

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
Meeting of January 3-4, 2013  
Cambridge, Massachusetts

**Minutes**

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Cambridge, Massachusetts, on Thursday and Friday, January 3 and 4, 2013. The following members were present:

Judge Jeffrey S. Sutton, Chair  
Dean C. Colson, Esq.  
Roy T. Englert, Jr., Esq.  
Gregory G. Garre, Esq.  
Judge Marilyn L. Huff  
Chief Justice Wallace B. Jefferson  
Dean David F. Levi  
Judge Patrick J. Schiltz  
Larry D. Thompson, Esq.  
Judge Richard C. Wesley  
Judge Diane P. Wood

The Department of Justice was represented at various points at the meeting by Acting Assistant Attorney General Stuart F. Delery, Elizabeth J. Shapiro, Esq., and Allison Stanton, Esq.

Deputy Attorney General James M. Cole, Judge Neil M. Gorsuch, and Judge Jack Zouhary were unable to attend.

Also participating were former member Judge James A. Teilborg; Professor Geoffrey C. Hazard, Jr., consultant to the committee; and Peter G. McCabe, Administrative Office Assistant Director for Judges Programs. The committee's style consultant, Professor R. Joseph Kimble, participated by telephone.

On Thursday afternoon, January 3, Judge Sutton moderated a panel discussion on civil litigation reform initiatives with the following panelists: Judge John G. Koeltl, a member of the Advisory Committee on Civil Rules and Chair of its Duke Conference subcommittee; Rebecca Love Kourlis, Executive Director of the Institute for the Advancement of the American Legal System at the University of Denver and a former justice of the Colorado Supreme Court; Dr. Emery G. Lee, III, Senior Research Associate in the Research Division of the Federal Judicial Center; and Judge Barbara B. Crabb, U.S. District Court for the Western District of Wisconsin.

Providing support to the Standing Committee were:

Professor Daniel R. Coquillette	The Committee's Reporter
Jonathan C. Rose	The Committee's Secretary and Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman (by telephone)	Chief Counsel to the Rules Committees
Joe Cecil	Research Division, Federal Judicial Center

Representing the advisory committees were:

- Advisory Committee on Appellate Rules —
  - Judge Steven M. Colloton, Chair
  - Professor Catherine T. Struve, Reporter (by telephone)
- Advisory Committee on Bankruptcy Rules —
  - Judge Eugene R. Wedoff, Chair
  - Professor S. Elizabeth Gibson, Reporter
  - Professor Troy A. McKenzie, Associate Reporter
- Advisory Committee on Civil Rules —
  - Judge David G. Campbell, Chair
  - Professor Edward H. Cooper, Reporter
  - Professor Richard L. Marcus, Associate Reporter
- Advisory Committee on Criminal Rules —
  - Judge Reena Raggi, Chair

Professor Sara Sun Beale, Reporter  
Advisory Committee on Evidence Rules —  
Chief Judge Sidney A. Fitzwater, Chair  
Professor Daniel J. Capra, Reporter

### INTRODUCTORY REMARKS

Judge Sutton opened the meeting by noting the extraordinary service to the rules committees by his predecessor Judge Mark Kravitz, which would be further commemorated at the committee's dinner in the evening. He praised Judge Kravitz's extraordinary ten years of service on both the Civil Rules Advisory Committee and the Standing Committee. Judge Kravitz served as chair of both committees.

Judge Sutton specifically called attention to the commendation of Judge Kravitz in Chief Justice Roberts's year-end report and asked that the following paragraph from that report be included in the minutes:

On September 30, 2012, Mark R. Kravitz, United States District Judge for the District of Connecticut, passed away at the age of 62 from amyotrophic lateral sclerosis—Lou Gehrig's Disease. We in the Judiciary remember Mark not only as a superlative trial judge, but as an extraordinary teacher, scholar, husband, father, and friend. He possessed the temperament, insight, and wisdom that all judges aspire to bring to the bench. He tirelessly volunteered those same talents to the work of the Judicial Conference, as chair of the Committee on Rules of Practice and Procedure, which oversees the revision of all federal rules of judicial procedure. Mark battled a tragic illness with quiet courage and unrelenting good cheer, carrying a full caseload and continuing his committee work up until the final days of his life. We shall miss Mark, but his inspiring example remains with us as a model of patriotism and public service.

Chief Justice John G. Roberts, Jr., 2012 Year-End Report on the Federal Judiciary 11 (2012).

Judge Sutton reported that at its September 2012 meeting, the Judicial Conference approved without debate all fifteen proposed rules changes forwarded to it by the committee for transmittal to the Supreme Court. Assuming approval by the Court and no action by Congress to modify, defer, or delay the proposals, the amendments will become effective on December 1, 2013.

