DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 2, 2012

The Civil Rules Advisory Committee meeting scheduled for November 1 and 2, 2012, was held on November 2 at the Administrative Office of the United States Courts. The meeting was shortened in order to adjust to the transportation difficulties caused by Storm Sandy. Many participants and observers gathered at the Administrative Office. Others participated by video- or audio-conference systems. Participants included Judge David G. Campbell, Committee Chair, and Committee members John Barkett, Esq.; Elizabeth Cabraser, Esq.; Hon. Stuart F. Delery; Judge Paul S. Diamond; Judge Paul W. Grimm; Peter D. Keisler, Esq.; Dean Robert H. Klonoff; Judge John G. Koeltl; Judge Michael W. Mosman; Judge Solomon Oliver, Jr.; and Judge Gene E.K. Pratter. Justice Randall T. Shepard and Anton R. Valukas, Esq., whose second terms as Committee members concluded on October 1, also participated. Professor Edward H. Cooper participated as Reporter, and Professor Richard L. Marcus participated as Associate Reporter. Judge Jeffrey S.Sutton, Chair, Judge Diane P. Wood, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris participated as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., the court-clerk representative, also participated. The Department of Justice was further represented by Theodore Hirt, Jonathan F. Olin, and Allison Stanton. Joe Cecil and Emery Lee participated for the Federal Judicial Center. Peter G. McCabe, Jonathan C. Rose, Benjamin J. Robinson, and Julie Wilson represented the Administrative Office. Observers included Henry D. Fellows, Jr., Esq. (American College of Trial Lawyers); Joseph D. Garrison, Esq. (National Employment Lawyers Association); Rachel Hines, Esq. (Department of Justice); Brittany K.T. Kauffman, Esq. (Institute for the Advancement of the American Legal System); John K. Rabiej (Duke Center for Judicial Studies); Jerome Scanlan (EEOC);Alfred W. Cortese, Jr., Esq., and Alex Dahl (Lawyers for Civil Justice); John Vail, Esq. (American Association for Justice); Thomas Y. Allman, Esq.; William P. Butterfield, Esq., Richard Braman, Esq., Conor R. Crowley, Esq., John J. Rosenthal, and Kenneth J. Withers, Esq. (Sedona Conference); Zviad V. Guruli, Esq.; and Jonathan M. Redgrave, Esq.

All participants' statements were recorded by audio means.

Judge Campbell opened the meeting by thanking all participants for joining the meeting in this unusual format. The meeting is just that, the meeting that was formally noticed for this day and place. Business will be conducted as usual, just as if all participants were physically present at the Administrative Office. Observers will be afforded opportunities to speak in the usual routine.

Judge Campbell also noted the death of Mark R. Kravitz, former chair of this Committee, who died on the last day of his first year

as chair of the Standing Committee. He was a beloved friend and leader. The Committee's thoughts and prayers are with his family. A memorial service will be held on November 17 in New Haven. Memorial funds have been established in Mark's name.

Judge Campbell introduced Judge Sutton as the new chair of the Standing Committee. He will make as formidable a team with Reporter Coquillette as former chairs have made.

This is the last meeting for outgoing members Shepard and Valukas, who have completed their terms. Judge Colloton has moved over to chair the Appellate Rules Committee, taking the position vacated by Judge Sutton. All three have made substantial contributions to the Committee. Lawyer Valukas brought rich experience, great expertise, and solid common sense to bear, particularly in his unstinting contributions to the work of the Discovery Subcommittee. Chief Justice Shepard has been a pillar of the judiciary for many years before serving on this Committee, serving prominently in the Conference of Chief Justices among many other positions, and regularly contributed the broad perspectives of state courts. Judge Colloton will fare well in the Appellate Rules Committee; if past experience is a guide, there is a strong prospect that joint projects will bring the Appellate and Civil Rules Committees together during his term.

The Judicial Conference approved the proposed amendments to Rule 45 at its September meeting. Rule 45 was on the consent calendar, suggesting that the Conference believes that the proposals are good. Rule 45 is headed next to the Supreme Court.

March 2012 Minutes

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

Meeting Format

Judge Campbell described the format for the meeting. The meeting is scheduled for four hours. The Discovery Subcommittee proposal for a revised Rule 37(e) on preservation and sanctions will be discussed first. If full discussion can be had in the time available, the goal will be to take a vote on the Subcommittee proposal to present the revised rule to the Standing Committee at its January meeting with a recommendation to approve publication in the summer of 2013. The sketches prepared by the Duke Subcommittee will come next. The proposal of the Rule 84 Subcommittee will follow, with the expectation that it will not require lengthy discussion. If time remains, two other matters will be presented

for a vote. First are the proposals advanced by Attorney General Hood, of Mississippi, to adopt a rule requiring speedy disposition of motions to remand removed actions to state court and a rule requiring that the removing party pay all costs, including attorney fees, incurred by removal of an action that is remanded. The second is a proposal to correct a potential style misadventure in Rule 6(d).

The procedure for the proposals of the Discovery Subcommittee, Duke Conference Subcommittee, and Rule 84 Subcommittee will begin with presentations by the Subcommittee chairs and the Reporter with first-line responsibility for each. Then each Committee member and liaison will be called on in turn for comments and advice. If time allows, observers will be invited to participate. Voting, when a matter requires a vote, will be by polling each member unless discussion shows apparent agreement that can be confirmed by asking whether there is any disagreement with the seeming consensus.

Comments on other matters reflected in the agenda materials, and also on matters that are discussed at the meeting, can be sent to Judge Campbell as committee chair and to the chairs of the Subcommittees.

New Rule 37(e)

Judge Grimm introduced the Rule 37(e) proposal. The materials begin at page 121 of the agenda materials; the draft rule begins at page 127, followed by the draft Committee Note.

The proposal reflects nearly two and a half years of Subcommittee work, beginning soon after the Duke Conference and building on the unanimous recommendation of the panel that a preservation rule be adopted. A miniconference on advanced drafts was held in Dallas in November, 2011. Further work developed drafts that were presented to the Committee for discussion in March, 2012. The Subcommittee work continued through a series of seven conference calls held from July 5 through the end of September, each lasting for at least an hour. Subcommittee members accomplished an extraordinary amount of work. Submissions were received from the Sedona Conference in the form of a not-yet-final draft that included model rule language; from John Vail, who raised questions about the relationship between federal rules and state spoliation law as mediated through the Erie doctrine, issues that are being considered; Lawyers for Civil Justice has from the beginning provided helpful guidance and suggestions; Tom Allman has offered observations about local rules that might affect preservation of electronically stored information.

