COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 14-15, 2010
Washington, DC
Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Monday and Tuesday, June 14 and 15, 2010. All the members were present:

Judge Lee H. Rosenthal, Chair
Dean C. Colson, Esquire
Douglas R. Cox, Esquire
Judge Harris L Hartz
Judge Marilyn L. Huff
Chief Justice Wallace Jefferson
John G. Kester, Esquire
Dean David F. Levi
William J. Maledon, Esquire
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

The Department of Justice was represented on the committee by Lisa O. Monaco, Principal Associate Deputy Attorney General. Other attendees from the Department included Karyn Temple Claggett, Elizabeth Shapiro, Kathleen Felton, J. Christopher Kohn, and Ted Hirt.

Professor R. Joseph Kimble, the committee's style consultant, participated throughout the meeting, and Judge Barbara Jacobs Rothstein, Director of the Federal Judicial Center, participated in part of the meeting.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Chief, Rules Committee Support Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Henry Wigglesworth	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Emery G. Lee III	Research Division, Federal Judicial Center
Tim Reagan	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Laura Taylor Swain, Chair
Professor S. Elizabeth Gibson, Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal reported that the Supreme Court had transmitted to Congress all the rule amendments approved by the Judicial Conference in September 2009, except the proposed amendment to FED. R. CRIM. P. 15 (depositions). That proposal would have authorized taking the deposition of a witness in a foreign country outside the presence of the defendant if the presiding judge were to make several special findings of fact. The Court remitted the amendment to the committee without comment, but some further explanation of the action is anticipated. She noted that the advisory committee had crafted the rule carefully to deal with delicate Confrontation Clause issues, and it appears that it may have further work to do.

Judge Rosenthal reflected that the rules committees had accomplished an enormous amount of work since the last Standing Committee meeting in January 2010. First, she said, the Advisory Committee on Evidence Rules had completed the restyling of the entire Federal Rules of Evidence and was now presenting them for final approval. The evidence rules, she noted, are the fourth set of federal rules to be restyled, and the final product is truly impressive.

Second, she said, final approval was being sought for important changes in the appellate and bankruptcy rules and for a package of amendments to the criminal rules that would allow courts and law enforcement authorities to take greater advantage of technological developments. Third, she pointed to the recent work of the sealing and privacy subcommittees and the Federal Judicial Center's major report on sealed cases in the federal courts.

Finally, she emphasized that the civil rules conference held at Duke Law School in May 2010 had been an unqualified success. She noted that the conference proceedings and the many studies and articles produced for the event should be viewed as just the beginning of a major rules project that will continue for years. All in all, she said, it had been a truly productive year for the rules committees, and the year was still not half over.

Judge Rosenthal introduced the committee's newest member, Chief Justice Wallace Jefferson of Texas. She noted that he is extremely well regarded across the entire legal community and recently received more votes than any other candidate for state office in Texas. She described some of his many accomplishments and honors, and she noted that he will be the next presiding officer of the Conference of Chief Justices.

With regret, she reported that several rules committee chairs and members were attending their last Standing Committee meeting because their terms would expire on October 1, 2010. She thanked Judge Swain and Judge Hinkle for their leadership and enormous contributions as advisory committee chairs for the past three years.

She pointed out that Judge Swain, as chair of the Advisory Committee on Bankruptcy Rules, had embarked on new projects to modernize the official bankruptcy forms and update the bankruptcy appellate rules, and had guided the committee through controversial rules amendments that were necessary to respond to economic developments. She emphasized that the work had been extremely complicated, timely, and meticulous.

Judge Hinkle's many accomplishments as chair of the Advisory Committee on Evidence Rules, she said, included the major, and very difficult, project of restyling the Federal Rules of Evidence. The new rules, she said, are outstanding and are an appropriate monument to his leadership as chair.

Judge Rosenthal said that the terms of two members of the Standing Committee were also about to end – Judge Hartz and Mr. Kester. She noted that Judge Hartz had come perfectly prepared to serve on the committee, having been a private practitioner, a prosecutor, a law professor, and a state judge. She thanked him for his incisive work as chair of the sealing subcommittee, for his amazing attention to detail, and for his willingness to do more than his share of hard preparatory work.

She said that Mr. Kester had been a wonderful member, bringing to the committee invaluable insights and wisdom as a distinguished lawyer. She detailed some of his background as a partner at a major Washington law firm, a law clerk to Justice Hugo Black, a former president of the Harvard Law Review, a former high-level official at the Department of Defense, and a member of many public and civic bodies. She noted that he always shows great respect and appreciation for the work of judges and has written articles on law clerks and how they affect the work of judges.

Judge Rosenthal pointed out that two of the committee's consultants – Professor Geoffrey C. Hazard, Jr. and Joseph F. Spaniol, Jr. – had been unable to attend the meeting and would be greatly missed. She noted that Mr. Spaniol had been part of the federal rules process for more than 50 years.

Judge Rosenthal reported that Tom Willging was about to retire from his senior position with the Research Division of the Federal Judicial Center. She noted that Dr. Willging had worked closely with the Advisory Committee on Civil Rules for more than 20 years and had directed many of the most important research projects for that committee. She thanked him for his many valuable contributions to the rules committees and emphasized his hard work, innovative approach, and completely honest assessments.

Judge Rosenthal also thanked the staff of the Administrative Office for their uniformly excellent work in supporting the rules committees, noting in particular that they coped successfully with the recent upsurge in rules committee activities and contributed mightily to the success of the May 2010 civil rules conference at Duke Law School.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 7-8, 2010.

LEGISLATIVE REPORT

Civil Pleading

Judge Rosenthal reported that legislation had been introduced in 2009 in each house of Congress attempting to restore pleading standards in civil cases to those in effect before the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009). Three hearings had been held on the bills, but none since January 2010.

In May 2010, she said, a discussion draft had been circulated of new legislation that would take a somewhat different approach from the two earlier bills. She added that Congressional markup of some sort of pleading legislation had been anticipated by May, but had been postponed indefinitely. Another markup session, she said, may be scheduled before the summer Congressional recess, but there is still a good deal of uncertainty over what action the legislature will take.

Judge Rosenthal pointed out that the judiciary's primary emphasis has been to promote the integrity of the rulemaking process and to urge Congress to use that process, rather than legislation, to address pleading issues. She noted that the rules committees have been: (1) monitoring pleading developments since *Twombly* and *Iqbal;* (2) memorializing the extensive case law developed since those decisions; and (3) drawing on the Administrative Office and the Federal Judicial Center to gather statistics and other empirical information on civil cases before and after *Twombly* and *Iqbal*. That information, she said, had been given to Congress and posted on the judiciary's website. In addition, she, Judge Kravitz, and Administrative Office Director Duff had written letters to Congress emphasizing the importance of respecting and deferring to the Rules Enabling Act process, especially in such a delicate and technical legal area as pleading standards.

Sunshine in Litigation

Judge Rosenthal reported that the committee was continuing to monitor proposed "sunshine in litigation" legislation that would impose restrictions on judges issuing protective orders during discovery in cases where the information to be protected by the order might affect public health or safety. She noted that a new bill had recently been introduced by Representative Nadler that is narrower than earlier legislation. But, she said, it too would require a judge to make specific findings of fact regarding any potential

danger to public health and safety before issuing a protective order. As a practical matter, she explained, the legislation would be disruptive to the civil discovery process and require a judge to make important findings of fact without the assistance of counsel and before any discovery has taken place in a case.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of May 28, 2010 (Agenda Item 11).

Amendments for Final Approval

FED. R. APP. P. 4(a)(1) and 40(a)
and
PROPOSED STATUTORY AMENDMENT TO 28 U.S.C. § 2107

Judge Sutton reported that the proposed changes to Rule 4 (time to appeal) and Rule 40 (petition for panel rehearing) had been published for comment in 2007. The current rules, he explained, provide additional time to all parties to file a notice of appeal under Rule 4 (60 days, rather than 30) or to seek a panel rehearing under Rule 40 (45 days, rather than 14) in civil cases in which one of the parties in the case is a federal government officer or employee sued in an *official* capacity. The proposed amendments, he said, would clarify the law by specifying that additional time is also provided in cases where one of the parties is a federal government officer or employee sued in an *individual* capacity for an act or omission occurring in connection with duties performed on the government's behalf.

He noted, by way of analogy, that both FED. R. CIV. P. 4(i)(3) (serving a summons) and FED. R. CIV. P. 12(a)(3) (serving a responsive pleading) refer to a government officer or employee sued "in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." The same concept was being imported from the civil rules to the appellate rules.

Judge Sutton pointed out that the advisory committee had encountered a complication when the Supreme Court held in *Bowles v. Russell*, 551 U.S. 205 (2007), that an appeal time period reflected in a statute is jurisdictional in nature. In light of that opinion, the advisory committee questioned the advisability of making the change in Rule 4 without also securing a similar statutory amendment to 28 U.S.C. § 2107.

The advisory committee, he said, had considered dropping the proposed amendment to Rule 4 and proceeding with just the amendment to Rule 40 – which has no statutory counterpart. But the committee was uncomfortable with making the change in

one rule but not the other because the two deal with similar issues and use identical language. Accordingly, after further discussion, the committee decided to pursue both the Rule 4 and Rule 40 amendments, together with a proposed statutory change to 28 U.S.C. § 2107. Amending all three will bring uniformity and clarity in all civil cases in which a federal officer or employee is a party.

Judge Sutton reported that the advisory committee had made a change in the proposed amendments following publication to specify that the rules apply to both current and former government employees.

He also explained that the advisory committee had debated whether to set forth specific safe harbors in the text of the rule to ensure that the longer time periods apply in certain situations. All committee members, he said, agreed to include two safe harbors in the rule. They would cover cases where the United States: (1) represents the officer or employee at the time the relevant judgment is entered; or (2) files the appeal or rehearing petition for the officer or employee.

Judge Sutton explained that two committee members had wanted to add a third safe harbor, to cover cases where the United States pays for private representation for the government officer or employee. There was no opposition to the third safe harbor on the merits, but a seven-member majority of the committee pointed to practical problems that cautioned against its inclusion. For example, neither the clerk's office nor other parties in a case will know whether additional time is provided because they will not be able to tell from the pleadings and the record whether the United States is in fact financing private counsel. The rule, moreover, had proven quite complicated to draft, and adding another safe harbor would make it more difficult to read.

In short, he said, the advisory committee concluded that the third safe harbor was simply not appropriate for inclusion in the text of the rule. He suggested, though, that some language addressing it could be included in the committee note, even though it would be unusual to specify a safe harbor in the note that is not set forth in the rule itself.

A participant inquired as to how often the situation arises where the government funds an appeal but does not provide the representation directly. Judge Sutton responded that the advisory committee had been informed that it arises rather infrequently, in about 30 to 50 cases a year.

A member suggested that the committee either add the third safe harbor to the text of the rules or not include any safe harbors in the rules at all. For example, the text of the two rules could be made simpler and a non-exclusive list added to the committee notes.

