COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

STEVEN M. COLLOTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

To: Honorable Jeffrey S. Sutton, Chair, Standing Committee on Rules of Practice and Procedure

From: Honorable David G. Campbell, Chair, Advisory Committee on Federal Rules of Civil Procedure

Date: December 6, 2013

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts in Washington, D.C., on November 7-8, 2013. The first day of the meeting was a hearing on proposed Civil Rules amendments published for comment in August. Forty-one witnesses testified. The transcript of the hearing is available at the Rules Committee Support Office and will be available on line by the end of December. Draft Minutes of the meeting are attached. This report has been prepared by Professor Cooper, Committee Reporter, with Professor Marcus, Associate Reporter.

Part IA of this Report presents for action a proposal recommending publication at a suitable time for comment on an amendment of Civil Rule 82 that accounts for legislation that revises the venue statutes.

Part IB presents for action a proposal recommending publication at a suitable time for comment on an amendment of Civil Rule 6(d) that would delete service by electronic means from the modes of service that add three days to the time set for

responding after service by those means. This proposal has been developed in coordination with the other advisory committees through the Subcommittee chaired by Judge Chagares.

Part II presents information on other matters that were discussed at the November meeting. The Committee decided to take no action on the question whether Rule 17(c)(2) should be amended to address the circumstances that may require a court to inquire whether it need appoint a guardian for an unrepresented party who may be incompetent. Other matters remain on the Committee agenda. These include the ongoing, all-committees project to determine how far each set of rules might be amended to better account for the continuing expansion of electronic modes of preserving and sharing information; an initial exploration of the possibility that specific rules provisions might be adopted to identify circumstances in which a requesting party should bear part or all of the costs incurred in responding to discovery; and ongoing coordination with the Committee on Court Administration and Case Management.

Other matters that have been on the agenda for some time were not ripe for further discussion at the November meeting. These include the development of pleading standards in response to the Supreme Court's *Twombly* and *Iqbal* decisions, and emerging issues in class-action practice. The questions posed by evolving pleading standards remain on the agenda, in part to await the results of continuing empirical work by the Federal Judicial Center and others. The Rule 23 Subcommittee has begun work to determine whether it would be useful to generate specific proposals to revise class-action practice, either in matters of detail or in broader form. The preparatory work is likely to take some time.

IA. ACTION: RULE 82: VENUE FOR ADMIRALTY OR MARITIME CLAIMS

The Committee recommends for publication at a suitable time for comment on this revision of Civil Rule 82:

Rule 82. Jurisdiction and Venue Unaffected

These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts. An admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1390-1391~~–1392~~.

COMMITTEE NOTE

Rule 82 is amended to reflect the enactment of 28 U.S.C. § 1390 and the repeal of § 1392.

It has long been understood that the general venue statutes do not apply to actions in which the district court exercises admiralty or maritime jurisdiction, except that the transfer provisions do apply. This proposition could become ambiguous when a case either could be brought in the admiralty or maritime jurisdiction or could be brought as an action at law under the "saving to suitors" clause. Rule 82 has addressed this problem by invoking Rule 9(h) to ensure that the Civil Rules do not seem to modify the venue rules for admiralty or maritime actions. Rule 9(h) provides that an action cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for purposes of Rule 82. It further provides that if a claim for relief is within the admiralty or maritime jurisdiction but also is within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim.

The occasion for amending Rule 82 arises from legislation that added a new § 1390 to the venue statutes and repealed former § 1392 (local actions). The reference to § 1392 must be deleted. And it is appropriate to add a reference to new § 1390 for reasons that are only slightly more complicated.

New § 1390(b) provides:

> (b) Exclusion of Certain Cases.—Except as otherwise provided by law, this chapter shall not govern the venue of a civil action in which the district court exercises the jurisdiction conferred by section 1333, except that such civil actions may be transferred between district courts as provided in this chapter.

Section 1333 "establishes original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

Section 1390(b), by referring to cases in which the court "exercises the jurisdiction conferred by section 1333," thus ousts application of the general venue statutes for cases that can be brought only in the admiralty or maritime jurisdiction, and also for cases that might have been brought in some other grant of subject-matter jurisdiction but that have been designated as admiralty or maritime claims under Rule 9(h).

The proposed amendment carries forward the purpose of integrating Rule 9(h) with the venue statutes through Rule 82. It is appropriate to refer to all of § 1390, not subsection (b) alone, because § 1390(a) provides a general definition of venue, while subsection (c) addresses transfer of an action removed from a state court.

Although this revision to respond to new legislation seems straight-forward, the Committee recommends publication rather than adoption as a mere technical amendment. Questions surrounding the "saving to suitors" clause can be complex and difficult. Although the Maritime Law Association has reviewed and approved the proposed Rule 82 amendment, it seems better to err on the side of caution. There is no apparent urgent need for immediate action, and hidden problems might be revealed.

