(iii):

The burden or expense of the proposed discovery outweighs its likely benefit and is not proportional to the reasonable needs of the case,¹⁷ ~~considering the needs of the case,~~ the amount in controversy, * * *

If 26(b)(2)(C)(iii) were revised this way, it likely would be desirable to make a parallel change in Rule 26(g)(1)(B)(iii), so that signing a discovery request, objection, or response certifies that it is

proportional to the reasonable needs of the case, and is neither unreasonable nor unduly burdensome or expensive, considering the reasonable needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.¹⁸

¹⁷ This may be no more than another way of saying what is already in the rule.

¹⁸ Should "the parties' resources" or "and the importance of the discovery in resolving the issues" be added to complete the parallel to (b)(2)(C)(iii)?

B. Limiting the Number of Discovery Requests

The Duke Conference included observations about approaching proportionality indirectly by tightening present presumptive numerical limits on the number of discovery requests and adding new limits. These issues deserve serious consideration.

Many studies over the years, many of them by the FJC, show that most actions in the federal courts are conducted with a modest level of discovery. Only a relatively small fraction of cases involve extensive discovery, and in some of those cases extensive discovery may be reasonably proportional to the needs of the case. But the absolute number of cases with extensive discovery is high, and there are strong reasons to fear that many of them involve unreasonable discovery requests. Many reasons may account for unreasonable discovery behavior – ineptitude, fear of claims of professional incompetence, strategic imposition, profit from hourly billing, and other inglorious motives. It even is possible that the presumptive limits now built into Rules 30, 31, and 33 operate for some lawyers as a target, not a ceiling.

Various proposals have been made to tighten the presumptive limits presently established in Rules 30, 31, and 33, and to add new presumptive limits to Rule 34 document requests and Rule 36 requests to admit. The actual numbers chosen for any rule will be in part arbitrary, but they can reflect actual experience with the needs of most cases. Setting limits at a margin above the discovery actually conducted in most cases may function well, reducing unwarranted discovery but leaving appropriate discovery available by agreement of the parties or court order.

Illustration is easy for Rules 30(a)(2)(A)(i) and 30(d)(1):

(a) When a Deposition May Be Taken. * * *

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

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

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

(d) Duration; Sanction; Motion to Terminate or Limit

(1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to [~~one day of 7~~ 4 hours in a single day][one day of ~~7~~ 4 hours].

A parallel change would be made in Rule 31(a)(2)(A)(i) as to the number of depositions. Rule 31 does not have a provision parallel to the "one day of 7 hours" provision in Rule 30(d)(1).

Rule 33(a)(1) is even simpler:

- (1) Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than ~~25~~ 15 interrogatories, including all discrete subparts.

(This could be made more complicated by adding a limit for multiparty cases – for example, no more than 15 addressed to any single party, and no more than 30 in all. No one seems to have suggested that. The complication is not likely to be worth the effort.)

Things are not so simple for Rule 34. It may not be as easy to apply a numerical limit on the number of requests; "including all discrete subparts," as in Rule 33, may not work. This question ties to the Rule 34(b)(1)(A) requirement that the request "must describe with reasonable particularity each item or category of items to be inspected." Counting the number of requests could easily degenerate into a parallel fight over the reasonable particularity of a category of items. But concern may be overdrawn. Actual experience with scheduling orders that impose numerical limits on the number of Rule 34 requests suggests that parties can adjust to counting without any special difficulty. If this approach is followed, the limit might be located in the first lines of Rule 34(a):

- (a) **In General.** A party may serve on any other party ~~a no more than [25] requests~~ within the scope of Rule 26(b):
* * *
- (3) Leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(2).

This form applies to all the various items that can be requested – documents, electronically stored information, tangible things, premises. It would be possible to draft a limit that applies only to documents and electronically stored information, the apparent subject of concern. But either way, there is a manifest problem in setting numerical limits. If a car is dismembered in an accident, is it only one request to ask to inspect all remaining parts? More importantly, what effect would numerical limits have on the ways in which requests are framed? "All documents, electronically stored information, and tangible things relevant to the claims or defenses of any party?" Or, with court permission, "relevant to the subject matter involved in this action"? Or at least "all documents and electronically stored

information relating to the design of the 2008 model Huppmobile"? For that matter, suppose a party has a single integrated electronic storage system, while another has ten separate systems: does that affect the count? Still, the experience of judges who adopt such limits in scheduling orders suggests that disputes about counting seldom present real problems.

(As noted above, the Subcommittee has concluded there is no apparent need to attempt to revise Rule 45 to mirror the limits proposed for Rule 34.)

Rule 36 requests to admit could be limited by a model that conforms to Rule 33. Rule 36(a)(1) would begin:

- (1) *Scope.* A party may serve on any other party ~~a~~ no more than [25] requests to admit, including all discrete subparts, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: * * *

That simple version lacks grace, and also lacks any provision to change the number by agreement or court order. Adding that wrinkle suggests that the limit might better be adopted as a new paragraph, probably (2):

- (2) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit on any other party, including all discrete subparts [, and no more than 50 requests to admit in all].

An all-encompassing limit to 25 requests may go too far with respect to Rule 36(a)(1)(B) requests to admit the genuineness of any described documents. Applying a numerical limit only to Rule 36(a)(1)(A) requests to admit the truth of facts, the application of law to fact, or opinions about either, suggests different drafting approaches. One that should not be ambiguous, but may seem that way to some:

- (1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to:
- (A) no more than 25 matters of facts, the application of law to fact, or opinions about either; and
 - (B) the genuineness of any described documents.

If there is a risk that hasty readers might extend the limit from (A) to (B), cross-referencing might do the job, leaving all of paragraph (1) as it is now and adding a new (2):

(2) Number. Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A)¹⁹ on any other party, including all discrete subparts.

¹⁹ This would be "(A) and (B)" if the more elaborate proposal to defer the time to respond described below is adopted.

C. Discovery Objections and Responses

The common laments about excessive discovery requests are occasionally met by protests that discovery responses often are incomplete, evasive, dilatory, and otherwise out of keeping with the purposes of the rules. Several proposals have been made to address these problems. The Subcommittee believes these proposals deserve serious consideration.

RULE 34: SPECIFIC OBJECTIONS

Two proposals have been advanced to improve the quality of discovery objections. The first would incorporate in Rule 34 the Rule 33 requirement that objections be stated with specificity. The second would require a statement whether information has been withheld on the basis of the objection.

Rule 33(b)(4) begins: "The grounds for objecting to an interrogatory must be stated with specificity." Two counterparts appear in Rule 34(b)(2). (B) says that the response to a request to produce must state that inspection will be permitted "or state an objection to the request, including the reasons." (C) says: "An objection to part of a request must specify the part and permit inspection of the rest." "[I]ncluding the reasons" in Rule 34(b)(2)(B) may not convey as clearly as should be a requirement that the reasons "be stated with specificity." If the objection rests on privilege, Rule 26(b)(5)(A) should control. But for other objections, it is difficult to understand why specificity is not as important for documents, tangible things, and entry on premises as it is for answering an interrogatory. Even if the objection is a lack of "possession, custody, or control," the range of possible grounds is wide.

It would be easy to draft Rule 34(b)(2)(B) to parallel Rule 33(b)(4):

- (B)** *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state [the grounds for objecting {to the request} with specificity] [an objection to the request, including the specific reasons.]

RULE 34: STATE WHAT IS WITHHELD

Many Conference participants, both at the time of the Conference and since, have observed that responding parties often begin a response with a boilerplate list of general objections, and often repeat the same objections in responding to each individual request. At the same time, they produce documents in a way that leaves the requesting party guessing whether responsive documents

have been withheld under cover of the general objections. (The model Rule 16(b) scheduling order in the materials provided by the panel on Eastern District of Virginia practices reflects a similar concern: " * * * general objections may not be asserted to discovery demands. Where specific objections are asserted to a demand, the answer or response must not be ambiguous as to what if anything is being withheld in reliance on the objection.)

This problem might be addressed by adding a new sentence to Rule 34(b)(2)(C):

- (C) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest. An objection [to a request or part of a request] must state whether any responsive [materials]{documents, electronically stored information, or tangible things <or premises?>} are being withheld [under]{on the basis of} the objection.²⁰

RULES 34 AND 37: FAILURE TO PRODUCE

Rule 34 is somewhat eccentric in referring at times to stating that inspection will be permitted, and at other times to "producing" requested information. Common practice is to produce documents and electronically stored information, rather than make it available for inspection. Two amendments have been proposed to clarify the role of actual production, one in Rule 34, the other in Rule 37.

Rule 34(b)(2)(B) would be expanded by adding a new sentence:

- (B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons.²¹ If the responding party elects to produce copies of documents or electronically stored information [in lieu of]{rather than} permit inspection, the response must state that copies will be produced, and the production

²⁰ Could this be simplified: "An objection must state whether anything is being withheld on the basis of the objection"?

²¹ This sentence would be amended to include a specificity requirement under the proposal described earlier in this section.

must be completed no later than the date for inspection stated in the request.²²

Rule 37(a)(3)(B)(iv) would be amended to provide that a party seeking discovery may move for an order compelling an answer if:

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

RULE 26(G): EVASIVE RESPONSES

Rule 26(g) provides the counterpart of Rule 11 for discovery. Signing a discovery request, response, or objection certifies that it is consistent with the Rules. It also certifies that a request, response, or objection is not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. Those strictures might seem to reach evasive responses. And it has been protested that adding an explicit prohibition of evasive responses will simply provide one more occasion to litigate about discovery practices, not about the merits. Nonetheless, it may be useful to add an explicit prohibition to 26(b)(1)(B)(i). By signing, an attorney or party certifies that the request, response, or objection is:

- (i) not evasive, consistent with these rules, and warranted * * *.

²² Requiring complete production by the time stated for inspection may give a slight advantage to the requesting party – work with the produced copies often will be easier than inspection. But that seems a quibble.

D. Rules 33 and 36: Contention Discovery

Discussion at the Conference and elsewhere suggests that contention discovery can be misused. Some observations doubt the value of any contention discovery. Others reflect concern with the timing of contention discovery, arguing that it should be postponed to a time when the completion of other discovery makes it feasible to frame contentions with some assurance. The proposals sketched here focus on the timing question.

Contention discovery was added to Rules 33 and 36 in 1970. What has become Rule 33(a)(2) provides:

An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

The 1970 Committee Note elaborated on the timing question:

Since interrogatories involving mixed questions of law and fact may create disputes between the parties which are best resolved after much or all of the other discovery has been completed, the court is expressly authorized to defer an answer. Likewise, the court may delay determination until pretrial conference, if it believes that the dispute is best resolved in the presence of the judge.

Similarly, Rule 36(a)(1)(A) provides for requests to admit the truth of "facts, the application of law to fact, or opinions about either." The Committee Note is similar to the Rule 33 Note:

Requests for admission involving the application of law to fact may create disputes between the parties which are best resolved in the presence of the judge after much or all of the other discovery has been completed. Power is therefore expressly conferred upon the court to defer decision until a pretrial conference is held or until a designated time prior to trial. On the other hand, the court should not automatically defer decision; in many instances, the importance of the admission lies in enabling the requesting party to avoid the burdensome accumulation of proof prior to the pretrial conference.

It has been suggested that this open-ended approach to timing should be tightened up by requiring court permission to submit contention interrogatories or requests to admit until the close of all other discovery. That would preserve the opportunity for early

contention discovery, but not permit it as freely as the present rules.

The question is whether early contention discovery is so often misused as to justify a change. An illustration of the potential values of early contention discovery is provided by one of the cases cited in the 1970 Committee Note to Rule 33. The FELA plaintiff in *Zinsky v. New York Central R.R.*, 36 F.R.D. 680 (N.D. Ohio 1964), alleged that at the time of his injury his duties were in furtherance of interstate commerce. The railroad defendant denied all allegations of the complaint. The plaintiff then served an interrogatory asking whether at the time of the accident, etc. There is a very real prospect that the denial of the commerce element was pro forma. Confronted with the interrogatory, there is a reasonable chance the railroad will admit the commerce element, putting that issue out of the case. Alternative forms of discovery aimed at showing that the New York Central really is engaged in commerce, at the nature of the plaintiff's duties in relation to the defendant's commerce, and so on, would impose substantial burdens, often serving little purpose.

As the Committee recognized in generating the 1970 amendments, the other side is equally clear. There may be no point in using contention discovery to supplement the pleadings until discovery is complete as to the issues underlying the contention discovery. Developing pleading practice may have a bearing - to the extent that fact pleading increases, there may be still better reason to defer the switch from pleading to discovery as a means of framing the parties' contentions.

Practical experience and judgment are called for. If early contention discovery is misused often enough to be a problem, either because it makes too much supervisory work for the courts or because the parties suffer through the battle without court intervention, it may be time to revise the rules.

One other difficulty must be noted. The 1970 Committee Note to Rule 33 observed: "Efforts to draw sharp lines between facts and opinions have invariably been unsuccessful * * *." The Note to Rule 36 was similar: "it is difficult as a practical matter to separate 'fact' from 'opinion' * * *." The Notes seem to assume that it is easier to separate law-application issues from fact or opinion, but that depends on clear analysis. Remember that "negligence" is treated as a question of fact to be decided by a jury, and to be reviewed for clear error when decided in a bench trial. The drafts that follow make no attempt to depart from the vocabulary adopted in 1970. They are offered without taking any position on the question whether it is better to leave the present rules unchanged, relying on specific case management to achieve proper timing in relation to the needs and opportunities presented by specific cases.

Revising Rule 33(a)(2) can be done directly, or it might be done in combination with Rule 33(b)(2) so as to avoid the need to resolve a seeming inconsistency.

Rules 33(a)(2), (b)(2) Together

- (a) (2) *Scope.* * * * An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the interrogatory need not be answered until the time set under Rule 33(b)(2) until designated discovery is complete, or until a pretrial conference or some other time.
- (b) (2) *Time to Respond.* The responding party must serve its answers and any objections within 30 days after being served with the interrogatories, but an answer to an interrogatory asking for an opinion or contention relating to fact or the application of law to fact need not be served until [all other discovery is complete][the close of discovery on the facts related to the opinion or contention]. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 36

Rule 36 time provisions make for more difficult drafting. A temporary illustration may suffice. Rule 36(a)(1) is amended to enable cross-reference in (a)(3):

- (a) (1) *Scope.* A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(2) relating to:
- (A) facts or opinions about fact₇;
 - (B) the application of law to fact, or opinions about facts or the application of law to fact either; and
 - (BC) the genuineness of any described documents.
- (a) (3) *Time to Respond; Effect of Not Responding.* A matter is admitted unless, within 30 days after being served – or for a request under Rule 36(a)(1)(B){within 30 days after}[all other discovery is complete][the close of discovery on

the facts relevant to the request] -²³ the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

(Remember the interplay of numerical limits on the number of requests to admit. One of the alternatives sketched above would set a limit of 25 requests for admissions of fact or contentions, but no limit on the number of requests to admit the genuineness of documents.)

²³ This may need more work. Expert trial witness discovery is governed by the time set for disclosure under Rule 26(a)(2), and deposition of an expert trial witness comes after the report.

E. Initial Disclosures

Conference reactions to Rule 26(a)(1) initial disclosures can be roughly described. Many participants thought the practice innocuous – it does not accomplish much, but does not impose great burdens. Some believe that any burden is too great, since so little is accomplished; given the limited nature of the disclosures, discovery is not reduced. And there is always the risk that an absent-minded failure to disclose will lead to exclusion of a witness or information. Still others believe that there is a real opportunity for good if the disclosure requirement is expanded back to resemble the form that was reflected in the rules from 1993 to 2000. They point out that the scope of initial disclosures was reduced only as a compromise to help win approval of the amendment that deleted the opportunity to opt out of initial disclosure requirements by local rule.

The starting point of any effort to reinvigorate initial disclosures likely would be the 1993 version. As to witnesses, it required disclosure "of each individual likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, identifying the subjects of the information." The provision for documents was similar, but limited to those within the possession, custody, or control of the party. That went far beyond the present rule, which covers only witnesses and documents "the disclosing party may use to support its claims or defenses." One hope for the 1993 version was that it would encourage particularized pleading for the purpose of forcing broader disclosures. Whether or not that function was served, developing pleading practices may lower any hopes in this direction. The broader purpose was to anticipate the first wave of inevitable discovery, simplifying and expediting the process. The list of exemptions added in 2000 could work to improve this substitute for discovery by reducing the number of cases in which disclosure is required even though the parties would have pursued less, or even no, discovery. Still, the 1993 version would provide no more than a starting point. More work would need to be done before attempting even a sketch of a new disclosure regime.

The Subcommittee has not found much reason to take up initial disclosure practice at present. But the question deserves to be carried forward for broader comment.

F. Cost Shifting (Discovery only)

Both at the Duke Conference and otherwise, suggestions continue to be made that the discovery rules should be amended to include explicit provisions requiring the requesting party to bear the costs of responding. Cost-bearing could indeed reduce the burdens imposed by discovery, in part by compensating the responding party and in part by reducing the total level of requests. But any expansion of this practice runs counter to deeply entrenched views that every party should bear the costs of sorting through and producing the discoverable information in its possession. The Subcommittee is not enthusiastic about cost-shifting, and does not propose adoption of new rules. But the topic is both prominent and important. These sketches are carried forward – and may deserve to be carried forward for some time – to elicit broader discussion.

Rule 26(c) authorizes "an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *." The list of examples does not explicitly include cost shifting. Paragraph (B) covers an order "specifying terms, including time and place, for the disclosure or discovery." "Terms" could easily include cost shifting, but may be restrained by its association with the narrow examples of time and place. More importantly, "including" does not exclude – the style convention treats examples as only illustrations of a broader power. Rule 26(b)(2)(B), indeed, covers the idea of cost shifting when the court orders discovery of electronically stored information that is not reasonably accessible by saying simply that "[t]he court may specify conditions for the discovery." The authority to protect against undue expense includes authority to deny discovery unless the requesting party pays part or all of the costs of responding.

Notwithstanding the conclusion that Rule 26(c) now authorizes cost shifting in discovery, this authority is not prominent on the face of the rules. Nor does it figure prominently in reported cases. If it is desirable to encourage greater use of cost shifting, a more explicit provision could be useful. Rule 26(b)(2)(B) recognizes cost shifting for discovery of electronically stored information that is not reasonably accessible from concern that Rule 26(c) might not be equal to the task. So it may also be desirable to supplement Rule 26(c) with a more express provision.

The suggestion that more explicit provisions would advance the use of cost shifting does not answer the question whether advance is desirable. Cost shifting will be highly controversial, given the still strong tradition that a party who has discoverable information should bear the cost of retrieving it. (Rule 45(c)(2)(B)(iii) protects a nonparty against significant expense in

responding to a subpoena to produce.) Becoming accustomed to cost shifting in the realm of electronically stored information may not reduce the controversy, in part because the fear of computer-based discovery makes it easier to appreciate the risks of overreaching discovery requests.

If a cost-shifting order enters, it is important to consider the consequences if the party ordered to bear an adversary's response costs prevails on the merits. Prevailing on the merits does not of itself mean that the discovery was justified. It may be that none of the discovered information was used, or even usable. Or it may have had only marginal value. On the other hand, the fact that discovery materials were not used, whether to support motions, summary judgment, or at trial, does not mean the discovery was unjustified. The materials may have had value for many pretrial purposes, and may have been winnowed out only to focus on the most compelling materials. Or the discovered information may have led a party to abandon a position that otherwise would have been pursued further, at additional cost. The most likely outcome is discretion to excuse part or all of the costs initially shifted to the requesting party. Rather than characterize the shifted costs as "costs" for Rule 54(d), this discretion can be directly built into the cost-shifting rule. The discretion could easily defer actual payment of the shifted costs to a time well after the discovery is provided and a bill is presented.

A conservative approach might do no more than add an express reference to cost shifting in present Rule 26(c)(1)(B):

- (1) *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *
- (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *

A more elaborate approach might add a new paragraph I:

- (I) requiring that the requesting party bear part or all of the expenses reasonably incurred in responding [to a discovery request],²⁴ including terms for

²⁴ One reason to add the language in brackets is to avoid any confusion as to disclosure; Rule 26(c) seems haphazard in alternating between "disclosure or discovery" and simply "discovery."

payment and subject to reconsideration [at any time before final judgment].²⁵

Still greater elaboration is possible, attempting to list factors that bear on a cost-bearing order. A relatively safe approach to that would be to build cost-bearing into Rule 26(b)(2)(C), adopting all of the factors in that rule:

- (C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule or require the requesting party to bear all or part of the expenses reasonably incurred in responding – if it determines that: * * *

None of these sketches approach the more radical idea that has been taken up by some close observers of the rules. This idea is that the discovery rules were adopted without the slightest inkling of the expenses that would become involved as the practice evolved, and without any consideration of the effects of a default assumption that a party asked to provide discovery should bear the costs of responding. The proposal is that each party should bear the costs another party incurs in responding to the discovery it

²⁵ The bracketed phrase is a place-keeper. Reconsideration may be appropriate even as the discovery continues – the yield of important information may justify reverting to the assumption that a party who has discoverable information must bear the costs of uncovering it and providing it. And the allocation of expenses may be strongly influenced by the outcome on the merits. Perhaps the deadline should extend beyond entry of final judgment – a Rule 59(e) motion to alter or amend the judgment might be appropriate. If so, it might help to include an express cross-reference.

It may not be necessary to add a provision for reassessment after appeal. Certainly the appellate court can review the order. And a remand that does not address the issue should leave the way open for reconsideration by the trial court in light of the outcome on appeal.

RLM adds this question, by analogy to a division of opinions under Rule 11. Some courts impose sanctions for filing an action without reasonable inquiry, even though subsequent proceedings show support for the positions taken. Might a comparable approach be justified when the response to an unreasonable discovery request yields information that could properly be requested? Something may turn on an ex post diagnosis of the difficulty of reaching the responsive information by a better-focused request, including an attempt to guess whether a better-focused request could have been framed in terms that would defeat a narrowing interpretation and result in failure to produce the proper material.

requests. Any change as fundamental as this one should be taken up, either by this Subcommittee or the Discovery Subcommittee, only under direction of the Advisory Committee.

G. Preservation in Rules 16(b)(3), 26(f)

Because the Conference provided many suggestions for discovery reform, many topics are suitable for the agendas of both Subcommittees. A particular illustration is the rather modest suggestion that preservation of electronically stored information be added to the topics appropriate for a scheduling order and for inclusion in the parties' Rule 26(f) discovery plan. Without yet attempting to map a plan for coordination between the Subcommittees, these drafts illustrate the relative simplicity of possible amendments. Whether there is any need to add this particular detail to the general provisions in the present rules is a fair question. It is particularly a fair question because present Rule 26(f)(2) includes "discuss any issues about preserving discoverable information * * *." The only apparent place for further reinforcement is in the (f)(3) description of the mandatory items for a discovery plan.

Rule 16(b)(3)(B)(iii)

- (B) *Permitted Contents.* The scheduling order may:
(iii) provide for disclosure, ~~or~~ discovery, or preservation of electronically stored information; * * *

Rule 26(f)(3)(C)

- (C) any issues about disclosure, ~~or~~ discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; * * *²⁶

²⁶ Note that Rule 26(f)(2) deliberately requires discussion of issues about preserving "discoverable information"; it is not limited to electronically stored information. The (f)(3) discovery plan provisions are more detailed than the (f)(2) subjects for discussion, so the discontinuity may not be a problem.

III. COOPERATION: RULE 1

The wish for reasonable proportionality in discovery overlapped with a broader theme explored at the Conference. Cooperation among the parties can go a long way toward achieving proportional discovery efforts and reducing the need for judicial management. But cooperation is important for many other purposes. Discovery is not the only arena for tactics that some litigants lament as tactics in a war of attrition. Ill-founded motions to dismiss – whether for failure to state a claim or any other Rule 12(b) ground, motions for summary judgment, or other delaying tactics are examples.

It is easy enough to draft a rule that mandates reasonable cooperation within a framework that remains appropriately adversarial. It is difficult to know whether any such rule can be more than aspirational. Rule 11 already governs unreasonable motion practice, and there is little outcry for changing the standards defined by Rule 11.²⁷ And there is always the risk that the ploy of adding an open-ended duty to cooperate will invite its own defeat by encouraging tactical motions, repeating the sorry history of the 1983 Rule 11 amendments.

Despite these reservations, the Subcommittee is interested in adding rule language that encourages cooperation. Initial discussion in the Advisory Committee reflects similar interest, even a measure of enthusiasm. The aspiration of the Civil Rules is articulated in Rule 1. Rule 1 now addresses the courts, but it could be amended to include the parties.

An illustration of a Rule 1 approach can be built out of the ACTL/IAALS pilot project rules:

* * * [These rules] should be construed, and administered, and employed by the court and parties to secure the just, speedy, and inexpensive²⁸ determination of every action and proceeding[, and the parties should cooperate to achieve these ends].²⁹

²⁷ Nor is there any sense that the 1993 amendments softening the role of sanctions should be revisited, despite the continuing concern reflected in proposed legislation currently captioned as the Lawsuit Abuse Reduction Act.

²⁸ Here the ACTL/IAALS proposal would ratchet down the expectations of Rule 1: "~~speedy, and inexpensive~~ timely, efficient, and cost-effective determination * * *."

²⁹ The ACTL/IAALS version is much longer. The court and parties are directed to "assure that the process and costs are proportionate to the amount in controversy and the

or:

* * * [These rules] should be construed and administered by the court to achieve the just, speedy, and inexpensive determination of every action and proceeding. The parties should cooperate to achieve these ends.

There is something to be said for a purely aspirational rule. But extending it to the parties – and thus to counsel – may be an invitation to sanctions, beginning with admonishments from the bench. Moving beyond that to more severe consequences should be approached with real caution.

complexity and importance of the issue. The factors to be considered by the court * * * include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation."

RLM adds a healthy note of skepticism. Does a duty to cooperate include some obligation to sacrifice procedural opportunities that are provided by the Rules? How much sacrifice? Is the obligation to forgo available procedures deepened if an adversary forgoes many opportunities, and defeated if an adversary indulges scorched-earth tactics? Is it conceivable that an open-ended rule could be read to impose an obligation to settle on reasonable terms – that is, terms considered reasonable by the court?

