

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 11-12, 2012
Washington, D.C.
Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Monday and Tuesday, June 11 and 12, 2012. The following members were present:

Judge Mark R. Kravitz, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Diane P. Wood

Deputy Attorney General James M. Cole was unable to attend. The Department of Justice was represented throughout the meeting by Elizabeth J. Shapiro, Esquire, and at various points by Kathleen A. Felton, Esquire; H. Thomas Byron III, Esquire; Jonathan J. Wroblewski, Esquire; Ted Hirt, Esquire; and J. Christopher Kohn, Esquire.

Judge Jeremy D. Fogel, Director of the Federal Judicial Center, participated in the meeting, as did the committee's consultants – Professor Geoffrey C. Hazard, Jr.; Professor R. Joseph Kimble; and Joseph F. Spaniol, Jr., Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Jonathan C. Rose	Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Chief, Rules Committee Support Office
Julie Wilson	Attorney, Rules Committee Support Office
Andrea L. Kuperman	Rules law clerk to Judge Kravitz
Joe Cecil	Research Division, Federal Judicial Center

Also attending were Administrative Office attorneys James H. Wannamaker III, Bridget M. Healy, and Holly T. Sellers, and the judiciary's Supreme Court fellows.

Representing the advisory committees were:

- Advisory Committee on Appellate Rules —
 - Judge Jeffrey S. Sutton, Chair
 - Professor Catherine T. Struve, Reporter
- 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 —
 - Judge Sidney A. Fitzwater, Chair
 - Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Kravitz reported that he would retire as committee chair on September 30, 2012, and the Chief Justice had nominated Judge Sutton to succeed him. He congratulated Judge Sutton and thanked the Chief Justice for making an excellent selection.

Judge Kravitz reported that the Supreme Court in April 2012 had adopted proposed amendments to the bankruptcy and criminal rules recommended by the Conference at its September 2011 session. The changes will take effect by operation of law on December 1, 2012, unless Congress acts to reject, modify, or defer them.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Robinson reported that there had been no further significant legislative action related to electronic discovery since the committee's January 2012 meeting.

He said that the House Judiciary Committee had held a hearing on the Class Action Fairness Act, at which no calls were made either for an overhaul of FED. R. CIV. P. 23 (class actions) or for dramatic changes to the rule. One witness, though, criticized the continuing reliance on *cy prè*s in class actions.

Mr. Robinson said that there had been no recent action on legislation addressing sunshine in regulatory decrees and settlements. He suggested that legislative attention now seemed to focus more on the criminal rules. A hearing, he reported, had been held before the Senate Judiciary Committee in June 2012 addressing the obligations of prosecutors to disclose exculpatory materials to the defense. At the hearing Senator Murkowski summarized her legislation on the subject, introduced in the wake of the prosecution of the late Senator Stevens and the ultimate dismissal of the criminal case.

Mr. Robinson reported that Judge Raggi had submitted a letter in connection with the hearing, in which she set out in broad terms the extensive work of the Advisory Committee on Criminal Rules over the last decade on FED. R. CRIM. P. 16 (discovery and inspection in criminal cases). The letter, he said, had a 909-page attachment describing that work in detail. In addition, Carol Brook, the federal defender for the Northern District of Illinois and a member of the advisory committee, testified at the hearing. He added that the legislators and witnesses appeared to agree that there were problems with non-disclosure of *Brady* materials that should be addressed, but most concluded that the pending legislation did not offer the right solution to the problems.

He reported that Senator Leahy had introduced legislation underscoring the nation's obligations under article 36 of the Vienna Convention to provide consular notification when foreign nationals are arrested. The legislation, he said, had been added to a State Department appropriations bill. He pointed out that language had been removed from the bill that would have duplicated the substance of proposed amendments to FED. R. CRIM. P. 5 and 58. The committee report accompanying the bill, moreover, encouraged the ongoing work of the rules committees and the Uniform Law Commission in facilitating compliance with the Vienna Convention by federal, state, and local law-enforcement officials. Mr. Robinson thanked the Judicial Conference's Federal-State Jurisdiction Committee for monitoring the legislation and informing the Senate of the activities of the rules committees.

He reported that the House Judiciary Committee had favorably reported out legislation to require bankruptcy asbestos trusts to report claimant filing information to the bankruptcy courts on a quarterly basis. The substance of the legislation, he noted, had previously been proposed as an amendment to the bankruptcy rules, but was not adopted by the Advisory Committee on Bankruptcy Rules. He added that the legislation would continue to be monitored.

Mr. Robinson noted that Magistrate Judge Paul W. Grimm, a member of the Advisory Committee on Civil Rules, had testified at the Senate hearing on his nomination to a district judgeship on the U.S. District Court for the District of Maryland. In addition, a Senate vote was expected shortly to confirm the nomination of Justice Andrew D. Hurwitz, a recent alumnus of the Advisory Committee on Evidence Rules, to a judgeship on the U.S. Court of Appeals for the Ninth Circuit.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 5 and 6, 2012.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of May 8, 2012 (Agenda Item 7).

Amendments for Final Approval

FED. R. APP. P. 13, 14, 24(b)

Judge Sutton reported that 26 U.S.C. § 7482(a)(2), enacted in 1986, authorizes permissive interlocutory appeals from the United States Tax Court to the courts of appeals. The Federal Rules of Appellate Procedure, however, were never amended to reflect this avenue for appellate review.

The proposed changes to FED. R. APP. P. 13 (review of a Tax Court decision) and FED. R. APP. P. 14 (applicability of other appellate rules to review of a Tax Court decision) would remedy this omission. The proposed change to FED. R. APP. P. 24(b) (leave to proceed in forma pauperis) would clarify the rule by recognizing that the Tax Court is not an administrative agency.

Judge Sutton reported that the advisory committee had consulted closely with the Tax Court and the Tax Division of the Department of Justice in developing the proposals. He added that no public comments had been received and no changes made in the proposals following publication.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. APP. P. 28 and 28.1(c)

Judge Sutton explained that the proposed change to FED. R. APP. P. 28(a) (appellant's brief) would revise the list of the required contents of an appellant's brief by combining paragraphs 28(a)(6) and 28(a)(7). Paragraph (a)(6) now requires a statement of the case, and (a)(7) a statement of the facts. The new, combined provision, numbered Rule 28(a)(6), would require "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." Conforming changes would be made in Rule 28(b), governing appellees' briefs, and Rule 28.1(c), governing briefs in cross-appeals.

Judge Sutton pointed out that most lawyers will choose to present the factual and procedural history of a case chronologically. The revised rule, though, gives them the flexibility to follow a different order. In addition, the committee note specifies that a statement of the case may include subheadings, particularly to highlight the rulings presented for review.

He reported that the proposed amendments had attracted six public comments, four of them favorable. Some comments expressed concern that deleting the current rule's reference to "the nature of the case, the course of proceedings, and the disposition below" might lead some to conclude that the procedural history of a case may no longer be included in the statement of the case. Therefore, after publication, the committee inserted into proposed Rule 28(a)(6)'s statement of the case the phrase "describing the relevant procedural history." The committee note was also modified to reflect the addition. He noted, too, that the Supreme Court's rule – which similarly requires a single, combined statement – appears to have worked well.

A member noted that a prominent judge had argued in favor of maintaining separate statements of the case and of the facts, predicting that combined statements will require judges to comb through a great deal of detail to find the key procedural steps in a case – the pertinent rulings made by the lower court. She suggested that the judge's concern might be addressed by requiring that the combined statement begin with the ruling below.

Judge Sutton said that the committee note contemplates that approach, emphasizing that lawyers are given flexibility in presenting their statements. Most, he said, will state the facts first and then the issues for review. He suggested that the judge would have been pleased with simply reversing the order of current paragraphs (a)(6) and (a)(7) to set out the statement of facts first, followed by the statement of the case. Professor Struve added that a circuit could have a local rule that specifies a particular order of subheadings.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FORM 4

Judge Sutton explained that Questions 10 and 11 on the current version of Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) require an IFP applicant to provide the details of all payments made to an attorney or other person for services in connection with the case. The questions, he said, ask for more information than needed to make an IFP determination. In addition, some have argued that the form's disclosures implicate the attorney-client privilege. But, he said, research shows that the payment information is very unlikely to be subject to the privilege. Sometimes, though, it might constitute protected work product.

The proposed amendments, he pointed out, combine the two questions into one. The new question asks broadly whether the applicant has spent, or will spend, any money for expenses or attorney fees in connection with the lawsuit – and if so, how much. Only

one public comment was received, which proposed an additional modification to the form to deal with the Prison Litigation Reform Act. The committee, he said, decided not to incorporate the suggestion into the current amendment, but to add the matter to its study agenda as a separate item.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments for Publication

FED. R. APP. P. 6

Professor Struve noted that the advisory committee was proposing several amendments to FED. R. APP. P. 6 (appeals in bankruptcy cases from a district court or bankruptcy appellate panel to a court of appeals). The modifications dovetail with the simultaneous amendments being proposed to Part VIII of the Federal Rules of Bankruptcy Procedure, which govern appeals from a bankruptcy court to a district court or bankruptcy appellate panel.

Revised FED. R. APP. P. 6 would update the rule's cross-references to the new, renumbered Part VIII bankruptcy rules. New subdivision 6(c) will govern permissive direct appeals from a bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2), enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It specifies that the record on a direct appeal from a bankruptcy court will be governed by FED. R. BANKR. P. 8009 (record on appeal and sealed documents) and FED. R. BANKR. P. 8010 (completing and transmitting the record). New Rule 6(c) takes a different approach from Rule 6(b), where the record on appeal from a district court or bankruptcy appellate panel is essentially based upon the record in the mid-level appeal to the district court or panel.

She noted that proposed new Bankruptcy Rule 8010(b) deals with transmitting the record from the bankruptcy court. It specifies that the bankruptcy clerk must transmit to the clerk of the court where an appeal is pending "either the record or a notice that the record is available electronically."

In the proposed amendments to FED. R. APP. P. 6(b)(2)(C), she said, the clerk of the district court or bankruptcy appellate panel must number the documents constituting the record and "promptly make it available." The amended appellate rule, she said, is very flexible and works well with the revised Part VIII bankruptcy rules. It allows the clerk to make the record available either in paper form or electronically.

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

Informational Items

Judge Sutton reported that he had sent a letter to each chief circuit judge explaining that the advisory committee had decided to take no action at the present time to amend FED. R. APP. P. 29 (amicus briefs) to treat federally recognized Native American tribes the same as states. The proposal would allow tribes to file amicus briefs as of right and exempt them from the rule's authorship-and-funding disclosure requirement. The committee, he said, had informed the chief judges that the issue warrants serious consideration, will be maintained on the committee's agenda, and will be revisited in five years.

He noted that the advisory committee had removed from its agenda an item providing for introductions in briefs. Many of the best practitioners, he said, currently include introductions in their briefs to lay out the key themes of their argument. The committee's proposed amendment to FED. R. APP. P. 28(a)(6), he said, was sufficiently flexible to permit inclusion of an introduction as part of a brief's statement of the case. Moreover, it would be difficult to specify how an introduction differs from the statement of the issues presented for review in FED. R. APP. P. 28(a)(5).

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of May 14, 2012 (Agenda Item 5).

