MINUTES

CIVIL RULES ADVISORY COMMITTEE

MARCH 18-19, 2010

The Civil Rules Advisory Committee met in Atlanta, Georgia, at the Emory University School of Law on March 18 and 19, 2010. The meeting was attended by Judge Mark R. Kravitz, Chair; Judge Michael M. Baylson; Judge David G. Campbell; Judge Steven M. Colloton; Professor Steven S. Gensler; Judge Paul W. Grimm; Daniel C. Girard, Esq.; Peter D. Keisler, Esq.; Judge John G. Koeltl; Chief Justice Randall T. Shepard; Anton R. Valukas, Esq.; Chilton D. Varner, 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 Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Eugene R. Wedoff attended as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., was the court-clerk representative. Peter G. McCabe, John K. Rabiej, Jeffrey Barr, and Henry Wigglesworth represented the Administrative Office. 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 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); Joseph Loveland, Esq.; Professor Robert A. Schapiro; John Vail, Esq. (American Association for Justice); and Emory Law School students.

Judge Kravitz opened the meeting with a general welcome to all present. He expressed deep appreciation to Emory for making their school available for the meeting, noting that the Committee enjoys meeting at law schools and the opportunity to interact with civil procedure teachers and students. He noted that Emory is a distinguished school, with a reputation for changing legal education and the profession. He also thanked Chilton Varner for helping to make the arrangements for the meeting.

Dean David F. Partlett and Associate Dean Gregory L. Riggs provided warm and gracious welcomes to Emory Law School. Dean Partlett observed that students seem to think that things like the Civil Rules appear from a mountain top; it is good for them to be able to observe the effort and talent brought to the work of rulemaking. Chilton Varner provided brief notes on the Law School's history. The school was founded with the purpose of establishing an institution that would vie with the best law schools in the country. It began with admissions requirements more demanding than the general standards of the time. It has continually fulfilled its commitment to achieving diversity, with high numbers of students from traditionally underrepresented minorities and with an even balance between men and women. It led the way in invalidating a Georgia law denying tax exemptions to private schools that integrate. It has continually moved upward in the much-watched US News & World Report rankings.

Judge Kravitz welcomed Judge Wedoff back, fully recovered from the injury that kept him from the October meeting. Judge Wedoff expressed his pleasure to be back. Judge Kravitz further noted that Judge Diamond was unable to attend, as was Judge Wood. He also reported that Chief Justice Shepard had recently received the Sixth Annual Dwight D. Opperman Award for Judicial Excellence. The citation noted many of Chief Justice Shepard's achievements, including chairing the National Conference of Chief Justices, serving the Indiana State Courts for more than 20 years, winning many awards for his work to achieve diversity in the profession and to advance professionalism, and recognition as an authority on judicial ethics. Judge Kravitz went on to comment on the extensive press coverage devoted to Anton Valukas's recent report as examiner in the bankruptcy proceedings for Lehman Brothers. The report concluded that the firm's failure was "more the consequence than the cause of our deteriorating economic climate." One securities litigator has called the report "porn for securities lawyers," so engrossed are they in exploring every facet of its 3,000 pages. "Repo 105 has entered our vocabulary."

Judge Kravitz also reminded the Committee that September 30 would mark the end of the Committee terms for members Baylson, Girard, Kravitz, and Varner. He hoped that all would be able to attend the fall meeting to be suitably recognized for their service to the Committee's work.

The Time Computation amendments took effect December 1, 2009. So far lawyers seem to be adjusting to the changes without difficulty.

The January Standing Committee meeting went well. Professor Robert Bone led a lively discussion of the pleading decisions in the Twombly and Iqbal cases. Joe Cecil described his hopes for the FJC study of those decisions. And all joined in congratulating "the most famous law clerk in the world," Andrea Kuperman, for her work in tracking the evolution of lower-court pleading decisions in the wake of Twombly and Iqbal. The sense of the Standing Committee seemed to be that more information must be gathered before undertaking serious consideration of possible rulemaking responses to these developments. It is important to carry on diligent work in assessing practice, and to address the information in the Committees' usual deliberate process.

October 2009 Minutes

The Committee approved the draft Minutes for the October 8 and 9, 2009, meeting, subject to correction of typographical and similar errors.

2010 Conference

Judge Kravitz introduced the plans for the 2010 Conference by observing that the conference calls show that presenters and panelists are working very hard. "Judge Koeltl has the orchestra finely tuned." The papers are being prepared. Data are being gathered and crunched. Participants are already working to find consensus on proposals for change.

Judge Koeltl said that people have indeed done a great job in preparing for the conference. The Administrative Office has done yeoman work in setting it up. The Duke Law School has been deeply involved, and they seem excited to be hosting the conference. The FJC has done wonderful work. The moderators and panelists are discussing the issues, working to make the conference more than a two-day long continuing education course. Issues of cost and delay will be addressed with the purpose of seeing how we can do better. The panels are well balanced, with lawyers who regularly represent plaintiffs, those who regularly represent defendants, and those who dwell in the academy. The response of people invited to attend has been strong; more want to come than the facilities can accommodate. Duke, and perhaps the Administrative Office, will stream it live. The Conference is open — the main meeting room will accommodate 160 people and there is an overflow room.

The conference will begin with the empirical research. The Institute for the Advancement of the American Legal System has a number of studies. First is the survey jointly administered with the American College of Trial Lawyers that is already familiar. They also are doing surveys of Arizona lawyers and of Oregon lawyers. Each of those states has a set of procedure rules that differ markedly from the federal rules. Lawyers in each state seem pleased with their own rules, and to prefer state courts over federal courts. The Oregon bar, moreover, is small and collegial — they seem to like dealing with each other. The IAALS also is doing a survey on the cost of litigation, to be completed this month.

The Searle Institute is working on a survey of litigation costs. The National Employment Lawyers Association distributed to its members a survey based on a revised version of the American College-IAALS survey; the FJC has looked at the results, and the NELA is doing a report. The

ABA Litigation Section is doing a report on its survey of section members, which also was based on the American College-IAALS survey. RAND is studying the costs of individual cases; it will not have a report in time for the conference, but the results will be presented.

A web site has been established for the conference. All papers and data can be downloaded. Access to the site is currently limited to conference participants because many of the resources are still in draft form. Eventually open access will be provided.

Other panels begin with one on pleading and dispositive motions. It is not easy to achieve consensus on these topics. When consensus can be achieved, it is useful — it may provide a more secure foundation for further work by the Advisory Committee on any topics that seem to call for further work. Daniel Girard's paper on specific discovery abuse, in the form of evasive answers, suggests some specific rules changes.

The next panel will address the current state of discovery. Elizabeth Cabraser's paper is one of the seed papers for the conference. She presents a plaintiff's view of what is wrong. Defendants, on her view, are refusing to produce and are running up the costs of discovery. She would accept fact-based pleading, but only if discovery to facilitate pleading is made available. Judge Grimm's paper is wonderful. The problem is seen to be one of attitude — the attitudes of clients who ask lawyers to do things that lawyers should not do; the attitudes of plaintiff and defense lawyers; and the attitudes of judges who do not enforce the rules. The concept of proportionality is not enforced by judges, who have the tools but will not use them. All of this means that changing the rules without changing attitudes will not fix much. Changing attitudes, however, is a task that must begin as early as law school. Judge Campbell suggests that without major changes, still some changes could be made in the matrix of the rules. "An idea is percolating that some things can be done without big system changes."

Judge Higginbotham will moderate the panel on judicial management. His paper can be read as highly critical of judges who are no longer trying cases. Judge Baylson responds that active judicial management can reduce the costs of discovery and enable trial if the lawyers and parties really want to go to trial. Judge Hornby's thesis is that people — clients — do not want to try cases; judges should honor this desire to avoid trial.

Discovery of electronically stored information will be addressed by a panel led by Gregory Joseph. They will address spoliation, sanctions, prelitigation preservation issues, and the like. Joseph has led a series of panel meetings. He put a series of thirty questions to the panel members asking for agreement, disagreement, and comments. Some of the propositions achieved unanimity, or close to it. Others revealed deep splits. This is already a remarkable achievement.

The panel on settlement is likely to conclude that there is no need to change the rules for the purpose of affecting settlements. The question is how the rules are applied, how judges and litigants use them. They are likely to conclude that there should be no tilt to further encourage settlement, nor to further encourage trial.

Users of the system — corporate counsel — will evaluate present practice from a perspective different from the lawyers who provide services to them. The panel on perspectives from state practice will similarly present views not often heard in these discussions.

The lunch speaker on the second day will be Judge Holderman of the Northern District of Illinois. The Northern District has a pilot program on e-discovery. He is enthused about the program. He believes that litigation in the 21st Century must have a concept of cooperation, not only on e-discovery but on other things as well.

Several bar groups will present proposals. Then long-range perspectives will be presented by a panel of people who have participated in the Civil Rules Committees over the years. Professor Carrington has prepared a wonderful paper, concluding that the case has not yet been made for major changes in the Rules. He draws support from the FJC study

The Sedona conference is surveying magistrate judges; a report will be ready for the conference.

"There are many themes out there, ranging from proposals for minor changes to proposals for major changes." The Conference will provide an unparalleled opportunity to focus on directions for the Civil Rules process over the next few years.

Judge Kravitz thanked Judge Koeltl for all of his hard and successful work in arranging the conference. The next steps may involve many possibilities. Rules changes are an obvious range of activity to be considered. But education also may prove an important tool, looking to educate both judges and lawyers in the opportunities provided by the rules as they stand. Judge Rosenthal and Professor Coquillette met with Chief Justice Roberts, who is excited about the opportunities presented by the conference. He is anxious that the momentum built up by the conference not be dissipated. The district court judges on the Judicial Conference also are excited. Some of them think that some tweaking changes in the rules may be in order. Gregory Joseph's panel on e-discovery has already reached consensus on some rules changes.

Judge Rosenthal joined the observations that there is great interest in the conference, and a determination that all this great effort not be wasted. The momentum must be carried forward. Judge Kravitz underscored the need to think creatively about how to make use of all this. This must not be just another conference that disappears without consequence.

Federal Judicial Center Reports

Emery Lee and Thomas Willging presented three Federal Judicial Center reports based on the FJC survey of lawyers in cases closed during the last quarter of 2008.

Multivariate Analysis of Litigation Costs in Civil Cases: Emery Lee presented this report. The survey gathered a great volume of data, more than can be usefully summarized. It draws on information about lawyers, judges, and clients. Multivariate analysis is the means to draw meaningful associations with specific factors by holding other factors constant. The results often represent centers around which real events cluster — as a simple analogy, no one person in a room may be the average weight of all the people in the room. No single case may look like the center of a broad range of cases.

