MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 3, 2016

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on November 3, 2016. (The meeting was scheduled to carry over to November 4, but all business was concluded by the end of the day on November 3.) Participants included Judge John D. Bates, Committee Chair, and Committee members John M. Barkett, Esq.; Elizabeth Cabraser, Esq.; Judge Robert Michael Dow, Jr.; Judge Joan N. Ericksen; Parker C. Folse, Esq.; Professor Robert H. Klonoff; Judge Sara Lioi; Judge Scott M. Matheson, Jr.; Hon. Benjamin C. Mizer; Judge Brian Morris; Justice David E. Nahmias; Judge Solomon Oliver, Jr.; Virginia A. Seitz, Esq.; and Judge Craig B. Shaffer. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge David G. Campbell, Chair, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge A. Benjamin Goldgar participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated (by telephone). The Department of Justice was further represented by Joshua Gardner, Esq.. Rebecca A. Womeldorf, Esq. (Rules Committee Officer), Lauren Gailey, Esq., and Julie Wilson, Esq., represented the Administrative Office. Judge Jeremy Fogel and Dr. Emery G. Lee attended for the Federal Judicial Center. Observers included Joseph D. Garrison, Esq. (National Employment Lawyers Association); Alex Dahl, Esq.(Lawyers for Civil Justice); Professor Simona Grossi; Brittany Kauffman, Esq. (IAALS); William T. Hangley, Esq. (ABA Litigation Section liaison); Frank Sylvestri (American College of Trial Lawyers); Derek Webb, Esq.; Ted Hirt, Esq.; Ariana Tadler, Esq.; John Vail, Esq.; Valerie M. Nannery, Esq.; Henry Kelston, Esq.; and Julie Yap, Esq.

HEARING

Business began with a hearing on proposed amendments published for comment in August 2016. Judge Bates announced the time that would be available to each witness, and thanked them all for attending and providing their insights and suggestions.

Eleven witnesses testified. The hearing ran through the morning to noon. A full transcript is available at uscourts.gov.

COMMITTEE MEETING

Judge Bates began the Committee meeting by introducing new member Judge Sara Lioi of Akron in the Northern District of Ohio. He also welcomed Judge David G. Campbell, who is returning to Committee meetings in his new role as Chair of the Standing Committee. Judge A. Benjamin Goldgar is the new liaison from the Bankruptcy Rules Committee. And Lauren Gailey, the new Rules Law

Clerk, is attending her first Civil Rules Committee meeting.

Judge Bates reminded the Committee that proposed amendments to Rules 5, 23, 62, and 65.1 were published for comment last August. The Committee will consider all the testimony and comments; the work will start with review in the Rule 23 Subcommittee, and in the Rule 62 Subcommittees if there is a substantial level of comment on Rules 62 and 65.1. He also noted that the Rule 65.1 proposal "came about late in the game." Discussion in the Standing Committee of amendments to Appellate Rule 8 that were proposed to mesh with the Rule 62 proposals suggested the value of making parallel revisions to Rule 65.1. Publication was approved by the Standing Committee, subject to this Committee's action by an e-mail vote that approved publication.

Judge Bates also noted a misadventure that occurred on the way to implementing the amendment of Rule 4(m) to add Rule 4(h)(2) to the list of service provisions excluded from the 90-day presumptive limit on the time to serve. The amendment was published for comment, approved, and adopted by the Supreme Court in a form that failed to take account of the December 1, 2015 amendment that added service of a notice under Rule 71.1(d)(3)(A) to the exemptions. There was never any intent to delete the exemption for Rule 71.1(d)(3)(A) notices. It was hoped that because nothing had been done to strike Rule 71.1(d)(3)(A) from Rule 4(m), the back-to-back amendments could remain in effect. But the Office of Law Revision Counsel has concluded that, assuming approval of the 2016 proposal, the safe course will be to show Rule 4(m) without Rule 71.1(d)(3)(A) in rule text as of December 1, 2016, with a footnote pointing out that the exemption for Rule 71.1(d)(3)(A) notices has not been removed. The correct full rule text will be submitted to the Judicial Conference in March 2017, with the expectation that it can be transmitted to the Supreme Court and will be adopted in time to become part of the official rule text on December 1, 2017. This problem illustrates the risk of inadvertent oversights when amendments of the same rule are pursued in close sequence. New administrative systems will be adopted to guard against like mistakes in the future.

Judge Bates further reported that the September Judicial Conference meeting approved the Expedited Procedures and Mandatory Initial Discovery Pilot Projects. Current developments in these projects will be discussed later in the meeting.

Ongoing efforts to educate bench and bar in the 2015 discovery amendments were also described. Two FJC workshops have been devoted to them, emphasizing the practical skills of case management more than the details of the rules texts. Presentations have been made at several circuit conferences. John Barkett and Judge Paul Grimm

are involved in an ABA webinar. And the discovery rules are included in the topics covered by an ABA road show on motion management by judges.

April 2016 Minutes

The draft Minutes of the April 2016 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

Report of the Administrative Office

The Administrative Conference of the United States is studying appeals to the courts in Social Security cases. They are concerned by disparate and at times high rates of reversals in different courts around the country. A subcommittee is considering a recommendation to suggest a court rule to establish uniform practices. But consideration also is being given to the prospect that "judicial education" may be an appropriate means of addressing whatever problems may be found.