## APPROVAL OF MINUTES OF THE LAST MEETING

**The committee without objection by voice vote approved the minutes of its last meeting, held on June 11 and 12, 2012, in Washington, D.C.**

## REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set forth in Judge Campbell's memorandum of December 5, 2012 (Agenda Item 3). Judge Campbell presented several action items, including the recommendation to publish for comment amendments to Rules 37(e), 6(d), and 55(c). Judge Campbell also presented the advisory committee's recommendation to adopt without publication an amendment to Rule 77(c)(1).

*Amendment for Final Approval*

## FED. R. CIV. P. 77(c)(1) – CROSS REFERENCE CORRECTION

The proposed amendment to Rule 77(c)(1) corrects a cross-reference to Rule 6(a) that should have been changed when Rule 6(a) was amended in 2009 as part of the Time Computation Project. Before those amendments, Rule 6(a)(4)(A) defined "legal holiday" to include 10 days set aside by statute, and Rule 77(c)(1) incorporated that definition by cross-reference.

As a result of the 2009 Time Computation amendment, the Rule's list of legal holidays remained unchanged, but became Rule 6(a)(6)(A). However, through inadvertence, the cross-reference in Rule 77(c) was not addressed at that time. The proposed amendment corrects the cross-reference.

**The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference without publication.**

*Amendments for Publication*

## FED. R. CIV. P. 37(e)

Judge Campbell first gave a short history behind the drafting of the proposed new Rule 37(e). He stated that the subject of the rule had been extensively considered at a mini-conference, as well as in numerous meetings of the advisory committee and conference calls of the advisory committee's discovery subcommittee. There was wide agreement that the time had come for developing a rules-based approach to preservation

and sanctions.

The Civil Rules Committee hosted a mini-conference in Dallas in September 2011. Participants in that mini-conference provided examples of extraordinary costs assumed by litigants, and those not yet involved in litigation, to preserve massive amounts of information, as a result of the present uncertain state of preservation obligations under federal law. In December 2011, a subcommittee of the House Judiciary Committee held a hearing on the costs of American discovery that focused largely on the costs of preservation for litigation.

The discovery subcommittee of the advisory committee had agreed for some time that some form of uniform federal rule regarding preservation obligations and sanctions should be established. The subcommittee initially considered three different approaches: (1) implementing a specific set of preservation obligations; (2) employing a more general statement of preservation obligations, using reasonableness and proportionality as the touchstones; and (3) addressing the issue through sanctions. The subcommittee rejected the first two approaches. The approach that would set out specific guidance was rejected because it would be difficult to set out specific guidelines that would apply in all civil cases, and changing technology might quickly render such a rule obsolete. The more general approach was rejected because it might be too general to provide real guidance. The subcommittee therefore opted for a third approach that focuses on possible remedies and sanctions for failure to preserve. This approach attempts to specify the circumstances in which remedial actions, including discovery sanctions, will be permitted in cases where evidence has been lost or destroyed. It should provide a measure of protection to those litigants who have acted reasonably in the circumstances.

After an extensive and wide ranging discussion of the proposed new Rule 37(e), the committee approved it for publication in August 2013, conditioned on the advisory committee reviewing at its Spring 2013 meeting the major points raised at this meeting. Judge Campbell agreed that the advisory committee would address concerns raised by Standing Committee members and make appropriate revisions in the draft rule and note for the committee's consideration at its June 2013 meeting.

During the course of the committee's discussion, the following concerns were expressed with respect to the current draft of proposed new Rule 37(e) and its note:

#### Displacement of Other Laws

One committee member expressed concern about the statement in the note that the amended rule "*displaces* any other law that would authorize imposing litigation sanctions in the absence of a finding of wilfulness or bad faith, including state law in diversity cases." (emphasis added).

The member pointed out that use of the term “displace” could be read as a possible effort to preempt on a broad basis state or federal laws or regulations requiring the preservation of records in different contexts and for different purposes, such as tax, banking, professional, or antitrust regulation. Judge Campbell stated that there had been no such intent on the part of the advisory committee. The advisory committee had been focused on establishing a uniform federal standard solely for the preservation of records for litigation in federal court (including cases based on diversity jurisdiction). The advisory committee intended to preserve any separate state-law torts of spoliation.

Judge Campbell believed the draft committee note could be appropriately clarified to make clear that the proposed rule on preservation sanctions had no application beyond the trial of cases. A committee member noted that a statutory requirement of records preservation for non-trial purposes should not require a litigant to make greater preservation efforts for trial discovery purposes than would otherwise be required by the amended rule.

#### Use of the Term “Sanction”

Another participant noted that the word “sanction” has particularly adverse significance in most contexts when applied to the conduct of a lawyer. In some jurisdictions, this might require reporting an attorney to the board of bar overseers. Thus, in using the term “sanction,” he urged that the advisory committee differentiate between its use when referring to the actions permitted under the rule in response to failures to preserve and its broader application to the general area of professional responsibility.

#### “Irreparable Deprivation”

Several committee members raised concerns about proposed language that would allow for sanctions if the failure to preserve “irreparably deprived a party of any meaningful opportunity to present a claim or defense.” These members stated that this language could potentially eliminate most of the rule’s intended protection for the innocent and routine disposition of records. Also, as a matter of style and precise expression, one committee member preferred substitution of the word “adequate” for the word “meaningful.”