Judge Wedoff noted that the advisory committee had 14 action items to present, six of them for final approval by the Judicial Conference and eight for publication. He suggested that the most important were the amendments dealing with the Supreme Court's decision in *Stern v. Marshall*, the revision of the Part VIII bankruptcy appellate rules, and the modernization of the bankruptcy forms.

Amendments for Final Approval

FED. R. BANKR. P. 1007(b)(7) and 5009(b) and 4004(c)(1)

Judge Wedoff explained that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 has required virtually all individual debtors to complete a personal course in financial management as a pre-condition for receiving a discharge. He noted that FED. R. BANKR. P. 1007(b)(7) (required schedules and statements) and 5009(b) (case closing) implement the statute by requiring individual debtors to file an official form (Official Form 23) certifying that they completed the course before filing their petition.

FED. R. BANKR. P. 1007(c) imposes deadlines for filing the certification. In Chapter 7 cases, for example, the debtor must file it within 60 days after the first date set for the meeting of creditors under 11 U.S.C. § 341.

If the debtor has not filed the form within 45 days after the first meeting of creditors, FED. R. BANKR. P. 5009(b) instructs the bankruptcy clerk to warn the debtor that the case will be closed without a discharge unless the certification is filed within Rule 1007's time limits. FED. R. BANKR. P. 4004(c) then specifies that the court may not grant a discharge if the debtor has not filed the certificate.

Judge Wedoff reported that the advisory committee recommended amending FED. R. BANKR. P. 1007(b) to allow the provider of the financial-management course to notify the court directly that the debtor has completed the course. This action would relieve the debtor of the obligation to file Official Form 23. FED. R. BANKR. P. 5009(b) would be amended to require the bankruptcy clerk to send the warning notice only if: (1) the debtor has not filed the certification; and (2) the course provider has not notified the court that the debtor has completed the course.

A conforming amendment to FED. R. BANKR. P. 4004(c)(1) (grant of discharge) specifies that the court does not have to deny a discharge if the debtor has been relieved of the duty to file the certification. In addition, language improvements would be made in the rule. Paragraph (c)(1) currently instructs a court to grant a discharge promptly unless certain acts have occurred. The amendment reformulates the text to instruct the court affirmatively not to grant a discharge if those acts have occurred.

Section 524(m) of the Bankruptcy Code, added in 2005, specifies that when a debtor files a reaffirmation agreement, the court must determine whether the statutory presumption that the agreement is an undue hardship for the debtor has been rebutted, *i.e.*, by finding that the debtor is apparently able to make payments under the agreement. A judge needs to make that determination before a discharge is granted. Therefore, FED. R. BANKR. P. 4004(c)(1)(K) tells the court to delay the discharge until the judge considers the debtor's ability to make the payments.

The proposed amendment to FED. R. BANKR. P. 4004(c)(1)(K) would make it clear that the rule's prohibition on entering a discharge due to a presumption of undue hardship ends when the presumption expires or the court concludes a hearing on the presumption. As a result, there would be no delay if the judge has already ruled on the matter.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference. The proposed amendments to FED. R. BANKR. P. 4004(c)(1) were approved without publication.

FED. R. BANKR. P. 9006(d), 9013, and 9014

Judge Wedoff noted that FED. R. BANKR. P. 9006 is entitled “computing and extending time,” but it also specifies the default time for filing motions and affidavits in response to motions. Unlike FED. R. CIV. P. 6 (computing and extending time; time for motion papers), the civil rules counterpart on which it is based, FED. R. BANKR. P. 9006 does not indicate by its title that it also addresses time periods for motions. Nor is it followed immediately by another rule that addresses the form of motions, as the civil rules do. FED. R. CIV. P. 7 (pleadings, motions, and other papers) specifies the pleadings allowed and the form of motions and other papers.

The advisory committee, he said, was proposing amendments to highlight Rule 9006(d). First, the rule’s title would be expanded to add a reference to “time for motion papers.” Second, cross-references to Rule 9006(d) would be added to both FED. R. BANKR. P. 9013 (form and service of motions) and FED. R. BANKR. P. 9014 (contested matters) to specify that motions must be filed “within the time determined under FED. R. BANKR. P. 9006(d).”

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

OFFICIAL FORM 7

Judge Wedoff explained that Official Form 7 (statement of financial affairs) is a lengthy form that details many of the debtor’s financial transactions. It makes frequent references to “insiders.” The current definition of “insider” on the form refers to any owner of 5% or more of the voting or equity securities of a corporate debtor. That definition, though, has no basis in law, and it is not clear why it was adopted. The advisory committee would replace it with the Bankruptcy Code’s definition of “insider,” which includes any “person in control” of a corporate debtor.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments for Final Approval Without Publication

OFFICIAL FORMS 9A-I and 21

Professor McKenzie noted that there are several variations of Official Form 9 (notice of a bankruptcy filing, meeting of creditor, and deadlines), based on the nature of the debtor and the chapter of the Bankruptcy Code under which a case is filed. Form 9 is directed at creditors, notifying them that a bankruptcy case has been filed and informing

them of upcoming case events and what steps they need to take. The form includes identifying information about the debtor that allows recipients of the notice to determine whether they are in fact a creditor of the debtor. In the case of individual debtors, the identifying information includes the debtor's social security number.

Debtors are required to provide their social security numbers to the bankruptcy clerk on Official Form 21 (statement of social security number). That form is submitted separately and not included in the court's public electronic records. The social security number is revealed to creditors on their personal copies of Form 9 purely for identification purposes, but only a redacted version of Form 9 is included in the case file.

The Court Administration and Case Management Committee expressed concern that bankruptcy forms may be mistakenly filed with the courts in ways that publicly reveal debtors' private identifying information. In some cases, creditors may file a copy of their unredacted Form 9 with their proofs of claim without redacting the debtor's social security number. Debtors, moreover, may file Form 21 with other case papers, rather than submit it to the clerk separately.

Professor McKenzie explained that the advisory committee would add prominent warnings on both Form 9 and Form 21 alerting users that the forms should not be filed with the court in a way that makes them publicly available. He pointed out that the advisory committee had made two minor changes in the language of Form 21's warning after the agenda book had been distributed. A corrected version was circulated to the members.

Judge Wedoff reported that the Court Administration and Case Management Committee had suggested that the debtor's full social security number be eliminated entirely from the forms to prevent any problems of inadvertent disclosure. But, he said, the advisory committee was convinced that social security numbers are still needed for some creditors to be able to identify the debtors. The full number, for example, is essential for the Internal Revenue Service. He added, though, that the committee will revisit the matter if the situation changes in the future.

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

OFFICIAL FORM 10

Professor McKenzie pointed out that the current version of Official Form 10 (proof of claim) contains a requirement at odds with FED. R. BANKR. P. 9010(c) (power of attorney). The form instructs an authorized agent of a creditor filing a proof of claim to attach to the claim a copy of its power of attorney. Rule 9010(c) generally requires an

agent to give evidence of its authority to act on behalf of a creditor in a bankruptcy case by providing a power of attorney. But it does not apply when an agent files a proof of claim.

In addition, Form 10 would be amended to require additional documentation in certain cases. For claims based on an open-end or revolving consumer-credit agreement, the filer of the proof of claim will have to attach the information required by FED. R. BANKR. P. 3001(c)(3)(A) (proof of claim based on open-end or revolving consumer credit agreement), scheduled to take effect on December 1, 2012. If a claim is secured by the debtor's principal residence, the filer will have to attach the Mortgage Proof of Claim Attachment (Official Form 10, Attachment A), required as of December 1, 2011.

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

Amendments for Publication

FED. R. BANKR. P. 1014(b)

Professor McKenzie explained that Rule 1004(b) (dismissal and change of venue) deals with the procedure when petitions involving the same debtor or related debtors are filed in different districts. The current rule specifies that, upon motion, the court in which the petition is filed first may determine the district or districts in which the cases will proceed. All other courts must stay proceedings in later-filed cases until the first court makes its venue determination, unless the first court orders otherwise. As a result, later cases are stayed by default while the venue question is pending before the first court.

The rule, he said, has been the subject of game playing because it allows an attorney who wants to stay all further proceedings to do so by filing a motion, or threatening to file a motion, in the first case. Therefore, the advisory committee proposal would change the default requirement to state that proceedings in later-filed cases are stayed only on express order of the first court. The change, he said, will prevent disruption of the other cases unless the judge in the first court determines affirmatively that a stay of a related case is needed while he or she makes the venue determination. In addition, the advisory committee made style changes in the rule.

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

FED. R. BANKR. P. 7004(e)

Professor McKenzie reported that the proposed amendment to FED. R. BANKR. P. 7004(e) would reduce the amount of time that a summons remains valid after it is issued. Currently, a summons must be served within 14 days after issuance. The proposed amendment to Rule 7004(e) would reduce that time to seven days.

Under the civil rules, a defendant's time to respond to a summons and complaint (30 days) begins when the summons and complaint are actually served. Under the bankruptcy rules, however, the defendant's response time is calculated from the date that the summons is issued.

He noted that concern had been expressed that seven days may be too short a period to effect service. Nevertheless, he said, the advisory committee believed that the time is sufficient and will encourage prompt service after issuance of a summons. He added that bankruptcy service is relatively easy and may be effected anywhere in the United States by first-class mail. Moreover, the necessary paperwork is usually generated by computer.

He added that the bankruptcy system has a strong objective in favor of moving cases quickly. In addition, calculating the time for service from the date of issuance, rather than service, provides clarity because issuance is noted on the court's docket. Finally, he explained that the time for service had traditionally been 10 days in the bankruptcy rules, but was increased to 14 days as a result of the omnibus 2009 time-computation amendments.

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

FED. R. BANKR. P. 7008, 7012(b), 7016, 9027, and 9033(a)

Professor McKenzie reported that the advisory committee was recommending publishing proposed amendments to five bankruptcy rules to deal with the recent Supreme Court decision in *Stern v. Marshall*, 564 U.S. ___, 131 S.Ct. 2594 (2011). In *Stern*, the Court held that a non-Article III bankruptcy judge could not enter final judgment on a debtor's state common-law counterclaim against a creditor of the bankruptcy estate. Even though the governing statute, 28 U.S.C. § 157(b), specifies that the counterclaim is a "core proceeding" that a bankruptcy judge may hear and determine with finality, the Court held that it was unconstitutional for Congress to assign final adjudicatory authority over the matter to a bankruptcy judge.

Professor McKenzie noted that the Federal Rules of Bankruptcy Procedure incorporate the statutory distinction between “core” and “non-core” proceedings and recognize that a bankruptcy judge’s authority is much more limited in non-core proceedings than in core proceedings. Under the current rules, a party filing a motion has to state whether the proceeding is core or non-core, and a response must do the same.

Since *Stern*, however, a core proceeding under the statute may not be a core proceeding under the Constitution. Therefore, the advisory committee, he said, decided that it was necessary to remove the words “core” and “non-core” from the rules entirely.

Instead, the advisory committee would amend FED. R. BANKR. P. 7016 (pretrial procedures and formulating issues) to make clear that a bankruptcy judge must consider his or her authority to enter final orders and judgment in all adversary proceedings. The judge’s decision, moreover, will be informed by the allegations of the parties as to whether the judge has that authority. This broad approach, he said, will allow the law to continue to develop without having to change the rules again in the future.

