COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

Phoenix, Arizona
January 7-8, 2010

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 7-8, 2010

1. Opening Remarks of the Chair

   A. Report on the September 2009 Judicial Conference session.
   B. Transmission of Judicial Conference-approved proposed rules amendments to Supreme Court.

2. **ACTION** - Approving Minutes of June 2009 committee meeting

3. Report of the Administrative Office

   A. Legislative Report.
   B. Administrative Report.

4. Report of the Federal Judicial Center (oral report)

5. Report of the Civil Rules Committee

   A. *Iqbal* and *Twombly*: legislative, rulemaking, and case law responses.
   B. Preparations for the May 2010 Conference at Duke University Law School.
   C. Minutes and other informational items.

6. Report of the Appellate Rules Committee

   • Minutes and other informational items.

7. Report of the Evidence Rules Committee

   A. Proposed "style" amendments to the Evidence Rules.
   B. Minutes and other informational items.

8. Report of the Criminal Rules Committee

   • Minutes and other informational items.

9. Report of the Bankruptcy Rules Committee

   • Minutes and other informational items.

10. Report of Subcommittee on Privacy

11. Report of Subcommittee on Sealing (oral report)

12. Panel Presentation: Changes in the Academy

13. Long-Range Planning Report

14. Next Meeting: June 2010

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

CHAIRS and REPORTERS

Effective October 1, 2009

Chairs:	**Reporters:**
Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600	Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Honorable Jeffrey S. Sutton United States Circuit Judge United States Court of Appeals 260 Joseph P. Kinneary 85 Marconi Boulevard Columbus, OH 43215	Professor Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
Honorable Laura Taylor Swain United States District Judge United States District Court Daniel Patrick Moynihan U. S. Courthouse 500 Pearl Street - Suite 755 New York, NY 10007	Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall Univ. of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380
Honorable Mark R. Kravitz United States District Judge United States District Court Richard C. Lee United States Courthouse 141 Church Street New Haven, CT 06510	Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Honorable Richard C. Tallman United States Court of Appeals 902 William Kenzo Nakamura United States Courthouse 1010 Fifth Avenue Seattle, WA 98104-1195	Professor Sara Sun Beale Duke University School of Law Science Drive & Towerview Road Box 90360 Durham, NC 27708-0360
Honorable Robert L. Hinkle Chief Judge, United States District Court United States Courthouse 111 North Adams Street Tallahassee, FL 32301-7717	Professor Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Standing Committee

Chair: Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600	Reporter: Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Members:	
Dean C. Colson, Esquire Colson Hicks Eidson 255 Aragon Avenue Second Floor Coral Gables, FL 33134	Douglas R. Cox, Esquire Gibson, Dunn & Crutcher LLP 1050 Connecticut Avenue, N.W. Washington, DC 20036-5306
Honorable Harris L Hartz United States Circuit Judge United States Court of Appeals 201 Third Street, N.W., Suite 1870 Albuquerque, NM 87102	Honorable Marilyn L. Huff United States District Court Edward J. Schwartz U. S. Courthouse 940 Front Street - Suite 5135 San Diego, CA 92101
John G. Kester, Esquire Williams & Connolly LLP 725 Twelfth Street, N.W. Washington, DC 20005-5901	David F. Levi Duke Law School Science Drive and Towerview Road Room 2012 Durham, NC 27708
William J. Maledon, Esquire Osborn Maledon, P.A. 2929 North Central Avenue, Suite 2100 Phoenix, AZ 85012-2794	Honorable David Ogden Deputy Attorney General (ex officio) U.S. Department of Justice 950 Pennsylvania Ave., N.W., Room 4111 Washington, DC 20530
Honorable Reena Raggi United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818	Honorable James A. Teilborg United States District Judge United States District Court 523 Sandra Day O'Connor United States Courthouse 401 West Washington Street Phoenix, AZ 85003-2146

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Standing Committee (CONT'D.)

Honorable Diane P. Wood United States Court of Appeals 2688 Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604	**Advisors and Consultants:** Professor Geoffrey C. Hazard, Jr. Hastings College of the Law 200 McAllister Street San Francisco, CA 94102
Professor R. Joseph Kimble Thomas M. Cooley Law School 300 South Capitol Avenue Lansing, MI 48933	Joseph F. Spaniol, Jr., Esquire 5602 Ontario Circle Bethesda, MD 20816-2461
Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544	

LIAISON MEMBERS

Appellate:	
Judge Harris L Hartz	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Eugene R. Wedoff	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Michael M. Baylson	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Committee)
Judge Marilyn Huff	(Standing Committee)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

John K. Rabiej Chief Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544	James N. Ishida Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Jeffrey N. Barr Attorney-Advisor Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544	Ms. Gale B. Mitchell Administrative Specialist Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
Ms. Amaya Bassett Staff Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544	Ms. Rachel Kessinger Program Assistant Rules Committee Support Office Administrative Office of the U.S. Courts Washington, DC 20544
James H. Wannamaker III Senior Attorney Bankruptcy Judges Division Administrative Office of the U.S. Courts Washington, DC 20544	Scott Myers Attorney Advisor Bankruptcy Judges Division Administrative Office of the U.S. Courts Washington, DC 20544

FEDERAL JUDICIAL CENTER

Joe Cecil (Rules of Practice & Procedure) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Marie Leary (Appellate Rules Committee) Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Robert J. Niemic (Bankruptcy Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Thomas E. Willging (Civil Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Members	Position	District/ Circuit	Start Date	End Date
Lee H. Rosenthal, Chair	D	Texas (Southern)	Chair: 2007	2010
Douglas R. Cox	ESQ	Washington, DC	2005	2011
David Ogden	DOJ	Washington, DC	2009	----
David F. Levi	ACAD	North Carolina	2010	2013
Dean C. Colson	ESQ	Florida	2010	2013
Harris L Hartz	C	Tenth Circuit	2003	2010
Marilyn L Huff	D	California (Southern)	2007	2010
John G. Kester	ESQ	Washington, DC	2004	2010
William J. Maledon	ESQ	Arizona	2005	2011
Reena Raggi	C	Second Circuit	2007	2010
James A. Teilborg	D	Arizona	2006	2009
Diane Wood	C	Seventh Circuit	2007	2010
Daniel Coquillette, Reporter	ACAD	Massachusetts	1985	Open
Principal Staff:				
Peter G. McCabe		(202) 502-1800		
John K. Rabiej		(202) 502-1820		

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JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 15, 2009

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All the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

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At its September 15, 2009 session, the Judicial Conference of the United States —

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2009.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

Authorized the transfer of the official duty station for the vacant bankruptcy judgeship position in the Eastern District of California from Bakersfield to Sacramento.

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2011, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Adopted a courtroom sharing policy for magistrate judges in new courthouse and courtroom construction, to be included in the *U.S. Courts Design Guide*.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Approved proposed amendments to Appellate Rules 1, 4, and 29 and Form 4 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

With regard to bankruptcy procedures:

a. Approved proposed amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, and new Rule 5012 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approved proposed revisions of Exhibit D to Official Form 1 and of Official Form 23, to take effect on December 1, 2009.

Approved proposed amendments to Civil Rules 8(c), 26, and 56 and Illustrative Form 52 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Criminal Rules 12.3, 15, 21, and 32.1 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Evidence Rule 804(b)(3) and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed *Guidelines for Distinguishing Between Matters Appropriate for Standing Orders and Matters Appropriate for Local Rules and for Posting Standing Orders on a Court's Web Site* and agreed to transmit them, along with an explanatory report, to the courts.

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 1-2, 2009
Washington, D.C.
Draft Minutes

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure met in Washington, D.C., on Monday and Tuesday, June 1 and 2, 2009. The following members were present:

Judge Lee H. Rosenthal, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
William J. Maledon, Esquire
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

Deputy Attorney General David Ogden attended part of the meeting for the Department of Justice. The Department was also represented throughout the meeting by Karyn Temple Claggett, Elizabeth Shapiro, and Ted Hirt.

Also participating were the committee's consultants: Joseph F. Spaniol, Jr.; Professor Geoffrey C. Hazard, Jr.; and Professor R. Joseph Kimble. Professor Nancy J. King, associate reporter to the Advisory Committee on Criminal Rules, participated in part of the meeting by telephone.

Judge Anthony J. Scirica, former chair of the committee and current chair of the Judicial Conference's Executive Committee, participated in portions 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
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, 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
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Changes in Committee Membership

Judge Rosenthal noted that several membership changes had taken place since the last meeting. She pointed out that Professor Daniel Meltzer had resigned from the committee to accept an important position in the White House. She emphasized that he had been a superb member and would be sorely missed at committee meetings. She noted, though, that Professor Meltzer had stayed in touch with the committee and would attend its group dinner.

She reported that this was the last official meeting for Judge Hartz and Mr. Beck, whose terms will expire on October 1, 2009. She pointed out that both would be honored at the January 2010 meeting.

In addition, she noted that this was Judge Stewart's last meeting as chair of the Advisory Committee on Appellate Rules. She pointed out that Judge Stewart was truly irreplaceable as a judge, friend, and colleague. She noted that he had been a remarkable chair, and the Chief Justice had extended his term for a year. The new chair, Judge Jeffrey S. Sutton, will represent the advisory committee at the next Standing Committee meeting.

Judge Rosenthal reported, sadly, the recent death of Mark I. Levy, a distinguished attorney member of the Advisory Committee on Appellate Rules. A resolution honoring him had been prepared and would be sent to his widow by Judge Stewart. Judge Rosenthal extended the committee's sympathies and gratitude to his family for his many contributions.

Recent Actions Affecting the Rules

Judge Rosenthal reported that little action at the March 2009 session of the Judicial Conference had directly affected the rules committees, although several items on the Conference's consent calendar indirectly affected the rules. She noted, for example, that the Court Administration and Case Management Committee had recommended that courts provide notice on their dockets of the existence of sealed cases. Also, she said, the Court Administration and Case Management Committee had proposed guidelines for filing and posting transcripts that are designed to safeguard privacy interests, including matters arising during jury voir dire proceedings. She noted that the Standing Committee's privacy subcommittee, chaired by Judge Raggi, would meet to discuss a wide range of privacy and security matters immediately following the committee meeting.

Judge Rosenthal reported that the Supreme Court had approved all the rules recommended by the committee and had sent them to Congress on an expedited basis. She noted that the committee had successfully pursued legislative changes to 28 statutes that specify time limits and would be affected by the time-computation rules. The legislation had just passed both houses of Congress and been enacted into law. The statutory changes will take effect on December 1, 2009, the same time that the new time-computation rules take effect. She added that coordinated efforts were also underway to have all the courts update their local rules by December 1 to harmonize them with the new national time-computation rules.

Judge Rosenthal thanked Judge Thomas W. Thrash, Jr., former committee member, for his assistance in promoting the recent legislation, and Congressman Hank Johnson, who introduced it and was very helpful in shepherding it through Congress. On behalf of the committee, Professor Coquillette expressed special thanks to Judge Rosenthal for leading the concerted and challenging efforts to get the legislation enacted.

On behalf of the Executive Committee, Judge Scirica extended his appreciation to the committee for its excellent work. He noted that the Chief Justice continues to praise Judge Rosenthal for her work, including her impressive legislative accomplishments.

Legislative Report

Judge Rosenthal reported that Judge Kravitz would testify again in Congress on behalf of the Judicial Conference in opposition to the proposed Sunshine in Litigation Act. The legislation, she explained, would impose daunting requirements before a judge could issue a protective order under FED. R. CIV. P. 26(c). The judge would have to first find that the proposed protective order would not affect public health or safety – or if it would, that the protection is needed despite the impact on public health and safety. All of this would occur even before discovery begins.

Judge Kravitz noted that the American Bar Association opposed the legislation, and other bar associations were likely to follow. In addition, he said, the hope is that the Department of Justice would formally oppose the legislation. He pointed out that the bill was well-intentioned in trying to protect public health and safety, but the mechanism it uses to do so was not at all practical. He noted that he was the only witness to be invited by the sponsors to testify against the bill.

Judge Rosenthal explained that the Judicial Conference opposes the legislation it would amend the federal rules outside the Rules Enabling Act process. She noted that empirical evidence demonstrates clearly that judges are doing a good job in dealing with protective orders and in balancing private and public interests. The Sunshine in

Litigation Act, though, would impose significant burdens on judges, requiring them to make findings when they have little information on which to base those findings.

Judge Kravitz added that if there is a problem in some cases with protective orders, it arises largely at the state level, not in the federal courts. He noted that there is also little understanding by the legislation's sponsors of how the civil litigation process actually works. The thought, he said, that a federal judge would be able to read through all the documents that could be discovered in order to find a smoking gun is truly misguided.

Mr. Rabiej reported that the Judiciary's implementation of the new privacy rules had been questioned by a special-interest group seeking to make all government information available to the public on the Internet without restrictions and without cost. He noted that the group had discovered that some documents filed by parties and posted on the courts' electronic PACER system contained unredacted social security numbers. He added that the privacy subcommittee would consider the matter and address a number of other privacy issues at its upcoming meeting immediately following the Standing Committee meeting.

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 12-13, 2009.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachments of May 8, 2009 (Agenda Item 6).

Amendments for Final Approval

FED. R. APP. P. 1

Judge Stewart reported that the proposed amendment to Rule 1 (scope of the rules, definition, and title) was straightforward. It would define "state" for purposes of the appellate rules to include the District of Columbia and any U.S. commonwealth or territory.

Professor Struve added that, after the public comment period had ended, the advisory committee received a letter from an attorney in New Mexico asking it to expand the rule's definition of a "state" to include Native American tribes. She noted that the committee had discussed the request at length at its April 2009 meeting and had decided that the matter merited more time to develop because it implicates a number of different rules and issues. Accordingly, the matter had been added to the advisory committee's study agenda. At the same time, though, the committee urged immediate approval of the proposed amendment to Rule 1.

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

FED. R. APP. P. 29

Judge Stewart reported that the proposed amendments to Rule 29(a) and (c) (amicus curiae brief) would add a new disclosure requirement on authorship and funding support received by an amicus in preparing its brief. The amendments had been modeled after the Supreme Court's recently revised Rule 37.6, although the advisory committee had to make a few adjustments because of differences in practice between the Supreme Court and the courts of appeals. Professor Struve added that the proposed amendment to Rule 29(a) would simply conform the rule to the proposed new definition of a "state" in Rule 1(b).

She noted that the advisory committee had received seven sets of public comments on the proposed amendments and had also considered the comments that had been submitted when the proposed revision to Supreme Court Rule 37.6 was published for comment. The comments, she said, had been very helpful, and the advisory committee had made two changes in the rule following publication. First, it reordered the subdivisions to place the authorship and disclosure provision in a new paragraph 29(c)(5).

Second, it revised subparagraph 29(c)(5)(C) to remove a possible ambiguity in the published language. The revised language would require an amicus to include in its brief a statement that "indicates whether . . . a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person." The revised language makes it clear that, if no such person has provided financial support for the brief, the amicus must state that fact expressly, rather than simply say nothing about funding. Professor Struve also pointed out that some public comments had suggested imposing a complete ban on funding amicus briefs, rather than merely requiring disclosure. But, she said, other commentators suggested that a ban would raise constitutional issues.

Professor Struve added that a suggestion had been received to delete the words "intended to fund." But, she explained, the advisory committee did not adopt it because the proposed alternative language — "contributed money toward the cost of the brief" — was too broad. Similar breadth in the version of Supreme Court Rule 37.6 published for comment had attracted vigorous opposition. It was later revised by the Court to use "intended to fund." She explained that without the "intended to fund" language, the disclosure requirement could require disclosure of membership dues and other indirect financial support. Therefore, both the Supreme Court rule and the proposed appellate rule use the words "intended to fund" to make clear that the rule does not cover mere membership dues in an organization. Rather, the funding disclosure applies only when a party or counsel has contributed money with the intention of funding preparation or submission of the brief.

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

FED. R. APP. P. 40

Judge Stewart reported that the proposed amendments to Rule 40 (petition for a panel rehearing) had been presented to the Standing Committee before. They would clarify the time limit for filing a petition for rehearing in a case where an officer or employee of the United States is sued in his or her individual capacity for an act or omission occurring in connection with official duties. Originally, he explained, the Department of Justice had also sought a companion change in Rule 4 (appeal) to clarify the time limit for filing an appeal in a case where an officer or employee is sued individually for acts occurring in connection with official duties.

But, he said, the Supreme Court's decision in *Bowles v. Russell,* 551 U.S. 205 (2007), had seriously complicated any attempts to amend Rule 4. In essence, *Bowles* held that appeal time periods established by statute are jurisdictional in nature. Since the 60-day time limit for filing an appeal under Rule 4(a)(1)(B) is also established by statute, 28 § U.S.C. § 2107, there was a question whether the time period should be changed by rulemaking rather than legislation. Therefore, the Department decided to abandon the effort to amend Rule 4.

Rule 40, however, is not covered by statute. So the Department continued to seek the proposed amendments to that rule. Nevertheless, the advisory committee asked the Department to consider whether it preferred to pursue a legislative solution to deal with both situations.

Judge Stewart pointed out that a case currently pending before the Supreme Court raises the question of the application of the Rule 4 deadline in a qui tam action. *United States ex. rel. Eisenstein v. City of New York,* 129 S.Ct. 988 (2009). In view of the

pendency of the case, the Department had asked that the Rule 40 proposal be held in abeyance (along with the Rule 4 proposal) to give it time to consider whether a single statutory fix might be a better approach. In addition, the Department was concerned that there could be a trap for the unwary if Rule 40 were to be amended before Rule 4 catches up. Therefore, even though the advisory committee had voted unanimously to proceed with amending Rule 40, it had decided to defer seeking final approval until the Supreme Court has acted in *Eisenstein.*

The committee without objection by voice vote approved remanding the proposed amendment back to the advisory committee.

FORM 4

Judge Stewart reported that Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) would be amended to conform to the new privacy rules that took effect on December 1, 2007, by removing the request for full social security numbers and other personal identifier information. He noted that the Administrative Office had already made interim changes to the version of Form 4 that it posts on the Judiciary's website. Nevertheless, the official form needs to be changed to ratify those interim changes.

A member asked why a court needs all the information now required on Form 4, such as the street address, city, or state of the applicant's legal residence. Some of that information, for example, may be available from other documents, such as the pre-sentence investigation report. Other information, such as the applicant's years of schooling, may be of little use to the court.

Professor Struve explained that the advisory committee at this time was merely attempting to conform the form to the new privacy rules. It had not yet considered matters of substance. In fact, she said, the advisory committee planned to take up these issues later, and it may decide to draft two separate versions of the form to address the requests of judges for both a short version and long version of the form. Judge Stewart added that the advisory committee had a number of questions about the form and had asked its circuit-clerk liaison, Fritz Fulbruge, to survey his clerk colleagues on how the form is used in the courts.

A participant cautioned that the advisory committees should be careful not to let the privacy rules reach too far. At some point, he said, a court needs to have full information about certain matters. Another participant stated that the other parties in a case are entitled to review the petitioner's in forma pauperis application. But the applications are generally not placed in the official case file or posted on the Internet for public viewing.

The committee without objection by voice vote approved the proposed changes in the form for approval by the Judicial Conference.

Informational Items

Judge Stewart reported that the appellate and civil advisory committees had created a joint subcommittee to study a number of issues that intersect or overlap both sets of rules, including "manufactured finality," the impact of tolling motions, and the impact of the Supreme Court's ruling in *Bowles v. Russell.*

Judge Stewart emphasized the advisory committee's shock and sadness at learning of the death of Mark Levy. He noted that Mark had participated actively in the advisory committee's April 2009 Kansas City meeting and had been responsible for a number of important proposals. He said that the advisory committee will present a resolution of remembrance and gratitude to Mrs. Levy. In addition, he had sent her some photographs that he had taken of Mark at recent advisory committee meetings in Charleston and Kansas City. She, in turn, had sent him a very nice note of appreciation.

Judge Stewart thanked the Standing Committee for its support of him personally and the advisory committee during his four years as chair. He also extended his special thanks to Professor Struve for her tireless, thorough, and uniformly excellent work.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in further detail in Judge Swain's memorandum and attachments of May 11, 2009 (Agenda Item 7).

Amendments for Final Approval

FED. R. BANKR. P. 1007, 1014, 1015, 1018, 1019, 4004, 5009, 5012, 7001, 9001

Professor Gibson reported that the advisory committee was seeking final approval of all but one of the proposed changes it had published for comment in August 2008. The committee, she said, would republish proposed new Rule 1004.2 for further comment because it had made a significant change in response to the first round of comments.

The amendments and proposed new rules, she explained, fall into several categories. Six of the provisions principally implement new chapter 15 of the Bankruptcy Code, governing cross-border insolvencies: FED. R. BANKR. P. 1014 (dismissal and change of venue), FED. R. BANKR. P. 1015 (consolidation or joint administration of cases), FED. R. BANKR. P. 1018 (contested petitions), FED. R. BANKR. P. 5009(c) (closing

cases), new FED. R. BANKR. P. 5012 (agreements concerning coordination of proceedings in chapter 15 cases), and FED. R. BANKR. P. 9001 (general definitions).

Professor Gibson said that amendments to two rules would change the procedure for seeking denial of a discharge on the grounds that the debtor has received a discharge within the prohibited time period to get a second discharge. She explained that all objections to discharge are currently classified as adversary proceedings and must be initiated by complaint. But, as revised, FED. R. BANKR. P. 4004 (grant or denial of discharge) and FED. R. BANKR. P. 7001 (scope of the Part VII adversary proceeding rules) would allow certain objections to discharge to be initiated by motion, rather than complaint. The advisory committee, she added, had received some helpful technical comments on the amendments and had decided as a result to make changes in the placement of the provisions. Originally, the proposal would have set forth the principal change in Rule 7001. But a former member pointed out that since Rule 7001 introduces the Part VII adversary proceeding rules, it should not begin by referring to a contested matter. Therefore, the advisory committee had moved the key provision to Rule 4004(d). The change, she said, would not require republishing.

Three of the rules, she said, deal with the statutory obligation of individual debtors to file a statement that they have completed a personal financial management course. Amended FED. R. BANKR. P. 1007(c) (lists, schedules, statements, and time limits) would extend the deadline for filing the statement from 45 to 60 days after the date set for the meeting of creditors. This would allow the clerk of court, under proposed new FED. R. BANKR. P. 5009(b) (notice of failure to file the statement), to send a notice within 45 days to anyone who has not filed the required statement that they must do so before the 60-day period expires. Rule 4004(c)(4) (grant of discharge) would be amended to direct the court to withhold the discharge until the statement is filed.

Professor Gibson stated that the advisory committee had received one comment from a bankruptcy judge that the noticing obligation would place an undue burden on the clerks of court. But a survey taken of the clerks by the committee's bankruptcy-clerk liaison, James Waldron, had shown that many send out the notice now, and it would not impose a major burden to require it.

Professor Gibson said that FED. R. BANKR. P. 1019 (conversion of a case to chapter 7) would provide a new period to object to exemptions when a case is converted from chapter 11, 12, or 13 to chapter 7. The amendment would give creditors a new period to object – unless the case had previously been in chapter 7 and the objection period had expired, or it has been pending more than a year after plan confirmation. The advisory committee had received one comment on the rule from the National Association of Bankruptcy Trustees supporting the rule but not supporting the one-year provision.

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

FED. R. BANKR. P. 4001

Professor Gibson reported that the advisory committee recommended approval of two changes to Rule 4001 (relief from the automatic stay and other matters) without publication because they are simply conforming amendments. Rule 4001 contains two time-period adjustments that had been overlooked and not included in the package of time-computation rules that will take effect on December 1, 2009.

OFFICIAL FORM 23

The advisory committee would also make a change in Official Form 23 (debtor's certification of completing a financial management course) without publication to conform to the change being made in Rule 1007. It would revise the instructions regarding the time for consumer debtors to file their certificate of having completed a personal financial management course. The proposed change in the form would become effective on December 1, 2010, at the same time that the proposed amendment to Rule 1007 takes effect.

The committee without objection by voice vote approved the proposed amendments to Rule 4001 and Official Form 23 without publication for approval by the Judicial Conference.

Amendments for Publication

FED. R. BANKR. P. 1004.2

Professor Gibson explained that the advisory committee would republish proposed new Rule 1004.2 (petition in a chapter 15 case) because it had made a substantive change in subdivision 1004.2(b) in response to public comments following the August 2008 publication.

An entity filing a chapter 15 petition to recognize a foreign proceeding must state in the petition the country where the debtor has the "center of its main interests." A party may challenge that designation. A commentator argued, persuasively, that the proposed 60-day time period allowed in the August 2008 version of the rule for a party to challenge the designation was simply too long. Therefore, the advisory committee would now set the deadline to file a challenge at 7 days before the hearing on the petition unless the court orders otherwise.

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

FED. R. BANKR. P. 2003, 2019, 3001, 3002.1, 4004

Professor Gibson highlighted some of the other proposed changes to be published, focusing on two that she said were likely to attract a good deal of attention.

Rule 2019 (representation of creditors and equity security holders in Chapter 9 and 11 cases), she explained, is a long-standing rule that requires disclosure of interests by representatives of creditors and equity security holders. She noted that the advisory committee had received suggestions from trade associations that the rule be deleted on the grounds that it is unnecessary and over-inclusive.

On the other hand, the advisory committee had received comments from the National Bankruptcy Conference, the American Bar Association's Business Bankruptcy Committee, and two bankruptcy judges in the Southern District of New York that the rule should not be eliminated. Rather, it should be rewritten and expanded in scope, both as to whom it applies and what information they must disclose. In response, the advisory committee added a broader definition to the rule to require disclosures from all committees and groups that consist of more than one creditor or equity security holder, as well as entities or committees that represent more than one creditor or equity security holder. The court would also have discretion to require an individual party to disclose.

In addition, the amended rule would expand the type of financial disclosure that must be made beyond just having a financial interest in the debtor. As revised, a party in interest would have to disclose all "disclosable economic interests," defined in the rule as all economic rights and interests that establish an economic interest in a party that could be affected by the value, acquisition, or disposition of a claim or interest.

The purpose of the expanded rule, she said, was to provide better information on the motive of all parties who assert interests in a case to help the court ascertain whom they represent and what they are trying to do. In addition, the advisory committee had reorganized the rule to clarify the requirements and specify the consequences of noncompliance.

Professor Gibson explained that the proposed amendments to Rule 3001(c) (proof of claim based on a writing) and new Rule 3002.1 (notice relating to claims secured by a security interest in the debtor's principal residence) would govern home mortgages and other claims in consumer cases. Rule 3001(c) specifies the supporting information that must be attached to a proof of claim. She pointed out that claims today are often filed by financial entities that the debtor has never heard of because they are bought and sold in bulk freely on the market. Amended Rule 3001(c) would tighten up the documentation

requirements to allow the debtor to see what claims are legitimate, what fees are being charged, and what defaults are alleged. Proposed subdivision 3001(c)(2)(D) specifies the consequences for a claim holder of not complying with the rule.

Professor Gibson explained that new Rule 3002.1 would work in tandem with the Rule 3001(c) changes and would govern mortgage claims in chapter 13 cases. It is common for debtors to attempt to cure their mortgage defaults and maintain their payments under the chapter 13 plan in order to keep their home. But problems arise with mortgage securitization, as holders of the mortgages change. The amounts of arrearages claimed on the mortgage, as well as various penalties and fees, are not clear to either the debtors or the trustees. Debtors, for example, often believe that they have cured the default, but after the plan is completed and the case closed they face a new default notice with a variety of new fees added on. Accordingly, the proposed rule would require full disclosure by the mortgage holder of both the amounts needed to cure and any fees and charges assessed over the course of the plan. The proposed rule also provides for a final cure and sanctions for not following the prescribed procedures.

Professor Gibson reported that some bankruptcy courts have been following a similar procedure on a local basis with considerable success. The bankruptcy system, she said, should benefit from the national uniformity that the rule will bring.

One member questioned the wisdom of adding new sanctions provisions to the rules. He suggested that it is unusual to have sanctions set forth in separate rules, rather than in a general sanctions provision, such as those in FED. R. CIV. P. 11 and FED. R. BANKR. P. 9011.

Professor Gibson explained that the two proposed amendments are very different from the other rules because they deal with the specific requirement that a creditor give a debtor information about the amount of the mortgage or other consumer claims. Judge Swain added that there are very few other sanctions provisions in the bankruptcy rules, and they tend to deal with very practical disclosure issues. FED. R. BANKR. P. 2019 (representation of creditors and equity security holders in chapter 9 and 11 cases), for example, authorizes a court to refuse to hear from a party that has failed to disclose. Proposed Rules 3001(c) and 3002.1, she said, attempt to have the creditor focus specifically on fees and charges tacked onto mortgages.

OFFICIAL FORMS 22A, 22B, 22C

Professor Gibson reported that the proposed changes in the means test forms were designed to conform the forms more closely to the language and intent of the 2005 bankruptcy legislation. Judge Swain explained that the revisions would replace the term "household size" in several places on the forms with "number of persons" in order to count dependents in a way that is consistent with Internal Revenue Service nomenclature.

The committee without objection by voice vote approved the proposed amendments to the rules and forms for publication.

Informational Items

Judge Swain reported that the advisory committee was working on two major projects that would have a major impact on the bankruptcy rules and forms.

REVISION OF THE BANKRUPTCY APPELLATE RULES

First, Judge Swain said, the advisory committee was reviewing comprehensively Part VIII of the Federal Rules of Bankruptcy Procedure, governing appeals from a bankruptcy court to a district court or bankruptcy appellate panel. The current rules had been modeled on the Federal Rules of Appellate Procedure (FRAP) as they existed more than 20 years ago. Since that time, though, the FRAP have been amended several times and restyled as a body. The Part VIII bankruptcy rules, she said, are no longer in sync with them.

She pointed out that Eric Brunstad, a former advisory committee member and distinguished appellate attorney, had drafted for the committee a revised set of rules to bring the Part VIII rules up to date. The two principal goals that the advisory committee would try to achieve are:

1. to clarify the rules – because the current rules are obscure and difficult in many respects; and

2. to eliminate the "hourglass" effect, under which page limits imposed on appeals from the bankruptcy court to the district court later undercut a party's further appeal to the court of appeals.

Judge Swain reported that the advisory committee had convened a very successful special subcommittee meeting in March 2009, to which it had invited a variety of interested parties to discuss their experience with the current rules and suggest how the rules might be improved. She said that the meeting had demonstrated that there is a great deal of support for pursuing the project to revise the part VIII rules.

On the other hand, concern had been expressed by several participants that it would not be advisable to pattern the bankruptcy rules strictly after the current Federal Rules of Appellate Procedure because the bankruptcy courts have made enormous progress in taking advantage of technology. Since most bankruptcy courts and courts hearing bankruptcy appeals now operate with electronic case files and electronic filing, several of the current appellate rules are outdated or immaterial. For example, she said, courts using electronic records are no longer concerned with the colors of briefs or with

many of the other requirements devised for a purely paper world. She said that the advisory committee would attempt to draft new appellate rules that take electronic record-keeping fully into account. She added that the committee will conduct another special subcommittee meeting in the fall and is grateful for Professor Struve's collaboration in its work on the bankruptcy appellate rules.

BANKRUPTCY FORMS MODERNIZATION

Second, Judge Swain reported that the advisory committee had made a good deal of progress on its major project to update and modernize the bankruptcy forms. She noted that its forms subcommittee had conducted an extensive analysis and deconstruction of all the information contained in the forms currently filed at the commencement of a bankruptcy case. It had also obtained the services of a professional forms consultant who has worked for the Internal Revenue Service and the Social Security Administration in formulating questions for the general public and making forms more user-friendly and effective in eliciting required information.

She added that the advisory committee's forms subcommittee was also working closely with the group designing the "Next Generation" electronic system that will replace CM/ECF with a new system that will take full advantage of recent advances in electronics and add new functionality. She pointed out that several individuals and organizations had asked the judiciary to build a greater capacity into the new system to capture, retrieve, and disseminate individual data elements provided by filers on the standard bankruptcy forms. She noted that the forms modernization subcommittee will meet again on June 26, 2009, at the Administrative Office.

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 attachments of May 8, 2009 (Agenda Item 5).

Amendments for Final Approval

FED. R. CIV. P. 8(c)

Judge Kravitz reported that the advisory committee in August 2007 had published a proposal to eliminate discharge in bankruptcy as an affirmative defense that must be asserted under Rule 8(c) (pleading affirmative defenses) to avoid waiver. He noted, though, that the Department of Justice had objected to the change.

Judge Eugene R. Wedoff, a member of the Advisory Committee on Bankruptcy Rules, had acted as the civil advisory committee's liaison with officials in the Department on the matter, but had been unable to reach an agreement with them. The civil advisory committee then asked the Advisory Committee on Bankruptcy Rules formally to consider the proposed amendment. That committee too supported eliminating the bankruptcy-discharge defense from Rule 8. The civil advisory committee met again in April 2009 and invited both Judge Wedoff and the Department to make presentations.

After a lengthy discussion, the advisory committee voted unanimously, except for the Department, to proceed with the proposed change to Rule 8. Judge Kravitz explained that the advisory committee was convinced that inclusion of a bankruptcy discharge as an affirmative defense is simply wrong as a matter of law because the Bankruptcy Code for years has made all debts discharged in bankruptcy legally unenforceable. They cannot be asserted in any judicial proceedings. Nevertheless, the current rule has misled some courts into finding waiver when a party fails to assert bankruptcy as an affirmative defense. The advisory committee, he said, believed that it was important to eliminate a rule that is continuing to lead some judges to err.

Judge Swain added that the Advisory Committee on Bankruptcy Rules was in complete agreement with those views. Professor Gibson added that the only complication in the matter was that even though a debtor may obtain a discharge in bankruptcy, there are certain statutory exceptions to the discharge. A question might arise in future litigation, for example, over whether a particular type of debt excluded from the discharge in the bankruptcy litigation may still be enforced legally. She explained that this issue is what had caused the Department's concerns. Nevertheless, she said, the proposed amendment to Rule 8 was needed because it will eliminate a trap.

Judge Kravitz reported that Judge Wedoff had prepared some language that might be added to the committee note to reinforce Professor Gibson's point. Ms. Shapiro said that the Department of Justice rested on the statements that it had already made on the matter. She added, though, that the proposed additional language for the committee note will go a long way to easing the Department's concerns.

The committee without objection by voice vote approved adding the proposed, bracketed language to the committee note.

The committee, with one objection (the Department of Justice), by voice vote approved the proposed amendment to Rule 8(c) for approval by the Judicial Conference.

FED. R. CIV. P. 26

Judge Kravitz expressed his gratitude to Judge David G. Campbell and Professor Richard L. Marcus for serving superbly as chair and reporter, respectively, of the advisory committee's Rule 26 project. He noted that the project had been very thorough and had produced a set of balanced, well-crafted amendments that will reduce discovery costs and make a practical, positive difference in the lives of practicing lawyers.

Judge Kravitz reported that the proposed amendments to Rule 26 (disclosures and discovery) enjoyed wide support among bench and bar, and among both plaintiff and defendant groups. Among the supporters were the American Bar Association, its Section on Litigation, the American College of Trial Lawyers, the Association of the Bar of New Jersey, the Federal Bar Council of the Second Circuit, the Federal Magistrate Judges Association, the American Association for Justice, the Lawyers for Civil Justice, the Federation of Defense and Corporation Counsel, the Defense Research Institute, the American Institute of Certified Public Accountants, and the Department of Justice. The amendments had been opposed only by a group of law professors. Their concerns, he said, had been carefully considered, but not shared, by the advisory committee.

Judge Kravitz explained that the amendments would accomplish two results. First, they will require lawyers to disclose a brief summary of the proposed testimony of non-retained expert witnesses whom they expect to use. This change should eliminate the confusion that now exists regarding the testimony of treating physicians, employees, and other non-retained experts.

Second, the rule will place draft reports of retained experts and communications between lawyers and their retained experts under work-product protection. In doing so, it will reduce costs, focus the discovery process on the merits of an expert's opinion, and channel lawyers into making better use of experts. At the same time, though, the amendments will not eliminate any valuable information that may be elicited during the discovery phase of a case. Judge Kravitz explained that little useful information is available today under the current rule because lawyers use stipulations and a variety of other practices to prevent discoverable information from being created in the first place.

These other practices are unnecessary and wasteful. One common practice is to hire two sets of experts – one to testify and the other to consult with the litigation team. In addition to being inefficient, the practice gives a tactical advantage to parties with financial resources. Another artificial discovery-avoidance tactic involves using experienced experts who make extraordinary efforts not to record any preliminary draft report in order to prevent discovery.

He noted that the advisory committee had made a few changes in the draft following publication of the amendments. It had eliminated the last paragraph of the committee note, referring to use of information at trial, and added a new sentence in the note. Both emphasize that the rule does not undercut the gate-keeping role and

responsibilities of judges under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The advisory committee had also changed the wording of Rule 26(b)(4) from "regardless of the form of the draft" to "regardless of the form in which the draft is recorded" to better capture the idea of drafts recorded electronically, while precluding the concept of an "oral" draft report.

The advisory committee, however, had decided not to extend the protection against disclosure enjoyed by retained expert witnesses to non-retained experts. There had been, he said, public comments recommending that the protection be extended at least to employees. The advisory committee, he said, may do so in the future. But for now, it had decided to defer the issue for a number of reasons. Most importantly, the committee believed that it could not proceed with a change because it had not signaled it sufficiently to the public and would have to republish the proposal. In addition, he explained, drafting a provision to extend the protection would be very tricky, as many employees are both fact witnesses and experts. There are also questions regarding former employees vis-a-vis present employees. Moreover, if the provision were limited to employees, it may be seen as tilting more towards defendants, rather than plaintiffs, and the advisory committee wants to be scrupulously neutral on the issue.

Several members praised the work of the advisory committee and said that the proposed amendments would eliminate the need for stipulations and artificial devices now used to avoid the rule. They suggested that the amendments will allow discovery of witnesses to proceed more openly and honestly. Members said that the advisory committee had done an excellent job of working through and accommodating the various public comments. Judge Kravitz added that Judge Campbell and Professor Marcus deserved the lion's share of the credit for the work.

The committee without objection by voice vote approved the proposed amendments to Rule 26 for approval by the Judicial Conference.

FED. R. CIV. P. 56

Judge Kravitz reported that the major project to revise Rule 56 (summary judgment) had been an exercise in rule-making at its very best. The advisory committee, he said, had taken full advantage of empirical research by the Federal Judicial Center (Joe Cecil), the Administrative Office (Jeffrey Barr and James Ishida), and Judge Rosenthal's staff (Andrea Kuperman). It had prepared and circulated several different drafts and had conducted three public hearings and two mini-conferences with lawyers, judges, and professors. The advisory committee, he said, had listened carefully to the views of people with very differing ideas, and it had made several changes in the proposed rule as a result of the public hearings and written comments.

The rules process, in short, had worked exactly as it should. He offered his special thanks to Judge Michael M. Baylson, chairman of the Rule 56 subcommittee, for his dedication and leadership in producing a greatly improved rule governing a central component of the civil litigation process. He also thanked Professor Cooper, the committee's reporter, for his enormous assistance and wise counsel during the project.

Judge Kravitz reported that the advisory committee had announced two overarching goals for the project at the outset. First, it did not want to change the substantive standard for summary judgment in any way. Second, it did not want the rule to tilt in either direction, towards plaintiffs or defendants. Both goals, he said, had been achieved.

The advisory committee also had two other goals in mind. First, it had set out to bring the text of the rule in line with the way that summary judgment is actually practiced in the courts today. Second, it wanted to bring some national uniformity to summary judgment practice. The committee, Judge Kravitz said, had accomplished the first goal. The second goal, he said, had been accomplished in part.

Judge Kravitz reported that the advisory committee had made three changes in the rule from the version that had been published.

First, it had eliminated from the rule the requirement of a point-counterpoint procedure based on the comments of several judges and lawyers who have used the procedure and believe that it imposes unnecessary expense. Several judges who testified at the public hearings, including Judges Holland, Lasnik, Wilken, and Hamilton, had been articulate in opposing the point-counterpoint procedure on the basis of their personal experience. But, he said, many other judges and lawyers, including the chair and several members of the advisory committee, believe that the procedure is quite effective.

Judge Kravitz emphasized, though, that all sides agree that, regardless of the specific procedure used to handle summary judgment motions, it is essential that lawyers provide pinpoint citations to the record to back up their assertions. Therefore, the advisory committee had decided to allow districts to continue with their own procedures for eliciting the facts, but uniformly to require pinpoint citations. He added that, even without the prescribed point-counterpoint procedure, the revised rule embodies a number of other good new features, such as specifically acknowledging partial summary judgment, limiting motions to strike, and addressing non-compliance.

The second significant change made following publication was to re-introduce the word "shall" into the text of the rule. As revised in new Rule 56(a) it would specify that: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

"Shall," he said is an ambiguous term and should not normally be used in drafting. But the dilemma that the advisory committee faced was that the word "shall" had acquired a substantive meaning in former Rule 56(c).

"Shall" had been used in the rule for decades until replaced with "should" as part of the 2007 general restyling of the civil rules. But in revisiting the matter in depth, Judge Kravitz said, the advisory committee simply could not find an appropriate replacement term for "shall," based on the pertinent case law. Neither "should" nor "must" are completely accurate. Many public comments, moreover, had asserted that selecting one or the other term would be viewed as making a change in substance and tilting the playing field. The advisory committee, he said, had even tried to formulate a revision using the passive voice, but decided that the alternative might inflict even more damage.

After hearing all the arguments, Judge Kravitz said, the advisory committee had returned to the vow that it had made at the outset of the project – not to change the substantive standard for granting summary judgment as developed in each circuit under the historical term "shall." Therefore, it decided to return to "shall" and allow the case law to continue to deal with that term. If, however, the Supreme Court were to change the substantive standard in the future, the advisory committee could later adjust the language of the rule. In essence, he said, the advisory committee does not advocate use of the term "shall" in drafting, but it had faced an unsolvable problem. The ambiguity in Rule 56 was so intractable that it could not be changed without affecting substance.

The third change made following publication was to eliminate the national rule's proposed time schedule for filing motions for summary judgment, responses to those motions, and replies to the responses. With elimination of the point-counterpoint procedure, there was no longer a need to retain all the deadlines. The advisory committee had been unanimous in deciding to specify only the deadline for filing a summary judgment motion and not to prescribe a schedule for further filings and responses. He noted that there is, for example, no other place in the Federal Rules of Civil Procedure where the rules fix briefing schedules, and it would not be appropriate to specify them for just one category of motions. In addition, he said, some lawyers recommended that the rule provide for sur-replies, which would have complicated the rule further.

The advisory committee had also been concerned about the time-computation rules that take effect on December 1, 2009. They will incorporate the time periods to respond and reply in the existing Rule 56, only to have a completely revised rule delete those time periods on December 1, 2010, when the new Rule 56 would take effect. The advisory committee concluded, however, that it needed to produce the best rule possible for the future, even though there might be some confusion for a year.

Finally, Judge Kravitz explained that the advisory committee had considered at length whether to republish the rule, since several changes had been made following the

August 2008 publication. But it decided unanimously not to do so because, at the Standing Committee's direction, it had already solicited the public's comments on a number of specific issues. The revised rule, he said, does not add any provision not fully noticed to the public. Rather, the advisory committee merely eliminated some provisions of the published rule.

Several committee members agreed that the rules process had worked at its best to facilitate a healthy public debate on summary judgment practice and to produce a very workable new rule. Several noted that legitimate differences of opinion had been expressed on some of the major issues, and the advisory committee had accommodated the differing views as well as possible. Some pointed out that they personally favored the point-counterpoint procedure, but recognized that it could not be forced on all the courts, particularly those that have tried and rejected it. They noted, though, that individual judges and districts that have adopted the procedure will be free to continue using it.

Support was voiced for the advisory committee's decision to return to use of the word "shall' in Rule 56(a) on the grounds that it preserves the substantive standard for granting summary judgment. A few members went further and suggested that "shall" is an appropriate term to use in drafting, despite the style conventions. The committee's style consultant, Professor Kimble, though, disagreed and asserted that "shall" is never appropriate. He suggested that a different formulation might still be developed to maintain the substantive standard.

Judge Rosenthal emphasized that the advisory committee's dilemma had been to resolve a conflict between two competing principles. First, as part of the restyling process, all the advisory committees have consistently eliminated the word "shall." But the higher principle that prevailed was avoiding making any change in the substantive standard for summary judgment. She noted that, in the interests of improving style by changing "shall" to "should" in the 2007 restyling amendments, the committee had actually changed the substantive law in some circuits.

A member suggested adopting a public comment to replace "as to" with "about" in proposed Rule 56(a)(2). The style consultant agreed that the change was better stylistically, but several members urged that the change not be made since it was not essential. One member added that the current language is almost a sacred phrase and should not be tinkered with.

The committee without objection by voice vote agreed not to make the proposed additional change in the language of Rule 56(a)(2).

Another member expressed concern over the language in proposed Rule 56(c)(2) authorizing a party to assert in its response or reply that the other party's material cited to support or dispute a fact "cannot be presented in a form that would be admissible in evidence." He suggested that the language had been revised from the formulation

presented to the public for comment, *i.e.*, that the material "is not admissible in evidence." The revised language, he said, appeared to require the judge to make a ruling on the potential future admissibility of evidence.

Judge Kravitz explained that affidavits and other materials submitted as part of the summary judgment process are not evidence. Professor Cooper added that the published language was too broad because it cannot be known until trial what evidence will be admissible. Some public comments, he said, had suggested alternative language, such as "would not be admissible" or "could not be put in a form that would be admissible." The specific language added after publication was intended to show that something more than an affidavit is needed. There is no need for the objecting party to make a separate motion to strike. In addition, failure to challenge the material during summary-judgment proceedings does not forfeit the party's right to challenge its admissibility at trial.

Other members suggested that the change in language was helpful because it lays out an option for parties to deal with an issue that arises often as part of summary-judgment practice, though not specified in the current rule. When a party objects that a submission cannot be produced in any admissible form, it allows the judge to cut through the issues and remedy any technical problems as part of the summary-judgment motion itself, rather than wasting time on motions to strike. Judge Kravitz pointed out that the revised rule gives the judge flexibility to tell a party that it has not presented the material in an admissible form, to give the party an additional opportunity to correct the defect, and to fashion an appropriate remedy.

One member suggested that the problem with the language may be that it could be construed as requiring the moving party to carry some burden, such as to show that the other party cannot present evidence in an admissible form. The word "cannot" appeared to be the problem. She suggested that it be changed to "could not." It was also suggested that the chair and reporter of the advisory committee consider possible modifications in the language.

Judge Kravitz recommended, alternatively, that an explanatory sentence be added to the committee note. He pointed out that in the situation covered by the provision, there is no doubt that the party has not properly presented the pertinent material, but it is difficult to say that it "cannot" be so presented. He suggested adding language to the note to explain that an assertion that the opponent could not produce material in admissible form functions like an objection at trial. The proponent of the material can then either show that it is admissible or explain the admissible form that is anticipated.

A member stated that the text of the rule was perfectly appropriate. An objector only has to assert that the material cannot be presented. The moving party then has the burden of showing that it can.

Another member suggested that the rule might be rephrased to say something like: "If an objection has been made that the material has not been presented in a form that can be admissible at trial, the court may require (or allow) the proponent of the material to show that it can be presented in an admissible form." Judge Kravitz pointed out, though, that the advisory committee was trying to get away from motions to strike. It would prefer to have parties address the matter in their summary-judgment briefs.

Other members said that the language of the rule, as modified after publication, was correct. One pointed out that proposed Rule 56(c)(2) must be read together with proposed Rule 56(c)(4), which states that an affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. The trial judge can easily handle any problems that arise. A member declared that it is a very interesting issue in theory, but will not be a real problem in practice.

A member suggested substituting the word "object" for "assert." "Assert" requires the opponent to know, or allege, that the material cannot be presented in admissible form. "Object" makes it clear that the opponent is only raising the point, placing the burden on the proponent. Judge Kravitz explained that the advisory committee had used the word "assert" because it is a word commonly used to refer to a point mentioned in a brief. He agreed to change it to "object."

The committee with one objection by voice vote approved changing "assert" and "asserting" in proposed Rule 56 to "object" and "objecting."

The committee without objection by voice vote then approved the proposed amendments to Rule 56 for approval by the Judicial Conference.

The committee without objection by voice vote further approved the proposed amendments without republication.

A member suggested adding language to the committee note to alert the reader that the revised rule places the burden on the parties to raise the point that the submitted material cannot be presented in an admissible form.

The committee by a vote of 7 to 3 approved making the suggested addition to the committee note.

Amendment for Publication

SUPPLEMENTAL RULE E(4)(f)

Professor Cooper noted that Rule E(4)(f) (in rem and quasi in rem actions – procedure for release from arrest or attachment) would be amended to delete the last

sentence because it has been superseded by statutory and rule developments. The statutes cited in the rule, 46 U.S.C. §§ 603 and 604, were repealed in 1983. Deletion of the reference to them seems entirely appropriate, and publishing the amendment for public comments might also flush out any arguments that other statutes should be invoked.

Deletion of the reference to forfeiture actions, though, is more complicated. Rule G, which took effect in 2006, governs forfeiture actions in rem arising from a federal statute. It also specifies that Supplemental Rule E continues to apply to the extent that Rule G does not. The problem, he said, is how best to integrate Rule G with Rule E(4)(f). The proposed amendment would strike the last sentence of Rule E(4)(f) and let courts figure it out on a case-by-case basis. The Department of Justice, he said, had suggested adding a sentence stating that Rule G governs hearings in a forfeiture action.