One finding was that a 1% increase in the dollar stakes leads to a 0.25% increase in costs, based on real dollar cost numbers as reported by the lawyers. There was no difference between plaintiff lawyers and defendant lawyers in reporting on the relationship. When nonmonetary stakes were important to the client, plaintiff lawyers reported a 42% increase in costs, while defendant lawyers reported a 25% increase. It does not seem likely that revisions in the Civil Rules can do anything to affect the stakes involved in litigation.

Time to disposition also increases costs. For each 1% increase in the time to disposition, plaintiff costs go up 0.32%, and defendant costs go up 0.25%. These figures include all litigation costs, including attorney fees; they do not reflect opportunity costs. (Attorney fees in contingent-fee cases were based on estimates of dollar values.)

If a case actually goes to trial, plaintiff costs increase by 53%, while defendant costs increase by 25%. It may be that the disproportionate effects as between plaintiffs and defendants arise because defendants incur greater costs before the eve of trial, while some plaintiffs defer "real preparation" until it is evident that the case will go to trial.

If there is any court ruling on a motion for summary judgment — grant, deny, grant in part — plaintiff costs are 24% higher, and defendant costs 22% higher. It may be that this reflects discovery costs, because summary-judgment rulings are likely to be made only after discovery is completed. The survey data do not support an inquiry into the relationship between the length of time a case was pending and an actual ruling on a summary-judgment motion. Neither is it possible to sort out cases in which there was a summary-judgment motion but no ruling before the case actually went to trial.

Measuring discovery is difficult. The sample of cases was constructed to exclude cases not likely to have any discovery. Cases where there was no answer or motion to dismiss were excluded, as were categories of cases corresponding to the Rule 26(a)(1) categories in which initial disclosure is not required. All cases that lasted more than four years, and all cases that went to trial, were included; this oversampling likely increased the number of discovery events. The next step is to distinguish different types of discovery. The study used 12 kinds — expert discovery, the number of depositions, third-party subpoenas, e-discovery, and so on. Distinctions were drawn between parties who requested or produced discovery, or those who did both. Eight types of disputes over e-discovery were distinguished. In general, for each type of discovery used, there was a 5% increase in costs for defendants, but no increase for plaintiffs. For depositions, plaintiffs found an 11% increase in costs for each expert deposition, and a 5% increase for other depositions. For defendants there was no increase for an added expert deposition, but a 5% increase for each other deposition.

E-discovery responses were mixed. Plaintiffs who only produced ESI reported no significantly higher costs than those with no e-discovery. Plaintiffs who only requested ESI experienced a 37% increase in costs, and those who both requested and produced experienced a 48% increase. The pattern was different for defendants. There was no statistically significant increase in costs for those who only requested, nor for those who only produced, ESI. Those who both requested and produced, however, had 17% higher costs. For both plaintiffs and defendants, each dispute over e-discovery increased costs by 10%. E-discovery, in short, is most costly when there is reciprocal e-discovery and when there are disputes over production.

Other findings show, not surprisingly, that case complexity increases costs. Case management might reduce costs, but it is difficult to control for the factors that have an influence; it is easily possible that case management is most active in more complex cases, and is associated with higher-cost cases even if in fact it holds the costs of those cases below the level that would occur without management. Similarly, each case referred to a magistrate judge had a 24% increase in costs, but that may be because the reference was based on the nature of the case, the level of contentiousness, or other factors.

Plaintiff attorneys who bill by the hour reported higher costs than those who bill by other methods. No similar association could be found for defense attorneys, but 95% of them bill by the hour so there was no reliable basis to study the question. It is clear that costs vary directly with the size of the law firm.

Differences in judicial workload had no meaningful correlation with costs. Nor were there significant differences among the circuits.

Attorney Views About Costs and Procedures: Thomas Willging reported on interviews with 35 attorneys chosen from the much larger number who responded to the survey. Of the 35, 16 principally represent plaintiffs, 12 principally represent defendants, and 7 represent plaintiffs and defendants about equally. These attorneys volunteered for the interviews; it cannot be known how far they are representative of all who participated in the survey.

The report includes many quotes from the lawyers. The quotes are useful illustrations. They may go some way toward explaining the survey results.

In discussing the relationship between costs and the stakes in the litigation, the attorneys said that the stakes are the principal guide in deciding what to do. The level of discovery was the most direct measure of costs. The best guess is that this behavior is economically based, not rule-based. The stakes influence how much clients are willing to pay, or how much effort a contingent-fee attorney is willing to invest.

The attorneys agreed that complexity affects costs, and that complexity is defined in terms of the number of parties and the number of transactions underlying the litigation.

Types of suit do not tell much about the costs of litigation, apart from intellectual property cases. Intellectual property cases often cost a lot. One lawyer said a company will spend $20 million for the right to sell a drug for $1 billion.

The survey shows that a 500-lawyer firm incurs litigation costs double those incurred by a solo practitioner. The survey lawyers confirmed this finding. "You have to feed the tiger" before the case can be settled.

Hourly billing also affects costs. When lawyers on both sides bill by the hour, costs go up. One of the interviewed lawyers said that hourly-billing lawyers lose all perspective on the value of the case. But another said that what counts is really the size and resources of the client. Clients may instruct the lawyer to engage in scorched-earth tactics. Some attorneys respond by holding themselves out as scorched-earth litigators, and clients know who these lawyers are.

All of the interviewed lawyers agree that the volume of discovery presents cost problems. It must be remembered that the lawyers in the survey generally said that the amount of discovery in the survey case was just right, or was too low; only 25% of them said there was too much discovery. So how do lawyers know when to stop? The typical response was that this is constantly assessed. The quest is not for perfect information, but for enough information in relation to the stakes. This is self-monitoring, not a result of enforcing the discovery rules. Lawyers also look to the scheduling order, which they see as a major control. They do what they can within its constraints. But one lawyer said that a scheduling order can actually increase costs when young lawyers think they are obliged to do everything that is permissible within the limits of the order. Other lawyers say they measure discovery by looking to the elements of the claim or defense — they pursue discovery to the point of securing reliable information on each element. And specialists in particular types of litigation often have protocols that they follow. An example is first to use interrogatories to find out about sources of discoverable information, then requests to admit, then depositions.

The interviews also asked questions about pleading, building on the National Employment Lawyers Association survey. In the survey, 94% of those who have filed an action after the Twombly and Iqbal decisions report adding more facts to their complaints. Seventy-four percent said they had responded to motions to dismiss that would not have been filed before the Twombly decision. Fifteen percent reported doing more pre-filing investigation. Only 7% reported having

cases dismissed on the pleadings after Twombly, but the survey does not show whether the same cases would have been dismissed under pre-Twombly practice.

A committee-member judge reported that Twombly and Iqbal had not changed the results in rulings on motions to dismiss. The only change is that he now cites them as the current Supreme Court statements of pleading standards. He asked whether the survey respondents counted it as a dismissal if the complaint was filed with leave to amend. The answer is that it is not possible to tell how the survey question was interpreted; that is one of the difficulties faced in attempting to measure the results of a survey that was not designed by the FJC.

Another judge noted that in talking with the district-judge representatives at the Judicial Conference this month, every judge said that Twombly and Iqbal had made no difference in what they do. But it was noted that the possibility of surveying judges generally on this question must be approached with care. The FJC is reluctant to intrude surveys into judges' busy lives unless there is very good reason and it is possible to frame questions that will give clear guidance.

The interviews showed both plaintiff and defendant lawyers agreeing that motions to dismiss are a waste of time. Several defendant attorneys said that in most cases they could not justify billing for a motion to dismiss. The plaintiff attorneys said they generally survive motions to dismiss, and even motions for summary judgment. Most also say that they seldom encounter notice pleading, although one said that notice pleading often occurs in patent cases. One lawyer confessed to being a notice pleader, meaning pleading that includes sufficient facts to tell the story but avoids adding facts that might come back to haunt the pleader. Most lawyers want to tell a persuasive story, aiming not only at the judge but also at the adversary.

Attorney Satisfaction: Emery Lee presented a summary of the results found by comparing the surveys done by the American College of Trial Lawyers with the IAALS, by the ABA Litigation Section, and by the National Employment Lawyers Association. The American College respondents "are much more senior" than those who responded to the other two surveys, with an average of 37.9 years in practice. Respondents to the other two surveys averaged 22.9 years (ABA) and 21.4 years (NELA), very close to the 20.9-year average in the FJC survey.

One question asked whether the Civil Rules are conducive to meeting the Rule 1 goals of just, speedy, and inexpensive determination. Only about 35% of the ACTL respondents agreed, a discouraging showing. About 40% of NELA respondents agreed. More than 60% of Litigation Section respondents agreed. No explanation for these disparities is immediately apparent.

Many of the succeeding questions are presented as "net agreement" charts: if, for example, 50% of respondents agreed with a proposition and 20% disagreed, the net agreement would be 30%.

The second survey statement was that the Rules must be reviewed in their entirety and rewritten to address the needs of today's litigants. All groups registered net disagreement; the strongest net disagreement, more than 40%, was from Litigation Section lawyers who typically represent defendants.

The next survey proposition was that one set of rules cannot accommodate every type of case. ACTL respondents showed a modest net agreement. NELA respondents showed a modest net disagreement, while ABA respondents showed substantial net disagreement.

The first three questions, in short, present a mixed picture. There was no net support in any survey for drastic revision of the Rules, but the other questions did not suggest resounding approval of the present system.

Another question stated that discovery is abused in almost every case. ACTL respondents showed modest net disagreement. ABA plaintiff lawyers showed slight net disagreement, while the defendant lawyers showed slight net agreement — 7.2 % — and those representing plaintiffs and defendants about equally showed 10.9% net agreement. NELA respondents — representing plaintiffs — showed 31.5% net agreement. The FJC survey showed very different results. It may be that the FJC survey respondents were not in any of these organizations. And there can be an "organization culture," propagated in organization magazines and at organization meetings, that influences these views. Perhaps more importantly, different respondents may have quite different views of what is abuse. Plaintiffs tend to find abuse in "stonewalling" by failing to provide responsive information. Defendants tend to find abuse in overuse of discovery.