IB. ACTION: RULE 6(d): "3 DAYS ARE ADDED": E-SERVICE

The Committee recommends publication at a suitable time for comment on an amendment of Rule 6(d). The Appellate, Bankruptcy, and Criminal Rules include provisions parallel to the Civil Rule 6(d) provision that adds 3 days to the time allowed to respond after service by, among others, "electronic means" under Civil Rule 5(b)(2)(E). Working through the Subcommittee appointed to coordinate the work of the several advisory committees, it has been agreed that the 3-added-days provision should be dropped for electronic service. The reasons are stated in the Committee Note that follows the rule text. It also has been agreed that it would be helpful to add parenthetical descriptions to illuminate the nature of the means of service that will continue to trigger the 3 added days. That choice presents a style question that can be resolved before publication. The time for publication need not be decided now. It seems likely that the other advisory committees will be prepared to recommend publication of parallel amendments to their rules in time for the May meeting of this Committee. If so, publication in August, 2014 may be in order. If not, it can be decided whether to publish Rule 6(d) as a bellwether.

Rule 6. Computing and Extending Time; Time for Motion Papers

* * *

(d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time

after being served[1] and service is made under Rule 5(b)(2)(C)(mail), (D)(leaving with the clerk), ~~(E),~~ or (F)(other means consented to),[2] 3 days are added after the period would otherwise expire under Rule 6(a).

COMMITTEE NOTE

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Deleting the 3 added days to respond after electronic transmission is supported by an affirmative reason in addition to the diminution of the concerns that prompted its adoption. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-

---

[1] This anticipates adoption of the proposed amendment published in August, 2013.

[2] The naked cross-references to Rule 5(b)(2) may seem awkward. The parenthetical descriptions are added to relieve much of the flipping back through the rules. It seems likely that e-service will dominate other modes, but absent some descriptions many anxious readers will track down the cross-references just to make sure e-service is not among the means listed. The risk that brief descriptions may mislead or confuse seems minimal. Anyone who wishes to be sure of what a Rule 5(b)(2) subparagraph says can easily find it.

week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

IIA. Rule 17(c)(2): Information — Duty of Inquiry

Rule 17(c)(2) directs that "The court must appoint a guardian ad litem — or issue another appropriate order — to protect a minor or incompetent person who is unrepresented in an action."

In *Powell v. Symons*, 680 F.3d 301 (3d Cir. 2012), the court struggled to identify the circumstances that might oblige a judge to initiate an inquiry into the competence of an unrepresented litigant. It concluded that the duty of inquiry arises only if there is "verifiable evidence of incompetence," and that the duty is not triggered simply by bizarre behavior. At the same time, it lamented "the paucity of comments on Rule 17" and observed that "We will respectfully send a copy of this opinion to the chairperson of the Advisory Committee to call its attention to" the question.

The Committee discussed this question extensively at its meeting in April, 2013, and carried the matter over for further research. Judge Grimm had an intern and a law clerk survey reported decisions. They found that although there are some variations in expression, the courts that have considered the question limit the duty of inquiry in much the same way as the Third Circuit did.

Three alternatives were considered. One would add an express duty to inquire into the competence of an unrepresented person on motion or when the person's conduct in the litigation suggests the person is incompetent to act without a representative or other appropriate order. The second would seek to express in rule text something like the approach now taken by the courts. The third was to take no further action on the question.

The decision to take no further action on the question was influenced by several concerns. Expanding the duty to inquire on the court's own motion could impose heavy burdens in a substantial number of cases, depending in part on the measure used to assess "competence." Should the court ask whether a person is not equal to the task of litigating? Totally overwhelmed? Manifesting bizarre behavior? A foil for this

question is provided by a Fourth Circuit statement: "[p]arties to a litigation behave in a great variety of ways that might be thought to suggest some degree of mental instability. Certainly the rule contemplates by 'incompetence' something other than mere foolishness or improvidence, garden-variety or even egregious mendacity or even various forms of the more common personality disorders." Hudnall v. Sellner, 800 F.2d 377, 385 (4th Cir. 1986).

The practical problems that may arise from expanding the duty to inquire, whether or not an attempt is made to define a standard of competence, gave further grounds for concern. The decision whether to appoint counsel or a guardian in a particular case is usually a very fact-specific decision that does not lend itself to general principles or guidelines. Such difficult decisions are better handled through the case-by-case development of the common law. And substantial difficulties arise when a court does seek to arrange representation for a party who has none and apparently needs it. The desire to provide adequate representation for those who would benefit from it must confront the reality of limited resources.

Foreseeable problems also generated concern about possible unforeseen problems.

Taken together, these concerns led the Committee to decide against further action. These questions can be restored to the agenda if greater signs of distress emerge.

