

MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 4-5, 2011

1 The Civil Rules Advisory Committee met at the University of
2 Texas Law School on April 4 and 5, 2011. The meeting was attended
3 by Judge Mark R. Kravitz, Chair; Elizabeth Cabraser, Esq.; Judge
4 David G. Campbell; Judge Steven M. Colloton; Judge Paul S. Diamond;
5 Professor Steven S. Gensler; Daniel C. Girard, Esq.; Judge Paul W.
6 Grimm; Peter D. Keisler, Esq.; Judge John G. Koeltl; Judge Michael
7 W. Mosman; Judge Gene E.K. Pratter; Chief Justice Randall T.
8 Shepard; Anton R. Valukas, Esq.; Chilton D. Varner, Esq.; and Hon.
9 Tony West. Professor Edward H. Cooper was present as Reporter, and
10 Professor Richard L. Marcus was present as Associate Reporter.
11 Judge Lee H. Rosenthal, Chair, Judge Diane P. Wood, Chief Justice
12 Wallace Jefferson, and Professor Daniel R. Coquillette, Reporter,
13 represented the Standing Committee. Judge Arthur I. Harris
14 attended as liaison from the Bankruptcy Rules Committee. Laura A.
15 Briggs, Esq., was the court-clerk representative. Peter G. McCabe,
16 James Ishida, Jeffrey Barr, Holly Sellers, and Andrea Kuperman,
17 Chief Counsel to the Rules Committees, represented the
18 Administrative Office. Judge Barbara Rothstein, Joe Cecil, and
19 Emery Lee represented the Federal Judicial Center. Ted Hirt, Esq.,
20 Department of Justice, was present. Observers included Alfred W.
21 Cortese, Jr., Esq.; Joseph Garrison, Esq. (National Employment
22 Lawyers Association liaison); John Barkett, Esq. (ABA Litigation
23 Section liaison); David Ackerman, Esq. (American College of Trial
24 Lawyers); Kenneth Lazarus, Esq.; John Vail, Esq. (American
25 Association for Justice); Thomas Y. Allman, Esq.; Robert Levy,
26 Esq.; Jerry Scanlon (EEOC liaison); Professor Lonny Hoffman; Andrew
27 Bradt, Esq.; and Professor Robert Bone.

28 Judge Kravitz expressed thanks to the University of Texas Law
29 School for hosting the event, They have been gracious hosts
30 throughout the planning process. He came early to attend a
31 clerkship extravaganza, a gathering of judges that included many
32 current participants in the rulemaking process. Real thanks are
33 due to Dean Sager.

34 Judge Kravitz introduced Judge Mosman as a new Committee
35 member. Judge Mosman is a graduate of Brigham Young, and clerked
36 for Judge Wilkie and then Justice Powell. He was an Assistant
37 United States Attorney up to 2001, and then became the United
38 States Attorney for the District of Oregon. He was confirmed as a
39 District Judge in 2003 by a 93-0 vote of the Senate.

40 Judge Kravitz also welcomed Elizabeth Cabraser to the
41 Committee. She has appeared before the Committee many times, and
42 has helped its work by responding to other outreaches. The rest of
43 the day could be filled by reciting the many accolades and awards
44 she has received. She is a Super Lawyer, and has been named as one
45 of the 50 most influential lawyers in the country. And she has

46 written many articles, including a wonderful contribution to the
47 Duke Conference last May. She already has taken hold in the work
48 of the Discovery Subcommittee. She will be an outstanding member.

49 Judge Vaughn Walker was unable to attend this meeting because
50 he is teaching, but sends his regards. It would have been nice to
51 have him present to hear a renewed salute for his many
52 contributions to the Committee.

53 During the introductions of all those present Judge Kravitz
54 expressed particular appreciation to Tony West, noting that it is
55 particularly important to have the Assistant Attorney General for
56 the Civil Division with the Committee to reflect the experience and
57 judgment of the Department of Justice.

58 Judge Kravitz lauded Chilton Varner's service as a member, and
59 presented a certificate of the Judicial Conference's appreciation
60 for her distinguished service and commitment to the federal
61 judiciary.

62 Judge Kravitz then reported that Greg Joseph, Tom Allman, John
63 Barkett, Dan Girard, Paul Grimm, and Emery Lee presented a panel
64 discussion of preservation of electronically stored information to
65 the Standing Committee in January. The panel elaborated on the
66 importance of the problems and the difficulties of crafting a
67 useful rule to address them. The Standing Committee also discussed
68 pleading standards, and the work of the Duke Conference
69 Subcommittee.

70 Bills affecting the Federal Rules of Civil Procedure continue
71 to be introduced in Congress. Andrea Kuperman said that the
72 Administrative Office is monitoring the Sunshine in Litigation
73 bills that have been introduced in the House and Senate. The bills
74 are similar to those that have been introduced in many past
75 Congresses, but there are differences. They apply only when the
76 pleadings in an action show facts relevant to the public health and
77 safety. In such actions, a discovery protective order can enter
78 only if supported by findings of fact that the order will not
79 restrict disclosure of information affecting the public health or
80 safety, or that the order is narrowly tailored to protect a
81 specific and substantial interest in confidentiality. Similar
82 findings are required to approve a settlement agreement that would
83 restrict disclosure of such information. The Senate bill includes
84 a provision that it does not constitute grounds for withholding
85 information in discovery that is otherwise discoverable; it is not
86 clear what this provision may mean. The central problems presented
87 by earlier bills in this series remain: it is not feasible to make
88 the required findings before knowing what information may be
89 involved in discovery, and the process will add greatly to the
90 contentiousness, cost, and delays of discovery.

91 Another bill would enact a Lawsuit Abuse Reduction Act. The

92 bill would unwind the 1993 amendments of Rule 11, returning to the
93 1983 version. Sanctions for violations would be made mandatory,
94 including attorney fees. The safe-harbor provision would be
95 deleted. The House has held a hearing on the bill. Judge Kravitz,
96 the American Bar Association, and the American College of Trial
97 Lawyers sent letters in opposition. The motivation for this bill,
98 and similar predecessors, is unclear; it may be viewed as a part of
99 "tort reform." Research shows that the 1983 version of Rule 11 was
100 counterproductive; it increased delay and costs. Whatever share of
101 the federal civil docket is made up of frivolous cases, all the
102 evidence is that the proportion did not increase in the wake of the
103 1993 amendments, and that the amendments greatly curtailed the
104 satellite litigation of Rule 11 motions that was compounded by Rule
105 11 motions claiming that Rule 11 motions violated Rule 11. All the
106 empirical work by the Federal Judicial Center is being ignored.
107 Professor Hoffman testified against the bill; Victor Schwartz
108 testified in support, along with a representative of small
109 businesses.

110 *November 2010 Minutes*

111 The draft minutes of the November 2010 Committee meeting were
112 approved without dissent, subject to correction of typographical
113 and similar errors.

114 *Rule 45*

115 Judge Kravitz prefaced the report of the Discovery
116 Subcommittee by expressing thanks to Judge Campbell and Profesor
117 Marcus for all their hard work on Rule 45. They and the
118 Subcommittee were so devoted that they sacrificed President's Day
119 to hold a meeting in Dallas. He noted that leaders of the American
120 Bar Association Section of Litigation had provided comments on the
121 current drafts, and that defense interests also had commented.

122 Judge Campbell introduced the Subcommittee report by stating
123 the goal: To conclude work, and send to the Standing Committee a
124 draft recommended for publication.

125 The drafts present four issues:

126 First, to move, emphasize, and improve the notice requirement.
127 It has been widely disregarded. The basic proposal has been
128 approved already, relocating the requirement to a more prominent
129 position in Rule 45 and adding a requirement that a copy of the
130 subpoena be served with the notice. Questions remain: some
131 observers believe that the person serving the subpoena also should
132 be required to notify other parties as things are produced in
133 response. And some language changes have been suggested by the
134 American Bar Association.

135 Second is the provision that would allow the court for the

136 place of performance to transfer enforcement disputes to the court
137 where the action is pending. Issues to be resolved include the
138 standard for transfer, and - if transfer is made - which court
139 should enforce the order issued by the court where the action is
140 pending.

141 Third are the "Vioxx" issues: should there be a provision to
142 compel a party or a party's officer to attend trial beyond the
143 limits established by present Rule 45(b) provisions for serving a
144 subpoena? The Subcommittee recommends that the Vioxx reading of
145 Rule 45 be overruled, but also has prepared a draft that would
146 restore some part of it. The alternative draft is not an
147 alternative recommendation. Nonetheless it may be wise to publish
148 it to ensure full comment, paving the way for adoption without
149 republication if the testimony and comments persuade the Committee
150 that it is better to establish some provision for compelling
151 attendance at trial beyond the limits established for depositions.

152 Fourth is the proposal to simplify the "3-ring circus" aspect
153 of Rule 45 created by the complex interplay of provisions that
154 identify the court that issues the subpoena, provide for place of
155 service, and, in a scattered fashion, address the place of
156 performance. This proposal would provide nationwide service, and
157 separately specify the place of performance.

158 The Subcommittee unanimously recommends the simplification of
159 Rule 45, but has recognized that this departure from what has
160 become familiar may encounter resistance. Alternative drafts have
161 been prepared to show what Rule 45 would look like if it included
162 only the provisions for notice, transfer, and overruling Vioxx.
163 The agenda book thus contains four sets of Rule 45 materials: I is
164 the Subcommittee's recommendation. II supplements I by showing a
165 provision that would preserve some part of Vioxx. III parallels I,
166 but without the simplification. IV supplements III by adapting the
167 provisions that would preserve part of Vioxx in the rule as it
168 would stand without simplification. One of the questions to be
169 addressed is whether this four-part presentation generates too much
170 confusion, whether it will be better to go forward to the Standing
171 Committee with only Parts I and II.

172 Judge Kravitz said it is important that the Committee choose
173 its preferred version and explain the choice. It may be useful to
174 send Alternatives III and IV to the Standing Committee if this
175 Committee concludes that it is better to go ahead to publication
176 now without attempting any simplification of Rule 45 if the
177 Standing Committee rejects whatever version of a simplified Rule 45
178 that may be approved at this meeting. The Standing Committee will
179 be able to understand the role of the alternatives.

180 Judge Campbell stated that the Subcommittee clearly favors
181 version I - rejecting the Vioxx decision, and simplifying Rule 45
182 by providing nationwide service of discovery subpoenas, separately

183 regulating the place of performance. But it recommends publication
184 in a subordinate posture of the alternative that would preserve
185 some authority to command testimony at trial of a party or a
186 party's officer beyond the limits established for depositions. It
187 does not recommend publication of versions III and IV; they are
188 intended, at most, as illustrations of an alternative for the
189 Standing Committee to consider if it rejects the Subcommittee's
190 preferences.

191 Judge Rosenthal said that the Standing Committee would readily
192 understand the role of versions III and IV if the Committee decides
193 to present them. They are a clear road map.

194 A question was raised about the practice of publishing
195 alternatives. How does it work? One practice, followed with some
196 frequency, is to publish rule text with alternatives when the
197 Committee itself is uncertain which is better. Another practice is
198 to publish a preferred version, clearly identified as preferred,
199 but also to focus comment on a competing version by presenting a
200 clear text that responds to weighty countervailing positions. So
201 with the Vioxx alternatives, the proposal is to publish the
202 recommended version and to explain why it is recommended. The
203 alternative would be published, perhaps as an appendix, with a
204 clear statement that it is not recommended but with a request for
205 comments both on the possible advantages of the alternative and on
206 possible improvements on the alternative. Publication has great
207 virtues. Time and again the Committees have been educated by
208 comments and testimony that show how to improve initial proposals
209 or show that a proposal does not deserve adoption.

210 Further discussion agreed that the mode of presenting versions
211 I, II, III, and IV was clear. The value of publishing an
212 alternative that carries forward some part of the Vioxx rule,
213 albeit in a subordinate posture, was recognized. The risk that
214 republication will be required is much reduced if there is an
215 opportunity for public comment on a carefully developed draft. As
216 for simplification, the question may be "yes" or "no"; in that
217 case, it can be useful to carry forward versions III and IV at
218 least as far as the Standing Committee. The question is a familiar
219 severability question: the Standing Committee will readily
220 understand the alternatives that present all the recommendations
221 other than simplification. But it was asked whether it would be
222 better to submit only versions I and II if the Committee decides
223 that simplification is clearly desirable.

224 Publication of a Vioxx-preserving alternative was further
225 supported on the ground that the district courts are divided.
226 Several have adopted the Vioxx ruling. Some of the courts that
227 reject it as inconsistent with the plain language of Rule 45 seem
228 to regret that result. The Committee must be sensitive to a view
229 that has attracted this much support.