Professor Cooper added that the advisory committee recommended publishing the rule for comment. But since the proposed changes are relatively minor, the publication should be deferred until other amendments to the civil rules are proposed and the proposed amendment to Supplemental Rule E(4)(f) can be included in the same publication.

The committee without objection by voice vote approved the proposed amendment for publication at an appropriate future time.

Informational Items

Judge Kravitz reported that the advisory committee would convene a major conference on the state of civil litigation to be held at Duke Law School in May 2010. He noted that Judge John G. Koeltl would chair the conference, and the Federal Judicial Center was helping him compile empirical data for the program. He pointed out that Judge Koeltl was working with the Litigation Section of the American Bar Association on a survey of its members. In addition, Judge Koeltl had persuaded RAND and others to produce papers and other information for the conference. He had put together a comprehensive agenda and was now securing moderators and panel members. The Chief Justice will deliver a taped message. The program may be broadcast by Duke, and the Duke Law Review is expected to publish the proceedings.

Judge Kravitz reported that a special subcommittee chaired by Judge Campbell and assisted by Professor Marcus was considering a range of potential changes to Rule 45 (subpoenas). The subcommittee was in the process of seeking input and planning for mini-conferences with the bench and bar.

Judge Kravitz reported that a joint subcommittee comprised of members of the civil and appellate advisory committees had been appointed and will begin studying several issues that intersect both sets of rules. In addition, the civil advisory committee was examining issues arising when judges are sued in their individual capacities,

including service in those cases. One suggestion is to require that service be made on the clerk of the court where the judge sits.

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 11, 2009 (Agenda Item 9).

Amendments for Final Approval

VICTIMS' RIGHTS AMENDMENTS

FED. R. CRIM. P. 12.3

Judge Tallman reported that the proposed amendment to Rule 12.3 (notice of public-authority defense) would conform the rule with a similar amendment made recently in Rule 12.1 (notice of alibi defense). He noted that the change was appropriate, even though the public-authority defense arises rarely.

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

A member pointed out that proposed Rule 12.3 and Rule 12.1 both permit the district court in certain circumstances to order the government to turn over to the defendant the names and telephone numbers of victims, which would otherwise be protected. She recommended that both rules require the Government to inform the protected persons that their names and numbers are being disclosed. Judge Tallman replied that proposed Rule 12.3(a)(D)(ii) explicitly authorizes a court to fashion a reasonable procedure to protect the victims' interests.

FED. R. CRIM. P. 21

Judge Tallman reported that the proposed amendment to Rule 21(b) (transfer for trial) would allow a court to consider the convenience of any victim in making a decision to transfer a case for trial.

A member questioned the need for the rule since it is not required by the Crime Victims' Rights Act. Judge Tallman pointed out that the advisory committee has been concerned over criticism that it has not been expansive enough in making changes to the rules to implement the Act. Professor Beale added that this was one of the few rules where the advisory committee had made changes that go beyond what is mandated by the Act. She explained that the advisory committee wants to incorporate victims' rights as

fully as possible without doing damage to the carefully balanced criminal justice system. Victims' rights groups, she said, have expressed a particularly strong interest in victims being able to attend court proceedings, and the proposed amendment to Rule 21 would further that interest. She pointed out, though, that the committee had made several other, more significant changes in the rules for victims at earlier meetings.

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

FED. R. CRIM. P. 5

Judge Tallman reported that the advisory committee had withdrawn its proposed change to Rule 5 (initial appearance) because it felt the current language adequately referenced the statutes providing consideration of the safety of victims and the community. The proposal would have required a court, in making the decision to detain or release a defendant at an initial appearance, to consider the right of any victim to be reasonably protected from the defendant.

Professor Beale explained that the advisory committee had been concerned that by singling out one situation, it had put its finger on the scales and changed the substantive law. The proposed amendment, moreover, was redundant and unnecessary. The Bail Reform Act, she said, is a carefully balanced and nuanced law, and just singling out one factor in support of victims could cause more damage than good. But in light of the politics of the situation, the decision to withdraw the amendment had not been an easy one for the committee.

A member agreed that many of the victims' rules amendments were not necessary, but clear political implications counsel in favor of including them. The Crime Victims' Rights Act, he said, emphasizes particularly the safety of victims. Therefore, this may be one area where a rule amendment may be advisable. Victims are particularly vulnerable to being harmed by defendants who have been released. He said, moreover, that he had not been persuaded by the argument that the proposed amendment would change the substantive law.

Judge Tallman pointed out that the Federal Magistrate Judges Association, whose members apply the rule every day, oppose changing the rule because they view the Bail Reform Act and the Crime Victims' Rights Act as sufficient, and changing the rule would upset the careful balance of the statutes. Judge Rosenthal added that the rule already speaks of detention or release "as provided by statute," which covers both the Bail Reform Act and the Crime Victims' Rights Act.

Members questioned whether the Standing Committee is authorized to initiate its own rules proposals or to forward to the Judicial Conference a proposed amendment that

has been withdrawn or rejected by an advisory committee. Professor Coquillette suggested that the Rules Enabling Act appears to contemplate the Standing Committee confining itself to reviewing the recommendations of the advisory committees.

A member recommended sending the matter back to the advisory committee for further consideration. But Judge Tallman pointed out that the advisory committee had already published the rule for comment, had then discussed it thoroughly, and had voted unanimously not to proceed with the amendment. He said that he was not sure that returning the matter to the committee would change the result.

A participant suggested, though, that other statutory changes may be made in the future. Sending the rule back to the advisory committee, rather than rejecting it, would keep the matter alive and be advisable as a matter of policy. A member added that the advisory committee might be asked to include the matter as part of its ongoing study of how the courts are implementing the Crime Victims' Rights Act. Professor Beale added that there is a careful balance between that statute and the Bail Reform Act, and the advisory committee will continue to monitor the situation closely to make sure that any problems are addressed.

The committee unanimously by voice vote returned the proposed amendment to the advisory committee with instructions to further study proposed amendments to Rule 5 as part of its ongoing study of the courts' implementation of the Crime Victims' Rights Act.

OTHER AMENDMENTS

FED. R. CRIM. P. 15

Judge Tallman reported that the advisory committee had briefed the Standing Committee before on the proposed amendments to Rule 15 (depositions). Recommended by the Department of Justice, they would allow the government – under certain limited conditions – to take a deposition in a criminal case outside the United States and outside the physical presence of the defendant, with the defendant participating by electronic means. Before allowing the deposition to proceed, the trial court would have to make case-specific findings on the following six factors:

1. the witness's testimony could provide substantial proof of a material fact in a felony prosecution;
2. there is a substantial likelihood that the witness's attendance at trial cannot be obtained;
3. the witness's presence for a deposition in the United States cannot be obtained;
4. the defendant cannot be present because: (I) the country where the witness is located will not permit the defendant to attend the deposition; (ii) for an

in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or (iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing;

5. the defendant can meaningfully participate in the deposition through reasonable means; and
6. for the deposition of a government witness, the attorney for the government has established that the prosecution advances an important public interest.

Judge Tallman explained that the Fourth Circuit had already approved procedures similar to those set forth in the proposed amendment and had held that the Confrontation Clause did not prohibit the introduction of deposition testimony taken under those procedures. *United States v. Ali,* 528 F.3d 210 (4th Cir. 2008), *cert. denied,* 129 S. Ct. 1312 (2009).

Judge Tallman pointed out that an analogous proposal for a change to Rule 26 (taking testimony) had been forwarded to the Supreme Court in 2002, but the Court rejected it on Confrontation-Clause grounds in an opinion by Justice Scalia. The advisory committee, he said, recognized fully that there may also be confrontation issues with the new proposal. But it also recognized that the practical need for the amendment is substantial, and it had been carefully crafted to address the Confrontation-Clause factors considered by the Supreme Court in 2002. He added that, unlike the proposed amendments to Rule 26, the proposed amendment to Rule 15 deals only with the taking of depositions and not the later admissibility of their contents at trial, which is where the Confrontation Clause issue arises.

Judge Tallman noted that there had been opposition to the proposed rule, as expected, from the defense bar. As a result, the advisory committee had limited the rule's reach to make sure that a deposition is restricted to evidence necessary to the government's case. But the committee did not adopt three other suggestions made by the defense bar during the comment period: (1) to limit the rule to government witnesses; (2) to require the government to show that the deposition would produce evidence "necessary" to its case; and (3) to require the government to show that it had made diligent efforts to secure the witness's testimony in the United States.

Deputy Attorney General Ogden thanked the committee for its attention to the matter and emphasized that the proposed rule is of substantial importance to the Department of Justice. It would be needed only in a few cases, but the depositions would be very important in those cases. The detailed procedures will require the Department to go to a great deal of trouble and expense to obtain the testimony. Arranging for a foreign deposition is costly and difficult, so it will not be pursued lightly, and the rule will be used only in cases that are vitally important to the United States.

Mr. Ogden said that the Department fully recognizes the importance of the issues under the Confrontation Clause. But, he said, the careful conditions that the rule specifies go a long way to shield the proposal from constitutional infirmity. The rule, he assured the committee, will not be taken lightly. Using the rule will be expensive because the government will likely also have to pay for defense counsel. And it will have to get the cooperation of the State Department and the approval of the foreign country involved. Moreover, the trial court has to approve taking the deposition, and it can do so only after having made all the requisite findings specified in the rule.

A member pointed out that subparagraph 15(c)(3)(F) is the only part of the rule that refers to the government. The rest of the rule would also apply to defendants. Professor Beale explained that the federal defenders had wanted to limit the rule to government witnesses, but the advisory committee did not agree. In fact, the committee had been surprised that the suggestion had come from the defenders. The defenders, she said, had suggested that they would very rarely use the device. As a matter of policy, though, the advisory committee believed that the rule should not be just a one-way street.

A participant suggested that the proposed amendments will have an impact on the admissibility of declarations against penal interest under FED. R. EVID. 804(b)(3). To admit evidence under Rule 804, he said, a party must show that the declarant was not only absent from trial, but cannot be deposed. Under proposed Rule 15, and its expanded possibilities to conduct depositions, declarations against penal interest will be admissible less often.

A member expressed strong opposition to the proposed amendments, asserting that they were directly contrary to the Confrontation Clause. He said that the committee should not recommend rules that are constitutionally debatable. That alone, he said, should be grounds for not proceeding further.

In addition, he said, there was no empirical support for the rule. Normally, he said, the advisory committee asks for data and background information. In this case, the procedures differ widely from country to country. The advisory committee needs to have a clearer understanding of the different procedures and requirements imposed around the world. It also needs to know more specifically how big a problem the government actually faces without the rule. In addition, he said, many additional procedural safeguards required by the developing case law had not been included in the proposed amendments, including some of the requirements set forth in the *Ali* case. The key question, he said, is not how rarely the proposed authority will be exercised, but whether it is fundamentally sound.

He noted that subparagraph 15(c)(3)(F) specifies that the procedure may only be invoked if there is "an important public interest." But, he noted, the government claims an important public interest in every prosecution. The provision, consequently, is not meaningful. Subparagraph 15(c)(3)(E) requires that the defendant be able to participate in

the deposition by "reasonable means," but that standard is too vague. In addition, it is unclear how the government will show that the witness cannot be obtained. He concluded that if this rule were so important to the country, it should be enacted by legislation, rather than by rule.

A member pointed out that the Confrontation Clause can still be used to prevent any testimony elicited at the foreign deposition from being used in court. Mr. Ogden agreed that admissibility questions must still be addressed in each case, but said that courts are competent to make the case-by-case decisions that the rule requires.

A member suggested that the rule would be very helpful because it would provide national uniformity on a matter that individual courts currently have to struggle with. She said that trial courts need guidance and a framework for dealing with foreign depositions. Another participant said, however, that it may be premature for the committee to bless the specific proposed procedure and suggested that the Department might consider adopting an internal guide rather than seeking a rule.

Professor Beale said, though, that the proposed rule would create a desirable template to guide the Department and the courts on taking depositions. She pointed out that the rule is procedural in nature. She emphasized that the evidence produced at the deposition still must face other obstacles under the Confrontation Clause and the Federal Rules of Evidence when the government tries to admit the testimony.

Another member expressed concern about proceeding by rule at this point and questioned whether the advisory committee had pinned down all the procedures correctly. Perhaps some additional flexibility may be needed. Moreover, she suggested, the advisory committee may be underestimating how often the defense might want to invoke the rule. The principal justification for the rule is that the courts need some procedural guidance on taking foreign depositions. But in light of the lack of definitive information at this point, it might be better to defer on a rule and consider providing other kinds of guidance to the courts, such as memoranda, white papers, or studies.

A participant asked whether the Department of Justice had considered proceeding with an internal Department memorandum based on the existing case law, rather than seeking a controversial rule. Mr. Ogden responded that the Department had conducted an extensive review of the matter and had taken an official position that seeking a federal rule is the best way to proceed.

A member added that the government faces many thorny problems in meeting the requirements and restrictions of other countries' laws. The federal courts, therefore, may need more advice on how to deal with these problems as a practical matter. Mr. Ogden responded that the Department would not even proceed if there were legal impediments in a particular country. He pointed out that the rule is based on the actual cases that had arisen to date and reflects the current case law.

A member responded, though, that it would be very difficult to obtain additional relevant information without actually having a rule in place. A procedural rule is needed, he said, and the Confrontation Clause and rules of evidence are in place to protect against constitutional violations. The Department of Justice, he said, still has obstacles to face, even if it follows the procedures specified in the rule. He recommended proceeding with the rule and monitoring how it works in practice.

Mr. Ogden noted that the Department had some concern about proposed subparagraph 15(c)(3)(F), which requires the government to establish that the prosecution advances "an important public interest." He pointed out that the requirement would lead to a determination by the court as to what is important, and what is not. The Department, he said, was prepared instead to have the certification made internally by a high-level Department official, at least as high as the Assistant Attorney General level.

Judge Tallman explained that the reason for including the provision was to respond to criticisms by the defense community that it would be too easy for a prosecutor to use the foreign deposition procedure without some greater level of accountability. The defense bar had argued for a certification by the Attorney General. He suggested that the committee might strike subparagraph (F) entirely upon assurance that the Department will impose an internal requirement of high-level approval.

A participant suggested that it is misleading to say that only a few cases will be brought under the rule because there are in fact many cases in this area. The key issue, he said, is preserving the defendant's right to face-to-face confrontation. The situations presented by the rule are similar in ways to those involved in confrontation of child witnesses. He suggested that the advisory committee was, in effect, trying to apply *Maryland v. Craig,* 497 U.S. 836 (1990), and the various statutes that implement it.

Judge Rosenthal concluded that members had expressed discomfort on two levels:

1. Whether the case had been made that the rule is needed.

2. Whether the committee knows enough about how the rule might be applied, even though it would be difficult to obtain that information in advance without having a rule in place.

She added that the advisory committee also needed to decide whether subparagraph 15(c)(3)(F) was needed, and whether the committee was confident enough to let the rule go forward in final form to the Judicial Conference and the Supreme Court. She noted that the advisory committee had drafted the rule very carefully to respond to all the expressed concerns. She pointed out that Justice Scalia's 2002 opinion was specific in setting forth the minimal requirements for a rule, and the rule that the advisory committee had drafted appeared to respond well to the concerns he had articulated. One member suggested that

although the draft rule contained all the minimal requirements, it might also specifically state that a judge may impose other requirements.

A participant noted that FED. R. EVID. 804(b)(1) (hearsay exceptions – declarant unavailable) deals with admissibility and has its own standard that requires a party to be afforded a trial-like "opportunity" to examine the witness before the witness's testimony may be admitted. He suggested that the criminal provision be dovetailed with the evidence rule or use the language of the evidence rule. Admissibility of the deposition evidence at trial is governed by the standards of FED. R. EVID. 804(b)(1), so a different standard is not needed in proposed FED. R. CRIM. P. 15(c). In fact, if the evidence is admissible under FED. R. EVID. 804(b)(1), it will probably also satisfy the Confrontation Clause under the pertinent case law. But for the evidence to meet the Rule 804(b)(1) standard, the defendant needs a "trial-like" opportunity to confront the witness.

A member moved to adopt the proposed amendments to Rule 15 with two changes:

1. delete proposed subparagraph 15(c)(3)(F) – on the representation of the Department of Justice that before invoking the revised Rule 15, it will require internal approval by an Assistant Attorney General; and

2. amend subparagraph 15(c)(3)(E) to conform it to the provisions of FED. R. EVID. 804(b)(1).

Professor Beale reported, though, that the advisory committee had been persuaded not to import the standard of FED. R. EVID. 804(b)(1) into the revised criminal rule. She explained that the district court evaluates motive and opportunity under Rule 804(b)(1) after the deposition has been taken, while ruling on admissibility of the evidence at trial. The standard in proposed FED. R. CRIM. P. 15(c), however, is different. It articulates the requirements that must be met for approving taking the deposition in the first place.

The member restated his motion to approve the proposed amendments with just one change – elimination of subparagraph 15(c)(3)(F).

The committee by a vote of 9-1 approved the motion and voted to forward the proposed amendments to Rule 15 for approval by the Judicial Conference.

FED. R. CRIM. P. 32.1

Judge Tallman reported that the proposed amendments to Rule 32.1(a)(6) (revocation or modification of probation or supervised release) had been requested by the Federal Magistrate Judges Association. They would resolve ambiguities and clarify in two ways the burden of proof for obtaining release in revocation and modification proceedings.

First the amended rule would specify the precise statutory provision that governs the revocation proceeding – 18 U.S.C. § 3143(a)(1), rather than all of 18 U.S.C. § 3143(a), which contains other provisions that do not apply and have caused some confusion. Second, the current rule places the burden of proof on the person seeking release, but it does not specify the standard. The revised rule specifies that the person facing revocation or modification must establish by "clear and convincing evidence" that he or she will not flee or pose a danger to any other person or the community.

He noted that an additional change to the rule, to allow video conferencing of these proceedings, was pending separately before the advisory committee for approval to publish as part of the package of technology-related amendments.

A member pointed out that the proposed committee note stated that the amendment reflected established case law. But only a single Ninth Circuit case and a district court case had been cited. She questioned whether the case law was in fact uniform across the country and expressed some concern that the committee may be making a substantive change in the law in some circuits. Professor Beale responded that the case law is, in fact, clear, as is the statute itself. She added that the defense bar did not object to the rule specifying the standard of "clear and convincing evidence."

Professor Coquillette recommended that the case references and the last sentence of the note be eliminated. He pointed out that case law is subject to change. Judge Tallman agreed with the suggestion.

The committee unanimously by voice vote approved the proposed amendments to the rule for approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 12 and 34

Judge Tallman reported that the proposed amendments to Rule 12 (pleadings and pretrial motions) would conform the rule to the Supreme Court's decision in *United States v. Cotton,* 535 U.S. 625 (2002). They would also save judicial resources by encouraging defendants to raise all objections to an indictment before trial. Rule 12(b)(3)(B), he said, sets forth the general rule that a defendant must raise before trial any claim alleging a defect in the indictment or information. But it also specifies that the particular objection that the indictment fails to state an offense may be raised at any time. This exception was justified originally on the ground that the latter claim is jurisdictional in nature and therefore may be raised at any point.

In *Cotton*, however, the Supreme Court abandoned that justification by holding that a defective indictment does not deprive a court of jurisdiction. A claim that the indictment fails to allege an essential element of an offense does not raise jurisdictional

issues. The claim can be forfeited if not timely raised. Judge Tallman explained that the Department of Justice had asked the advisory committee to amend Rule 12 to require explicitly that a claim that an indictment fails to state an offense be raised before trial.

The proposed amendment would do so. But it also contains a fail-safe provision in proposed Rule 12(e)(2), which states that a court may grant relief from the waiver either: (1) for good cause; or (2) if the indictment's omission of an element of the offense has prejudiced a substantial right of the defendant. The proposed amendment to Rule 34 (arresting judgment) would conform that rule to the proposed amendment to Rule 12(b).

Judge Tallman explained that the advisory committee had wrestled with whether to require a defendant to show both good cause and prejudice to obtain relief from the waiver, but it had concluded that only one or the other should be required. Professor Beale added that the advisory committee wanted to provide judges with greater leeway in dealing with this specific type of error and noted that it is a different standard from that required for relief from other errors.

Several members suggested that "forfeiture" would be a better choice of words than "waiver" because the context makes clear that Rule 12 deals with forfeiture. Moreover, the Supreme Court used the term "forfeiture" in *Cotton.* Judge Tallman replied that "waiver" has always been used in the text of Rule 12, even though "forfeiture" might be a better term if the advisory committee were writing the rule on a clean slate. He suggested that the proposed rule could be published using the term "forfeiture," and the advisory committee could solicit public comments regarding the appropriate choice. It was also suggested that both terms could be used in the publication and placed in brackets to solicit comments from bench and bar.

Some members questioned whether the proposed amendments were completely consistent with *United States v. Cotton* and suggested that there are alternative possible readings of the holding. Judge Rosenthal noted that revising the remedy provision of the rule, Rule 12(e)(2), would pose many drafting difficulties. Professor Beale explained that the advisory committee had struggled with drafting that portion of the rule and suggested that it might be advisable, in light of the comments of the members, for the advisory committee to explore the issues further and consider additional adjustments in the rule. A member suggested that the advisory committee also take a fresh look at all the criminal rules that use the term "waiver," rather than "forfeiture."

Due to the many issues surrounding the provision, Judge Rosenthal suggested that the best course of action might be for the matter to be returned to the advisory committee for further study.

The committee without objection by voice vote approved returning the proposed amendments to Rules 12 and 34 to the advisory committee for further study.

TECHNOLOGY RULES

Judge Tallman reported that the proposed amendments started with a commission given to Judge Anthony J. Battaglia and his subcommittee to review all the Federal Rules of Criminal Procedure with a view towards improving them to take account of technology changes. He added that technology has now reached the stage of high reliability and accessibility that the rules should take specific account of it and make it easier for prosecutors, law enforcement officers, judges, and others to use the system. The proposed changes deal largely with the issuance of arrest and search and seizure warrants, and with the use of video conferencing to avoid having to bring people into court.

FED. R. CRIM. P. 1

Judge Tallman reported that the proposed amendment to Rule 1 (scope of the rules and definitions) would broaden the definition of "telephone," "telephonic," or "telephonically" to include any form of live electronic voice communication. The definition is intended to be sufficiently broad in order to cover both recent changes and future changes in technology. The committee note, moreover, also speaks of services for the hearing impaired.

Judge Tallman emphasized that use of the technological options is discretionary. Judges, prosecutors, and officers may continue to handle proceedings in the traditional way. But he pointed out that there are many areas in the country where the distance between a judicial officer and a law enforcement officer is great. The proposed rules authorize the use of technology to close the distance gap and improve enforcement of the law.

Professor Beale pointed out that live communication will continue to be required for taking an oath. Under proposed new Rule 4.1, "[t]he judge must place under oath — and may examine — the applicant and any person on whose testimony the application is based." The proposed rules preserve live communication in person by video or telephone.

FED. R. CRIM. P. 3

Judge Tallman reported that Rule 3 (complaint) would be amended to require that a complaint be made under oath before a magistrate judge "except as provided in Rule 4.1."

FED. R. CRIM. P. 4

Judge Tallman explained that Rule 4 (arrest warrant or summons on a complaint) sets forth the procedure for obtaining a warrant on a complaint. The amended rule adopts the concept of a "duplicate original" that has been in Rule 41 for years, dealing with issuance of search warrants by telephone. The term will now be used for other kinds of

process besides search warrants. Under proposed Rule 4(d), all warrant applications may be presented to a magistrate judge by telephone or other reliable electronic means.

FED. R. CRIM. P. 4.1

Judge Tallman explained that new Rule 4.1 (complaint, warrant, or summons by telephone or other reliable electronic means) was the heart of the technology amendments. It would place in one rule the procedure for obtaining electronic process of all kinds. The new rule extends the Rule 41(e)(3) procedures governing the issuance of a warrant on information transmitted by reliable electronic means to the issuance of a complaint and summons. Testimony taken by electronic means must be recorded in writing, but a written summary or order suffices if the testimony is limited to attesting to the contents of a written affidavit submitted by reliable electronic means. The applicant must prepare a "duplicate original" of a complaint, warrant, or summons and must read or otherwise transmit its contents verbatim to the judge. When approved by the judge, the duplicate original may serve as the original. The officer, who may be many miles away, may use the duplicate original as an original.

The judge always has discretion to require that the oath be taken in person. In addition, the judge may modify the complaint, warrant, or summons, and transmit the modified version to the applicant electronically, or direct the applicant to modify the proposed duplicate original. The judge, for example, might require more facts or alter the warrant to specify clearly what the agent is authorized to search and seize. The officer at the other end makes the changes and sends them to the judge.

Rule 4.1 also contains a provision in subsection (c), using language now found in Rule 41, specifying that "absent a finding of bad faith, evidence is not subject to suppression." This is derived from the decision of the Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984).

Professor Beale pointed out that the new Rule 4.1 has a number of innovations not found in the current Rule 41. The oath, for example, would be broken out from the rest of the conversation between the law enforcement officer and the magistrate judge. She noted that many judges interpret the current rule to require the judge to write down everything said during the conversation. The new rule allows the judge to prepare only a summary or a brief order (rather than a verbatim record of the conversation) if the conversation was limited to an oath affirming a written affidavit. The rest of the conversation may be recorded. Judge Tallman added that the rule should produce a better record of all the proceedings from start to finish. It may also encourage greater use of the warrant process by law enforcement officers, which is good as a matter of public policy.

A member questioned the numbering of the new rule as FED. R. CRIM. P. 4.1, asking why it should not be placed later in the body of rules. Judge Tallman responded

that the advisory committee had considered the matter and had decided to set forth the procedures immediately following the first place in the rules where they could be invoked – after Rule 4, governing issuance of arrest warrants. He suggested that the rule could easily be moved to a later position in the rules. A member suggested soliciting comments from the public on the appropriate numbering of the rule.

FED. R. CRIM. P. 9

Judge Tallman reported that amended Rule 9 (arrest warrant or summons on an indictment) would allow an arrest warrant on an indictment or information to be issued electronically.

FED. R. CRIM. P. 40

Rule 40 (arrest for failing to appear in another district or for violating conditions of release set in another district) would be amended to permit the use of video conferencing to conduct a Rule 40 appearance, with the defendant's consent. The procedure would be discretionary with the court.

FED. R. CRIM. P. 41

Rule 41 (search and seizure) would be substantially reduced in size because its provisions for issuing a telephonic warrant would be moved to the new Rule 4.1. In addition, the revised rule provides that electronic means may be used for the return of a search warrant or tracking warrant.

FED. R. CRIM. P. 43

Rule 43 (defendant's presence) would be amended to include a cross-reference to Rule 32.1. In addition, the court may permit misdemeanor proceedings to be handled by video conferencing.

A member noted that Rule 43 specifies that the entire proceedings in misdemeanor cases could be conducted without the defendant's presence. It would be possible, for example, for the arraignment, plea, and sentencing all to be conducted without the judge verifying in person that the defendant is the correct person before the court. But, she noted, that is already the case under the current Rule 43.

Judge Tallman explained that waiver of the defendant's presence should normally be used only for traffic cases and other low-penalty offenses, even though the language of the rule is broad enough to cover more serious offenses. He said that the system has to rely on the sound judgment of magistrate judges to determine which cases to apply the rule in. He observed, for example, that the advisory committee had heard of several cases

where prison inmates want to get rid of cases outstanding against them to avoid negative effect on their prison condition and opportunities. Professor Beale added that the proposed rule is an improvement over the current rule because it adds the alternative of conducting the proceedings by video conferencing to the current option of proceeding without the presence of the defendant at all.

FED. R. CRIM. P. 49

Rule 49 (serving and filing papers) would be amended to conform the criminal rules with the civil rules regarding electronic filing of documents. It is derived from FED. R. CIV. P. 5(d)(3), and makes clear that a paper filed electronically in compliance with a court's local rule is a written paper.

A participant stated that in the recent restyling of the evidence rules, the term "telephone" had been changed to "phone" in order to capture cell phones. It was recommended that the terminology in the criminal rules and the evidence rules be consistent. During a break in the proceedings, representatives of the criminal and evidence advisory committees and the Style Subcommittee conferred and agreed to change the references in the proposed restyled evidence rules back from "phone" to "telephone."

Professor Beale added that the package of technology amendments also included an amendment to Rule 6(e) (recording and disclosing grand jury proceedings), previously approved by the Standing Committee for publication. It would authorize the taking of a grand jury return by video conferencing.

FED. R. CRIM. P. 32.1

Judge Tallman pointed out that the amendments to Rule 32.1 (revocation or modification of probation or supervised release) were somewhat different from the other technology amendments. They deal with defendants who are subject to revocation or modification of probation or supervised release. At the defendant's request, the court would be able to allow the defendant to participate in the proceedings through video conferencing. The advisory committee, he said, had reviewed the case law and had seen no suggestion that the defendant's waiver would be inconsistent with the Sentencing Reform Act.

A participant suggested that the revised rule appeared to carry the negative implication that a judge may not modify conditions by telephone. In revocation cases where a defendant is far away, a judge may simply telephone the defendant and the probation officer to resolve a matter without the need for a hearing. The rule, he said, should not imply that the judge cannot continue to resolve matters in this manner. As written, though, it appears to apply to all modifications of probation or supervised release.

It should, instead, provide that in appropriate cases a judge may simply use the telephone to resolve problems.

Professor Beale stated that the situation posed is different from that contemplated in the proposed amendments to Rule 32.1. In the former, the defendant is waiving a hearing altogether. The judge then chooses to speak personally with the defendant and the probation officer by telephone and be assured that the defendant's waiver is voluntary and knowing. The proposed amendments to Rule 32.1, by contrast, address holding a hearing – which the defendant has not waived – by video conferencing at the defendant's request.

Another participant suggested that there may be a potential conflict between Rule 32.1(c)(2)(A), specifying that a hearing is not required if the person waives it, and the proposed new Rule 32.1(f) because the latter applies to the entire rule and could be construed as replacing Rule 32.1(c)(2)(A). Another participant recommended adding a heading to Rule 32.1(f).

Professor Beale reported that Rule 32.1 was the only rule in the technology package that had produced any controversy during the advisory committee's deliberations. Some members, she said, had expressed concerns over a judge being able to revoke release by video conference. A member added that the appropriate procedure depends in large measure on what the judge is going to do. Sometimes the modifications will be very minor in nature, but other times they may be more serious. She pointed out that before video conferencing became widely available, judges simply used the telephone to handle many different circumstances. Video conferencing is easier to use than in the past, but it is still a big step to take and is more difficult and inconvenient than using the telephone.

A participant suggested adding a sentence to the committee note to address the issue. Another suggested that the note state that whenever a defendant is entitled to waive a hearing completely, the proceeding may be conducted by telephone. Others agreed that additional language would be helpful.

A participant pointed out that use of the word "proceedings" in Rule 32.1(f) may create some ambiguity. In reality, the rule should refer to a "hearing" conducted by video conference. That term, she said, is used several other places in the rule.

A participant questioned the need for the rule because a defendant may waive the hearing altogether. Professor Beale explained that the rule sets forth alternatives. The advisory committee had decided to exempt Rule 32.1 proceedings from the requirements of Rule 43 because there had been some uncertainty among the members as to whether Rule 43 applied to revocation and modification proceedings.

The committee without objection by voice vote approved Rule 32.1 for publication with additional language to be included in the committee note

emphasizing that use of a telephone is still a permissible alternative to video conferencing in appropriate circumstances.

The committee then without objection by voice vote approved all the other proposed technology-related amendments for publication, including the amendments to Rule 6 approved for publication by the committee in June 2008.

Judge Tallman pointed out that proposed amendments to Rule 47 (motions and supporting affidavits) had been withdrawn by the advisory committee.

Judge Rosenthal extended special thanks to Judge Battaglia for spearheading the technology project and producing a superb package of amendments.

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 6, 2009 (Agenda Item 8).

Amendments for Final Approval

FED. R. EVID. 804(b)(3)

Judge Hinkle reported that the proposed amendment to Rule 804(b)(3) (statement against interest) would change the hearsay exception regarding the statement against penal interest of an unavailable witness. The existing rule, he said, requires a defendant in a criminal case to show "corroborating circumstances" in order to have the statement admitted. But the government introducing a statement does not have the same requirement. The amended rule, he said, would apply the corroborating circumstances requirement to the government as well. The Department of Justice, he said, did not object to the amendment, and there had been no written comments objecting to its substance. One comment from a defense lawyer had recommended that corroborating circumstances be deleted as a requirement for a defendant, but the committee did not consider that course appropriate as a substantive matter. The public hearings had been cancelled because no witnesses had asked to testify on the rule.

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

Amendments for Publication

RESTYLED FED. R. EVID. 101-1103

Judge Hinkle reported that the written agenda materials provided background information about the restyling project. The effort to restyle the federal rules started back in the early 1990s under the leadership of committee chair Judge Robert Keeton and committee member Professor Charles Alan Wright. It has been a long and successful process over several years, though not without controversy. Some had thought that it would not be worth the effort to change the rules, even if the end product were improved. But, in fact, the four restyling projects have been very successful, and the rules are clearly much better than before.

He pointed out that accuracy and clarity are the most important values in the restyling effort. It is important, he said, for a judge or a lawyer to be able to look at an evidence rule and know immediately what it means. Consistency is also important, but it does not rise to the same level as the other two values.

The process used to restyle the Federal Rules of Evidence, he said, had started with Professor Kimble rewriting each of the rules in the first instance. Then Professor Capra made his changes. The drafts were then sent to the advisory committee and the style subcommittee of the Standing Committee for comment. The rules were reviewed carefully several times and at several levels. In addition, some members of the Standing Committee had already made specific comments on the proposed rules.

But, he said, that will not be the end of the process. The advisory committee was only asking for authority to publish the rules for comment. It should receive a number of public comments, each of which will be reviewed in 2010. He thanked Judge Hartz for spotting inconsistencies, and he thanked Jeffrey Barr and Stacey Williamson of the Administrative Office for great staff support in getting the package completed.

Judge Hinkle reported that the advisory committee was presenting Rules 801-1103 to the Standing Committee for the first time. All the other rules in the restyling package had been presented to the committee at earlier meetings. The advisory committee was now seeking authority to publish the entire set of evidence rules for comment. It would also like authority to make further corrections before publication.

Judge Hinkle noted that several changes had been made in the restyled hearsay rules from "offered to prove" to "admitted to prove," and the advisory committee will highlight the terminology in the publication. Professor Capra explained that the change had started with the restyling of Rule 803(22). There, it would be a substantive change from the current rule to use "offered to prove" because the judge plays a fact-finding role and so admissibility is not controlled by the purpose of the proffering party. Once the

advisory committee had made the change from "to prove" to "admitted to prove", he said, it decided to change all the instances of "offered to prove" to "admitted to prove" because the judge has some role as to each piece of evidence offered. What is determinative is not what the lawyer states the evidence is offered for, but what the judge admits it to prove. He said that the advisory committee wanted to hear from the public on the use of the terminology so that it can make a reasoned choice on it.

A member questioned the use of unnumbered bullet points, rather than numbers, noting that bullet points cannot be cited. He added, though, that it is not a big problem because a whole rule may be cited. Professor Kimble explained that the style guidelines call for using bullet points where there is no preferred rank order in a list. In Rule 407 (subsequent remedial measures), for example, there is no way to cite each of the measures listed. In addition, he pointed out that when a list is created with numbered divisions, a dangling paragraph may follow. That dangling paragraph cannot be effectively cited. Where a list is created within a rule, with text before the list and more text after the list, bullets work better than numbers. The member pointed out, though, that not every series in the restyled rules appeared to have been broken out and expressed a strong preference for breaking out and numbering all series and lists.

The member also questioned the use of dashes, rather than commas. In some cases, he pointed out, dashes are used to set off an aside, which is an appropriate usage. But often what appears within the dashes follows from what is said before the dash, which is inappropriate usage. Professor Kimble responded that dashes may properly be used for both purposes. They are often more successful than commas, especially if there are other commas in a sentence. One member emphasized that dashes make the text easier to read, and that is the key objective of the restyling effort.

The committee without objection by voice vote approved the proposed amendments for publication, subject to the advisory committee making additional, minor style changes.

Professor Capra thanked Professor Kimble for truly excellent work. He also said that the style subcommittee had accomplished amazing work with a very fast turn around time. In short, he said, the process had been fantastic. Judge Hinkle added that very special thanks are due to Professor Capra for his major, indispensable role in the restyling project.

GUIDELINES ON STANDING ORDERS

Judge Rosenthal reported that the primary changes made in the text of the proposed guidelines since the last meeting had been to strike just the right balance between concerns that the draft guidelines had placed insufficient limits on individual-judge orders

and countervailing concerns that individual-judge orders are entirely appropriate and useful. She thanked Judge Raggi for her help in improving the product to address those competing concerns.

Judge Rosenthal pointed out that the revised guidelines distinguish between substantive rules of practice, on the one hand, and rules of courtroom conduct, on the other. The former should clearly be set forth in local rules of court. But rules of courtroom conduct are appropriate for orders by individual judges. The revised second paragraph of Guideline 4, she said, now makes that distinction clear. In addition, at the request of the Department of Justice a new bullet point had been added to the internal administrative matters listed in Guideline 1 to suggest that standing orders are appropriate to deal with courthouse or courtroom access for individuals with disabilities. In addition, Guidelines 7 and 8 had been supplemented.

Judge Rosenthal reported that a reference had been added to Bankruptcy Rule 9029. She noted that the Advisory Committee on Bankruptcy Rules had suggested that the guidelines address some special needs of the bankruptcy courts. The bankruptcy courts, for example, sometimes need greater flexibility to use standing orders to effect urgently needed changes during the time that it takes for local rules to be put into effect. The recent implementation of the massive 2005 bankruptcy reform legislation demonstrated the value of operating under standing orders.

The committee, she said, planned to send the guidelines to the Judicial Conference with a request that they be distributed to the courts for consideration as non-binding guidance. But Mr. Rabiej suggested that it might be more effective to have the Judicial Conference actually adopt the guidelines. Some members agreed and said that it would be easier to get courts to adopt them if they are approved by the Conference itself. Judge Rosenthal added that the Conference might also be informed that the committee is considering bankruptcy guidelines and may return with additional recommendations.

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

SEALED CASES

Judge Hartz reported that the sealing subcommittee would meet again immediately following the Standing Committee meeting. He pointed out that the subcommittee included a representative from each advisory committee, a Department of Justice representative, and a clerk of court. He noted that the subcommittee was only addressing cases that are entirely sealed, not sealed documents within a case.

He reported that Tim Reagan of the Federal Judicial Center had completed a good deal of work on sealed cases, having examined all the cases filed in 2006 at both the district and appellate levels. He had found no bankruptcy cases in which an entire case had been sealed by a court. He added that roughly 10,000 magistrate-judge and miscellaneous cases had been found, and a few will be sampled from each court. Most of these matters involve initial proceedings pending formal initiation of a criminal prosecution.

Judge Hartz pointed out that no indications of abuse had been found. In fact, he said, he had only seen one case that he thought might have been sealed improperly. The decisions of courts to seal cases, he said, appear to be reasonable. Nevertheless, there may be some other issues that should be addressed, such as how long cases should remain sealed. Apparently, there is a problem in that some courts appear to overlook the task of unsealing cases.

He noted that the subcommittee would consider whether there should be standards on when cases should be sealed. The subcommittee would also consider whether there should be procedural requirements for sealing, who should order the sealing, whether there should be notice of sealing, whether a record should be made of the reasons for sealing, and whether there should be time limits on the length of sealing. He pointed out that the subcommittee would also look at whether certain administrative measures should be pursued, such as adding special prompts to the courts' electronic case management and filing systems. Finally, the subcommittee would consider whether there is a need for additional empirical research or public hearings.

Judge Hartz pointed out that the subcommittee had contemplated at the start of the project that it would discover that most sealed cases might be national security cases. But, in fact, very few involve national security. The biggest group of sealed cases, he said, are criminal cases that involve danger to witnesses and victims. There are also a number of qui tam civil cases.

He thanked Professor Richard Marcus for participating in all the meetings and working exceptionally hard on the project. Judge Rosenthal added that Professor Marcus is a recognized national authority on sealing.

LONG-RANGE PLANNING

Judge Rosenthal pointed out that the rules committees have been deeply involved in long-range planning for several years. Some examples of current activities include the ongoing work of the privacy subcommittee, the convening of the upcoming conference at Duke Law School on the state of civil litigation, and the major projects of the Advisory Committee on Bankruptcy Rules to reformulate the appellate bankruptcy rules and

modernize the bankruptcy forms. She invited all the participants to send the Administrative Office staff any additional ideas for long-range planning that the committees should consider.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi reported that she had been asked to chair the special subcommittee to examine implementation of the new privacy rules. The subcommittee, she said, would hold its first meeting immediately following the Standing Committee meeting. She pointed out that the subcommittee included several colleagues from the Court Administration and Case Management Committee, which had established the original Judicial Conference privacy policies later incorporated into the 2007 amendments to the w1federal rules. She added that Professor Capra will be the reporter for the subcommittee, and Judge Hinkle will participate. She said that the subcommittee would address the following areas:

1. Are amendments needed to the national privacy rules?

2. Are there problems in criminal cases and sealed cases that need to be addressed further? Should, for example, the Judicial Conference policy that certain documents not be included in the public case file be stated expressly in the national rules? If so, should the list of documents be expanded or contracted?

3. Should the policy of placing the burden on the parties to redact sensitive information be reviewed with an eye towards simplification? Are there viable alternatives that will assure protection of private information without imposing undue burden on the courts? Is more public education needed to inform the parties of their obligations to redact private information from transcripts?

4. Are additional efforts needed to implement the existing rules, especially in response to Congressional concerns that personal information still appears in some court case files?

NEXT MEETING

The committee agreed to hold the next meeting in January 2010, with the exact date to be set after the members have had a chance to consult their calendars. By e-mail, the committee later decided to hold the meeting on Thursday and Friday, January 7-8, 2010, in Phoenix, Arizona.

Respectfully submitted,

Peter G. McCabe
Secretary

3A

JAMES C. DUFF
Director

JILL C. SAYENGA
Deputy Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

December 7, 2009

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Fifteen bills were introduced in the 111th Congress that affect the Federal Rules of Practice, Procedure, and Evidence. A list of the relevant pending legislation is attached. Since the last Committee meeting, we have been focusing on the following matters:

Journalists' Shield

On February 11, 2009, Representative Rick Boucher (D-VA) introduced the "Free Flow of Information Act of 2009." (H.R. 985, 111th Cong., 1st Sess.) Senator Arlen Specter (D-PA) introduced a similar bill, the "Free Flow of Information Act of 2009," on February 13, 2009. (S. 448, 111th Cong., 1st Sess.) Both bills are similar to legislation introduced in the last two Congresses. The legislation generally gives journalists a limited privilege to withhold the identity of a confidential informant or other confidential information unless a court determines by a preponderance of the evidence that: (1) the party seeking the information has exhausted all reasonable alternative sources for the information; (2) in a criminal matter, there are reasonable grounds to believe that a crime has occurred and that the information sought is essential to the investigation, prosecution, or defense; (3) in a non-criminal matter, the information sought is essential to the successful completion of that matter; (4) nondisclosure of the information is contrary to public interest; and (5) in any matter in which the information sought could reveal the source's identity, disclosure is necessary to: (a) prevent imminent and substantial harm to national security, (b) prevent imminent death or significant bodily injury, or (c) determine who has disclosed a trade secret of significant value in violation of state or federal law, individually identifiable health information, or nonpublic personal information of any consumer in violation of federal law.

On March 31, 2009, the House passed H.R. 985 by voice vote. The Senate Judiciary Committee has considered a series of proposed amendments to S. 448 at several meetings held to mark up pending legislation. On September 10, 2009, the Senate Judiciary Committee adopted a substitute amendment to S. 448 by unanimous consent. This amendment narrowed the field of reporters eligible for protection under the bill to those whose "primary intent" is to "investigate events and procure material in order to disseminate to the public news or information concerning,

local, national, or international events or other matters of public interest." The amendment also provides for in-camera review and an expedited appeal process.

Several Judiciary Committee members expressed concerns that S. 448 would not sufficiently protect national security. In late October, Senators Arlen Specter and Charles E. Schumer (D-NY) reached an agreement with the Obama administration that addressed the national security concerns raised about the bill. At its November 18, 2009, markup session, the Senate Judiciary Committee adopted a substitute amendment offered by Senator Specter that incorporated this agreement. Specifically, the substitute amendment provides that: (1) the burden would be on media organizations to show that the disclosure of information sought in criminal matters would be contrary to the public interest; (2) the Attorney General would be required to certify that the government sought the information in accordance with Justice Department guidelines for subpoenaing the media; and (3) the shield would not apply to national security matters in which the government seeks to prevent future acts. The Committee considered S. 448 again on December 3, 2009, but adjourned after considering only two amendments. No further action has been taken on the legislation, and the next markup session has been scheduled for December 10, 2009.

Cameras in the Courtroom

On March 19, 2009, Senator Charles Grassley (R-IA), joined by Senators Charles Schumer (D-NY), Patrick Leahy (D-VT), Arlen Specter (R-PA), Lindsey Graham (R-SC), Russ Feingold (D-WI), John Cornyn (R-TX), and Richard Durbin (D-IL), introduced the "Sunshine in the Courtroom Act of 2009." (S. 657, 111th Cong., 1st Sess.) On June 25, 2009, Representatives William Delahunt (D-MA) and Dan Lungren (R-CA) introduced a similar bill, the "Sunshine in the Courtroom Act of 2009." (H.R. 3054, 111th Cong., 1st Sess.) The legislation is similar to bills introduced in the past two Congresses and generally provides that the presiding judge of proceedings in the district court, court of appeals, and Supreme Court, may, at their discretion, permit the photographing, electronic recording, broadcasting, or televising of any court proceeding over which that judge presides. The bill also provides that the presiding judge must not allow electronic media coverage if it is determined that such coverage would constitute a violation of the due process rights of any party.

Under the Senate bill, the legislation also authorizes the Judicial Conference to promulgate advisory guidelines on the management and administration of electronic media coverage. The Conference must, however, promulgate mandatory guidelines, no later than six months after enactment, that shield certain witnesses from electronic media coverage, including minors, crime victims, and undercover law enforcement officers. Media coverage is not permitted until the Conference promulgates the mandatory guidelines.

On February 13, 2009, Senator Specter introduced S. 446, a bill to permit the televising of Supreme Court proceedings. (111th Cong., 1st Sess.) This bill is identical to H.R. 429, which

was introduced on January 9, 2009, by Representative Ted Poe (R-TX). The bills require the Supreme Court to permit television coverage of all open sessions unless the Court decides, by majority vote of the justices, that allowing such coverage would constitute a violation of the due process rights of one or more parties before the Court. On November 5, 2009, Senator Specter introduced S. Res. 339, a resolution expressing the sense of the Senate that the Supreme Court should permit live television coverage of its proceedings unless it decides that allowing such coverage would constitute a due process violation of the rights of one or more parties. (111th Cong., 1st Sess.) No further action has been taken on the legislation.

On July 23, 2009, Secretary Duff sent a letter to the Senate Judiciary Committee expressing strong opposition to the Senate camera bill. (See attached.) Secretary Duff sent a second letter to the Senate Judiciary Committee on September 23, 2009, stating that the Conference would oppose S. 448, the "Free Flow of Information Act of 2009," if S. 657, the "Sunshine in the Courtroom Act of 2009," was added as an amendment to S. 448. No further action has been taken on the legislation.

The Judicial Conference does not speak for the Supreme Court on the issue of cameras or other policy matters. The Conference strongly opposes cameras in the trial courts (*see, e.g.*, JCUS-SEP 94, p. 46; JCUS-SEP 99, p. 48), but has authorized each court of appeals to decide for itself whether to permit the taking of photographs and allow radio and television coverage of oral argument. (JCUS-MAR 96, p. 17.) (The Second and Ninth Circuits allow broadcast coverage of their proceedings upon approval of the presiding panel.) There is no provision governing the televising of proceedings in the Civil Rules, but Criminal Rule 53 prohibits the use of cameras in criminal proceedings.

Protective Orders and Sealed Settlements

On March 5, 2009, Senators Herb Kohl (D-WI) and Lindsay Graham (R-SC) introduced the "Sunshine in Litigation Act of 2009." (S. 537, 111th Cong., 1st Sess.) One week later, Representatives Robert Wexler (D-FL) and Jerry Nadler (D-NY) introduced the same proposal as H.R. 1508. (111th Cong., 1st Sess.) The legislation provides, among other things, that before a judge enters a protective order under Civil Rule 26(c), the judge must make findings of fact that the discovery sought is not relevant for the protection of public health or safety or, if relevant, the public interest in disclosing potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information and the protective order is narrowly drawn to protect only the privacy interest asserted. The bill would apply to protective orders sought by motion as well as agreed to by stipulation. The bills are similar to legislation introduced in the last several Congresses.

On June 4, 2009, the House Judiciary Subcommittee on Commercial and Administrative Law held a hearing on H.R. 1508. Judge Kravitz testified at the hearing on behalf of the Rules

Committees. A written statement submitted by Judge Kravitz at the hearing is attached. No further action has been taken on the legislation.

Notice Pleading

On July 22, 2009, Senator Arlen Specter (D-PA) introduced the "Notice Pleading Restoration Act of 2009." (S. 1504, 111th Cong., 1st Sess.) The legislation provides that courts must not dismiss a complaint under Civil Rule 12 except under the standards set forth in *Conley v. Gibson*, 355 U.S. 41 (1957), effectively overruling the Supreme Court's decisions in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). Although several hearings have been held on the legislation, no further action has been taken.