Respondents were asked to agree or disagree with the statement that the cumulative effect of changes enacted since 1976 has significantly reduced discovery abuse. ACTL plaintiff respondents showed a net disagreement of 12.4%, and defendants showed net disagreement of 22%. Among the Litigation Section respondents, plaintiff attorneys agreed by a net of 0.4%, while defendant attorneys showed net 17.9% disagreement and those who represent both plaintiffs and defendants showed net 11.6% disagreement. NELA respondents showed net 39.5% disagreement. However they defined abuse, then, most respondents thought rules amendments had not had any effect. (It was pointed out that the median time in practice for the Litigation Section and NELA respondents goes back to about 1988, some time after the 1983 amendment adding what is now Rule 26(b)(2)(C).)

The next statement was that early intervention by judges helps to limit discovery. All groups of respondents in all three surveys agreed by wide margins; the highest net agreement was by Litigation Section attorneys representing defendants, 56.6%, and those representing both plaintiffs and defendants, 57.9%. Interpreting these responses is complicated by the possibility that "limit" could be interpreted as no more than an arbitrary cut off rather than imposing focus and sensible limits. But there are other indications that the respondents interpreted the question to mean that early judicial intervention helps.

Summary judgment responses showed a clear divide between plaintiff and defendant attorneys. The statement was that summary judgment practice increases cost and delay without proportionate benefit. ACTL plaintiff attorneys showed net agreement at 26.2%, while the defendant attorneys showed net disagreement at 59.6%. In the Litigation Section, plaintiff attorneys agreed at a net of 26.9%, while defendant attorneys showed net disagreement at 77.2% and those who represent both showed net disagreement of 45.1%. NELA respondents showed net agreement of 76.9%.

Another statement was that litigation costs are not proportional to the value of a case. The ACTL survey did not distinguish between small-value cases and large-value cases. The plaintiff respondents showed net 36.5% agreement, and defendant attorneys agreed 45.5% more than they disagreed. The Litigation Section and NELA cases distinguished small-value case from large-value cases. With respect to small-value cases, Litigation Section plaintiff attorneys showed net agreement of 63.2%, defendants were at 85.3% net agreement, and those representing both had 89% net agreement. NELA respondents had 69.8% net agreement. For large-value cases, Litigation Section plaintiff attorneys registered net disagreement of 25.1%, defendants came in at 6.4% net disagreement, and those representing both showed 11.2% net disagreement. NELA respondents came in at 5.9% net disagreement. (It seems likely that the ACTL respondents were reading "small value" into the question, but this is an example of the difficulty of interpreting a survey written by someone else.)

The 2006 e-discovery rules also were discussed. The most common response was that they provide for efficient and cost-effective discovery of electronically stored information "some of the time." Defendant attorneys were more likely to say "no, never" across the different groups of respondents.

Judge Kravitz thanked the FJC for its work, which will play an important role in the 2010 conference.

Willging Retirement

Judge Kravitz then noted that Thomas Willging "is purporting to retire." He has rendered brilliant service to the Advisory Committee as FJC Senior Research Attorney over the course of 26 years. Judge Kravitz and Judge Rosenthal presented a plaque with this inscription:

In recognition and appreciation of the

distinguished service of

THOMAS E. WILLGING

for his unsurpassed devotion to the administration of justice, dedication to the Rules Enabling Act, and commitment to the federal judiciary while serving as a researcher to the

Advisory Committee

on the Federal Rules of Civil Procedure

Judicial Conference of the United States

1984 — 2010

During Tom's 26 years as a senior research associate with the Federal Judicial Center, the Advisory Committee was involved in many important projects that have had a profound impact on the judicial system. Tom worked on many of the projects at the request of the Advisory Committee, providing comprehensive research and analysis on a wide range of subjects, including class actions, mass torts, electronic discovery, special masters, Civil Rule 11, and general civil litigation practices. His superb work informed the Committee's decision-making process and contributed to many proposed rules amendments. Tom's departure will mark the end of a long and distinguished association with the Judicial Conference Rules Committees. His diligence, wise counsel, and quiet leadership have earned him the respect and admiration of all with whom he served. Tom was a wonderful friend and colleague to the Rules Committees. He will be greatly missed. The Rules Committees extend to Tom their very best wishes and congratulations on a well-earned retirement.

Honorable Lee H. Rosenthal, Chair,	Honorable Mark R. Kravitz, Chair
Committee on Rules of Practice	Advisory Committee on
and Procedure	Civil Rules

Judge Kravitz concluded that Willging has been a wonderful friend and colleague who will be greatly missed.

Willging responded that he had never heard so many favorable adjectives in a single paragraph.

Pleading Standards

Judge Kravitz introduced the discussion of pleading standards by noting that the Twombly and Iqbal decisions have been a boon to academia. They have fostered more law reviews, and supported more tenure awards, than any recent civil-procedure phenomenon. It is puzzling that some of the writing calls for legislation to reverse the decisions — that could easily bring a halt to the train of articles.

Andrea Kuperman continues to update her survey of judicial responses to Twombly and Iqbal. Her current work will focus on decisions in the courts of appeals, where standards and guidance are being threshed out.

The Administrative Office is continuing its monthly update of statistics on motions to dismiss. The statistics track the number of cases filed, the number of motions to dismiss, and the rate of granting motions to dismiss. The statistics are broken out into several case categories.

The FJC is working to dig deeper into the raw statistics provided by the Administrative Office docket data. Joe Cecil is starting by separating out Rule 12(b)(6) motions from other motions to dismiss in ten large districts. He will focus on statistics for the months from September through December in 2005, 2006, 2007, 2008, and 2009. This will cover two years before the Twombly decision, the two years between Twombly and Iqbal, and the end of the year in which Iqbal was decided. The data will be divided by case types. A preliminary report should be ready for the 2010 Conference, and a detailed report should be ready for the fall Committee meeting. The report will not include Rule 12(e) motions.

Peter McCabe noted that studying docket information remains a challenge because there is no standardization in how information is reported. But "docket events" do seem useful in identifying motions to dismiss. The Administrative Office is working toward the goal of establishing criteria for uniform reporting that will support research in other fields comparable to the research now being undertaken for pleading dismissals.

Judge Kravitz expressed appreciation for the FJC study that is ongoing. One important feature will be to inquire whether dismissal is accompanied or followed by leave to amend, and — when amendment is undertaken — what is the post-amendment disposition. Andrea Kuperman's review of application in the lower courts suggests that the courts of appeals are sanding down the rough edges that inevitably emerge as district courts respond in the immediate aftermath of ambiguous opinions. The Supreme Court itself may be sending further signals; a per curiam opinion this January cited the Leatherman "no heightened pleading" decision as the standard on a motion to dismiss. And an opportunity for further clarification is presented by a pending petition for certiorari that asks the question whether the Swierkiewicz decision remains good law. (Certiorari was denied on March 22, Townes v. Jarvis, 2010 WL 1005965.)

The continuing work to gather data is important. We do not yet know whether there is a problem, nor what the problem is if indeed there is a problem. It may be that future work should be directed not so much at pleading standards as at developing means of enabling discovery to support sufficient pleading in cases in which plaintiffs with potentially good claims cannot frame

an adequate complaint because defendants (or perhaps others) control the necessary information. This problem of information asymmetry is approached informally by many judges. Discovery may be permitted while a motion to dismiss is taken under advisement. Or in an action with two defendants, one may be dismissed with the express caveat that leave to amend and reinstate will be granted if discovery against the remaining defendant provides information that supports a sufficient complaint.

Judge Rosenthal noted that bills to supersede Twombly and Iqbal are pending in the House and the Senate. The initial draft of the Senate bill carries Conley v. Gibson forward in terms that could be read to supersede the Private Securities Litigation Reform Act and the Prisoner Litigation Reform Act. The bill expressly recognizes that Enabling Act rules can supersede the bill's standard, an important matter. But it will be difficult to turn the clock back to 1957, ignoring everything that happened in the half-century between 1957 and 2007. The Senate bill may be a place holder, designed to introduce the topic while revised drafting is undertaken. A revised version is circulating for discussion. This version would turn the clock back to May 20, 2007; it would clearly preserve PSLRA standards, and may preserve PLRA standards. It still defers to any Rule adopted under the Enabling Act after the statute's effective date. The draft includes legislative findings that accuse the Supreme Court of violating the Enabling Act by amending the pleading rules in decisions that bypass Enabling Act procedures. At different points it cites the Swierkiewicz and Leatherman decisions for appropriate pleading standards. It says that only Rule 56 can resolve questions of fact insufficiency; it is not clear what that means. The Senate has had a hearing, with witnesses supporting the bill outnumbering those who oppose.

The House bill seeks to create a standard: "beyond doubt there is no set of facts that would support the claim." It would supplant the PSLRA and PLRA. There have been two hearings in the House. Again, the witnesses in support outnumber those who oppose.

The Committees' role in all this is to inform Congress that the Committees are pursuing questions of pleading standards in a very careful way. The Committees are grateful that the bills recognize the role of the Enabling Act process as the appropriate means to consider and, if change is needed, adopt new pleading standards for the long run. The discussions in Congress are very political. The Committees have constantly refused to be drawn into such political divisions, and must continue to avoid entanglement. They must continue to focus on what they do best, founded on careful and thorough study. The results can be presented to Congress. Providing Andrea Kuperman's memorandum is an example.

Judge Kravitz added that the Kuperman memorandum shows there is little difference among the circuits. There are a few district-court decisions saying there has been a big change in pleading standards, but they are outliers.

Judge Rosenthal noted that the Administrative Office data are based on consistent identification of all motions to dismiss. The accuracy of the data is shown by the spikes of activity in March and September, when district judges address accumulating motions to be ready for their six-month reports. The data show not much increase in rates of filing motions to dismiss, nor in the rates of granting. There has been much concern about the effects on civil rights and employment cases, but the data show the rates are flat in those cases. Surveys so far have been consistent with this data. There is no apparent information that would support a need for immediate action. The district courts that read the Iqbal decision more aggressively are being reversed.

Pleading is both fundamental and delicate. The Committees are gathering information in a disciplined and thorough way. They are prepared to offer rule changes if good reason appears.

It was noted that pleading standards have become a topic of lively discussion in the Department of Justice. A working group has been formed to gather views from different Department components — civil, civil rights, environment, and so on. There is no sense yet whether any changes are needed, but it is agreed that any changes should be effected through the Enabling Act process.