APPENDIX

Various parts of the same rules are affected by proposals made for different purposes. This appendix lays out the full set of changes rule by rule, leaving alternative sketches to footnotes in an effort to improve clarity of illustration.

Rule 1

* * * [These rules] should be construed, and administered, and employed by the court and parties to secure the just, speedy, and inexpensive determination of every action and proceeding[, and the parties should cooperate to achieve these ends].³⁰

Rule 4

(m) **Time Limit for Service.** If a defendant is not served within ± 20 60 days after the complaint is filed, the court * * * must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause * * *.

Rule 7(b)(3) [or 26(h)]

(3) Conference for Discovery Motion. Before filing a motion for an order relating to [disclosure or] discovery the movant must [attempt to resolve the questions raised by the motion by meeting and conferring with other parties when required by these Rules and] request [an informal conference with the court][a Rule 16 conference with the court]. The motion may be filed if the request is denied or if the conference fails to resolve the issues [that would be] raised by the motion.³¹

Rule 16

(b) **SCHEDULING.**

(1) Scheduling Order. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B)³² ~~categories of actions exempted by local rule~~, the district judge – or a magistrate judge when authorized by local rule – must issue a scheduling order:

³⁰ A simpler alternative is sketched in Part III.

³¹ A simpler and milder version, clearly preferred by the Subcommittee, is set out as Rule 16(b)(3)(B)(v) below. This sketch is carried forward only for purposes of discussion.

³² As noted above, the Rule 26(a)(1)(B) exemptions could be moved to Rule 16(b), changing later references accordingly.

- (A) after receiving the parties' report under Rule 26(f); or
 - (B) after consulting with the parties' attorneys and any unrepresented parties at a scheduling conference ~~by telephone, mail, or other means.~~
- (2) *Time to Issue.* The judge must issue the scheduling order as soon as practicable, but in any event:
- (A) within the earlier of ~~120~~ 60 days after any defendant has been served with the complaint or ~~90~~ 45 days after any defendant has appeared; or
 - (B) in any case in which these rules allow a defendant 60 days to answer the complaint, within 100 days after that defendant has been served with the complaint or 45 days after that defendant has appeared.³³
- (3) * * *
- (B) *Permitted Contents.* The scheduling order may: * * *
 - (iii) provide for disclosure, ~~or discovery, or~~ preservation of electronically stored information; * * *
 - (v) direct that before filing a motion for an order relating to discovery the movant must request an informal conference with the court.³⁴[present (v) and (vi) would be renumbered] * * *

Rule 26

- (a) (1) (A) *In General.* Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must * * *
- (b) (1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery, proportional to the reasonable needs of the case, regarding any nonprivileged matter that is relevant to any party's claim or defense * * *.³⁵
- (c) (1) *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *

³³ This is the alternative version that responds to Department of Justice concerns. The simpler version is easy to derive.

³⁴ A more complex and nearly mandatory alternative is set out as Rule 7(b)(3) above. The Rule 7(b)(3) draft is carried forward only for purposes of discussion.

³⁵ Several alternatives are described in Part II A.

- (B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *³⁶
- (d) **Timing and Sequence of Discovery.**
- (1) **Timing.** A party may not seek discovery from any source before [20 days after service of the summons and complaint on any defendant,]{45 days after the complaint is filed or 20 days after any defendant appears, whichever is later} ~~the parties have conferred as required by Rule 26(f),~~ except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.
- (2) **Sequence.** Unless the parties stipulate, or, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:
- (A) methods of discovery may be used in any sequence; and
- (B) discovery by one party does not require any other party to delay its discovery.
- (f) (1) *Conference Timing.* Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or * * *
- (3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on: * * *
- (C) any issues about disclosure, or discovery, or preservation of electronically stored information, including the form or forms in which it should be produced; * * *
- (g) (1) (B) (i) *Signature Required; Effect of Signature.* [By signing, an attorney or party certifies that a discovery request, response, or objection is:] not evasive, consistent with these rules, and warranted * * *.

Rule 30

³⁶ The alternatives sketched in Part II F are intriguing: One would add a new paragraph to Rule 26(c)(1), describing an order (I) requiring that the requesting party bear part or all of the expenses reasonably incurred in responding [to a discovery request], including terms for payment and subject to reconsideration [at any time before final judgment].

The other would include cost sharing in the general proportionality provisions of Rule 26(b)(2)(C):

- (C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule or require the requesting party to bear all or part of the expenses reasonably incurred in responding — if it determines that: * * *

- (a) (2) **With Leave.** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):
- (A) if the parties have not stipulated to the deposition and:
 - (i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants;
 - (ii) the deponent has already been deposed in the case; or
 - (iii) the party seeks to take the deposition at a time before the time specified in Rule 26(d) a scheduling order enters under Rule 16(b), unless the proceeding is exempted from initial disclosure under Rule 26(b)(1)(B) or unless the party certifies in the notice, with supporting facts, that the deponent is expected to leave the United States and to be unavailable for examination in this country after that time; or * * *
- (d) **Duration; Sanction; Motion to Terminate or Limit**
- (1) *Duration.* Unless otherwise stipulated or ordered by the court, a deposition is limited to [~~one day of 7~~ 4 hours in a single day][one day of 7 4 hours].

Rule 31

- (a) (2) **With Leave.** A party must obtain leave of court, and the court must grant leave to the extent consistent with Rule 26(b)(2):
- (A) if the parties have not stipulated to the deposition and:
 - (i) the deposition would result in more than ~~10~~ 5 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants; * * * or
 - (iii) the party seeks to ~~take the deposition before the time specified in Rule 26(d)~~ commence the process for serving additional questions under Rule 31(a)(5) before a scheduling order is entered under Rule 16(b), unless the proceeding is exempted from initial disclosure under Rule 26(a)(1)(B); or * * *

Rule 33

- (a) (1) *Number.* Unless otherwise stipulated or ordered by the court, a party may serve on another party no more than ~~25~~ 15 interrogatories, including all discrete subparts.
- (a) (2) *Scope.* * * * An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the interrogatory need not be answered until the time set under Rule 33(b)(2)

~~until designated discovery is complete, or until a pretrial conference or some other time.~~

- (b) (2) **Time to Respond.** The responding party must serve its answers and any objections within 30 days after being served with the interrogatories or within 30 days after any scheduling order is entered under Rule 16(b), whichever is later, but an answer to an interrogatory asking for an opinion or contention relating to fact or the application of law to fact need not be served until [all other discovery is complete][the close of discovery on the facts related to the opinion or contention]. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

Rule 34

- (a) **In General.** A party may serve on any other party ~~a~~ no more than [25] requests within the scope of Rule 26(b): * * *

(3) Leave to serve additional requests may be granted to the extent consistent with Rule 26(b)(2).

- (b) (2) *Responses and Objections.*

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served or within 30 days after a scheduling order is entered under Rule 16(b), whichever is later. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state [the grounds for objecting {to the request} with specificity] [an objection to the request, including the specific reasons.] If the responding party elects to produce copies of documents or electronically stored information [in lieu of]{rather than} permit inspection, the response must state that copies will be produced, and the production must be completed no later than the date for inspection stated in the request.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest. An objection [to a request or part of a request] must state whether any responsive [materials]{documents, electronically stored information, or tangible things <or premises?>} are being withheld [under]{on the basis of} the objection.

Rule 36

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

- (A) facts or opinions about fact⁷;
- (B) the application of law to fact, or opinions about facts or the application of law to fact ~~either~~;
and
- (BC) the genuineness of any described documents.
- (2) Number. Unless otherwise stipulated or ordered by the court, a party may serve no more than 25 requests to admit under Rule 36(a)(1)(A) and (B) on any other party, including all discrete subparts.³⁷ * * *
- (34) Time to Respond; Effect of Not Responding. A matter is admitted unless, within 30 days after being served or within 30 days after a scheduling order is entered under Rule 16(b), whichever is later, - or for a request under Rule 36(a)(1)(B){within 30 days after}[all other discovery is complete][the close of discovery on the facts relevant to the request] - the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.³⁸

Rule 37

- (a) (3) (B) (iv) [A party seeking discovery may move for an order compelling an answer if:] a party fails to produce documents or fails to respond that inspection will be permitted - or fails to permit inspection - as requested under Rule 34.

³⁷ Alternative sketches of this numerical limit are set out in Part II B. One version would set a limit of 25 contention and fact requests, but unlimited requests to admit the genuineness of documents.

³⁸ If all of these provisions are adopted, it may be better to depart from the order of provisions in the present rule, setting the times for responding after the provision for a written answer or objection:

A matter is admitted unless the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney within 30 days after being served or within 30 days after a scheduling order is entered under Rule 16(b), whichever is later, - or for a request under Rule 36(a)(1)(B){within 30 days after}[all other discovery is complete][the close of discovery on the facts relevant to the request]. A shorter or longer time for responding may be stipulated to under Rule 29 or be ordered by the court.

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TAB 3D

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Questions for the Dallas Mini-Conference.

Overview

1. Please review the sketched Rules changes . We value your thoughts on whether individual proposals are worthwhile, how they could be improved, what other proposals should be considered, and whether the proposals together are likely to increase the efficiency and effectiveness of civil litigation.

Changes in the Initial Stage of the Litigation Process

1. Is it useful to shorten the time limits for the initial service of the summons and complaint and for the scheduling of the Rule 26(f) and Rule 16 Conferences? Are the proposed shortened time limits reasonable?

2. In your experience do lawyers hold meaningful Rule 26(f) conferences and do judges hold Rule 16 case management conferences? Are such conferences effective in managing the litigation and controlling costs? Are there specific techniques or procedures used by some judges that improve the effectiveness of these conferences?

3. Do you find that litigation is more effective when the judge confers with the parties to resolve discovery disputes before discovery-related motions are filed?

4. Do lawyers understand and follow the current moratorium on discovery imposed by Rule 26(d)? If parties are allowed to serve discovery requests before a Rule 26(f) conference is held, but responses are not required until after the Rule 16 case management conference has occurred, would parties file such requests? Would it be useful to be able to discuss such requests at the Rule 26(f) conference or the Rule 16 case management conference?

5. Rule 26(a)(1)(B) exempts eight categories of cases from initial disclosures; the same categories are exempt from the Rule 26(f) conference and the Rule 26(d) discovery moratorium. It is proposed to adopt these same categories as exemptions from the scheduling order requirement of Rule 16(b), displacing local rule exemptions. Is it useful to establish uniformity? Are these the right categories of cases to exclude? Should the uniform set of exemptions be included in Rule 16(b) rather than in Rule 26(a)(1)(B)?

Other Discovery Issues

1. Are the initial disclosures required by Rule 26(a)(1)(A) helpful? Should they be abandoned as largely useless, amended in some way, made more demanding for the purpose of accelerating inevitable discovery, or left as written?
2. Does the concept of “proportionality” in civil discovery have meaning to civil litigants and judges? Do you find that it is regularly considered in the cases that you handle? Would adding proportionality as an explicit limit on the scope of discovery in the first sentence of Rule 26 (b)(1) increase the efficiency and effectiveness of civil litigation? Is this more effective than the cross reference to Rule 26(b)(2)(C) in the final sentence of Rule 26 (b)(1) which does not explicitly use the term “proportionality,” and should that sentence then be deleted?
3. Some are of the view that civil litigators – even those who are efficient civil litigators – conduct more discovery than is necessary to try a case, settle it, or brief a motion for summary judgment. The amount of such discovery is plainly far in excess of what occurs in a criminal case. In your view, do civil litigators conduct more discovery than is necessary and what, if anything, should be done to curtail unnecessary discovery?
4. Are the proposed numerical limits on depositions, interrogatories, document requests, and requests to admit reasonable?
5. Some believe that document requests are overused because they are essentially free and impose the costs and burdens on the producing party. Are there any reasonable ways of limiting the amount of free discovery, and then imposing on the requester the cost of the additional discovery, subject to reasonable exceptions for parties who could not afford to pay for the opponent’s production costs? Don’t courts currently have the power to allocate costs if the production sought is unwarranted? Do they not use whatever power they have? Are there any additional ways that the Rules should address the issue of cost-sharing or the reduction of costs?
6. The proposed changes to Rules 26, 34, and 37 are intended to modernize the way in which document requests are answered in light of the way documents are actually produced, to eliminate evasive responses, and avoid delay in the production of documents. Are these changes reasonable?
7. Is it useful to defer the responses to contention interrogatories and requests to admit with respect to opinions, until the close of discovery, subject to the ability to obtain earlier responses by stipulation or court order?
8. Is it useful to make preservation a specific subject for the Rule 26(f) conference and the Rule 16(b) scheduling order?

Cooperation

1. Does the concept of “cooperation” in civil discovery have meaning to civil litigants and judges? Do you find that it is regularly considered in the cases that you handle? Would adding the concept to Rule 1 increase the efficiency and effectiveness of civil litigation? Is it useful to make it clear that Rule 1 is directed at the parties and not only at the Court?

Overall Issues

1. Are any of the proposals unreasonable for pro se litigants? Do any accommodations need to be made?
2. What can be done to educate the Bench and the Bar about the current means of reducing the cost and expense of litigation and the implementation of any changes?
3. What other suggestions do you have for improving the efficiency and reducing the cost of civil litigation in federal court?

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RULE 84

RULE 84: ABROGATION

The Rule 84 Subcommittee recommends that Rule 84 be abrogated. Many alternative approaches have been considered; two are illustrated in the attached proposal. The recommendation is made with some lingering regrets, but the Subcommittee has concluded that the time has come to withdraw promulgation of "official" forms from the Enabling Act process.

Rule 84 has drawn attention mostly because of the pleading forms. The pleading forms embody stark illustrations of the "simplicity and brevity" contemplated by the original proponents of what has come to be called "notice pleading." As notice pleading became entrenched in practice, these forms led an untroubled life, often invoked as models (particularly in law school classes), however often actually adopted in practice. That changed in 2007 with the decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544. Although the Court accepted the sufficiency of the Form 9 (now Form 11) complaint for negligence, 550 U.S. at 565 n. 10, many observers thought the mood of the Court's exposition of pleading standards inconsistent with the pleading forms. Particular concern focused on the Form 18 complaint for patent infringement, perhaps in part because many infringement plaintiffs seemed to emulate the brevity and simplicity of Form 18. The Federal Circuit seems to have come to terms with Form 18. See *In re Bill of Lading Transmission & Processing Sys. Patent Litigation*, 681 F.3d 1323 (Fed.Cir.2012). Rule 84 says that the forms suffice under the rules, and that validates Form 18. Not all judges are as comfortable with this reconciliation of *Twombly* with the forms. Judge Hamilton, for example, has suggested that the decisions in *Twombly* and *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), are inconsistent with the Enabling Act because inconsistent with the Rule 84 forms.¹

Concern about the pleading forms opens broader questions about the value of Rule 84. These questions are in many ways more important than the narrowly focused concern with the pleading forms. If the pleading forms are the only issue, it may be best to fold them into the long-term project on pleading standards. It could easily be premature to decide the fate of the pleading forms before determining whether to attempt rules revisions in response to the ongoing evolution of pleading practice. Nor is prematurity the only risk. Discarding only the pleading forms would inevitably

¹ "*Iqbal* conflicts with the form complaints approved by the Supreme Court and Congress as part of the Federal Rules of Civil Procedure." "Unless one can plausibly explain away the tension between *Iqbal* and Rule 9(b) and the Rule 84-endorsed form complaints, then *Iqbal* conflicts with the Rules Enabling Act * * * and the prescribed process for amending the Federal Rules of Civil Procedure." *McCauley v. City of Chicago*, 671 F.3d 611, 620, 623-624 (7th Cir.2011)(dissenting in part).

be seen by some as taking an implicit position on the direction of pleading practice. What, then, are the broader questions?

A common element that ties together the broader questions is what the Committee does not know about the Rule 84 forms as a whole. It has proved difficult to determine how often these forms are actually used, or to what effect. Most indications suggest that they are not often used. Informal surveys have found more speculation that the forms might be useful for someone else, particularly pro se litigants, than actual indications of frequent use. The same informal surveys suggest that many lawyers rely on alternative sources of forms. The Administrative Office has prepared some civil forms that are available on the web site and easily downloaded for use. Clerks' offices and individual judges seem more likely to rely on locally developed forms, or the Administrative Office forms. Infrequent actual use does not belie the potential teaching value of the forms, but it does diminish one important concern about what could be lost if the forms are abandoned.

A more important aspect of not knowing enough about the forms is the reason for not knowing. The forms have not received systematic attention or review for many years. Form 5 was carefully crafted with the adoption of the Rule 4(d) provisions for waiving service of process. Form 52 for reporting on the parties' Rule 26(f) planning meeting has been amended in conjunction with revisions of Rule 26(f). All of the forms were revised as part of the Style Project, but the process adopted for the forms was a pale shadow of the process adopted for rule text.

The lack of sustained attention to the forms might be explained on the ground that they comprise a carefully chosen body that addresses the subjects suitable for official forms and that functions well. There is some reason for doubt. Discovery, for example, is favored only by Forms 50, 51, and 52. These illustrate a request to produce under Rule 34, a request for admissions under Rule 36, and the report of the Rule 26(f) planning conference. Rule 33 interrogatories and Rule 35 physical or mental examinations are not illustrated. Nor, to pick two examples at random, is there a form for a Rule 26(b)(3)(C) request for a witness statement, nor is there one to illustrate a Rule 26(b)(5)(A) "privilege log." A quick review of Rule 26 will suggest many other important discovery issues that might benefit from guidance in a form.

Discovery is not alone in suggesting gaps in coverage. In comparison to the full set of Civil Rules, the entire set of forms is episodic. Some might be tempted to find it almost eccentric. Yet no thought has been given to filling out the set.

The lack of systematic attention may be benign. But it reflects the reality that the forms could be tended to only for pressing reasons. The Advisory Committee must choose carefully among the projects that might be brought into the Enabling Act process. Current major projects include pleading, discovery, class

actions, and revising several rules to respond to needs identified by the Duke Conference. Discovery is not likely to move off the agenda in the foreseeable future – the question tends to be which discovery issues press most urgently for attention, not whether discovery can be put aside for a while. And unforeseen projects tend to arise with some frequency; a perennial source of important work arises from the need to integrate the Civil Rules with projects launched by the Appellate Rules Committee. Devoting scarce Committee resources to sustained ongoing work on the forms would come at a high cost.

Account also should be taken of the carefully deliberate nature of Enabling Act processes. It takes at least three years to revise a rule or a form. Beyond the Advisory Committee, the Standing Committee, Judicial Conference, Supreme Court, and Congress all must pay attention. In addition to these formal actors, engaged public participation is vitally important, not only in the formal process of publication for comment but also in less formal means of suggestion and exchange. Diverting these resources to the forms might detract from the attention devoted to changes in the rules themselves. Or – perhaps more realistically – the attention devoted to changes in the rules might leave scant attention to the forms, particularly if form revisions were published in tandem with unrelated rules changes. Apart from these costs, there may be advantages in leaving forms to less cumbersome processes, enabling prompt and flexible response to opportunities for revision and improvement.

These considerations bear on choosing among the more obvious approaches to Rule 84 and the Rule 84 forms.

One approach would be to do nothing. The forms do not appear to be a source of any stress or difficulty, apart from the form complaints. The case against abandoning the form complaints while maintaining the remaining forms, noted above, may be persuasive.

The opposite approach would be to take up a full-scale review of the forms, perhaps improving some of the current forms and considering the addition of new forms for at least frequently encountered rules that are not now supplemented by a form. This approach would require a heavy commitment of Enabling Act resources, particularly by the Advisory Committee. It may be difficult to anticipate benefits commensurate with the costs. There are many sources of good forms

Another alternative might be to retain Rule 84 forms, but to leave the initial responsibilities to the Administrative Office. But it would be difficult to justify placing the imprimatur of the Enabling Act process on forms generated outside the full process. The advice of the Administrative Office staff would be a substantial help, but burdens on the Advisory Committee and later actors would not be much reduced unless full responsibility is delegated to the Administrative Office.

Yet another possibility is illustrated in the attached set of drafts. Rule 84 could be defanged, withdrawing the statement – added in 1948 – that the forms suffice under the rules. The forms would remain as mere illustrations of simplicity and brevity. The line between illustration and implicit endorsement, however, is thin, and likely would become invisible to all but a few blessed to carry the memory of the current version.

As against these alternatives, the Subcommittee recommends that Rule 84 be abrogated. Few will lament the passing of "official" forms. Other sources of forms are readily available, and often better tailored to specific needs. The Administrative Office forms, perhaps with some additions, can serve well the peculiar need for forms that advance the operation of the courts themselves. This recommendation seems ripe without further delay in a project that has been pending for some time, and that has benefited from consideration by an ad hoc subcommittee drawn from the other advisory committees. Many projects benefit from formal empirical research before going forward. The essentially uniform responses to informal inquiries by Subcommittee members, however, support the belief that there is little need to seek a place for Rule 84 on the crowded agenda of Federal Judicial Center projects. The public comment process is a reliable check.

If Rule 84 is abrogated, separate thought should be given to Form 5. Form 5 was carefully developed to implement waiver of service. Its use is required by Rule 4(d)(1)(D). It may be desirable to carry Form 5 forward. The attached draft includes adoption of present Form 5 as a new Form 4(d)(1)(D), expressly incorporated in Rule 4(d)(1)(D) and attached to Rule 4. If that approach is adopted, it will be useful to ask whether Form 5 should be revised in any way.

Finally, the Committee Note takes pains to dispel any implication that abrogation of Rule 84 and all the official forms bears on the evolution of pleading standards. It is unusual for a Note to expand a negative at such length, but it seems important to do as much as can be done to avoid arguments that abrogation confirms the need for heightened pleading standards or, conversely, that abrogation without more leaves untouched all of the pleading decisions rendered in the light and shadows cast by the forms.

RULE 84 SKETCHES

These sketches illustrate approaches that could be taken to retracting Rule 84's provision that the forms suffice under the Civil Rules. The Committee Note is sketched only for complete abrogation, but it can easily be adapted to other approaches.

Abrogation

Rule 84. Forms [Abrogated (mo., day, yr., eff. mo., day, yr.).]

~~The forms in the Appendix suffice under these rules and~~

~~illustrate the simplicity and brevity that these rules contemplate.~~

Delete "suffice"

Rule 84. Forms.

The forms in the Appendix ~~suffice under these rules and illustrate the simplicity and brevity that these rules contemplate.~~

Aspirational

Rule 84. Forms.

~~The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that t~~ These rules contemplate simplicity and brevity of form.²

COMMITTEE NOTE³

Rule 84 is abrogated. The Rule 84 forms implement several, but far from all, of the Civil Rules. The illustrative pleading forms have drawn the most comment, particularly in recent years. When Rule 84 was adopted in 1937, the Committee Note said only this: "In accordance with the practice found useful in many codes, provision is here made for a limited number of official forms which may serve as guides in pleading." Rule 84 was amended in 1946 to provide that the forms suffice under the rules, so that "the practitioner using them may rely on them to that extent." The 1946 Committee Note observed that the courts of appeals generally have upheld use of the forms, and that "the amended rule will operate to discourage isolated results such as those found in" two cited district court cases.

The original purpose to provide "guides in pleading" was important in 1937 to illustrate and emphasize the departure of the new federal pleading practices from prevailing practices. Elevating the forms from illustrations to official sufficiency provided reassurance that the simplification of pleading – and the expansion of discovery that made simplification possible – was intended to endure.

Abrogating the pleading forms recognizes that litigation,

² The possible passing of Rule 84 prompted at least one Standing Committee member to express the nostalgic wish that the exhortation for "simplicity and brevity" remain in the Rules. The wish has appeared in Rule 84, and might be preserved there. But it may be wondered whether Rule 84, stripped of its present function, is too far back in the rules for this purpose. If the current Duke Subcommittee sketch that adds a duty of party cooperation to Rule 1 goes forward, simplicity and brevity might be added there.

³ This sketch is probably longer than will prove desirable. Much of it is likely better suited to the reports that transmit the proposal through the Enabling Act process.

pleading, and discovery have evolved in many ways since 1937 and 1946, and continue to evolve. Most actions are brought on claims that are not reflected in any of the forms, leaving the way open to develop pleading standards in response to new circumstances. Some of the pleading forms may well continue to suffice for the claims they illustrate. But some may not. It would be possible to attempt abstract consideration of all the pleading forms – and potentially new forms for many additional categories of claims. But the practical and philosophical restrictions on abstract contemplation by the Enabling Act process make that approach undesirable. Deleting the forms leaves the courts free to draw from the experience of hundreds of thousands of cases in tailoring pleading standards for all categories of claims. The lessons of the past will not be lost in this process, but they will no longer impose awkward constraints.

Most of the forms do not address or reflect pleading. Many of them address topics where uniformity is useful. Others address sensitive matters, such as ensuring that notice of the opportunity to consent to trial before a magistrate judge does not imply any incentive to consent. It is useful to have good forms for these purposes. But, even for those purposes, it is not necessary to have official forms adopted and maintained through the Rules Enabling Act process.

The Rule 84 forms are not much used. They are not readily available to pro se litigants. Many other sources of useful and easily adapted forms are available, and often are more convenient. Forms that parallel many of the Rule 84 forms can be obtained from the web site of the Administrative Office of the United States Courts, among other authoritative sources.

Most of the Rule 84 forms have languished in benign neglect, not because of indifference but because of competing demands on the resources devoted to maintaining the Civil Rules themselves. The Enabling Act process, moreover, is designed to work through multiple stages with painstaking deliberation at each step. Continuing and timely revisions of the forms has not proved possible.

The decision to abrogate Rule 84 and the Rule 84 forms does not reflect considered or particular dissatisfaction with the forms as a set, nor with any individual form. It comes in large measure from a judgment that the rules committees can and should not expend the resources required to timely discharge the responsibility to ensure that the forms remain responsive, and well adapted, to continually evolving practice. No inferences should be drawn as to the ongoing value of any of the former forms.

Abrogation of Rule 84 opens the way for continuing, prompt, and flexible development and dissemination of forms by the Administrative Office. National uniformity can be achieved where desirable by working through the district clerks' offices.

Use of present Form 5 is made mandatory by Rule 4(d)(1)(D).
Rule 4 is amended to incorporate this form[, as revised].

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RULE 4(D)(1)

(d) WAIVING SERVICE.

