MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 7-8, 2013

1 The Civil Rules Advisory Committee met at the Administrative
2 Office of the United States Courts in Washington, D.C., on November
3 7-8, 2013. Participants included Judge David G. Campbell, Committee
4 Chair, and Committee members John M. Barkett, Esq.; Elizabeth
5 Cabraser, Esq.; Hon. Stuart F. Delery; Judge Paul S. Diamond; Judge
6 Robert Michael Dow, Jr.; Parker C. Folse, Esq.; Judge Paul W.
7 Grimm; Peter D. Keisler, Esq.; Dean Robert H. Klonoff; Judge John
8 G. Koeltl; Judge Scott M. Matheson, Jr.; Justice David E. Nahmias;
9 Judge Solomon Oliver, Jr.; and Judge Gene E.K. Pratter. Professor
10 Edward H. Cooper participated as Reporter, and Professor Richard L.
11 Marcus participated as Associate Reporter. Judge Jeffrey S.Sutton,
12 Chair, and Professor Daniel R. Coquillette, Reporter, represented
13 the Standing Committee. Judge Arthur I. Harris participated as
14 liaison from the Bankruptcy Rules Committee. Laura A. Briggs,
15 Esq., the court-clerk representative, also participated. The
16 Department of Justice was further represented by Theodore Hirt,
17 Esq.. Judge Jeremy Fogel and Dr. Emery Lee participated for the
18 Federal Judicial Center. Jonathan C. Rose, Andrea Kuperman,
19 Benjamin J. Robinson, and Julie Wilson represented the
20 Administrative Office. Observers included Judge Lee H. Rosenthal,
21 past chair of the Committee and of the Standing Committee; Jonathan
22 Margolis, Esq. (National Employment Lawyers Association); John K.
23 Rabiej (Duke Center for Judicial Studies); Jerome Scanlan (EEOC);
24 Alex Dahl, Esq. and Robert Levy, Esq. (Lawyers for Civil Justice);
25 John Vail, Esq.; Valerie M. Nannery, Esq., and Andre M. Mura, Esq.
26 (Center for Constitutional Litigation); Thomas Y. Allman, Esq.;
27 Ariana Tadler, Esq.; Henry Kelsen, Esq.; and Elsa Rodriguez
28 Preston, Esq. (Law Department, City of New York).

29 The first day of the meeting, November 7, was devoted to a
30 public hearing on proposed rule amendments that were published for
31 comment in August, 2013. The testimony of forty-one witnesses is
32 preserved in a separate transcript.

33 Judge Campbell opened the second day of the meeting, November
34 8, by welcoming Judge Dow as a new Committee member. Judge Dow has
35 served in the Northern District of Illinois since 2007. He had been
36 serving on the Appellate Rules Committee — "We won the tug-of-war."
37 He has degrees from Yale, Oxford (as a Rhodes Scholar), and
38 Harvard. He served as law clerk to Judge Flaum, and practiced as a
39 litigator and appellate lawyer.

40 Justice Nahmias and Parker Folse also were welcomed to the
41 first meeting they have been able to attend in person; they were
42 able to participate in their first meeting as members last April
43 only by telephone.

44 Judge Pratter and Elizabeth Cabraser have been renewed for

45 their second three-year terms. And, in a welcome departure from the
46 usual two-term limit, the Chief Justice has extended Judge Koeltl's
47 term by one year, to maintain continuity in perfecting the proposed
48 amendments that have grown out of the 2010 Duke Conference.

49 Judge Gorsuch will be the new liaison from the Standing
50 Committee.

51 John Vail, who has been a long-time friend of the Committee,
52 has entered private practice. Two new representatives from the
53 Center for Constitutional Litigation are attending this meeting,
54 but all hope that Vail will continue to be involved.

55 The next meeting will be on April 10 and 11 in Portland,
56 Oregon at the Lewis and Clark Law School; part of the first day
57 will be devoted to a conference in tribute to Judge Mark R.
58 Kravitz, the immediate prior chair of this Committee and of the
59 Standing Committee. The second day will likely be a full day.

60 The Standing Committee acted at its June meeting to approve
61 recommendations to publish Civil Rules amendments in August.

62 Judge Sutton noted that the Standing Committee got the rules
63 proposals recommended for adoption and the Standing Committee
64 meeting minutes to the Judicial Conference earlier than usual. With
65 the Conference's approval of the proposals, this will give the
66 Court a bit more time to consider the proposals in the fall. And,
67 if the Court has concerns, there will be more time for the
68 Committee to respond. As an example of the benefits, it has been
69 possible to consider the question whether one of the Bankruptcy
70 Rule proposals should be withheld because the Court granted
71 certiorari on a related issue late last June.

72 Judge Campbell observed that the present rules proposals
73 reflect the need for more effective case management in some courts.
74 "We can write rules." But training by the Federal Judicial center
75 is an essential part of making them effective. Judge Fogel observed
76 that there seems to be a perception in Congress that judges do not
77 manage cases effectively enough. The current efforts to encourage
78 early and active case management will provide important reassurance
79 that the rules committees are pursuing these issues vigorously.