Judge Kravitz noted that the Second Circuit has established pretty good pleading guidelines. Legislation — and particularly vague legislation — will delay attempts to determine where practice is moving. The Committee will keep on moving, deliberately but as rapidly as possible. The pleading rules are interrelated with all the other rules, most obviously discovery. This interdependence will be a constant factor in Committee deliberations. It must be recognized not only that some cases are dismissed on the pleadings, but also that some are wrongly dismissed. That happened before Twombly and Iqbal. It is possible that there has been some increase in the number of unwarranted dismissals. But there is nothing to suggest that there has been a large increase in unwarranted dismissals.

A member asked how the Committee could evaluate the data if indeed it shows an increase in the number of dismissals on the pleadings. How can we tell whether that is a good thing or a bad thing?

A first response was that rules changes might be required if it were shown that district judges think they cannot allow targeted discovery when the defendant controls the information needed to frame a complaint. Another ground for rules changes might appear if judges become confused about the relationship between Rule 12(b)(6) and the Rule 11(b)(3) standard that explicitly allows pleading factual contentions that "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Another response was that it will be important to learn whether dismissals seem randomly distributed, or instead whether there are big increases in identifiable categories of cases. Concern continues to be expressed about employment cases and civil rights cases. If it should be borne out — remember that present numbers do not seem to bear it out — that would become a reason for close inquiry.

Those concerns focus on the fear that pleading standards may become too rigid. From the time of the Leatherman decision in 1993, on the other hand, the Committee has considered the Court's suggestion that heightened pleading standards might appropriately be adopted for some types of cases by amending the Civil Rules. "Conspiracy" claims might be added to Rule 9(b), for example, responding to the Twombly decision. Official-immunity cases are another example. These two examples, not coincidentally, would address the concerns reflected in the Twombly and Iqbal decisions, and indirectly in the Leatherman decision. Adopting specific rules for those cases might have the effect of restraining any impulse to expand the Twombly and Iqbal decisions beyond the specific problems they address.

The member who asked whether it is possible to determine whether any heightened rate of dismissals is a good thing or bad agreed that it is important to gather data. "But in the end, it will be a policy decision." It was agreed that this is a good caution to observe. It is distinctively difficult for the rules committees to make policy decisions in a way that is not political, or seen to be political.

Another member agreed that the Committee must continue to wait while working hard to learn more about evolving practice. When the time comes to act, one option may be to reaffirm

Rule 8 notice pleading. Pennsylvania, a fact-pleading state, is actively considering a move toward notice pleading. If careful study persuades the Committee that notice pleading, as it has been practiced, is still the best choice, the Committee can report that.

It was noted that the academic literature says that there has been a change, and that the change makes a difference. Some articles point to "statistics" claimed to show an increase in the rate of dismissals. Others say simply that even dismissal of one case that would not have been dismissed before Twombly and Iqbal is one too many. But it was noted that the "statistics" are derived from WestLaw. WestLaw gets 3% of district-court opinions. Dismissals are more likely to be sent to WestLaw than refusals to dismiss. The number of grants is far lower in relation to the number of denials than reported. It would be helpful to have a critique of these "data," which are being used at conferences now to paint an inaccurate picture of what is going on. "We should be in a position to refute" the supposed data.

The focus on academic commentary continued by noting that after Conley v. Gibson, "academic interest in pleading almost vanished. Now it's getting out of hand. There is little correlation between the anguish in much of the writing and what courts are actually doing."

It was further observed that "academics are not the source of the political pressure. There are powerful political sources at work here."

It was said that the Bankruptcy Rules Committee will be grateful for the Civil Committee's work. A survey is important to find out whether lawyers are refraining from filing cases now that would have been filed before Twombly and Iqbal. But that will be hard to pick up. A related effect may be that the cases are still filed, but with 6 claims, not 19; with 3 defendants, not 7. The FJC study will at least inquire whether dismissals involve only some claims, or only some defendants.

It was asked whether the studies will track pro se cases. They may be the most vulnerable to dismissal. "The dynamic is different." This is indeed part of the FJC study. Pro se status may be associated with a higher rate of dismissals, but there is little sign of change.

Discussion of pleading standards concluded by confirming that the Committee is taking the subject most seriously. "We send Congress the information we have. But we see the need for serious, careful, deliberate consideration before action." It cannot be foretold whether legislation will be enacted in this session of Congress, or in the next. Either way, the Committees must continue their ordinary processes.

Rule 45

Judge Kravitz introduced the Rule 45 report by thanking the Discovery Subcommittee — members Campbell, Girard, Valukas, and Varner — and Reporter Marcus for the enormously hard work that has gone into the report.

Judge Campbell introduced the report. A series of comments on Rule 45 prompted the Subcommittee review. Andrea Kuperman did a literature search. With her help, and by canvassing various bar groups, the Subcommittee identified 17 possible issues. The list was narrowed to 6. Further work has narrowed it still further. Beyond these specific questions, there also were a number of comments on the cumbersome, complex character of Rule 45. It may be the second longest rule in the Civil Rules. The Subcommittee recommendations will be presented in four packages: What issues are "off the list" for further action; recommendations for amendments that can be approved now, without advancing them toward publication until other

issues are resolved; the question raised by district-court opinions asserting nationwide jurisdiction to compel a party or a party's officers to appear as trial witnesses; and the possibility of restructuring Rule 45.

No Change: Two issues seem ready to be put aside without further work. One is whether Rule 45 should require personal, in-hand service of a subpoena. As compared to Rule 4 methods of service, the issue seems to be a theoretical point, "not a real problem." When service is on a nonparty, "the drama of personal service may be useful." The other is cost allocation. Rule 45 addresses this in part now. Rule 45(c)(1) directs that a party or attorney issuing a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. Rule 45(c)(2)(B)(ii) says that if a person commanded to produce documents or other things objects, an order enforcing the subpoena "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." Some lawyers say that compliance costs a lot, and the cost is rarely recovered. Other lawyers — those who serve subpoenas — complain that they are presented with big bills for the costs of compliance and are obliged to pay. The Subcommittee could not find a principled basis for amending the rule; the problems seem best worked out by the lawyers. This approach seemed to be pretty much approved at the Committee meeting last October.

Discussion began with the means of serving a subpoena. It was noted that there is a good bit of district-court law allowing "Rule 5-ish" service. These rulings are made in response to objections to service by means other than delivery in hand. Do we want somehow to rein that in? It was further observed that Rule 45(b)(1) is ambiguous. It says only that "[s]erving a subpoena requires delivering a copy to the named person * * *." "[D]elivering" can easily encompass delivery by means other than in-hand service. If indeed it is wise to limit service to in-hand delivery, a couple of words could be added to the rule to make that direction unambiguous. Lawyers seem to think in-hand delivery is not a big problem.

Discussion continued by asking whether the possible ambiguity is creating unnecessary work for courts — are they being asked to resolve the problem by ruling on motions to quash, or motions to compel? Do we need to add the "two words" to close this down? The response was that this does not seem to be a huge problem in terms of burdening the courts. The issue may be a problem for the lawyer who cannot accomplish in-hand service. Sometimes other means of service are made with the judge's blessing. The most obvious problem arises when a nonparty is evading service. One response is to adopt state-court methods of service.

It was further noted that in practice, subpoenas are often mailed when the lawyer expects there will be no objection. In-hand service tends to be reserved for cases in which resistance is expected. The Subcommittee will consider this question further.

As to costs of compliance, it was agreed that the Committee should keep an eye on the issue to see whether problems emerge that might benefit from rule amendments.

Changes: Notice. Rule 45(b)(1) clearly provides that before a document subpoena is served, "notice must be served on each party." But often the notice is not provided. The Subcommittee recommends changes in wording and in location within Rule 45 to emphasize the notice requirement, believing that one reason for noncompliance is that the obscure location at the end of present Rule 45(b)(1) causes lawyers to overlook the clear obligation.

The proposed change would transfer the present Rule 45(b)(1) direction to a new Rule 45(a)(4), giving it a more prominent position that may be less often overlooked. In addition, the provision would be changed by adding a requirement that a copy of the subpoena be served with

the notice. The draft Committee Note includes in brackets an optional paragraph that would address the consequences of failure to provide the required notice. This paragraph expresses an expectation that courts will deal appropriately with such problems as arise, and confidence that ample remedies are available.

The Subcommittee decided not to add a requirement that notice be provided some specified number of days before service of the subpoena. There was some support at the October meeting for adding such a requirement. Plaintiffs in employment cases may experience adverse consequences when a subpoena is served on a former employer or a present employer. But the Subcommittee was concerned about the costs of increasing the complexity of Rule 45. Leaving it to those who get notice to act quickly seems about all that can be done. If specific requirements were added, the occasions for seeking sanctions would multiply.

Similar concerns led the Subcommittee to decide against recommending that the party who serves a subpoena give notice to other parties when documents are produced in compliance with the subpoena. A particular problem would arise when documents are not produced all at once, but are provided in batches. Notice before service alerts other parties to the need to follow up by later inquiries for access to whatever has been produced.

A point of style was raised: the present rule follows the preface describing a document subpoena with "then" before it is served, notice must be given. "Then" is omitted from the proposed draft. The Subcommittee will consider the style choice.

Enforcing court: Rule 45 assigns responsibility for enforcement to "the issuing court." The issuing court may not be the court where the action is pending — the present structure calls for issuance by the court where a deposition is to be taken, or where documents are to be produced. When disputes arise, there may be very good reasons to resolve them in the court where the action is pending. The decision whether to enforce the subpoena may dispose of the case, and be tightly bound up with ongoing management of the case. Or a single action may involve discovery in many different districts, raising the prospect of inconsistent rulings on the same points and further undermining management by the court where the action is pending.

These concerns lead to proposals for parallel amendments adding a new Rule 45(c)(2)(B)(iii) and (3)(D). They would provide for transfer of a motion to compel production or a motion to quash from the issuing court to the court in which the action is pending. The standard for transfer would be "in the interests of justice." This standard is borrowed from the "interest of justice" standard in §§ 1404 and 1406, but without the "convenience of parties and witnesses" language. The draft Committee Note includes an optional bracketed paragraph at the end that would address the possible objection that a Civil Rule cannot confer authority on a court sitting in one state — where the action is pending — to resolve disputes involving a nonparty who has been served with a subpoena outside that state. The question is analogous to personal jurisdiction issues. The Subcommittee thinks it clear that the Enabling Act authorizes the proposed transfer provision. Whether it is useful to address the question in the Committee Note remains open for discussion.

The Committee Note recognizes that it may be important to resolve disputes involving a nonparty in the court local to the nonparty. But it also recognizes that transfer may be important for a variety of reasons.