The immediate question is whether it would be desirable to become involved with the Administrative Conference while their work remains in its early and mid-stream phases. The Deputy Director of the Administrative Office and the Counselor to the Chief Justice are members of the Administrative Conference and could be a natural communications channel.

Discussion began by observing that the Committee has long been wary of departing from the general practice of focusing on transsubstantive rules. Adopting subject-specific rules, carving out what may seem to be special interests, involves special risks. It may be difficult to acquire sufficiently deep knowledge of specific problems in particular substantive areas. Starting down this road will inevitably generate requests to adopt other substance-specific rules for other topics.

One way to avoid the substance-specific problem would be to adopt a more general provision. During the work that led to the 2010 amendments of Rule 56, the Rule 56 Subcommittee considered the possibility of adapting Rule 56 — or perhaps a new Rule 56.1 — to cover review on an administrative record. The standard of review generally looks for substantial evidence on the record considered as a whole. Only unusual circumstances will call for taking new evidence in the reviewing court; district courts, when they are the first line of review, function in much the same way as a court of appeals does when it is the first line of review. The question was put aside as ranging beyond the purposes that launched the Rule 56 project, and from a sense that courts are managing well as it is.

This approach could be revived. A rule could address all review on an administrative record, if further study shows that a common approach is suitable. The proposal might be limited to review of federal administrative agencies, perhaps with some questions about distinguishing agencies from executive-branch entities. Or it might be broadened to include the special circumstances that may bring review of a state administrative decision on for review by a federal court on the state agency's record. So too it might be appropriate to consider the question whether review on ERISA records might be included, or even proceedings to confirm or set aside an arbitral award. The project, in short, could be expanded, but also could be confined to first-line review of traditional federal agencies.

General discussion followed, addressed to uncertainties about identifying the courts with unusually high reversal rates on Social Security review. There also was uncertainty as to the criteria that might be used to determine what reversal rates might be appropriate. The idea that a Civil Rule might undertake to articulate a standard of review, whether for a particular agency or more generally, was thought unattractive.

The discussion closed with agreement that Judge Bates and Rebecca Womeldorf should consider further the question whether it may be desirable to find a means of informal consultation with the Administrative Conference while their work remains in a formative stage.

Five Year Committee "Jurisdiction" Review

Judge Bates introduced a Questionnaire provided by Administrative Office Director Duff that, once every five years, asks for a review of Committee jurisdiction. The answers to the questions seem straight-forward for the Civil Rules Committee. But Committee members are urged to review the questions, and to send on to Judge Bates any thoughts that may suggest a non-routine answer. All suggestions and questions are welcome.

Rule 30(b)(6)

Judge Bates introduced the Rule 30(b)(6) discussion by noting that the Rule 30(b)(6) Subcommittee has been hard at work since it was appointed. Its work has included two conference calls; Notes on the calls are included in the agenda materials. Rule 30(b)(6) was studied carefully ten years ago, in response to a detailed memorandum provided by a New York State Bar committee. The conclusion then was that although there may be problems in the way Rule 30(b)(6) is implemented, they do not seem amenable to effective amelioration by new rule text. Questions have continued

to be raised by bar groups, however. The most recent submission came from a number of members of the ABA Litigation Section. Their request for study is not a Section recommendation, but it details several questions that have persisted over the years. The immediate question is whether there is a sufficient prospect of developing helpful rule amendments to justify continued work by the Subcommittee.

Judge Ericksen introduced the Subcommittee Report by emphasizing, in bold and capitals, that no decisions have been made. A set of detailed Rule 30(b)(6) provisions is included in the agenda materials. But "this is a pencil-scratch draft." The Subcommittee has been at work only for a short while. But there have been repeated cries of anguish over the years. "Are there things that judges do not see?" The Subcommittee believes that continued study is worthwhile, recognizing that it may lead to recommendations for big changes, for modest changes, or no rule-text changes at all.

The inquiry will include finding out what is going on at the bar. Apart from traditional law review literature, it will be useful to find out what lawyers are saying to lawyers through CLE programs. Other sources of lawyer information also may be found. Do they show a troubling level of gamesmanship?

Professor Marcus introduced the draft provisions by emphasizing again that they are all tentative. Outreach to the profession may help. And it may help to look back at the information gathered more than a decade ago. A list of possibly promising ideas was developed. Bar groups were asked to comment. The detailed summary of the comments remains available and will be studied. Repeating the outreach process may again be useful.

As already suggested, it will help to get a better fix on CLE materials. Case law will be studied, including cases dealing with the circumstances that might justify treating a witness's testimony on behalf of an entity as the entity's own "judicial admission." A survey of local rules will show whether there are any that deal with the kinds of questions that have been raised by bar groups. It also may be possible to find standing orders that address some of these questions. One example is included in the agenda materials.

The Subcommittee has brought focus to its initial work by developing a list of 16 questions, set out at pages 101 to 103 of the agenda materials. Many of them derive from the suggestions of bar groups. These issues are tested by the tentative rules drafts.

One question is whether providing new specific rule text is an effective way to address these questions. An alternative approach,

sketched at the end of the rules drafts, is to emphasize case management by minor revisions of Rule 16(b) or Rule 26(f).