Judge Wedoff reported that it is unclear since *Stern* whether a bankruptcy judge may enter a final judgment in a preference action or avoidance action. He pointed out that under the proposed amendments, however, there will be no need to distinguish between core and non-core proceedings. Rather, the parties will only have to decide whether they consent to entry of final orders or judgment by the bankruptcy judge. The judge will then decide whether to: (1) hear and determine the proceeding; (2) hear it and issue proposed findings of fact and conclusions of law; or (3) take some other action.

A member commended the advisory committee for an elegant solution to a difficult problem. He suggested that the revised heading to revised Rule 7016 (“procedure”) may be too limited.

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

FED. R. BANKR. P. 8001-8028

Judge Wedoff explained that the advisory committee’s thorough revision of Part VIII of the Federal Rules of Bankruptcy Procedure – the bankruptcy appellate rules – was the result of a multi-year project to bring the rules into closer alignment with the Federal Rules of Appellate Procedure, to make the rules simpler and clearer, and to recognize that bankruptcy documents today are normally filed, served, and transmitted electronically, rather than in paper form.

He thanked Professor Gibson, emphasizing that she deserved enormous credit for having coordinated the huge forms project. He noted that she had immersed herself in all the details of appellate practice, had conducted considerable research, and had drafted a great many documents for the committee. He also thanked James Wannamaker and Bridget Healy, attorneys in the Bankruptcy Judges Division of the Administrative Office, for their dedication and professional assistance to the project. In addition, he expressed the committee's appreciation to Professor Struve, Professor Kimble, and Mr. Spaniol for their incisive and important contributions to the project, often made on very short notice.

He and Professor Gibson proceeded to describe each Part VIII rule not previously presented to the Standing Committee (Rules 8013-8028) and some additional changes made in the rules presented at the January 2012 meeting (Rules 8001-8012).

Fed. R. Bankr. P. 8001

Professor Gibson reported that since the January 2012 Standing Committee meeting, the advisory committee had made two additional changes in Rule 8001 (scope of Part VIII, definition of "BAP," and method of transmitting documents). The draft rule presented in January had included a general definition of the term "appellate court" to mean either the district court or the bankruptcy appellate panel – the court in which the first-level bankruptcy appeal is pending or will be taken. It did not, though, include the court of appeals.

It was suggested at the last meeting that the term is misleading because "appellate court" in common parlance generally refers to the court of appeals. As a result, she said, the advisory committee had eliminated the general definition. Each of the revised rules now refers specifically to the district court or the "BAP." Despite the objections of the style consultants, she added, the advisory committee decided to use the universally recognized abbreviation for a bankruptcy appellate panel and to define BAP in Rule 8001(b).

She said that there was a need to highlight a strong presumption in the revised rule in favor of electronic transmission of documents. Accordingly, revised Rule 8001(c) states specifically that a document must be sent electronically under the Part VIII rules, unless: (1) it is being sent by or to a pro se individual; or (2) a local court's rule permits or requires mailing or other means of delivery. She added that the advisory committee was comfortable with using the term "transmitting."

Fed. R. Bankr. P. 8007

Professor Gibson stated that Rule 8007 (stay pending appeal, bonds, and suspension of proceedings) had been restyled and subheadings added. In addition, the

advisory committee corrected the omission of a reference to the court of appeals in subdivision (c).

A member pointed out that under proposed Rule 8007(b), the showing required for making a motion for relief in the appellate court deals with two situations: (1) where moving first in the bankruptcy court would be impracticable; and (2) where the bankruptcy court has already ruled. But, he said, the Federal Rules of Appellate Procedure cover a third possibility – where a motion was filed below but not ruled on.

Judge Wedoff agreed to revise Rule 8007(b)(2)(B) to require the moving party to state whether the bankruptcy court has ruled on the motion, and, if so, what the reasons were for the ruling.

Fed. R. Bankr. P. 8009

Professor Gibson noted that proposed Rule 8009 (record on appeal and sealed documents) was incorporated by reference in the proposed new FED. R. APP. P. 6(c), which will govern permissive direct appeals from a bankruptcy court to a court of appeals.

Fed. R. Bankr. P. 8010

Professor Gibson reported that the advisory committee had made several changes in Rule 8010 (completing and transmitting the record) since the January 2012 meeting after conferring with clerks of the bankruptcy courts, the clerk of a bankruptcy appellate panel, and Administrative Office staff. She noted that bankruptcy courts generally use recording devices to take the record. If a transcript of a proceeding is ordered, it is produced for the court from the electronic record, usually by a contract service provider.

The rule requires the “reporter” to prepare and file the transcript with the bankruptcy clerk, but there is some question as to the identity of the reporter when a recording device is used. The advisory committee, she said, decided that the “reporter” should be defined in Rule 8010(a) as the person or service that the bankruptcy court designates to transcribe the recording.

In addition, the rule requires reporters to file all documents with the bankruptcy clerk. In the Federal Rules of Appellate Procedure, by contrast, reporters file certain documents in the appellate court and others in the district court. The reporter in a bankruptcy case, though, may not know where an appeal is pending.

Fed. R. Bankr. P. 8011

Professor Gibson reported that a minor typographical error had been corrected in Rule 8011 (filing, service, and signature) since the last Standing Committee meeting.

With regard to proof of service, a member questioned whether affidavits of service still serve a useful purpose in light of the universal use of CM/ECF in the federal courts. He noted that service in virtually all his civil cases is accomplished through CM/ECF, and there is no need to make the parties file an affidavit of service. He suggested that the Advisory Committee on Civil Rules consider removing the requirement of a certificate of service in the future.

Fed. R. Bankr. P. 8013

Professor Gibson noted that proposed Rule 8013 (motions and intervention) would change current bankruptcy practice. Currently, a person filing a motion or response may file a separate brief. The new rule, however, would not permit briefs to be filed in support of or in response to motions. Instead, it adopts the practice in FED. R. APP. P. 27 (motions), requiring that legal arguments be included in the motion or response.

She reported that proposed FED. R. BANKR. P. 8013(g) is a new provision for the bankruptcy rules. It is also not included in the Federal Rules of Appellate Procedure. It will authorize motions for intervention in an appeal pending in a district court or bankruptcy appellate panel. The party seeking to intervene must state in its motion why it did not intervene below.

Fed. R. Bankr. P. 8014

Professor Gibson explained that Rule 8014 (briefs) largely tracks the Federal Rules of Appellate Procedure and incorporates the proposed amendment to FED. R. APP. P. 28(a)(6) (briefs), which combines the statements of the case and of the facts into a single statement. (See pages 5 and 6 of these minutes.) In a change from current bankruptcy practice, revised Rule 8014 follows the Federal Rules of Appellate Procedure and requires inclusion of a summary of argument in the briefs. New Rule 8014(f) adopts the provision of FED. R. APP. P. 28(j) regarding the submission of supplemental authorities. Unlike the appellate rule, the proposed Rule 8014(f) proposes a definite time limit of seven days for any response, unless the court orders otherwise.

She emphasized that the advisory committee was attempting to make the bankruptcy rules as similar as practicable to the Federal Rules of Appellate Procedure to

make it easier for the bar to handle double appeals, *i.e.*, an appeal first to a district court or bankruptcy appellate panel, and then to the court of appeals.

Fed. R. Bankr. P. 8015

Professor Gibson noted that Rule 8015 (form and length of briefs, appendices, and other papers) was modeled on FED. R. APP. P. 32 (form and length of briefs, appendices, and other papers). The new bankruptcy rule adopts the provisions of the appellate rule governing the length of briefs, but not those prescribing the colors for brief covers. She added that the change is likely to attract comments during the publication period because new Rule 8015(a)(7) reduces the length of principal and reply briefs currently permitted in the bankruptcy rules. To achieve consistency with FED. R. APP. P. 32(a)(7), it reduces the page limits for a principal brief from 50 pages to 30, and those for a reply brief from 25 to 15.

Fed. R. Bankr. P. 8016

Professor Gibson reported that Rule 8016 (cross-appeals) was new to bankruptcy and modeled on FED. R. APP. P. 28.1 (cross-appeals). A member noted, though, that proposed Rule 8016(e) does not exactly parallel the appellate rule. Moreover, it does not include a provision, similar to that in Rule 8018(a), allowing a district court or bankruptcy appellate panel by local rule or order to modify the rule's time limits.

Judge Wedoff suggested that it would be possible to incorporate the Rule 8018 language on local court modifications into Rule 8016. He added that Rules 8016 and 8018 should be internally consistent, even though there may be some differences between them and the counterpart appellate rules. A participant recommended making both the bankruptcy and appellate rules internally consistent and consistent with each other. The same provisions should apply in both sets of rules.

Another participant recommended not including any provision in the bankruptcy rules allowing a local court to extend the time limits of the national rules. He suggested that it will only encourage extensions.

Fed. R. Bankr. P. 8017

Professor Gibson reported that Rule 8017 (amicus briefs) was new to bankruptcy and was derived from FED. R. APP. P. 29 (amicus briefs). She pointed out that proposed Rule 8017(a) would allow a bankruptcy court on its own motion to request an amicus brief.

Fed. R. Bankr. P. 8018

Professor Gibson reported that Rule 8018 (serving and filing briefs) would continue the existing bankruptcy practice that allows an appellee to file a separate appendix. It differs from FED. R. APP. P. 30 (appendix to briefs), which requires all the parties to file a single appendix. Rule 8018(a) lengthens the period for filing initial briefs from the current 14 days to 30. Since requests for extensions of time are very common, she said, it just makes sense to increase the deadline to 30 days.

Fed. R. Bankr. P. 8019

Professor Gibson noted that proposed Rule 8019 (oral argument) tracks FED. R. APP. P. 34(a)(1) (oral argument) and is more detailed than the current bankruptcy rule. Rule 8019(a) would alter the existing bankruptcy rule by: (1) authorizing the court to require the parties to submit a statement about the need for oral argument; and (2) permitting a statement to explain why oral argument is not needed, rather than only why it should be allowed. Rule 8019(f) gives the court discretion, when the appellee fails to appear for oral argument, either to hear the appellant's argument or to postpone it.

Fed. R. Bankr. P. 8020

Professor Gibson reported that Rule 8020 (frivolous appeal and other misconduct) was derived from FED. R. APP. P. 38 (frivolous appeals, damages and costs) and FED. R. APP. P. 46(c) (attorney discipline). It applies to misconduct both by parties and attorneys.

Fed. R. Bankr. P. 8021

Professor Gibson noted that Rule 8021 (costs) would continue the existing bankruptcy practice that gives the bankruptcy clerk the entire responsibility for taxing costs on appeal. The practice under FED. R. APP. P. 39 (costs), on the other hand, involves both the court of appeals and the district court in taxing costs.

Rule 8021(b) was added to govern costs assessed against the United States. Derived from FED. R. APP. P. 39(b), it is not included in the current bankruptcy rules.

Fed. R. Bankr. P. 8022

Professor Gibson reported that Rule 8022 (motion for rehearing) would continue the current bankruptcy practice of requiring that a motion for rehearing be filed within 14 days after entry of judgment on appeal. It differs from FED. R. APP. P. 40(a)(1) (time to file a petition for rehearing), which gives parties 45 days to file a rehearing motion in any civil case in which the United States is a party. She added that the Department of Justice reported that it had no problem with the rule.

