COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 6-7, 2011
San Francisco, California
Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in San Francisco, California, on Thursday and Friday, January 6 and 7, 2011. The following members were present:

Judge Lee H. Rosenthal, Chair
Douglas R. Cox, Esquire
Roy Englert, Esquire
Judge Neil M. Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace Jefferson
William J. Maledon, Esquire
Judge Reena Raggi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Judge Diane P. Wood

Three members were unable to attend the meeting: Dean C. Colson, Esquire; Dean David F. Levi; and Deputy Attorney General James M. Cole. The Department of Justice was represented by Karen Temple Claggett, Esquire and S. Elizabeth Shapiro, Esquire.

Also participating in the meeting were the committee's consultants, Professors Geoffrey C. Hazard, Jr. and R. Joseph Kimble, and the following guests who participated in a panel discussion: Judge Barbara J. Rothstein; Judge Paul W. Grimm; Gregory P. Joseph, Esquire; Daniel C. Girard, Esquire; Thomas Y. Allman, Esquire: and John Barkett, Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Special counsel, Administrative Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Emery G. Lee	Research Division, Federal Judicial Center
Meghan A. Dunn	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

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
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal welcomed the new committee members – Judge Gorsuch, Judge Schiltz, and Mr. Englert – and summarized their extensive professional backgrounds and achievements.

She reported that John Rabiej would be leaving the Administrative Office shortly to become executive director of the Sedona Conference. She noted that the committee would honor him for his service at its next meeting in June. As a short-term measure, she said, Andrea Kuperman, her rules law clerk, would be detailed to the Administrative Office to serve as chief counsel to the committee. She also asked the committee to recognize the excellent work that Katherine David had performed as rules law clerk during Ms. Kuperman's maternity leave.

With great sadness, Judge Rosenthal reported that Judge David G. Trager, a former member of the Advisory Committee on Criminal Rules, had just passed away. She also noted that Joe Cecil of the Federal Judicial Center, who has conducted a great deal of excellent research for the committee over many years, had recently lost his son in a tragic accident. She extended the deepest sympathies of the committee to the Trager and Cecil families.

Judicial Conference Action

Judge Rosenthal reported that the Judicial Conference at its September 2010 session had approved all the rules amendments recommended by the committee.

The Conference also approved the proposed statutory amendment to 28 U.S.C. § 2107. That legislative change, she explained, was needed to buttress the proposed amendment to FED. R. APP. P. 4(a)(1) (time to appeal) that would clarify the time to appeal in civil cases when a federal officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States. The Supreme Court has held that time limits set forth in statutes are jurisdictional in nature. Therefore, the statute needs to be amended to complement the rule amendment. *Bowles v. Russell*, 551 U.S. 205 (2007). The statutory change, she noted, was essentially technical in nature. She reported that she and Mr. Rabiej had spoken to House and Senate judiciary committee staff about it and had received encouragement that it would likely be adopted.

Pleading Standards Legislation

Judge Rosenthal noted that two pieces of legislation had been introduced in 2009 that would regulate pleading standards in civil cases, and three Congressional hearings had been conducted on them. She suggested that it will be difficult for Congress to

achieve consensus on the specific language of a single bill. Nevertheless, the thrust of the various legislative efforts to date had been: (1) as an interim measure, to restore pleading standards to those in effect immediately before *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); and (2) as a longer-term measure, to allow the rules committees to work out the final standards under the Rules Enabling Act process.

She reported that it was unclear whether any of the bills will be successful in the new Congress. The committee's overarching interests, she said, are: (1) to avoid being drawn into the political fray; and (2) to preserve the integrity of the Rules Enabling Act process. She added that the committee and its staff will continue to monitor and document the extensive case law on pleading standards following *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937 (2009). The committee's summaries of the developing case law are posted on the judiciary's rules web site, www.uscourts.gov. In addition, she noted, the Federal Judicial Center would continue to study civil cases after *Twombly* and *Iqbal* to elicit meaningful insights on how the district courts are handling motions to dismiss.

Finally, she observed that two bills had been introduced in Congress that would alter the standards for pleading in specific types of civil litigation – in fashion-design cases and "anti-SLAPP" cases. She solicited the committee's views on whether the Administrative Office should prepare a standard response that could be used for all future legislation affecting pleading standards or should wait and comment individually on each bill as it is introduced. A participant urged the judiciary to be very cautious and avoid being drawn into the legislative debate in light of the politically charged atmosphere that had accompanied the private securities legislation.

Sunshine in Litigation Legislation

Judge Rosenthal noted that some sort of "sunshine in litigation" legislation continues to be introduced in every Congress. Among other things, she said, the bills would prevent a court from issuing a protective order if the information that would be protected by the order could be relevant to protecting public health or safety.

She noted that concern had arisen again in the wake of the BP oil spill when a bill was introduced specifying that court orders restricting the dissemination of broad categories of information would be void and unenforceable in any legal proceeding. The proposed legislation would effectively have made discovery unworkable. As a result, she and Judge Kravitz had written to Congress explaining why that particular provision was unnecessary and would be disruptive, and the sponsors later removed it from the bill.

Judge Rosenthal reported that she and Judge Kravitz had met with the staff of Representative Nadler, who had introduced the latest version of the sunshine legislation. She noted that his current bill, although a little narrower than earlier versions, still

presented difficult and unnecessary problems that would make civil litigation more expensive, burdensome, and time-consuming. It would also make it more difficult to protect important privacy interests.

Bankruptcy Rules

Judge Rosenthal explained that under the Rules Enabling Act, the Supreme Court must promulgate rule amendments and send them to Congress by May 1 of each year. The amendments then take effect by operation of law on December 1 of each year, unless Congress acts during the interim seven months to reject, modify, or defer them.

She reported that on the eve of the December 1, 2010, deadline, Congressional staff had raised an objection to the 2010 rule amendments – apparently in response to a last-minute attempt by opponents of a particular bankruptcy rule. She noted that the matter had eventually been resolved to the satisfaction of the staff, and the rules went into effect on December 1.

Nevertheless, she said, this sort of last-minute action could become a recurring tactic every year. She explained that the committee chairs, the reporters, and AO staff were continuing to work hard at all stages of the rules process to avert potential surprises by informing Congressional staff in advance about pending amendments and potentially controversial issues. Those ongoing, informal communications, she said, had proven to be enormously beneficial.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 14-15, 2010.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. McCabe reported that appropriations legislation had still not been enacted by Congress to provide funds to operate the federal government for the 2011 fiscal year. As a result, the federal judiciary was operating under a continuing resolution limiting its funding to 2010 levels. He noted, moreover, that a great deal of talk had been heard in the political arena about imposing cuts in spending across all parts of the federal government. As a result, he said, the future budget for the courts could be very constrained.

REPORT OF THE FEDERAL JUDICIAL CENTER

Judge Rothstein reported that the Federal Judicial Center had come away from the Duke conference with clear instructions to pursue additional case-management training

for judges, regardless of whatever rules changes might be adopted by the committee. She noted that the Center had designed a new program focused on case management, and it had already been oversubscribed.

She reported that about 30 years ago the Center had conducted a study to identify the most effective case-management procedures. Now it is in the process of designing a similar, updated study to assess which procedures work well and which do not. Center staff, moreover, will be updating the Center's case-management monographs and drafting new publications. For example, the Center, working in conjunction with the Judicial Panel on Multi-District Litigation, will prepare a new series of "how-to" monographs for judges and lawyers on handling specific categories of civil cases before the panel.

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 December 3, 2010 (Agenda Item 6).

Amendments for Publication

FED. R. APP. P. 13, 14 and 24

Judge Sutton noted that Congress enacted 26 U.S.C. § 7482 in 1986. It authorizes discretionary interlocutory appeals from the Tax Court to the courts of appeals, similar to the provision in 28 U.S.C. § 1292(b) that governs interlocutory appeals from the district courts. The Federal Rules of Appellate Procedure, however, have never been amended to implement the 1986 statute.

He reported that the advisory committee's proposed amendments to Rule 13(a) (appeal from the Tax Court) and Rule 14 (applicability of other rules) had been developed in close consultation with the Tax Court and the Department of Justice. In addition, the advisory committee had consulted tax lawyers on the proposed rules.

Revised FED. R. APP. P. 13(a) would largely carry forth the provisions of existing Rule 13 and address an "appeal as of right" from the Tax Court. Proposed FED. R. APP. P. 13(b) would address an "appeal by permission" from the Tax Court by incorporating the provisions of FED. R. APP. P. 5 (appeal by permission).

The proposed revisions to FED. R. APP. P. 14 had been designed to complement Rule 13. They would delete the current reference to Tax Court "decisions" and specify that references to the district court and the district clerk in any applicable appellate rule,

other than FED. R. APP. P. 24(b), should be read as referring to the Tax Court and its clerk.

The amendments to FED. R. APP. P. 24(b) had been recommended by the Tax Court. They would correct the impression fostered by the current rule that the Tax Court is an executive branch agency, rather than a court.