On November 19, 2009, Representative Jerrold Nadler (D-NY) introduced a similar bill, "Open Access to Courts Act of 2009." (H.R. 4115, 111th Cong., 1st Sess.) The bill provides, among other things, that a court must not dismiss a complaint under Civil Rule 12 unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him or her to relief. No further action has been taken on the legislation.

Other Developments of Interest

Time Computation — Bankruptcy Rules. The time-computation rules amendments to the Federal Rules of Appellate Procedure, Federal Rules of Bankruptcy Procedure, Federal Rules of Civil Procedure, and Federal Rules of Criminal Procedure and parallel changes to 28 statutory deadlines took effect on December 1, 2009.

Last month, Congressional staffers raised concerns that time changes to 12 Bankruptcy Rules that shorten the time to act from 15 to 14 days would cause problems for debtors and bankruptcy attorneys who are unaware of the changes. To address the concerns, the staffers proposed legislation that would delay for six months the effective date of the 12 Bankruptcy Rules amendments. Judge Rosenthal, Judge Swain, and AO staff successfully convinced Congressional staffers that actions taken by the Rules Committees and the Judiciary would obviate the need for legislation.

On November 16, 2009, Judge Rosenthal and Judge Swain sent a memorandum to the courts advising them that it is the position of the Bankruptcy Rules Committee that for a six-month transition period starting on December 1, 2009, a filing that was timely under the current versions of the 12 rules but late under the amended rules should be treated as the product of "excusable neglect" within the Rule 9006(b)(1) provision authorizing an enlargement of time requested after the deadline has expired. The memorandum also requested that courts continue their efforts to publicize the time-computation rules changes. (See attached.)

Habeas Rule 11. New Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts and new Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts also took effect on December 1, 2009. The new rules require the district court to issue or deny a certificate of appealability simultaneously with the filing of the final order disposing of the petition or motion on the merits. The National Association of Criminal Defense Lawyers raised a concern about the last two sentences of amended Rule 11 that provides that the denial of a certificate of appealability is not separately appealable and that motions for reconsideration of the denial of a certificate do not extend the time to file an appeal from the underlying judgment denying habeas relief. Congressional staffers asked for clarification on the amended rules, and Judge Tallman provided a memorandum clarifying the amendments do not change or limit existing law on the tolling effect of timely motions for reconsideration of the judgment denying relief or the deadlines for filing a notice of appeal challenging the underlying judgment. (See attached.) A similar clarification was sent in a memorandum by Secretary Duff to the courts on November 25, 2009. (See attached.)

Heather Williams

Attachments

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

December 9, 2009

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter briefly comments on the "Notice Pleading Restoration Act of 2009" (S. 1504) and the "Open Access to Courts Act of 2009" (H.R. 4115) on behalf of the Judicial Conference Standing Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure. Both S. 1504 and H.R. 4115 would effectively amend the Rules of Civil Procedure that set the standard for pleading a cause of action and for dismissing a complaint because it fails to do so. The bills would affect Rule 12(b)(6), Rule 12(c), Rule 12(e), and Rule 8, other related rules, and statutes. We ask that this letter be made a part of the record of the hearing entitled "Has the Supreme Court Limited Americans' Access to Courts?" held by the Senate Committee on the Judiciary on December 2, 2009.

Both S. 1504 and H.R. 4115 recognize the important role of the Rules Committees of the Judicial Conference under the Rules Enabling Act (28 U.S.C. §§ 2071-2077) in drafting the procedural rules that apply in the federal courts, including the rules for pleadings and motions to dismiss. Seventy-five years ago, Congress enacted the Rules Enabling Act. The Act charged the judiciary with the task of neutral, independent, and thorough analysis of the rules and their operation. Congress designed the Rules Enabling Act rulemaking process in 1934 and reformed it in 1988 to produce the best rules possible by ensuring broad public participation and thorough review by the bench, the bar, and the academy. The internet has made this process truly transparent and inclusive. As recent experience with Civil Rules 26 and 56 has demonstrated, the Rules Committees are dedicated to obtaining the type of reliable empirical information

needed to enact rules that will serve the American justice system well and will not produce unintended harmful consequences. The different House and Senate bills demonstrate some of the difficulties in an area as fundamental and delicate as articulating the pleading standard for the many different kinds of cases filed in the federal courts.

The Civil Rules Committee and the Standing Committee are at this moment deeply involved in precisely the type of work Congress required in the Rules Enabling Act. The Committees, working with the Federal Judicial Center, are gathering and studying the information needed both to understand how Rule 8, Rule 12, and other affected rules – which have not been changed substantively since 1938 – have in fact worked since the Supreme Court decided *Twombly* and *Iqbal* and to consider changes to the text of these rules and other related rules.

At the request of the Civil Rules Committee, the law clerk for the Chair of the Standing Committee wrote a memorandum describing the case law since *Iqbal* was decided. That memorandum sets out circuit court opinions issued to date that examine *Iqbal* or discuss how district courts are to apply *Iqbal* to different kinds of cases, and sets out many district court opinions discussing *Iqbal*. The memorandum is available on the Rules Committees' website.[1] The memorandum will be regularly updated as additional cases are decided, and the updates will be posted on the Rules Committees' website as well.

Charts and graphs setting out preliminary data from the federal courts' dockets on the filing, granting, and denying of motions to dismiss after *Twombly* and *Iqbal* are also on the Rules Committees' website.[2] This data will be updated periodically, and those updates will be posted on that website. The Federal Judicial Center is gathering more detailed data on motions to dismiss, which will also be made available. In addition, even before *Iqbal*, the Rules Committees had begun a thorough reexamination of how pleading and discovery are actually working in federal cases and what changes should be considered. Major empirical work on discovery costs and burdens – which are inextricably linked to pleading standards – is underway in preparation for a May 2010 conference at the Duke Law School hosted by the Civil Rules Committee. The Rules Committees will of course make the results of this work available to all.

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[1] http://www.uscourts.gov/rules/Memo%20re%20pleading%20standards%20by%20circuit.pdf

[2] http://www.uscourts.gov/rules/Motions%20to%20Dismiss.pdf

Thank you for considering these comments and the information the Committees' work will produce.

We look forward to continuing to work with you on these issues, which are vital to the federal civil justice system that we are all dedicated to preserving and improving.

Sincerely,

Lee H. Rosenthal
Chair
Standing Committee on
Rules of Practice and Procedure

Mark R. Kravitz
Chair
Advisory Committee on Civil Rules

cc: Honorable Sheldon Whitehouse
Honorable Arlen Specter

Identical letter sent to: Honorable Jeff Sessions

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

July 23, 2009

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Senator Sessions:

The Judicial Conference of the United States strongly opposes the "Sunshine in the Courtroom Act of 2009," S. 657 (111th Cong.), because it provides for the use of cameras in federal trial court proceedings. Cameras can affect behavior in court proceedings. Cameras can even affect whether a case goes to trial. Cameras can also affect courtroom security of judges, witnesses, employees, and U.S. marshals. This is of particular concern in light of recent increased threats to federal judges. The Judicial Conference believes that these and other negative affects of cameras in trial court proceedings far outweigh any potential benefit. The Judicial Conference also opposes the legislation because it would empower any appellate court panel to permit cameras in their courtroom rather than retain that power within the management of each circuit.

The Judicial Conference bases its policy and opposition to the use of cameras in the federal trial court proceedings on decades of experience and study. The Conference considered the issue in a number of different situations and contexts – including a pilot project – and concluded that the presence of cameras in federal trial court proceedings is not in the best interest of justice. Federal judges must preserve each citizen's right to a fair and impartial trial. Of course, federal trials have long been open to the media and public. But it is the studied judgment of the Judicial Conference that cameras can

interfere with a fair and impartial trial. Thus, the use of cameras in trial courts would differ substantially from the impact of their use in legislative, administrative, or ceremonial proceedings.

Cameras can interfere with a fair trial in numerous ways. First, broadcasting proceedings can affect the way trial participants behave. Television cameras can intimidate litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding and are involved in it through no action of their own. Witnesses might refuse to testify or alter their stories when they do testify if they fear retribution by someone who may be watching the broadcast.

Second, and similarly, camera coverage can create privacy concerns for many individuals involved in the trial, such as witnesses and victims, some of whom are only tangentially related to the case but about whom very personal and identifying information might be revealed. For example, efforts to discredit a witness frequently involve the revelation of embarrassing personal information. Disclosing embarrassing facts or accusations in a courtroom already creates challenges in court proceedings. Those challenges would be multiplied enormously if that information were aired on television with the additional possibility of taping and replication. This concern can have a material effect on a witness's testimony or on his or her willingness to testify at all.

Third, and as a consequence of the aforementioned points, camera coverage could also become a potent negotiating tactic in pretrial settlement discussions. Parties may choose not to exercise their right to trial because of concerns regarding possible camera coverage. Thus, allowing cameras could cause a "chilling effect" on civil rights litigation; plaintiffs who have suffered sex or age discrimination may simply decide not to file suit if they learn that they may have to relive the incident and have that description broadcast to the public at large. Or, parties litigating over medical issues may not wish to reveal their personal medical history and conditions to a broad audience.

Fourth, the presence of cameras in a trial court will encourage some participants to become more dramatic, to pontificate about their personal views, to promote commercial interests to a national audience, or to lengthen their appearance on camera. Such grandstanding is disruptive to the proceedings and can delay the trial.

The Federal Judiciary is therefore very concerned that the effect of cameras in the courtroom on participants would be to impact negatively the trial process and thereby interfere with a fair trial.

In addition to affecting the fairness of a trial, the presence of cameras in a trial courtroom also increases security and safety issues. Broadcasting the images of judges and court employees, such as court reporters, courtroom deputies, and law clerks, makes them more easily identified as targets by those who would attempt to influence the outcome of the matter or exact retribution for an unpopular court ruling. Threats against judges, lawyers, and other participants could increase even beyond the current disturbing level. Cameras create similar security concerns for law enforcement personnel present in the courtroom, including U.S. marshals and U.S. attorneys and their staffs.

Finally, regarding the courts of appeals, in 1996 the Judicial Conference adopted the position that each circuit may decide for itself whether to permit photographic, radio, and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Conference may adopt. This policy ensures consistency within each circuit. The Sunshine in the Courtroom Act of 2009 would allow panels within the circuits to determine whether cameras will be allowed at their proceedings, rather than leaving the initial decision to the circuit's management. This will result in differing treatment of litigants within each circuit. Currently, the circuit-wide policies avoid piecemeal and ad hoc resolutions of the issue among the various panels convened within a court of appeals, and that approach is therefore better than the proposed legislative change.

* * *

For the foregoing reasons, the Judicial Conference of the United States strongly opposes legislation that allows the use of cameras in federal trial court proceedings and permits individual panels to use of cameras in all courts of appeals instead of deferring to each circuit's rules on such use.

Thank you for the opportunity to provide the position of the Judicial Conference on this legislation. The legislation raises issues of vital importance to the Judiciary. If we may be of additional assistance to you, please do not hesitate to contact our Office of Legislative Affairs at 202-502-1700.

Sincerely,

James C. Duff
Secretary

cc: Members, Senate Judiciary Committee

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

September 23, 2009

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Senator Sessions:

As you are aware, the Judicial Conference of the United States strongly opposes S. 657, the "Sunshine in the Courtroom Act of 2009." Please be advised that the Judicial Conference would also oppose S. 448, the "Free Flow of Information Act of 2009," if S. 657 is added as an amendment. Until now, the Conference has not taken a position on media shield legislation, such as S. 448.

The Judicial Conference's opposition to legislation, such as S. 657, that would allow for the use of cameras in federal trial court proceedings is more fully explained in my letter to you of July 23, 2009. (See enclosed letter.) As explained in that letter, cameras can affect behavior, security of persons in the courtroom, such as judges, witnesses, and law enforcement, and even whether a case goes to trial. Cameras can also interfere with a fair and impartial trial. In short, the negative effects of cameras in the trial courts far outweigh any potential benefit.

Consequently, the Conference would oppose S. 448 if cameras legislation were added to it. If you have any questions, please contact our Office of Legislative Affairs at 202-502-1700.

Sincerely,

James C. Duff

James C. Duff
Secretary

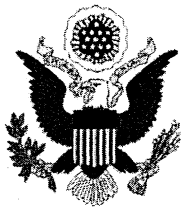
Enclosure

cc: Members, Senate Judiciary Committee

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
AND ITS
ADVISORY COMMITTEE ON CIVIL RULES

STATEMENT OF
THE HONORABLE MARK R. KRAVITZ

JUDGE, UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT



FOR THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON
THE "SUNSHINE IN LITIGATION ACT OF 2009," H.R. 1508

JUNE 4, 2009

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building, Washington, DC 20544

STATEMENT OF JUDGE MARK R. KRAVITZ
ON BEHALF OF THE RULES COMMITTEES OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and members of the subcommittee, I am Judge Mark R. Kravitz of the United States District Court for the District of Connecticut, and I chair the Judicial Conference's Advisory Committee on Civil Rules. I am submitting this statement on behalf of the Conference's Committee on Rules of Practice and Procedure and its Advisory Committee on Civil Rules.

The Rules Committees oppose the "Sunshine in Litigation Act of 2009" (H.R. 1508), which was introduced on March 12, 2009, on the ground that it effectively amends the Federal Rules of Civil Procedure outside the rulemaking process, contrary to the Rules Enabling Act (28 U.S.C. §§ 2071-2077). Under the Rules Enabling Act, proposed amendments to federal court rules are subjected to extensive scrutiny by the public, bar, and bench through the advisory committee process, carefully considered by the Judicial Conference, and then presented after approval by the Supreme Court to Congress. It is an exacting, transparent, and deliberative process designed to provide exhaustive scrutiny to every proposed amendment of the rules, by many knowledgeable individuals and entities, so that lurking ambiguities can be unearthed, inconsistencies removed, problems identified, and improvements made. It is also a process that relies heavily upon empirical research, rather than anecdotal information, to identify problems and to ensure that any solution is workable, effective, and does not create unintended consequences. Direct amendment of the federal rules through legislation, even when the rulemaking process has been completed, circumvents the careful safeguards that Congress itself established in the Rules Enabling Act.

After years of careful and thorough study through the Rules Enabling Act process, the Judicial Conference Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules did not recommend that the Judicial Conference approve a change to Rule 26(c) similar to that proposed in the Sunshine in Litigation Act and its predecessors. Because the Rules

Committees made no such recommendation, the Judicial Conference has not been asked nor has it taken a formal position on the specifics of the Act's provisions. The Rules Committees did not recommend such a change to Rule 26(c) for three principal reasons. First, the bill is unnecessary. Second, it would impose an intolerable burden on the federal courts. Third, it would have significant adverse consequences on civil litigation, including making litigation more expensive and making it more difficult to protect important privacy interests.

I am no stranger to these issues. In my former life as a private practitioner, I represented numerous media companies in their efforts to gain access to court proceedings and to information held by state and federal governments. As a judge, I have worked with litigants to craft responsible protective orders that safeguard the legitimate privacy interests of the parties while at the same time protecting the public's constitutionally grounded interest in open judicial proceedings.

Discovery Protective Orders

H.R. 1508 is intended to prevent parties from using the federal judicial process to conceal matters that harm the public health or safety by imposing requirements for issuing discovery protective orders under Rule 26(c) of the Federal Rules of Civil Procedure. The bill would require a judge presiding over a case, who is asked to enter a protective order governing discovery under Rule 26(c), to make findings of fact that the information obtained through discovery is not relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted.

Bills that would regulate the issuance of protective orders in discovery under Rule 26(c), similar to H.R. 1508, have been introduced regularly since 1991. Under the Rules Enabling Act, the Rules Committees studied Rule 26(c) to inform themselves about the problems identified by

these bills and to bring the strengths of the Rules Enabling Act process to bear on the problems that might be found. Under that process, the Rules Committees carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, held public hearings, and initiated and evaluated empirical research studies.

The Rules Committees also considered specific alternative proposals to amend Rule 26(c), intended to address the problems identified in H.R. 1508's predecessor bills, including an amendment to Rule 26(c) that expressly provided for modification or dissolution of a protective order on motion by a party or nonparty. The Rules Committees published the proposed amendments through the Rules Enabling Act process. Public comment led to significant revisions, republication, and further extensive public comment. At the conclusion of this process, the Judicial Conference decided to return the proposals to the Rules Committees for further study. That study included the work described above.

The Empirical Data Identify Scope of Protective Order Activity

In the early 1990's, the Rules Committees began studying pending bills, like H.R. 1508, requiring courts to make particularized findings of fact that a discovery protective order would not restrict the disclosure of information relevant to the protection of public health and safety. The study raised significant concerns about the potential for revealing, in the absence of a protective order, confidential information that could endanger privacy interests and generate increased litigation resulting from the parties' objections to, and refusal to voluntarily comply with, the broad discovery requests that are common in litigation. The Rules Committees concluded that the issues merited further consideration and that empirical information was necessary to understand whether there was a need to regulate the issuance of discovery protective orders by changing Rule 26(c).

In 1994, the Rules Committees asked the Federal Judicial Center (FJC) to do an empirical study on whether discovery protective orders were operating to keep information about public safety

or health hazards from the public. The FJC completed the study in April 1996. It examined 38,179 civil cases filed in the District of Columbia, Eastern District of Michigan, and Eastern District of Pennsylvania from 1990 to 1992. The FJC study showed that discovery protective orders were requested in only about 6% of the approximately 220,000 civil cases filed in federal courts in that time period. Most of the requests are made by motion. Courts carefully review these motions and deny or modify them in a substantial proportion. Less than one-quarter of the requests are made by party stipulations and the courts usually accept them.

In most civil cases in which discovery protective orders were entered, the empirical study showed that the orders did not impact public safety or health. In its study, the FJC randomly selected 398 cases that had protective order activity. A careful inspection of the data reveals that the protective orders targeted by H.R. 1508 represent only a small fraction of civil cases in federal courts. Only half of the 398 cases studied by the FJC involved a protective order restricting disclosure of discovery materials. The other half of the 398 cases involved a protective order governing the return or destruction of discovery materials or imposing a discovery stay pending some event or action. In addition, in those cases in which a protective order was entered, a little more than 50% were civil rights and contract cases and only about 9% were personal injury cases, in which public safety or heath issues might conceivably arise. The empirical data showed no evidence that protective orders create any significant problem of concealing information about public hazards. A copy of the study is attached to this statement.

Information Shows No Need for the Legislation

The Rules Committees studied the examples of cases in which information was hidden from the public commonly cited to justify legislation such as H.R. 1508. In these cases, the Rules Committees found that there was information available to the public sufficient to protect public health or safety. The pertinent information was found in court documents available to the public,

e.g., pleadings and motions, as well as in reported stories in the media. In particular, the complaints filed in these civil cases typically contained extensive information describing the alleged party's actions sufficient to inform the public of any health or safety issue. In product defect cases, for example, complaints typically, at a minimum, identify the allegedly defective product or alleged wrongdoer, identify the accident or event at issue, and describe the harm. Complaints are readily accessible to the public, the press and regulatory agencies. Indeed, remote access to court filings, now available in virtually all federal courts, makes it easier, more efficient, and inexpensive to find complaints with allegations that raise public health and safety issues.

The Rules Committees also examined the case law to determine whether the court rulings in cases in which parties file motions for protective orders in discovery justified legislation. The case law showed that federal courts review such motions carefully and often deny or modify them to grant only the protection needed, recognizing the importance of public access to court filings. The case law also showed that courts often reexamine protective orders if intervenors or third parties raise concerns. *See, e.g., In re Zyprexa Prods. Liab. Litig.*, 253 F.R.D. 69, 208-09 (E.D. N.Y. 2008). That conforms with my own personal experience as a lawyer in representing media companies. The FJC study corroborated the findings of the case law study and showed that judges denied or modified a substantial proportion of motions for protective orders.

The bill's limited practical effect further undermines its justification. The potential benefit of the proposed legislation would be minimized by the general rule that what is produced in discovery is not public information. The Supreme Court recognized this limit when it noted in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984), that discovery materials, including "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, ... and, in general, they are conducted in private as a matter of modern practice." Information produced in discovery is not publicly available unless it is filed

with the court. Information produced in discovery is not filed with the court unless it is part of or attached to a motion or other submission, such as a motion for summary judgment. Consequently, if discovery material is in the parties' possession but not filed, it is not publicly available. The absence of a protective order does not require that any party share the information with the public. The proposed legislation would have little effect on public access to discovery materials not filed with the court.

Even when a protective order is entered, it usually does not result in the sealing of all, or even many, documents or information submitted to the court. Case law shows that courts are rightly protective of the public's right to gain access to information and documents submitted to the courts. Thus, my court of appeals, the Second Circuit, has held that "[d]ocuments used by parties moving for, or opposing summary judgment should not remain under seal *absent the most compelling reasons*." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006) (quoting *Joy v. North,* 692 F.2d 880, 893 (2d Cir. 1982)); *see Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004) (stating that judicial records enjoy a "presumption of openness," a presumption that is rebuttable only "upon demonstration that suppression is essential to preserve higher values and is narrowly tailored to serve that interest" (internal quotations omitted)). The Court of Appeals has instructed District Courts that "a judge must carefully and skeptically review sealing requests to insure that there really is an extraordinary circumstance or compelling need." *Video Software Dealers Assoc. v. Orion Pictures, Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24, 27 (2d Cir. 1994) (citation omitted).

The Legislation Would Impose Intolerable Burdens on the Federal Civil Justice System

The scope of discovery has dramatically changed since legislation like H.R. 1508 was first introduced in 1991. Most discoverable information is now stored in computers and the growth in electronically stored information has exploded. Relatively "small" cases often involve huge

volumes of information. The discovery requests in cases filed in federal court typically involve gigabytes of electronically stored information or about 50,000 pages per gigabyte. Cases requiring intensive discovery can involve many gigabytes, and some cases are now producing terabytes of discoverable information, or about 50 million pages.

Requiring courts to review discovery information to make public health and safety determinations in every request for a protective order, no matter how irrelevant to public health or safety, will burden judges, further delay pretrial discovery and inevitably increase the cost of civil litigation in federal courts. It is important to recognize that most protective orders are requested *before* any documents are exchanged among the parties or submitted to the court and that it would be difficult, if not impossible, for the court to make the review the legislation requires. Furthermore, as a practical matter, "smoking guns" will be difficult, if not impossible, for the judge to recognize in the mountain of documents that must be reviewed, all without the assistance of the requesting party's counsel or expert. Indeed, the requirement to review all this information would make it infeasible for most federal judges even to consider undertaking the review.

Under current law, by contrast, motions for protective orders typically do not require the judge, who at that point has little information about the case, to examine all documents and information that may be produced in discovery to try to determine in advance whether any of it is relevant to protecting public health or safety. Instead, the parties generally request protective orders that seek confidentiality for categories of documents or information. The lawyers for each side can present arguments and the judge can evaluate whether particular categories of documents should be covered by a protective order and what the terms should be. If entered by the judge, protective orders provide the parties and the court with a procedural framework that allows the parties to produce documents and information much more quickly than would be the case if item-by-item judicial examination was required.

Moreover, protective orders also usually provide that after documents are produced in discovery, the receiving party may challenge whether particular documents or information should be kept confidential. Such challenges are often made at a time when the judge knows more about the case, and they typically involve a much smaller subset of the documents produced in discovery. In considering such requests, the judge also has the benefit of input from the lawyers after they have received the documents and know what they contain. Current law also allows federal courts to tailor protective orders to be sure that they are no broader than necessary. Finally, when documents are filed in court, the common law or constitutional interest of the public in open proceedings will apply.

The Legislation Would Have Significant Adverse Consequences

Since bills like H.R. 1508 were first introduced in 1991, obtaining information contained in court documents has become much easier. Court records no longer enjoy the practical obscurity they once had when the information was available only on a visit to the courthouse. The federal courts now have electronic court filing systems, which permit public remote electronic access to court filings. Electronic filing is an inevitable development in this computer age and is providing beneficial increases in efficiency and in public access to court filings. But remote public access to court filings makes it more difficult to protect confidential information, such as competitors' trade secrets or individuals' sensitive private information. If particularized fact findings are required before a discovery protective order can issue, parties in these cases will face a heavier litigation burden, and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal or confidential information.

Parties rely on the ability to obtain protective orders in voluntarily producing information to each other without the need for extensive judicial supervision. They do this for many valid reasons, including saving costs that would otherwise be incurred in carefully screening every document produced in discovery. If obtaining a protective order required item-by-item judicial

consideration to determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, parties would be less likely to seek or rely on such orders and less willing to produce information voluntarily, leading to discovery disputes. Requiring parties to litigate and courts to resolve such discovery disputes would impose significant costs and burdens on the discovery process and cause further delay. Such satellite disputes would increase the cost of litigation, lead to orders refusing to permit discovery into some information now disclosed under protective orders, add to the pressures that encourage litigants to pursue nonpublic means of dispute resolution, and force some parties to abandon the litigation.

The burdensome requirements of H.R 1508 are especially objectionable because they would be imposed in cases having nothing to do with public health or safety, in which a protective order may be most needed and justified. As noted, the empirical data showed that about one-half of the cases in which discovery protective orders of the type addressed in H.R. 1508 are sought involve contract claims and civil rights claims, including employment discrimination. Many of these cases involve either protected confidential information, such as trade secrets, or highly sensitive personal information. In particular, civil rights and employment discrimination cases often involve personal information not only about the plaintiff but also about other individuals who are not parties, such as fellow employees. As a result, the parties in these categories of cases frequently seek orders protecting confidential information and personal information exchanged in discovery. H.R 1508 would make it more difficult to protect confidential and personal information in court records to the detriment of parties filing civil rights and employment discrimination cases.

Conclusion

The Rules Committees consistently have concluded that provisions affecting Rule 26(c), similar to those sought in H.R. 1508, are not warranted and would adversely affect the administration of justice. The Committees' substantive concerns about the proposed legislation

result from the careful study conducted through the lengthy and transparent process of the Rules Enabling Act. That study, which spanned years and included research to gather and analyze empirical data, case law, academic studies, and practice, led to the conclusion that no change to the present protective-order practice is warranted because: (1) the empirical evidence showed that discovery protective orders did not create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery would become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that added conditions before any discovery protective order could be entered would impose significant burdens on the court system and costs on litigants; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available in any event.

If the Committee is aware of empirical information that suggests that protective orders have become a problem of some kind, the Rules Committees would be pleased to take a look at the empirical information and consider whether any rules changes are needed in response. To date, the Rules Committees have not been directed to any such empirical information. In the absence of demonstrated abuses, there seems no reason to burden litigants and courts with the requirements of H.R. 1508.

Confidentiality Provisions in Settlement Agreements

The Empirical Data Shows No Need for the Legislation

H.R. 1508 would also require a judge asked to issue an order approving a settlement agreement to make findings of fact that such an order would not restrict the disclosure of information relevant to the protection of public health or safety or, if it is relevant, that the public interest in the disclosure of potential health or safety hazards is outweighed by the public interest in maintaining the confidentiality of the information and that the protective order requested is no

broader than necessary to protect the privacy interest asserted. In 2002, the Rules Committees asked the Federal Judicial Center to collect and analyze data on the practice and frequency of "sealing orders" that limit disclosure of settlement agreements filed in the federal courts. The Committees asked for the study in response to proposed legislation that would regulate confidentiality provisions in settlement agreements. H.R. 1508 contains a similar provision. In April 2004, the FJC completed its comprehensive study surveying civil cases terminated in 52 district courts during the two-year period ending December 31, 2002. In those 52 districts, the FJC found a total of 1,270 cases out of 288,846 civil cases in which a sealed settlement agreement was filed, about one in 227 cases (0.44%). A copy of the study is attached to this statement.

The FJC study then analyzed the 1,270 sealed-settlement cases to determine how many involved public health or safety. The FJC coded the cases for the following characteristics, which might implicate public health or safety: (1) environmental; (2) product liability; (3) professional malpractice; (4) public-party defendant; (5) death or very serious injury; and (6) sexual abuse. A total of 503 cases (0.18% of all cases) had one or more of the public-interest characteristics. That number would be smaller still if the 177 cases that were part of two consolidated MDL (multidistrict litigation) proceedings were viewed as two cases because they were consolidated into two proceedings before two judges for centralized management.

After reviewing the information from the 52 districts, the FJC concluded that there were so few orders sealing settlement agreements because most settlement agreements are neither filed with the court nor require court approval. Instead, most settlement agreements are private contractual obligations.

The Rules Committees were nonetheless concerned that even though the number of cases in which courts sealed a settlement was small, those cases could involve significant public hazards. A follow-up study was conducted to determine whether in these cases, there was publicly available

information about potential hazards contained in other records that were not sealed. The follow-up study showed that in the few cases involving a potential public health or safety hazard and in which a settlement agreement was sealed, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints generally contained details about the basis for the suit, such as the defective nature of a harmful product, the dangerous characteristics of a person, or the lasting effects of a particular harmful event. Although the complaints varied in level of detail, all identified the three most critical pieces of information regarding possible public health or safety risks: (1) the risk itself; (2) the source of that risk; and (3) the harm that allegedly ensued. In many of the product-liability cases, for example, the complaints went further and identified a particular feature of the product that was defective, or described a particular way in which the product failed. In the cases alleging harm caused by a specific person, such as civil rights violations, sexual abuse, or negligence, the complaints consistently identified the alleged wrongdoer and described in detail the causes and extent of the alleged injury. These findings were consistent with the general conclusions of the FJC study that the complaints filed in lawsuits provided the public with "access to information about the alleged wrongdoers and wrongdoings." A copy of the follow-up study is attached to this statement.

The Legislation is Unlikely to be Effective

The FJC study shows that only a small fraction of the agreements that settle federal-court actions are filed in the court. Most settlement agreements remain private contracts between the parties. On the few occasions when parties do file a settlement agreement with the court, it is to make the settlement agreement part of the judgment to ensure continuing federal jurisdiction, not to secure court approval of the settlement. Such agreements would not be affected by prohibitions, like those in H.R. 1508, prohibiting a court from entering an order "approving a settlement agreement that would restrict disclosure" of its contents.

Conclusion

Based on the relatively small number of cases involving a sealed settlement agreement and the availability of other sources — including the complaint — to inform the public of potential hazards in cases involving a sealed settlement agreement, the Rules Committees concluded that it was not necessary to enact a rule or a statute restricting confidentiality provisions in settlement agreements. Once again, if the Committee is aware of empirical information that suggests that sealed settlements have become a larger problem, the Rules Committees would be pleased to take a look at the empirical information and consider whether any rules changes are needed in response.

I thank you for the opportunity to appear before you today.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

CARL E. STEWART
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

July 6, 2009

Honorable Steve Cohen
Chairman, Subcommittee on Commercial
and Administrative Law
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Chairman Cohen:

On behalf of the Judicial Conference's Committee on Rules of Practice and Procedure and the Civil Rules Advisory Committee, I want to thank you for giving me the opportunity to share with your Subcommittee the concerns that the Rules Committees have with H.R. 1508. In accordance with your request, I enclose a few transcript edits as well as answers to the Subcommittee's additional questions. As a supplement to my answers to the Subcommittee's additional questions, I attach a comprehensive compilation of federal court decisions regarding the standards for entry of a protective order, the standards for modifying or dissolving a protective order, and the standards for sealing documents or pleadings that are filed with the court. I also provide an Executive Summary of the case law compilation.

The Rules Committees stand willing to assist the Subcommittee in its deliberations regarding H.R. 1508 in any way that you believe would be useful. Once again, I want to thank you and the Subcommittee for the courtesies you have shown me and the Rules Committees.

Sincerely yours,

Mark R. Kravitz

Enclosures

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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ROBERT L. HINKLE
EVIDENCE RULES

May 1, 2009

MEMORANDUM

To: Chief Judges, United States Courts

From: Honorable Lee H. Rosenthal
Chair, Committee on Rules of Practice and Procedure

RE: CHANGES TO FEDERAL RULES THAT REQUIRE AMENDMENT OF TIME DEADLINES IN LOCAL RULES AND STANDING ORDERS **(ACTION REQUESTED)**

On March 26, 2009, the Supreme Court approved amendments to Appellate Rule 26, Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45. The changes are the result of a major project to make all the federal rules on calculating time periods simpler, clearer, and consistent. The amendments have been sent to Congress and are due to take effect on December 1, 2009.

The current rules exclude intermediate weekends and holidays for some short time periods, resulting in inconsistency and unnecessary complication. The amended rules are consistent and simple: count intermediate weekends and holidays for all time periods. All the deadlines in the Federal Appellate, Bankruptcy, Civil, and Criminal Rules were reviewed and most short periods extended to offset the shift in the time-computation rules and to ensure that each period is reasonable. The amended rules will affect some local rules and standing orders, especially those that set short deadlines. To maintain consistency with the national rules and to avoid confusion, we ask courts to review their local rules and standing orders and make necessary adjustments. It is important that the adjustments take effect on December 1, the same date as the national rule changes.

Neither the review nor the adjustments should be difficult. The ability to electronically search local rules and standing orders greatly simplifies the task. For example, an electronic search of any district court's local rules, using the key words "day," "week," and "hour," should quickly identify all or almost all the time deadlines that need adjustment.

The simple "days are days" approach to computing deadlines has the effect of shortening current periods less than 11 days in appellate, civil, and criminal proceedings and 8 days in bankruptcy proceedings. Virtually all short periods in the federal rules were lengthened to offset the change in the computation method — 5-day periods became 7-day periods and 10-day periods became 14-day periods — in effect maintaining the status quo. Periods shorter than 30 days were revised to be multiples of 7 days, to reduce the likelihood of ending on weekends.

Additionally, time periods in a few rules were extended because they were too short and impractical.[1] In total, 91 rules were changed. Congress passed legislation on April 27 adjusting time periods in 28 statutes that are similarly affected by the federal rules time-computation amendments (H.R. 1626). The legislation is awaiting the President's signature. Both the federal rules amendments and the legislation will take effect on December 1, 2009.

Amendments to local rules and standing orders are necessary because the federal rules for calculating time periods also apply to them. In most cases, only slight adjustments will be needed. A 10-day period that was effectively 14 days (because two weekends were excluded) should be lengthened to 14 days; a 5-day period that was effectively 7 days (because one weekend was excluded) should be lengthened to 7 days. Ideally, periods of less than 30 days should be revised to be a multiple of 7 days. Using terms such as "business days" or "court days" to describe how to compute a time period should be revised to use "days." Local provisions that are designed to fit with a period stated in the federal rules should be adjusted consistent with the federal rule changes. These conforming amendments to the local rules and standing orders should take effect on December 1, 2009, consistent with the effective date of the federal rules amendments.

Other changes to the federal time-computation rules affect how to tell when the last day of a period ends, how to compute hourly time periods, how to calculate a time period when the clerk's office is inaccessible, and how to compute backward-counted periods that end on a weekend or holiday. Courts are also asked to review their local rules and standing orders to determine whether any amendments are necessary to be consistent with these changes, especially provisions defining when the clerk's office is "inaccessible" for filing purposes.

The time-computation rules amendments are at www.uscourts.gov/rules. Separate power point presentations, which you may find helpful, explaining the amended rules and their operation in appellate, bankruptcy, and district court proceedings are at http://www.uscourts.gov/rules/presentations.html. If you have any questions, please contact John K. Rabiej, Chief, Rules Committee Support Office, at (202) 502-1820.

Thank you.

cc: Circuit Executives
District Court Executives
Clerks, United States Courts

[1] App. R. 4(a)(4)(A)(vi) (adjusting time to file a Civil Rule 60 motion that tolls appeal time); App. R. 4(a)(6)(B) (adjusting time for motion to reopen time to file appeal); Civ. R. 6(c) (adjusting time to serve motion and any affidavit supporting motion in opposition); Civ. R. 50, 52, and 59 (adjusting time to file certain posttrial motions); Civ. R. 54(d)(1) (adjusting timing of taxation of costs); Civ. R. 56 (establishing presumptive deadline for motions); Cr. R. 29, 33, and 34 (adjusting time to file certain posttrial motions and motion for judgment of acquittal); and Cr. R. 35 (adjusting deadline to file motion to correct technical errors in sentencing).

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

November 16, 2009

MEMORANDUM

To: Chief Judges, United States District Courts
Chief Judges, United States Bankruptcy Courts

From: Honorable Lee H. Rosenthal
Chair, Committee on Rules of Practice and Procedure

Honorable Laura Taylor Swain
Chair, Advisory Committee on Bankruptcy Rules

RE: TRANSITION TO SHORTENED DEADLINES UNDER CERTAIN OF THE AMENDED TIME-COMPUTATION RULES **(IMPORTANT INFORMATION)**

As you are aware, the time-computation amendments to the Federal Rules of Bankruptcy Procedure, Civil Procedure, Criminal Procedure, and Appellate Procedure go into effect on December 1, 2009. These amendments implement a consistent method of calculating time periods throughout the federal rules. This consistent method is to count every day, instead of the current method of excluding weekends and holidays for some periods but not others. Congress has enacted changes to 28 statutory time periods affecting court proceedings to be consistent with this new, simplified computation approach. Courts across the country have revised their local rules effective December 1 to be consistent with the national rule and statutory changes. We now write to ask your further assistance in ensuring a smooth transition to the amended rules.

Most of the amendments lengthen time periods by a few days, to offset the effect of counting weekends and holidays and to express time periods of less than 30 days in 7-day multiples, for simplicity and ease of application. The result of these two changes in most of the rules is either to maintain the status quo or lengthen periods: 5-day periods will become 7-day periods, and 10-day periods will become 14-day periods. There are twelve Bankruptcy Rules that are an exception to the general lengthening in the rules.[1] These twelve rules have time periods that will be *shortened* by one day. These twelve rules now have 15-day periods; as amended, these rules will have 14-day periods, consistent with all the other rules that are set out in 7, 14, 21, or 28-day increments. Of special note are the deadlines in Rule 1007(c) for filing schedules, statements, and other documents; in Rule 3015(b) for filing a chapter 13 plan; and in Rule 8009(a) for filing appellate briefs.

[1] The affected rules are Bankruptcy Rules 1007, 1019, 1020, 2015, 2015.1, 2016, 3015, 4001, 4002, 6004, 6007, and 8009.

Despite the extensive notification and education efforts that have been undertaken in advance of the time-computation national and local rule changes, it is possible that some attorneys and parties will be unaware after December 1 of the one-day reduction in the time for taking action under these twelve Bankruptcy Rules. It is also possible that attorneys and others assisting debtors may not have fully conformed their office paperwork and procedures to accommodate the shortened deadlines by the December 1 effective date. Relying on past experience with a 15-day time period, and assuming mistakenly that all the time-computation amendments lengthen existing time periods, lawyers or litigants may unwittingly take action that is one day late.

In light of the potential consequences of noncompliance with the shortened deadlines, the Advisory Committee on Bankruptcy Rules has concluded that for these twelve rules, a filing that would have been timely before December 1 should be considered timely under the time-computation amendment for a six-month transition period. It is the position of the Advisory Committee that for these twelve rules, during the six-month transition period after December 1, a filing that was timely under the prior rule but late under the amended rule should be treated as the product of "excusable neglect" within the Rule 9006(b)(1) provision authorizing an enlargement of time requested after the deadline has expired. Similarly, timely applications for extensions to obtain the full 15-day period should also suffice to demonstrate "cause" warranting the grant of an extension request under Rule 9006(b)(1) during the six-month transition period.

To further reduce the likelihood of untimely filings and the need for extensions of time, we also request that your court continue its efforts to publicize the upcoming time-computation changes. In particular, we ask that you post on your court's website, on the initial screen displayed on the CM/ECF system for persons filing electronically, and in the clerk's office a conspicuous notice that specifically points out the rules for which time periods will be reduced by one day. The attachment contains suggested language that can be posted alone or added to existing notices about the upcoming time-computation changes.

We thank you for your continued support of the orderly implementation of these important rule amendments. If you have any questions or comments, please do not hesitate to let us know.

Attachment

cc: Judges, United States Courts of Appeals
Judges, United States District Courts
Judges, United States Bankruptcy Courts
Clerks, United States Courts

Attachment

Important Notice Regarding Time Period Changes Effective December 1, 2009, Including 14-Day Deadlines for Filing Schedules, Statements, Chapter 13 Plans, and Bankruptcy Appellate Briefs

Among the time-computation amendments to the Federal Rules of Bankruptcy Procedure that will take effect on December 1, 2009, are changes to 12 rules that will result in a reduction by one day (from 15 to 14 days) of the time to take action. The affected rules are Bankruptcy Rules 1007, 1019, 1020, 2015, 2015.1, 2016, 3015, 4001, 4002, 6004, 6007, and 8009. Please take note of these changes and particularly of the new 14-day deadline for filing schedules, statements, and other documents under Rule 1007(c); for filing a chapter 13 plan under Rule 3015(b); and for filing appellate briefs under Rule 8009(a).

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

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MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

November 9, 2009

Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I write to express our gratitude for your continued support of the Rules Enabling Act rulemaking process. The Judicial Conference and the Supreme Court have approved and sent to Congress proposed amendments simplifying and making more consistent the method of calculating deadlines in 90 federal rules of practice and procedure. These amendments are scheduled to take effect on December 1, 2009. Last summer, Congress enacted legislation amending 28 statutory time periods with the same effective date as the rules amendments, to ensure consistency with the rules changes. Courts across the country have been busy revising their local rules to be effective on December 1, to be consistent with the national rule and statutory changes. All these efforts will make litigation in federal courts simpler and eliminate unnecessary mistakes that can affect substantive rights.

I enclose a letter that is being sent to all federal judges in the country to address concerns raised about a few amendments that shorten by one day certain time periods in bankruptcy cases. The letter explains that it is the position of the Judicial Conference's Advisory Committee on Bankruptcy Rules that, for a six-month transition period after the new rules become effective, if a litigant is one day late in making filings affected by these amendments shortening the period by one day, that is excusable. The letter explains that extensions of these shortened deadlines are appropriate during the six-month transition

period. The letter also sets out several steps that the judiciary is taking to ensure that the bar and public are alerted to the time-calculation changes. These steps include displaying warnings on the courts' Case Management/Electronic Case Files system for persons filing electronically, in forms given to every filer when a case is opened, and in notices posted in the offices of each Clerk of Court. These steps, combined with a number of other efforts to publicize the rule and statutory changes, will help ensure that all participants in federal litigation are aware of the changes.

I also want to commend the staff for their careful work in examining the proposed rules amendments. It has been a pleasure to work with all the staff on these and other matters important to ensuring that our justice system operates fairly and effectively for everyone.

Sincerely,

Lee H. Rosenthal

Enclosure

Identical letter sent to: Honorable Lamar Smith
Honorable Henry "Hank" Johnson
Honorable Howard Coble

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EVIDENCE RULES

MEMORANDUM

November 9, 2009

TO: John K. Rabiej, Chief, Rules Committee Support Office

FROM: Judge Richard C. Tallman, Chair, JCUS Criminal Rules Committee

RE: **Concerns Raised by NACDL to Habeas Rule 11 Amendments**

Introduction

New Rule 11 of the rules governing 28 U.S.C. § 2254 petitions and new Rule 11 of the rules governing § 2255 motions will take effect on December 1, 2009, unless legislation is enacted modifying or rejecting the amended rules. These amendments require the district court to issue or deny a certificate of appealability simultaneously with the filing of the final order disposing of the petition or motion on the merits. The National Association of Criminal Defense Lawyers ("NACDL") has raised a concern about the last two sentences of amended Rule 11 that state that the denial of a certificate of appealability is not

separately appealable and that motions for reconsideration of the denial of a certificate do not extend the time to file a notice of appeal from the underlying judgment denying habeas relief. We believe NACDL's concern is misplaced because the amendments do not in any way alter the current legal landscape with respect to motions for reconsideration or deadlines for filing a notice of appeal challenging the underlying judgment. We circulated this language in May 2009 to all federal judges in the country and to all federal public defenders. No one raised any concern.

Congress has provided that no appeal from the denial of habeas relief may proceed without first obtaining a certificate of appealability from either the district court or the court of appeals. 28 U.S.C. § 2253 establishes how a habeas petitioner perfects his appeal of the final order denying relief. It requires issuance of a certificate by a circuit justice or judge:

> Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from–
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> (B) the final order in a proceeding under section 2255.

Id. § 2253(c)(1). Additionally, the petitioner must file a notice of appeal from the final order denying habeas relief pursuant to the time deadlines set in Federal Rule of Appellate Procedure 4(a). Thus, in order for an appellate court to have jurisdiction over the appeal, the petitioner must have filed a timely notice of appeal *and* received a certificate of appealability from either the district court or the court of appeals.

Under current practice, there is no requirement that the district court decide whether to issue or deny a certificate of appealability until the petitioner has filed a notice of appeal from the final order denying habeas relief. Some district courts do not consider whether to issue a certificate until the petitioner has filed a notice of appeal, while other district courts routinely consider and rule on whether to issue a certificate of appealability at the time the court rules on the habeas petition. Federal Rule of Appellate Procedure 22(b)(2) provides that if the applicant does not make an express request to the district court for a certificate, the notice of appeal will be construed as a request to the court of appeals to issue one.

Denial of Certificate of Appealability Not Appealable

NACDL has raised a concern that the proposed new rule is subject to confusion. Their first concern is with the clarity of the language of the proposed

Rule 11 amendment stating that the denial by the district court of a certificate of appealability is not appealable. That statement, contained within Rule 11(a)'s paragraph titled "**Certificate of Appealability**," does not change existing law. Rather, it is codification of current law. *See United States v. Futch*, 518 F.3d 887, 891 (11th Cir.), *cert. denied*, 129 S.Ct. 396 (2008) (noting that it had earlier dismissed an attempted appeal of the district court's denial of a certificate "because the district court's order denying Futch a certificate of appealability was not an appealable order"); *Sims v. United States*, 244 F.3d 509 (6th Cir. 2001) (holding that a district court order denying a certificate of appealability is not appealable); *Greenawalt v. Stewart*, 105 F.3d 1268, 1272 (9th Cir.), *cert. denied*, 519 U.S. 1103 (1997) (denial of a certificate of appealability is not separately appealable and can be challenged only in the context of an appeal from the judgment). We have found no cases that hold to the contrary.

This makes sense because the court of appeals has authority to issue its own certificate of appealability. Under § 2253, the petitioner may independently request a certificate from the court of appeals so that he may prosecute his appeal from the district court judgment denying habeas relief. While the court of appeals's decision whether to issue a certificate may be influenced by the district

court's decision on the propriety of an appeal, in practice the court of appeals independently makes its own determination whether "the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). The proposed amendment tracks this statutory scheme.

NACDL's concern about the penultimate sentence of amended Rule 11(a) is fully addressed by examining the clear language of the proposed rule. The language of the rule, as amended, is consistent with the language of § 2253 as it has existed since 1996. The requirement for a separate certificate of appealability before the appeal may proceed has not proven to be a problem, or subject to the misinterpretation that NACDL suggests. For example, in the Ninth Circuit, so long as a petitioner files something in the court of appeals within the deadline for filing an appeal, the pleading is treated as a notice of appeal and a request for issuance of a certificate of appealability. *Tinsley v. Borg*, 895 F.2d 520, 523 (9th Cir. 1990), *cert. denied*, 498 U.S. 1091 (1991) (request for issuance of a certificate of probable cause, the predecessor to a certificate of appealability, treated as a timely notice of appeal). This rule has been adopted in several other circuits. *Ortberg v. Moody*, 961 F.2d 135, 137 (9th Cir.), *cert. denied*, 506 U.S. 878 (1992) (citing cases from the Fifth and Sixth Circuits that have held that a request for a

certificate of probable cause satisfied the notice of appeal requirement); *see also Turner v. Armontrout*, 922 F.2d 492, 494 (8th Cir. 1991) (collecting cases); *Thames v. Dugger*, 848 F.2d 149, 150 (11th Cir. 1988); *Fitzsimmons v. Yeager*, 391 F.2d 849, 853 (3d Cir.), *cert. denied*, 393 U.S. 868 (1968); *Butler v. Cain*, 327 Fed. Appx. 455, 2009 WL 1096295 (5th Cir. 2009); *United States v. Smith*, 22 Fed. Appx. 261, 2001 WL 1568315 (4th Cir. 2001), *cert. denied*, 537 U.S. 870 (2002). This mirrors the practice authorized in Federal Rule of Appellate Procedure 4(d) of treating a notice of appeal mistakenly filed in the court of appeals as though it had been properly filed on that date in the district court. Fed. R. App. P. 4(d).

No Change in Time to File Notice of Appeal

The new rule, which expressly allows petitioners to seek reconsideration of the denial of a certificate of appealability, makes clear that such a motion does not extend the time to file a notice of appeal from the judgment itself. This does not change current law. It is clearly consistent with the rules as they have always existed and is not in any way inconsistent with *Browder v. Director, Department of Corrections*, 434 U.S. 257 (1978). A motion for reconsideration of the judgment denying habeas relief, if filed within the time limits set forth in the rules,

will still extend the time to appeal from that judgment under Federal Rule of Appellate Procedure 4(a)(4), which applies to these proceedings pursuant to Rule 11(b), as amended. The *Browder* case dealt precisely with this type of motion, not with a motion for reconsideration of the denial of a certificate of appealability. We have been unable to find any federal cases involving an otherwise untimely appeal from a judgment where the appellant raised an argument that a motion for reconsideration of the denial of the certificate should have extended the deadline for appeal.

This is not surprising. A motion for reconsideration solely challenging the denial of a certificate of appealability should not extend the time to appeal from the judgment denying habeas relief because it does not seek reconsideration of that judgment. And it cannot extend the time to appeal from the denial of the certificate because such a denial is not in itself appealable.