230 The question whether to send forward a version that includes
231 notice, overruling Vioxx, and transfer, but that does not include
232 simplification, was postponed with the observation that the
233 decision will depend on the course of deliberations on the merits.
234 If simplification is clearly preferred, it may make sense to go
235 forward with the simplified version alone. This course will be
236 further supported if the Committee concludes that failure of the
237 present simplification approach leaves the possibility of an
238 intermediate simplification that would remain to be drafted and
239 debated.

240 A preliminary question was noted: if a discovery motion is
241 transferred by the court for the place of performance to the court
242 where the action is pending, is there a problem with enforcing the
243 order? It was noted that the absence of any present provision for
244 transfer deprives us of the opportunity for any extensive
245 experience. The Subcommittee has looked for published opinions,
246 but the prospect of finding much help seems slender. Professor
247 Marcus has been looking, without finding anything useful. A law
248 clerk looked for contempt cases without success. And
249 Administrative Office data are not likely to provide reliable
250 information.

251 Professor Marcus began the detailed presentation of the Rule
252 45 proposals with Version I, Alternative A. Initially, he noted
253 that a contemporary commentator reacted to the 1991 revisions of
254 Rule 45 when they were created by finding them highly complicated
255 and difficult to follow. These sentiments have echoed through the
256 following two decades.

257 *Rule 45: Notice*

258 The changes in the notice requirements are familiar from
259 earlier Committee meetings. It is often lamented that many lawyers
260 fail to heed the direction that before a subpoena to produce is
261 served on the witness it must be served on each party. This
262 problem is addressed by moving the direction from the last sentence
263 of present Rule 45(b)(1) to become a new paragraph (a)(4). The
264 notice requirement also is bolstered by requiring that the notice
265 include a copy of the subpoena. Finally, the requirement is
266 extended to include trial subpoenas by deleting the words that
267 limit the notice requirement to subpoenas to produce "before
268 trial." The Subcommittee concluded that prior notice may be even
269 more important with respect to trial subpoenas than it is for
270 discovery subpoenas.

271 The notice provision could be expanded. Several experienced
272 lawyers urge that notice should be required when materials are
273 produced in response to a subpoena. They complain that it is
274 difficult to gain access to the materials. Leading figures in the
275 ABA Litigation Section have recommended that after notice that the
276 subpoena will be served, notice also should be given of any

277 modification of the subpoena, and that things produced in response
278 should be made available to all parties in a timely fashion. The
279 Subcommittee has considered this question several times, and
280 reconsidered it after it was raised at the Standing Committee last
281 January. Each time it has concluded that these additional notices
282 should not be required. There is a real concern that requiring
283 subsequent notices could impose significant burdens, particularly
284 when materials are produced in a rolling fashion – how many notices
285 are required, and when? And there is concern that the requirement
286 could become a source of "gotcha" disputes about compliance,
287 particularly with respect to how many notices must be given, and
288 how soon, when production spreads out over time. And the disputes
289 may be deliberately deferred to motions made on the eve of trial,
290 requesting exclusion of materials produced under the subpoena.
291 Lawyers should bear the responsibility of following up on the
292 notice that the subpoena will be served by making periodic
293 inquiries about compliance, with requests for access to the
294 materials produced. The draft Committee Note says, at pages 104-
295 105 of the agenda materials, that parties desiring access should
296 follow up to obtain access, and that the party serving the subpoena
297 should respond by making reasonable provision for prompt access.
298 This sort of advice does not seem appropriate for rule text.

299 Discussion began with observations that a lawyer who has
300 notice that a subpoena is in play becomes responsible to follow up
301 by inquiring about the response, and that it could be complicated
302 to apply a notice requirement to rolling production – and phased
303 discovery is often directed in the quest for proportionality. In
304 addition, it was suggested that it is better to avoid anything that
305 increases the length and complexity of Rule 45. This problem is a
306 good example of the need to foster cooperation in litigation.

307 John Barkett, who participated in drafting the ABA letter,
308 reported that it came out of exhaustive, robust discussions. The
309 conclusion was unanimous. The participants included lawyers who
310 engage in very complex litigation and others who engage in less
311 complex litigation. Their experience is that no matter how often
312 they call or ask, they do not get the documents produced under a
313 subpoena. It is not enough to say it becomes the responsibility of
314 other parties to pursue production by the party who served the
315 subpoena. The suggestion that notice also should be required when
316 the party who serves a subpoena negotiates modification of its
317 terms with the person served may prove complicated in practice.
318 But the problem is created by people who do not practice
319 cooperatively. The prospect that a Committee Note can solve this
320 behavior is not good.

321 It was suggested that there is no need for notice of
322 modification if the breadth of the subpoena is cut back. Does it
323 happen that modifications expand the reach, so other parties need
324 notice that enables them to assert needs for protection?

325 An alternative was suggested: lawyers could agree in the Rule
326 26(f) plan to require the subsequent notices of modification and
327 production, and the requirements could be included in the ensuing
328 discovery order. Doubts were expressed in a different direction:
329 "Rules are not always obeyed or enforced." Behavior will not be
330 changed by adding new rule requirements. A similar doubt was
331 expressed: "You cannot do all lawyering in the rules." Other
332 parties should be responsible for calling the party who served the
333 subpoena, or the nonparty who was served. If problems arise, the
334 court can resolve them. "This is a 'gotcha' provision" that would
335 cause lawyers to avoid doing what they should do to keep abreast of
336 subpoena responses. A lawyer who encounters problems can issue an
337 independent subpoena to the same nonparty.

338 The proposed notice provision, new Rule 45(a)(4), lines 62-65
339 on page 94 of the agenda materials, was approved without dissent.

340 *Rule 45: Transfer*

341 Earlier drafts had two transfer provisions that addressed
342 motions to quash and motions to enforce, but not a motion to
343 determine whether privilege or work-product protection apply to
344 material covered by a notice given after initial production. It
345 has seemed more efficient to redraft a single transfer provision,
346 proposed Rule 45(f) at lines 257-263, pages 100-101 of the agenda
347 materials. The transfer, at least at the first step, is from the
348 court where compliance is required to the court where the action is
349 pending. Three aspects of transfer should be discussed: the
350 standard for transfer; enforcement issues that may arise if an
351 order is entered by the court where the action is pending rather
352 than by the court where performance is required; and potential
353 choice-of-law issues. A minor drafting issue will be considered by
354 the Subcommittee - whether the text should refer to a motion "in a
355 court other than the issuing court," or instead to a motion "in the
356 court where compliance is required."

357 Earlier drafts began with the language of 28 U.S.C. § 1404(a)
358 as a standard for transfer. But it seemed inappropriate to invoke
359 the standard that governs transfer of an entire action, a more
360 momentous event. A series of alternatives led to the current
361 version: "considering the convenience of the person subject to the
362 subpoena, the interests of the parties, and the interests of
363 effective case management." The Committee Note attempts to make it
364 clear that this standard is not easily met. Alternative approaches
365 should be discussed. It may be that transfer should be readily
366 made, or that it should be seldom made, or that some more-or-less-
367 neutral midpoint should be preferred. The Note comes close to the
368 "really hard" end of the spectrum if the local nonparty addressed
369 by the subpoena prefers local resolution without transfer. If that
370 is the preferred approach, is the Note sufficient to overcome the
371 fear that transfers will be ordered too often?

372 The ABA letter recommends that transfer should be ordered only
373 on consent of the parties and the person subpoenaed, "or in
374 exceptional circumstances." There may be little need to address
375 the unanimous consent possibility in rule text – courts generally
376 will honor such a request, and it may be better to recognize that
377 in some circumstances the court may have good reason to refuse
378 transfer in the face of unanimous consent. The "exceptional
379 circumstances" term appears in other rules – 26(b)(4)(D)(ii)
380 limiting discovery of consulting experts, and 37(e) on sanctions
381 for failing to produce electronically stored information that has
382 been lost. "[E]xceptional condition" appears in 53(a)(1)(B)(i) on
383 appointing a special master. At the same time, the ABA provides
384 examples of exceptional circumstances that do not seem all that
385 exceptional – a risk of inconsistent rulings by different courts
386 when performance is required in different places, the prospect that
387 resolution of the objections would materially affect the merits of
388 the action, or the court for the place of performance cannot timely
389 address the matter.

390 Judge Campbell noted that the proposed draft reflected a
391 Subcommittee expectation that transfer will not happen very often,
392 but that he has come to fear that the language may allow transfer
393 too often. Busy judges in the place of performance may find
394 justification in one phrase or another to justify transfer. It is
395 not likely that a judge ruling on a discovery dispute will have
396 time to consult a Committee Note. The ABA request for stricter
397 language seems attractive.

398 The factor addressing the "interests of effective case
399 management" was questioned. "A concept doesn't have interests.
400 The draft permits too many arguments for transfer."

401 One possibility would be to provide that a person seeking
402 transfer has the burden of justification. But it was thought
403 sufficient to state a standard; the burden falls naturally on a
404 party seeking transfer.

405 As usual, invoking a term found in other rules risks
406 comparison to different problems that require different approaches.
407 But a phrase like "exceptional circumstances" resonates more to
408 general terms such as "good cause." There is little reason to fear
409 that "good cause" provisions will be read to require the same
410 threshold of justification in every rule where they appear. So a
411 generic reference to "exceptional circumstances" will be read to
412 set the tone for transfer in light of all the interests that bear
413 on choosing the court to rule on the motion.

414 It was urged that "exceptional circumstances is demanding."
415 The ABA list of examples "does not capture the situation where
416 enforcement is integrally related to management of the case by the
417 court where the action is pending." The draft reference to
418 effective case management does capture this situation, although it

419 might also be read to enable the court where discovery is pending
420 to manage its cases by transferring a problem away. The standard
421 should be drafted in a way that invokes the burdens on the nonparty
422 subject to a subpoena, the interests of the parties, and the
423 relation of the discovery dispute to the underlying litigation.

424 Another member suggested that transfer is not necessarily a
425 bad thing. Concern for local interests and the nonparty subject to
426 the subpoena may be relatively rare in comparison to concern about
427 the impact of the issues on the whole case. "Making transfer
428 easier is not a bad thing."

429 The Subcommittee, however, has been worried that a nonparty
430 should have access to a local judge. It has believed that most
431 issues relate to the nonparty, that relation to the central issues
432 in the case is less common.

433 Another suggestion was that it could be useful to put the ABA
434 examples in the Committee Note, and perhaps to refer to the local
435 interests as well as the convenience of the local nonparty. An
436 example was given. Enterprises such as Google and Facebook are
437 frequently served with nonparty subpoenas. It often takes a few
438 days for the subpoena to come to the attention of the appropriate
439 people. The time to respond is, as a practical matter, very short.
440 It can be very helpful to locate the dispute in the court local to
441 the place where compliance is required.

442 A preference was expressed for "exceptional circumstances" as
443 a way to avoid making it too easy to transfer. "The focus should
444 be on the nonparty, who has no interest in the case."

445 John Barkett noted that the ABA wants transfer really to be
446 the exception, not the rule. If there are words better than
447 "exceptional circumstances" to achieve this end, that's fine.
448 Another observer said that Lawyers for Civil Justice also favors
449 the "exceptional circumstances" wording. The Committee Note could
450 provide examples in addition to those suggested by the ABA.

451 Still further support was offered for "exceptional
452 circumstances." As drafted, Rule 45(f) reads as if the court can
453 act on its own, without a motion. Do we want that? (No answer was
454 given.)

455 The question was framed again: suppose, under the nationwide
456 subpoena proposal, a subpoena issues from the Western District of
457 Washington, addressed to a nonparty in Connecticut. Should we
458 generally prefer that the parties deal with objections -
459 particularly those made by the nonparty - in Connecticut? The
460 provision for nationwide service intersects the provision for
461 transfer, although transfer can be provided for in a rule that
462 carries forward the present practice of issuing the subpoena from
463 the court where performance is required.

464 In response to a question about actual experience with
465 nonparty discovery disputes relating to a distant action, a judge
466 described that he had encountered these problems twice. Once
467 involved discovery in his court incident to an action elsewhere,
468 while the other involved discovery elsewhere incident to an action
469 in his court. These problems arise only in exceptional
470 circumstances, and are likely to involve large, high-stakes
471 commercial litigation. The nonparty is more likely to be a
472 corporation than an individual. It is not a bad thing to have the
473 dispute resolved in the court where the action is pending. But it
474 would be better to provide that the party seeking transfer has the
475 burden of showing justification.

