MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 10-11, 2014

The Civil Rules Advisory Committee met at the Lewis & Clark Law School in Portland, Oregon, on April 10-11, 2014. Participants included Judge David G. Campbell, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Hon. Stuart F. Delery; Judge Paul S. Diamond; Judge Robert Michael Dow, Jr.; Parker C. Folse, Esq.; Judge Paul W. Grimm; Peter D. Keisler, Esq.; Dean Robert H. Klonoff; Judge John G. Koeltl; Judge Scott M. Matheson, Jr.; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; and Judge Gene E.K. Pratter. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S.Sutton, Chair, Judge Neil M. Gorsuch, Liaison, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Standing Committee member Judge Susan P. Graber also attended. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt, Allison Stanton, and James C. Cox. Judge Jeremy Fogel participated for the Federal Judicial Center. Jonathan C. Rose, Andrea Kuperman, Benjamin J. Robinson (by telephone), Julie Wilson, and George Everly represented the Administrative Office. Observers included Judge Lee H. Rosenthal, past chair of the Committee and of the Standing Committee; Professor Steven S. Gensler, a former member of the Civil Rules Committee; Joseph D. Garrison, Esq. (National Employment Lawyers Association); Jerome Scanlan (EEOC); Alex Dahl, Esq. and Robert Levy, Esq. (Lawyers for Civil Justice); Patrick Coyne, Esq. (American Intellectual Property Law Association); John Vail, Esq.; Valerie M. Nannery, Esq. (Center for Constitutional Litigation); Thomas Y. Allman, Esq.; Jonathan Redgrave, Esq.; Ariana Tadler, Esq.; Henry Kelsen, Esq.; and William Butterfield, Esq.

The first morning of the meeting was devoted to a Symposium honoring Judge Mark R. Kravitz, former chair of the Civil Rules Committee and former chair of the Standing Committee. The Symposium included tributes by Chief Justice John G. Roberts (read by Dean Klonoff), Elizabeth Cabraser, Charles Cooper, Judge Jeremy Fogel, Peter Keisler, and Judge Anthony Scirica (also read by Dean Klonoff). Two panels completed the symposium. Judge Sutton moderated a panel on The Rulemaking Process, which explored papers by Edward J. Brunet, Edward Cooper, and Richard Marcus. Judge Campbell moderated a panel on Applying The Rules, which explored papers by Judge Rosenthal and Steven S. Gensler, and by Judge Diane P. Wood. The symposium will be published in the Lewis & Clark Law Review.

Judge Campbell began the afternoon portion of the first day

by noting that it was a privilege for all present to be part of the tribute to Judge Kravitz.

Judge Campbell noted that there have been no changes in Committee membership to occasion welcoming introductions or fond farewells. He also expressed the Committee's appreciation of the presence of Judge Sutton, Judge Gorsuch, Judge Graber, and Professor Coquillette for the Standing Committee, and of the presence of Judge Fogel for the Federal Judicial Center.

Judge Campbell concluded the introduction by stating that through the Subcommittees, Committee members had worked harder in preparing the materials for the agenda than any group he had ever observed doing volunteer work purely for the good of the public order. "This is a full-participation rulemaking enterprise."

April 2013 Minutes

The draft minutes of the April 2013 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

I PROPOSALS FOR ADOPTION

A. Duke Rules Package

Many of the proposals published for public comment and testimony in August 2013 were initially prepared by the Duke Conference Subcommittee chaired by Judge Koeltl. They included changes in Rules 1, 4, 16, 26, 30, 31, 33, 34, and 37. Judge Campbell noted that the voluminous public comments and extensive testimony had provided both new reasons for supporting the proposals and serious challenges. The Subcommittee evaluated these ideas and has suggested changes both in rule texts and in Committee Notes. Publication of the April agenda materials prompted a few comments on the proposed revisions that have further illuminated the issues, including a letter from four United States Senators. These comments too have been considered by the Subcommittee and presented to the Committee. Judge Campbell then asked "the indefatigable" Judge Koeltl to present the Duke Conference Subcommittee Report.

Judge Koeltl introduced the Subcommittee Report as one that recommends a few changes in some of the published proposals, withdrawal of parts of the proposals, and several changes in Committee Note language to respond to concerns raised in the

hearings and comments.

The Duke Conference was the inspiration of Judge Kravitz. Preparations began a year and a half before the conference. Participants were broadly representative of the bar, bench, and academy. The lawyer participants in private practice were balanced between those who ordinarily represent plaintiffs and those who ordinarily represent defendants. Other lawyers were drawn from house counsel, combining the perspectives of lawyers with the perspectives of clients, and from government. The enthusiasm of those invited to participate was extraordinary; only one person declined to participate in the two days of panel discussions, and only because of a schedule conflict. The participants accepted the direction to leave their clients at the door. The charge was to seek consensus on measures that can be taken to advance the Rule 1 goals — the just, speedy, and inexpensive determination of civil actions.

Three broad areas of agreement were expressed at the Conference. Improvements in civil litigation can be made by enhancing cooperation among the parties and counsel; by limiting use of procedural devices and opportunities to what is proportional to the needs of the case; and by providing early and active case management by judges.

The Subcommittee began its work promptly after the Conference concluded in May 2010. It met frequently, both in person and by conference calls. Minutes in the form of Notes were prepared for all its meetings and made public. A diverse group of lawyers and judges were gathered for a miniconference that discussed early drafts of rules proposals, some of which were later abandoned. Notes on the miniconference also were made public.

Following publication, more than 120 witnesses testified at the three public hearings, and more than 2,300 comments were submitted. Most of the witnesses and most of the comments addressed parts or all of the Duke Subcommittee proposals. All of this advice was very helpful in refining the published proposals.

The Subcommittee was able to achieve consensus on the recommendations made in the Report. The recommendations are unanimous. The Report appears at pages 79-93 of the agenda book. The proposals appear at pages 95-113. They will advance the goals of cooperation, proportionality, and early and active judicial case management. Rather than follow the order of the rules themselves, the proposals are presented in three steps: those

that deal with discovery; those that deal with case management; and the one that deals with cooperation beyond the elements of cooperation built into the discovery and case-management proposals.

DISCOVERY PROPOSALS

Scope: Rule 26(b)(1): Four changes are proposed for Rule 26(b)(1).

Proportionality is emphasized by moving the factors found in present Rule 26(b)(2)(C)(iii) to become part of the scope of discovery. Seven words are added to make proportionality explicit: "proportional to the needs of the case." One consideration in moving this concept up to (b)(1) is that "in fairness, many people never got down to Rule 26(b)(2)(C)(iii)."

Present Rule 26(b)(1) includes a list of examples of discoverable matter: "the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." The proposal deletes these words. The purpose is to reduce the great length of Rule 26, in the belief that discovery of these matters is so well established that the list is no longer needed or even useful. The Subcommittee recommendations include adding language to the published Committee Note to emphasize that all of these and other matters will remain as fully discoverable as they are now. The new language will defeat attempts to argue that deletion of these examples implies that such matter is not discoverable.

Rule 26(b)(1) now includes two spheres of discovery. Discovery is available as a matter of right as to nonprivileged matter that is relevant to any party's claim or defense. Beyond that, "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action." The proposals eliminate this distinction between lawyer-managed and court-managed discovery by deleting the provision for discovery of matter relevant to the subject matter. All discovery must be relevant to a party's claim or defense. New language is proposed for the Committee Note to address concerns raised in the comments and testimony. When the distinction between "claims and defenses" discovery and "subject-matter" discovery was adopted in 2000, the Committee Note recognized that it can be difficult to draw the distinction. Examples were given of things that, suitably focused, would be relevant to the parties' claims or defenses. The proposed new Note repeats that such discovery is

not foreclosed by the amendments. The proposed new Note language emphasizes the need to focus directly on what is relevant to the claims or defenses, and recognizes that it may be appropriate to amend the pleadings to add new claims or defenses. In addition, new Note language emphasizes the common purpose that was emphasized in the 2000 Committee Note — the purpose is to engage the court more actively in regulating the breadth of discovery.

Finally, the next-to-last sentence of present Rule 26(b)(1) provides: "Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." This sentence would be revised to continue the concept that discovery is not limited by the rules that govern admissibility in evidence, but also to make it clear that inadmissibility does not expand the scope of discovery. All discovery is limited to matter relevant to any party's claim or defense and proportional to the needs of the case.