In conclusion, the rule as amended does not in any way change or limit the effect of timely tolling motions for reconsideration of the judgment under Federal Rule of Appellate Procedure 4(a)(4), which was the subject of the *Browder* case, and which the amended rule itself adopts by expressly incorporating Rule 4(a). There is no reason to extend the time to file a notice of appeal from the judgment

on the habeas application itself based on a motion for reconsideration of the denial of the certificate of appealability. Such an extension would be inconsistent with the purpose and terms of Rule 4(a)(4) and would make no sense because the denial of the certificate is not itself appealable. This might sometimes result in the simultaneous processing of a notice of appeal while a motion for reconsideration of the denial of the certificate of appealability is pending in the district court. This practice occurs now.

The Committee's intention in recommending this change was to avoid creating a "trap for the unwary," often *pro se*, habeas petitioner. The experience in the Ninth Circuit—where almost one-third of all federal appeals are filed—is that unschooled jailhouse lawyers could easily overlook the need to file a timely notice of appeal from the underlying judgment denying habeas relief. *See* Fed. R. App. P. 4(a). This mistake is premised on the erroneous belief that, after losing a request for a certificate of appealability because the claim does not meet the statutory standard in § 2253(c)(2), the petitioner's time to appeal can be extended by filing a motion for reconsideration of the denial of the certificate in the district court. In the process, the Rule 4(a) clock continues to run and, by the time the petitioner realizes the error, he has forfeited his right to appeal and the court of

appeals has no jurisdiction to review the case. The statement in the amended rule that a motion for reconsideration of the denial of a certificate of appealability does not extend the time to file a notice of appeal from the judgment itself warns the habeas petitioner against making this mistake and possibly forfeiting the appeal.

Conclusion

We hope this responds to the concerns raised by NACDL and are happy to answer additional questions.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

November 25, 2009

MEMORANDUM

To: All United States Judges
Circuit Executives
Federal Public/Community Defenders
District Court Executives
Clerks, United States Courts
Chief Probation Officers
Chief Pretrial Services Officers
Senior Staff Attorneys
Chief Preargument/Conference Attorneys
Bankruptcy Administrators
Circuit Librarians

From: James C. Duff

RE: AMENDMENTS TO THE FEDERAL RULES OF PRACTICE AND PROCEDURE AND ADMINISTRATIVE OFFICE NATIONAL FORMS **(IMPORTANT INFORMATION)**

Congress has taken no action on the amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, approved by the Supreme Court on March 26, 2009, which include revisions of time periods in 91 rules. **The following amendments to the rules on the computation of time will take effect on December 1, 2009**:

- Appellate Rules 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41;
- Bankruptcy Rules 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033;
- Civil Rules 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, 81; Supplemental Rules B, C, and G; and Illustrative Civil Forms 3, 4, and 60; and

- Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, and 59; Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts; and Rule 8 of the Rules Governing Section 2255 Proceedings for the United States District Courts.

The following non-time-computation amendments and new rules under the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure will take effect on December 1, 2009:

- Appellate Rules 4, 22, 26, and new Rule 12.1;
- Bankruptcy Rules 2016, 4008, 7052, 9006, 9015, 9021, 9023, and new Rule 7058;
- Civil Rules 13, 15, 48, and 81, and new Rule 62.1; and
- Criminal Rules 7, 32, 32.2, and 41; Rule 11 and new Rule 12 of the Rules Governing Section 2254 Cases in the United States District Courts; and Rule 11 of the Rules Governing Section 2255 Proceedings for the United States District Courts.

The amendments and new rules were mailed to you in May 2009 as part of House Documents 111-28, 111-29, 111-30, and 111-31. In accordance with 28 U.S.C. § 2074(a) and the March 26, 2009, Supreme Court orders, they will govern all proceedings commenced on or after December 1, 2009, and "insofar as just and practicable" all proceedings then pending. The text of the amended rules and extensive supporting documentation can also be found on the Judiciary's Federal Rulemaking web site at http://www.uscourts.gov/rules. In addition, pamphlets containing the rules, as amended, will be sent to you as soon as they become available from the Government Printing Office.

Most of the rules amendments involve time-computation changes, which are intended to make the federal rules on calculating time periods simpler, clearer, and consistent. The principal simplifying innovation is to count all days, including intermediate weekends and holidays, in computing time periods under the procedural rules. The current rules exclude intermediate weekends and holidays for some short time periods, resulting in inconsistency and unnecessary complication. In addition, all the deadlines in the rules were reviewed and most short periods were extended to offset the shift in the time-computation rules and to ensure that each period is reasonable. As a reminder, appropriate revisions to deadlines in local rules of court should also take effect on December 1, consistent with the time-computation changes to the federal rules.

Further information on the time-computation rules amendments and parallel changes to certain statutory time periods affecting court proceedings can be found in the excerpt reports of the Rules Committees, which are posted on the Rules web site at http://www.uscourts.gov/rules/supct0309.html and at http://www.uscourts.gov/rules/HR1626.pdf. Separate PowerPoint presentations, which you may find helpful, explaining the amended time-computation rules and their operation in appellate, bankruptcy, and district court proceedings are posted at http://www.uscourts.gov/rules/presentations.html.

To conform with the time-computation rules changes, Administrative Office staff, advised by the Forms Working Group of judges and clerks, have revised eight civil and criminal forms. The revised forms can be found on the Judiciary's J-Net and www.uscourts.gov websites and include:

AO 93	Search and Seizure Warrant
AO 93A	Search and Seizure Warrant on Oral Testimony
AO 100B	Surety Information Sheet
AO 109	Warrant to Seize Property Subject to Forfeiture
AO 133	Bill of Costs
AO 440	Summons in a Civil Action
AO 441	Summons on Third-Party Complaint
AO 466A	Waiver of Rule 5 & 5.1 Hearing (Complaint or Indictment)

Questions have been raised by the National Association of Criminal Defense Lawyers about new habeas Rule 11 of the rules governing 28 U.S.C. § 2254 petitions and new habeas Rule 11 of the rules governing § 2255 motions, which expressly allow petitioners to seek a district court's reconsideration of the denial of a certificate of appealability. The new rules state that a motion to reconsider the denial of a certificate of appealability does not extend the time to file a notice of appeal from the judgment denying relief. The new rules, however, do not change or limit the tolling effect of timely motions for reconsideration of the judgment denying relief, as set forth in Federal Rule of Appellate Procedure 4 (a)(4). That is, a timely-filed motion for reconsideration of the judgment, filed pursuant to Federal Rule of Civil Procedure 59, will continue to extend the time to file a notice of appeal until entry of an order disposing of the Rule 59 motion by the district court.

If you have any questions concerning the status of these amendments, please call Peter G. McCabe, Assistant Director for Judges Programs, at (202) 502-1800 or John K. Rabiej, Chief of the Rules Committee Support Office, at (202) 502-1820. If you have any questions about the national forms, please call Jennie Allen, Magistrate Judges Division, at (202) 502-1830.

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

December 7, 2009

MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Report of the Administrative Actions Taken by the Rules Committee Support Office*

The following report briefly describes administrative actions and some major initiatives undertaken by the Rules Committee Support Office to improve its service to the rules committees.

Official Up-to-Date Publication of the Federal Rules of Bankruptcy Procedure

The Office of the Law Revision Counsel of the House of Representatives publishes the Federal Rules of Practice and Procedure, including the Bankruptcy Rules, once every six years in the United States Code. Annual supplements to the United States Code only contain the text of the amendments to the rules. Every year, the House Judiciary Committee also publishes "colored pamphlets" containing the complete set of the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Federal Rules of Evidence. But for several longstanding reasons, it does not publish the Federal Rules of Bankruptcy Procedure. The absence of an official up-to-date publication containing all the amendments to the Bankruptcy Rules in one convenient place has created problems over the years, especially because the text of the Bankruptcy Rules reprinted by commercial publishers is not always identical and varies.

Last year, at the request of the Advisory Committee on Bankruptcy Rules, the office began compiling a complete up-to-date version of the Federal Rules of Bankruptcy Procedure. The compilation was created by painstakingly comparing five versions of the bankruptcy rules using the electronic comparison tools in Word and WordPerfect. Then, whenever a discrepancy arose in the rules being compared, the underlying official source documents were checked — either the orders of the Supreme Court or Congressional legislation — to resolve the discrepancy. Each step in the process was verified and documented. The rules also underwent a stringent editorial, proofreading, and legal review process to ensure that the rules were as accurate as possible.

Our final review is nearly complete. Upon completion of the review process, the rules will be posted on the Judiciary's website at <www.uscourts.gov/rules>. The rules will also be transmitted to the Office of the Law Revision Counsel, which had requested a copy of them.

Web site for the 2010 Conference on Civil Litigation

At the request of Judge John Koeltl, a member of the Civil Rules Committee and chair of the 2010 Conference Planning Committee, the office created a web site containing information on the 2010 Conference to be held at Duke University Law School on May 10-11, 2010. The web site contains a wealth of information on the Conference, including papers submitted by Conference participants, empirical research and analysis, and agenda materials. The web site also features an interactive section where users can post comments, suggestions, or documents. Password-protected access to the web site has been granted to all Conference participants and members of the 2010 Conference Planning Committee. It is expected that the web site will be made available to the public early next year.

Federal Rulemaking Web site

We posted on the Judiciary's Federal Rulemaking web site comments and requests to testify submitted to date on the proposed amendments published for comment in August 2009. The comments and requests are posted at http://www.uscourts.gov/rules/comments0808.html.

We are working with other offices on a major redesign of the web site to make it easier to use, navigate, and search for rules-related documents. The new redesigned web site is expected to be operational sometime next year.

Committee and Subcommittee Meetings

For the period from May 2009 to December 2009, the office staffed eleven meetings, including one Standing Committee meeting, five advisory committee meetings, two subcommittee meetings, a mini-conference on the Part VIII Bankruptcy Rules, a meeting of the Bankruptcy Forms Modernization Working Group, and a meeting of the informal working group on mass torts. We also arranged and participated in numerous conference calls involving rules subcommittees.

Miscellaneous

Rules Approved by the Judicial Conference. In December 2009, the package of proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence, as approved by the Judicial Conference at its September 2009 session, was transmitted to the Supreme Court for its review and approval. The amendments, which include the proposed amendments to Civil Rules 26 and 56, will take effect on December 1, 2010, unless Congress enacts legislation to reject, modify, or defer the amendments.

James N. Ishida

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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ROBERT L. HINKLE
EVIDENCE RULES

MEMORANDUM

DATE: December 8, 2009

TO: Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure

FROM: Honorable Mark R. Kravitz, Chair, Advisory Committee on Federal Rules of Civil Procedure

RE: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met in Washington, D.C., on October 8 and 9, 2009. Draft Minutes of this meeting are attached.

The Committee presents no items for action at this meeting. Several matters on the Committee agenda are presented for information and possible discussion.

2010 Conference

Judge John Koeltl has led Committee planning for a major conference to be held on May 10 and 11 at Duke Law School. This Litigation Review Conference has come to be known as The 2010 Conference. The two days have been completely filled with new empirical research projects, papers, and panel discussions. Discovery, e-discovery, judicial management, settlement, summary judgment and pleading, perspectives from state procedure systems and from the users of federal courts, bar association proposals, and the observations of veterans of the rulemaking process will be explored. The Committee expects the Conference will provide valuable foundations for continuing work on improving the Civil Rules. A copy of the agenda is attached. The Administrative Office has established a limited-access web site for posting conference materials as they come in, http://civilconference.uscourts.gov Standing Committee members have access to the site, and can post and read comments.

Among several empirical projects planned for presentation at the Conference is a Federal Judicial Center survey of discovery practice. Preliminary results were presented at the Committee meeting. Although this survey was structured somewhat differently from the 1997 FJC study, the central conclusions are similar. Discovery does not impose heavy burdens in the vast majority of civil actions filed in federal court, even after excluding categories of cases that are not likely to generate much discovery.

All members of the Standing Committee are invited to attend the Conference. This event has become a "hot ticket" in the procedure world, reflecting widespread belief that it is an opportunity to be seized if at all possible.

Rule 6(d): Three Days Are Added

Prompted by questions raised during the recent Time Computation Project, the Committee addressed the question whether Rule 6(d) should continue to add three days to times to act after service when service is made by electronic means or by means consented to in writing. Hesitation was expressed on at least two grounds. The new time computation provisions took effect December 1, 2009. It may be better to give the bar a period to become familiar with the new rules before once again imposing new time-computation rules. And there continue to be signs that e-service is not invariably as instantaneous as might be wished.

The other Advisory Committees have been informed of the Committee's consideration of this question. Their reactions will be important in determining whether to take it up for immediate consideration.

Notice Pleading: Twombly and Iqbal

A year ago this Committee held a panel discussion of pleading in the wake of the 2007 decision in Bell Atlantic Corp. v. Twombly. The Supreme Court again addressed pleading practice a few months later, in Ashcroft v. Iqbal. These two decisions have become the mandatory citations in all decisions ruling on motions to dismiss for failure to state a claim. Lower courts are grappling with the possible implications of the Court's opinions. Andrea Kuperman, Judge Rosenthal's Rules Clerk, is maintaining a continuously expanding memorandum on many of the most thoughtful results. The most current version of this memorandum is attached.

Empirical work is also under way. John Rabiej is compiling statistics on the frequency of motions to dismiss, and the rate of granting these motions. The data are presented for a period before the Twombly decision, for the period between Twombly and the Iqbal decision, and for the period after Iqbal. They are broken down by various case types. The Administrative Office data base, however, does not permit distinctions between motions addressed to the pleadings and motions to dismiss based on other grounds. Neither do the data reveal what happens after a motion to dismiss is granted — whether defects are cured by amendment; this information may be supplied by the FJC study noted below. But with these limitations, the preliminary data suggest that things have not much changed — the monthly rate of granting motions to dismiss made on any ground was 13.15% of the monthly rate of filing cases during the 4 months before Twombly was decided, while the rate during the 4 months after Iqbal was decided was 13.78%. Although much more detailed and sophisticated work remains to be done, looking to a narrower sample of cases, these data suggest there is no reason to short-circuit ordinary careful study in a rush to propose some revision of the pleading rules.

The Federal Judicial Center has agreed to make its resources available for a more detailed examination of the docket data. It already has a foundation for comparison in data gathered for earlier years. The plan is to examine individual dockets, identifying any differential impacts of new pleading practices on different categories of cases. Individual docket studies also will show whether granting a motion to dismiss ends the litigation, or leads to amendments that may enable

the litigation to carry forward. This study should be launched soon if it proves possible to work with the database used for the Administrative Office study. If that is not possible, a new design must be developed.

Many courts remain puzzled about just what to make of the Twombly and Iqbal opinions. Uncertainty inevitably generates motions as bench and bar work together to hammer out new pleading standards. In the end, the new standards may hew close to practice as it stood immediately before the Twombly decision. Or there may be significant changes — the direction of changes that may be inferred from the Twombly and Iqbal opinions would be to raise the pleading threshold.

Uncertainty has combined with the fear of heightened pleading standards to cause serious concern in some areas of practice and outright distress in some parts of the legal academy. Pleading has suddenly become a popular subject of law-review discourse.

Concern is not limited to the bench, bar, and academy. Congress also has taken an interest. Bills have been introduced to supersede the effects of the Twombly and Iqbal decisions by restoring pleading practice as it had developed under the sway of Conley v. Gibson. The early bills recognize the role of the Enabling Act process by providing that the statutory standard will endure until an amendment of the Federal Rules of Civil Procedure that takes effect after the statute is enacted.

If this be turmoil, it is not clear that the proper response is an immediate attempt to revise Civil Rule 8(a)(2). Some of the reasons for caution are described in the draft Minutes for the October Committee meeting. The discussion was too long to summarize neatly. And events in the intervening three months add to the complexity. It seems best to provide only a modest elaboration here.

The reason for limiting present discussion may seem paradoxical. Pleading standards have become a matter of great moment. Excitement runs almost as high as uncertainty. The questions being stirred go to the very heart of the original 1938 design of the Civil Rules. Many had come to believe that the central purpose of barebones notice pleading is to establish a framework to guide discovery. Separating out claims premised on failing legal theories might be an occasional bonus. Assessing the cogency of fact assertions was not proper. Now the relationship between pleading and discovery has been cast in doubt. The Supreme Court is openly skeptical about the benefits of massive discovery, and even more skeptical about the practical ability of district judges to manage discovery to reduce disproportionate costs. Faith that the 1938 Committee got it exactly right — as elaborated by seven decades of decisions and multiple amendments of the discovery and pretrial conference rules — has been challenged. Faith challenged reacts vigorously.

The questions are simply too important and too difficult to be resolved by rapid response. More time is required for lower courts to come to even approximate understanding of whatever new pleading regime may emerge. Serious empirical assessment of the results will take more time. The best outcome cannot be predicted, indeed will be difficult to assess once some measure of stability is achieved. At first intermittently, and now continually, the Committee has considered possible pleading amendments for more than twenty years. The need for change has not been clear. The course of wise change has been elusive.

What is called for now is continual study. Pleading practice must be engaged by all of the means used in the Enabling Act process. Court opinions must be examined carefully and in depth. Lawyers and judges must be consulted. More rigorous empirical study must be launched. All of these approaches are being actively pursued now. The 2010 Conference will provide an important component. Subsequent conferences also may prove desirable — two "miniconferences" greatly improved the development of the current Rule 56 proposals, and pleading practice may require similar events in deciding whether, and if so how, to amend the pleading rules.

It is to be hoped that Congress will respect this deliberate, thorough approach. Actual restoration of pleading practices to whatever they were on May 20, 2007, is not possible. Practice was fluid, and has flowed in many directions under the Supreme Court's influence. Increased confusion could easily follow any attempt to restore something that never really was concrete, particularly as lower courts would properly attempt to anticipate the Supreme Court's application of any restored notice-pleading rhetoric. But if general pleading legislation is enacted, calm pursuit of regular Enabling Act procedures will remain imperative. The Advisory Committee is working to that end.

Pleading Forms

Rule 84 supports official forms: "The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."

The most elemental question is whether the Forms serve any purpose. Forms are available in great numbers and variety from many sources. The Rule 84 Forms cover only a small and perhaps eccentric range of the practices covered by the Civil Rules. But there may be some value in encouraging national uniformity on some topics. Illustrations might include Forms 1 and 2 governing caption and signature lines; Forms 3 and 4 for summonses; and Forms 5 and 6, for the request to waive service and the waiver, which the Committee developed in detail when it proposed the waiver rule. Apart from uniformity, there may be an occasional need for national perspectives. The Form 80 Notice of a Magistrate Judge's Availability is designed to protect against even slight pressure to consent to trial before a Magistrate Judge. Similar protection might not be uniformly achieved by resort to local forms.

The Committee has tended to the Forms only at sporadic intervals. It was only the Style Project that, in 2007, eliminated the provisions in many Forms that used illustrative dates ranging from 1934 to 1936. And even in the Style Project, revision of the Forms was given much less attention than revision of the rules themselves. This benign neglect is readily understood: continual review and revision of the Forms could easily absorb Committee energy better devoted to other tasks. But if the Committee cannot spare the resources required for regular scheduled maintenance, it may be asked whether it would be better to devolve responsibility to some other body. At the same time, if final responsibility is shifted outside the full Enabling Act process, it should be asked whether Rule 84 should continue to confirm that the Forms suffice under the rules.

The prospect of resorting to a different process is not fanciful. The bankruptcy forms — and there are many of them — are approved by the Judicial Conference without review by the Supreme Court or submission to Congress. There are no forms attached to the Criminal Rules; the Administrative Office prepares forms, with advisory review by the Criminal Rules Committee. These processes seem to work well.

Reconsideration of the Forms enterprise is complicated by the role of the multiple pleading forms. The Twombly opinion seemed, in a footnote, to confirm the continuing vitality of the automobile negligence form complaint, now Form 11. But it is not clear whether the Court would continue to approve all of the pleading Forms. Perhaps they no longer suffice under the rules as now interpreted. However that may be, unintended messages might be read into any retraction of the pleading forms or demotion to unofficial status without warranting their sufficiency. Even repeated explicit statements that no inferences about pleading practice should be drawn in any direction could go unheeded.

The Committee will continue to study the Forms question, looking first to the question whether primary responsibility for the Forms should be placed elsewhere. It is not yet clear whether the Committee will move toward recommendations for consideration in 2010. The only part of the Forms that might lend some urgency to the task, the pleading Forms, may also be the only part that warrants careful and perhaps lengthy study.

Rule 26(c): Protective Orders

The Committee has decided that the time has come to take another serious look at discovery protective orders. This practice was carefully reviewed between 1992 and 1998 in response to proposed Sunshine in Litigation legislation. Work during that period included a study by the Federal Judicial Center, review of case law, and publication of two proposals for comment. At the conclusion of the process, the Committee ended where it began. It could find no general problems in protective-order practice. Protective orders were being used to facilitate discovery. Courts understood their responsibility to allow protection only for good cause. Protection for materials actually filed with the court was approached with special care, particularly when the materials were used for a substantive purpose such as supporting or opposing summary judgment. Requests to modify or dissolve protective orders were entertained and decided on appropriate grounds, particularly when discovery materials were sought for use in parallel litigation. And no information could be found to support the concerns reflected in the suggested legislation — that protective orders were defeating access to information needed to avert threats to the public interest, including public health and safety.

Sunshine in Litigation bills continue to be introduced. This evidence of Congressional concern is of itself good reason to take up the question again. The Committee cannot be satisfied that circumstances have not changed without undertaking further inquiry.

Initial efforts seem to reconfirm the conclusions drawn more than ten years ago. Andrea Kuperman has done a broad study of the case law that shows diligent application of the good-cause requirement, particular awareness of the need for public access to all materials filed with the court for substantive use in an action, and receptive understanding of the reasons for modifying or dissolving protective orders.

Still, reasons to inquire further persist. The language of Rule 26(c) seems somewhat antiquated, focusing more on commercially valuable information than on the common use of protective orders to shield personal privacy, medical records, mental health records, and like personal information. The rule does not expressly provide a procedure for modifying or dissolving protective orders — an omission that may be particularly perplexing when nonparties seek relief. And although continued hearings on proposed legislation have failed to produce even persuasive anecdotal evidence of protective orders that thwart access to information important to the public interest, reassurance should be sought on this score as well.

It will remain important to recognize the vital interests served by protective orders. Intrinsically, they provide necessary limits on the expansion of discovery beyond the needs of the litigation that supports it. Functionally, they enable discovery to proceed with more party control and less need for constant judicial supervision. It is not clear that any proposals to amend Rule 26(c) will emerge from renewed study. But the project will be pursued.

Rule 45: Subpoenas

The Discovery Subcommittee has been studying Rule 45 for some time. An outline of the current issues suffices to carry forward earlier reports to this Committee and to give a sense of probable future directions. The extensive discussion at the October Advisory Committee meeting is summarized in the draft minutes. Depending on decisions that remain open, it may be that proposals will be brought to this Committee in June with a recommendation to publish for comment.

Four main topics have advanced to the stage of drafting recommendations by the Subcommittee. The first three have been well developed by Subcommittee work and Committee discussion. The fourth is broader, and may present greater challenges.

Notice of document discovery subpoenas is one topic. The last sentence of Rule 45(b)(1) directs that notice must be served on each party before serving a subpoena demanding the production of documents and similar materials. The direction is clear, but there are indications

that the location is not — that some lawyers fail to give notice because they simply overlook this provision. That problem might be remedied by moving the notice requirement to a more prominent place in Rule 45(a). A related question asks whether some minimum advance notice period should be set — perhaps three days, or seven days — to support the opportunity of other parties to object, to request broadening the subpoena to include additional materials, and to monitor compliance. Beyond this initial notice, it also may be desirable to direct the party who served the subpoena to notify other parties when materials are produced. The notice might be a simple statement that materials have been produced, or it might be required to provide some description of what has been produced. Finally, thought should be given to the question of sanctions for failing to provide notice. It is not clear that the rule should address sanctions at all, nor what sanctions might be provided, on what terms.

Rule 45(c)(3)(A)(ii) says that a court must quash or modify a subpoena that "requires a person who is neither a party nor a party's officer to travel more than 100 miles," except that a subpoena to attend a trial may command travel from a place within the state. Some courts have found a negative implication that a party or a party's officer may be commanded to travel to a trial from anywhere in the United States. Other courts have rejected this interpretation, relying on the provisions of Rule 45(b)(2) describing the places where a subpoena may be served. The competing interpretations of the present rule provide strong reason to draft a clear rule. But it remains to decide what the clear rule should be — a party or party's officer is routinely subject to a nationwide trial subpoena; such subpoenas are never authorized; or such subpoenas may be authorized in the trial court's discretion — perhaps as informed by criteria listed in the rule.

A third common problem arises when ancillary discovery proceedings are initiated in a court other than the court where the action is pending. Disputes about the discovery may be better resolved by the court in charge of the main action — it is familiar with the issues and many of the factors that may inform the discovery ruling; it can establish uniform disposition of issues that may arise in several courts supervising discovery in a single case; it alone can integrate the problems into an effective case management plan. The ancillary discovery court, moreover, may be faced with heavy burdens in acquiring a duplicate familiarity with the action and in learning enough about ongoing case management to integrate its rulings with overall progress in the case. It may be understandably reluctant to invest much time in an action that is not its own. At the same time, there may be strong reasons to keep some disputes in the ancillary discovery court. A nonparty subject to a subpoena may have little inclination and scant resources for travel to a distant court. Some grounds for protecting the nonparty may be better resolved in the ancillary court, the scene of the contended discovery. The Subcommittee is working on a discretionary model that permits the ancillary court to transfer or "remit" the dispute to the main-action court, but establishes constraints sufficient to protect against routine dumping of bothersome disputes.

The fourth question is more difficult. Many observers believe that Rule 45 is unnecessarily complex. They point to such features as the direction in Rule 45(a)(1)(A)(iv) that the subpoena set out the text of Rule 45(c) and (d). Even lawyers find challenges in reading those subdivisions, and it is unrealistic to believe that an ordinary person served with a subpoena would be able to unravel the protections and obligations they provide. The rule might be improved by rebuilding it around three functions: identify the court where the action is pending as the court that issues the subpoena; identify the place where performance of subpoena obligations should occur; and identify the court that enforces compliance. Completely rebuilding Rule 45 will be a complex task, but there is sufficient interest that the Subcommittee will consider this possibility.

Two other questions may be put aside unless further inquiry shows there are persistent problems in practice. One is whether something more should be done about allocating the costs of complying with a subpoena. Rule 45(c)(2)(B)(ii) provides that if there is an objection, an order to produce documents must protect a person who is neither a party nor a party's officer from significant expense. Some issues recur: does the expense of compliance include fees for attorney review? Should the party who served the subpoena be protected against high and

unexpected demands for reimbursement? The other is whether to authorize additional means of serving subpoenas. Rule 45(b)(1) directs that service "requires delivering a copy to the named person." Most courts read this to require in-hand service. It is occasionally suggested that any of the Rule 4 methods of serving a summons and complaint should be available to serve a subpoena. Although these questions are interesting, they seem to be worked out by the parties in most cases. The Subcommittee has not abandoned further consideration, but does not seem likely to advance any recommendations for change.

Appellate-Civil Rules Interaction

The Appellate and Civil Rules Committees have formed a joint subcommittee to consider issues that intersect both sets of rules. The Committee considered a proposal to amend Civil Rule 58 to clarify the circumstances that require entry of a new judgment by a separate document on disposing of a motion that, under Appellate Rule 4, suspends appeal time. The Committee decided to defer final action pending formulation of parallel revisions of Rule 4. The Committee also agreed to entertain future recommendations of the subcommittee, which will soon take up the problems of "manufactured finality."

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DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

OCTOBER 8-9, 2009

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

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

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

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

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

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

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

Judge Kravitz noted that the Time Computation Project Rules amendments are moving steadily toward taking effect on December 1, 2009. While on the Standing Committee, he chaired the Time Computation Subcommittee, and was closely involved with the hard work of all the advisory committees. Judge Rosenthal worked hard and successfully to facilitate Congressional adoption of conforming amendments to several statutes, enacted to also take effect this December 1.

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

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

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

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

Minutes

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

2010 Conference

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

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

Topics covered will include two panels on empirical research, and panels on pleadings and dispositive motions; issues with the current state of discovery; judicial management of the litigation process; e-discovery; settlement; perspectives from users of the system; perspective from the states; bar association proposals; observations from those involved in the rulemaking process over the years; and — briefly — summaries and conclusions that may able to sketch some of the refinements and distillations to be accomplished in the aftermath.

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

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

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

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

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

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

Papers from any of the panel participants will be welcome.

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

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

Federal Judicial Center Discovery Study

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

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

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

A variety of the initial findings were described:

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

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

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

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

The survey produced much information about the costs of discovery. The median reported by all plaintiff respondents was $15,000, with a 10th percentile of $1,600 and a 95th percentile of $280,000. The $15,000 median is 12% higher, after adjusting for inflation, than the median in the 1997 survey. The median was much higher in cases with any electronic discovery, reported at $30,000; the 10th percentile for those cases was $3,000, and the 95th percentile was $500,000. The figures for e-discovery rise higher still for a party who both requests and produces ESI: the median

is $65,000, the 10th percentile $5,000, and the 95th percentile $850,000. The numbers reported by defendants are somewhat different. For all cases in which there was some discovery, the median is $20,000, the 10th percentile $5,000, and the 95th percentile $300,000. For defendants in cases with any e-discovery the median is $40,000, the 10th percentile $6,214, and the 95th percentile $600,000. When the defendant is both a producer and requester of e-discovery, the median is $60,000, the 10th percentile $10,000, and the 95th percentile $991,900.

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

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

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

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

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

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

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

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

Judge Kravitz thanked Judge Rothstein and the FJC for all the work that has been done, and

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

Rule 4: Service on Government Employees and Judges

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

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

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

Rule 6(d) Three Days are Added

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

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

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

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

On an anecdotal level, lawyers still tell stories of as much as three days from docketing in the court to receipt of e-notice, and rather often.

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

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

The question of e-service ties to the question of e-filing. Under Rule 5(d)(3), a local rule may require e-filing, although reasonable exceptions must be allowed. Many courts effectively require

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Congress, however, may take the lead. S 1504 would direct courts to decide Rule 12(b)(6) and 12(e) motions to dismiss under the standards set forth in Conley v. Gibson. It is too early to know whether any legislation will be enacted, or whether anything enacted will take the same form as the first bill. Revisions are always possible.

Further presentation of the challenges raised by the Twombly and Iqbal opinions began with the observation that the Court's concerns command careful attention. The Court has the advantage

of a perspective slightly above the fray in the lower courts. Lower courts are accustomed to working in the accommodations they have made with the carefully developed combination of notice pleading, expansive discovery, and summary judgment. They believe, with real justification, that they are doing it well. But in both opinions the Court expresses obvious concern with the costs and burdens imposed by discovery in some kinds of cases. Years of repeated attempts to address these concerns by revising the discovery rules have not **completely** solved all the problems.

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

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

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

Additional questions remain. Twombly and Iqbal focus on the complaint. Should they be

extrapolated to address Rule 8(c), requiring greater detail in pleading affirmative defenses? Might they even reach out to require an explanation whenever a responsive pleading denies an allegation?

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

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

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

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

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

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

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

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

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

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

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

Another question was asked: Does the Court's failure to mention its earlier "no heightened

pleading" decisions in the Iqbal opinion presage an open heightened pleading approach? The responses suggested that it is difficult to read much into this kind of opinion-drafting choices.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A somewhat different question asked how these problems can compete for Congress's attention in competition with the much larger issues that confront it. Should the Committee attempt

to predict what Congress will do in deciding on its own best course of action?

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

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

Forms

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

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

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

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

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

Even if pleading forms are to be maintained in some form, is it possible even to attempt forms for more complex claims? And even if the Committee could contrive to draft a Form that would plead the claim in the Twombly case in a way that satisfies the Twombly and Iqbal standards, would the Form be of any use to any other plaintiff in any other antitrust conspiracy case?

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

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

forms are abandoned, there may be less reason to fear Forms endorsed as sufficing under the rules.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Rule 26(c): Protective Orders

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

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

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

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

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

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

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

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

It voted to defer further consideration pending broader consideration of the discovery rules. In 1998 the Committee suspended active consideration, maintaining a watch on continuing practice.

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

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

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

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

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

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

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

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

An observer offered environmental statutes as an example. The public interest is protected by statutory duties to report to public agencies pollutant discharges. Another observer suggested that

reporting obligations extend broadly across most industries.

It was noted that the Department of Justice has not yet taken a position on these questions, but does not now think that any legislation is necessary.

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

Rule 45

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

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

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

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

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

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

inspection or copying of the produced materials.

The Sedona Conference has suggested a further wrinkle, describing it as a "best practice" to attempt to confer with the nonparty before production. This suggestion was not included in the draft because the Subcommittee concluded that it could produce complications outweighing any likely benefits.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

are developed to limit the occasions even for depositions.

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

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

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

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

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

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

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

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

The 100-mile limit may seem an antiquated relic, given its origins in 1793. But it may be

rejuvenated by modern technology. Often technology enables testimony in a mode that is an effective substitute for live testimony. Although limited by a requirement of good cause in compelling circumstances, Rule 43(a) recognizes the use of "testimony in open court by contemporaneous transmission from a different location." The Criminal Rules Committee has proposed a rule, recently approved by the Judicial Conference, that would permit live video testimony of a witness outside the United States when it would be dangerous to bring the witness to the United States. That rule will encounter Confrontation Clause questions that do not arise in civil actions — that it is being pursued shows a high level of confidence in testimony by remote transmission. And many immigration hearings are done by contemporaneous video transmissions.

These questions will be further considered by the Subcommittee.

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

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

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

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

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

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

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

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

Judge Campbell agreed that the Subcommittee would consider this approach.

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

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

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

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

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

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

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

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

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

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

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

There was no further discussion.

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

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

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

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

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

Rule 58 - Appellate Rule 4

Judge Colloton presented the Report of the Joint Civil/Appellate Subcommittee. The

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

The first question involves Appellate Rule 4 and Civil Rule 58. The problem is primarily a Rule 4 problem. Under Rule 4(a)(4)(B), appeal time runs "from the entry of the order disposing of the last" remaining motion that tolls appeal time. It is possible that appeal time may run out, as measured from entry of the order, even before an amended judgment is entered. An example might be an order "disposing of" a motion for new trial by conditionally granting a new trial, subject to denial if the plaintiff accepts a remitted amount within 40 days. If the plaintiff does not act on the remittitur within 30 days from entry of the order, there may be confusion as to the proper course. The defendant might file a notice of appeal, and then withdraw it if remittitur is not accepted and the new trial order becomes absolute and defeats finality. The defendant might ask for an extension of appeal time. Or the defendant might wait, hoping that the absence of a final judgment will allow an appeal after a remitted judgment is entered. Although there seem to be ways to muddle through, the Subcommittee has submitted to the Appellate Rules Committee a revision of Rule 4(a)(4)(A) that would run appeal time from "the latest of entry of the order disposing of the last such remaining motion or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment: * * *." A parallel change would be made in the Rule 4(a)(4)(B)(i) and (ii) provisions for premature notices of appeal and appeals from an order disposing of a tolling motion or altering or amending the judgment.

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

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

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

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

The Subcommittee also considered the question whether Appellate Rule 4(a)(4)(B)(ii) should be made parallel to Rule 4(b)(3)(C). Rule 4(b)(3)(C) provides that for appeals in a criminal case, a valid notice of appeal is effective, without amendment, to appeal from an order disposing of any

of the tolling motions listed in Rule 4(b)(3)(A). Rule 4(a)(4)(B)(ii), in contrast, provides that for appeals in a civil action a party intending to challenge an order disposing of any of the tolling motions, or a judgment altered or amended on such a motion, must file an amended notice of appeal even though that party had already filed a timely notice of appeal. The Subcommittee concluded that the civil and criminal contexts are sufficiently different to justify the different approaches. No changes will be recommended.

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

FJC-CAFA Assessment

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

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

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

Adjournment

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

Next Meeting

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

Respectfully submitted,

Edward H. Cooper

Reporter

6

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

LAURA TAYLOR SWAIN
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MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

MEMORANDUM

DATE: December 7, 2009

TO: Judge Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Jeffrey S. Sutton, Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on November 5 and 6 in Seattle, Washington. The Committee removed three items from its study agenda and discussed a number of other items.

The Committee has tentatively scheduled its next meeting for April 8 and 9, 2010.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the November meeting[1] and in the Committee's study agenda, both of which are attached to this report.

[1] These minutes have not yet been approved by the Committee.

II. Information Items

The Committee removed from its agenda three items. One of those items concerned a suggestion that the Committee consider amending Appellate Rule 29(e) to define the 7-day filing deadline for amicus briefs in "calendar days." The 2009 amendment to Appellate Rule 26(a) imposes a days-are-days approach to computing all time periods, no matter how short, and this change renders the Rule 29(e) proposal moot. The other two items removed from the study agenda concerned proposals to amend Appellate Rule 4(a) to provide that a previously-filed notice of appeal encompasses challenges to later dispositions of postjudgment motions. Such proposals posed significant drafting challenges, and members did not see a need for the proposed amendment.

The Committee discussed the proposal to amend Rule 40(a) to clarify the time for seeking rehearing in cases where a U.S. officer or employee is sued in his or her individual capacity. This proposal was remanded to the Committee for further consideration in the light of the Supreme Court's decision in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 988 (2009). The Committee is considering the possibility of recommending a coordinated set of amendments to Appellate Rule 4(a)(1) and 28 U.S.C. § 2107 as well as to Appellate Rule 40(a). The Rule 4(a)(1) and Section 2107 amendments would clarify the applicability of the 30-day and 60-day appeal periods in cases involving U.S. officers or employees. Action on this possibility was deferred until the Committee's spring meeting to afford the Department of Justice and other participants time to consider whether it is advisable to seek legislation concerning Section 2107 and to consider carefully the wording of any proposed amendment.

The Committee discussed but did not vote on a proposal to amend Title III of the Appellate Rules to address interlocutory appeals from the Tax Court. Prior to the Committee's spring 2010 meeting, the Committee will informally solicit the views of interested constituencies (such as judges of the Tax Court, relevant bodies within the ABA, and specialists within the Department of Justice) concerning whether such amendments would be useful and, if so, how they should be drafted.

The Committee also discussed, without voting on, a proposal to amend Appellate Rule 4(a)(4) to address a current peculiarity in that Rule. The issue arises from the observation that under Rule 4(a)(4)(B) the time to appeal from an amended *judgment* runs from entry of the *order* disposing of the last remaining postjudgment motion. The proposed amendment would provide that the appeal time runs from the latest of the entry of such an order or the entry of any amended judgment. Working through the Civil / Appellate Subcommittee, the Appellate Rules Committee is coordinating its consideration of this proposal with the Civil Rules Committee. A related amendment to Civil Rule 58(a) is also under consideration.

The meeting provided an occasion to discuss several issues of interest to both the Appellate Rules Committee and the Bankruptcy Rules Committee. The Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules will affect practice in the courts of appeals, for example by addressing procedures for direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). The Part VIII project will provide an occasion to coordinate the two Committees' work on that issue and other matters of common interest such as a clarifying amendment to Appellate Rule 6.

The Committee continued its discussions of a number of existing agenda items, including proposals to amend Form 4 (concerning applications to proceed *in forma pauperis*); to consider permitting double-sided and/or 1.5-spaced printing of briefs; and to amend Rule 29 with respect to the treatment of amicus filings by Native American tribes.

The Committee discussed a couple of other matters pending before other advisory Committees. The Committee noted the Civil Rules Committee's discussion of the "three-day rule." (In the Appellate Rules, the "three-day rule" is found in Appellate Rule 26(c), which affords additional time if a deadline is measured from service and service is accomplished electronically or by non-electronic means that do not result in delivery on the date of service.) Like the Civil Rules Committee, the Appellate Rules Committee is considering changes to the three-day rule; but the Appellate Rules Committee believes that a wait-and-see approach is currently advisable because the shift to electronic filing is still ongoing in the courts of appeals. The Committee also briefly discussed the Criminal Rules Committee's proposed new Criminal Rule addressing the practice of indicative rulings.

DRAFT

Minutes of Fall 2009 Meeting of
Advisory Committee on Appellate Rules
November 5 and 6, 2009
Seattle, Washington

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, November 5, 2009, at 8:30 a.m. at the Fairmont Olympic Hotel in Seattle, Washington. The following Advisory Committee members were present: Judge Kermit E. Bye, Justice Randy J. Holland, Ms. Maureen E. Mahoney, Dean Stephen R. McAllister, and Mr. James F. Bennett. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Lee H. Rosenthal, the Chair of the Standing Committee; Judge Carl E. Stewart, the past Chair of the Appellate Rules Committee; Judge T.S. Ellis III, a past member of the Appellate Rules Committee; Judge Harris L Hartz, liaison from the Standing Committee; Professor Daniel R. Coquillette, Reporter to the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Leonard Green, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Sutton welcomed the meeting participants and introduced Mr. Green. Judge Sutton noted that Mr. Fulbruge's contributions as clerk liaison to the Committee were irreplaceable but that the Committee is very fortunate to have, as Mr. Fulbruge's successor, someone as experienced as Mr. Green. Judge Sutton noted that the Committee will particularly benefit from Mr. Green's experience with the Sixth Circuit's transition to electronic filing.

Judge Sutton pointed out to the Committee the tribute to Mark I. Levy that was displayed in the meeting room. Judge Sutton recalled that at the first Appellate Rules Committee meeting he attended (in San Francisco in April 2006), Mr. Levy took the time to have lunch with him and other new participants and to make them feel welcome. He was a great friend and colleague and he made tremendous contributions to the work of the Committee. At Judge Sutton's suggestion, the Committee observed a moment of silence in memory of Mr. Levy.

During the meeting, Judge Sutton and Committee members presented tokens of appreciation to Judge Stewart for his service on the Committee from 2002 onward and for his leadership of the Committee from 2006 to 2009, and to Judge Ellis for his service as a member of

the Committee from 2003 to 2009. Judge Sutton thanked Judge Stewart for his wise guidance of the Committee's deliberations, and noted that Judge Stewart had provided a model for him to follow as the incoming Chair of the Committee. Judge Stewart said that he had greatly enjoyed serving as a member of the Committee and, later, as its Chair. He observed that he valued the Committee members' commitment and collegiality. He expressed appreciation to the Chief Justice for appointing him to serve and to Judge Rosenthal for her leadership of the parent Committee. He thanked the Reporter for her work, and he thanked Mr. McCabe, Mr. Rabiej, Mr. Ishida, Mr. Barr, and others at the AO who have done so much to keep the Committee working smoothly, and Ms. Leary whose research at the FJC has informed the Committee's assessment of many issues. Judge Sutton thanked Judge Ellis for providing such clear and thoughtful input during the Committee's meetings. Judge Ellis stated that he was honored to have had the opportunity to serve on the Committee, and he expressed his appreciation to all the participants in the Committee's work.

Judge Sutton observed that the camaraderie of the Appellate Rules Committee meetings over the years has produced a scholarly product in the form of the manuscript for a new textbook on state constitutional law co-authored by, inter alios, Justice Holland, Dean McAllister, and Judge Sutton.

II. Approval of Minutes of April 2009 Meeting

The minutes of the April 2009 meeting were approved subject to minor changes on pages 2 and 3.

III. Report on June 2009 meeting of Standing Committee

The Reporter briefly noted some relevant aspects of the Standing Committee's discussions at its June 2009 meeting. The Standing Committee gave final approval to the proposed amendments to Appellate Rules 1(b), 29(a), and 29(c) and Form 4. The Standing Committee also discussed the proposed amendment to Appellate Rule 40(a)(1) and remanded that proposal to the Appellate Rules Committee. During the summer, the Appellate Rules Committee and the Standing Committee approved, by email circulation, a proposed technical amendment to Appellate Rule 4(a)(7); this amendment conforms Rule 4(a)(7) to changes made during the 2007 restyling of the Civil Rules by replacing references to Civil Rule "58(a)(1)" with references to Civil Rule "58(a)." In September 2009 the Judicial Conference approved the package of amendments to Appellate Rules 1(b), 4, and 29, and Form 4.

IV. Other Information Items

The Supreme Court has approved a number of proposed amendments that are currently on

track to take effect on December 1, 2009, assuming that Congress takes no contrary action. The amendments include the proposed clarifying amendment to Rule 26(c)'s three-day rule; new Rule 12.1 (and new Civil Rule 62.1) concerning indicative rulings; an amendment that removes an ambiguity in Rule 4(a)(4)(B)(ii); an amendment to Rule 22 that parallels amendments to the habeas and Section 2255 rules; and the package of time-computation amendments.

The Sealing Subcommittee, chaired by Judge Hartz, has been working diligently to investigate concerns raised about the sealing of entire cases. The Subcommittee met in June 2009. It has formed two sub-subcommittees: One sub-subcommittee, on which Judge Ellis and Mr. Letter have participated, is investigating what, if any, substantive standards should govern the sealing of entire cases and who should make the decision to seal. The other sub-subcommittee, chaired by Judge Merryday, is considering what procedures, if any, should be followed in sealing entire cases.

The Privacy Subcommittee, on which Mr. Bennett serves as the representative of the Appellate Rules Committee, met in September 2009 and will meet again in January 2010. The Subcommittee is planning a conference in April 2010 at Fordham that will feature panels on cooperation agreements, transcripts, and other matters that raise privacy issues.

The Standing Committee has also organized a May 2010 conference, to be held at Duke, that will consider the challenges facing the civil justice system. Panels at the conference will discuss new empirical data and will focus on issues such as pleading, discovery (including electronic discovery), and judicial case management. The panels will incorporate perspectives from experienced practitioners, from state procedural systems, from bar association proposals, and from those experienced in the rulemaking process. Judge Rosenthal observed that a number of factors have combined to highlight the importance of the conference. There is a great deal of congressional interest in the question of pleading standards. The conference will make available new and better empirical data on questions such as the burdens of discovery. It will be invaluable to obtain real data with which to inform judgments about the system.

The House of Representatives held an oversight hearing concerning pleading standards, in anticipation of the introduction of a bill. S. 1504, the bill currently pending in the Senate, would provide that federal courts shall not dismiss complaints under Rule 12(b)(6) except under the standards set forth in Conley v. Gibson, 355 U.S. 41 (1957). The Civil Rules Committee and the Standing Committee – assisted by Judge Rosenthal's law clerk Andrea Kuperman – are carefully studying the effects 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). That research focuses on all of the court of appeals opinions as well as some district court decisions that cite Iqbal. The results so far disclose that, overall, courts are applying Iqbal in a thoughtful, context-specific and nuanced way. The research also includes a hard look at the overall statistics that reflect what courts are doing – including the rate of motions, the rate of grants, rulings on requests for leave to amend, the success of such amendments, and the effect on particular types of cases (such as types of cases that tend to feature information asymmetries between the plaintiff and defendant).

It is too early as yet to draw any conclusions about *Iqbal*'s effects. Judge Stewart observed that *Iqbal* itself was a very atypical case. Mr. Letter asked whether any cases can be found in which a court states that it would not have granted a particular motion to dismiss under the pre-*Iqbal* standard, but that the post-*Iqbal* standard leads the court to dismiss. Judge Rosenthal responded that though some such cases do exist, many other opinions state that the motion would have been decided the same way under either standard.

V. Action Item

A. For publication

1. Item No. 08-AP-M (interlocutory appeals in tax cases)

Judge Sutton invited the Reporter to introduce this item, which concerns the procedure for interlocutory tax appeals. As the Committee has previously discussed, in 1986 Congress enacted 26 U.S.C. § 7482(a)(2), which adopts for interlocutory appeals from the Tax Court a system similar to that provided by 28 U.S.C. § 1292(b) for interlocutory appeals from district courts. The Appellate Rules, however, were never amended to take account of Section 7482(a)(2)'s interlocutory-appeal mechanism. The Committee has discussed the possibility of amending Title III of the Appellate Rules to make clear that Appellate Rule 5 applies to interlocutory appeals under Section 7482(a)(2). Informal inquiries with Judge Holmes of the Tax Court indicate that such amendments would be useful even though the universe of affected appeals might be small.

The proposed amendments set forth in the agenda materials take the approach of distinguishing Tax Court "decisions" from Tax Court "orders" – an approach that would entail changes in Title III's heading, in Rule 13(d)(1), in the title of Rule 14, and in Rule 14(a). The proposal would then specify in a new Rule 14(b) the treatment of interlocutory appeals from Tax Court "orders." The Reporter noted, however, that an attorney member had made a very helpful suggestion in advance of the meeting concerning a possible alternative approach.

The member explained that the approach shown in the agenda materials places great weight on the technical distinction between a Tax Court "decision" and a Tax Court "order." She questioned whether all users would understand that this distinction is meant to express the difference between appeals as of right from final decisions and appeals by permission from interlocutory orders. She noted that interlocutory "orders" are often reviewed in the course of an appeal as of right from a final decision. She suggested that Title III's heading might be revised to refer to "Appeals From the United States Tax Court." Rule 13 could be revised to refer to "Appeals as of Right," and Rule 14 could be revised to treat "Appeals by Permission." Committee members agreed with this suggested approach.

The Reporter also raised some additional drafting choices. What provisions should be

included for or excluded from application to tax appeals? And should the Rules contain a global definition that defines "district court" and "district clerk" to encompass the Tax Court and its clerk? There was consensus that a global definition would likely be useful. A member asked why the Title III rules refer to review of "decisions" rather than "judgments"; the Reporter said that she would research this question.

Judge Rosenthal suggested that, prior to the Committee's spring meeting, it would be useful for the Committee to reach out to the tax bar and bench, as a way of obtaining advance comment on the proposals before deciding whether to seek permission to publish them officially for comment. The American Bar Association's Tax Section would be a useful resource, as would the judges on the Tax Court and Mr. Letter's colleagues in the DOJ. It is worth asking these groups whether the changes are needed and how the changes should be drafted.