#### Acts of God

Another concern was whether the proposed draft of Rule 37(e) would permit the imposition of sanctions against an innocent litigant whose records were destroyed by an “act of God.” The accidental destruction of records because of flooding during the recent Hurricane Sandy was offered as a hypothetical example. Judge Campbell agreed that a literal reading of the current draft might lead to imposition of sanctions as the result of a blameless destruction of records resulting from such an event. Both he and Professor

Cooper agreed that the question of who should bear the loss in an “act of God” circumstance was an important policy issue for the advisory committee to revisit at its spring meeting.

#### Preservation of Current Rule 37(e) Language

The Department of Justice and several committee members also recommended retention of the language of the current Rule 37(e), which protects the routine, good-faith operation of an electronic information system. Andrea Kuperman’s research showed that the current rule is rarely invoked. But the Department of Justice argued that in its experience, the presence of the Rule 37(e) has served as a useful incentive for government departments to modernize their record-keeping practices.

#### Expanded Definition of “Substantial Prejudice”

The Department also urged that the term “substantial prejudice in the litigation”—a finding required under the draft proposal in order to impose sanctions for failure to preserve—be given further definition. It suggested that “substantial prejudice” should be assessed both in the context of reliable alternative sources of the missing evidence or information as well as in the context of the materiality of the missing evidence to the claims and defenses involved in the case. The Department and several committee members suggested that publication for public comment might be helpful to the committee in developing its final proposed rule.

**By voice vote, the committee preliminarily approved for publication in August 2013 draft proposed Rule 37(e) on the condition that the advisory committee would review the foregoing comments and make appropriate revisions in the proposed draft rule and note for approval by the Standing Committee at its June 2013 meeting.**

#### FED. R. CIV. P. 6(d) – CLARIFICATION OF “3 DAYS AFTER SERVICE”

Professor Cooper reviewed the advisory committee’s proposed amendment to Rule 6(d), which provides an additional 3 days to act after certain methods of service. The purpose of the amendment is to foreclose the possibility that a party who must act within a specified time after making service could extend the time to act by choosing a method of service that provides the added time.

Before Rule 6(d) was amended in 2005, the rule provided an additional 3 days to respond when service was made by various described means. Only the party being served, not the party making the service, had the option of claiming the extra 3 days. When Rule 6(d) was revised in 2005 for other purposes, it was restyled according to the conventions adopted for the Style Project, allowing 3 additional days when a party must

act within a specified time “after service.” This could be interpreted to cover rules allowing a party to act within a specified time after making (as opposed to receiving) service, which is not what the advisory committee intended. For example, a literal reading of present Rule 6(d) would allow a defendant to extend from 21 to 24 days the Rule 15(a)(1)(A) period to amend once as a matter of course by choosing to serve the answer by any of the means specified in Rule 6(d). Although it had not received reports of problems in practice, the advisory committee determined that this unintended effect should be eliminated by clarifying that the extra 3 days are available only to the party receiving, as opposed to making, service.

**The committee without objection by voice vote approved the proposed amendment for publication.**

FED. R. CIV. P. 55(c) – APPLICATION TO “FINAL” DEFAULT JUDGMENT

Professor Cooper explained that the proposed amendment to Rule 55(c), the rule on setting aside a default or a default judgment, addresses a latent ambiguity in the interplay of Rule 55(c) with Rules 54(b) and 60(b) that arises when a default judgment does not dispose of all claims among all parties to an action. Rule 54(b) directs that the judgment is not final unless the court directs entry of final judgment. Rule 54(b) also directs that the judgment “may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.” Rule 55(c) provides simply that the court “may set aside a default judgment under Rule 60(b).” Rule 60(b) in turn provides a list of reasons to “relieve a party . . . from a final judgment, order, or proceeding . . . .”

A close reading of the three rules together establishes that relief from a default judgment is limited by the demanding standards of Rule 60(b) only if the default judgment is made final under Rule 54(b) or when there is a final judgment adjudicating all claims among all parties.

Several cases, however, have struggled to reach the correct meaning of Rule 55(c), and at times a court may fail to recognize the meaning. The proposed amendment clarifies Rule 55(c) by adding the word “final” before “default judgment.”

**The committee without objection by voice vote approved the proposed amendment for publication.**

*Information Items*

Judge Campbell reported on several information items that did not require committee action at this time.



## DUKE CONFERENCE SUBCOMMITTEE WORK

A subcommittee of the advisory committee formed after the advisory committee's May 2010 Conference on Civil Litigation held at Duke University School of Law ("Duke Conference subcommittee") is continuing to implement and oversee further work on ideas resulting from that conference. Judge Campbell and Judge Koeltl (the Chair of the Duke Conference subcommittee) presented to the committee a package of various potential rule amendments developed by the subcommittee that are aimed at reducing the costs and delays in civil litigation, increasing realistic access to the courts, and furthering the goals of Rule 1 "to secure the just, speedy, and inexpensive determination of every action and proceeding." This package of amendments has been developed through countless subcommittee conference calls, a mini-conference held in Dallas in October 2012, and discussions during advisory committee meetings. The discussions that have occurred will guide further development of the rules package, with a goal of recommending publication of this package for public comment at the committee's June 2013 meeting.