Turning first to proportionality, many of the comments and many parts of the testimony have questioned the need to add an explicit proportionality limit to the Rule 26(b)(1) scope of discovery. But there was a consensus at the Duke Conference on the need for proportionality. It is in the rules now. Several reports show that many lawyers believe that discovery now is often not proportional to what the litigation needs. Rule 26(g) now makes proportionality an obligation of both the party that requests discovery and the party that responds. It was added to the rules in 1983, along with the proportionality requirement that now appears in Rule 26(b)(2)(C)(iii). An effort to reinforce proportionality was made in the 1993 amendments. And yet another effort to reinforce it was made in the 2000 amendments. The revised Committee Note describes these repeated attempts to achieve thorough recognition and enforcement of the 1983 concept. The 2000 amendment is a particular witness to the sense of frustration that surrounds proportionality. It added a completely redundant final sentence to (b)(1); no new or independent meaning was added by the reminder that all discovery is subject to the limitations imposed by Rule 26(b)(2)(C). This compelling sense of need carried through the Style Project, defeating repeated efforts to strike this sentence as the surplusage that it is. The present proposal is a fourth attempt that seeks to fulfill the purpose that has not yet been fully implemented.

The Subcommittee recommends two changes in the proportionality factors as published. The first transposes the first two considerations, to be "the importance of the issues at

stake in the action, the amount in controversy * * *." This change responds to the concerns expressed in hundreds of comments. Many claims may seek relatively low amounts of money damages, or seek only specific relief without any damages at all. Focus on the importance of the issues at stake was included in the 1983 rule as an explicit recognition that many actions that seek minimal or no damages involve matters of personal or public importance beyond, and perhaps far beyond, money alone. Often an individual plaintiff may be functioning in part as a private attorney general. Proportionality cannot be measured by the money alone. Although this principle has been embodied by the rules from the beginning, there is a fear that placing the amount in controversy first in the list may cause courts to impose inappropriate limits on discovery. At the other end of the line, other comments expressed a fear that focus on the money involved might lead some courts to allow absolutely unlimited discovery in actions involving huge sums of money. The reordering in the rule text is further supported by new language proposed for the Committee Note.

The second change recommended for the rule text adds a new factor to the list of proportionality considerations: "the parties' relative access to relevant information." This language, along with an explanation proposed for the Committee Note, is meant to address circumstances commonly described as involving "asymmetric information." Some categories of litigation are characterized by an uneven distribution of discoverable information. Civil rights actions in general, and most particularly individual employment claims, are examples identified by many comments and much testimony. An individual plaintiff claiming adverse employment action, for example, may have very little information that the defendant employer needs to discover. The employer, on the other hand, may have relatively large amounts of information that the employee can obtain only through formal discovery, particularly when it is necessary to present evidence of the treatment of other employees in similar circumstances. An asymmetric distribution of discoverable information often means an asymmetric incidence of discovery burdens. This factor recognizes that proportionality may allow one party to request more extensive discovery than its adversary requests.

Many of the comments and much of the testimony expressed a fear that moving proportionality from Rule 26(b)(2) to (b)(1) would effect a change in the burdens imposed on the parties in presenting discovery motions. The argument was that the present rule simply expresses a limitation on discovery, so that a party

resisting discovery has the "burden" of persuading the court that proposed discovery is disproportional. Characterizing proportionality as part of the scope of discovery, on the other hand, was feared to mean that the party requesting discovery will have the full burden of justifying the request as proportional. Additions to the Committee Note are proposed to address these fears, which arise from quite unintended interpretations of the proportionality proposal that have no basis in either the proposed rule or the Committee Note. The Note now makes it clear that the new rule text "does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations." Boilerplate objections are not permitted. Proposed Rule 34, indeed, requires that objections be specific. Nor can a party unilaterally decide to limit its responses to what it considers proportional — "the parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes."

Further additions to the Committee Note are recommended to respond to other concerns expressed in the comments and testimony that the factors to be considered in implementing proportionality are subjective and impossible to define. The basic point is that these factors began with the somewhat shorter list in 1983, and have been expanded since then. They are familiar. When concerns were expressed about the open-ended nature of a simple reference to "proportionality" at the miniconference on early drafts, participants suggested that the concept should be given content by incorporating the factors now listed in Rule 26(b)(2)(C)(iii). They agreed that when a court does turn to consider proportionality, these factors are familiar and work well.

Turning to the new formulation of the proposition that discovery is not limited to matter that would be admissible in evidence, Judge Koeltl emphasized that the history of the "reasonably calculated" phrase shows that it was not intended to expand the scope of discovery. This phrase was originally added in 1946, when it applied only to depositions, to overcome decisions ruling that a deponent could not be required to testify to hearsay. The 2000 amendment made it clear that discovery of inadmissible matter is subject to the Rule 26(b)(1) limits on the scope of discovery. But many lawyers and courts continue to treat this provision as expanding, and indeed defining, the scope of discovery. Andrea Kuperman's research provides many examples. This view is incorrect. An attempt was made to correct it in 2000.

Most of the organized bar association groups that have commented on the changes to Rule 26(b)(1) support them. The Department of Justice also supports it.

Discussion began with a Committee member who thought the work extraordinary. "I'm a big believer in proportionality." Proportionality was added to the English Practice Rules in 2009. It is essential. The need for proportionality is demonstrated in long experience as a mediator in federal courts.

Another member noted that as a new member he had been impressed by the serious attention both Subcommittees and the Committee had devoted to the public testimony and comments. He had had some concerns about the published proposals. These concerns have been resolved by the proposed changes in rule text and Committee Notes.

A judge echoed these observations. He had been concerned by the testimony and comments that worry about the burdens of arguing proportionality, and about what the factors bearing on proportionality mean. All these concerns have been addressed in the Committee Note.

Another judge recalled that two witnesses at the Dallas hearing expressed fear that the hearings and comment process were a charade. The changes that have been made show the Committee in fact does listen and respond.

It was noted that the Department of Justice generally has supported proportionality. There were some specific issues, but they have been addressed by the Subcommittee recommendations. Support for the proposed rule was confirmed by circulating it within the Department.

Other members made similar observations. Moving "the importance of the issues at stake in the action" up to become the first factor, and adding "the parties' relative access to relevant information" to the factors, make for a better rule and reflect the Committee's responsiveness. The recommendations are "a wonderful job in careful response to comments." The quantity and quality of the comments and testimony show the importance of involvement by all segments of the bar in public rulemaking.

Cost-Bearing: Rule 26(c)(1)(B): Judge Koeltl noted that the new reference to "the allocation of expenses" by a protective order simply confirms authority that is already established by the rule provisions for protecting against undue burden or expense. The

authority is exercised now. But adding it to rule text will forestall arguments to the contrary. The proposed Committee Note adds new material that responds to public comments that feared the new rule text would encourage routine cost-bearing orders. The Note now says that cost-shifting should not become a common practice, and also says that courts and parties should continue to assume that a responding party ordinarily bears the costs of responding. A comment responding to this new material has objected that it seems to prejudge the continuing work of the Committee on "requester pays" proposals. That is not so. The work will continue, and will be thorough. But "it will not be easy." The proposed rule and Committee Note, in short, should not change current practice by making cost-shifting a common event.

There was no further discussion of proposed Rule 26(c)(1)(B).

"Early" Rule 34 Requests: Rule 26(d)(2): The Subcommittee does not recommend any changes in the published proposal that would allow early delivery of Rule 34 requests to produce. Present Rule 26(d)(1) establishes a moratorium on discovery, barring discovery before the parties have conferred as required by Rule 26(f), except in cases exempted from initial disclosure. Proposed Rule 26(d)(2) would allow delivery of Rule 34 requests before the parties' conference, but only after 21 days from service of a summons and complaint on a party. Delivery of the requests does not start the time to respond. Instead, the requests are considered to have been served at the parties' first Rule 26(f) conference, starting the time to respond. The advantage of early delivery is that the parties will have a concrete focus for discussion at the conference, making for a more productive conference, and a better Rule 16(b) conference.

Public comments generally were favorable. Many plaintiff-side lawyers like the proposal. Defense lawyers generally say they would not be likely to make early delivery, but some said they would be glad to see plaintiffs' requests before the parties' conference.

Brief discussion focused on the time calculation. The time to respond begins at the first Rule 26(f) conference, and the Committee Note says that the opportunity for advance consideration of early requests should not affect the determination whether to extend the time to respond. The time provisions for early requests should be read carefully. The requests cannot be delivered with the complaint. Initially, an early request may be delivered to a party 21 days after that

party has been served with the summons and complaint. That party then can deliver early requests to any plaintiff and also to any other party that has been served.

In deference to a recommendation by the Style Consultant, Rule 26(d)(2)(B) will read: "The request is considered to have been served at the first Rule 26(f) conference," rather than "considered as served."