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

Information Items

Judge Sutton asked the members for feedback and guidance on two potential rule amendments that the advisory committee had under consideration.

FED. R. APP. P. 29(a)

Judge Sutton reported that Rule 29(a) currently allows the following entities to file an amicus-curiae brief in a court of appeals without the consent of the parties or prior leave of court: (1) the United States; (2) a federal officer or agency; and (3) a state, commonwealth, or territory, and the District of Columbia. The advisory committee, he explained, was considering a proposal that would extend that exemption to federally recognized Indian tribes.

He explained that the original public suggestion had been much broader in scope and would have redefined the term "state" in FED. R. APP. P. 1(b) (scope and definitions) to include Indian tribes throughout the appellate rules. The advisory committee, however, decided against that proposal and currently was only considering the proposal to permit tribes to file amicus briefs without leave of court.

He noted that the Federal Judicial Center had conducted an empirical study at the committee's request. It revealed that Indian tribes do in fact file a number of motions for permission to file amicus briefs, most of them in three federal circuits. The study further showed that the great majority of the motions for leave to file are granted by the courts. In reality, thus, Indian tribes already have the ability to file amicus briefs. The key issue, therefore, is not access to the courts but the fundamental dignity of the tribes.

Judge Sutton said that he had written to the chief judges of the three circuits having the most motions for leave to file and had asked them: (1) whether they favored changing the national rule to allow tribes to file amicus briefs without court permission; and (2) whether their circuits would consider modifying their own local rules to permit tribes to file without permission. He reported that the circuits had not shown much enthusiasm so far for either course of action.

Judge Sutton pointed out that the rules of the U.S. Supreme Court allow municipalities to file amicus briefs without permission, but not Indian tribes. He added that there is no clear history as to why that particular choice had been made when the Court adopted its rule in the 1930s.

He reported that the advisory committee was divided on the merits of the proposal, and it would appreciate hearing any views that the members of the Standing Committee may have to offer. He proceeded to summarize the arguments offered by opponents and proponents of the proposal.

Advisory committee members opposed to the change had stated that there is no problem that needs fixing because Indian tribes routinely are given leave to file amicus briefs now. As a matter of substance, moreover, tribes are essentially different from states. In addition, the Supreme Court's amicus rule recognizes states and municipalities, but not tribes. Although dignity is important, opponents concede, it is in reality another name for sovereignty – a matter of great political sensitivity that the rules committees should avoid.

On the other hand, advisory committee members favoring the change had argued that dignity is a core value that should be recognized in the rule. Judge Sutton noted that the advisory committee had received a letter from several tribal groups strongly endorsing the proposed amendment. Proponents also argued that Indian tribes are exactly the same as states, at least for the purposes of Rule 29(a). If municipalities are allowed to file amicus briefs without permission in the Supreme Court, sovereign Indian tribes should have at least the same status. In fact, it would make sense to include both Indian tribes and municipalities in a revision of Rule 29(a). He also noted that the advisory committee had considered and rejected the possibility of adding foreign governments to the rule.

Judge Sutton pointed out that amicus briefs pose a risk because they may raise recusal problems for judges. With that in mind, he said, some courts currently specify that an amicus brief will not be allowed if it would result in the recusal of a judge. He suggested that if Rule 29(a) were to be amended, the revised rule could address the recusal prohibition directly or explicitly allow the courts of appeals to address it in their local rules.

The participants then expressed the same divergence of views that the members of the advisory committee had voiced. One member strongly supported the proposed amendment and pointed out that Indian tribes have a greater claim of sovereignty than municipalities because the latter are only creatures of the states. Moreover, tribes, as sovereign entities, have essentially the same important interests in third-party cases that states do.

A participant said that many commercial cases affect Indian tribes, and he suggested that the tribes normally can afford to write amicus briefs in these cases. He added that it is rare for a court to deny a tribe's request to file an amicus brief, although recusal problems arise from time to time.

Another participant cautioned that there is a real political risk in amending Rule 29. The rules committees may be used as a political stepping stone to achieve other political objectives involving sovereignty and tribal rights.

A member inquired as to why the advisory committee had decided to include Indian tribes only in Rule 29. Judge Sutton and Professor Struve responded that the committee had in fact reviewed all the appellate rules individually, and there were simply too many practical complications with adding tribes to the other rules.

A member encouraged the advisory committee to amend Rule 29 to include both tribes and municipalities. Among other things, he said, including cities in the rule would reduce any political fallout. In addition, if Rule 29 were amended, the Supreme Court would likely change its rule eventually to include tribes.

On the other hand, a member pointed to the lack of enthusiasm for the proposal on the part of the three circuits that have the most tribal cases. He emphasized that there is no real problem under the current rule because tribes as a practical matter have no problem in filing amicus briefs in meritorious cases. He expressed concern about the committee getting out ahead of the Supreme Court on a potentially controversial issue.

Ms. Claggett stated that the Department of Justice did not have an official view on the matter, but the Department encouraged the committee to keep the matter on its agenda.

Some participants suggested that it is not always clear what constitutes a tribe and who may speak for the tribe in litigation. In addition, a member cautioned that the amendment could lead to a slippery slope because other groups that Congress has "deemed" to be Indian tribes, such as Alaskan native villages and corporations, could ask to be included in the rule. Legislation had been introduced in Congress to recognize Native Hawaiians as a tribe. Judge Sutton explained that the advisory committee had deliberately limited the proposal to federally recognized tribes, and Professor Struve added that the process for federal recognition is a lengthy one.

A member suggested that the committee also needs to take account of the 2010 change in FED. R. APP. P. 29 that requires amicus briefs to disclose authorship and funding.

FED. R. APP. P. 28

Judge Sutton pointed out that Rule 28 (briefs) mandates the specific contents of a brief and the order in which the contents must be presented. Rule 28(a)(6), for example, states that a brief must contain "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." Then Rule 28(a)(7) requires "a statement of facts relevant to the issues submitted for review." He suggested that it might make more sense to collapse (a)(6) and (a)(7) into a single statement, as the Supreme Court's rule does. That approach, he said, would allow lawyers to make their case and tell their story in a more natural way. Most lawyers, he said, would choose to follow a chronological approach.

Judge Sutton reported that there was strong support on the advisory committee in favor of reformulating the contents requirements. The committee was considering three options: (1) aligning Rule 28 more closely with the Supreme Court's rule; (2) leaving paragraphs (a)(6) and (a)(7) of Rule 28 in place, but reversing their order – placing the facts first and then the statement of the case; and (3) removing the words "course of proceedings" from Rule 28(a)(6). He added that the members of the advisory committee agree that there is a problem with Rule 28, but there is no consensus yet as to which particular option to pursue.

Several participants stated that, as a minimum, the phrase "course of the proceedings" should be eliminated from Rule 28(a)(6) because it induces lawyers to include unnecessary details about the proceedings below and causes briefs to be too long. Judges, they said, want briefs to focus on the dispositional ruling below. Chief Justice Jefferson quoted from the pertinent Texas state-court rule (Rule 38.1) that requires a concise statement of the case that "should seldom exceed one-half page, and . . . not discuss the facts." Several members praised that approach because it requires the lawyers to tell the court up front precisely and briefly what they want the court to do. Along the same lines, a member pointed out that some state courts specifically require an introduction to a brief.

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 December 6, 2010 (Agenda Item 9). Judge Wedoff reported that the advisory committee had no action items to present.

Informational Items

FED. R. BANKR. P. 1007

Judge Wedoff explained that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 specifies that individual debtors in chapter 7 cases must file a statement that they have completed an approved course in personal financial management before they may receive a discharge. FED. R. BANKR. P. 1007(c) (time limits) had required a debtor to file the statement within 45 days after the first date set for the meeting of creditors under § 341 of the Code.

Some debtors, however, fail to file the required statement within 45 days. Therefore, the court has no choice under the statute but to close the case without a discharge. To alleviate that hardship, FED. R. BANKR. P. 5009(b) (notice of failure to file the Rule 1007(b)(7) statement) was amended, effective December 1, 2010. It now requires the bankruptcy clerk to notify individual debtors who have not filed the statement within 45 days to inform them that if they do not file the statement within an additional 15 days, their case will be closed without a discharge. As a conforming amendment, the time limit in Rule 1007(c) was increased from 45 days to 60 days.

Judge Wedoff reported that a complicating factor is that two versions of Rule 1007 were currently in place – FED. R. BANKR. P. 1007 and INTERIM RULE 1007-1. The latter, he said, was a special, temporary rule adopted by the bankruptcy courts as a local rule or standing order to deal temporarily with certain servicemen under the National Guard and Reservists Debt Relief Act of 2008. In that Act, Congress exempted certain members of the Guard and Reserves from the means testing required of other chapter 7 debtors. The statutory exemption, though, was made applicable only for cases filed during the three-year period from December 2008 to December 2011. Since the statutory provision would expire in less than a year, Judge Wedoff said that it made no sense to change the permanent, national rule. Therefore, the committee asked the courts to adopt the interim rule for servicemen as a local rule or standing order.