A Subcommittee member said that the work already done shows there are recurring problems that increase cost and delay. Unlike many problems, these do not seem to come to courts often in forms that generate published opinions. "At least in commercial litigation the problems arise all the time." And when the problems do get to a judge, the responses are not uniform. "But it is hard to know whether we can make it better by rule." The list of issues includes many that deserve careful thought. Rules, or default rules, could save a lot of the time that lawyers burn through now. Continuing to develop specific rule language is a good way to test the possibilities.

Judge Ericksen directed discussion to a specific question framed by alternative drafts at page 110 of the agenda materials. Both deal with submitting exhibits that may be used at the deposition before the deposition happens. The first alternative requires the party noticing the deposition to provide the deponent organization "all" exhibits that may be used. The other simply says that the party noticing the deposition "may" provide exhibits, and that if exhibits are provided the organization must prepare the witness to testify about the exhibits or, alternatively, the topics raised by the exhibits. Either alternative may help to make clear the nature of the "matters" specified for examination in the notice. And either could reduce the risk that the designated witness will be ill-prepared.

A related question was asked: need this part of the rule address requests that the witness produce documents?

A Subcommittee member observed that most Rule 30(b)(6) opinions deal with claims that the witness has not been adequately prepared. Poor preparation may flow from notices that list too many topics, or from poor definition of the topics. Providing exhibits in advance will clarify the matters for examination. But requiring advance notice of all documents may defeat the opportunity to use surprise to advantage. The permissive alternative, on the other hand, simply blesses and emphasizes something that a party can do now, and may wish to do to achieve the advantages of clarity and better preparation.

The alternative drafts for advance notice of deposition exhibits were characterized as "a big change," with a question whether there is any information about this practice? Both has it been done, and has it been done successfully?

Professor Marcus observed that the more detail we build into

the rule, the more elaborate it will become. Both of the drafts on providing advance notice of exhibits include a provision for submission a definite time, not yet specified, before the deposition. Other drafts include time periods, as for objecting to the notice. "If we have successive time periods, we get into increasing regimentation." These potential complications underscore the importance of getting a sense whether Rule 30(b)(6) is causing problems across the board. And they likewise underscore the need to consider whether other approaches may be better than attempting detailed regulation by rule text.

A similar observation was that rule provisions can help by provoking occasions for the parties to meet and confer.

The concern about poor preparation of witnesses designated to testify for the organization was met by a counter: Often the party that notices the deposition is poorly prepared. "Can we shape a rule to encourage preparation on both sides?"

The general question recurred: "There are problems. But are there uniform answers? Or is it better to leave them to resolution on a case-by-case basis?"

A Subcommittee member responded that there is room for both approaches — rules provisions can address the most common problems, while case management also should be encouraged. "Tossing it amorphously into Rule 16(b) for discussion early in the case is not likely to work for all cases." But it can help a lot when there is a hands-on case-managing judge, working with lawyers who can develop procedures for resolving future problems.

Another Subcommittee member observed that there are many issues. "Many other Civil Rules have changed since Rule 30(b)(6) was born." What does the experience of Committee members show?

One way to ask how other rules fit with Rule 30(b)(6) is to ask whether it is different enough from other discovery rules that it should be applied differently to nonparties.

The question of local rules recurred. A judge member noted that he did not know of any local rules, but that he raises the Rule 30(b)(6) question in scheduling conferences.

Another Committee member said that he sees many Rule 30(b)(6) depositions as a litigator, in many courts around the country, and has not encountered any local rules.

The Subcommittee noted that it does know of one standing order used for Rule 30(b)(6) depositions by Judge Donato in the Northern

District of California. It sets a limit of 10 matters for examination, specifies the duration of examination of each person designated, addresses the issue of combining the deposition of the witness for the organization with deposition of the witness as an individual, and specifies that the designated witness's testimony is never a "judicial admission." But this may be the only judge in that court that follows that practice.

The same member also said that the draft for making objections that appears on page 109 of the agenda materials "seems a really nice innovation." An objection will trigger a meet-and-confer session. The initial scheduling conference occurs too early to enable the parties to anticipate the problems that may arise. A system that encourages a meet-and-confer is a good thing.

Another Committee member noted the concern that the objection procedure and the pre-deposition submission of exhibits will delay the deposition by 30 to 90 days. Often Rule 30(b)(6) depositions are designed to set the foundation for other discovery, and should occur early in the litigation. Delay here will lead to delay in other discovery. So time is allowed to make an objection after the notice is served. Then time must be available to meet and confer. Then time may be required for court assistance in ironing out disputes the parties cannot manage to work out on their own.

One of the draft provisions prohibits deposition questions that ask for an opinion or contention that relates to fact or the application of law to fact. This language is drawn from Rule 33(a)(2), but as prohibition rather than permission. The aim is to channel contention discovery into interrogatories or requests to admit. The need arises from reports that Rule 30(b)(6) is often used to attempt to get lay witnesses to bind an organization to legal positions. A Committee member agreed, stating that his office often sees Rule 30(b)(6) used as contention interrogatories would be used.

Judge Campbell agreed that "these are recurring problems. We could not find answers ten years ago. Rule 30(b)(6) depositions occur in a majority of my cases — frequent use suggests they must be useful." There seem to be a lot of conferences among the lawyers, but they seem to figure out how to solve their problems without coming to the court. "I see one or two of these disputes a year." It would be good to be able to address these problems in a way that is not case-specific. But it is difficult to know how often rule text can successfully do that.