(1) *Requesting a Waiver.* * * * The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must: * * *

(D) inform the defendant, using ~~text prescribed in Form 5~~ Form 4(d)(1)(D), of the consequences of waiving and not waiving service; * * *

Form 4(d)(1)(D)

Present Form 5 would be inserted at the end of Rule 4. If this route is adopted, we may want to consider some changes in the form.

It would be possible to incorporate Form 6 as well. It is possible to read Form 5 as incorporating Form 6. The "statement about the duty to avoid unnecessary expenses" attached to Form 6 may be indirectly incorporated in Form 5's reference to it.

It also is possible to amend Rule 4(d)(1)(D) by simply deleting the attempt to prescribe a specific form. Any Rule 84 revisions will take effect more than 20 years after adoption of the waiver provision in 1993. There may be sufficient experience to ensure that lawyers requesting waiver, and anxious to be sure that the request is effective, will use appropriately clear language.

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Rule 84 Subcommittee Conference Call 15 May 2012
Notes

The Rule 84 Subcommittee met by conference call on May 15, 2012. Judge Gene E.K. Pratter participated as chair. Other participants included John M. Barkett, Esq.; Judge David G. Campbell; Judge Steven M. Colloton; Professor Daniel R. Coquillette; Judge Paul S. Diamond; Ted Hirt, Esq.; Andrea L. Kuperman, Chief Counsel; Peter McCabe, Esq.; Judge Solomon Oliver, Jr.; and Julie Wilson, Esq. Professor Edward H. Cooper participated as reporter.

The purpose of the meeting was to explore a foundational question: Are the Rule 84 Forms useful? Who uses which Forms, for what reasons? What advantages do they have over other sources of forms – Simplicity? Uniformity? Quality?

One member reported making an informal inquiry that found no one who even knew of Rule 84, much less the forms.

But it was noted that there is at least one group of lawyers who know about the Forms, or at least the Form 18 complaint for patent infringement. "The patent bar is beside itself to get rid of Form 18." Patent lawyers are willing to participate in improving Form 18, but would rather eliminate it entirely.

The Forms were adopted in 1938; the purpose of the pleading Forms was to educate the bar by illustrating the simplicity of pleading contemplated by Rule 8. That purpose has long since been satisfied. But the Forms have become a symbol in the struggle over pleading standards that has followed the *Twombly* and *Iqbal* decisions.

Concern was expressed that the Enabling Act process is "not nimble enough to keep the Forms current." The Forms should be extricated from this process. Some forms may be different. Rule 4(d)(1)(D) expressly mandates use of Form 5 in requesting waiver of service. If that continues to be important, the Form could be attached to Rule 4 directly while discarding Rule 84 and other forms.

The counter question was whether there is some value in retaining the Forms as part of the Civil Rules. But perhaps there is too much value, giving the Forms more impact than should be.

One potential value for the Forms is as an aid to pro se litigants. Pro se litigation is pervasive – there is a pro se party in 40% of the cases in one member's court. It will be useful to ask legal aid groups that counsel pro se litigants whether the Forms are helpful. Forms 1 through 9, for example, illustrate caption and signature line; they can provide guidance in pleading jurisdiction, a concept totally unfamiliar to most pro se litigants. Court clerks also may help on this score. But there are

many other sources of forms, and it may be that some of them are more helpful than Rule 84 Forms to pro se litigants. Prison libraries, for example, provide many forms.

These questions led to the observation that it is difficult to intuit the reasons for choosing to illustrate some Rules by Rule 84 Forms, but not others.

The suggestion that the Rule 84 Forms might be separated from the rules and demoted to unofficial status provoked a broader question. Reading the appellate decisions cited in the list of "Forms opinions" prepared by Judge Pratter suggests that withdrawal of the Forms could have a significant impact. "Will the decisions that rely on them linger on in the law"? Some of the opinions seem to suggest uncertainty whether the pleading Forms have survived the Supreme Court's recent pleading decisions. If the pleading Forms are withdrawn, "we need to say what's intended."

Discussion turned to other court-related sources of forms. It seems likely that many local district rules include forms; the Rules Committee Support Office will make a survey of the local rules, which are available on the AO web site. The AO itself generates some civil forms, though they are harder to find on the site. The AO also has a collection of interesting local forms, but this collection is not available to the general public.

The meeting concluded by parceling out responsibilities for an informal survey of a few lawyers and bar groups to find out, in a preliminary way, more about the actual use of the Rule 84 Forms, if any general use can be found.

Judge Colloton will become Chair of the Appellate Rules Advisory Committee on October 1. Judge Campbell will ask Laura A. Briggs, Clerk of Court Representative to the Civil Rules Committee, to join the Rule 84 Subcommittee.

The next phone conference will be scheduled for a workable date in mid-June.

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RULE 84 SUBCOMMITTEE NOTES, JUNE 19, 2012

The Civil Rules Committee Rule 84 Subcommittee met by conference call on June 19, 2012. The meeting focused on the results of informal inquiries about actual use of the official "Rule 84" forms, and alternatives that might be pursued in considering revision of Rule 84. The central question was whether there is enough information to support development of a recommendation to the Advisory Committee next November.

Informational Matters

The clerk's office in the District of Arizona has used some of the Rule 84 forms – the forms aimed at summonses and waiver of service; the forms for judgment; and notice of magistrate judge availability. The office, however, is as comfortable with the forms adopted by the Administrative Office.

The clerk's office in the Northern District of Ohio does not use any of the Rule 84 forms. There are some local forms. The Administrative Office forms are used for judgment on a verdict, and for notice of a magistrate judge's availability and consent. Some Administrative Office forms may be modified for local use. To help pro se plaintiffs, the office has complaints from actions that have actually been filed.

Somewhat mixed views were reported from a brief survey in Iowa. Some participants thought the Rule 84 forms are useful for young lawyers, and remain useful to "verify that pleadings are sufficient." They may help lawyers who are not familiar with a particular area; the Form 18 complaint for patent infringement is an example.

A survey of some district clerks, pro se clerks, and others in like positions showed that the Administrative Office forms are frequently used, while Rule 84 forms are seldom used.

The Administrative Office forms are easy to access online, and they are easily downloaded.

Pro se parties continue to be a matter of concern. Inquiries so far have produced speculation by several lawyers that the forms may be helpful to pro se parties, but little information about actual use. Lawyers in two surveyed legal assistance programs do not use the forms; they have their own forms. They can only guess whether pro se litigants use them. One magistrate judge was found who refers pro se litigants to the forms, but most do not. Looking to the form complaints, for example, it does not seem likely that a pro se plaintiff would be likely to use any of them apart from the Form 11 complaint for negligence. And even if pro se plaintiffs were to use the forms, the outcome could be untoward if – despite the apparent support for Form 11 in the *Twombly* opinion – courts should come to the view that despite Rule 84 these forms do not in fact suffice.

Bernida Evans surveyed local district rules, and found that only five districts refer to the Rule 84 forms. Many districts have links to the Administrative Office forms. The AO forms, however, do not include complaints and answers. They are more like Forms 1-7, which address formal matters, and the forms that address judgments and magistrate-judge availability.

Overall Concerns

Several concerns affect the process of converting this information, and future information, into recommendations. One important concern is the role of the Advisory Committee and Standing Committee under the Enabling Act. The Enabling Act process is deliberate and requires great care at each successive step. There are powerful limitations on use of this process to make small changes, and quick response is not possible. These constraints are vitally important for any action that carries the force of the Rules. They must be followed if Rule 84 continues to provide that the forms suffice under the rules. But that approach carries with it responsibility to devote the time and resources required to keep the forms current, and might imply a responsibility to develop forms on topics not now included. Experience of many years suggests that it will be difficult to find time for this purpose in competition with more important demands that seem to arise continually. There is room for like concern about the capacity of the public comment process to take the forms as seriously as rules proposals are taken; alert public attention could be particularly useful with forms, but might not be provided.

The possibility of more formal research was discussed. Informal efforts can continue. There is some reason to hope that bar groups will provide some more information, although informal responses from active participants suggest views much like those encountered elsewhere. Given the nature of the information already in hand, moreover, Rule 84 may be one of those cases where it is appropriate to publish a proposal with the expectation that public comments will uncover anything that is seriously amiss.

The nature of whatever proposal that may emerge also is important. A proposal to abolish only the pleading forms, for example, would be likely to raise questions whether the Committee was advancing an implied position on pleading standards in general after the still controversial *Twombly* and *Iqbal* decisions.

Alternative Approaches

The Subcommittee's task is to make a recommendation to the Advisory Committee. That does not require a recommendation to do something. A recommendation to leave Rule 84 and the Forms as they are, without any change, would be proper.

One approach would be to retain Rule 84, but as a cross-reference to the Administrative Office forms. This approach would provide a graceful way to retain the encouragement to adopt "the

simplicity and brevity that these rules contemplate." Rule 84, however, would not say that the Administrative Office forms suffice under the rules; delegation of Enabling Act authority is not appropriate.

One very limited approach would be to delete the much-abused Form 18 complaint for patent infringement. The Federal Circuit has criticized this form, but seems to have come to terms with it as a matter of perceived compulsion. See *In re Bill of Lading Transmission and Processing System Patent Litigation*, 2012 WL 2044605 (Fed.Cir. June 7, 2012). Many patent lawyers would like to discard it. Or all the form complaints could be discarded, retaining the other forms.

The question was then put directly: does any Subcommittee member prefer to retain Rule 84 and all the forms, pursuing more active Committee attention to the forms?

The "procedural" forms – those not involving pleadings – were suggested as perhaps worthy. But it was noted that the Administrative Office forms are easier to find, and are easy to download. Most judges have their own preferred forms for the report of the parties' Rule 26(f) meeting, diminishing the possible value of Form 52, despite the fact that this is one of the few forms to receive Committee attention in recent years. The Forms 60 and 61 notice of condemnation and complaint for condemnation might seem important, but apparently are not important to the government lawyers who initiate condemnation proceedings.

Several participants then suggested that it would be better to abrogate Rule 84, or at least modify it by deleting all the forms and eliminating any reference to Forms that suffice. One important caution will be to decide what to do about Form 5 for the request to waive service. Rule 4(d)(1)(D) requires use of Form 5. Requests to waive seem to be made rather often, although it is unclear whether plaintiffs always heed the advice to use Form 5. It would be possible to delete this requirement as something that was important when the waiver practice was first adopted but is no longer needed. Or the requirement could be retained, perhaps with some changes in the form, but attaching Form 5 directly to Rule 4. That will be a subject of continuing attention.

Another caution was suggested. The pleading forms have influenced many pleading decisions over the years. If the forms are withdrawn, what will be the effect on the continuing development of pleading practice? Withdrawal would occur through the regular Enabling Act process. That makes it proper to change pleading practices if that is intended. It will be important, if withdrawal is recommended, to provide an explicit statement whether there is any intent to affect pleading standards.

Another question is implicit in the incomplete character of the Subcommittee's informal surveys. Withdrawal of all the Rule 84 forms might leave a gap. It may be desirable to recommend to the

Administrative Office that they generate some new forms. But it may be better to leave pleading forms to other, less official seeming sources. It will be desirable seek reassurance on that score.

The next step will be to prepare a draft that abrogates Rule 84, including a Committee Note that explains the impact of abrogation, and perhaps preserves some residual behest for brevity and simplicity of form. The Form 5 request to waive service will be addressed, likely with alternatives.

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PLEADING

Pleading has been on the agenda of every meeting since the 2007 decision in the *Twombly* case. Several draft amendments to various pleading and discovery rules have been prepared to illustrate potential lines of action. The continuing sense of the Committee has been that the time had not yet come to begin the serious work of proposing rule amendments to incorporate – or to revise – the practices that have grown up in response to the Supreme Court's lead. The discussion at the meeting last March is summarized in the following part of the draft Minutes:

Pleading [March draft Minutes]

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

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

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

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

What Now?

Two diverging reasons might be found for launching a pleading project now. One is that practice is going so seriously astray that it is important to begin work, recognizing that any project in this area is likely to take longer, and perhaps much longer, than the minimum three years required to effect even a minor amendment. A judgment made in these terms would determine that the need to act outweighs the possible advantages of waiting to develop still more information. A nearly opposite reason to act would be a determination that although there is no urgent need, we have about as much useful information as we are likely to get. Continuing lower-court decisions may not make any further changes in practice. Beginning work on this theory need not entail a commitment to recommend any amendments. It would reflect only a judgment that the time is ripe to decide whether amendments are desirable.

Although slightly delayed, the FJC research project is moving forward. A report will be provided at the meeting. That reason for deferring any pleading project is still with us. There also may be reason to believe that actual practice may evolve still further, despite the nearly overwhelming attention to pleading and related discovery and case-management practices that have followed *Twombly* and *Iqbal*. Judgments will differ on the intrinsic wisdom of the practices that have emerged. But if identifiable disuniformity persists, that alone could support an argument for attempting to find rule language that would establish greater uniformity.

Yet another consideration may be the work to be done on other projects. The agenda continues to provide rich subjects for work. If the balance seems close, it may be wise to continue to study pleading practices without yet undertaking development of possible amendments.

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RULE 23 ISSUES

The Rule 23 Subcommittee reported to the full Committee during its Ann Arbor meeting about the Subcommittee's initial efforts to identify issues suitable for potential rulemaking, and the Committee offered initial reactions to those efforts. Since that time, the Subcommittee has had a conference call to reflect on next steps. Notes of that call are attached to this memorandum as Appendix 1.

The Subcommittee is not presently proposing moving forward on any of the specific ideas initially identified at the last meeting. In part because the full ramifications of recent Supreme Court decisions are not yet clear, it feels that there is no clear urgency about proceeding at this time. Beyond that, the Court has granted certiorari in at least three cases raising class-action issues for the coming Term, and at least one of those cases seems to bear on one of the main questions the Subcommittee already identified as potentially meriting attention -- the role of "merits scrutiny" at the class-certification stage.

Not only did the class-action issues seem still to be in a formative stage, it also seemed that the Committee is more immediately concerned with other issues. Thus, the Discovery Subcommittee has worked hard to develop a possible rule proposal for the preservation/sanctions issues it has been studying for more than two years, and the Duke Subcommittee has developed specific possible rule-change proposals that will be discussed at a mini-conference in October, 2012. Any Rule 23 project would require considerable efforts, and it was not clear that there would be sufficient energy or other resources to begin such a project at this time.

Accordingly, the goal of this memorandum is to report on the current thinking of the Subcommittee. The current attitude is that it remains important to reach out to the bar to generate and evaluate ideas for possible rulemaking; the existing issues listing should not be regarded as a closed set. Thoughtful observation and fact-gathering, rather than immediate action, seem the order of the day.

As a reminder, the Subcommittee brought the following possible topics to the full Committee for the Ann Arbor meeting:

"Front burner" issues

- (1) Settlement class certification
- (2) Class certification and merits scrutiny
- (3) Issues classes under Rule 23(c)(4)

- (4) Refining or improving the criteria for settlement review under Rule 23(e)
- (5) Rule 23(b)(2) and monetary relief
 - "Back burner" issues
 - (1) Fundamental revision of Rule 23(b)
 - (2) Revisiting Rule 23(a)(2)
 - (3) Requiring court approval for "individual" settlement of cases filed as putative class actions
 - (4) Revisiting the "predominance" or "superiority" language in Rule 23(b)(3)
 - (5) Revising the notice requirements of Rule 23(c), and considering notice by means other than U.S. mail
 - (6) Responding the Supreme Court's *Shady Grove* decision by confirming district court discretion in deciding whether to certify a class
 - (7) Addressing choice of law in Rule 23
 - (8) Revisiting Rule 23(h) and standards for attorney fee awards in class actions
 - (9) Addressing the binding effect of a federal court's denial of certification or refusal to approve a proposed class-action settlement
 - (10) Addressing the propriety of aggregation by consent

A starting point, as spelled out in more detail in the notes of the Subcommittee's June 27 conference call, is to underscore the ongoing process of adjustment that has developed in the lower courts as a result of the Supreme Court's decisions, particularly in *Wal-Mart Stores, Inc. v. Dukes*. The Subcommittee members do not feel confident at present about the actual long-term impact of those rulings. Gaining an adequate appreciation of that impact would be important, and would take effort and time.

Somewhat relatedly, the Subcommittee members -- despite considerable experience in class action litigation -- are not confident that they fully appreciate the ramifications of recent developments in all significant areas of class action practice. For that reason, they are diffident (even after the helpful advice from the full Committee at the Ann Arbor meeting) about concluding that the various issues identified so far are the "right" ones, and whether the ranking of those issues as between

the "front burner" and the "back burner" is justified. Instead, it is inclined to favor remaining open to revision or expansion of the listing of issues as the process moves forward, hoping for helpful input from members of the bar experienced in pertinent fields.

One initial conclusion is that there are probably few (if any) "easy" amendments that could address important topics. To take a very recent illustration, two Ninth Circuit panel decisions involving cy pres provisions in class-action settlements [Lane v. Facebook, 2012 WL 4125857 (9th Cir., Sept. 20, 2012); Dennis v. Kellogg, 2012 WL 3800230 (9th Cir., Sept. 4, 2012)] arguably conflict. According to one plaintiff lawyer, "there isn't any way to reconcile these two decisions." Miller, Privacy Settlement Gets Nod, S.F. Recorder, Sept. 24, 2012, at 1. Cy pres concerns are among the many that the Subcommittee has noted in its initial work; dealing with them may well be important, but it probably would not be easy.

Though it is not of unique importance, the class-action rule is a focus of great attention, and any changes should be examined with great care. As a consequence, the Subcommittee is inclined not to think now in terms of proceeding with a first round of possible changes to address less momentous matters, leaving others for later. For one thing, proceeding seriatim raises risks of amending the rules too often. For another, with this rule, it may be counterproductive. So the Subcommittee's intention is to consider all amendment ideas warranting serious attention together as a package.

This does not mean that the Subcommittee is currently persuaded that any amendment is in order. To the contrary, several of the ideas it has already developed appear to present difficult amendment challenges without obvious and simple amendment solutions.

Getting more and broader input on current class-action activity in a variety of substantive areas seems a priority. Ultimately, that would probably best be done in a mini-conference organized for the purpose. But owing to the press of other rule-amendment projects and the finite resources of the Committee, it did not seem feasible to attempt to undertake such a session in the very near future.

In addition, the Subcommittee is advised that events scheduled by others may provide further insights. In particular, it is aware of the following three events:

- (1) Oct. 25, 2012, ABA class-action conference in Chicago. At least one member of the Subcommittee will be attending and participating in this event.

(2) March 7-8, 2013, class-action conference at George Washington University in Washington, D.C. Several members of the Subcommittee expect to be attending this event.

(3) March 15-16, 2013, Michigan Journal of Law Reform symposium on Class Actions. At least one member of the Rule 23 Subcommittee will be participating.

It may be that there are other such events. The Subcommittee hopes to benefit from the insights offered during these events.

The Subcommittee also discussed the question whether it would benefit from research by the Federal Judicial Center on class-action topics. It has found that the FJC has a rather full library of research on class-action litigation already completed at the Committee's request over recent years. A downloaded version of the FJC list of publications is attached as Appendix 2 to this memorandum. It is uncertain about the utility of any further research at this time.

For the present, then, the Subcommittee does not have any definite plans to discuss. It invites further reactions to the issues it has identified so far, suggestions regarding possible issues for attention or other ideas about how best to proceed. In addition, it provides updating about developments outside the rules process:

Supreme Court certiorari grants

The Supreme Court has granted certiorari in at least three cases that have class-action aspects. One, as noted above, may directly address at least some features of one of the "front burner" issues the Subcommittee had already identified:

Behrend v. Comcast Corp, 655 F.3d 182 (3d Cir. 2011), cert. granted sub nom. Comcast Corp. v. Behrend, no. 11-864. The Court granted certiorari "limited to the following question":

Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.

Connecticut Retirement Plans & Trust v. Amgen, Inc., 660 F.3d 1170 (9th Cir. 2011), certiorari granted sub nom. Amgen, Inc. v. Connecticut Retirement Plans & Trust, No. 11-1085. The Questions Presented were as follows:

1. Whether, in a misrepresentation case under SEC Rule 10b-5, the district court must require proof of

materiality before certifying a plaintiff class based on the fraud-on-the-market theory.

2. Whether, in such a case, the district court must allow the defendant to present evidence rebutting the applicability of the fraud-on-the-market theory before certifying a plaintiff class based on that theory.

Knowles v. Standard Fire Ins. Co., 2011 WL 6013024 (W.D. Ark., Dec. 2, 2011), cert. granted sub nom. Standard Fire Ins. Co. v. Knowles, no. 11-1450. The Question Presented in the petition for certiorari was:

Last Term, this Court held that in a putative class action "the mere proposal of a class . . . could not bind persons who were not parties." *Smith v. Bayer Corp.*, 131 S.Ct. 2368, 2381 (2011). In light of that holding, the question presented is:

When a named plaintiff attempts to defeat a defendant's right of removal under the Class Action Fairness Act of 2005 by filing with a class action complaint a "stipulation" that attempts to limit the damages he "seeks" for the absent putative class members to less than the \$5 million threshold for federal jurisdiction, and the defendant establishes that the actual amount in controversy, absent the "stipulation," exceeds \$5 million, is the "stipulation" binding on absent class members so as to destroy federal jurisdiction?

Activity in Congress

Meanwhile, there has been some relevant activity in Congress as well. First, on June 1, 2012, the Subcommittee on the Constitution of the House Judiciary Committee held a hearing on the subject "Class Actions Seven Years After the Class Action Fairness Act." Witnesses included Prof. Martin Redish (Northwestern Law), Thomas M. Sobol (Hagens Berman Sobol Shapiro LLP), and John H. Beisner (Skadden Arps). The written testimony and a video of the hearing can be found at:

http://judiciary.house.gov/hearings/Hearings%202012/hear_06012012.html

Second, S 3317, the Equal Employment Opportunity Restoration Act, has been introduced in the Senate. The Findings and Purpose in Sec. 2 of this proposed legislation refer to the Supreme Court's decision in *Wal-Mart v. Dukes* and explain that the goal of the legislation is "to restore employees' ability to challenge, as a group, discriminatory employment practices,

including subjective employment practices." Accordingly, the legislation would authorize "group actions," which would be handled in many ways like class actions. A copy of the bill should be included in this agenda book.

Current Subcommittee Intentions

As noted above, the Subcommittee does not presently propose moving forward to give serious consideration to rule amendments to deal with any of the issues it has identified thus far. Indeed, it remains uncertain whether it has identified the right issues, or properly categorized them (between "front burner" and "back burner" status). Meanwhile, various developments -- particularly pending Supreme Court decisions -- make this very much a moving target.

For the present, subject to the full Committee's direction, the Subcommittee intends to pursue a strategy of what might be called watchful waiting. Its members will seek input, including that available from events like the three conferences identified above, on what issues are most important. It will also confer (perhaps by conference call) to share insights gained. Finally, it hopes to be able to report back to the full Committee about the best course forward after this Supreme Court Term is done.

APPENDIX A.1

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APPENDIX 1

Notes on Conference Call
Rule 23 Subcommittee
Advisory Committee on Civil Rules

June 25, 2012

On June 25, 2012, the Rule 23 Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participating were Hon. Michael Mosman (Chair, Rule 23 Subcommittee), Hon. David Campbell (Chair, Advisory Committee), Elizabeth Cabraser, Dean Robert Klonoff, Prof. Edward Cooper (Reporter, Advisory Committee), and Prof. Richard Marcus (Reporter, Rule 23 Subcommittee).

Judge Mosman introduced the call as intended to reflect on the developments to date and chart a future course for the Subcommittee's work. The Subcommittee had made a substantial initial effort to identify issues worthy of consideration in the rulemaking process, and divided the issues it had identified into front burner and back burner categories. The full Committee had spent some time during its March meeting discussing those issues and the hierarchy the Subcommittee had developed for them. It seemed that the full Committee did not regard the division of the issues the Subcommittee had done to be inappropriate, or have additional issues to suggest for inclusion on the current discussion list. The goal of this call would be to reflect on whether these issues still appear to be a good focus for activity moving forward. In addition, it will be important to determine how to move forward, and when -- should class action issues be pursued energetically now, or should the Subcommittee plan an extended fact-gathering effort?

As an initial matter, the Supreme Court's grant of certiorari in *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011), sub nom. *Comcast Corp. v. Behrend*, no. 11-864, bears directly on front burner issue no. 2 -- class certification and merits scrutiny. The Court order says certiorari is granted "limited to the following question":

Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.¹

¹ It may be worth noting that the Questions Presented section of the petition for certiorari seemed to take a broader view of the issues presented in the case:

Judge Mosman invited participants in the call to address the issues the Subcommittee had identified and the best way of proceeding from this point.

The first participant began by noting that the cert. grant in the Comcast case takes the issue of merits consideration in making the certification decision somewhat off the front burner; moving forward on the issue before the Supreme Court's decision would not be useful. Somewhat similarly, focusing now on the question of Rule 23(b)(2) and monetary relief seems premature because it is not only complicated but involves application of the Supreme Court's *Dukes* decision in ways that are not yet clearly spelled out in the lower courts' opinions. Similarly, revisiting Rule 23(a) seems premature; whatever the right conclusion about the Court's decision in *Dukes*, it behooves the Committee to defer until the actual handling of these issues becomes clearer.

For the present, it seems that the stress should be on background research -- getting more input, in particular. Although we have identified many important issues, there are so many kinds of class actions that it is tough to conclude that we've already identified all issues. We should strive to get more input on issues we have not identified, and on the importance of the ones we have identified. One possible way to do that might be a mini-conference, but in the current climate of austerity that might not be feasible. Whatever method we use, however, it might be better not to separate the "front burner"

This Court recently reiterated that district courts must engage in a "rigorous analysis" to ensure that the "party seeking class certification [can] affirmatively demonstrate his compliance" with Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 156 (1982)). Disavowing an allegedly contrary suggestion in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), *Dukes* emphasized that district courts are required to resolve any "merits question[s]" bearing on class certification, even if the plaintiffs "will surely have to prove [those issues] again at trial in order to make out their case on the merits." 131 S.Ct. at 2552 n.6. In this case, however, the Third Circuit repeatedly invoked the disavowed aspect of *Eisen* in declining to consider several "merits arguments" directly relevant to the certification analysis.