Fed. R. Bankr. P. 8023

Professor Gibson reported that proposed Rule 8023 (voluntary dismissal) deviates from both the existing bankruptcy rule and the Federal Rules of Appellate Procedure. It would allow a voluntary dismissal while a case is still pending. Under the current rules, a case on appeal from a bankruptcy judge is not docketed in the district court or bankruptcy appellate panel until the record is transmitted. But under the new Rule 8023, the appeal will be docketed immediately after the notice of appeal is filed. The notice, moreover, will normally be transmitted electronically to the district court or bankruptcy appellate panel. The advisory committee, she said, concluded that it is very unlikely that an appeal will be voluntarily dismissed before it is docketed.

Fed. R. Bankr. P. 8024

Professor Gibson reported that Rule 8024 (clerk's duties on disposition of an appeal) contained virtually no changes, other than stylistic, from the current bankruptcy rule.

Fed. R. Bankr. P. 8025

Professor Gibson reported that Rule 8025 (stay of a district court or BAP judgment) contained only stylistic changes from the existing bankruptcy rule. She pointed out, though, that subdivision (c) was new. It specifies that if the district court or BAP affirms a bankruptcy court ruling and the appellate judgment is stayed, the bankruptcy court's order, judgment, or decree will be automatically stayed to the same extent as the stay of the appellate judgment.

Fed. R. Bankr. P. 8026

Professor Gibson reported that Rule 8026 (rules by circuit councils and district courts, and procedure when there is no controlling law) contained only stylistic changes from the current bankruptcy rule.

Fed. R. Bankr. P. 8027

Professor Gibson reported that Rule 8027 (notice of mediation procedure) was a new rule with no counterpart in the Federal Rules of Appellate Procedure. It provides that if a district court or bankruptcy appellate panel has a mediation procedure applicable to bankruptcy appeals, the clerk of the district court or the panel must notify the parties promptly after the appeal is docketed whether the mediation procedure applies, what its requirements are, and how it affects the time for filing briefs in the appeal.

Fed. R. Bankr. P. 8028

Professor Gibson explained that Rule 8028 (suspension of rules in Part VIII) was derived from current FED. R. BANKR. P. 8019 (suspension of rules in Part VIII) and FED. R. APP. P. 2 (suspension of rules). It authorizes a district court, bankruptcy appellate panel, or court of appeals to suspend the requirements or provisions of the Part VIII rules, except for certain enumerated rules. The new rule expands the current list of rules that may not be suspended.

Professor Gibson reported that the current FED. R. BANKR. P. 8013 (disposition of appeal and weight accorded fact findings) would be eliminated. The first part of that rule specifies what a district court or BAP may do on an appeal, *i.e.*, affirm, modify, reverse, or remand. She noted that there is no similar provision in the Federal Rules of Appellate Procedure. The second part of the current rule specifies the weight that must be given to a bankruptcy judge's findings of fact. She explained that the provision is not needed because it is already covered by FED. R. CIV. P. 52 (findings and conclusions) and incorporated by FED. R. BANKR. P. 7052 (findings by the court).

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

FED. R. BANKR. P. 9023 and 9024

Judge Wedoff explained that FED. R. BANKR. P. 9023 (new trials and amendment of judgments) and FED. R. BANKR. P. 9024 (relief from a judgment or order) would be amended to add a cross-reference in each rule to the procedure set forth in proposed new Rule 8008, governing indicative rulings.

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

MODERNIZATION OF THE OFFICIAL FORMS

Judge Wedoff explained that the bankruptcy process is driven in large measure by forms. Several of the current forms, however, are difficult to complete, especially for people unfamiliar with the bankruptcy system. In addition, the forms take little cognizance of electronic filing in the bankruptcy courts.

He explained that forms modernization has been a major, multi-year project of the advisory committee, working under the leadership of Judge Elizabeth L. Perris and in close coordination with the Administrative Office and the Federal Judicial Center. The major goals of the project have been: (1) to improve the quality and clarity of the forms in

order to elicit more complete and accurate information from debtors and creditors; and (2) to enhance the interface between the forms and modern technology, especially the “next generation” of CM/ECF currently under development.

He said that the advisory committee and the forms-project team had reached out extensively to users of the bankruptcy system to seek their input in redesign and testing of the forms. In addition, the committee had made an important policy decision at the outset to separate the forms used by individual debtors from those used by entities other than individuals.

He explained that the first nine forms, now presented for authority to publish, are a subset of the larger package of individual forms filed by debtors at the beginning of a case. He emphasized that the forms used by individuals need to be less technical in language because individuals are generally less sophisticated than other entities and may not have the assistance of experienced bankruptcy counsel. As a result, he said, the revised individual forms are written in more conversational language, have a more approachable format, and contain substantially more instructions.

OFFICIAL FORMS 3A AND 3B

Judge Wedoff explained that debtors who cannot pay the filing fee have two options – either to ask the court for permission to pay the fee in installments (Form 3A) or to waive the fee (Form 3B). The latter option is available only to individuals whose combined family monthly income is less than 150% of the official poverty guideline last published by the Department of Health and Human Services.

In addition to major stylistic and formatting changes common to all the new forms, three minor substantive changes were made in Form 3B. First, the opening question asks for the size of the debtor’s family, as listed on Schedule J. That information is currently required on Schedule I. Second, the income portion of the form was changed to specify that non-cash governmental assistance, such as food stamps or housing subsidies, will not count against the debtor as income in determining eligibility for a fee waiver. The information, though, will continue to be reported for purposes of determining the debtor’s ability to pay the filing fee. Third, the new form eliminates the declaration and signature section for non-attorney bankruptcy petition preparers because the same declaration is already required on Official Form 19.

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

OFFICIAL FORMS 6I and 6J

Judge Wedoff noted that some substantive changes had been made on Forms 6I (statement of the debtor's income) and 6J (statement of the debtor's expenses) to elicit more accurate and useful information from individual debtors. First, the debtor will have to provide more information on Form 6J about non-traditional living arrangements, such as living with an unmarried partner or living and sharing expenses in a household with non-relatives. The form asks for all financial contributions to the household. Second, Form 6J asks for separate information on dependents who live with the debtor, dependents who live separately, and other members of the household. Third, in Chapter 13 cases, Form 6J asks for the debtor's expenses at two different points in time – when the debtor files the bankruptcy petition and when the proposed Chapter 13 plan is confirmed. Fourth, a line has been added to the form setting out a calculation of the debtor's monthly net income.

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

OFFICIAL FORMS 22A-1, 22A-2, 22B, 22C-1, and 22C-2

Judge Wedoff explained that Form 22, commonly referred to as the “means test” form, has five variations. It is used to determine a debtor's “current monthly income” under 11 U.S.C. § 101(10A) and, in Chapter 7 and Chapter 13 cases, to determine the debtor's income remaining after deducting certain specified expenses.

In Chapter 7 cases, the form is used to assess whether the debtor qualifies under the statute to file a petition under Chapter 7. In Chapter 13, cases, it determines how much the debtor is able to pay under the plan. Other than stylistic changes, no changes were made in the form's Chapter 11 version (Form 22B). But four changes would be made in the Chapter 7 and Chapter 13 versions.

First, the advisory committee separated both the Chapter 7 and Chapter 13 forms into two distinct forms each because debtors with income below the median of their state do not have to list their expenses. As a result, the vast majority of debtors will only have to fill out the income portion. Thus, all debtors will complete an income form (Form 22A-1 or 22C-1), but only some will have to file the expense form (Form 22A-2 or 22C-2).

Second, the revised forms modify the deduction for cell phone and internet expenses to reflect more accurately the Internal Revenue Service allowances incorporated by the Bankruptcy Code.

Third, line 60 on the Chapter 13 expense form (Form 22C-2)) would be removed because it is rarely used. It allows debtors to list, but not deduct from income, “other necessary expense” items not included within the categories specified by IRS.

Fourth, Form 22C-2 reflects the Supreme Court’s decision in *Hamilton v. Lanning*, 560 U.S. ___, 130 S. Ct. 2464 (2010). *Lanning* requires taking a “forward-looking approach” in calculating a Chapter 13 debtor’s projected disposable income by considering changes in income or expenses that have occurred or are virtually certain to occur by the time the plan is confirmed. The changes may either increase or decrease the debtor’s disposable income. Part 3 of Form 22C-2 will require the debtor to report those changes.

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

Information Items

FED. R. BANKR. P. 3007(a)

Judge Wedoff reported that proposed amendments to FED. R. BANKR. P. 3007(a) (objections to claims), published in August 2011, would have specified the time and manner of serving objections to claims. The rule currently requires that notice of an objection be provided at least 30 days “prior to the hearing” on the objection. The proposal would have authorized a negative notice procedure – requiring notice of an objection to be made at least 30 days before “any scheduled hearing on the objection or any deadline for the claimant to request a hearing.”

He noted that at its March 2012 meeting, the advisory committee decided to withdraw the proposed amendments temporarily and consider them as part of its project to draft a national Chapter 13 form plan.

OFFICIAL FORM 6C

Judge Wedoff reported that the advisory committee had decided not to proceed with amending Form 6C (property claimed as exempt) by adding a box to give debtors the option of declaring that the value of property claimed as exempt is the “full fair market value of the exempted property.” The amendment, published in August 2011, was intended to reflect the Supreme Court’s decision in *Schwab v. Reilly*, 560 U.S. ___, 130 S. Ct. 2652 (2010).

He said that representatives of the Chapter 7 and Chapter 13 trustee associations had objected to the change on the grounds that it would encourage debtors to claim the

full market value of property even when the exemption is capped by statute at a specific dollar amount. They predicted that the revision would lead to gamesmanship and a “plethora of objections.” On the other hand, supporters of the amendment, including representatives of the consumer bankruptcy attorneys’ association, disputed the prediction. They argued that it was consistent with *Schwab* and would be beneficial to debtors.

Judge Wedoff reported that the advisory committee decided not to proceed with the amendment because: (1) it is unnecessary since debtors already incorporate the *Schwab* language into the existing form; and (2) courts are divided on whether it is always improper for a debtor to claim as exempt the full fair market value of property when the exemption is capped at a specific dollar amount. The advisory committee decided, therefore, that any amendment to the form should await further case law development. It might also be considered as part of the forms modernization project.

OFFICIAL FORMS 22A AND 22C

Judge Wedoff reported that the advisory committee had decided to defer final approval of proposed amendments to Forms 22A and 22C (the means test forms) that would have: (1) reflected changes in the IRS standards on telecommunication expenses; and (2) changed the Chapter 13 version of the form to respond to the Supreme Court’s decision in *Hamilton v. Lanning*, 560 U.S. ___, 130 S. Ct. 2464 (2010).

He said that it would be better to avoid having the proposed amendments take effect in 2012, only to have substantially reformatted versions of the same forms take effect in 2013 as part of the forms modernization project. The proposed amendments, he added, had been incorporated into the first set of modernized forms to be published for comment in August 2012. (See pages 21-23 of these minutes.)

OFFICIAL FORM FOR CHAPTER 13 PLAN AND RELATED RULE AMENDMENTS

Judge Wedoff explained that the advisory committee was working on drafting a national form for Chapter 13 plans. He pointed out that a wide variety of local forms and model plans are currently used in the bankruptcy courts. They impose different requirements and distinctive features from district to district. The lack of a national form, he said, makes it difficult for lawyers who practice in several districts, and it adds transactional costs that are passed on to debtors.