By consensus, it was decided that the Reporter would prepare a proposed re-draft of the Title III rules, and that Judge Sutton would write to relevant constituencies to seek advance comment on the possible amendments.

VI. Discussion Items

A. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) – treatment of U.S. officer or employee sued in individual capacity)

Judge Sutton invited the Reporter to summarize the status of this item. This item originally concerned the DOJ's proposal for changes to both Rule 4(a)(1) and Rule 40(a)(1). After the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), the DOJ withdrew its proposal to amend Rule 4, but continued to support amending Rule 40. The proposed Rule 40 amendment received final approval at the Committee's fall 2008 meeting, and it was on the discussion agenda at the January 2009 Standing Committee meeting. Shortly thereafter, certiorari was granted in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 988 (2009) – a case that presented a question concerning the interpretation of Rule 4(a)(1)(B) and 28 U.S.C. § 2107 – and the DOJ suggested putting Item No. 03-09 on hold pending the outcome of *Eisenstein*. In June 2009, the Standing Committee remanded Item No. 03-09 to the Appellate Rules Committee for further consideration in the light of the expected decision in *Eisenstein*. The ensuing decision in *Eisenstein* held that the United States is not a "party" to a False Claims Act qui tam action, for purposes of applying Section 2107 and Rule 4(a)(1), unless the United States has intervened in the action.

The Reporter turned to Mr. Letter for his report on the views of the DOJ. Mr. Letter explained that the DOJ supports moving forward with the amendment to Rule 40. The Rule 40 issue frequently arises, in that the government regularly finds it has to seek extensions of the time to seek rehearing in cases that involve government employees sued in their individual capacity for acts in connection with federal duties. As to the possibility of amending Rule 4, Mr. Letter

questioned whether a rulemaking change to Rule 4 would produce the desired effect in the absence of a similar legislative amendment to Section 2107. He noted that the DOJ might propose such a statutory change at some future point.

A member questioned whether it makes sense to amend Rule 40 without also amending Rule 4. An attorney member expressed reluctance to recommend amending Rule 4; she noted that often private attorneys are retained to defend suits against federal officials. Those private attorneys might not be as well informed as DOJ lawyers would be, and they might rely on the text of such an amended Rule 4 without realizing the dangers of relying on a Rule 4 change that diverged from the text of Section 2107. This risk would also exist for the attorneys for other parties in such a case. A judge member agreed that it would be undesirable to have a rule that is inconsistent with the statute.

An appellate judge stated that he supports the Rule 40 proposal because it would eliminate a number of extension motions. Another appellate judge noted that his court receives many such extension requests, and typically grants them. Mr. Letter observed that even if the request is ultimately granted, that grant may not always occur promptly, and the delay before the grant can cause problems for the government's planning. Moreover, the additional time is not needed only for the Solicitor General to decide whether to seek rehearing; if the Solicitor General decides *not* to seek rehearing, the employee may need time to obtain private counsel for the purpose of seeking rehearing.

Judge Sutton noted that he sensed consensus that if Rule 4, Section 2107 and Rule 40 could all be amended to clarify the treatment of federal officers and employees sued in an individual capacity, that would be useful. Judge Rosenthal observed that on prior occasions the rulemakers have coordinated a rulemaking change with proposed legislation. It was suggested that amending Rule 40 without amending Rule 4 might "take care of the tail but not the dog." Professor Coquillette expressed optimism that a legislative amendment could be accomplished.

Members also discussed the wording of the Rule 40 proposal as approved at the fall 2008 meeting. A participant questioned whether the language "for an act or omission occurring in connection with duties performed on the United States' behalf" captured the sense that the Committee desires. One DOJ attorney had suggested to Mr. Letter that this language might lead to litigation over whether a particular act or omission did or did not qualify; this attorney had queried whether a better formulation might be one that captures cases in which "any party claims that the act or omission occurred in connection with [etc.]." The Reporter noted that the Committee had discussed a somewhat similar question at the fall 2008 meeting.

At the fall 2008 meeting, the Committee had before it comments from the Public Citizen Litigation Group ("Public Citizen"), expressing concern that the language in the proposed Rule 4 and Rule 40 amendments could be read to exclude instances when the court of appeals ultimately concluded that the federal officer's or employee's act did not occur "in connection with duties performed on the United States' behalf." Public Citizen argued that the wording should be

changed to make clear that the extended time periods' availability turned on the nature of the act as alleged by the plaintiff rather than on the nature of the act as ultimately found by the court. Public Citizen suggested that this could be achieved by changing "an act or omission occurring in connection with" to read "an act or omission alleged to have occurred in connection with." At the meeting, however, a participant objected that the time period for rehearing should not turn on the way in which the complaint was framed. Also, it was pointed out that the uncertainty that concerned Public Citizen would presumably be less in connection with Rule 40(a)(1) (compared to the concern over Rule 4(a) and appeal time) because where the question is the time to seek rehearing, there will already be a panel opinion which will indicate the panel's view of the facts. The Committee also noted that Public Citizen's proposed language would diverge from the language used in Civil Rule 12(a).

After this discussion was recapitulated, members at the fall 2009 meeting did not express an immediate inclination to alter the proposed language shown in the agenda materials. However, it was noted that if the DOJ wished to propose alternative language it could do so in advance of the spring 2010 meeting.

The Committee discussed the possible timing of a rule change and legislative proposal. Mr. McCabe noted that if the Committee were to conclude that no republication is needed, then the rules amendment could take effect (assuming approval at each relevant step) on December 1, 2011. Mr. Letter noted that he would not be in a position to vote to request legislation without first seeking authorization to do so. Mr. Rabiej noted that the rulemakers would need to obtain permission from the Judicial Conference in order to seek legislation. A participant wondered whether a proposed legislative amendment might become complicated through association with other questions relating to government litigation.

By consensus, the Committee decided to retain the matter on the agenda and to revisit these questions at the Committee's spring 2010 meeting.

B. Item No. 05-05 (FRAP 29(e) – timing of amicus filing)

Judge Sutton invited the Reporter to present this item, which had been pending for some years. Prior to 1998, the briefing deadlines for amici were the same as those for the party whom the amicus supported. In 1998, Rule 29 was amended to stagger those deadlines by placing the amicus's deadline 7 days after the filing of the brief of the party supported. The Public Citizen Litigation Group initially expressed concern about this 7-day stagger, noting that it shortened the time within which the appellant can review (and address in the reply brief) assertions made in briefs of amici supporting the appellee. The Committee discussed those concerns in fall 1999 but decided to take no action on them. In 2002, Rule 26(a)'s time-computation provision was amended to shift the trigger (for skipping intermediate weekends and holidays) from "less than 7 days" to "less than 11 days." In 2005, Public Citizen expressed concern that the 2002 time-computation change effectively lengthened the 7-day stagger, and suggested that Rule 29(e) be

amended to refer to "7 calendar days." This proposal was considered by the Appellate Rules Committee's Deadlines Subcommittee, which expressed no view on whether the stagger should be retained but suggested that if the stagger were to be retained then the period should be amended to provide that the 7-day period should be counted on a days-are-days basis. In the meantime, Mr. Letter had consulted some 24 practitioners (including attorneys in various types of practice) concerning the possibility of amending Rule 29(e). He received ten responses, and the respondents unanimously opposed abandoning the stagger. They pointed out that the stagger provides time for the potential amicus to decide whether to file at all, as well as to revise the amicus brief to avoid redundancy. Some noted that briefing in the court of appeals tends to be less coordinated than briefing in the Supreme Court. The respondents did differ somewhat on whether to adjust the length of the stagger.

The main concern expressed by Public Citizen in 2005 has now been addressed. Effective December 1, 2009 (assuming no contrary action by Congress), Rule 29(e)'s 7-day period will be computed on a days-are-days basis. This suggests that the main motivation for this agenda item has now been removed. There is, though, one additional concern expressed by Public Citizen: namely, that amicus deadlines run from the filing of the relevant brief, but the parties' deadlines run from the service of the relevant brief. Public Citizen suggested that this feature results in additional time pressure on the party responding to the amicus, and it proposed that Rule 29(e) should be amended to run the amicus deadline from service rather than filing, and also suggested that amici should be encouraged to serve their briefs electronically. The Reporter suggested that these additional concerns would be rendered largely moot by the advent of electronic filing.

Mr. Letter noted that in the time since Public Citizen first raised its concerns, the Supreme Court has amended its own rules to add a similar time stagger.

A motion was made to remove Item No. 05-05 from the Committee's agenda. The motion passed by voice vote without opposition. Judge Sutton stated that he would make sure a letter is written to Public Citizen to inform it of this disposition.

C. Civil Rules Committee – query concerning three-day rule

Committee members next discussed an inquiry received from the Civil Rules Committee. Under Appellate Rule 26(c), the "three-day rule" is a provision that adds three days to a given period if that period is measured after service and service is accomplished electronically or by a non-electronic means that does not result in delivery on the date of service. Similar provisions exist in the Civil, Criminal and Bankruptcy Rules. Some comments received during the time-computation project had suggested that the "three-day rule" should be altered or abolished in the light of changes such as the advent of electronic filing. The Appellate Rules Committee's Item No. 08-AP-C concerns the suggestion that Rule 26(c)'s three-day rule be amended; the Committee discussed that item at the fall 2008 meeting and decided to retain it on the study

agenda while encouraging the other advisory committees to consider the question. Judge Kravitz and Professor Cooper have now reported that the Civil Rules Committee discussed the three-day rule at its fall 2009 meeting, and they have requested the views of the Appellate Rules Committee and the other advisory committees. Evidently, the discussion at the Civil Rules Committee meeting supported a wait-and-see approach to the matter at the current time.

Mr. Letter reported that he had polled his colleagues, who state that in their experience where the case management / electronic case filing ("CM / ECF") system is used to accomplish service it is unproblematic, but that this is not yet true in all circuits. For example, the Second Circuit does not use the CM / ECF system to effect service. Instead, electronic service among parties litigating before the Second Circuit is accomplished by email. And there are many horror stories about glitches with email service.

Mr. Rabiej reported that several clerks have noted that the time-computation project strove to set time periods in multiples of seven so that the periods would not end on a weekend, and that adding three days at the end of such periods can frustrate that objective.

An attorney member suggested that the Appellate Rules Committee should wait to act on this matter until all the circuits use the CM/ ECF system to accomplish service. He suggested that when the Committee does turn to the question of eliminating the three-day rule, it should also consider whether to lengthen the deadlines for responding to motions.

Mr. Green reported that in the Sixth Circuit the clerk's office sees very few problems with electronically served documents bouncing back. He observed that the last circuits to go live on ECF are scheduled to do so in January 2010. Mr. Letter predicted that prisoner litigation will always involve paper filings.

Judge Rosenthal suggested that the issue of the three-day rule forms a part of a larger set of questions concerning the shift to electronic filing. Judge Sutton noted that the Bankruptcy Rules Committee's project to review Part VIII of the Bankruptcy Rules is motivated partly by a desire to take account of the switch to electronic filing. Over the coming years, the advisory committees are all likely to consider amendments to take account of this shift – probably through a coordinated, inter-committee project akin to the time-computation project.

The Committee directed the Reporter to convey the gist of the Committee's discussion to Judge Kravitz and Professor Cooper. In sum, the Appellate Rules Committee agrees with the Civil Rules Committee that this question will need to be addressed within the next few years but that, for the moment, it warrants a wait-and-see approach.

D. Item No. 07-AP-E (issues relating to Bowles v. Russell)

Judge Sutton invited the Reporter to summarize recent developments relating to *Bowles v.*

Russell, 551 U.S. 205 (2007). The agenda materials attempt to give some sense of the effects of *Bowles* by examining selected post-*Bowles* decisions. The sample analyzed in the materials is not randomly selected, so it is important not to assume that the analysis is representative of the universe of cases as a whole. Out of a sample of 36 decisions, whether the relevant requirement was jurisdictional or non-jurisdictional affected the disposition of the appeal in 23 cases. Of those 23 cases, there was a fairly even split: in 11 cases the choice (jurisdictional or non-jurisdictional) resulted in the loss of appellate rights, while in another 9 the choice resulted in the preservation of appellate rights. (A couple of cases were more difficult to classify.)

The agenda materials also discuss whether courts are likely to make use of the clear statement rule set by *Arbaugh v. Y&H Corporation*, 546 U.S. 500 (2006), to help discern whether a statutory appeal requirement is jurisdictional. A Westlaw search for federal court opinions discussing that clear statement rule revealed no cases discussing appellate jurisdiction or procedure. There are roughly 20 federal court opinions that discuss both *Bowles* and *Arbaugh*. The pending case of *Reed Elsevier v. Muchnick* – which presents the question whether 17 U.S.C. § 411(a) restricts subject matter jurisdiction for copyright infringement actions – might offer the Supreme Court an opportunity to clarify when courts should apply *Arbaugh*'s clear statement rule. But it appears likely that most statutory appeal deadlines will be considered jurisdictional under *Bowles*.

Finally, the agenda materials consider whether authorities such as *Becker v. Montgomery*, 532 U.S. 757 (2001), might be employed to mitigate the effects of jurisdictional deadlines in cases where some document, filed within the appeal time, constitutes the substantial equivalent of a notice of appeal. Those authorities may well prove useful in that respect, but it should be noted that not all cases take the forgiving approach exemplified in *Becker*. A leading example of the alternative, unforgiving, approach is *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). It should also be noted that even if a court is inclined to apply the *Becker* line of cases, those cases can only rescue an appeal if *some* document has been timely filed that could be considered the substantial equivalent of the notice of appeal.

The Committee took no action on this agenda item.

E. Item Nos. 08-AP-D, 08-AP-E, & 08-AP-F (possible changes to FRAP 4(a)(4))

Judge Sutton noted that Judge Bye, Mr. Letter and Ms. Mahoney are serving as representatives of the Appellate Rules Committee on the joint Civil / Appellate Subcommittee. That Subcommittee is chaired by Judge Colloton; the other representatives of the Civil Rules Committee are Judge Walker and Mr. Keisler. The Subcommittee conferred by telephone over the summer and considered a number of possible amendments to Appellate Rule 4.

One set of proposed amendments – Item No. 08-AP-D – grows out of Peder Batalden's observation that under Rule 4(a)(4)(B) the time to appeal from an amended *judgment* runs from

entry of the *order* disposing of the last remaining tolling motion. The proposal that the Subcommittee placed before the Appellate Rules Committee for discussion would amend Rule 4(a) so that the appeal time runs from the latest of entry of the order or entry of any amended judgment. A related proposal would clarify the operation of Civil Rule 58's separate document requirement. Currently, the Seventh Circuit reads Civil Rule 58(a)'s reference to an order "disposing of" certain post-judgment motions as meaning orders "denying" such motions. Professor Cooper has pointed out that there can sometimes be orders that grant a tolling motion without actually leading to an amended judgment. The proposal would revise Civil Rule 58 to state that a separate document is not required "when an order – without altering or amending the judgment – disposes of a motion [etc.]." As Judge Colloton pointed out during the Subcommittee's discussions, the Civil Rule 58(a) proposal is conceptually separable from the Appellate Rule 4(a) proposal. But a majority of the subcommittee members appeared to think that it is worthwhile to move forward with both proposals.

An attorney member stated that it seems useful to clarify these provisions. A judge member agreed that even if cases that would be affected by this issue may be rare, the issue is very important when it does arise.

On a somewhat related matter, a participant recounted the practice of one district judge who has on occasion entered a judgment on a separate document before filing an opinion with respect to the judgment. In such instances, a footnote to the judgment states that the judge will later issue an opinion and that the judgment should not be considered a final appealable judgment until the opinion issues. A question has arisen as to whether the entry of the judgment starts the appeal time running. A district judge observed that there is no reason for the judge in question to enter judgment on a separate document at that point – why not just state the disposition but hold off on entering judgment on a separate document until after the opinion is ready to issue? It was also observed that if the appeal time starts to run and a notice of appeal is filed, then the pendency of the appeal may call into question the district judge's authority, at that point, to provide new reasoning in support of the judgment that is on appeal.

The Committee next discussed another set of proposals – Item Nos. 08-AP-E and 08-AP-F – that had also been considered by the Civil / Appellate Subcommittee. These items concern suggestions by Public Citizen and by the Seventh Circuit Bar Association Rules and Practice Committee that Rule 4(a) be amended so that an original notice of appeal encompasses appeals from orders disposing of tolling motions. Such an approach, if adopted, would parallel the approach currently taken by Rule 4(b)(3)(C) for criminal appeals. But as the Subcommittee discussed, any such amendment to Rule 4(a) would face significant drafting problems. One difficulty is that under current law, not every notice of appeal encompasses every *previously*-resolved issue. In particular, under the expressio unius canon a notice of appeal that specifies particular orders can be read to exclude by implication any orders not mentioned. If the rule is to be amended to provide that a previously filed notice encompasses challenges to later dispositions of tolling motions, should such a provision encompass all notices or should it exclude notices that specify only one or more specific prior orders? There are also questions as to how one

would treat actions involving multiple parties. In any event, apart from these drafting difficulties, Subcommittee members did not discern a need for such an amendment.

By consensus, the Committee decided to remove Item Nos. 08-AP-E and 08-AP-F from its study agenda.

F. Item No. 08-AP-G (substantive and style changes to FRAP Form 4)

Judge Sutton invited the Reporter to provide an update on her research relating to this Item, which concerns the possibility of revising Form 4 in various ways. The Reporter recounted that her most recent research was designed to investigate suggestions that Form 4's Questions 10 and 11 seek information that might be protected by work product protection. Question 10 asks those applying to proceed in forma pauperis whether they have paid or will pay an attorney for services in connection with the case, and if so, asks how much and whom. Question 11 requests similar information concerning payments to anyone other than an attorney.

To the extent that Question 11 might be read to encompass payments to investigators or experts (especially non-testifying experts), it seems to raise questions about work product protection. And because many of those who seek to appeal in forma pauperis will be proceeding pro se, it makes sense to consider in particular the scope of work product protection for pro se litigants. Cases concerning protection for the work product of pro se litigants are sparse. But it does appear that pro se litigants' work product should be viewed as falling within the scope of work product protection. Civil Rule 26(b)(3)(A) refers to materials prepared "by or for [a] party or its representative." This dates back to the 1970 amendments to Rule 26, which clarified that work product protection extends beyond lawyers' work. Those who prepared the 1970 amendments appear to have been intending to cover the work of non-lawyer investigators; but the existing language does extend more broadly and appears to cover the work product of pro se litigants.

A district judge asked why the court of appeals needs the answers to Questions 10 and 11 – or, for that matter, a number of other questions in Form 4 – when deciding whether to permit the applicant to appeal in forma pauperis. He suggested that Questions 10 and 11 could be eliminated. What the judge wants to know, he stated, is how much money the applicant has, not what he or she spends it on. An attorney member asked whether any judge is known to have denied a motion for i.f.p. status based on information elicited by Questions 10 and 11. An appellate judge suggested that Questions 10 and 11 can elicit information germane to the question of i.f.p. status, in the sense that a judge might wish to know how much money the applicant is spending on matters relating directly to the litigation itself. An attorney member suggested that perhaps instead of Questions 10 and 11 one could substitute the following simpler formula proposed by certain pro se staff attorneys: "whether funds have been or will be used in the prosecution of the litigation for costs or attorney's fees."

Members discussed the fact that one of the pieces of information that might be disclosed in response to Question 10 is whether the applicant has obtained legal assistance for certain parts of the litigation, even if the applicant is not formally represented by the lawyer in question. This connects to a broader debate over the "unbundling" of legal services. Professor Coquillette observed that the topic of "unbundling" has been the subject of much discussion in the American Bar Association. A district judge stated that if an applicant is receiving any assistance from a lawyer with respect to the litigation, the judge wants to know of the lawyer's involvement because the lawyer should be subject to the discipline of the court.

A judge member asked whether the information elicited by Form 4 is shared with the applicant's opponent. Mr. Green stated that in the Sixth Circuit that information is not provided to the opponent, but he also stated that the practice on this question varies from circuit to circuit. Mr. Green observed that in cases where an application for i.f.p. status is coupled with a motion for appointment of counsel – either Criminal Justice Act ("C.J.A.") counsel or pro bono counsel – the information elicited by Questions 10 and 11 could be relevant to the latter. A participant stated that the C.J.A. form is not put into the court record, but he expressed uncertainty as to whether the C.J.A. form is shared with the DOJ. Mr. Letter undertook to obtain the answer to this question.

An attorney member stated that it would be advisable to find out more about the Supreme Court's practice on i.f.p. applications. Applicants seeking i.f.p. status before the Supreme Court are directed to employ Form 4. Members agreed that it is important to obtain more information about practice in the Supreme Court. Would practice in the Supreme Court be adversely affected if Questions 10 and 11 were replaced with the briefer question "whether funds have been or will be used in the prosecution of the litigation for costs or attorney's fees"? Is the detail currently sought in Form 4 necessary for the review of i.f.p. applications in the Supreme Court? The possibility was noted that one could propose the adoption of different forms for use in the Supreme Court and in the lower courts.

G. Item No. 08-AP-L (FRAP 6(b)(2)(A) / Sorensen issue)

Judge Sutton invited the Reporter to introduce this item, which concerns an ambiguity in Rule 6(b)(2)(A)(ii). The relevant language is similar to that in Rule 4(a)(4)(B)(ii). In both instances, the rules refer to challenges to "a judgment altered or amended" upon a post-judgment motion (or "an altered or amended judgment") – when they should instead refer to challenges to the alterations or amendments. An amendment designed to remove this ambiguity from Rule 4(a)(4)(B)(ii) is on track to take effect December 1, 2009 (absent contrary action by Congress). At the fall 2008 meeting, the Committee discussed the possibility of making a similar change to Appellate Rule 6(b)(2)(A)(ii). The Committee decided to seek guidance from the Bankruptcy Rules Committee. The Bankruptcy Rules Committee referred the question to its Subcommittee on Privacy, Public Access and Appeals. That Subcommittee reviewed the proposal, concluded that the proposed amendment would be useful, and suggested refinements to the wording of the

proposed amendment. The Bankruptcy Rules Committee adopted the views of its Subcommittee.

The Reporter noted that the Bankruptcy Rules Committee's refinement of the proposal is very constructive. The Reporter suggested that it will be important to coordinate the Appellate Rule 6 amendment with the possible amendments to Appellate Rule 4 and Bankruptcy Rule 8015. If the Bankruptcy Rules Committee's Part VIII revision project moves forward, then Bankruptcy Rule 8015 may be renumbered – a change that would necessitate a conforming change to Appellate Rule 6. It is also worth noting that both Bankruptcy Rule 8015 and Appellate Rule 6 address the question of the timing of an appeal after disposition of a timely rehearing motion, and that these rules do so in inconsistent ways. And it may be useful to consider whether Rule 6(b) should conform to the approach currently proposed for Rule 4(a)(4) by the Civil / Appellate Subcommittee – i.e., specifying that when a timely rehearing motion is made the time to appeal runs from the latest of the entry of the order disposing of the last such remaining motion or entry of any altered or amended judgment. The Bankruptcy Rules Committee has not yet had an opportunity to consider that point. For all these reasons, it may make sense for any proposed change to Rule 6 to proceed in tandem with the Part VIII revision project, and for the Appellate Rules Committee to seek the Bankruptcy Rules Committee's guidance on the additional questions mentioned here.

Mr. Letter reported that he had discussed the Rule 6 proposal with Christopher Kohn, the DOJ's longtime representative on the Bankruptcy Rules Committee, and that Mr. Kohn had stated that the suggestion concerning Rule 6 looked right to him. By consensus, the Committee retained this item on the study agenda and resolved to seek further input from the Bankruptcy Rules Committee.

H. Item No. 08-AP-P (FRAP 32 – line spacing of briefs)

Judge Sutton invited the Reporter to introduce this item, which arose from Mr. Batalden's suggestion that Rule 32 should be amended to provide for 1.5-spaced instead of double-spaced briefs. At the spring 2009 meeting, members also discussed the possibility of permitting briefs to be printed double-sided. Members expressed diverse views; much discussion centered on the potential significance of the ongoing shift to electronic filing. After the spring 2009 meeting, Mr. Rabiej had asked Mr. Ishida to review the history of prior proposals to amend Rule 32 to provide for double-sided briefs. The agenda materials include Mr. Ishida's very helpful memo detailing that history, as well as excerpts from a 1995 Appellate Rules Committee report that summarized the comments submitted on the double-sided printing proposal.

An attorney member stated that she would like to hear from the judge members of the Committee what they thought about the proposal. Justice Holland noted that the Delaware Supreme Court permits double-sided (but double-spaced) printing for printed briefs, and that two-sided printing has not been a problem; he also noted that the lawyers are required to provide hard copies for all the justices and their clerks. A district judge asked whether the shift to

electronic filing would moot the question. Mr. Green noted that even with the shift to e-filing, all circuits other than the Sixth Circuit still require the submission of hard copies of briefs. An appellate judge noted that once a brief is electronically filed, each judge can have it printed precisely the way he or she prefers. Another appellate judge noted that the problem of eye strain is likely to prevent judges from simply reading briefs on-screen without printing them. He stated that judges on the Fifth Circuit generally want to receive hard copies of the briefs. Another appellate judge agreed that many judges are likely to continue to want hard copies, though their law clerks may read the briefs on the screen; he noted that the need to print out electronically filed briefs has created a great deal of work for the judicial assistants. Another appellate judge noted that the Eighth Circuit was an early adopter of electronic filing. He stated that his assistant prints out copies of the electronically filed briefs for him; he prefers single-sided printing, though his clerks do not.

An appellate judge suggested that as time progresses, this item might usefully be addressed as part of the set of issues that relate to electronic filing. An attorney member questioned whether line-spacing really will become moot with the shift to electronic filing; she noted that if a judge chooses to have electronic double-spaced briefs printed out with 1.5 or single line spacing, the brief's internal page references will no longer make sense. But it was noted that the question of line-spacing does relate to the question of double-sided printing, and the latter question does appear to be shifting in valence with the adoption of electronic filing.

By consensus, the Committee resolved to keep this item on its study agenda.

I. Item No. 09-AP-B (definition of "state" and Indian tribes)

Judge Sutton invited the Reporter to introduce this item, which concerns Daniel Rey-Bear's suggestion that the term "state" be defined, for purposes of the Appellate Rules, to include federally recognized Native American tribes. There are two possible ways to proceed with this suggestion: one option would be to consider a global definition of the type proposed by Mr. Rey-Bear; a second option would be to examine each Appellate Rule in which the term "state" appears and to consider how to treat Native American tribes for purposes of each such rule.

If one considers the question on a rule-by-rule basis, some rules appear to present more significant issues than others. Mr. Rey-Bear states that there are no federal courthouses that are located within federally recognized Indian reservations; assuming this to be the case, it would appear to make no practical difference whether Native American tribes are treated the same as states for purposes of applying the definition of legal holidays in Rule 26(a)'s time-computation provisions. Mr. Rey-Bear also states that tribal courts' attorney admission standards typically require admission to practice before the bar of a state's highest court, and he suggests that therefore treating tribes as states for purposes of Rule 46 would not change current practice. Professor Coquillette stated that Mr. Rey-Bear's assessment is an accurate description of current practice, but he noted that tribal practices might change; he also observed that admission to

practice before the federal courts of appeals (under Rule 46) also has implications for practice in other jurisdictions. Treating tribes the same as states for purposes of Rule 22's certificate-of-appealability provisions could result in a change in current law. Federal habeas review for persons detained by a Native American tribe is governed by a distinct statutory framework and it is not at all clear that this framework requires a petitioner who has lost in the district court to obtain a certificate of appealability in order to appeal. As to Rule 44, it seems eminently sensible to require that a tribe be notified of litigation in which the validity of the tribe's laws is at stake; but Rule 44 is drafted in terms of challenges to the *constitutionality* of a law, and that language seems like a poor fit as to tribal laws, given that the federal-law constraints on tribal authority appear to be more in the nature of federal common law than federal constitutional law.

Rule-by-rule consideration of Mr. Rey-Bear's suggestion also may be useful because Mr. Rey-Bear's concern appears to center on the operation of Rule 29's provisions for amicus filings. Mr. Rey-Bear argues that tribes should not be required to seek party consent or court leave in order to file an amicus brief, and he also objects to the inclusion of tribes within the proposed new authorship-and-funding disclosure requirement that is currently on track to take effect December 1, 2010 (if it is approved by the Supreme Court and Congress takes no action to the contrary).

An attorney member stated that if the Committee is considering whether to treat tribes the same as states for purposes of amicus filings, the Committee should expand its focus to consider cities and towns as well. She noted that the U.S. Supreme Court's amicus-filing rule – Rule 37 – permits amicus filings (without court leave or party consent) by federal, state and municipal governments but not by tribes. She wondered how often a tribe's request to file an amicus brief is denied. Ms. Leary stated that it would be possible to study this question empirically. A member questioned whether all Native American tribes would actually want to be included within the definition of "state"; tribes and states are different entities with different histories. This member stated that he can see merit in the arguments for treating tribes the same as states for purposes of Rule 29. He also agreed that it is worthwhile to consider whether to treat municipal governments the same as states, because all government entities are distinguishable from private litigants. He suggested that the real issue here is the importance of according tribes as much dignity as states. A participant suggested that the equal-dignity rationale is potentially very expansive in its application, reaching well beyond questions of amicus filing and, indeed, beyond questions pertaining merely to the Appellate Rules.

A district judge noted that there is no Civil Rule governing amicus filings in the district court; requests to file amicus briefs in the district court are made, and often denied. He stated that it seems incorrect to define tribes as states. According the same treatment to tribes as to states may make sense for purposes of amicus filing, but he noted as well that as to a number of tribes there are disputes as to tribal recognition, and that tribes vary greatly in their size and characteristics. (It was noted that Mr. Rey-Bear's proposal would cover only federally-recognized tribes.)

Mr. Letter reported that he has not yet been able to ascertain the DOJ's position on this item. He noted that the dignity rationale is likely to be of considerable importance to the government. Concerning the question of whether tribes are denied leave to file amicus briefs, Mr. Letter recounted that a colleague of his in the environmental division of the DOJ has told him that tribes make a significant number of amicus filings. The courts generally permit such filings, though on some occasions some courts (it was not clear whether these were district courts or courts of appeals) have denied leave to file. Mr. Letter noted that though there is no rule governing amicus filings in the district court, there is a statute – 28 U.S.C. § 517 – that could be argued to authorize the United States to make amicus filings without court permission.

An attorney member suggested that all parties should be treated the same before the court, though he recognized that the United States has an institutional interest when federal statutes are under challenge. An appellate judge stated that courts should be receptive to tribes' amicus filings in cases that implicate tribal sovereignty or other issues of Indian law. Another participant asked whether tribes should be seen as more analogous to states or to foreign nations, for purposes of the amicus-filing question. The Reporter noted that Native American tribes may often have much more at stake in federal court litigation than a foreign nation would have, because the U.S. Supreme Court has made clear that the outer bounds of tribal authority are set by federal law. An attorney member noted, however, that denying a foreign nation leave to file an amicus brief might have foreign relations implications. A participant noted that states, the United States and foreign states are not persons for purposes of the Due Process Clause; he asked whether Native American tribes are persons for that purpose. The Reporter agreed to research this question.

Members discussed the fact that the authorship-and-funding disclosure requirement that is slated to take effect in 2010 as a new Rule 29(c)(5) links the application of that disclosure requirement to whether the litigant is permitted to make an amicus filing without party consent or court permission under Rule 29(a).

There was consensus among the meeting participants that the focus, going forward, should be on Rule 29's amicus-filing provisions rather than on the possibility of globally defining "state" to include Native American tribes. And the inquiry now encompasses whether to include municipal governments as well as tribal governments. Mr. Letter will continue his efforts to gather information within the DOJ. Dean McAllister undertook to research the history of the U.S. Supreme Court's amicus rule, with a view to determining why Native American tribes are not treated the same as states by that rule. Ms. Leary will study amicus filings in the courts of appeals (over the past five or ten years) to determine whether and how often Native American tribes are denied leave to file amicus briefs. One way to focus the search might be to select courts in areas where numerous tribes are located. She will also research the nature of amicus-filing practices in some of the largest tribal courts.

VII. Additional Old Business and New Business

A. Item No. 09-AP-C (matters relating to the Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules)

Judge Sutton invited the Reporter to introduce this item. The Bankruptcy Rules Committee is considering a project to update Part VIII of the Bankruptcy Rules, which addresses appeals from bankruptcy court to district courts and bankruptcy appellate panels. One impetus for the project was the desire to update the Part VIII rules to take account of changes in the Appellate Rules on which they were modeled. But as the project has progressed, participants have also noted the need to update the Part VIII rules to take account of the shift to electronic filing. The Bankruptcy Rules Committee's Subcommittee on Privacy, Public Access and Appeals held an open subcommittee meeting to discuss the project in Boston in September 2009. It seems likely that the earliest that the project would be sent out for public comment – assuming that it progresses – would be the summer of 2011.

The Part VIII rules project seems likely to provide the Appellate Rules Committee with a useful model for adjusting the rules to the practice of electronic filing. In addition, the project provides a good opportunity to address the rules governing permissive direct appeals from bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Interim procedures for those appeals were originally provided by a part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) that is set forth as a note to Section 158. The BAPCPA section setting forth those interim procedures specifies that its provisions apply until a rule relating to the relevant provision is promulgated through the rulemaking process. Such a rule – Bankruptcy Rule 8001(f) – did take effect in December 2008, and thus BAPCPA's interim procedures no longer apply as to matters covered in Bankruptcy Rule 8001(f). But though Bankruptcy Rule 8001(f) sets a 30-day deadline for petitions for permission to appeal, it does not otherwise address procedure in the court of appeals, except to direct the application of Appellate Rule 5. The Part VIII project contemplates putting in place Part VIII rules that would address appeals under Section 158(d)(2), and it thus seems advisable for the two advisory committees to consider jointly what changes, if any, might be appropriate for Appellate Rules 5 and 6. It also would be useful to consider how (and where) to address the compilation of the record for direct appeals. An interesting twist on this question is that in the first level of appeals from bankruptcy court to the district court or BAP, it may be possible to think of the record as simply consisting of a series of online links to the electronic components of the record. Overall, direct bankruptcy appeals present interesting complexities due to the multiple levels of courts – bankruptcy court, district court or bankruptcy appellate panel, and court of appeals – that may be involved at various steps in the process.

A participant asked how frequently direct appeals are taken under Section 158(d)(2). The Reporter noted that research on that question is currently ongoing.

By consensus, the Committee retained this item on its study agenda and resolved to coordinate its efforts with those of the Bankruptcy Rules Committee.

B. Proposed Criminal Rule concerning indicative rulings

Judge Sutton suggested that the Reporter describe the Criminal Rules Committee's work on a proposed new Criminal Rule concerning indicative rulings. The proposed new rule, which was approved for publication this fall by the Criminal Rules Committee, is largely modeled on Civil Rule 62.1 and is designed to dovetail with Appellate Rule 12.1. Presumably because the DOJ has expressed concern about the possible misuse of the indicative-ruling procedure in connection with Section 2255 proceedings, the Criminal Rules Committee modified the Note of the proposed new Criminal Rule to state that "[t]he Committee anticipates that this rule will be used primarily if not exclusively for newly discovered evidence motions under Rule 33(b)(1) (see *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Rule 35(b), and motions under 18 U.S.C. 3582(c). This rule applies to motions 'that the court lacks authority to grant,' and therefore does not apply to motions under 28 U.S.C. 2255."

VIII. Schedule Date and Location of Spring 2010 Meeting

The Committee tentatively discussed two possible dates for the spring 2010 meeting – April 8 and 9, 2010, and May 13 and 14, 2010.

IX. Adjournment

The Committee adjourned at 9:21 a.m. on November 6, 2009.

Respectfully submitted,

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Catherine T. Struve
Reporter

Advisory Committee on Appellate Rules
Table of Agenda Items — December 2009

FRAP Item	Proposal	Source	Current Status
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Discussed and retained on agenda 11/03; awaiting revised proposal from Department of Justice Tentative draft approved 04/04 Revised draft approved 11/04 for submission to Standing Committee Approved for publication by Standing Committee 06/07 Published for comment 08/07 Discussed and retained on agenda 04/08 FRAP 40(a)(1) amendment approved 11/08 for submission to Standing Committee FRAP 40(a)(1) proposal remanded to Advisory Committee 06/09 Discussed and retained on agenda 11/09
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
06-04	Amend FRAP 29 to require that amicus briefs indicate whether counsel for a party authored brief and to identify persons who contributed monetarily to preparation or submission of brief.	Hon. Paul R. Michel (C.J., Fed. Cir.) and Hon. Timothy B. Dyk (Fed. Cir.)	Discussed and retained on agenda 11/06 Draft approved 04/07 for submission to Standing Committee Remanded by Standing Committee for consideration of new developments, 06/07 Draft approved 11/07 for submission to Standing Committee Approved for publication by Standing Committee 01/08 Published for comment 08/08 Revised draft approved 04/09 for submission to Standing Committee Approved by Standing Committee 06/09 Approved by Judicial Conference 09/09

FRAP Item	Proposal	Source	Current Status
07-AP-D	Amend FRAP to define the term "state."	Time-computation Subcommittee 3/07	Discussed and retained on agenda 04/07 Tentative draft approved 11/07 Drafts approved 04/08 for submission to Standing Committee Approved for publication by Standing Committee 06/08 Published for comment 08/08 Approved 04/09 for submission to Standing Committee Approved by Standing Committee 06/09 Approved by Judicial Conference 09/09
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
07-AP-G	Amend FRAP Form 4 to conform to privacy requirements.	Forms Working Group, chaired by Hon. Harvey E. Schlesinger	Discussed and retained on agenda 11/07 Draft approved 04/08 for submission to Standing Committee Approved for publication by Standing Committee 06/08 Published for comment 08/08 Approved 04/09 for submission to Standing Committee Approved by Standing Committee 06/09 Approved by Judicial Conference 09/09
07-AP-H	Consider issues raised by Warren v. American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09

FRAP Item	Proposal	Source	Current Status
08-AP-D	Delete reference to judgment's alteration or amendment from FRAP 4(a)(4)(B)(ii)	Peder K. Batalden, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
08-AP-K	Consider privacy issues relating to alien registration numbers	Public.Resource.Org	Discussed and retained on agenda 11/08
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-N	Amend FRAP 5 to allow parties to submit an appendix of key documents from the record along with petitions and answers	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1.5 line-spacing for briefs	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-Q	Consider amending FRAP 10(b) to permit the use of digital audio recordings in place of written transcripts	Hon. Michael M. Baylson	Discussed and retained on agenda 04/09
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09

FRAP Item	Proposal	Source	Current Status
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09

7A

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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CHAIR

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RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

MEMORANDUM

DATE: December 14, 2009

TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Robert L. Hinkle, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

Introduction

The Advisory Committee on Evidence Rules met on November 20, 2009, in Charleston, S.C. The meeting produced no action items for Standing Committee consideration at the January 2010 meeting. This report is submitted for the Standing Committee's information.

I. Information Item: Restyling Project

At its last meeting, the Standing Committee approved publication of the proposed restyled rules for public comment. The deadline for comments is February 16, 2010. So far, we have received extensive comments from the American College of Trial Lawyers and more limited comments from others. The comments are generally favorable, with specific suggestions. Historically, most comments on rules arrive at or near the deadline, and we expect that to be true this time, too.

We of course can take no further action until the comment period ends. But the Advisory Committee and the Standing Committee's Style Subcommittee have begun consideration of the comments received to date, with the goal of having all work done on all remaining issues in time for the Standing Committee's final consideration of the restyling project at the summer 2010 meeting. In preparing the package for that Standing Committee meeting, the standard protocol will apply: the Advisory Committee will have final say on whether a proposed change is substantive, and the Style Subcommittee will have final say on matters of style. The Advisory Committee greatly appreciates the level of diligence and cooperation the Style Subcommittee has provided.

II. Information Item: Crawford and Its Progeny

The Advisory Committee continues to monitor developments following the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). The decision concludes that, under the Confrontation Clause, a person's "testimonial" out-of-court statement is inadmissible against the defendant in a criminal case unless the person appears at the trial or the defendant had a prior opportunity for cross-examination.

Late last term, in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the Court applied *Crawford* to hold inadmissible a laboratory report concluding that a substance was cocaine. The Advisory Committee considered a memorandum from the Reporter addressing the decision's possible effect on several hearsay exceptions.

The memorandum concluded that one exception is now of doubtful validity. Under Rule 803(10), a certificate may be admitted to show the absence of a public record—and as proof in turn that an event did not occur. *Melendez-Diaz* includes language indicating that the introduction of such a certificate against the defendant in a criminal case violates the Confrontation Clause.

The Advisory Committee nonetheless elected not to propose an amendment to Rule 803(10) at this time. One proposal might be a notice-and-objection procedure of the kind used in some states. Under such an approach, the government would give notice of its intent to introduce a certificate, and the defendant would be required to object prior to the trial. If the defendant objected, the government would have to call the witness live. If the defendant did not object, the government could introduce the certificate. Before proposing a rule adopting such an approach—or any similar approach—it makes sense to await further developments.

The Supreme Court has granted certiorari in *Briscoe v. Virginia*. The case will be argued on January 11, 2010. Under the procedure at issue there, the state must give notice of its intent to introduce a certificate setting out a forensic analyst's conclusion. The defendant cannot require the state to call the analyst as a witness, but the defendant may call the analyst in the defense case

and may proceed as if on cross-examination. The Supreme Court in *Briscoe* will not necessarily indicate the validity of a notice-and-objection procedure under which the witness would be called in the government's case. But the decision could provide further guidance and could be especially important because of the change in the court's membership. Both *Crawford* and *Melendez-Diaz* were 5-4 decisions with Justice Souter in the majority.

It thus makes sense to wait before proposing a fix for Rule 803(10). Another reason for waiting, at least at this time, is that continuing developments may bear on the desirability of amending other hearsay exceptions. It would be best to adopt all needed amendments at one time, both because the best fix might be a single new provision applicable to all affected hearsay exceptions, and because making all needed changes at one time would be less disruptive.

III. Information Item: Physician-Patient Privilege and Related Matters

The Advisory Committee considered a set of proposals submitted by a physician interest group. The group proposed adoption of rules recognizing a physician-patient privilege and medical peer-review privilege. The group proposed requiring the court to instruct the jury in a medical malpractice case to give added weight to the testimony of a specialist in the field at issue. And the group proposed amending the rules to make a pretrial *Daubert* hearing mandatory.

The Advisory Committee thanked the group for its proposals; the group had raised serious issues in a serious way. But the Advisory Committee decided not to go forward with any of the proposals. The Rules Enabling Act would require any privilege rule to be adopted directly by Congress. Comments at the meeting included these: proposing privilege rules, especially in only one field, would be inadvisable; the proposal for a peer-review privilege raises substantive ideological issues best addressed in the political field; and district judges should have discretion on whether to hold a *Daubert* hearing and on instructing a jury on the weight to be given expert testimony.

IV. Minutes of the November 2009 Meeting

The Reporter's draft of the minutes of the November 2009 meeting is attached to this report as Appendix A. The Advisory Committee has not yet approved the minutes.

7B

Advisory Committee on Evidence Rules

Minutes of the Meeting of November 20, 2009

Charleston, S.C.

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Committee") met on November 20th in Charleston, S.C..

The following members of the Committee were present:

Hon. Robert L. Hinkle, Chair
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
Hon. Andrew D. Hurwitz
Marjorie A. Meyers, Esq.,
William W. Taylor, III, Esq.
John Cruden, Esq., Department of Justice

Also present were:

Hon. Lee H. Rosenthal, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee")
Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee's Style Subcommittee
Hon. Michael M. Baylson, Liaison from the Civil Rules Committee
Hon. Judith H. Wiznur, Liaison from the Bankruptcy Rules Committee
John K. Rabiej, Esq., Chief, Rules Committee Support Office
James Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee on Rules of Practice and Procedure.
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Professor R. Joseph Kimble, Consultant to the Standing Committee's Style Subcommittee
Professor Daniel R. Coquillette, Reporter to the Standing Committee
Elizabeth J. Shapiro, Esq., Department of Justice
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office
Professor Stephen A. Saltzburg, Representative of the ABA Section on Criminal Justice
Landis Best, Esq., Representative of the ABA Section of Litigation

Kenneth Lazarus, Esq.
Andrea Kuperman, Law Clerk to Judge Rosenthal

Opening Business

Judge Hinkle welcomed the members of the Committee and other participants to the meeting. He welcomed John Cruden, the new representative of the Justice Department, and Landis Best, the new representative of the ABA Section of Litigation.

The Committee approved the minutes of the Spring 2009 meeting, with two minor changes suggested by Professor Kimble.

Judge Hinkle then reported on the Spring 2009 meeting of the Standing Committee. The Standing Committee unanimously approved the amendment to Evidence Rule 804(b)(3) proposed by the Advisory Committee. That amendment requires the government to provide corroborating circumstances clearly indicated the trustworthiness of a hearsay statement before it may be admitted against the accused as a declaration against penal interest. That amendment should go into effect on December 1, 2010. Judge Hinkle also noted that the Standing Committee approved all of the restyled Evidence Rules for release for public comment. The Standing Committee's vote in favor of publication was unanimous — though two members expressed some reservations about the use of certain style conventions. For example, one member of the Standing Committee objected to the use of bullet points, and another objected to the use of double dashes for any purpose other than to include a collateral point in a sentence. Judge Hinkle stated that it was important to convince these Standing Committee members that the style conventions employed in the Evidence Rules are the same as were used — very successfully — in the restylings of the Criminal, Civil and Appellate rules.

I. Restyling Project

A. Introduction

At its Spring 2007 meeting, the Committee voted unanimously to begin a project to restyle the Evidence Rules. At the Fall 2007 meeting, the Committee agreed upon a protocol and a timetable for the restyling project. Over the next two years, the Committee prepared restyled versions of all the Evidence Rules. As discussed above, the restyled Rules were approved for publication by the Standing Committee at its Spring 2009 meeting. The public comment period runs until February 15, 2010. Three hearings have been scheduled for comment on the restyled Rules.

The first draft of the restyled Rules was prepared by Professor Kimble. The Evidence Rules Committee has reviewed each Rule to determine whether any proposed change was one of substance rather than style — with "substance" defined as changing an evidentiary result or method of analysis, or changing language that is so heavily engrained in the practice as to constitute a "sacred phrase." Under the protocol for the restyling project, if a significant minority of Evidence Rules Committee members agree that the proposed change is substantive, then that change should not be implemented. The Committee has also reviewed each rule to determine whether to recommend that a change, even though stylistic only, might be improved in any respect and reconsidered by the Style Subcommittee of the Standing Committee.

At the Fall 2009 meeting, the Committee considered comments that it had received on the restyled rules issued for public comment. Some comments were from members of the public — most importantly a detailed set of comments from the American College of Trial Lawyers. Other comments were submitted by Professor Kimble, the Reporter, or other Committee members after a top-to-bottom review of the restyled rules.

The Committee's review of these comments at the Fall meeting was tentative, because it anticipates receiving many more public comments. Nonetheless, the review indicated a number of rules that might be improved in some important respects.

What follows is a description of the Committee's tentative determinations, rule by rule.

Rule 101(b)(4)

Restyled Rule 101(b)(4) provides a definition of the term "record" — so that related and repetitive terms such as "memorandum," "report," etc. could be dropped from Rules such as 803(6) and 803(8). Professor Kimble was concerned that references in the Evidence Rules to rulings "on the record" might somehow raise confusion if applied to the definition of "record" under Rule 101(b)(4). So Rule 101(b0(4), as issued for public comment, provided a drafting alternative to distinguish a "record" that was evidence from a court record or a ruling on the record.

Rule 101(b)(4), as issued for public comment, reads as follows:

(b) Definitions. In these rules:

* * *

(4) "record" [in Rules 803, 901, 902, and 1005] includes a memorandum, report, or data compilation;

Committee Discussion:

The Reporter suggested that the bracketed material be deleted, because there was little chance that any reader would confuse a record offered as evidence and a ruling "on the record" — the definition could not possibly apply to the reference "on the record." Professor Kimble suggested that a reader might think the Committee had made an oversight in defining "record" without treating or mentioning different uses of the term.

The Committee determined that the bracketed language should be dropped, because if the languages is added to the existing text it would read "In these rules record in Rules 803, 901," etc. The repetitive reference to rules would be awkward. The Committee approved two alternatives for Professor Kimble and the Style Subcommittee to consider for the next meeting. The first alternative is:

"a record includes a memorandum, report, or data compilation."

The Committee reasoned that adding the article "a" sufficiently distinguished a record as evidence from a ruling on the record. The use of the "a" was also useful to distinguish the noun "record" from the verb "record."

The second alternative approved by the Committee is:

"a record includes a memorandum, report, or data compilation, except in a phrase such as 'on the record.'"

The Committee will review Professor Kimble's rewrite before the next meeting.

Rule 101(b)(6)

Rule 101(b)(6) is intended to clarify that paper-based references in the Evidence Rules cover electronically stored information.

The Rule as issued for public comment provides as follows:

(b) Definitions. In these rules:

* * *

(6) a reference to any kind of written material includes electronically stored information.

Committee Discussion:

The Committee addressed a concern expressed by the Reporter to the Civil Rules Committee, that the reference to "any kind of written material" was not sufficiently comprehensive to cover all the electronically stored information that might be offered and admitted. For example, would "any kind of written material" cover a photograph offered in digital form? Another concern was that the term might not be as comprehensive as the use of the term "electronically stored information" in Civil Rule 34.