An important issue at the Duke Conference and in the work undertaken since by the Duke Conference subcommittee has been the principle that discovery should be conducted in reasonable proportion to the needs of the case. In an important fraction of the cases, discovery still seems to run out of control. Thus, the search for ways to embed the concept of proportionality successfully in the rules continues.

Current sketches of possible amendments to parts of Rule 26 exemplify this effort and include the following proposals:

**Rule 26**

\* \* \* \* \*

**(b) Discovery Scope and Limits.**

- (1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information [within this scope of discovery]{sought} need not be admissible in evidence to be discoverable. — including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons

~~who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C). \* \* \*~~

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions, ~~and interrogatories, requests [to produce][under Rule 34], and requests for admissions,~~ or on the length of depositions under Rule 30. ~~By order or local rule, the court may also limit the number of requests under Rule 36.~~

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery ~~otherwise allowed by these rules or by local rule~~ if it determines that: \* \* \*

(iii) ~~the burden or expense of the proposed discovery is outside the scope permitted by Rule 26(b)(1) outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

\* \* \* \* \*

(c) **Protective Orders**

(1) *In General.* \* \* \* The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: \* \* \*

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; \* \* \*

The drafts are works in progress and will be revisited by the advisory committee at its spring meeting.

formed to study Rule 84 and associated forms is inclined to recommend abrogating Rule 84. This inclination follows months of gathering information about the general use of the forms and whether they provide meaningful help to attorneys and pro se litigants. The advisory committee is evaluating the subcommittee's inclination and intends to make a recommendation to the committee concerning the future of Rule 84 at the June 2013 meeting. If Rule 84 is abrogated, forms will still remain available through other sources, including the Administrative Office. Although forms developed by the Administrative Office do not go through the full Enabling Act process, the subcommittee would likely recommend that the advisory committee plan to work with the Administrative Office in drafting and revising forms for use in civil actions.

The committee briefly discussed the feasibility of appointing a liaison member of the civil rules advisory committee to the Administrative Office forms committee. Several members of the committee praised the prior work of the Administrative Office forms committee, particularly its ready responsiveness to current judicial and litigant needs. Its flexibility and responsiveness to rapidly changing requirements were favorably compared to the more cumbersome process imposed by the Rules Enabling Act. Peter McCabe, who chairs the Administrative Office forms committee, expressed the willingness of that committee to respond to the needs of the civil rules advisory committee.

No significant concern was raised by the committee about the potential abrogation of Rule 84.

#### MOTIONS TO REMAND

Judge Campbell reported on a proposal from Jim Hood, Attorney General of Mississippi, to require automatic remand in cases in which a district court takes no action on a motion to remand within thirty days. Attorney General Hood also proposed that the removing party be required to pay expenses, including attorney fees, incurred as a result of removal when remand is ordered. While the advisory committee was sympathetic to the problems created by federal courts failing to act timely on removal motions, it did not believe the subject fell within the jurisdiction of the rules committees. Both subject matter jurisdiction and the shifting of costs from one party to another on removal and remand are governed by federal statutes enacted by Congress and not by rules promulgated under the Rules Enabling Act. Judge Sutton has conveyed the advisory committee's response to Attorney General Hood.

#### PANEL ON CIVIL LITIGATION REFORM PILOT PROJECTS

Four panelists covered the topics outlined below.

#### *Selected Federal Court Reform Projects*

Judge Koeltl outlined five litigation reform projects that the Duke Conference subcommittee is following. These include:

- a. A set of mandatory initial discovery protocols for employment discrimination cases was developed as part of the work resulting from the Duke Conference. These protocols were developed by experienced employment litigation lawyers and have so far been adopted by the Districts of Connecticut and Oregon.
- b. A set of proposals embodied in a pilot project in the Southern District of New York to simplify the management of complex cases.
- c. A Southern District of New York project to manage section 1983 prisoner abuse cases with increased automatic discovery and less judicial involvement. The project's goal is to resolve these types of cases within 5.5 months using judges as sparingly as possible through the use of such devices as specific mandatory reciprocal discovery, mandatory settlement demands, and mediation.
- d. A project in the Seventh Circuit inspired by Chief Judge James F. Holderman that seeks to expedite and limit electronic discovery. The project emphasizes concepts of proportionality and cooperation among attorneys. One specific innovation, Judge Koeltl noted, was the mandatory appointment of a discovery liaison by each litigant.
- e. The expedited trial project being implemented in the Northern District of California. This project provides for shortened periods for discovery and depositions and severely limits the duration of a trial. The goal is for the trial to occur within six months after discovery limits have been agreed upon. Judge Koeltl noted, however, that this entire procedure is an "opt in" one, and so far no litigant has "opted" to use it. As a result, the entire project is now under review to determine what changes will make it more appealing to litigants.