Judge Sutton explained that the advisory committee had originally drafted the rule using the words, "including, but not limited to . . . ." The style subcommittee, however, did not accept that formulation because it was not consistent with general usage elsewhere

in the rules. He suggested, therefore, that two options appeared appropriate: (1) returning to the original language proposed by the advisory committee, *i.e.*, "including but not limited to . . ."; or (2) retaining the current language of the rule with two safe harbors, but adding language to the note referring to the third safe harbor as part of a non-exclusive list. Professor Struve offered to draft note language to accomplish the latter result.

A member moved to adopt the second option, using the language drafted by Professor Struve, with a minor modification.

The committee without objection by voice vote approved the proposed amendments to Rules 4 and 40, including the additional language for the committee notes, for approval by the Judicial Conference. Without objection by voice vote, it also approved the proposed corresponding statutory amendment to 28 U.S.C. § 2107.

Informational Items

Judge Sutton reported that the advisory committee was considering proposals to amend FED. R. APP. P. 13 (review of Tax Court decisions) and FED. R. APP. P 14 (applicability of other rules to review of Tax Court decisions) to address interlocutory appeals from the Tax Court. He noted that the committee would probably ask the Standing Committee to authorize publication of the proposed amendments at its January 2011 meeting.

He reported that the advisory committee was continuing to study whether federally recognized Indian tribes should be given the same status as states under FED. R. APP. P. 29 (amicus briefs), thereby allowing them to file amicus briefs without party consent or court permission. He said that he would consult on the matter with the chief judges of the Eighth, Ninth, and Tenth Circuits, where most tribal amicus filings occur. One possibility, he suggested, would be for those circuits to amend their local rules to take care of any practical problems. This course might avoid the need to amend the national rules. Otherwise, he said, the advisory committee would consider amending Rule 29. In addition, he noted that the Supreme Court does not give tribes the right to file amicus briefs without permission, but it does allow municipalities to do so.

He also reported that the advisory committee was considering some long-term projects, including possible rule amendments in light of the recent Supreme Court decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), which held that a ruling by a district court on attorney-client privilege did not qualify for an immediate appeal under the "collateral order" doctrine. Another long-term project, he said, involved studying the case law on premature notices of appeal. He noted that there are splits among the circuits regarding the status of appeals filed prior to the entry of an appealable final judgment.

Finally, Judge Sutton noted that the advisory committee was considering whether to modify the requirements in FED. R. APP. P. 28(a)(6) and (7) (briefs) that briefs contain separate statements of the case and of the facts. He suggested that the requirements prevent lawyers from telling their side of the case in chronological order. Several members agreed with that assessment and encouraged the advisory committee to proceed.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachment of May 27, 2010 (Agenda Item 10).

Amendments for Final Approval

FED. R. BANKR. P. 1004.2

Judge Swain reported that proposed new Rule 1004.2 (chapter 15 petition) would require a chapter 15 petition – which seeks recognition of a foreign proceeding – to designate the country in which the debtor has "its center of main interests." The proposal, originally published in 2008, had been criticized in the public comments for allowing too much time for a party to file a motion challenging the designation. As a result, the advisory committee republished the rule in 2009 to reduce the time for filing an objection from 60 days after notice of the petition is given to 7 days before the date set for the hearing on the petition.

She noted that no comments had been submitted on the revised proposal, and only stylistic changes had been made after publication.

The committee without objection by voice vote approved the proposed new rule for approval by the Judicial Conference.

FED. R. BANKR. P. 2003

Professor Gibson explained that under current law the officer presiding at the first meeting of creditors or equity security holders, normally the trustee, may defer completion of the meeting to a later date without further notice. The proposed amendment to Rule 2003 (meeting of creditors or equity security holders) would require the officer to file a statement specifying the date and time to which the meeting is adjourned. This procedure will make it clear on the record for those parties not attending whether the meeting was actually concluded or adjourned to another day.

She noted that § 1308 of the Bankruptcy Code requires chapter 13 debtors to file their tax returns for the last four taxable periods before the scheduled date of the meeting.

If, however, a debtor has not filed the returns by that date, § 1308(b)(1) permits the trustee to "hold open" the meeting for up to 120 days to allow the debtor additional time to file.

Under FED. R. BANKR. P. 3002(c) (filing a proof of claim or interest), taxing authorities have 60 days to file their proofs of claim after the debtor files the returns. If the debtor fails to file them within the time period provided by § 1308, the failure is a basis under § 1307 of the Code for mandatory dismissal of the case or conversion to chapter 7.

Professor Gibson pointed out that the purpose of the proposed amendment to Rule 2003 was to give clear notice to all parties as to whether a meeting of creditors has been concluded or adjourned and, if adjourned, for how long. It will let them know whether the trustee has extended the debtor's time to file tax returns as required for continuation of a chapter 13 case, since adjourning the meeting functions as "holding open" the meeting for purposes of the tax return filing provision.

She noted that eight of the nine public comments on the rule had been favorable. The Internal Revenue Service, however, recommended that the rule be revised to require the presiding officer to specify whether the meeting of creditors is being: (1) "held open" explicitly under § 1308 of the Code to give a taxpayer additional time to file returns; or (2) adjourned for some other purpose.

She reported that the advisory committee had debated the matter, and the majority voted to approve the rule as published for three reasons. First, no court has required a presiding officer to state specifically that the meeting is being "held open" or to cite § 1308. Rather, courts distinguish only between whether the meeting is concluded or continued. Second, the advisory committee believed that "holding open" and "adjourning" are truly equivalent terms, even though Congress used the inartful term "hold open" in § 1308. Third, the advisory committee was persuaded that the consequences of a presiding officer not specifically using the term "hold open" would be sufficiently severe for the debtor – conversion or dismissal of the case – that use of the exact words should not be required. Moreover, the taxing authorities are not prejudiced because they still have 60 days to file their proofs of claim.

Professor Gibson reported that the only change made since publication was the addition of a sentence to the committee note stating that adjourning is the same as holding open. The modification was made to address the concerns expressed by the Internal Revenue Service.

Ms. Claggett and Mr. Kohn stated that the Department of Justice appreciated the advisory committee's concerns for the Internal Revenue Service's position, but wanted to reiterate the position for the record. Mr. Kohn explained that making a distinction in the rule between adjourning a meeting for any possible reason and holding it open for the

narrow purpose of § 1308 is fully consistent with § 1308. The meeting, he said, can be "held open" for only one purpose. Congress, he said, had used the term deliberately, and it should be carried over to the rule.

The Department, he said, agreed that § 1308 had been designed to help taxing authorities prod debtors into filing returns and promptly providing information early in a case. The Department, he said, was concerned that there will be confusion if the distinction between holding open and adjourning a meeting is blurred. Moreover, the sanctions that may be imposed for failing to file in a timely fashion may be compromised.

The committee by voice vote with one objection (the Department of Justice) approved the proposed amendment for approval by the Judicial Conference.

FED. R. BANKR. P. 2019

Judge Swain reported that the advisory committee was recommending a substantial revision of Rule 2019 (disclosure of interests) to expand both the coverage of the rule and the content of its disclosure requirements. The rule, she said, provides the courts and parties with needed insight into the interests and potentially competing motivations of groups participating in a case. It attracted little attention over the years until buyers of distressed debt began to participate actively in chapter 11 cases.

The revised rule would require official and unofficial committees, groups, or entities that consist of, or represent, more than one creditor or equity security holder to disclose their "disclosable economic interests." That term is defined broadly in the revised rule to include not only a claim, but any other economic right or interest that could be affected by the treatment of a claim or interest in the case.

Among other things, she said, there has been strategic use of the current rule, especially to force hedge funds and other distressed-debt investors to reveal their holdings when they act as ad hoc committees of creditors or equity security holders. As a result, a hedge fund association suggested that the rule be repealed in its entirety. Other groups, however, including the National Bankruptcy Conference and the American Bar Association, recommended that the rule be retained and broadened.

Judge Swain pointed out that the proposal had drawn considerable attention, including 14 written comments and testimony from seven witnesses at the advisory committee's public hearing. In the end, she said, all but one commentator acknowledged the need for disclosure and supported expansion of the current rule.

Three sets of objections were voiced to the proposal as published. First, distressed-debt buyers objected to the proposed requirement to divulge the date that each disclosable economic interest was acquired and the amount paid for it. That information, the industry said, would compromise critical business secrets, such as trading strategies,

seriously damage their operations, and undercut the bankruptcy process. Second, objections were raised to applying the disclosure requirements to entities acting in certain institutional roles, such as entities acting in a purely fiduciary capacity. Third, there were objections to applying the rule to "groups" that are really composed of a single affiliated set of actors, or to law firms or other entities that are only passively involved in a case.

On the other hand, she said, there had been many public comments in support of the rule. The supporters, however, agreed that the rule would still be effective even if narrowed to address some of the objections. Accordingly, after publication, the committee made a number of changes to narrow the disclosure requirements and the sanctions provision.

She said that republication would not be necessary because all the subject matter included in the revised rule had been included in the broader published rule, and the advisory committee had added no new restrictions or requirements. Republication, moreover, would delay the rule by a year, and it is important to have it take effect as soon as possible to avoid further litigation over the scope and meaning of the current rule and strategic invocation of the current rule to gain leverage in disputes.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. BANKR. P. 3001

Professor Gibson reported that the proposed amendments to Rule 3001 (proof of claim) and new Rule 3002.1 (notice of fees, charges and payment amount changes imposed during the life of a chapter 13 case in connection with claims secured by a security interest in the debtor's principal residence) were designed to address problems encountered in the bankruptcy courts with inadequate claims documentation in consumer cases. First, she said, proofs of claims are frequently filed without the documentation currently required by the rules and Official Form 10, especially by bulk purchasers of consumer claims. Second, problems arise in chapter 13 cases as a result of inadequate notice of various fees and penalties assessed on home mortgages. Debtors who successfully complete their plan payments may be faced with deficiency or foreclosure notices soon after they emerge from bankruptcy with a discharge.

Professor Gibson explained that current Rule 3001(c) lays down the basic requirement that whenever a claim is based on a writing, the original or a duplicate of the writing must be filed with the proof of claim. The published amendments to Rule 3001(c)(1) would have added a requirement that a copy of the debtor's last account statement be attached to open-end or revolving credit-card account claims. The statement would let the debtor and trustee know who the most recent holder of the claim was, how old the claim is and whether it may be barred by the statute of limitations.

Because accounting mistakes occur and creditors change periodically, it would also help debtors to match up the claim with the specific debt.

She reported that the two rules had attracted a good deal of attention, including more than a hundred written comments and several witnesses at the advisory committee's public hearing. Comments from buyers of consumer debt objected because the last account statements, they said, are often no longer available. Federal law, for example, requires that they be kept for only two years. In addition, industry representatives stated that some of the loan information required by the amendments is not readily available to current creditors and cannot be broken out as specified in the proposed rules. Some commentators also argued that a copy of the last statement would unnecessarily reveal private information as to the nature and specifics of the credit card purchases of the debtor.