The question presented is whether a district court may certify a class action without resolving "merits arguments" that bear on Rule 23's prerequisites for certification, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3).

from the "back burner" issues in outreach to bar groups and others, as that arrangement might skew the responses.

These comments prompted reactions by others about earlier efforts at written outreach. Regarding class actions in the mid 1990s, there was a "Dear Fans" letter directed to many who had experience and inviting reactions. Similarly, in 2002 the Discovery Subcommittee invited lawyers to comment in writing on amendment ideas it had identified. More recently, one feature of the Rule 45 project involved getting written reactions about the functioning of the rule and possible improvements. These efforts had produced some input, but had not been as useful as mini-conferences.

The austerity concern is also one that should be kept in mind. The judicial branch must be frugal and make careful choices about how and when to expend resources; holding conferences in particular have become a delicate issue and may be closely monitored. It would make sense to assume that, despite the complexity and importance of the class-action topic, there can be only one Committee-sponsored conference about it. If that's right, a decision will have to be made whether to have that event earlier or later in the process. A conference is a very valuable way to obtain nuanced insights. This speaker's initial sense is that deferring that event until later would probably make sense.

Another possibility would be to add a conference aspect to some conference or similar activity that will happen in any event. For example, could such a gathering be appended to an Advisory Committee meeting, either before or after? That would minimize expense, because all the Committee participants would already be there; maybe there would be a need for an additional night in a hotel, but perhaps not even that. The idea would be to have 15 to 20 people to exchange ideas with the Committee. Perhaps, for example, this could be done on the Friday afternoon of the full Committee's Fall meeting. (A Duke conference about predictive coding is expected to occur the day before the Fall meeting begins this year, so that date is not available.)

These ideas prompted a discussion of events that have already been scheduled by other groups about class actions, which might also include exchange with Subcommittee members about possible amendment issues. At least three came to mind: (1) On October 25, 2012, the ABA will be hosting an event in Chicago about class actions. This is a single-day conference. (2) The University of Michigan has a conference scheduled in early 2013. (3) George Washington University has a two-day event scheduled in March, 2013. The ABA event, which is the one happening soonest, may offer promise. Judge Mosman could approach the organizer.

The first participant then rounded out introductory reactions by addressing the question whether to contemplate one or two rounds of amendments. This raised a point that Judge Sutton expressed during the Standing Committee meeting in January -- multiple rounds of rule amendments tax the bar and the bench. It's better to group them together and do them all at once. Moreover, although one might hope that there could be some "low-hanging" fruit in terms of amendments to Rule 23, in reality that is probably not so. Accordingly, both because it would tax the bar and because it would probably prove a chimera, trying to identify "easy" amendments for a first round of amendments would not be workable.

A second participant began by noting that the idea of trying first to grab the low-hanging fruit by pursuing a first round of amendments limited to such issues seemed attractive. But reflection led to the conclusion that there is probably nothing about Rule 23 that is insignificant. Indeed, changes that were not thought likely to have a major effect have proved to do so. For example, when it was first put forward Rule 23(f) on interlocutory review of class-certification rulings was introduced as a minor revision. But it has become a "universal procedure" because review is sought in almost every case. This has had a major effect that seemingly was not foreseen. Any "minor" changes would be considered to be important.

Besides that, the reality is that the various provisions of Rule 23 are intrinsically linked together. Take Rule 23(c)(4) as an example. That is joined at the hip to the predominance requirement of (b)(3). As to some of the issues we have identified, however, the newness of the Court's decision in Wal-Mart makes immediate action unwise. That's true in particular of the 23(b)(2) monetary relief and the 23(a)(2) questions.

Regarding how to proceed, the goal should be to involve practitioners from a wide range of specialties. The employment bar may have views that are quite different from the securities bar, and the antitrust and consumer bars may diverge from those others. The mass torts bar, to the extent that remains important, may often have yet another view. The Committee would benefit from these multiple perspectives.

Regarding the Supreme Court's grant of cert. in the Comcast case, this participant was uncertain whether it takes the merits consideration issue off the front burner. The cert. petition was very narrow, and the Court's cert. grant was narrower yet. We will know more about what the case really involves as time moves forward. By the time the full Committee meets in Spring, 2013, we should know a lot more; the case may even be decided by then.

A third participant began with "rulemaking logistics" as a background concern. There is surely much activity occurring now

that bears on what the Subcommittee is addressing. The June 1 hearing in Congress showcased various Representatives' views on class actions, and showed that class actions remain a topic of active importance to them. The presentations to the House committee raised at least one new issue to this participant -- the alleged frequency of combination of state-wide class actions by the Judicial Panel on Multidistrict Litigation that leads to an eventual decision by the transferee judge that it is unmanageable to certify 24 different state-wide classes, resulting in denial of certification where individual state-wide class actions might well be certified. This problem was not apparent before.

The cert. grant in Comcast is narrow, but certainly means that nothing definitive on merits scrutiny can be undertaken until the Court has resolved the case. Meanwhile, the Advisory Committee has other activities on its plate. The preservation/sanctions issues are moving forward, although the outcome of that discussion remains unclear. The Duke Subcommittee may be moving toward making a package of proposals, and there has been some suggestion that it could try to arrange a mini-conference to address those issues. Those topics seem more advanced, and the variety of unresolved and important issues bearing on them may be considerably fewer, than is true of the Rule 23 issues. Accordingly, it appears that deferring action on these issues for some time is appropriate.

In terms of whether to have one or two rounds of rulemaking (if any), this participant saw many downsides to trying to pursue two rounds. Not only are there likely no "easy" issues, there might be a temptation in some quarters to resist the changes in the first round, even though it was limited to "easy" issues, due to fear of what the second round might hold. Any who were unhappy with features of the first round might fear worse in the second round no matter what the Committee said about the likely focus of that second round. A first round that depended to some extent on the further reforms of the second round for a well-rounded rule might invite objections that there was no assurance the second round would ever be completed. One round is more realistic.

Turning to the issues identified so far, it seems that front burner issues 1 and 4 -- settlement class certification and revising the criteria for settlement review -- are closely linked. The more one relies on settlement review as a substitute for vigorous application of the requirements of Rules 23(a) and (b), the more stress one might place on the content and application of those criteria. And there has been a suggestion that we rethink the conclusion in Amchem that Rule 23(e)'s criteria are no substitute for anything in Rule 23(a) or (b). Merits scrutiny and class certification (front burner issue 2) seems likely to persist no matter what the Court does with the

Comcast case, although addressing those issues will depend on what the Court does.

Issues classes (front burner issue 3) seem intrinsically linked to back burner issue 4 (revisiting predominance and superiority) so that they should be handled together. Front burner issue 5 (Rule 23(b)(2) and monetary relief) seems both uncertain in terms of lower court accommodation of the Supreme Court's Wal-Mart directives and potentially very difficult to resolve.

Turning to other back burner issues, a fundamental revision of Rule 23(b) (no. 1) seems unwarranted. That would, in a sense, toss out nearly a half century of (evolving) experience applying current Rule 23(b), including some Supreme Court decisions. Starting from scratch is not indicated here. Restoring the requirement of court approval of "individual" settlements (no. 3) would not be difficult as a drafting matter, but may not be of significant importance. The question has arisen what the court does if it concludes that it will not approve the individual settlement -- how does it force the unwilling proposed representative to proceed? But that concern may not be too large; there is a difference between the original plaintiff's abandonment of the action and the plaintiff's exploiting the class-action designation to extort a favorable "individual" settlement. Requiring the court to scrutinize the settlement for seeming abuse of the class-action device could be a valuable curative. Whether the problem is now worth noting, however, is quite unclear.

Revisiting notice requirements (no. 5) seems warranted in the Internet age. But there is an underlying oddity -- the current rule only requires notice and an opt-out opportunity in (b)(3) actions. Yet it seems peculiar to say that class members have such rights in a (b)(3) suit claiming that a bank overcharged account holders \$50, but none at all in a (b)(2) class action seeking to revise the pupil assignment methods of the school district on the ground that they have produced segregated results. In that (b)(2) action, not only is there no right to opt out, there is no requirement in the rule for any notice at all.

Choice of law (issue 7) seems to strain at the Enabling Act limits, and also to be very difficult to resolve. Moreover, the amendment to CAFA regarding choice of law that was proposed while the bill was pending before the Senate -- directing that certification not be denied solely on grounds that the law of more than one state will apply, seemed not to move the ball very far. The handling of attorney's fees (issue 8) seems unlikely to benefit from further rule changes. Rule 23(h) straddles a variety of concerns that apply in a variety of circumstances. Fortifying the commitment to a results-based approach (i.e.,

something like the percentage basis) would likely add little to the existing caselaw.

Finally, the development of rules to deal with overlapping class actions (issue 9) seems less pressing now that CAFA is on the books, and aggregation by consent (issue 10) appears to be based almost entirely on one Second Circuit decision reversing a single district court effort to employ such a technique. This does not seem pressing at present.

In sum, this participant urged that there is much to work on, but that the Subcommittee probably should for a while pursue a course of "creative treading of water."

Another participant announced somewhat similar views. An abiding question is whether, in a couple of years, the Committee might conclude that further amendments do not really hold the promise of making improvements. So it seems valuable to recognize from the outset that it may later seem that the best course is honorably to conclude that any amendments are not worth the effort. This might be a reason to resist drafting too soon; doing drafts may suggest to some a more vigorous confidence that changes will be made than the Committee really feels.

In any event, the right course would be to assume a one-step, not a two-step amendment process. There is probably no advantage, and may be significant risk, to trying to separate out some things for early treatment. So the watchword might be "steady as we go" rather than treading water, but that may not be much different.

On specific issues, it seems that the effects of the Wal-Mart decision are sufficiently uncertain so that we will be unable to discern them with confidence for some time. We should keep our fingers on the pulse. The (b)(2) monetary relief issue may be a bit closer, and might tie in to notice issues. In 2001-03, there was a proposal to call for some (not individual) notice in (b)(2) cases that was vigorously and effectively opposed on the ground that it would erect too high a barrier to discrimination class actions. In (b)(3) class actions, on the other hand, it seems very attractive to amend the rule and get out of the horse-and-buggy era of first-class mailed notice. Regarding merits scrutiny in connection with class certification, it is unlikely that a Supreme Court decision will resolve all the issues, but also likely that the time needed to digest a new Supreme Court decision would mean that there would be no formal proposals for three or four years. Issues classes can't be separated from predominance. One thing this participant would dearly like to do would be to reverse Shady Grove on the matter of district court discretion. Choice of law, on the other hand, would be intriguing "if we could get away with it."

Another participant began by voicing sensitivity to the concern expressed by Judge Sutton about frequent rule amendments. Simply for that reason, this participant would countenance two rounds of amendments only if there were a compelling reason for doing things that way. And there seems to be no such compelling reason.

In addition, it will be important to be frugal as we go about the Subcommittee's work. It is not fully clear yet, but budgetary concerns must be kept in mind. So trying to take advantage of events primarily organized by other groups seems attractive. At the same time, it is extremely important for the Committee to avoid any appearance that it is allied in any way with any group or that any group has special access to the Committee.

One reaction was that our conferences tend not to be in places that suggest indulgence. A conference at the Dallas-Fort Worth airport is unlikely to strike anyone as a frivolous venture.

The call began winding up with the observation that the main task going forward now seems to be gathering more input. Some further thought should be given to the best way of doing so. It may be that some of the events already scheduled by other groups will offer low-cost ways of significantly improving the Subcommittee's understanding of the issues involved. And invitations for written comments from groups or individuals might bolster its information base.

Another suggestion was to get an inventory of FJC work on class actions in recent years. It is not clear that there is reason to ask the FJC to undertake further work on Rule 23. But if there is, that work would require some lead time. For the present, at least a bibliography of what the FJC has done would be desirable, and also efforts to complete any projects not quite compete as yet.

Another possibility that was raised had to do with § 1407. One source of difficulty after CAFA is the inability of transferee districts due to Lexecon to enter final judgments in class actions transferred to them. That does not seem something that Rule 23 itself controls, but it is something that significantly affects the way in which transferee courts can employ the rule. This might also connect with choice of law. It is not clear that legislation to change the Lexecon result failed due to strong opposition, but more perhaps due to the weakness of support. It was not clear what position the Judicial Conference had taken on the subject; it may be that attention to that possibility is in order.

The call ended with Judge Mosman undertaking to focus the

discussion for further effort. For the present many avenues remain open, the course forward remains uncertain, although it is gradually becoming somewhat clearer.

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APPENDIX A.2

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APPENDIX 2

FJC Publications
(From FJC website)

_ Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide

2010 (Publication) 10 pages

This checklist is referenced in the Managing Class Action Litigation: A Pocket Guide for Judges, Third Edition, p. 11 (under the title: Notice Checklist and Plain Language Guide).

_ Managing Class Action Litigation: A Pocket Guide for Judges, Third Edition

Barbara J. Rothstein, Thomas E. Willging,

2010 (Publication) 55 pages

This pocket guide is designed to help federal judges manage the increased number of class action cases filed in or removed to federal courts as a result of the Class Action Fairness Act of 2005 (CAFA). It includes a section on determining federal jurisdiction that incorporates case-management ...(Read more)

_ Managing Class Action Litigation: A Pocket Guide for Judges, Second Edition

Barbara J. Rothstein, Thomas E. Willging,

2009 (Publication) 40 pages

Superseded

This pocket guide is designed to help federal judges manage the increased number of class action cases filed in or removed to federal courts as a result of the Class Action Fairness Act of 2005 (CAFA). This second edition includes a new section on determining federal jurisdiction that ...(Read more)

_ The Impact of the Class Action Fairness Act of 2005 on the Federal Courts: Fourth Interim Report to the Judicial Conference Advisory Committee on Civil Rules

Emery G. Lee III, Thomas E. Willging,

April 2008 (Publication) 29 pages

The Class Action Fairness Act of 2005 (CAFA) (Pub. L. No. 109-2, 119 Stat. 4 (2005)) expanded the federal courts' diversity of citizenship jurisdiction over class action litigation. Congress's intent was, in part, to shift some class action litigation from the state courts to the federal courts. ...(Read more)

_ Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions

Emery G. Lee III, Thomas E. Willging,

November 2008 (Publication) 20 pages

The preliminary findings presented in this report suggest that, in diversity class actions, there is less to class allegations

than one would expect. There was relatively little motions activity in the typical case, and the majority of cases not remanded to state court were voluntarily dismissed. ...(Read more)

_ FJC Research Brief, No. 1
 April 2007 (Publication) 2 pages
 The Impact of the Class Action Fairness Act of 2005: Third Interim Report to the Judicial Conference Advisory Committee on Civil Rules.

_ The Impact of the Class Action Fairness Act of 2005: Third Interim Report to the Judicial Conference Advisory Committee on Civil Rules
 Thomas E. Willging, Emery Lee,
 April 16, 2007 (Publication) 26 pages

The Federal Judicial Center has undertaken a long-term study of the impact of the Class Action Fairness Act of 2005 (CAFA) on the resources of the federal courts. The third interim report was delivered to the committee on April 16, 2007 for discussion at its April 19 meeting and reports on the ...(Read more)

_ Progress Report to the Advisory Committee on Civil Rules on the Impact of CAFA on the Federal Courts
 Tom Willging, Emery Lee,
 November 8, 2007 (Publication) 8 pages
 The Federal Judicial Center has undertaken a long-term study of the impact of the Class Action Fairness Act of 2005 (CAFA) on the resources of the federal courts. This progress report on the impact of the Class Action Fairness Act of 2005 was presented to the Advisory Committee on Civil Rules on ...(Read more)

_ Attorney Choice of Forum in Class Action Litigation: What Difference Does It Make?
 Thomas E. Willging, Shannon R. Wheatman,
 2006 (Publication) 64 pages
 This article presents a post-Class Action Fairness Act of 2005 (CAFA) discussion and analysis of data presented previously in An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation (FJC 2005). Data originated from a national random survey of 728 attorneys who represented ...(Read more)

_ The Impact of the Class Action Fairness Act of 2005: Second Interim Report to the Judicial Conference Advisory Committee on Civil Rules
 Thomas E. Willging, Emery Lee,
 September 7, 2006 (Publication) 14 pages
 The Federal Judicial Center has undertaken a long-term study of the impact of the Class Action Fairness Act of 2005 (CAFA) on the resources of the federal courts. This second interim progress report was presented to the Judicial Conference Advisory

Committee on Civil Rules on September 7, 2006, and ...[\(Read more\)](#)

_ Interim Progress Report on Class Action Fairness Act Study

Thomas E. Willging, Emery Lee,
May 22, 2006 (Publication) 11 pages

This interim progress report on the impact of the Class Action Fairness Act of 2005 was presented to the Advisory Committee on Civil Rules on May 22, 2006. The report examines class action filing trends from July 1, 2001 through June 30, 2005 in three federal district courts and includes data on ...[\(Read more\)](#)

_ An Empirical Examination of Attorneys' Choice of Forum in Class Action Litigation

Thomas E. Willging, Shannon R. Wheatman,
2005 (Publication) 125 pages

This article presents attorney responses to a national random survey of 728 attorneys who represented plaintiffs and defendants in 621 recently closed class action cases. Those cases had been filed in or removed to federal courts, and the article focuses on attorneys' reasons for choosing a state ...[\(Read more\)](#)

_ Managing Class Action Litigation: A Pocket Guide for Judges

Barbara J. Rothstein, Thomas E. Willging,
2005 (Publication) 29 pages

[superseded]

This guide is designed to help federal judges manage the increased number of class actions expected as a result of the Class Action Fairness Act of 2005. As called for in that legislation, the guide is part of a continuing effort of the federal judiciary to identify "best practices" ...[\(Read more\)](#)

_ Attorney Reports on the Impact of Amchem and Ortiz on Choice of a Federal or State Forum in Class Action Litigation: A Report to the Advisory Committee on Civil Rules Regarding a Case-based Survey of Attorneys

Thomas E. Willging, Shannon R. Wheatman,
2004 (Publication) 119 pages

While considering a proposal to amend Fed. R. Civil P. 23 to create new certification standards that would apply only to settlement class actions, the Advisory Committee on Civil Rules sought this empirical research from the Center to help it decide how to proceed.

_ Manual for Complex Litigation, Fourth

2004 (Publication) 798 pages

Successor to the Manual for Complex Litigation, Third. This work describes approaches that trial judges have found to be useful in managing complex cases. This edition updates the treatment of electronic discovery and other aspects of pretrial management and describes major changes affecting case ...[\(Read more\)](#)

_ Effects of Amchem/Ortiz on the Filing of Federal Class Actions: Report to the Advisory Committee on Civil Rules

Robert J. Niemic, Thomas E. Willging,
 September 9, 2002 (Publication) 46 pages
 The Advisory Committee on Civil Rules has been considering a proposal to revise Fed. R. Civil P. 23 to create new certification standards that would apply only to settlement class actions. The Committee sought empirical research from the Center to help it decide how to proceed. The Center conducted ...(Read more)

_ Auctioning the Role of Class Counsel in Class Action Cases: A Descriptive Study

Laural L. Hooper, Marie Leary,
 August 29, 2001 (Publication) 120 pages
 A study conducted by the Center to provide the Third Circuit Task Force on Selection of Class Counsel information on judges who have employed an auction or bidding method to select class counsel. The report describes in detail the auctioning procedures used by the judges, including the process of ...(Read more)

_ Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation

Thomas E. Willging,
 June 2000 (Publication) 50 pages
 148 University of Pennsylvania Law Review 2225, No. 6 (June 2000)

_ Case Studies of Mass Tort Limited Fund Class Action Settlements & Bankruptcy Reorganizations

S. Elizabeth Gibson,
 2000 (Publication) 244 pages
 This is an expanded version of a report that was previously published as Appendix E of the Report of the Advisory Group on Civil Rules and the Working Group on Mass Torts (Report on Mass Tort Litigation) February 15, 1999. In this version, the author expands her analysis by examining publicly ...(Read more)

_ Individual Characteristics of Mass Torts Case Congregations: A report to the Mass Torts Working Group (Appendix D)

Thomas E. Willging, Rebecca Spiro, Carol Witcher, Philip Egelston, Suzanne Hruby, Melissa Deckman Fallon,
 1999 (Publication) 113 pages
 This report, done for the Mass Torts Working Group, appointed in 1998 by the Chief Justice, organizes and presents information from published sources on about fifty sets of mass tort litigations involving personal injury and property damage claims. Information presented includes the shape of the ...(Read more)

_ Mass Tort Settlement Class Actions: Five Case Studies

Jay Tidmarsh,
 1998 (Publication) 100 pages
 This monograph by Professor Jay Tidmarsh of Notre Dame Law School examines five cases in which Rule 23 of the Federal Rules of Civil Procedure has been used to achieve a settlement of a mass tort controversy. The reason for studying mass tort settlement

class actions is simple: Using class actions ...(Read more)

_ An Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules
Thomas E. Willging, Laural L. Hooper, Robert J. Niemic,
1996 (Publication) 200 pages

A study conducted by the Center to provide the Judicial Conference's Advisory Committee on Civil Rules with systematic, empirical information about how Federal Rule of Civil Procedure 23 operates. The study addressed many questions about the day-to-day administration of Rule 23 in the types of ...(Read more)

_ Manual for Complex Litigation, Third
1995 (Publication) 568 pages
[superseded]

The successor to the Manual for Complex Litigation, Second, this work describes procedures that trial judges have found to be successful in managing complex cases. It also analyzes practices that have caused difficulties. It includes a number of forms that have been used by U.S. ...(Read more)

_ Preliminary Empirical Data on Class Action Activity in the Eastern District of Pennsylvania and the Northern District of California in Cases Closed Between July 1, 1992 and June 30, 1994 (preliminary draft not for citation)
Thomas E. Willging, Laurel L. Hooper, Robert J. Niemic,
April 12, 1995 (Publication)

_ Summary of Empirical Data from and About All Securities Class Actions Terminated in the Eastern District of Pennsylvania and the Northern District of California Between July 1, 1992-June 30, 1994 (Draft)
Thomas E. Willging, Laurel L. Hooper, Robert J. Niemic,
April 12, 1995 (Publication)
A summary report to the Judicial Conference Advisory Committee on Civil Rules on ongoing research.

_ Trends in Asbestos Litigation
Thomas E. Willging,
1987 (Publication) 138 pages
A report, prepared as asbestos litigation was becoming a growing presence on federal dockets, based on an intensive study of ten federal district courts with heavy asbestos caseloads. The author examines both innovative and traditional methods of handling the asbestos caseload in the federal ...(Read more)

_ Asbestos Case Management: Pretrial and Trial Procedures
Thomas E. Willging,
1985 (Publication) 39 pages
A description of case-management procedures various courts have used to facilitate prompt resolution in asbestos litigation. The

report is based on a conference of federal judges, magistrate judges, and clerks. Among the methods described are use of standardized pretrial procedures to avoid ...(Read more)

_ Manual for Complex Litigation, Second
1985 (Publication) 525 pages
[superseded]

The successor to the Manual for Complex Litigation, this work describes alternative procedures that trial judges have found to be successful in managing complex cases. It also analyzes practices that have caused difficulties. It includes a number of forms that have been used by U.S. ...(Read more)

_ Asbestos Case Management Conference Notebook
Thomas E. Willging,
June 7, 1984 (Publication)

_ Asbestos Case Management Conference Reading File, Volumes 1
and 2
Thomas E. Willging,
June 7, 1984 (Publication)
Asbestos Case Management Orders.

Volume 1: Clerk's Division Report; Northern District of California; District of Colorado; Western District of Louisiana; District of Maryland

Volume 2: District of Massachusetts; District of New Jersey; Southern District of Mississippi; Middle District of North
...(Read more)

_ Manual for Complex Litigation (Fifth Edition) With Amendments to September 1981
1982 (Publication) 457 pages
[superseded]
This publication was prepared by the Federal Judicial Center but published by West Publishing Company. West Publishing assigned its own "edition" number to the publication.

_ Attorneys' Fees in Class Actions
Arthur R. Miller,
1980 (Publication) 430 pages
A circuit-by-circuit review of case law governing award of attorneys' fees in class actions and an examination of abuses in fee requests. The report also includes a discussion of judges' and attorneys' attitudes toward fee computation. Recommendations focus on procedures, implemented early in ...(Read more)

_ Overview of Federal Class Actions: Past, Present, and Future
Arthur R. Miller,
1977 (Publication) 68 pages
An analysis and discussion of the origins, development, and

existing state of the law governing class actions.

_ Manual for Complex and Multidistrict Litigation (corrected copy)

June 7, 1971 (Publication) 268 pages

[superseded]

One of the predecessors of the Manual for Complex Litigation.

_ Manual for Complex and Multidistrict Litigation

1969 (Publication)

[superseded]

One of the predecessors of the Manual for Complex Litigation.

_ Manual for Complex and Multidistrict Litigation Board
Bulletins

John T. McDermott,

1969 (Publication)

[superseded]

These brief bulletins which were supplements to the Manual for Complex and Multidistrict Litigation contain summaries of opinions and orders concerning problems which occur in complex and multidistrict litigation.

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TAB 6B

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112TH CONGRESS
2^D SESSION

S. 3317

To restore the effective use of group actions for claims arising under title VII of the Civil Rights Act of 1964, title I of the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, section 1977 of the Revised Statutes, and the Genetic Information Non-discrimination Act of 2008, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 20, 2012

Mr. FRANKEN (for himself, Mr. LEAHY, Mrs. MURRAY, Mr. HARKIN, Mr. WHITEHOUSE, Mr. BLUMENTHAL, Ms. MIKULSKI, Mr. SANDERS, Mrs. BOXER, Mr. AKAKA, Mr. COONS, Mr. INOUE, Mr. KERRY, Mrs. SHAHEEN, Mr. BINGAMAN, Mr. BROWN of Ohio, Mrs. GILLIBRAND, Mr. UDALL of New Mexico, Mr. DURBIN, Mr. WYDEN, Mr. MERKLEY, Ms. CANTWELL, Mr. UDALL of Colorado, and Mr. LAUTENBERG) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To restore the effective use of group actions for claims arising under title VII of the Civil Rights Act of 1964, title I of the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, section 1977 of the Revised Statutes, and the Genetic Information Nondiscrimination Act of 2008, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Equal Employment
3 Opportunity Restoration Act of 2012”.