He reported that a recent survey of the bankruptcy bench had established that a majority of chief bankruptcy judges support developing a national form plan. Therefore, he said, the advisory committee had established a working group that expects to have a draft ready soon for informal circulation and comment. He added that it became apparent

during the course of the group's work that the effectiveness of a national form plan will depend on making some simultaneous amendments to the bankruptcy rules to harmonize practice among the courts and clarify certain procedures.

MINI-CONFERENCE ON NEW MORTGAGE FORMS

Judge Wedoff reported that the advisory committee will hold a mini-conference in conjunction with its September 2012 meeting to discuss the effectiveness of the new mortgage-information disclosure forms that took effect on December 1, 2011.

ELECTRONIC SIGNATURES

Judge Wedoff noted that the advisory committee was considering the use of electronic signatures as part of its forms modernization project. In particular, it was focusing on whether, and under what circumstances, bankruptcy courts should accept for filing documents signed electronically without also requiring retention of a paper copy with an original signature. If retention of an original signature is required, moreover, who should maintain it? He noted that the committee was exploring a range of options and contemporary practices.

FORMS MODERNIZATION PROJECT

Judge Wedoff reported that the forms modernization project had nearly completed its work on all the individual-debtor forms and had begun its work on revising the non-individual forms.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professor Cooper presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of May 8, 2012 (Agenda Item 4).

Amendments for Final Approval

FED. R. CIV. P. 45 and 37

Judge Campbell reported that the advisory committee had undertaken a multi-year project to revise Rule 45 (subpoenas) by simplifying the rule and addressing several problems brought to its attention. He noted that during the course of its study, the advisory committee came to appreciate that Rule 45 is an important workhorse in civil litigation that governs virtually all discovery involving non-parties and accomplishes several other important procedural purposes.

After reviewing the pertinent literature on the rule and canvassing the bar, the committee developed a list of 17 concerns that might potentially be addressed through rule amendments. The list was eventually pared down to four proposed changes: (1) simplification of the rule; (2) transfer of subpoena-related motions; (3) trial subpoenas for distant parties and party witnesses; and (4) notice of service of documents-only subpoenas. A revised rule incorporating those changes was published for public comment in August 2011, and some minor modifications were made after publication. The revised rule, he said, was now ready for final approval by the Judicial Conference.

1. Simplification of the rule

He noted that the first category of proposed changes would simplify an overly complex rule. As Rule 45 is now written, he explained, a lawyer has to look in three different parts of the rule to determine where a subpoena may be issued, where it may be served, and where performance may be required.

First, Rule 45(a)(2) specifies which court may issue a subpoena. It may be a different court for trial, for deposition discovery, or for document discovery. Second, Rule 45(b)(2) specifies four different possibilities for the place where a subpoena may be served. It may be within the district, outside the district but within 100 miles of the place of compliance, anywhere in the state where the district sits if state law permits, or anywhere in the United States if federal law authorizes it. Third, Rule 45(c) imposes limits on the place of enforcement. A non-party, for example, cannot be required to travel more than 100 miles to comply with a subpoena, except to attend a trial. In that case, attendance may be anywhere in the state if the person does not have to incur “substantial expense” to travel. He said that it was the experience of all the judges on the advisory committee that even good lawyers get the various provisions of the rule wrong from time to time.

The advisory committee’s proposed simplification addresses those problems and should eliminate most of the confusion. First, revised Rule 45(a)(2) specifies that the court that issues a subpoena is the court that presides over the case. There are no other possibilities. Second, Rule 45(b)(2) specifies that a subpoena may be served at any place in the United States. Third, Rule 45(c)(3) specifies where performance may be required. Essentially, it preserves the performance requirements of the current rule, but eliminates its reference to state law.

There is, he said, precedent in the rules for authorizing nationwide service. Rule 45(b)(2)(D), he noted, currently authorizes service in another state if there is a federal statute that authorizes it. In addition, the Federal Rules of Criminal Procedure authorize nationwide service (FED. R. CRIM. P. 17)(e)).

Professor Marcus said that the public comments on simplification of the rule had been very favorable, and some offered suggestions for additional clarification. As a result, the committee made some changes in the committee note, dealing with depositions of party witnesses and subpoenas for remote testimony. In essence, though, the changes made after publication were very minor.

Professor Marcus pointed out that under the committee's proposal, as published, Rule 45(c)(2) would have left it essentially to the parties to designate the place for production of Rule 34 discovery materials. It provided that a subpoena could command production "at a place reasonably convenient for the person who is commanded to produce." But, he explained, that simplification did not work and could lead to mischief. Accordingly, the committee revised Rule 45(c)(2) to specify that a subpoena may command production "at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person." That formulation essentially preserves the current arrangements, but states them more clearly.

2. Transfer of subpoena-related motions

Judge Campbell explained that the modified rule, like the current rule, specifies that a party receiving a subpoena typically has to litigate the enforceability of the subpoena in the court in the district where the performance is required. The producing party, thus, enjoys the convenience of having its dispute handled locally and does not have to travel to a different part of the country to litigate.

Rule 45, however, does not currently allow the court where production is required to transfer a dispute back to the court having jurisdiction over the case. Yet, there are certain situations in which the court in the district of performance should be allowed to refer a dispute to the judge presiding over the case. There is, he said, a split in the case law on the matter, and some courts in fact transfer disputes. The current rule, though, does not authorize the practice expressly.

The proposed new Rule 45(f) would resolve the matter and explicitly allow certain disputes to be resolved by the judge presiding over the case. It would allow the local court to transfer the case either on the consent of the person subject to the subpoena or if the court finds "exceptional circumstances." He reported that some public comments had questioned whether exceptional circumstances was the appropriate standard for authorizing a transfer, but the advisory committee ultimately concluded unanimously that it was.

The proposed amendment to FED. R. CIV. P. 37 (failure to make disclosures or cooperate in discovery) would conform that rule to the proposed amendments to Rule 45(f). A new second sentence in Rule 37(b)(1) deals with contempt of orders entered after a transfer. It provides that failure to comply with a transferee court's deposition-

related order may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

Professor Marcus pointed out that the August 2011 publication had highlighted the new transfer provision and expressly invited comment on two questions: (1) whether consent of the parties should be required in addition to consent by the person served with the subpoena; and (2) whether “exceptional circumstances” should be the standard for transfer if the non-party does not consent. Considerable public comment argued that it was inappropriate to require party consent. As long as the recipient of the subpoena consents to the transfer, the parties should have no veto over the matter. The advisory committee, he said, revised the rule to remove the party-consent feature.

With regard to the appropriate standard for authorizing a transfer in the absence of consent, considerable public support was voiced for a more flexible, less demanding standard. But formulating an appropriate lesser standard, while still protecting the primary interests of the producing party, had been very challenging. The advisory committee and its discovery subcommittee discussed the matter at considerable length and decided to retain the exceptional circumstances standard, but add some clarifying language to the committee note. The note was recast to state that if the local non-party served with a subpoena does not consent to a transfer, the court’s prime concern should be to avoid imposing burdens on that person. In some circumstances, though, a transfer may be warranted to avoid disrupting the issuing court’s management of the underlying litigation. In short, transfer is appropriate only if those case-management interests outweigh the interests of the producing party in obtaining local resolution of the dispute.

A member praised the work of the advisory committee and said that the proposed changes were long overdue. He noted that few rules of procedure are used more often, yet are harder to work with, than Rule 45. Nevertheless, he said, the “exceptional circumstances” standard may be too high. It may underestimate the needs of a judge presiding over a big, hotly disputed civil case to have flexibility in controlling the case. It may also underestimate how easy it is today to conduct hearings and resolve disputes by telephone or video-conference. He noted that when subpoena disputes arise, it is common for the judge in the district of compliance to call the judge having jurisdiction over the underlying case to discuss the matter.

In addition, he said, the language in the committee note stating that transfers should be “truly rare” events is much too restrictive. It tells judges, in essence, that transfers should almost never occur. He added that a more generous standard is warranted, and “good cause” should be considered as a substitute. He recommended combining a good cause standard with an appropriate explanation in the committee note to give judges the flexibility they need to decide what is best in each case.

Judge Campbell explained that some public comments had suggested a good cause standard, and the advisory committee had considered them carefully. But it ultimately concluded that it had to err in favor of protecting third parties who receive subpoenas and spare them from assuming undue burdens and hiring counsel in other parts of the country. The exceptional circumstances standard, he said, will afford them more protection than the good cause standard.

He said that the committee was concerned that if the rule were to contain a “good cause” standard, many busy district judges faced with subpoena disputes in out-of-district cases would be readily inclined to transfer them routinely to the issuing court. The rule, he said, should make those busy district judges pause and carefully balance the reasons for a transfer against the burdens imposed on the subject of the subpoena. In essence, he explained, the committee concluded that it was essential to have a higher threshold than mere good cause.

Professor Marcus added that it is very difficult to achieve just the right balance in the rule. It is, he said, particularly difficult to draft a standard that falls somewhere between “exceptional circumstances,” which is very difficult to satisfy, and “good cause,” which is quite easy to satisfy. He added that the comments from the ABA Section on Litigation were very supportive of retaining the exceptional circumstances standard in order to protect non-party witnesses.

A member argued in favor of retaining the exceptional circumstances standard, and emphasized that it was important to resolve the current conflict in the law and explicitly authorize transfers in appropriate, limited circumstances. She added that the rule should be designed for the average civil case, not the exceptional case. The great majority of subpoena disputes, she said, involve local issues and should be resolved locally. As a practical matter, a good cause standard would lead to excessive transfers.

A participant spoke in favor of the good cause standard, but recommended that if the exceptional circumstances standard were retained, the committee note should be toned down and revised to eliminate the current language stating that transfers should be “truly rare.” In addition, it would be useful to refer in the note to the difference between the average case with a local third party and complex litigation in which the lawyers hotly dispute every aspect of a case, including the subpoenas. He added that not all subpoenaed persons are in fact uninvolved, uninterested third parties. Often, the subpoenaed person, although not a party to the case, may well have a direct financial interest in the litigation.

A member agreed that the word “truly” should be eliminated from the note, but supported the advisory committee’s decision to retain the exceptional circumstances standard. A member recommended resolving the matter by eliminating the second sentence in the third paragraph of the portion of the committee note dealing with Rule 45(f). As revised, it would read: “In the absence of consent, the court may transfer in

exceptional circumstances, and the proponent of transfer bears the burden of showing that such circumstances are presented.”

A member expressed concern about the language added to the committee note after publication regarding the issuance of subpoenas to require testimony from a remote location. He suggested that the committee should consider amending Rule 45(c)(1) itself to clarify that it applies both to attendance at trial and testimony by contemporary transmission from a different location under Rule 43(a).

3. Trial subpoenas for distant parties and party officers

Judge Campbell explained that the third change in the rule resolves the split in the case law in the wake of *In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664 (E.D. La. 2006). The district court in that case read Rule 45 as permitting a subpoena to compel a party’s officer to testify at a trial at a distant location. Other courts, though, have ruled that parties cannot be compelled to travel long distances from outside the state to attend trial because they have not been served with subpoenas within the state, as required by Rule 45(b)(2).

The advisory committee, he said, was of the view that *Vioxx* had misread Rule 45, in part because the current rule is overly complex. The proposed amendments, he said, would overrule the *Vioxx* line of cases and confirm that party officers can only be compelled to testify at trial within the geographical limits that apply to all witnesses. He noted that the committee had highlighted the matter when it published the rule by including in the publication an alternative draft text that would have codified the *Vioxx* approach.