The Committee agreed that the term "any kind of written material" could be usefully expanded. But the definition could not be stated so broadly as to cover, for example, oral testimony of a witness. After discussing a number of alternatives, the Committee tentatively agreed on the following change to Rule 101(b)(6) as it was issued for public comment.

(b) Definitions. In these rules:

* * *

(6) a reference to any kind of written material <u>or other medium</u> includes electronically stored information.

The Committee also resolved to add a reference to Civil Rule 34 to the Committee Note to Rule 101(b)(6).

Rule 104(b)

Professor Kimble suggested an amendment to restyled Rule 104(b) — the rule governing conditional relevance. This proposal stemmed from suggestions of the American College of Trial Lawyers.

The proposal, blacklined for changes from the Rule as issued for public comment, was as follows:

Relevancy That Depends on a Fact. When the relevancy of evidence depends on ~~fulfilling a factual condition~~ <u>whether a fact exists</u>, the court may admit ~~it~~ <u>the evidence</u> on, or subject to, the introduction of evidence sufficient to support a finding that the ~~condition is fulfilled~~ <u>fact does exist</u>.

Committee Discussion:

The Reporter was concerned with the use of "may admit." That could be read as giving a trial court discretion to exclude evidence conditioned on the existence of a fact even when the judge determines that there is evidence sufficient to support a finding. One member responded that "may admit" could instead be read to refer to the fact that even if the standard for conditional relevance is met, the proffered evidence might nonetheless be excluded under other rules such as 403 and 801. But the Reporter responded that the Rule could accomplish both objectives — requiring the court to find the conditional relevance standard met if there is evidence sufficient to support a finding, and providing for the possibility of exclusion under other rules — by the following change:

> When the relevancy of evidence depends on ~~fulfilling a factual condition~~ whether a fact exists, the ~~court may admit it~~ proponent must provide the court with ~~on, or subject to, the introduction of~~ evidence sufficient to support a finding that the ~~condition is fulfilled~~ fact does exist.

But the problem with this alternative is that it does not treat the "sequencing" function of the Rule. Rule 104(b) has two functions: 1) establishing the evidentiary standard for questions of conditional relevance; and 2) allowing the judge to make a determination either at the time the evidence offered, or to admit the evidence subject to a showing of the conditional fact.

After discussion, the Committee suggested that Professor Kimble and the Style Subcommittee consider a revision that will more clearly set out the two functions of the Rule. One possibility might look like this:

When the relevancy of evidence depends on fulfilling a factual condition, a proponent must provide the court, at the time the evidence is offered or later in the trial, with evidence sufficient to support a finding that the fact does exist.

> When the relevancy of evidence depends on ~~fulfilling a factual condition~~ whether a fact exists, the ~~court may admit it~~ proponent must provide the court with ~~on, or subject to, the introduction of~~ evidence sufficient to support a finding that the ~~condition is fulfilled~~ fact does exist.The proponent's showing may be made at the time the evidence is offered or later in the trial.

Professor Kimble will revise Rule 104(b) to cover both functions of the rule, and the Committee will consider the revisions before the next meeting.

Rule 104(c)

Professor Kimble suggested a change to the heading of Rule 104(c), as follows:

~~**Matters That the Jury Must Not Hear:**~~ **Conducting a Hearing Outside the Jury's Presence.** A hearing on a preliminary question must be conducted outside the jury's hearing if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and requests that the jury not be present; or

(3) justice so requires.

Committee Discussion:

Committee members noted that the word "presence" is not accurate because many preliminary determinations are made sidebar while the jury is still in the courtroom. Thus, "outside the jury's hearing" — the term used in the text, is correct.

The Committee, therefore, rejected the use of the word "presence" in the heading of the Rule, but did not disagree with Professor Kimble that the heading in the restyled rule could be improved. Members also noted that the text of the Rule was somewhat awkward because there are two different uses of the word "hearing" — the hearing conducted by the court and the protection against the jury hearing the evidence.

Professor Kimble will try to revise the Rule to sharpen the heading and to avoid the multiple references to "hearing." The Committee will review that proposal before the next meeting.

Rule 104(d)

Professor Kimble, and the Style Subcommittee, suggested a change to the heading of the Rule as it was issued for public comment:

~~**Testimony by**~~ **Limited Cross-Examination of a Defendant in a Criminal Case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

Professor Kimble argued that the current heading is incomplete because the rule is not about a defendant's testimony, but rather about limiting cross-examination of a criminal defendant who testifies on a preliminary question.

Committee Discussion:

Committee members were concerned that the heading was misleading — it seems to imply that cross-examination of a criminal defendant is limited in all cases. Nothing in the heading refers to the context of the rule — preliminary questions. Professor Kimble responded that all of Rule 104 is about preliminary questions — the Rule is titled "Preliminary Questions" — so there is no need to refer to preliminary questions in the heading of a subdivision. But Committee members remained concern that the broad reference to "a defendant in a criminal case" — made necessary by the fact that all references to an accused have been changed to "defendant in a criminal case" — would be misleading.

After discussion, the Committee and Professor Kimble agreed that the word "limited" should be taken out of the heading. So there was tentative agreement on the following heading

"Cross-Examining a Defendant in a Criminal Case"

Rule 201(d)

The American College of Trial Lawyers suggested a slight change to Rule 201(d), and Professor Kimble implemented that suggestion. The proposed change to the Rule, blacklined from the Rule as issued for public comment, is as follows:

> **Opportunity to Be Heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the ~~noticed~~ fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

Committee Discussion:

The Reporter noted that the reason for possible change is that a reference to "the noticed fact" is not completely accurate — because, at the time of the hearing, the fact has not yet been noticed.

The Committee unanimously approved the change to Rule 201(d).

Rule 301

The restyled Rule 301, as issued for public comment, reads as follows:

> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of going forward with evidence to rebut the presumption. But this rule does not shift the burden of proof in the sense of the risk of nonpersuasion; the burden of proof remains on the party who had it originally.

The American College of Trial Lawyers suggested that the phrase "in the sense of the risk of nonpersuasion" was awkward and that the Rule could be sharpened. The suggestion led to a broad discussion of the Rule at the Committee meeting.

Committee Discussion:

Committee members noted that the two sentences in the restyled Rule address different questions. The first allocates a burden of *production* while the second allocates a burden of *persuasion.* The current restyled Rule uses the term "burden of going forward" for the former concept and "burden of proof in the sense of the risk of the burden of nonpersuasion" for the latter. While these terms are taken from the original Rule 301, the Committee discussed how the terminology might be improved to make the rule more easily understood. After significant discussion, the Committee unanimously approved tentative changes to the restyled Rule 301. Those changes provide as follows:

> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of ~~going forward with~~ producing evidence to rebut the presumption. But this rule does not shift the burden of ~~proof in the sense of the risk of nonpersuasion; the burden of proof~~ persuasion, which remains on the party who had it originally.

Rule 401

Restyled Rule 401 provides as follows:

> Evidence is relevant if it has any tendency to make more or less probable the existence of a fact that is of consequence in determining the action.

The Committee considered suggestions raised by a law professor on a listserve that the term "more or less" might somehow make a substantive change in the standard for relevance. The Committee also addressed a concern that the term "more or less" might be taken for the colloquialism for a rough approximation. The Style Subcommittee had reviewed these concerns and voted to retain Rule 401 as it was released for public comment. After discussion, the Evidence Rules Committee agreed that no change to the published rule was needed.

Rule 404a

Professor Kimble proposed some minor changes to Rule 404(a): an addition to the heading of Rule 404(a)(2), and deletion of the word "crime" before "victim" in Rule 404(a)(2) (B). The restyled Rule, blacklined to indicate the proposed changes, is as follows:

(a) Character Evidence.

(1) ***Prohibited Uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) ***Exceptions <u>for a Defendant or a Victim</u> in a Criminal Case.*** The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged ~~crime~~ victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and
(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

Committee Discussion:

The Committee agreed that the deletion of the word "crime" was appropriate because that word is superfluous. Rule 404(a)(2) operates only in the context of a criminal case, and the reference to a victim can only be to a victim of crime.

A member questioned whether the proposed change to the heading was accurate. The use of the word "for" might make it seem like the defendant or victim were obtaining a benefit, when in fact the rule contemplates that evidence attacking their character may be admitted. But the Committee determined that in context, the heading must be read to mean that it is providing an exception for *character evidence* of a defendant or a victim — the rule is designated "character evidence" and under the restyling protocol, subheadings are assumed to incorporate the title of the rule.

The Committee therefore tentatively approved the suggested changes to Rule 404(a).

Rule 404(b)(2)

Professor Kimble suggested a minor clarification of the heading to Rule 404(b)(2), as follows:

(2) ***Permitted Uses; Notice <u>in a Criminal Case</u>.***

Committee Discussion

The Committee determined that the change was helpful in sharpening the heading and more accurately describing the text. The Committee unanimously approved the change.

Rule 405(a)

Professor Kimble proposed a change to Rule 405(a), the rule governing the means of proving character. The suggested change to the rule as published was as follows:

Methods of Proving Character.

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

Committee Discussion:

Professor Kimble suggested this change out of concern that the restyled version did not make it exactly clear that the witness being cross-examined would ordinarily be different from the person whose character is being proved. An evidence professor made a similar suggestion on the Evidence ListServ.

The Committee found that the clarification was useful. The Reporter noted that any problem of ambiguity could be made even more clear by referencing the witness as a *character witness*. The Committee agreed and tentatively approved the following change to the rule as issued for public comment:

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

Rule 406

Restyled Rule 406, as released for public comment, provides as follows:

Habit; Routine Practice

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

The American College of Trial Lawyers suggested that the second sentence of the Rule should be deleted as unnecessary, because it simply emphasized the apparent point that relevant evidence is admissible.

Committee Discussion:

Members were opposed to deleting the second sentence of Rule 406, because that sentence was necessary to explain the historical background of the Rule. Pre-Rules common law barred habit evidence 1) where there was no corroboration, or 2) if there was an eyewitness to the event. The original Advisory Committee determined that the second sentence of Rule 406 was necessary to emphasize that these prior limitations on habit evidence were abrogated. Indeed, the second sentence was the *major reason* for Rule 406, because the first sentence simply provides that a certain type of relevant evidence is admissible. The Committee reasoned that in light of the history, deleting the second sentence would raise an argument that the rule on habit evidence had restored the common-law limitations.

The Committee therefore unanimously rejected the suggested modification of Rule 406, as it called for a substantive change.

Rule 410

The American College of Trial Lawyers suggested a set of substantial revisions of restyled Rule 410, in order to clarify two asserted ambiguities in the existing Rule 410: 1) What is a "guilty plea" as defined in Rule 410?; and 2) When is a guilty plea considered "withdrawn" under Rule 410?

The American College noted that its proposals appeared to call for substantive changes and so were outside the scope of the restyling project. For example, the proposal provided for protection of statements regarding pleas when made in *any* proceeding, whereas courts have held that under the terms of the existing Rule 410 there is no protection for plea statements made in foreign proceedings. And generally speaking, the College called for somewhat broader protection for statements made during the guilty plea process than is currently provided by Rule 410.

Before the meeting, the Reporter referred the proposal to the DOJ for its opinion on whether the substantive changes proposed would be useful or necessary. The DOJ representative reported back that the line prosecutors interviewed had generally concluded that the Rule was clear and had not raised any serious problems of application.

When the restyling is completed, the Reporter will review the College's substantive proposals and report to the Committee.

While the College's substantive proposals were deferred, both the College and the DOJ noted a possible substantive change made in restyling the provisions describing the information protected by the Rule.

Specifically, the current Rule 410 in pertinent part protects the following statements:

"(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal procedure or comparable state procedure *regarding either of the foregoing pleas;* * * *"

The restyled version of Rule 410 in pertinent part protects the following statements:

"(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) a statement *about either of those pleas* made during a proceeding under Federal Rule of Criminal Procedure 11 or a comparable state procedure; * * *"

The Department of Justice representative explained how the restyled language in subdivision (3) creates a substantive change: the restyling unintentionally narrows the class of statements that are inadmissible to those only "about the pleas." It appears that the restyling assumed that the phrase "regarding either of the foregoing pleas" modified the word "statement." Thus, the restyled rule limits the non-admissibility to only statements "about the pleas" as opposed to any statements made during the defined proceedings. But the currently understood meaning among practitioners is that the phrase "regarding either of the foregoing pleas" modifies the *comparable state procedure*, not the statement. Thus, under the current rule, a broader range of statements -- those made "in the course of any proceedings" would be excluded.

The Committee agreed with the Department's position that the restyled version of Rule 410 needed to be revised in order to avoid a substantive change by narrowing the class of statements subject to Rule 410 protection. Professor Kimble and the Reporter promised to come up with a rewrite for the Committee's consideration before the next meeting.

Rule 411

The restyled Rule 411 provides as follows:

Liability Insurance

Evidence that a person did or did not have liability insurance is not admissible to prove that the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or — if

disputed — proving agency, ownership, or control.

An Evidence professor on a listserve contended that the restyling made a substantive change because the current rule states that evidence of insurance is not admissible "upon the issue whether the person acted negligently or otherwise wrongfully." The academic contended that under the existing rule, a *plaintiff* is prohibited from proving that he is *not* insured, when the evidence is offered to prove that the plaintiff therefore had an incentive to be careful. But under the restyled rule, plaintiff's evidence of his own lack of insurance would be admissible because it would not be offered to prove that he acted negligently.

Committee Discussion:

The Committee concluded that the scenario posited by the academic — a plaintiff proving his own lack of insurance — was a farfetched hypothetical. Nonetheless, to avoid any contention that a substantive change has been made, the Committee adopted Professor Kimble's suggestion for a slight change to the restyled Rule 411.

The Committee tentatively approved the following change to the restyled Rule 411:

> Evidence that a person did or did not have liability insurance is not admissible to prove ~~that~~ whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or — if disputed — proving agency, ownership, or control.

Rule 412(b)(2)

The restyled Rule 412(b)(2) provides that in a civil case involving sexual misconduct, "the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to *any victim* and of unfair prejudice to any party." (Emphasis added.)

The American College of Trial Lawyers recommended changing "any victim" to "a victim" on the ground that even in a multi-victim case, "only harm to the impeached victim" is to be

considered.

Committee Discussion:

The Committee noted that Rule 412(b)(2) is primarily about admitting substantive evidence, not impeachment. The rule was designed to protect *all* victims against harm in a multi-victim case. Thus, the Committee determined that the American College's suggestion would result in a substantive change in the rule — it would change the application of the balancing test in a multi-victim case.

Rule 412(c)(2)

The restyled Rule provides that the court must conduct an "in-camera hearing." Professor Kimble suggested deleting the hyphen. The Committee approved the change.

Rule 413(a) and Rule 414(a)

The American College of Trial Lawyers suggested the following change to restyled Rule 413(a) — and an identical change to the identical words in Rule 414(a):

Rule 413. Similar Crimes in Sexual Assault Cases

Permitted Uses. In a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered ~~on any matter to which it is relevant~~ to prove predilection/predisposition.

Committee Discussion:

The American College suggested that the rule would be improved by clarifying the purpose for which evidence of sexual assault would be relevant. But the Committee noted that the description in the existing rule is accurate — the evidence is admissible for any matter to which it is relevant. Admissibility is *not* limited to proving the defendant's propensity. For example, in appropriate cases the evidence could also be admitted for a non-character purpose such as to prove intent, motive, identity, etc. So limiting admissibility to predisposition is unquestionably a substantive change, as it limits the breadth of the existing rule. The Committee voted unanimously

to reject the suggested change as beyond the scope of restyling.

Rule 413(b) and Rule 414(b)

The Committee agreed with Professor Kimble's suggestion that the heading of these subdivisions governing notice should be changed from "Disclosure" to "Disclosure to the Defendant." The change makes the heading more descriptive and useful to the reader.

Rule 413(d) and 414(d)

The American College of Trial Lawyers notes that the definition of "sexual assault" in Rule 413(d) (and the definition of "child molestation" under Rule 414(d)) is tied to "any conduct prohibited by 18 U.S.C. chapter 109A." The American College states that the conduct covered by chapter 109A requires crossing a state line and states that "if the drafters intend to include state law violations * * * they might consider reviewing the language accordingly."

Committee Discussion:

The Committee was unanimously opposed to expanding the number of crimes covered by the Rules, as that would be a substantive change — the rule would be admitting more evidence than previously.

Members noted that the description of covered crimes in the existing Rule is not limited to conduct prohibited by chapter 109(a). The coverage is quite comprehensive. So a reference to state law violations either be unnecessary because such crimes are already covered, or it would add more crimes to the list, in which case it would be substantive. Accordingly, the Committee unanimously rejected the suggestion for change.

Rule 606(a)

Restyled Rule 606(a) provides as follows:

Rule 606. Juror's Competency as a Witness

(a) At the Trial. A juror may not testify as a witness before the other jurors at the

trial. If a juror is called to testify, the court must give an adverse party an opportunity to object outside the jury's presence.

Professor Kimble suggested that the words "as a witness" were superfluous because the only way a person could testify under the terms of the rule would be as a witness. The Committee agreed that the words "as a witness" should be deleted.

Rule 608(a)

The American College suggested the following changes to the restyled Rule 608(a):

Rule 608. A Witness's Character for Truthfulness or Untruthfulness

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by ~~testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by~~ testimony in the form of an opinion about — or a reputation for — truthfulness or untruthfulness ~~that character~~. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

The American College thought the phrase "having a character for truthfulness" was awkward.

Committee Discussion:

The sense of the Committee was that the restyled version issued for public comment was precise and accurate. The Committee saw no need for change, and noted that the College's proposal tended to mute the purpose of the Rule — it made it less clear that the only attack permitted by the Rule is an attack on the witness's character for truthfulness.

Rule 608(c)

Restyled Rule 608(c) is a new subdivision, breaking out what is a hanging paragraph in the current Rule 608(b).

The restyled Rule 608(c) provides as follows:

(c) Privilege Against Self-Incrimination. A witness does not waive the privilege against

self-incrimination by testifying about a matter that relates only to a character for truthfulness.

The language in current Rule 608(b), from which restyled Rule 608(c) is taken, provides as follows:

> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

Committee Discussion:

Professor Kimble suggested a change at the end of restyled Rule 608(c) to clarify that the "matter" relates to *the witness's* character for truthfulness. As this change was being discussed, Professor Saltzburg raised the argument that the restyled provision makes a substantive change by providing that there is no waiver "by testifying about a matter that relates only to a character for truthfulness." He noted that the original rule states that there is no waiver when the witness is "examined" on matters related only to truthfulness.

There is a difference between "testifying" about matters relating to character for truthfulness and being examined with respect to them. The provision is intended to allow a witness to refuse to answer questions about his past when they are offered solely to attack his character. For example, if a witness testifies as a bystander to a crime, Rule 608 might allow the cross-examiner to ask the witness about a prior fraud that he committed, unrelated to the instant case. The provision would allow the witness to refuse to answer if the answer would tend to incriminate him — and the cross-examiner could not argue that the witness waived the privilege by testifying, because the prior fraud is being offered only to attack the witness's character for truthfulness.

The rule as restyled could be read to allow a witness to refuse to answer a question about his past whenever his *direct testimony* related only to a character for truthfulness. Thus, a witness who testified solely as a character witness might be able, under the terms of the restyling, to refuse to answer questions about criminal activity that might bear on his qualifications as a character witness. The focus of the restyled rule thus shifts from the adversary's attack (whether the bad act is offered solely to attack character for truthfulness) to the witness's direct testimony.

The Committee recognized that the restyled Rule 608(c) might be interpreted to make a substantive change. Professor Kimble and the Reporter resolved to work on a revision for the Committee's review before the next meeting. One possibility is to use the words of the existing rule — that there is no waiver when the witness is "examined about" matters relating only to the witness's character for truthfulness. Another possibility is to retain the emphatic reference to criminal defendants in the existing rule.

Rule 609(b)

Professor Kimble suggested the following change to restyled Rule 609(b)— the rule governing impeachment with prior convictions — as it was released for public comment:

> **Limit on Using the Evidence After 10 Years.** This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for ~~the conviction~~ it, whichever is later. Evidence of the conviction is admissible only if: * * *

The Committee approved the change.

Rule 612

Restyled Rule 612 provides as follows:

Rule 612. Writing Used to Refresh a Witness's Memory

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires a party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or - if justice so requires - declare a mistrial.

The Committee considered three suggestions for change:

1. The American College suggested that the reference to the Jencks Act, 18 U.S.C. § 3500, should be moved to the beginning of the rule, as it is in the current rule.

2. Professor Kimble suggested putting "adverse" before "party" in (a)(2).

3. Professor Kimble suggested changing the heading of subdivision (c) to "Failure to Produce or Deliver the Writing."

Committee Discussion:

1. The Committee saw no reason to move the reference to the Jencks Act. Professor Kimble noted that the location in the restyled rule made the rule flow more smoothly. And Committee members noted that there was no substantive reason to put the reference in subdivision (a), as that subdivision is descriptive only.

2. The Committee saw no reason to add "adverse" in (a)(2) as the rule is clear, and the term "adverse" is used throughout the rule and would essentially be repetitive here.

3. The Committee approved the suggestion to change the heading of subdivision (c) as it made the heading more descriptive and user-friendly.

Rule 613

Restyled Rule 613 provides as follows:

Rule 613. Witness's Prior Statement

(a) Showing or Disclosing the Statement During Questioning. When questioning a witness about the witness's prior statement, the party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to question the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Professor Kimble suggested a minor change to subdivision (a): "a ~~the~~ party need not show it or disclose its content to the witness." This change was approved.

Professor Kimble also noted that the use of "adverse" and "opposing" should be made consistent in this rule, and indeed throughout the rules.

The Reporter noted that the use of "opposing" in the last sentence of subdivision (b) was necessary to tie in with the hearsay exception for statements of a party-*opponent* in Rule 801(d)(2). As to uniformity in the use of "adverse" and "opposing" the Reporter noted that some courts had construed "opponent" in Rule 801(d)(2) to mean that the parties had to be on opposite sides of the "v" — thus, some courts have held that co-defendants are not "opponents" for purposes of Rule 801(d)(2) even though they may be taking adversarial positions in a litigation. Under this view, "adverse" and "opposing" are not the same — at least under Rule 801(d)(2) — and so it might create a substantive change to use one term rather than the other throughout the rules. The Reporter agreed to check every use of "adverse" and "opposing" in the restyled rules to ensure that no substantive change has been made.

Rule 614(a)

The restyled Rule 614(a) reads as follows:

Rule 614. Court's Calling or Questioning a Witness

(a) Calling. The court may call a witness on its own or at a party's suggestion. Each party is entitled to cross-examine the witness.

Professor Kimble suggested that the word "suggestion" — which comes from the original

— should be replaced with "request." The Committee agreed, noting that the word "request" was more consistent with terminology used throughout the Evidence Rules.

Rule 706(d)

Professor Kimble suggested that the heading, "Disclosing the Appointment" should be changed to "Disclosing the Appointment to the Jury." The Committee approved the change, as it made the heading more specific and would aid users in applying the rules.

Rule 801(a)

The current Rule 801 defines hearsay as a "statement * * * offered in evidence to prove the truth of the matter asserted." Thus evidence must be a "statement" to be excluded as hearsay. Current Rule 801(a) defines a "statement" as follows:

> (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

The existing rule is vague on whether an oral written assertion can be hearsay if it is not intended to be so. The rule requires a showing of intent to assert for nonverbal conduct. But the placement of the word "it" could be read to refer either to nonverbal conduct only, or to both verbal and nonverbal conduct.

This vagueness in drafting is clarified by the restyled version of Rule 801(a), which defines "statement" as follows:

> **(a) Statement.** "Statement" means:
>
> **(1)** a person's oral or written assertion; or
>
> **(2)** a person's nonverbal conduct, if the person intended it as an assertion.

The restyled version is structured to make it clear that an oral assertion is a statement even if it is not intended as such. But the problem with the restructuring is that many courts—in part perhaps because of the vagueness of the current rule — have held that an oral or written assertion cannot be hearsay unless the speaker intends to make the assertion that the proponent is offering into evidence.

The Committee therefore considered whether the restyled Rule 801(a) would make a substantive change in the hearsay rule. One member argued that the restructuring would not change

any result in the cases because the intent requirement can be found in Rule 801(c), which defines hearsay as statements offered for the truth of the "matter asserted." Under this argument, "asserted" must mean intentionally asserted. But some of the literature and case law puts the intent requirement in the definition of "statement" under Rule 801(a).

Some Committee members suggested that the best way to avoid any substantive change in this difficult area is to return, as closely as possible, to the original rule. That would mean that the rule would remain vague, but it would keep the existing case law intact. The Reporter noted that a "restyled" version that hews closest to the original would provide as follows:

> "Statement" means an oral or written assertion or nonverbal conduct of a person if it is intended by the person as an assertion.

Professor Kimble and the Reporter agreed to work on a possible change to the restyled version of Rule 801(a), for the Committee to consider before the next meeting.

Rule 801(d)(2)(B)

The hearsay exemption for adoptive admissions currently covers "a statement of which the party has manifested an adoption or belief in its truth."

The restyled version released for public comment covers a statement "that the party appeared to adopt or accept as true."

The Committee discussed whether the change from "manifested an adoption or belief" to "appeared to adopt or accept" was a substantive change. On its face the restyled language would appear to allow courts to find an adoptive admission more easily. The language "appeared to adopt" seems more diffident or passive than "manifested an adoption." Members noted, however, that the case law under the existing Rule does *not* require active conduct for an adoption — cases abound where parties are found to adopt by silence.

The restyled language seems less active and therefore more in accord with existing case law. But there is a legitimate concern that the less aggressive language may be interpreted as a signal for a substantive change that would liberalize *even further* the already minimal showing necessary for adoption.

Committee members determined that, in light of the problematic interface of rule language and case law, the restyled version should hew as closely to the existing rule as possible. Some

members contended that under the circumstances, "manifested" was a sacred word that could not be restyled. The Committee voted to return to the word "manifested" in Rule 801(d)(2)(B) — subject of course, to receiving public comment on the question. (Comment on Rule 801(d)(2)(B) was specifically invited in the cover letter to the public). Professor Kimble agreed to revise the restyled version to include the word "manifested" and to submit it for the Committee's review before the next meeting.

Rule 801(d)(2)(E)

The existing rule on coconspirator hearsay provides an exemption for:

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

The restyled version of the rule provides the exemption in the following language:

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

* * *

(E) was made by the party's co-conspirator during and in furtherance of the conspiracy.

Professor James Duane argues that the restyled version makes a substantive change because the existing rule's reference to "a coconspirator of *a* party" allowed the government to admit a statement against *any* defendant so long as the government could prove that the declarant conspired with any one defendant in the case. As he puts it: "taken literally and at face value, [the existing language] has always meant that a statement is technically admissible against all of the defendants in a criminal case, as long as it was made in furtherance of a conspiracy that included any one of the defendants as a member." Professor Duane notes that this possibility is precluded in the restyled version, as the statement must be made by a coconspirator of the party against whom it is offered.

The Committee considered whether Professor Duane's contention had merit. Members noted that the existing rule has *never* been construed to allow the admission of coconspirator hearsay against a party who has not conspired with the declarant. There is no rationale in the coconspirator exception that would allow a court to pin admissibility on the fact that the defendant happened to be unluckily joined in a case with a party who did conspire with the declarant. The notion that a coconspirator statement can be admitted against one who is not a coconspirator is made extremely doubtful by other language in the existing rule. The final sentence of current Rule 801(d)(2) provides

as follows:

> The contents of the statement shall be considered but are not alone sufficient to establish * * * the existence of the conspiracy and the participation therein *of the declarant and the party against whom the statement is offered* under subdivision (E).

That language indicates that admissibility is predicated on a conspiracy between the declarant and the party against whom the statement is offered — not on the declarant's relationship to any other party in the case.

Members noted that there does not appear to be a single case in which coconspirator hearsay was admitted in the absence of a finding of a conspiracy between the declarant and the defendant against whom the statement is offered. To the contrary, *all* the reported case law on the subject requires a showing of conspiracy between the declarant and the party against whom the statement is offered. See, e.g., *United States v. Bulman,* 667 F.2d 1134 (11th Cir. 1982) (coconspirator's statement properly excluded as to one defendant, while admitted against others, where government failed to establish a connection between the defendant and the declarant).

Under the restyling protocol, the definition of a substantive change is one that changes an admissibility determination under existing law. As applied to the restyling of the coconspirator exception, there is no substantive change because the law is as before — admissibility is dependent on a conspiratorial connection between the declarant and the party against whom the evidence is offered. The restyled version *clarifies* the existing rule, but it does not change any evidentiary result. The Committee therefore unanimously agreed to retain the restyled Rule 801(d)(2)(E).

Rule 803(2)

The existing Rule 803(2) provides a hearsay exception for statements relating to a startling event "made while the declarant was under the *stress of excitement*" caused by the event.

The restyled version of Rule 803(2) covers statements made while the declarant was under the "stress *or* excitement" caused by the event.

The change was made because "stress or excitement" was a more common usage than "stress of excitement." But research by Professor Broun indicated that the term "stress of excitement" was carefully chosen by the original Advisory Committee. The Advisory Committee specifically relied on pre-Rules case law that used the term "stress of excitement." In light of this history, the Committee determined, unanimously, that there was not a sufficient justification for the change to "stress or excitement." The Committee therefore voted to retain the original language.

Rule 803(6), (7) and (8)

The exceptions for business records, absence of business records, and public records each contain a clause providing that the court may exclude a proffered record if the source of information or the method or circumstances of preparation indicate lack of trustworthiness. Under the restyled versions issued for public comment, each of those Rules located the trustworthiness clause in a hanging paragraph at the end of each Rule. For example, restyled Rule 803(6) provides as follows:

> **(6) Records of a Regularly Conducted Activity.** A record of an act, event, condition, opinion, or diagnosis if:
>
> > **(A)** the record was made at or near the time by - or from information transmitted by - someone with knowledge;
> >
> > **(B)** the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;
> >
> > **(C)** making the record was a regular practice of that activity; and
> >
> > **(D)** all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(b)(11) or (12) or with a statute permitting certification.
> >
> > But this exception does not apply if the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

Restylists try to avoid hanging paragraphs.

Professor Saltzburg proposed that the hanging paragraph be reconfigured as a new subdivision (E), which would provide as follows:

> ***(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.***

Professor Kimble agreed with this suggestion, and it was approved by the Style Subcommittee. At the meeting, the Committee voted unanimously in favor of the new subdivision (E).

Discussion then turned to whether the same solution could be employed in Rule 803(7) and (8). The Committee determined that the subdivision would work in subdivision (7) because the introductory clause of that Rule was the same as that of Rule 803(6).

The fix would *not* work for revised Rule 803(8) as currently conceived, however, because the introductory language to that Rule does not introduce admissibility requirements. Rather, it simply describes the records that are admissible under the Rule. Thus, starting the trustworthiness clause with a "neither" would make no sense.

Professor Kimble agreed to work on a solution by which the hanging paragraph in Rule 803(8) could be recast as a new subdivision. It that could not work, the hanging paragraph would be retained. The Committee resolved to review the matter at the next meeting.

Rule 1101

Rule 1101 describes the cases and proceedings to which the Evidence Rules are applicable. Bankruptcy Judge Isgur provided a comment to the Committee in which he suggested that restyled Rule 1101 might make an inadvertent substantive change with respect to the applicability of the Evidence Rules in Bankruptcy Courts. He noted that the restyled Rule 1101 provides that the Evidence Rules are applicable to "cases and proceedings under 11 U.S.C." — but that not all proceedings before Bankruptcy Judges are brought under that Chapter.

Committee Discussion:

Judge Wiznur, the liaison from the Bankruptcy Rules Committee, helpfully assisted the Committee in determining whether the restyled Rule 1101 changed the applicability of the Evidence Rules in any bankruptcy proceeding. She noted that the restyled language ("cases and proceedings under 11 U.S.C.") was not substantively different from the reference to Title 11 in the existing Rule. She recommended, however, that any question of coverage could be answered by simply adding "bankruptcy" to the civil cases and proceedings explicitly covered by the Rule. Thus, the first bullet point in Rule 1101(b) could provide as follows:

These rules apply in:

• civil cases and proceedings, including bankruptcy, admiralty and maritime cases;

When coupled with the later reference to "cases and proceedings under 11 U.S.C.," there should be no question about the Evidence Rules' applicability to all bankruptcy proceedings.

The Committee unanimously agreed that the reference to bankruptcy should be added in the first bullet point. It also voted unanimously to change the heading of subdivision (b) from "Proceedings" to "Cases and Proceedings" — because the term "cases and proceedings" is used

throughout the text of the Rule.

Final Point

The Committee thanked and commended Professor Kimble for his outstanding efforts in restyling the Evidence Rules. Professor Kimble's dedication and professionalism were critical to the success of the project.

II. Proposals by a Physician Interest Group

A physician interest group suggested a number of changes to the Evidence Rules. The Committee reviewed the suggestions at the meeting.

1. The physician group suggested that the Committee draft and propose a doctor-patient privilege. After discussion, the Committee rejected the suggestion. Committee members, fresh from the experience of working for the enactment of Rule 502, found it unlikely that any proposal for a doctor-patient privilege would be enacted by Congress. Moreover, any physician-patient privilege would raise a number of difficult drafting questions and policy objections — for example, the Department of Justice would be concerned about application of the privilege to cases involving Medicaid fraud. The privilege is not uniform in the states and so a number of difficult policy questions would have to be resolved. The Committee determined that any effort to codify a new privilege should begin in Congress (as was the case with Rule 502). If Congress then wanted the assistance of the Committee in helping to draft the privilege, the Committee might at that point be of assistance.

2. For similar reasons, the Committee rejected the physician group's suggestion that it draft and propose a privilege protecting peer review. In addition, the Committee noted that the Supreme Court had refused to adopt a peer review privilege under federal common law — meaning that the difficulties of enacting a privilege were even more daunting.

3. The physician group suggested that Rule 407 — the Rule excluding subsequent remedial measures when offered to show fault or product liability — be amended to limit or prevent the use of subsequent remedial measures when offered to prove feasibility or for impeachment. The group contended that these exceptions had been used so broadly as to provide exceptions that swallowed the rule excluding subsequent remedial measures. The Committee rejected the suggestion that an

amendment was needed. Reviewing the case law under Rule 407, the Committee noted that the courts had reasonably limited those exceptions. As to feasibility, courts have limited the exception to situations in which the defendant actively contested feasibility; and when feasibility *is* actively contested, it would be unfair for the defendant to then argue that a subsequent remedial measure could not be admitted to prove the change was feasible. As to impeachment, the courts have refused to apply the exception to every case in which the remedial measure could contradict a defense witness; that is, the courts refuse to apply the impeachment exception in a way that would swallow the rule. Because the Committee rejected the physician group's premise that the feasibility and impeachment exceptions have been too broadly interpreted, it voted unanimously against any amendment to Rule 407 at this time.

4. The physician interest group suggested that Rule 702 be amended to require the court to instruct the jury to give added weight to an expert "with an advanced level of experience, training, education or certification relevant to the fact at issue in the case." The Committee voted unanimously against the proposal, on the following grounds: a) the Evidence Rules govern admissibility and not weight; b) the suggestion raises the specter of a judge invading the jury's province; c) many states have rules prohibiting the judge from commenting on the evidence, and so any rule in that regard in the Federal Rules would create disuniformity with those states; and d) practical problems would arise in giving such an instruction, such as, how much weight should be given, how much specialization must be found before an instruction is required, etc.

5. The physician interest group proposed a new evidence rule (numbered 707) that would require courts to hold *Daubert* hearings. The Committee unanimously rejected this suggestion for a number of reasons: a) the Evidence Rules are not ordinarily the place to set out procedural requirements; b) the Committee already rejected an absolute requirement for a hearing on experts when it drafted the 2000 amendment to Rule 702 — as the Committee Note to Rule 702 indicates, the Committee believed then, as it does now, that the trial court must have flexibility in evaluating challenged expert testimony; c) any amendment requiring hearings would be contrary to the law in every circuit, which indicates that judges have discretion to dispense with a *Daubert* hearing; d) the proposal conflicts with the Supreme Court's opinion in *Kumho Tire*, in which the Court declared that trial courts have discretion in how to evaluate an expert's opinion under *Daubert*; e) in many cases, the trial court will have more than enough information upon which to make a *Daubert* determination, and in those cases a hearing would be an empty exercise; and f) any concern that trial courts will make a *Daubert* ruling without sufficient information is sufficiently addressed by the case law providing that a trial court abuses its discretion in those circumstances.

In the end, the Committee thanked Mr. Lazarus, the representative of the physician interest group who attended the Fall meeting. While the Committee decided not to act on any of the group's suggestions, members noted that the Committee greatly appreciated input from the public. For his part, Mr. Lazarus thanked the Committee for its careful consideration of the proposals and expressed the physician group's interest in working with the Committee in the future.

III. Possible Amendments to the Evidence Rules in Response to Supreme Court Cases on the Right to Confrontation

For the Committee meeting, the Reporter prepared a memorandum on the Supreme Court's recent decision in *Melendez-Diaz v. Massachusetts.* The *Melendez-Diaz* Court held that certain certificates reporting the results of forensic tests were "testimonial" and therefore the admission of such a certificate violated the accused's right to confrontation, unless the person who prepared the certificate were produced to testify. The Court reasoned that the certificates were prepared exclusively for use in a criminal trial, as substitutes for trial testimony, and so were testimonial within the meaning of the Confrontation Clause as construed by *Crawford v. Washington.*

Melendez-Diaz raises serious questions about the admissibility of certificates offered to prove the absence of a public record under Rule 803(10). Like the certificates at issue in *Melendez-Diaz,* a certificate proving up the absence of a public record is prepared with the sole motivation that it will be used at trial — as a substitute for live testimony. *Melendez-Diaz* is less likely to have an impact on the Federal Rules exceptions for business and public records (Rules 803(6) and (8)) because the federal courts have largely construed those exceptions to be inapplicable to records prepared solely in anticipation of litigation. The effect of *Melendez-Diaz* on provisions permitting the authenticity of evidence to be proven by certificate is uncertain.

The Reporter suggested that it would be premature to propose any amendment to the Evidence Rules to respond to *Melendez-Diaz.* The Supreme Court has another case on its docket this term — *Briscoe v. Virginia* — that will examine and perhaps alter the impact of *Melendez-Diaz.* Moreover, time is needed for lower courts to weigh in on any effect that *Melendez-Diaz* has on the Federal Rules of Evidence. The Committee asked the Reporter to continue to monitor the case law and to report to the Committee at the next meeting.

IV. Civil Rule 6(d) — Three Day Rule

Civil Rule 6(d) adds three days to any time specified to act after service is made by any means other than in-hand delivery or leaving the paper at a person's home or office. The Civil Rules Committee is considering whether to propose an amendment to Rule 6(d). The most important question is whether the three day bonus should be retained when service is made electronically. The initial reason for giving the three days for electronic service was that there may be glitches in the technology that justify the three-day protection.

The Civil Rules Committee is asking all the Advisory Committees for any views they may have about the need to amend Rule 6(d). The Evidence Rules Committee discussed the matter, and

none of the members thought there was any need for an amendment to Rule 6(d) at this time. As to electronic service, members noted that technological glitches remain frequent enough to justify continuing the three-day rule.

V. Next Meeting

The Spring 2010 meeting of the Committee is tentatively scheduled for April 22-23 in New York City.

Respectfully submitted,

Daniel J. Capra
Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

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CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

MEMORANDUM

DATE: December 11, 2009

TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Richard C. Tallman, Chair
Advisory Committee on Federal Rules of Criminal Procedure

RE: Report of the Advisory Committee on Criminal Rules

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on October 13, 2009 in Seattle, Washington, and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are attached.

This report describes discussion items concerning Rule 16 (Discovery and Inspection), Rule 12 (Pleadings and Pretrial Motions), Rule 32 (Sentencing and Judgment), Rule 5 (Initial Appearance), and Indicative Rulings.

II. Discussion Items

A. Rule 16 (Discovery and Inspection)

Proposals to codify and/or expand the government's obligation to disclose exculpatory and impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963), have been considered by the

Criminal Rules Committee on multiple occasions. Most recently, in 2007 the Standing Committee voted not to publish for notice and comment an amendment endorsed by the Rules Committee that would have mandated "open file" discovery of all exculpatory and impeaching information in the custody or control of federal prosecutors and their investigative agencies. The Justice Department, which opposed the proposed amendment, argued that the proposed amendment would upset the balance of interests in the criminal justice process. The Department also took the position that it was important to allow time for a recent amendment to the United States Attorneys' Manual to have an impact on the practice of federal prosecutors. The Standing Committee remanded the matter to the Advisory Committee for further consideration at some future date after sufficient time had passed to assess the impact of those changes.

The Advisory Committee has now turned its attention once again to Rule 16. In April 2009, Judge Emmet Sullivan, who had presided over the trial of Senator Ted Stevens in the United States District Court for the District of Columbia, wrote a letter to Judge Tallman urging the Committee to reconsider amending Rule 16. In response, Judge Tallman appointed a Rule 16 subcommittee, which met by teleconference prior to the October meeting, and he put the matter on the agenda for the October meeting.[1]

At the October meeting, Attorney General Lanny Breuer addressed the Committee. He stated that both he and the Attorney General are committed to holding federal prosecutors to the highest ethical and professional standards, and he described a variety of steps the Department had taken in the aftermath of the Stevens' trial. The Department established a working group on discovery in criminal proceedings to recommend changes, and is taking a multi-faceted approach that includes training, guidance, strong leadership, and more uniformity. Every federal prosecutor will be required to undergo training, and each district will designate an expert on discovery to advise its prosecutors. There will be a new position in Washington to oversee these efforts, and a new online repository of relevant materials.

General Breuer stated that the Department of Justice would not object to amending Rule 16 simply to codify the disclosure requirements of *Brady*, but it would oppose any proposed amendment going beyond *Brady*. He said that extending the government's disclosure obligations beyond *Brady* would be inconsistent with Supreme Court precedent, would upset the careful congressionally-mandated balance inherent in criminal discovery under the Jencks Act, and would disregard critical interests such as the rights and safety of victims and other witnesses, and special concerns relating to cases implicating national security. If the Committee decided to amend Rule 16 to require more disclosure than *Brady* currently requires, General Breuer said that the proper course of action would be for the Committee to write a report to Congress seeking statutory authorization for such a change, including an amendment of the Jencks Act.

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[1]The members of the Subcommittee chaired by Judge Tallman are Judge Morris England, Professor Andrew Leipold, Ms. Rachel Brill, and Assistant Attorney General Lanny Breuer.

The Committee discussed various mechanisms for gaining additional information that might illuminate the issues. Although it would be desirable to have detailed information about the impact of the changes in internal procedures as a result of the amendment to the United States Attorneys Manual, it was determined that this subject would not lend itself to research conducted by the Federal Judicial Center. Members noted that extensive disclosure is already available in some districts, in which an open file procedure is the norm. Judge Tallman requested the assistance of the Center in surveying judges and lawyers in the so-called "open file districts" to determine whether those districts have fewer *Brady*-type problems.

There was general agreement that it would be useful for the Rule 16 subcommittee to host a consultative session, as the Civil Rules Committee did when considering changes to summary judgment and expert witness issues in civil litigation, bringing together criminal justice experts from the bench, bar, and academia to share their views. The Advisory Committee on Civil Rules found this procedure to be very useful. Accordingly, a consultative session has been scheduled for February 1, 2010, in Houston, Texas. The reporters and members of the Rule 16 subcommittee will be joined by an small group of practitioners, academics, and judges with substantial experience bearing on different issues of concern.

After discussion, Judge Tallman recommitted full consideration of the issue to the Rule 16 Subcommittee. Given the time required for additional research and extensive consultation on the various issues raised by the proposal to amend Rule 16, it is not anticipated that the Subcommittee will present a draft proposal at its April 2010 meeting. But there will be a full report on what it has learned in the interim.

B. Rule 12 (Pleadings and Pretrial Motions)

In April 2009, the Committee voted to send to the Standing Committee an amendment to Rule 12 that attempted to conform the rule to the Supreme Court's ruling in *United States v. Cotton*, 535 U.S. 625 (2002). The amendment required defendants to raise a claim that an indictment fails to state an offense before trial, but provided relief in certain narrow circumstances when defendants failed to do so. In particular, the amendment provided for relief if the failure to raise the claim was for good cause or prejudiced a substantial right of the defendant.

The Standing Committee declined to publish the proposed amendment and remanded it to the Committee for further study. Specifically, as Judge Raggi pointed out, members of the Standing Committee generally approved of the concept of the proposed amendment to Rule 12 but wanted the Advisory Committee to consider the implications of using the term "forfeiture" instead of "waiver" in the relief provision. In *Cotton*, the Supreme Court had used the term "forfeiture" and the two terms trigger different standards of review on appeal. In drafting its proposed amendment, the Committee had used "waiver" because it was part of the existing language of Rule 12.

Judge Tallman observed that the Committee had not previously considered the option of using "forfeiture" and the impact of such a choice was unclear, and he recommitted the issue of whether to use "waiver" or "forfeiture" to the Rule 12 subcommittee, with the goal of presenting a revised draft to the full Committee at the spring meeting in 2010.

C. Indicative Rulings

In light of the adoption of Appellate Rule 12.1 and Civil Rule 62.1, which went into effect on December 1, 2009, the Committee took up the question whether to propose a parallel provision in the Criminal Rules permitting "indicative rulings." The new Appellate and Civil Rules are designed to facilitate remands to the district court to enable it to consider motions after appeals have been docketed and the district court no longer has jurisdiction.

Because the new rules permitting indicative rulings have been adopted in the appellate and civil context, the Committee focused on whether the criminal context is different and somehow incompatible with adoption of such a rule. The Committee considered but was not persuaded by the Department of Justice's concern that the proposed rule might be viewed by jailhouse lawyers as an invitation to file frivolous motions. One member expressed the view that this fear is overstated because in his experience as a trial judge, jailhouse lawyers do not need an invitation to file such motions. In addition, Judge Rosenthal pointed out that the Standing Committee had considered and rejected a proposal to limit the appellate rule's applicability in the criminal arena.

After discussion of whether the new Rule would apply to motions under 28 U.S.C. § 2255, members concluded that the rule did not so apply, because § 2255 motions, while disfavored, are not precluded during the pendency of a direct appeal. Because the new Rule would apply solely to motions that a district court is unable to consider during an appeal, the proposed rule would not cover § 2255 motions.

The Committee voted unanimously to approve a proposed rule paralleling Civil Rule 62.1, and also approved an amendment to the Committee Note. Following the meeting, the Chair and Reporter determined that the new language in the Committee Note raised issues on which additional research and discussion would be beneficial. Accordingly, these matters will be placed on the agenda for the Committee's meeting in April, and it is anticipated that the proposed rule will be submitted to the Standing Committee in June 2010.

D. Rule 5 (Initial Appearance)

In June 2009, the Standing Committee considered the Committee's decision not to amend Rule 5 and recommitted the matter to the Committee for further study as part of its ongoing monitoring of the implementation of the Crime Victims' Rights Act ("CVRA").

In April 2009, the Committee had decided against forwarding to the Standing Committee an amendment to Rule 5 that would have required a judge, when deciding whether to detain or release the defendant, to consider the right of any victim to be reasonably protected from the defendant. The Committee based its decision on its belief that the current version of Rule 5 already provides adequate protection for victims: the rule requires a judge making a decision to release or detain to apply all relevant statutes, including both the CVRA and the Bail Reform Act, which require a judge to consider danger to the community.

The Committee was informed that recent hearings on CVRA oversight had not indicated any need for amendments to the Rules. The Committee requested that the Department of Justice continue to provide a liaison with advocates for victims' rights, and that it report any dissatisfaction with the application of Rule 5 as it relates to victims. The Committee noted the need to continue to monitor victims' rights.

E. Rule 32 (Sentencing and Judgment)

In April 2009, the Committee deferred consideration of two amendments to Rule 32: (1) an amendment to Rule 32(h) that would require a judge to give notice to parties when the judge was considering imposing a sentence that was a "variance" from the sentencing guidelines; and (2) an amendment to Rule 32(c) that would ensure that parties receive the same information as the probation officer who prepares the presentence report ("PSR"). At the October meeting, it was agreed that consideration of both amendments should again be deferred to await further development in sentencing law.

F. Rule 11 (Advice on Immigration Consequences of Conviction)

The Committee had been asked by Judge Rosenthal to consider the desirability and feasibility of amending Rule 11 to require the district court to warn an alien defendant who is pleading guilty of the possible collateral consequences that might flow from a conviction, *i.e.*, deportation or ineligibility for various forms of relief under immigration laws. The Committee had twice previously declined to add immigration consequences to the list of warnings required to be issued by a judge conducting a plea colloquy under Rule 11.

The Committee decided to defer consideration of amending Rule 11. The Supreme Court has before it this term *Padilla v. Kentucky*, No. 08-651, a case presenting the related question of whether the Sixth Amendment requires that counsel advise an alien defendant who pleads guilty of the immigration consequences of the conviction. The Court's decision in *Padilla* will clarify the obligations of defense counsel. Additionally, the Department of Justice has awarded a grant to a project conducted by the American Bar Association to create a computer database compiling the collateral consequences of various offenses. The availability of a mechanism to determine the collateral consequences of the conviction for various offenses might also bear on the desirability of amending Rule 11.

G. Other Issues

The Committee heard reports on the work of the Sealing and Privacy Subcommittees. It also considered and declined to pursue the suggestion that it consider amending Rule 12.2 to require a district court to advise a defendant of his right to appeal from an order to submit to a competency examination or from an order of commitment.