4 **SEC. 2. FINDINGS AND PURPOSE.**

5 (a) FINDINGS.—Congress finds the following:

6 (1) Congress has enacted laws to eradicate
7 workplace discrimination and to secure equal em-
8 ployment opportunities for all Americans, as noted
9 in *Teamsters v. United States*, 431 U.S. 324 (1977)
10 and *McDonnell Douglas Corp. v. Green*, 411 U.S.
11 792 (1973) (stating that civil rights laws are meant
12 “to assure equality of employment opportunities and
13 to eliminate . . . discriminatory practices and de-
14 vices” in the workplace).

15 (2) Workplace discrimination laws prohibit sub-
16 jective employment practices that operate to deny
17 equal employment opportunities to employees, as ex-
18 plained in *Watson v. Fort Worth Bank & Trust*, 487
19 U.S. 977 (1988), which stated that personnel deci-
20 sions “based on the exercise of personal judgment or
21 the application of inherently subjective criteria” are
22 unlawful when the personnel decisions have the ef-
23 fect of discriminating on grounds prohibited by law.

24 (3) Class actions often have been the most ef-
25 fective means to enforce employment discrimination
26 laws, as explained in *East Texas Motor Freight Sys-*

1 tem Inc. v. Rodriguez, 431 U.S. 395 (1977)
2 (“[S]uits alleging . . . discrimination are often by
3 their very nature class suits, involving classwide
4 wrongs” where “[e]ommon questions of law or fact
5 are typically present.”) and in Eisen v. Carlisle &
6 Jacquelin, 417 U.S. 156 (1974) (“Economic reality
7 dictates that [claims of relatively small value] pro-
8 ceed as a class action or not at all.”).

9 (4) Historically, a class action alleging employ-
10 ment discrimination could be maintained if the class
11 was united by a common issue of law or fact. As a
12 leading legal treatise, William B. Rubenstein, 1
13 Newberg on Class Actions § 3:20 (5th ed. 2011), ex-
14 plained, “this requirement [was] easily met in most
15 cases”. As another leading treatise, Charles A.
16 Wright et al., 7A Federal Practice and Procedure,
17 Wright and Miller § 1763 (3rd ed. 2005), explained,
18 this requirement had been given “permissive applica-
19 tion”.

20 (5) However, the Supreme Court recently made
21 it more difficult for victims of discrimination to vin-
22 dicate claims for their rights. In Wal-Mart Stores,
23 Inc. v. Dukes, 131 S. Ct. 2541 (2011), the Court re-
24 quired “convincing proof of a companywide discrimi-
25 natory pay and promotion policy” as a prerequisite

1 to class certification. In a dissent in that case, Jus-
 2 tice Ginsberg wrote that the Court’s decision “dis-
 3 qualifies the class at the starting gate”.

4 (b) PURPOSE.—The purpose of this Act is to restore
 5 employees’ ability to challenge, as a group, discriminatory
 6 employment practices, including subjective employment
 7 practices.

8 **SEC. 3. GROUP ACTIONS.**

9 (a) IN GENERAL.—Part VI of title 28, United States
 10 Code, is amended by adding at the end the following:

11 **“CHAPTER 182—GROUP ACTIONS**

“Sec.

“4201. Group actions in certain employment discrimination cases.

12 **“§ 4201. Group actions in certain employment dis-**
 13 **crimination cases**

14 “(a) GROUP ACTIONS.—In seeking relief under title
 15 VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et
 16 seq.), title I of the Americans with Disabilities Act of 1990
 17 (42 U.S.C. 12111 et seq.), title V of the Rehabilitation
 18 Act of 1973 (29 U.S.C. 791 et seq.), section 1977 of the
 19 Revised Statutes (42 U.S.C. 1981), or title II of the Ge-
 20 netic Information Nondiscrimination Act of 2008 (42
 21 U.S.C. 2000ff et seq.) (individually referred to in this sec-
 22 tion as a ‘covered employment statute’), 1 or more mem-
 23 bers (collectively referred to in this section as the ‘rep-
 24 resentative party’) of a group may sue on behalf of all

1 members of the group if the representative party shows,
2 by a reasonable inference, that—

3 “(1) the members of the group are so numerous
4 that their joinder is impracticable;

5 “(2) the claims of the representative party are
6 typical of the claims of the group the representative
7 party seeks to represent and the representative party
8 and the representative party’s counsel will fairly and
9 adequately protect the interests of the group; and

10 “(3) the members of the group are, or have
11 been, subject to an employment practice that has ad-
12 versely affected or is adversely affecting a significant
13 portion of the group’s members.

14 “(b) SUBJECTIVE EMPLOYMENT PRACTICES.—

15 “(1) DEFINITION.—In this subsection, the term
16 ‘subjective employment practice’ means—

17 “(A) an employer’s policy of leaving per-
18 sonnel decisions to the unguided discretion of
19 supervisors, managers, and other employees
20 with authority to make such personnel deci-
21 sions; or

22 “(B) an employment practice that com-
23 bines a subjective employment practice, as de-
24 fined in subparagraph (A), with other types of
25 personnel decisions.

1 “(2) CHALLENGES.—A representative party
2 may challenge a subjective employment practice cov-
3 ered by a covered employment statute in a group ac-
4 tion filed under this section to the same extent as
5 the party may challenge any other employment prac-
6 tice covered by the covered employment statute in
7 such an action.

8 “(3) EXERCISE OF DISCRETION IN DIFFERENT
9 WAYS.—The fact that individual supervisors, man-
10 agers, or other employees with authority to make
11 personnel decisions may exercise discretion in dif-
12 ferent ways in applying a subjective employment
13 practice under the covered employment statute shall
14 not preclude a representative party from filing a cor-
15 responding group action under this section.

16 “(4) CONSIDERATION OF WRITTEN NON-
17 DISCRIMINATION POLICY.—In determining whether
18 to certify a group action challenging an employment
19 practice, the court may consider as evidence, in op-
20 position to certification, an employer’s written non-
21 discrimination policy only to the extent that the em-
22 ployer demonstrates that the policy has been consist-
23 ently and effectively used to prevent and, where nec-
24 essary, promptly correct discrimination against the
25 group.

1 “(c) RELATIONSHIP TO RULE 23 OF THE FEDERAL
2 RULES OF CIVIL PROCEDURE.—

3 “(1) ELECTION OF PROCEDURE.—The rep-
4 resentative party may elect to proceed in a group ac-
5 tion under this section or in a class action under
6 rule 23 of the Federal Rules of Civil Procedure. This
7 election shall occur not later than the latest date on
8 which the representative party may petition for class
9 certification under rule 23 of the Federal Rules of
10 Civil Procedure.

11 “(2) RULE 23 REQUIREMENTS.—To the extent
12 consistent with this section, the court shall apply the
13 provisions of rule 23(c) through rule 23(h) of the
14 Federal Rules of Civil Procedure, including the re-
15 quirements under rule 23 regarding notice and re-
16 quests for exclusion, to claims brought pursuant to
17 this section.

18 “(3) INTERLOCUTORY APPELLATE REVIEW.—
19 Decisions granting or denying certification of claims
20 as group actions under this section are subject to re-
21 view to the same extent as orders granting or deny-
22 ing class certification pursuant to rule 23 of the
23 Federal Rules of Civil Procedure.

24 “(4) CLASS ACTION FAIRNESS ACT.—Group ac-
25 tions certified under this section shall be subject to

1 section 1332(d), section 1453, and chapter 114 to
2 the same extent as class actions certified pursuant
3 to rule 23 of the Federal Rules of Civil Procedure.

4 “(5) RULE OF CONSTRUCTION.—Nothing in
5 this section shall be construed to create any infer-
6 ence regarding the standards for determining wheth-
7 er claims may be adjudicated together under any law
8 other than the covered employment statutes.

9 “(d) REMEDIES.—

10 “(1) AVAILABILITY OF REMEDIES.—If an em-
11 ployer has been found liable under a covered employ-
12 ment statute against a group certified under this
13 section, the court may deny a remedy available
14 under the covered employment statute to a member
15 of the group only if the employer demonstrates, by
16 a preponderance of the evidence, that the member of
17 the group would not have received the corresponding
18 employment opportunity or benefit even in the ab-
19 sence of a violation of the covered employment stat-
20 ute.

21 “(2) RELIEF.—

22 “(A) IN GENERAL.—The court shall fash-
23 ion the most complete relief possible for mem-
24 bers of a prevailing group described in this sec-

1 tion and shall have broad discretion in deter-
2 mining how to fashion that relief.

3 “(B) EXERCISE OF DISCRETION.—In exer-
4 cising its discretion under this paragraph, the
5 court shall—

6 “(i) use such procedures as the inter-
7 ests of justice warrant, which procedures
8 may include economic or statistical mod-
9 eling, mathematical calculation, sampling,
10 individual adjudication, and other means
11 the court may adopt;

12 “(ii) consider which procedure will
13 best ensure that members of the group will
14 be made whole;

15 “(iii) consider which procedure will
16 best minimize the cost to and burden on
17 the parties; and

18 “(iv) consider which procedure most
19 reliably and efficiently accounts for limita-
20 tions on the court’s ability to identify indi-
21 vidual members of the group and to meas-
22 ure the harm incurred by individual mem-
23 bers of the group.”.

1 (b) TECHNICAL AND CONFORMING AMENDMENT.—

2 The table of chapters for part VI of title 28, United States

3 Code, is amended by adding at the end the following:

“182. Group actions 4201”.



TAB 7

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RULE 6(d): "3 DAYS ARE ADDED": STYLE GLITCH

Introduction

Two quite different questions are posed by Rule 6(d). One, the more fundamental, is whether the "3 days are added" provision encompasses too many different modes of service. That question has caused uncertainty in the past, and has been on the agenda for a while. This question affects other sets of rules, and may tie into more general questions about filing and service by electronic means.

The other question arises from a styling glitch that occurred in 2005, before the Style Project but at a time when amendments were drafted under Style Project protocols. The 3 days are added when a party must or may act "after service and service is made" by specified means. The intended meaning is that 3 days are added when a party may or must act "after being served," but not when a party may act after making service. The glitch is easily fixed. The harder question has been whether the fix should be proposed immediately. It may be that the time has come to go forward with this change without delaying to coordinate with the uncertain timing of other possible changes in Rule 6(d). The change is simple and noncontroversial. It can be published for comment in conjunction with the next publication package, most likely in 2013, if the other advisory committees concur. The thought that style missteps might be accumulated for correction in a single package seems less and less persuasive as time passes by. The most likely reason for further delay may be the need to coordinate with other advisory committees, as discussed below.

A. THE PROBLEM AND THE FIX

Rule 6(d), as amended in 2005, now reads:

(d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time *after service and service is made* under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

The proposed amendment would make a simple change in order to clarify the meaning that was intended:

When a party may or must act within a specified time after ~~service~~ being served and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

As easy as it is to forget the details, the 2005 amendment of what then was Rule 6(e) was prompted by the emergence of four competing ways to calculate the 3 extra days. As the Committee Note says, the amendment was intended "to remove any doubt as to the method for extending the time to respond after service by mail,

leaving with the clerk of court, electronic means, or other means consented to by the party served." That is all that was intended.

Styling choices, however, adopted words that can easily be read to change something more. Before the amendment, the 3 extra days were provided when a party had a right or was required to act within a prescribed period after service of a notice or other paper "upon the party" if the paper or notice "is served upon the party" by the designated means. "[A]fter service," and "service is made" were meant to convey the same thought – the purpose is to allow extra time to a party who has been served by a means that may not convey actual notice as quickly as personal service or leaving the paper at home or office. There was no thought to provide extra time to the person making service. Probably that was because no one paused to recall that a few rules provide time to act after making service, rather than after being served. But there are such rules.

Rule 14(a)(1) requires permission to serve a third-party complaint only if the third-party plaintiff files the complaint "more than 14 days after serving its original answer." Rule 15(a)(1)(A) allows a party to amend a pleading once as a matter of course "within * * * 21 days after serving it" if the pleading is not one to which a responsive pleading is required. Rule 38(b)(1) allows a party to demand a jury trial by "serving the other parties with a written demand * * * no later than 14 days after the last pleading directed to the issue is served."

Literally, to take one example, a defendant who wants to amend an answer could argue that if it mailed the answer it has 24 days to amend under Rule 15(a)(1)(A), because it "may act within a specified time after service." This literal reading may be resisted on the ground that it makes no sense to allow a party to expand its own time to act by choosing the means of service. The defendant knows when the answer was served, even if the mails do not carry it to the plaintiff for two, three, four, or perhaps even more days. Courts may come to read the rule that way. But the literal meaning also may prevail.

Not much is lost if the literal reading should prevail. None of the opportunities to deliberately generate an added 3 days is likely to create much difficulty. Allowing 17 days for the two 14-day periods would do no more than might happen under the most extensive applications of the former 10-day periods that were measured without counting intervening Saturdays, Sundays, and legal holidays. Rule 15's 20 days were 20 days, but moving from 21 to 24 days at the pleading stage does not seem a big deal.

Neither is much lost if a literal reading awards 3 added days to an unwary litigant who discovers this reading in a moment of desperation, flailing about for a means to recover from an inadvertent failure to act within the basic time period.

But something could be lost if a party deliberately relies on the literal reading, only to be caught up short by a court that

rejects this view in favor of the pre-2005 meaning. A defendant who counted on a right to amend on the 24th day, and preferred to wait past the 21st day, might be required to ask leave to amend and be denied. Or permission must be sought to serve a third-party complaint, or to demand jury trial. It does not seem at all likely that a court would deny a worthy motion for any of these things, particularly if the party claimed deliberate reliance on the new rule language. Still, some risk is there.

This contretemps has been explored at length by Professor James J. Duane in *The Federal Rule of Civil Procedure That Was Changed By Accident: A lesson in the Perils Of Stylistic Revision*, 62 S.C.L. Rev. 41 (2010). The article, and correspondence with Professor Duane, are set out at pages 309-335 of the April 2011 agenda materials. There is no indication that the potential trap has been sprung on any litigant, but it may have happened out of sight, and could happen still.

The amendment that fixes this potential problem, set out above, is simple. So simple that it deserves adoption without waiting to see whether serious problems develop in practice:

When a party may or must act within a specified time after ~~service~~ being served and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

B. TIMING

The fix is easy. Why not do it straightaway?

One snag is that similar provisions appear in other sets of rules. Appellate Rule 26(c) is "after service," but apparently there is no problem because no Appellate Rule sets a time to act after serving, rather than after being served. Criminal Rule 45(c) is nearly verbatim the same as Rule 6(d), but the Criminal Rules Committee Reporters have found no Criminal Rule that creates problems analogous to Civil Rules 14, 15, and 38. They suggest that Criminal Rule 12.1(b)(2) "could be affected," but think any ambiguity is unlikely to cause a serious problem."⁴ Bankruptcy Rule 9006(f), on the other hand, read as Rule 6(d) now reads for many years before 2005 – "within a prescribed period after service * * * and the notice or paper * * * is served by mail * * *." The Bankruptcy Rules, moreover, incorporate Civil Rules 14, 15, and 38

⁴ Criminal Rule 12.1(a) authorizes the government to request that the defendant notify the government of any intended alibi defense. If the defendant serves notice, 12.1(b)(1) requires the government to disclose the witnesses it will rely on to establish the defendant's presence at the scene of the offense. 12.1(b)(2) sets the time to disclose as "14 days after the defendant serves notice * * * under Rule 12.1(a)(2), but no later than 14 days before trial."

either for adversary proceedings or for all litigation. The Bankruptcy Rules Committee Reporter, however, has not been able to discover any case addressing the question whether the 3 added days are provided to a person who makes service by mail.

In keeping with recent tradition, it would be desirable to change all these sets of rules in tandem, even though the Appellate and Criminal Rules do not seem to present any occasion to measure time after making service. In addition to uniform wording of parallel provisions, it is possible that a future rule might measure time after making service, requiring a belated amendment of the 3-added-days rule.

Another reason for delay may extend beyond the time required to coordinate with the other advisory committees. There is no apparent urgent need to make the change. The problem has been identified in a law review article, not in developing case law. Unwitting victims who rely unsuccessfully on a literal reading of the new language may be hard to find.

Taken together, these considerations suggest that it is appropriate to recommend publication of the proposed amendment after the other advisory committees have had an opportunity to determine whether parallel changes should be made in or more of the other sets of rules.

TAB 8

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Rule 17(c)(2) reads:

- (2) *Without a Representative.* A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem – or issue another appropriate order – to protect a minor or incompetent person who is unrepresented in an action.

The court grappled with the second sentence in *Powell v. Symons*, 680 F.3d 301 (3d Cir.2012). Two cases were before the court. Each involved a pro se prisoner plaintiff. Each plaintiff requested appointment of counsel. Each was denied. One plaintiff, Powell, showed that he had been declared incompetent to plead guilty in a prosecution pending in federal court. He also presented the extensive psychiatric report and follow-up examination that led to this conclusion. The magistrate judge in that case thought it would be good to appoint counsel, but refused because of experience that it was difficult to find counsel to accept an appointment. The plaintiff in the other case, Hartmann, presented a letter from a psychiatrist stating that he was experiencing "major depression and attention deficit disorder. I do not feel that he is competent at this time to represent himself in court."

The court of appeals adopted the approach taken by the Second Circuit. Bizarre behavior by a pro se litigant does not alone trigger a duty to inquire into mental competence, even if the behavior suggests mental incapacity. The court is required to inquire into mental competence for purposes of the Rule 17(c)(2) duty to appoint a guardian or enter some other order only if there is "verifiable evidence of incompetence." A legal adjudication of incompetence that has been brought to the court's attention brings Rule 17(c)(2) into play. So too, "'verifiable evidence from a mental health professional demonstrating that the party is being or has been treated for mental illness of the type that would render him or her legally incompetent'" may suffice. Absent some such showing, the court is not required to inquire into competence on its own.

Applying this test, the determination that Powell lacked competence to enter a guilty plea required appointment of "an appropriate representative." The representative might be counsel, perhaps to be found by inquiring of bar associations or law school clinics, or another representative, perhaps a social worker from a senior center. As to Hartmann, the psychiatrist's letter triggered a duty of further inquiry.

What brings this case to the agenda is Judge Sloviter's opening lament that "[t]he Advisory Committee Notes do not elaborate on the requirement [of Rule 17(c)(2)] and there is but a

paucity of reported decisions interpreting the provision. Although the language of the Rule makes the obligation mandatory, * * * there is no suggestion which factors should trigger the district court's duty of inquiry as to whether the individual at issue is incompetent. As a result, responsibility for Rule 17 appears generally to be left to the discretion of the district courts." Then, the final words of the opinion appear in footnote 10: "We will respectfully send a copy of this opinion to the chairperson of the Advisory Committee to call its attention to the paucity of comments on Rule 17."

The issue addressed by the Third Circuit is challenging in many respects. On the one hand, Rule 17(c)(2) recognizes that courts should be careful to protect those who cannot protect their own rights. On the other hand, federal courts – including some of the busiest courts in the country – are burdened by a very high volume of prisoner pro se cases, and other pro se cases as well. Imposing on the courts an obligation to inquire often into the mental capacity of pro se plaintiffs would substantially increase their burden in a time of dwindling resources. In addition, finding counsel to represent pro se litigants is often very difficult, and imposing the obligation on courts to find counsel in a large number of cases would further increase the burden.

Judge Sloviter served on the Standing Committee on Rules of Practice and Procedure. She knows that the rules committees issue committee notes only to explain a rule at the time it is adopted or amended. Earlier committee notes are not amended unless rule text is amended. Thus the question put to the Committee is whether something should be done to revise the text of Rule 17(c)(2).

Possible revisions could go in many different directions. The most obvious would be to address the questions reflected in the Powell case: In what circumstances is a court obliged to raise the Rule 17(c)(2) question without motion? What showings as to competence must be made when the question is raised, either by motion or on the court's own inquiry? The court does address that, and seems satisfied with adopting the approach framed by the Second Circuit. But this topic could be developed further.

Whether to consider the merits of the claim while considering a Rule 17(c)(2) issue presents challenging questions. What is the relationship between acting under Rule 17(c)(2) and screening the complaint for forma pauperis purposes? If the claim seems obviously fanciful, does it make any sense to appoint counsel or guardian, even if the litigant is found incompetent? Or would that defeat the very purpose of the rule by determining the merits of a claim the claimant is incompetent to present? Conversely, if the litigant has managed to state a claim, is that a sign of competence that forecloses further inquiry? Or is it instead a sign that diligent inquiry is required to ensure competence to develop the claim? Does it make a difference whether the claim seems to present issues of real importance, rather than issues that are trivial even if they support a legally valid claim?

Further questions might be addressed. What circumstances call for appointing a guardian ad litem? What different circumstances call for "another appropriate order"? There can easily be circumstances in which a pro se party is competent to function as a client, requiring only appointment of counsel. Or the party might be so incompetent as to require an intermediary who can stand in the party's shoes to become an effective client. Or the party might be able, with some form of assistance short of appointed counsel, to function as a pro se litigant.

And there are still other possibilities. One would be to avoid these questions by reducing the command from "must" appoint a guardian or issue an appropriate order. "Should" might replace the ambiguous "shall" that was rendered as "must" in the 2007 Style amendments. That is an important question that cannot be addressed lightly.

Rule 17(c)(2) is not limited to actions brought by prison inmates. It may raise awkward issues in relation to state law as invoked by Rule 17(b), particularly 17(b)(3), on the capacity of a representative.

The immediate question is whether the problem encountered by the Third Circuit, and resolved by it, presents issues that justify consideration of possible Rule 17(c)(2) amendments. As the Third Circuit recognizes, Rule 17(c)(2) issues do not appear frequently in the case law. The relative dearth of decisions means there is little guidance in identifying significant problems, much less in crafting workable solutions. This may be an area where the Committee would be wise to await further development of the common law before venturing into rule making.

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claims, and remand for proceedings consistent with the foregoing opinion.



Kevin POWELL, Appellant

v.

Dr. SYMONS.

Detlef F. Hartmann, Appellant

v.

Warden Thomas Carroll; Commissioner Stanley Taylor; Jane Brady, Former Attorney General; Adult Bureau Chief Paul Howard; James Welsh; Warden Robert Snyder; Elizabeth Burris; Deputy Warden David Pierce; Francene Kobus; Mike Little; Edward Johnson; John Melbourne; Jane Thompson; Lisa M. Merson; R. Vargas; Evelyn Stevenson; Nikita Robbins; Janet Leban; Michael Knight; John Malaney; Jane Alie; Deborah Rodweller; Gail Eller; Oshenka Gordon; Brenda Heddinger; Nancy Doe; R.W. Doe, IV; Larry Linton; Kimberly Weigner; Dr. Anthony Cannuli; J. Doe(s) to LXIII; Joyce Talley; Carl Hazzard; Cap. J. Henry; Michael McCreanor; John Scranton; Ihuoma Chuks.

Nos. 10–2157, 10–3069.

United States Court of Appeals,
Third Circuit.

Argued Oct. 24, 2011.

Filed: March 30, 2012.

Background: State prisoner filed § 1983 action asserting Eighth Amendment claim that physician was deliberately indifferent

to his medical needs. The United States District Court for the Middle District of Pennsylvania, James F. McClure, Jr., J., 2010 WL 1485675, granted summary judgment for defendant. Prisoner appealed. Another prisoner filed similar claim and the United States District Court for the District of Delaware, Sue L. Robinson, J., 719 F.Supp.2d 366, granted summary judgment for defendants. Prisoner appealed. Appeals were consolidated.

Holdings: The Court of Appeals, Sloviter, Circuit Judge, held that:

- (1) district court abused its discretion as to one prisoner in not entering order appointing appropriate representative under guardian ad litem rule and
- (2) letter from physician as to other prisoner sufficed to put district court on notice that prisoner possibly was incompetent.

Reversed and remanded.

1. United States Magistrates ⇌31

Court of Appeals could assert jurisdiction over state prisoner's pro se notice of appeal that listed date of magistrate judge's report and recommendation, rather than final order of district court, since those two documents were closely related, prisoner's intent clearly was to appeal final order adopting report and recommendation as that was only means of obtaining relief from summary judgment decision that he had challenged, and defendant had full opportunity to brief all issues and had not been prejudiced by prisoner's error. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

2. Federal Courts ⇌666

Notices of appeal, especially those filed pro se, are liberally construed, and the Court of Appeals can exercise jurisdiction over orders not specified in a notice of appeal if (1) there is a connection between

the specified and unspecified orders; (2) the intention to appeal the unspecified order is apparent; and (3) the opposing party is not prejudiced and has a full opportunity to brief the issues.

3. Federal Courts ¶813

The Court of Appeals reviews for abuse of discretion both a district court's decision to appoint a guardian ad litem as well as its decision to deny counsel to an indigent civil litigant. Fed.Rules Civ.Proc. Rule 17(c), 28 U.S.C.A.

4. United States Magistrates ¶31

Normally, a party who fails to object before the district court to a magistrate judge's ruling on a non-dispositive pretrial matter waives that objection on appeal.

5. United States Magistrates ¶31

Court of Appeals had discretion to reach issue of magistrate judge's orders denying state prisoner's motions for counsel, where prisoner was proceeding pro se and magistrate judge's orders did not notify prisoner that he risked waiving his appellate rights by failing to object.

6. Mental Health ¶488

District judges are not expected to do any more than undertake a duty of inquiry as to whether there may be a viable basis to invoke the guardian ad litem rule; that duty of inquiry involves a determination of whether there is verifiable evidence of incompetence, and in the context of unrepresented litigants proceeding in forma pauperis, this inquiry usually would occur after the preliminary merits screening. 28 U.S.C.A. § 1915A; Fed.Rules Civ.Proc. Rule 17, 28 U.S.C.A.

7. Mental Health ¶488

A court is not required to conduct a sua sponte determination whether an unrepresented litigant is incompetent unless there is some verifiable evidence of incom-

petence; however, once the duty of inquiry is satisfied, a court may not weigh the merits of claims beyond the in forma pauperis screening if applicable. 28 U.S.C.A. §§ 1915(e)(2), 1915A; Fed.Rules Civ.Proc. Rule 17, 28 U.S.C.A.

8. Federal Civil Procedure ¶1951.29

District courts have broad discretion to request an attorney to represent an indigent civil litigant. 28 U.S.C.A. § 1915(e).