476 After support was expressed for the "exceptional
477 circumstances" test, a proposal to adopt it was approved
478 unanimously. The Committee Note will be modified accordingly.
479 Either in rule text or Note, account will be taken of the situation
480 in which the parties and the person subject to the subpoena join in
481 requesting transfer.

482 Rule 45(f) also includes a sentence authorizing an attorney
483 for the party subject to a subpoena to appear in the court where
484 the action is pending if a motion is transferred. An invitation to
485 discuss the provision drew no response.

486 *Rule 45: Enforcement After Transfer*

487 Three draft provisions bear on the enforcement questions that
488 may arise after a Rule 45 motion is transferred to the court where
489 the action is pending. Two alternatives are proposed for Rule
490 45(f). The first: "If [appropriate]{necessary} to enforce its
491 order on the motion, the issuing court may retransfer [the
492 motion]{its order} after entering its order." The alternative: "If
493 the issuing court orders discovery from a nonparty [not subject to
494 its jurisdiction], it may retransfer [the motion]{its order}for
495 enforcement after entering its order." The first alternative looks
496 toward transfer back after problems arise; the second looks toward
497 transfer back as a precautionary measure.

498 Proposed Rule 45(g), with an addition over the version that
499 appears in the agenda materials, would provide: "The court for the
500 district where compliance is required – or, after transfer of the
501 motion, the issuing court – may hold in contempt a person who,
502 having been served, fails without adequate excuse to obey the
503 subpoena or an order relating to the subpoena."

504 Rule 37(b)(1), as presented, would allow "either court" to
505 treat as contempt a deponent's failure to obey an order to be sworn
506 or to answer a question if the court where the discovery is taken
507 transfers the motion to the court where the action is pending. The
508 draft could be read to allow the court where the action is pending
509 to impose contempt sanctions even without transfer from the court

510 where the motion is made. That will be corrected by further
511 drafting.

512 There is a faint analogy for holding a nonparty witness in
513 contempt of a court at a distance from the witness in Criminal Rule
514 17, which authorizes nationwide service of trial-witness subpoenas.
515 There is not a lot of law on the enforcement aspects of these
516 subpoenas.

517 Turning first to Rule 45(f), the basic question is whether the
518 court where the action is pending should want to remit enforcement
519 to the court where the discovery is to occur before there are any
520 concrete reasons to anticipate failures to comply with the order.

521 A judge asked whether the standard for contempt is the same
522 nationwide? And whether the practice also is uniform. He holds a
523 person in contempt only after an in-person appearance. Would it be
524 right to allow the Western District of Washington to hold a person
525 in the Southern District of Florida in contempt without a personal
526 appearance in Washington? Would it be reasonable to drag a
527 nonparty charged with contempt across the country for this purpose?
528 This is in part a subset of the choice-of-law problem, as well as
529 the decision to provide nationwide service of all nonparty
530 subpoenas from the court where the action is pending. "How far
531 should we upset local-court expectations in civil actions"? It also
532 invokes the distinction between civil and criminal contempt – and
533 criminal contempt raises rights to jury trial and proof beyond a
534 reasonable doubt.

535 The purpose of providing for transfer back to the court where
536 compliance is required is to ensure personal appearance in a
537 convenient tribunal. Transfer seems less complicated than the
538 alternative of proceeding by motion in the court where compliance
539 is required to enforce the order of the court where the action is
540 pending.

541 It also was noted that pro se parties will be a problem,
542 assuming they manage to pursue proceedings to the point of
543 participating in a motion, transfer, and subsequent enforcement
544 proceedings. "It is the party trying to enforce the subpoena who
545 will have to figure it out."

546 A further distinction may be drawn between enforcement of
547 orders that restrict requested discovery and enforcement of orders
548 that compel discovery. Problems are more likely to arise from
549 orders that compel discovery.

550 The relationship between proposed 45(f) and proposed 45(g) was
551 addressed by asking whether 45(g) authorizes the court where
552 compliance is required to enforce an order of the court where the
553 action is pending without transfer back. With the proposed
554 revision, it would allow the compliance court to enforce an order

555 relating to the subpoena made by the court where the action is
556 pending. There may be real advantages in enforcement by the court
557 where compliance is required. Disputes about compliance may focus
558 on whether what in fact has been done does in fact comply with the
559 order, raising essentially local issues.

560 A separate problem was noted. Civil contempt may be courted
561 by a party that wants a basis to appeal a discovery order.
562 Selection of the court that enters the contempt order will
563 determine the circuit in which appeal is available, and that may
564 affect the law that governs the dispute. Rule 45(g), indeed,
565 identifies only contempt as the enforcement sanction, although a
566 minority of courts have recognized the use of other sanctions.

567 The question was reframed: is there a clear answer to the
568 place-of-enforcement question? The reasons for preferring
569 enforcement where the nonparty is required to comply might lead to
570 a rule that automatically calls for enforcement by that court. The
571 court where the action is pending could achieve most of the case-
572 management advantages, and could satisfy any need for uniform
573 rulings on issues arising in different places of compliance, by
574 issuing the order. Confiding enforcement to the court for the
575 place of compliance would seize the advantages of locally resolving
576 local issues as to compliance or no. There might be some
577 awkwardness about interpreting the order, or about motions to
578 modify it, but they need not be great. And this approach would
579 provide a clean, simple rule.

580 This suggestion was resisted. One difficulty would arise if
581 the court where the action is pending is directed to rely for
582 enforcement on several courts in several different places where
583 compliance is required. Those courts might interpret and enforce
584 the same order differently. And enforcement often will be ordered
585 because it is a party that is causing the problem - one example was
586 a case in which a defendant directed a nonparty witness to refuse
587 to produce the documents. Compare Rule 26(c), which directs a
588 nonparty from whom discovery is sought to move for a protective
589 order in the court where the action is pending, and provides an
590 alternative only for matters relating to a deposition by allowing
591 a motion in the court where the deposition will be taken.
592 Flexibility seems better than a simple requirement that enforcement
593 always be in the court where compliance is required.

594 A preference was expressed for Alternative 1, providing for
595 transfer back when a problem arises. That might make it wise to
596 adopt "necessary" as the standard for transferring back, and to
597 transfer back the order, not the motion. Style changes were also
598 suggested. The sentence might be shortened like this: "To enforce
599 its order on the motion, the issuing court may transfer the order."
600 But it was asked whether drafting in this fashion would suggest
601 that the court where the action is pending (the issuing court)
602 lacks authority to enforce its order. That led to the question

603 whether the court for the place of compliance can enforce an order
604 of the court where the action is pending without transfer back;
605 Rule 45(g), as proposed, may not clearly answer that question. It
606 was observed that "We do not want two courts to be able to enforce
607 the same order simultaneously – different parties may go to
608 different courts." A rule that says "either" does not mean that
609 both can do it. Another suggested edit would have the rule allow
610 the court where the action is pending to "retransfer the matter,"
611 understanding "matter" to include both the motion and the order.
612 Or: "To enforce its order, the issuing court may transfer the order
613 to the court where [the motion was filed]{compliance is required}."

614 This discussion concluded with unanimous approval of
615 "alternative 1," to provide – in language to be worked out – for
616 retransfer to the court where the motion was filed.

617 The Committee unanimously approved the suggested addition to
618 Rule 45(g), described above, adding at line 272, page 102, these
619 words: "may hold in contempt a person who, having been served,
620 fails without adequate excuse to obey the subpoena or an order
621 relating to the subpoena."

622 Turning to Rule 37(b)(1), the drafting problem described above
623 came on for discussion. The Subcommittee does not want to
624 establish power for the court where the action is pending to
625 enforce an order entered by the court where compliance is required
626 if there has not been a transfer. A relatively lengthy drafting
627 fix is readily accomplished. Perhaps a shorter version can be
628 managed. It is useful to amend Rule 37 because it is the only
629 place that covers nonparty deposition testimony, as compared to the
630 production subpoenas covered at length in Rule 45.

631 *Rule 45: Choice of Law With Transfer*

632 Choice-of-law problems can arise in the present structure of
633 Rule 45, even absent a transfer provision. An illustration is
634 provided by *Jimenez v. City of Chicago*, 733 F.Supp.2d 1268
635 (W.D.Wash.2010). A nonparty witness was subpoenaed in the Western
636 District of Washington to give testimony for an action pending in
637 the Northern District of Illinois. The question was whether to
638 rely on Ninth Circuit journalist privilege law, or to invoke the
639 Seventh Circuit's rejection of the privilege. The court chose
640 Ninth Circuit law, as the precedent binding it as the court that
641 issued the subpoena. This example is particularly useful because
642 it serves as a reminder that not only may the rules of evidence and
643 discovery vary among the circuits, but state law also may become
644 relevant, as when Evidence Rule 501 invokes state privilege law.
645 In a transfer regime, the question would be sharpened if the
646 subpoena issued from the court in Illinois and the court in
647 Washington decided to transfer the issue to Illinois.

648 The agenda materials include only one entry on this question,

649 a possible Committee Note sentence: "If the transfer might alter
650 the legal standards governing the motion, this factor might affect
651 the desirability of transfer." Would adding this to the Note help?
652 Create confusion or even suggest undesirable practices? It was
653 concluded that these questions should not be addressed, either in
654 rule text or in the Committee Note.

655 *Rule 45: Party as Trial Witness*

656 The Vioxx decision, discussed at length in earlier meetings,
657 interpreted Rule 45 to authorize a subpoena commanding a party or
658 a party's officer to appear as a trial witness without regard to
659 the place-of-service limits in Rule 45(b). It has been followed by
660 other courts. It also has been rejected by other courts.

661 The Subcommittee proposes to reject the Vioxx ruling. It
662 misreads the present rule. More importantly, it reaches a wrong
663 result. Proposed Rule 45(c)(1)(A) expressly overrules the Vioxx
664 result by providing that a subpoena may require a party or a
665 party's officer to appear at a trial only within the state where
666 the party or its officer resides, is employed, or regularly
667 transacts business in person, or within 100 miles of where the
668 party or its officer does such things. This proposal has been
669 discussed and approved in earlier meetings. The Committee
670 confirmed it again as a recommendation to the Standing Committee
671 for publication.

672 At the same time, the Subcommittee recognizes the support that
673 Vioxx has commanded. It may be that public comments supporting
674 Vioxx will prove persuasive. To encourage and focus comments, the
675 Subcommittee has prepared an alternative that would go part way to
676 preserving the Vioxx result. But only part way. The alternative
677 does not authorize a party to issue a subpoena to another party.
678 It requires a court order, and requires good cause to issue the
679 order. The order can be directed only to the party; if it seeks
680 testimony of the party's officer, it is the party that is directed
681 to produce the officer to appear and testify at trial. Before
682 issuing the order the court must consider the alternatives of
683 audiovisual deposition or securing testimony by contemporaneous
684 transmission under Rule 43(a). The court may order reasonable
685 compensation for expenses incurred to attend the trial. The
686 Committee Note emphasizes the good-cause requirement. Vioxx does
687 not include any of these limits.

688 The Subcommittee recommends that the alternative preserving
689 some part of Vioxx be published along with the Rule 45 proposal,
690 but in a subordinate posture that clearly marks it as something the
691 Committee does not recommend.

692 The Committee approved the language of the alternative, as it
693 appears on page 111 of the agenda materials.

694 Discussion turned to the question whether the alternative
695 should be published. It was noted that Vioxx does not stand alone,
696 but has gathered support. And some of the cases that reject Vioxx
697 rely only on the language of present Rule 45, at times seeming to
698 indicate a preference for the Vioxx rule if it could be squared
699 with the rule language. And plaintiff's lawyers at the Dallas
700 meeting in February thought it is good to be able to command trial
701 testimony when it can be shown that a party's officer has important
702 knowledge about the events in suit.

703 The efficacy of publishing an alternative for comment was also
704 noted. There is a risk that when an alternative is published as
705 something the Committees do not favor, subsequent adoption of the
706 alternative will lead to protests that people who supported the
707 Committees' primary recommendation did not bother to express their
708 support because they assumed the Committees would not be moved from
709 their initial preference. But a clear invitation to comment now on
710 both alternatives will reduce the force of any such protests.
711 Various forms of alternative publication have been used in the
712 past. What is important is to be careful to actively solicit
713 comment, without presenting the disfavored alternative as if it
714 were co-equal with the preferred version. The solicitation for
715 comment will be worked out carefully, for the purpose of enhancing
716 the prospect that if the Committees eventually decide to go part
717 way toward embracing Vioxx there will be no need to republish.