The recommendation is to adopt the new provisions as a

replacement for present Rule 37(e). Earlier drafts had been framed as a new Rule 37(g), but they have evolved to a point that protects everything that has been protected by present Rule 37(e) and protects much else as well.

The draft lists factors to aid in determining what is reasonable preservation, and what curative measures or sanctions to employ. The Subcommittee did not reach consensus on the factors listed in draft 37(e)(3)(C)(requests to preserve) and (D)(a party's resources and sophistication in litigation). Some feared that listing these factors might unintentionally increase burdens in litigation. Guidance will be asked on that.

Guidance also will be sought on Note language set out in brackets at lines 123-128 on page 131 of the agenda materials. This paragraph says that even an intentional attempt to destroy information does not support sanctions under the rule if the attempt fails. It does no more than state one of the things that is clear from the rule text — the rule applies only when a party fails to preserve information.

Several key features of proposed Rule 37(e) deserve note.

Unlike present Rule 37(e), the proposed rule applies to all forms of information, not only electronically stored information.

As compared to some threads in present case law, the rule provides more comprehensive protection for those who inadvertently and in good faith lose information.

The limitations of consequences for losing information are reflected in the distinction between proposed paragraphs (1) and (2). A distinction is drawn between remedies — curative measures — and sanctions. Remedies include such tools as additional discovery, restoring lost information or developing substitute information, and paying expenses (including attorney fees) caused by the failure to preserve. Sanctions are available under paragraph (2) only if the failure to preserve caused substantial prejudice in the litigation and was willful or in bad faith.

Rule 37(e) is intended to create a uniform national standard. Both at the Duke conference and the miniconference many participants complained that disuniformity among federal courts leads to vast over-preservation as they feel a need to comply with the most onerous standard identified by any one court.

Proposed 37(e)(2) authorizes use of any of the sanctions listed in Rule 37(b)(2) even though there is no order to preserve. But substantial prejudice plus willfulness or bad faith must be

shown, except for the very limited circumstances described in (c)(2)(B) where the failure irreparably deprives a party of any meaningful opportunity to present a claim or defense. The working example of this category is destructive testing of a product that makes it impossible for other parties to perform their own tests.

Present Rule 37(e) is limited to regulating sanctions "under these rules." That limit is discarded in the proposal. The purpose is to make it unnecessary to resort to inherent authority. There is a lot of loose language in the cases about inherent authority. (e)(2)(A), requiring substantial prejudice and bad faith or willfulness, encompasses all the circumstances in which it would be appropriate to rely on inherent authority.

The several factors listed in proposed Rule 37(e)(3) stress reasonableness and proportionality. They apply only when there is a failure to preserve.

Professor Marcus added that the Subcommittee went through many issues at length. Andrea Kuperman provided an excellent memorandum on reported uses of current Rule 37(e), supporting the conclusion that the proposal does not take away any protection that has been important. He further noted that Judge Harris has suggested some possible wording changes in proposed (e)(3) that will be considered by the Subcommittee. And there was a high level of consensus in the Subcommittee on the proposal. Even as to the items that failed to achieve consensus there was not much dissent.

Judge Grimm reiterated that the Subcommittee is proposing that Rule 37(e) be recommended to the Standing Committee for publication. It seeks a Committee vote, subject to the Subcommittee's further consideration of the argument that there may be Erie problems in relating to state spoliation law, and to reviewing the wording suggested by Judge Harris. If the Subcommittee concludes that any significant change should be made in the proposal, it will seek a Committee vote by e-mail.

Judge Campbell summarized the most prominent issues for discussion: Should subparagraphs (e)(3)(C) and (D) go forward? Should the Note language about unsuccessful attempts to destroy information be omitted? If a draft proposal is approved by Committee vote, it will go to the Standing Committee at the January meeting with a recommendation to publish next summer. This schedule will be particularly helpful if a package of Duke Subcommittee proposals can be approved at the April meeting, so that both sets of recommendations can be published at the same time.

Committee members and liaisons spoke in order.

The first member expressed concern that (e)(3)(C) and (D) "are not necessary." They are simply elaborations of factor (B), looking to the reasonableness of the party's efforts to preserve information. And for that matter, (B) should be cut short: "the reasonableness of the party's efforts to preserve the information~~;~~ ~~including the use of a litigation hold and the scope of the preservation effort;~~ There is no need to elaborate the reasonableness requirement in (C) and (D), and there is a potential for mischief. Apart from these matters, the proposal "is fine."

The next Committee member offered "only a brief editorial. We will continue to face problems, but the rule will advance the courts' ability to solve the problems." It will not constrain desirable solutions. Sanctions will be focused.

Support was then offered for factor (C), dealing with requests to preserve. Participants in the miniconference focused on over-preservation resulting from a lack of guidance. It is wrong to assume that lawyers cannot talk to each other. We should encourage them to talk about preservation, to substitute dialogue for "gotcha" tactics. Factor (D), on the other hand, is a "rabbit hole." How should a court determine whether a lawyer or a party is "sophisticat[ed] in litigation"? This serves no purpose.

A judge tended to agree that (C) and (D) are not necessary, but thought that the package could be supported even if they are included.

Another member thought this is a "nicely constructed rule," that offers good answers to difficult questions. An initial reaction that factor (C) on requests to preserve should be dropped has been discarded in favor of the arguments that lawyer dialogue should be encouraged. Factor (D) is an additional concern. As (e)(3) is framed, a party's resources and sophistication are considered both in determining what is reasonable preservation and in determining whether there is bad faith or willfulness. But resources and sophistication are relevant to bad faith or willfulness only in rare circumstances. If (D) is retained, courts may be misled to think it is relevant to bad faith or willfulness. The Note language on unsuccessful efforts to lose information is unnecessary; it should be dropped. Finally, the introductory language of (e) begins: "If a party fails to preserve discoverable information that reasonably should be preserved * * *." The problem is that no one is a party until an action is filed. It would be better to say information "that reasonably <u>should have been</u> preserved."

The next member thought it difficult to determine which of factors (A) through (F) in (e)(3) bear on reasonableness, which on

bad faith or willfulness. The Sedona Conference draft teases out factors that relate to good faith. Should we attempt to disaggregate the factors in (e)(3)? (It was noted that the Subcommittee had considered this problem and had been afraid that "more precision would generate unhelpful arguments." A further response was a reminder that these factors "are illustrative, not exhaustive." A court can find that some of them are irrelevant in a particular case, and can consider factors not listed. It is desirable to avoid complexity.)