IIB. Information: e-Rules

The task of digesting the still developing comments and hearing testimony on the proposed rule amendments published in August, along with other chores, have left little opportunity for the Committee to consider the matters being addressed by the Subcommittee appointed to consider revisions of all the rules to reflect increasing reliance on electronic means of generating, storing, and communicating information. The Committee has made the recommendation to publish Rule 6(d) for comment, described as an action item above. Beyond that, it believes that consideration of other proposals will require more time than it is likely to have before summer.

One broad proposal is to adopt a general rule allowing electrons to be used whenever paper can be used. Proponents of this approach recognize that any general rule must recognize some exceptions. Preliminary study suggests that at least for the

Civil Rules, identification of the appropriate exceptions will prove difficult. Some, to be sure, may be relatively clear. There is as yet little enthusiasm for authorizing service of the initial summons and complaint by electronic means. Others will prove more elusive. Rule 49, for example, speaks of special "written findings" for a special verdict, or "written questions" to supplement a general verdict. Has the time come to submit Rule 49 verdicts by tablet, laptop, or jury-room computer terminals? It may prove difficult even to choose whether to list all exceptions in the general rule, or to amend each excepted rule under the authorization of an "except as otherwise provided" clause in the general rule. Serious study will be required if this possibility is to be explored further.

Short of a general rule, it may be that the most useful opportunities lie in expanding the already general use of electronic filing and electronic service. Rule 5(b)(2)(E), for example, provides for service by electronic means "if the person [served] consented in writing." The element of consent has been effectively reduced in many districts that require electronic filing, and that require consent to electronic service as a condition of registering for electronic filing. Electronic service seems to work. It could be put on a more regular foundation by simply authorizing electronic service, subject to some exceptions. Identification of the exceptions will require some thought, but the combined forces of the several advisory committees may be able to manage the task with some expedition. The same holds for electronic filing.

It may be that suitable provisions for electronic filing and service, more or less common among the different sets of rules, will satisfy the needs for joint action. If so, that will leave the way open for each advisory committee to consider other opportunities to adjust specific rules for the electronic era. One small example: Civil Rule 7.1 requires a corporate party to file 2 copies of a disclosure statement. Providing one copy for the clerk’s office and one copy for the judge assigned to the case can be convenient in a paper world. But is it useful in a world of electronic dockets? Although it is useful to keep such questions on the agenda, and if possible to treat a package of them together, it may make sense to allow each advisory committee to work at its own pace.

One specific concern arises from the frequent need for an authorized user of an e-filing system to file a document signed by someone else. Authentication of the signature is addressed by alternative provisions in Bankruptcy Rule 5005, which was published for comment last summer. The Civil Rules Committee has

encountered some perplexity in understanding how the alternative that calls for notarization of the nonfiler's signature would work. This question may be illuminated by comments on the proposed rule.

IIC. Information: Discovery Cost Shifting

Laments about the costs that discovery requests can inflict are common. Various proposals have been made to depart from the presumption that the responding party bears the expense of responding, see Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978). These proposals have been advanced by independent groups that often suggest rules reforms and comment on published proposals. Congress has shown a clear interest in these questions. Present Rule 26(c) authorizes an order to protect a party against "undue burden or expense" that would flow from a discovery request. The proposals published for comment last August include a revision of Rule 26(c) that explicitly calls attention to the authority, already recognized and used in some cases, to order an "allocation of expenses" as part of a protective order. But in order to make sure that the broader suggestions are taken seriously, the Discovery Subcommittee has begun the process of investigating the possibility that it might be useful to consider a more specific provision for transferring some discovery costs to the requesting party. There is no thought that the general rule should be reversed, creating a presumption that the requester pays absent good reason to direct that the responding party bear the costs of responding. The question instead is whether it is possible to identify categorical distinctions between types of requests that continue to fall within the present practice that the responder bears the costs and other types of requests that justify requiring the requester to pay some or all of the costs of responding.

Much work remains to be done before the Subcommittee will be in a position even to determine whether there is any real reason to pursue development of possible amendments. It may be that there will be added reason for caution if the current Rule 26(c) proposal is recommended for adoption and in fact is adopted. Experience under the amendment is likely to develop over a course of some years. Awaiting that experience may be wise.

A general cost-bearing proposal was advanced, but in 1999 the Judicial Conference decided not to recommend adoption. That experience is a reason to be deliberate, but it is not dispositive. Discovery continues to evolve.

IID. Information: Court Administration and Case Management Projects

The Court Administration and Case Management Committee has raised a number of topics that may lead to Civil Rules amendments. Action on all of these topics has been deferred pending further development by CACM.

Issues relating to e-filing have been raised in the process of developing the next generation CM/ECF system. One is whether the Notice of Electronic Filing can automatically be treated as a certificate of service. This issue continues to hold a place as part of the overall project to evaluate the impact of electronic case management.