The public comments, he said, were split, with no consensus emerging for either position. The advisory committee decided ultimately that it should not change the original intent of a rule that has worked well for decades. Professor Marcus added that the committee’s concern was that if the rule were amended to codify *Vioxx*, subpoenas could be used to exert undue pressures on a party and its officers. Moreover, there are alternate ways of dealing with the problems of obtaining testimony from party witnesses, including the use of remote testimony under Rule 43(a).

4. Notice of service of documents-only subpoenas

Judge Campbell explained that the current Rule 45 requires parties to notice other parties that they are serving a subpoena. But the provision is hidden as the last sentence of Rule 45(b)(1), and many lawyers are unaware of it. The advisory committee proposal, he said, relocates the provision to a more prominent place as a separate new paragraph 45(a)(4), entitled “notice to other parties before service.” In addition, the revised rule requires that a copy of the subpoena be attached to the notice.

Judge Campbell said that the advisory committee realized that many other reasonable notice provisions might have been added to the rule. For example, it could have required that: notice be given a specific number of days in advance of service of the subpoena; additional notice be given if the subpoena is modified by agreement; notice be given when documents are received; and copies of documents be provided by the receiving party to the other parties in the litigation. The rule could also have specified the sanctions for non-compliance with the notice requirements.

The advisory committee, however, concluded that those provisions, though sensible, should not be included because the primary purpose of the amendments is to get parties to give notice of subpoenas. Just accomplishing that objective should resolve most of the current problems. The remaining issues can generally be worked out if lawyers are left to their own devices to consult with opposing counsel to obtain copies of whatever documents they need. The committee, he said, was concerned about the length and complexity of the current rule and did not want to add to that length and complexity by dictating additional details. He added, though, that the committee could return to the rule in the future if problems persist.

Professor Marcus said that many competing suggestions had been received for additional provisions. He added that, at the urging of the Department of Justice, the committee had made a change in the rule following publication to restore the words “before trial” to the notice provision. It also added in Rule 45(c)(4) the word “pretrial” before “inspection of premises.”

Judge Campbell noted that the advisory committee had considered whether the time limit in current Rule 45(c) for serving objections to subpoenas was too short, but decided not to change it. He added that the matter rarely results in litigation, as courts allow extensions of time when appropriate. He agreed to a member’s suggestion that language in lines 43 and 44 of the committee note be deleted. It had suggested that parties may ask that additional notice requirements be included in a court’s scheduling order.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Information Items

PRESERVATION AND SPOILIATION

Judge Campbell reported that one of the panels at the committee’s 2010 Duke Law School conference had urged the committee to approve a detailed civil rule specifying when an obligation to preserve information for litigation is triggered, the scope of that obligation, the number of custodians who should preserve information, and the

sanctions to be imposed for various levels of culpability. After the conference, Judge Kravitz, then chair of the advisory committee, tasked the committee's discovery subcommittee with following up on the recommendations.

The subcommittee began its work in September 2010 by asking the Federal Judicial Center to study the frequency and nature of sanctions litigation in the district courts. The Center's research found that litigation is rare, as only 209 spoliation motions had been filed in more than 130,000 civil cases studied, and only about half the motions involved electronic discovery. The subcommittee also studied a large number of federal and state laws that impose various preservation obligations.

The subcommittee, he said, then drafted three possible rules to address preservation. The first was a very detailed rule that provided specific directives and attempted to prescribe which events trigger a duty to preserve, what the scope of the preservation duty is, and what sanctions may be imposed for a failure to preserve. The committee, however, found it exceedingly difficult to draft a detailed rule that could be applied across all the broad variety of potential cases and give any meaningful certainty to the parties.

The second rule also addressed the triggering events for preservation, the scope of retention obligations, and sanctions for violations, but it did so in a much more general way. Essentially it provided broad directions to behave reasonably and preserve information in reasonable anticipation of litigation.

The third rule focused just on sanctions under Rule 37 in order to promote national uniformity and constraint in imposing sanctions. Currently, there is substantial dispute among the circuits on what level of culpability gives rise to sanctions for failure to preserve. The prevailing standards now range from mere negligence to wilfulness or bad faith.

The third rule specified that a court may order curative or remedial measures without finding culpability. Imposition of sanctions of the kind listed in Rule 37(b), on the other hand, would require wilfulness or bad faith. The proposed rule identified the factors that a court should consider in assessing the need for sanctions. Those factors, moreover, should also provide helpful guidance to parties at the time they are considering their preservation decisions.

Judge Campbell said that the three draft rules had been discussed with about 25 very knowledgeable people at the committee's September 2011 mini-conference in Dallas. A wide range of views was expressed, but no consensus emerged. Many written comments were received by the committee and posted on the judiciary's website. They embrace a full range of proposals. Some groups argued that there is an urgent need for a very detailed rule on preservation and spoliation with bright-line standards. One, for

example, suggested that a duty to preserve should only be triggered by the actual commencement of litigation. Others contended that no rule is needed at all, and the common law should continue its development. The Department of Justice, he said, took the position that it is premature to write a rule on these subjects.

The subject area, he said, continues to be very dynamic. In April 2012, the RAND Corporation completed a study of large corporations, documenting that they spend millions of dollars in trying to comply with preservation obligations. About 73% of the costs are spent on lawyers reviewing materials and 27% on the preservation of information itself. A recent in-house study by the Department of Justice generally corroborated the conclusion of the Federal Judicial Center that spoliation disputes in court are rare. Another recent study, by Professor William Hubbard, found that the problem arises only in a small percentage of cases, but when it does it can be extraordinarily expensive.

Judge Campbell pointed out that the Seventh Circuit was conducting a pilot program on electronic discovery and preservation that emphasizes the need for the parties to cooperate and discuss preservation early in the litigation. The pilot, he said, was entering its third phase and producing a good deal of helpful information. The Southern District of New York recently launched a complex-case pilot program that also includes preservation as an element. The Federal Circuit promulgated clear guidelines on discovery of electronically stored information and has placed some important limits on discovery in patent cases. A Sedona Conference working group has been working for months on a consensus rule for the committee's consideration. The group, he noted, had not yet reached consensus on potential rule amendments. Finally, he said, the case law continues to evolve, as trial judges are taking imaginative steps to deal with preservation problems and restrain unnecessary costs.

Judge Campbell reported that the advisory committee was still leaning towards a sanctions-only rule, rather than a rule that tries to define trigger and scope. Nevertheless, the subcommittee was still absorbing and discussing the many sources of information coming before it. He suggested that the subcommittee may have a more concrete draft available for the advisory committee's consideration at its November 2012 meeting.

He noted that the advisory committee was aware that some are frustrated with the pace of the project. But, he said, the delay in producing a rule has not been for lack of effort. Rather, the issues are particularly difficult, and the views expressed to the subcommittee have been very far apart. He noted that even if the committee were to approve a rule at its next meeting, it could not take effect before December 2015.

He reported that in December 2011, the House Judiciary Subcommittee on the Constitution had held a hearing on the costs and burdens of civil discovery. The proceedings included substantial discussion on electronic discovery issues. The basic

message from the majority was that preservation obligations and electronic discovery cost corporations substantial money and are a drain on innovation and jobs. He pointed out that the witnesses testified that the federal rules process works well, and the rules committees should continue their efforts to solve the current problems. After the hearings, the subcommittee chair wrote a letter urging the advisory committee to approve a strong rule. The subcommittee minority, though, followed with a letter asking the committee to proceed slowly and let the common law work its course.

Professor Marcus pointed out that the advisory committee had not resolved two critical policy questions and invited input on them from the members. First, he said, a decision must be made on whether a new rule should be confined just to electronic discovery or apply to all discoverable information. Second, in light of the strikingly divergent views expressed to the committee on the subject, a basic decision must be made on how urgently a new rule is needed and how aggressive it should be.

A member argued that national uniformity is very important because preservation practices and litigation holds cost parties a great deal of money. The precise contents of the new rule may not be clear at this point, but the advisory committee should continue to proceed deliberately and carefully study the various pilot projects underway in the courts. Eventually, however, it needs to produce a national rule. A participant added that the primary risk of moving too slowly is that courts will develop their own local rules and become attached to them, making it more difficult to impose a uniform national rule.

A participant pointed out that efforts have been made, without much result so far, to prod the corporate community into developing a series of best practices to deal with preservation of information. Corporations, he said, need to balance their legitimate need to get rid of information in the normal course of business against the competing need to preserve certain information in anticipation of eventual litigation. There is, he said, reluctance on the part of corporate management even to consider the matter, but there may be some movement in that direction in the future.

He suggested that a sanctions-only rule is appropriate. It would also be desirable, he said, to include a more emphatic emphasis in Rules 16 and 26 on getting the parties and the judge to address preservation obligations more directly at the outset of a case.

A member expressed great appreciation for the advisory committee's work and agreed with its inclination to pursue a narrow rule that focuses just on Rule 37 sanctions. He emphasized that the Rules Enabling Act restricts the rules committees' authority to matters of procedure only. Preservation duties, though, generally go beyond procedure and simply cannot be fixed by a rule.

Moreover, he said, the committee cannot solve all preservation problems because most litigation is conducted in the state courts, not the federal courts. He suggested that

the more the committee sticks to procedure and avoids matters of substantive conduct, the more likely the states will follow its lead. A member added that there is an important opportunity for the committee to achieve greater national uniformity by working with the state courts. If the committee produces a good rule, he said, effective complementary state-court rules could be promoted with the support and encouragement of the Conference of Chief Justices.

DUKE CONFERENCE SUBCOMMITTEE

Judge Campbell pointed out that it is difficult to speak about preservation without considering more broadly what information should be permitted in the discovery process, especially electronically stored information. He reported that the advisory committee had established a separate subcommittee, chaired by Judge John G. Koeltl, to evaluate the many helpful ideas for discovery reform raised at the Duke conference and to recommend which should be proposed as rule amendments. Eventually, he said, the advisory committee will marry the work of the Duke Conference subcommittee with that of the discovery subcommittee on spoliation because the two are closely related.

He reported that Professor Cooper had produced very helpful and thought-provoking drafts of several potential rule amendments to implement the Duke recommendations. The proposals, he explained, can be categorized as falling into three sets of proposed changes.

The first set of proposals was designed to promote early and active case management. They include: reducing the time for service of a complaint from 120 days to 60; reducing the time for holding a scheduling conference from 120 days to 60 or 45; requiring judges to actually hold a scheduling conference in person or by telephone; no longer allowing local court rules to exempt cases from the initial case-management requirements; requiring parties to hold a conference with the court before filing discovery motions; and allowing written discovery to be sought before the Rule 26(f) conference is held, but providing that requests do not have to be answered until after the case-management conference. The latter provision would let the parties know what discovery is contemplated when they meet with the judge to discuss a discovery schedule. Those and other ideas were designed to get the courts more actively involved in the management of cases and at an earlier stage.

Judge Campbell noted that the second category of possible changes was designed to curtail the discovery process and make it more efficient. One set of proposals would take the concept of proportionality and move it into Rule 26(b)(1)'s definition of discoverable information. It is already there by cross-reference in the last sentence of that provision, but the proposals would make it more prominent. In essence, the revised definition would define discoverable information as relevant, non-privileged information that is proportional to the reasonable needs of the case.