9. Mental Health ¶488

District court abused its discretion in not entering order appointing appropriate representative under guardian ad litem rule, in state prisoner's civil rights action asserting Eighth Amendment claim that physician was deliberately indifferent to his medical needs, where prisoner's psychiatric report was thorough as to his incapacity for purposes of criminal case and court's finding of incapacity was amply supported in record, and yet magistrate judge did not seek anyone who would be willing to undertake necessary representation, and court could not assume prisoner's competence in face of evidence to contrary. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rule 17(c), 28 U.S.C.A.; 20 Pa.C.S.A. § 5517; Rules Civ. Proc., Rule 2051, 42 Pa.C.S.A.

10. Mental Health ¶19

Under Pennsylvania law, once a person is adjudicated incompetent, he is deemed incompetent for all purposes until, by court order, the status of incompetency is lifted. 20 Pa.C.S.A. § 5517; Rules Civ. Proc., Rule 2051, 42 Pa.C.S.A.

11. Mental Health ¶488

Letter from physician, that state prisoner "is under my care for Major Depression and Attention Deficit Disorder. I do not feel he is competent at this time to represent himself in court. I would rec-

ommend that he be given a public defender, if at all possible,” sufficed to put district court on notice that state prisoner possibly was incompetent, as required to invoke guardian ad litem rule, in prisoner’s civil rights action asserting Eighth Amendment claim that physician was deliberately indifferent to his medical needs. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983; Fed. Rules Civ.Proc.Rule 17(c), 28 U.S.C.A.

12. Federal Civil Procedure ¶1751, 1837.1

Where a plaintiff fails without good cause to effect service on a defendant within 120 days of the filing of a complaint, a district court does not abuse its discretion by dismissing the action against that defendant without prejudice. Fed.Rules Civ. Proc.Rule 4(m), 28 U.S.C.A.

Kevin Powell, LaBelle, PA, Pro Se Appellant in No. 10–2157.

Kathryn M. Kenyon (Argued), James W. Kraus, Pietragallo, Gordon, Alfano, Bosick & Raspanti, Pittsburgh, PA, Attorneys for Appellee in No. 10–2157.

Detlef F. Hartmann, Georgetown, DE, Pro Se Appellant in No. 10–3069.

Catherine C. Damavandi (Argued), Department of Justice, Wilmington, DE, James E. Drnec (Argued), Balick & Balick, Wilmington, DE, Attorneys for Appellees in No. 10–3069.

Karen C. Daly (Argued), Stephen J. McConnell, Dechert, Philadelphia, PA, Attorneys for Amicus Curiae.

* Hon. Louis H. Pollak, Senior Judge, United States District Court for the Eastern District

Before: SLOVITER, GREENAWAY, JR., Circuit Judges and POLLAK,* District Judge.

OPINION OF THE COURT

SLOVITER, Circuit Judge.

Rule 17(c)(2) of the Federal Rules of Civil Procedure provides that:

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

(emphasis supplied).

The Advisory Committee Notes do not elaborate on the requirement of the emphasized language above and there is but a paucity of reported decisions interpreting the provision. Although the language of the Rule makes the obligation mandatory, *see Berrios v. N.Y. City Hous. Auth.*, 564 F.3d 130, 134–35 (2d Cir.2009), there is no suggestion which factors should trigger the district court’s duty of inquiry as to whether the individual at issue is incompetent. As a result, responsibility for Rule 17 appears generally to be left to the discretion of the district courts.

This consolidated appeal arises from two cases in which prisoners, proceeding pro se, sought damages from prison officials. The appeal calls on the court to decide whether the District Courts erred in failing to *sua sponte* inquire whether Powell or Hartmann were incompetent under Federal Rule of Civil Procedure 17(c)(2) or in declining to appoint counsel or some representative for them.

of Pennsylvania, sitting by designation.

I.

Kevin Powell, a Pennsylvania state prisoner proceeding pro se and *in forma pauperis*, filed suit in the Middle District of Pennsylvania in 2007 pursuant to 42 U.S.C. § 1983 against Dr. John Symons, his treating physician at SCI–Rockview. Powell asserts an Eighth Amendment claim that Dr. Symons was deliberately indifferent to his medical needs. The District Court denied Dr. Symons’ motion to dismiss for failure to state a claim. Dr. Symons subsequently filed a motion for summary judgment.

Powell filed a series of motions for extensions of time and for counsel. The Magistrate Judge, exercising his authority to resolve non-dispositive pre-trial motions, granted five of Powell’s requests for extensions of time to file a response and denied one request as moot. In the last order extending Powell’s time to respond, the Magistrate Judge directed him to respond by February 26, 2010 and informed Powell that no further extensions would be granted. Powell’s seventh motion for an extension of time to respond to Dr. Symons’ motion for summary judgment explained that the District Court presiding over his criminal proceeding had ordered him to a psychiatric facility for four months and he was there without his personal property. The Magistrate Judge denied the motion and reminded Powell that no further extensions would be granted. Powell never filed a response to the motion for summary judgment.

Powell’s ten motions for counsel cited his rudimentary education and his difficulties obtaining legal assistance while in prison. The Magistrate Judge denied each of Powell’s motions for counsel. In so doing, the Magistrate Judge wrote that

he assumed Powell’s claim to have potential merit and that several of the relevant factors, including Powell’s education level and the need for expert testimony, weighed in favor of appointing counsel. Although the Magistrate Judge stated that he preferred to appoint counsel, he denied counsel primarily on the ground that, in his experience, it is difficult to find counsel willing to represent prisoners in civil rights cases.

At about the same time as Powell’s civil proceeding, he was charged in a criminal proceeding in the Middle District of Pennsylvania for issuing threats against the President and mailing threatening communications in violation of 18 U.S.C. §§ 871 and 876(c), respectively.¹ Powell, who was represented in the criminal case by appointed counsel, pleaded guilty to those charges in January 2009. However, prior to sentencing, the District Court appointed a psychiatrist, Dr. Stefan Kruszewski, to examine Powell and prepare a written report of his findings.

Dr. Kruszewski, a graduate of Harvard Medical School, has written and spoken extensively about psychiatric issues. He has had at least 30 years of clinical practice experience in which he treated several thousand patients with a wide variety of psychiatric and neuropsychiatric conditions. He prepared an extensive report for the criminal case, setting forth details of his examination. Dr. Kruszewski concluded that Powell met the accepted diagnosis of delusional disorder, mixed subtypes, a diagnosis based on Powell’s “repeated pattern of physical complaints without medical findings to support them, the somatic elements of his reported ‘torture’ and his simultaneously persistent

1. He subsequently explained that he sent those threats so he would be transferred to

federal prison.

and episodic refusal of medication.” S.A. at 42. The report continued, “[r]egardless of the cause of his symptoms and the origins of his delusional disorder, some of his conduct is beyond his willful control. That is the nature of an isolated psychotic system of relatively fixed delusional beliefs.” *Id.*

Dr. Kruszewski wrote that Powell’s “potential to act out violently against others, including those he named in his letters, is small,” in part because he has “somewhat limited cognitive abilities.” S.A. at 42. Dr. Kruszewski further noted that “there is a great deal of doubt that he had the capacity to form the criminal intent to harm because he has a persistent serious mental illness that chronically alters his reality and his ability to conduct himself within the confines of the law,” and that “we can expect his delusional symptoms to wax and wane.” *Id.* Notwithstanding this diagnosis, Dr. Kruszewski also found that “[a]lthough his testable fund of information was limited in certain ways . . . , Mr. Powell was able to satisfy my concern that he was able to understand the legal processes and cooperate with them to the best of his ability.” S.A. at 32.

After reading and absorbing Dr. Kruszewski’s diagnosis, the District Court acknowledged that Powell “may be suffering from a mental disease or defect that has rendered him mentally incompetent to the extent that he was previously unable to enter a knowing and voluntary guilty plea.” S.A. at 49. However, the Court determined that Dr. Kruszewski’s report did not provide the Court with sufficient information regarding Powell’s competency when he pleaded guilty and ordered that Powell be committed to federal custody for further psychiatric evaluation.

In October 2009, on the basis of an additional psychiatric evaluation, the Court granted the motion of Powell’s defense

counsel to withdraw his guilty plea and enter a plea of not guilty to the charges in the indictment. The Court then issued an order finding that Powell “is presently suffering from a mental disease or defect rendering him mentally incompetent to understand the nature and the consequences of the proceedings now against him.” S.A. at 52. Subsequently, the U.S. Attorney requested dismissal of the indictment, which the Court granted in July 2010.

Turning to the civil case, the Magistrate Judge, in his last two orders denying counsel, noted the criminal court’s rulings and his own concerns about Powell’s mental competence. In an order entered August 2009, the Magistrate Judge concluded that although “[Powell’s] mental capacity could affect his ability to present his case in a clear and concise manner, he has thus far been able to preserve his interests by engaging in communication with the court. As evident in the documents that [Powell] has already filed with the court, it is clear that [Powell] is literate and more than capable of communicating effectively.” J.A. at 22. In a later order entered in March 2010, the Magistrate Judge acknowledged that since his last order Powell had been adjudicated mentally incompetent in the criminal proceeding. The Magistrate Judge stated that “[t]he fact that [Powell] has been found incompetent, of course, weighs in favor of appointing counsel.” J.A. at 27. He once again denied the motion, however, based on his conclusion that “it is unlikely that counsel could be found to represent [Powell].” J.A. at 28. The Magistrate Judge did not discuss his obligations under Rule 17 of the Federal Rules of Civil Procedure.

[1,2] The same day, the Magistrate Judge issued a report and recommendation noting that Powell had not filed a response to the motion for summary judgment, but he recommended granting it on

the merits because Dr. Symons “presented evidence that [Powell] received extensive medical care and treatment including examinations, medications, lab tests, chest x-rays and an electrocardiogram.” J.A. at 38. The Magistrate Judge noted that Powell “has not presented any evidence that [Dr. Symons] was deliberately indifferent to his medical needs or any evidence that [Dr. Symons’] actions or inactions caused him harm.” J.A. at 39. The District Court adopted the recommendation in full. Powell appeals.²

[3–5] We review for abuse of discretion both a district court’s decision to appoint a guardian ad litem under Rule 17(c) as well as its decision to deny counsel to an indigent civil litigant.³ See *Montgomery v. Pinchak*, 294 F.3d 492, 498 (3d Cir.2002) (appointment of counsel); *Gardner ex rel. Gardner v. Parson*, 874 F.2d 131, 140 (3d Cir.1989) (Rule 17(c)). We exercise plenary review of a district court’s grant of

2. Because Powell asserts a claim under the Eighth Amendment and sued under 42 U.S.C. § 1983, the District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction over his appeal under 28 U.S.C. § 1291.

We reject Dr. Symons’ argument that, because Powell cited the wrong order in his Notice of Appeal, this court is without jurisdiction over Powell’s appeal. Notices of appeal, especially those filed pro se, are liberally construed, and we can exercise jurisdiction over orders not specified in a notice of appeal if “(1) there is a connection between the specified and unspecified orders; (2) the intention to appeal the unspecified order is apparent; and (3) the opposing party is not prejudiced and has a full opportunity to brief the issues.” *Sulima v. Tobyhanna Army Depot*, 602 F.3d 177, 184 (3d Cir.2010) (quotation marks and citation omitted). Those requirements are met here. In his Notice of Appeal, Powell listed the date of the Magistrate Judge’s Report and Recommendation rather than the final order of the District Court. However, those two documents are closely related, as Dr. Symons concedes. Moreover, Powell’s intent is clearly to appeal the final order adopting the Report and Recommendation as

summary judgment, and apply the same standard as the district court. See *Tri-M Group, LLC v. Sharp*, 638 F.3d 406, 415 (3d Cir.2011); Fed.R.Civ.P. 56.

II.

This court consolidated the appeals filed by Powell and Detlef Hartmann (whose appeal raises similar issues of the obligation of district courts under Federal Rule 17(c)) and appointed amicus counsel to address the following: (1) whether, in light of Federal Rule of Civil Procedure 17(c), the District Courts should have *sua sponte* questioned the competence of Powell and Hartmann; (2) if so, what actions the Courts should have taken in that regard; and (3) whether the District Courts abused their discretion in denying the motions for appointment of counsel.⁴

Federal courts encounter the issue of appointment of counsel more frequently in

this is the only means of obtaining relief from the summary judgment decision he challenges. Moreover, Dr. Symons has had a full opportunity to brief all the issues and has not been prejudiced by Powell’s error.

3. Powell did not object to the Magistrate Judge’s orders denying his motions for counsel, as required by Middle District of Pennsylvania Rule 72.2. “Normally, a party who fails to object before the district court to a magistrate judge’s ruling on a non-dispositive pretrial matter waives that objection on appeal.” *Tabron v. Grace*, 6 F.3d 147, 153–54 n. 2 (3d Cir.1993). However, in light of Powell’s pro se status and the fact that the Magistrate Judge’s orders did not notify Powell that he risked waiving his appellate rights by failing to object, this court has discretion to reach the issue. See *Leyva v. Williams*, 504 F.3d 357, 364–65 (3d Cir.2007); *Tabron*, 6 F.3d at 153 n. 2.

4. We express our appreciation to counsel for amici Karen Daly and Stephen McConnell and their law firm, Dechert LLP, for undertaking this responsibility. It is in the best tradition of the Philadelphia bar.

civil cases under 28 U.S.C. § 1915(e), but only rarely consider the issue of appointment of a guardian ad litem under Rule 17(c).

[6] As noted at the outset of the opinion, it is the federal district court's obligation to issue an appropriate order "to protect a minor or incompetent person who is unrepresented in an action." Fed. R.Civ.P. 17(c)(2). This court has yet to set forth the factors that warrant *sua sponte* inquiry into a litigant's capacity to sue or be sued under Rule 17(c) and the Rule itself does not offer any commentary. However, the Second Circuit has set forth a well-reasoned standard that has been adopted elsewhere and that we adopt under the circumstances here. In *Ferrelli v. River Manor Health Care Center*, 323 F.3d 196, 201 (2d Cir.2003), that Court concluded that a district court need not inquire *sua sponte* into a pro se plaintiff's mental competence based on a litigant's bizarre behavior alone, even if such behavior may suggest mental incapacity. That is an important limiting factor as to the application of Rule 17. The federal courts are flooded with pro se litigants with fanciful notions of their rights and deprivations. We cannot expect district judges to do any more than undertake a duty of inquiry as to whether there may be a viable basis to invoke Rule 17. That duty of inquiry involves a determination of whether there is verifiable evidence of incompetence. In the context of unrepresented litigants proceeding *in forma pauperis*, this inquiry would usually occur after the preliminary merits screening under 28 U.S.C. § 1915A or 28 U.S.C. § 1915(e)(2).

With regard to the question of whether there is verifiable evidence of incompetence, the *Ferrelli* Court concluded that a district court would likely abuse its discretion if it failed to consider whether Rule 17(c) applied "[i]f a court were presented

with evidence from an appropriate court of record or a relevant public agency indicating that the party had been adjudicated incompetent, or if the court received verifiable evidence from a mental health professional demonstrating that the party is being or has been treated for mental illness of the type that would render him or her legally incompetent." *Id.* We also agree with the Fourth Circuit in *Hudnall v. Sellner*, 800 F.2d 377, 385 (4th Cir.1986), that bizarre behavior alone is insufficient to trigger a mandatory inquiry into a litigant's competency but "if there has been a legal adjudication of incompetence and that is brought to the court's attention, the Rule's provision is brought into play." The *Ferrelli* Court noted that it was "mindful of the need to protect the rights of the mentally incompetent," but at the same time "in light of the volume of pro se filings in [the Second] Circuit," it could not "disregard the potential burden on court administration associated with conducting frequent inquiries into pro se litigants' mental competency." 323 F.3d at 201. We share the same concern. It follows that the district court must satisfy its duty of inquiry before it proceeds to determine if Rule 17 applies.

[7, 8] A court is not required to conduct a *sua sponte* determination whether an unrepresented litigant is incompetent unless there is some verifiable evidence of incompetence. However, once the duty of inquiry is satisfied, a court may not weigh the merits of claims beyond the § 1915A or § 1915(e)(2) screening if applicable. *Cf. Berrios v. N.Y.C. Hous. Auth.*, 564 F.3d 130, 134 (2d Cir.2009) (citing *Gardner*, 874 F.2d at 141) ("Because [the plaintiff, a severely mentally retarded teenager] was without a representative when the court dismissed her claims, and was otherwise unprotected, the court was without authority to reach the merits of those claims.");

cf. also *Sam M. ex rel. Elliott v. Carcieri*, 608 F.3d 77, 94 n. 15 (1st Cir.2010) (citing *Adelman ex rel. Adelman v. Graves*, 747 F.2d 986, 989 (5th Cir.1984), for the proposition that “the district court improperly dismissed the case without first determining whether the incompetent’s interests were adequately represented”).⁵

A. Kevin Powell

[9, 10] It appears that the District Court in Powell’s case failed to consider whether Rule 17(c) applied, an issue raised first by this court rather than by anyone on Powell’s behalf, or by the defendant. Most important, Powell had been adjudicated incompetent in the simultaneous criminal proceeding, and the Magistrate Judge was on notice of that adjudication. Under Pennsylvania law, the applicable law of Powell’s domicile, see Fed.R.Civ.P. 17(b)(1), once a person is adjudicated incompetent, s/he is deemed incompetent “for all purposes until, by court order, the status of incompetency is lifted.” *Syno v. Syno*, 406 Pa.Super. 218, 594 A.2d 307, 310 (1991) (citing 20 Pa. Cons.Stat. Ann. § 5517 and Pa. R. Civ. P.2051).⁶

5. In a not dissimilar context, this court has previously had occasion to consider the standard for appointment of counsel under 28 U.S.C. § 1915(e), a statute that “gives district courts broad discretion to request an attorney to represent an indigent civil litigant.” *Tabron v. Grace*, 6 F.3d 147, 153 (3d Cir.1993). In *Tabron*, we held that, after considering the merits of a plaintiff’s claim as a threshold matter, a district court should consider additional factors that bear on the need for appointed counsel including: (1) plaintiff’s ability to present his case; (2) the difficulty of the legal issues; (3) the degree to which factual investigation will be necessary and plaintiff’s ability to pursue investigation; (4) plaintiff’s capacity to retain counsel on his own behalf; (5) the extent to which the case will turn on credibility determinations; and (6) whether the case will require testimony from an expert witness. *Id.* at 155–57; *Montgomery v. Pincihak*, 294 F.3d 492, 499 (3d Cir.2002). Powell’s complaint easily met the threshold issue

Under ordinary circumstances, a determination as to whether Rule 17 applies is to be made in the first instance by the trial court. Here, however, the psychiatric report is so thorough as to Powell’s incapacity for purposes of the criminal case and the Court’s finding of incapacity so amply supported in the record, that we conclude that it was an abuse of discretion not to enter an order appointing an appropriate representative. There is nothing to show that the Magistrate Judge sought counsel, made inquiry of the bar associations, or inquired as to whether law schools that may have clinical programs or senior centers with social workers would be willing to undertake the necessary representation.

It appears that in Powell’s case it may not be difficult to undertake this task. Dr. Symons’ brief suggests that there is ample evidence that Powell’s condition was seriously considered, but under the test we adopt from *Ferrelli*, we may not assume his competence in the face of evidence to the contrary. Therefore, we will reverse and remand with directions to the District

of the merits of the putative claim because the District Court denied defendant’s motion to dismiss, acknowledging that Powell’s claim had sufficient merit to proceed. Nonetheless, the District Court denied Powell’s request for counsel noting the scarcity of attorneys willing to take prisoner civil rights cases *pro bono*. We recognized that problem in *Tabron*, but we declined to make that issue determinative of appointment of counsel, 6 F.3d at 157, and we decline to do so here as well.

6. Pennsylvania defines an “incapacitated person” as “an adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that the person is partially or totally unable to manage financial resources or to meet the essential requirements for physical health and safety.” Pa. R. Civ. P.2051.

Court to appoint a representative or counsel to proceed with the case.

B. Detlef Hartmann

[11] In 2006, while incarcerated at the James T. Vaughn Correctional Center (“Vaughn”), Detlef Hartmann filed a pro se suit under 42 U.S.C. § 1983 in the District of Delaware against the warden and members of the prison medical staff, among others.⁷ Hartmann was granted leave to proceed *in forma pauperis*.

Hartmann’s initial complaint listed twenty defendants and made a variety of claims concerning the circumstances of his incarceration, including the denial of medical services and inadequate access to legal materials. After screening under 28 U.S.C. §§ 1915 and 1915A and a series of amendments to the complaint, the District Court permitted Hartmann to proceed with his claims against Ihuoma Chuks, an employee of Correctional Medical Services, Inc., the contractor responsible for health-care at Vaughn; Thomas Carroll, then warden of Vaughn; and David Pierce, then deputy warden of Vaughn. Hartmann alleged that Chuks, Carroll, and Pierce were deliberately indifferent to his medical needs. Specifically, Hartmann claimed that he was denied treatment for throat pain and thyroid disease and that, although he was referred to an endocrinologist, prison officials never transported him to one. Hartmann’s other claims and other named defendants were dismissed for various reasons, including failure to serve, and are not the subject of this appeal.

Defendants Carroll and Pierce filed a motion to dismiss for insufficiency of process, which was denied by the District Court. Carroll subsequently served a set of interrogatories on Hartmann. Hartmann’s response to those interrogatories,

while somewhat discursive, demonstrated an impressive ability to organize his points, make rational arguments, and cite supporting legal authority.

During the course of this litigation, Hartmann also filed eight motions seeking appointment of counsel. Those motions listed a variety of reasons why counsel was necessary, including Hartmann’s limited access to legal materials and unspecified “mental disabilities.” J.A. at 217, 246. Attached to his final request for counsel, Hartmann filed a one-paragraph letter from Dr. Jeanette Zaines, a psychiatrist, that states:

To Whom It May Concern: Mr. Detlef Hartmann is under my care for Major Depression and Attention Deficit Disorder. I do not feel he is competent at this time to represent himself in court. I would recommend that he be given a public defender, if at all possible.

J.A. at 389. There is no other medical evidence of Hartmann’s mental health in the record.

The District Court denied each of Hartmann’s requests for counsel, repeatedly finding that Hartmann was capable of presenting his own case. In its order denying Hartmann’s final request for counsel, the Court acknowledged Dr. Zaines’ letter, but found that “[u]pon consideration of the record, the court is not persuaded that appointment of counsel is warranted at this time. The court has thoroughly reviewed the file and, at every turn, [Hartmann] has ably represented himself. At this juncture of the case, there is no evidence that prejudice will result in the absence of counsel.” J.A. at 89. However, the Court denied the motion without prejudice, to be renewed should any of his claims survive summary judgment. As in

7. Hartmann was released from custody in

January 2009.

Powell's case, the District Court did not explicitly discuss its Rule 17 obligations.

[12] Thereafter, in April 2010, Chuks, Carroll, and Pierce moved for summary judgment, which the District Court granted. The Court concluded that the defendants were entitled to summary judgment because there was insufficient evidence that "the defendants had any personal involvement in the alleged constitutional violations." J.A. at 99. In addition, the Court found that the record demonstrated that Hartmann received medical care for his throat and thyroid conditions and that the evidence could not support a finding of deliberate indifference. In the same order the District Court dismissed, without prejudice, Hartmann's claims against two other defendants for failure to effect service.⁸ Hartmann appeals this final order.

Under the rule we adopt in this case, the letter from Dr. Zaimes sufficed to put the district court on notice that Hartmann was possibly incompetent. When confronted with verifiable evidence from a mental health professional of an unrepresented litigant's incompetence, the district court has an obligation, pursuant to Rule 17, to inquire into the litigant's competency. But the letter from Dr. Zaimes is hardly overwhelming evidence of incompetency. It amounts to little more than a conclusory statement that Hartmann is incompetent, and it fails to specify what assessments Dr.

Zaimes performed to arrive at that conclusion. It is thus quite unlike the careful and detailed analysis provided by Dr. Kruszewski as to Kevin Powell.

Under the circumstances, the evidence of incompetency is not so strong that we may conclude that the district court necessarily should have found Hartmann to be incompetent and should have appointed a guardian or counsel to represent his interests. Instead, we hold only that the district court abused its discretion in failing to at least consider the possible application of Rule 17(c). We are sensitive to the potential burden imposed by such a holding on the district courts. It might be that some evidence of incompetence (such as, perhaps, Dr. Zaimes's letter) is sufficiently unpersuasive as to be rebutted by other evidence in the record, or by the district court's own experience with an unrepresented litigant, without the need for a full blown hearing. But there ought to have been at least some consideration of the Rule under these circumstances. We shall remand for the district court to determine, in its discretion, whether Hartmann is competent within the meaning of Rule 17(c), as well as the degree and form of process required to answer that question. If he is determined to be incompetent and remains unrepresented, Rule 17(c) requires that a guardian be appointed or some other remedial step taken.⁹

8. It is not clear whether Hartmann intends to challenge the dismissal of his claims against Paul Howard and Edward Johnson on appeal. However, to the extent that Hartmann challenges that ruling, we will affirm. The District Court waited over two years after Hartmann filed his revised amended complaint before dismissing Hartmann's claims against Howard and Johnson for failure to serve. Hartmann was given an opportunity to state good cause for the delay, but he failed to do so. Where a plaintiff fails without good cause to effect service on a defendant within 120 days of the filing of a complaint, a district

court does not abuse its discretion by dismissing the action against that defendant without prejudice. See Fed.R.Civ.P. 4(m); *Rance v. Rocksolid Granit USA, Inc.*, 583 F.3d 1284, 1286–87 (11th Cir.2009) (explaining that an incarcerated pro se plaintiff is entitled to rely on service by the U.S. Marshals, but only after the plaintiff has taken reasonable steps to identify the defendants).

9. In denying Hartmann's motions for appointment of counsel, the District Court stated that appointment of counsel is warranted "only 'upon a showing of special circumstances in-

III.

The fact that we remand does not suggest that either District Judge erred in the procedure each followed. Each Judge was conscientious in his or her review. We had not previously turned our attention, and therefore theirs, to Rule 17. Only after the issue of the propriety of appointing a representative on behalf of each of these plaintiffs is considered can we be satisfied that the process required by Rule 17 has been satisfied.¹⁰



Florencio ROLAN, Appellant

v.

Brian V. COLEMAN; The District Attorney of the County of Philadelphia; The Attorney General of the State of Pennsylvania.