80 The Committee had no proposals for review at the September
81 Judicial Conference meeting.

82 The Rule 45 Subpoena amendments will take effect December 1.
83 The Administrative Office forms are being revised to account for
84 the changes. John Barkett will hold an ABA webinar to inform
85 lawyers about the changes. Judge Harris has written an article to
86 inform bankruptcy lawyers of the changes. It is important that the
87 bar learn of the changes and adapt to them — technically, a lawyer

88 who on December 1 issues a subpoena from a district court in
89 Michigan to a witness in Michigan for a deposition in Michigan to
90 support an action in Illinois will be issuing an invalid subpoena,
91 since the new rules direct issuance from the court in Illinois.

92 Judge Campbell concluded his opening remarks by thanking all
93 the observers for their interest and attendance.

94 *April 2013 Minutes*

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

98 *Legislative Activity*

99 Benjamin Robinson reported on current legislative activity.

100 Congress is considering bills to amend Rule 11. The House has
101 passed similar bills in recent years. The full House is expected to
102 vote on the Lawsuit Abuse Reduction Act next week. It is not clear
103 whether the Department of Justice will express views on the bill.
104 The rules committees have clearly expressed their opposition. The
105 dissenters in the House have addressed the concerns with the
106 provisions that would make sanctions mandatory. Should the bill
107 pass in the House, prospects in the Senate are uncertain.

108 Representative Goodlatte has a bill, House 3309, that
109 addresses discovery costs and concerns, especially in patent-
110 infringement actions. Section 6 requires the Judicial Conference,
111 using existing resources, to generate rules. Section 6 further
112 prescribes the content of the rules, mandating discovery cost-
113 shifting for discovery beyond "core" discovery. Judge Sutton and
114 Judge Campbell have submitted a letter expressing concerns about
115 the relationship of these provisions to the Enabling Act procedure
116 that Congress has adopted for revising court rules. Working with
117 staffers on the Hill in the last few months has been productive.
118 The best outcome for the Enabling Act process may be an expression
119 of the sense of Congress on what might be desirable rules. One
120 possibility, for example, would be to generate for patent cases
121 something like the protocol for individual employment cases
122 developed under the leadership of the National Employment Lawyers
123 Association. Much further work should be done in assessing the
124 desirability of a system in which a party requesting discovery pays
125 for the cost of responding to all discovery beyond the "core,"
126 however the core might be defined. One reason to avoid precipitous
127 action is that there are pilot projects for patent litigation, and
128 much may be learned from them.

129 Judge Fogel noted that the Federal Judicial Center is studying
130 the pilot projects. The pending bills reflect the sense of both

131 political parties and the White House that something should be done
132 about patent litigation brought by nonpracticing entities, referred
133 to by some as "patent trolls." There is a perception that these
134 plaintiffs use the cost of discovery as a weapon to force
135 settlement. The bill, in its present form, is not very flexible. It
136 prohibits discovery on anything but claim construction before the
137 Markman hearing, absent exceptional circumstances. But there are
138 cases in which claim construction is not a critical issue, and in
139 which prompt discovery on other issues is important. Another
140 provision directs that the nonprevailing party pay the other
141 party’s fees unless it can show its position was substantially
142 justified.

143 Judge Campbell noted that the rules committees comment only on
144 the parts of pending legislation that affect civil procedure
145 directly. Substantive issues — here, substantive patent issues —
146 are beyond the committees’ scope. We do urge Congress to respect
147 the Enabling Act. But there are many procedural provisions. Core
148 discovery is limited to documents. The requester pays for
149 everything after that, including non-core documents and attorney
150 fees for depositions. Discovery of electronically stored
151 information is limited to 5 custodians, and search terms must be
152 specified. The committees are pleased to address issues that
153 Congress finds troubling or important, but they ask that Congress
154 not dictate the terms of rules amendments. Staff members in both
155 houses seem receptive to this message.

156 One specific provision of the patent bill directly abrogates
157 Form 18 of the Rule 84 official forms. Congress knows that the
158 Committee proposes to abrogate Rule 84 and all the forms, but it
159 also knows how much time remains in the full Enabling Act process.
160 Some are impatient with that. "It is an ongoing process."

161 It also was noted that there are private groups that oppose
162 the patent bill. They believe there should be no distinctions
163 between nonpracticing entities and other patent owners. Free
164 transfer of patent rights is argued to enhance the value of the
165 patent system. There will be vigorous representation of all views.

166 Benjamin Robinson also described a November 5 hearing by the
167 Senate Judiciary Committee Subcommittee on Bankruptcy and the
168 Courts that was, in substance, deliberate and thoughtful. The
169 witnesses were well-informed and thoughtful. They expressed
170 concerns about the adequacy of judicial resources. And there were
171 criticisms of the rules proposals published in August, which are
172 seen to create "procedural stop signs." Many of those at the
173 hearing reflected their interest in the Enabling Act process, and
174 were concerned that the committees work hard to "get it right."
175 Four specific questions were posed at the end: what, specifically,
176 the proposals are intended to accomplish; what failures of the
177 system they are designed to correct; whether the amendments are

178 likely to be effective; and what are the likely costs, including
179 collective costs, and how the costs should be weighed against the
180 hoped-for benefits. Concerns also were expressed that recent
181 procedural developments will impede access to justice — pleading
182 standards and summary judgment are particular subjects of concern.