#### *State Court Pilot Projects*

Justice Kourlis presented a summary of information compiled by the Institute for the Advancement of the American Legal System on state court pilot projects. She said these projects fell into three basic categories, all with the common purpose of increasing access to the courts for all types of litigants. The three basic categories were:

- a. Different rules for different types of cases

One category of pilot projects attempts to resolve issues of cost and delay by establishing different sets of rules for different types of cases, such as for complex (e.g., business) cases and simple cases amenable to short, expedited, and summary ("SES")

procedures. Complex case programs are currently underway in California and Ohio. In those projects, the emphasis appears to be on close judicial case management, frequent conferences, and cooperation by counsel. Substantial prior experience in complex business cases by participating judges appears to have contributed to the success of the projects.

SES programs for simple cases are currently underway in California, Nevada, New York, Oregon, and Texas. These programs emphasize streamlined discovery, strict adherence to tight trial deadlines, and, in at least one state, mandatory participation by litigants whose cases fall under a \$100,000 damages limit.

b. Proportionality in Discovery

A number of states have launched projects to achieve this objective. These projects have involved local rule changes to expedite and limit the scope of discovery, more frequent and earlier conferences with judges, and more active judicial case management to achieve proportionate discovery and encourage attorney cooperation.

c. Active Judicial Case Management

This third category of state projects overlaps with the first two categories. Some examples of the techniques employed include: (i) the assignment of a case to a single judicial officer from start to finish; (ii) early and comprehensive pretrial conferences; and (iii) enhanced judicial involvement in pretrial discovery disputes before the filing of any written motions.

*A "Rocket Docket" Court*

Judge Crabb gave a succinct presentation on the benefits of her "rocket docket" court (the Western District of Wisconsin) and how such a court can effectively manage its docket. She explained that litigants value certainty and predictability, and that the best way to achieve these goals is to set a firm trial date. Given her court's current case volume, the goal is to complete a case within twelve to fifteen months after it is filed. Judge Crabb explained that this management style achieves transparency, simplicity, and service to the public.

Once a case is filed in the Western District of Wisconsin, a magistrate judge promptly holds a comprehensive scheduling conference. At this conference, a case plan is developed and discovery dates are fixed. Although this court usually will not change pre-trial discovery deadlines, it will do so on application of both parties if the ultimate trial date is not jeopardized.

In Judge Crabb's district, the magistrate judges are always available for telephone

conferences on motions or other pretrial disputes, but they do not seek to actively manage cases. The litigants know that they have a firm trial date and can be relied upon to seek judicial intervention whenever it is necessary. In Judge Crabb's view, this "rocket docket" approach permits both the rapid disposition of a high volume of cases and maintenance of high morale of the court staff.

*Federal Judicial Center Statistical Observations on Discovery*

Dr. Lee of the Federal Judicial Center then gave a short presentation on statistical observations about discovery. He noted that the Center's research shows that the cost of discovery is a problem only in a minority of cases. Indeed, various statistical analyses lead him to conclude that the problem cases are a small subset of the total number of cases filed and involve a rather small subset of difficult lawyers.

Dr. Lee cited a multi-variate analysis done in 2009 and 2010 for the Duke Conference. In that study, the Federal Judicial Center found that the costly discovery cases have several common factors:

1. High stakes for the litigants (either economic or non-economic);
2. Factual complexity;
3. Disputes over electronic discovery; and
4. Rulings on motions for summary judgment.

Other interesting statistical observations of the study included the fact that on average a 1% increase in the economic value of the case leads to a .25% increase in its total discovery cost. Other discovery surveys indicate that almost 75% of lawyers on average believe that discovery in their cases is proportionate and that the other side is sufficiently cooperative. Only in a small minority of the cases—approximately 6%—are lawyers convinced that discovery demands by the opposing side are highly unreasonable.

**REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES**

Judge Colloton and Professor Struve presented the report of the advisory committee, as set forth in Judge Colloton's memorandum of December 5, 2012 (Agenda Item 6). There were no action items for the committee.

*Information Items*

**SEALING AND REDACTION OF APPELLATE BRIEFS**

Judge Colloton reported that the advisory committee had decided not to proceed with a proposal to implement a national uniform standard for sealing or redaction of appellate briefs. He explained that the circuits take varying approaches to sealing and redaction on appeal. During the advisory committee's discussions, several members had expressed support for the approach of the Seventh Circuit, where sealed items in the record on appeal are unsealed after a brief grace period unless a party seeks the excision of those items from the record or moves to seal them on appeal. This approach is based on the belief that judicial proceedings should be open and transparent. However, members also noted that each circuit currently seems satisfied with its own approach to sealed filings.