A further note on drafting history observed that the Subcommittee began with the thought of attempting to define precise triggers for the duty to preserve. Draft (e)(3) is designed to suggest the things that bear both on the criteria for litigants and potential litigants to consider in undertaking preservation and on thinking when the duty to preserve arises.

The next member in the rotation supported both factors (C) and (D). (C) concerns, and will encourage, discussion among the lawyers. (D) reflects concern individual parties lack sophistication on questions of preservation, frequently have little concept of what electronically stored information they have, and are particularly vulnerable to losing data from social media. But the note language on unsuccessful efforts to lose information should be deleted.

Continuing along the Committee roster, another member supported factor (C) in order to encourage discussions among the lawyers. Factor (D) is important not only for individuals, but also in dealing with the increasing frequency of litigation that involves municipalities and counties that are financially strapped. And it is good that the rule has been drafted in technologically neutral terms that are likely to survive the advances of technology over time.

A judge member reported that his initial view was that factors (C) and (D) should be deleted, but that the discussion had persuaded him otherwise. He had been worried about which of the factors address which issues, but (D) — sophistication and resources — goes to bad faith as well as reasonableness, and should be retained. The rule "seems slanted toward big litigation," as illustrated by the reference to "holds," but it will apply to all litigation. It is the normal-scale litigation that (D) will serve. The Note language on failed attempts to destroy information should be deleted.

The next judge member commended the draft as ready to take the next step to the Standing Committee. Shorter rules are better than longer rules. Factors (C) and (D) should be dropped for this

reason, and (B) should be shortened by deleting the references to litigation holds and the scope of preservation. The value of encouraging professional cooperation can be served by putting factor (C) into the Committee Note. There is a drafting change that would improve (2)(a). A recent long argument about the possible ambiguity of antecedents in dealing with "and" "or" sequences points to the need to at least insert a comma, or better to rearrange it to read: "that the failure caused substantial prejudice in the litigation and was willful or in bad faith." This will make it clear that both willful or bad faith failures warrant sanctions only if there was substantial prejudice. The Note language on unsuccessful attempts to delete information should be omitted.

The Department of Justice recognized that much hard work has gone into developing proposed Rule 37(e), vigorously grappling with the issues. The draft make progress. The Department has doubts about how widespread the sanctions problems are. And there are several reasons to conclude that it would be premature to vote on the proposal today. The Department has not had time to do a full review, nor have the agencies the Department represents. It must be remembered that the Department appears on all sides of all the varieties of litigation that come to federal courts — it is involved in about one-third of the civil actions. It has not yet come to a position on the proposal. Despite the real progress that has been made in the proposed draft, the Department is not in a position to vote for taking it forward with a recommendation for publication.

At the same time, The Department can make some observations. (1) It is right to address loss of all forms of information, not just electronically stored information. (2) Invoking proportionality as one of the factors to measure reasonable preservation is strongly supported. (3) Present Rule 37(e) should be preserved. It provides a safe harbor that has guided information technology professionals in addressing some of these issues. Still, the same considerations could be taken into account under the proposed rule. (4) The proposed rule refers to failure to preserve "discoverable information"; the Note should say expressly that Rule 26(b) defines the scope of what is discoverable. (5) Willfulness and bad faith can make sense as a concept for a standard, but achieving uniformity may be advanced by providing a better developed explanation in the Note. Without guidance, different courts will interpret these words in different ways. (6) Proposed (e)(3)(A) looks to "the extent to which the party was on notice that litigation was likely," etc. This should include "should have known"; a prospective party may "lose" information and claim lack of actual knowledge. (7) Both factors (C) and (D) should be omitted. (C), looking to requests to preserve, may encourage

premature or very broad preservation demands early in the process. Government agencies already are receiving such demands, often early in the administrative process. "Dialogue is good, but this gets in the way." So factor (D),looking to a party's resources and sophistication in litigation, could be used against the government because it has what seem to be vast resources and has a high level of sophistication in litigation. (8) Factor (F), asking whether the party sought timely guidance from the court, raises a question of the relationship to dispositive motions. Is it expected that a party will ask the court for guidance on preservation obligations before rulings on dispositive motions, at a time when the scope of discovery may seem broader than it will be after the motions are resolved? (9) The Rule does not include a list of factors bearing on the determination of "substantial prejudice" in (e)(2)(A). It would help to describe such elements as materiality, the availability of information from alternative sources, and so on. (10) The note language on a failed attempt to destroy information should be deleted — it is not necessary, even while it is not objectionable.

Another Committee member expressed admiration for the work. Factors (e)(3)(C) and (D) seem useful. And it is wise to include factor (E), proportionality. Courts too often overlook the need for proportionality, both in preservation and in discovery.

A liaison expressed ambivalence about retaining factors (C) and (D), but suggested that "generally, shorter is better." The note language on failed attempts to destroy information should be removed. It is not clear which of the (e)(3) factors bear on determining reasonable preservation, which on determining willfulness or bad faith. Nor is it clear how they relate to the choice of remedies under (e)(1) or sanctions under (e)(2). The rule text might be studied further to see whether clarification is feasible.

Another liaison said that the note language on unsuccessful attempts to destroy information should be dropped.

A third liaison applauded the distinction between remedies, (e)(1), and sanctions, (e)(2). The questions raised by factor (C), requests for preservation, and (D), resources and sophistication, stem from the fact that many problems can be resolved without considering all of the suggested factors, and may require consideration of others. The text should be clear that the court is not required to consider all factors in every dispute. Perhaps "the court should consider all relevant factors <u>where appropriate</u> * * *." Public comments may help in considering these questions. And the Note language on thwarted spoliation attempts should be deleted.

Judge Sutton lauded the draft rule as a terrific product. He remained agnostic on factors (C) and (D) — they could be moved to the Note as illustrations of what is reasonable preservation. The Note language on extreme bad faith efforts that fail to lose information should be expunged. And as a matter of caution, one word might be added to (e)(2)(B): the failure to preserve, although not willful or in bad faith, "irreparably deprived a party of any meaningful opportunity to present a cognizable claim or defense * * *."

Reporter Coquillette observed that "This is a long Note. Delete anything you're not sure is necessary."

An observer agreed with the suggestion that (e)(3)(B) should be shortened by deleting "~~including the use of a litigation hold and the scope of the preservation efforts~~." A hold is a technical means of implementing preservation; probably it is not needed in less complex litigations. (C) and (D) could be relegated to the Note.