It was asked whether a court can transfer on its own, without providing a hearing? The Subcommittee wants to guard against reflexive transfer simply to "get rid of" motions that burden the issuing court. But adding a hearing provision might raise awkward questions about

what is a "hearing"? Many motions are "heard" on paper, without oral presentation. Responses to a transfer order can easily qualify as an opportunity for hearing. It will be desirable to have a statement of reasons for transfer, but that is not made explicit in the draft. It was agreed that the issuing court should act only after knowing the positions of the parties and a nonparty served with a subpoena, and to really assess the interest of justice rather than transfer to avoid work. Perhaps the Committee Note should be revised to address this issue more specifically.

The "interests of justice" standard was discussed. The Subcommittee does not want transfer to be "too easy." Does this phrase capture it? Would it be useful to add the parallel focus on the convenience of parties and witnesses, even if only to avoid any negative implications from the obvious comparison to the statutes governing transfer of venue?

It was stated that it is important to emphasize that there often are good reasons to decide disputes locally, in the issuing court. "Exceptional circumstances" might be the test, but that seems too strong. The Committee Note does emphasize the factors that often weigh against transfer. But it may be important to focus the rule text on the convenience of the parties and, especially, a nonparty witness. An alternative form might pick up the § 1407(a) standard which, for multidistrict transfers, addresses both the convenience of the parties and witnesses and also asks whether transfer "will promote the just and efficient conduct of such actions." The analogy to coordinated pretrial proceedings lends weight to this alternative.

It was asked whether there should be a bias against transfer. The Subcommittee did not try to quantify the balance. "We don't want it to be an easy out for the local judge." But transfer may be important when sound resolution of the dispute requires close familiarity with the action. It is hard to draw general formulas from the cases that struggle with these problems. There is a great variety of circumstances. The Subcommittee will, however, consider further the choice of words to express the standard for transfer.

Party Witnesses at Trial: Judge Campbell described the questions that have emerged from the ruling in In re Vioxx Products Liability Litigation, 438 F.Supp.2d 664 (E.D.La.2006). Rule 45(b)(2) limits the place of serving a subpoena. The understanding has been that the limits on service also limit the place where compliance can be enforced. Compliance cannot be required outside the limits of service. When Rule 45 was extensively amended in 1991, Rule 45(c)(3)(A)(ii) was added. This provision requires a 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," except that a trial subpoena can command attendance by traveling from any such place within the state where the trial is held. The Vioxx decision found by "inverse inference" that Rule 45(c)(3)(A)(ii) authorizes authority to compel a party or a party's officer subpoenaed as a trial witness to travel from outside the state where the trial is held. This inverse inference from the language of the rule was found to trump the 1991 Committee Note saying the amendments made no change. The court also said that the 100-mile limit is antiquated in an era of easy travel over far greater distances. Andrea Kuperman's memorandum shows that several cases agree, while it also shows several cases that disagree. One of the cases that disagrees is from the same district as the Vioxx decision, Johnson v. Big Lots Stores, Inc., 251 F.R.D. 213 (E.D.La.2008).

Ms. Kuperman noted that although many cases describe the Vioxx rule as the majority rule, they often support this statement by citing inapposite decisions. The more recent decisions tend to reject the Vioxx ruling. There is no circuit authority. And all cases, no matter which side they take, assert that the answer they choose is mandated by the plain language of Rule 45.

The Subcommittee recommends that the disagreement in these cases be resolved. It further recommends that the resolution go back to the original meaning: a subpoena to testify at trial can require travel only from a place within the state, whether the witness is a party, a party's officer, or a nonparty. The only distinction appears in Rule 45(c)(3)(B)(iii) — a person who is neither a party nor a party's officer can be required to travel more than 100 miles within the state, but the court may modify or quash the subpoena if it requires the person to incur substantial expense.

Although the Subcommittee recommends restoration of the 1991 meaning, it recognizes that the question is difficult. The desire to reach further for trial witnesses who are parties, or officers of parties, is expressed not only in the Vioxx line of cases but also in some of the decisions that reject the Vioxx reading of Rule 45. It will be important to provoke extensive discussion of this question at the miniconference the Subcommittee recommends to explore Rule 45 issues. It may be important to provide some resolution that allows a reach beyond state lines, but that does not establish routine nationwide subpoenas for trial testimony by a party or a party's officer.

It was recognized that under present rules a subpoena is not required to take a party's deposition. Parties, as well as their officers, directors, and managing agents often are subjected to depositions in the court where the action is pending. But a deposition can be arranged on terms that are less intrusive than trial testimony. Scheduling a deposition can adjust for the deponent's schedule, and can avoid the need to wait around during the uncertain pace of trial. The burdens of appearing as a trial witness may encourage strategic use of trial subpoenas naming high-level organization figures, who often are far from the most useful witnesses in the organization, aiming to increase settlement pressure. A more refined rule will be required if we aim to provide for live testimony at trial by people within an organization who do know something useful.

One proposed draft,then, would do no more than overrule the Vioxx interpretation of Rule 45. Rule 45(c)(3)(A) would begin by directing the court to quash or modify a subpoena "properly served under Rule 45(b) that" requires travel from beyond the state. This would establish by express language the link originally assumed between the place of serving and the place of complying with a subpoena. In addition, to make twice sure, "subject to Rule 45(c)(3)(A)(ii)" would be removed from the beginning of Rule 45(b)(2). This cross-reference to (3)(A)(ii) may be misread to suggest that service can be made at places not actually authorized by (b)(2).

An alternative is presented to illustrate the possibilities of extending the reach of trial subpoenas without going all the way to the Vioxx result of nationwide authority over a party or a party's officer. This draft recognizes that there are circumstances in which a party, or a person within an organization that is a party, may be an important witness. The desire to compel appearance may be more than a mere tactical lever. This alternative, presented as a new Rule 45(b)(4), does not rely on serving a subpoena. Instead it authorizes the court to order a party to attend and testify at trial, or to order the party to produce a person employed by the party. Alternatives are presented to identify the employees a party may be required to produce — one who is subject to the party's legal control, or one who is a party's officer, director, or managing agent. The decision whether to order appearance at trial should be made only after considering the alternatives of an audiovisual deposition or of testimony by contemporaneous transmission under Rule 43(a). The court may order reasonable compensation for attending the trial or

hearing. And the court may impose sanctions authorized by Rule 37(b) for a party's failure to appear and testify or to produce a person to appear and testify.

The first question asked whether the authority to order appearance and testimony at trial is intended to cross international boundaries to reach a party or the employee of an organization party. There are cases dealing with this issue under the party deposition provisions in Rule 37(d). The question often is framed by asking who should have to travel to whom. The organization is before the court, and is subject to sanctions for failing to comply with discovery demands. The broader the categories of people the organization can be ordered to produce at trial the greater the consequences of the rule and the greater the need for care in considering it. As compared to the limited concept of an employee "subject to the legal control" of an organization, is it fair to assume that a corporation can compel any employee to travel to the place of trial?

One alternative might be to reconsider the tight limits that Rule 43(a) places on testimony by contemporaneous transmission from a different location.

Members of the Subcommittee noted again that the primary concern is "to not encourage gamesmanship." Remote transmission does alleviate the travel problem. But the CEO may or may not have relevant information. If the testimony is important, it should be taken by video deposition. Improving electronics and changing ways of presenting testimony should be recognized. The Vioxx decision generates enormous practical problems, "holding CEOs and officers hostage to appear at trial." Another Subcommittee member seconded these observations. Trials were fair before the Vioxx ruling. No solid study shows important differences in the ability to evaluate testimony presented by video deposition as compared to testimony presented live at trial. It is too easy for a persuasive lawyer to win an order compelling appearance at trial. Consider, for example, the president of a foreign automobile manufacturer whose products become embroiled in multiple actions in this country. There is no reason for things to be different than they were before the Vioxx ruling. An observer joined these remarks.

It was noted that the Criminal Rules authorize nationwide trial subpoenas, and that the Criminal Rules Committee is working on rules that, despite Confrontation Clause problems, would authorize presentation of trial testimony by deposition of a witness located outside the country when circumstances prevent a witness from appearing live at trial.

A third Subcommittee member said that the circumstances of small organizations provide persuasive reasons for simply returning to Rule 45 as it was understood before the Vioxx ruling. Untoward burdens might be imposed by nationwide compulsion to appear at trial when the witness is an officer of a small business or, for example, a small local union.

It was noted that at least one district court has asserted inherent power to punish a party who does not produce a witness. This power is asserted without regard to the limits of Rule 45. But the Subcommittee chose not to explore "the raw exercise of judicial power."

Discussion concluded by noting again that district-court opinions reflect a lot of sympathy for the Vioxx ruling, without regard to the language of Rule 45. It will be important to explore these questions in depth at the miniconference.

Simplify and Shorten: The Subcommittee has produced sketches of three approaches that might be taken to shorten and simplify Rule 45. Rule 45 has been criticized as too long, too elaborate, too much laden with details, too much beyond the understanding of lawyers — much less

nonparties who do not have lawyers — who have not struggled through to mastering its complexities.

The criticisms may be justified, at least in part. But any attempt to simplify the rule must reckon with the prospect of unintended consequences. One approach, set out in the October agenda materials, suggested a number of small changes that might be made. It was abandoned as not worth the risk that unforeseen consequences might outweigh the intended benefits. Another approach would be to simply incorporate Rules 26 through 37 into Rule 45 to define the scope of nonparty discovery and provide enforcement mechanisms. That approach would thwart "one-stop shopping," and might easily lead to confusion as courts and lawyers attempted to work out the intended integration. Abandoning those possibilities, the sketches that have been developed are presented in the agenda materials in progressive steps of aggressiveness.

Eliminate the Three-Ring Circus: Rule 45 identifies three courts that can issue a subpoena: the court where a hearing or trial is to be held; the court where a deposition is to be taken; and the court where documents are to be produced. Rule 45(b) creates four permutations on the place of service. And Rule 45(c) establishes three different rules to identify the place where performance can be required. Thirty-six combinations are possible. Since 1991, a lawyer in one place can "issue" a subpoena "from" a court sitting in another place. Identification of an "issuing court" is essentially a fiction. The solution offered by this sketch is to separate the three functions. All subpoenas issue from the court where the action is pending; service may be made anywhere within the United States. The place of performance is identified separately — in this sketch, there is no change in the place of performance, except that the sketch cuts free from any reliance on state practice. And the place of enforcement would be selected on the terms already suggested for choosing between the court for the place where performance is required and the court where the action is pending.