183 *E-Rules*

184 The Standing Committee has appointed a subcommittee
185 constituted by two representatives from each of the advisory
186 committees, together with the reporters. Judge Chagares serves as
187 chair. Professor Capra is the reporter. Judge Oliver and Clerk
188 Briggs are the delegates from the Civil Rules Committee. The task
189 of the subcommittee is to consider the ways in which developing
190 methods of electronic communication may warrant adoption of common
191 approaches that are adopted in each set of rules. The initial goal
192 has been to produce a set of proposals that can be recommended for
193 publication in time for the June 2014 Standing Committee meeting.

194 <u>Rule 6(d): "3 days are added"</u>: A proposal to eliminate the "3 days
195 are added" provision for reacting after being served by electronic
196 means has reached a consensus. All committees with this rule will
197 eliminate the 3 added days. A common Committee Note has been
198 drafted. There is one small issue for the text of Civil Rule 6(d).
199 Professor Capra suggested that parenthetical word descriptions
200 should be added to the cross-references to the rules that will
201 continue to activate the 3 added days to respond. The
202 parentheticals could prove useful to avoid repeated flipping back
203 to the corresponding Rule 5 provisions. Although only Rules 5.1 and
204 5.2 intervene between Rule 5 and Rule 6, the added convenience may
205 be more useful because there are cross-references to service by
206 mail, by leaving with the clerk, and by other means consented to.
207 There is no risk that these simple identifying words will create
208 confusion in the rules. On the other hand, there are many cross-
209 references throughout the rules, and they do not add parenthetical
210 descriptions. Generalizing this practice might encounter greater
211 dangers that parenthetical descriptions would be read as
212 interpretations. And the burden of following cross-references may
213 be reduced by the growing use of hyperlinks in electronic versions
214 of the rules. The Style Consultant will no doubt have views on this
215 proposal. (The Style Consultant approved the parentheticals at the
216 January meeting of the Standing Committee.)

217 The Committee approved recommendation of the draft Rule 6(d)
218 for publication.

219 <u>Electronic Signatures</u>: Verification of signatures on papers filed
220 by electronic means has raised some disquiet. An amendment of
221 Bankruptcy Rule 5005 addressing these issues was published this
222 summer. The first part provides that the user name and password of
223 a registered user serves as a signature. The second part addresses

224 signatures by persons other than the registered user who makes the
225 filing. Two alternatives are provided. The first alternative states
226 that by filing the document and the signature page, the registered
227 user certifies that the scanned signature was part of the original
228 document. The second alternative directs that the document and
229 signature page must be accompanied by an acknowledgment of a notary
230 public that the scanned signature was part of the original
231 document.

232 The Civil Rules delegates to the subcommittee are puzzled by
233 the alternative that would require a notary's acknowledgment. The
234 underlying concern seems to be that as compared to paper documents,
235 it easier to misuse an authentic signature many times by electronic
236 submissions. An original paper signature page might be detached
237 from one document and attached to a filed document. An electronic
238 signature might be replicated many times. And bankruptcy practice
239 may involve more frequent needs for the same person to sign several
240 documents than arise in other areas of practice. That of itself may
241 serve to distinguish the bankruptcy rules from the other sets of
242 rules — if they need the notary alternative, there may be good
243 reason to adopt a different approach in the other sets of rules.
244 Interest in adopting a different approach stems from uncertainty
245 about how the notary will participate in a way that reduces the
246 perceived danger. If the paper is signed before it is filed, the
247 notary could guarantee authenticity only by retaining the
248 electronic file and being present at the time of filing — indeed,
249 perhaps, making the filing to ensure there is no legerdemain in the
250 filing process. Or the notary could be present at the time of
251 signing and simultaneous filing. Either alternative seems
252 cumbersome at best. And it could apply to many filings — the
253 affidavits or declarations of several witnesses might be needed for
254 a summary-judgment motion, for example. Involving a notary also
255 seems inconsistent with the movement away from requiring
256 notarization, as reflected in 28 U.S.C. § 1746. Relying on the
257 filer to ensure authenticity has seemed to work for paper filings.
258 It is not clear that anything more should be required for e-
259 filings.

260 These observations were elaborated by comments that e-
261 signatures have generated much discussion. The Evidence Rules
262 Committee planned to present a panel on these issues, developed by
263 the Department of Justice, at the conference scheduled for October
264 but cancelled for the government shutdown. The IRS has used scanned
265 e-signatures, under a statute that relieves the prosecutor of the
266 burden. The FBI argues that it is impossible to verify forgeries of
267 scanned signatures. One solution is to require that lawyers keep
268 "wet signature" documents. Lawyers do not want that burden. Nor are
269 lawyers eager to have to produce documents that harm their clients'
270 positions. The Department of Justice has discussed these issues
271 extensively, and finds them complicated.

272 It was noted that the problems of filing are complemented by
273 evolving concepts of admissibility in evidence. Social media
274 postings, for example, may be offered to show motive and intent.
275 Evidence Rules 803(6)(E) and (8)(B), and 901(a), are not much help
276 in telling you what needs to be done to show a source is
277 trustworthy. Addressing what need be done to file a paper is like
278 the tail wagging the dog — the more important questions are what
279 can be done with the paper. "This is a moving target."