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

October 13, 2009
Seattle, Washington

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "Committee") met in Seattle, Washington, on October 13, 2009. The following members participated:

Judge Richard C. Tallman, Chair
Judge Morris C. England, Jr.
Judge John F. Keenan
Judge David M. Lawson
Judge Donald W. Molloy
Judge James B. Zagel
Justice Robert H. Edmunds, Jr.
Professor Andrew D. Leipold
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Lanny A. Breuer, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter
Professor Nancy King, Assistant Reporter

Two members were unable to attend: newly-appointed member Timothy R. Rice, U.S. Magistrate Judge of the Eastern District of Pennsylvania, and Thomas P. McNamara, Federal Public Defender of the Eastern District of North Carolina (excused due to illness).

Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, and liaison member, Judge Reena Raggi. Supporting the Committee were:

Peter G. McCabe, Rules Committee Secretary and Administrative Office
Assistant Director for Judges Programs
John K. Rabiej, Chief of the Rules Committee Support Office at the
Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Henry Wigglesworth, Attorney Advisor at the Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center

Also attending were two officials from the Department of Justice's Criminal Division - Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton,

Deputy Chief of the Appellate Section. Bruce Rifkin, Clerk of the United States District Court for the Western District of Washington, attended as a representative of the Clerks of Court and Thomas Hillier, Federal Public Defender of the Western District of Washington also attended as a representative of the Federal Public Defenders.

A. Chair's Remarks, Introductions, and Administrative Announcements

Judge Tallman welcomed everyone to the newly-renovated William K. Nakamura Courthouse in Seattle. Judge Tallman particularly welcomed newly-appointed Committee members Judge David Lawson and Assistant Attorney General Lanny Breuer.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the April 2009 meeting.

The Committee unanimously approved the minutes.

II. CRIMINAL RULES UNDER CONSIDERATION

Mr. Rabiej reported that the following proposed rule amendments simplifying the computation of time had been approved by the Supreme Court and transmitted to Congress. Unless Congress enacts legislation to reject, modify, or defer them, they will take effect on December 1, 2009.

1. Rule 45. Computing and Extending Time. Proposed amendment simplifying time-computation methods.

2. Related amendments regarding the time periods in Criminal Rules 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 47, 58 and 59; Rule 8 of the Rules Governing § 2254 Cases; and Rule 8 of the Rules Governing § 2255 Proceedings.

In addition, the following proposed amendments had also been approved by the Supreme Court and submitted to Congress, to take effect December 1, 2009:

1. Rule 7. The Indictment and Information. Proposed amendment removing reference to forfeiture.

2. Rule 32. Sentencing and Judgment. Proposed amendment requiring government to state whether it is seeking forfeiture in presentence report.

3. Rule 32.2. Criminal Forfeiture. Proposed amendment clarifying applicable procedures.

4. Rule 41. Search and Seizure. Proposed amendments specifying procedure for warrants to search for or seize electronically stored information.

5. Rule 11 of the Rules Governing § 2254 Cases. Proposed amendments clarifying requirements for certificates of appealability.

6. Rule 12 of the Rules Governing § 2254 Cases. Proposed amendment renumbering provision regarding applicability of Civil Rules.

7. Rule 11 of the Rules Governing § 2255 Proceedings. Proposed amendments clarifying requirements for certificates of appealability.

Mr. Rabiej further reported that the following proposed amendments had been approved by the Judicial Conference at its September 2009 session for transmittal to the Supreme Court:

1. Rule 12.3. Notice of Public Authority Defense. Proposed amendment implementing the Crime Victims' Rights Act.

2. Rule 15. Depositions. Proposed amendment authorizing a deposition outside the presence of the defendant in limited circumstances outside the United States after the court makes case-specific findings.

3. Rule 21. Transfer for Trial. Proposed amendment implementing the Crime Victims' Rights Act.

4. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment clarifies standard and burden of proof regarding the release or detention of a person on probation or supervised release.

Finally, Mr. Rabiej reported that the following proposed amendments had been approved by the Standing Committee for publication, and had been posted on the internet in August 2009 for review and comment:

1. Rule 1. Scope: Definitions. Proposed amendment broadens the definition of telephone.

2. Rule 3. The Complaint. Proposed amendment allows complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1.

3. Rule 4. Arrest Warrant or Summons on a Complaint. Proposed amendment adopting concept of "duplicate original," allowing submission of return by reliable

electronic means, and authorizing issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.

4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. Proposed amendment provides comprehensive procedure for issuance of complaints, warrants, or summons.

5. Rule 9. Arrest Warrant or Summons. Proposed amendment authorizing issuance of warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.

6. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment authorizing defendant to participate by video teleconferencing.

7. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. Proposed amendment authorizing use of video teleconferencing.

8. Rule 41. Search and Seizure. Proposed amendment authorizing request for warrants to be made by telephone or other reliable electronic means as provided by Rule 4.1, and return of warrant and inventory by reliable electronic means.

9. Rule 43. Defendant's Presence. Proposed amendment cross-referencing to Rule 32.1 provision for participation in revocation proceedings by video teleconference and authorizing defendant to participate in misdemeanor proceedings by video teleconference.

10. Rule 49. Serving and Filing Papers. Proposed amendment authorizing papers to be filed, signed, and verified by electronic means.

Professor Beale asked whether any comments had yet been received. Mr. Rabiej replied that none had been received but that the deadline was February 16, 2010, and comments typically do not come in until the end of the period.

III. CONTINUING AGENDA ITEMS

A. Rule 16 (Discovery and Inspection)

Judge Tallman introduced the discussion of again considering amendments to Rule 16 by briefly summarizing the Committee's prior attempts to amend the rule to codify and expand the requirements to disclose exculpatory and impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963). First, Judge Tallman pointed out that the Committee has wrestled with this issue

almost since *Brady* was decided forty years ago. He informed members that the Rules Committee Support Office had compiled documents of the Committee's prior consideration of amendments to Rule 16. They are available, along with a table of contents, on the rulemaking website.

Second, Judge Tallman recounted that in 2007, the Committee had approved an amendment to Rule 16, over the objection of the Department of Justice (the "Department"), and had sent the amendment to the Standing Committee to approve for publication for notice and comment. Before the Standing Committee, the Department argued, among other things, that the amendment unnecessarily upset the careful balance of interests in the criminal justice process. As an alternative, the Department had agreed to change the U.S. Attorneys' Manual ("the Manual") to explicitly set forth a prosecutor's disclosure obligations under *Brady* and undertook a commitment to additional training of all litigating prosecutors. The Standing Committee declined to approve the amendment for publication and remanded the matter to the Committee for further consideration as it deemed appropriate at some future date after sufficient time had passed to assess the impact of the Department's changes.

In April 2009, Judge Emmet Sullivan, who had presided over the trial of Senator Ted Stevens in the United States District Court for the District of Columbia, wrote a letter to Judge Tallman urging the Committee to reconsider amending Rule 16 to require disclosure of all exculpatory evidence to the defense. Judge Tallman appointed a subcommittee consisting of himself, Judge England, Professor Leipold, Rachel Brill, and Assistant Attorney General Lanny Breuer. On September 10, 2009, the subcommittee held a teleconference, with Jonathan Wroblewski filling in for General Breuer who was out of the country. Mr. Wroblewski told the subcommittee that a working group had been formed at the Department to review issues related to Rule 16 and said that by the Committee's October meeting, he anticipated that the Department would be able to articulate its position on how to best resolve these issues.

After Judge Tallman's summary, Lanny Breuer addressed the Committee. General Breuer pledged that he and the Attorney General are committed to making federal prosecutors the most professional and ethical lawyers in the nation. He described steps that the Department had taken in the aftermath of the Stevens trial, including forming a working group to study discovery in criminal proceedings and to suggest improvements. He said that while the Department took its obligations seriously, an Office of Professional Responsibility report of alleged *Brady* violations over the past nine years did not reveal evidence of a widespread problem. Indeed, according to OPR, only 15 instances of sustained misconduct during that period had been substantiated.

Nonetheless, General Breuer said that the Department recognized that further steps are necessary to address what he characterized as two different types of problems: prosecutorial misconduct and prosecutorial error. Because prosecutorial misconduct is by definition "knowing and intentional," General Breuer suggested that changing the rule to make disclosure obligations more stringent would not be an effective deterrent. Rather, prosecutorial misconduct can only be

rectified by robust enforcement and sanctions, which General Breuer maintained the Department was ready to implement once the Deputy Attorney General had reviewed the report of the working group.

To address prosecutorial error, General Breuer said the Department was adopting a multi-faceted approach, emphasizing training, guidance, strong leadership, and more uniformity. All federal prosecutors will be required to undergo training on discovery issues. Each U.S. Attorney's Office will be required to designate an expert on discovery to advise prosecutors on individual cases. At the Department's headquarters in Washington, D.C., a new position will be created to oversee these efforts. In addition, the Department will create an on=line repository of material on *Brady* issues and is considering developing a manual that deals exclusively with disclosure obligations.

Although the Department is committed to a comprehensive approach to the issue, General Breuer reiterated that the Department remained opposed to amending Rule 16 to expand disclosure requirements beyond the dictates of *Brady*. He said that such an approach would be inconsistent with Supreme Court precedent, would upset the careful congressionally-mandated balance inherent in criminal discovery under the Jencks Act, and would disregard critical interests such as the rights and safety of witnesses and special concerns relating to cases implicating national security. He outlined several hypothetical scenarios involving criminal cases to illustrate the problems that the Department feared would be created by amending the rule.

General Breuer concluded by stating that the Department would not object to amending Rule 16 simply to codify the disclosure requirements of *Brady*, but would object to any proposed amendment that went beyond *Brady* and unnecessarily impinged on these concerns. If the Committee decided to amend Rule 16 to require more disclosure than *Brady* currently requires, General Breuer said that the proper course of action would be for the Committee to write a report to Congress seeking statutory authorization for such a change, necessitating amendment of the Jencks Act.

Following General Breuer's presentation, Judge Tallman recounted his efforts in meeting with the Director of the Federal Judicial Center to devise a research project that could measure the effectiveness of the Department's 2007 changes to the Manual. (The FJC had issued reports in 2004 and 2007 on local rules that incorporated *Brady*.) Judge Tallman's discussion with the FJC revealed that any research project on this issue poses numerous methodological problems. He concluded from those discussions that measuring the efficacy of the Manual change does not easily lend itself to research using the FJC.

A member cautioned against giving undue weight to any research that might be done if that research is fundamentally unsound. Another member said that after-the-fact review of cases

to determine if there were any *Brady* violations would be very difficult and that perhaps a better approach is to develop best practices at the outset of cases.

Professor Beale suggested that it might be feasible to emulate a model used by hospitals to improve the delivery of health care, whereby the hospital reviews the treatment of patients in cases selected at random. Such a random review could be performed by the Department in various U.S. Attorneys' offices to see if any undetected discovery problems had occurred. General Breuer expressed interest in considering the idea and said he would look into it.

A participant voiced a concern over *Brady* violations that are relatively minor, and therefore do not become the subject of litigation, but still have a significant effect on the case. He suggested that the training of federal prosecutors should include presentations by members of the defense bar who could offer their perspective on discovery issues. He also suggested that the determination of whether information is "material" and therefore should be divulged is better made by a judge than by a prosecutor. Judicial members expressed concern that it is very difficult to determine such a question *in camera* without greater familiarity of the underlying facts and theories of a particular case.

A member pointed out that regardless of the amount of empirical data demonstrating *Brady* violations, it only takes one case to skew perception of the problem. In addition, he expressed concern that there is so much variation nationwide among the 94 U.S. Attorney's Offices and the litigating divisions within Main Justice itself in handling discovery in criminal cases. General Breuer responded that the Deputy Attorney General was aware of the variation and is considering whether and how best to achieve greater uniformity.

Another member said she agreed that prosecutors should not be in charge of determining what information is material and therefore must be disclosed. She also said that in some districts, a change in culture was necessary before improvements could be made.

Judge Tallman pointed out that if Rule 16 were amended to require the government to disclose a witness's information before trial, such an amendment could conflict with the Jencks Act, codified at 28 U.S.C. § 3500. In the event of such a conflict, there remains a legal issue under the "supersession clause" whether the Rules Enabling Act, 28 U.S.C. § 2072(b), would give the rule precedence over the statute. However, both Judge Tallman and Judge Rosenthal cautioned that as a general matter, the rules committees prefer not to rely on the supersession clause and that committees should strive to avoid conflicts with statutes wherever possible.

Discussion then ensued over whether the so-called "open-file" policy that has been adopted by some U.S. Attorney's Offices produced fewer *Brady* problems. One member thought that the policy had been successfully used in the Northern District of California. However, Judge Tallman noted that as an appellate judge, he sees *Brady* issues arising in many cases from California, including that district.

Judge Tallman proposed that the FJC conduct a limited survey of judges and defense lawyers to find out whether the districts that employ an open-file policy had fewer discovery issues. Mr. Wroblewski said that the Department could seek similar information from the U.S. Attorney's Offices in those districts. Judge Rosenthal pointed out that the FJC could accept data from the Department but must retain its own independence when analyzing that data.

As another way to gain information, Judge Tallman proposed that the Rule 16 subcommittee host a "consultative session" on the topic, to which experts from the bench, bar, and academia would be invited to share their views. A member suggested that it might be valuable to ask participants in the session to reverse roles so that prosecutors and defense lawyers would see things from the other's perspective.

Judge Rosenthal said that it might be helpful for participants in the session to work with actual drafts of the rule in order to focus on the various issues presented by any amendment. Mr. Wroblewski offered to provide Judge Tallman with examples of drafts that were debated by the Committee when it last considered amending Rule 16 in 2007.

A member said that she felt it was important to hold the Department accountable for assessing and reporting the effects of the 2007 changes to the Manual, since the changes had essentially functioned as an alternative to amending the rule.

Judge Tallman finished the discussion of Rule 16 by noting that due to the time required to perform research and hold the consultative session, the Committee was unlikely to see a draft amendment for consideration at its next meeting in the spring of 2010. He further commented that ultimately, the Committee might decide that any rule change would be better accomplished by Congress than through the rulemaking process. Judge Tallman concluded by recommitting consideration of whether to amend the rule to the Rule 16 subcommittee.

B. Rule 12 (Pleadings and Pretrial Motions)

In April 2009, the Committee voted to send to the Standing Committee an amendment to Rule 12 that attempted to conform the rule to the Supreme Court's ruling in *United States v. Cotton*, 535 U.S. 625 (2002). The amendment required defendants to raise a claim that an indictment fails to state an offense before trial, but provided relief in certain narrow circumstances when defendants failed to do so. In particular, the amendment provided for relief if the failure to raise the claim was for good cause or prejudiced a substantial right of the defendant.

The Standing Committee declined to publish the proposed amendment and remanded it to the Committee for further study. Specifically, as Judge Raggi pointed out, members of the Standing Committee generally approved of the concept of the proposed amendment to Rule 12 but wanted the Advisory Committee to consider the implications of using the term "forfeiture"

instead of "waiver" in the relief provision. In *Cotton*, the Supreme Court had used the term "forfeiture" and the two terms trigger different standards of review on appeal. In drafting its proposed amendment, the Committee had used "waiver" because it was part of the existing language of Rule 12.

Judge Tallman observed that the Committee had not previously considered the option of using "forfeiture" and the impact of such a choice was unclear. Judge Rosenthal pointed out that the use of either term should be consistent with the use of those terms in other rules.

Judge Tallman recommitted the issue of whether to use "waiver" or "forfeiture" to the Rule 12 subcommittee, with the goal of presenting a revised draft to the full Committee at the spring meeting in 2010.

C. Rule 32 (Sentence and Judgment)

In April 2009, the Committee deferred consideration of two amendments to Rule 32: (1) an amendment to Rule 32(h) that would require a judge to give notice to parties when the judge was considering imposing a sentence that was a "variance" from the sentencing guidelines; and (2) an amendment to Rule 32(c) that would ensure that parties receive the same information as the probation officer who prepares the presentence report ("PSR"). Both amendments were deferred because the law regarding federal sentencing is in flux, with both the Department and the U.S. Sentencing Commission currently undertaking comprehensive reviews.

Mr. Wroblewski reported on the status of the Department's sentencing review. He said that many reforms were under consideration and that he anticipated that a final report would be ready for the Attorney General's review within a few months. Judge Tallman asked whether it would make sense for the Committee to await further developments before proceeding with its own amendments. Mr. Wroblewski responded in the affirmative.

Members commented that the current version of Rule 32 puts defendants and prosecutors at a disadvantage because it does not require probation officers to provide them with information gathered in preparing a PSR. If a defendant or prosecutor does not discover errors in the information used to prepare the PSR until the actual time of sentencing, the members contended that raising a challenge at that late date then causes delay which prejudices the defendant or the government.

Judge Tallman noted, however, that even if a rule change were to address this problem, such a change would not take effect for three years, given the multiple steps inherent in the rulemaking process. During that time, federal sentencing law might change in ways that could affect the rule. Accordingly, further action on the amendments was deferred to await further developments in federal sentencing law.

D. Rule 5 (Initial Appearance)

In April 2009, the Committee had decided against forwarding to the Standing Committee an amendment to Rule 5 that would have required a judge, when deciding whether to detain or release the defendant, to consider the right of any victim to be reasonably protected from the defendant. The Committee based its decision on its belief that the current version of Rule 5 already provides adequate protection for victims because the rule requires a judge to apply all relevant statutes – including the Bail Reform Act, which requires a judge to consider danger to the community – in making the decision to release or detain.

In June 2009, the Standing Committee considered the Committee's decision not to amend Rule 5 and recommitted the matter to the Committee for further study as part of its ongoing monitoring of the implementation of the Crime Victims' Rights Act ("CVRA"). Judge Tallman commented that the Committee must continue to review all the rules to determine whether the Crime Victims' Rights Act is being fully implemented. Professor Beale added that the area of victims' rights needs constant monitoring to ensure that victims and witnesses are being protected.

Mr. Wroblewski reported that there had been no mention of any rules amendments at a recent CVRA oversight hearing on Capitol Hill. He also said that he would be willing to serve as a liaison between the Committee and advocates for victims' rights. Judge Tallman asked him to report any dissatisfaction on the part of victims with how Rule 5 was being applied. Professor Beale reiterated the importance of remaining vigilant regarding the needs of victims in order to determine whether any adjustments to the rules are warranted.

E. Indicative Rulings

Appellate Rule 12.1 and Civil Rule 62.1 are scheduled to go into effect on December 1, 2009. These rules are designed to facilitate remands to the district court to enable the court to consider motions after appeals have been docketed and the district court no longer has jurisdiction. In light of the adoption of these new rules, the question before the Committee is whether to propose a parallel provision in the Criminal Rules permitting "indicative rulings."

Professor Beale noted that courts are already issuing indicative rulings in criminal cases, and adopting a new rule would merely formalize the existing procedure. Judge Tallman said that as an appellate judge, he appreciated the efficiencies of indicative rulings which obviate appeals by permitting the district court to grant relief if given the opportunity before the appellate court takes action. Judge Rosenthal said that since new rules permitting indicative rulings had been adopted in the appellate and civil context, the question is whether the criminal context is different and somehow incompatible with adoption of such a rule.

Mr. Wroblewski noted that the Department had earlier voiced a concern about language in the Committee Note to Appellate Rule 12.1, which interprets the rule as permitting indicative rulings in the criminal context. The Department's concern had been that the rule might be viewed as an invitation by jailhouse lawyers to file frivolous motions. A member replied that this fear is overstated because in his experience as a trial judge, jailhouse lawyers do not need an invitation to file such motions. In addition, Judge Rosenthal pointed out that the Standing Committee had considered and rejected a proposal to limit the appellate rule's applicability in the criminal arena.

As an initial matter, Judge Tallman suggested that the proposed rule allowing indicative rulings, "Rule X.X" (page 319 of agenda book) be renamed either Rule 37 or Rule 39. After the meeting, it was decided by email that the new Rule be called "Rule 37."

After discussion of whether the new Rule would apply to motions under 28 U.S.C. § 2255, it was concluded that the rule did not so apply, because § 2255 motions, while disfavored, are not precluded during the pendency of a direct appeal. Because the new Rule would apply solely to motions that a district court is unable to consider during an appeal, the rule does not cover § 2255 motions.

The Committee voted unanimously to approve the new Rule and send it to the Standing Committee for publication.

Turning to the Note following the new Rule, the Committee considered whether to amend the Note by inserting the following paragraph immediately before the last paragraph (page 320 of agenda book):

> The procedure formalized by Appellate Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). This rule applies to motions that the court lacks authority to grant, and therefore does not include motions under 28 U.S.C. § 2255.

The Committee voted unanimously to amend the Note following the new Rule by inserting the above paragraph before the last paragraph.

IV. NEW PROPOSALS

A. Rule 11. Advice on Immigration Consequences of Conviction

The Committee had been asked by Judge Rosenthal to consider the desirability and feasibility of amending Rule 11 to require a district court to warn an alien defendant who is pleading guilty of the possible collateral consequences that might flow from a conviction, *i.e.*, deportation. Professor Beale introduced the topic by remarking that by coincidence, the Supreme Court was hearing argument that day in *Padilla v. Kentucky*, No. 08-651, a case presenting the related question of whether the Sixth Amendment requires that counsel advise an alien defendant who pleads guilty of the immigration consequences of the conviction. Professor Beale noted that the Committee has twice previously declined to add immigration consequences to the list of warnings required to be issued by a judge conducting a plea colloquy under Rule 11.

Judge Tallman expressed concern about pursuing such an amendment because of the complexity of immigration law and the added burden that such a requirement would place on the district courts. A member suggested that the Committee table the proposal until the Supreme Court issues its decision in *Padilla* and the obligations of defense counsel become clearer. Mr. Wroblewski added that the Department had recently awarded a grant to a project conducted by the American Bar Association to create a computer database compiling the collateral consequences of various offenses.

In light of these concerns, the Committee decided to defer consideration of amending Rule 11.

B. Rule 12. Advice on Right to Appeal

Mr. Enoc Alcantara Mendez wrote the Committee a letter requesting that it consider amending Rule 12.2 to require a district court to advise a defendant of his right to appeal from an order to submit to a competency examination or from an order of commitment.

Judge Tallman noted that in general, notice of the right to appeal is not given in specific hearings. He asked whether any special circumstances warranted giving such notice in competency hearings, when it is not given, for example, in bail hearings. No special circumstances were identified and, accordingly, the Committee decided not to pursue Mr. Mendez's suggestion of amending Rule 12.2.

V. RULES AND PROJECTS PENDING BEFORE CONGRESS, JUDICIAL CONFERENCE, STANDING COMMITTEE, OR OTHER ADVISORY COMMITTEES.

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure

Mr. Rabiej reported that there is no legislation currently pending in Congress that would affect the Criminal Rules.

B. Update on Work of Sealing Subcommittee

Judge Zagel reported that the Sealing Subcommittee had divided its work into two sub-subcommittees. These panels are making progress in analyzing the following issues: Should there be a standard to guide district courts in deciding when to seal cases? What constitutes a "case" for the purposes of calculating how many cases are sealed? Is there an effective way to prompt judges to unseal cases once the need for sealing no longer exists? In addition, the subcommittee was awaiting a further report by Timothy Reagan of the FJC, collecting and analyzing data on sealed cases. Judge Zagel concluded by saying that he anticipated the Sealing Subcommittee would finish its work by the end of the year or shortly thereafter.

C. Update on Work of Privacy Subcommittee

Judge Raggi reported that the Privacy Subcommittee was addressing concerns about the privacy of court records raised by Congress and also issues raised by the judiciary. Of particular interest in the criminal context, Judge Raggi cited the need to protect the privacy of cooperating defendants whose names might be mentioned in plea agreements or other court documents. Judge Raggi reported that the courts have developed various techniques to deal with this issue, ranging from sealing such documents to not filing them at all. The subcommittee's first task has been to gather information on these various techniques and evaluate their effectiveness.

Judge Raggi also cited the need to protect the privacy of jurors as an important issue that the subcommittee is reviewing. To illustrate this point, Judge Raggi recounted a recent incident involving a juror who had served in a murder trial in Chicago and whose address and phone number were subsequently posted, along with derogatory comments, on a website. Such a threat to the privacy of jurors undermines the judiciary's ability to find people willing to serve as jurors, Judge Raggi observed, which in turn undermines the system as a whole.

The subcommittee will collect further information about privacy concerns by sending out a survey in a few weeks to federal judges, prosecutors, and members of the defense bar. In addition, the reporter for the subcommittee, Professor Dan Capra, is arranging an all-day conference focusing on privacy issues, to be held at Fordham Law School in New York City in April 2010.

In response to a question regarding minute entries by docket clerks that contain private information, Judge Raggi expressed hope that some privacy issues could be resolved by additional training and education of court staff. In addition, Judge Raggi noted that court CM/ECF websites have been revised to contain a "banner" that requires lawyers filing

documents electronically to certify that they have read and are complying with the court's privacy rules.

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman proposed several dates in April 2010 for the next meeting of the Committee. After the meeting was adjourned, the Committee decided by email that the meeting would take place on April 15-16, 2010, in Chicago, Illinois.

9

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

MEMORANDUM

DATE: December 7, 2009

TO: Honorable Lee H. Rosenthal, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Laura Taylor Swain, Chair
Advisory Committee on Bankruptcy Rules

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on October 1-2, 2009, in Boston, Massachusetts, to consider a number of proposed amendments to the Bankruptcy Rules, Official Forms, and Director's Procedural Forms. The draft minutes of that meeting are attached to this report as Appendix A.

The Advisory Committee is not submitting any action items to the Standing Committee at this meeting. It is continuing to work on some rule and form amendments that it anticipates bringing to the Standing Committee in June, along with any rules and forms published for comment in August 2009 that the Advisory Committee approves at its spring meeting.

This report discusses several information items regarding continuing, multi-year projects of the Advisory Committee, as well as actions taken by the Committee during and after the October meeting that do not require action by the Standing Committee. The information items that are discussed are the following:

- revision of the Part VIII (appellate) Bankruptcy Rules;
- the Forms Modernization Project;
- communications regarding time period changes in the Bankruptcy Rules from 15 to 14 days;

- changes to the reaffirmation agreement form and other Director's Procedural Forms;
- creation of an authoritative version of the Bankruptcy Rules;
- consideration of a suggestion to eliminate the prohibition on the use of special masters in bankruptcy cases; and
- changes in the membership of the Advisory Committee.

II. Information Items

A. Revision of the Bankruptcy Appellate Rules

The Advisory Committee has continued its deliberations regarding a possible comprehensive revision of the bankruptcy appellate rules (Part VIII of the Bankruptcy Rules). On September 30, 2009, its Subcommittee on Privacy, Public Access and Appeals held a second special open meeting devoted to this topic. The meeting, held at the Harvard Law School, was attended by invited judges from the First and Eighth Circuits' Bankruptcy Appellate Panels, clerks of court, bankruptcy practitioners, and academics. The chair and reporter of the Standing Committee and the reporter for the Advisory Committee on Appellate Rules also participated. Additional public attendees included trustees, academics, practitioners, and students. Harvard Law School Dean Martha Minow greeted the participants and made remarks at the beginning of the meeting.

The participants discussed the operation of the current bankruptcy appellate rules and provided feedback on a working draft of a revised Part VIII. That draft incorporated changes made in response to comments received at the initial special open meeting held in San Diego in March 2009. Among the changes were the addition of provisions that take account of the use of electronic filing in the federal courts. Strong support was expressed at the Cambridge meeting for the undertaking of a Part VIII revision and for recognition in the rules of the use of electronic filing and anticipated future technologies.

Because of the mutual interest in considering how best to incorporate evolving information technologies into the federal rules, the Advisory Committee will keep the other advisory committees informed of its progress on this project as it goes forward. Likewise, the Committee hopes to benefit from the wisdom and experience of the other committees that have begun to consider these issues.

At its spring 2010 meeting, the Advisory Committee will discuss and vote on the underlying goals that it seeks to achieve in revising the Part VIII rules.

B. Forms Modernization Project

Work has continued by the Advisory Committee's Forms Subcommittee on its multi-year Forms Modernization Project. This undertaking seeks to develop recommendations for making the Official Bankruptcy Forms more user-friendly and less error-prone, and for taking better advantage of modern information technology. The Project has solicited comments from judges, clerks, and other participants in the bankruptcy system, and representatives from a number of groups within the Judiciary have assisted with their specialized expertise.

In April, 2009, the Project hired an expert in forms redesign and began the painstaking process of reformatting and rephrasing the hundreds of questions on the forms. The Forms Subcommittee decided to focus on an initial filing package to be used by individual debtors in bankruptcy. Through the fall of 2009, subgroups conducted nearly weekly teleconferences, revising the petition and the debtor's real and personal property schedules for consideration by the Project working group at its next meeting in January 2010.

The Project continues to solicit feedback from users of the forms (bankruptcy judges, attorneys, court and clerk's office employees, the Executive Office for United States Trustees, and academics) through a series of electronic surveys and other questionnaires, and has also provided to the NextGen CM/ECF Project a list of functional requirements it believes should be included in the future version of CM/ECF.

C. 15- to 14-Day Time Period Changes

Most of the time computation amendments that went into effect on December 1, 2009, lengthen time periods in the rules by a few days, thereby offsetting the effect of counting intermediate weekends and holidays as part of all time periods. There are twelve Bankruptcy Rules, however, that are an exception to the general lengthening in the rules. These twelve rules, which include the deadlines for filing schedules and statements at the start of a bankruptcy case, chapter 13 plans, and appellate briefs, have time periods that were shortened from 15 days to 14 days.

No one raised concerns about possible adverse effects of these changes during the comment period following publication of the proposed time computation amendments. During the fall of 2009, however, Congressional staff members informed the Administrative Office that they had received some expressions of concern from debtors' lawyers about whether sufficient notice had been provided of the shortening of these deadlines by one day. It was suggested that a six-month deferral of the effective date of these twelve time period changes might be appropriate.

Concerned that a deferral might increase, rather than reduce, confusion regarding the bankruptcy rules time computation amendments, the Advisory Committee took the position that for these twelve rules, during a six-month transition period, a filing that would have been timely under the prior rule but was late under the amended rule should be treated as the product of "excusable neglect" under Rule 9006(b)(1). This position was communicated to the courts in a memorandum from the chairs of the Standing Committee and the Bankruptcy Rules Committee.

To reduce the likelihood of untimely filings and the need for extensions, the memorandum also suggested that bankruptcy courts continue their efforts to publicize the time-computation changes and, in particular, that the courts post a conspicuous notice that specifically identifies the rules for which time periods are reduced by one day. It suggested that the notice be posted on court websites, in the clerks' offices, and on the initial screen displayed on the CM/ECF system for persons filing electronically.

Director's Form B201, Notice to Consumer Debtor(s) under § 342(b) of the Bankruptcy Code, was also amended to include warnings about the deadlines that have been shortened.

D. Changes to the Reaffirmation Agreement Form and Other Director's Procedural Forms

The Administrative Office, with the Advisory Committee's assistance, has issued a new set of forms that may be used when a debtor seeks to reaffirm a pre-bankruptcy debt. Form B240A (called the "Reaffirmation Documents," a package of five form documents, including the agreement itself, the statutory disclosures and other documents), Form B240B ("Motion for Approval of Reaffirmation Agreement"), and Form B240C ("Order on Reaffirmation Agreement") have been substantially revised to make the reaffirmation form easier to complete and, as a result, to reduce errors. The forms also are intended to be easier for the court to review. The revision was prompted, in part, by comments received from numerous bankruptcy judges in connection with the Forms Modernization Project. Among other changes, the statutorily required components of the reaffirmation documents were rearranged so that the most significant information appears at the beginning of the reaffirmation document form, and the language was simplified to make it easier for debtors and creditors to understand what information is being sought.

Because many bankruptcy courts require the use of the existing versions of the reaffirmation agreement, motion, and order forms, both the old and new versions of the reaffirmation forms have been posted on the Judiciary's website for a six-month transitional period beginning December 1, 2009.

The Advisory Committee also reviewed three new Director's Procedural Forms, which were issued by the Administrative Office with an effective date of December 1, 2009. The new forms are:

- Form B250F, Summons in a Chapter 15 Case Seeking Recognition of a Foreign Nonmain Proceeding,
- Form 18RI, Discharge of Individual Debtor in a Chapter 11 Case, and
- Form B261C, Judgment in an Adversary Proceeding.

The five existing forms used as bankruptcy summonses, Director's Forms B250A, B250B, B250C, B250D, and B250E, were amended to conform the Certificates of Service on the forms more closely to the service of process provisions of Bankruptcy Rule 7004. The Advisory Committee assisted in the development and review of these amended forms.

Finally, six Director's Forms and the Instructions for those forms were revised to reflect the December 1, 2009, time computation amendments.

E. Authoritative Version of the Bankruptcy Rules

For a number of historical reasons, there has never been an official version of the Federal Rules of Bankruptcy Procedure. The Office of the Law Revision Counsel of the House of Representatives, which prepares and publishes the other federal rules of practice, procedure, and evidence, has never compiled and published the Bankruptcy Rules. The bench, bar, and public have adapted to this anomaly by consulting bankruptcy rules published by commercial and nonprofit organizations. Although this has been a workable solution, the absence of an official version of the Bankruptcy Rules is not ideal and has created problems over the years.

Last year, at the request of the Advisory Committee, the Rules Committee Support Office tackled the job of creating an authoritative version of the Federal Rules of Bankruptcy Procedure. After months of intense effort, an authoritative version of the Bankruptcy Rules was created. This was accomplished by painstakingly comparing five versions of the bankruptcy rules using the electronic comparison tools in Word and WordPerfect. Whenever a discrepancy in the rules being compared was discovered, the official source documents were checked – either the orders of the Supreme Court or Congressional legislation – to resolve the discrepancy. Each step in the process was verified and documented. The rules also underwent a stringent editorial, proofreading, and legal review process.

Most of the work was done by, and credit goes to, the interns who were involved in the project: Katie Mize (lead intern), Heather Williams, and Danielle White. The interns worked under the expert supervision of James Ishida.

The final review is nearly complete. Upon completion of the review process, the rules will be transmitted to the Office of the Law Revision Counsel with a request that they be published as the official version of the Federal Rules of Bankruptcy Procedure.

F. Consideration of Suggested Elimination of Prohibition on the Appointment of Special Masters in Bankruptcy Cases

Bankruptcy Rule 9031 makes Civil Rule 53 inapplicable in bankruptcy cases, thus precluding the appointment of special masters by bankruptcy or district judges exercising bankruptcy jurisdiction. The Advisory Committee received suggestions from two bankruptcy judges that Rule 9031 be amended or deleted so that special masters could be appointed when needed in complex chapter 11 cases and other bankruptcy matters.

On at least three occasions since the 1983 adoption of Rule 9031, the Advisory Committee has considered extensively, and rejected, suggestions that the rule's prohibition on the use of special masters be eliminated. In view of the recent attention to the rule, the absence of information indicating any change in relevant circumstances, and the absence of evidence that special masters have been needed in bankruptcy cases, the Committee adhered to its earlier decisions.

G. Changes in the Membership of the Advisory Committee

District Judge Karen K. Caldwell of the Eastern District of Kentucky is the newest member of the Advisory Committee. Judge Caldwell and two additional appointees to be named in the near future will replace Court of Appeals Judge R. Guy Cole, Jr., of the Sixth Circuit, District Judge Richard A. Schell of the Eastern District of Texas, and Bankruptcy Judge Jeffery P. Hopkins of the Southern District of Ohio. Judges Cole and Schell completed two terms on the Committee. Judge Hopkins accepted a transfer to the Committee on the Judicial Branch.

Attachment: Draft of Minutes of the Advisory Committee Meeting of October 1-2, 2009

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of October 1 - 2, 2009
Boston, Massachusetts
(DRAFT MINUTES)

The following members attended the meeting:

District Judge Laura Taylor Swain, Chair
Circuit Judge Guy Cole, Jr.
District Judge Karen Caldwell
District Judge David H. Coar
District Judge William H. Pauley, III
District Judge Richard A. Schell
Bankruptcy Judge Jeffery P. Hopkins
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Eugene R. Wedoff (telephonically)
Bankruptcy Judge Judith H. Wizmur
Dean Lawrence Ponoroff
Michael St. Patrick Baxter, Esquire
J. Christopher Kohn, Esquire
J. Michael Lamberth, Esquire
David A. Lander, Esquire
John Rao, Esquire

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Jeffrey W. Morris, former reporter
G. Eric Brunstad, Jr., Esquire, former member
District Judge James A. Teilborg, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
District Judge Joy Flowers Conti, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee)
District Judge Lee H. Rosenthal, chair of the Standing Committee
Professor Daniel Coquillette, reporter of the Standing Committee
Peter G. McCabe, secretary of the Standing Committee
Mark Redmiles, Deputy Director, Executive Office for U.S. Trustees (EOUST)
Lisa Tracy, Counsel to the Director, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
John Rabiej, Administrative Office of the U.S. Courts (Administrative Office)
James Ishida, Administrative Office
James H. Wannamaker, Administrative Office
Stephen "Scott" Myers, Administrative Office
Robert J. Niemic, Federal Judicial Center

Phillip S. Corwin, Butera & Andrews

The following summary of matters discussed at the meeting is written in the order of the meeting agenda unless otherwise specified, not necessarily in the order actually discussed. It should be read in conjunction with the agenda materials and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee.

An electronic copy of the agenda materials, other than materials distributed at the meeting after the agenda was published, is available at http://www.uscourts.gov/rules/Agenda_Books.htm. Votes and other action taken by the Committee and assignments by the Chair appear in **bold**.

Introductory Items

1. Greetings and Introduction of new members. (Judge Swain)

The Chair welcomed the members, former reporter Jeffrey Morris, and other guests to the meeting. She noted this meeting was in part a celebration of members Judge R. Guy Cole, Jr. and Judge Richard A. Schell, whose terms were ending, and also a welcome to incoming member Judge Karen Caldwell. The Chair said that Mr. Rao had been appointed to a second three-year term and thanked him for his willingness to continue serving.

The Chair also welcomed Judge Rosenthal and Professor Coquillette, chair and reporter of the Standing Committee, and extended special thanks to Professor Coquillette for hosting and coordinating the special open meeting of the Subcommittee on Privacy, Public Access, and Appeals at Harvard Law School on the previous day.

The Chair said that during their terms both Judge Cole and Judge Schell had been valued members and leaders of the Committee. She thanked Judge Cole for his service on the Subcommittee on Attorney Conduct and Health Care, the Subcommittee on Privacy, Public Access, and Appeals, and the Subcommittee on Technology and Cross Border Insolvency; and she thanked Judge Schell for serving on and chairing the Subcommittee on Attorney Conduct and Health Care, as well as serving on the Subcommittee on Privacy, Public Access, and Appeals, and the Subcommittee on Technology and Cross Border Insolvency.

2. Approval of minutes of San Diego meeting of March 26 - 27, 2009.

The minutes were approved without objection.

3. Oral reports on meetings of other committees:

(A) June 2009 meeting of the Standing Committee.

The Chair reported that the Standing Committee had approved the Committee's recommendation that proposed amendments to Rules 2003, 2019, 3001, and 4004, new Rules 1004.2 and 3002.1, and Official Forms 22A, 22B, and 22C be published for comment in August 2009. (At an earlier meeting, the Standing Committee approved publishing for comment in August 2009, the Committee's proposed amendment to Rule 6003).

The Chair also reported that the Standing Committee had approved the Committee's recommendation that proposed amendments to Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, new Rule 5012, and Official Form 23 be transmitted to the Judicial Conference for final approval. She said the rule changes were scheduled to go into effect December 2010.

Mr. Wannamaker added that although the Form 23 change was meant to conform to a pending 2010 change to a time period in Rule 1007, an error in the report to the Judicial Conference resulted in the effective date of the form being a year too early. He said that staff had consulted with the Chair and Reporter of this Committee and the Chair of the Standing Committee, and had decided to add a footnote to the form explaining that although the time period change to the form had been approved by the Judicial Conference in September 2009, it would not become effective until December 1, 2010, when the rule is scheduled to take effect.

Further consultations after the meeting resulted in a decision to leave the Form 23 text unchanged until the December 1, 2010, the effective date of the Rule 1007 amendment, in order to avoid potential confusion.

Mr. Wannamaker also explained the need for courts to readopt Interim Rule 1007-I, to incorporate the time amendment changes that had been made to Rule 1007.

The Chair further reported that the Standing Committee had approved the Committee's recommendation of a technical change to a time period (five to seven days) in Exhibit D to Official Form 1 to conform it to the time amendment changes. Mr. Wannamaker added that in the course of updating Exhibit D, staff had discovered another time amendment change (15 to 14 days) that needed to be made to the form. He said that the 15- to 14-days change was added to the version of the form that will go into effect this December, and that an explanation had been added to the forms website.

Mr. Wannamaker said that, just prior to the meeting, he, along with Mr. Scott Myers, Ms. Vanessa A. Lantin and Ms. Camden Burton, reviewed the time periods in all the Official Forms and Director's Forms for conformity with the time amendments to the rules and statutes scheduled to go into effect this December. He said most of the needed changes had been discovered during Ms. Burton's review of the Director's Forms, and would be considered by this Committee at Agenda Item 4(I). He said that, other than the time periods on Exhibit D to Form 1, the only time period in an Official Form that may need to be changed was a provision stating

that the effective date of the form "Plan of Reorganization in a Small Business Case under Chapter 11" was the "eleventh business day" following confirmation of the plan (Official Form 25A, § 8.02).

The Chair thanked Mr. Wannamaker and the staff for their efforts in reviewing all the forms on short notice. **She asked the Business Subcommittee to review the time period in Official Form 25A and make a recommendation at the next meeting of whether it should be changed to conform to the time amendments.**

Finally, the Chair reported that the Standing Committee had accepted the Committee's recommendation that Civil Rule 8(c) be amended to delete the requirement that a bankruptcy discharge be pleaded as an affirmative defense.

Judge Rosenthal added that the Standing Committee and the Civil Rules Committee will be conducting a conference next May at Duke Law School focusing on the costs of civil litigation, including issues and costs related to e-discovery. She said that much of the available information on e-discovery is anecdotal and said that the FJC would therefore be conducting a study in advance of the conference to determine how e-discovery is affecting federal civil litigation. She also said that, in light of the Supreme Court's decision in *Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009),* the issue of pleading and its relationship to discovery would be a central theme at the conference.

Draft minutes of the Standing Committee meeting were circulated separately at the meeting.

(B) June 2009 meeting of the Bankruptcy Committee, including status of proposed BAPCPA technical amendments.

Judge Conti reported that the Bankruptcy Committee had discussed two significant issues at its last meeting. She said that the Bankruptcy Committee Chair requested that the FJC perform a study of existing practices of pro se litigants to aid in consideration of a proposed pro se law clerk program. She said that there were many requests for such clerks, and that the study would aid in the proposed next step of establishing a pilot pro se law clerk program.

She said the second issue was a potential "pay-go" issue concerning any the current request of the Judicial Conference for the appointment of new bankruptcy judges. She said the Bankruptcy Committee was concerned that the judiciary might be asked to consider an increase in filing fees to pay for any new appointments. She said the Bankruptcy Committee had discussed the matter and opposed the idea of increasing fees to pay for new judgeships because of the burden it puts on debtors.

Finally, Judge Conti said that the long range planning subcommittee had a long list of topics under consideration but was focusing on four topics: (1) inter-court relations and court

governance; (2) judicial resource issues (including recall, inter-circuit assignments, venue, law clerks, and judicial retirements); (3) bankruptcy appeals; and (4) administrative resource issues (including pro se issues, translation and interpretation issues, technology issues, the fee structure, and shared administrative services).

(C) April 2009 meeting of the Advisory Committee on Civil Rules.

Judge Wedoff reported that Civil Rules Committee approved changes to three rules that had been out for comments. It approved a change to Rule 8(c), removing the requirement to plead discharge in bankruptcy as an affirmative defense, and that it approved the proposed amendments to Rule 26 with minor changes.

Judge Wedoff said that the proposed amendments to Rule 56 were also approved, but with the following changes: (i) removing point-counterpoint; and (ii) changing to wording so that the judge "shall" rather than "should" grant the motion. He added that this Committee would discuss in a later agenda item the need in bankruptcy for a possible variance in the default deadline for filing a motion for summary judgment under revised Rule 56.

Judge Wedoff said the Civil Rules Committee had also formed a subcommittee to look into possible amendments to Rule 45. Judge Rosenthal added that the Committee would also be considering whether, in light of wide-spread use of electronic filing and notice, the provision of Civil Rule 6 that adds three days to deadlines when service is other than personal should be eliminated.

(D) April 2009 meeting of the Advisory Committee on Evidence.

Judge Wizmur said that the restyled evidence rules had been published for comment. She noted that a later agenda item would address whether any of the proposed changes merited special consideration in the bankruptcy context such that the Committee should comment.

(E) Bankruptcy CM/ECF Working Group and the CM/ECF NextGen Project.

Judge Perris said she would provide a status report on the CM/ECF working group and the CM/ECF NextGen project later in the meeting in the context of Agenda Item 5(C).

(F) Progress report from the Sealing Committee.

Judge Hopkins said that the FJC was still conducting its study of sealed cases. The Reporter added that, in an initial study, no bankruptcy case had been found that had been entirely sealed. She said that, going forward, the committee would be considering procedures for sealing a case.

(G) Progress report from the Privacy Committee.

The Reporter said the Privacy Committee is a new subcommittee of the Standing Committee. She said that it has met twice and that it is looking at a number of things, including, possible privacy-related amendments to the e-government rules; limiting access to parts of the docket, including plea agreements, in criminal cases; issues related to public access to transcripts and procedures for redacting transcripts; and implementation of privacy policies. She said the Privacy Committee has drafted a survey that will be administered by the FJC, and that there will be a conference at Fordham Law School on April 12, 2010.

Judge Coar noted that an issue of identifiers has come up with respect to claims, and the use of account numbers or social security numbers in the creation of such identifiers. He said the FJC survey may reveal how such identifiers are being used by creditors. **The Chair asked AO staff to make sure that the Privacy Committee and its staff support was aware of recent requests to this Committee by chapter 13 trustees to place a claims identifier directly on the claims form.**

(H) Report on the outcome of the subcommittee best practices review.

Judge Rosenthal said that a best practices guide concerning the use of subcommittees was developed and approved by the Executive Committee of the Judicial Conference after receiving input from all of the committees. She said the guide, included in the agenda materials, was created based on a concern that some committees were relying too heavily on subcommittees. She said that concern was not significant with respect to the rules committees, and that the guidelines developed were consistent with how subcommittees have been used by the rules committees in the past.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendation concerning Judge Mund's suggestion for a mini Form 22C for debtors who convert from chapter 7 to chapter 13 (Suggestion 09-BK-C)

Judge Wedoff said that the Subcommittee carefully considered Judge Mund's suggestion and that the Reporter had developed a model of what a short version of Form 22 might look like. In the end, he said, the Subcommittee recommended against adopting such a form. He said that some subcommittee members were concerned about the additional complexity the form would introduce in some cases, and that none of the members was aware of any problems that have been presented by requiring debtors in converted cases to complete existing Form 22C.

Judge Wedoff said that subcommittee members also concluded that transferring information from the previously filed Form 22A to Form 22C is relatively simple, and doing so

would prevent the trustee and others from having to refer back to another form to see how the totals were calculated.

After discussing the Subcommittee's recommendation, **the Committee voted against developing a special version of Form 22 for use in conversions from chapter 7 to chapter 13.**

(B) Recommendation concerning possible revision of Schedule C to deal with the extent of a claimed exemption; issues that the Supreme Court will be considering in Schwab v. Reilly (08-538).

Judge Wedoff said the Subcommittee considered, and recommended tabling, a possible revision to the wording in Form 6C to address the extent of an exemption claim by the debtor in light of *In re Reilly*, 534 F.3d 173 (3d Cir. 2008). He said that the primary reason to defer was that the outcome of the Supreme Court's ruling in Schwab could affect the need for a change to the form, and because any proposal made now could be viewed as attempting to influence the Supreme Court's decision. He said that deferral was also appropriate because some subcommittee members were concerned that the proposed language changes would not fix the problem, and because considering the issue during the Advisory Committee's April 2010, meeting (which would likely be after the Supreme Court's decision), would not delay implementation of any proposed change to the form. **The Committee agreed without objection to defer consideration of the proposed change to Form 6C until the April 2010, meeting.**

(C) Recommendations concerning addition of creditor certification to Form 10, the Proof of Claim, prompted by Judge Small's suggestion regarding claims filed by bulk claims purchasers (San Diego Agenda Item 4(D)), and other Proof of Claim issues.

Judge Wedoff said that Consumer Subcommittee had considered several proposed changes to Form 10.

Creditor Certification. Judge Wedoff said that, although the Subcommittee and Committee had previously rejected a suggestion by Bankruptcy Judge Tom Small (E.D.N.C.) to require the creditor to affirmatively assert the timeliness of its claim, there was Subcommittee support for further emphasizing the creditor's duty to carefully review the validity of the claim before filing it. He said that the Subcommittee thought this could best be done by adding a creditor's certification to the form similar to the debtor's certification on Form 1, and he moved to add to the form the underlined language shown in the "Date" box on page 48 of the agenda materials.

Mr. Kohn said that he thought the proposed language imposes a higher standard on the filer than Rule 9011. Other members asked whether the "person" making the affirmation should be the one who files the form, or the one who completes it, and whether the affirmation was

meant to include both the individual signing and the corporate creditor.