Judge Campbell explained this approach by noting that Rule 45 is a workhorse. It does a lot, governing all third-party discovery practice. It is amazing that it does not bring a great many problems to the courts. But "it does have a three-ring circus aspect." The concept of an issuing "court" is a fiction; the court does not know that the lawyer has issued the subpoena. A lawyer in Illinois, moreover, can issue a subpoena incident to an action pending in a district court in Kansas and arrange service anywhere in the country. The place of performance is governed, but by subtle provisions that require some effort to untangle. Most of the difficulty with Rule 45 could be eliminated by providing for nationwide service of subpoenas issued by the court where the action is pending, limiting the place of performance to the places specified by present Rule 45 or to some slight variations on those places, and providing for enforcement on the terms already suggested for modifying present Rule 45.

Initial discussion suggested that this approach is good, but asked whether there are countering considerations. The first response was that the approach indeed is good; the countering concern is that there are no large problems now. One judge observed that the problems arise just often enough that it is necessary to go back to close study of the rule to figure it out. And it was suggested that one benefit might be to reduce tactical efforts to select a particular issuing court. The revision, further, is fully consistent with the independent suggestions to address the Vioxx problem of compelling a party to attend trial as a witness, "transfer" of enforcement disputes to the court where the action is pending, and improving the notice requirement for document subpoenas. Those provisions can readily be incorporated in the sketch.

An observer agreed that it is hard to read Rule 45. One source of the difficulty is treating parties and parties' officers together, while separating nonparties. It might be better to establish three categories, distinguishing between parties and officers or other persons affiliated with a party.

Another suggestion was that the provision for enforcement might be chosen as the court where the witness is, rather than the court where compliance with the subpoena is to occur.

It was agreed that this sketch should be presented to the anticipated miniconference.

More Aggressive: Judge Baylson: The second sketch has been developed by Judge Baylson, consulting with the Discovery Subcommittee, over the course of the last year. Judge Baylson believes that Rule 45 is too complicated, not only for nonparties who do not have lawyers but also for pro se litigants and even for lawyers who do not come into frequent contact with it. Sufficient illustration is provided by the Rule 45(a)(1)(iv) direction that a subpoena must set out the text of Rule 45(c) and (d). Lawyers who routinely engage in complex federal litigation have worked through to an understanding of subdivisions (c) and (d). Other lawyers have to struggle with them. Nonlawyers have little chance of unraveling them.

The proposed draft simplifies extensively. One of the means of achieving simplification is to omit several provisions that have been added to Rule 45 over the years to resolve problems that were causing difficulties in practice. The sketch also adds new things to Rule 45, such as invoking all the provisions of Rules 26 through 37 to address objections or noncompliance by saying the court "may refer" to them.

Judge Baylson said that the sketch is still a work in progress. It has been refined with the help of the Discovery Subcommittee in a number of conference calls. The purpose is to provide a model for consideration in the Rule 45 miniconference. Although seasoned lawyers and judges understand Rule 45, a nonparty may not have a lawyer, may not want to pay one, and may not be able to pay one. Compliance can be costly and burdensome. Rule 45 operates unfairly in these circumstances. An illustration of the complexity of Rule 45 arises from the time that has been devoted to achieving a clear understanding of its terms as a foundation for attempting revision.

The heart of simplification is elimination of the structure that calls for subpoenas to be issued by a court different from the court where the action is pending. The first sketch, by eliminating this distinction, goes a long way toward improvement. There are not many differences in what a subpoena must cover.

This sketch leaves open the distance over which a person may be dragged to perform a subpoena. That is a matter of detail.

The provision for objections, subdivision (e), is important. It takes the debatable position that once an objection is made the burden falls on the party serving the subpoena to work it out or to get an order directing compliance.

Subdivision (f) is central to the goal of simplification. It invokes Rules 26(c), 37(a)(1), and 37(a)(5) to govern any person seeking court action concerning a subpoena. It requires that all disputes concerning a trial subpoena be resolved by the court where the action is pending. A party seeking relief from any other subpoena also must apply to the court where the action is pending. A nonparty may request relief from any subpoena other than a trial subpoena from the court where the action is pending, but also may request relief from the court for the district where the subpoena is served or is to be performed. That court may refer the dispute to the

issuing court. In providing for reference to Rules 26 through 37 the sketch also says that in considering the costs and burdens imposed by compliance the court may require advancement or allocation of costs and expenses, including attorney fees. Finally, the sketch directs that the court must act promptly in ruling on a dispute concerning a subpoena and must state the reasons for any order.

It is true that the sketch omits several provisions found in present Rule 45. Some might be restored, perhaps with language changes.

The first question asked how cross-reference to the Rule 26 through 37 discovery provisions helps a pro se litigant? Judge Baylson replied that it does not help, but the rules generally are adopted on the premise that a pro se litigant is responsible for achieving some understanding of them. The question was then reframed — how does cross-reference help young lawyers or those otherwise inexperienced with Rule 45? Judge Baylson replied that Rule 45 is too long because it repeats many provisions of the discovery rules, often at length. The need to read Rules 26 through 37 is offset by avoiding the agony of determining whether the duplications are precise or whether there are some variations.

The next observation was that the list of things omitted suggests it is better to omit them. The cross-reference to the discovery rules is a good way to simplify. "Simpler is better." There is a problem for a pro se witness who wants to quash a subpoena, but the judge has an obligation to help.

In the same vein, it was speculated that the great majority of subpoenas are straight-forward: they ask for a clearly identified set of documents, and compliance is simple. There will be no occasion to pore over the cross-referenced rules.

Another observation was that a doctor's office may be served with hundreds of subpoenas a year. They have confidentiality problems. It is difficult to minimize the burden on them. They cannot easily reach the people who served the subpoena to work out the proper means of compliance.

Agreement was expressed with the concern that Rule 45 is long, and with the value of discussing this sketch at a miniconference. But it was also noted that a review of the Committee Notes over the years shows evident care in adding the details now in the rule. If this guidance is removed, the same problems may emerge again. And if they emerge, absent guidance in the rule different judges are likely to give different answers. "Economy of words is not the only goal."

This view was supported by observing that practice is well settled under present Rule 45. An attempt to "simplify" the rule by omissions will lead to a lot of experimenting. "A shorter rule may not be more effective."

It was agreed that the questions raised by this sketch deserve further discussion. "It is a mistake to assume that cross-reference is a simplification."

"Rule 36.1": This sketch was introduced as one illustration of the most dramatic approaches that have been considered. It would strip discovery subpoenas out of Rule 45, placing them somewhere in the sequence of all the rest of the discovery rules. Rule 45 would be limited to subpoenas to provide testimony at a hearing or trial. Separating these topics might promote clarification and simplification, but that result is not assured. It is not clear that bright lines can be drawn to separate discovery subpoenas from subpoenas to appear as a witness at a trial or

hearing. Nor is it clear that Rule 45 could be much simplified if discovery subpoenas were removed. Any variation on this approach raises a number of fundamental issues.

The sketch was presented by focusing on two distinct aspects. The broad question is whether the time has come to integrate discovery subpoenas more directly with the discovery rules, not by cross-reference but by closer drafting. The sketch is one example of how this might be accomplished; many variations are possible. A series of smaller questions are posed by including provisions addressing questions that Rule 45 now leaves to be worked out by the parties. The ever-present risks of inviting unintended consequences, or of disrupting the paths of negotiation that have developed under present Rule 45, must be considered in reviewing these smaller questions.

There is little point in drafting rules that separate discovery subpoenas from subpoenas for a hearing or for trial if the distinction has no real meaning in practice. Courts do confront attempts to avoid discovery cut-offs by asserting that a subpoena is used for a trial or hearing, not for discovery. When there is a trial, the distinction seems feasible. The court can enforce the discovery cut-off by limiting compliance with the subpoena to trial itself, forbidding any attempt to examine the documents or question the witness outside the trial. If that seems undesirable, the court can grant relief from the cut-off; relief often will be desirable, for the benefit of all parties, when a trial subpoena is used to secure information that the parties had thought to supply from other sources that have failed, or when new issues emerge at trial that make it desirable to present information that would not have been relevant during discovery. There may be more difficulty in drawing lines, but perhaps also less need, when witnesses or documents are subpoenaed for a "hearing" that is not a trial. A common illustration would be a preliminary injunction hearing, held well before any discovery cut-off. An exotic illustration would be the use of witnesses at a summary-judgment hearing, relying on Rule 43(c) — summary judgment may be considered before the cut-off of all discovery. In these settings it may be desirable to manage compliance by allowing discovery immediately before or even during the hearing, separate from presentation of testimony or documents at the hearing. Complications might arise from differences in the place for compliance. Compliance with a subpoena for hearing or trial means producing or testifying, by one means or another, at the hearing or trial. Compliance with a discovery subpoena often will be directed to a different place. There may be distinctions in the extent of the burdens that can be imposed for discovery or for trial. But it may be possible to work through these issues, and indeed it may be possible to address them more clearly than Rule 45 now does.

There are many possible approaches to separating discovery subpoenas from trial subpoenas if the separation is in fact useful. The current sketch combines deposition subpoenas and production subpoenas in a single rule. It carries forward the opportunity to issue a subpoena to compel a party's appearance at a deposition, despite the availability of sanctions under Rule 37(d) when a party fails to comply with a deposition notice. It expressly limits discovery production subpoenas to nonparties, relying on Rule 34 as the exclusive means for compelling production between the parties. This approach might be carried further by adding nonparties to Rule 34. Rule 34 would have to be expanded to some extent, at least by incorporating some variation on the Rule 45 provisions that prohibit imposing unreasonable burdens and require a court to protect a nonparty from significant expense if the nonparty objects. It likely would be desirable to add provisions addressing the place of performance by a nonparty, and referring enforcement to the court in the place of performance but allowing transfer back to the court where the action is pending.

The sketch incorporates the Rule 45 revisions proposed for serious study even if no other changes are made. It also incorporates the approach that has all subpoenas issued by the court where the action is pending, separately governing the place for compliance and the court that resolves disputes.

Apart from the overall relocation of discovery subpoenas, the sketch addresses some questions not now addressed by Rule 45.

The place where an entity can be subjected to a Rule 30(b)(6) deposition is not clearly addressed by Rule 45. The most likely relevant provision, Rule 45(c)(3)(A)(ii), directs the court to quash or modify a subpoena that requires a person, not a party, "to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person." Assuming that an entity is a "person" covered by this rule, applying the concepts of residence, place of employment, or regularly transacting business "in person" is not easy. Reliance on concepts of personal jurisdiction seems an awkward fit when a nonparty is subpoenaed — general personal jurisdiction may open the door too wide, and specific transaction-based personal jurisdiction may fit poorly. But it may be difficult to identify any useful limit. The draft simply provides that the entity may be compelled to produce a person designated to testify on its behalf at any reasonable place. Those words foreclose an "anything goes" approach, but do little more.