Professor Gibson reported that as a result of the public comments and testimony, the advisory committee had decided to withdraw the proposed revolving and open-end credit related amendments, redraft them, and republish them for further comment as a proposed new paragraph (c)(3). See *infra*, page 18.

The advisory committee, therefore, was seeking final approval at this point of only the proposed changes in Rule 3001(c)(2). They would require that additional information be filed with a proof of claim in cases in which the debtor is an individual, including:
(1) itemized interest charges and fees; and (2) a statement of the amount necessary to cure any pre-petition default and bring the debt current. In addition, a home mortgage creditor with an escrow account would have to file an escrow statement in the form normally required outside bankruptcy.

To standardize the new requirements of paragraph (c)(2) and supersede the many local forms already imposing similar requirements, the advisory committee was also seeking approval to publish for comment a proposed new standard national form – Official Form 10, Attachment A. See *infra*, page 20. The form would take effect on December 1, 2011, the same date as the proposed amendments to Rule 3001(c)(2).

Professor Gibson added that some public comments had recommended requiring a creditor to provide additional information on fees and calculations, while others argued for less information. The advisory committee, she said, had tried to strike the correct balance between obtaining additional disclosures needed for the debtor and trustee to understand the claim amounts and avoiding imposing undue burdens on creditors.

Professor Gibson pointed out that proposed new subparagraph (c)(2)(D) sets forth sanctions that a court may impose if a creditor fails to provide any of the information specified in Rule 3001(c). Modeled after FED. R. CIV. P. 37(c)(1), it specifies that if the

holder of a claim fails to provide the required information, the court may preclude its use as evidence or award other appropriate relief.

She reported that the provision had attracted several comments. After publication, the advisory committee revised the rule and committee note to emphasize that: (1) a court has flexibility to decide what sanction to apply and whether to apply a sanction at all; (2) the rule does not create a new ground to disallow a claim, beyond the grounds specified in § 502 of the Code; and (3) a court has discretion to allow a holder of the claim to file amendments to the claim. The proposed rule, she said, is a clear rejection of the concept that creditors may routinely ignore the documentation requirements of the rule and force debtors to go to the court to obtain necessary information.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. BANKR. P. 3002.1

Professor Gibson explained that proposed new Rule 3002.1 (notice related to post-petition changes in payment amounts, and fees and charges, during a chapter 13 case in connection with claims secured by a security interest in the debtor's principal residence) implements § 1322(b)(5) of the Bankruptcy Code. It would provide a procedure for debtors to cure any pre-petition default, maintain payments, and emerge current on their home mortgage at the conclusion of their chapter 13 plan. For the option to work, she explained, the chapter 13 trustee needs to know the required payment amounts, and the debtor should face no surprises at the end of the case.

She noted that subdivision (b) of the new rule would require the secured creditor to provide notice to the debtor, debtor's counsel, and the trustee of any post-petition changes in the monthly mortgage payment amount, including changes in the interest rate or escrow account adjustments. As published, the rule would have required a creditor to provide the notice 30 days in advance of a change. Public comments pointed out, though, that only 25 days is sometimes required by non-bankruptcy law. Accordingly, the advisory committee modified the rule after publication to require 21 days' advance notice of changes.

She added that the advisory committee had drafted a new form to implement subdivision (b) (Official Form 10, Supplement 1, Notice of Mortgage Payment Change). It would be published for comment in August 2010 and take effect on December 1, 2011, the same time as the proposed new rule. See *infra*, page 20.

Professor Gibson reported that subdivision (c) would require the creditor to provide notice to the debtor, debtor's counsel, and the trustee of any post-petition fees, expenses, and charges within 180 days after they are imposed. She explained that

debtors are often unaware of the different kinds of charges that creditors assess, some of which may not be warranted or appropriate under the mortgage agreement or applicable non-bankruptcy law. The proposed amendments would give the debtor or trustee the chance to object to any claimed fee, expense, or charge within one year of service of the notice. She added that the advisory committee had worked hard to strike the right balance between providing fair notice to debtors and avoiding imposing unnecessary burdens on creditors.

She noted that the advisory committee had drafted a new form to implement subdivision (c) (Official Form 10, Supplement 2, Notice of Postpetition Mortgage Fees, Expenses, and Charges). It would be published for comment in August 2010 and take effect on December 1, 2011, the same time as the proposed new rule. See *infra*, page 20.

Professor Gibson explained that subdivisions (f) through (h) deal with final-cure payments and end-of-case proceedings. They will permit debtors to obtain a determination as to whether they are emerging from bankruptcy current on their mortgage. The amendments recognize that in some districts, debtors make mortgage payments directly, and in others they are paid by the chapter 13 trustee. In all districts, the trustee makes the default payments.

Within 30 days of the debtor's completion of all payments under the plan, the trustee would be required by the rule to provide notice to the debtor, debtor's counsel, and the holder of the mortgage claim that the debtor has cured any default. The holder of the claim would be required to file a response indicating whether it agrees that the debtor has cured any default and also indicating whether the debtor is current on all payments.

She pointed out that subdivision (i) contains a sanction provision for failure to provide the information required under the rule, similar to the sanction provision proposed in Rule 3001, *supra* page 14.

The committee without objection by voice vote approved the proposed new rule for approval by the Judicial Conference.

FED. R. BANKR. P. 4004

Professor Gibson explained that the proposed amendments to Rule 4004 (grant or denial of discharge) would resolve a problem identified by the 7th Circuit in *Zedan v. Habash*, 529 F.3d 398 (2008). They would permit a party in specific, limited circumstances to seek an extension of the time to object to the debtor's discharge after the time for objecting has expired. The proposal would address the unusual situation in which there is a significant gap in time between the deadline in Rule 4004(a) for a party to object to the discharge (60 days after the first date set for the meeting of creditors) and the date that the court actually enters the discharge order.

During such a gap, a party – normally a creditor or the trustee – may learn of facts that may provide grounds to revoke the debtor's discharge under § 727(a) of the Code, such as fraud committed by the debtor. But it is too late at that point to file an objection. The party, moreover, cannot seek revocation because § 727(d) of the Code specifies that revocation is not permitted if a party learns of fraud *before* the discharge is granted. The party, therefore, may be left without appropriate recourse.

The proposed amendments would allow a party to file a motion to extend the time to object to discharge after the objection deadline has expired and before the discharge is granted. The motion must show that: (1) the objection is based on facts that, if learned after the discharge was entered, would provide a basis for revocation under § 727(d); and (2) the party did not know of those facts in time to file an objection to discharge. The motion, moreover, must be filed promptly upon discovery of the facts.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. BANKR. P. 6003

Judge Swain reported that Rule 6003 (relief immediately after commencement of a chapter 11 case) generally prohibits a court from issuing certain orders during the first 21 days of a chapter 11 case, such as approving the employment of counsel, the sale of property, or the assumption of an executory contract or unexpired lease. The proposed rule amendment would make it clear that the waiting period does not prevent a court from later issuing an order with retroactive effect, relating back, for example, to the date that the application or motion was filed. Thus, professionals can be paid for work undertaken while their application is pending.

The amendment would also clarify that the court is only prevented from granting the relief specifically identified in the rule. A court, for example, could approve the procedures for a sale during the 21-day waiting period, but not the actual sale of estate property itself.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

OFFICIAL FORMS 22A, 22B, and 22C

Judge Swain reported that the proposed amendments to the "means-test" forms, Official Forms 22A (chapter 7), 22B (chapter 11), and 22C (chapter 13), would replace in several instances the terms "household" and "household size" with "number of persons" or "family size." The revised terminology more closely reflects § 707(b) of the Code and IRS standards. Section 707(b)(2)(A)(ii)(I) of the Code specifies that the debtor's means-test deductions for various monthly expenses may be taken in the amounts specified in the IRS National and Local Standards. The national standards, she said, are based on numbers of persons, rather than household size. The local standards are based on family size, rather than household size.

In addition, she said, an instruction would be added to each form explaining that only one joint filer should report household expenses regularly paid by a third person. Instructions would also be added directing debtors to file separate forms if only one joint debtor is entitled to an exemption under Part I (report of income) and they believe that filing separate forms is required by § 707(b)(2)(C) of the Code. The statutory provisions, she said, are ambiguous on means-testing exclusions. Therefore, the form does not impose a particular interpretation, and the instructions allow debtors to take positions consistent with their interpretations of the ambiguous exemption provisions.

The revisions, she said, would become effective on December 1, 2010.

The committee without objection by voice vote approved the proposed amendments to the forms for approval by the Judicial Conference.

Amendments for Final Approval, Without Publication

OFFICIAL FORMS 20A AND 20B

Judge Swain reported that the proposed changes to Official Forms 20A (notice of motion or objection) and 20B (notice of objection to claim) were technical in nature and did not require publication. They would conform the forms to: (1) the 2005 amendment to § 727(a)(8) of the Code, which extends the time during which a debtor is barred from receiving successive discharges from 6 years to 8 years; and (2) the 2007 addition of FED. R. BANKR. R. 9037, which directs filers to provide only the last four digits of any social security number or individual taxpayer-identification number.

The revisions, she said, would become effective on December 1, 2010.

The committee without objection by voice vote approved the proposed amendments to the forms for approval by the Judicial Conference without publication.

Amendments for Publication

FED. R. BANKR. P. 3001

As noted above on pages 12-14, the proposed amendments to Rule 3001(c)(1) (proof of claim) published in August 2009 would have required a creditor with a proof of claim based on an open-end or revolving consumer credit agreement to file the debtor's last account statement with the proof of claim. The main problem that the rule was designed to address is that credit-card debt purchased in bulk claims may be stale.

Professor Gibson explained that the advisory committee had withdrawn the published proposal in light of many comments from creditors that they could not effectively produce the account statements, especially since claims for credit-card debt may be sold one or more times before the debtor's bankruptcy. Some recommended that pertinent information be required instead.

Professor Gibson explained that the advisory committee would replace the proposal with a substitute new paragraph 3001(c)(3). In lieu of requiring that a copy of the debtor's last account statement be attached, the revised proposal would require the holder of a claim to file with the proof of claim a statement that sets forth several specific names and dates relevant to a consumer-credit account. Those details, she said, are important for a debtor or trustee to be able to associate the claim with a known account and to determine whether the claim is timely or stale.

Although the creditor would not have to attach the underlying writing on which the claim is based, a party, on written request, could require the creditor to provide the writing. In certain cases, the debtor needs the information to assert an objection.

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

FED. R. BANKR. P. 7054

Judge Swain reported that the proposed amendment to Rule 7054 (judgment and costs) would conform the rule to FED. R. CIV. P. 54 and increase the time for a party to respond to the prevailing party's bill of costs from one day to 14 days. The current period, she said, is an unrealistically short amount of time for a party to prepare a response. In addition, the time for serving a motion for court review of the clerk's action in taxing costs would be extended from 5 to 7 days, consistent with the 2009 time-computation rules that changed most 5-day deadlines to 7 days.