Another observer thought the draft "almost right." The distinction between remedies and sanctions "is key." This distinction is not well reflected in the case law, which generally is under-reasoned. But (e)(2) raises a serious concern. It precludes use of an adverse-inference instruction as a curative measure by treating it as a sanction. This conflicts with the law in many states. Under these state laws, preservation is a duty owed not only to the court but to other parties. In some of them an adverse inference instruction is available for a negligent failure to preserve. This is a substantive state duty, and a substantive state remedy. Erie doctrine and the limits of § 2072 forbid invoking the proposed rule to limit the remedy provided by state law when the federal court is resolving a state-law claim.

Yet another observer approved the drafting as "technology agnostic," so it can survive through the continual changes of technology. And it is good to cover all forms of information, not only electronically stored information. But explicit reference to a litigation hold as a factor in measuring reasonable preservation "is too detailed." There is a risk that some parties or courts may read this factor to require a written notice, when oral notice might suffice. This can be relegated to the Note. Factor (C), looking to requests to preserve, will generate overbroad — even form — demands to preserve. We do need to encourage dialogue between the parties, but this should be put in the Note on factor (A), looking to the extent to which the party was on notice that information would be discoverable in likely litigation. It also could bear on factor (F), whether the party sought guidance from the court. Factor (D), looking to a party's sophistication, may be

misapplied as courts mistakenly attribute sophistication in litigation to small and medium-size companies that in fact are not sophisticated. Again, this can be explored in the Note, but does not belong in the rule. Still, there is room to be concerned that individual litigants will be "hammered" for ignorantly doing things that a business would not do. It is right to replace present 37(e) with the new provisions, but the Note should carry forward the protection for automatic processes that routinely destroy information. And the Note language on unsuccessful bad-faith attempts to destroy information is unnecessary.

Observers from the Sedona conference noted that the working group had submitted a draft proposal in response to the Advisory Committee's interest in receiving comments. A committee was formed. It has considered not only Rule 37 but other topics addressed by the Duke Subcommittee. The Rule 37 committee was formed as a balance of those who primarily represent plaintiffs, or primarily represent defendants, and corporate counsel. It did not achieve complete consensus. The draft is a compromise. It has four main characteristics: it provides a uniform sanctions standard; it is not a tort-based duty; it requires heightened culpability for more serious sanctions; and it avoids a false distinction between sanctions and remedies.

The Sedona views were amplified. The distinction drawn between remedies, proposed (e)(1), and sanctions, proposed (e)(2), is false. Most courts view as sanctions the measures that (e)(1) would characterize as remedies. Tying remedies to loss of evidence limits courts in the future. Remedies can be appropriate even when there is no loss of evidence. The focus in (e)(2)(A) on bad faith and willfulness "will perpetuate confusions the courts exhibit now." Bad faith is not the same as willfulness. The Sedona proposals take a better approach in providing a list of factors that bear on "good faith," moving away from a tort standard. Is the information available from other sources? Is there material prejudice? Is the motion for court action timely? The aim is to incentivize good behavior, to consider "intent" as bearing on the weight of the sanctions. For the "Silvestri" problem addressed by (e)(2)(B), Sedona relies on "absent exceptional circumstances." That is better than looking for irreparably depriving a party of any meaningful opportunity to present a claim or defense, a concept that will generate huge litigation. How does this differ from the "substantial prejudice" invoked in (e)(2)(A)?

The Sedona group also moved away from rule text addressing requests to preserve, the (e)(3)(C) factor, for reasons expressed by other participants. So too it rejected (D), looking to a party's sophistication and resources, because that will be unfair to corporations: consider the preservation burdens that might be

imposed on a corporation with such far-flung activities as to be involved in 15,000 litigations, generating great sophistication. Factor (F), seeking guidance from the court, raises problems with information claimed to be privileged: how does the party seek, and the court give, meaningful guidance?

Finally, the Sedona draft approaches sanctions differently. Rather than incorporate Rule 37(b)(2), they specifically enumerate sanctions. Spoliation sanctions are available only on showing intent. And the rule text should incorporate a "least severe sanction" provision. Proportionality does not bear on choosing the "weight" of the sanction. It does bear on determining the degree of prejudice.

One of the Sedona observers added that speaking for himself, it would be useful to step back from the present Rule 37(e) draft. It will generate "a lot of litigation."

Judge Campbell suggested that the Committee needs to move toward a conclusion. The discussion has provided many helpful comments. There would be still more helpful comments if the discussion were continued for another three or four years. The Subcommittee has worked hard for two and a half years, including a miniconference. It would be useful to take this to the Standing Committee in January with a recommendation to approve publication. The Subcommittee will continue to polish the proposal for submission to the Standing Committee. Presenting a proposal for publication will support a thorough discussion in the Standing Committee. The Standing Committee can judge whether it is ready for publication. Of course the proposal could be deferred for further work at the April Advisory Committee meeting, to present it to the Standing Committee for the first time at its spring meeting. Perhaps the better course is to aim for the January meeting.

Judge Sutton noted that the Rule 37(e) proposal interacts with the Duke Conference Subcommittee drafts. The Standing Committee can devote more time to thorough discussion of the 37(e) proposal in January than can be found in the more crowded spring agenda. The Subcommittee can continue to work on the draft that will go to the January agenda. It makes sense to vote now.

Four Committee votes were taken. By vote of 7 to 4, the Committee voted to retain Rule 37(e)(3)(C), listing requests for preservation among the factors to be considered in determining what is reasonable preservation and whether there is bad faith or willfulness. By vote of 6 to 5, the Committee voted to delete the next factor, (D), looking to a party's resources and sophistication in litigation. The Committee voted unanimously to delete the draft Note language discussing a deliberate but unsuccessful effort to

spoil discoverable information. The Department of Justice voted against sending the proposal to the Standing Committee in January; all other members voted in favor.

Duke Conference Subcommittee

Judge Koeltl introduced the report of the Duke Conference Subcommittee. The report to be considered is not the version that appears in the original agenda materials but a revised version circulated a week before this meeting. The revised version includes new sketches that reflect a Subcommittee conference call held after the October 8 miniconference in Dallas. The rules amendments sketched in the report constitute a package. Some are more important than others. Some still will be discarded, and perhaps others will be added. As a whole, the package is aimed to reduce expense and delay, to promote access to the courts, to serve the goals of Rule 1. "We have come far."

The sketches will be described in three groups, but there is no priority among the groups. And they will be discussed together.