Rule 34: Judge Koeltl noted that Rule 34 would be revised to reflect the Rule 26(d)(1) provision for early requests, and summarized the three other proposed changes in Rule 34. The proposals reflect experience with responses that often "are absurd." General objections often incorporate boilerplate protests that the requests are overbroad, unduly burdensome, and so on, without providing any specific explanation. The responses then produce materials "subject to these objections" without stating whether anything has been withheld on the basis of the objections. And the responses often fail to state whether anything actually will be produced. All of this "is true abuse. The response is only an invitation to meet and confer, not any real indication of what will be produced." The proposals require that the response "state with specificity" the grounds for objecting; allow a response that rather than permit inspection the requested materials will be produced; and provide that production must be completed no later than the time stated in the request or a later reasonable time stated in the response. In addition, an objection must state whether any responsive materials are being withheld on the basis of the objection.

The proposed Committee Note responds to a concern expressed in testimony and comments. A party may limit its search to a scope smaller than the request. A request for "all documents," for example, may be met by a search for all documents back to 2005 and nothing earlier. The party does not know whether relevant and responsive documents might be found if the search were extended back beyond 2005, and does not know whether anything has been "withheld." The Note explains that this potential dilemma ties to the direction to state objections with specificity. The response should object that the request is overbroad and state that the search will be limited to documents created in 2005 and later. This response counts as a statement that anything earlier has been "withheld." The parties are then free to discuss the response and, if they cannot resolve the issue, seek a court order.

The Note also anticipates an issue addressed by some of the

testimony and comments. It says that the producing party does not need to provide a detailed description or "log" of all documents withheld.

In response to a suggestion by the Style Consultant, Rule 34(b)(2)(B) will provide: "state with specificity the grounds for objecting," rather than "state the ground for objecting * * * with specificity."

There was no further discussion of the Rule 34 proposals.

Numerical Limits: Rules 30, 31, 33, and 36: Judge Koeltl summarized several published proposals that would reduce present presumptive limits on discovery events and add a new presumptive limit. The presumptive limit on the number of depositions under Rules 30 and 31 would be reduced from 10 to 5 per side. The presumptive limit on the number of interrogatories under Rule 33 would be reduced from 25 to 15. And, for the first time, Rule 36 would impose a presumptive limit of 25 on requests to admit, excluding from the count requests to admit the genuineness of documents. In addition, the presumptive time limit for oral depositions would be reduced from one day of 7 hours to one day of 6 hours.

The Committee expected that these presumptive limits would be only that, simply presumptive. The proposals relied on the parties to understand what numbers are proportional to the needs of individual cases, and to agree on higher numbers whenever appropriate. Failing party agreement, the expectation was that courts would respond flexibly in ordering higher numbers suitable to the needs of each case. The purpose was to encourage realistic appraisal of the level of discovery proportional to individual case needs. "To put it mildly, these proposals generated strong opposition." Opposition came from the organized bar as well as from testimony and comments from individual lawyers. The proposals were seen as counter-productive. Lawyers fear that some courts would view the presumptive numbers as hard ceilings, and that attempts to achieve reasonable accommodations through party discussions would often fail, leading to increased motion practice.

The Subcommittee recommends that these proposals be withdrawn. Such widespread and forceful opposition deserves respect. The hope remains that most parties will continue, as they do now, to discuss reasonable discovery plans at the Rule 26(f) conference and with the court initially and, if need be, as the case unfolds. Failing party agreement, courts have power to

shape discovery to the reasonable needs of the case.

A Subcommittee member noted that the testimony and comments on the numbers of depositions were impressive. Only a minority of cases now involve more than 5 depositions per side; withdrawing the proposal will not affect most cases. For the cases that do involve more than 5 depositions per side, it is "better to leave well-enough alone." As to the number of interrogatories, the change is not as important because they are not much used anyway.

One judge reported that colleagues were pleased with the recommendation to withdraw these proposals.

CASE MANAGEMENT

Judge Koeltl began discussion of this segment of the package proposal by noting that early and active judicial case management has encountered little opposition and widespread support from the organized bar. There is concern that the early steps in an action take too long.

Rule 4(m): Time to Serve: The published proposal reduced the time to serve the summons and complaint from 120 days to 60 days. The comments and testimony persuaded the Subcommittee to recommend that the time be set at 90 days.

Several practical observations support the change to 90 days. Many comments suggest the need for time to serve multiple defendants, or defendants who seek to evade service. When service is to made by a marshal, 60 days may strain the Marshals Service. A 60-day period may deter requests to waive service, since not much time will remain when the plaintiff learns that service will not be waived.

In addition to recommending a 90-day period, the Subcommittee proposes adding new language to the Committee Note to reflect some of the circumstances that will justify an extension of the time.

The published proposal also amends Rule 4(m) to exclude service of a notice under Rule 71.1(d)(3)(A). There was almost no comment on this proposal. The Subcommittee recommends it for adoption. The Committee Note should carry forward as published, striking an extraneous clause that was inadvertently carried into the agenda book materials from an earlier sketch.

Many of the comments on Rule 4(m) reflected an assumption

that the limit applies to service on a corporation in a foreign country. There are powerful reasons to exclude these cases from Rule 4(m), which does not apply to service abroad on individuals and a foreign state or its subdivision. The Subcommittee's recommendation for publication of a clarifying amendment of Rule 4(m) was discussed later in the meeting.

Rule 16 Scheduling Conferences and Orders: Judge Koeltl described the proposed changes in Rule 16(b).

The proposal continues to allow entry of a scheduling order on the basis of the parties' Rule 26(f) report without a conference. But it emphasizes the value of direct simultaneous communication by deleting the reference to a conference "by telephone, mail, or other means." Telephone conferences remain available. But mail, or other means that do not involve direct simultaneous communication, are excluded.

The time to issue a scheduling order is reduced to the earlier of 90, not 120, days after any defendant has been served, or 60, not 90, days after any defendant has appeared. This acceleration is offset by adding a new provision that allows the judge to set a later time on finding good cause for delay. The Department of Justice has continued to be concerned that the reduced time periods may not be enough to support a meaningful conference, a concern that has been echoed by other comments about the needs of complex cases. The Subcommittee proposes new language for the Committee Note to reflect the circumstances that may show good cause to extend the time, including cases that involve "complex issues, multiple parties, and large organizations, public or private."

New subjects are added to the list of permitted contents of a scheduling order, as well as the Rule 26(f) discovery plan, including preservation of electronically stored information and agreements reached under Federal Rule of Evidence 502. These topics are added to emphasize the importance of paying early attention to them.

Finally, a new provision would recognize that a scheduling order may direct that before moving for an order relating to discovery, the movant must request a conference with the court. This provision reflects practices adopted by local rule or individual judges in many courts. About one-third of judges now do this. But many do not, and the Subcommittee recognizes that some courts may not be able to do it. So this provision simply provides another option, not a mandate.

Discussion began with the question why it is useful to foreclose a scheduling conference by mail or other means that do not involve simultaneous communication among the parties and court. The rule continues to allow entry of the order without any conference at all, relying on the parties' Rule 26(f) report. The initial response focused on the value of allowing entry of the order on the basis of the Rule 26(f) report alone. This can be an effective practice, particularly in "routine" cases in which the judge trusts the lawyers. Some judges would not willingly give up this alternative to a requirement of an actual conference in all cases. But this response did not satisfy the question: "sure, it can make sense to allow entry of the order without any conference. But why limit the means available for having a conference if the judge chooses to have one? The rule text, moreover, does not directly say that there must be simultaneous communication." A further response stated that a "conference" implies simultaneous communication, not, for example, an exchange of correspondence. And it is desirable to emphasize the value of simultaneous communication by deleting the reference to mail or other means.

COOPERATION

Rule 1: Judge Koeltl introduced the proposed amendment of Rule 1 that directs that the rules be "employed by the court and the parties" to secure the just, speedy, and inexpensive determination of every action. This amendment applies Rule 1 aspirations directly to the parties. The published Committee Note observes that effective advocacy is consistent with, and indeed depends upon, cooperative and proportional use of procedure.

The Subcommittee recommends that the Rule 1 proposal go forward without change. The testimony and comments went in different directions. Some urged that "cooperation" be introduced directly into rule text. Others urged that the proposal be abandoned, fearing that although it seems desirable in the abstract it will become the occasion for prompting exactly the sort of behavior it is meant to discourage. "Rule 1 motions" will be made as a strategic means of increasing cost and delay. And still others — including the Sedona Conference — think the proposal gets it just right.