A Subcommittee member suggested "we may well come out of this concluding to leave it alone." But the topic has been raised in part because of the experience "of lawyers like me," and in part

because of repeated entreaties from bar groups. We know Rule 30(b)(6) is useful. We know there are headaches. And we know that, after howls of protest, lawyers struggle to work out their disputes and often succeed. A simple example is provided by the questions of how to count a Rule 30(b)(6) deposition with multiple witnesses against the presumptive limit on the number of depositions, and how to apply the 7-hour limit, whether to each witness or to the organization as the single named deponent. The Committee Notes from earlier years do not provide clear guidance. The rule could, for example, provide that every 7 hours of deposition time counts as a separate deposition against the presumptive limit to 10 depositions. That, in turn, would reduce the pressure to name only a few witnesses for the organization for the purpose of reducing the total amount of deposition time. A rule also could address the problem of questions on matters not described in the notice.

A judge observed that the problems of counting numbers of depositions and hours comes up between the parties. He has never had the question presented for resolution by the court.

Reporter Coquillette observed that the advisory committees often face the question whether reported problems are "real" problems in the sense that they recur frequently. Some guidance can be found in collective committee experience. And help also can be sought from the Federal Judicial Center. "This is something the FJC could look at." Emery Lee responded that the kinds of problems reported with Rule 30(b)(6) rarely rise to the docket-sheet level. It might be possible to learn something useful from an attorney survey, but it is really difficult to do that.

Another Committee member suggested that it might be useful to look at state laws.

Judge Ericksen responded that these difficulties provide the motive to find out whether anything can be learned by surveying CLE program materials. And she asked whether there are yet other problems that are not covered by the drafts.

One suggestion was that, in part inspired by some state practices, it is common to ask whether the rule should require the organization to designate the "most knowledgeable person" as its witness.

Joseph Garrison, speaking as liaison from the National Employment Lawyers Association, reported an "optimistic view" of Rule 30(b)(6). It is used all the time in employment cases. "We never take problems to the court." To be sure, "employment cases are not big commercial litigation," but they make up something on the order of 15% of the civil docket. NELA gives many seminars on

Rule 30(b)(6); they will be happy to share these materials with the Committee as part of the survey of what CLE programs show.

Rule 30(b)(6) is used to start discovery, to get it all done in the least expensive way. Individual employee plaintiffs live in a world of asymmetrical information. In this world, the draft that provides for objections to the deposition notice is a bad idea. "It would take us back before the days of the employment-case discovery protocol." "We learn a lot quickly if we have effective discovery early in the case." The plaintiff has no documents and cannot be made to show there is a claim before having an opportunity for discovery.

Mr. Garrison further observed that if the Committee finds a dearth of local rules, that is likely to be a sign that there are not many problems. And the deposition testimony can be used at trial, but it is subject to impeachment — it does not bind the organization. "It is rare for a judge to deny a chance to correct the record." In response to a question, he agreed that it can be desirable to allow supplementation of the designated witness's deposition testimony. The question arises when an attempt is made to bind the organization by the testimony — that's when leave to supplement is requested and is allowed. In response to a question whether allowing supplementation encourages sloppy preparation of the witness, he said "we prepare our witnesses." Supplementation issues do arise with "I don't know" responses, often when the response is met by asking whether there is a way to find out an answer. Often the answer is that yes, there is a way to find out. Then there is supplementation. Designated witnesses in individual employment cases should be well prepared. It may be different in big commercial cases.

Responding to a further question, he said that reasons for the "I don't know" responses sometimes arise from poor notices that do not adequately designate the matters for examination. "Sometimes it is a tactic to not prepare." If you go to court, the court wants the parties to work it out. The lawyers themselves often want to work it out. "The point is to have an efficient deposition. Rule 30(b)(6) is efficient." But "you're not going to cure bad lawyers by a rule."

Responding to another question, Mr. Garrison said that Connecticut state practice has no presumptive limit on the number of depositions, and that may explain why they do not have fights about whether to count an organization deposition according to the number of designated witnesses. One example is provided in a letter he prepared for the Committee, a case in which the employer claimed that the decision to discharge the plaintiff was made by a committee of ten. Counting each committee member's deposition

separately would exhaust the presumptive limit set in Rule 30(a)(2)(A)(i).

He responded to another question by agreeing that there are some useful ideas in the Subcommittee drafts. But it is not clear that they need to be incorporated in rule provisions.

Further discussion echoed the point that a party noticing a Rule 30(b)(6) deposition is trying to figure out what sources of information exist, and may supplement that by asking for production at the deposition. The lower-level provision that would simply allow the party noticing the deposition to deliver exhibits before the deposition by a stated time before the deposition leaves an open question: suppose the exhibits are delivered after that time, but still before the deposition? One answer was that they still could be used, but do not command as much effect in arguments whether the witness was properly prepared. This does tie to the adequacy of preparation as measured by the clarity of the matters designated for examination.

A Subcommittee member added that the draft rules crystallize the thought. A party is free now to provide exhibits in advance of the deposition. Putting it in the rule tells people they get the advantage of greater particularity by taking this step.

This discussion led to a further question: The rule provides that the party noticing the deposition "must describe with reasonable particularity the matters for examination." Why does it not work? A judge responded that he gets a lot of fights over claims that the notice is too vague, too broad. Perhaps Rule 30(b)(6) should include a reminder of Rule 26(g) obligations. "I get notices that the lawyer says were simply designed to start a conversation." And they may come 30 days before the discovery cutoff. "We need to figure out a way to get the gamesmanship out of it." A practicing lawyer added that talking with other lawyers, he hears stories of notices that specify 150 matters for examination and failed attempts to negotiate it out, so the dispute goes to the judge. "The plaintiff's employment bar may be using Rule 30(b)(6) in ways very different from antitrust cases."