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

FED. R. BANKR. P. 7056

Judge Swain explained that Rule 7056 (summary judgment) incorporates FED. R. CIV. P. 56 in adversary proceedings. Rule 56 is also incorporated in contested matters through FED. R. BANKR. P. 9014(c).

She reported that the proposed amendment to Rule 7056 would alter the rule's default deadline for filing a summary judgment motion in bankruptcy cases. She explained that the deadline in civil cases – 30 days after the close of discovery – may not work well in fast-moving bankruptcy contested matters, where hearings often occur shortly after the close of discovery. Therefore, the advisory committee decided to set the deadline for filing a summary judgment motion in bankruptcy at 30 days before the initial date set for an evidentiary hearing on the issue for which summary judgment is sought. As with FED. R. CIV. P. 56(c)(1), she noted, the deadline may be altered by local rule or court order.

A member suggested that the proposed language of the amendment was a bit awkward and recommended moving the authorization for local rule variation to the end of the sentence. Judge Swain agreed to make the change.

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

OFFICIAL FORM 10
and
ATTACHMENT A, SUPPLEMENT 1, AND SUPPLEMENT 2

Judge Swain reported that the advisory committee was recommending several changes in Official Form 10 (proof of claim). The holder of a secured claim would be required to specify the annual interest rate on the debt at the time of filing and whether the rate is fixed or variable. In addition, an ambiguity on the current form would be eliminated to make it clear that the holder of a claim must attach the documents that support a claim, and not just a summary of the documents.

To emphasize the duty of accuracy imposed on a party filing a proof of claim, the signature box would be amended to include a certification that the information submitted on the form meets the requirements of FED. R. BANKR. P. 9011(b) (representations to the court), *i.e.*, that the claim is "true and correct to the best of the signer's knowledge, information, and reasonable belief." This is particularly important, she said, because a proof of claim is prima facie evidence of the validity of a claim. In addition, a new space would be provided on the form for optional use of a "uniform claim identifier," a system

implemented by some creditors and chapter 13 trustees to facilitate making and crediting plan payments by electronic funds transfer.

Professor Gibson reported that three new claim-attachment forms had been drafted to implement the mortgage claims provisions of proposed Rules 3001(c)(2) and 3002.1. They would prescribe a uniform format for providing additional information on claims involving a security interest in a debtor's principal residence.

Attachment A to Official Form 10 would implement proposed Rule 3001(c)(2) and provide a uniform format for the required itemization of pre-petition interest, fees, expenses, and charges included in the home-mortgage claim amount. It would also require a statement of the amount needed to cure any default as of the petition date. If the mortgage installment payments include an escrow deposit, an escrow account statement would have to be attached, as required by proposed Rule 3001(c)(2)(C).

Supplement 1 to Official Form 10 would implement proposed Rule 3002.1(b) and require the home-mortgage creditor in a chapter 13 case to provide notice of changes in the mortgage installment payment amounts.

Supplement 2 to Official Form 10 would implement proposed Rule 3002.1(c) and provide a uniform format for the home-mortgage creditor to list post-petition fees, expenses, and charges incurred during the course of a chapter 13 case.

Judge Swain noted that, following publication, the proposed form changes would become effective on December 1, 2011.

The committee without objection by voice vote approved the proposed amendments to Form 10 and the new Attachment A and Supplements 1 and 2 to the form for publication.

OFFICIAL FORM 25A

Judge Swain reported that Official Form 25A is a model plan of reorganization for a small business. It would be amended to reflect the recent increase of the appeal period in bankruptcy from 10 to 14 days in the 2009 time-computation rule amendments. The effective date of the plan would become the first business day following 14 days after entry of the court's order of confirmation.

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

Informational Items

Professor Gibson reported that the advisory committee was continuing to make progress on its two major ongoing projects – revising the bankruptcy appellate rules and modernizing the bankruptcy forms. She noted that the committee would begin considering a draft of a completely revised Part VIII of the Bankruptcy Rules at its fall 2010 meeting. In addition, it would try to hold its spring 2011 meeting in conjunction with the meeting of the Advisory Committee on Appellate Rules in order to have the two committees consider the proposed revisions together.

Judge Swain reported that the forms modernization project, under the leadership of Judge Elizabeth L. Perris, had made significant progress in reformatting and rephrasing the many forms filed at the outset of a individual bankruptcy case. She noted that the project had obtained invaluable support from Carolyn Bagin, a nationally renowned forms-design expert, and it was continuing to reach out to users of the forms to solicit their feedback through surveys and questionnaires. In addition, the project was working closely with the groups designing the next generation replacement for CM/ECF to make sure that the new system includes the ability to extract and store data from the forms and to retrieve the data for user-specified reports.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachment of May 17, 2010 (Agenda Item 5). The advisory committee had no action items to present.

Informational Items

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee, aided by a subcommittee chaired by Judge David G. Campbell, was exploring potential improvements to Rule 45 (subpoenas). Professor Marcus, he noted, was serving as the subcommittee's reporter.

Judge Kravitz said that substantial progress had been made in addressing some of the problems most often cited with the current rule. The subcommittee's efforts have included: (1) reworking the division of responsibility between the court where the main action is pending and the ancillary discovery court; (2) enhancing notice to all parties before serving document subpoenas; (3) resolving a split of authority on the power to compel a party to appear as a witness at trial; and (4) simplifying the overly complex rule. The subcommittee, he noted, had drafted three models to illustrate different approaches to simplification, including one that would separate discovery subpoenas from trial subpoenas.

Judge Kravitz reported that the committee would convene a Rule 45 mini-conference with members of the bench and bar in Dallas in October 2010. The conference, he said, should be helpful in informing the advisory committee on what approach to take at its fall 2010 and spring 2011 meetings. Rule amendments might be presented to the Standing Committee in June 2011.

PLEADING

Judge Kravitz reported that the advisory committee was continuing to monitor dismissal-motion statistics and case-law developments in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The committee, he said, was focusing in particular on whether the decisions have had an impact on motions to dismiss and rates of dismissal.

Dr. Cecil explained that the Federal Judicial Center was collecting and coding court orders disposing of Rule 12(b)(6) motions in about 20 district courts and comparing outcomes in 2006 with those in 2010 to see whether there are any differences. In addition, the Center was examining court records to determine whether judges in granting dismissal motions allow leave to amend and whether the plaintiffs in fact file amended complaints.

Judge Kravitz noted that a division of opinion had been voiced at the May 2010 Duke conference on the practical impact of *Twombly* and *Iqbal*. One prominent judge, for example, urged the participants to focus on the actual holdings in the two cases, and not on the language of the opinions. Other judges concurred and argued that the two cases had not changed the law materially and were being implemented very sensibly by the lower courts. On the other hand, two prominent professors argued that the two Supreme Court decisions would cause great harm, were cause for alarm, and would effectively diminish access to justice.

Judge Kravitz emphasized that stability matters. He suggested that the advisory committee's intense research efforts demonstrated that the law of pleading in the federal courts was clearly settling down, and the evolutionary process of common-law development was working well. For that reason, he said, it would make no sense to enact legislation or change pleading standards at this point. He noted that the advisory committee's reporters were considering different ways to respond to the cases by rule, but they were awaiting the outcome of further research efforts by the Federal Judicial Center.

He pointed out that the advisory committee was looking carefully at the frequently cited problem of "information asymmetry." To that end, it was considering permitting some pre-dismissal, focused discovery to elicit information needed specifically for pleading. Another approach, he said, might be to amend FED. R. CIV. P. 9 (pleading special matters) to enlarge the types of claims that require more specific

pleading. In addition, there may be a need for more detailed pleading requirements regarding affirmative defenses.

In short, he said, the advisory committee was looking at several different approaches and focusing on special, limited discovery for pleading purposes. He added that true "notice pleading" is actually quite rare in the federal courts. To the contrary, he said, when plaintiffs know the facts, they usually set them forth in the pleadings. The problem seems to be that some plaintiffs at the time of filing simply lack access to certain information that they need in order to plead adequately.

Judge Kravitz added that pleading issues should occupy a good deal of the advisory committee's time at its November 2010 meeting. The committee, he said, should have a report available in January 2011, but it may not have concrete proposals ready until later.

MAY 2010 CIVIL LITIGATION REVIEW CONFERENCE

Judge Kravitz thanked Dean Levi for making the facilities at Duke Law School available for the May 2010 conference. He said that the event had been a resounding success, thanks largely to the efforts of the conference organizer, Judge John G. Koeltl. He pointed out that Judge Koeltl had done an extraordinary job in creating an excellent substantive agenda, assembling an impressive array of speakers, and soliciting a wealth of valuable articles and empirical data.

Several members who had attended the conference agreed that the program had been outstanding. They described the panel discussions as extremely substantive and valuable.

Specific Suggestions Made at the Conference

Judge Kravitz noted that a few recommendations had been made at the conference for major rule changes, such as: (1) moving away from "trans-substantivity" towards different rules for different kinds of cases; (2) abandoning notice pleading; (3) limiting discovery; and (4) recasting the basic goals enunciated in Rule 1. Nevertheless, he emphasized, most of the speakers and participants at the conference did not advocate radical changes in the structure of the rules. Essentially, the consensus at the conference was that the civil process should continue to operate within the broad 1938 outline.

Judge Kravitz noted that the topics discussed at the conference were largely matters that the advisory committee has been considering in one form or another for years. He added that much of the discussion and many of the papers presented dealt with discovery issues, and he proceeded to describe some of the suggestions.

The initial disclosures required by Rule 26(a), he said, came under attack from two sides. Some speakers recommended eliminating them entirely, while others urged that they be expanded and revitalized.

Some support was voiced for imposing presumptive limits on discovery. In particular, it was suggested that the current presumptive ceiling on the number of depositions and the length of depositions might be reduced.

Judge Kravitz reported that strong support was voiced by many participants for increased judicial involvement at the pretrial stage of civil cases. Lawyers at the conference all cited a need for more actual face-to-face time with judges in the discovery process. Judges, they said, need to be personally available to provide direction to the litigants and resolve disputes quickly. Nevertheless, he suggested, it would be difficult to mandate appropriate judicial attention through a national rule change. Other approaches, such as judicial education, may be more effective in achieving this objective.

Support was offered for developing form interrogatories and form document requests specifically tailored to different categories of cases, such as employment discrimination or securities cases. The models could be drafted collectively by lawyers for all sides and established as the discovery norm for various kinds of cases.