The first group begins with a set of changes that would accelerate the first stages of an action. The time to serve process set out in Rule 4(m) would be reduced from 120 days to 60 days. The alternative times for issuing the scheduling order would be reduced. Rule 16(b) now sets the time as the earlier of 120 days after any defendant has been served or 90 days after any defendant has appeared. The proposals would reduce the 120-day period to 60 days, or possibly 90; the 90-day period would be reduced to 45, or possibly 60. The extent of the reduction will be determined after hearing more advice. Discussion at the miniconference suggested that two further proposals be considered — carrying forward the authority for local rules that exempt categories of cases from the scheduling-order requirement, and allowing exceptions to the timing requirement for good cause.

The next change in the first group would change the scope of discovery defined by Rule 26(b)(1). Discovery would be limited to what is proportional to the needs of the case as measured by the cost-benefit calculus now required by Rule 26(b)(2)(C)(iii). Participants in the miniconference expressed ready acceptance of these factors. Further changes would delete the present authority to order discovery extending to the subject matter of the action, confining all discovery to what is relevant to the claims or defenses of the parties. In addition, the sentence allowing discovery of information that appears reasonably calculated to lead to the discovery of admissible evidence is shortened, so as to provide only that information need not be admissible in evidence to be discoverable. This change reflects experience, shared by the

miniconference participants, that in operation many lawyers and judges read the "reasonably calculated" phrase to obliterate all limits on the scope of discovery; any information may lead to other evidence that is relevant and admissible. These changes result in a shorter, clearer rule that incorporates a concept of proportionality made workable by adopting the (b)(2)(C)(iii) factors.

The third set of changes in the first group look to limits on the numbers of discovery requests that are allowed. The presumptive number of Rule 33 interrogatories would be reduced from 25 to 15. A new limit of 25 Rule 36 requests for admissions would be added, with an exception for requests to admit the genuineness of documents. Another new limit would set 25 as the number of Rule 34 requests; this limit has encountered objections that it would lead to a smaller number of broader requests, while other participants in the miniconference thought that real experience shows this is not a problem. The number of depositions allowed per side would be reduced from 10 to 5, and the time limit for each would be reduced from 7 hours to 4 hours. There was support for the deposition limits, but also some resistance from those who think the reduction is both unnecessary and unrealistic. But there seemed to be general agreement that a reduction of the presumptive time from 7 hours to 6 hours per deposition would work.

The second group starts with a sketch that would allow discovery requests to be served before the parties' Rule 26(f) conference; the time to respond would run from the close of the conference. This sketch in part responds to a perception that the Rule 26(d) moratorium barring service of discovery requests before the parties have conferred is often ignored or not even known. Pre-conference requests would enhance both the parties' conference and the scheduling conference with the court by providing a specific focus on actual discovery requests. It may be wise to impose some hiatus after filing before the requests can be served.

The next set of proposals in the second group focuses on objections to Rule 34 requests to produce. Objections would become subject to the same specificity requirement as Rule 33 imposes on objections to interrogatories. An objecting party would be required to state whether any documents are being withheld under the objections. If a party elects to produce documents rather than permit inspection, the response must state a reasonable time when production will be made; this sketch recognizes the value of "rolling" production.

The third proposal in the second group focuses on encouraging cooperation among the parties. The Subcommittee favors a more modest sketch that would amend Rule 1 to make clear that the rules

should be employed by the parties to achieve the Rule 1 goals of just, speedy, and inexpensive determination of the action. The Subcommittee feared the collateral consequences of a more aggressive sketch that would add to Rule 1 a new final sentence stating that the parties should cooperate to achieve these ends.

The third group of proposals includes some that have proved uncontroversial. One would add to the list of subjects suitable for a scheduling order a direction to seek a conference with the court before filing a discovery motion. Related sketches would expand the topics for the scheduling order, and for the parties' Rule 26(f) conference, to include preservation of electronically stored information and entry of court orders under Evidence Rule 502(e). Other sketches in the third group are likely to be deferred. One would adopt a uniform set of exemptions from Rule 26(a)(1) initial disclosures and from mandatory scheduling conferences. This topic will benefit from further research. Another set would defer the time to respond to contention discovery under Rules 33 and 36. The questions posed by initial disclosures under Rule 26(a)(1) reflect a significant difference of views about the practice that may be illuminated by developing practice in some states. Some sketches deal with cost-shifting in discovery; more work is required, but there is a consensus that the allocation of costs should be added as a possible provision of a protective order.

Professor Cooper added two points. A sketch that would amend Rule 26(g) to state specifically that a discovery objection or response is not evasive has been put aside in deference to the fears of many miniconference participants who thought this provision would generate much litigation as a "sanctions tort." The general certifications imposed by Rule 26(g) should embrace evasive responses and objections in any event. And it may be worthwhile to consider further a sketch that, omitting depositions, would allow discovery requests under Rules 33, 34, 35, and 36 to be served (or a Rule 35 motion to be made) at any time after the action is filed. The old practice that enabled a plaintiff to get a head start and claim priority in all discovery has been abandoned and, in light of Rule 26(d)(2), should not be a problem. This approach would avoid the awkward choices that must be made in drafting an initial no-discovery hiatus, to be followed by requests served before the Rule 26(f) conference. Time to respond still would be measured from the Rule 26(f) conference. Some concerns would remain — it may not always be clear when the first 26(f) conference has been held, and the advance notice might make it more difficult for a responding party to persuade the court that it needs still more time to respond.

These multiple questions were again submitted to the Committee for a sequential "roll call" of the members.

The first member thought that shortening the time for service and accelerating the timing of the scheduling conference makes sense. This will get the litigation going. Far more important, the proposal to make proportionality an express limit on the scope of discovery under Rule 26(b)(1) is right on target. More and more judges rely on proportionality in applying the cost-benefit analysis of Rule 26(b)(2)(C)(iii). The other changes in (b)(1) also are OK. There is no apparent problem with the present Rule 33 presumptive limit to 25 interrogatories, but there also is likely to be no problem if the limit is reduced to 15. Adding numerical limits to Rule 36, with an exception for requests to admit the genuineness of documents, also is appropriate. Imposing a presumptive limit of 25 requests to produce under Rule 34 is not obviously right; it will be difficult, however, to define the right number. But it is clear from practice, and experience in mediating and arbitrating, that "Rule 34 can be handled in a smart way." As for the number of depositions, most cases now involve 5 or fewer per side; a reduction from 7 hours to 6 hours would be fine. Allowing discovery requests before the Rule 26(f) conference is good, but setting the time to respond from the conference may be difficult because it may not be clear when the conference has ended. It is good to require that Rule 34 objections be specific and that the responding party state whether anything is being withheld under the objections. Requiring the responding party to state a reasonable time when production will be made is good. Bringing the parties into Rule 1 is a good idea. But it may be better to refer to "collaboration" rather than "cooperation.