Asking about means to get additional information led observers to offer suggestions.

Ariana Tadler said that it is important to seek out qualitative information "across the bar." The NELA observations are helpful. There are many places to go to. The mass trial bar, on both sides, the American Association for Justice, and so on. Her practice commonly involves asymmetrical discovery, but she also works in complex litigation that involves large amounts of

information on both sides. "It is rare that we cannot work it out cooperatively." The new emphasis on cooperation in Rule 1 "is working." The 2015 refinements in discovery practice also help. "Rule 30(b)(6) is used in refined ways to find out what the other side has." This can help determine whether the mass of information is so large as to trigger proportionality rules; given knowledge of the information available on topics a, b, c, d, and e, the inquiry might be limited to topics a and e. But it would be a mistake to attempt to articulate new rules on the number or duration of depositions. "Depositions are costly." That provides an internal restraint. And be careful about even permissive rules on advance provision of deposition exhibits — they can backfire. In response to a question, she said that time is needed to think whether there should be a distinction between parties and nonparties for Rule 30(b)(6). That is an illustration of why it is important to actually talk to lawyers.

Alex Dahl reported that the Lawyers for Civil Justice members are interested. "Rule 30(b)(6) is important. We spend a lot of time dealing with these depositions."

William T. Hangley noted that the submission from the ABA Litigation Section, although not a Section proposal, does come from a large number of active participants. This is not a plaintiffs' problem. It is not a defendants' problem. It is in part a problem of nonuniformity in practice. In another part, it is a problem of inconsistency in the Rules. Lawyers generally work it out. Practice tends to be helpful, cooperative. But risks remain. It would be good to clarify some of the issues.

Frank Sylvestri indicated that the American College of Trial Lawyers federal courts committee is interested in these questions.

Judge Ericksen asked whether the Subcommittee should continue to inquire into attempts to ask about contentions. A judge responded that this does happen, but "trying for contentions in deposing a lay witness just does not make sense." Another judge noted that Rule 33 clearly provides that contention discovery can be deferred to a late point in the case; allowing it in a deposition, without that sort of court control, seems inappropriate. Still another judge asked why is there a need to address this kind of discovery for Rule 30(b)(6) depositions but not others. The response was that is because the deponent is the organization, the witness is speaking for the party, and the party is obliged to prepare the witness. It is different when deposing a party who is the person being examined because the individual party does not have the duty to prepare that Rule 30(b)(6) imposes on an organization.

The Rule 30(b)(6) discussion concluded by asking whether these questions should be pursued further by the Subcommittee. Should it work to further develop the draft rule language? The value of drafting is its role as a reality check. Working on language tends to bring out problems that otherwise might be overlooked. The work will continue.

Continued work on rule drafts does not reflect a conclusion that, in the end, the Subcommittee will recommend amendments for publication. Much of the discussion, and the provisions illustrated by the rules drafts, can be seen as best practices, something that can most effectively be addressed by education of the bench and bar. The Subcommittee will pursue its literature search. And it will create a repository of information. All suggestions from outside observers should be made to the Administrative Office.

Rules 38, 39, 81: Jury Trial Demand

Consideration of the rules that provide for waiver of the right to jury trial unless a proper demand is made began with Rule 81(c)(3), which governs demands for jury trial when a case is removed from state court. A potential ambiguity may have been introduced in one part of this rule by the Style Project. Before the Style Project, Rule 81(c)(3)(A) provided that there is no need to demand a jury trial after removal if state law "does" not require a demand. The Style Project changed "does" to "did." The need for clarification was suggested by a lawyer who is concerned that "did" could be read to excuse the need to demand a jury after removal if state law, although requiring a demand at some later time, did not require a demand by the point that the case had reached prior to removal. If the courts read the new language to have the same meaning as the pre-Style language, the result may be inadvertent forfeiture of the right to jury trial. The Committee discussed this question in April and decided to ask the Standing Committee for guidance. Discussion in the Standing Committee was brief and did not resolve the question whether anything should be done about the arguable ambiguity.

Shortly after the Standing Committee meeting, two of its members — Judge Gorsuch and Judge Graber — suggested that this Committee should consider the jury demand procedure in Rule 38 and the related provisions of Rule 39. See 16-CV-F. They were concerned that it is important to increase the number of jury trials, and fear that the demand requirement proves a trap for the unwary. Parties who wish to exercise a constitutional or statutory right to jury trial may lose the right by overlooking the demand requirement. They suggested that, like Criminal Rule 23(a), jury trial should become the default provision. Rule 23(a) provides that when a defendant is entitled to a jury trial, the case must be

tried by a jury unless the defendant waives a jury trial in writing, the government consents, and the court approves.

Exploration of these questions will begin with research by the Rules Committee Support Office. One question will be historical. The Committee Note for the 1938 Rules states that the demand procedure was adopted after looking to models in the states and other common-law jurisdictions, and that the period was set at 14 days after the last pleading addressed to the issue after examining a wide range of periods adopted by other rules. There is a reference to an article by Professor Fleming James, who served as a consultant to the Committee; the article focuses on administrative concerns, with a hint at concerns about strategic behavior. Can more be found out about the reasons that prompted both adoption of a demand procedure and an early cut-off for the demand?