718 *Rule 45: Simplification*

719 Alternative I simplifies Rule 45 by providing that subpoenas
720 issue from the court where the action is pending and may be served
721 anywhere in the United States. The place of compliance is
722 separated from the place of service. These changes are reflected
723 in Rules 45(a)(2), (b)(2), and (c).

724 The subdivision (c) provisions for place of compliance are
725 drawn from present Rule 45, but are not entirely the same. Exact
726 similarity would complicate the rule. The changes remove any
727 reliance on state law. They also end the possibility of compelling
728 appearance for a deposition or trial by serving a witness as a
729 transient. On the other hand, nationwide service means there is no
730 need to serve the witness where the discovery is to occur; that
731 issue is addressed directly by the provisions designating the place
732 of compliance. It seems likely that these changes will not matter
733 in most cases.

734 As a separate matter, the provision that would restore some
735 part of the Vioxx rule will be relocated from the position shown in
736 the agenda materials to become part of subdivision (c). That will
737 put all of the provisions on place of compliance in the same
738 subdivision.

739 The draft identifies many possible questions in footnotes.

740 None of them were raised for further discussion.

741 The Committee unanimously approved the recommendation to
742 advance the simplified Rule 45 for publication.

743 The Committee then returned to the question whether to send on
744 to the Standing Committee the versions that omit simplification but
745 incorporate the provisions for notice, transfer, and overruling
746 Vioxx. One concern is that there are many alternative means of
747 simplifying Rule 45 in some measure. If the Standing Committee
748 concludes that full simplification goes too far, it may be better
749 to ask for a remand to consider alternative approaches. An
750 invitation to publish Rule 45 now, without any attempt to simplify,
751 may be unduly defeatist. Deferring publication of Rule 45
752 proposals for another year is not a matter for great concern; we
753 have been living with its present form since 1991. And it would be
754 unwise to publish one set of Rule 45 proposals now and then publish
755 a second set in another year or two.

756 The question whether to send Versions III and IV to the
757 Standing Committee as a fallback for publication if the
758 simplification proposals are rejected was deferred for
759 consideration on the second day of the meeting. The Subcommittee
760 then recommended that only the simplified version, including the
761 Vioxx alternative, be sent to the Standing Committee. If full
762 simplification is rejected, the Subcommittee will want to develop
763 alternative versions in light of the discussion in the Standing
764 Committee. The no-simplification alternative presents questions
765 different from going forward to publish the alternative that
766 partially restores Vioxx. Publishing the Vioxx alternative will
767 enhance the prospect that a final rule can be adopted without
768 republication if public comments show that Vioxx should be restored
769 in part or in full. The comments will be more useful if they focus
770 on a specific model; criticisms of the model can suggest
771 variations, or complete restoration of Vioxx. Publication also will
772 show respect for the courts that have adopted the Vioxx rule.

773 Concern was expressed that publishing an alternative that
774 expands the reach of orders for trial testimony by a party or a
775 party's officer may appear as a recommendation to codify Vioxx.
776 But the publication will not be framed as one asking "which do you
777 like." The alternative likely will be framed as an appendix. The
778 letter transmitting Rule 45 for publication will clearly recommend
779 that Vioxx be overruled. This approach will ensure active
780 comments. At the Dallas meeting in February plaintiffs lawyers who
781 work in multidistrict cases thought the MDL panel should adopt the
782 Vioxx rule for MDL cases. A like approach has been taken in the
783 past, asking for comment on alternatives that are designated as
784 disfavored. The resulting comments may cause the Committees to
785 rethink the question, and support adoption of a revised rule
786 without the need to republish. The concern about sending confused
787 signals remains important, however, as a reminder of the need to be

788 very careful about how the proposal is published.

789 The concluding comments observed that "When we publish we are
790 not necessarily trying to persuade. We are seeking input."
791 Putting the alternative out for comment will stimulate a more
792 complete spectrum of views. It seems particularly important to
793 enhance the comment process by these means when the courts have
794 divided on a question addressed by a proposal.

795 The Committee agreed unanimously that the nonsimplified
796 versions, III and IV, should not be sent to the Standing Committee.

797 *Discovery: Preservation and Sanctions*

798 Prompted by the strong recommendations made at the Duke
799 Conference by the panel chaired by Greg Joseph, the Discovery
800 Subcommittee began work last fall on possible rules governing
801 preservation of discoverable information and sanctions for failing
802 to preserve. The task is challenging. The case law is clear that
803 a duty to preserve can arise before an action is filed. But when?
804 What must be preserved? How long must it be preserved? Wrong
805 guesses can lead to sanctions for spoliation. The uncertainties
806 are reported to cause great anguish.

807 The anguish over exposure to sanctions could be alleviated by
808 highly specific preservation rules. But the more specific the
809 rule, the greater the prospect there will be important omissions.
810 A more general rule designed flexibly to cover all important
811 preservation duties, on the other hand, may be of little use for
812 want of concrete guidance.

813 After wrestling with illustrative drafts similar to those in
814 the agenda materials, the Subcommittee concluded that it needs more
815 information. It hopes to hold a miniconference in September, to
816 hear from people versed in the technology of storing, searching,
817 and retrieving electronically stored information; from plaintiffs'
818 counsel, defense counsel, and in-house counsel. The miniconference
819 will be focused by providing drafts similar to those presented in
820 the agenda materials for initial discussion. Suggestions about
821 people who should be invited to the conference are eagerly
822 requested.

823 An immediate suggestion for a conference participant was made,
824 pointing out that many lawyers are poorly informed about the
825 realities of preservation. In many circumstances it does not cost
826 much to preserve electronically stored information, whatever the
827 cost may be to preserve other forms of information. And the
828 dreaded costs of searching huge accumulations of electronically
829 stored information may be reduced dramatically by electronic
830 searching and screening. Beyond word-search terms, concept
831 searching is being developed. Comparisons to human searches show
832 that computer searching can produce far better results at

833 dramatically lower costs.

834 The Committee agreed that the miniconference should be held.

835 The agenda materials illustrate three approaches. The first
836 states a duty to preserve and attempts to provide detailed
837 provisions; the second states a duty to preserve but elaborates the
838 duty only in general terms; the third avoids any direct statement
839 of a duty to preserve, but instead describes appropriate responses
840 and sanctions for failure to preserve. The thought behind the
841 sanctions-only rule is that it will give retrospective guidance on
842 what should be preserved.

843 These models are presented for reactions at a conceptual
844 level. The details are useful only to illustrate the
845 characteristics of each approach. And the Subcommittee is open to
846 suggestions for still different approaches that depart from any of
847 these three models.

848 Models I and II present alternative forms of a new Rule 26.1
849 creating a duty to preserve. The first model, full of specifics,
850 provides the best model for discussion because the specifics
851 identify the problems encountered with preservation. The details
852 have been borrowed from various sources, beginning with the
853 elements agreed upon by the Joseph panel at Duke. Additional
854 sources continue to emerge, including a lengthy comment by the
855 Lawyers for Civil Justice received three days ago.

856 The very first part of the first subdivision, Rule 26.1(a),
857 seeks to disclaim any intent to supersede preservation duties
858 "provided by other law." Katherine David, interim Rules Law Clerk,
859 provided a memorandum sketching the wide variety of other laws that
860 establish duties to preserve. A discovery preservation rule should
861 not attempt to displace any of them; they exist for independent
862 purposes.

863 The draft imposes a duty to preserve on "every person who
864 reasonably expects [is reasonably certain] to be a party to an
865 action cognizable in a United States Court." These few words
866 address several issues. The duty is established at a time before
867 any action is filed. It reaches anyone who reasonably expects to
868 be a party – but should the standard be raised to "reasonably
869 certain," higher than the case law seems to be? Should the duty
870 extend to a person who does not reasonably expect to be a party,
871 but who should reasonably understand that it has information that
872 may be important to litigation among others? The duty extends only
873 to an expectation of litigation in a federal court – it would not
874 do to attempt to write a rule for state courts – but how is a
875 prospective party (or nonparty) to know whether anticipated
876 litigation may be cognizable in a federal court? And bracketed
877 language identifies the question whether a preservation rule should
878 be limited to electronically stored information, the source of most

879 current anxieties, or should extend to all discoverable
880 information. It may be useful to recall that many of the cases
881 identified by Emery Lee's FJC study involve tangible items -
882 things, not simply paper documents.

883 The first question was whether the Enabling Act authorizes a
884 rule that would establish a duty before any federal-court action
885 has been filed. The Committee still has not decided that question.
886 Instead, it seems useful to determine what sort of rule, if any,
887 seems best. If the preferred rule recognizes a duty to preserve
888 before an action is filed, and if the Committees conclude that
889 Enabling Act authority for the rule is uncertain, Congress can be
890 asked for authority to develop the rule. It was pointed out that
891 federal courts now enforce a duty to preserve that arises before a
892 federal action is filed: what is the authority to do that? If the
893 duty can be - indeed has been - established by decisions, should
894 there not be authority to clarify and regulate the duty through the
895 Enabling Act? One of the chief concerns is that the decisions are
896 not uniform in some aspects, particularly on the relationship
897 between degree of culpability in failing to preserve, the degree of
898 prejudice to others, and selection of an appropriate sanction.
899 That seems the stuff of proper rulemaking.

900 It was suggested that it is troubling to think of developing
901 a rule aimed only at electronically stored information. Other
902 forms of information remain important, and often critical. And
903 leaving other forms of information outside the rule, to be governed
904 by decisional law, would perpetuate disuniformity and create
905 complications in the many cases that involve preservation of
906 information in various forms. And there might be problems of
907 categorization: is a printout of an e-mail message electronically
908 stored information?

909 It was pointed out that the "reasonably expects" phrase in
910 26.1(a) contrasts with "would lead a reasonable person to expect to
911 be a party" in 26.1(b). "Reasonable person" suggests an objective
912 standard, and the comparison may imply that "reasonably expects" is
913 a subjective standard. What is intended? The Subcommittee intends
914 an objective standard - perhaps 26.1(a) should be revised to say
915 something like "who reasonably should expect."

916 The relationship to other sources of preservation duties was
917 explored by an observer. There are thousands of sources of
918 obligations to preserve information. They are established
919 independently of whatever duties relate to litigation. The rules
920 should not attempt to interfere with them. Professor Marcus
921 replied that the intent clearly is to leave all other duties as
922 they are. Perhaps it would be better to write the rule like this:
923 "~~In addition~~ Without regard to any duty to preserve information
924 provided by other law * * *."

925 The relationship to other duties to preserve also is addressed

926 by the "trigger" provisions of 26.1(b)(6), invoking a duty to
927 preserve on "the occurrence of an event that results in a duty to
928 preserve information under a statute, regulation * * *." Does this
929 mean that a litigant is the beneficiary, for example, of a duty to
930 preserve mandated by the SEC? An observer suggested that major
931 problems could be created by invoking external duties established
932 without any thought to use in litigation. A wondrous variety of
933 duties to preserve are created by federal and state statutes,
934 administrative regulations, and ordinances. The focus should be on
935 an objectively reasonable anticipation of litigation, not failure
936 to comply with standards that do not bear on litigation and that
937 often will be obscure or unknown.

938 It was pointed out that duties to preserve information overlap
939 with state attorney-discipline rules. In England, these problems
940 are dealt with in disciplining the attorney who allowed spoliation.

941 The issue of preservation costs was addressed by another
942 observer, who pointed out that costs are imposed by preserving
943 information for litigation that never gets filed. A group of in-
944 house counsel are trying to develop more specific information on
945 these costs.

946 The identity of the beneficiary of a duty to preserve was
947 raised as another source of difficulty. Draft 26.1(b)(2) triggers
948 a duty to preserve on receipt of a notice of claim or other
949 communication indicating an intention to assert a claim. Suppose
950 one person indicates an intent to sue, and suit is then brought by
951 someone else? Does the duty to preserve extend to the benefit of
952 the actual plaintiff? Does it make a difference whether there was
953 a reason to anticipate a possible action by the actual plaintiff -
954 if the original communication is made by the driver of an
955 automobile involved in a collision, for example, should it depend
956 on whether the defendant was on notice that there was a passenger
957 in the automobile who ultimately proved to be the plaintiff? If
958 there was no notice as to the passenger, and the information was
959 destroyed three years after the communication, could there be a
960 violation of the duty to preserve? For that matter, it was
961 suggested that outside the states that recognize a tort claim for
962 spoliation, the duty to preserve is identified as a duty to the
963 court, not to opposing parties. That is important in determining
964 sanctions.