DUKE PACKAGE CONCLUSION

Judge Koeltl concluded the presentation of the Duke Rules Package with thanks to all who have been instrumental in

developing it. Judges Kravitz, Rosenthal, Sutton, and Campbell provided great help. Judge Wood provided extraordinary help as liaison from the Standing Committee, working as if a member of both the Advisory Committee and the Subcommittee. All members of the Subcommittee worked with tireless skill and diligence. Professor Gensler has helped throughout. The Subcommittee, further, operated by seeking consensus on a package that is unanimously endorsed by every member. And every member "has fingerprints all over the product." Judge Koeltl thanked Professor Cooper and Professor Marcus for their tireless and invaluable contributions to the work of the Subcommittee.

A Subcommittee member recalled that Chief Justice Roberts approved the concept of the Duke Conference only with the expectation that it would lead to specific proposals. "All these years later, dealing with these sprawling and diffuse questions, we have done it." The patience, care, and creativity that Judge Koeltl showed "were inspirational."

Another Subcommittee member observed that great care was taken in keeping track of each change, large and small. "The result is reliable."

Another Subcommittee member said that "Judge Koeltl made the almost impossible look easy."

Judge Campbell said that Judge Koeltl was the one whose hard work pulled the Duke Conference together. He enlisted the participants and saw to it that all papers were produced on time. The Conference itself was great. Combing through the record and pulling it all together has been a remarkable accomplishment.

Judge Rosenthal added that this work owes a debt to Judge Scirica and Judge Levi who embraced the concept of the Conference and helped to push forward the importance of relying on empirical data to support Committee action, as well as the importance of listening carefully to the many constituencies the Rules serve. And, of course, Dean Levi must be thanked for helping with arrangements for the Conference itself. And Judge Koeltl was closely engaged with all of this and more, never impatient, always cooperative and proportional.

Judge Campbell noted that several comments on the revised proposals in the agenda book have been received and carefully considered. One comment comes from four United States Senators who remain concerned about adding proportionality to Rule 26(b)(1). Committee members have read their letter with care, as

the other letters also, and have carefully considered their views. The letters are thoughtful. "With some, we do not fully agree." Those who continue to oppose proportionality are not satisfied with the revised version in the agenda book. They do not think it is needed. The Committee thinks it is needed. Four different advisory committees, going back 30 years, have believed it is needed: it was originally added in 1983, encouraged in 1993, and emphasized in 2000. The present Committee, as the Committees that recommended the 1993 and 2000 amendments, continues to believe that the 1983 rule has never really been applied. It is time to renew the effort.

The Committee voted unanimously to recommend adoption of the entire Duke Rules Package as proposed by the Subcommittee.

Judge Campbell expressed the Committee's thanks to Judges Sutton and Gorsuch and Professor Coquillette for attending this meeting to represent the Standing Committee. Thanks as well were expressed to Judge Fogel for representing the Federal Judicial Center. "We hope the rules will prompt more judicial education."

B. Rule 37(e): Failure to Preserve ESI

Judge Campbell introduced the Report of the Discovery Subcommittee by observing that the Subcommittee had met repeatedly since preparation of the revised Rule 37(e) draft presented in the agenda materials. The result of these further deliberations, which included consideration of several outside comments on the agenda-book version, is a still further revision of the proposed rule text. There was not time to revise the Committee Note to reflect the rule text changes. A revised Committee Note will be prepared by the Subcommittee and circulated to the full Committee with the goal of approving final Note language in time for inclusion in the agenda materials for the Standing Committee meeting at the end of May. The task for today is to work on the rule text, allowing for comments on the ways in which the Note might be revised to respond to whatever rule text is approved for adoption.

Judge Grimm presented the Discovery Subcommittee Report. The Report is supplemented by the revised Rule 37(e) text handed out to the Committee.

The first step of the Report is a recommendation that the new Rule 37(e) should replace current 37(e), without carrying forward the current language.

Revising the proposed rule text began at a Subcommittee meeting held the morning after the February 7 public hearing in Dallas. Several meetings were held by conference call after that, culminating in a two and one-half hour call on Tuesday, April 8. A final meeting was held in the evening of the first day of the present Committee meeting. Subcommittee members have given great amounts of time to the project, as have Judges Campbell and Sutton, and also Andrea Kuperman.

Present Rule 37(e) was adopted in 2006 as part of a package of amendments that for the first time expressly brought electronically stored information into Civil Rules texts. It was an attempt to provide a limited safe harbor that some came to see as a limited not-so-safe harbor. It applied only to sanctions "under these rules," leaving inherent power intact. The Note showed that once a duty to preserve arises, there may be a duty to intervene to stop the destruction of ESI by auto-delete functions or by other events.

A panel at the Duke Conference, chaired by Gregory Joseph, made a unanimous recommendation for a comprehensive review of ESI preservation. The concern was that large enterprises have felt forced to over-preserve huge amounts of ESI for fear of spoliation sanctions imposed under the most demanding standards adopted by the most demanding court in the country. The common law of spoliation provided the background — all things are presumed against one who spoliates evidence. But ESI is not like traditional evidentiary materials, whether paper documents or tangible things. Different circuits have developed different approaches to the duty to preserve ESI, although all agree that the duty can arise before an action is actually filed. There are differences in looking to the relevance of the information and the prejudice that may arise from its loss, and different standards of culpability have been adopted. The Second Circuit approved sanctions for negligence or gross negligence, based on a remedial focus: who should bear the loss, how do we level the playing field? The Fifth and Tenth Circuits, on the other hand, allow adverse-inference instructions only if there is enough culpability to support an inference that the lost information was unfavorable to the party who lost it. Organizations that are subject to nationwide jurisdiction have to observe the most demanding preservation regimes that may be imposed.

The Duke Conference panel asked that a rule be adopted. The Subcommittee was charged with developing a proposal. The Dallas miniconference discussed initial sketches addressing these issues.

Repeated attempts to draft a rule defining the duty to preserve failed to find a satisfactory definition. The panel recommendation wanted to establish definitions of when the duty to preserve arises; of the scope of the duty, both backward in time and continuing through the litigation and perhaps beyond; how many custodians should be subject to a "litigation hold"; and still other matters. The further these drafts progressed, the greater the obstacles that were identified. Even articulating the events that might trigger a duty to preserve in anticipation of litigation proved difficult, despite the widespread agreement that the duty can arise before an action is actually filed. The Subcommittee simply could not draft a rule that provided meaningful guidance and at the same time applied fairly to the wide variety of civil cases filed in federal court.

The first conclusion, then, was to rely on the common law to establish the duty to preserve. A new Rule 37(e) should address only the procedural consequences when the duty is breached.

Subcommittee work, after many drafts and repeated discussion in the full Advisory Committee, led to the proposal that was published for comment last summer. Comments and testimony were expected. The message transmitting Rule 37(e) for publication specifically invited comment on five stated questions. These questions asked whether the new rule should be limited to the loss of ESI; whether to retain a provision that allowed "sanctions" without a showing of bad faith when loss of the information irreparably deprived a party of any meaningful opportunity to present or defend against the claims in the litigation; whether the provisions of present Rule 37(e) should be retained; and whether the rule text should attempt to provide definitions of "substantial prejudice," "willful," and "bad faith."

The volume of comments up to the time of the February hearing led to an expectation that as many as 1,000 comments might be addressed to the full set of proposals published in August. In the end, more than twice that number were received.

The comments and testimony persuaded the Subcommittee that the published proposal "is not the best we can do." Several concerns guide the need to adopt a reshaped rule.

There is a great need for a rule to address the consequences of losing ESI. Over-preservation and the lack of uniformity in dealing with loss are real problems. It would be good to deal with the circuit disagreements, even if nothing else can be

accomplished.

It remains important to define responses to failures to preserve ESI that should have been preserved. Over-reactions should be cabined, while preserving needed flexibility. John Barkett generated an encyclopedic review of the case law. This review demonstrates the need to establish a flexible range of responses, a need that is underscored by the prospect that the ESI universe will change greatly in only a few years.

The published rule sought to establish a distinction between curative measures and sanctions. The comments and testimony persuaded the Subcommittee that this distinction would not work well. "ESI is so voluminous that you cannot preserve it all." But the volume of it also makes the inevitable losses likely to be less serious than might seem. Often there are exact duplicates of a source that has been lost. Often a lost source can be retrieved. And often measures aimed to cure the loss will involve steps that also might be viewed as "sanctions." Invoking the list of sanctions in Rule 37(b)(2)(A) also does not work well. These measures properly are "sanctions" in the context of Rule 37(b) because they address violation of a court order. In the context of ESI lost without violating any court order, they seem to serve a remedial purpose. And some of the choices available under (b)(2)(A) do not fit failure to preserve ESI — contempt is not available when there is no court order, and it makes no sense to "stay[] further proceedings until the order is obeyed." The "sanctions" label came to seem inappropriate.