280 Further discussion confirmed that the signature rule is
281 addressed to all papers signed by someone other than the registered
282 user. The example of affidavits or declarations submitted with a
283 summary-judgment motion recurred. The rule applies to anything
284 filed. A settlement agreement would be another example. And the
285 fear indeed is that a lawyer will cheat. But fraudsters will cheat
286 in either medium, paper or electronic filing. The burden of
287 invoking notarization would be great. It was urged again that we
288 should continue to rely, as we do now, on the integrity of lawyers.

289 <u>e=Paper</u>: Continuing advances in electronic technology and parallel
290 advances in its use raise the question whether the time has come to
291 adopt a general rule that electrons equal paper. The subcommittee
292 has prepared a generic draft rule that provides that any reference
293 to information in written form includes electronically stored
294 information, and that any act that may be completed by filing or
295 sending paper may also be accomplished by electronic means. The
296 draft recognizes that any particular set of rules may need to
297 provide exceptions — that could be done either by adding "unless
298 otherwise provided" to the general rule and adding specific
299 provisions to other rules, or by listing a presumably small number
300 of exceptions in the general rule. The task of identifying suitable
301 exceptions may be challenging; multiple questions are suggested in
302 the materials. It will be helpful to think about the need for a
303 general provision by starting with e-service and e-filing. If those
304 rules cover most of the important issues, and if it is difficult to
305 be confident in creating exceptions to a more general rule, it may
306 be that the provisions for service and filing will suffice for now.

307 <u>e-Service, e-Filing</u>: Rule 5(b)(2)(E) now provides for electronic
308 service of papers after the initial summons and complaint if the
309 person served consented in writing. This "consent" provision has
310 been stretched in many courts by local rules that require consent
311 as an element in registering to participate in electronic filing.
312 At least some courts would be more comfortable with open authority
313 to require e-service. The agenda includes a draft that begins by
314 authorizing service by electronic means, and then suggests a number
315 of alternative exceptions — "unless" good cause is shown for
316 exemption, or a person files a refusal at the time of first
317 appearing in the action, or the person has no e-mail address, or
318 local rules provide exemptions. The initial temptation to exempt
319 pro se filers was resisted because some courts are experimenting

320 successfully with programs that require prisoners to participate in
321 e-filing and e-service.

322 Rule 5(d)(3) authorizes a court to adopt a local rule that
323 allows e-filing, so long as reasonable exceptions are allowed. Here
324 too it may be desirable to put greater emphasis on e-action. The
325 agenda materials include a draft directing that all filings must be
326 by electronic means, but also directing that reasonable exceptions
327 must be allowed by local rule.

328 Judge Oliver opened the discussion by noting that many courts
329 effectively require consent to e-service, and that the subcommittee
330 is interested in emphasizing e-service. At the same time, some
331 exceptions will prove useful. Clerk Briggs noted that her court
332 has a good-cause exception, but it has been invoked only once — and
333 that was eight or nine years ago. They have a prisoner e-filing
334 project that has been surprisingly successful. Another committee
335 member observed that e-service is done routinely; "this is the
336 world we live in."

337 The value of allowing exceptions by local rules was supported
338 by suggesting that this is an area where geography may make a
339 difference. Some areas may encounter distinctive circumstances that
340 warrant a general exception by local rule.

341 A question was raised about a pro se litigant who wants to be
342 served electronically but may present difficulties. One has argued
343 an equal protection right to be treated the same as litigants
344 represented by counsel.

345 Benjamin Robinson reported that a survey of all districts
346 uncovered 92 local rules and 2 administrative orders. Eighty-five
347 districts mandate e-filing. Nine are permissive. One difficulty in
348 unraveling this is that some local rules treat civil and criminal
349 proceedings together. All have various exceptions. The variety may
350 make life difficult for a lawyer who practices in multiple
351 jurisdictions, but registration itself is the biggest hassle.

352 Without going further into the agenda materials — and
353 particularly without returning to the question whether to recommend
354 a general rule that equates electrons with paper, and electronic
355 action with paper action, it was asked whether these issues alone
356 suggest that it may be too ambitious to attempt to develop
357 recommendations for rules that warrant publication next summer. One
358 reason for caution is the hope that courts and lawyers will be able
359 to work together to develop sensible solutions to problems as they
360 arise, and that this process will provide a better foundation for
361 new rules than more abstract consideration. If there are no general
362 calls for help, no widespread complaints that the rules need to be
363 brought into the present and near future, perhaps there is no need
364 to rush ahead on a broad basis.

One committee member offered his own experience as an anecdote. "I practice all over the country. I do not see these issues as problems." It makes sense to do the simple and obvious things now. Leaving the rest to the future is not a bad idea. These questions do not impact daily practice, even though 99% of practice is accomplished by electronic means.

A judge observed that he had never seen a problem with e-communications. They are happening, and working.

Caution was urged with respect to service of the initial summons and complaint under Rule 4, and similar acts that bring a party into the court's jurisdiction. Expanding e-service to this area could affect the "finality" of judgments, both directly and in terms of recognition and enforcement in other courts. This caution was seconded.

Discussion returned to the concern that local rules that impose consent to e-service as a condition of registering with the court's sytem are potentially inconsistent with the national rule that recognizes e-service only with the consent of the person served.

On the other hand, "the big problem is the people who are not in the e-system." Pilot projects that are bringing prisoners into the e-system are really important.