INTERIM BANKRUPTCY RULE 1007-1 also includes the requirement that debtors file the statement that they have completed a course in personal financial management. Therefore, when FED. R. BANKR. P. 1007 was amended on December 1, 2010, to extend the total time for debtors to file the statement from 45 days to 60 days, a corresponding

change had to be made in INTERIM BANKRUPTCY RULE 1007-1. So, on November 4, 2010, the chairs of the Standing Committee and the advisory committee sent a memorandum to the bankruptcy courts advising them to increase the interim rule's deadline for filing the statement from 45 days to 60 days, consistent with revised FED. R. BANKR. P. 1007.

Judge Wedoff pointed out that the December 2010 amendments to FED. R. BANKR. P. 1007 also had shortened from 14 days to 7 days the time for a debtor in an involuntary case to file a list of creditors' names and addresses. The debtor, however, only has to file the list of creditors after the court enters the order for relief.

FED. R. BANKR. P. 3001

Judge Wedoff reported that the proposed amendments to FED. R. BANKR. P. 3001 (proof of claim) published in August 2010 had been designed to address problems often arising with proofs of claims that involve credit-card debt, especially debt purchased by bulk buyers. He said that the documentation filed by some bulk creditors is often insufficient to support their claims because it fails to comply with Rule 3001's current requirement that a claim be accompanied by the original or a duplicate of the writing on which it is based.

He reported that the advisory committee had published a proposed revision to Rule 3001 in August 2009. It would have required a creditor holding a claim based on an open-end or revolving consumer-credit agreement to attach the last account statement sent to the debtor before the debtor filed the petition. At the public hearings, however, several institutional creditors stated that they were simply unable to produce a copy of the last statement.

In response, the advisory committee deleted the requirement that a copy of the last statement be attached. Instead, it republished a revised version of the rule in August 2010 that would instead require the holder of a claim to file five specific pieces of information with the proof of claim. He noted that a public hearing on the revised rule would be held in early February 2011.

FED. R. BANKR. P. 7054

Judge Wedoff reported that the proposed amendments to Rule 7054 (judgments and costs) would give a party more time to respond to a prevailing party's bill of costs.

FED. R. BANKR. P. 7056

Judge Wedoff explained that FED. R. BANKR. P.7056 (summary judgment) incorporates FED. R. CIV. P. 56 by reference. As amended effective December 1, 2009, FED. R. CIV. P. 56(c)(1)(A) specifies that a party may move for summary judgment at any time until 30 days after the close of all discovery, unless the court specifies another time.

Since bankruptcy matters tend to move quickly and hearings often occur shortly after the close of discovery, Judge Wedoff said that the advisory committee had decided that a shorter deadline was needed in bankruptcy. Therefore, it had published a proposed amendment to FED. R. BANKR. P. 7056 specifying that in bankruptcy adversary proceedings a summary-judgment motion must be made "at least 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought." As with FED. R. CIV. P. 56(c)(1), the deadline may be altered by local rule or court order.

OFFICIAL FORMS

Judge Wedoff reported that the advisory committee had published proposed amendments to OFFICIAL FORM 10 (proof of claim) and three new forms to be filed with proofs of claims for home-mortgage debts. The changes would implement pending amendments to FED. R. BANKR. P. 3001 and new FED. R. BANKR. P. 3002.1, both due to take effect on December 1, 2011. In summary, they will require the holder of a home-mortgage claim to: (1) provide additional details about the breakdown of the mortgage debt; (2) give notice of any changes in installment payment amounts; and (3) give notice of the assessment of any fees, expenses, and charges after the claim is filed.

He reported that OFFICIAL FORM 25A (model plan for reorganization of a small business under chapter 11) would be amended to change its effective-date provisions. The changes, he said, were technical in nature and would give more time to appeal an order confirming the plan.

Judge Wedoff reported that the advisory committee will consider two new form amendments at its next meeting in response to the Supreme Court's recent decisions in *Hamilton v. Lanning,* 130 S. Ct. 2464 (2010), and *Schwab v. Reilly,* 130 S. Ct. 2652 (2010).

He explained that under § 1325(b)(1) of the Bankruptcy Code, chapter 13 debtors may be required to devote all their "projected disposable income" to payment of unsecured claims. *Hamilton v. Lanning* concerned the calculation of that disposable income. In that case, the debtor's financial situation had changed, as he had acquired a new job at a considerably lower salary. The Supreme Court rejected the mechanical approach of considering only the debtor's average monthly income for the six months

preceding the bankruptcy filing. Instead, it adopted a forward-looking approach that will allow bankruptcy courts to consider changes in a debtor's income and expenses after filing.

As a result of *Lanning*, he said, the advisory committee was considering amending OFFICIAL FORM 22C (chapter 13 statement of current monthly income and calculation of commitment period and disposable income). The form currently asks debtors only to list their pre-bankruptcy average income and current expenses. The proposed revision would ask them to list any changes in income and expenses that have already occurred or are virtually certain to incur during the 12 months following filing.

Judge Wedoff explained that *Schwab v. Reilly* concerned how a debtor may claim an exemption in property where the actual value of the property exceeds the maximum dollar amount allowed for the exemption under the relevant federal or state law. The Supreme Court held that if the debtor enters a specific dollar amount on the exemption form, he or she is then limited to that amount. If the full market value of the property exceeds that amount, the trustee may use the overage.

Judge Wedoff said that OFFICIAL FORM 6C (property claimed as exempt) is ambiguous. In *Schwab*, the Court stated that the debtor's listing of the claimed exemption and the value of the property in the same amount did not put the trustee on notice that the debtor was claiming the full market value of the property as exempt, whatever the value might turn out to be. As a result of *Schwab*, Judge Wedoff said, the advisory committee had tentatively agreed to amend Form 6C to permit the debtor to exempt the "full fair market value of the property." The change would put the trustee on notice of the need to object if he or she believes that the value of the property exceeds the allowed exemption amount.

FORMS MODERNIZATION

Judge Wedoff reported that the advisory committee was engaged in a major project to modernize and reformulate all the bankruptcy forms to make them clearer and easier to complete, and to take full advantage of technological advances. He noted that considerable progress had been made under the direction of its forms modernization subcommittee, chaired by Judge Elizabeth Perris and assisted by Carolyn Bocella Bagin, a nationally prominent forms expert. The subcommittee, he said, should complete a set of revised forms for individual debtors in the next few months, and he anticipated that the advisory committee may have all the forms ready to be published for public comment in August 2012.

BANKRUPTCY APPELLATE RULES

Judge Wedoff noted that the advisory committee was also making major progress in revising Part VIII of the bankruptcy rules – the bankruptcy appellate provisions. He pointed out that the current Part VIII rules are difficult to follow and inconsistent in several respects with the Federal Rules of Appellate Procedure. He reported that the advisory committee was working closely with the Advisory Committee on Appellate Rules, and the two committees would meet jointly in April 2011.

He explained that the advisory committee was in the process of deciding which of two structural approaches to pursue in revising the Part VIII rules:

(1) to maintain stand-alone bankruptcy appellate rules that repeat many of the provisions of the Federal Rules of Appellate Procedure; or

(2) to incorporate the Federal Rules of Appellate Procedure into Part VIII of the bankruptcy rules by citation – with listed exceptions and modifications – in the same manner that Part VII of the bankruptcy rules now incorporates the Federal Rules of Civil Procedure by citation for adversary proceedings.

He pointed out that the advisory committee had prepared alternate drafts of a revised FED. R. BANKR. P. 8003, and he asked the members for their preferences as to the two approaches.

Incorporation, he said, would result in shorter rules that are clearer to lawyers familiar with the Federal Rules of Appellate Procedure. Incorporation would also have the advantage that when the FRAP are amended in the future, no additional changes will be needed in the bankruptcy rules. But, he noted, it will be complicated to incorporate FRAP by reference into the bankruptcy rules because bankruptcy appeals are different in several respects from civil and criminal appeals.

Professor Gibson added that the incorporation model was shorter, but it will present a number of drafting problems. For example, there are three different appellate "courts" to which an appeal may be taken from a bankruptcy judge, three different "clerks," and there may be several different adversary proceedings within a bankruptcy case. The Federal Rules of Appellate Procedure, moreover, contain a number of matters that do not apply to bankruptcy appeals or can only be applied uneasily.

Several members expressed a preference for the sample self-contained rule over the incorporation rule, suggesting that it was clearer and more intelligible. They pointed out that the apparent brevity of the incorporation model was illusory because the text of the incorporated appellate rules would have to be published along with the bankruptcy

rules in any event. They emphasized, though, that if the advisory committee chooses the stand-alone model, the revised bankruptcy appellate rules should be parallel to the Federal Rules of Appellate Procedure to the maximum extent possible. Moreover, whenever a change is made in the FRAP in the future, it needs to be picked up right away in the bankruptcy rules.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set forth in Judge Kravitz's memorandum and attachments of December 6, 2010 (Agenda Item 5). Judge Kravitz reported that the advisory committee had no action items to present.