Further problems appeared with the concepts of substantial prejudice and willfulness or bad faith, and with some of the factors listed in proposed 37(e)(2). The provisions designed to address loss of unique tangibles — for example the automobile claimed to have been improperly designed — also caused difficulty. And the attempt to deal with losses caused by forces outside a party's control was not easily understood.

The Subcommittee set out to improve the rule, maintaining as much of the published version as possible. The goal was to refine the expression in response to the comments and testimony.

The starting point remains the same. The revised proposal, as the published proposal, addresses loss of information that should have been preserved in the anticipation or conduct of litigation. And the revised proposal is intended to make it clear that losses of information caused by forces outside a party's control are outside Rule 37(e). The published Note addressed that

clearly, and the revised Note will continue to be clear.

Further revisions pursue the distinction between curative measures and sanctions by refining the approach to curative measures and abandoning any reference to "sanctions." Curative or remedial measures are addressed in two steps. The introduction focuses on restoring or replacing lost information by additional discovery. If that does not work, the court can order measures no greater than necessary to cure prejudice caused by the loss. But it is not required that the court do everything possible to restore or replace the lost information, nor that it do everything possible to cure prejudice caused by the loss. Great flexibility is maintained. Finally, an intent to deprive another party of the lost information's use in the litigation is required for any of four measures: the court's presumption that the lost information was unfavorable to the party who lost it, an instruction that the jury may or must presume the lost information was unfavorable to party who lost it; or dismissal or a default judgment.

This version in part responds to concerns expressed about the dimensions of "curative measures" under (e)(1)(A) of the published proposal. There was a fear that curative measures could come to overlap many of the orders alternatively authorized as sanctions, but without the restrictions that limited sanctions under the published rule.

Greater concerns were expressed in comments dealing with "sanctions" under the published (e)(1)(B). The central provision, (i), allowed sanctions only on finding substantial prejudice and willful or bad-faith loss. Many comments, responding to one of the questions inviting comment, urged that there should be a definition of what is "substantial" prejudice. Still greater concerns addressed the concept of willfulness. Many comments pointed to the great range of definitions that appear in judicial opinions. "Wilful" is interpreted differently in different contexts. In many contexts it means only an intent to do the questioned act, without any need to show an intent to produce the act's consequences. An intent to discard an old smart phone, for example, could be willful even though no thought was given to the loss of information stored in the phone. "Bad faith" also drew criticism. Many comments suggested the two concepts should be combined as "willful and in bad faith," or that at least "willful" should be discarded entirely.

The comments on the alternative in proposed (e)(1)(B)(ii) were equally strong. Although it was intended to dispense with

the requirement of willful or bad-faith conduct only on finding an irreparable defeat of any meaningful opportunity to present or defend against a claim, a consequence far worse than "substantial prejudice," many comments suggested that a court unhappy with the bad-faith requirement would seize on this provision to make an end-run around both the substantial prejudice and willfulness or bad-faith requirements.

The version in the agenda book responded to these comments in several ways.

The revised version carried forward the starting point: the rule applies only to a failure to preserve information that should have been preserved in the anticipation or conduct of litigation.

The next step preserved a separate paragraph (1) for curative measures, but specified that the measures must be no greater than necessary to cure the loss of information. It continued to include examples of curative measures. It did not require a finding of prejudice.

The next step, paragraph (2), addressed situations in which the court finds prejudice, and authorized measures no greater than necessary to cure the prejudice. No element of culpability was required.

The final step, paragraph (3), addressed four specific measures: a court's presumption that the lost information was unfavorable to the party who lost it; an instruction that a jury may or must presume that the information was unfavorable to the party who lost it; dismissal; or default. Any of these measures could be taken only on finding an intent to deprive another party of the information's use in the action.

Comments on the agenda-book version suggested that it did not fully address the challenges made to the published version. They asked what it means to "cure" a loss of information? They questioned the absence of any culpability requirement for curative measures — with no definition of curative measures, this provision could be used to justify powerful measures, such as excluding evidence, defeating the limits of the next two paragraphs. So too, it was noted that no culpability was required to support measures designed to cure prejudice, and that again there were no limiting standards apart from the exclusion of the measures identified in the paragraph that requires an intent to deprive another party of the lost information's use in the

action. And the intent paragraph also caused concerns that it could authorize sanctions based on culpable intent without any showing of prejudice.

The new draft proposed by the Subcommittee addresses these concerns. It limits the rule to settings in which a party "failed to take reasonable steps to preserve" information that should have been preserved. This standard is meant to encourage reasonable preservation behavior. Proportionality is part of the calculus of reasonableness.

The new draft eliminates the separate paragraph covering curative measures for lost information, and instead makes clear in the introduction that the succeeding paragraphs apply only when the lost information "cannot be restored or replaced through additional discovery." The illustrations of additional discovery provided in the abandoned paragraph (1) on curative measures will be explored in the Committee Note, which will be further revised to explore what it means to restore or replace lost information and what is meant by "additional discovery." Additional discovery is authorized by Rules 16 and 26, and includes discovery aimed at determining whether in fact any information was lost. If a source of information was lost, additional discovery may show that the very same information resides in a different source. An e-mail message deleted from the system of one person, for example, may survive intact in another system. Or the court may order discovery under Rule 26(b)(2)(B) from sources that otherwise would be thought not reasonably accessible because of undue burden or cost. The goal is to put other parties effectively back in the position that would have existed if the information had not been lost.

If the lost information cannot be restored or replaced, the next step in the revised proposal is paragraph (1). This paragraph remains exactly the same as paragraph (2) in the agenda book: on finding prejudice, the court may order measures no greater than necessary to cure the prejudice.

Finally, the revised proposal carries forward unchanged as paragraph (2) the agenda-book paragraph (3) provision for information lost because a party acted with the intent to deprive another party of the information’s use in the litigation.

The Subcommittee, both in the agenda book proposal and in its revised proposal, has responded to its own question by limiting Rule 37(e) to the loss of ESI. There is much to be said for adopting a rule that establishes a uniform procedure for loss

of any form of discoverable information. But the loss of a unique tangible object is difficult to capture in a rule. There may be circumstances that justify the ultimate sanctions of dismissal or default even though there was no intent to deprive another party of the use of the object in the litigation. The *Silvestri* case cited in the published Committee Note is an example of the problem. As comments on the published proposal show, there is a risk that any attempt to draft a rule for this problem may open the door to evade the restrictions embodied in other provisions. Beyond that, there is a well-developed body of law for losses of things other than ESI. Further, the abundance of ESI makes it likely that satisfactory ways can be found to work around the loss.

In short, the revised proposal has these features: It is limited to circumstances in which a party failed to take reasonable steps to preserve information that should have been preserved, thus embracing a form of "culpability." The concept of attempting first to cure the loss is maintained by focusing on additional discovery to restore or replace the lost information. If those steps fail, the central focus is on prejudice and measures no greater than necessary to cure the prejudice. The circuit split on serious sanctions is resolved; an intent to deprive another party of the information's use in the litigation is required for adverse inferences, dismissal, and default. Flexibility is the central theme. The court need not order all additional discovery that might restore or replace the lost information. It may, but need not, order all measures that might cure prejudice from the loss. The focus is on what is appropriate in the circumstances, neither too demanding nor too forgiving. Nor must a court impose the most severe sanctions when an intent to deprive is found.

Comments and testimony raised the question whether the new rule will affect the burden of proving prejudice. The answer is that the burden is allocated to the party that has the knowledge that bears on the issue. The party who lost the information generally is in the better position to have some idea of what was lost. The party who wants the information generally is in a better position to explain why information in the category of the lost information may have been important to its case.

The concept of willfulness or bad faith is abandoned. All that remains is an intent to deprive another party of the lost information's use in the action. This intent is required only for a limited range of powerful measures. The court may presume that the lost information was unfavorable to the party who lost it for

such purposes as motion practice, summary judgment, or a bench trial; adverse-inference jury instructions; or dismissal or default.

The requirement of an intent to deprive another party of the information's use in the litigation is designed to supersede the *Residential Funding* decision. That decision allows adverse-inference instructions on finding negligence or gross negligence. Superseding this approach may give comfort that will reduce over-preservation, at least in some measure. And restricting the use of adverse-inference jury instructions carries with it the same restriction on the even more definitively fatal measures of dismissal or default.