A concept voiced repeatedly was the need for greater cooperation among lawyers. Judge Kravitz pointed out that data from the recent Federal Judicial Center's discovery study had demonstrated a direct correlation between lawyer cooperation and reduced discovery requests and costs. He noted that a panelist at the conference emphasized that the discovery process is considerably more coordinated and disciplined in criminal cases (where the defendant's freedom is at stake) than in civil cases (where money is normally the issue). He observed that lawyers in criminal cases focus on the eventual trial and outcome, while civil lawyers focus mostly on the discovery phase itself. There are, moreover, more guidelines and limits in criminal discovery, due to the specific language of FED. R. CRIM. P. 16 and the Jencks Act. In addition, there are no economic incentives for the attorneys to prolong the discovery phase in criminal cases.

Judge Kravitz reported that many participants who represent defendants in civil cases complained about discovery costs. Among other things, they stated that the costs of reviewing discovery documents before turning them over to the other side continue to be huge, despite the recent enactment of FED. R. EVID. 502 (limitations on waiver of attorney-client privilege and work product). He observed that lawyers are naturally reluctant to let their opponents see their clients' documents, even if the rule now gives them adequate legal protection.

Professor Cooper noted that plaintiffs' lawyers, on the other hand, argued that the emphasis that defendants place on their discovery burdens and costs is misplaced. They

suggested, to the contrary, that the greatest problem with discovery is stonewalling on the part of defendants.

Judge Kravitz noted that support was also voiced at the conference for adopting simplified procedures, improving the Rule 16 and Rule 26 conferences, fashioning sensible discovery plans, and providing for greater cost shifting.

He reported that electronic discovery was a major topic at the conference. The lawyers, he said, were in agreement on two points. First, they recommended amending the civil rules to specify with greater precision what materials must be preserved at the outset of a case, and even before a federal case is filed. Second, they urged revision of the current sanctions regime in Rule 37(e) and argued that the rule's safe harbor is too shallow and ineffective.

Judge Kravitz said that current law provides clear triggers for the obligation to preserve potential litigation materials, but they are not specified in the federal rules. Preservation obligations, moreover, vary among the states and among the federal circuits. He said that the advisory committee was examining potential rule amendments to address both the preservation and sanctions problems. But, he cautioned, it will be very difficult to accomplish the changes that the bar clearly wants through the national rules.

He pointed out that the Rules Enabling Act limits the rules committees to matters of procedure, not substance. That statutory limitation is a serious impediment to regulating pre-lawsuit preservation obligations. Yet, once a case is actually filed in a federal court, the rules may address preservation and sanctions issues. Thus, despite the difficulty of drafting a rule to accomplish what the participants recommend, the advisory committee will move forward on the matter.

Professor Cooper agreed that the bar was promoting the laudatory goal of having clear and precise rules on what they must preserve and how they must preserve it. But the task of crafting a national preservation rule will involve complex drafting problems, as well as jurisdictional problems, and it just may not be possible.

Professor Coquillette added that state attorney-conduct rules addressing spoliation have been incorporated in a number of federal district-court rules. He explained that the Standing Committee had considered adopting national rules on attorney conduct a few years ago, but it eventually backed away from doing so because it involved many competing interests and difficult state-law issues.

Judge Kravitz reported that an excellent presentation was made at the conference on a promising pilot project in the Northern District of Illinois that focuses on electronic discovery. It emphasizes educating the bar about electronic discovery, promoting cooperation among the lawyers, and having the parties name information liaisons for discovery.

Judge Kravitz observed that, overall, the bar sees the 2006 electronic-discovery rule amendments as a success. They have worked well despite continuing concerns about preservation and sanctions. He suggested that the rules may well need further refining, but they were, in retrospect, both timely and effective.

Judge Kravitz referred to a panel discussion at the conference that focused on trials and settlement. He noted that substantial angst was expressed by some participants over diminution in the number of trials generally. Nevertheless, no changes to that phenomenon appear in sight. One professor, he noted, argued that since all civil cases are eventually bound for settlement, the rules should focus on settlement, rather than trial. On the other hand, an attorney panelist countered that maintaining the current focus of the rules on the trial facilitates good results before trial.

Perceptions of the Current System

Judge Kravitz reported that several written proposals had been submitted to the conference by bar groups, and a good deal of survey data had been gathered. One clear conclusion to be drawn from the conference, he said, is that a large gap exists between the perceptions of plaintiffs' lawyers and those of defendants' lawyers. Those differences, he said, will be difficult to reconcile. Nevertheless, the advisory committee may be able to take some meaningful steps toward achieving workable consensus.

The general consensus, he said, is that the civil rules are generally working well. At the same time, though, frustration experienced by certain litigants leads them to believe that the system is not in fact working. The two competing perceptions, he said, are reconcilable. The reality appears to be that the process works well in most cases, but not in certain kinds of cases, particularly complex cases with high stakes. The various empirical studies, he said, show that the stakes in cases clearly matter, and complex cases with more money at stake tend to have more discovery problems and greater discovery costs. The goal in each federal civil case, he suggested, should be to agree on a sensible and proportionate discovery plan that relates to the stakes of the litigation.

Dr. Lee described and compared the various studies presented at the conference. He said that two different kinds of surveys had been conducted – those that asked lawyers for their general perceptions and those that were empirically based on actual experiences in specific cases.

The two approaches, he said, produce different results. For example, the responses from lawyers in a perception study showed that they believe that about 70% of litigation costs are associated with discovery. The empirical studies, on the other hand, demonstrate that discovery costs were actually much lower, ranging between 20% and 40%. By way of further example, a recent perception-study showed that 80% or 90% of lawyers agree that litigation is too expensive. Yet the Federal Judicial Center studies

demonstrate empirically that costs in the average federal case were only about $15,000 to $20,000.

The difference between the two results, he suggested, is due to cognitive biases. Respondents focus naturally on extreme cases and cases that stand out in their memory, and not on all their other cases. Perceptions, understandably, are not always accurate.

Judge Kravitz added that the empirical studies show that the vast majority of civil cases in the federal courts actually have little discovery. Nevertheless, discovery in complex civil cases can be enormous and extremely costly. Lawyers at the conference, he said, emphasized that it is the complex cases that judges should spend their time on.

Dr. Lee added that the empirical studies show that discovery costs clearly increase in complex cases. The stakes in litigation, he said, are the best predictor of costs, and they alone explain about 40-50% of the variations in costs shown in the studies. The economics of law practice, he said, also affects costs. Large firms, for example, have higher costs, and hourly billing increases costs for plaintiffs. He concluded that most of the factors shown in the studies to affect costs – such as complexity, litigation stakes, and law practice economics – are not driven by the rules themselves, but by other causes. Therefore, changing the rules alone may only have a marginal impact on the problems.

Future Committee Action

Judge Kravitz suggested that a handful of common themes had emerged at the conference. (1) There was universal agreement that cooperation among the attorneys in a case has a beneficial impact on limiting cost and delay. (2) There was universal agreement that active judicial involvement in a case, especially a case that has potential discovery problems, is essential. (3) There was little enthusiasm for retaining the Rule 26(a) mandatory disclosures in their current form. (4) Discovery costs in some cases are very high, and they may drive parties to unfavorable settlements in some cases. (5) Certain types of cases are more prone to high discovery costs than others.

He noted that the advisory committee would address each of these issues, and it may also form a subcommittee to explore how judicial education and pilot projects might contribute to improvements, especially if the pilots are carefully crafted and channeled through the Federal Judicial Center to assure that they generate useful data to inform future policy choices. The bottom line, he said, is that the advisory committee will be digesting and working on these issues for a long time.

A member suggested that the conference discussions on electronic discovery were particularly meaningful and asked the advisory committee to place its greatest priority on addressing the electronic discovery issues – preservation and sanctions. He said that most of the other problems referred to at the conference can be resolved by lawyers

working cooperatively, but rules changes will be needed to address the electronic discovery problems.

Other members agreed, but they questioned whether changes in the electronic discovery rules to address preservation obligations can be promulgated under the Rules Enabling Act. Judge Kravitz pointed out that the advisory committee was very sensitive to the limits on its authority. He said that the committee might be able to rework the sanction provisions, make them clearer, and specify the applicable conduct standards more precisely. On the other hand, preservation obligations are normally addressed in state laws and ethics rules. There are also federal laws on the subject, such as Sarbanes-Oxley. He said that the advisory committee would explore preservation issues closely, and it might be able to make the preservation triggers clearer. Ultimately, though, legislation may be required, as with the 2008 enactment of FED. R. EVID. 502 (attorney-client privilege and work product; limitations on waiver).

A member pointed out that general counsel from several corporations participated actively in the conference. He noted that they did not generally criticize the way that the rules are working and recommended only minor tweaks in the rules. On the other hand, they argued unanimously and strongly for greater judicial involvement in the discovery process, especially early in cases. They tended to be critical of their own outside lawyers for contributing to increased costs and saw the courts as the best way to drive down costs. He acknowledged that mandating effective early judicial involvement is hard to accomplish formally by a rule, but it should be underscored as an essential ingredient of the civil process.

A judge added that many suggestions raised at the conference are not easily addressed in rules, but might be promoted through best-practices initiatives, handbooks, websites, workshops, and other educational efforts. She added that controlled pilot projects could also be helpful to ascertain what practices work well and produce positive results.

A member noted that he had heard a good deal of criticism of judges at the conference, especially about their lack of sufficient focus on resolving discovery matters. He noted that magistrate judges handle discovery extremely well and can provide the intense focus on discovery that is needed, especially with regard to electronic discovery. The system, though, may not be working effectively in some districts because the magistrate judges have been assigned by the courts to other types of duties and do not focus on discovery.

A participant cautioned, though, that for every theme raised at the conference, there was a counter theme. Several lawyers suggested, for example, that there should be a single judge in a case. Yet every court has its own culture and different available resources. Essentially, each believes that its own way of doing things is the best approach.

Judge Rosenthal pointed out that a report of the conference and an executive summary would be prepared. She added that the advisory committee and the Standing Committee were resolved to take full advantage of what had transpired at the conference, and the proceedings will be the subject of considerable committee work in the future.

RULE 26(C) PROTECTIVE ORDERS

Judge Kravitz reported that the advisory committee had brought Rule 26(c) (protective orders) back to its agenda for further study in light of continuing legislative efforts to impose restrictions on the use of protective orders. He noted that the chair and reporter had worked on a possible revision of Rule 26(c), working from Ms. Kuperman's thorough analysis of the case law on protective orders in every circuit.

He noted that draft amendments to Rule 26(c) had been circulated at the advisory committee's spring 2010 meeting. They would incorporate into the rule a number of well-established court practices not currently explicit in the rule itself and add a provision on protecting personal privacy.

The committee, he said, was of the view that the federal courts are doing well in applying the protective-order rule in its current form. Nevertheless, it decided to keep the proposed revisions on its agenda for additional consideration. He noted, too, that none of the participants at the May 2010 conference had cited protective orders as a matter of concern to them. That fact, he suggested, was an implicit indication that the current rule is working well.