Given the division of opinion among the circuits, the advisory committee ultimately decided there was no compelling reason to propose a rule amendment on the topic of sealing on appeal. However, its members believed that each circuit might find it helpful to know how other circuits handle such questions; therefore, shortly after its meeting, Judge Sutton, in one of his last acts as the chair of the advisory committee, wrote to the chief judge and clerk of each circuit to summarize the concerns that have been raised about sealed filings, the various approaches to those filings in different circuits, and the rationale behind the approach of the Seventh Circuit.

#### MANUFACTURED FINALITY

The advisory committee also revisited the topic of "manufactured finality," which occurs when parties attempt to create an appealable final judgment by dismissing peripheral claims in order to secure appellate review of the central claim. A review of circuit practice found that virtually all circuits agree that an appealable final judgment is created when all peripheral claims are dismissed with prejudice. Many circuits also agree that an appealable final judgment is not created when a litigant dismisses peripheral claims without prejudice, although some circuits take a different view. But less uniformity exists for handling middle ground attempts to "manufacture" finality. For example, there is disagreement in the circuits as to whether an appealable judgment results if the appellant conditionally dismisses the peripheral claims with prejudice by agreeing not to reassert the peripheral claims unless the appeal results in reinstatement of the central claim. A joint civil-appellate rules subcommittee was appointed to review whether "manufactured finality" might be addressed in the federal rules. On initial examination, members had divergent views.

Before last fall's advisory committee meeting, the Supreme Court accepted for review *SEC v. Gabelli*, 653 F.3d 49 (2nd Cir. 2011), *cert. granted*, 133 S.Ct. 97 (2012). The Second Circuit's jurisdiction in that case rested on "conditional finality." Since the Court might clarify this issue in that case, the advisory committee decided to await the Court's decision before deciding how to proceed.

#### LENGTH LIMITS FOR BRIEFS

The advisory committee is considering whether to overhaul the treatment of filing-length limits in the Appellate Rules. The 1998 amendments to the Appellate Rules set the length limits for merits briefs by means of a type-volume limitation, but Rules 5, 21, 27, 35, and 40 still set length limits in terms of pages for other types of appellate filings. Members have reported that the page limits invite manipulation of fonts and margins, and that such manipulation wastes time, disadvantages opponents, and makes filings harder to read. The advisory committee intends to consider whether the type-volume approach should be extended to these other types of appellate filings.

#### CLASS ACTION OBJECTORS

Finally, the advisory committee has received correspondence about so-called “professional” class action objectors who allegedly file specious objections to a settlement and then appeal the approval of the settlement with the goal of extracting a payment from class action attorneys in exchange for withdrawing their appeals. One proposed solution would amend Rule 42 to require court approval of voluntary dismissal motions by class action objectors, together with a certification by an objector that nothing of value had been received in exchange for withdrawing the appeal. Another proposed solution would require an appeal bond from class action objectors sufficient to cover the costs of delay caused by appeals from denials of non-meritorious objections. Judge Colloton suggested that collaboration with the Civil Rules Advisory Committee would likely be required to determine both the scope of and possible remedies for this problem.

#### REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi’s memorandum of November 26, 2012 (Agenda Item 8). As the committee’s fall meeting in Washington was canceled as a result of Hurricane Sandy, there were no action items for the committee.

#### *Information Items*

Judge Raggi reported that on the agenda for the advisory committee’s Fall 2012 meeting and now high on the agenda for its Spring 2013 meeting is a Department of Justice proposal to amend Rule 4 to permit effective service of summons on a foreign organization that has no agent or principal place of business within the United States. The Department argues that its proposed change is necessary in order to prevent evasion of service by organizations committing offenses within the United States.

Judge Raggi also reported on the status of the proposed amendments to Rule 12,



the rule addressing pleadings and pretrial motions. The proposed amendments were published for public comment in August 2011. The amendments clarify which motions must be raised before trial and the consequences if the motions are not timely filed. Numerous comments were received, including detailed objections and suggestions from various bar organizations. The committee's reporters prepared an 80-page analysis of these comments. In its consideration of the comments, the Rule 12 subcommittee reaffirmed the need for the amendment, but concluded that the public comments warranted several changes in its proposal. With those changes, the subcommittee has recommended to the advisory committee that an amended proposal be approved and transmitted to the Standing Committee for its approval. The advisory committee's consideration of the Rule 12 subcommittee's report will take place at its Spring 2013 meeting. Judge Raggi expressed her appreciation for the extended attention already devoted by Judge Sutton to the committee's work on Rule 12.

#### REPORT OF THE ADVISORY COMMITTEE ON RULES OF EVIDENCE

Judge Fitzwater and Professor Capra delivered the report of the advisory committee, as set forth in Judge Fitzwater's memorandum of November 26, 2012 (Agenda Item 4). There were no action items for the committee.