Limiting the use of adverse-inference jury instructions invokes a spectrum of instructions. The rule text refers only to an instruction that the jury may or must "presume" the information was unfavorable to the party that lost it. "Presume" is the language of many opinions. But the mental task involved is inference, not the rebuttable presumption of evidence law. This form of instruction stands at one end of the line. The other end of the line involves instructions that address evidence actually introduced at trial. Evidence may be introduced to show the failure to preserve. That evidence may be met by other evidence that explains the failure. The parties may argue about what inferences the jury should draw from all the evidence about the favorable or unfavorable character of the lost evidence. The court might instruct the jury that it is proper to evaluate the loss as suggested by the evidence and arguments. The distinction invoked by the rule text is explored in the Committee Note provided to explain the agenda-book version, which is the same as the Subcommittee's new proposal on this point. The Subcommittee will work further on the Committee Note. There is a proper evidentiary aspect to lost information, something that is not a "sanction." One example is provided by a case in which the defendant introduced a memorandum to show that an employment plaintiff voluntarily quit his job; the plaintiff was allowed to show that metadata went missing from the ESI file for the memorandum.

The "intent to deprive" provision raises another issue: should prejudice be an explicit limitation? That might seem implicit in presuming that the lost evidence was unfavorable, and supported by the inference that deliberate destruction shows awareness that the information is unfavorable. But the Subcommittee concluded that these measures, including dismissal or default, should be available as a deterrent without adding an

explicit prejudice requirement. The Committee Note will say that the court should not dismiss or default simply for deliberate loss of immaterial information. But if there is prejudice — including what may be inferred from the deliberate intent to deprive — dismissal or default is available. The choice invokes discretion, and the Note will suggest limits on the sound exercise of discretion.

The Subcommittee recommends that the list of factors in the published version, and the revised list of factors in the agenda-book version, be abandoned. In the published version, these factors bore both on determining whether information should have been preserved and on determining whether the failure to preserve was willful or in bad faith. In the agenda-book version, the factors bore generally on "applying Rule 37(e)." In addition to the usual problems that attend an incomplete "laundry list" of factors in rule text, these factors seem less important now that "failure to take reasonable steps" has been added to rule text. Reasonableness includes proportionality. Two of the factors are thus made redundant. And reasonableness also reflects another of the factors, the extent of the party's notice about impending litigation.

The Committee Note will be shortened, simplified, and adjusted to reflect the revised proposal. Among other elements, it will explain the "restore or replace" element, along with the related focus on "additional discovery."

Judge Campbell observed that Judge Grimm's thorough report "gave a short version of what happened." The revised proposal continues the progress made by the agenda-book version toward a simpler, more modest rule. The failure to preserve ESI presents many problems. The drafting challenge is great. The difficulties push toward doing less, rather than attempting to do more in the rule. And even in attempting less, we can aim only to get a good rule, not to get a perfect rule. This proposal is a good rule. It can be adopted, and then tested in application. We will learn more from how it works.

A Subcommittee member agreed that the Subcommittee had decided to be satisfied with a more modest approach. There are great limitations on what we can do by rule to alleviate the burdens of ESI preservation. The rule does not define the duty to preserve. Nor could the rule define duties to preserve imposed by state law. The comments and testimony did not say much about how these rules will alleviate the burden of preservation. The Subcommittee followed many paths. Nothing in the rule requires a

court to do anything. All of its provisions are "may." It is an authorization of discretion. And there are limits: there must be a loss of information that should have been preserved, a breach of the duty to preserve; the breach must at least be a failure to take reasonable steps to preserve; and further steps can be taken only if the lost information cannot be restored or replaced. The inquiry passes to prejudice and curing prejudice only if restoration or replacement cannot be accomplished.

Another Subcommittee member began by recalling his reaction on first reading the *Residential Funding* decision: "Oh my, look out." The case itself had nothing to do with spoliation, but it had the potential to wreak havoc. It has. Decisions in the Second Circuit and in its district courts have been inconsistent. There is something woefully wrong with them. We need to establish uniformity, and it is not uniformity in the (non-uniform) Second Circuit approach. And we should observe the separation between evidence law and procedure. Several recent decisions in the district courts show that judges are pausing in the approach to lost ESI because they realize the lost information may be restorable or replaceable, or may be merely cumulative even though it is not restored or replaced. They may wait for trial to decide what to do about the loss, based on the trial evidence. Some courts, attempting to level the playing field, have in the past invoked remedies that tilt the playing field in the opposite direction. We should cure that. The "should have been preserved" element brings in relevance, "content" as well as "intent." The Committee Note should mark the line between evidence and procedure, to avoid tilting the playing field one way or the other. This proposal may not be a perfect rule, but it is far better than the undisciplined case law. "I'm not sure what a perfect rule is." But we can establish a measure of uniformity in approaching the loss of ESI, and "this is a HUGE improvement."

Another Subcommittee member agreed that "it was a hard rule to write, and it will not be entirely comfortable to apply." We want to preserve authority to maintain the integrity of the ESI discovery process, but without going overboard. The Committee Note should make it clear that the rule does not intrude on jury freedom to find the facts. "To avoid open season," the Note should emphasize "replace or restore," and can draw on court help in ordering additional discovery. Measures in response to prejudice will be the exception.

A fourth Subcommittee member described "two realities." First, ESI will be lost. It will be lost a lot in a lot of cases. More often the loss will result from failure to take reasonable

steps than from intentional loss. And reasonable steps are not perfect steps; information will be lost even when reasonable steps are taken to preserve it. Second, all of these problems are case-specific. Subcommittee discussions included specific hypothetical cases, eliciting different intuitions. And even if all members shared common intuitions, "we could not draft them." We depend on the court's discretion. But, while depending on discretion, we can guide it in ways that will achieve greater uniformity. Beyond these realities, the rule can cabin discretion in invoking the most severe sanctions. In this dimension, the Subcommittee talked a lot about remedy, as compared to deterrence and punishment. There is agreement that the principal focus is on remedy, even if not complete agreement on the role of deterrence. "Bad intent is the periphery of the rule. The core is in the preface and in curing prejudice."

An active participant in the Subcommittee process said that the proposal is a fine rule. The limits in the preface — failure to take reasonable steps, and efforts to restore or replace — are impressive. "The Subcommittee work is brilliant."

A fifth Subcommittee member noted that he had come late to the Subcommittee. He was impressed by the seriousness of the attention paid to the testimony and comments, and to the comments on the version in the agenda book. The proposed simplification, focusing on the core things that need to be done, is what we should do. "We cannot write a rule that will deal with all cases."

General discussion began with a reminder that in 2009 Judge Kravitz suggested there might be Enabling Act problems in framing a rule to address pre-litigation conduct. It is "brilliant avoidance" to frame a rule that, rather than attempt to establish an independent duty to preserve, takes as given the duty established by court decisions.

The Committee Note addressing the parties' burdens in arguing whether a failure to preserve caused prejudice, however, was found confusing. "I would fear the burden may shift during the hearing." Nor is it clear whether the preponderance standard applies. It would help to say that a party seeking remedial measures normally has the burden.

The burden question was addressed by noting the difficulty of proving what was in the lost source of information. Imposing a burden on the party seeking to cure the loss "may thwart justice." So it was that every attempt to write a burden

provision proved difficult. "Some courts say where the burden lies. Others are silent." There is this much guidance in the rule: the court must find prejudice to invoke paragraph (1), and it must find intent to invoke paragraph (2).

The response was the same question, reframed: "Do we require the party who lost information to prove the other party was not prejudiced"? If the party who lost the information has the burden it has no way to know what other information is available to the party who may have been prejudiced. "I fear discretion will be a complete lack of discipline. Allocating the burden may determine the outcome."

Another judge reframed the question: "How does a trial judge get through this flexible process? It is very complex. When I start to hear all this, whom do I look to at the starting point, recognizing the burden may change as the hearing moves along"?

The response was the same. "We have not attempted to say where the burden rests, nor when it may shift." The aim is only to draft a modest but broad rule, and to establish uniformity. Another Committee member said that the basic law imposes the burden of proving prejudice on the moving party. But when bad faith is shown, there is either a very low threshold on prejudice, or the burden is shifted.

A Committee member commended the "restore or replace" provision as "an important and good change." The next steps follow — measures no greater than necessary to cure prejudice, and then intent. But if you cannot cure the prejudice by other means, paragraph (2) allows the court to draw adverse inferences, give an adverse-inference jury instruction, or dismiss or default only on finding an intend to deprive another party of the lost information's use in the litigation. Not even reckless loss will support those measures. So if the court does not find the required intent, it will not ask the jury to find the intent. What does the court say to the jury?