A search also will be made to determine whether there are local rules that address demand procedure. And experience under state rules will be explored — they vary widely, but many of them allow demands to be made later in the proceedings than Rule 38 allows, and some, as reflected in Rule 81(c)(3)(A), do not require a formal demand at any time.

The more elusive part of the research will attempt to determine whether there is any reliable way to estimate the number of cases in which a party who wishes a jury trial has lost the right by failure to make timely demand and by failing to persuade the court to allow an untimely demand under Rule 39(b). It may be difficult to get more than anecdotal evidence on this point.

Another part of the inquiry must ask whether it is important, or at least useful, to know early in the proceedings whether the case is to be tried to a jury. Is it more than a matter of convenient administrative trial-scheduling practices? Or a concern that a party who was content to waive jury trial early in the action may, as proceedings progress, come to want a jury because its position does not seem to be winning favor with the judge? (This possible concern seems likely to arise only when a case remains with the same judge from beginning through trial; it seems likely that practice in the 1930s was different in this respect.)

If the conclusion is that some relaxation of the demand procedure is desirable, many drafting questions will need to be addressed. The choices will range from abolition of any demand requirement through a mere extension of the time when a demand must be made. Adopting jury trial as the default that prevails unless the parties opt out could be implemented by a procedure that requires express written waiver by all parties; the court's

approval might also be required, as in Criminal Rule 23(a). A further drafting choice must be made whether to complicate the rule by addressing the problem that it is not always clear whether there is a constitutional or statutory right to jury trial. The merger of law and equity has led to decisions that expand the right to jury trial in comparison with pre-merger practice, but the details may be murky. Issues common to legal and equitable relief must be tried to the jury, and the verdict binds the judge. But it may be difficult to untangle closely related but separate issues. More generally, the process of analogy to the common law of 1791 may not always yield clear answers when asking whether a novel statutory action entails a Seventh Amendment right to jury trial. Criminal Rule 23 does not address such questions, but the right to jury trial in criminal cases may be free from complications similar to those that occasionally arise in civil actions. One resolution would be to include rule text that recognizes the right of any party who prefers a bench trial to raise the question whether there is a right to jury trial.

Discussion began with the observation of a judge that in more than 20 years on the bench, he could not remember more than 2 or 3 litigants who had lost a desired right to jury trial. But that does not diminish the value of attempting a more comprehensive inquiry. It also might be asked whether a party who has forfeited the right to jury trial by failing to make a timely demand will be inclined to settle rather than face a bench trial. There might be an independent value in adopting an all-parties waiver provision. The question of court approval also should be considered. One variation would be to revise Rule 39(b) to allow the court to order a jury trial on its own.

Another judge noted similar experiences — there are few cases of inadvertent forfeiture. One way to inquire further may be to research cases that deal with late requests, but disposition of these requests may not often make it into reports or electronic repositories. And a party may react to its failure to make a timely demand by settling rather than attempting to win permission to make an untimely demand.

Turning to the question whether and why it is useful to know early on about the mode of trial — to a judge or to a jury — a Committee member suggested there is a lot of value in knowing. The mode of trial impacts mediation. It also may affect summary-judgment practice, which may be blended with "trial" when trial is to be to the judge. Managing a jury calendar will be helped, and trial scheduling will be helped. "I'm all for more jury trials," but no one seems to be getting trapped in practice.

Another Committee member said that "everyone demands jury

trial so they don't waive it." They may not know until later in the case whether they really want a jury trial. It may make sense to extend the time for demands so better-supported choices are made and so as to avoid the complications when a party who demanded jury trial decides to abandon a demand that other parties may wish to enforce. The removal situation is the only setting that is at all likely to generate inadvertent waivers, especially on remand from an MDL court to the court where the case was initially filed. The need to demand a jury trial is likely to get lost from sight at times. This could be addressed by a rule provision.

A judge agreed that the issue seems to arise only in MDL proceedings. He also noted that he has had criminal cases in which the defendant wants to waive jury trial but the government insists on it.

Draft Rule 5.2(i)

Rule 5.2 was adopted as a joint project with the Appellate, Bankruptcy, and Civil Rules Committees. The purpose was not only to provide for omitting sensitive personal information from court filings but also to achieve uniform provisions in each set of rules.

The Committee on Court Administration and Case Management suggested that the Bankruptcy Rules Committee should study the need to revise Bankruptcy Rule 9037 to provide an explicit procedure for redacting personal identifiers inadvertently included in court filings. It made the suggestion because of reports that creditors often file thousands of claims, frequently in different courts, without properly abbreviating personal information as required by Rule 9037. The Bankruptcy Rules Committee responded by drafting a proposed Rule 9037(h). Rule 9037(h) would provide for a motion to redact the improperly filed information. Although the Bankruptcy Rules Committee was prepared to recommend publication of this proposal last summer, it agreed to defer publication to enable the Appellate, Civil, and Criminal Rules Committees to study the possibility of recommending parallel proposals.

The draft Rule 5.2(i) included in the agenda materials reflects a process of friendly cooperation among the Reporters for the Bankruptcy Rules and the Civil Rules. Some drafting details remain to be ironed out if Rule 5.2(i) is to proceed to a recommendation to publish. The Criminal Rules Committee is uncertain whether it should recommend a parallel draft, and the Appellate Rules Committee is content to depend on the outcome in the other Committees because Appellate Rule 25(a)(5) adopts the other rules as appropriate.