965 The scope of the duty to preserve described in 26.1(b) raises
966 still other problems. In the first model the list initially
967 appears as a finite and total list, but then (b)(7) seeks to avoid
968 the risk of omissions by adding a catch-all: "Any other
969 [extraordinary] circumstance that would make a reasonable person
970 aware of the need to preserve information." The catch-all "may
971 catch too much." But a rule limited to defined categories will
972 invite litigation disputing whether a bit of information falls into
973 any of the categories. Return to the example of a communication of

974 intent to sue over an automobile collision. Does the scope of the
975 duty to preserve depend on whether the putative defendant knows
976 there was a passenger? On whether the model of automobile was
977 identified to a manufacturer defendant? So of the other
978 categories. A potential party might retain an expert consultant,
979 (b)(4), for the purpose of correcting perceived problems in a
980 product, without any thought of being sued. A notice to preserve
981 information, (b)(5), may be detailed – does that give license to
982 discard information not identified? And so on through the list.
983 And the Lawyers for Civil Justice submission identifies still other
984 specific events that might trigger a duty to preserve.

985 One possibility is that ambiguity in the events that trigger
986 a duty to preserve may be taken into account in sanctions
987 decisions. That directs attention to the third model, which relies
988 on provisions that directly govern sanctions as an indirect means
989 of identifying the nature of the duty to preserve.

990 Discussion of these questions began by asking whether "cloud
991 computing" practices that farm out data storage to unknown systems
992 in unknown places is moving us toward a requirement that everyone
993 preserve everything? We need to be educated as to what cloud
994 computing is – perhaps as to the many different and potentially
995 different things that it is or may become. Who controls the cloud
996 – the owner of the information, or the system operator? What
997 happens if the owner stops paying the cloud? How much of this will
998 change in the next three years?

999 A specific example was offered. "Most people would say that
1000 filing an EEOC complaint would trigger a duty to preserve," but
1001 only a small fraction of these complaints eventually lead to
1002 litigation. Should the filing trigger a duty to preserve? The
1003 EEOC liaison responded by observing that an EEOC regulation
1004 requires preservation of everything relevant to the EEOC complaint.
1005 But he did not know how often private litigation follows after an
1006 employee files a complaint with the EEOC. Another observation was
1007 that only a small fraction of people who receive right-to-sue
1008 letters actually bring an action, but that there are a lot of
1009 private Title VII suits independent of the EEOC complaint process.
1010 This example may illuminate the choice between defining the duty as
1011 one to preserve by a person who is reasonably certain to become a
1012 party or as one imposed on a person who should reasonably expect to
1013 become a party. Perhaps "reasonably anticipates" would work
1014 better?

1015 A member asked whether the "laundry list" of triggers might
1016 better be included in a Committee Note, not rule text. The second
1017 version of 26.1(b) provides the same list, but in the form of "such
1018 as" examples of a generally described duty to preserve. That
1019 approach also could be shifted to a Note. An observer who had been
1020 a member of the Joseph panel noted that some panel members thought
1021 the list of triggers should be exhaustive, while others thought it

1022 should include a catch-all. A different observer who had been a
1023 member of the panel noted that he had preferred relegating the list
1024 to a Committee note.

1025 An observer asked why a list of triggers will cause any
1026 appreciable harm if preservation is inexpensive? It was suggested
1027 that "we hear different things about the cost of preservation."
1028 And so long as preservation is not costless in any dimension, there
1029 is a risk that expansive preservation duties will impose
1030 unwarranted costs, or lead to unwarranted sanctions when they are
1031 overlooked. An enterprise that frequently confronts the
1032 possibility of litigation may encounter substantial costs if there
1033 is an expansive duty to preserve associated with each of them. And
1034 the cost of preserving information is not limited to direct
1035 preservation costs – once you have preserved it, you face the
1036 prospect of search costs if litigation is actually commenced.

1037 After the trigger provisions of 26.1(b) come the "scope"
1038 provisions of 26.1(c). These may create greater difficulty than
1039 the trigger provisions. An anecdote from long ago illustrates the
1040 problems. In *United States v. IBM* the preservation order required
1041 IBM to retain "all documents related to computing." IBM responded
1042 by not throwing away anything. The waste baskets were emptied into
1043 storage. When the order was vacated, IBM had to file an
1044 environmental impact statement because there was so much paper.
1045 "Scope matters."

1046 The starting point of 26.1(c) requires "actions that are
1047 reasonable under the circumstances to preserve discoverable
1048 information." Bracketed alternatives then invoke the
1049 proportionality criteria of Rule 26(b)(2)(C) by cross-reference or
1050 by paraphrase. But when and how can a prospective party identify
1051 what is proportional to litigation that has not even been filed?

1052 The preface is followed by 26.1(c)(1), presented as four
1053 alternative provisions to define the subject matter of what must be
1054 preserved. One of them is very narrow – it demands only
1055 preservation of information relevant to a subject on which a
1056 potential claimant has demanded preservation, seemingly obviating
1057 the duty to preserve anything in response to any of the other
1058 triggering events listed in 26.1(b). The first alternative broadly
1059 requires preservation of anything relevant to any claim or defense
1060 that might be asserted in the action: is that too broad? The
1061 fourth alternative looks to what a reasonable person would
1062 appreciate should be preserved under the circumstances: does that
1063 give sufficient guidance?

1064 The next provision, 26.1(c)(2), addresses the sources of
1065 information to be preserved. One alternative is limited to
1066 information "that is reasonably accessible to the person." This
1067 test looks to the Rule 26(b)(2)(B)(2) protection against discovery
1068 of electronically stored information, but it presents questions.

1069 Why not require preservation, particularly if the cost is low,
1070 against the prospect that cause may be found for discovery? And
1071 how does this affect other forms of information? The second
1072 alternative is specific, invoking all sorts of technological
1073 concepts that many will not understand and that may become obsolete
1074 in short order. How many lawyers, for example, will fully
1075 understand what it means to establish a presumptive exclusion that
1076 excuses preservation of "deleted, slack, fragmented or unallocated
1077 data on hard drives"?

1078 Draft 26.1(c)(3) extends the duty to preserve to documents and
1079 tangible things as well as electronically stored information. But
1080 what of real property?

1081 At this point Judge Campbell suggested that the central point
1082 had been made. Difficult and controversial issues will arise at
1083 many points, perhaps at every point, in attempting to define a
1084 specific duty to preserve. It may make better use of remaining
1085 meeting time to offer general observations, leaving specific
1086 suggestions for later messages.

1087 One suggestion was that it would be good to include in the
1088 September conference representatives of medium-sized businesses
1089 that are based outside the United States but do business here. It
1090 seems likely that they would view either version of Rule 26.1 as
1091 frightening, much more frightening than the Rule 37 approach to
1092 preservation obligations by defining the occasions for sanctions.

1093 This observation led to another. The European Union, moved by
1094 privacy concerns different from those that prevail in the United
1095 States, is aggressive in imposing obligations to discard data after
1096 a relatively brief time. Stringent requirements in the United
1097 States could whipsaw enterprises that operate in both places.
1098 Perhaps the United States Trade Representative's Office might be
1099 able to send someone to the conference to explore these issues.

1100 The suggestion that the conference should be structured to
1101 include representatives of the plaintiff perspective was renewed.
1102 It will important to learn what they think is sensible, what they
1103 need to be able to discover.

1104 It will be more difficult to know how to gain information
1105 about imposing duties to preserve on individual litigants. A
1106 prospective plaintiff or defendant may give little thought to these
1107 matters. In employment cases, for example, employers seek
1108 discovery of Facebook pages for information that may undercut the
1109 plaintiff's litigating positions. Similar quests may be made in
1110 class actions for information bearing on adequacy of representation
1111 and commonality of class-member interests. Other plaintiffs may be
1112 different - governments often appear as plaintiffs, and may be
1113 expected to preserve in a sophisticated way. Here too, the
1114 plaintiffs' bar should be searched for information.

1115 Discussion closed with a statement that the Subcommittee hopes
1116 to be able to recommend a general approach at the November meeting,
1117 and to have a concrete proposal for consideration at the Spring
1118 2012 meeting.

1119
1120

Pleading: FJC Report

1121 Judge Kravitz noted that the Supreme Court has already
1122 delivered two opinions on pleading standards in 2011. The Skinner
1123 opinion invokes the Swierkiewicz decision and applies it outside
1124 employment law, finding the complaint sufficient. Matrixx
1125 Initiatives also seems to reflect a relatively relaxed approach.
1126 It has been suggested that before the Twombly and Iqbal decisions
1127 the Court seemed to swing back and forth between pronouncements
1128 that heightened pleading is not required and somewhat indirect
1129 approaches to raising pleading thresholds. It may be that a
1130 similar fluctuation is going on now.

1131 The Committee asked the Federal Judicial Center to study the
1132 impact of the Twombly and Iqbal decisions on the district courts.
1133 The study will be presented by Joe Cecil. In addition, Judge
1134 Rothstein and Joe Cecil have agreed to do a follow-up study to
1135 determine what happens when dismissal is coupled with leave to
1136 amend: is a new motion filed to challenge the amended complaint?
1137 What happens on the renewed motion?

1138 Joe Cecil presented the report, beginning with an expression
1139 of thanks to Professor Gensler, who recruited University of
1140 Oklahoma Law School students to do the coding for the study.
1141 "That's how we got it done."

1142 The purpose of the study was to assess changes in Rule
1143 12(b)(6) practice over time in broad categories of civil cases.
1144 Footnote 4 in the study summarizes other studies that have been
1145 done. The other studies find increases in motions to dismiss,
1146 particularly in civil rights cases. But they have relied on cases
1147 published in the Westlaw database, which is likely to overrepresent
1148 orders granting motions, and have examined orders decided soon
1149 after Iqbal and before interpretation of the decisions by the
1150 courts of appeals.

1151 The study was based on 23 districts, generally the largest two
1152 districts in each regional Circuit. Together, these districts
1153 account for 51% of the actions filed in federal court.

1154 The central conclusions of the study are that there has been
1155 an increase in the rate of filing Rule 12(b)(6) motions to dismiss,
1156 although this may not prove out in civil rights cases where the
1157 rate of motions was high before the Twombly and Iqbal decisions.
1158 But the rate of granting motions and the rate of termination after
1159 a grant both held constant. And as noted below, the picture is

1160 more complicated than that.

1161 Joe Cecil found this study the most complicated study that he
1162 has done in 30 years at the Federal Judicial Center because of the
1163 need to make statistical adjustments to account for other events
1164 that were occurring in the federal courts apart from the Twombly
1165 and Iqbal decisions. Looking to the period immediately before the
1166 Twombly decision, for example, is subject to the prospect that
1167 courts may defer rulings in anticipation of new guidance from the
1168 Supreme Court. But decisions in 2006 are not likely to be affected
1169 by anticipation of Twombly.

1170 The study is based on actual CM/ECF records. This approach
1171 yields more cases than reliance on published decisions. It also
1172 shows more decisions denying motions, which are less likely to be
1173 published than decisions that grant motions.

1174 Prisoner and pro se cases were excluded from the study.

1175 Motions in response to counterclaims and affirmative defenses
1176 also were not considered. The study also excluded cases in which
1177 a motion to dismiss was converted to a motion for summary judgment
1178 because materials outside the pleading were considered.

1179 "A lot changed between 2006 and 2010 that was unrelated to
1180 Twombly and Iqbal." The types of cases changed. There were fewer
1181 tort cases in 2010, and motions to dismiss are not made as
1182 frequently in tort cases as in other types of cases. There were
1183 many more financial instrument cases in 2010 than in 2006. The
1184 financial instrument cases often were filed in state court,
1185 removed, dismissed as to the federal claims as a matter of law, and
1186 remanded. And there were more amended complaints in 2010; they are
1187 more likely to be dismissed.

1188 Different districts seem to take different approaches to
1189 motions to dismiss. Some tend to deny. Others grant with leave to
1190 amend. The Southern District of New York seems to have a low rate
1191 of filing motions to dismiss, but to tend to grant them without
1192 leave to amend. An effort was made to control for these
1193 differences.

1194 The study looked only to the rate of filing motions to dismiss
1195 in the first 90 days of an action. It found an increased filing
1196 rate in all types of cases, including § 1983 civil rights cases,
1197 but not in other types of civil rights cases where the rate was
1198 already high in 2006. Financial-instrument cases "are a bubble in
1199 the data we have to account for."

1200 Without statistical adjustments to account for factors
1201 unrelated to the Supreme Court decisions, the grant rate increased
1202 from 66% to 75%. But it is an increase in grants with leave to
1203 amend – the cases were not terminated. There were great variations

1204 across districts. And there were more amended complaints in 2010
1205 than in 2006.