Informational Items

ELECTRONIC DISCOVERY

Judge Kravitz reported that electronic discovery continued to be an important matter on the advisory committee's agenda. It had also been a major topic of discussion at the committee's May 2010 conference at Duke Law School. He said that the participants at Duke had urged the committee to focus on two issues of particular concern to the bar – preservation and sanctions. The lawyers, he said, had been seeking greater certainty and uniformity, both as to their preservation obligations and the standards for imposing sanctions. He added that Mr. Joseph had chaired a superb panel discussion at the conference, and the panel had produced a paper setting forth the elements that should be included in a proposed federal rule governing preservation.

Following the Duke conference, he said, he had asked the advisory committee's discovery subcommittee, chaired by Judge David Campbell, to follow up on both issues. There was, however, concern about the committee's authority under the Rules Enabling Act to address preservation obligations. Generally, he said, the obligations are governed by state law, and they often vest before a federal case is filed. Nevertheless, he said, the subcommittee would move forward to draft a rule while the issue of the committee's authority remains under advisement.

Judge Kravitz noted that the subcommittee had asked the Federal Judicial Center to conduct empirical research on spoliation sanctions in order to ascertain how frequently they are imposed in the federal courts. The Center's findings, he said, would be summarized by Dr. Lee during the upcoming panel discussion on spoliation and sanctions. In addition, he said, Andrea Kuperman and Katherine David had prepared an excellent memorandum analyzing the pertinent case law.

The subcommittee, he added, was of the view that even though courts do not impose sanctions very often, the very threat of sanctions for failure to preserve information has a profound effect on litigant behavior. The subcommittee, he said, was having difficulty in drafting the language of a rule on preservation that would give lawyers the specificity and comfort they seek. The essential problem, he said, is that there is simply an infinite variety of pre-litigation situations that may trigger preservation obligations.

On the other hand, he said, it should be easier for the subcommittee to agree on the language of a rule addressing sanctions. Just by improving the rule on sanctions, moreover, it may be possible to affect preservation behavior at the front end of a case. He added that the advisory committee will discuss a proposed rule at its April 2011 meeting, and it might possibly have a sanctions proposal for the Standing Committee's consideration in June 2011.

PANEL DISCUSSION ON SPOLIATION AND SANCTIONS

Empirical Study

To introduce the discussion, Emery Lee of the Federal Judicial Center outlined the results of the empirical study that he conducted for the committee to identify litigation in the federal courts involving spoliation sanctions. The first task of the study, he said, had been to ascertain the frequency with which spoliation issues are actually litigated. He emphasized that an empirical study – based on tabulating the frequency of court docket events and records – is a very different exercise from a review of the reported case law.

The Center's study, he explained, had examined the records of 131,992 civil cases filed in 19 district courts during the years 2007 and 2008. The number of those cases with spoliation issues, he noted, was very small, as sanctions motions were filed in only 209 cases – or 0.15% of all cases.

But the study also showed that the cases with sanctions motions were particularly contentious. They also had much longer disposition times than other civil cases – taking 649 days on average from filing to disposition, versus 153 days for all cases. In addition, they were far more likely to go to trial. About 17% of the spoliation cases went to trial, versus fewer than 1% of all the cases. Spoliation motions also tended to be filed late in the cases – on average 513 days into a case.

Dr. Lee added that every dispute involving electronic discovery tends to increase the costs of a case by about 10%. The empirical study found that spoliation issues had occurred both in cases with electronically stored information (62% of the total) and cases

without it (38%). About two-thirds of spoliation motions were made by plaintiffs, and businesses were the targets of the motions 74% of the time.

Of the motions ruled on, 28% were granted by the courts and 72% denied. For cases involving electronically stored information, the grant rates were slightly higher, at 34% granted and 66% denied. Dr. Lee noted that the numbers in the empirical study were very different from those in recent studies of published orders and opinions, which showed grant rates approaching 60%. The explanation, he said, is that cases with published orders and opinions are simply not typical of all cases. When a court grants sanctions, the order is much more likely to be published.

As for the types of sanctions imposed by the courts, Dr. Lee reported that the study showed that FED. R. CIV. P. 37 was the most prevalent basis for sanctions. Of the sanctions granted, 45% resulted in adverse inferences or instructions, 48% resulted in preclusion of evidence or testimony, 23% led to dismissal or default, and 3% involved civil contempt.

Judge Kravitz concurred that sanctions are rarely granted. Nevertheless, he said, the fear of sanctions clearly drives litigant behavior. As a result, clients tend to over-collect and over-preserve their records.

Panel Discussion

The panel was chaired by Mr. Joseph and included Judge Rothstein, Judge Grimm, and Messrs. Allman, Barkett, and Girard.

A panelist emphasized that spoliation issues arise far more often than the Federal Judicial Center study indicated. Preservation, he said, is raised frequently at Rule 26(f) attorney conferences and in other discussions among counsel. Lawyers and parties, he added, try to avoid sanctions and commonly work out preservation disputes on their own without court involvement. These discussions, however, are not reflected on the court's docket or in its opinions. In addition, he said, third parties are frequently involved in spoliation issues that do not appear in court records. He added that he receives regular reports of all cases in which there is a sanctions issue, whether or not a motion is filed. In all, he said, he had counted nearly 4,000 cases involving spoliation issues in the federal and state courts.

Other panelists agreed that the frequency of spoliation issues is much greater than the court dockets seem to indicate. Almost all sanctions decisions, moreover, are published, and the behavior of lawyers and their clients is greatly affected by what they read in opinions and orders.

A panelist explained that preservation and sanctions law varies greatly from jurisdiction to jurisdiction. In the absence of a clear national standard, companies that conduct business in multiple states must comply with the most stringent preservation standards extant, greatly increasing precautionary practices and costs.

One possible improvement that the rules could make, he said, would be to fold the limited safe-harbor provision of Rule 37(e) (failure to provide electronically stored information) into the general standard of Rule 37(c) (failure to disclose or supplement). A revised rule might specify that in the absence of willfulness or bad faith, a court could not order sanctions against a party that has acted reasonably and in proportion to the stakes in the litigation. The rule, though, would also have to address instances where there is only negligence, rather than wilfulness, but the negligence leads to a loss of information that destroys the other side's case. The rule, therefore, would have to include elements of reasonableness, proportionality, and prejudice.

Another panelist endorsed that approach, but added that the rule should be limited to instances involving gross negligence. A party should be protected against ordinary mistakes that may be mildly negligent, but do not warrant sanctions.

Another panelist, though, expressed serious concern with the approach. He noted that a judge's inherent power is the most significant source of sanctions authority, regardless of whatever specific language is set forth in a rule. That inherent power is hard to limit, so a more effective approach might be to harness that power and specify in the rule the criteria for invoking the power.

It was suggested that the result might be achieved by eliminating the qualifying phrase "under these rules" in Rule 37(e). Judge Rosenthal explained that when Rule 37(e) was being discussed in the Standing Committee, the concern had been voiced that the committee was approaching the outer limits of its authority under the Rules Enabling Act. That is why the words "under these rules" were added – to guarantee that the committee had the authority to adopt the rule.

A panelist emphasized that the case law on sanctions is intensely factually driven, and it would be unwise to have a rule that binds the court's ability to act to a particular level of fault. A rule that inflexibly requires a certain level of culpability would inevitably create a rational incentive to destroy information. As such, it would interfere with the truth-finding process.

The rule, instead, should focus on the policy objectives to be achieved when a litigant fails to preserve, and it should give weight to the injured party's showing of how it was hurt by the spoliation. The actor's state of mind is often not as important as the consequences of an act. As a practical matter, courts try to restore the innocent party to where it would have been without the destruction of information. The right rule will not

be easy to draft, but it should focus on restoring the situation and require a nexus between the loss of the information and the resulting prejudice.

A panelist pointed out that the culpability standards found in the case law among the circuits are chaotic and inconsistent, and they need to be addressed. The most difficult situation, he said, involves the case where there is no culpability, but an act has severely prejudiced a party or deprived it of information that it needs to make its case. Including a "bad faith" or "wilfulness" standard may be appropriate in a rule, but prejudice also needs to be included in the rule. In other words, the rule should aim to take care of litigants who have been hurt by the conduct, even though the conduct did not constitute bad faith or wilfulness.

A participant suggested that the range of sanctions available to a judge in dealing with spoliation problems is quite wide, and it might be possible to calibrate the sanctions to fit the level of culpability and the extent of the prejudice. For example, the offending party might be required pay the costs of restoring a situation, or the court may extend the time for discovery. Dismissal of a case or other severe sanctions might be reserved for only the most egregious conduct.

A panelist recommended that the committee work from the elements of a preservation rule that had been developed by the panel at the Duke conference. He emphasized the importance of specifying the preservation "triggers" in the rule, *i.e.*, identifying the specific events and point in time when an obligation to preserve attaches.