Three questions remain: If the Civil Rules were treated independently, is there any sufficient need to add an express provision governing a motion to redact? If there is no sufficient independent need, should a provision be adopted nonetheless in order to maintain uniformity with the Bankruptcy and Criminal Rules? And if some form of Rule 5.2 is to be recommended for publication, what further efforts should be made to work through the drafting issues that remain following recent efforts to reconcile Rule 5.2 with Rule 9037(h)?

The need for an express Rule 5.2 procedure for a motion to redact may be less than the need in Bankruptcy. Bankruptcy may face a distinctive need for a uniform procedure not only because of the frequent occurrence of unredacted filings but also because the same unredacted filings may be made in different courts. It may well be that the problem is sufficiently less widespread in civil actions that parties and the courts can work out appropriate corrections without difficulty. The fact that the Committee on Court Administration and Case Management addressed its concerns only to the Bankruptcy Rules Committee may support an inference that problems have not been widely reported for civil or criminal filings.

The independent value of uniformity across the Bankruptcy, Civil, and Criminal Rules also may be uncertain. The present rules are not perfectly uniform — departures were made to reflect the different circumstances that arise in each type of proceeding. That fact alone may reduce whatever risk there might be that inappropriate inferences might be drawn, or at least argued, from the absence of provisions parallel to proposed Rule 9037(h) in the Civil or Criminal Rules.

If a decision is made to move forward toward a recommendation to publish, the remaining drafting questions will be addressed under the auspices of the Administrative Office as referee and arbiter.

Discussion began with a reminder that it is generally better to avoid adding new rule text unless there is a genuine need. And there are different aspects to uniformity. When separate sets of rules choose to address the same problem, care should be taken to adopt uniform terms to the extent that the underlying problems are uniform. But it is not as important to ensure that when one set of rules undertakes to address a particular problem the other sets also address the problem. As here, the needs confronting one branch of practice may be different from those that arise in the others.

A judge said that unredacted filings in civil actions result from simple oversight. Lawyers typically recognize the problem and

want to fix it. The draft rule seems to require a motion to permit the fix, more work than is necessary for a result that can be accomplished more efficiently.

Judge Goldgar said that unredacted filings in bankruptcy also result from simple mistakes. Creditors or the debtor simply file attachments without recognizing the presence of personal identifiers. It is not correct to characterize the recommended motion as a motion to redact. It is rather a motion to replace the original unredacted filing with a redacted filing. The court does not itself make the redaction. He later elaborated that the problem arises in bankruptcy because "so much personal information is bandied about." Creditors file lots of documents. "Debtors' lawyers make this mistake all the time." If you do not provide an express remedy for mistakes, you lose uniformity.

Doubts were expressed whether an express provision in Rule 5.2 is needed, coupled with uncertainty whether the interest in uniform provisions among the rules outweighs the lack of any independent need.

Laura Briggs noted that "Overall, we get them filed all the time." The Clerk's Office automatically restricts access to the unredacted filing so that only the parties may access it, and asks the attorneys to refile. The Clerk's Office then substitutes the redacted filing for the original filing. It is not clear that there is any need for a new rule provision, but there is an argument for uniform provisions. Her court has ECF guidelines that address redaction.

A judge noted that her Clerk's Office does exactly the same thing — it limits access and asks the parties to fix the filing.

Another judge suggested that the court clerks should not be responsible for policing unredacted filings, and that we should be reluctant to impede easy corrections through ECF procedures.

Another judge observed that his court sees "enough documents with personal information, but I suspect bankruptcy may see more."

The first question put to the Committee was whether anyone thought draft Rule 5.2(i) should not be pursued further. The Committee voted not to proceed further by 8 votes to 6. But it was agreed that the project might be resurrected if other committees urgently ask for uniformity.

Rule 45(b)(1)

The State Bar of Michigan Committee on United States Courts

has suggested that Rule 45(b)(1) be amended to expand the methods for serving subpoenas. The suggestion is 16-CV-B.

Rule 45(b)(1) blandly directs that "[s]erving a subpoena requires delivering a copy to the named person." It does not say what method of delivery is required. But most courts read it as if it requires delivery to the named person personally. There are minority views that recognize delivery by mail, or that recognize delivery by mail if diligent attempts to make personal delivery fail. And occasionally a court accepts delivery by some other means. One reason to consider the question would be to establish a uniform meaning.

Identifying the best uniform meaning would remain to be decided. The Michigan Bar recommendation is that service of a subpoena is a less important event than service of the summons and complaint that initially brings a party into a civil action. It makes sense, from this perspective, to allow service by any of the means provided by Rule 4(e), (f), (g), (h), (i), or (j). In addition, their suggestion would allow service "by alternate means expressly authorized by the court."

The method of service was considered during the work that led to the extensive revisions of Rule 45 adopted in 2013. An extensive research memorandum by Andrea Kuperman, the Rules Law Clerk, supplied detailed information on case-law developments that confirms the research supplied to support the present suggestion. The Subcommittee included service as one of the 17 questions to be addressed, but concluded that no change was needed. One concern was that personal service is a dramatic event that impresses on the witness the importance of compliance. The Committee, without extensive discussion, approved the Subcommittee recommendation that revision was not needed.