A committee member suggested that it is worthwhile to look at these questions more thoughtfully, but not immediately. "There are issues out there, but they are not yet big issues. Time will bring more information." We should do the obvious things now, and find out whether lawyers are complaining about other things.

A broader view noted that this discussion reflects a regular pattern in rulemaking. We often confront a choice. We could attempt to anticipate the future and provide for it. Or we can wait and codify what the world has come to do, at least generally. "We do want to reflect what people are doing. But perhaps not just yet."

States "may get ahead of us." And we can learn from them.

So there are any number of cybersecurity experts who worry about many of these problems. They are working, for example, to develop electronic notary seals. "Answers may emerge and be used."

The discussion concluded by suggesting three steps. First, the Committee agrees to the proposal to delete the "3 added days" to respond after e-service. And it will wait to see what can be learned from public comments on the Bankruptcy Rule proposal for dealing with e-signatures. Second, a few Committee members should be assigned to talk to bar groups and state groups to learn what

407 problems may be out there and what efforts are being made to
408 address them. Finally, the Committee believes that it may be better
409 not to attempt broad action as soon as a recommendation to publish
410 next June, although the 3 added days question itself seems to be
411 rightly resolved.

412 Separate note was made of a suggestion by the Committee on
413 Court Administration and Case Management that a notice of
414 electronic filing should serve as a certificate of service. The
415 agenda materials include a sketch of Rule 5(d)(1) that so provides,
416 while maintaining the certificate requirement for any party that
417 was not served by means that provide a notice of electronic filing.
418 Preliminary consideration of this question suggested a further
419 question. It is not clear on the face of the rules whether a
420 certificate of service need be served on the parties, or whether
421 filing suffices. The Rule 5(a)(1)(E) reference to "any similar
422 paper" is open to interpretation. These questions will be held in
423 abeyance pending further advice from CACM.

424 *Rule 17(c)(2)*

425 The second sentence of Rule 17(c)(2) provides: "The court must
426 appoint a guardian ad litem — or issue another appropriate order —
427 to protect a minor or incompetent person who is unrepresented in an
428 action." The court grappled with this provision in *Powell v.*
429 *Symons*, 680 F.3d 301 (3d Cir.2012), finding a relative dearth of
430 case guidance that would help a court determine whether it is
431 obliged to act on its own to open an inquiry into the competence of
432 an unrepresented party. It urged the Advisory Committee to consider
433 whether something might be done to provide greater direction. This
434 question was considered at the April meeting, and postponed for
435 further research in the case law. Judge Grimm enlisted an intern
436 and a law clerk to undertake the research. The results of their
437 work are described in a memorandum and a circuit-by-circuit
438 breakdown in the agenda materials.

439 The additional research has found the state of the law much as
440 the Third Circuit found it. Although there are variations in
441 expression, there is a clear consensus that a court is not obliged
442 to open an inquiry into the competence of an unrepresented litigant
443 unless there is something like "verifiable evidence of
444 incompetence." If the inquiry is opened, whether on the court's own
445 or by request, the court has broad discretion both in determining
446 competence and in choosing an appropriate order if a party is found
447 not competent. An adjudication of incompetence for other purposes,
448 for example, need not automatically compel a finding of
449 incompetence to conduct litigation.

450 The questions of initiating the inquiry and of dealing with a
451 party who is not competent to litigate are both independent and, in
452 part, interdependent. What circumstances might trigger a duty to

453 inquire will be shaped by the concepts applied in measuring
454 competence. So too, practical constraints on what can be done to
455 secure a guardian ad litem or other representation may be
456 considered in determining whether it is practical to pursue further
457 development of Rule 17(c)(2).

458 So the present question is whether the Committee should pursue
459 this question further by developing a rule amendment that might be
460 recommended for publication and comment. The agenda materials
461 provide initial sketches of two different approaches. The first
462 would expand the duty to inquire: "The court must inquire into a
463 person's competence on motion or when the person's litigating
464 behavior [strongly] suggests the person is incompetent to act
465 without a representative [or other appropriate order]." The second
466 approach would attempt to capture the present approach, for more
467 reassuring guidance: "The court must inquire into a person's
468 competence when evidence is presented to it that [*alternative 1* the
469 person has been adjudicated incompetent] [*alternative 2* strongly
470 suggests the person is incompetent] [*alternative 3* the person is
471 incompetent to manage the litigation without appointment of a
472 guardian ad litem or other appropriate order]." The third
473 approach, to do nothing and remove the question from the agenda,
474 does not require an illustrative sketch.

475 Judge Grimm opened the discussion by noting that his intern
476 and law clerk had done a good job of researching the issue. The
477 threshold that imposes an obligation to open an inquiry into an
478 unrepresented party's competence is high. The Fourth Circuit has
479 provided an illustrative statement of the behavior that may not
480 trigger an inquiry: "Parties to a litigation behave in a great
481 variety of ways that might be thought to suggest some degree of
482 mental instability. Certainly the rule contemplates by
483 'incompetence' something other than mere foolishness or
484 improvidence, garden-variety or even egregious mendacity or even
485 various forms of the more common personality disorders." *Hudnall v.*
486 *Sellner*, 800 F.2d 377, 385 (4th Cir.1986).