The next member said that it can work to reduce the presumptive limits on the number of discovery requests so long as it is clear that they are only presumptive, that the parties and court should be alert to the need for flexibility in making exceptions. Allowing discovery requests before the Rule 26(f) conference will be good — it will eliminate confusion about the Rule 26(d) discovery moratorium. Adding the concept of party cooperation to Rule 1 is good, but "collaboration" may be a better concept to use. "Anything that promotes Evidence Rule 502 is good."

Applauding the package, the next member said that it is important to keep within the § 2072 limit that bars abridging, enlarging, or modifying any substantive right. Many outside observers want changes that would violate that limit. These proposals do not. Litigation will, gas-like, expand to fill the available volume; the proposed acceleration of the first steps in an action reflect the reality of the smaller cases that are the staple of federal litigation and that do not need so much time. "The attempt to eliminate boilerplate objections is worthy." The Evidence Rules Committee believes that Evidence Rule 502 is underused by the bar; amending the Civil Rules to draw attention to

it is good.

Another member expressed support for the package.

Two more members noted support for the package in the terms used by the earlier speakers. One suggested support for the "Utah" model that would set limits on depositions by allocating a finite number of hours per party or side, leaving it to the parties to divide the total time budget among depositions — one might be held to a single hour, while another might run far longer.

The next member offered comments in supporting the general package. The "not controversial" proposals are good. Requiring that Rule 34 objections be specific is good. Asserting that lawyers are responsible for achieving the goals of Rule 1 is good. As for allowing discovery requests to be served before the Rule 26(f) conference, "I haven't seen any problems, but if the Subcommittee sees them," the proposal is OK. Moving up the time for the 16(b) scheduling conference is attractive, but perhaps it should be 90 days after any defendant is served or 60 days after any defendant appears. Limiting the presumptive number of discovery requests is appropriate if it is made clear that there is room for flexibility through judicial discretion. Incorporating proportionality into the Rule 26(b)(1) scope of discovery is good.

A Subcommittee member noted the need to focus on the "philosophical" question posed by the risk of making rules so specific as to interfere with the judge's case-management discretion. Should some of these issues be dealt with by educating the bench and bar, one of the initial efforts launched by the Subcommittee after the Duke Conference? That could reduce the need to incorporate numerical and time limits in the rules. But shortening the time periods for serving process and holding the first scheduling conference is obviously right.

The Department of Justice thinks the package is impressive, but is still thinking about some of the components. The Department wholeheartedly endorses incorporating the concept of proportionality in Rule 26(b)(1). There are practical problems for the Department in accelerating events at the beginning of an action. Federal government defendants are given more time to answer for reasons that also apply here. It takes time to get the case to the right lawyers, and then for the lawyers to get to the right people with the right information. Early discovery requests cut against the value of an initial conference with the court on what the scope of the case actually will be, and seem inconsistent with the values of initial disclosures. Accelerating the time when requests are actually reduced to writing "may make things worse." The question is how best to focus discovery on what the actual

issues in the case will be. (In response to a question about the importance of initial disclosures in this process, it was repeated that they are helpful in the early discussions about what discovery is needed. Writing detailed requests before the initial discussion will lead to broader requests, or requests based on misinformation or misperception.) As to the presumptive numerical limits on discovery, "there is a bit of a division within the Department." It will be essential to ensure that courts understand their flexible authority to set appropriate parameters.

Another member thought it very attractive to permit discovery requests to be served before the initial conference, running the time to respond from the conference.

The last Committee member to speak said that the broad slate of proposals promises a good cumulative effect on the way discovery is conducted. "There is a possibility of significant improvement."

A liaison reminded the Committee that adoption of these proposals would create a need to make conforming amendments to the Bankruptcy Rules that incorporate the Civil Rules. Bankruptcy Rule 1001, for example, incorporates Civil Rule 1.

The clerks-of-court liaison stated that shortening the Rule 4(m) time for service to 60 days makes sense from the clerks' perspective. It is not clear whether it is feasible to shorten the time for the initial scheduling conference and order.

Another liaison thought the package "an amazing distillation of the Duke Conference." A cap on the total number of hours for all depositions seems attractive. As Professor Gensler observed, it is easier to manage up from a floor than to manage down. It is important that case-management discretion remain, and be well recognized.

Reporter Coquillette observed that any addition to Rule 1 that affects attorney conduct must confront the consequent impact on the rules of professional responsibility. These are matters of state law that present big issues.

Judge Campbell observed that the package of proposals remains a work in progress. The Subcommittee and Committee remain open to further suggestions.

An observer underlined the concern that applying Rule 1 to the parties "raises a vast array of questions that may be inconsistent with the adversary system of justice." Even speaking of "cooperation" among the parties in a Committee Note "is only slightly less objectionable" than putting it in a rule text. He

further suggested that discovery requests before the Rule 26(f) conference are premature. The conference should be mostly about defining the issues in the action.

Another observer suggested that cooperation among the parties should be addressed in the Committee Note, not in rule text. The Sedona committee proposal is to amend Rule 1 to provide that the rules "should be construed, complied with, and administered" to achieve the Rule 1 goals.

Judge Koeltl expressed appreciation for all of these contributions. The Subcommittee will continue to work on the drafts. Further comments will be welcomed. "We have had a lot of supporters as we have gone forward." Detailed models will be helpful in addressing such matters as the number of depositions, the length of depositions, allowing discovery requests before the Rule 26(f) conference (including whether there should be a hiatus between initial filing and serving the requests), and other topics. The Subcommittee expects to have a package of proposals ready for consideration at the April Advisory Committee meeting. All proposals and comments will advance the work. The Subcommittee believes the package will have a significant beneficial effect on the conduct of litigation. But it is expected, and desirable, that there will be still more comments and suggestions as the package is scrutinized during the period for public comment. Earlier versions of the package put aside many initial drafts, and the package has been still further pruned. Detailed rule text and Committee Notes will be prepared. The Subcommittee hopes they will win as much enthusiastic response as the current drafts.

Rule 84

Judge Pratter introduced the report of the Rule 84 Subcommittee by stating that the Subcommittee hopes to ask approval in April of a recommendation to the Standing Committee to publish a specific proposal on what, if anything, to do with Rule 84. The purpose today is to revisit the discussion at the March Advisory Committee meeting. The discussion then seemed to show interest in abrogating Rule 84. But later exchanges suggest some concern that all competing considerations should be carefully weighed once more, to ensure that we not move too fast.