No. 10–4547.

United States Court of Appeals,
Third Circuit.

Argued Jan. 23, 2012.

Opinion Filed: May 17, 2012.

Background: Following affirmance on direct appeal of petitioner’s state-court convictions for first degree murder and possession of an instrument of crime and his life imprisonment sentence, after a second

dicating the likelihood of substantial prejudice to [plaintiff] resulting from [plaintiff’s] probable inability without such assistance to present the facts and legal issues to the court in a complex but arguably meritorious case.’” J.A. at 88–89 (quoting *Smith–Bey v. Petsock*, 741 F.2d 22, 26 (3d Cir.1984)). We note, however, that in *Tabron* this court repudiated the “special circumstances” requirement.

jury trial, 2008 PA Super 291, 964 A.2d 398, he filed a petition for a writ of habeas corpus. The United States District Court for the Eastern District of Pennsylvania, Berle M. Schiller, J., denied the petition. Petitioner appealed.

Holdings: The Court of Appeals, Greenaway, Jr., Circuit Judge, held that:

- (1) habeas claim that prosecutor’s comments on absence of key defense witness from petitioner’s first trial constituted prosecutorial misconduct was not procedurally defaulted;
- (2) claim that prosecutor’s alleged misstatements of evidence during closing argument amounted to prosecutorial misconduct was not procedurally defaulted;
- (3) prosecutor’s comments during closing argument on absence of key defense witness from first trial did not constitute reversible prosecutorial misconduct;
- (4) prosecutor’s comments on petitioner’s failure to previously raise self-defense theory did not amount to reversible prosecutorial misconduct;
- (5) prosecutor’s comment during closing argument about petitioner’s post-arrest statement to police did not violate privilege against self-incrimination; and
- (6) reading of transcript of deceased prosecution witness’s testimony from first murder trial during second murder trial did not violate Confrontation Clause.

Affirmed.

See 6 F.3d at 155. In light of that fact we will remand for the District Court to reconsider the request for counsel in addition to the Rule 17(c) issue.

10. We will respectfully send a copy of this opinion to the chairperson of the Advisory Committee to call to its attention the paucity of comments on Rule 17.

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TAB 9

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TAB 9A

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REMAND OF REMOVED ACTIONS: PROMPT DISPOSITION; SANCTIONS

The Mississippi Attorney General, Jim Hood, has suggested two rules amendments to address frustrations encountered with "the use of removal to federal court as a dilatory defense tactic." He describes situations in which his "duty to protect citizens from corporate wrongdoing" by securing immediate protection has been thwarted by removal-related delays. His letter is attached.

The first rule change would "requir[e] the automatic remand of cases in which the district court takes no action on a motion to remand within 30 days."

The second amendment would "provide that in all cases remanded, the removing party or parties must pay the just costs and any actual expenses, including attorney fees, incurred as a result of removal and remand."

These proposals deserve serious consideration. The first question will be whether the Civil Rules provide the proper tools to address the problems described by Attorney General Hood. Removal jurisdiction is established by statute as part of the provisions that confer parts of the Article III judicial power on the federal courts. Within the Judicial Conference, most issues of subject-matter jurisdiction – and matters of relationships between federal courts and state courts – are referred to the Federal-State Jurisdiction Committee. Further study and detailed drafting will become appropriate only once it is concluded that remedies should be found in the Civil Rules. Perhaps the first question for further study, if it is undertaken, will be whether existing provisions in rule and statute provide adequate protections, particularly as to remedies for unsuccessful removals.

Automatic Remand

Sympathy is often stirred by suggestions that proceed from dissatisfaction with delays in adjudication. Attorney General Hood's experience with a 3-year delay in ruling on a remand motion, so long as to provoke correction by mandamus, stirs more than sympathy. Indignation might be tempered by learning the full circumstances confronting the court, but in the end something extraordinary – mandamus – was done. The question is whether particular instances of inordinate delay are so common as to justify an attempted remedy through the Civil Rules.

Automatic remand of a removed action "if the district court takes no action on a motion to remand within 30 days" operates directly on subject-matter jurisdiction. At times it would defeat jurisdiction of an action properly removed from state court. It would be serious business to adopt a court rule that defeats subject-matter jurisdiction so directly. Although Rule 81(c) addresses procedure after an action is removed from state court, removal procedure itself has been governed by the removal statutes.

Rule 82, further, reflects the traditional understanding of the Enabling Act in providing that "[t]hese rules do not * * * limit the jurisdiction of the district courts * * *." Automatic remand would limit jurisdiction. If this course is to be taken, it may be wise to consult with the Federal-State Jurisdiction Committee.

A deadline enforced by automatic remand also must be reconciled with the lack of Civil Rules fixing precisely defined deadlines for court action. Compare Rule 23(c)(1)(A), directing determination of class-action certification "[a]t an early practicable time." Whatever period might be chosen – 30 days, 60 days, 90 days – would, in the docket conditions of particular courts and individual judges, prove unattainable in competition with still more pressing problems. The process of fixing defined deadlines for one particular problem will invite claims that other problems require similar deadlines. An accumulation of deadlines could generate serious problems.

Setting the deadline also will call for some care. Some cases may present questions so clear, and so free from any entanglements with disputed facts, as to be suitable for decision within 30 days in a court that enjoys the luxury of a relaxed docket. Other cases will be more complicated. One example is provided by removals based on the theory that jurisdiction-destroying parties were "fraudulently joined" to defeat removal. Even seemingly simple disputes as to the citizenship of the parties that establishes or defeats diversity jurisdiction may be difficult to resolve within 30 days. How much more time should be allowed – or whether there should be a presumptive shorter deadline, subject to extension "for good cause" or on meeting rule-specified conditions – will need serious thought.

These difficulties with fixed deadlines for court action are not unique to court rules. The Judicial Conference has a well-established policy opposing legislative priorities for hearing and determining civil actions. This policy is reflected in 28 U.S.C. § 1657, which – with enumerated exceptions – provides that "each court of the United States shall determine the order in which civil actions are heard and determined." The history of Judicial Conference policy is described in the attached memorandum prepared by Benjamin Robinson.

"Just Costs and Actual Expenses"

The removal statutes and the Civil Rules already provide consequences for unsuccessful removal.

28 U.S.C. § 1447(c) provides: "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Congress has spoken, and has made the award a matter of discretion. A Civil Rule imposing a mandate raises two problems. One is whether it would abridge, enlarge, or modify a substantive right. Many Civil Rules provide for attorney fees, so that may not be a problem. But

eliminating the statutory discretion by rule would invoke the supersession power, a matter to be approached with great circumspection. A truly persistent and serious set of problems would have to be shown to justify superseding the statute.

The discretion built into § 1447(c) illustrates another concern. Not every failed removal attempt reflects a bad-faith effort to add expense and delay. Some cases present complex questions of fact, law, or both. Imposing strict liability for getting it wrong is strong medicine.

Mandatory awards also would have a collateral consequence. Although many remand orders are "not reviewable on appeal or otherwise," § 1447(d), it is accepted that a fee award incident to remand is appealable. Reviewing the fee award entails determining whether the removal was, after all, proper – but only for the purpose of the fee award, not for the purpose of recalling the remanded action if the court of appeals finds that removal was proper. Mandatory fee awards would increase the occasions for these appeals – by how much would depend on the frequency with which courts now make awards under § 1447(c).

Another removal statute, § 1446(a), requires that a notice of removal be "signed pursuant to Rule 11 of the Federal Rules of Civil Procedure." Rule 11 on its own applies to any "paper," and provides that signing or filing the paper certifies that it is not presented to "cause unnecessary delay." The role of mandatory sanctions under Rule 11 has been the subject of long and contentious debate. It may be that improvident removals are so frequently used for the improper purpose of causing unnecessary delay as to warrant separate treatment and mandatory awards. But the question must be approached with care and sensitivity.

Where Next?

Just as it seems premature to prepare illustrative drafts, so it may be premature to reach a final decision whether to pursue these suggestions further. The underlying question is whether dilatory removal presents such frequent and general problems as to justify the strain the proposed remedies would place on the Civil Rules. Perhaps further fact inquiries should be undertaken, or perhaps the Federal-State Jurisdiction Committee should be asked for its views. Perhaps the project should continue on the agenda to allow further time for reflection. Alternatively, it may be the sense of the Committee that the problem identified by General Hood arises seldom enough that the proposed changes are not warranted.

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JIM HOOD
ATTORNEY GENERAL

August 10, 2012

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Dear Secretary McCabe:

I am writing to propose amendments to the Federal Rules of Civil Procedure ("Rules") to address an issue of significant concern to the states: the use of removal to federal court as a dilatory defense tactic. Specifically, I urge the Committee on Rules of Practice and Procedure to take action to (1) establish a deadline for federal courts to rule on motions to remand in cases brought by states and (2) impose costs and fees on those who file improper notices of removal.

Our office, as is the case with many attorneys general across the country, has a duty to protect citizens from corporate wrongdoing. Often, this need for protection is immediate. Examples in Mississippi include our fight with insurers following Hurricane Katrina, as well as our more recent lawsuit against Entergy, a regional power company that our office believes has vastly overcharged its customers for years. In these cases and similar ones across the country each year, the timing of the relief is just as important as the nature of the remedy sought.

In the Entergy litigation, our office filed suit in December 2008. Defendants removed the case to federal court later that month, and the State filed a motion to remand in January 2009. By June 2009, all remand related briefing was complete, and the Court had heard oral arguments twice. In September 2011, the Court had yet to issue a remand ruling but did grant the State's request for a status conference. At that status conference, the Court stated that a remand decision was forthcoming. Despite the State's repeated efforts to obtain a ruling, the Court did not act on the State's motion to remand for more than three years following the completion of briefing, and the State was forced to file a petition for mandamus. Just today, the Fifth Circuit granted that petition, which requires the district judge to rule on remand within 15 days. Similarly, in our cases against insurers following Hurricane Katrina, it took fifteen months to get a final ruling on the defendants' motions to remand.

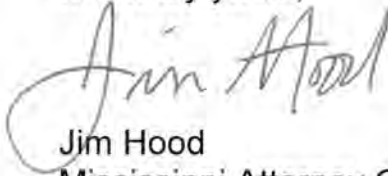
Citizens in our state cannot afford this delay in justice.

To address situations such as the examples above and deter stalling tactics by defendants, I would recommend adding language to the Rules requiring the automatic remand of cases in which the district court takes no action on a motion to remand within 30 days. As an additional deterrent, the Rules should be amended to provide that in all cases remanded, the removing party or parties must pay the just costs and any actual expenses, including attorney fees, incurred as a result of removal and remand.

I ask this Committee to consider the amendments described above at its next scheduled meeting in November, 2012. If the Committee needs more information or would like for me to attend the next meeting, please contact Special Assistant Attorney General Meredith Aldridge at (601) 359-4204 or at maldr@ago.state.ms.us.

Having experienced lengthy delays in critical state litigation, I believe this Committee has an opportunity to foster justice through these amendments. Together, we can make the changes needed to deter companies from abusing the federal court system to delay or deny remedies to injured parties.

Sincerely yours,

A handwritten signature in cursive script that reads "Jim Hood". The signature is written in dark ink and is positioned above the printed name.

Jim Hood
Mississippi Attorney General

TAB 9C

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TO: EHC
FROM: BJR
DATE: September 27, 2012 (rev. Oct. 3, 2012)
RE: Background on Judicial Conference Position Opposing Fixed Civil Litigation Deadlines

The Mississippi Attorney General has suggested civil rules amendments that would, among other things, “requir[e] the automatic remand of cases in which the district court takes no action on a motion to remand within 30 days.” *Civil Rules Suggestion 12-CV-C*. This memorandum briefly summarizes (1) the Judicial Conference position on statutorily imposed litigation priority, expediting, or time-limitation rules; and (2) recent, related legislative proposals that have drawn the Conference’s opposition.

When faced with legislation seeking to prioritize types of civil actions and decision-making, the Judicial Conference has consistently opposed provisions imposing litigation priority, expediting, or time-limitation rules on specified cases brought in the federal courts. The Conference views 28 U.S.C. § 1657 as sufficiently recognizing the appropriateness of federal courts generally determining case management priorities and the desire to expedite consideration of limited types of actions. *Rpt. of the Comm. on Federal-State Jurisdiction A-5* (Sept. 1998); JCUS-SEP 90, p. 80.

Since 1990, legislation setting docket and case management priorities has been studied most closely by the Conference’s Committee on Federal-State Jurisdiction. But, as detailed below, the Conference’s position on this issue was firmly established by 1981. The position developed from concerns that:

- (1) proliferation of statutory priorities means there will be no priorities;
- (2) individual cases within a class of cases inevitably have different priority treatment needs;
- (3) priorities are best set on a case-by-case basis as dictated by the exigent circumstances of the case and the status of the court docket; and
- (4) mandatory priorities, expedition, and time limits for specific types of cases are inimical to effective case management.

Letter from James C. Duff, Secretary, Judicial Conf. of the United States, to Lamar Smith (R-TX), Ranking Member, Comm. on the Judiciary, U.S. House of Representatives (Nov. 10, 2009) (expressing Judicial Conference views concerning the *Tribal Law and Order Act* of 2009).¹ The

¹ Section 103(b) of that Act authorized and encouraged each U.S. Attorney serving a district that includes Indian country “to coordinate with the applicable United States magistrate and district courts...to ensure the provision of docket time for prosecutions of Indian country crimes.” *Tribal Law and Order Act of 2009*, H.R. 1924.

In 2010, the Judicial Conference’s Executive Committee approved a recommendation from the Judicial Conference Committee on Criminal Law to “oppose the establishment of statutory litigation priorities that would call for the expediting of certain types of criminal cases.” *Rpt. of the Comm. on Crim. Law* 16 (Mar. 2010). Like its approach to legislation affecting the civil docket, the Conference takes the position that the *Speedy Trial Act*, 18

Conference's formal opposition to statutory civil litigation priorities developed in part from judicial improvements and legislative reforms first called for by the American Bar Association (ABA). In February 1977, the ABA House of Delegates adopted the following resolution:

BE IT RESOLVED, That the American Bar Association endorses the repeal by the Congress of all statutory provisions which require that any class or category of civil cases, other than habeas corpus matters, be heard by the United States Courts of Appeals and the United States District Courts on a priority basis; and

BE IT FURTHER RESOLVED, That the American Bar Association endorses the principle that the Circuit Council of each United States Courts of Appeals set calendar priorities for that Circuit.

See Mandatory Appellate Jurisdiction of the Supreme Court—Abolition of Civil Priorities—Jurors Rights: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 74 (1982) [hereinafter Hearing] (prepared statement of Benjamin L. Zelenko). Following this resolution, the U.S. Department of Justice's Office for Improvements in the Administration of Justice pursued several attempts to develop reform legislation that same year. Hearing at 82.

On August 4, 1981, Congressman Robert W. Kastenmeier (D-WI) introduced H.R. 4396 (97th Cong.), the Federal Courts Civil Priorities Act, observing that because of the large caseloads in the federal courts, the number of priority cases had increased to the extent that many non-priority civil cases could not be docketed for hearings at all, or suffered inordinate delays. *See Rpt. of the Comm. on Court Admin. and Case Mgmt.* 11 (Sept. 1981); *Hearing* 26. Consistent with the ABA resolutions, Rep. Kastenmeier's bill sought to repeal virtually all of the civil expediting provisions applicable to either the district or appellate courts. The bill's initial phrase, "[n]otwithstanding any law to the contrary," sought to ensure prospectively that any priority provision later slipped into the code would be of no effect. *Hearing* at 96.

The Judicial Conference welcomed the legislation and at its September 1981 session approved the bill based on a recommendation from the Committee on Courts Administration. JCUS-MAR 1981, p. 68. In June 1982, on behalf of the Judicial Conference, Judge Elmo B. Hunter, U.S. District Judge for the Western District of Missouri and Chairman of the Committee on Court Administration, testified in support of the bill before the House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice. *See Hearings* 29-30 (recommending that all civil case priorities "be placed in a single section in the judiciary title of the United States Code . . . under proposed new section, 1657."). Judge Hunter noted that Chief Justice Warren E. Burger had previously expressed to the same subcommittee concerns about the welter of acts requiring expedited case handling. *Id.* at 43. And representatives from the U.S. Department of Justice, ABA, and the Association of the Bar of the City of New York echoed Judge Hunter's testimony supporting the bill. *See, e.g., id.* at 110-12, 121-26 (testimony of Deputy Assistant Attorney General Timothy J. Finn). Ultimately, the *Federal Courts Civil*

U.S.C. § 3161, establishes the appropriate time limits for all criminal cases. *Id.* Prior to H.R. 1924, it appears the Conference had not been called upon to articulate opposition to the prioritization of certain types of criminal cases.

Priorities Act was read and referred to the House Judiciary Committee but did not become law. It was reintroduced as H.R. 5645 (98th Cong.) on May 10, 1984, and was passed only by the House.

But, in November 1984, Congress added Section 1657 to Title 28 using language substantively identical to that used in H.R. 4396. *See* 28 U.S.C § 1657 (“Notwithstanding any other provision of law . . .”). The enactment of Section 1657(a) directed “each court of the United States to determine the order in which civil actions are heard and determined,” with limited exceptions for (1) habeas corpus actions; (2) actions concerning recalcitrant grand jury witnesses; (3) any action for temporary or preliminary injunctive relief; and (4) other actions if “good cause” for calendar priority is shown (for purposes of the statute, good cause is shown if a federal Constitutional right or a federal statutory right, including rights under 5 U.S.C. § 552 (FOIA), would benefit from expedited treatment). Before Section 1657 became law, more than eighty separate federal statutes authorized civil actions and, at the same time, gave the authorized civil actions calendar priority, making it difficult to obey one statute without violating another. *See Hearing* 181-90 (collecting statutes). Its addition to the United States Code abrogated most of these individual prioritizing statutes.

A temporary and apparently voluntary moratorium on legislative proposals to impose litigation priorities followed the enactment of Section 1657. But in 1990, the Committee on Federal-State Jurisdiction revisited the issue because a pending Department of Interior appropriations bill sought to give priority over all other civil actions to any federal court action that challenged a timber sale in a forest with the northern spotted owl. The legislation also required the courts to render a final decision on the merits in such cases within forty-five days. *Rpt. of the Comm. on Federal-State Jurisdiction* 3-4 (Mar. 1990). At its March 1990 session, the Conference voted to oppose reenactment of these provisions, observing that “[e]stablishing civil priorities, and imposing time limits on the judicial decision-making process, are inimical to effective civil case management and unduly hamper exercise of the necessary discretion in the performance of judicial functions.” JCUS-MAR 1990, p. 19.

The Conference focused further attention on the issue of litigation priorities and expediting provisions in legislation at its next meeting, in September 1990. At the time, the Senate had incorporated into S. 1970 (101st Cong.), the major crime legislation passed by the Senate on July 11, 1990, litigation priority provisions concerning habeas corpus and Section 2255 motions in capital cases and thrift institution bailout litigation. The legislation sought to impose the following time limits for resolving habeas corpus petition litigation in capital cases: the district court would have to determine any such petition within 110 days of filing; a court of appeals would have to determine an appeal of a grant, denial, or partial denial of such a petition within ninety days after the notice of appeal is filed; and the Supreme Court would have to act on any petition for a writ of certiorari within ninety days after the petition is filed. The bill also contained priority provisions for judicial handling of Section 2255 motions in federal capital cases.

With respect to the thrift institution bailout litigation, the amendments to S. 1970 specified that (1) consistent with 28 U.S.C. § 1657, a court of the United States shall expedite the consideration of any case brought by the Federal Deposit Insurance Corporation against

directors, officers, employees, and those providing services to an insured institution, stating that “[a]s far as practicable the court shall give such a case priority on its docket;” (2) the hearing in an appeal in such a case “shall be conducted not later than 60 days after the date of filing of the notice of appeal” and “the appeal shall be decided not later than 90 days after the date of the notice of appeal;” and (3) the court may modify these schedules and limitations in a particular case “based on a specific finding that the ends of justice that would be served by making such a modification would outweigh the best interest of the public in having the case resolved expeditiously.” See *Rpt. of the Comm. on Federal-State Jurisdiction* 4 (Sept. 1990) (discussing S. 1970 and past Judicial Conference positions on statutory civil priority issues). Responding to the bill, the Conference “reiterated its strong opposition to legislative provisions imposing statutory litigation priority, expediting, or time limitation rules on specified classes of civil cases [and] strongly opposed any attempt to impose statutory time limits for disposition of specified cases in the district courts, the courts of appeals or the Supreme Court.” JCUS-SEP 1990, p. 80.

The “Judicial Improvement Act of 1998” (S. 2163, 105th Congress) again resurrected the docket prioritization issue. That legislation was introduced in June 1998, by Senator Orrin Hatch (R-UT), Chair of the Senate Judiciary Committee, and Senators John Ashcroft (R-MO), Spencer Abraham (R-MI), Strom Thurmond (R-SC), Jeff Sessions (R-AL), and Jon Kyl (R-AZ). Section 3(a) of the bill included an automatic termination provision modeled upon the Prison Litigation Reform Act and provided for the automatic termination of any court ordered relief or decree, if the federal district court failed to rule on a motion to terminate within sixty days. The Federal-State Jurisdiction Committee determined that the sixty-day time limit included in section 3(a) was inconsistent with previous Conference positions regarding the statutory imposition of litigation priorities and recommended that the Judicial Conference oppose the time limit because it would likely “impede the effective administration of justice.” *Rpt. of the Comm. on Federal-State Jurisdiction* A-9 (Sept. 1998).

Most recently, in March 2005, Senator Lamar Alexander (R-TN) introduced the “Federal Consent Decree Fairness Act,” S. 489 (109th Congress). The purpose of the bill was to create “term limits” for consent decrees and to narrow them to “encourage the courts to get the decision-making back in the hands of the elected officials as soon as possible.” 151 Cong. Rec. S2064 (daily ed. Mar. 4, 2005). The legislation would have created a new section 1660 of Title 28, to allow state or local officials sued in their official capacities to file a motion to modify or vacate a consent decree (limited to those involving state or local officials and not private settlements) upon the earlier of four years after it was originally entered, or at the expiration of the term of office of the highest elected state or local official who authorized the government to consent. Section (b)(3) of the new section 1660 would have required the court to rule on such motions within 90 days. If the court did not, then pursuant to section (b)(4), the consent decree would have no force or effect beginning on the ninety-first day after the motion was filed until the date on which the court enters a ruling on the motion. Consistent with past opposition, the Committee on Federal-State Jurisdiction requested that the Director of the AO send a letter to Congress opposing the ninety-day deadline in the legislation. That letter was transmitted to selected members of the House and Senate Judiciary Committees, as well as the primary sponsors of the legislation, on June 22, 2005. *Rpt. of the Comm. on Federal-State Jurisdiction* 14-15 (Sept. 2005).

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This is a draft by the *Benchbook* committee. The material is not in *Benchbook* format and should not be cited.

6.01 Civil Case Management

Fed. R. Civ. P. 16 and 26.

- I. The Judge's Role
- II. Initial Case Management (pre-Rule 16 Conference)
- III. Rule 16 Case-Management Conferences and Orders
- IV. Ongoing Case Management
- V. Final Pretrial Conference
- VI. Conclusion

Introduction

This section is designed to provide guidance for managing both simple and complex cases. It includes actions that are required by rule along with factors to consider, alternative methods, and recommendations that experienced judges have found to be helpful. Not all of the recommendations given will be appropriate for every case, and judges should tailor the advice to the case at hand. Also, a district's local rules may recommend or require a different practice or procedure, or even use different terminology.

Magistrate judges routinely handle many of the pretrial functions referred to below (see Sec. II, *infra*), and the term "judge" is meant to include both district and magistrate judges.

I. The Judge's Role

The Civil Rules contemplate that the judge will be an active case manager. The Rules apply across case types and sizes, but different cases have different pretrial needs. Some cases may require extensive discovery and motion practice, while others may involve little or no discovery or pretrial motions. The Civil Rules create a flexible template to be tailored to the needs of each case.

The judge and the parties share case management responsibility. The parties exercise first-level control and are the principal managers of their cases, but they do so under a schedule and other limits established by the judge. Many parties will not manage, or will do so in ways that are disproportionate to the needs of the case, or will otherwise frustrate the just, speedy, and inexpensive determination of the action. Judges may meet their own responsibility for the efficient resolution of cases both by guiding the parties to sound self-management and by intervening to impose effective management when necessary.

Active judicial case management is an essential part of the civil pretrial process. No party has the right to impose disproportionate or unnecessary costs on the court or the other side. Many parties and lawyers want and welcome active judicial case management, viewing it as key to controlling unnecessary cost and delay.

Active case management does involve additional judge time at the start of the case, but it pays valuable dividends. It ensures that the case will proceed under an efficient but reasonable schedule, that time and expense will not be wasted on unnecessary discovery or motion practice, and that court and lawyer time will be devoted to the issues most important to the resolution of the case. When lawyers know the judge will be managing them, they are more likely to engage in sound self-management. Early attention to case management may also identify potential problems before they arise or address them before they worsen. Active case management promotes justice by focusing the parties and the court on what is truly in dispute and by reducing undue cost and delay.

There are three stages of pretrial case management:

- (1) activities before the Rule 16 conference and/or order;
- (2) holding a Rule 16 Case-Management Conference and issuing a Case-Management Order; and
- (3) ongoing case management.

II. Initial Case Management (pre-Rule 16 Conference)

The Rule 16 Case-Management Conference between the lawyers and the judge is the primary opportunity for assessing the pretrial needs of the case in time to craft an appropriately tailored Case-Management Order. The effectiveness of the Rule 16 conference depends in large part on the information the parties provide. Rule 26(f) requires the parties to confer and prepare a discovery planning report to use in the Rule 16 conference with the court. The judge can take steps to promote the parties' effective use of Rule 26(f).

A. Rule 26(f) Discovery Planning Conference and Report

1. FED. R. CIV. P. 26(f) requires the parties to confer at least 21 days before the Scheduling Conference is to be held or a Scheduling Order is due under Rule 16(b), except in proceedings exempted from the Rule 26(a)(1)(B) initial disclosures or when the court orders otherwise.
2. The parties must, among other things, consider the nature and basis of their claims, discuss their expected discovery needs, and make a good-faith effort to agree on a proposed discovery plan, which they must submit to the court within 14 days.
3. The Rule 26(f) conference and report serve two purposes. One is to have the parties discuss discovery before engaging in it, to prevent a "shoot first, ask questions later" approach. The second is to generate information for the court to consider at the Rule 16 conference in determining the reasonable pretrial needs of the case.