In addition, he said, the subcommittee was considering limiting discovery requests by lowering presumptive numbers and time limits, such as reducing the number of depositions from 10 to 5, the time of depositions from 7 hours to 4, and the number of interrogatories from 25 to 15, and by imposing caps of 25 requests for production and 25 requests for admissions. Although courts may alter them, just reducing the presumptive limits may reduce the amount of discovery that occurs and change the prevailing ethic that lawyers must seek discovery of everything.

Another proposal, he noted, would require parties objecting to a request for production to specify in their objection whether they are withholding documents. A responding party electing to produce copies of electronically stored information, rather than permitting inspection, would have to complete the production no later than the inspection date in the discovery request. Rule 26(g) would be amended to require the attorney of record to sign a discovery response to attest that the response is not evasive. Another proposal would defer contention interrogatories and requests to admit until after the close of all other discovery. The subcommittee, he said, was also considering cost-shifting provisions and may make cost shifting a more prominent part of discovery. All these changes are designed to streamline the discovery process and reduce the expenses complained about at the Duke conference.

Judge Campbell reported that a third category of proposals was designed to emphasize cooperation among the attorneys. One amendment would make cooperation an integral part of Rule 1. The rule, thus, might specify that the civil rules are to be construed and used to secure the just, speedy, and inexpensive determination of cases, and the parties should cooperate to achieve these ends.

Judge Campbell said that the advisory committee will study these drafts at its November 2012 meeting. It will likely marry them with the proposed rule on preservation to produce a package of rule amendments to make litigation more efficient. Professor Cooper added that it would be very beneficial for the Standing Committee members to review the proposed drafts carefully and point out any flaws and make additional suggestions that the advisory committee might consider.

A member praised the comprehensive and impressive efforts of the committee. She noted, though, that several corporate counsel had expressed concern about giving proportionality a more prominent place in the rules. They fear that it would give attorneys an excuse to litigate more discovery disputes.

A participant pointed out that the objective of fostering cooperation among the parties is excellent, but specifying a cooperation requirement in the text of the rules is troublesome. Cooperation inevitably is entwined with attorney conduct, an area on the edge of the Rules Enabling Act that may impinge on the role of the states in regulating attorney conduct.

Another participant suggested that consideration be given to appointing special masters to handle discovery in complex cases because busy judges often do not have the time to devote undivided attention to overseeing discovery. Some way would have to be found to pay for masters, but at least in large corporate cases, the parties may be able to work it out. He also recommended reducing the presumptive limit for expert-witness depositions to 4 hours.

A member commended the advisory committee for undertaking the discovery project. He suggested that anything the committee can do to limit the number of discovery requests and reduce discovery time periods, at least in the average case, will be beneficial. He also commended the proposed modest recommendations on cost-shifting and proportionality. He urged the committee to carry on the work and move as quickly as possible.

His only reservation, he said, concerned adding a cooperation requirement to the rules. The concept, he said, was fine, but it may conflict with an attorney's ethical duty to pursue a client's interests zealously. He asked how much lawyers can be reasonably expected to cooperate in discovery when they are not expected to cooperate very much in other areas. The adversarial process, he said, is a highly valued attribute of the legal system, and the committee should avoid intruding into the states' authority over attorney conduct.

Members noted that some states have imposed effective, stricter limits on depositions that led lawyers to reassess how long they really need to take a deposition. A member added that depositions of expert witnesses have been eliminated completely in his state. It was noted that the original intent of Rule 26(a)(2)'s report requirement was to reduce the length of depositions of expert witnesses or even to eliminate them in many cases. That benefit, however, has not been realized.

PLEADING STANDARDS

Professor Cooper reported that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Iqbal v. Ashcroft*, 556 U.S. 662 (2009). There is, he said, no sense that the lower courts have unified around a single, identifiable pleadings standard for civil cases, but there is also no sense of a crisis or emergency. The committee, he said, was essentially biding its time and did not plan to move forward quickly. It has several potential proposals on the table, including directly revising the pleading standards in FED. R. CIV. P. 8 (general rules of pleading), addressing pleading indirectly through Rule 12(e) motions for a more definite statement, or integrating pleading more closely with discovery, particularly in cases where there is an asymmetry of information.

Dr. Cecil reported that the Federal Judicial Center had begun pilot work on its new study of all case-dispositive motions in the district courts. The study, he said, will be different from earlier studies because it will take a more comprehensive, holistic look at all Rule 12 motions and summary judgment issues and explore whether there are any tradeoffs, such as whether an increase in motions to dismiss has led to a reduction in motions for summary judgment. In addition, the Center is collaborating closely with several civil procedure scholars and hopes to reach a consensus with them about what is actually going on in the courts regarding dispositive motions. The study, he said, will be launched in September 2012 with the help of law professors and students in several schools.

FED. R. CIV. P. 84 AND FORMS

Judge Campbell reported that the advisory committee was examining FED. R. CIV. P. 84 (forms), which states that the forms appended to the rules “suffice” and illustrate the simplicity and brevity that the rules contemplate. He explained that many of the forms are outdated, and some are legally inadequate.

Professor Cooper pointed out that the Standing Committee had appointed an ad hoc forms subcommittee, chaired by Judge Gene E. K. Pratter of the civil committee, to review how the advisory committees develop and approve forms. The subcommittee, he said, made two basic observations: (1) in practice, the civil, criminal, bankruptcy, and appellate forms are used in widely divergent ways; and (2) the process for generating and approving forms differs substantially among the advisory committees.

The civil and appellate forms, for example, adhere to the full Rules Enabling Act process, including publication, approval by the Judicial Conference and the Supreme Court, and submission to Congress. The bankruptcy rules, on the other hand, follow the process partly, only up through approval by the Judicial Conference. At the other extreme, the criminal rules have no forms at all. Instead, the Administrative Office drafts the criminal forms, sometimes in consultation with the criminal advisory committee. He said that the subcommittee ultimately concluded that there is no overriding need for the advisory committees to adopt a uniform approach.

Professor Cooper explained that the civil advisory committee was now in the second phase of the forms project and was focusing on what to do specifically with the civil forms. He noted that the project had received an impetus from the Supreme Court’s *Twombly* and *Iqbal* decisions on pleading requirements and from the widely held perception that the illustrative civil complaint forms are legally insufficient. There is, he said, a clear tension between the simplicity of those forms and the pleading requirements announced in the Supreme Court decisions.

He noted that the advisory committee was considering several different options. One would be just to eliminate the pleading forms. An alternate would be to develop a set of new, enhanced pleading forms for each category of civil cases consistent with *Twombly* and *Iqbal*. There was, though, no enthusiasm in the committee for that approach. Going further, the committee could consider getting back into the forms business full-bore and spend substantial amounts of time on improving and maintaining all the forms. At the other extreme, the committee could eliminate all the forms and allow the Administrative Office to generate the forms, with appropriate committee consultation.

CLASS ACTIONS AND RULE 23 SUBCOMMITTEE

Judge Campbell reported that the advisory committee had appointed a Rule 23 subcommittee to consider several topics involving class-action litigation and whether certain amendments to the class-action rule were appropriate.

Professor Marcus said that the subcommittee had begun its work and was examining a variety of controversial issues that have emerged as a result of several Supreme Court decisions in the past couple of years, recent litigation developments, and experience under the Class Action Fairness Act. Among the topics being considered are: (1) the relationship between considering the merits of a case and determining class action certification, particularly with regard to the predominance of common questions; (2) the viability of issues classes under Rule 23(c)(4); (3) monetary relief in a Rule 23(b)(2) class action; (4) specifying settlement criteria in the rule; and (5) revising Rule 23 to address the Supreme Court's announcement in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fairness and adequacy of a settlement are no substitute for full-dress consideration of predominance.

Professor Marcus noted that the list of issues continues to evolve and many were discussed at the panel discussion during the Standing Committee's January 2012 meeting. He pointed out that the project to consider appropriate revisions to Rule 23 will take time, since several topics are controversial and will pose drafting difficulties.

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 and attachments of May 17, 2012 (Agenda Item 8).

Amendment for Final Approval

FED. R. CRIM. P. 11(b)

Judge Raggi reported that the proposed amendment to FED. R. CRIM. P. 11(b)(1) (pleas) would add a new subsection (o) to the colloquy that a court must conduct before accepting a defendant's guilty plea. It would require a judge to advise defendants who are not United States citizens that they may face immigration consequences if they plead guilty.

She noted that at every stage of the advisory committee's deliberations, a minority of members questioned whether it is wise or necessary to add further requirements to the already lengthy Rule 11 plea colloquy. Moreover, the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010), addressed the duty of defense counsel, not the duty of courts, to provide information on immigration consequences to the defendant. Nevertheless, a majority of the advisory committee concluded that immigration is qualitatively different from other collateral consequences that may flow from a conviction. Moreover, a large number of criminal defendants in the federal courts are aliens who are affected by immigration consequences.

The committee, she said, recognized the importance of not allowing Rule 11(b) to become such a laundry list of every possible consequence of a guilty plea that the most critical factors bearing on the voluntariness of a plea do not get lost, *i.e.*, knowledge of the important constitutional rights that the defendant is waiving. She added that the only change made after publication was a modest change in the committee note.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 5(d) and 58(b)

Judge Raggi explained that the proposed amendments to FED. R. CRIM. P. 5(d) (initial appearance) and FED. R. CRIM. P. 58(b)(2) (initial appearance in a misdemeanor) dealt with advising detained foreign nationals that they may have their home country's consulate notified of their arrest.

The amendments had been approved by the Judicial Conference in September 2011, but returned by the Supreme Court in April 2012. The advisory committee then discussed possible concerns that the Court may have had, such as that the possibility that the language of the amendments could be construed to intrude on executive discretion or confer personal rights on a defendant. She suggested that there may have been concern

over the proposed language in Rule 5(d)(1)(F), which specified that a detained non-citizen be advised that an attorney for the government or law-enforcement officer *will* do either of two things: (1) notify a consular office of the defendant's country, or (2) make any other consular notification required by treaty or international agreement.

She suggested that use of the word "will" might have been seen as potentially tying the hands of the executive in conducting foreign affairs. In addition, despite language in the committee note that the rule did not create any individual rights that a defendant may enforce in a federal court, the rule might have been seen as taking a step in that direction,

After the rule was returned by the Court, the advisory committee went back to the drawing board and produced a revised draft of the amendments. As revised, the first part provides that the defendant must be told only that if in custody, he or she "may request" that an attorney for the government or law-enforcement officer notify a consular office. It does not guarantee that the notification will in fact be made. The second part of the amendments was not changed. It specifies that even without the defendant's request, consultation notification may be required by a treaty or other international agreement.

Judge Raggi pointed out that the primary concern in revising the amendments was to assuage any concerns that the Supreme Court may have had with the amendments as originally presented. She noted that the Department of Justice had been consulting closely with the Department of State, which is very eager to have a rule as an additional demonstration to the international community of the nation's compliance with its treaty obligations.

A member noted that the Vienna Convention only requires notification of a consular office if a defendant requests it. She said that the Supreme Court might have found the original language of proposed Rule 5(d)(1)(F)(i) too strong in stating that the government *will* notify a consular office if the defendant requests. But the new language in Rule 5(d)(1)(F)(ii) may go too far in the other direction by requiring notification without the defendant's request if required by a treaty or international agreement.

Ms. Felton explained that several bilateral treaties, separate from the Vienna Convention, require notification regardless of the defendant's request. She added that the Departments of Justice and State had proposed the amendments to Rules 5 and 58 primarily as additional, back-up insurance that consular notification will in fact be made.