Despite this recent history, there may be reason to consider the question further. At a minimum, it might help to add an express provision authorizing the court to approve service by means other than in-hand service. Highly reliable means may be available in a particular case that ensure actual service at lower cost and with no delay.

Going beyond case-specific orders, there is some attraction to the view that the several Rule 4 methods of service could be incorporated. The provisions in Rules 4(e) and (h) for service on individuals and entities may be the easiest to adopt by analogy. Service on an individual by leaving a subpoena at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there may be as well justified as service of a summons and complaint by this means. But it is not as simple to

consider service on an agent authorized by appointment or by law to receive service of a subpoena. Apart from the question whether many individuals have appointed agents for service of process, how often does the appointment extend to service of a subpoena? And — remembering that a subpoena issues from the federal court where the action is pending but can be served in any state — what complications might flow from following state law for serving a summons in the state where the subpoena is served? Moving from these common and relatively simple situations to include service on an infant or incompetent person, service abroad (which may be governed by conventions different from those that apply to service of initiating process), and so on through the rest of Rule 4 raises additional uncertainties.

The analogy to Rule 4 suggests a further possibility: just as an intended defendant may agree to waive service of the summons and complaint, there may be some value in a rule provision that expressly recognizes agreements to accept service by specified means or to waive formal "service" entirely.

Serious work on the means of service might explore still greater complications. An obvious one is whether distinctions should be drawn between party witnesses and nonparty witnesses. When a party is represented by an attorney, for example, service of other papers is made on the attorney; service of a subpoena on the attorney might be still more effective than service directly on the party client. It also might be sensible to provide means of minimizing delay and disruption when a witness has actually received a subpoena — there is something incongruous about a motion to quash a subpoena on the ground that although it has been received, it should be ignored and replaced by further efforts to serve by formally correct means.

Discussion began by asking whether there is sufficient reason to take up a topic that was considered and put aside a few years ago. In some circumstances there may be convincing reasons that justify reconsideration after only a short interval. It is not apparent that sufficient reason appears here, although the Michigan Bar suggestion speaks of a plague of delay and expense. Is that reason enough?

A judge asked whether there indeed is a plague — judges do not often see these questions.

A Committee member observed that she had thought that service by mail is proper. The rule should be clarified. "I thought I knew what it means. Rules should tell us these simple things."

A judge echoed the thought: "Why not say what 'delivery'

means"? The cases offer different interpretations. That may be reason enough to clarify the rule.

Another Committee member observed that this question was not a major focus of the recent Rule 45 revision discussions. The thought seemed to be only that there was no big need for change. This view was seconded — the issue did not seem as important as many others that commanded the attention of the Subcommittee and Committee.

Still another Committee member noted that states often follow the federal rule on service. The Michigan rule calls for "delivery." Any amendment of Rule 45 is likely to make work for state rules committees.

The conclusion was that the Administrative Office staff should be asked to explore further the possible reasons for pursuing these questions.

Pilot Projects

Judge Bates opened the discussion of pilot projects by noting that the pilot projects have been developed by a working group that includes members from the Standing Committee, this Committee, and the Committee on Court Administration and Case Management. Judge Grimm, a former Civil Rules Committee member, chairs the working group. The two pilot projects have reached the final stages of development and description.

The Expedited Procedures pilot is designed to expand the use of practices that many judges adopt under the present Civil Rules. No changes in rule texts are contemplated. The purpose is to demonstrate the values of active case management, hoping to promote a culture change. The practices aim at: (1) holding a scheduling conference and issuing a scheduling order as soon as practicable, but no later than the earlier of 90 days after any defendant is served or 60 days after any defendant appears; (2) setting a definite period for discovery of no more than 180 days and allowing no more than one extension, only for good cause; (3) informal and expeditious disposition of discovery disputes by the judge; (4) ruling on dispositive motions within 60 days of the reply brief, whether or not there is oral argument after the reply brief; and (5) setting a firm trial date that can be changed only for exceptional circumstances, allowing flexibility as to the point in the proceedings when the date is set but aiming to set trial at 14 months from service or the first appearance in 90% of cases, and within 18 months in the remaining cases. Work is proceeding on a Users Manual. Mentor judges will be made available to support implementation in the pilot courts. The goal is to have the project

in place in 2017, to run for a period of three years. Means of measuring the results are a central part of the project.

The Mandatory Initial Discovery pilot seeks to test new procedures to see whether experience will support amendments of the present rules. It is based on a model standing order to respond to uniform discovery requests by providing information, both favorable and unfavorable, without regard to whether the responding party plans to use the information in the case. These requests supersede the initial disclosure provisions of Rule 26(a)(1). The pilot does not allow the parties to opt out. It calls for discussion at the case-management conference. Answers, counterclaims, and crossclaims are to be filed without regard to pending motions that otherwise would defer the time for filing, although the court may suspend the obligation to file for good cause when the motion goes to matters of jurisdiction or immunity. There are separate provisions for producing electronically stored information.

The task of enlisting pilot courts is under way. The hope is to find five to ten districts for each; no one district would be selected for both projects. Districts of different characteristics should be involved, both large, medium, and small, in different parts of the country. Although it will be desirable to have participation by every judge on each pilot court, there is some flexibility about engaging a court that cannot persuade every judge to participate.

Several judges expressed optimism about engaging their courts in a pilot project. Others were less optimistic.

Respectfully submitted,

Edward H. Cooper
Reporter