B. Initial Case-Management Orders (pre-Rule 16 Conference)

1. Too often, the lawyers' Rule 26(f) conferences are perfunctory. As a result, the reports supply little useful information to the court. To improve the quality of the Rule 26(f) process, some judges issue Initial Case-Management Orders that spell out the topics the judge expects the parties to discuss at their Rule 26(f) conferences and address in their Rule 26(f) report. The Order can also make clear that the judge will be asking about these topics at the Rule 16 Case-Management Conference, creating an incentive for the lawyers to carry out their Rule 26(f) obligations responsibly.
2. Consider issuing an order (or developing case-management guidelines) that structures the parties' initial planning activities to facilitate an effective and efficient Case-Management Conference with you later. The order or guidelines can be a standardized form issued by your staff when the Rule 16 Case-Management Conference is scheduled.
3. Consider reminding the parties that Rule 26(f) requires them to discuss issues relating to discovery of electronically stored information and advising that you will ask about it at the Rule 16(b) Case-Management Conference.
4. Consider reminding the parties that Rule 26(b) and (g) require their discovery activities to be proportional to the needs of the case and that you will ask about proportionality at the Rule 16(b) Case-Management Conference.

C. Supplementing the Rule 26(f) Agenda for the Parties

1. Your order or guidelines can also direct the parties to discuss at their Rule 26(f) conference matters that go beyond those listed in Rule 26(f), and to address those matters in their Rule 26(f) report or in a separate pre-Rule 16 conference submission. A district's local rules may have specific requirements for the conference.
2. Possible topics – for discussion or report or both – could be anything that will aid in your assessing and managing the case, including:
 - a. the basis for federal-court subject-matter jurisdiction;
 - b. a brief description of the facts and issues in the case;
 - c. the status of any initial settlement discussions or a statement of whether the parties will engage in initial settlement discussions; and
 - d. any other case-management topics listed in Rule 16(c)(2).

3. One factor to consider is that supplemental discussions or supplemental pre-Rule 16 conference reports will increase the parties' up-front costs and burdens of litigation. While some judges effectively use supplemental submissions, other judges prefer to raise these topics at the Rule 16(b) conference if appropriate for the case. Each judge must determine how best to balance the costs and benefits of additional pre-Rule 16 conference requirements in different types of cases.

III. Rule 16 Case-Management Conferences and Orders

Before issuing a Scheduling Order, most judges find it advisable to hold a Case-Management Conference with the lawyers—and sometimes the parties—to learn more about the case. The exchange with the lawyers, preferably face-to-face but by telephonic conferencing if circumstances require, is usually much more valuable for the court and the lawyers than just reviewing the parties' report. The exchange provides the court with the information it needs to develop a Scheduling Order/Case-Management Order that really is tailored to the needs of the case. The Rule 26(f) report, even when well done, is typically no substitute for a live dialogue in which a judge asks questions, probes behind representations, and fills in gaps.

A tailored Case-Management Order can address several critical areas:

1. the issues to be resolved and the best methods for doing so in a timely and efficient manner;
2. the scope of discovery, the best methods for the timely and cost-effective exchange of information, and limits on the amount and type of discovery allowed in the case;
3. procedures the parties must follow in the case, such as procedures for obtaining the court's assistance in resolving discovery disputes;
4. whether and when the parties might participate in processes designed to facilitate settlement; and
5. a schedule for the topics addressed below.

A. Rule 16(b) Minimum Requirements

1. The district judge—or a magistrate judge when authorized by local rule—must issue a basic Scheduling Order in every civil case unless it is in a category of cases exempted by local rule.
2. The basic Scheduling Order must set four deadlines:

- a. to join new parties;
 - b. to amend the pleadings;
 - c. to complete discovery; and
 - d. to file motions.
3. The judge must issue the Scheduling Order as soon as practicable, but in any event within the earlier of 120 days after any defendant has been served or 90 days after any defendant has appeared.

B. Rule 16(b) Case-Management Conferences; Case-Management Orders

1. *Scope.* Most judges issue orders that go well beyond the minimum basic deadlines required by Rule 16(b). The label used is not controlling; a Rule 16(b) order that provides extensive case management may be styled as a Scheduling Order.
2. *Format.* As noted, most judges hold a Rule 16 conference with the lawyers, either face-to-face or by conference call, to learn about the case in order to issue a Scheduling Order/Case-Management Order tailored to the case. In some cases, it will be clear in advance that such a conference is not necessary. In some categories of suits, the pretrial needs do not vary by case. In that event, the court can issue a Scheduling Order based on established practice as informed by the parties' Rule 26(f) submissions. In general, however, it is better to hold a Case-Management Conference, either in person or by telephone, even if the parties agree on deadlines and no motions are pending. The Conference often reveals information and issues not apparent to the parties or the judge in the submissions. That information and those issues are often important to preparing a tailored Case-Management Order.
3. *Length.* The length of the Conference will depend on the complexity of the case and the scope of the matters to be addressed. In many cases, between 20 to 30 minutes should be adequate to explore the matters discussed below. More complicated cases likely will require more time. Cases that might seem simple and organized often turn out to have unseen complications and call for a longer conference to get them on a productive and efficient path. Allotting enough time for every conference maximizes the benefits of early case management.
4. *Judge Participation.* The judge who is conducting the pretrial activities should lead the Conference.
5. *Party Participation.* Consider whether represented parties should be present in the Case-Management Conference. Having the parties present can make it easier to identify the issues and can greatly add to a meaningful discussion of the litigation

costs and the importance of limiting pretrial work to what is reasonable and proportional to the case. Note that some districts have a local rule that requires the parties to meet and discuss settlement or ADR before the pretrial conference.

C. Addressing Merits Issues

1. *Narrowing the Issues.* The pleadings often fail to clearly identify what claims or defenses—or elements of claims or defenses—are genuinely in dispute. The Case-Management Conference is an ideal time to probe the parties’ contentions to determine what issues actually need to be resolved.
2. *Initial Disclosures.* Because initial disclosures are required in most cases, it is useful to ask counsel whether initial disclosures have been exchanged and, if not, include that in the Scheduling Order.
3. *Motions to Dismiss.* The Case-Management Conference is an important opportunity to address any pending motions to dismiss and determine whether the plaintiff intends to file an amended complaint that might moot the need to resolve a pending motion. Consider discussing with counsel other ways of limiting dismissal motions and whether it may be better to address the issues by summary judgment rather than by pleading challenges. For example, if a party wishes to raise a statute of limitations issue, it may be better to address that in a summary judgment motion after some discovery rather than by a motion to dismiss.¹
4. *Staging Motions.* Explore whether there are any threshold issues that should be resolved first. Where appropriate, phase the pretrial process (including discovery) so that critical or case-dispositive threshold issues are resolved before the parties begin work on other issues.
5. *Stipulations.* Consider asking counsel whether they will stipulate to facts that do not appear to be genuinely contested. Such stipulations can streamline the issues to be resolved and can eliminate the need for costly discovery on uncontested issues.
6. *Experts.* Explore the need for experts. Counsel often say they need experts in cases or on issues but, on examination, it is apparent that experts are neither needed nor appropriate. If experts are needed, deadlines should be included in the Case-Management Order for expert disclosures, reports, and discovery, and for the filing of motions raising *Daubert* challenges under Rule 702 of the Federal

¹ Consider establishing a process for the submission of premotion letters or for premotion conferences before a party can file a motion to dismiss or for summary judgment. Such motions can be expensive and time-consuming both for the parties and the court. Some judges have found that a premotion letter or conference requirement avoids or limits motions to dismiss or for summary judgment without the need for full briefing, or clarifies and focuses the issues for those motions that do proceed to full briefing.

Rules of Evidence if those are expected. Such motions should not be deferred until the Final Pretrial Conference.

7. *Class Certifications.* If the case is styled as a class action, the Conference is often the best time to set dates for class certification motions and to establish a process for any certification discovery that may be needed. The Conference provides an effective opportunity to explore with counsel the relationship between, and possible overlap of, discovery on class certification and on the merits, the limits that should be imposed on class-certification discovery, and staging discovery to decide the certification motion before proceeding to other merits discovery.

D. Addressing Discovery Issues

1. *Managing Discovery.* Excessive discovery is one of the chief causes of undue cost and delay in the pretrial process. The Case-Management Conference can help ensure that discovery proceeds fairly and efficiently in light of the needs of the case. Although you should ask the parties what discovery they need and how much time they will need to do it, do not rely solely on what the parties say in the Rule 26(f) discovery plan. Even if the parties agree, that does not guarantee that discovery will be proportional or proceed on a timely basis.

Remember that parties are not entitled to all discovery that is relevant to the claims and defenses. The judge has a duty to ensure that discovery is proportional to the needs of the case. Under Rule 26(b)(2)(C), the court must limit discovery that would be “unreasonably cumulative or duplicative” or when “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”

2. *Proportionality.* When needed, consider these techniques for imposing proportionality limits in discovery:
 - a. limiting the number of depositions (or their length), interrogatories, document requests, and/or requests for admission;
 - b. identifying whether discovery should initially focus on particular issues that are most important to resolving the case;
 - c. phasing discovery so that the parties initially focus on the sources of information that are most readily available and/or most likely to yield key information. Guide the parties to go after the “low hanging fruit” first;
 - d. limiting the number of custodians and sources of information to be searched;

- e. delaying contention interrogatories until the end of the case, after discovery is substantially completed; and
 - f. otherwise modifying the type, amount, or timing of discovery to achieve proportionality.
3. *Evidence Rule 502 Non-Waiver Order.* Consider whether to enter a “non-waiver order” under Federal Rule of Evidence 502(d). This order, which does not require party agreement, precludes the assertion of a waiver claim based on production in the litigation. It avoids the need to litigate whether an inadvertent production was reasonable. By reducing the risk of waiver, the order removes one reason parties conduct exhaustive and expensive preproduction review. Many parties still are not aware of this opportunity for reducing the cost of discovery by reducing privilege review.
4. *Electronic Discovery.* Because electronic discovery is often a source of dispute, excessive costs, and delays, it can be important to ask whether the parties have considered any issues on discovery of electronically stored information (“ESI”). While the parties have a duty to discuss the discovery of ESI at their Rule 26(f) conference and include it in their Rule 26(f) report, experience shows that many lawyers do not.

If they have not already done so, see if the parties can reach agreement on basic electronic discovery issues, including the following:

- a. the form in which ESI will be produced (i.e., native format, pdf, paper, etc.). The form of production can affect whether the material produced will include metadata and whether it will be computer searchable;
 - b. whether to limit discovery of ESI to particular sources or custodians, at least as an initial matter (see the “low hanging fruit” principle above); and
 - c. whether to seek agreement on search terms or methods before conducting computer searches to identify responsive materials.
5. *Preservation.* Explore whether the parties have discussed the preservation of discoverable information, especially ESI. See if the parties can reach agreement on what will be preserved. If there are disputes, it is important to keep the case on track to resolve them quickly to try to avoid spoliation issues later. The principles of reasonableness and proportionality that guide discovery generally apply.
6. *Resolving Discovery Disputes.* Consider whether to require parties to present discovery disputes informally—e.g., via a telephone conference or a short letter—before allowing the parties to file formal discovery motions and briefs. Many

courts have found that they are able to resolve most discovery disputes using these less formal—and considerably less expensive and less time-consuming—methods. These courts do not allow counsel to file motions to compel or for sanctions before getting the judge on the phone (with a court reporter or a tape machine) to discuss the issue. Many courts find that they are able to resolve most discovery disputes over the telephone and that simply being available encourages the parties to resolve many disputes on their own.

7. *Cooperation.* The discovery process is adversarial in the sense that the adversaries make choices about what information to seek and how to seek it. But that does not mean that lawyers cannot cooperate or that they must act in a hostile and contentious manner while conducting discovery. It is helpful to let the parties know that you expect them to be civil and to find ways to streamline the discovery process where possible and to avoid needless cost and delay.

E. Addressing Settlement or Other Means of Alternative Dispute Resolution

1. Most courts will ask about the prospects of settlement and whether it would be useful for the parties to have an early settlement conference before the Magistrate Judge or another adjunct of the court.
2. Some judges set a deadline in the Scheduling Order by which parties must engage in face-to-face settlement talks (whether assisted by a neutral or not), and require the parties to file a short status report on settlement talks after the deadline. This may prompt the parties to address settlement sooner than would otherwise occur. However, judges should be attuned to the parties' views on settlement discussions. Sometimes counsel are prepared for early settlement discussion. But other times counsel will want to hold off discussing settlement until they have learned more about the case.
3. Consider discussing whether the parties would be interested in pursuing other forms of alternative dispute resolution such as early neutral evaluation, private mediation, non-binding arbitration, or a summary jury trial.

F. Trial Date and Joint Pretrial Order

1. Most courts set a trial date in the Scheduling Order and try to adhere to it. Empirical data shows that setting a firm trial date and sticking to it when possible is one of the best ways to ensure that the case moves forward without undue cost or delay.
2. Consider whether a simpler and less costly joint pretrial order would suffice for the case. For example, for some cases, it is sufficient to have the parties submit exhibit and witness lists, proposed *voir dire* questions, and proposed jury instructions.

IV. Ongoing Case Management

Case management does not end when the Case-Management Order is entered. Not all cases will require active continuing case management, but many will. It is helpful to make clear up front that you stand prepared to re-engage when needed.

A. Scheduling Future Conferences

1. At the initial Case-Management Conference, consider whether to schedule one or more follow-up conferences. These may include interim pretrial conferences to manage discovery and resolve any disputes, schedule deadlines for potential summary judgment motions, or narrow the issues. These may also include a conference at the end of discovery to identify remaining issues, hear oral argument on motions if that would be helpful, and address any problems that presenting proof at trial may raise.
2. In cases with heavy or contentious discovery, some judges schedule a standing discovery conference at set periods (e.g., once a month). This ensures that time is available to address any issues. Experience shows that the lawyers often call shortly before the regularly scheduled conference date to cancel it, as the impending conference date motivates them to resolve the issues on their own.
3. In cases with extensive electronic discovery, the judge and the parties often adopt an iterative approach, in which the parties initially limit discovery to specific sources or custodians, deferring until later the decision whether to pursue further discovery. In cases that follow that approach, it is advisable to schedule a follow-up discovery management conference in advance, subject to cancellation if it is not needed.
4. If the judge has deferred exploring settlement or other alternative dispute resolution activities until the parties have conducted discovery, it may be advisable to schedule a conference after the initial discovery to reassess the prospects of settlement or other resolution activity.

B. Modifying the Litigation Schedule

1. In some cases, it may be necessary to modify the schedule set in the initial Case-Management Order. Under Rule 16(b)(4), any modification requires an order and a finding of good cause.
2. Only the judge can modify the Case-Management Order. The parties cannot extend the schedule on their own, even by agreement. It is common for the parties

to seek a modification by stipulation, but the stipulation has no force of its own and should not be adopted automatically because of the need to determine whether there is good cause for the proposed modification.

3. Modifying the Case-Management Order requires a good-cause showing. The dominant factor is whether the existing schedule cannot reasonably be met despite the diligence of the party seeking extension. If that party has not been diligent in meeting the schedule, good cause to extend it may be lacking.
4. Effective case management requires holding the parties and their lawyers to reasonable schedules. Parties and lawyers who disregard reasonable deadlines interfere with the “just, speedy, and inexpensive determination of every action and proceeding.” Fed. R. Civ. P. 1. When judges adhere to the schedules they have imposed and enforce the good-cause requirement for modification, cases tend to be resolved more efficiently.

C. Addressing Issues Promptly

1. Addressing disputes promptly is the key to capitalizing on early case-management work and keeping the case moving. If the parties contact chambers with an issue, prompt attention—whether by conference call, a quickly scheduled case-management conference, or other means—can help keep the parties and the schedule on track.
2. The way a dispute or motion is decided will often define or limit the pretrial activities to follow. For example, the way a motion for summary judgment is decided might dramatically narrow the issues in the case and therefore affect the scope of discovery. The way a discovery dispute is resolved also affects the cost, burden, and time of discovery. The prompt resolution of motions and disputes that intersect with the management of the case can be critical to reducing costs and delays.
3. Rule 16(f) provides tools to promote the purposes of Rule 16 and to enforce the court’s Case-Management Order.

V. Final Pretrial Conference

A. A Valuable Case-Management Tool

Rule 16(e) states that a court may hold a Final Pretrial Conference to “formulate a trial plan.” While not mandatory, holding a Final Pretrial Conference is strongly encouraged. It is the judge’s primary way to ensure that the lawyers and the parties are prepared to try the case and that the trial starts and ends on time, and to avoid surprises. The Final Pretrial Conference allows

the judge, with the parties and counsel, to identify the legal issues that still need to be resolved and provides an opportunity to identify and address problems that otherwise might disrupt, delay, or unnecessarily complicate the trial.

B. Scheduling the Conference and Setting the Agenda

1. Timing and Participation

The purpose of the Final Pretrial Conference is to plan the trial. Rule 16(e) provides that it must be held “as close to the start of trial as is reasonable.” Rule 16(e) also addresses who should be in attendance, stating that each party must be represented at the Conference by at least one attorney who will conduct the trial, or by the party if unrepresented. Many judges require the attorneys who will take the lead at the trial to be present.

2. Final Pretrial Conference Orders

For a Final Pretrial Conference to be effective, the lawyers and parties must prepare in advance. To facilitate that, many judges issue Final Pretrial Conference Orders that identify specific steps that the lawyers and parties must complete and the documents they must file before the Conference. These steps and documents are designed to make the lawyers focus on what is actually needed to try the case. The Final Pretrial Conference Order does not have to be one-size-fits-all. The court can tailor or adapt the Order to be sure that the steps the lawyers and parties are required to take are appropriate for the case, address the information needed for the trial, and do not unnecessarily increase the expense and burden of trial preparation.

C. Requiring the Parties to Submit Materials Before the Conference

Most judges require the parties to prepare and submit materials in advance of the Final Pretrial Conference, although specific practices vary both by district and judge. Some districts have local rules, while others leave the matter to each judge. When local rules exist, they typically still allow for tailoring by the judge who will try the case. The two most important things to decide are what matters the judge wants the parties to address and the form the submissions should take.

1. Matters To Be Addressed in the Preconference Submissions

The judge may ask the parties to address any matters that will help in planning the trial. The following items illustrate the types of matters judges often ask the parties to address in preconference submissions:

- a. *Factual Issues.* Require the parties to identify the factual issues to be resolved at trial, with a brief summary of each party’s position on each issue. This requires the parties to think through the trial ahead of time and enables the judge to discuss the nature and length of the trial and resolve issues that may simplify the trial.

- b. *Legal Issues.* Require the parties to identify disputed legal issues that must be resolved in connection with the trial. This prepares the judge to address those issues and, if possible, to decide them before trial.
- c. *Rule 26(a)(3)(A) disclosures.* Rule 26(a)(3)(A) requires the parties to make pretrial disclosures on three topics. The parties must:
 - (1) identify their trial witnesses, separately identifying those they expect to present and those they may call if the need arises;
 - (2) designate any witness that will be presented by deposition transcript or videotape; and
 - (3) identify their documents and trial exhibits, separately identifying those they expect to offer and those they may offer if the need arises.

Rule 26(a)(3)(B) provides that these disclosures are due 30 days before trial unless the court sets a different due date. Many judges alter the deadline by ordering the parties to make their disclosures as part of the preconference submissions.

- d. *Marking Exhibits.* To ensure that the evidence is ready for trial and to minimize surprises, consider requiring the parties to exchange not only lists of exhibits, but actual copies of exhibits marked for introduction into evidence.
- e. *Objections.* Rule 26(a)(3)(B) requires opposing parties to list objections to the use of a deposition under Rule 32(a), as well as any objection—together with the grounds for it—to the admissibility of trial exhibits. With the exception of objections under Federal Rules of Evidence 402 and 403, objections not so made are waived unless excused by the court for good cause.

These objections are due 14 days after the pretrial disclosures are made, unless the court sets a different deadline. Consider including in the Final Pretrial Conference Order instructions on how the parties should make any such objections.

- f. *Motions in limine.* Many judges require parties to file and brief motions in limine before the Final Pretrial Conference. The judge has discretion to place page or number limits on the motions in limine that are filed.

Resolving motions in limine at the Final Pretrial Conference defines the issues and evidence to be presented at trial.

- g. *Voir dire*. Consider requiring the parties to submit proposed voir dire questions and a joint statement of the case to be read to the jury panel during voir dire.
- h. *Jury instructions*. Consider requiring the parties to submit proposed preliminary and final jury instructions.
- i. *Verdict*. Consider requiring the parties to submit proposed verdict forms or jury interrogatories.
- j. *Findings of fact and conclusions of law*. In a bench trial, consider requiring the parties to submit proposed findings of fact and conclusions of law.

As noted, there is no one-size-fits-all requirement. In cases that are simple or straightforward or in which the stakes are small, an elaborate Joint Proposed Pretrial Order may not be needed. In such cases, consider conferring with the lawyers about tailoring the preconference submissions, including any Joint Proposed Pretrial Order, so that they are limited to what the court and parties reasonably need for a fair and efficient trial.

2. Form of the Preconference Submissions

Many judges require the parties to prepare and submit a Joint Proposed Pretrial Order that incorporates all of the matters they are required to address. Some judges prefer a shorter Joint Proposed Pretrial Order with additional matters, such as motions in limine, proposed voir dire questions, or proposed jury instructions, to be addressed separately, either in attachments or as freestanding submissions.

The deadlines for submission should allow time for the parties to prepare and submit any materials that respond to other submitted materials. For example, time is needed to see and review the other side's exhibits and deposition designations before submitting objections to those exhibits and designations.

D. Conducting the Final Pretrial Conference

1.

Narrowing
and Refining
Issues; Ruling
on Motions in
Limine

With the parties' preconference submissions, the judge works with the parties to narrow and refine the issues for trial. Ruling on motions in limine may be an important part of this work. Narrowing and refining the issues and ruling in advance on as many issues as the record permits allows the court and parties to conduct the trial more efficiently and within the time allotted on the court's calendar.

2. Resolving Other Evidentiary Issues

- a. The Final Pretrial Conference provides an opportunity to preadmit exhibits if there will be no objections or if the court is able to resolve the objections and rule on admissibility under Federal Rule of Evidence 104.
- b. The Final Pretrial Conference can also be used to address evidence-related matters, such as which witnesses may be in the courtroom during the trial under Federal Rule of Evidence 615, the mode of questioning under Rule 611, and identifying exhibits suitable for summaries under Rule 1006.

3. Other Issues Related to Conducting the Trial

The Final Pretrial Conference can address any other issues regarding the conduct of the trial, including:

- a. the order of presenting evidence, particularly if multiple parties are involved;
- b. possible bifurcation of the trial;
- c. witness-scheduling issues, such as calling witnesses out of order;
- d. how to present depositions or electronic evidence;
- e. the need for interpreters;
- f. special equipment needs; and
- g. jury questions.

4. Firm Trial Dates and Fixed Trial Times

If the court has not previously set a firm trial date, that date should be set at the Final Pretrial Conference. The order scheduling the Conference can advise attorneys to come with their calendars and with information on the availability of their witnesses and clients. Once the issues and evidence have been identified, the judge, in consultation with the parties, can determine the length of the trial. Consider entering an order limiting the time for the trial, such as

by allotting a specific number of trial hours to each party. The adage that work expands to fill the time available applies fully to trials. Trials with established time limits tend to be more focused and more efficient.

5. Educating Parties on the Court's Trial Practices

Many judges use the Final Pretrial Conference to educate lawyers and parties on the court's trial practices, such as the extent of lawyer participation in jury voir dire; whether re-cross-examination generally is allowed; or whether jurors are permitted to take notes, to have copies of exhibits, or to submit questions to witnesses. It may also be helpful to educate the lawyers about the court's expectations for the conduct of trial counsel. For example, the judge can educate the parties about proper practice for marking and presenting exhibits, for approaching witnesses, or for the use of courtroom equipment. Such an education can be particularly valuable for trials involving pro se litigants.

6. Promoting Settlement

If a Final Pretrial Conference covers the kinds of issues identified above, parties leaving such a conference will never know more about their dispute, short of trial, than they do at that moment. The Final Pretrial Conference may provide a valuable opportunity for settlement. Some judges encourage the parties to engage in settlement talks after the Final Pretrial Conference and before trial.

E. The Final Pretrial Order

1. Issuing the Final Pretrial Order

After the Final Pretrial Conference, the judge should issue a Final Pretrial Order that reflects the decisions made during the Conference. The Final Pretrial Order should clearly identify the issues to be decided at trial, the witnesses to be called, the exhibits to be offered in evidence, and objections preserved for trial. The Order should also reflect evidentiary or other rulings made by the judge for trial. The firm trial date should be fixed, as should the length of the trial, where appropriate. Judges may use a proposed Final Pretrial Order submitted jointly by the parties, as modified by the judge, or an order written or dictated specifically for a particular case.

2. Modifying the Final Pretrial Order

- a. By adhering to the Final Pretrial Order—that is, by holding the parties to the issues, evidence, objections, and schedule identified at the Final Pretrial Conference—the judge can help avoid surprises and ensure that the trial will be completed in the time allotted.
- b. Rule 16(e) provides that “[t]he court may modify the order issued after a final pretrial conference only to prevent manifest injustice.” This is a higher standard than the “good cause” test found elsewhere in Rule 16 and

is intended to reflect the relative finality of the Final Pretrial Order. It may be useful to restate this standard in the Final Pretrial Order itself.

VI. Conclusion

Case management, beginning early, is essential to controlling costs and burdens of discovery and motions practice, particularly given the challenges of electronic discovery issues. Continuing to provide judicial management as the case develops, ending in a careful and thorough Final Pretrial Conference, will reduce delays and unnecessary costs and increase the likelihood that the case will be resolved on terms that reflect the strength and weaknesses of the merits, rather than avoiding disproportionate discovery or the costs of an unnecessarily protracted trial. Effective case management is a critical part of achieving “just, speedy, and inexpensive” case resolutions.

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