The main thrust of the amendments, she said, was to inform defendants of their option to request consular notification. In the vast majority of cases, however, the notification will already have been made by a law-enforcement officer or government attorney at the time of arrest. That is what the Vienna Convention contemplates. The

proposed amendments, which apply at initial appearance proceedings, will help catch any cases that may have slipped through the cracks.

Judge Raggi noted that this factor was part of the discussion on whether a rule is needed at all because there are no court obligations under the Convention and treaties. The rule, essentially, is a belt-and-suspenders provision designed to cover the rare cases when a defendant has not been advised properly. It only states that a defendant may request notification, and that is as far as it can go. If were to imply that the notice will in fact be given, which is what some treaties actually require, there would be concern that the rule itself was creating an enforceable individual right in the defendant.

Professor Beale added that the revised amendments were acceptable to the Departments of Justice and State. They may be more acceptable to the Supreme Court because they do not in any way tie the hands of the executive and avoid creating any individual rights or remedies. A member noted that the last part of the committee notes makes that point explicitly.

Judge Raggi pointed out that it was up to the Standing Committee to decide whether to republish the rule. Although the changes made after the return from the Supreme Court simply clarify the intent of the amendments, the advisory committee had reason to think that they were different enough to warrant publishing the rule again for further comment.

The committee unanimously by voice vote approved the proposed amendments for republication.

Information Items

FED. R. CRIM. P. 12 and 34

Judge Raggi explained that the proposed amendments to FED. R. CRIM. P. 12 (pleadings and pretrial motions) and the conforming amendment to FED. R. CRIM. P. 34 (arresting judgment) deal with motions that have to be made before trial and the consequences of an untimely motion. The amendments, she said, had been prompted by a proposal by the Department of Justice to include motions objecting to a defect in the indictment in the list of motions that must be made before trial.

The proposal, she said, had now come to the Standing Committee for the third time. The last draft was published for public comment in August 2011. It generated many thoughtful comments, which led the advisory committee to make some additional changes. It is expected that the ad hoc subcommittee reviewing the rule will present a final draft to the advisory committee in October 2012, and it may be presented to the Standing Committee for final approval in January 2013.

FED. R. CRIM. P. 6(e)

Judge Raggi reported that the advisory committee had received a letter from the Attorney General in October 2011 recommending that FED. R. CRIM. P. 6(e) (grand jury secrecy) be amended to establish procedures for disclosing historically significant grand jury materials. She noted that applications to release historic grand jury materials had been presented to the district courts on rare occasions, and the courts had resolved them by reference to their inherent supervisory authority over the grand jury.

The Department of Justice, however, questioned whether that inherent authority existed in light of Rule 6(e)'s clear prohibition on disclosure of grand jury materials. Instead, it recommended that disclosure should be permitted, but only under procedures and standards established in the rule itself. The Department submitted a very thoughtful memo and proposed rule amendments that would: (1) allow district courts to permit disclosure of grand jury materials of historical significance in appropriate circumstances and subject to required procedures; and (2) provide a specific point in time at which it is presumed that materials may be released.

She noted that a subcommittee, chaired by Judge John F. Keenan, had examined the proposal and consulted with several very knowledgeable people on the matter. In addition, the advisory committee reporters prepared a research memorandum on the history of Rule 6(e), the relationship between the court and the grand jury and case law precedents on the inherent authority of a judge to disclose grand jury material. After examining the research and discussing the proposal, all members of the subcommittee, other than the Department of Justice representatives, recommended that the proposed amendment not be pursued.

The full advisory committee concurred in the recommendation and concluded that in the rare cases where disclosure of historic materials had been sought, the district judges acted reasonably in referring to their inherent authority. Therefore, there is no need for a rule on the subject.

Judge Raggi added that she had received a letter from the Archivist of the United States strongly supporting the Department of Justice proposal. She spoke with him at length about the matter and explained that it would be a radical change to go from a presumption of absolute secrecy, which is how grand juries have always operated, to a presumption that grand jury materials should be presumed open after a certain number of years. A change of that magnitude, she said, would have to be accomplished through legislation, rather than a rule change. She noted that the archivist has a natural, institutional inclination towards eventually releasing historical archived documents and might consider supporting a legislative change.

FED. R. CRIM. P. 16

Judge Raggi reported that a suggestion had been received from a district judge to amend FED. R. CRIM. P. 16(a) (government's disclosure) to require pretrial disclosure of all the defendant's prior statements. There was, however, a strong consensus on the advisory committee that there are no real problems in criminal practice that warrant making the change. The committee, accordingly, decided not to pursue an amendment.

Judge Raggi reported that the Senate Judiciary Committee was considering legislation addressing the government's obligations to disclose exculpatory materials under *Brady v. Maryland* and *Giglio v. United States*. The committee had asked the judiciary for comments and a witness at the hearings. She said that she had decided not to testify but wrote to the committee to document the work of the advisory committee and the Standing Committee on the subject over the last decade. Attached to the letter were 900 pages of the public materials that the committee had produced.

She explained in the letter that the advisory committee had tried to write a rule that would codify all the government's disclosure obligations under case law and statute, but concluded that it could not produce a rule that fully captures the obligations across the wide range of federal criminal cases. In addition, she said, her letter alluded to a Federal Judicial Center survey of federal judges showing, among other things, that judges see non-disclosure as a problem that only arises infrequently. Although the advisory committee decided not to pursue a rule change, she added, the subject is being addressed in revisions to the *Bench Book for U.S. District Court Judges*. She noted that the Federal Judicial Center's Bench Book Committee was close to completing that work.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of May 3, 2012 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Amendments for Final Approval

FED. R. EVID. 803(10)

Judge Fitzwater reported that the proposed amendment to FED. R. EVID. 803(10) (hearsay exception for the absence of a public record) was needed to address a constitutional infirmity as a result of the Supreme Court's decisions in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009). It raised the concern that "testimonial" evidence is being allowed when a certificate that a public record does not exist is introduced in

evidence without the presence of the official who prepared the certificate. The proposed amendment would create a notice-and-demand procedure that lets the prosecution give written notice of its intention to use the information. Unless the defendant objects and demands that the witness be produced, the certificate may be introduced.

The proposed procedure, he said, had been approved in *Melendez-Diaz*. The advisory committee received two comments on the amendment, one of which endorsed it and the other approved it in principle with some comments.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. EVID. 801(d)(1)(B)

Judge Fitzwater reported that FED. R. EVID. 801(d) (declarant-witness's prior statement) specifies that certain prior statements are not hearsay. Under Rule 801(d)(1)(B), the proponent of testimony may introduce a prior consistent statement for its truth, *i.e.* to be admitted substantively, but not for another rehabilitative purpose, such as faulty recollection.

He said that two problems have been cited with the way the rule is now written. First, the prior consistent statement of the witness is of little or no use for credibility unless the jury actually believes the testimony to be true anyway. The jury instruction, moreover, is very difficult for jurors to follow, as it asks them to distinguish between prior consistent statements admissible for the truth and those that are not. Second, the distinction has little, if any, practical effect because the proponent of the testimony has already testified in the presence of the trier of fact.

The proposed amendment would allow a prior consistent statement to be admitted substantively if it otherwise rehabilitates the witness' credibility.

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

FED. R. EVID. 803(6)-(8)

Judge Fitzwater noted that FED. R. EVID. 803(6), (7), and (8) are the hearsay exceptions, respectively, for business records, the absence of business records, and public records. When the admissibility requirements of the rule are met, the evidence is admitted as an exception to the hearsay rule unless the source, method, or circumstances indicate a lack of trustworthiness.

During the restyling of the rules, he said, a question arose as to who has the burden on the issue of lack of trustworthiness. By far the vast majority of court decisions have held that the burden is on the opponent of the evidence, not the proponent. But a few decisions have placed the burden on the proponent. Since the case law was not unanimous, the advisory committee decided that it could not clarify the matter as part of the restyling project because a change would constitute a matter of substance.

Although the ambiguity was not resolved during the restyling project, the Standing Committee suggested that the advisory committee revisit the rule. The advisory committee initially was of the view that no further action was needed until it was informed that the State of Texas, during its own restyling project, had looked at the restyled federal rules and concluded that FED. R. EVID. 803(6)-(8) had placed the burden on the proponent of the evidence. This, clearly, was not the advisory committee's intention. At that point, it decided to make a change in the rules to make it clear that the burden is on the opponent of the evidence.

At members' suggestions, minor changes were made in the proposed committee notes. Line 34 of the note to Rule 806(8) was corrected to conform to the text of the rule, and an additional sentence was added to the second paragraph of the note to Rule 806(6).

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

Information Items

SYMPOSIUM ON FED. R. EVID. 502

Judge Fitzwater noted that the advisory committee's next meeting will be held on October 4 and 5, 2012, in Charleston, South Carolina. A symposium on Rule 502 will be held in conjunction with the meeting, with judges, litigators, and academics in attendance. There is concern, he said, that Rule 502 (limitations on waiver of attorney-client privilege and work product) is not being used as widely as it should be as a means of reducing litigation costs. He noted that Professor Marcus will be one of the speakers at the program, and he invited the members of the Standing Committee to attend.

REPORT OF THE E-FILING SUBCOMMITTEE

Judge Gorsuch noted that the ad hoc committee, which he chaired, was comprised of representatives from all the advisory committees. It was convened to consider appropriate terminology that the rules might use to describe activities that previously had only involved paper documents but now are often processed electronically. Although the

impetus for the subcommittee's formation arose in connection with the appropriate terminology to use in the pending amendments to Part VII of the bankruptcy rules and FED. R. APP. P. 6, the subcommittee took a comprehensive look at all the federal rules. Professor Struve served as the subcommittee reporter, and Ms. Kuperman compiled a comprehensive list of all the terms used in each set of federal rules to describe the treatment of the record and other materials that may be either in paper or electronic form.

He noted that the subcommittee had identified four possibilities for defining its work and listed them from the most aggressive to the least. First, he said, it could conduct a major review of all the federal rules in order to achieve uniformity in terminology across all the rules. That major project would be conducted along the lines of the recent restyling efforts. Second, the subcommittee could compile a glossary of preferred terms. Third, it could serve as a screen for all future rule amendments, and advisory committees would have to run their proposals through the subcommittee. And fourth, the subcommittee could simply make itself available for assistance at the request of the advisory committees.

He reported that the subcommittee opted for the last alternative, largely because the others would all take a great deal of time and effort. Moreover, it recognized that technology is changing so rapidly that it may not be timely to undertake a more aggressive approach at this juncture. At some point in the future, though, terminology will have to be addressed more comprehensively. He added that the most valuable result of the subcommittee's work was to make the reporters cognizant of the extraordinary number of synonyms currently in use in the rules and to encourage them to coordinate with each other on terminology.

INTERIM ASSESSMENT OF THE JUDICIARY'S STRATEGIC PLAN

Judge Kravitz noted that he would work with the advisory committees to prepare a response to Judge Charles R. Breyer, the Judicial Planning Coordinator, on the committee's progress in implementing the *Strategic Plan for the Federal Judiciary*.

NEXT MEETING

The committee will hold its next meeting on Thursday and Friday, January 3 and 4, 2013 in Boston, Massachusetts.

Respectfully submitted,

Peter G. McCabe,
Secretary