Rule 45 also fails to specify the place for producing documents or electronically stored information. The sketch provides for inspection and copying of documents or tangible things where they are ordinarily maintained or at another convenient place chosen by the person producing them. It also provides that the subpoena can designate another reasonable place if the requesting party pays all the reasonable added expenses. For electronically stored information, the sketch provides for transmission to an electronic address stated in the request. But it also recognizes that the parties may agree on, or the court may order, participation by the requesting party in searching the nonparty's storage system. It seems likely that similar terms are regularly worked out in practice; perhaps there is no need to add these provisions.

The provisions for enforcement draw from both of the less aggressive models. Rule 37 is incorporated more directly, by providing that a motion to enforce a subpoena against a nonparty must be made under Rule 37(a). Rule 37(a) enforcement substitutes for the contempt procedure provided by Rule 45(e). That means the requesting party must attempt to confer to resolve the problem before moving for an order. The order must specify what must be produced. Sanctions are available only after refusal to obey the order. It seems likely that most of the same incidents are used in contempt enforcement, beginning with a motion to show cause, a hearing, an order that specifies what must be done, and sanctions for disobedience. Rule 37(b) sanctions include contempt. It does not seem likely that other Rule 37(b) sanctions will be appropriate, although some thought might be given to the possibility of party-directed sanctions when the nonparty is closely affiliated with a party and subject to its control.

Discussion began with the observation that any such surgery on Rule 45 can be justified, if at all, only by showing clear benefits. It deserves to be explored only if the Committee decides to explore relatively broad revisions. If broad revisions are explored, it seems useful to consider — if only to exclude — all plausible alternatives. Any thorough revision should be designed to put Rule 45 to rest for many years, at least in its major design. Even then, the risk of unintended consequences urges caution. The suggested distinctions between discovery subpoenas and subpoenas for a hearing or trial may not prove workable. Attempts to define the place of performance more clearly may hinder the process by which workable accommodations are

worked out by negotiations in the shadow of an opaque rule. Simply wrong answers might be adopted for some questions. There is real reason for concern with the prospect that computer search programs might not prove able to direct innocent inquiries framed around Rule 36.1 to earlier interpretations of ancestral provisions in Rule 45.

The distinction between amending existing rules and drafting on a clean slate is uncertain. The Rule 36.1 sketch draws in large part on present Rule 45, and on the current proposals to amend or to explore. It deserves to carry forward as at least an exhibit in the materials for a miniconference, but it is not likely to carry further unless there is a strong upswelling of support.

Rule 26(c) Protective Orders

Continuing introductions of "Sunshine in Litigation Act" bills have prompted renewed attention to Rule 26(c). Similar bills prompted the Committee to study Rule 26(c) in depth and at length in the 1990s. A proposed amended Rule 26(c) was published for comment. A revised proposal was sent back by the Judicial Conference because it had not been republished after making extensive changes to reflect the public comments. The revised proposal was then published. After considering the comments offered at this second round, the Committee concluded that there was no need to pursue amendments. The rule seemed to be working well as it was. The Committee has not devoted much attention to Rule 26(c) since then.

Continuing Congressional attention provides reason to renew consideration of Rule 26(c). Judge Kravitz testified before Congress last year. Andrea Kuperman undertook a circuit-by-circuit study of current practices, looking to standards for initially entering protective orders, tests for filing under seal, and approaches to modifying or dissolving protective orders. This research suggests that there are few identifiable differences among the circuits. All recognize the need to adhere to a meaningful good-cause requirement in granting protective orders. All recognize flexible authority to dissolve or modify protective orders, although the Second Circuit adheres to a more demanding standard that has been expressly rejected by several circuits. All recognize that the tests for filing "judicial documents" under seal are far more demanding than the standards for entering protective discovery orders. This research is reassuring, and provides some ground for satisfaction with present Rule 26(c). Nonetheless, it is wise to explore possible revisions.

A draft Rule 26(c) has been prepared by the Committee Chair and Reporter. The draft was presented solely for discussion purposes. If the Committee decides to take up this topic, more rigorous drafting will be attempted. Specific suggestions from Committee members will play an important role in improved drafting.

Good reason may appear to do nothing. Not long after the Committee concluded its last thorough consideration of Rule 26(c), the Court of Appeals for the District of Columbia Circuit said this: "Rule 26(c) is highly flexible, having been designed to accommodate all relevant interests as they arise." United States v. Microsoft Corp., 165 F.3d 952, 959 (D.C.Cir.1999). That advice seems to hold good today. The purpose of placing this topic on the agenda is to determine whether it makes sense to take it up again. Courts are doing desirable things, but some of these good things do not have an obvious anchor in the rule. Expanded rule language might save time for bench and bar, and provide valuable reassurance. Some of the rule language seems antique. It expressly recognizes the need to protect trade secrets and other commercial information, but does not mention the personal privacy interests that underlie many protective

orders. Some updating and augmentation may be in order. And it will always be important to be alert to signs that practice might somehow be going astray.

The draft carries forward the "good cause" test established in present Rule 26(c). The text deliberately omits two topics that generated much discussion in the 1990s. The rule text might recognize the role of party stipulations, adopting some provision such as "for good cause shown by a party or by parties who submit a stipulated order." Party stipulations may show both that there is good cause for a protective order and that the order will facilitate the smooth flow of discovery without unnecessary contentiousness. But it is important to recognize that a stipulation does not eliminate the need for the court to determine that there is good cause for the order. There is no clear reason to believe that courts fail to understand these contending concerns or fail to act appropriately. It may be better to leave practice where it lies.

It also would be possible to add rule text that points to reasons for not entering a protective order. Concern is repeatedly expressed that protective orders may defeat public access to information needed to safeguard public health and safety. But, both in the 1990s and today, there has been no persuasive showing that protective orders in fact have had this effect. The Federal Judicial Center studied protective orders and showed that most enter to protect information that does not implicate the public health or safety. When the protected information may bear on public health or safety, alternative sources of information have always been available. The pleadings in the cases are one source that is routinely available. This concern does not yet seem real.

The draft rule text does make some changes in the traditional formula that looks to "annoyance, harassment, embarrassment, oppression, or undue burden or expense." Many protective orders enter to preserve personal privacy. In addition, Rule 26(g) recognizes other potential discovery dangers as an "improper purpose." Rule 26(c) might benefit from recognizing some of the same dangers, such as unnecessary delay, harassment, and needless increase in cost.

The draft also relegates to a footnote the question whether the rule should provide for disclosing information to state or federal agencies with relevant regulatory or enforcement authority. The footnote suggests that it may be better to leave it to the courts to continue working out the countervailing interests they have identified in this area.

Present Rule 26(c) text does not address another familiar problem. Particularly when large volumes of documents or electronically stored information are involved, protective orders often provide that a producing party may designate information as confidential. Another party may wish to challenge the designation. The draft illustrates one possible approach, assigning the burden of justifying protection to the party seeking protection.

Another familiar problem arises when a party seeks to file protected discovery information with the court. The standards for sealing court records are more demanding than the Rule 26(c) standards for entering a protective order. Sealing standards are much higher for records that are used as evidence at a hearing, trial, or on summary judgment. The draft provides that a party may file under seal information covered by a protective order and offered to support or oppose a motion on the merits or offered in evidence at a hearing or trial only if the protective order directs filing under seal or if the court grants a motion to file under seal. It does not attempt to restate the judicially developed tests for determining whether sealing is appropriate.

The draft also carries forward, with some changes, the 1990s drafts that provided for modifying or dissolving a protective order. The 1990s drafts allowed a nonparty to intervene to

seek modification or dissolution, and the Committee Note suggested that the standard for intervention should be more permissive than the tests for intervening on the merits. The present draft simply allows any person to seek modification or dissolution, reasoning that it is more efficient to consider the interests that may support relief all at once. Several factors are identified for consideration. One of them looks to "the reasons for entering the order, and any new information that bears on the order." This factor addresses in circumspect terms the need to distinguish between protective orders entered after thorough consideration of the interests implicated by a motion to modify or dissolve and orders entered after less thorough consideration. "New information" may include arguments that were not as fully presented as might have been. At the same time, reliance is identified as another factor bearing on modification or dissolution. Yet another factor reflects the common practice of modifying protective orders to facilitate discovery and litigation in related cases.

A number of interesting questions are not addressed by the draft. At least some courts believe there is no common-law right of access to discovery materials not filed with the court. This view ties to the amendment of Rule 5(d) that prohibits filing most discovery materials until they are used in the proceeding or the court orders filing. The rule might say something about access to unfiled materials.

Rule 29(b) provides that parties may stipulate that "procedures governing or limiting discovery be modified." Rather than seek a protective order from the court, the parties may stipulate to limited discovery and to restrictions on using discovery materials. It is also possible that parties may agree to exchange information voluntarily, entirely outside the formal discovery processes. It might prove difficult to address such agreements in Rule 26(c), but perhaps the topic deserves some attention.

This introduction was summarized as identifying issues that probably should be considered if Rule 26(c) is to be studied further. But the question remains whether there is any reason to take on Rule 26(c) while "things seem to be working out just fine."

The first question asked for a summary of the best reasons for taking up Rule 26(c). Responses suggested again the value of bringing well-established "best practices" into rule text, and the desire to modernize expression of some provisions. Rule 26(c) "was written in a paper world. Protecting privacy and access to information filed in court have become more important in the electronic era." Pressures grow both to protect the privacy of parties and other persons with discoverable information, and also to ensure public access. The right balance is difficult, and is likely to be different now than it was in 1938. Although courts are adjusting well, it may help to update the rule.

It was further suggested that various provisions could address the concerns reflected in the Sunshine in Litigation Act proposals. Some are in the draft, including challenges to designations of information as confidential, modification or dissolution of protective orders, and sealing of filed materials. But the best reason to act may be to bring best practices into the rule.

The "best practices" suggestion was countered by asking whether there is good reason to avoid an attempt to distill developed judicial practices into rule text. It is not possible to incorporate all of the case law. Litigants will argue that leaving some practices out of the rule reflects a judgment that they are not worthy of incorporation, and should be reconsidered.

The rejoinder was that the case law is pretty consistent. It provides a secure foundation for incorporation into rule text. It will be useful to provide explicitly for modification or dissolution. Recognition of the procedure for challenging designations of confidentiality will be

useful, even though a procedure is spelled out in "every protective order I've seen." The risk of doing more harm than good seems relatively low.

Another reason for taking on Rule 26(c) may be persisting concerns in Congress. But this preliminary inquiry satisfies much of that burden — there is no apparent reason to revise the conclusions reached in the 1990s. Courts do consider public health and safety. They do allow access to litigants in follow-on cases. They do modify or dissolve protective orders. They are careful about sealing judicial documents. The reasons for going ahead now are more the values already described — bringing established best practices into rule text expressed in contemporary language.

This suggestion was elaborated by noting that there is an important value in access to justice. That includes ensuring that the public in general has a chance to see what courts do. But it also includes providing ready access to the law for lawyers. Not all practitioners are familiar with case-law elaborations of Rule 26(c), and not all have the resources required to develop extensive knowledge. Capturing these values in rule text can be useful.

Another comment began with the suggestion that there is a "wink and nudge" aspect of real practice, as compared to rule text. Expressing practice in rule text could be useful. But there are offsetting values in leaving things where they stand. It has been noted that the Second Circuit takes a distinctive approach to modifying or dissolving a protective order, emphasizing the need to protect reliance in particular cases so that litigants will be encouraged to rely on protective orders to facilitate discovery in future cases. So it is well understood that umbrella protective orders are entered, but the practice is questioned by some. Adopting rule provisions that address party designations of confidentiality may seem to bless more practices than should be blessed.

Returning to the need for free access to judicial documents, it was observed that the draft provisions for modification or dissolution are open-ended. They do not interfere with the provision that a protective order for discovery does not automatically carry over to documents filed with the court. But it also was suggested that care should be taken in even referring to the possibility of sealing information offered as evidence at trial.

The pending proposal to revise Rule 56 was recalled. One of the major reasons for undertaking revision was that the rule text simply did not correspond to the practices that had developed over the years. In contrast, Rule 26(c) text is not inconsistent with current practice. The proposed changes are obvious. There is little reason to revise a rule only to incorporate obvious present practice.

An observer suggested that one of the most important concerns is that Rule 26(c) is now a very good thing for employment plaintiffs. If the Committee starts to tinker with it, interest groups will be stirred to press revisions that would distort the rule. Another observer agreed in somewhat different terms. There are some benefits in acting to improve Rule 26(c). But there are risks that once the topic is opened, the end result will make things worse. Sending a revised rule to Congress, for example, might provide an occasion for enacting the infeasible procedural incidents contemplated by the Sunshine in Litigation Act bills.

Discussion resumed the next morning. A committee member asked whether it is wise to pursue Rule 26(c) in depth if the Committee thinks the end result will be to recommend no changes. Judge Rosenthal noted that the Committee had done that already. Several years were devoted to Rule 26(c), culminating in a decision to withdraw after two rounds of public comment because there was no apparent need to revise established practices. At the same time, Judge

Kravitz is right in observing that the Committee should not feel obliged by political considerations to pursue a topic it thinks does not need attention.

It seems better not to take Rule 26(c) off the agenda in a final way just yet. At a minimum, the Committee should continue to monitor developing case law. Congress should understand that the Committee recognizes the importance of Rule 26(c) and continues to monitor it. If the Federal Judicial Center research staff can free up some time, it might be useful to update their study. And whether or not there is a further study, it might be desirable to have the judicial education arm of the Center prepare a pocket guide that helps judges and lawyers through the case law by summarizing best practices.

These proposals were supplemented by asking whether it would be useful to have an FJC survey of judges. The FJC prefers to survey judges only when there are compelling reasons. Judge time is a valuable resource that should not be lightly drawn on. When a survey seems justified, it seems better to do it by presenting a concrete proposal, not a general question whether there is some reason to revise a rule.

The 2010 conference may generate ideas that would support a useful survey, most likely aimed at lawyers. Until then, the prospect seems premature.

Further reason for carrying Rule 26(c) forward was found in the work of two Standing Committee subcommittees. One is examining privacy concerns, although without a direct focus on Rule 26(c). Another is examining the practice of sealing entire cases, as distinguished from sealing particular files or events. Exhaustive empirical investigation has shown that it is very rare to seal entire cases, but there may be reason to recommend that courts establish systems to ensure that sealing does not carry forward by default after the occasion for sealing has disappeared.

Forms

The October meeting considered the question whether the time has come to reconsider the Forms appended to the Rules. Rule 84 says the forms "suffice under these rules." For the most part, however, the Committee has paid attention to the Forms only when adding new forms to illustrate new rules provisions. Looking at the set as a whole, there are reasons to wonder why some topics are included, while others are omitted. Looking at particular forms raises questions whether they are useful. The pleading forms in particular seem questionable. The pleading forms were obviously important in 1938. The adoption of notice pleading, a concept not easily expressed in words, required that the Committee paint pictures in the guise of Forms to illustrate the meaning of Rule 8(a)(2). That need has long since been served. The current turmoil in pleading doctrine, moreover, suggests that the Forms may provide more distraction than illumination.

The benign neglect that has generally characterized the Committee's approach to the Forms is in part a consequence of the need to tend to matters that seem more important. There is reason to question whether the Committee should continue to bear primary responsibility for policing the forms. If responsibility were assigned elsewhere — for example, to the Administrative Office — it would be appropriate to reconsider Rule 84.

These concerns are detailed at some length in the Minutes for the October meeting. The Committee was particularly concerned that any effort to revise the Forms, or to abandon them, might seem to be taking sides in ongoing debates about pleading standards. The Committee

clearly is not yet prepared to address pleading standards in this way. It tentatively concluded that reconsideration of the Forms should be postponed until pleading practice settles down.

This reaction was reported to the Standing Committee in January. The Standing Committee agreed that it would be better not to launch a Forms project just now.

Discussion was limited to the question whether it would be useful, as some law review writers have suggested, to develop a series of forms that illustrate pleadings that just barely comply with minimum standards, and perhaps some that just barely fail to comply. The response was that it seems premature to do that. Negligence offers a simple example. The Form 11 automobile negligence complaint seems sufficient for such a case. A claim that a manufacturer negligently failed to recall a defective product as early as should have been, and negligently designed the recall campaign when it was launched, would likely require greater fact detail. And a newspaper report of an actual case suggests the need for still greater details in a negligence claim — this claim was that the SEC acted negligently in failing to discover and stop the Madoff ponzi scheme. The general utility of revised forms also seems open to doubt, at least for the cases that have stirred current debates. A model of a sufficient conspiracy complaint for the Twombly case, for example, might not provide much use to a plaintiff attempting to plead any other conspiracy.

It was agreed that the Committee would continue to monitor the long run role of the Forms.

Style and Time Computation Glitches

The question of the approach to glitches discovered in the Style Project was opened for initial discussion. Throughout the course of the Style Project it was recognized that some inadvertent changes of meaning were likely to occur. Similar risks may appear with the much simpler changes effected by the Time Computation Project. It is heartening that few questions have yet appeared in the first two years of the Style Project, and none have appeared in the first three months of the Time Computation revisions. But Style questions have been raised, and others no doubt will appear.

One example of a near-Style Project difficulty has been offered. In 2005, two years before the overall Style amendments, Rule 6(d) was revised in keeping with Style Project conventions. Until 2005 it allowed three extra days when a party had a right or was required to do some act, etc., within a prescribed period after service of a notice or other paper "upon the party," and the paper or notice "is served upon the party" by designated means. Clearly that meant three extra days were available only to the party served. The 2005 amendment provides that three days are added "Whenever a party must or may act within a prescribed period after service and service is made" by designated means. It is no longer clearly limited to acts by the party on whom service is made. It can be read to allow extra time to the party who makes service. One possible application: Rule 15(a)(1) allows a party to amend a pleading once as a matter of course within 21 days after serving it. Similar opportunities to act after a party has served a paper appear in Rules 14(a) and 38(b)(1); Rule 38(c) may also fall into this camp. The result would be that a party could routinely add three days to its time to act by choosing the means of service.

It is not clear whether any court or party has encountered this Rule 6(d) question, which is elaborated at great length in a draft law review article that was sent to Professor Kimble for comments. But there may be reason to revise the drafting.

That leaves the question whether the Committee should scramble to respond immediately to each drafting misadventure as it appears. The present disposition is to wait a while to see how many examples appear, with an eye to accumulating them for disposition in a single package of proposals.

Brief discussion confirmed the decision to allow time for other drafting lapses to appear. If a truly important problem arises, it can be dealt with promptly. Otherwise, there is little need to bombard the profession with a cascading series of amendments, if indeed many problems do appear.

Appellate-Civil Rules Subcommittee

Judge Colloton, Chair of the joint Appellate-Civil Rules Subcommittee, reported that the Subcommittee will report at the fall meeting.

2010 Conference Preparation

Judge Rosenthal noted Judge Kravitz's suggestion that the Committee should start thinking about various means of harnessing the fruits of the 2010 Conference. The Conference will generate momentum that should not be allowed to die. The first step after the Conference will be a report to the Chief Justice. The report should include suggestions about the next steps. Some steps may be relatively modest, focusing on judicial education and perhaps lawyers. "Best practices" guides might be devised. Of course consideration of rules amendments in the regular Enabling Act process may be important. Beyond that, thought should be given to other possibilities. A committee might be formed within the Judicial Conference, to include members from committees outside the rules committees, and perhaps representatives of Congress. The Federal Courts Study Committee was formed within the Judicial Conference by statute; a similar course might be wise now.

Thank yous

Judge Rosenthal expressed great thanks to Chilton Varner and the Emory Law School for making fine arrangements for the meeting. The Committee was made to feel welcome. The Thursday afternoon reception provided a good opportunity to meet students and faculty, and it was good to have some students attend the meeting.

Thanks also were extended to the Discovery Subcommittee for all its hard work. The work has been of very high quality, and has covered many hard topics. Rule 45 remains in the beginning stages, but it is a very promising beginning.

Judge Koeltl was thanked again for "an amazing amount of enormously effective work in putting the Conference together."

The Committee voted thanks to Andrea Kuperman for her great research support for several Committee projects.

Next Meeting

The next regular meeting will be in late October or early November, most likely in Washington, D.C. A firm date will be set as soon as possible. If possible, the Discovery Subcommittee will attempt to schedule a Rule 45 miniconference in conjunction with the Committee meeting.

Respectfully submitted

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Reporter