He suggested three potential approaches. First, the committee could be aggressive and list the minimum factors that trigger the preservation obligation. That approach, though, would raise questions about the committee's pre-litigation authority under the Rules Enabling Act. Second, the rule might state what preservation obligations arise on commencement of the litigation, leaving the pre-litigation field to the common law. Third, the rule could specify that once the common-law test of "reasonable forseeability of litigation" is met, a party must act reasonably, in good faith, and in proportionality to the stakes of the litigation.

He concluded that the committee does in fact have the authority to draft a federal rule defining what pre-litigation conduct triggers preservation obligations because the spoliation ultimately affects the federal case. He suggested, though, that in the final analysis, the process of education may be more effective than the rulemaking process. He noted, for example, that the Sedona Conference had produced a document setting forth best practices regarding triggering events and preservation obligations.

A panelist reiterated that under the common law the duty to preserve is triggered when there is a reasonable forseeability of litigation. The duty, he explained, is owed to the court itself because the court needs to have the evidence readily available for the case.

The preservation obligation predates the federal lawsuit, but it is vested in the lawsuit itself. He argued that the committee had authority under the Rules Enabling Act to specify the preservation obligations in the rule because there is sufficient nexus between those obligations and the federal case.

Another panelist pointed to several examples of rules that regulate pre-litigation conduct and are predicated on the consequences that the conduct may have on later litigation decisions. For example, FED. R. CIV. P. 27 (depositions to perpetuate testimony) governs the pre-litigation preservation of evidence. That rule, he said, could be amended to specify the obligations and the consequences. He suggested, moreover, that if the committee drafts a preservation rule, it should not restrict the rule to electronically stored information.

A member strongly endorsed efforts by the committee to amend the rules to address both spoliation and sanctions. He said that spoliation problems arise far more frequently than the study of dockets and opinions suggests. The issues do not get reported very often, but they are either discussed informally with the court at pretrial conferences or resolved by the attorneys without court involvement. Preservation issues, moreover, can be very complex, very important, and very expensive. The bar, he concluded, needs definitive guidance and greater certainty on the matter from the committee. In particular, the rules should be clear in addressing the penalties for violations of preservation obligations.

A member explained that whether or not there is authority under the Rules Enabling Act to issue a preservation rule, it is essential that lawyers and parties have clear national guidelines that they can rely on. She noted, for example, that it is well established in antitrust law that companies that act within antitrust compliance guidelines are generally safe from adverse action by the Department of Justice. Likewise, companies that have anti-harassment programs in place enjoy a level of defense in employment discrimination litigation. In short, parties that comply with a set of accepted professional guidelines generally receive the benefit of the doubt from the courts.

Judge Kravitz emphasized that the civil rules committee was not just pursuing the rulemaking path. It was also working with the Federal Judicial Center on case-management and educational approaches. In some areas, he said, the current civil rules are sufficient, but the bench and bar may not be applying them properly and consistently.

A member agreed, but pointed to practical limitations with traditional educational efforts. The law school curriculum, for example, allows little time for legal ethics, and it does not lend itself to the level of complexity that the committee is attempting to address. On the other hand, law firms and bar associations might do more with continuing education to address ethical issues for litigators, including preservation obligations.

A member noted that most litigation occurs in the state courts. The committee, therefore, would be well advised to examine developments in the states regarding preservation and sanctions that could be adapted for possible use in the federal courts. Uniformity in this area among all the federal courts and all the states would be very desirable. Therefore, it would be profitable to work in conjunction with the states on the matter. Other participants agreed, noting that the federal rules have a major influence on the state courts, and a revised federal rule could have a beneficial impact on state litigation.

Judge Rosenthal pointed out that the discussions, both at the meeting and at the Duke conference, had focused on a federal rule that would both define preservation duties and specify the consequences for violations. She emphasized that a rule dealing with sanctions would be far easier to draft than a rule dealing with preservation. Since the fear of sanctions was driving much of the behavior of lawyers and clients, she asked whether a federal rule that addressed sanctions alone would be sufficient.

A panelist said that it would be a great beginning, but it would not be enough alone to influence the desired behavior. The proposed rule would also have to address preservation. But a member questioned how the rule could specify pre-lawsuit preservation obligations, other than to use broad terms such as "reasonable" and "foreseeable."

A participant suggested that the committee has clear authority to address sanctions in the federal rules. But in the absence of additional legislation, the Rules Enabling Act limits its authority to address preservation. He emphasized that the law of spoliation is essentially state law. The text of a federal procedural rule, he said, could make a reference to preservation duties, but it would have to recognize that the field is governed by state law, at least up to the point that a federal lawsuit is filed.

He recommended that corporate counsel think closely about developing a shared professional understanding as to what constitutes reasonable behavior. The professional standards that they develop could be recognized by courts in their rulings and listed as a relevant factor in a federal rule. He recommended that the corporate divisions of the American Bar Association focus on pursuing this approach.

A panelist expressed unease over the practical difficulty of applying any national preservation rule to small businesses and individuals. Adoption of national standards, he said, may result in disparate treatment. They may work very well for corporations or other large organizations that become familiar with them, but individuals and small organizations will not be as aware of their specific obligations. The disparity problem, he said, already exists with regard to document-preservation obligations. So, rather than devising a fixed culpability standard in a rule, which will inevitably be used by counsel

as a tool against their opponents, the federal rule should focus on providing comfort to those who act reasonably.

Finally, a panelist recommended that the committee address all three major issues discussed by the panel: (1) the triggers that initiate preservation obligations; (2) the scope of the preservation obligations; and (3) the culpability level required before sanctions may be imposed. Judge Kravitz said that the advisory committee and its subcommittee were planning to consider all three areas.

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee was considering revisions to Rule 45 (subpoenas), and it had appointed a subcommittee to lead the effort, with Judge David Campbell as chair and Professor Marcus as reporter. The subcommittee, he said, had considered dozens of suggested improvements to Rule 45, but it had narrowed its focus to three main issues: (1) notice, (2) transfer of enforcement proceedings, and (3) the 100-mile rule. It was also considering overall simplification of the rule and was planning to present a revised rule to the Standing Committee at its June 2011 meeting.

(1) Notice of subpoena

Judge Kravitz explained that the current rule directs that "notice must be served on each party" before a subpoena to produce documents is served. Nevertheless, he said, few lawyers seem to follow the rule, perhaps because the notice requirement is buried in the last sentence of Rule 45(b)(1). The subcommittee planned to restructure the rule to give the requirement more prominence and a separate heading. Professor Cooper added that the revised rule would require for the first time that a copy of the subpoena be supplied with the notice.

Judge Kravitz said that beyond requiring notice to all parties that the subpoena has been served, the subcommittee had considered whether to add a requirement that notice also be provided to parties when the documents are produced. The subcommittee concluded, though, that the burden of providing notice could be great because a subpoena is often produced in pieces. Rule 45, moreover, is already too long. Adding another notice requirement would only make it harder to follow and comply with.

Nevertheless, he said, a prominent lawyer had informed the subcommittee that lack of notice of production is the most important problem that he faces in practice, and he often does not learn that documents have been produced until it is too late to act.

A member concurred strongly with this observation and recommended adding a provision to the rule requiring the server of a subpoena to give opposing parties notice of production and of any revisions to the subpoena, even if it further complicates the rule.

He said that lawyers are entitled to the documents, and they should receive copies when the subpoenaing party gets them. Other participants suggested, though, that lawyers normally tend to work out the problems on their own, even though they do not always comply with the details of the rule. They suggested that lawyers are always free to contact the subpoenaed party to ask for an update as to what has been produced, or they may serve their own subpoena. The member responded, though, that subpoenas are a substantial burden on third-party producers, and the third parties should not have to deal separately with all the lawyers. Having a rule that requires notice of production would be a much simpler approach.

(2) Transfer of enforcement proceedings

Judge Kravitz explained that under Rule 45, a subpoena is issued in the name of the court where the witness is located, and it is enforced by that court. He noted, though, that there are times when enforcement of a subpoena does not involve local issues. Rather, the issues go to the merits of the case and should be addressed by the court where the case is pending. Rule 45, however, does not currently provide for a transfer of authority for enforcement purposes, even though some courts have managed to find ways to transfer the enforcement dispute. It is also not unusual, he said, for a judge in the district where a subpoena has been served to call the presiding judge in the district where the case is pending to ask for advice.

Judge Kravitz noted that the subcommittee's pending proposal would explicitly authorize transfer of enforcement proceedings in certain limited circumstances. Judges should not routinely transfer cases, however, because enforcement issues are often truly local in nature and have nothing to do with the merits of a case. They frequently involve the convenience of the subpoenaed party. The subpoenaed party, moreover, should be able to use local counsel and go into the local court.

He noted that the subcommittee was struggling with drafting the language of the standard needed to justify a transfer. He said that one option would be to track 28 U.S.C. § 1404, the general change of venue provision dealing with "the interests of justice." Even if the subcommittee were to adopt that standard, the committee note would specify that if the issues are local, a case should not be transferred.