OTHER MATTERS

Judge Kravitz referred briefly to a number of other matters pending on the advisory committee's agenda, including the future of the illustrative forms issued under Rule 84 and the committee's interplay with the Advisory Committee on Appellate Rules on a number of issues that intersect both sets of rules.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of May 19, 2010 (Agenda Item 6).

Amendments for Final Approval

TECHNOLOGY AMENDMENTS

Judge Tallman reported that the package of proposed technology changes would make it easier and more efficient for law enforcement officers to obtain process, typically early in a criminal case. It includes the following rules:

FED. R. CRIM. P. 1	Scope and definitions
FED. R. CRIM. P. 3	Complaint
FED. R. CRIM. P. 4	Arrest warrant or summons
FED. R. CRIM. P. 4.1 (new)	Issuing process by telephone or other reliable electronic means
FED. R. CRIM. P. 6	Grand jury
FED. R. CRIM. P. 9	Arrest warrant or summons on an indictment or information
FED. R. CRIM. P. 40	Arrest for failing to appear or violating release conditions in another district
FED. R. CRIM. P. 41	Search and seizure
FED. R. CRIM. P. 43	Defendant's presence
FED. R. CRIM. P. 49	Serving and filing papers

Judge Tallman commended the leadership of Judge Anthony Battaglia of the Southern District of California, who chaired the subcommittee that produced the technology package. The project, he said, was a major effort that had required substantial consultation, analysis, and drafting. He also thanked Professors Beale and King, the committee's hard-working reporters, for their contributions to the project.

He noted that the proposed amendments are intended to authorize all forms of reliable technology for communicating information for a judge to consider in reviewing a complaint and affidavits or deciding whether to issue a warrant or summons. Among other things, the term "telephone" would be redefined to include any form of technology for transmitting live electronic voice communications, including cell phones and new technologies that cannot yet be foreseen.

The amendments retain and emphasize the central constitutional safeguard that issuance of process must be made at the direction of a neutral and detached magistrate.

They are designed to reduce the number of occasions when law enforcement officers must act without obtaining prior judicial authorization. Since a magistrate judge will normally be available to handle emergencies electronically, the amendments should eliminate most situations where an officer cannot appear before a federal judge for prompt process.

The heart of the technology package, he said, is new Rule 4.1. It prescribes in one place how information is presented electronically to a judge. It requires a live conversation between the applicant and the judge for the purpose of swearing the officer, who serves as the affiant. A record must be made of that affirmation process.

Rule 4.1 also reinforces and expands the concept of a "duplicate original warrant" now found in Rule 41 and extends it to other kinds of documents. In the normal course, he said, the signed warrant will be transmitted back to the applicant, but there will also be occasions in which the judge will authorize the applicant to make changes on the spot to a duplicate original.

He noted that new Rule 4.1 preserves the procedures of current Rule 41 and adds improvements. Like Rule 41, Rule 4.1 permits only a federal judge, not a state judge, to handle electronic proceedings.

Judge Tallman pointed out that the proposed amendments carry the strong endorsement of the Federal Magistrate Judges Association. Helpful comments were also received from individual magistrate judges, federal defenders, and the California state bar. The advisory committee, he said, had amended the published rules in light of those comments.

The advisory committee, he explained, had withdrawn a proposed amendment to FED. R. CRIM. P. 32.1 (revoking or modifying probation or supervised release) that would have allowed video teleconferencing to be used in revocation proceedings. He noted that there is strong societal value in having defendants appear face-to-face before a judge, and many observers fear that embracing technology may diminish the use of courtrooms and undercut the dignity of the court. Revocation proceedings, he said, are in the nature of a sentencing, and they clearly may affect the determination of innocence or guilt. For that reason, the advisory committee concluded that while video teleconferencing is appropriate for certain criminal proceedings, it should not be used for revocation proceedings.

FED. R. CRIM. P. 1

Judge Tallman reported that the proposed amendment to Rule 1 (scope and definition) would expand the term "telephone," now found in Rule 41 to allow new kinds of technology.

A member asked whether the term "electronic" is appropriate since other kinds of non-electronic communications may become common in the future. Judge Rosenthal

explained that the same issue had arisen with the 2006 "electronic discovery" amendments to the Federal Rules of Civil Procedure. She said that after considerable consultation with many experts, the civil advisory committee chose to adopt the term "electronically stored information." She added that if new, non-electronic means of communication are developed, it may well be necessary to amend the rules in the future to include those alternatives, but at this point "electronic" appears to be the best term to use in the rule.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 3

Judge Tallman explained that the proposed amendment to Rule 3 (complaint) refers to new Rule 4.1 and authorizes using the protocol of that rule in submitting complaints and supporting materials to a judge by telephone or other reliable electronic means.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 4

Judge Tallman reported that the proposed amendments to Rule 4 (arrest warrant or summons on a complaint) also refer to new Rule 4.1 and authorizes using that rule to issue an arrest warrant or summons.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. CRIM. P. 4.1

Judge Tallman pointed out that proposed new Rule 4.1 (complaint, warrant, or summons by telephone or other reliable electronic means) is the heart of the technology amendments. He emphasized that a judge's use of the rule is purely discretionary. A judge does not have to permit the use of technology and may insist that paper process be issued in the traditional manner through written documents and personal appearances.

He noted that if the protocol of Rule 4.1 is used, the supporting documents will normally be submitted electronically to the judge in advance. A phone call will then be made, the applicant law enforcement officer will be placed under oath, and a record will be made of the conversation. If the applicant does no more than attest to the contents of the written affidavit submitted electronically, the record will be limited to the officer's swearing to the accuracy of the documents before the judge. The judge will normally

acknowledge the jurat on the face of the warrant. If, however, the judge takes additional testimony or exhibits, the testimony must be recorded verbatim, transcribed, and filed.

The judge may authorize the applicant to prepare a duplicate original of the complaint, warrant, or summons. The duplicate will not be needed, though, if the judge transmits the process back to the applicant.

The judge may modify the complaint, warrant, or summons. If modifications are required, the judge must either transmit the modified version of the document back to the applicant or file the modified original document and direct the applicant to modify the duplicate original document. In addition, Rule 4.1(a) adopts the language in existing Rule 41(d) specifying that, absent a finding of bad faith, evidence obtained from a warrant issued under the rule is not subject to suppression on the grounds that issuing the warrant under the protocol of the rule was unreasonable under the circumstances.

A member noted that the proposed rule expands the requirement in current Rule 41(d) that testimony be recorded and filed. Yet, he said, there is no requirement in either the current or revised rule that the warrant and affidavits themselves be filed. He pointed out that record-keeping processes among the courts are inconsistent, and the advisory committee should explore how documents are being filed and preserved in the courts, especially in the current electronic environment.

Judge Tallman agreed and noted that the advisory committee was aware of the inconsistencies. Some districts, for example, assign a magistrate-judge docket number to warrant applications and file the written documents in a sealed file without converting them to electronic form. Other courts digitize the documents and transfer them to the district court's criminal case file when an indictment is returned and a criminal case number assigned. He said that preserving a record of warrant proceedings is very important to defense lawyers, and the advisory committee will look further into the matter.

Mr. Rabiej reported that one of the working groups designing the next generation CM/ECF system is addressing how best to handle criminal process and other court documents that generally do not appear in the official public case file. Dr. Reagan explained that as part of the Federal Judicial Center's recent study of sealed cases, he had looked at all cases filed in the federal courts in 2006. Typically, he said, a warrant application is assigned a magistrate-judge electronic docket number. Although the records may still be retained in paper form in the magistrate judge's chambers in one or more districts, most courts incorporate them into the files of the clerk's office.

A member suggested that Rule 4.1 may be mandating more requirements than necessary. Judge Tallman pointed out, though, that the requirements had largely been carried over from the current Rule 41. He said that the rule needs to be broadly drafted because there are so many different situations that may arise in the federal courts. An officer, he said, may be on the telephone speaking with the magistrate judge, writing out

the application, and taking down what the judge is saying. More typically, though, an officer will call the U.S. attorney's office and have a prosecutor draft the application.

A member said that the rule assumes that the applicant will wind up with an official piece of paper in hand. Yet in the current age of rapid technological development, perhaps an electronic version of the document should suffice. By way of example, electronic boarding passes are now accepted at airports, and police officers use laptop computers and hand-held devices in their patrol cars.

Judge Tallman explained, though, that Rule 41(f) requires the officer to leave a copy of a search warrant and a receipt for the property taken with the person whose property is being searched. Professor Beale added that Rule 4.1 may need to be changed in the future to take account of electronic substitutes for paper documents. Nevertheless, the rule as currently proposed will help a great deal now because it will make electronic process more widely available and reduce the number of situations where officers act without prior judicial authorization. Ms. Monaco added that the Department of Justice believes that the new rule will be of great help to its personnel, and it plans to provide the U.S. attorneys with guidance on how to implement it.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. CRIM. P. 6

Judge Tallman reported that the proposed amendment to Rule 6 (grand jury) would allow a judge to take a grand jury return by video teleconference. He noted that there are places in the federal system where the nearest judge is located a substantial distance from the courthouse in which the grand jury sits. The rule states explicitly that it is designed to avoid unnecessary cost and delay. The rule would also preserve the judge's time and safety.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 9

Judge Tallman reported that the proposed amendment would authorize the protocol of Rule 4.1 in considering an arrest warrant or summons on an indictment or information.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 40

Judge Tallman reported that the proposed amendment to Rule 40 (arrest for failing to appear or violating conditions of release in another district) would allow using video teleconferencing for an initial appearance, with the defendant's consent. It will be helpful to some defendants, as, for example, when a defendant faces a long transfer to another district and hopes that the judge might quash the warrant or order release if he or she is able to present a good reason for not having appeared in the other district.

Professor Beale added that Rule 40 currently states that a magistrate judge should proceed with an initial appearance under Rule 5(c)(3), as applicable. The advisory committee, she said, had some concern whether current Rule 5(f), allowing video teleconferencing of initial appearances on consent, would clearly be applicable to Rule 40 situations. So, as a matter of caution, it recommended adding a specific provision in Rule 40 to make the matter clear.

A member cautioned that the committee should not encourage a reduction in the use of courtrooms, and he asked where the participants will be located physically for the Rule 40 video teleconferencing. Judge Tallman suggested that the judge and the defendant normally will both be in a courtroom for the proceedings.

He added that the potential benefits accruing to a defendant who consents to video conferencing under Rule 40 outweigh the general policy concerns about diminishing the use of courtrooms. Professor Beale pointed out that Rule 5 already authorizes video teleconferencing in all initial appearances if the defendant consents. Moreover, the role of lawyers and the use of court interpreters will not change. The proposed amendment merely extends the current provision to the Rule 40 subset of initial appearances.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 41

Judge Tallman said that the proposed amendments to Rule 41 (search and seizure) are largely conforming in nature. Most of the current text in Rule 41 governing the protocol for using reliable electronic means for process would be moved to the new Rule 4.1. In addition, revised Rule 41(f) would explicitly authorize the return of search warrants and warrants for tracking devices to be made by reliable electronic means.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. CRIM. P. 43

Judge Tallman reported that, after considering the public comments, the advisory committee withdrew a proposed amendment to Rule 32.1 (revoking or modifying

probation or supervised release) and a proposed conforming cross-reference to Rule 32.1 in Rule 43(a) (defendant's presence). The withdrawn provisions would have authorized a defendant, on consent, to participate in a revocation proceeding by video teleconference.