1206 The raw numbers seem to show an increase in claims dismissed,
1207 but after statistical adjustment that held only for financial-
1208 instrument cases. As for types of cases where particular concerns
1209 have been expressed, there was no increase in the rate of dismissal
1210 in employment discrimination and civil rights cases.

1211 The study did not examine possible changes in substantive law.
1212 Nor did it consider the effect of any changes in pleading practices
1213 that may have resulted from the Twombly and Iqbal decisions.
1214 Remember that it was based only on motions filed in the first 90
1215 days of an action. And it did not determine the outcomes after
1216 leave to amend was granted.

1217 Critics of the study do not accept the statistical
1218 adjustments, but they have not heard of the need to make the
1219 adjustments. They also question the exclusion of pro se and
1220 prisoner cases. But the prisoner cases have a different procedure.

1221 The study is not able to identify cases that were not filed in
1222 federal court because of pleading standards, whether the choice was
1223 to file in state court or not to file at all. Removal rates were
1224 considered; no change was found even after separating fact-pleading
1225 states from notice-pleading states. (It was recognized that
1226 classifying state pleading practices can be difficult. California
1227 formally seems to be a code pleading state. But at various times,
1228 and in different types of actions, actual pleading standards may be
1229 more sympathetic to plaintiffs than federal notice pleading is.
1230 "It goes in cycles.")

1231 Nor was the study able to identify cases where the pleadings
1232 suffered from factual deficiencies that could be cured only by
1233 discovery. The further study will attempt to determine whether
1234 discovery continues after dismissal with leave to amend, but it may
1235 be difficult to find this. A related comment observed that the
1236 problem of access to information available only to defendants can
1237 be resolved by informal means in some situations. Antitrust
1238 plaintiffs, for example, may be able to offer one potential
1239 defendant an exchange – give us all the information you have about
1240 the conspiracy, and we won't name you as a defendant.

1241 In response to a question, it was agreed that Table 4 shows a
1242 7% increase in the rate of filing motions to dismiss in civil
1243 rights cases, but the increase does not meet the ordinary 0.05
1244 standard of significance. It would be significant if a 0.10
1245 standard of significance were employed. And the number of cases
1246 increased from 2006 to 2010.

1247 Another question pointed out that page 21 of the report finds
1248 no increase in the rate of granting motions with or without leave

1249 to amend. But this reflects the difference between the raw figures
1250 in Table 4 and the statistical adjustments. Table 5 shows that
1251 after statistical adjustments, only financial instruments showed an
1252 increase. The adjustments are described in Appendix B. They
1253 provide a way of accounting for changes that would have happened
1254 even if Twombly and Iqbal had never been decided.

1255 A judge observed that many district judges have said that
1256 Twombly and Iqbal have not made much of a difference, apart from an
1257 increase in the rate of filing motions. Joe Cecil responded that
1258 the study confirms these observations. And the study of what
1259 happens after leave to amend will be important.

1260 Another judge asked the direct question: if the rate of filing
1261 motions has increased, and if the rate of granting motions holds
1262 constant, doesn't that mean that there are more dismissals? Joe
1263 Cecil agreed that might be the case. With more cases being filed,
1264 and motions more likely to be filed in those cases, the same rate
1265 of granting dismissal will result in more dismissals. "But we have
1266 two very different data sets, so we can't just combine the
1267 estimates and be confident of the answer." It is important to
1268 remember that leave to amend is more often granted than before.

1269 Pro se cases were addressed by asking whether it is possible
1270 to go back to examine fee-paid pro se cases. They may prove
1271 interesting because Twombly and Iqbal may make it easier to dismiss
1272 "fanciful" claims than it was earlier. They are only conceivable,
1273 not plausible.

1274 It was suggested that Committee members should think about
1275 anything that would be particularly useful for the study about
1276 leave to amend. Do cases settle after leave to amend is granted?
1277 Is there a renewed motion to dismiss?

1278 And what about staying discovery while a motion to dismiss is
1279 pending? Joe Cecil was uncertain whether the codes will show
1280 whether there is a formal stay of discovery. But it would be
1281 useful to know whether discovery proceeds, with or in the absence
1282 of a formal stay. The difficulty is that discovery requests and
1283 responses are not filed. And the parties may suspend discovery
1284 without an order, perhaps after consulting with a judge who
1285 recommends the suspension. It was suggested that many pro se cases
1286 are brought against "the government," which responds with a motion
1287 for summary judgment that the plaintiff does not think to address
1288 by requesting an opportunity for discovery. Joe Cecil said he
1289 would think about the challenges of making reliable findings about
1290 discovery stays.

1291 Joe Cecil also said that the greatest difficulty with the
1292 study arises in attempting to distinguish pleadings that fail for
1293 want of factual sufficiency alone and those that fail in whole or
1294 in part for advancing an untenable legal theory. The difficulty is

1295 most acute with cases decided before the Twombly decision. It was
1296 noted that the recent Skinner decision says that a complaint need
1297 not pin the claim on a precise legal theory. A plausible short and
1298 plain statement of the claim is all that is required. "This is
1299 likely to be quoted a lot."

1300 Responding to a question about the time taken to decide
1301 motions to dismiss, Joe Cecil said that the motions may be filed a
1302 couple of days earlier after Twombly and Iqbal. The person who put
1303 the question then said that "there are cycles of relative
1304 desirability of state courts and federal courts." In California,
1305 the state courts believe the facts stated in the complaint; the
1306 baseline assumption is that discovery continues while the court
1307 deliberates a motion to dismiss. And the state court is required
1308 to decide the motion quickly. In the federal courts, at least in
1309 complex cases, discovery is stayed pending decision on the motion
1310 to dismiss. "State-court desirability is at an all-time high."
1311 Joe Cecil agreed to study the time taken to dispose of motions to
1312 dismiss.

1313 An observer asked what it means to dismiss with leave to
1314 amend. Is it possible to find the changes that were made to enable
1315 the amended complaint to survive where the initial complaint
1316 failed? Joe Cecil said it would be possible to retrieve the
1317 pleadings, but the FJC is not in a position to suggest specific
1318 lessons about the comparison or the quality of the changes made by
1319 the amended complaint. A judge supported this approach, noting
1320 that - to take only one example - securities cases often have "huge
1321 complaints." Joe Cecil said it also would be interesting to look
1322 at the cases that were terminated by a motion to dismiss.

1323 Judge Kravitz praised the report as enormously helpful to the
1324 Committee and to scholars. The FJC has the Committee's thanks.
1325 The further work, following up on what happens after leave to amend
1326 is granted, also will be very useful. The Al Kidd case pending in
1327 the Supreme Court may say something more about pleading.

1328 *Pleading: Rule Revisions?*

1329 Judge Kravitz introduced the question whether the time has
1330 come to consider rules revisions to respond to the Twombly and
1331 Iqbal decisions. The Supreme Court continues to describe pleading
1332 standards in variable terms. It may continue to provide guidance
1333 that helps lower courts to converge on a common understanding.
1334 Given this continuing evolution, it may not be useful to attempt to
1335 consider amending the pleading rules. Perhaps the right thing is
1336 to focus on discovery practices in relation to motions to dismiss.
1337 And the Court has not said anything about the standards for
1338 pleading affirmative defenses. Plaintiffs complain that defendants
1339 often plead affirmative defenses by label alone. It is more useful
1340 to require added detail - a fraud defense, for example, should be
1341 pleaded with some detail.

1342 Doubts about amending the pleading rules were repeated. The
1343 Supreme Court seems to continue active consideration of these
1344 problems. It is a moving target.

1345 The agenda-book sketches of possible revisions of the rules
1346 for pleading a complaint were described. The first step is to
1347 identify the reason for revision. What is it that needs to be
1348 changed in pleading practice as it has developed in the years since
1349 the Twombly and Iqbal decisions?

1350 One sketch would "restore what never was." This approach
1351 would seek to reduce the pleading threshold to the discarded dictum
1352 that dismissal is proper only if "it appears beyond doubt that the
1353 plaintiff can prove no set of facts in support of his claim that
1354 would entitle him to relief." A pleading need only give notice of
1355 the claim. Courts routinely required more than that in countless
1356 decisions rendered before the Twombly opinion. It is fair to ask
1357 whether new reasons have appeared to justify going in this
1358 direction now.

1359 Another approach would attempt to find rule language that
1360 would reestablish the pleading standards that prevailed before the
1361 Twombly and Iqbal decisions. This approach assumes that those
1362 decisions have caused the pleading threshold to be raised to some
1363 level identifiably higher than the standard prevailing on May 20,
1364 2007. It may be too early to rely on that assumption. An attempt
1365 to roll back to pre-Twombly practice, moreover, must account for
1366 the fact that there was no easily stated or uniform practice.
1367 Actual pleading standards varied among different types of claims,
1368 and among different courts. Nor was practice entirely stable.
1369 Rule revisions could do no more than invite courts to disregard the
1370 Twombly and Iqbal opinions and to carry on the process of adapting
1371 practices vaguely characterized as "notice pleading" as they had
1372 been doing. And even that invitation would encounter the challenge
1373 of persuading lower courts that Supreme Court implementation of the
1374 new rule would not be affected by the concerns that led to the
1375 Twombly and Iqbal decisions.

1376 A third approach might be to seek some sort of middle ground
1377 between the practices perceived to have existed before the Twombly
1378 decision and the standards perceived to have resulted from it. It
1379 could prove difficult to find words capturing this purpose.

1380 Another approach would seek to confirm in rule language an
1381 understanding of what the Twombly and Iqbal decisions have come to
1382 mean. The opinions were not written as rule text, nor should they
1383 have been. Clear expression will require a clear understanding of
1384 what was intended, or – perhaps more usefully – what has emerged as
1385 lower courts have worked to implement the Court's intent in the
1386 best ways possible.

1387 Defense interests have suggested another step up the scale.

1388 They suggest that, at least as lower courts have developed it, the
1389 practice emerging from Twombly and Iqbal has not raised pleading
1390 standards as high as they should be. Without attempting to judge
1391 whether this position is right, it must be recognized that rules
1392 proposed to adopt it would encounter fierce opposition.

1393 Still other approaches to pleading a claim are possible,
1394 including an explicit revival of "fact pleading." Or the rules
1395 could expand the categories of claims singled out for pleading with
1396 particularity. Or, conversely, the rules might establish
1397 categories of claims that can be pleaded more generally than most
1398 claims.

1399 A member asked whether there is any reason to suppose the
1400 Supreme Court would adopt a rule that reduces pleading standards
1401 below the level set by the Twombly and Iqbal decisions. It was
1402 suggested that the Court would be receptive if the Committee could
1403 show a major problem, that large classes of cases are being kept
1404 out of federal court. But that may not be likely. Observers often
1405 complain, for example, about the fate of employment discrimination
1406 cases. But "I never get a motion to dismiss in employment cases."
1407 They are pleaded carefully and effectively.

1408 Indirect responses also might be well received. Many courts
1409 have experimented over the years with a requirement that a
1410 plaintiff provide a reply when a defendant pleads official
1411 immunity. The Iqbal decision shows special concern for official-
1412 immunity cases, concern that might well support a rule requiring a
1413 reply.

1414 The Committee concluded that it is not yet time to discuss
1415 these various possibilities. Nor did it find need to discuss a
1416 variety of models that would respond to the arguments that it is
1417 unfair to require plaintiffs to plead details of a claim that are
1418 known only to defendants. These models would provide for discovery
1419 in aid of stating a claim, perhaps before an action is filed, or at
1420 the time of filing, or in response to a motion to dismiss.

1421 Pleading will remain on the agenda. It may be that further
1422 FJC work will show that the rise in orders granting dismissal but
1423 also granting leave to amend does not have the benign effect of
1424 simply provoking better pleadings that help frame the case and
1425 reduce the burdens of discovery. The prospect of further
1426 information, a sense that practice has not fully crystallized in
1427 the lower courts, and the possibility that the Supreme Court will
1428 have more to say, however, undercut arguments that the time has
1429 come to begin preparing rules revisions for publication and
1430 eventual adoption.

1431 *Pleading: Forms*

1432 The intense focus on pleading brought on by the Twombly and

1433 Iqbal decisions has put the illustrative "Rule 84" Forms back on
1434 the agenda. There are powerful arguments for taking the adoption
1435 and revision of forms outside the Enabling Act process. Action has
1436 been deferred, however, for fear that abrogation of the pleading
1437 forms – which are particular targets of criticism and doubt – might
1438 appear to be taking a position in the debates engendered by Twombly
1439 and Iqbal. But the debates have matured to a point that may make
1440 it feasible to launch a forms project.

1441 The first observation was that the Forms were important in
1442 1938 when the new pleading philosophy was just that – entirely new.
1443 The Forms provided concrete illustrations of "the simplicity and
1444 brevity" intended by the new rules. Now the rules are mature. "It
1445 is not Charles Clark's world." The pleading forms were time-bound;
1446 they are no longer important.

1447 Carrying the Forms forward as creatures of the Enabling Act
1448 process presents several problems. One big problem is that they
1449 need to be tended to, and tending to them would absorb great
1450 amounts of time. The Committee has not been able to devote serious
1451 attention to the Forms for many years. Even in the Style Project,
1452 they were revised by a process far less intense than the process
1453 for the rules themselves. The consequences may be troubling. The
1454 Form 18 complaint for patent infringement, for example, has been
1455 excoriated. A related problem is that it would be useful to be
1456 able to revise forms with some speed to respond to changing
1457 circumstances. "Some speed" is not a characteristic of the
1458 Enabling Act process.

1459 These problems may be exacerbated by the idiosyncratic
1460 selection of topics covered by the Civil Forms. It is not at all
1461 clear how possible topics were selected, honoring some problems
1462 with forms and ignoring others.

1463 Consideration of the Forms questions should be undertaken in
1464 conjunction with the Appellate, Bankruptcy, and Criminal Rules
1465 Committees. The roles played by forms, and the means of developing
1466 them, are different among the different sets of rules. The
1467 criminal procedure forms are developed outside the Enabling Act
1468 framework, although the Criminal Rules Committee reviews some of
1469 the forms and offers advice. A similar process could be followed
1470 for civil procedure forms, leaving most of the work to the
1471 Administrative Office. Work is under way now on revising the
1472 procedures for the conduct of business by the rules committees. A
1473 focus on the procedures for generating forms is an appropriate
1474 adjunct of this work, although in the end it may be that work on
1475 the procedures should finish on other topics, leaving the way for
1476 additional provisions after the several committees and the Standing
1477 Committee work through the forms process.

1478 It was pointed out that most of the forms are not illustrative
1479 complaints. Revising the whole framework need not be seen as

1480 implicit commentary on the Twombly and Iqbal decisions, but instead
1481 can be recognized for what it is - a program to shift the
1482 initiating responsibility for forms away from the full Enabling Act
1483 process.

1484 The Committee concluded that work should begin on Rule 84.
1485 The rate of progress will depend on the interest of other advisory
1486 committees in beginning a joint project. At least a progress
1487 report should be submitted at the November meeting.

1488 *Duke Subcommittee*

1489 Judge Koeltl presented the report of the Duke Subcommittee.
1490 Its deliberations on possible rules revisions have been guided by
1491 the menu of possible subjects set out in the agenda materials at
1492 page 286. The menu itself is not all-inclusive; it filtered out
1493 suggestions that seemed not ripe for present action. The menu has
1494 been whittled down through e-mail messages, meetings by conference
1495 call, and in-person meetings. The agenda materials include a
1496 significantly narrowed set of rules to be considered further.
1497 Which of them will lead to specific proposals continues to be
1498 discussed.

1499 Some common themes will be recalled. Conference participants
1500 repeatedly emphasized the need for proportionality and cooperation
1501 in litigation, and for active judicial management to help achieve
1502 these goals. Radical revision of the rules has failed to command
1503 majority, or near-majority support. There is a strong stream of
1504 views that most problems can be resolved within the current
1505 framework of rules given sensible behavior by lawyers as encouraged
1506 by case management. But there is support for relatively modest
1507 "tweaks" of various rules to further these goals.

1508 One source of inspiration will be a study of the "rocket
1509 docket" practices in the Eastern District of Virginia. The study
1510 will aim to identify practices that might be generalized and
1511 carried to other courts. The Subcommittee will form a panel of
1512 judges and lawyers to make presentations about rocket-docket
1513 practices at the November Committee meeting.

1514 Employment lawyers representing plaintiffs and defendants, led
1515 by Joseph Garrison and Chris Kitchell, have come together to
1516 develop a set of initial disclosures and discovery requests,
1517 documents to be provided and questions to be answered. The hope is
1518 to have these standard obligations incorporated in scheduling
1519 orders. They made enormous progress at a meeting at the Institute
1520 for the Advancement of the American Legal System two weeks ago.
1521 They plan to meet again this summer and expect to reach agreement
1522 then. They also expect that some judges will be eager to adopt
1523 these queries as scheduling orders. The FJC is prepared to frame
1524 a study that will determine in a rigorous way whether these
1525 practices reduce cost and delay. Many nuances remain to be

1526 resolved, but the process of bringing all the lawyers together for
1527 direct consultation has proved very good.

1528 Joseph Garrison said that it would be desirable to use the
1529 employment discrimination protocol as the prototype for developing
1530 protocols for other types of litigation. Judge Koeltl was a great
1531 facilitator at the IAALS meeting. The drafting group hopes that
1532 twenty or thirty judges will adopt the protocol as scheduling
1533 orders. And the drafting group is working on a model protective
1534 order.

1535 Judge Kravitz suggested that there will be no problem in
1536 finding a suitable number of judges willing to adopt the protocol.
1537 But it will be necessary to coordinate with the FJC in order to
1538 establish the framework for effectively measuring the results.

1539 Judge Koeltl noted that the protocol will function as a first
1540 wave of discovery, and may lead to early settlement. The possible
1541 facilitation of settlement will be another facet of the study of
1542 cost and delay. At the least, adoption of the protocol in a
1543 scheduling order should reduce disputes about what is discoverable.

1544 Judge Koeltl continued the Subcommittee report by noting that
1545 the Administrative Office did a study of pre-motion conference
1546 practices as revealed by district web sites. It asked about the
1547 use of conferences before discovery motions, and also before other
1548 motions such as Rule 12(b)(6) motions to dismiss and Rule 56
1549 summary-judgment motions. The question was raised because some of
1550 the participants in the Duke Conference said that some judges are
1551 drowning in discovery motions, while others do not seem to have
1552 such severe problems.

1553 The Administrative Office found 37 districts in which some or
1554 all judges require a pre-motion conference before a discovery
1555 motion can be filed. Judges that require a conference before other
1556 motions were found in only four districts.

1557 The dearth of pre-motion requirements for motions other than
1558 discovery motions effectively forecloses exploration of a rule that
1559 would impose this requirement. There is no real support for it.

1560 The question whether to require a conference before filing a
1561 discovery motion remains on the table. The same effect might be
1562 achieved by calling for oral discovery motions, avoiding the risk
1563 that a judge might fail to do anything after the pre-motion
1564 conference, effectively barring any motion. (That risk also could
1565 be addressed by providing that a motion could be filed if no action
1566 were taken within a prescribed number of days after the
1567 conference.)

1568 Judge Rothstein has agreed to have the FJC do research on the
1569 beginning phases of litigation. Rule 16(b) directs that a

1570 scheduling order must enter as soon as practicable, and no later
1571 than 120 days after any defendant has been served or, if earlier,
1572 90 days after any defendant has appeared. Among other things, the
1573 scheduling order must limit the time to complete discovery and file
1574 motions. And lawyers are required by Rule 26(f) to confer at least
1575 21 days before a scheduling conference is to be held or a
1576 scheduling order is due.

1577 Several obscurities surround Rule 16(b). One arises from Rule
1578 16(b)(1)(B), which directs that the order enter after receiving a
1579 Rule 26(f) report or after consulting with the parties at a
1580 conference "or by telephone, mail, or other means." What are the
1581 other means? Perhaps e-mail exchanges would be.

1582 The Duke Conference suggested there are problems. Data
1583 revealed that no discovery cutoff is set in nearly half of all
1584 cases. Why? Is it because the cases settle? Are dismissed before
1585 they progress to the scheduling-order phase? Do lawyers really
1586 hold Rule 26(f) conferences? Are Rule 26(f) conferences helpful?
1587 Do the Rule 16(b)(1)(B) timing provisions make any sense, or are
1588 they too drawn out? The experience of Subcommittee members
1589 suggests that districts differ in these dimensions. In some
1590 districts lawyers do meet, provide a Rule 26(f) report, and the
1591 judges enter a scheduling order without actually meeting with the
1592 parties. It is a loss when the judge does not meet and confer with
1593 the lawyers to provide judicial management. In other districts,
1594 lawyers often do not meet together but instead go straight to a
1595 meeting with the judge.

1596 Changes are possible. The time to enter a scheduling order
1597 seems too long. Perhaps there should be a presumptive requirement
1598 to meet with the judge. The Rule 26(d) bar on discovery before the
1599 Rule 26(f) conference may deserve reconsideration – it might be
1600 better to allow discovery requests to be served before the
1601 conference, so that the parties and later the judge have a better
1602 idea of what the discovery issues may be. The FJC research will
1603 help to explore these issues.

1604 The Subcommittee is open to suggestions of other topics that
1605 should be considered, or excluded. It has tended to keep issues on
1606 the table to encourage discussion. The lack of suggestions has
1607 been disappointing.

1608 Initial disclosure under Rule 26(a)(1) has been put in the
1609 background. Some lawyers think it does no good. Others think it
1610 is worthwhile in some cases. Courts do impose sanctions for
1611 failures to disclose.

1612 The scope of discovery relates to the questions of
1613 proportionality and cooperation. Proportionality has been required
1614 by Rule 26(b)(2) since 1983, but it seems to be buried. It is
1615 seldom raised. When appellate courts describe the scope of

1616 discovery they focus on the broad terms of Rule 26(b)(1) without
1617 going on to note the express incorporation of 26(b)(2)(C) at the
1618 end of (b)(1). Should something be done about this? Would even a
1619 separate rule on proportionality capture judges' attention? Is it
1620 better to rely on judicial education to ensure that proportionality
1621 is addressed in all discovery conferences?

1622 Judge Grimm has volunteered to generate a list of references
1623 and a set of concrete examples to help walk through the need for
1624 proportionality. Cases can be found that note proportionality in
1625 passing, but there are not many cases on how to do it. Professor
1626 Gensler has written on it. The Sedona Conference has generated
1627 guides for cooperation. A set of guidelines and examples may prove
1628 helpful. Judge Kravitz thanked Judge Grimm for undertaking this
1629 work, and suggested that efforts to educate judges seem a desirable
1630 first step before considering rules changes. Judge Koeltl noted
1631 that Judge Rothstein has agreed to include discovery
1632 proportionality in judicial education materials.

1633 The Subcommittee also has considered the possibility of adding
1634 cooperation to the rules. Cooperation appears now only in the
1635 heading of Rule 37, but nowhere in the rule text; it was added in
1636 1980, when the rules were amended to include a Rule 26(f)
1637 conference provision quite different from the present provision,
1638 which dates to 1993, and when what is now Rule 37(f) was added to
1639 reflect the duty to participate in a discovery conference in good
1640 faith. One possibility would be to add a duty of cooperation to
1641 Rule 1, imposing on attorneys as well as the courts the duty to
1642 achieve the just, speedy, and inexpensive disposition of every
1643 action and proceeding.

1644 Three specific proposals to curtail evasive discovery
1645 responses advanced by Daniel Girard at the Duke Conference continue
1646 to attract strong support in the Subcommittee. The first would
1647 amend Rule 26(g)(1)(B)(i) to add a certification that a discovery
1648 request, response, or objection is "not evasive." The second would
1649 add an explicit requirement to produce in response to a Rule 34
1650 request. The third would amend Rule 34 to provide that each
1651 objection to a request must specify whether any responsive
1652 documents are being withheld on the basis of the objection.

1653 Other discovery proposals remaining on the agenda would
1654 reconsider the role of contention interrogatories and requests to
1655 admit, and consider presumptive numerical limits on the number of
1656 Rule 34 requests to produce and Rule 36 requests to admit. Some
1657 judges now adopt pretrial orders that limit the number of requests
1658 to produce, perhaps to 25. The limit encourages parties to focus
1659 on what they need, but may have the counterproductive effect of
1660 encouraging more general requests.

1661 Discussion began with the observation that the tenor of the
1662 Duke Conference was to ask whether there is a better way to conduct

1663 litigation that too often is too long, too cumbersome, and too
1664 expensive. The Subcommittee has done a great job, but the present
1665 agenda does not seem calculated to accomplish broad improvement.
1666 Is there a way to force the Committee to think about more efficient
1667 procedures? Can something be done to help address pro se
1668 litigation – the civil docket in the District of Arizona is now up
1669 to 45% pro se cases. The rise of pro se litigation is both a
1670 problem and a symptom of the expense of litigating with a lawyer in
1671 federal court. Studying docket practices in the Eastern District
1672 of Virginia may yield clues as to how to experiment with moving
1673 cases along, but there is a concern that a solo practitioner may be
1674 forced to devote all available time to a single case under rocket-
1675 docket procedures.

1676 The Committee was reminded of the value in looking to what
1677 others do, including state courts. Oregon uses fact pleading.
1678 Arizona has vastly expanded unilateral disclosure requirements.
1679 There even may be lessons to learn from other countries. But we
1680 should remember the results of the FJC study for the Duke
1681 Conference. Many cases finish in ten months to a year, with some
1682 discovery but not a great deal, and with a cost of around \$15,000.
1683 There are, to be sure, monster cases. Controlling them requires
1684 special techniques, but it is important to remember the frequent
1685 advice that the rules are adequate to the task, that the need is
1686 for better implementation of present rules more than for new rules.

1687 It was suggested that it would be helpful to study ways to
1688 deal with pro se cases apart from rules changes. "Help desks," and
1689 internet forms, might be a start.

1690 Judge Koeltl observed that even within the federal system
1691 there is an enormously diverse array of courts, case loads, and
1692 conditions. Courts are experimenting with ways to deal with pro se
1693 cases, and with other procedural devices. The Southern District of
1694 New York has adopted forms for excessive-force cases, and hopes to
1695 mount a pilot project for complex cases. The IAALS is looking for
1696 other pilot programs. The Seventh Circuit is well into its pilot
1697 project on e-discovery. Continuing experimentation will help. It
1698 also will help to pursue vigorous programs to educate judges and
1699 lawyers about the opportunities available in the present rules.

1700 Fact pleading has been one idea, but "we may not go there."

1701 Many states track cases. State courts have many more cases
1702 than the federal courts do, and they have many cases with little
1703 discovery. State courts also entertain complex litigation,
1704 however, and several states are creating complex-litigation courts
1705 that often attract cases that might have been filed in federal
1706 court. The Delaware Chancery court is a familiar example of a state
1707 court that has dealt with highly sophisticated and complex
1708 litigation for many years. And state courts entertain class
1709 actions of broad, even nationwide, scope.

1710 An observer suggested that "Rule 56 is a big driver of all the
1711 cost and expense." The Committee will have to deal with it in ways
1712 more fundamental than the recent amendments if cost and expense are
1713 to be reduced. A summary-judgment motion often forces discovery
1714 that otherwise would not be undertaken. Many arbitrators achieve
1715 efficiency by going straight to hearings, without summary judgment.
1716 Such, at least, is the experience in employment cases.

1717 A sympathetic comment observed that "Rule 56 makes no sense in
1718 excessive-force cases." Different judges have different ways of
1719 dealing with this.

1720 Another observer said that when acting as a mediator, he uses
1721 the costs of litigation as a tool to encourage settlement. But in
1722 arbitration, he finds criticisms that arbitration can be too slow
1723 and too expensive, with calls for summary judgment. What is most
1724 important, as said repeatedly at the Duke Conference, is engagement
1725 by and with the judge, cooperation, and proportionality.
1726 Engagement by the judge is the most important factor. The rules we
1727 have can work; a really fine judge can use them to deal with the
1728 problems. Long-range improvement must begin with changes in the
1729 law schools, teaching lawyers how to contribute to the
1730 administration of justice.

1731 Judge Kravitz noted that it is terrific that the FJC is
1732 considering ways to provide judicial education programs outside
1733 D.C. One shortcoming of education programs is measured by the
1734 judges who do not attend, and taking the programs to them may
1735 accomplish much good.

1736 Attention should be devoted to finding ways to get feedback
1737 from the bar outside major conferences, occasional miniconferences,
1738 and the publication of formal proposals for amendments. It will be
1739 useful to let the bar know what the Committees are doing, and to
1740 encourage a flow of information from lawyers and judges to the
1741 Committees.

1742 An optimistic note was suggested. It may not sound like much
1743 to achieve a 1% reduction in the cost of litigating all cases - it
1744 would not much reduce the burdens on litigants. But the cumulative
1745 saving for the system would be substantial. Seemingly modest
1746 improvements can do real good.

1747 It was asked when the Committee could devote a day to thinking
1748 about these issues. Some help might be available from the National
1749 Center for State Courts. David Steelman at the Center has studied
1750 what works for efficient court systems. Other people can be found
1751 who know of innovative ways of doing things.

1752 These questions will have to be worked out in developing the
1753 agenda for the November meeting. Time should be set aside for the
1754 first hearing on the Rule 45 proposals. The rocket-docket panel

1755 will take some time. The Discovery Subcommittee plans to present
1756 recommendations on the approach to be taken to preservation and
1757 sanctions issues, whether a highly detailed description of a duty
1758 to preserve, a more open-ended reasonable but express duty to
1759 preserve, or an indirect approach that defines the circumstances
1760 and limits of sanctions for failing to preserve. The Duke
1761 Conference Subcommittee can consider what is desirable and make
1762 recommendations for making use of the time available.

1763 And it will be important to let the Standing Committee know
1764 that the Advisory Committee is considering the possibility of
1765 aggressive changes, but also is tending to changes in the rules
1766 that can be achieved and do good in the short term.

1767 *Appellate-Civil Subcommittee*

1768 Judge Colloton delivered the report of the Appellate-Civil
1769 Subcommittee. There is no recommendation for present action.

1770 The one topic currently active on the agenda is "manufactured
1771 finality." The question arises when a plaintiff encounters an
1772 adverse ruling that cannot be appealed under normal rules. One
1773 tactic has been to achieve finality by dismissing whatever remains
1774 of the action. A common illustration arises when the principal
1775 claim is dismissed by the court, and the plaintiff believes that
1776 the remaining minor claims are not worth litigating alone or that
1777 it costs too much to litigate the remaining claims to final
1778 judgment with the hope that an appeal will revive the principal
1779 claim for a second trial. Most courts recognize that the plaintiff
1780 can achieve finality by dismissing all remaining parts of the
1781 action with prejudice, but the price is that those parts cannot be
1782 revived if dismissal of the principal claim is reversed. A few
1783 courts address that problem by allowing dismissal of the remaining
1784 claims without prejudice, but most courts reject that practice
1785 because it seriously corrodes the final judgment rule. An
1786 intermediate approach has occasionally been recognized, most
1787 clearly in the Second Circuit. Under this approach, the plaintiff
1788 secures dismissal of the remaining parts of the action with
1789 prejudice, but subject to revival if the adverse court rulings are
1790 reversed on appeal. This practice has been dubbed "conditional
1791 prejudice" in Subcommittee discussions. The Subcommittee has not
1792 been able to find out much about the operation of the conditional
1793 prejudice practice in the Second Circuit; it may be that it is
1794 little used.

1795 The Subcommittee believes that two approaches are most
1796 promising. One would be to craft a rule that allows finality to be
1797 manufactured only by dismissing all remaining parts of the action
1798 with prejudice. The rule would defeat attempts to manufacture
1799 finality by dismissing the remaining parts without prejudice, or
1800 with conditional prejudice. The other approach would be to do
1801 nothing, leaving it to the courts to continue present practices as

1802 they may evolve in the light of experience. The Subcommittee is
1803 pretty much in equipoise between these approaches. The Appellate
1804 Rules Committee will meet soon. Once its views are known, the
1805 Subcommittee will work toward a final recommendation.

1806 It was noted that Rule 54(b) does not address all of the
1807 concerns that lead litigants to seek manufactured finality. The
1808 district judge may refuse to enter a partial final judgment. The
1809 court of appeals may conclude that entry of judgment was an abuse
1810 of discretion. Or – and more sympathetically – the case may not
1811 fall within Rule 54(b) possibilities. A common illustration would
1812 be a ruling that excludes vital evidence, or rejects the major
1813 components of requested damages, but leaves all claims alive.

1814 *Rule 6(d): Three Added Days*

1815 The "three added days" provision in Rule 6(d) presents two
1816 problems. The more fundamental problem is whether all of the modes
1817 of service that now entitle a party to three added days deserve the
1818 added time. The simpler problem arises from a misstep in the 2005
1819 amendment that revised Rule 6(d) to establish a single and uniform
1820 method of calculating the three added days.

1821 The misstep in drafting the 2005 amendment was identified in
1822 an article by Professor James J. Duane, *The Federal Rule of Civil
1823 Procedure that was Changed by Accident: A Lesson in the Perils of
1824 Stylistic Revision*," 62 S.C.L. Rev. 41 (2010). Although the change
1825 was made two years before the Style Project revisions, the misstep
1826 was a result of applying Style Project drafting conventions.

1827 The drafting problem is most easily identified by the simple
1828 fix: "When a party may or must act within a specified time after
1829 service being served and service is made under Rule 5(b)(2)(C).
1830 (D), (E), or (F), 3 days are added after the period would otherwise
1831 expire under Rule 6(a)."

1832 Before the 2005 revision, Rule 6(d) provided added time after
1833 service "upon the party" if a paper or notice "is served upon the
1834 party" by designated means. "[A]fter service" seemed a reasonable
1835 way of saving words. But it overlooked three rules that permit a
1836 party to act within a specified time after the party has made
1837 service. See Rules 14(a)(1), 15(a)(1)(A), and 38(b)(1). Using
1838 Rule 15(a)(1)(A) as an illustration, the unintended but possible
1839 effect of the 2005 revision is to allow a party to expand the time
1840 available to amend its own pleading by choosing to serve the
1841 pleading by mail, e-mail, or the other means that support the 3
1842 added days.

1843 No cases have been identified that make anything of the
1844 changed wording. It is possible that a court confronted with an
1845 argument from the apparent meaning of the present rule will reject
1846 the argument, ruling that it makes no sense to allow a party to

1847 expand its own time to act by unilaterally choosing the means of
1848 serving a paper, and that the rule should be read to carry forward
1849 the meaning clearly established by the prior language.
1850 Nonetheless, it seems appropriate to amend Rule 6(d) to restore the
1851 clear meaning that no one thought to change.

1852 The recommendation to amend Rule 6(d) does not determine how
1853 soon the amendment should be made. There is no apparent reason for
1854 urgent action. In most circumstances, the worst result may be that
1855 a party has three added days to implead a third-party defendant
1856 without seeking leave, to amend a pleading once as a matter of
1857 course, or to demand jury trial. It is possible that a wily party
1858 will make a deliberate decision to defer one of those acts in
1859 reliance on the apparent meaning of the rule, only to confront a
1860 court that chooses to carry forward the original clear meaning. It
1861 seems unlikely that the court would then deny leave to act if there
1862 were any persuasive reason for the desired action.

1863 Two reasons appear for delaying action. One is general. It
1864 seems likely that various missteps in the Style Project itself will
1865 be identified. Rather than act item-by-item, confronting the bar
1866 with an irregular series of amendments to digest, it may be better
1867 to allow non-urgent revisions to accumulate for a while, to be
1868 presented as a package.

1869 A second reason to delay is the growing sense that the 3-added
1870 days provision should be reconsidered. There is particular
1871 interest in the question whether 3 added days are appropriate when
1872 service is made by e-mail, particularly when service is made
1873 through the court's system. The 3 added days may seem a relatively
1874 minor cause of delay, but they also complicate time calculations.
1875 And when the time allowed is 7, 14, or 21 days, they defeat the
1876 purpose of same-day-of-the-week time computations.

1877 Committee discussion concluded that it is, or soon will be,
1878 time to reconsider which modes of service deserve the 3 added days.
1879 This question arises in other sets of rules, and likely should be
1880 addressed as a common project. Indeed it may be appropriate to
1881 make the question part of a much larger project for all the
1882 Advisory Committees to bring the rules of procedure into the e-
1883 filing and e-service world.

1884 The Committee agreed that case-law developments should be
1885 monitored for signs that the style misstep is causing trouble.
1886 Absent any indication of trouble, the question will be carried
1887 forward for action as part of a larger project.

1888 *Next Meeting*

1889 The dates for the next meeting have been set for November 7
1890 and 8. The meeting likely will be in Washington, D.C.

1891

Valedictory

1892 Judge Kravitz noted that he had followed six years as a member
1893 of the Standing Committee with four years as chair of the Civil
1894 Rules Committee. The Advisory Committee members welcomed him
1895 warmly and supportively when he arrived, and have provided
1896 continued support and inspiration, and have worked enormously hard,
1897 ever since. The Committee has done a superb job, with first-rate
1898 results. The Reporters have provided fine support. Judge
1899 Rosenthal has provided wise and patient guidance. Now term limits
1900 provide the occasion for great thanks to all. The Committee
1901 responded with a long and loud standing ovation.

1902

Respectfully submitted,

1903

Edward H. Cooper

1904

Reporter