Professor Marcus said that a revised rule could take any of three approaches: (1) to favor transfer of enforcement most of the time; (2) to express no preference as to enforcement location; or (3) to oppose transfer of enforcement most of the time, but make it available in the right cases. He noted that the subcommittee had chosen the third option, and it was struggling to draft appropriate language.

Judge Kravitz added that the subcommittee had also asked whether Rule 45 should not simply discard the fiction and the complexity of having subpoenas issued in

the name of the court where a witness is located. The rule, instead, might move towards nationwide service, allowing the court where the case is pending to issue the subpoenas. But, he noted, that approach raises a number of other questions.

(3) The 100-mile rule

Judge Kravitz noted that in *In re Vioxx Products Liability Litigation*, 438 F. Supp.2d 664 (E.D.La. 2006), the district court had held that a subpoena may compel a party or a party's officer to appear as a witness at trial regardless of the 100-mile limit in FED. R. CIV. P. 45(b)(2). Some courts have followed the *Vioxx* ruling, while others have rejected it. The advisory committee, he said, planned to recommend an amendment to Rule 45 that would effectively undo the *Vioxx* ruling.

Judge Kravitz reported that the advisory committee was of the view that the 100-mile provision in Rule 45 should be retained and enforced for three reasons. First, there is a fear that litigants may demand the presence of high corporate officials at trial, even though they may not have first-hand knowledge of the facts, in order to force a settlement. Second, video depositions of corporate executives and other witnesses are a viable alternative to trial testimony in many cases. Third, if a high ranking official in fact has meaningful knowledge about a case, the presiding judge will attempt to persuade the party to bring the official to the trial.

Judge Kravitz noted that the committee was also considering publishing in brackets a non-favored alternative *Vioxx* approach that would allow a court to compel the presence of an official for trial under certain conditions. The subcommittee, he said, was working on drafting a high threshold standard for triggering the alternative.

PLEADING STANDARDS

Judge Kravitz reported that the Federal Judicial Center was conducting a survey of how motions to dismiss and motions to amend the pleadings are being handled in the 20 largest district courts since *Twombly* and *Iqbal*. Joe Cecil of the Center, he said, was examining the dockets and case files to ascertain the real impact of the *Twombly* and *Iqbal* decisions.

Judge Kravitz said that he had reported to the committee two years ago that a common-law process would develop following *Twombly* and *Iqbal* and that the federal courts would take a context-specific and nuanced approach to pleading requirements. That, he said, was in fact happening, and it had clearly been confirmed in Andrea Kuperman's summary of the extensive case law. He added that once the Federal Judicial Center's research findings are available, the advisory committee will discuss pleading issues and consider several different approaches in response to *Twombly* and *Iqbal.*

MISCELLANEOUS MATTERS

Judge Kravitz reported that following the May 2010 Duke conference, Judge John Koeltl had agreed to chair a subcommittee to implement the many suggestions raised at the conference. The subcommittee, he said, has had several meetings. In addition, the Duke Law Journal had published several of the articles produced for the conference, and the committee, in conjunction with the Standing Committee, had presented a report on the conference to the Chief Justice.

Judge Kravitz noted that the advisory committee still had FED. R. CIV. P. 26(c) (protective orders) on its agenda and will continue to monitor the case law on protective orders.

The advisory committee, he said, was generally of the view that it should eliminate the illustrative civil forms. But it had deferred action on the matter to avoid signaling any conclusions about *Twombly* and *Iqbal* if the pleading forms were to be abandoned. He noted, for example, that the patent bar had severely criticized the existing forms on patent litigation.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of December 8, 2010 (Agenda Item 7).

Amendments for Publication

FED. R. CRIM. P. 11

Judge Tallman reported that the proposed amendment to Rule 11 (pleas) had been motivated by the Supreme Court's decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). In *Padilla*, the Court found that the defendant had received ineffective assistance of counsel because his lawyer had failed to warn him about the possible deportation and immigration consequences of his guilty plea and conviction. The proposed amendment would require a court to expand the Rule 11 colloquy and advise defendants that if they are not United States citizens and are convicted, they may be removed from the country, denied citizenship, and denied admission in the future.

A member pointed out that Rule 11 does not currently require a court to advise a defendant of any of the collateral consequences of a conviction. He questioned why immigration had been singled out for inclusion in the rule and warned that it could lead to a "slippery slope" of other amendments – since several other collateral consequences are

equally important to some defendants. The proposal, moreover, would require judges to warn all defendants of the potential adverse consequences of deportation, even defendants who are United States citizens. At the most, he said, the rule should be limited only to defendants who are not citizens. He added that the Rule 11 plea colloquy is already very long, and many defendants do not understand all of it. Adding even more requirements may distract defendants from the more important consequences of conviction that they need to focus on.

Rule 11, he said, is a haven for prisoners who get buyer's remorse in prison after pleading guilty. He predicted that defendants will inevitably file motions attacking their sentence under 28 U.S.C. § 2255 on the grounds that the court did not follow the rule and inform them of the immigration consequences of their guilty plea.

Judge Tallman explained that the advisory committee had discussed these arguments extensively. But, he said, a majority of the members favored limiting the proposed amendment to immigration consequences because it had been the Supreme Court's focus in *Padilla.* The reason that the proposed amendment applied on its face to all defendants is that a judge cannot always tell at a Rule 11 proceeding whether the defendant is in fact an alien and subject to deportation. The defendant, for example, may not want to answer whether he is a citizen or may lie about citizenship.

Other participants expressed similar views and argued that the list of topics in Rule 11 is already too long. One emphasized that in *Padilla* the Supreme Court had placed the obligation to inform the defendant of deportation and immigration consequences squarely on defense counsel, and not on the court. There is, moreover, no real problem to address because most judges already include these consequences in their Rule 11 discussion whenever it is relevant. That practical approach is preferable to requiring a court by rule to advise every defendant of immigration consequences, even when not relevant.

A member expressed support for the proposed amendment as a matter of policy and pointed out that much of the Rule 11 colloquy is covered by the harmless error rule. If immigration consequences are not important in a particular case, such as when a defendant is a citizen, omitting it from the plea colloquy would clearly be harmless error.

A participant noted that the Department of Justice was in the process of adding language similar to the proposed amendment to its standard plea agreements. That course of action, she said, will help produce a record to assist the court of appeals.

A participant stated that the Bench Book for District Judges already recommends that judges include immigration consequences in the advice they give to defendants under Rule 11. Even if there were a violation of the rule, the case law is clear that it would not

rise to the level of constitutional due process if the judge failed to warn of immigration or other collateral consequences. She added that giving the warning of deportation consequences in open court at the plea proceedings will provide an additional safeguard. A defendant clearly will have no claim if the record shows that the judge clearly warned him or her of the consequences.

Even though several committee members expressed reservations about the wisdom of the proposed amendment, they all agreed that it should be published for public comment.

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

FED. R. CRIM. P. 12 and 34

Judge Tallman reported that the advisory committee was seeking authority to publish amendments to Rule 12 (pleadings and pretrial motions) that would clarify which motions must be raised before trial and the consequences if not timely raised. He noted that a proposal had first been presented to the Standing Committee in 2009. But it had been returned for further study, and the advisory committee was asked at that time to consider the differences between "waiver" and "forfeiture" and whether some or all violations of Rule 12(b)(3) should be considered forfeited rather than waived.

Professor Beale pointed out that the impetus for the proposed amendments had been the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002). The Court held in *Cotton* that the defects in an indictment are not jurisdictional in nature, so the court continues to have jurisdiction over the case if the defendant fails to file a motion to dismiss based on those defects. Accordingly, she said, defendants should be channeled into raising defects in the indictment before trial. Therefore, the proposed amendments specify that a motion based on a defect in the indictment must be made before trial if the basis for the motion is reasonably available before trial and the motion can be determined without a trial on the merits.

She added that in the current Rule 12, all defaults are described as "waivers," including inadvertent forfeitures. But failure to raise a defect in the indictment before trial is not like other "waivers" – a knowing, intentional waiver of rights. Therefore, in revising the rule, the advisory committee had to decide whether a defendant's failure to make the motion before trial should constitute to be characterized as a "waiver."

Judge Tallman explained that the advisory committee proposal would restructure Rule 12. Revised Rule 12(b)(2) specifies that a motion that the court lacks jurisdiction may be made at any time while a case is pending. Rule 12(b)(3) then lists all the motions that must be raised before trial.

Under revised Rule 12(e)(2), a party would "forfeit" any claim not timely raised if it is based on: (1) failure to state an offense; (2) double jeopardy; or (3) the statute of limitations. Relief from a forfeited claim would be governed by Rule 52(b) (plain error).

Under revised Rule 12(e)(1), a party would "waive" any other defense, objection, or request listed in Rule 12(b)(3) if not timely raised by motion. The court could grant relief upon "a showing of cause and prejudice." Professor Beale noted that the choices that the advisory committee had made on the list had been derived in large part from the case law and how the courts have been addressing these motions.