#### *Information Items*

#### SYMPOSIUM ON FED. R. EVID. 502

Professor Capra reported on a symposium the advisory committee hosted in conjunction with its Fall 2012 meeting. The purpose of the symposium was to review the current use (or lack of use) of Rule 502 (on attorney-client privilege and work product and waiver of those protections) and to discuss ways in which the rule can be better known and understood so that it can fulfill its original purposes of clarifying and limiting waiver of privilege and work product protection, thereby reducing delays and costs in litigation. Panelists included judges, lawyers, and academics with expertise and experience in the subject matter of the rule, some of whom are also veterans of the rulemaking process. The symposium proceedings and a model Rule 502(d) order will be published in the March 2013 issue of the *Fordham Law Review*.

The panel attributed much of the lack of use of Rule 502 as a device to aid in pre-production review to a simple lack of knowledge of the rule by practitioners and judges. Part of this absence of knowledge was attributed to the rule's location in the rules of evidence as opposed to the rules of civil procedure. Various suggestions on promotion of the rule's visibility, including a model Rule 502 order, education through Federal Judicial Center classes and a possible informational letter to chief district judges, are in the process of being implemented or developed.

PROPOSED AMENDMENTS TO FED. R. EVID. 801(d)(1) AND 803(6)-(8)

A published proposed amendment to Rule 801(d)(1), the hearsay exemption for certain prior consistent statements, provides that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. This proposal has been the subject of only one public comment so far. Proposed amendments to Rule 803(6)-(8)—the hearsay exemptions for business records, absence of business records, and public records—would clarify that the opponent has the burden of showing that the proffered record is untrustworthy. No comments have been received yet on this proposal.

SYMPOSIUM ON TECHNOLOGY AND THE FEDERAL RULES OF EVIDENCE

Judge Fitzwater reported that the advisory committee is planning to convene a symposium to highlight the intersection of the evidence rules and emerging technologies and to consider whether the evidence rules need to be amended in light of technological advances. The symposium will be held in conjunction with the advisory committee's Fall 2013 meeting at the University of Maine School of Law in Portland.

These presentations concluded the first day of the meeting of the Standing Committee.

**FRIDAY, JANUARY 4, 2013**

**REPORT ON PACE OF RULEMAKING**

Benjamin Robinson gave a brief presentation on the timing and pace of federal rulemaking over the past thirty years. Judge Sutton had requested the report, noting that at various times in the past both the Federal Judicial Center and the committee have tackled this subject. He specifically pointed to the Easterbrook-Baker “self-study” report by the Standing Committee, 169 F.R.D. 679 (1995), contained in the agenda book.

Mr. Robinson presented a series of charts that demonstrated that over the past thirty years there have been several peaks and valleys in the pace of federal rulemaking. The charts demonstrated that the peaks were caused by legislative activity and to a lesser extent by several rules restyling projects.

For example, bankruptcy legislation in the mid-1980s created the occasion in 1987 for 117 bankruptcy rule changes. Similarly, bankruptcy legislation created the occasion for 95 bankruptcy rule changes in 1991. Additional bankruptcy legislation in 2005 produced a total of 43 bankruptcy rules amendments in 2008. The civil and evidence rules restyling projects also have required a considerable number of rule changes.

Mr. Robinson’s presentation initiated a broader discussion of the timing and pace of rulemaking by committee members.

Judge Sutton stated that he had placed this matter on the agenda in part to sensitize the Standing Committee to the work required by the Supreme Court on rule amendments.

At one point during the discussion, Judge Sutton advanced a theoretical proposal that perhaps rule changes could be made every two years instead of every year. For example, the civil and appellate rules committees could group their proposed changes in the even years, while the criminal, evidence, and bankruptcy rules committees could group their proposed changes in the odd years. Judge Sutton noted that such a scheme would have the advantage of predictability both for the Supreme Court and for the bar as to what types of rule changes could be expected in a particular year.

Judge Sutton asked for comments from several of those present, in particular, participants who have had extensive experience over the years in the rulemaking process. Several points emerged during the discussion. First, there is no question that the Supreme Court is very aware of the burden that the rulemaking process places upon it. Chief Justices Burger and Rehnquist were particularly conscious of it. Also, the current rules calendar places a heavy burden on the Court in that the rule proposals arrive in the

spring when the Court is busiest. However, no one argued that seeking a legislative change in the calendar made any sense. Instead, the idea was advanced that the Rules Committees could target the March meeting of the Judicial Conference for its major proposals, rather than the September meeting. This would mean that the rule changes could go to the Court at a more convenient time, such as late summer before its annual session begins on October 1. However, a correlative disadvantage would be the overall extension in the length of time required for a proposed amendment to the rules to be adopted.

Experienced observers pointed out that much of the timing of rulemaking is dictated by external factors such as legislation or decided cases. While the timing of such projects as the restyling of the evidence and civil rules might be discretionary, the need for new rules created by legislation or other external events often is not. All participants appeared to agree that keeping the Supreme Court involved in the rulemaking process is most important to its integrity and standing. Thus, all agreed at a minimum that greater sensitivity to the needs and desires of the Court as to the timing of proposed rules changes is highly advisable.

#### REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff, Professor Gibson, and Professor McKenzie presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum of December 5, 2012 (Agenda Item 7). The report covered four major subjects: (1) revisions to the official forms for individual debtors; (2) a mini-conference on home mortgage forms and rules; (3) the development of a Chapter 13 form plan and related rule amendments; and (4) electronic signature issues.

#### DRAFTS OF REVISED OFFICIAL FORMS FOR INDIVIDUAL DEBTORS

Judge Wedoff first reported on the restyled Official Bankruptcy Forms for individual debtors. These forms are the initial product of the forms modernization project, a multi-year endeavor of the advisory committee, working in conjunction with the Federal Judicial Center and the Administrative Office. The dual goals of the forms modernization project are to improve the official bankruptcy forms and to improve the interface between the forms and available technology.

In August 2012, the first nine forms were published for public comment. To date, few comments have been received; however, the advisory committee expects to receive more comments before the February 15, 2013, deadline, and it will review those comments before seeking approval at the June meeting to publish the following eighteen remaining forms for individual debtor cases that have not yet been published:

#### **Forms To Be Considered in June**

- Official Form 101—Voluntary Petition for Individuals Filing for Bankruptcy
- Official Form 101AB—Your Statement About an Eviction Judgment Against You – Parts A and B
- Official Form 104—List in Individual Chapter 11 Cases of Creditors Who Have the 20 Largest Unsecured Claims Against You Who are not Insiders
- Official Form 106 – Summary—A Summary of Your Assets and Liabilities and Certain Statistical Information
- Official Form 106A—Schedule A: Property
- Official Form 106B—Schedule B: Creditors Who Hold Claims Secured by Property
- Official Form 106C—Schedule C: Creditors Who Have Unsecured Claims
- Official Form 106D—Schedule D: The Property You Claim as Exempt
- Official Form 106E—Schedule E: Executory Contracts and Unexpired Leases
- Official Form 106F—Schedule F: Your Codebtors
- Official Form 106 – Declaration—Declaration About an Individual Debtor’s Schedules
- Official Form 107—Your Statement of Financial Affairs for Individuals Filing for Bankruptcy
- Official Form 112—Statement of Intention for Individuals Filing Under Chapter 7
- Official Form 119—Bankruptcy Petition Preparer’s Notice, Declaration and Signature
- Official Form 121—Your Statement About Your Social Security Numbers
- Official Form 318—Discharge of Debtor in a Chapter 7 Case
- Official Form 423—Certification About a Financial Management Course
- Official Form 427—Cover Sheet for Reaffirmation Agreement

In anticipation of seeking publication in June, Judge Wedoff gave the committee an extensive preview of each of the above forms and took under advisement specific committee member comments on each of them with a plan to incorporate these comments in the preparation of the advisory committee’s ultimate proposals.

#### MINI-CONFERENCE ON HOME MORTGAGE FORMS AND RULES

Judge Wedoff reported on a successful mini-conference held by the advisory committee on September 19, 2012, to explore the effectiveness of the new rules and forms concerning the impact of home mortgage rules and reporting requirements for chapter 13 cases, which went into effect on December 1, 2011. The mini-conference reflected a general acceptance of the disclosure requirements of the new rules, but pointed out various specific difficulties that will likely require some subsequent fine-tuning either by the advisory committee or through case-law development.

## CHAPTER 13 FORM PLAN AND RELATED RULE AMENDMENTS

Professor McKenzie reported on the advisory committee's development of a national form plan for chapter 13 cases. The working group presented a draft of the form plan for preliminary review at the advisory committee's Fall 2012 meeting. The group also proposed amendments to Bankruptcy Rules 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, specifically to require use of the national form plan and to establish the authority needed to implement some of the plan's provisions.

The advisory committee discussed the proposed form and rules amendments and accepted the working group's suggestion that the drafts be shared with a cross-section of interested parties to obtain their feedback on the proposals. Professor McKenzie reported that a mini-conference on the draft plan and proposed rule amendments was scheduled to take place in Chicago on January 18, 2013. The working group will make revisions based on the feedback received at the mini-conference and then present the model plan package to both the consumer issues and forms subcommittees for their consideration. The subcommittees will report their recommendations to the advisory committee at its Spring 2013 meeting. If a chapter 13 form plan and related rule amendments are approved at that meeting, the advisory committee will request that they be approved for publication in August 2013 at the June meeting of the Standing Committee.

## CONSIDERATION OF ELECTRONIC SIGNATURE ISSUES

The last item of Judge Wedoff's report was an update on the advisory committee's consideration (at the request of the forms modernization project) of a rule establishing a uniform procedure for the treatment and preservation of electronic signatures. The advisory committee has requested Dr. Molly Johnson of the Federal Judicial Center to gather information on existing practices regarding the use of electronic signatures by nonregistered individuals and requirements for retention of documents with handwritten signatures. Her findings will be available by the end of this year and will be reported to the advisory committee at its Spring 2014 meeting.

## NEXT MEETING

The Standing Committee will hold its next meeting in Washington, D.C., on June 3 and 4, 2013.