The remaining Rule 43 amendment would authorize video teleconferencing in misdemeanor or petty offense proceedings with the defendant's written consent. He noted that Rule 43 currently permits arraignment, plea, trial, and sentencing in misdemeanor or petty offense cases in the absence of the defendant. The procedure, he noted, is used mainly in minor offenses occurring on government reservations such as national parks because requiring a defendant to return to the park for court proceedings may impose personal hardship. He emphasized, though, that the presiding judge may always require the defendant's presence and does not have to permit either video teleconferencing or trial in absentia.

A member agreed that there are practical problems with misdemeanors in national parks, but lamented the trend away from courtroom proceedings. The dignity of the courtroom and the courthouse, he said, are very important and have positive societal value. The physical courtroom, moreover, affects personal conduct. In essence, steps that reduce the need for courtroom proceedings should only be taken with the utmost caution and concern.

Judge Tallman agreed and explained that the advisory committee had withdrawn the proposed amendment to Rule 32.1 for just that reason. Several members concurred that substitutes to a physical courtroom should be the exception and never become routine. One member noted, though, that courts are being driven to using video teleconferencing by the convenience demands of others, including law enforcement personnel, lawyers, and parties. A member added that the only practical alternative to video teleconferencing for a defendant in a misdemeanor case now is for the defendant not to show up and to pay a fine.

Members suggested that language be added to the committee note to emphasize that the use of video teleconferencing for misdemeanor or petty offense proceedings should be the exception, not the rule, and that judges should think carefully before allowing video trials or sentencing. They suggested that the advisory committee draft appropriate language to that effect for the committee note. Judge Tallman pointed out that the committee note to the current Rule 5 contains appropriate language that could be adapted for the Rule 43 note. After a break, the additional language was presented to the committee and approved.

The committee without objection by voice vote approved the proposed amendment, including the additional note language, for approval by the Judicial Conference.

Judge Tallman reported that the proposed amendment to Rule 49 (serving and filing papers) would bring the criminal rules into conformity with the civil rules on electronic filing. Based on FED. R. CIV. P. 5(d)(3), it would authorize the courts by local rule to allow papers to be filed, signed, or verified by reliable electronic means, consistent with any technical standards of the Judicial Conference.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

Technical Amendments for Final Approval without Publication

FED. R. CRIM. P. 32

Judge Tallman reported that the proposed amendments to Rule 32(d)(2)(F) and (G) (sentencing and judgment) had been recommended by the committee's style consultant. They would remedy two technical drafting problems created by the recent package of criminal forfeiture rules.

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

FED. R. CRIM. P. 41

Judge Tallman reported that the proposed amendments to Rule 41 (search and seizure) were also technical and conforming in nature. The rule currently gives a law enforcement officer 10 "calendar" days after use of a tracking device has ended to return the warrant to the judge and serve a copy on the person tracked. The proposed amendments would delete the unnecessary word "calendar" from the rule because all days are now counted the same under the 2009 time computation amendments' "days are days" approach.

Judge Rosenthal suggested that when the rule is sent to the Judicial Conference for approval, the committee's communication should explain why as a matter of policy it chose the shorter period of 10 days, rather than 14 days, since the 10-day periods in most other rules had been changed to 14 days as part of the time computation project.

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

Amendments for Publication

FED. R. CRIM. P. 37

Judge Tallman reported that the proposed new Rule 37 (indicative rulings) would authorize indicative rulings in criminal cases, in conformance with the new civil and appellate rules that formalize a procedure for such rulings – FED. R. CIV. P. 62.1 and FED. R. APP. P. 12.1. Professor Beale pointed out that the criminal advisory committee had benefitted greatly from the work of the civil and appellate committees in this matter. She added that the advisory committee would also delete the first sentence of the second paragraph of the proposed committee note.

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

FED. R. CRIM. P. 5 and 58

Judge Tallman reported that the proposed amendments to Rule 5 (initial appearance) and Rule 58 (petty offenses and other misdemeanors) had been suggested by the Department of Justice and would implement the government's notice obligations under applicable statutes and treaties.

He noted that the proposed amendment to Rule 5(c)(4) would require that the initial appearance of an extradited foreign defendant take place in the district where the defendant is charged, rather than in the district where the defendant first arrives in the United States. The intent of the amendment is to eliminate logistical delays. A member voiced concern, though, over potential delay of the initial appearance if the defendant no longer receives an initial appearance as soon as he or she arrives in the United States.

A member suggested adding language to the rule requiring that the initial appearance be held promptly. Professor Beale and Judge Tallman pointed out that Rule 5(a)(1)(B) already states explicitly that the initial appearance must be held "without unnecessary delay." The member suggested that it would be helpful to include a reference in the committee note to the language of Rule 5(a)(1)(B). After a break, Judge Tallman presented note language to accomplish that result.

Judge Tallman explained that the other proposed amendments to Rules 5 and 58 would carry out treaty obligations of the United States to notify a consular officer from the defendant's country of nationality that the defendant has been arrested, if the defendant requests. A member recommended removing the first sentence of the committee note for each rule, which refers to the government's concerns. Professor Beale agreed that the sentences could be removed, but she noted that the rule and note had been carefully negotiated with the Department of Justice. Judge Tallman suggested rephrasing the first sentence of each note to state simply that the proposed rule facilitates compliance with treaty obligations, without specifically mentioning the government's motivation.

The committee without objection by voice vote approved the proposed amendments, including the additional note language, for publication.

Informational Items

FED. R. CRIM. P. 16

Judge Tallman noted that at the January 2010 Standing Committee meeting, he had presented a report on the advisory committee's study of proposals to broaden FED. R. CRIM. P. 16 (discovery and inspection) and incorporate the government's obligation to provide exculpatory evidence to the defendant under *Brady v. Maryland,* 373 U.S. 83 (1963) and later cases. He noted that the advisory committee had convened a productive meeting on the subject in February with judges, prosecutors, law enforcement authorities, defense attorneys, and law professors. The participants, he said, had been very candid and non-confrontational, and the meeting provided the committee with important input on the advisability of broadening discovery in criminal cases.

He reported that the Federal Judicial Center had just sent a survey to judges, prosecutors, and defense lawyers on the matter, and the responses have been prompt and massive, with comments received already from 260 judges and nearly 2,000 lawyers. He added that the records of the Department of Justice's Office of Professional Responsibility showed that over the last nine years an average of only two complaints a year had been sustained against prosecutors for misconduct. But, he added, lawyers may be reluctant to file formal complaints with the Department. The current survey, he noted, was intended in part to identify any types of situations that have not been reported.

FED. R. CRIM. P. 12

Judge Tallman noted that in June 2009 the Standing Committee recommitted to the advisory committee a proposed amendment to Rule 12 (pleadings and pretrial motions) that would have required a defendant to raise before trial any claims that an indictment fails to state an offense. The advisory committee was also asked to explore the advisability of using the term "forfeiture," rather than "waiver," in the proposed rule.

He reported that the pertinent Rule 12 issues are complex. Therefore, the committee was considering a more fundamental, broader revision of the rule that might clarify which motions and claims must be raised before trial, distinguish forfeited claims from waived claims, and clarify the relationship between these claims and FED. R. CRIM. P.52 (harmless and plain error).

FED. R. CRIM. P. 11

Judge Tallman reported that the recent Supreme Court decision in *Padilla v. Kentucky,* 130 S. Ct. 1473 (March 31, 2010) had demonstrated the importance of informing an alien defendant of the immigration consequences of a guilty plea. As a result, he said, the advisory committee had appointed a subcommittee to examine whether

immigration and citizenship consequences should be added to the list of matters that a judge must include in the courtroom colloquy with a defendant in taking a guilty plea under FED. R. CRIM. P. 11 (pleas).

CRIME VICTIMS' RIGHTS

Judge Tallman reported that the advisory committee was continuing to monitor implementation of the Crime Victims' Rights Act. Among other things, he said, the committee had discovered an instance of an unintended barrier to court access by crime victims. An attorney representing victims had been unable to file a motion asserting the victim's rights because the district court's electronic filing system only authorized motions to be filed by parties in the case. On behalf of the advisory committee, he said, he had brought the matter to the attention of the chair of the Judicial Conference committee having jurisdiction over development of the CM/ECF electronic system.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle and Professor Capra presented the report of the advisory committee, as set forth in Judge Hinkle's memorandum and attachments of May 10, 2010 (Agenda Item 7).

Amendments for Final Approval

RESTYLED EVIDENCE RULES 101-1103

Judge Hinkle reported that the restyling of the Federal Rules of Evidence was the only action matter on the agenda. He noted that the project had been a joint undertaking on the part of the advisory committee and the Standing Committee's Style Subcommittee, comprised of Judge Teilborg (chair), Judge Huff, and Mr. Maledon.

He noted that the project to restyle the federal rules had originated in the early 1990s under the sponsorship of the Standing Committee chair at the time, Judge Robert Keeton, who set out to bring greater consistency and readability to the rules. Judge Keeton had appointed Professor Charles Alan Wright as the first chair of the Standing Committee's new Style Subcommittee and Bryan Garner as the committee's first style consultant. Judge Hinkle pointed out that Mr. Garner had authored the pamphlet setting out the style conventions followed by the subcommittee – *Guidelines for Drafting and Editing Court Rules.*

Judge Hinkle explained that the restyled appellate rules took effect in 1998, the restyled criminal rules in 2002, and the restyled civil rules in 2007. With each restyling effort, he said, there had been doubters who said that restyling was not worth the effort and that the potential disruption would outweigh the benefits. Each time, he said, the

doubters had been proven wrong. He pointed out, for example, that a professor who had opposed restyling changes later wrote an article proclaiming that they were indeed an improvement.

He added that whatever disruption there may be initially will evaporate rather quickly because the committee worked intensively to avoid any changes in substance. He pointed out, though, that there are indeed differences between the evidence rules and the other sets of federal rules because the evidence rules are used in courtrooms every day, and lawyers need to know them intimately and instinctively.

Judge Hinkle reported that Professor Kimble had assumed the duties of style consultant near the end of the criminal rules restyling project and had been an indispensable part of both the civil and evidence restyling efforts. He pointed out that the restyled civil rules had proven so successful that they had been awarded the Burton Award for Reform in Law, probably the nation's most prestigious prize for excellence in legal writing.