Several members suggested specific refinements in the list and in the language of the proposed amendments. One pointed out that the Supreme Court had sharpened the distinctions between forfeiture and waiver and questioned retaining the word "waiver" in Rule 12. She suggested that "waiver" in Rule 12 was a peculiar, unique use of the term because it does not deal with a knowing and intentional relinquishment of a right. The rules, she said, should not retain an idiosyncratic use of the term. The committee should aim for clarity, but the current language of the amendment had not yet achieved it in this particular respect.

A participant noted that the Department of Justice had initiated the request to revise Rule 12 because it wanted to make clear that a failure to raise the defense of a defect in the indictment is waived if not asserted before trial. But the advisory committee's deliberations had broadened the scope of the proposal to address other defenses, such as double jeopardy and the statute of limitations.

Judge Tallman pointed out that the advisory committee had spent a great deal of time focusing on the concepts of waiver and forfeiture. By using "waiver," he said, the committee was indeed trying to address matters that involve a knowing relinquishment of a right. But several lawyers had informed the committee that many lawyers do not even think about these issues until later in a case. The proposed rule, therefore, in effect imposes a due diligence requirement on counsel.

The participants debated the differences between waiver and forfeiture, the consequences of each, and which of the two carries the more stringent consequences. One participant suggested that in light of the uncertainty surrounding the two terms and the consequences flowing from them, it might well be better to introduce a new term in the rule, such as "default." Others concurred and recommended deleting the term "waiver" from the rule entirely and replacing it with alternative language.

A member emphasized that the proposed Rule 12 amendments, though not yet perfect, will be very beneficial. They will give lawyers and judges necessary clarity and provide a very helpful check list for the bench and bar. She recommended that the amendments be published for public comment, perhaps using an alternate term for

"waiver." Another member agreed that the revised rule was very valuable, but recommended that the language be refined further before being published.

Professor Beale suggested that the published rule might use the word "default" and place both "default" and "waiver" in brackets in the text to solicit public comments on them. The advisory committee might also bracket the words "double jeopardy" and "statute of limitations" in proposed Rule 12(b)(3) and ask for comments on whether those claims should moved from the forfeiture category to the waiver category. A member endorsed that approach and pointed out that including the alternatives in brackets will avoid the need to republish the rule if further changes are made after publication.

Several participants emphasized that the advisory committee was on the right track and should continue to refine the rule. One urged the committee to be more adventuresome in drafting the rule and devise new language to replace "waiver" and "forfeiture." He suggested that the standards for relief under the two concepts are not clearly stronger or weaker than each other. Another participant, though, expressed concerns about changing the labels or tinkering with the substance of current standards because a great deal of law had already been built on the current rule.

Ms. Claggett urged the advisory committee to continue its work. She suggested that the current Rule 12 is incorrect, is inconsistent with *Cotton,* and needs to be changed. She said that the drafting problems could be worked out.

Judge Tallman expressed reservations about sending the rule back to the advisory committee again for another round of drafting in light of the continuing uncertainty and apparent lack of consensus. But several participants said that the proposed amendments were a major improvement over the current rule, and they urged further refinement in the language.

Judge Rosenthal pointed out that it had been very helpful for the advisory committee to have brought the revised draft of Rule 12 to the Standing Committee for a thorough discussion. She said that many excellent suggestions had been made. As a result, it appeared to be the clear consensus of the Standing Committee that: (1) the advisory committee's recent restructuring of the rule was very beneficial and represented a major improvement over the current rule; and (2) the advisory committee should continue to refine the language and return to the Standing Committee in June 2011 for approval to publish the rule, perhaps placing certain terms in brackets to attract public comment.

The committee without objection by voice vote approved the proposed amendments in principle and asked the advisory committee to continue refining them for presentation at the June 2011 Standing Committee meeting.

Informational Items

FED. R. CRIM. P. 16

Judge Tallman complimented the Federal Judicial Center for its excellent work in conducting a major survey of the bar on the issue of pretrial disclosure of exculpatory and impeachment information under *Brady v. Maryland*, 373 U.S. 83 (1963) and later cases. He noted that the survey had been sent to 1,500 federal judges, all the U.S. attorneys' offices, and 16,000 criminal defense lawyers. The response rate, he said, had been the highest of any Center survey ever. In addition, the survey had elicited 700 pages of detailed written comments.

The study, he said, had separated the federal judicial districts into two categories – districts that adhere literally to the current requirements of FED. R. CRIM. P. 16 (discovery and inspection) and those that have local rules supplementing Rule 16 with additional disclosure requirements. He added that the criminal discovery system must work within the framework of the Jencks Act. In practice, however, the statutory time frame is often honored in the breach. Disclosure of information by prosecutors before trial often helps to make the system work effectively and avoid trial adjournments.

Judge Tallman said that the central question for the advisory committee was to decide whether Rule 16 should be amended to require disclosure of exculpatory and impeaching information. He pointed out that 51% of judges responding to the Federal Judicial Center survey (64% in the broader disclosure districts) had favored an amendment to Rule 16 because it would: (1) eliminate confusion as to the "materiality " requirement for impeaching information; and (2) reduce the wide variation of discovery practices now existing among the federal courts and among individual judges. On the other hand, judges opposed to amending Rule 16 had asserted that the current system was working well and no changes were needed.

Judge Tallman noted that the Department of Justice opposed any amendment to Rule 16 and agreed with the reasoning of the judges who opposed changing the rule. The Department, he said, also emphasized another reason for opposition. It cited several important internal reforms that it has made, including: (1) major national efforts greatly increasing the advice and training given prosecutors and staff regarding their disclosure obligations; (2) appointment of a national discovery coordinator; and (3) establishment of local district discovery plans. He also pointed out that the Department stressed that there have been, on average, fewer than two complaints a year alleging *Brady* violations by prosecutors, even though 86,000 criminal cases had been filed in the federal courts last year.

He noted that a major concern raised by opponents of an expanded Rule 16 was its potential effect on the privacy and security of cooperating witnesses. The advisory

committee, he said, was extremely sensitive to that concern and to the impact that every proposed amendment may have on victims' rights. The Federal Judicial Center survey responses, though, showed that the great majority of respondents other than the Department of Justice had stated that an expanded rule would have little or no negative impact on witnesses. Nevertheless, the U.S. attorneys' offices remain very wary, and they argued that there is no way to know in advance with certainty whether there is going to be a threat in any particular case.

He suggested that it might have been better to have surveyed individual lawyers in the U.S. attorneys' offices, rather than the offices themselves. He pointed out that the survey had elicited many anecdotes and insights from the 5,000 individual defense lawyers, but very few details from the U.S. attorneys' offices. Therefore, it is difficult to fully assess the threat to cooperating witnesses in particular cases.

Judges who opposed a rule change in the survey had said that the gain to be derived from the rule would simply not be worth the gamble. Some had cited the potential chilling effect that an expanded rule would have on potential witnesses, even though many of them will not be called to testify at trial.

He said that U.S. attorneys' offices in the survey had relied heavily on the Jencks Act. They also responded that disclosure of information to defendants without regard to its materiality will result in making the lives of all potential witnesses an open book. It will also create a real risk that witnesses will simply refuse to come forward and cooperate or testify. At a minimum, moreover, any potential rule would have to include an exception for national security cases and certain other types of cases. Prosecutors should also be allowed in certain cases to defer turning over information until after the witness testifies.

The survey responses also showed, though, that judges have several devices to deal with security concerns, such as issuing protective orders. The survey also indicated that the defense bar was apparently not too concerned about the ethical problem raised by protective orders that prohibit them from disclosing information to their clients. They would rather have the information.

Proponents of an expanded disclosure rule also pointed out that exculpatory and impeaching information is turned over regularly in the state courts without adverse effects. They also argued that defendants for the most part already know who is going to testify against them.

On the other hand, survey respondents who oppose expanding Rule 16 had said that it would negatively impact safety and privacy and have a chilling effect on witnesses. Lawyers representing cooperating witnesses had also opposed greater

disclosure and said that their clients would be labeled as snitches and their safety in prison could not be guaranteed.

Judge Tallman said that it would be difficult to draft a rule requiring disclosure before trial that could be reconciled with the timing provisions of the Jencks Act. It would be necessary to ask Congress to change the Act. The rules committee, he advised, should not attempt to invoke the supersession clause of the Rules Enabling Act.

A member added that the Department had taken many important internal initiatives to emphasize the obligations of prosecutors to disclosure exculpatory and impeaching information. The Department, moreover, has asked that these initiatives continue to play out before the rules committees take any action on amending Rule 16.

Another member suggested that as long as the Department of Justice is adamantly opposed to a rule, the proposed amendments will never come to pass. The committee, therefore, should defer further action on the proposal.