Responding to this concern, the Subcommittee reached out to find out who uses the Forms, and for what purposes. This effort confirmed what had been suspected. Very few professionals or practitioners use the Rule 84 Forms. Some think the forms cause problems — the patent bar is agitated about the serious problems they find in the Form 18 complaint for patent infringement. Many of the lawyers who were contacted responded: "I don't use the Forms;

perhaps someone else does." Lawyers instead use their own forms, their firms' forms, Administrative Office forms, local forms, forms provided by treatises, and forms from like sources.

The Forms have not received frequent attention from the Advisory Committee. There is little enthusiasm for taking on the task that would follow from assuming active responsibility for the Forms. Meanwhile, the Administrative Office working group on forms, composed of six judges and six court clerks, is doing a great deal of attentive and conscientious work on AO forms. They deal with a host of forms, including forms for civil actions. "They are really good."

Judge Colloton has expressed concern that abrogation of the pleading forms would bedevil the bench and bar in working out the impact on pleading practice. He is concerned that the forms will live on through the influence of decisions rendered while they stood as official guides to pleading practice.

Many options are open. The Committee could do nothing, leaving Rule 84 and the Forms to carry on as they are. Or it could undertake a complete overhaul of the Forms. Or it could retain Rule 84 but shed all responsibility for ongoing maintenance and revision — but it is questionable whether it would be either legal or wise to delegate this Enabling Act responsibility. Or we could "defang" Rule 84 by deleting the provision that the Forms suffice under the rules, leaving them as mere illustrations. Or, as the Subcommittee currently prefers, Rule 84 can be abrogated. The Subcommittee asks advice on which direction it should pursue.

Judge Campbell elaborated Judge Colloton's concern that decisions that have relied on the Forms in developing pleading standards will live on, giving the Forms renewed life in the common law. Or courts might view the Forms, no longer official, as still a form of legislative history that illuminates the continuing meaning of Rule 8 pleading standards. But Judge Colloton also believes that the draft Committee Note does a good job of addressing these questions; his concern is to make sure that the Committee considers these things.

Reporter Cooper offered a few additional remarks. First, some of the lawyers surveyed by the Subcommittee reported that they do not use the Rule 84 Forms, but speculated that the Forms might be helpful to pro se parties. But there seems to be little indication that pro se parties often find the forms, much less use them. Some courts are making attempts to aid pro se litigants by developing local forms for common types of litigation, a process that may work better than attempting to fill the need through the Enabling Act. Second, abrogating the pleading Forms does not mean that none of

them should remain adequate under developing pleading standards. Form 11, for example, may well suffice as a complaint for an automobile accident case even though it would not do as a complaint for negligence in more complicated settings. Finally, if Rule 84 is abrogated, the Committee will need to establish a system for coordinating with the Administrative Office working group. It may be wise to begin with a relatively conservative approach that establishes a close connection, so that the Committee monitors the process and is enabled to participate when that seems desirable. This is one of the subjects that should be addressed when a proposal for publication is advanced next spring.

Discussion began with support for abrogating Rule 84. The goal should be to remove the Forms from the Enabling Act process. The process takes too long. "We're not nimble."

The next member noted the concern about carrying forward the validity of the common law that depended on the pleading forms, but agreed that there is no profit in attempting to revamp the process to force greater Advisory Committee involvement.

Another member asked how far back the forms go. It was noted that the original pleading forms were developed in 1938; Judge Clark explained that it is difficult to capture the intended new pleading practice in rule text, "but at least you can paint pictures." The forms were illustrative in the beginning, but in 1946 Rule 84 was amended to state that they suffice under the rules. All of the forms were restyled as part of the Style Project that culminated in 2007, but much less attention was lavished on them than on the rules themselves. A few forms have been carefully developed by the Committee. Forms 5 and 6 were developed to implement the Rule 4(d) waiver-of-service provisions when the waiver procedure was created. Form 52, the Report of the Parties' Planning Meeting, was carefully revised in conjunction with Rule 26(f) amendments. But for the most part the Forms have languished in benign neglect. With this background, the member observed that "too many subjects of federal litigation are missing" from the pleading forms. Either there should be wholesale revisions to make them reflect the forms of litigation that dominate the docket or they should be abrogated. "They will live on, but the half-life will be short." And the courts have had sufficient time to adjust to the pleading decisions in *Twombly* and *Iqbal*; abrogation of the pleading forms will not be seen as taking sides on pleading standards.

Several more members expressed support for abrogation. One summarized that the alternatives are clearly set out, and "the trail leads back to abrogation." A liaison supported abrogation, noting that the next-best alternative would be to divorce the

Advisory Committee from the process of maintaining and revising the forms. The Administrative Office working group provides strong support and produces very good forms.

It was noted that further thought should be given to preserving the Form 5 request to waive service — Rule 4(d)(1)(D) specifically requires that it be used. Form 6, the waiver itself, is not required by Rule 4, but it too might be preserved, perhaps by incorporating it into Rule 4 as Form 5 is now incorporated. Some members urged that Form 6 be carried forward. The Subcommittee will consider the manner of preserving and perhaps revising Form 5, and also will consider possibly preserving Form 6.

And it was suggested that the Committee should not worry about the effect of abrogation on pleading precedents. The precedents may carry forward, but they will be treated in the same way as other precedents developed under the aegis of subsequently repealed statutes. These issues should not be addressed directly in the Committee Note since any comments might be read as comments on what the Committee thinks pleading standards should be. Another member agreed with this view.

Another member supporting abrogation noted that there is no sense that pro se plaintiffs are using the pleading forms. The courts that are working to help pro se plaintiffs are not using Rule 84 Forms for the purpose.

Turning to the Committee Note, it was suggested that it is too narrow to refer only to Administrative Office forms. It should be recognized that there are other excellent sources of forms as well. Another suggestion was that the draft Note is, as the agenda materials suggest, too long. It should be shortened.

Judge Campbell concluded the discussion by reminding observers that comments on Rule 84 can be sent to him and to Judge Pratter.

Speedy Remand of Removed Actions

Jim Hood, the Attorney General of Mississippi, has proposed that rules be adopted to deal with "the use of removal to federal court as a dilatory defense tactic" to interfere with the need for immediate protection of citizens "from corporate wrongdoing." The problem is aggravated by delays in ruling on motions to remand. In one recent case in his office the Fifth Circuit granted mandamus to compel prompt disposition of a remand motion that had languished for three years on the district court docket. In another case it took fifteen months to get a final ruling from the district court.

Two remedies are proposed. The first rule would require

automatic remand if the district court fails to act on a motion to remand within 30 days. The second rule would provide that whenever a case is remanded the removing party must pay just costs and actual expenses, incurring attorney fees.

The long delays described by Attorney General Hood are cause for genuine sympathy and concern. But there are countervailing considerations that make each proposal ill-suited for cure by rules adopted under the Rules Enabling Act. Although the agenda materials do not make specific recommendations, the Reporter offered a summary of the reasons why each proposal is more properly considered in the legislative process than in the rulemaking process.

The automatic remand proposal encounters at least three obstacles. The first and most profound is that it would require remand for want of timely decision even though the action was properly removed and lies in the subject-matter jurisdiction of the federal court. The Rules Enabling Act should not be used to expand or to limit subject-matter jurisdiction. This point is emphasized by Rule 82: "These rules do not extend or limit the jurisdiction of the district courts." It is for Congress, not the courts — not even with the participation of Congress at the culmination of the Enabling Act process — to define subject-matter jurisdiction.

Another difficulty with the automatic remand period is that 30 days often will not be enough to act responsibly on a motion to remand. Complicated questions of law or fact may arise. The court may be hard-pressed by many conflicting obligations. These difficulties would be reduced if the period were made longer, although even 90 or 120 days — still within the 6-month reporting period — may not be long enough, particularly in courts with especially crowded dockets. These concerns reflect a third obstacle. The Judicial Conference has long opposed statutory or rules requirements that give some disputes priority over others on the court's docket. This policy is reflected in 28 U.S.C. § 1657, which directs that "each court of the United States shall determine the order in which civil actions are heard and determined," with exceptions that are not relevant to the present question.

The mandatory imposition of expenses, including attorney fees, encounters at least two obstacles. The more fundamental is that it would amend 28 U.S.C. § 1447(c), which makes the award of expenses and fees a matter for district court discretion. Congress considered these questions not so long ago, and opted for discretion. Supersession by an Enabling Act rule should be attempted only for compelling reasons, and even then might better be left to a request by the Judicial Conference that Congress take up the matter. A similar issue is presented by § 1446(a), which

requires that a notice of removal be signed pursuant to Civil Rule 11. The long-drawn battle over the choice between discretionary and mandatory sanctions under Rule 11 is familiar; the choice for discretion is relatively recent and firm.

The second obstacle to making an award of expenses and fees mandatory is that it is bad policy. Some removals may indeed be dilatory. Others present legitimate arguments for federal jurisdiction, even if in the end the arguments fail. It is not only that the rules committees should defer to Congress. It is that Congress got it right.

A third but less important obstacle also was noted. Although § 1447(d) bars review of most remand orders by appeal or otherwise, the award of fees and expenses incident to remand is an appealable final judgment. Review of the award commonly entails review of the remand. The result may be reversal of the award because the remand was wrong — nothing can be done about the remand, but the court of appeals has been put the work of deciding the issue.

Judge Campbell summarized these concerns from additional perspectives. It is easy to understand Attorney General Hood's frustration. But we should be reluctant to base rules amendments on extreme cases. The 30-day automatic remand would in effect amend the federal subject-matter jurisdiction statutes and the removal statutes. That does not seem a sensible subject for the rulemaking process. His own experience is that expenses and attorney fees are often awarded on remanding an action; some removal attempts present no colorable basis for removal or are dilatory. But other cases present valid arguments; that the argument fails at the last point of fine analysis does not mean that the removing party should have to pay.

Committee discussion reflected unanimous agreement that these proposals are not proper subjects for consideration in the Rules Enabling Act process. It was noted that extreme events should not be brushed off. Sometimes the system fails, and the system should attempt to do something to correct the failures. Whatever the circumstances of the cases that Attorney General Hood has encountered, however, resolution should be found in other sources. Mandamus from the Fifth Circuit finally provided relief in one of these cases. At least extraordinary cases may be subject to correction by that process. It was agreed that Judge Sutton would respond to Attorney General Hood.

Rule 6(d): "After Service"

Rule 6(d) was rewritten two years before the Style Project, but in keeping with Style Project precepts. Before the revision, it

provided an additional 3 days to respond when service is made by various described means. It provided the three extra days following service "upon the party." The spirit of economy in style led to a subtle change, allowing 3 extra days when a party must act within a specified time "after service." The problem is that no one thought of the rules that allow a party to act within a specified time after making service, Rules 14(a)(1)(service of a third-party complaint more than 14 days after serving the original answer); 15(a)(1)(A)(leave to amend a complaint once as a matter of course "within * * * 21 days after serving it); and 38(b)(1)(jury demand no more than 14 days after the last pleading is served). Time to act "after service" could easily be read to include time to act after making service. Thus a party who serves an answer could extend the time to amend once as a matter of course from 21 days to 24 days by electing to make service by any of the means eligible for the 3 added days.

For reasons described in the agenda materials, this misadventure does not seem grave. But it can be fixed easily:

> When a party may or must act within a specified time after ~~service~~ being served and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added * * *.

The only reason for going slow is that Rule 6(d) may soon require attention for other reasons. The question whether it is appropriate to add 3 days after each of the various means of service described in Rule 5(b)(2)(C), (D), (E), and (F) has lingered for some time. The most pointed question may be whether service by electronic means has matured to a point that warrants treating it in the same way as direct personal service. This question, however, is related to more general questions about electronic filing and service that involve the other advisory committees and that will take some time for further work.

A recommendation to approve the "being served" amendment to Rule 6(d) for publication as part of the next package of Civil Rules published for comment was approved unanimously. It can be paired with an earlier-approved amendment of Rule 55 and presented to the Standing Committee for approval, with publication to await a package of more important amendments. That can be next summer if the Rule 37(e) proposal and perhaps the Duke Conference Subcommittee proposals are approved for publication then.

Technical Cross-Reference Fix

The Administrative Office has just received a suggestion that the cross-reference to Rule 6(a)(4)(A) in Rule 77(c)(1) is an apparent oversight, probably made in the Time Computation Project.

The holidays defined in former 6(a)(4)(A) are now defined in Rule 6(a)(6)(A). It was agreed that if study of the suggestion proves it to be as simple an oversight as it seems, the technical correction can be made without publication for comment.

Closing

The meeting closed with a reminder that the next meeting will be on April 11 and 12, 2013, in Norman, Oklahoma, hosted by the University of Oklahoma Law School. Judge Koeltl thanked the Administrative Office for making such successful arrangements to carry on the meeting by electronic means. Judge Campbell thanked all participants.

Respectfully submitted

Edward H. Cooper
Reporter