Judge Hinkle explained that the process used by the advisory committee to restyle the rules had involved several steps. It started with Professor Kimble drafting a first cut of the restyled rules. That product was reviewed by Professor Capra, the committee's reporter, who examined the revisions carefully to make sure that they were technically correct and did not affect substance. Then the rules were reviewed again by the two professors and by members of the advisory committee. They were next sent to the Style Subcommittee for comment. After the subcommittee's input, they were reviewed by the full advisory committee.

The advisory committee members reviewed the revised rules in advance of the committee meeting and again at the meeting. He added that the committee had also been assisted throughout the project by Professor Kenneth S. Broun, consultant and former member of the committee, by Professor Stephen A. Saltzburg, representing the American Bar Association (and former reporter to the criminal advisory committee), and by several other prominent advisors. He explained that the rules were all published for comment at the same time, even though they had been reviewed and approved for publication by the Standing Committee in three batches at three different meetings.

Judge Hinkle reported that if the advisory committee decided that any change in the language of a rule impacted substance, it made the final call on the revised language. If, however, a change was seen as purely stylistic, the advisory committee noted that it was not a matter of substance, and the Style Subcommittee made the final decision on language.

Judge Hinkle reported that the public comments had been very positive. The American College of Trial Lawyers, for example, assigned the rules to a special committee, which commented favorably many times on the product. The Litigation Section of the American Bar Association also praised the revised rules and stated that they

are clearly better written than the current rules. The only doubt raised in the comments was whether the restyling was worth the potential disruption. Nevertheless, only one negative written public comment to that effect had been received.

At its last meeting, the advisory committee considered the comments and took a fresh look at the rules. In addition, Professors Capra and Kimble completed another top-to-bottom review of the rules. The Style Subcommittee also reviewed them carefully and conducted many meetings by conference call.

Finally, the advisory committee received helpful comments from members of the Standing Committee in advance of the current meeting. The comments of Judges Raggi and Hartz were reviewed carefully and described in a recent memorandum from Professor Capra. Dean Levi also suggested changes just before the meeting that Judge Hinkle presented orally to the committee.

A motion was made to approve the package of restyled evidence rules, including the recent changes incorporated in Professor Capra's memo and those described by Judge Hinkle.

A member stated that she would vote for the restyled rules, but expressed ambivalence about the project. She applauded the extraordinary efforts of the committee in producing the restyled rules, but questioned whether they represent a sufficient improvement over the existing rules to justify the transactional costs of the changes.

She also expressed concern over the need to revise the language of all the rules since the evidence rules are so familiar to lawyers as to make them practically iconic. They are cited and relied on everyday in courtroom proceedings. Any changes in language, she said, will inevitably be used by lawyers in future arguments that changes in substance were in fact made.

She noted that some of the changes clearly improve the rules, such as adding headings, breakouts, numbers, and letters that judges and lawyers will find very helpful. Nevertheless, every single federal rule of evidence was changed in the effort, and some of the changes were not improvements. She asked whether it was really necessary to change each rule of evidence, especially because the rules were drafted carefully over the years, and many of them have been interpreted extensively in the case law.

She recited examples of specific restyled rules that may not have been improved and suggested that some of them were actually made worse solely for the sake of stylistic consistency. In short, she concluded, the new rules represent a solution in search of a problem. Nevertheless, despite those reservations, she stated that she would not cast the only negative vote against the revised rules and would vote to approve the package, but with serious doubts.

A member suggested that those comments were the most thoughtful and intelligent criticisms he had ever heard about the restyling project. Yet, he had simply not been persuaded.

Another member also expressed great appreciation for those well-reasoned views, but pointed out that the great bulk of lawyers and organizations having reviewed the revised rules support them enthusiastically. She explained that the new rules eliminate wordiness and outdated terms in the existing rules. They also improve consistency within the body of evidence rules and with the other federal rules. Moreover, the restyling retains the familiar structure and numbering of the existing evidence rules, even though the style conventions might have called for renumbering or other reformatting. In the final analysis, she suggested, the restyled evidence rules are significantly better and lawyers will easily adapt to the changes.

A member agreed and said that, as a practicing lawyer, he had been skeptical when the project had first started. He pointed out, though, that the committee had made extraordinary efforts to avoid any changes in substance or numbering that could potentially disrupt lawyers. This attempt to preserve continuity, he said, had been a cardinal principle of the effort and had been followed meticulously.

On behalf of the Style Subcommittee, Judge Teilborg offered a special tribute to Judge Hinkle for his outstanding leadership of the project, as well as his great scholarship and technical knowledge. The end product, he said, was superlative and could only have been achieved through an enormous amount of work and cooperation. He also thanked Judge Huff and Mr. Maledon for their time and devotion to the Style Subcommittee's efforts, especially for giving up so many of their lunch hours for conference calls.

Judge Teilborg added that it had been a joy to observe the intense interplay between Professors Capra and Kimble, truly experts in their respective fields. He pointed out that Professor Kimble had left his hospital bed after surgery to return quickly to the project. He also thanked Jeffrey Barr of the Administrative Office for his great work as scribe in keeping the minutes and preparing the drafts. Finally, he thanked Dean Levi and Judges Raggi and Hartz for offering helpful changes in the final days of the project.

A member suggested that one of the great benefits of the restyling process is that the reviewers uncover unintended ambiguities in the rules. He pointed out that Professor Capra was keeping track of all the ambiguities in the evidence rules, so they may be addressed in due course as matters of substance on a separate track. He also remarked that the committee's style conventions are not well known to the public and suggested that they be made available to bench and bar to help them understand the process.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz, chair of the Sealing Subcommittee, reported that the subcommittee had been charged with examining the sealing of entire cases in the federal courts. The assignment had been generated by a request to the Judicial Conference from the chief judge of the Seventh Circuit.

Judge Hartz noted that the bulk of the subcommittee's work in examining current court practices had been assigned to the Federal Judicial Center. Dr. Reagan of the Center, he said, had reviewed every sealed case filed in the federal courts in 2006.

He pointed out that there are very good reasons for courts to seal cases – such as matters involving juveniles, grand juries, fugitives, and unexecuted warrants. The study, he added, revealed that many of the sealed "cases" docketed by the courts were not entire cases, but miscellaneous proceedings that carry miscellaneous docket numbers.

He noted that the Center's report had been exhaustive, and the subcommittee felt comfortable that virtually all the sealing decisions made by the courts had been supported by appropriate justification. On the other hand, it was also apparent from the study that court sealing processes could be improved. In some cases, for example, lesser measures than sealing an entire case might have sufficed, such as sealing particular documents. Moreover, the study found that in practice many sealed matters are not timely unsealed after the reason for sealing has expired.

In the end, the subcommittee decided that there is no need for new federal rules on sealing. The standards for sealing, he said, are quite clear in the case law of every circuit, and the courts appear to be acting properly in sealing matters. Nevertheless, there does appear to be a need for Judicial Conference guidelines and some practical education on sealing.

Professor Marcus said that it is worth emphasizing that when the matter was first assigned to the rules committee, the focus was on whether new national rules are needed. He added that there is a general misperception that many cases are sealed in the courts. The Federal Judicial Center study, though, showed that there are in fact very few sealed cases, and many of those are sealed in light of a specific statute or rule, such as in qui tam cases and grand jury proceedings. As for dealing with public perceptions, he said, the committee should emphasize that the standards for sealing are clear and that judges are acting appropriately. Nevertheless, some practical steps should be taken to improve sealing practices in the courts.

He noted that the subcommittee's report does not recommend any changes in the national rules. Its recommendations, rather, are addressed to the Judicial Conference's

Court Administration and Case Management Committee. The report recommends consideration of a national policy statement on sealing that includes three criteria.

> First, an entire case should be sealed only when authorized by statute or rule or justified by a showing of exceptional circumstances and when there is no lesser alternative to sealing the whole case, such as sealing only certain documents.
>
> Second, the decision to seal should be made only by a judge. Instances arise when another person, such as the clerk of court, may seal initially, but that decision should be reviewed promptly by a judge.
>
> Third, once the reason for sealing has passed, the sealing should be lifted. He noted that the most common problem identified during the study was that courts often neglect to unseal documents promptly.

Professor Marcus explained that the subcommittee was also recommending that the Court Administration and Case Management Committee consider exploring the following steps to promote compliance with the proposed national policy statement:

(1) judicial education to make sure that judges are aware of the proper criteria for sealing, including the lesser alternatives;
(2) education for judges and clerks to ensure that sealing is ordered only by a judge or reviewed promptly by a judge;
(3) a study to identify when a clerk may seal a matter temporarily and to establish procedures to ensure prompt review by a judge;
(4) judicial education to ensure that judges know of the need to unseal matters promptly and to set expiration dates for sealing;
(5) programming CM/ECF to generate notices to courts and parties that a sealing order must be reviewed after a certain time period;
(6) programming CM/ECF to generate periodic reports of sealed cases to facilitate more effective and efficient review of them; and
(7) administrative measures that the courts might take to improve handling requests for sealing.

The committee endorsed the subcommittee report and recommendations and voted to refer them to the Court Administration and Case Management Committee for appropriate action.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi, chair of the Privacy Subcommittee, reported that the subcommittee's assignment was to consider whether the current privacy rules are adequate to protect

privacy interests. At the same time, she noted, it is also important to emphasize the need to protect the core value of providing maximum public access to court proceedings.

She noted that the subcommittee included three representatives from the Court Administration and Case Management Committee, whose contributions have been invaluable. In addition, she said, Judge John R. Tunheim, former chair of the Court Administration and Case Management Committee, and Judge Hinkle were serving as advisors to the subcommittee.

In short, the subcommittee was reviewing: (1) whether the new rules are being followed; and (2) whether they are adequate. To address those questions, she explained, the subcommittee had started its efforts with extensive surveys by the Administrative Office and the Federal Judicial Center. It then conducted a major program at Fordham Law School, organized by Professor Capra, to which more than 30 knowledgeable individuals with particular interests in privacy matters were invited. The invitees included judges, members of the press, representatives from non-government organizations, an historian, government lawyers, criminal defense lawyers, and lawyers active in civil, commercial, and immigration cases. With the benefit of all the information and views accumulated at the conference, the subcommittee will spend the summer drafting its report for the January 2011 Standing Committee meeting.

Judge Raggi noted that, like the sealing subcommittee, her subcommittee's report will likely not include any recommendations for changes in the federal rules. Rather, it will provide relevant information on current practices in the courts and on the effectiveness of the new privacy rules. Professor Capra added that the Federal Judicial Center had prepared an excellent report on the use of social security numbers in case filings that will be a part of the subcommittee report.

LONG RANGE PLANNING

It was noted that the April 2010 version of the proposed *Draft Strategic Plan for the Federal Judiciary* had been included in the committee's agenda materials, and several of the plan's strategies and goals relate to the work of the rules committees. It was also pointed out that a separate chart had been included in the materials setting out the specific matters in the proposed plan that have potential rules implications.

NEXT MEETING

The members agreed to hold the next committee meeting on January 6-7, 2011, in San Francisco.

Respectfully submitted,

Peter G. McCabe,
Secretary