Judge Tallman said that because of the sharp disagreements on fundamental, controversial issues among both bench and bar, the advisory committee was in a conundrum as to what to do. Much of the discussion to date, he said, had been general in nature and focused on broad policy concerns. The debates, though, have not identified with necessary precision the specific kinds of information that should be disclosed by prosecutors. A broad recommendation to delete the materiality requirement, for example, is well-meaning. But it would require disclosure of virtually everything, and it might well be unworkable.

He said that the advisory committee will have to decide at its next meeting whether to proceed at all with Rule 16 amendments. If it does decide to proceed, it will also have to decide the specifics of what to include in the amendments. He reported that the advisory committee was also considering developing a discovery check list that might be included in the Bench Book for District Judges. In addition, it was conferring with the Federal Judicial Center on publishing a best-practices guide that could be helpful to the litigating bar.

Judge Rosenthal pointed out that a great deal of creativity had been devoted to the issue, including the various non-rule approaches for dealing with disclosure of *Brady* materials. The debate, she said, had been a healthy development, and a great deal had already been accomplished, even without a rule change. The rules committees, however, will have to consider how much time and resources to continue devoting to the matter.

Judge Tallman added that about a third of the federal district courts have not waited for a national rule and have issued their own local rules, which offer quite varied solutions. Therefore, there is currently a lack uniformity in the federal courts.

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 November 3, 2010 (Agenda Item 8). Judge Fitzwater reported that the advisory committee had no action items to present.

Informational Items

Judge Fitzwater reported that the advisory committee will hold its October 2011 meeting at the William and Mary Law School. In conjunction with that meeting, the advisory committee will host a symposium to commemorate the restyled evidence rules scheduled to take effect on December 1, 2011. The committee was planning to hear from a number of judges and law professors on the restyling process. He invited the Standing Committee members to attend.

He noted that the advisory committee expected to seek approval from the Standing Committee at its June 2011 meeting to publish a proposed amendment to Rule 803(10) – the hearsay exception for the absence of a public record. The change would be another in the line of fixes required by the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), dealing with testimonial statements.

He pointed to the Court's 2009 decision in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), holding unconstitutional a state procedure that allowed conviction on the basis of a certificate of forensic test results without personal testimony. The proposed amendment to Rule 803(a), he said, would adopt a notice-and-demand procedure, under which the government could give notice to the defendant of its intent to produce a certificate without personal testimony, and the defendant in turn could demand that the witness who produced the results testify in person at trial. In the absence of such a demand, the matter could proceed without the testimony.

He noted that Professor Capra had reviewed all the evidence rules for potential *Crawford* problems and had found no others. He added that the advisory committee was also working on a possible amendment to Rules 803(6), (7), and (8) that had surfaced during the restyling process.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi, chair of the Privacy Subcommittee, presented the subcommittee's report. (Agenda Item 11)

Judge Raggi reported that the agenda book included the subcommittee's report on the 2007 federal privacy rules. The subcommittee, she said, had also produced several appendices to the report that documented the subcommittee's inquiries and the data that it had gathered.

Judge Raggi noted that the subcommittee in conducting its review had made extensive efforts to obtain information about: (1) how the privacy rules are working; and (2) how they might be improved. Among other things, she said, the subcommittee had explored whether there are any additional privacy needs that the current rules do not address.

She summarized the report's findings and recommendations, including the key conclusion that the privacy rules are being implemented effectively by courts and parties. In essence, judges, lawyers, and clerks are doing their jobs well. She explained that there was no need to amend the privacy rules at this point. Nevertheless, the subcommittee pointed out some areas where further implementation was in order, such as continuing education, periodic monitoring, and experimentation.

She explained that the Judicial Conference's privacy policies, now embodied in the 2007 federal privacy rules, had been developed by the Court Administration and Case Management Committee. Fundamental to the current Conference policy is the concept that "public is public," *i.e.*, that court records available to the public at the courthouse should also be available to the public on the Internet. The subcommittee, she said, did not attempt to revisit that policy, and it invited members of the Court Administration and Case Management Committee to serve on the subcommittee.

The subcommittee, she said, had studied the problems comprehensively and had collected substantial data that will be of continuing value to both committees. It had received a great deal of research and other staff assistance from both the Administrative Office and the Federal Judicial Center.

She noted that the subcommittee had examined a complaint that social security numbers appear widely in court records. The staff, though, had examined all the case files of the federal courts, and the evidence clearly showed the opposite conclusion. Unredacted social security numbers appear in very few cases and seem to be a minor problem. Nevertheless, the subcommittee urged continuing monitoring and spot checking, and the report recommended that the Federal Judicial Center conduct a random review of case filings every other year.

In addition, the subcommittee had sent a questionnaire to judges, clerks of court, government lawyers, and private lawyers asking about privacy practices in federal cases. The vast majority of the respondents stated that they were aware of the privacy rules and their redaction obligations.

The subcommittee had also conducted critical studies and convened a major conference on privacy and public access at Fordham Law School in April 2010. The conference included nearly 100 people with a strong interest in privacy matters, including judges, lawyers from all segments of the legal profession, prison officials, professors and the press. Every point of view was represented. There were, of course, conflicting views, but the conference provided the subcommittee with a great deal of information and a broad perspective, which are reflected in its report.

Judge Raggi reported that although the subcommittee had concluded that no changes were needed in the federal rules at this point, three points needed to be made. First, the subcommittee had discovered in its research that a few local-court rules conflict with the national rules by imposing additional requirements on parties. The subcommittee would prefer to deal with that issue in the traditional way by communicating with the chief judges of the pertinent courts and pointing out the discrepancies.

Second, there is the unresolved problem of how to deal with cooperating witnesses in criminal cases. Different practices prevail among the district courts on whether cooperation documents should be filed or made public. Two separate panels at the Fordham conference had been devoted to the issue.

The professors and lawyers on one panel agreed that there should be a national rule addressing the subject, but there was no consensus among them as to what that rule should provide. The other panel, composed of judges, emphasized that their courts had studied the problem carefully, had discussed it with the bar, and had debated at length before adopting their local rules and practices. Each court was convinced that they had arrived at the right solution after all the study and collaboration, but the courts arrived at very different solutions. So, she said, there is no single best practice that could be embodied in a national rule at this point.

In addition, the subcommittee had invited the Department of Justice to offer a model national rule. It had not yet produced a rule because the topic had generated extensive discussion and debate within the Department.

Third, there is a potential issue that may arise in the future with voir dire transcripts, particularly in criminal cases. Recent Judicial Conference policy states that jury selection should be presumptively open to the public. The voir dire transcripts, accordingly, will be posted on the Internet. No problems had been reported yet, and a rule change is not in order, but concerns have been expressed about the privacy and safety of potential jurors.

Judge Raggi thanked Professor Capra for his enormous support to the Privacy Subcommittee and for organizing the conference at Fordham Law School. Professor

Capra, in turn, thanked Heather Williams and Henry Wigglesworth of the Administrative Office and Joe Cecil and Meaghan Dunn of the Federal Judicial Center for their substantial staff assistance to the subcommittee.

Ms. Shapiro thanked Judge Raggi and Professor Capra on behalf of the Department of Justice for their support in addressing the issue of protecting the privacy and security of witnesses and cooperators. She noted that the Department was continuing to work on promoting greater uniformity of practices among the districts.

Judge Raggi emphasized that the subcommittee's study had been comprehensive, and it concluded that no further action was needed at this point. She said that the subcommittee would continue its efforts and would continue to coordinate with the Court Administration and Case Management Committee.

The committee unanimously by voice vote approved the subcommittee's report for submission to the Judicial Conference as an information item. It further agreed to continue working collaboratively with the Court Administration and Case Management Committee on privacy issues.

REVISION OF RULES COMMITTEE PROCEDURES

Judge Rosenthal pointed out that the *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* govern the work of the rules committees. She reported that the procedures had been very effective, but they had not been updated since adoption by the Conference in 1983. She noted that committee staff and the reporters had prepared a draft revision of the procedures, and she invited the participants' comments.

Professor Coquillette summarized several of the changes that the proposed revisions would make in the current procedures. He noted that the suggested changes were not major, but they should bring greater clarity and direction to the process and define more sharply the respective responsibilities of the standing committee, the advisory committees, the reporters, and the staff. In addition, he said, the revised procedures adhere to the style conventions used in restyling the federal rules.

Judge Rosenthal added that the rules committees are "sunshine" committees, but there is disagreement over the contours of what documents and information must be made public. Some have suggested that e-mails, routine letters, draft documents, and subcommittee transactions should be public. Others countered that posting those materials is unnecessary and would chill and impede decision-making. Instead, only formal meetings and final drafts need be considered public.

LONG RANGE PLANNING

Judge Rosenthal reported that the committee had examined the Judicial Conference's new long-range plan and would report to the Conference's Ad Hoc Advisory Committee on Judiciary Planning on strategic initiatives that the rules committees were taking to implement the plan. She invited the members to send her any suggestions they may have.

NEXT MEETING

The committee will meet hold its next meeting on Thursday and Friday, June 2 and 3, 2011, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary