MINUTES

CIVIL RULES ADVISORY COMMITTEE

OCTOBER 8-9, 2009

The Civil Rules Advisory Committee met in Washington, D.C., at the Georgetown University Law Center on October 8 and 9, 2009. The meeting was attended by Judge Mark R. Kravitz, Chair; Judge Michael M. Baylson; Judge David G. Campbell; Judge Steven M. Colloton; Judge Paul S. Diamond; Professor Steven S. Gensler; Judge Paul W. Grimm; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Peter D. Keisler, Esq.; Judge John G. Koeltl; Chief Justice Randall T. Shepard; Anton R. Valukas, Esq.; Judge Vaughn R. Walker; and Hon. Tony West. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Associate Reporter. Judge Lee H. Rosenthal, Chair, and Judge Diane P. Wood represented the Standing Committee, along with Professor Daniel R. Coquillette, Standing Committee Reporter. Laura A. Briggs, Esq., was the court-clerk representative. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office. Joe Cecil, Jill Gloekler, Emery Lee, and Thomas Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Andrea Kuperman, Rules Clerk for Judge Rosenthal, attended. Observers included Professor Sherman Cohn; Alfred W. Cortese, Jr., Esq.; Joseph Garrison, Esq. (National Employment Lawyers Association liaison); John Barkett, Esq. (ABA Litigation Section liaison); Ken Lazarus, Esq. (American Medical Association); Alan Morrison; and John Vail, Esq. (American Association for Justice).

Judge Kravitz opened the meeting with a general welcome to all present. He expressed deep appreciation to Georgetown for making their school available for the meeting. He observed that in the 1970s there was only one building; now there are three, "and even grass, which did not exist when I was in law school." Particular thanks went to Dean Aleinikoff and Professor Cohn. The plan to meet here was launched early in the summer when Judge Kravitz and Professor Cohn met while testifying on the Sunshine in Litigation Act.

Judge Kravitz congratulated Assistant Attorney General West on the work he has begun at the Department of Justice.

Judge Kravitz reported that Judge Wedoff, our always cheerful and unfailingly helpful liaison from the Bankruptcy Rules Committee, was badly injured while bicycling. Judge Wood added that although the injury was quite serious, Judge Wedoff is recovering well, although not as rapidly as his ambition to get back to full-time work.

Judge Kravitz noted that the Chief Justice has reappointed Chief Justice Shepard, Anton Valukas, and Judge Walker as Committee Members. He also has appointed two new members. Judge Diamond, E.D.Pa., is a Penn Law graduate, a veteran of the U.S. Attorney's Office, and was counsel to Arlen Specter's 1996 presidential campaign. Judge Grimm, D.Md., is well known for his articles and books on e-discovery, civil procedure, and trial practice. Both are warmly welcome.

John Barkett is the new liaison from the American Bar Association Litigation Section. Among other accomplishments, he is a prolific author of texts on e-discovery. It is important to have the strong liaisons from bar groups that we have enjoyed. The Committee owes a collective debt of gratitude to Jeff Greenbaum for his long and outstanding service in this role, contributing most recently to the work on discovery of expert trial witnesses.

The Committee, and particularly Subcommittee Chairs Judges Baylson and Campbell, were congratulated on the event of the Judicial Conference's consent-calendar adoption of the current Rule 56 and 26 proposals. Judge Wood added that Judge Rosenthal's fine management of the Judicial Conference submission was an important factor in movement through the consent calendar.

Judge Kravitz noted that the Time Computation Project Rules amendments are moving steadily toward taking effect on December 1, 2009. While on the Standing Committee, he chaired

the Time Computation Subcommittee, and was closely involved with the hard work of all the advisory committees. Judge Rosenthal worked hard and successfully to facilitate Congressional adoption of conforming amendments to several statutes, enacted to also take effect this December 1.

The past summer was not idle on the rulemaking front. Judge Koeltl moved with great speed to sew together the topics, presenters, and panels for the May 2010 Conference to be described more fully below. The Federal Judicial Center administered its discovery survey. Judge Campbell and Professor Marcus worked with the Discovery Subcommittee to refine the Rule 45 subpoena project. Judge Colloton convened the Appellate-Civil Rules Subcommittee to begin work on several topics that may benefit from coordinated proposals for both sets of rules. Work with Congress continues, particularly with protective-order bills. Senator Specter has introduced a bill that would restore the pleading tests adopted by federal courts before the Supreme Court opinions in the Twombly and Iqbal cases. John Rabiej has been terrific in working with the Committee Chairs and Congress. Andrea Kuperman has done spectacular work in two memoranda on case law. The first addresses entry and modification of protective orders. The second focuses on what is happening in the early days of reaction to the Iqbal decision. It is good that Judge Rosenthal has been able to make so much of Ms. Kuperman's time available for Civil Rules projects.

The work of the summer reflects the vanished hope that the summer might provide a respite from hard Civil Rules work in the wake of the recently concluded Rules 26 and 56 projects, looking forward to the 2010 Conference as the next major beginning. "But we've been hijacked by Congress and the Supreme Court."

Judge Rosenthal recognized Peter McCabe's 45 years of government service, continually since graduation from law school, including 40 years now with the Administrative Office.

Judge Hagy was thanked with great appreciation for his years of service on the Committee. He responded that it has been a great six years. The process of Committee work is wonderful. "The number of ways to see the same problem reflected by so many minds is dazzling." Expressing sadness on the completion of Judge Hagy's terms with the Committee, Judge Kravitz presented Judge Hagy a commendation for distinguished service to the Civil Rules Committee. Judge Hagy thanked Judge Kravitz and the Committee.

Minutes

The Committee approved the draft Minutes for the April 20 and 21, 2009 meeting, subject to correction of typographical and similar errors.

2010 Conference

Judge Kravitz observed that the 2010 Conference is shaping up to be a major event. It will provide a chance to look at what we have been doing, and may need to do in the future. Many judges and academics are clamoring for the opportunity to come to the conference. The empirical data being gathered by a variety of sources will be important. The Federal Judicial Center, in particular, should be thanked for its response to the Committee's requests for work.

Judge Koeltl began his summary of the plans by noting that this event has come to be known as "*The* 2010 Conference." The planning committee has enjoyed a phenomenal acceptance rate from the people asked to participate. Plaintiffs' lawyers, defense lawyers, judges — both state and federal, and academicians have been enlisted.

Topics covered will include two panels on empirical research, and panels on pleadings and dispositive motions; issues with the current state of discovery; judicial management of the litigation process; e-discovery; settlement; perspectives from users of the system; perspectives from the states;

bar association proposals; observations from those involved in the rulemaking process over the years; and — briefly — summaries and conclusions that may be able to sketch some of the refinements and distillations to be accomplished in the aftermath.

The Duke Law Journal will publish the major papers. There will be an "overflow of additional information."

The conference is not a CLE enterprise. The purpose is to discover where we are, how to make the system better. There will be many points of view. Consensus will be welcome when it emerges and will help to guide future projects. Work will continue on areas of disagreement.

The Federal Judicial Center discovery research has already been noted. The American College of Trial Lawyers and The Institute for the Advancement of the American Legal System have done a major survey; they are working on proposed rules to build on the results. The IAALS is doing additional substantial work, including a survey of Arizona lawyers to gather views on the Arizona disclosure rules. They also are doing a survey of Oregon lawyers. They are doing an additional survey of in-house lawyers, reflecting the belief that their views may differ from the views of their outside lawyers. They also are doing work on the costs of litigation. The Denver Law Review will devote an issue to possible changes in the rules suggested by all this work. Nick Pace at RAND is gathering information on costs at various stages of the litigation process; he tells us that the corporate world is aware of the 2010 Conference project.

Gregory Joseph's paper on e-discovery is in hand. It looks at preservation, sanctions, rules, and searching. Judge Holderman in the Northern District of Illinois has a pilot project on e-discovery rules; we hope to have something from it as well. Elizabeth Cabraser has done a paper on the current state of discovery from the plaintiff's perspective, looking at defense failures to produce, tactics of attrition, and the need for civility. She ends up supporting the American College - IAALS proposals as a package, though not for piecemeal adoption; discovery should not be limited unless there is more up-front disclosure. Judge Higginbotham's paper questions the directions courts are taking, suggesting that district courts are acting more as administrative agencies than as the trial courts they once were. He proposes restoration of 12-person juries, but allowing 10-2 majority verdicts. He also advises early judicial intervention, with a peek at the merits to focus discovery. He strongly disagrees with Iqbal and Twombly. Justice Hurwitz's paper focuses on the Arizona rules, which require much more mandatory up-front disclosure than the federal rule requires. Professor Miller's paper is almost finished. It will be a major contribution on the direction of the federal rules process, focusing on Iqbal, Twombly, and summary judgment.

The Administrative Office is close to creating a web site for participants in the conference to have access to all the materials.

The Chief Justice "is inclined to do an introduction" to the Duke Law Journal issue on the conference. Deputy Attorney General David Ogden is considering an invitation to appear at the conference.

Papers from any of the panel participants will be welcome.

Judge Kravitz thanked Judge Koeltl for the splendid organization work. The task is like conducting an orchestra, keeping it focused and together. The empirical data will be available well in advance of the conference, at least for the most part, enabling all panelists to draw on it.

The Conference will be an open event. It is important that it be open. Physical constraints will be imposed on the number of people who can meet in a single room, but arrangements will be made to transmit the proceedings to an overflow room by video feed.

Federal Judicial Center Discovery Study

Thomas Willging introduced the FJC Discovery Study, noting that Emery Lee has done the brunt of the work.

Emery Lee then described the present state of the project. "This is a work in progress." Late in 2008 The Center was asked to explore discovery and e-discovery. The present study is similar to the Center's 1997 study, but has been reframed with help from many people. Jill Gloekler has done a lot of work on the study.

The study was framed by asking attorneys about their cost experiences in a particular case. The cases were chosen from all of the cases that closed in the federal district courts in the last quarter of 2008. Low-discovery categories of cases were excluded in selecting the cases. Cases that were actually tried, and cases that had endured on the docket for four years or longer, were oversampled — all of those cases were included. An additional 2,689 cases were chosen from the 16,810 cases that remained, giving an initial sample of 3,550 cases. E-mail addresses were obtained from CM/ECF files for 5,685 attorneys. The survey was sent to all; 2,690 responded, giving a response rate of 47.3%, although not every respondent answered every question. About as many plaintiffs' attorneys as defense attorneys responded. Over 270 solo attorneys who represent plaintiffs responded. There also were many lawyers from large firms. The respondents appear to represent a good cross-section of the federal bar.

A variety of the initial findings were described:

Of the cases in which there was some discovery, plaintiff attorneys reported there was some e-discovery in 38.9%, and defendant attorneys reported e-discovery in 33.4%. (Figure 7) Future work will break these responses down according to categories of cases. One potential complication in these numbers is that it was not feasible to draft the survey questions in a way that would ensure that respondents would describe as e-discovery documents that were retrieved from computers but produced in paper form.

There were many e-discovery cases in which plaintiffs were both requesting and producing parties, and many in which defendants were both requesting and producing parties. See Figure 8.

Disputes about e-discovery were relatively rare. 72.4% of plaintiffs and 78.3% of defense attorneys reported no disputes arose. Very few cases had four or more disputes. Sanction requests also were rare, appearing in slightly over 2% of the cases.

Litigation holds were used by parties who both requested and produced e-discovery materials in 52.6% of cases, and by parties who only produced in 47.5%. Relatively large numbers of respondents could not answer this question. But parties who only produced e-discovery materials did not use a freeze in about 28% of the cases and were unable to say whether a freeze was imposed in about 27%. Figure 9.

The survey produced much information about the costs of discovery. The median reported by all plaintiff respondents was $15,000, with a 10th percentile of $1,600 and a 95th percentile of $280,000. The $15,000 median is 12% higher, after adjusting for inflation, than the median in the 1997 survey. The median was much higher in cases with any electronic discovery, reported at $30,000; the 10th percentile for those cases was $3,000, and the 95th percentile was $500,000. The figures for e-discovery rise higher still for a party who both requests and produces ESI: the median is $65,000, the 10th percentile $5,000, and the 95th percentile $850,000. The numbers reported by defendants are somewhat different. For all cases in which there was some discovery, the median is $20,000, the 10th percentile $5,000, and the 95th percentile $300,000. For defendants in cases with any e-discovery the median is $40,000, the 10th percentile $6,214, and the 95th percentile $600,000. When the defendant is both a producer and requester of e-discovery, the median is $60,000, the 10th percentile $10,000, and the 95th percentile $991,900.

Table 10 shows the attorneys' estimates of the relationship between discovery costs and the stakes. For plaintiff attorneys the median was 1.6%, the 10th percentile 0, and the 95th percentile 25%. For defendant attorneys the median is 3.3%, the 10th percentile 0.2%, and the 95th percentile 30.5%. The medians are rather low. The median in 1997 was 3%. It is important, however, to note that the "stakes" were defined as the spread between the best and worst outcomes the client could reasonably expect, not the absolute judgment. Subjectively, most respondents thought the relationship between discovery costs and the stakes was just about right. This result contrasts with the American College survey, which concludes that we spend far too much on discovery.

Turning to the rules in operation, Figure 22 illustrates responses to the question asking the point — if any — at which the central disputed issues were adequately narrowed and framed for resolution. Everyone thought that this point was reached earlier in the case identified by the survey than typically happens. Plaintiffs always think it happens earlier than defendants think. Convergence of plaintiff and defendant estimates occurs only late in the case — at summary judgment, or a post-discovery pretrial conference.

Figure 13 shows that a majority of both plaintiff and defendant attorneys thought discovery yielded just the right amount of information. Plaintiff attorneys were more likely to think it generated too little information, while defendant attorneys were more likely to think it generated too much information.

Figure 32 shows that approximately equal numbers of lawyers agree or disagree with the statement that litigation in federal courts is more expensive than litigation in the state courts in which they practice.

Figure 34 shows responses to the statement that discovery in federal courts leads to more reliable and predictable case outcomes than in courts with more restricted discovery. There were many neutral responses, perhaps reflecting lack of experience in courts with more restricted discovery. Of those who expressed opinions, agreement or strong agreement outstripped disagreement by wide margins. But still about 20% of the respondents disagreed.

Figure 43 summarizes responses to the statement that the outcomes of cases in the federal system are generally fair. 80.3% of the lawyers primarily representing defendants agreed or strongly agreed. For those primarily representing plaintiffs, 53.9% agreed or strongly agreed, while for those who represent plaintiffs and defendants about equally the number is 69.2%.

Figure 44 shows responses to the statement that the procedures employed in the federal courts are generally fair. 67.8% of plaintiff attorneys agreed or strongly agreed. The number for attorneys who represent plaintiffs and defendants about equally is 78.7%, and for defendant attorneys is 85.5%.

The study is still in a "very preliminary" stage. Multivariate regression analysis will be done on the cost information. And more work will be done on the volume of e-discovery in the cases that have it.

Judge Kravitz thanked Judge Rothstein and the FJC for all the work that has been done, and remains to be done. These data, and other data being gathered for the 2010 Conference — including the ABA Litigation Section version of the American College survey, and a survey by the National Employment Lawyers Association — will be very important. Judge Rosenthal added that it was heartening that more than 900 lawyers responding to the FJC survey took the time to write comments in the free-comment block.

Rule 4: Service on Government Employees and Judges

Judge Kravitz reminded the Committee of the April discussion about means of serving

government employees, including judges. The question arises in actions against these defendants in their individual capacities. Concern focuses on in-hand service. But simply providing alternatives to in-hand service will not address those concerns. Only elimination of permission for in-hand service would do that. And it might seem difficult to eliminate in-hand service.

It is possible that a judge who prefers to avoid in-hand service could designate the court clerk as the agent for service, and give notice of that on the court's web site. But it does not seem likely that many judges will want to advertise an easy means of launching individual-capacity litigation.

The April discussion did not show much interest in a general rule for all government-employee defendants. But it was thought that judges might be a distinct category, in part because it is easy to rely on service on the clerk of the judge's court for service on the judge. That question has been put to other Judicial Conference Committees. Although little interest was shown, it is on the agenda of the Judicial Branch Committee. The Security Committee had no interest. If the Judicial Branch Committee concludes that there is no need to consider these questions, they are likely to be dropped from the Civil Rules agenda.

Rule 6(d) Three Days are Added

Judge Kravitz introduced the Rule 6(d) topic. Rule 6(d) adds three days to any time specified to act after service when service is made by any means other than in-hand delivery or leaving the paper at a person's home or office. These other means include mail, leaving the paper with the court clerk if the person has no known address, sending by electronic means, and delivery by any other means the person consented to in writing. In the Time Computation Project the Subcommittee and several advisory committees decided to defer the question whether the three added days are appropriate in all the circumstances now provided. It is useful to reconsider the timing question now.

The most questionable instances are those where three days are added after e-service and after service by agreed means. When e-service was first authorized, the three days seemed useful. The CM/ECF system was still in its infancy — it was not clear whether it would work well, nor whether lawyers would seize the opportunity to effect service through the court's system. Lawyers said that it might take as long as three days to accomplish effective receipt of e-messages, particularly with attachments. The attachments to Rule 56 motions may run hundreds of pages, and there were problems with system compatibilities. Service by private carrier is not instantaneous, and only the most expensive means are likely to accomplish next-day delivery.

Despite these questions, lawyers will surely see any reduction of the categories that allow three added days as taking away something they count on. This seems particularly true for e-service, which ordinarily arrives the same day as transmitted. Moreover, the Time Computation Project amendments take effect this December 1. It might be wise to see how they work before undertaking further adjustments. The three-day addition "is a small thing; why not let the bar absorb the new rules" before looking toward further changes?

Laura Briggs has provided great help in explaining how e-service through the court's facilities works. She found that in her court approximately 5,000 notices of electronic filing are received each day. Of them, 20 to 30 are initially undeliverable. The clerks immediately investigate the undeliverable notices and are able to accomplish effective transmission of all but 2 or 3 within the next day. When delivery cannot be accomplished, notice is mailed — triggering the three extra days for mail delivery. In exploring the question with a bar group, however, she found great resistance to deletion of the three added days for e-service.

On an anecdotal level, lawyers still tell stories of as much as three days from docketing in

the court to receipt of e-notice, and rather often.

On a more general level, it was observed that this question affects Appellate Rule 26(c), Bankruptcy Rule 9006(f), and Criminal Rule 45(c). Criminal Rule 45(c) is virtually identical to Rule 6(d), but the others introduce variations. Any project to revise Rule 6(d) must be coordinated with the other advisory committees, perhaps directly or perhaps through a joint subcommittee.

The three added days for service by mail seems to make sense; if it were treated the same as direct delivery or e-service, lawyers would do everything possible to serve by mail so as to reduce the effective time available to respond. And pro se litigants, particularly prisoners, are likely to use mail service. When service is made on the court clerk because the person to be served has no known address, the three added days may be more symbolic than useful, but do no apparent harm. Service by other means consented to may not be a real problem, since consent might be conditioned on the most expeditious mode of delivery, and can be withheld in any event.

The question of e-service ties to the question of e-filing. Under Rule 5(d)(3), a local rule may require e-filing, although reasonable exceptions must be allowed. Many courts effectively require e-filing by lawyers. Rule 5(b)(2)(E) requires consent of the person served for e-service, and Rule 5(b)(3) allows e-service through the court's facilities if authorized by local rule. It may prove desirable to reconsider this package in tandem with the three-added day provision. Registering for e-filing is obviously coupled with consent to receive e-notice of filing from the court. So in the Southern District of Indiana, the local rules require all cases to be e-filed, subject to exceptions. Signing in for e-filing includes consent to e-notice. That might be made mandatory for all e-filing cases, carrying forward the requirement that reasonable exceptions be allowed.

The lawyer members were asked whether the Committee should move promptly to reconsider the three-added days. One said: "Enough already. This is all some of us have left. It is too soon after the Time Computation Project to make further changes." Another agreed, and added that e-service "does not always work that smoothly." A third added that some of the "darndest things" wind up in his junk-mail box; there is a real risk that spam filters will divert an e-notice away from the in-box.

Emery Lee added that the recent discovery survey used e-mail transmission, and that a non-negligible number of messages were bounced back and did not work. And sometimes the system has to try several times to get a good address to go through.

Laura Briggs added to the information about the success of her office in ensuring near-perfect e-transmission the results of a quick look at practices in other districts. Even a quick look showed at least two districts that explicitly refuse to monitor bouncebacks. That is cause for worry about eliminating the three added days.

Judges Kravitz and Rosenthal suggested that the other advisory committees are not likely to be disappointed if this Committee decides to postpone any reconsideration of the three added days. The Bankruptcy Rules Committee might have some regret — there is much greater pressure for fast action in many bankruptcy proceedings than in most civil proceedings. The Bankruptcy Rules Committee is working on the Part 8 appeal rules, seeking a model that approaches closer to the Appellate Rules. Their many conferences lead to questions that come back to e-filing: why is it necessary to adopt rules on the color of brief covers, when all is done electronically anyway? There is considerable pressure to make e-filing the norm. This affects service, filing, and more. E-records are upon us.

Two lawyer members observed that in the e-world they still print out copies, but limit the number and share the paper copies as different lawyers need them.

Judge Rosenthal suggested that it may be appropriate to undertake a project akin to the Style Project as a long-term reconsideration of every rule to remove vestiges of the bygone paper world. But the time has not yet come. E-filing must be allowed to become firmly settled first.

It was agreed that the question should remain on the agenda, and when it is taken up should be approached in a way that avoids any unnecessary differences among the different sets of rules.

Ashcroft v. Iqbal: Rule 8(a)(2)

Judged Kravitz began the discussion of pleading by noting that this clearly is an important topic. The successive decisions in the Twombly and Iqbal cases have generated great interest, some uncertainty, and real consternation in some quarters. The American College of Trial Lawyers is contemplating the possibility of moving to a system quite different from notice pleading. The immediate question is whether the Committee should begin the task of getting a grip on the ways in which lower courts are responding to these decisions. Some work has been done already.

The Administrative Office has begun to pull together CM/ECF statistics on the rates of filing and the rates of granting motions to dismiss.

Judge Rothstein has agreed to make the resources of the Federal Judicial Center available to help study the ways in which lower courts react to the uncertain messages in the Twombly and Iqbal opinions. It is enormously important to develop as much empirical information as possible to support the lessons that will be conveyed in lower-court opinions. The Center has provided invaluable assistance with many past Civil Rules projects, including much discovery work and some pleading work. If at all possible, the Committee should pace its own work to take maximum advantage of the Center's work. Joe Cecil will be our guide.

Andrea Kuperman has begun the running task of compiling and evaluating lower-court decisions. The purpose is to determine whether the lower courts are taking a context-specific approach, and — if so — to attempt to catalogue categories of contexts with identifiable and distinctive approaches.

If possible, it will be important to go beyond initial decisions to dismiss to determine what happens next. The frequency of amendments, and of successful amendments, is a central part of the dismissal picture.

The Committee was already looking at these questions in light of the Twombly decision. The 2010 Conference plans were well under way when the Iqbal decision was announced. The data collection and analysis, and the case collection and analysis, will help show the dimensions of any problems that may appear.

The Iqbal opinion can be read expansively, but it also can be read narrowly. Development over the near term may show outcomes similar to the aftermath of the Booker decision that converted the Sentencing Guidelines from a mandatory to an advisory role. If Congress had reacted immediately, it might have missed the mark. So it may be with respect to pleading — any hasty response in the Enabling Act process or in Congress might miss the mark. But ongoing consideration is not the same as hasty action. It seems wise to maintain constant attention.

The National Employment Lawyers Association may provide help in understanding the impact of new pleading approaches on employment cases. This is one illustration of a broader question whether there will be differential impacts on different types of cases.

Congress, however, may take the lead. S 1504 would direct courts to decide Rule 12(b)(6) and 12(e) motions to dismiss under the standards set forth in Conley v. Gibson. It is too early to

know whether any legislation will be enacted, or whether anything enacted will take the same form as the first bill. Revisions are always possible.

Further presentation of the challenges raised by the Twombly and Iqbal opinions began with the observation that the Court's concerns command careful attention. The Court has the advantage of a perspective slightly above the fray in the lower courts. Lower courts are accustomed to working in the accommodations they have made with the carefully developed combination of notice pleading, expansive discovery, and summary judgment. They believe, with real justification, that they are doing it well. But in both opinions the Court expresses obvious concern with the costs and burdens imposed by discovery in some kinds of cases. Years of repeated attempts to address these concerns by revising the discovery rules have not completely solved all the problems.

Exploring revised pleading practices does not come without cost. Whatever emerges at the end, the transition period will generate greater anxiety as plaintiffs frame complaints, defendants make more frequent motions to dismiss, and judges cope with uncertainty as to what is expected and what should be done. It seems likely that some complaints will be dismissed — and in the end fail totally after exhausting opportunities to amend — that would not have been dismissed under the pleading practices that prevailed in the first months of 2007 and that would not be dismissed under the pleading practices that emerge at the end of the development period. Nothing the Committee could do would forestall much of the transition cost. Even if the Committee could know precisely what rule amendments are desirable, it would take three years to test the amendments through the regular Enabling Act process. Lower courts would continue to develop pleading practices during the interim, and might well show the need to further revise what initially seemed precisely right. For that matter, it is unlikely that pleading practices could be returned to the status quo by a simple direction to reestablish the practices established on May 20, 2007. The Supreme Court's opinions cannot be recalled, and would continue to influence lower courts. Established pleading practices were far too fluid and variable even before Twombly and Iqbal for it to be otherwise.

In these early days it is difficult to venture any guess as to the eventual need for any rule amendments. The Supreme Court construed the language of present Rule 8(a)(2). If developing case law should show desirable developments of pleading practice, it may be best to leave the language of the rule unchanged. There would be little reason to attempt to confirm whatever changes may have emerged by choosing a new and equally open-ended set of words. Many other possibilities can be identified. One — the initial concern of many academic commentators — is that pleading standards will be raised too high, either in general or for particular classes of cases. If that should happen, something might be done to move back toward earlier concepts of "notice" pleading, but attempting to capture the restoration in rule language will be difficult. Another possibility is that pleading standards are not raised high enough, either in general or for particular classes of cases. That diagnosis would return matters to the questions that have been considered repeatedly by the Committee since the Leatherman decision in 1993. Several different paths toward heightened pleading were explored, and all were deferred or put aside for want of any confidence that they would bring significant improvements. The possibilities included revisions of Rule 8(a)(2) for all cases, perhaps establishing some form of "fact" pleading; adding specific categories to the Rule 9 enumeration of cases that require particularized pleading; and amending Rule 12(e) to establish a court-controlled process aimed at framing pleadings that will facilitate case management.

Pleading rules might be supplemented by other devices. England has initiated a "pretrial protocol" system for the most commonly encountered kinds of litigation. Prospective parties are required, under pain of significant disadvantages, to engage in exchanges of information akin to descriptive pleading and disclosure before an action is filed. Review of the first years of experience with this practice is ongoing. Other means might be found to integrate disclosure, discovery, and pleading. Judicially controlled and narrowly focused discovery might be developed to enable the

parties to make pleadings amendments that would better frame the action for further pretrial proceedings.

Additional questions remain. Twombly and Iqbal focus on the complaint. Should they be extrapolated to address Rule 8(c), requiring greater detail in pleading affirmative defenses? Might they even reach out to require an explanation whenever a responsive pleading denies an allegation?

Other rules as well must be considered. Rule 15 now provides generous leave to amend. Should more exacting pleading standards be accompanied by less forgiving opportunities to amend? Or, to the contrary, should leave to amend be still more freely available on the theory that the concern is to ensure that the opportunity for discovery is properly unleashed? Repeated rounds of pleading to define what a party must allege as a basis for recovery, if willing to undertake the burden of proving it, might entail substantially lower overall burdens than simply allowing payment of a filing fee and a virtually automatic pass into discovery.

Alternatively, pleading might remain as a relatively relaxed threshold, to be supplemented by extensive initial disclosures that pave the way for either a considerably more detailed second round of pleading or something that blends into a new procedure the present practices on motions to dismiss or for summary judgment.

The package of notice pleading with discovery could be revised in other dimensions as well. The most fundamental question to be addressed is the approach framed by Rule 11(b)(3). Rule 11(b)(3) is much more than a rule about pleading practice. It permits initiation and the further conduct of litigation only when, after reasonable inquiry, a party can "certify" that specifically identified factual contentions that do not yet have evidentiary support "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." This rule says it is proper to file a complaint even though you know you do not have the evidence required to establish the claim. Discovery will be provided to enable you to determine whether you actually have a claim. One way of looking at the Twombly and Iqbal decisions is as a challenge to this rule.

Rule 27's limits present yet another practice that may require further examination. Most courts now hold that Rule 27 does not support discovery to determine whether a would-be plaintiff can frame a complaint that meets even the generous threshold of Rule 11(b)(3). If plaintiffs are required to plead greater detail, making it less plausible to assert there will likely be evidentiary support, perhaps a procedure should be created to allow discovery in aid of framing a complaint, subject to relatively strict judicial control.

This introduction was supplemented by agreeing that the Court is clearly worried about the costs and burdens of discovery. The opinions seem to reflect skepticism about the effectiveness of case management in controlling these costs. The 2010 conference will address all of these issues, and may provide important new empirical information about present practice and opportunities for improvement.

John Rabiej discussed the Administrative Office project to gather CM/ECF data. Introduction of S 1504 makes it clear that it is important to begin immediate data collection. The Administrative Office statistical system is geared to information on opening and closing cases. It is not well geared to gather information on events in between opening and closing. But the system does give a national data base of court docket information. The Office was granted access to court dockets for the number and disposition of motions to dismiss. Unfortunately the character of the motions cannot be distinguished — motions to dismiss for failure to state a claim are lumped together with motions to dismiss for lack of subject-matter jurisdiction or personal jurisdiction, improper venue, or service defects. But it is possible to break the data down by categories of actions — personal injury, prisoner petitions, civil rights-employment, other civil rights, antitrust, patent, labor law, contracts, and "all others." Disposition by grant or denial is recorded. But there is no

information to tell whether leave to amend is granted; a manual search would be required to find that information.

The Administrative Office information is depicted in tables and graphs for a period of two years before the Twombly decision, the next period of two years between Twombly and Iqbal, and the months that have followed Iqbal. The numbers relate events month-by-month, but do not involve exact parallels. The number of cases filed represents the number of new cases in the month; the number of motions to dismiss granted represents actions taken that same month in cases filed earlier. This is a snapshot of docket information that does not support linking between the time of filing and the time of granting the motion to dismiss. Despite their limitations, the Administrative Office data do not show large increases in motions filed or the rate of grants.

Joe Cecil noted that the Federal Judicial Center has for many years considered looking at dispositions of motions. Data were gathered in 2000; there is a foundation for study. Further data gathering was deferred after Twombly, and "there still seems to be some churning in the cases." Recognizing that it is important to have data soon, the Center will begin working with the same data as the Administrative Office, even though the data do not differentiate different grounds for the motions to dismiss. The Center will have to look at the docket sheets, and they are messy. But it seems likely the Center study will be able to resolve the problems of gathering information about leave to amend. It is clear that there may be differential effects across case types. The study will be able to identify types of cases where Twombly and Iqbal are likely to have an effect, and other types in which they are not likely to have an effect.

Andrea Kuperman summarized her investigation of cases that cite the Iqbal decision. There are far too many cases to read. She concentrated on the cases flagged for serious consideration of Iqbal. In the first few months the decisions turn so much on the particular facts that it has been difficult to find any over-arching themes. The most general observation is that the results are context-specific. Ms. Kuperman stated that it appeared to her that the courts were not so much applying a different standard as erecting a new framework for analyzing motions to dismiss. And, although in the early days the courts of appeals are reviewing rulings made in the district courts before the Iqbal decision, the courts of appeals appear to be instructing district courts to be careful and thoughtful in applying this new framework. The pleading bar has been raised in some manner, but many cases continue to rely on a framework established by decisions rendered before the Twombly and Iqbal decisions. Some of the current cases say that courts have always required some facts in the pleading. But other courts are worried that the bar has been raised too high. It seems clear that the context-specific approach leaves real flexibility. Pro se plaintiffs are treated more generously. Some cases seem to cast doubt on pleading on information and belief. The "plausibility" requirement may yet establish a new framework. It may come to be more a new framework than a new standard. Courts are still trying to figure it all out, although it is clear they want to enable plaintiffs to plead their claims well enough to withstand dismissal. At the same time, it appears that some cases are dismissed now that would not have been dismissed before Twombly and Iqbal. Yet it is difficult to know whether the dismissed cases would have proved meritorious had they survived the pleading stage.

Discussion began with a question whether future research would be helped by generating a "statement of reasons" form for dismissal on the pleadings that would be similar to the statement of reasons on sentencing. If courts would fill out the forms, a wealth of information would be available for assessing pleading standards. The response was that researchers would welcome the form if someone can devise one and persuade courts to fill it in.

Joe Cecil said that the FJC would look into any empirical studies that have been done to measure whether the Private Securities Litigation Reform Act gets rid of frivolous cases, and whether it defeats meritorious cases.

Another question was asked: Does the Court's failure to mention its earlier "no heightened pleading" decisions in the Iqbal opinion presage an open heightened pleading approach? The responses suggested that it is difficult to read much into this kind of opinion-drafting choices.

Another participant observed that the Seventh Circuit takes the pleading test back to context. A simple prisoner pro se case does not demand "a whole raft of details."

An oft-recurring theme was recalled by observing that before Twombly, most people pleaded with more detail than Rule 8 requires. There was as much a problem of over-pleading as barebones notice pleading. It seems likely that after Twombly and Iqbal, many lawyers will respond by larding into the pleadings still more of the information they have had all along. That will make it more difficult to measure the effect of these decisions by considering dismissal rates alone.

Another possible avenue of inquiry may be found in states that still have fact pleading.

It was suggested that the Kuperman research gives the flavor of first reactions, illustrating the kinds of questions courts are asking after Twombly and Iqbal. Further research has identified a group of cases in which leave to amend was granted; the next step will be to find out what happens when complaints drafted before Iqbal are dismissed after Iqbal and then amended.

A further caution was noted. From 1993 to 2000 the initial disclosure rule was based on disputed facts alleged with particularity. The rule was designed to encourage more detailed pleading; to whatever extent it realized that purpose, it will be more difficult to sort out the changes in pleading practice over time.

Another observation was that Twombly and Iqbal are most likely to have an effect on cases at the margin of plausibility. The question will be how wide the margins are set.

The Department of Justice has not yet resolved its evaluation of the Twombly and Iqbal decisions. It is engaged in many cases that raise questions of official immunity, as Iqbal did, and is often anxious to protect public officials against the burdens of discovery. It is difficult to separate the broader general pleading questions from that specific set of concerns raised by the substantive law. A similar tie of pleading to substantive considerations is apparent in the antitrust conspiracy concerns reflected in Twombly.

The Court's approach to pleading purpose in the Iqbal opinion also will present difficult questions. Rule 9(b) allows general allegations of malice, intent, knowledge, and other conditions of mind. The Court said that this is not permission for mere conclusional pleading. But how much more can be alleged in a pleading than that a person acted with a specified purpose?

Discussion continued with an observation that the Iqbal opinion is a broad statement of general principles. The plausibility test will have real impact in antitrust cases, where the courts have economic theories of what is plausible and in immunity cases where special policies conduce to more demanding pleading standards. It will be harder to argue implausibility in many other contexts. Many defendants are reacting for the moment by framing motions to dismiss as if the opinion is a general invitation, but there is no general invitation here.

It was noted that because they are the Supreme Court's current explanation of pleading doctrine, Twombly and Iqbal will be cited in opinions granting or denying motions that would have been resolved the same way, citing Conley v. Gibson, in earlier days. Ms. Kuperman's research confirms this routine invocation of the new authoritative texts in many cases where the analysis and results remain unchanged.

Similar thoughts were expressed in the view that there were high hurdles to asserting plausibility both in Twombly, augmented by the fear of massive discovery, and in Iqbal, augmented

by concerns for protecting public officials. "Judicial experience and common sense will not often be put to comparable tests."

These comments, focusing on identifiable specific substantive areas, led to the question whether the time has come to reconsider the general trans-substantive approach to pleading.

A somewhat different perspective was offered with the statement that "defendants are treating it as open season on complaints. Courts are not drawing inferences in favor of the pleading party, but they weren't doing that before." Are meritorious cases being dismissed? Lawyers engaged in complex securities and consumer-protection litigation think so. But many of the cases in the Kuperman memorandum look like cases that properly should be weeded out. The bar was set very high in complex and high-stakes cases. Complaints commonly run 100 pages and more. The time and resources devoted at the "front end," before filing the complaint, are enormous. Often it takes a year simply to get to disposition of the motion to dismiss. But perhaps this is right, given the costs of discovery.

A judge observed that 95% of his docket involves "small cases. Iqbal is seldom cited. Plausibility is seldom mentioned." Iqbal makes a difference only in supporting dismissal of truly fanciful complaints of a sort that courts might have felt obliged to string along under truly minimal notice-pleading standards. "We long ago moved beyond notice pleading. Often to overpleading. Iqbal is not likely to make much difference." It should not be forgotten that the Court split 5:4 on the adequacy of the Iqbal complaint.

Another committee member observed that he had been involved in several motions to dismiss since the Iqbal decision. "It doesn't seem to make much difference." That seems to be the view of many litigators.

Another judge noted that he cites Twombly and Iqbal — so far it always has been in denying motions to dismiss.

Returning to the opening question, it was asked whether the state of pleading has fallen into an emergency that requires immediate response? Or is it better to carry forward in the Committee's ordinary deliberate way?

The first response was that the Committee should move ahead to collect data. "There is a lot of consternation. The academic community is particularly interested, particularly in the process, which some see as Supreme Court amendment of Rule 8 without using the Enabling Act procedures." Some plaintiffs' lawyers fear there will be a very fine pleading sieve, straining out cases that should survive. Citations of Twombly and Iqbal do not show what effect they may have had; they simply have replaced Conley as the obligatory citations. A much finer hand will be required to determine whether they will make a difference. Individual cases will have to be examined. There may be categories of cases where there is a difference — one example may be prisoner claims against wardens or other higher-level supervisors who had no apparent involvement in the underlying events.

A similar caution was urged by noting that the outcome in Iqbal was surely heavily influenced by the positions of the defendants — an Attorney General and a Director of the FBI.

Another participant noted that the Supreme Court talks about the burden of discovery in both opinions. "We cannot look at them in isolation. If we could get discovery right, the Supreme Court might not be as much worried about pleading."

A somewhat different question asked how these problems can compete for Congress's attention in competition with the much larger issues that confront it. Should the Committee attempt to predict what Congress will do in deciding on its own best course of action?

It was suggested that "bills will move forward." It cannot be guessed whether a bill will pass. But the Committee should stick to its own careful, deliberate, data-oriented process. "We should not be stampeded into doing things out of our ordinary procedures." S 1504 invokes Conley; it should be remembered that the trial judge dismissed the Twombly complaint under Conley standards. The Committee will continue not only its own work, but also its outreach to professional groups.

This note was carried further. "The more you look at the question, the more apparent become the difficulty of the drafting task and the delicacy of the choices to be made." The Enabling Act allocation of responsibility is important. The Committee and Congress should heed this wise allocation.

Forms

The Rule 84 Forms attached to the Civil Rules have seemed troubling for reasons antedating the Twombly and Iqbal decisions, and independent of them. The Chief Judge of the Federal Circuit, for example, has called the Form 18 complaint for patent infringement an embarrassment.

The fundamental questions begin with the continuing need for illustrative forms. The Civil Rules were new in 1938, and illustration was important. It must be asked whether illustration remains as important in the maturity of the rules as it was in their infancy. Even if illustration remains useful, there are difficulties. The Rules are not static even when the text remains unchanged. Interpretations evolve. The Forms can fall into irrelevance, or worse can become misleading. If Forms are retained, the Committee has an obligation to review them periodically to ensure that they are up to date. That will require significant effort.

It might be useful to begin with an inventory of the Forms. Some may never be used. There may be no Forms for other and important topics that would benefit from having Forms.

Then it might be asked whether the Forms provide a useful service to the bar. There are all sorts of form "books," including e-forms and collections within individual firms. If the Forms are to be maintained as a service to the bar, the Committee should take pains to do the job well. The lack of attention over time is reflected in the persistence from 1938 to 2007 of forms that set out specific illustrative dates ranging from 1934 to 1936. (This observation was supplemented by a comment that Professor and Reporter Clark was a member of the Tavern Club located near Boylston Street in Boston — that was the origin of the Form 9 accident site.) Then the Style project undertook a sweeping revision that depended heavily on a consultant and that received comparatively little attention from either the Style Subcommittees or the Committee in the surge of rule-focused activity.

Although the multiple pleading forms are not the only reason for concern, they provide as many illustrations of the questions. Form 11, formerly Form 9, alleges simply that the defendant negligently drove a motor vehicle against the plaintiff. Is "negligently" a legal conclusion, a threadbare recital of an element of the claim that fails the Iqbal pleading test? Would it be useful to provide a form that calls on the plaintiff to fill in the blanks by specifying the many ways in which a driver may be negligent? Would it even satisfy Iqbal to allege that the defendant was operating at a negligently fast or slow speed, or must a specific speed be specified? For that matter, how useful is it to require specific allegations if the initial specifications can be freely amended? Attempting to frame pleading forms while pleading standards remain in flux could be difficult. But it might be useful to abrogate the current pleading forms to avoid any incorrect illustrations, while beginning the task of developing new forms in conjunction with evolving pleading practice.

Even if pleading forms are to be maintained in some form, is it possible even to attempt forms for more complex claims? And even if the Committee could contrive to draft a Form that

would plead the claim in the Twombly case in a way that satisfies the Twombly and Iqbal standards, would the Form be of any use to any other plaintiff in any other antitrust conspiracy case?

Different questions are presented by Forms outside the pleading forms. There may be real value in establishing national uniformity through Forms 1 and 2 governing caption and signature lines. Forms 3 and 4 for summonses may be valuable. The Forms 5 and 6 request to waive service and waiver were developed after careful consideration in conjunction with adoption of the waiver provisions in Rule 4, and may provide valuable protection against misadventures.

Rule 84 itself might be reconsidered. If the Forms are abrogated in toto, Rule 84 would go down with them. If some Forms survive, it may be useful to reconsider the direction that they suffice under the Rules. Something will depend on the nature of the Forms that survive — if the pleading forms are abandoned, there may be less reason to fear Forms endorsed as sufficing under the rules.

A different reason might warrant reconsideration of Rule 84. If official Forms are valuable, it may be better to develop a different process for creating and maintaining them. The higher the status accorded the Forms, the greater the need for serious involvement of the Committee. If pleading Forms are continued, it likely will prove necessary to seek help through processes like those developed for major rules revisions. Miniconferences could be held. Groups of lawyers expert on all sides of litigation in a particular area could be asked to hammer out Forms that reflect shared needs. Even with such help, it might be that the Committee will have sufficient work without diverting its energies to doing a better job with the Forms. The burden could be reduced considerably, however, if pleading forms are abandoned.

If the Rule 84 direction that the Forms suffice under the rules is relaxed, it would be easier to shift the burden to groups outside the Enabling Act process. A variety of approaches could be considered, including preparation by the Administrative Office.

Discussion began by describing the recent adoption in the Eastern District of Pennsylvania of a set of forms appropriate for pro se cases. The forms are optional. They follow a direct format of who, what, when, where, and why, with a request for relief. The court expects they will be helpful.

The question whether the full Enabling Act process is necessary for the Forms was brought to the fore: Should the Committee engage in this business at all?

Peter McCabe observed that official forms play different roles in different sets of rules. The Bankruptcy Rules involve by far the most detailed forms, and include forms in great numbers. Under Bankruptcy Rule 9009 use of the forms is mandatory. The forms are approved by the Judicial Conference, but do not go on to the Supreme Court or Congress. The Director of the Administrative Office can issue additional forms; there are 150 of them. They are submitted for advisory committee review, but not officially acted on by the committee. The Appellate Rules have 6 forms; some of them are simply suggested for use. The Criminal Rules have no forms. The Administrative Office prepares forms, including such things as arrest warrants, search warrants, and bail orders. The Office asks the Criminal Rules Committee to review these forms. Different processes seem to work. Requiring the full 3-year Enabling Act process to revise a form does not make sense.

In this vein, it was asked whether assigning responsibility for the forms to the Administrative Office would be better because — assuming repeal of the Rule 84 provision that the Forms suffice under the rules — that would relieve the Committee of the responsibility that flows from present Rule 84. And the Administrative Office procedures may well be more efficient than Enabling Act procedures.

Doubt was expressed whether the Form complaints are much used. And it was suggested that a distinction might be drawn between Forms addressed to practitioners and Forms directed to judges. This doubt was supplemented by the observation that we do not know how often lawyers use the Forms. Neither do we know whether the Forms preserve models of complaints that deserve to expire. In a case that did not deserve to survive the Federal Circuit felt obliged to reverse dismissal of a complaint that tracked the Form complaint for patent infringement.

A judge observed that it would be good to streamline the process. But — although he has never seen a lawyer use a Form — the Forms are useful guides for pro se plaintiffs. Another judge agreed that pro se forms are useful. The 2010 Conference materials touch on a related question, generation of form interrogatories.

Discussion continued along the same lines. If primary responsibility were transferred to the Administrative Office, with opportunities for advice from the Committee, Rule 84 should at least be modified to say only that the Forms illustrate rules requirements. Even then it might be better to abrogate Rule 84; the rules at times provide for compliance with Judicial Conference models, as in the e-filing provisions of Rule 5(d)(3), but delegation to the Administrative Office seems different.

It was recognized that any project to develop Administrative Office Forms will take time. That may provide a collateral advantage. Immediate abrogation of the pleading Forms might seem to send a message about the Twombly and Iqbal pleading opinions, no matter how strenuously the Committee might emphasize that the project is to abrogate all the Forms without taking or implying any position on the sufficiency of any Form. There is plenty of time to proceed deliberately. The Forms have endured from 1938, and little harm will flow from carrying them forward a while longer.

In response to a question, it was stated that the Administrative Office regularly consults with court clerks in developing and maintaining the many forms it now generates. Every year it sends out a questionnaire seeking comments on existing forms, and suggestions for new forms.

Timing questions recurred. The very length of time required even to abrogate the forms illustrates the need for a speedier, more flexible process. If the Standing Committee approved, a proposal to abrogate Rule 84 could be published in August, 2010, leading — if all went smoothly — to an effective date of December 1, 2012. But publication so soon would generate a perception that the Forms were being abrogated because the pleading forms, sufficient under notice pleading as it had been understood up to 2007, no longer suffice under Twombly and Iqbal. That is a serious reason to hold off. Nothing the Committee can say would defeat the perception. It is even possible that Congress might take proposed abrogation as a sign that legislation is needed to revivify notice pleading. Nor would there be much advantage in merely revising Rule 84 so it no longer says that the Forms suffice under the rules. If the Committee does not know whether illustrative Forms actually suffice, how should lawyers know?

Delay also would allow more time to consider a mid-range compromise. Most of the Forms could be abrogated. Rule 84 could remain as it is, covering a small number of forms that establish national uniformity. Caption, signature, summonses, requests for waiver and waiver of service, might be useful. The Form 80 Notice of a Magistrate Judge's Availability also may be useful for a different reason — it is designed to protect litigants against even slight pressure to consent to trial before a Magistrate Judge, and strict neutrality may be better served by a national Form.

It was suggested that if the Committee defers action for a while, the Administrative Office could nonetheless begin generating forms that might be put on an interactive website for easy use.

The discussion concluded with a decision to retain Rule 84 and the Forms on the active agenda. More detailed proposals may be prepared for the March 2010 agenda, or the matter may

carry over to the next fall meeting for further consideration.

Rule 26(c): Protective Orders

Judge Kravitz began discussion of protective orders by noting that he testified this summer in hearings on the Sunshine in Litigation Act, H.R. 1508. Professor Cohn also testified. Judge Kravitz later responded to follow-up questions. Andrea Kuperman prepared a lengthy memorandum describing, circuit-by-circuit, practices in issuing protective orders, sealing-order standards, and the readiness of courts to modify or dissolve protective orders. Letters were sent in by the American Bar Association, the American College of Trial Lawyers Federal Civil Procedure Committee, Daniel Girard, and Professor Arthur R. Miller. This flow of information seems to have been effective in alerting Congressional staff to some of the problems that inhere in the bill. But it is difficult to make any predictions as to any eventual outcome.

Andrea Kuperman's case-law survey shows that there are no significant problems in present practice. Judges take seriously the Rule 26(c) requirement that good cause be shown for a protective order. They take care on motions to dissolve or modify. And they are very careful about sealing documents used in the litigation — the tests for sealing are much more demanding than the standards in the Sunshine bill.

Despite the apparent lack of problems, several years have passed since the Committee last actively considered protective-order practice. The rule text seems to reflect greater concern for commercial confidentiality than other interests. Courts in fact do protect personal privacy, medical records, and mental health records. But it might be useful to reflect such interests more explicitly in the rule.

Similarly, Rule 26(c) does not say anything about modifying or dissolving protective orders. Courts in fact seem to take a desirable approach, but again it might be useful to address these practices in express rule text.

A trickier question is presented by orders that allow a party to designate discovery information as confidential. Often the orders do not include provisions for challenging a designation. Courts in fact do entertain challenges. Here too it might help to adopt express rule text, although this may descend to a level of detail better left to administration in practice.

Application of the broad good-cause standard is context-specific. It might be possible to adopt more specific rule language, although here too it may be wise rely on general language alone.

With all of these potential issues, it may be sensible to take another hard look, even though there are no apparent practices that need to be improved and no indication at all that protective orders have had the feared effect of defeating public knowledge of circumstances that involve an ongoing threat to public health or safety.

The history of Committee study was reviewed. In 1992 proposed Sunshine in Litigation legislation, similar to the current bill, caused the Committee to inquire whether in fact there were significant problems with protective-order practice. The Committee, although not convinced there were any problems, published for comment a draft that addressed modification and dissolution of protective orders. The draft was revised in light of extensive public comments. The revised draft was returned by the Judicial Conference for further consideration, in part because there had not been any opportunity for public comment on the revisions. The proposal that had been submitted to the Judicial Conference was then published. As often happens, comments on the published proposals were divided. The Committee concluded that there were no problems that required immediate action, and that courts seemed to be striking proper balances between private and public interests. It voted to defer further consideration pending broader consideration of the discovery rules. In 1998

the Committee suspended active consideration, maintaining a watch on continuing practice.

With these introductions, discussion began with the suggestion that it is important to get documents produced to requesting parties as promptly as possible, a goal greatly facilitated by allowing production under a protective order that allows the producing party to designate particular documents as confidential. At the same time, it is important to ensure that the receiving party can challenge the confidentiality designation. It also is important to ensure that a protective order can be modified or dissolved. The Zyprexa litigation is a good example of releasing documents from protection.

The claims that protective orders thwart public health or safety have not been supported by persuasive examples. Nor will judges refuse to allow transmission of information to government regulators.

Fear also has been expressed that plaintiffs' lawyers are taking enhanced settlements in return for being muzzled about topics of public concern. Again, there is so much information available from other sources that this seems unlikely. Specific examples have yet to be provided.

The Committee was reminded that the FJC studied protective orders for the Committee during the last review. There are not many protective orders. Only a small fraction of the cases with protective orders involve topics that animate the public health and safety concerns. Quite a few of the protective orders are initiated by plaintiffs' lawyers who wish to protect personal information. E-filing has become universal; the privacy dynamic has shifted.

An important distinction must be recognized between information filed with the court and information that is not filed. Great care is exercised in sealing information that has been filed, particularly when it is filed in conjunction with anything that goes to the merits — summary-judgment materials are the most obvious example. In the Second Circuit, for example, it is very difficult to seal information filed with the court, but easier to maintain confidentiality for information that is not filed or used in the litigation.

Thomas Willging added that the FJC study of sealed documents showed the same cases included unsealed documents that revealed any information that might be needed to protect public health or safety.

The Committee was reminded of the general rules of professional responsibility that make it unethical for an attorney to limit future practice opportunities, and that make it permissible to disclose confidential information to avert bodily harm.

A practical observation was offered from a practitioner's experience: there are dramatic differences among judges. Some are very strict in applying Rule 26(c). Others let the parties keep everything secret. Some judges are reluctant to grant motions to unseal, fearing that "plaintiffs are trying to terrorize defendants." Beyond that, there are sensitive documents. A plaintiff's lawyer has a duty to maximize the return for the client; it would be wrong for the court to jeopardize the client's interests for the purpose of getting sensitive documents to the public. This is a philosophical question that is answered differently by different judges. There also are cases with mutual interests in confidentiality — both plaintiff and defendant have information they do not wish be made public, and cooperate. All of this works fine from the lawyers' perspective, but there may be some information that the public should know.

An observer offered environmental statutes as an example. The public interest is protected by statutory duties to report pollutant discharges to public agencies. Another observer suggested that reporting obligations extend broadly across most industries.

It was noted that the Department of Justice has not yet taken a position on these questions,

but does not now think that any legislation is necessary.

Discussion concluded with a project to study the question further and to offer a report at the March 2010 meeting. The conclusion may be that there is no reason to amend Rule 26(c). But it will help to remain focused on the issues for a while. Even if there are no problems in practice, it may be possible to capture present good practices in better rule language.

Rule 45

Judge Kravitz introduced discussion of Rule 45 by observing that the FJC survey shows that third-party subpoenas are indeed a significant part of discovery practice.

Judge Campbell introduced the Discovery Subcommittee's report of Rule 45 issues. It has been a year since the Subcommittee was asked to examine Rule 45. Andrea Kuperman did a remarkable review of the literature. Comments came from other sources, and bar associations submitted suggestions. The Subcommittee identified 17 issues warranting further exploration. The issues were discussed with bar groups, the Subcommittee held several meetings by telephone conference calls, and narrowed the list to six issues. Those six issues are presented in the report without advancing any proposals for present action. The rule drafts included in the report are designed to illuminate the issues and illustrate possible approaches. Some of the issues seem to cry out for solutions. Others present more abstract policy questions. The issues are presented for discussion, with regret that Chilton Varner is in trial and could not be present to participate.

(1) Notice of Service and Response. These issues begin with the observation of many lawyers that often they do not get the required notice that a third-party subpoena for documents is being served. Although the requirement appears clearly at the end of Rule 45(b)(1), it may be that the location is too obscure — that failures to provide notice before the subpoena is served result from ignorance or forgetfulness. A related issue is not addressed by Rule 45 — should the party who issued the subpoena provide notice when documents are produced.

Professor Marcus developed these questions. The authority to issue a subpoena solely for documents, without an attendant deposition, was added in 1991. The notice requirement was added then — a subpoena for a deposition was already covered by the Rule 30 requirement to give notice of the deposition. The purpose of the 1991 notice provision was to enable other parties to object, demand that additional materials be included in the subpoena, or to monitor discovery and seek access to the documents produced in response. The 1991 provision was ambiguous as to the time for serving the notice on other parties; the ambiguity was resolved in the 2007 Style Project by directing that notice be served before the subpoena is served.

Greater prominence could be achieved for the notice requirement by relocating it as a subparagraph within a new paragraph in Rule 45(a) — Rule 45(a)(4)(A) could carry forward the requirement that notice be served on each party before the subpoena is served. This provision could add a new requirement that a copy of the subpoena be served, ensuring that other parties can decide whether additional documents should be required and better enabling them to follow up after compliance.

The ABA Litigation Section has suggested that there also should be notice that materials have been received under the subpoena, enabling other parties to know whether and how to seek access. The illustrative draft includes this suggestion as a new Rule 45(a)(4)(B), providing that within 7 days after production the party serving the subpoena must serve notice on other parties and offer to permit inspection or copying of the produced materials.

The Sedona Conference has suggested a further wrinkle, describing it as a "best practice" to attempt to confer with the nonparty before production. This suggestion was not included in the

draft because the Subcommittee concluded that it could produce complications outweighing any likely benefits.

Discussion began with agreement that it makes sense to move to a more prominent position in Rule 45 the notice-of-service requirement. And it is also a good idea to require that a copy of the subpoena be attached to the notice. That will enable other parties to seek a protective order, to seek production of additional materials, or take other useful action.

It was suggested that notice "before the subpoena is served" may not suffice. The rule might set a minimum period before service, somewhere in a range of 3 to 7 days. Very short notice may be inadequate. In employment cases, great harm can be done a plaintiff by subpoenas served on employers where the plaintiff worked before working for the defendant, and even greater harm may flow from a subpoena served on the plaintiff's new employer.

The requirement that notice also be given when materials are produced in response to the subpoena also was supported. It was asked whether this will reduce the burden on the nonparty who produces information. One possibility is that it will reduce the burden by reducing the use of multiple subpoenas. But even better protection may flow from the present requirement of advance notice, at least in the likely event that a party may seek a protective order. At any rate, the main purpose is to help other parties.

In the same vein, it was reported that many lawyers say the notice of production would be really helpful. What matters most is what documents are produced, not what documents are demanded. There may be a practical problem when documents are produced in stages — when and how often must notice be given? It was suggested that the notice is not a big burden. At times the party receiving subpoenaed documents "tends to hide the ball. The second notice prevents confusion and game playing."

It would be possible to augment the notice of production by requiring that the notice describe the type and volume of the produced materials. The Subcommittee rejected this approach for fear that it would add unnecessary burdens, and might lead to later objections that the description was inadequate. Notice of the opportunity to inspect and copy should suffice.

A further problem was noted. The party who served the subpoena may agree with the person served to withdraw the subpoena. The person served then produces documents amicably. Perhaps the idea should be reasonable access, not a second notice when things are produced in response to a subpoena. The rule should not create a risk that documents will be excluded from evidence for failure to give a notice that they were produced. Whether the party who failed to give notice should anticipate exclusion may depend on the circumstances.

The same question was asked as to the notice before serving the subpoena: What, if anything, should be the sanction for omission?

A finer distinction was suggested. Telling other parties that materials have been produced is a relatively minor burden. Should the party who received the materials also be required to offer an opportunity to inspect or copy the materials? Support for this requirement was offered by observing that a subpoena may demand many items, to be followed by negotiations between the party who served it and the person who received it. The negotiations may sharply reduce the number of items demanded and produced. All parties should know what has been produced and have access.

It was asked how the opportunity to inspect or copy would affect the allocation of costs among the parties. The Subcommittee chose not to address cost questions because these issues are rarely presented to the courts. They are worked out. As a practical matter, other parties expect to

pay the costs of copying things that another party has obtained by subpoena.

The notice of production was questioned from a different direction — why do not all the parties' lawyers participate in the negotiations?

(2) Trial subpoena on party witnesses. Judge Campbell introduced this issue by describing In re Vioxx Products Liability Litigation, 438 F.Supp.2d 664 (E.D.La.2006). Rule 45(c)(3)(A)(ii) directs the court to quash or modify a subpoena that "requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person." The Vioxx decision found a negative implication that a subpoena can require a party or a party's officer to travel to testify at trial no matter whether the subpoena is served within the geographic limits prescribed by Rule 45(b)(2). There is a "pretty good split of authority" on this reading of Rule 45(c)(3), including a later contrary decision in the same court. The issue can be approached in two ways: given the split in authority, is it important to establish a clear answer? And should the answer be that a party or a party's officer can be made to travel to testify at trial even though the subpoena cannot be served within the state where the district court sits?

Professor Marcus noted that both sides invoke the "plain language" of Rule 45. That suggests there is good reason to clarify the language. The policy question is more difficult. The Vioxx litigation provides an attractive illustration of the value of a long reach. The case involved a potential "bellwether" trial in consolidated multidistrict proceedings. The witness was the President of Human Health at Merck & Co.. There was a cogent prospect that such a high official might have important testimony. The later case in the same court, however, offers a contrast. That case was an opt-in Fair Labor Standards Act case. The trial subpoenas were directed to 9 plaintiffs who lived in other states. The need to burden such parties in such a case might seem much less.

There are three likely resolutions. The rule could provide that any party is subject to a subpoena to testify at trial, no matter where served. Or it could treat a party in the same way that nonparties are treated. Or it could confer discretion to order that a party be compelled to appear at trial in circumstances that would not support a nonparty trial subpoena.

One way to reinstate the limits imposed by the Rule 45(b)(2) service provisions, treating parties and nonparties alike, would be to add a few words at the beginning of Rule 45(c)(3)(A): "On timely motion, the issuing court must quash or modify a subpoena properly served under Rule 45(b)(2) that: * * *."

The approach that establishes court discretion could be modeled on Rule 45(c)(3)(B)(iii), which authorizes the court to quash or modify a subpoena that requires a person who is not a party or a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

The first reaction is that a plaintiff's lawyer may be strongly tempted to compel the chair or chief executive officer of a major corporation to appear for trial anywhere, even though the officer has limited knowledge of the matters in suit. "In any case you can identify some reason why the chairman should be there." It creates a pressure point. The subpoena puts pressure on the corporation because these officers "have very limited time." There are studies suggesting that video depositions are about as sound a basis for deciding a case as presence at trial. Video depositions are taken all the time.

This reaction was extended by observing that the same concerns apply to the heads of governmental agencies. Courts recognize the strong reasons for protection, and elaborate procedures are developed to limit the occasions even for depositions.

A different reaction was offered. You can sue the corporation or agency at its home base.

The chair or chief executive officer is subject to a trial subpoena. But if the expected testimony serves little real purpose, protection is available. Miles should not make a difference. This observation was explored by agreeing that even within the 100-mile limit, harassment can support a motion to quash. The question is whether the 100-mile limit should make a difference. One approach would require an enhanced showing to justify going beyond 100 miles. Another would be to allow service, subject to a motion to quash.

Protective sentiment came back in the observation that the witness could be the chief executive officer of a 20-person firm who has absolutely no knowledge of the events in suit. But it was asked whether that means a trial subpoena should never reach beyond state limits? Often a court will direct that the witness be protected by taking the testimony by video deposition.

The question was framed again: up to Vioxx, the rule was that a nonparty could be made to travel to be a trial witness from any place where employed, residing, or regularly transacting business within the state, but subject to discretion to quash or modify the subpoena if the person must incur substantial expense to travel more than 100 miles. Vioxx changed that in some courts. Should the Vioxx approach be secured by revising Rule 45? Rule revision may be desirable, whichever way it goes, because these questions are not likely to arise in a context that supports appellate resolution.

It was observed that concerns about the need to protect high officials in government agencies "are overdrawn." The courts have developed "a lot of law" protecting them, including many decisions in the District of Columbia. There are rogue judges who at times go too far, for example by attempting to require that someone with settlement authority attend a Rule 16 conference, but the Department of Justice generally succeeds in persuading the judges to alter course.

One committee member asked several plaintiffs' lawyers about these questions and was told that generally the "100-mile" limit is not a big problem. A high corporate official who prefers to present testimony by way of video deposition risks offending the jury. But as a matter of policy, an extended reach may be desirable. Corporations enjoy the right to do business throughout the country. The Vioxx case illustrates circumstances in which a high corporate official has vital information about activities at the heart of what the company does. "This is not a pressure tactic." Courts allow depositions of individuals at the "apex" of a corporate or government agency hierarchy, but the law is very protective. That approach is better than setting a 100-mile limit. In appropriate circumstances, the lead figure should be subject to a trial subpoena.

A response protested that "no one thought this was necessary before 2006." Some lawyers are so good that they will be able to persuade judges to follow the Vioxx decision. The rule should be clarified to close off this possibility.

An interim summary suggested that no Committee member seemed to want an unlimited right to nationwide trial subpoenas of parties or their officers.

Another member wondered whether there is a serious problem. There are cases in which a defendant has taken the position that it intends to use an officer as part of the defense case, at the same time objecting to having the plaintiff call the same officer as part of the plaintiff's case. The courts recognize that in such circumstances it is appropriate to compel the witness to appear in the plaintiff's case. If we change the rule we may encourage situations that have led to the solutions reached without a rule.

The 100-mile limit may seem an antiquated relic, given its origins in 1793. But it may be rejuvenated by modern technology. Often technology enables testimony in a mode that is an effective substitute for live testimony. Although limited by a requirement of good cause in compelling circumstances, Rule 43(a) recognizes the use of "testimony in open court by

contemporaneous transmission from a different location." The Criminal Rules Committee has proposed a rule, recently approved by the Judicial Conference, that would permit live video testimony of a witness outside the United States when it would be dangerous to bring the witness to the United States. That rule will encounter Confrontation Clause questions that do not arise in civil actions — that it is being pursued shows a high level of confidence in testimony by remote transmission. And many immigration hearings are done by contemporaneous video transmissions.

These questions will be further considered by the Subcommittee.

(3) Place of resolving enforcement disputes. Judge Campbell identified this problem as one that arises from the Rule 45 provisions for enforcing a nonparty subpoena in the court that issued the subpoena. When the underlying action is pending in one court and the subpoena issues from another court, there may be compelling reasons to prefer that the court entertaining the action resolve objections and enforcement questions. Discovery issues may go to the heart of the dispute. The choice to allow, limit, or forbid discovery may have case-dispositive effect. And it may be hard to get the court's attention in ancillary discovery proceedings. An ancillary court, moreover, may find it difficult to integrate its efforts with the overall case-management responsibilities of the court entertaining the action. This difficulty may be extended when several ancillary courts are involved in a single underlying action — different courts may resolve the same issue differently. The nonparty, moreover, may prefer to have the dispute resolved by the court where the action is pending; it may be difficult to feel sympathy for a party who resists.

Considerations like these have led some courts to "transfer" or "remit" enforcement questions to the court where the main action is pending. But Rule 45 does not seem to allow that. And there can be good reasons to keep the enforcement decision in the ancillary discovery court. A local nonparty might encounter serious burdens if compelled to litigate the dispute in a distant court. The questions may be substantially separate from the merits and from other discovery issues. An attempt to force a local nonparty to litigate in a distant court may even raise questions similar to questions of personal jurisdiction over a defendant: should a federal court in New York be able to compel a witness in Arizona to litigate the subpoena dispute in New York? Although nationwide personal jurisdiction is authorized by several statutes, and Rule 4(k)(2) extends personal jurisdiction over defendants not subject to jurisdiction in any state, the question is not one of power alone.

The balance of advantages can readily be struck in case-specific transfer decisions. But transfer should not be made too easy. If it is easy, the issuing court will always transfer. The dispute will be docketed as a miscellaneous matter, it involves an action in which the court has no other stake, it is better to get it over with by transfer. Easy transfer, however, may impede the negotiations that usually resolve these disputes without any need for court action. The requesting party may be no more eager to show up in the issuing court than the subpoenaed nonparty is to show up in the main-action court. "If we change the dynamics, the negotiating process may be affected."

Professor Marcus pointed to a drafting choice presented in the illustration of a possible Rule 45(c)(2)(B)(iii) transfer provision. Should the standard for transfer invoke only the interests of justice, or should it also refer to the convenience of the parties and of the person subject to the subpoena? The longer formula might be useful as a caution against routine transfer.

Discussion concluded with the observation that there seemed to be consensus support for drafting rule language to authorize the issuing court to refer enforcement issues to the main-action court.

(4) More aggressive reconsideration of geographic limits. Judge Campbell introduced this issue by noting that "Rule 45 does a lot of work. It is complex. It limits service, place of performance, and enforcement. Can it be simplified"?

Professor Marcus pointed to the appendix to the Subcommittee Report. The appendix sets out the text of Rule 45 with footnotes identifying possible changes. It illustrates the proposition that it will be difficult to shorten or simplify Rule 45 without substantial reorientation of its approach. One point to begin may be with the 1991 change that authorizes a lawyer in the main action to issue subpoenas from any district court. It may be time to reconsider — to allow all subpoenas to issue from the court where the action is pending. Lawyers have asserted that it is difficult even to capture the attention of an issuing court away from the main-action court. At the same time, a nonparty may have a strong interest in local resolution and enforcement. The method of service presents related questions. Some comments suggest that personal service should not be required, perhaps going as far as authorizing service by mail or by any means authorized in Rule 4 for service of summons and complaint.

The case for simplification was taken up by a member who observed that "Rule 45 has intricacies valuable mostly to big corporations. It requires a lot of lawyer input." Subpoenas often are served on nonparties who do not have the lawyer resources, and who encounter the text of Rules 45(c) and (d) — which must be set out in every subpoena — as gobbledygook. "We should start over." All subpoenas should issue from the main-action court. Trial, deposition, and document-production subpoenas should be distinguished. Local courts should have initial enforcing authority. Often the local court will want to act so as to reduce the burden on local nonparties. Subpoenas often are not especially complicated. The rule should be simple.

Judge Campbell agreed that the Subcommittee would consider this approach.

It was asked whether one approach might be to provide for cross-designating magistrate judges from the main-action court to act where the issuing court sits.

Another suggestion was that it might help to add a page to the Federal Judicial Center website addressing frequently asked questions about nonparty subpoenas.

Yet another suggestion was that rather than incorporate the provisions of Rules 45(c) and (d), a clearer notice could be developed. The notice could be provided either by incorporation in the subpoena or perhaps as a separate notice to be served with the subpoena.

The 100-mile limit returned to the discussion. Is it really an anachronism, or is it something that may have been an anachronism for a while but has again become synchronous with the realities of contemporary technology, including video depositions? Perhaps it is time to contract to a distance shorter than 100 miles. Complexity can be reduced by making the party go to the witness. Some nonparty witnesses really have no stake in the underlying action, and do not care about it. Present limitations are artificial. Here too, trial subpoenas might be distinguished — perhaps more sharply than now — from deposition and production subpoenas.

Further guidance will be useful. One source may be Criminal Rule 17. It authorizes service of a trial witness subpoena "at any place within the United States." A deposition subpoena may be issued in the district where the deposition is to be taken, but Rule 17(f)(2) authorizes the court to order — and the subpoena to require — "the witness to appear anywhere the court designates."

A caution was sounded by asking whether these questions are looking for a solution where there is no problem. "There is no angst in the majority of cases. People do work it out. We should be sure there really are problems. Lawyers understand the rule, and are familiar with it."

The original theme was offered in response. Yes, big firms and big companies understand Rule 45. But individuals and small businesses do not. It would be better to authorize national service from the main-action court, but to impose geographic limits on the duty to comply and to begin with a preference for resolving disputes at the nonparty witness's home.

Another judge agreed that simplification would be useful. A vast majority of the civil cases in his district involve damages less than $100,000. Nonparty subpoenas generally are addressed to local entities. Subpoenas tend to go outside the district only in very big cases. Then there can be problems — in a big case with multiple subpoenas, some of the disputes came to the judge in the main-action court while others were resolved inconsistently in ancillary courts. Technology can be used to facilitate convenient resolution of these disputes in the main-action court, achieving consistency at little or no cost in inconvenience.

(5) Cost allocation. Judge Campbell described the kinds of issues that have been raised around two provisions added in 1991. Rule 45(c)(1) directs an attorney responsible for issuing a subpoena to take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. Rule 45(c)(2)(B)(ii) provides for objections by a person subject to a document subpoena, and further provides that after objection production may be required only by order, and that the order "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." The suggestions commonly ask for greater detail. The rule might answer the question whether attorney fees are part of the expense a nonparty must be spared. The rule might confer greater protection on the nonparty. Or, looking the other way, parties responsible for issuing subpoenas complain that the responding nonparty often demands payment of excessive costs for complying.

Professor Marcus suggested that courts seem to be ruling sensibly under the present rule. It is not clear that more precise language will make anyone's task any easier.

Judge Campbell agreed that the Subcommittee has not yet come to see any need for change. Things indeed seem to be worked out reasonably in most cases.

There was no further discussion.

(6) In-hand service. The earlier discussion noted the question whether in-hand service should be required for nonparty subpoenas. Judge Campbell noted that in-hand service may serve an important purpose. The nonparty is, after all, not a party to the action. Often that nonparty will not have a lawyer. The penalty for noncompliance is contempt. "We need a dramatic event to signal the importance of the subpoena."

Professor Marcus observed that a recent decision held service by certified mail sufficient.

The analogy to service of summons and complaint on an intended defendant was questioned by observing that it would be odd to allow substituted service of a subpoena on a state official in the mode often used in long-arm statutes.

Judge Campbell concluded the Rule 45 discussion by welcoming comments on the several suggestions included in the appendix. The Subcommittee will make firm recommendations to the Committee for consideration at the March 2010 meeting.

Judge Kravitz thanked the Subcommittee for its work, commenting that "we are in good hands."

Rule 58 - Appellate Rule 4

Judge Colloton presented the Report of the Joint Civil/Appellate Subcommittee. The Subcommittee was formed to provide joint consideration of topics that overlap the Civil and Appellate Rules. The topics currently on the agenda arise from suggestions and comments made to the Appellate Rules Committee. The Subcommittee is ready to report on two of them.

The first question involves Appellate Rule 4 and Civil Rule 58. The problem is primarily a Rule 4 problem. Under Rule 4(a)(4)(B), appeal time runs "from the entry of the order disposing

of the last" remaining motion that tolls appeal time. It is possible that appeal time may run out, as measured from entry of the order, even before an amended judgment is entered. An example might be an order "disposing of" a motion for new trial by conditionally granting a new trial, subject to denial if the plaintiff accepts a remitted amount within 40 days. If the plaintiff does not act on the remittitur within 30 days from entry of the order, there may be confusion as to the proper course. The defendant might file a notice of appeal, and then withdraw it if remittitur is not accepted and the new trial order becomes absolute and defeats finality. The defendant might ask for an extension of appeal time. Or the defendant might wait, hoping that the absence of a final judgment will allow an appeal after a remitted judgment is entered. Although there seem to be ways to muddle through, the Subcommittee has submitted to the Appellate Rules Committee a revision of Rule 4(a)(4)(A) that would run appeal time from "the latest of entry of the order disposing of the last such remaining motion or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment: * * *." A parallel change would be made in the Rule 4(a)(4)(B)(i) and (ii) provisions for premature notices of appeal and appeals from an order disposing of a tolling motion or altering or amending the judgment.

Civil Rule 58(a) has become involved with the Appellate Rule 4 discussion because Rule 4(a)(7)(A)(i) provides that a judgment is entered for purposes of Rule 4(a): "(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a)." There is a potential for confusion in applying Rule 4 — where mistakes can lead to forfeiture of the right to appeal by filing an untimely notice of appeal — to any extent that Rule 58 is confusing. And there is a possibility that ambiguity may lurk in Rule 58(a). The rule as it now reads can be shown with one draft of possible amendments:

> Separate Document. Every judgment and [altered or] amended judgment must be set out in a separate document, but a separate document is not required ~~for~~ when an order — without [altering or] amending the judgment — disposes of a motion * * *.

At least one court has concluded that Rule 58(a) does not mean what it says when it refers to an order that "disposes of" a motion. The theory seems to be that an order granting any of the tolling motions will always lead to an amended judgment, so the rule can only refer to orders that deny a tolling motion. But that is not accurate. The simplest illustration of an order that grants a tolling motion without leading to an amended judgment is an order that amends Rule 52 findings of fact or makes additional findings — the additional or amended findings may not lead to any change in the judgment. The intended meaning, as reflected in the 2002 Committee Note, is that a separate document is required only when the judgment is amended. A party who waits for entry of an amended judgment may inadvertently let the appeal period expire.

Present action was not requested on the Rule 58 draft. The Appellate Rules Committee will consider the same package, and the actions of both Committees can be coordinated for the spring meetings.

The Subcommittee also considered the question whether Appellate Rule 4(a)(4)(B)(ii) should be made parallel to Rule 4(b)(3)(C). Rule 4(b)(3)(C) provides that for appeals in a criminal case, a valid notice of appeal is effective, without amendment, to appeal from an order disposing of any of the tolling motions listed in Rule 4(b)(3)(A). Rule 4(a)(4)(B)(ii), in contrast, provides that for appeals in a civil action a party intending to challenge an order disposing of any of the tolling motions, or a judgment altered or amended on such a motion, must file an amended notice of appeal even though that party had already filed a timely notice of appeal. The Subcommittee concluded that the civil and criminal contexts are sufficiently different to justify the different approaches. No changes will be recommended.

The Subcommittee has a third item on the agenda, the set of problems that are referred to as "manufactured finality." Those issues will be explored in the coming months. And the Subcommittee will work to accomplish any coordination that may be useful as the Bankruptcy Rules Committee pursues its work on the Part 8 rules that govern appeals.

FJC-CAFA Assessment

Thomas Willging provided a brief interim report on the FJC study of the impact of the Class Fairness Act. "This project has a long tail." Cases filed during the years immediately before the 2005 effective date of CAFA have generally concluded. Cases filed in the years immediately after the effective date continue to linger on the docket. A full report will be put off at least to the Committee's meeting next March, and perhaps to the fall 2010 meeting.

Although it is too early to reach firm conclusions, it can be noted that CAFA appears to be having at least part of the intended effect. The rate of remands to state courts is diminishing. Thirty percent of pre-CAFA removals were remanded. The figure for post-CAFA cases is twenty percent; although it is possible there will be some remands in the cases that remain open, remand usually occurs early in the litigation so there may be little change in this figure.

Brief note was taken of ongoing studies of class actions in California state courts, and of Professor Gensler's project to study actions in Oklahoma courts.

Adjournment

Judge Kravitz thanked the Administrative Office staff, and particularly Gale Mitchell and Amaya Bassett, for their hard work in making the meeting, although away from the Judiciary Building, a great success.

Next Meeting

The next meeting is scheduled for March 18-19, 2010, at the Emory Law School in Atlanta. The 2010 Conference will be held at Duke Law School on May 10-11, 2010.

Respectfully submitted,

Edward H. Cooper
Reporter