487 The problem may not be a need for more guidance; at most, it
488 is lack of familiarity with the guidance that in fact is provided
489 by the cases. A real part of the challenge, however, is to do
490 something effective after a party is found to lack competence. One
491 pending case provides an illustration. A person confined in a state
492 mental hospital has filed a petition for habeas corpus complaining
493 of events in the hospital. State courts have appointed a guardian
494 for her property and for her person. On inquiry put to the
495 guardians, the petitioner objected that she did not want them to
496 represent her. What should be done? "We cannot by rule address the
497 problems of what to do when you find incompetence."

498 It would ask too much to impose a duty to inquiry when a court
499 sees something irregular. It would be better to leave the rule as

it is.

Another example was provided of a pro se litigant who asked for counsel in a § 1983 action against prison guards. He was found incompetent on the basis of a state criminal court finding that he was not competent. Now the challenge is to find a lawyer to represent him. It has not been easy. But how could we write a rule that gives the court more guidance?

Another judge suggested that these questions verge into the broader questions characterized as "civil Gideon." "Now is not the time to wade into this."

Yet another judge suggested that it is difficult to imagine a rule that would do much to help with the question put by the Third Circuit. The issue often arises in § 2254 petitions and § 2255 motions. Can we appoint guardians ad litem for them?

An illustration of the problems was provided by the example of a child pornography prosecution of the child victim’s father. The statute directs that a guardian ad litem be appointed for the child. But the statute does not provide a source of funding, and none can be found.

The Committee concluded to remove this topic from the agenda.

Rule 82

Rule 82 provides that the rules do not extend or limit jurisdiction or venue. The second sentence cross-refers to a venue statute that has been repealed. And there is a new venue statute to be considered. Rule 82 must be amended in some way. The proposal is to adopt this version:

> An admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1390-1391 ~~– 1392~~.

New section 1390 provides that the general venue statutes do not govern "a civil action in which the district court exercises the jurisdiction conferred by section 1333." Section 1333 establishes exclusive federal jurisdiction of "[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

The complication addressed by Rule 9(h) and invoked in Rule 82 arises from the "saving to suitors" clause. Some claims are intrinsically admiralty claims. For such claims, a federal court inherently exercises the § 1333 jurisdiction. But there are other claims that can be brought either as an admiralty claim or as a general civil action. Rule 9(h) gives the pleader an option in such

541 cases. The pleader may designate the claim as an admiralty claim
542 for purposes of Rules 14(c), 38(e), and 82.

543 The effect of invoking Rule 9(h) to designate a claim as an
544 admiralty claim is that the court is then exercising § 1333
545 jurisdiction. Section 1390(b) confirms the longstanding
546 understanding that in such cases the general venue statutes do not
547 apply. It makes sense to add § 1390 to the cross-reference in Rule
548 82.

549 The other step is simpler. Congress has repealed § 1392, which
550 applied to "local actions." The cross-reference to § 1392 must be
551 deleted from Rule 82.

552 The Committee voted to recommend the proposed Rule 82
553 amendment to the Standing Committee for publication. Although the
554 amendment seems on its face to be a clearly justified technical
555 change to conform to recently enacted legislation, it seems better
556 to publish for comment. Admiralty jurisdiction involves some
557 questions that are arcane to most, and complex even to those who
558 are familiar with the field. A period for comment will provide
559 reassurance that there are no unwelcome surprises.

560 *Rule 67(b)*

561 The final sentence of Rule 67(b) provides that money paid into
562 court under Rule 67 "must be deposited in an interest-bearing
563 account or invested in a court-approved, interest-bearing
564 instrument." In 2006 the IRS adopted a regulation dealing with
565 "disputed ownership funds on deposit." Interpleader actions are a
566 common illustration. The regulation requires a separate account and
567 administrator for each fund, and quarterly tax reports. The
568 Administrative Office became aware of the regulation in 2011. The
569 practice has been to deposit these funds in a common account. The
570 burden of establishing a separate account for each fund, with
571 separate administration, and providing quarterly tax reports, would
572 be considerable. The estimated annual cost is $1,000 per fund, with
573 an additional $400 for the quarterly tax reports. This cost
574 compares to the report that the average fund is $36,000. And the
575 clerk of court cannot be appointed as administrator. But the IRS
576 has taken the position that it will look to the clerks to assure
577 compliance.

578 The Administrative Office staff initially proposed that rule
579 67(b) should be amended to delete the interest-bearing account
580 requirement. But further discussion has led to a preferred position
581 that would carry forward with a common depository fund, with a
582 single administrator. Preparing a common quarterly tax report would
583 not be much burden. The opportunity to garner some income on the
584 deposited funds would be maintained — an opportunity that seems
585 likely to become more important as interest rates return closer to

historically normal levels. This approach is functionally better. And it avoids the need to embark on a rule amendment that would draw strong opposition — forgoing interest on deposited funds does not make any obvious sense.

The Administrative Office has begun discussions with the IRS to explore the preferred solution. This should be to the advantage of the IRS as well as the court system and claimants to deposited funds. A single fund is likely to generate greater aggregate income than many separate, and often rather small, funds. The IRS will get as much or more tax revenue, and it will have to deal with only a single return. Everyone will be better off.

Further consideration of these questions will await the outcome of negotiations with the IRS.

Requester Pays For Discovery

Judge Campbell opened discussion of "requester pays" discovery issues by noting that various groups, including members of Congress, have asked the Committee to explore expansion of the circumstances in which a party requesting discovery can have discovery only by paying the costs incurred by the responding party. The suggestions are understood to stop short of a general rule that the requesting party must always bear the cost of responding to any discovery request. Instead they look for more modest ways of shifting discovery costs among the parties.

Judge Grimm outlined the materials included in the agenda book. There is an opening memorandum describing the issues; a copy of his own general order directing discovery in stages and contemplating discussion of cost-shifting after core discovery is completed; notes of the September 16 conference-call meeting of the Discovery Subcommittee; and Professor Marcus' summary of a cost-shifting proposal that the Standing Committee approved for adoption in 1998, only to face rejection by the Judicial Conference.

Several sources have recommended further consideration of cost-shifting. Congress has held a hearing. Patent-litigation reform bills provide for it. Suggestions were made at the Duke Conference. The proposed amendments published for comment this August include a revision of Rule 26(c) to confirm in explicit rule text the established understanding that a protective order can direct discovery on condition that the requester pay part or all of the costs of responding. That builds on the recently added provisions in Rule 26(b)(2)(B).

The Subcommittee has approached these questions by asking first whether it is possible to get beyond the "anecdata" to find whether there are such problems as to justify rules amendments. Are such problems as may be found peculiar to ESI? to particular

630 categories of actions? What are the countervailing risks of
631 limiting access to justice? How do we get information that carries
632 beyond the battle cries uttered on both sides of the debate?

633 The 1998 experience with a cost-bearing proposal that
634 ultimately failed in the Judicial Conference is informative. The
635 Committee began by focusing on Rule 34 requests to produce as a
636 major source of expense. Document review has been said to be 75% of
637 discovery costs. Technology assisted review is being touted as a
638 way to save costs, but it is limited to ESI. The 1998 Committee
639 concluded that a cost-bearing provision would better be placed as
640 a general limit on discovery in Rule 26(b), as a lead-in sentence
641 to the proportionality factors.

642 Discussions since 1998 have suggested that a line should be
643 drawn between "core" discovery that can be requested without paying
644 the costs of responding and further discovery that is available
645 only if the requester pays.

646 Emery Lee is considering the question whether there is a way
647 to think about getting some sense of pervasiveness and types of
648 cases from the data gathered for the 2009 case study. Andrea
649 Kuperman will undertake to survey the literature on cost shifting.
650 Other sources also will be considered. There may be standing
651 orders. Another example is the Federal Circuit e-mail discovery
652 protocol, which among other provisions would start with presumptive
653 limits on the number of custodians whose records need be searched
654 and on the number of key words to be used in the search.

655 One of the empirical questions that is important but perhaps
656 elusive is framed by the distinction between "recall" and
657 "precision." Perfect recall would retrieve every responsive and
658 relevant document; it can be assured only if every document is
659 reviewed. Perfect precision would produce every responsive and
660 relevant document, and no others. Often there is a trade-off. Total
661 recall is totally imprecise. There is no reason to believe that
662 responses to discovery requests for documents, for example, ever
663 achieve perfect precision. But such measures as limiting requests
664 to 5 key words are likely to backfire — one of the requests will
665 use a word so broad as to yield total recall, and no precision.

666 Judge Grimm continued by describing his standard discovery
667 order as designed to focus discovery on the information the parties
668 most need. It notes that a party who wants to pursue discovery
669 further after completing the core discovery must be prepared to
670 discuss the possibility of allocating costs. This approach has not
671 created any problems. Case-specific orders work. For example, it
672 might be ordered that a party can impose 40 hours of search costs
673 for free, and then must be prepared to discuss cost allocation if
674 it wants more.

675 Although this approach works on a case-by-case basis,
676 "drafting a transsubstantive rule that defines core discovery would
677 be a real challenge."

678 The question is how vigorously the Subcommittee should
679 continue to pursue these questions.

680 Professor Marcus suggested that the "important policy issues
681 have not changed. Other things have changed." It will be important
682 to learn whether we can gather reliable data to illuminate the
683 issues.

684 Emery Lee sketched empirical research possibilities. Simply
685 asking lawyers and judges for their opinions is not likely to help
686 with a topic like this. It might be possible to search the CM/ECF
687 system for discovery disputes to identify the subjects of the
688 disputes and the kinds of cases involved. That would be pretty easy
689 to do. Beyond that, William Hubbard has pointed out that discovery
690 costs are probably distributed with a "very long tail of very
691 expensive cases." The 2009 Report provided information on the costs
692 of discovery. Extrapolating from the responses, it could be said
693 that the costs of discovery force settlement in about 6,000 cases
694 a year. That is a beginning, but no more. Interviewing lawyers to
695 get more refined explanations "presents a lot of issues." One
696 illustration is that we have had little success in attempts to
697 survey general counsel — they do not respond well, perhaps because
698 as a group they are frequently the subjects of surveys. A different
699 possibility would be to create a set of hypothetical cases and ask
700 lawyers what types of discovery they would request to compare to
701 the assumptions about core and non-core discovery made in
702 developing the cases. The questions could ask whether requester-
703 pays rules would make a difference in the types of discovery
704 pursued.

705 Discussion began with a Subcommittee member who has reflected
706 on these questions since the conference call and since the
707 testimony at the November 5 congressional hearing. Any proposal to
708 advance cost-bearing beyond the modest current proposal to amend
709 Rule 26(c) would draw stronger reactions than have been drawn by
710 the comments on the "Duke Package" proposals. "So we need data.
711 But what kind? What *is* the problem?" Simply learning how much
712 discovery costs does not tell us much. E-discovery is a large part
713 of costs. But expert witnesses also are a large part of costs. So
714 is hourly billing. But if the problems go beyond the cost of
715 discovery, what do we seek? Whether cost is in some sense
716 disproportionate, whether the same result could be achieved at
717 lower cost? How do we measure that? Would it be enough to find — if
718 we can find it — whether costs have increased over time? Then let
719 us suppose that we might find cost is a problem. Can rulemaking
720 solve it? And will a rule that addresses costs by some form of
721 requester pays impede access to the courts? There is a risk that if

722 we do not do it, Congress will do it for us. But it is so difficult
723 to grapple with these questions that we should wait a while to see
724 what may be the results of the current proposed amendments.

725 Another member said that these questions are very important.
726 "The time needed to consider, and to decide whether to advance a
727 proposal, is enormous." It took two years to plan the Duke
728 Conference, which was held in 2010. It took three years more to
729 advance the proposed amendments that were published this summer.
730 That is a lot of preparation. It is, however, not too early to
731 start now. Among the questions are these: Does discovery cost "too
732 much"? How would that be defined? Requester-pays rules could reduce
733 the incidence of settlements reached to avoid the costs of
734 discovery; in some cases that would unnecessarily discourage trial,
735 but there also are cases that probably should settle. A different
736 measure of excess cost is more direct — does discovery cost more
737 than necessary to resolve the case, resulting in wasted resources?
738 What data sources are available? We have not yet mined a lot of the
739 empirical information provided for the Duke Conference. The RAND
740 report reviewed corporate general counsel, assuring anonymity; its
741 results can be considered. We might enlist the FJC to interview
742 people who have experience with the protocol developed for
743 individual employment cases under the leadership of NELA — it would
744 be good to know what information they got by exchanges under the
745 protocol, and how much further information they gathered by
746 subsequent discovery. All of these things take time. The pilot
747 project for patent cases is designed for ten years. FJC study can
748 begin, but will take a long time to complete. And other pilot
749 projects will help, remembering that they depend on finding lawyers
750 who are willing to participate. All of this shows that it is
751 important to keep working on these questions, without expecting to
752 generate proposed rules amendments in the short-term future.

753 A member expressed great support for case management, but
754 asked how far it is feasible to approach these problems by general
755 national rules. "What is our jurisdiction"?

756 A partial response was provided by another member who agreed
757 that this is a very ambitious project. "Apart from 'jurisdiction,'
758 what is our capacity to do this?" Forty-one witnesses at the
759 hearing yesterday divided in describing the current proposals —
760 some found them modest, others found them a sea-change in discovery
761 as we know it. Requester-pays proposals are far more sensitive. A
762 literature search may be the best starting point. What is already
763 out there? And we can canvass and inventory the pilot projects.
764 That much work will provide a better foundation for deciding
765 whether to go further. If the current proposals are adopted — no
766 earlier than December 1, 2015 — they may work some real changes
767 that will affect any decisions about requester-pays proposals.

768 A lawyer member observed that Rule 26(b)(2)(B) provides for

769 cost shifting in ordering discovery of ESI that is difficult to
770 access. "There have been a number of orders. We could follow up
771 with experience." One anecdote: in one case a plaintiff seeking
772 discovery of 94 backup tapes, confronted by an order to pay 25% of
773 the search costs, reacted by reducing the request to 4 tapes.
774 Beyond that, Texas Rule 196.4 has long provided for requester
775 payment of extraordinary costs of retrieving ESI. We might learn
776 from experience. So, reacting to the Federal Circuit model order
777 for discovery in patent actions, the Eastern District of Texas has
778 raised the initial limit from 5 custodians to 8, and has omitted
779 the provision for cost-shifting if the limit is exceeded; it
780 prefers to address cost-shifting on a case-by-case basis. And we
781 should remember that "cloud" storage may have an impact on
782 discovery costs.

783 The Committee was reminded that if the proposed Rule 26(c)
784 amendment is adopted, experience in using it could provide a source
785 of data to support further study.

786 The discussion concluded by determining to keep this topic on
787 the agenda. The Duke data can be mined further. We can look for
788 cases that follow in the wake of the Supreme Court's recognition
789 that the presumption is that the responding party bears the expense
790 of response, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 358
791 (1978).

792 *CACM*

793 The agenda materials describe continuing exchanges with the
794 Committee on Court Administration and Case Management. The question
795 whether pro se filers should be required to provide social security
796 numbers to assist in identifying problem filers can be put off
797 because the current version of the "NextGen" CM/ECF system does not
798 include a field for this information. And CACM agrees that there is
799 no present need to consider rules amendments to address the
800 prospect that a judge in one district might, as part of accepting
801 assignment to help another district, conduct a bench trial by
802 videoconferencing.

803 The meeting concluded with thanks to all participants and
observers for their interest and hard work.

Respectfully submitted,

Edward H. Cooper
Reporter