One response was that in the (e)(2) situation, the jury has heard what happened — that information was not preserved. An example is proof of the loss of metadata for a document that survives and is introduced in evidence. Even if the loss occurred at a time when there was no duty to preserve, the jury may consider whether the missing evidence would be helpful to a party opposing the party who lost it.

It was noted that the Subcommittee will work to refine the

part of the Committee Note that deals with the forms of jury instructions that may be given when there is no finding of an intent to deprive another party of the lost information's use. This work will consider the later observation that there is such a broad range from negligent to intentional conduct that we should be clear in reflecting on the cases in which a jury may hear evidence on what was lost. There is a range of remedies not circumscribed by a requirement of finding intent under (e)(2).

A Committee member said it is "good not to commoditize, to avoid a one-size-fits-all approach, to tailor reactions to each case." Modesty is a strong mark of intelligence. It is good to encourage a tailor-made approach to each case. But should a greater range of options be made available under (e)(2) when intent is found? It was pointed out that (2) does not require resort to any of the remedies it lists. The Committee Note says explicitly that the court may adopt less severe remedies designed to cure the prejudice, if any, or to otherwise address the party's conduct.

A Committee member asked whether prejudice is required to invoke the severe measures provided by paragraph (2) for a failure to preserve for the purpose of depriving another party of the lost information's use in the action. The response was that to a certain extent, a finding of this intent permits the judge to infer from the intent that the information was unfavorable to the party who lost it. It would be confusing to add an explicit prejudice requirement. The case of deliberate intent without prejudice raises the question of deterrence: should we remove any consideration of deterrence from the choice of remedies? The Subcommittee decided that a need for deterrence might justify even dismissal or default, but not if the lost information is truly inconsequential.

It was pointed out that if the "incompetent spoliator" is an attorney, the court has another remedy by reporting to the state disciplinary authority.

Another Committee member recognized that "the rule presents challenging issues." The proposed draft is in many ways an elegant way of improving on the complexities of the version that was published for comment. And it is good to limit remedies to those that are no greater than necessary to cure prejudice. But what types of loss start you down this path? The draft is not limited to loss of "discoverable" information, nor does it require materiality. Some clarification in the Committee Note would be helpful. It was agreed that the Subcommittee would

attempt to do this.

The same member asked whether restoring backup tapes fits under the preface as additional discovery to restore or replace lost information, or only under paragraph (1) as a measure to cure prejudice? The preface goes beyond determining whether anything was lost. "Replace or restore can be very expensive": should such measures be available without finding prejudice? Should we build proportionality, a "no greater than necessary" limit into the approach to restoring or replacing the lost information? Again the response was that this would be addressed in the Committee Note. "Often you don't know whether there is prejudice until you've had the added discovery." Facing a renewed protest that restoring or replacing can be very expensive, the response was that this is a matter of discretion. The more reasonable the conduct was, the less likely it is that the judge will order extreme measures. Proportionality concerns may persuade the judge to order phased discovery, as many judges do now. "If there is a cost to some steps, we can talk about who pays."

The question whether present Rule 37(e) should be preserved in the text of the new rule was renewed. The value may lie not so much in guiding litigants and courts as in providing a tool for lawyers to use in persuading IT staff to design information systems that facilitate preservation. "Does 'reasonable steps' build in this idea"? It was suggested that something can be built into the Committee Note to reflect this concern — it could be something like the portions of the Note that appear in the agenda book at lines 37-47 and 384-385.

The question whether to limit the rule to loss of electronically stored information also was renewed. The Subcommittee Report lays out powerful reasons for adopting this limit. But "I'm not as confident there are not ESI equivalents to the vanishing car and air bag: there can be unique ESI in unique sources." Not all ESI is redundant. And is the case law on the loss of tangible things in fact less disuniform than the law on loss of ESI, so less in need of a uniform rule? A further concern is that a single case may involve loss both of ESI and of a tangible thing: do we want to leave it open to take different approaches to the different losses?

This question was characterized as a reflection of the reasons that make it unwise to attempt to write a rule for all situations. Examining the cases equivalent to the lost car failed to find any where there was not bad faith and a really critical

loss of ESI. At the same time, it must be recognized that some cases may present serious questions whether a particular bit of lost information qualifies as ESI — our running example has been a printout of a vanished e-mail message.

A participant confessed to have begun by wanting a rule to address all forms of information. But the complications are great. If the proposed rule is adopted, "we will monitor it closely." If it works, we can think seriously about extending it to other forms of information. If it does not work, we will look at it for that reason.

Another participant asked when the proposed rule would permit "issue sanctions, or evidence sanctions." Can the court exclude testimony as a remedy without finding the intent required for paragraph (2) measures, or — shades of Rule 37(b)(2)(A)(i) — direct that designated facts be taken as established? The Committee Note should address this. It was responded that the Note calls these steps "measures." But are they available without a showing of intent? Can the court forbid a witness from testifying to the contents of an e-mail message he wrote and lost when there is "no mens rea"? The Committee Note says, and is expected to say still, that anything that is equivalent to dismissal or default requires intent.

A similar question asked whether taking a matter as established can extend to taking "liability" as established? It was agreed that such a measure is equivalent to default, and is available only on finding the intent required by paragraph (e)(2).

The Subcommittee agreed with a separate suggestion that the Note should make clear that (e)(2) measures should not be punitive.

Brief discussion led to agreement that the "factors" in the published rule and the modified list of factors in the agenda-book proposal would be deleted from rule text. Some discussion of them may be provided in the Committee Note.

The Committee voted unanimously to approve the substitute draft proposed by the Subcommittee at this meeting. A revised Committee Note will be prepared and promptly circulated to the Committee.

The final question was whether approval of the new rule text should be for adoption or for republication. The sense of the

Subcommittee is that republication is not necessary. "We have accomplished the purpose of publication and have had the full benefit of public input. Every issue has been fully explored." The published proposal, moreover, gave full notice of everything that remains in the rule. The new version still applies only to a failure to preserve information that should have been preserved. The first step still is to try to restore, the equivalent of permitting discovery in the language of the published proposal. The next step continues to address prejudice. And the new rule continues to limit the *Residential Funding* decision. Beyond that, "this has been a long process." There is a real need for clarification and uniformity. It is better to avoid further delay.

Agreement with this view was expressed. "The rule text is within the four corners of the published proposal." A revised Committee Note that reflects the new rule text does not have to be republished. When other proposals have been republished it has been because the revised version involves a new factor that was not at all involved in what was published.

The Committee unanimously agreed that the recommendation should be for adoption without republication.

Judge Campbell concluded the discussion with praise for the Subcommittee. "It has been a great Subcommittee." It included a balance of lawyers "on both sides of the v." The judges also did great work. Thanks are due from all for their substantial work.

C. Rule 84

Judge Pratter presented the Report of the Rule 84 Subcommittee.

The Subcommittee recommends approval of the published proposal to abrogate Rule 84 and all of the Rule 84 Forms. Form 5, the request to waive service, and Form 6, the waiver, would be carried forward by amending Rule 4(d) to incorporate them.

"The Forms from 1938 should be thanked for their service and retired."

A number of comments, especially many from the academy, reflect a wish that the Forms remain. The hope is that people will return to them and use them. But there is little evidence of actual use. And there are many readily available sources of excellent forms.

Another concern is that the Forms are part of the debate about the consequences of the Supreme Court decisions in the *Twombly* and *Iqbal* cases.

The Subcommittee continues to believe, for reasons reflected in its Report, that abrogation will reflect current reality. The Committee cannot be in the business of keeping official Forms up to date in shapes that will be useful in today's litigation world.

The recommendation to recommend for adoption the published Rule 84 proposal, and the related Rule 4(d) proposal, was unanimously approved.

D. Rule 6(d)

A modest revision of Rule 6(d) was published for comment in August, 2013. The change corrects an unintended ambiguity created by a style choice to allow 3 added days to respond "after service" by specified means. This formulation could be read to allow the 3 added days for periods set for action by the party who makes service. It was intended to carry forward the original meaning that allows the 3 added days only for a party who is served. The correction is simple: "after ~~service~~ being served * * *."

Three written comments supported the proposal.

The Committee unanimously approved the amendment for adoption. The timing for the next steps should be determined by the Standing Committee in light of the prospect that further changes may be made in Rule 6(d). Last January the Standing Committee approved for publication a revision that would exclude service by electronic means from the categories of service that provide 3 added days to respond. That proposal may be published for comment this summer if the advisory committees for other rules that have similar 3-added-days provisions recommend publication of parallel changes. It also is possible that these questions will be held back for a determination whether to recommend withdrawal of the 3-added-days provision entirely, or for some other modes of service. There is no urgency about the "being served" amendment. The ambiguity was identified in a law review article, and there is no indication that it has caused any significant problems in actual practice. The advantages of accomplishing all potential revisions of Rule 6(d) in a single package are real.

E. Rule 55(c)

A modest revision of Rule 55(c) was published for comment in August, 2013. The change corrects an ambiguity by adding one word: "The court may * * * set aside a final default judgment under Rule 60(b)." Rule 60(b) authorizes relief from "a final judgment." Rule 54(b) provides that any order or other decision that adjudicates fewer than all the claims among all the parties "may be revised at any time before the entry of a judgment" adjudicating all claims among all parties. Present Rule 55(c) is meant to govern only relief from a final default judgment, whether finality is achieved by an order under Rule 54(b) to enter a partial final judgment or results from complete disposition of all claims among all parties. Courts have reached this result, but often have had to struggle through the three rules to understand that it is the proper result. The amendment makes the point clear, sparing future parties and courts from the need to work through to the correct answer.

Three public comments supported the proposal.

The Committee unanimously approved the proposal for adoption.

II PROPOSALS FOR PUBLICATION

A. Rule 4(m)

As noted in discussing the Duke Rules Package, many comments on the proposal to reduce the time set by Rule 4(m) for serving the summons and complaint suggested that even 120 days are not enough to accomplish service abroad, whether under the Hague Convention or otherwise. Most of these comments were puzzling. By its express terms, Rule 4(m) "does not apply to service in a foreign country under Rule 4(f) or 4(j)(1)." The apparent source of the confusion is that Rule 4(f) governs service on an individual at a place not within any judicial district of the United States, and Rule 4(j)(1) governs service on a foreign state or its political subdivision, agency, or instrumentality in accordance with 28 U.S.C. § 1608. Service on a corporation, partnership or other unincorporated association outside any judicial district of the United States is governed by Rule 4(h)(2). Rule 4(h)(2) in turn directs service "in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under (f)(2)(C)(i)." This sequence of cross-references could be construed to mean that service under Rule 4(h)(2), "in any manner prescribed by Rule 4(f)," is service under Rule 4(f). Then the present 120-day limit, and the proposed 90-day limit, would not apply. That construction makes sense; there is no reason to think that service abroad can be any more expeditious when service is to be made on a corporation rather than an individual. But that conclusion is not manifestly required, and the comments suggest that many lawyers have not thought of it. One thoughtful comment pointed to the uncertainties in Rule 4, suggested that courts that have confronted the problem of serving a corporation in another country have reached the right result, albeit without clear analysis, and urged that Rule 4(m) be amended.

The Committee unanimously recommended publication of an amendment to Rule 4(m): "* * * This subdivision does not apply to service in a foreign country under Rule 4(f), 4(h)(2), or 4(j)(1) * * *."

B. Rule 82

The Standing Committee at the meeting last January approved publication of a proposal to amend Rule 82 to reflect amendments of the statutory venue provisions governing admiralty or maritime actions. New 28 U.S.C. § 1390(b) provides that apart from the transfer provisions, the venue provisions of Chapter 87 do not govern the venue of a civil action in which the district court

exercises the jurisdiction conferred by § 1333 over admiralty or maritime claims. It was agreed that the message transmitting the amended rule for comment would ask whether the rule should continue to refer to 28 U.S.C. § 1391. Further reflection prompted the need for further consideration.

Rule 82 serves to make it clear that the Civil Rules do not "extend or limit the jurisdiction of the district courts or the venue of actions in those courts."

The second sentence of Rule 82 was added to reflect the well-established rule that the general venue statutes do not apply to admiralty or maritime actions, apart from the transfer provisions. This specific statement reflects potential ambiguities about the exercise of admiralty or maritime jurisdiction. Some admiralty and maritime claims are inescapably admiralty or maritime claims; as to them there is no ambiguity. But other claims, governed by the "saving to suitors" clause in 28 U.S.C. § 1333, may be brought either as admiralty or maritime claims within § 1333 jurisdiction or as common-law claims that can be brought in federal court only by asserting a different basis for jurisdiction. Rule 9(h) allows a pleading that states such a claim to designate it as an admiralty or maritime claim. But the merger of the admiralty rules into the general Civil Rules in 1966 made an action asserting an admiralty or maritime claim a "civil action." The remedy was to add the second sentence, stating that an admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391-1393. Section 1393 was deleted from Rule 82 when § 1393 was repealed.

The venue amendments enacted in 2012 repeal § 1392. If nothing else, Rule 82 must be revised to strike the reference to § 1392.

That leaves the question whether to continue to refer to § 1391. The proposal approved for publication in January was conservative. It retained much of the present language of Rule 82, revising it only to provide that an admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of §§ 1390-1391. The snag is that § 1390(b) twice refers to actions under § 1333 as civil actions. It seems at best incongruous to say in the rule that an admiralty or maritime claim is not a civil action for purposes of § 1391, and flatly inconsistent with § 1390(b) to say it is not a civil action for purposes of § 1390.

The revised version proposed in the agenda book was this:

"An admiralty or maritime claim under Rule 9(h) is an exercise of the jurisdiction conferred by 28 U.S.C. § 1333, including for purposes of 28 U.S.C. § 1390." The Committee voted to recommend this revised version for publication.

Subsequent consultation with Professor Kimble, the Style Consultant, suggested a clearer version: "An admiralty or maritime claim under Rule 9(h) is governed by 28 U.S.C. § 1390." That version will be included with the recommendation to the Standing Committee.

III. INFORMATION

Judge Dow delivered a report on the preliminary work of the Rule 23 Subcommittee. The Subcommittee met in Phoenix after the public hearing on the published rules proposals. The sense of the Subcommittee is that it is timely to start considering possible revisions of Rule 23. Many developments that affect class actions have occurred since Rule 23 was last revised. The Class Action Fairness Act and a number of Supreme Court interpretations of Rule 23 have affected ongoing practice in many ways.

The Subcommittee has considered a number of possible topics, with the sense that a manageable project should not attempt to address every issue that might be identified. It has worked up a list that identifies three topics as potential "front burner" subjects, with another half dozen as potential further subjects.

One subject is presented by settlement classes. Some work identifying issues within this category has already been done. the issues include criteria for certifying a settlement class; cy pres provisions; criteria for approving a settlement; and a matter currently on the agenda of the Appellate Rules Committee, the responses appropriate when an objector appeals approval of a class settlement and then seeks to dismiss the appeal, perhaps because of an agreement with proponents of the approved settlement. Most class actions settle. Consideration of settlements seems desirable, including work with the Appellate Rules Committee on settlements pending appeal.

Issues classes present a second set of issues. Different circuits treat Rule 23(c)(4) differently. Serious questions arise from integration of Rule 23(c)(4) with the predominance criterion of Rule 23(b)(3).

Notice to class members also presents interesting questions. Contemporary technology presents many alternative possibilities

for accomplishing notice. Different means may be consistent with due process as an abstract matter, and may in fact be more effective than some contemporary modes of accomplishing notice.

After these issues come several that have not percolated as much in initial Subcommittee deliberations and that may not be appropriate for present action. Among those that have been identified, several seem to present both attractive opportunities to improve the rule and equally daunting risks of interfering with current practices that may be better than formal rule provisions could manage. These include: (1) the extent to which consideration of the claims on the merits should be explored at the certification stage; (2) implementation of the predominance and superiority requirements in Rule 23(b)(3); (3) the extent to which a mandatory (b)(2) class for injunctive or declaratory relief should extend to monetary awards; (4) the questions of commonality raised by the *WalMart* decision, including related questions of consolidation by other means; and (5) amending the language that prompted the *Shady Grove* ruling that allows certification of a class to enforce state-law claims that state law excludes from class recovery.

It was noted that the Supreme Court continues to take cases involving class actions, but that this is not a reason to abandon work on Rule 23.

The prospect that people often junk class-action notices without reading them was noted.

The next step for the Subcommittee will be to generate a more concrete list of topics for consideration at the fall meeting. More detailed work can be launched after that; when the work has advanced to an appropriate stage, it is likely that a miniconference will prove helpful. No rule text drafts have been prepared, apart from an initial sketch of small changes that would supersede the textual foundation for the Shady Grove result.

A thank you

The Committee expressed gratitude and appreciation to Dean Klonoff and the staff of the Lewis and Clark Law School for their extensive and gracious efforts in hosting the Kravitz symposium and the Committee meeting.

Adjournment

The meeting adjourned. The next meeting will be on October 30 and 31 in Washington, D.C.

Respectfully submitted,

Edward H. Cooper
Reporter