Judge Wizmur said there are two sides to the issue: how to get the creditor to exercise due diligence, versus what the individual signing personally knows has been done. She suggested inserting a qualifier like "upon reasonable inquiry" or "to the best of my information and belief," into the certification. Ms. Ketchum suggested "upon information and belief" as a qualifier. Judge Wedoff said that changing from "under penalty of perjury" to "upon information and belief" would bring the certification closer to Rule 11. Mr. Rao favored using some type of oath, rather than the currently proposed "under penalty of perjury."

Some speakers noted that claims are often signed by the creditor's bankruptcy attorney or by a low level employee and suggested that the certification ought to be more focused on the creditor entity, maybe by adding a qualifier such as "the person on whose behalf this claim is filed ...". On the other hand, Mr. Lander noted, in a world where it is uncertain who the creditor is, the individual actually signing should be held to have a responsibility of inquiry before filing.

After additional discussion, the Chair said that there seemed to be general support for a certification, but no consensus on the precise language. **The Committee supported the Chair's suggestion that the Subcommittee consider the suggestions made, and that it submit a revised proposed certification in the spring.**

Use of Summaries rather than attaching all writings that support the claim. On the next Form 10 issue, Judge Wedoff noted that there is a conflict between the form and Rule 3001(c) as to whether a summary of the writings upon which a claim is based is a substitute for, or is simply in addition to, the writing itself. As currently drafted, the form indicates that a summary of the writings could substitute for the writings. Rule 3001(c), however, explicitly requires attachment of the writing (the original or a duplicate) and does not address use of a summary at all. Judge Wedoff said that the sense of the Subcommittee was that the complete supporting documents should be supplied, as required by the rule, and that the summary is merely optional. He said the Subcommittee asked for sense of the Committee on the issue and instruction on whether the Subcommittee should review and suggest any changes to the rule or the form.

Dean Ponoroff asked whether the attachment of voluminous documents presented any sort of technical problem. Judge Wedoff said that the Subcommittee had investigated this question and, while there may have been storage problems when CM/ECF was first introduced, that issue no longer seemed to exist.

After additional discussion, a motion was made, and the sense of the Committee (with one member opposing) was that complete supporting documents should be attached to all claims with an option of providing a summary in addition to the required attachments. The Chair suggested that, in reviewing whether any clarifying language on Form 10 was needed to convey the sense of the Committee, the Subcommittee consider whether there should be exceptions for "voluminous" attachments, and if so, under what circumstances a

summary would suffice.

Inconsistent use of pronouns. Judge Wedoff said that in attempting to draft the creditor certification, the Subcommittee noted an inconsistent use of pronouns throughout the form, and it questioned how to draft the certification to deal with claims that are filed by the debtor or trustee on behalf of the holder rather than by the holder itself. **After a short discussion, the Committee referred the matter of pronoun use on Form 10 to the Forms Subcommittee to consider possible revisions.**

Following the meeting the Chair, in consultation with the Reporter and Committee staff, determined that the Forms Subcommittee should address all three of the foregoing issues in advance of the April 2010 meeting.

5. Report of the Subcommittee on Forms.

(A) Recommendations on proposed changes to Form 10, the Proof of Claim, concerning annual interest rate.

Judge Perris said that the Subcommittee recommends a change to the interest rate line at box 4, as shown on page 51 of the agenda materials. She said the proposed change would be to add the phrase "(at time case filed)" under the annual interest rate line, and to provide boxes to indicate whether the interest rate is fixed or variable. She said that the Subcommittee had discussed whether the filer should also provide information about how the rate was determined, but decided that such a request would make the form too complicated, and the additional information was unnecessary because it would be available from the attachments or, in the case of certain tax claims, the applicable statute.

Mr. Kohn said the form still presented a problem for tax claims, at least in chapter 13 cases, because the rate due under the statute varies daily, and the relevant calculation date is the plan confirmation date, not the case filing date. Judge Perris responded that, by checking the "variable" box, the claimant signals that the amount must be calculated in some manner and puts the trustee and debtor on notice in a chapter 13 case that the amount must be calculated.

A motion was made to approve the change, as set forth on page 51, along with the corresponding change to instruction 4 on the back of the form, to be held in the bullpen with other pending changes to Form 10. **The motion was approved with one objection.** However, the Forms Subcommittee was asked to revisit placement of the phrase "(at time filed)" when it considered other proposed changes to Form 10 before the next meeting. One suggestion was to center the phrase under "Annual Interest Rate", while another suggestion was to place "Annual Interest Rate_____% (at time case filed) __ Fixed or __ Variable" under the "Value of the Property" line.

(B) Recommendation on Suggestion 08-BK-K by Judges Isgur, Magner, and Bohm to

create two new forms to address problems related to claims secured by a debtor's home – an addendum to the proof of claim which sets out the full loan history and a calculation of the mortgage arrearage and a second form which serves as a payment change notice; Judge Shea-Stonum's alternative approach.

Judge Perris said that, in anticipation of the adoption of new bankruptcy rules pertaining to mortgage claims that currently are out for comment, the Subcommittee had developed a drafting committee (consisting of Mr. Rao, Judge Wizmur, Mark Redmiles and Professor Gibson) to propose complementary forms to be used with the rules. She said the drafting committee had only recently been formed and did not have a proposal for this meeting, but that it was evaluating forms currently in use throughout the country, some of which were included at pages 58 to 67 of the agenda materials. Committee members supported the Subcommittee's endeavor and the Chair said she looked forward to a proposal in the spring.

(C) Oral report on status of the Bankruptcy Forms Modernization Project.

Judge Perris said that since the last rules meeting, the Forms Modernization Project had hired a forms revision expert, Ms. Carolyn Bagin, who was assisting the membership in revising the initial package of forms to be used by an individual debtor to file a bankruptcy case. She said a very preliminary draft of the revised petition and a combined schedule A&B was included in the agenda materials.

Judge Perris said that the Ms. Bagin has proven very helpful in forcing the group to think about how the project will progress. Ms. Bagin spent an initial period of time interviewing project members and other forms users (i.e., clerks, trustees, judges lawyers, U.S. trustees and petition preparers), and compiled a list of concerns about the existing forms, such as users not completing questions with a sufficient level of detail, confusion about terminology, and confusion about what to do when a form does not provide enough room to respond to the question.

Judge Perris said that Ms. Bagin was also working with Beth Wiggins and other staff from the FJC to develop targeted surveys for specific forms users groups to get additional information about problems with the existing forms and to help understand how they are used. She said the surveys should be complete soon and should be going out in time for the results to be considered by the Project group in January 2010 at its next meeting.

Judge Perris said that subgroups were reviewing the draft petition and the combined schedule A/B, and that those forms had already been considerably revised from the versions included in the agenda materials. She said that an initial concern of some project members was striking a balance between making the material on the form more understandable, and still conveying the idea that expert advice is needed. She said that the tone of the draft forms was becoming more formal in the revision process in part because of this concern.

Professor Coquillette said he thought the draft forms were a great improvement and he encouraged the project membership to strive for more understandable language. He commented that, for many debtors, a lawyer is simply not an option, so the forms may be all the explanation they will get.

Judge Perris said another concern was that the introduction of more white space, and more explanatory language, was making the forms longer. She said this doesn't present an electronic storage problem, but bigger petition packages filed "over the counter" in the clerk's office would take longer to scan and to review for information that has to be keyed in. A related problem is that redesigning and reorganizing the forms, to make them more logical to the person filling them out, may make them less well organized and useful for end users.

Judge Perris said that concerns about form length and organization of the information in the forms for different users would be much less significant if technology allows the extraction of information from the forms. To that end, she said the project had been communicating closely with the NextGen working group to develop a list of functional requirements that it believed would be needed to accommodate the modernization project in the next generation of CM/ECF. She noted that the Project's NextGen requirements memo was at page 85 of the materials.

After discussing the requirements memo, the Committee voted without objection to endorse the principles set forth on page 88 at of the materials with slight modifications, as follows:

a. Reduce the need for the bankruptcy clerk to manually extract data from forms filed by pro se and other parties not using electronic case upload.

b. Allow judiciary users (e.g. courts, AO, FJC) to easily prepare customized reports for internal purposes, extracting some information from multiple forms.

c. Increase ease of search for and retrieval of information contained in multiple forms.

d. Allow flexibility for expansion of the types and quantity of data collected.

e. Include in NextGen a system that is capable of creating different levels of access to the information from the forms. For example, to the extent that the system allows accessing selected data or reconfiguring the data into custom reports, the system would be capable of limiting who could have such access or reconfiguration capacity, both within the judiciary and as to outside users.

The Committee also voted to join with the NextGen project in seeking relevant committee approvals for data extraction from the forms, so long as appropriate safeguards are in place to restrict access to the extracted information.

(D) Oral status report on the revision of Director's Form B240, the Reaffirmation Agreement, and the development of an electronic version.

Judge Perris noted that this project grew out of forms modernization because the existing version of Director's Form B240 was the form most frequently viewed as needing revision. She said that a draft revision has been developed as set forth at page 97 of the materials, and that Mr. Waldron had been working on an electronic version as a pilot for collecting forms information electronically. She said that Waldron/electronic version began with a questionnaire (shown at page 91 of the materials) that, when completed online, would automatically fill in the blanks of both new Official Form 27 and the new Director's Form B240A.

Mr. Waldron explained that some feedback on the proposed electronic version indicated that many vendors have developed software that already automatically completes the form, and their users didn't see a need for his version. He said another difficulty is that much of the information is filled out by multiple parties at various times, making a model that requires completion all at once problematic.

Judge Perris said that the new B240 itself is complete and she recommended asking the director to post it on the public website for immediate use. She said that, because many courts require the use of the existing version, that version should remain on the website for a transitional period. **A motion recommending that the director post the form on the internet, while leaving the older version available for six months after posting, was approved without objection.**

(E) Oral report on proposed new summons form B250F to be used in a foreign non-main proceeding prepared in response to a suggestion by staff attorney Mark Diamond of the Bankruptcy Court for the Southern District of New York that a Director's Form be issued in conformity with Rule 1010(a).

Mr. Wannamaker explained that the form was developed to address the clerk's need for a form summons at the beginning of a chapter 15 case. **Motion to recommend that the Director promulgate the form approved without objection.**

(F) Report on proposed revision of the Certificates of Service on the bankruptcy summons, Director's Forms B250A, B250B, B250C, B250D, and B250E, to conform to Rule 7004 and Fed. R. Civ. P. 4 regarding who may serve process.

Mr. Wannamaker said that the forms were updated to conform the service representations to the Federal Rules to Civil Procedure and Bankruptcy Procedure. **Motion to recommend that the Director promulgate the forms approved without objection.**

(G) Oral report on proposed new discharge form B18RI for individual chapter

11 debtors prepared in response to court requests.

Mr. Wannamaker explained that the form was developed because individual chapter 11 cases were becoming more common. **Motion to recommend that the Director promulgate the form approved without objection.**

(H) Oral report on proposed bankruptcy judgment form B261C, prepared in response to Judge Benjamin Goldgar's suggestion.

Mr. Myers explained that the proposed form was developed at the suggestion of Judge Benjamin Goldgar, and was to be used by the clerk in situations limited to those described in Rule 7054(b)(1). He added that the form was based on the existing district court version (AO 450), with a modification to the caption to indicate it was to be used in the bankruptcy court for adversary proceedings. He said that the Forms Subcommittee had considered creating a multipurpose form that could be used by the clerk under 7054(b)(1) or the court under 7054(b)(2), and that could also address the clerk's duties under Rule 5003(b). Ultimately, the Subcommittee concluded that a multipurpose form was too complex, and recommended that the Director instead promulgate the simpler version in the agenda materials at page 121. **Motion to recommend that the Director promulgate the form approved without objection.**

(I) Oral report on proposed amendments to Director's Forms B200, B210, B231A, B231B, and B250E, to conform to the December 1, 2009, time-computation amendments to the Bankruptcy Rules.

Mr. Wannamaker explained that the listed forms had been revised to incorporate the upcoming time period changes due to go into effect on December 1, 2009. **Motion to recommend that the Director promulgate the forms as set forth in the materials at pages 122 to 130 approved without objection.**

6. Report of the Subcommittee on Business Issues.

(A) Recommendation concerning Judge Kressel's comments on the last sentence of Rule 1007(k).

Judge Hopkins said that the Subcommittee had carefully considered Judge Kressel's suggestion that the final sentence of Rule 1007(k) be deleted as either substantive or unnecessary. He said the Subcommittee had concluded that while the sentence may be unnecessary, it should be retained, noting that it has been part of the rule for 27 years without objection or litigation. The Subcommittee also thought that the sentence may serve to indicate more succinctly and clearly than does 11 U.S.C. § 503 that the costs of complying with the court's order under Rule 1007(k) may be treated as an administrative expense. **Motion to not eliminate the final sentence of Rule 1007(k) approved without objection.**

(B) Recommendation concerning the suggestions by Judge Mund and Judge Kennedy that Rule 9031 be amended to remove the prohibition on special masters.

The Reporter said that Judge Geraldine Mund (Bankr. C.D. Cal.) and Judge David Kennedy (Bankr. W.D. Tenn.) had submitted suggestions that Rule 9031 be amended or deleted so that special masters could be appointed in bankruptcy cases. In their comments, both judges said that special masters could be a useful resource in some complex chapter 11 cases and adversary proceedings.

The Subcommittee considered the comments, as well as prior deliberations by the Committee on this topic recounted by the Reporter in her August 7 memo in the agenda materials. After discussing the matter, the Subcommittee concluded that no change should be made to Rule 9031.

The Reporter explained that the Committee has previously considered requests to allow the appointment of special masters several times since Rule 9031 was adopted in 1983. Each time it decided not to change the rule. The Reporter said that the initial purpose of the rule may have been reflected in the minutes to the Standing Committee meeting in August 1982, at which time the Committee decided not to permit "bankruptcy judges to appoints special masters" because "this would eliminate an area in which charges of 'cronyism' had previously been leveled at the bankruptcy system." She said the chair of the Committee at that time, Judge Aldisert, also explained that the Committee "felt that bankruptcy judges should be directly involved in cases and should not delegate to masters."

The Reporter added that, although the focus during the promulgation of the rule seemed to be on whether bankruptcy judges should appoint masters, the rule concerns "cases under the Code" and therefore it applies (as do the bankruptcy rules generally) in district courts and bankruptcy appellate panels.

The Reporter said the Committee had addressed the purpose of Rule 9031 at several meetings in the 1990s. While some members suggested that special masters could be useful in appropriate bankruptcy cases and the rule could be amended to authorize their use in limited circumstances, the majority of members recommended no change. The majority noted the history of patronage in bankruptcy system, and concluded that the Bankruptcy Code and Rules had been designed to avoid that problem in part through the prohibition on receivers (under the Code) and special masters (in the Rules). Committee members also questioned whether there was really any need for special masters in bankruptcy cases and whether the Code allows for their compensation out of the estate. Professor Resnick, Reporter to the Committee when the matter was considered in September 1996, raised the further issue of the inefficiency of adding another layer of review to bankruptcy proceedings if findings of fact or conclusions of law were made by a special master.

In response to a letter from Judge Kennedy suggesting that the size of recent bankruptcy cases justified revisiting the matter, and the publication of two law review articles in favor of amending Rule 9013 to permit special masters, the Committee discussed the issue once again at its September 2002 meeting. The Committee again decided to take no action

The Reporter said that the Subcommittee considered Judge Mund's and Judge Kennedy's suggestions in the context of the past action and reasoning of the Committee, and concluded that the rule should not be amended. First, the Subcommittee noted that the matter has been fully considered by the Committee several times, and that it is sound policy to decline to revisit issues previously decided unless circumstances have changed so as to cast doubt on the prior decision. The Subcommittee did not think there had been any such changes in circumstances since 2002.

The Subcommittee also concluded that, even if Rule 9031 were to be reconsidered, its prohibition on the use of special masters should be retained. Although concerns about "cronyism" may have abated since the rule was adopted in 1983, the bankruptcy judge members of the Subcommittee indicated they did not want the appointment power, and some Subcommittee members worried about the possible return of cronyism if judges were given the authority to appoint special masters. The Subcommittee was also persuaded by concerns noted by the Committee that using special masters would create greater complexity and expense in cases and add another level of decision-making and review to a judicial scheme in which there are already multiple levels of review. One member also questioned the constitutional legitimacy of a delegation of authority twice removed from an Article III judge.

Finally, the Subcommittee doubted whether there is a need for the appointment of special masters in bankruptcy cases. No member was aware of any bankruptcy case in which a court has expressed frustration about the inability to appoint a special master, and the Subcommittee concluded that the use of examiners is a sufficient alternative.

After discussing the matter the Committee approved a motion to take no further action on the suggestion.

7. Report of the Subcommittee on Privacy, Public Access, and Appeals.

(A) Oral report on the special open subcommittee meeting on revision of the Part VIII rules held September 30, and plans for further work.

Judge Pauley said that the Subcommittee held its second open subcommittee meeting at Harvard Law School just before this full Committee meeting. He said the meeting was attended by judges from the First and Eighth Circuits' Bankruptcy Appellate Panels, other First Circuit bankruptcy judges, clerks of court, bankruptcy practitioners, and academics. The chair and reporter of the Standing Committee and the reporter for the Appellate Rules Committee also participated.

Judge Pauley said the attendees engaged in a robust discussion of the proposed changes to the bankruptcy appellate rules both as to the initial set of rules presented in San Diego, and as to the revised version attendees had been asked to review. He added that the general response to a change along the lines of the draft was very positive

Mr. Brunstad gave an overview of the nearly 600 changes he had made to the draft since the spring meeting in San Diego. He said that, while many of the changes were mechanical, such as moving statutory cross references, there were also changes that had required significant thought. Among the changes were additional explanation in the annotations; an attempt to orient the rules more toward electronic filing as the default, with an allowance for paper filing or paper copies of the filings; incorporating rules on direct appeals from the bankruptcy court to the court of appeals; incorporating rules on indicative rulings (previously approved by the Committee, but not yet published for comment); service issues; forms of brief issues; and addressing how to handle and dispose of appeals that settle.

Mr. Brunstad agreed with Judge Pauley that attendees at the open subcommittee meeting were engaged and supported the idea of revising the bankruptcy appellate rules. He said there seemed to be plenty of suggestions for improvements to the current draft, but his sense was that the suggestions would require less complicated revision than those he made to the San Diego version. He noted, however, that the reviewing subgroups still had time to submit written comments.

Judge Pauley said the Subcommittee recommended that the project continue going forward, and requested approval to do so from the full Committee. The Reporter added that if such approval is given, she anticipated drafting a summary of the written subgroup comments for consideration by the Subcommittee, and that she and Mr. Brunstad (who volunteered to continue working with the draft for one more round), would incorporate those comments recommended by the Subcommittee.

Judge Rosenthal said that in considering revisions in anticipation of electronic filing, it would be important to provide a functional rather than prescriptive description of what is needed. She noted that all of the federal rules will have to be adjusted to account for electronic filing, and that this project will likely be the model. The Reporter added that the Committee was working to keep the other rules committees informed, and that coordination with the other committees will continue as the project goes forward. She said that the Subcommittee anticipates that there will be a further report next spring and possibly a written product for the Committee to consider next fall.

A motion that Judge Pauley's request that the Subcommittee be authorized to continue along the projected timeline as outlined was approved without objection.

(B) Discussion of whether to continue the indicative ruling amendments

(proposed new Rule 8007.1 and the amendment to Rule 9024 as approved at the September 2008 meeting), in the *Bull Pen* and/or to incorporate the amendments into the revised Part VIII rules. (March 2009 agenda item 7(B))

Motion that Rule 8007.1 and the amendment to Rule 9024 stay in bullpen and be included in the eventual Part VIII package, approved without objection.

(C) Recommended response to the Appellate Rules Committee's request for views on potential amendment to Appellate Rule 6(b)(2)(A) regarding timing of notice of appeal following ruling of District Court or BAP on motion for rehearing.

The Reporter reviewed the memo and the Subcommittee's recommendation. She said that the Subcommittee agreed with the proposed change as set out on pages 203 and 204 of the materials, but suggested that an additional change as noted on page 205 be considered by the appellate rules committee. **Motion to support the Subcommittee's recommendation to the Appellate Rules Committee approved without objection.**

8. Report by the Subcommittee on Technology and Cross Border Insolvency.

No matters assigned.

9. Report of the Subcommittee on Attorney Conduct and Health Care.

No matters assigned.

10. Report concerning the proposed amendment to Civil Rule 56 and the possible need for a Bankruptcy Rule amendment in light of the Civil Rule amendment's impact on the timing of summary judgment motions in contested matters and adversary proceedings. (March 2009 agenda item 7(B))

Judge Wedoff said that the Standing Committee approved an amendment to Civil Rule 56 that is scheduled to go into effect December 1, 2010. He noted that Rule 56 is currently incorporated in whole in bankruptcy adversary proceedings and contested matters, and the Committee should consider whether a modification is needed for bankruptcy once the new civil rule goes into effect.

Judge Wedoff explained that subsection (b) of proposed Rule 56 establishes a default deadline for filing summary judgment motions at 30 days after the close of discovery. Because of the speed with which bankruptcy issues are heard -- including contested matters such as motions for relief from stay -- the default deadline in the proposed rule would not come into effect in many situations, allowing a timely summary judgment motions to be filed shortly before a scheduled evidentiary hearing. Because subsection (a) of the proposed rule again states that the

court "shall grant summary judgment" if the motion is meritorious, a bankruptcy court could consider itself bound to continue a scheduled evidentiary hearing to allow consideration of any timely filed summary judgment motion.

Judge Wedoff said a more meaningful default deadline for bankruptcy purposes might be based on the date set for the evidentiary hearing rather than the close of discovery, and he recommended that the Consumer Subcommittee consider such a revision and provide a recommendation at the next meeting.

Judge Perris noted that, whatever the Committee ultimately decides to do, since Rule 56 is scheduled to go into effect before a change to 7056 could be made, a memo should be distributed to all bankruptcy courts highlighting how the new rule works in bankruptcy so that the courts can take steps to modify local rules or judges can create scheduling orders to prevent summary judgment motions from being filed on the eve of a hearing.

The Chair referred the matter to the Consumer Subcommittee for further consideration and for a recommendation at the spring meeting.

11. Discussion of whether the time limits in Rule 7054(b) should be changed to conform to Civil Rule 54 and the new time computation provisions.

The Reporter said that Rule 7054(b) had been overlooked during the review of bankruptcy time periods with respect to the time amendments that will go into effect this December. She said a five-day period and a one-day period were possibly affected. She recommended changing the five-day time period to seven days, as was done to all other five-day time periods.

The Reporter said the existing one-day time period in the rule was for the clerk to provide notice of taxing costs. She said that period could remain the same, or be changed to seven or 14 days. The Reporter explained that the Committee had deliberately not changed the one-day period in Rule 9006(d), and that prior actions might be a basis for not changing the one-day period in 7054(b), particularly since there has never been a request to change the period in the past. On the other hand, the Civil Rules Committee did change the parallel period in Rule 54(d) from one day to 14 days, because it concluded that the one-day period "was unrealistically short."

Judge Rosenthal said she thought that the bankruptcy rule ought to continue to parallel the civil rule unless there was bankruptcy reason for a different time period. Judge Wizmur agreed. After additional discussion, the Chair suggested that the question of whether the one-day period is too short in bankruptcy could be referred to the Bankruptcy Clerk's Advisory Group and the Bankruptcy Judges Advisory Group, and the Committee could decide whether to recommend the change at it next meeting. Mr. Waldron said that he could also survey the clerks on the issue.

A motion was made, seconded and approved without objection to: recommend changing the five-day period to seven days, and to defer consideration of changing the one-day period to 14 days until the spring meeting, so that the views of the BCAG, the BJAG and Mr. Waldron's survey of the clerks could be considered. The proposed changes will remain in the bullpen until the spring, and the Committee agreed that publishing any proposed changes for comment in the fall would be necessary only if it decides to recommend changing the one-day period to 14 days.

12. Guidelines for the use of standing orders.

The Reporter said the Committee assembled an ad hoc group of bankruptcy judges to consider whether the guidelines proposed for use of local rules presented any special problems in bankruptcy cases. She said the only issue the judges thought might need further clarification in bankruptcy would be the use of a standing order instead of a local rule in situations where a statutory or rule provision applies "unless the court orders otherwise." She said the initial question before the Committee is whether a local rule would amount to an order in such a situation.

Judge Rosenthal said all circuit courts that have looked at the issue have concluded that a local rule *does* satisfy an "unless the court orders otherwise" provision. Because the case law seems to support use of a local rule to satisfy the "unless the court orders otherwise," she said it would be preferable to use local rules in such situations across all the federal courts. She also said that the transmittal letter that would accompany the guidelines could specifically state that a local rule satisfies the "unless the court orders otherwise" situation.

Judge Wedoff asked how many circuits have adopted the principle that a local rule has the same effect as a court order, and he noted that the language in Rule 56 provides for *either* a court order or local rule, so he questioned whether they were really the same. Judge Rosenthal said the Seventh, Third and Fifth Circuits had all considered the issue and concluded that a local rule satisfies the "unless the court orders otherwise" provision. She noted that there was a dissent in one of the Fifth Circuit cases, based on the Rule 56 language raised by Judge Wedoff. The majority in that case, however, concluded that while it is true that local rules and orders are different, in the context of "unless the court orders otherwise" a local rule suffices because all local rules are adopted by court order.

The Chair asked for a vote on the "Sense of the Committee" that the "guidelines for the use of standing orders should be disseminated as proposed so long as the transmittal letter contains a statement clarifying that a local rule satisfies the unless the court orders otherwise situation." The Committee approved the "Sense of the Committee" statement without objection.

Discussion Items

13. Discussion of impact of the restyled Evidence Rules on bankruptcy matters and recommendation on a response to the restyling.

The Reporter said that the Evidence Rules Committee had finished its restyling project and that the proposed rules were now out for comment. She asked whether any member thought that there was a need for the Committee as a whole to comment on the changes.

Judge Wedoff said he believed that the Committee should only comment "as the Committee" on changes that affect bankruptcy. He thought individual members could and should make any general comments individually. The Committee agreed with this approach.

The Reporter said that the only issue she identified that might work differently in bankruptcy dealt with admissions by an "opposing party." Judge Perris suggested the possibility of substituting "adverse party," but Professor Ponoroff said that "party opponent" (the phrase currently used in the evidence rules) has not seemed to cause problems in bankruptcy and he questioned whether the restyled phrase "opposing party" would be any more likely to do so. **A motion to make no comment on the restyled evidence rules carried without objection.** The Chair added that she would report back to the Evidence Committee that this Committee was grateful for the opportunity to comment, but that it found no bankruptcy-specific issues.

14. Oral report on the status of pending legislation, including authorizing modification of certain home mortgages in chapter 13 cases and legislation liberalizing exemptions for debtors with medical problems.

Mr. Wannamaker reported that he spoke with the AO's Office of Legislative Affairs and that none of pending bankruptcy legislation, including a bill for technical amendments, appeared likely to pass or even be considered soon.

15. 11 U.S.C. § 521(i) update.

The Reporter said that although the circuit courts are starting to address § 521(i), the cases are breaking toward not enforcing automatic dismissal and finding that the bankruptcy court has discretion to retain the case after the 45th day. She said that courts seemed most likely to invoke this type of discretion in cases where the debtor is attempting to use the statute as a sword to escape the hardships of bankruptcy. She added that so long as the courts seemed to breaking in favor of finding the that statute allows discretion, and concluding that "automatically dismissed" is not really automatic, it would be hard to develop a rule to implement automatic dismissal.

After a short discussion, **a motion was made and the Committee voted without opposition to continue monitoring the case law on 11 U.S.C. § 521(i).**

Information Items

16. Rules Docket.

Mr. Wannamaker explained that the Rules Docket was meant to help the membership keep track of ongoing comments and suggestions to the rules and asked members to email him with any suggestions for changes or updates.

17. Notice to local courts concerning reviewing Interim Rule 1007-I in light of the upcoming time computation amendments to Rule 1007.

Discussed by Mr. Wannamaker at Item 3(A).

18. Bull Pen.

The proposed amendments to Official Form 10, approved at the March 2009 meeting, remain in the bull pen pending incorporation of additional proposed changes to Form 10 discussed at Items 4(C) and 5(A).

Proposed new Rule 8007.1 and the proposed amendment to Rule 9024 (indicative rulings), approved at the September 2008 meeting and recopied at Item 7(b), remain in the bull pen, but will be incorporated into the rewrite of Part VIII rules.

The decision to recommend changing the five-day period in Rule 7054(b) to seven days (discussed at Item 11) was added to the bull pen pending a decision in the spring about the one-day period in the same rule.

19. Oral report on the preparation of a definitive set of Bankruptcy Rules.

Mr. Ishida explained that for a number of historical reasons, there has never been an official version of the Federal Rules of Bankruptcy Procedure. The Office of the Law Revision Counsel of the House of Representatives, which prepares and publishes the other federal rules of practice, procedure, and evidence, has never compiled and published the Bankruptcy Rules. The bench, bar, and public have adapted to this anomaly by consulting the bankruptcy rules published by commercial and nonprofit organizations. Mr. Ishida said that this has been a workable solution, but is not ideal and has created problems over the years.

This past summer, Mr. Ishida said, at the request of the Committee and with considerable help from a group of summer interns over months of intense effort, the Administrative Office compiled an authoritative version of the Bankruptcy Rules. He said the project was accomplished by painstakingly comparing five commercial and nonprofit versions of the

bankruptcy rules using the electronic comparison tools in Word and WordPerfect. He said that whenever a discrepancy arose in the rules being compared, the official source documents were checked -- either the orders of the Supreme Court or Congressional legislation -- to resolve the discrepancy. Each step in the process was verified and documented, and the final product underwent a stringent editorial, proofreading, and legal review process by AO staff.

Mr. Ishida said that most of the work was done by, and credit goes to, the interns that were involved in the project. On behalf of AO staff, he extended his heartfelt gratitude and thanks to: Ms. Katie Mize (lead intern), Ms. Heather Williams and Ms. Danielle White. On behalf of the Committee, the Chair added her thanks for the work of the interns and AO staff.

Mr. Ishida said the review process was nearly done, and that upon completion, the rules would be transmitted to the Office of the Law Revision Counsel with a request that they be published as the official version of the Federal Rules of Bankruptcy Procedure. He said they would also be published on the court's public website.

20. Future meetings.

The spring 2010 meeting will be at the Windsor Court Hotel, New Orleans, April 29 - 30, 2010. Suggestions for possible locations for the fall 2010 meeting were solicited.

21. New business.

None.

22. Adjourn.

Respectfully submitted,

Stephen "Scott" Myers

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

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MEMORANDUM

DATE: **December 1, 2009**

TO: **Honorable Lee H. Rosenthal, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Reena Raggi, Chair**
Subcommittee on Privacy

RE: **Subcommittee's Progress Report**

The Subcommittee on Privacy is engaged in a long-term project to review the E-Government privacy rules enacted in 2007. The Subcommittee is examining how those rules — requiring redaction of certain private information in court filings — work in practice, and it is addressing some concerns that private identifying information remains unredacted and subject to remote public access. The Subcommittee held meetings in June and September, and will also meet on January 6, 2010 in Phoenix. This memo describes the organization of the Subcommittee, its work thus far, and its agenda for the next six months.

Organization:

The Subcommittee has divided its work into four subject matter areas:

1. The subcommittee on rule amendments is considering whether the current privacy rules — Civil Rule 5.2, Criminal Rule 49.1, etc. — should be amended in any respect. Questions include whether more information should be subject to redaction requirements; whether the current exemptions in the rules should be expanded or contracted; and whether the special treatment for social security cases and immigration cases should be altered in any way.

2. The subcommittee on criminal cases is reviewing whether and how to permit remote public access to plea agreements and cooperation agreements; and whether a rule is necessary to describe the information that must or should go into the criminal case file that would be available on PACER.

3. The subcommittee on transcripts is reviewing the Judicial Conference policy on redacting transcripts of court proceedings, and it is also considering problems that may arise when private juror information is included in transcripts of voir dire proceedings.

4. The subcommittee on implementation is investigating whether the current rules are effective in protecting personal identifying information, such as social security numbers, from remote public access over PACER. It is also considering ways to make filers more aware of the redaction requirements.

Subcommittee's Work to Date:

1. Survey

The Subcommittee determined that it needed information about how the privacy rules were working from those who deal with those rules on a daily basis. With the outstanding assistance of Joe Cecil and Meghan Dunn of the FJC, the Subcommittee prepared and sent out surveys for district judges, clerks and attorneys. The survey questions sought experiential information about how the rules were working, and they also invited the respondents' opinions on whether the privacy rules should be changed in any respect.

The results from the survey of district judges and clerks are complete, and reports on those results from Joe and Meghan are attached to this memo. The survey data has provided valuable information for the Subcommittee in considering whether the privacy rules need to be amended in any respect. The Subcommittee plans to follow up with individual respondents whose comments merit special inquiry.

2. Review of Court Filings by PublicResource.org

PublicResource.org conducted a review of court filings and purported to find that social security numbers were unredacted in a large number of cases. With the outstanding assistance of Henry Wigglesworth of the Administrative Office, the Subcommittee conducted an in-depth analysis of the PublicResource.org data. It determined that there were in fact very few cases in which social security numbers have been left unredacted. Mr. Wigglesworth's report is attached to this memorandum.

3. Review of Local Rules

The Subcommittee is indebted to Heather Williams of the Administrative Office, who collected all local rules governing redaction of private information in court filings. The Committee plans to use this information to evaluate different approaches to redaction. The Subcommittee will consider whether any local rules conflict with the national privacy rules.

4. Work With CACM

The Subcommittee has worked closely with CACM and its staff; the Subcommittee has three members from CACM, and the former chair of CACM, Judge Tunheim, is an ex officio member. CACM staff has provided critical information about the various approaches that districts have taken with respect to disclosure of plea agreements and cooperation agreements. CACM staff has also worked to implement a "banner notice" that notifies each electronic filer about the redaction requirements imposed by the national rules. Finally, the Subcommittee is working in cooperation with the Electronic Public Access (EPA) Working Group of the Administrative Office on questions of implementation of the privacy rules and the operation of PACER.

Subcommittee's Agenda

1. Conferences

To gain a still broader perspective on the identified four areas of interest, the Subcommittee is planning a day-long conference to be held on April 13, 2010, at Fordham Law School in New York City. Professor Dan Capra is assisting the Subcommittee in staffing a number of panels to discuss the existing privacy rules, the policy determinations supporting those rules, and how to resolve any problems in protecting private information in court filings from remote public access. The Subcommittee will invite judges, United States attorneys, private practitioners, academics and members of the media to make presentations. The proceedings will be published in the Fordham Law Review. Members of the Standing Committee are most welcome to attend the conference.

The Subcommittee may hold one further conference on privacy issues with a West Coast venue. The Subcommittee invites Standing Committee members to recommend panelists for any of its conferences on privacy issues.

2. Local Rules

As noted above, the Subcommittee has reviewed all local rules on redacting private information in court filings. It has identified some discrepancies between certain local rules and

the national rules. Notably, some local rules mandate redaction of more information than is required by the national rules. Following the protocol of the last local rules project, the Subcommittee will prepare letters to the Chief Judge of each district with a disparate local rule to resolve any possible inconsistencies.

3. Monitoring Privacy Rules

This Spring the Subcommittee will review data from randomly selected court filings to determine whether private information is being properly redacted in accordance with the privacy rules. The data will be collected by Joe Cecil of the FJC and reviewed by both Joe and Henry Wigglesworth of the Administrative Office. The goal will be to determine whether private information subject to the redaction requirements is still turning up unredacted in court filings; to provide some indication of the frequency of any such errors; and to determine whether the errors, if any, particularly arise in certain cases or from certain filers. This information will be critical in responding to any concerns expressed from members of Congress about the efficacy of the privacy rules.

In closing, I note the extraordinary assistance of Professor Daniel Capra, the Subcommittee Reporter, in all aspects of this project. I thank him, CACM and its staff for supporting the Subcommittee in its efforts, John Rabiej and Rules Committee staff for critical support and guidance, and Joe Cecil and Meghan Dunn of FJC for their outstanding efforts on the surveys.

AGENDA # _____
Committee on Rules of Practice and Procedure
January 2010

SUBJECT: Judiciary Strategic Planning (Action)

The Ad Hoc Advisory Committee on Judiciary Planning would like the Committee on Rules of Practice and Procedure to review and provide feedback on a draft strategic plan for the federal judiciary (see Attachment 1). The Committee may provide the strategic plan to the Judicial Conference as early as March 2010.

Background

On the recommendation of the Executive Committee, the Ad Hoc Advisory Committee on Judiciary Planning was formed in August 2008. The Committee is developing a cross-committee approach to planning that is sustainable and national in scope. The Committee now has 17 members:

- three members of the Executive Committee, including the Director of the Administrative Office;
- the chairs of seven committees and one subcommittee;
- three at-large judge members;
- two circuit executives; and
- one district court clerk.

A list of the Committee's members is included as Attachment 2.

Development of a Draft Strategic Plan

To prepare this draft, the Ad Hoc Advisory Committee reviewed the mission and core values of the judiciary expressed in the 1995 *Long Range Plan for the Federal Courts*, and developed more concise re-statements. The Committee also considered trends affecting the judiciary and their implications, taking into account the judiciary's organizational culture and systems of governance and administration.

The Ad Hoc Advisory Committee then identified strategic issues, i.e., fundamental policy questions or challenges based on an assessment of key trends affecting the judiciary's mission and core values. These strategic issues provide the framework for the draft strategic plan. The Committee asked Judicial Conference committees to review these issues during their June and July 2009 meetings. The Ad Hoc Advisory Committee then met in late July to review committee input, and made several changes to the issues.

The Ad Hoc Advisory Committee next identified a set of strategies and goals to address each of the strategic issues that had been defined. The draft contains the following elements:

- mission
- core values
- strategic issues
- strategies
- goals

It is important to note that the draft strategic plan does not include goals or strategies covering every important project, initiative, or study underway, or every policy that is under consideration. The Committee has focused on selected high-priority strategies and goals that respond to judiciary-wide challenges. The plan is intended to promote change and improvement that helps the judiciary to accomplish its mission while preserving its core values. The plan is designed to be implemented within the judiciary's current systems of governance and administration.

The Committee strongly believes that the judiciary's ongoing planning process should include the regular assessment of whether the strategic plan's goals have been accomplished. It is anticipated that during their Summer 2010 meetings, Judicial Conference committees will be asked to consider how the accomplishment of goals relating to their jurisdiction should be assessed.

Request for Comments and Input

The Ad Hoc Advisory Committee requests that the Rules Committee review the draft strategic plan. In its review, the Committee is asked whether the draft includes measurable goals that, if accomplished, would address judiciary challenges in a manner consistent with the judiciary's mission, core values, and anticipated policy directions. The Ad Hoc Advisory Committee is seeking any ideas and suggestions that the Rules Committee may have about the draft strategic plan or the judiciary planning process.

Summary

The Rules Committee is asked to:

1) Review the draft judiciary strategic plan in Attachment 1.

2) Consider whether the accomplishment of the draft strategic plan's goals would address the judiciary's challenges in a manner consistent with its mission, core values, and anticipated policy directions.

3) Provide feedback to the Ad Hoc Advisory Committee on Judiciary Planning.

Ad Hoc Advisory Committee on Judiciary Planning

- **Charles R. Breyer, chair**, District Judge, N.D. California (Executive Committee)
- **Joseph F. Bataillon,** Chief District Judge, Nebraska (At Large)
- **Robert C. Broomfield,** Senior District Judge, Arizona (Economy Subcommittee, Committee on the Budget)
- **Julie E. Carnes,** Chief District Judge, N.D. Georgia (Committee on Criminal Law)
- **Rosemary M. Collyer,** District Judge, District of Columbia (Committee on Information Technology)
- **Michael W. Dobbins,** District Clerk, N.D. Illinois
- **James C. Duff,** Director of the Administrative Office (Executive Committee)
- **Julia Smith Gibbons,** Circuit Judge, Sixth Circuit (Committee on the Budget)
- **Barbara M.G. Lynn,** District Judge, N.D. Texas (Committee on the Administration of the Bankruptcy System)
- **Paul R. Michel,** Chief Federal Circuit Judge (Executive Committee)
- **Lawrence L. Piersol,** Senior District Judge, South Dakota (At Large)
- **Michael A. Ponsor,** District Judge, Massachusetts (Committee on Space and Facilities)
- **Julie A. Robinson,** District Judge, Kansas (Committee on Court Administration and Case Management)
- **George Z. Singal,** District Judge, Maine (Committee on Judicial Resources)
- **Toby D. Slawsky,** Circuit Executive, Third Circuit
- **John R. Tunheim,** District Judge, Minnesota (At Large)
- **Gary H. Wente,** Circuit Executive, First Circuit

AD HOC ADVISORY COMMITTEE ON JUDICIARY PLANNING

Draft Strategic Plan for the Federal Judiciary

Introduction

The American federal judiciary is respected throughout America and the world for its excellence, for the independence of its judges, and for its delivery of equal justice under the law. This plan identifies a set of strategies that will help the judiciary continue to be a model for others in providing fair and impartial justice.

This plan considers trends and issues affecting the judiciary, many of which challenge the judiciary's ability to effectively perform its mission. In addition, the plan recognizes that the future may provide tremendous opportunities for improvement in the delivery of justice.

This plan furthers the judiciary's tradition of identifying and responding to challenges while preserving its core values. It identifies seven issues that the judiciary must address, and a set of responses to them.

This plan is intended to serve as an agenda that outlines a set of actions to bring about positive change. It focuses on issues that affect the entire judiciary, and responses that should benefit the entire branch and those it serves. The plan does not include goals or strategies covering every important project, initiative, or study underway, or every policy that is under consideration.

The future envisioned by this plan is a federal judiciary that is accessible, timely and efficient; that attracts and retains highly competent judges and staff; that has effective working relationships with Congress and the executive branch; and that continues to enjoy the trust and confidence of the American people.

Mission and Core Values

The strategic plan begins with statements of the judiciary's mission and core values. The mission and core values are constants, and this plan strives to preserve them. The aim of this plan is to stimulate and promote change within the federal judiciary—but only change that is consistent with the judiciary's mission and core values.

Mission of the Federal Judiciary

The United States Courts are an independent, national judiciary providing fair and impartial justice within the jurisdiction conferred by the Constitution and Congress. As an equal branch of government, the federal judiciary preserves and enhances its core values as the courts meet changing national and local needs.

Core Values of the Federal Judiciary

- ***Rule of Law***: legal predictability, continuity, and coherence; reasoned decisions made through visible processes and based faithfully on the law
- ***Equal Justice***: fairness and impartiality in the administration of justice; accessibility of court processes; treatment of all with dignity and respect
- ***Judicial Independence***: the ability to render justice without fear that decisions may threaten tenure, compensation or security; sufficient structural autonomy for the judiciary as an equal branch of government in matters of internal governance and management
- ***Accountability***: stringent standards of conduct; self-enforcement of legal and ethical rules; good stewardship of public funds and property; effective and efficient use of resources
- ***Excellence***: adherence to the highest jurisprudential and administrative standards; effective recruitment, development and retention of highly competent and diverse judges and staff; commitment to innovative management and administration; availability of sufficient financial and other resources

Strategic Issues Facing the Federal Judiciary

The strategies and goals in this plan are organized around seven strategic issues—fundamental policy questions or challenges that are based on an assessment of key trends affecting the judiciary's mission and core values. These issues also take into account the judiciary's organizational culture. The strategies and goals developed in response to these issues are designed with the judiciary's decentralized systems of governance and administration in mind.

Delivering Justice

How can the judiciary deliver justice in a more effective manner and meet new and increasing demands, and do so in a manner that adheres to its core values?

Exemplary and independent judges, high quality staff, well-reasoned and researched rulings, and time for deliberation and attention to individual issues are among the hallmarks of federal court litigation. Scarce resources, changes in litigation and litigant expectations, and certain changes in law challenge the federal judiciary's effective delivery of justice. This plan includes strategies that focus on improving performance while ensuring that the judiciary functions under conditions that allow for the effective administration of justice.

Strategy 1.1. Pursue improvements in the delivery of services on a nationwide basis.

Effective case management is essential to the delivery of justice, and most cases are handled in a manner that is both timely and deliberate. The judiciary monitors several aspects of case management, and has a number of mechanisms to identify and assist congested courts. Despite ongoing efforts, pockets of congestion and delay persist in the courts. This plan calls for a concerted and collaborative effort among Judicial Conference committees, circuit judicial councils and others to make measurable progress in reducing the number of cases that are unduly delayed, and the number of courts with persistent significant backlogs.

This plan also includes a goal to ensure that persons entitled to representation under the Criminal Justice Act are afforded highly qualified representation through either a federal defender or panel attorney. Highly qualified representation requires sufficient resources to assure adequate pay, training, and support services. Further, because the defendant population and needs of districts differ, appropriate guidance and support must be tailored to local conditions.

Other efforts to improve the delivery of justice are ongoing and should be continued. For example, a number of significant initiatives to transform the judiciary's use of technology are underway, including the development of next-generation case management systems. Also, improvements in the supervision of offenders and defendants include the use of techniques that are supported by research. This evidence-based approach has been enhanced through the use of a Decision Support System that integrates data from other agencies with probation and pretrial services data to facilitate the analysis and comparison of supervision practices and outcomes among districts. In addition, many judiciary forms have been translated into Spanish to improve access to the courts for persons with limited English proficiency.

Goal: Reduce congestion and delay through the work of circuit judicial councils, committees and other appropriate entities.

Goal: Ensure that persons represented by panel attorneys and federal defender organizations are afforded highly qualified representation consistent with the best practices of the legal profession.

Strategy 1.2. Strengthen the protection of judges, court staff and the public at court facilities, and of judges at other locations.

The judicial process requires effective security, and the judiciary must work closely with the U.S. Marshals Service to continually assess and improve the protection provided to the courts and individuals. Initiatives to improve judicial security include a seven-courthouse perimeter security pilot program in which the Marshals Service has assumed the responsibility for security equipment and exterior guarding from the Federal Protective Service. An additional key area of focus is raising the level of awareness of security issues. Efforts include "Project 365," a joint judiciary-Marshals Service initiative to increase the awareness of judges, their families and court staff to potential security risks away from the courthouse and via the internet.

The effective implementation of this strategy is linked to other efforts in this plan. Strategy 1.3 includes a goal to ensure that judiciary proceedings are conducted in secure facilities. In addition, Strategy 4.1 includes a goal to ensure that IT policies and practices provide effective security for court records and data, including confidential personal information.

Goal: Improve the perimeter security of primary court facilities, including security equipment and exterior guarding.

Goal: Increase the awareness of vulnerabilities and potential risks to the safety and security of judges, their families and court staff.

Goal: Work with the U.S. Marshals Service to improve the collection, analysis and dissemination of protective intelligence information concerning individual judges.

Strategy 1.3. Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.

The judiciary has been very successful in securing a level of funding that has allowed staffing levels to keep pace with workload, and to support judiciary operations. However, judges' pay has failed to keep pace with inflation for many years, placing at risk the judiciary's ability to attract and retain highly competent judges from a broad spectrum of backgrounds and career paths. In addition, many circuit, district and bankruptcy courts have an insufficient number of authorized judgeships. The judiciary has received very few Article III district judgeships, and no circuit judgeships, since 1990. And, while the judiciary has made great progress over the past two decades in securing additional space, some court proceedings are still conducted in courthouses that are cramped, poorly configured, and lacking separate, secure corridors for inmates appearing in court.

Strategies and goals in other sections of this plan are closely related to this strategy of securing adequate resources. For example, Strategy 3.2 and its associated goals focus on the importance of attracting, recruiting, developing and retaining the staff that are required for the effective performance of the judiciary's mission, and will be critical to supporting tomorrow's judges and meeting future workload. Also, a goal under Strategy 4.1 urges the judiciary to continue to build and maintain a robust technology infrastructure.

Goal: Restore judicial compensation to attract and retain the best-qualified persons from varied backgrounds as judges and eliminate disincentives to long judicial service.

Goal: Secure needed circuit, district, bankruptcy and magistrate judgeships to maintain access and excellence in the federal courts.

Goal: Ensure that judiciary proceedings are conducted in courthouses that are secure, accessible, efficient and properly equipped.

The Effective and Efficient Management of Public Resources

How can the judiciary provide justice consistent with its core values while managing its resources and programs in a manner that reflects workload variances and funding realities?

The workload of the federal courts can vary greatly from year to year, and it is an ongoing challenge to ensure that adequate resources are available in each court to meet workload demands. Consequently, whether cases are handled in a timely manner can sometimes be a function of location. The judiciary relies upon effective decision-making processes governing the allocation and use of judges, staff, facilities, and funds to ensure the best use of limited resources. Developing, evaluating, publicizing and implementing best practices will assist courts and other judiciary organizations in addressing workload changes. Local courts have many operational and program management responsibilities in the judiciary's decentralized governance structure, and the continued development of effective local practices should be encouraged. At the same time, the judiciary may also need to consider whether and to what extent certain practices should be adopted judiciary-wide.

Strategy 2.1. Allocate and manage resources more efficiently and effectively.

Since 2004, the judiciary has worked to contain the growth in judiciary costs, and pursued a number of studies, initiatives, and reviews of judiciary policy. Significant savings have been achieved, particularly for rent, compensation, and information technology. Cost containment remains a high priority, and new initiatives to contain cost growth are under consideration. Other initiatives identify better and more efficient practices, such as the methods analysis program, which analyzes discrete clerks' office functions and identifies techniques that save staff time and improve service. Efforts to ensure the effective use of resources are also underway. For example, the Judicial Conference's Committee on the Administration of the Magistrate Judges System publishes suggestions for the utilization of magistrate judges for consideration by district courts.

This plan includes two goals to increase the flexibility of the judiciary in matching resources to workload, for example, by enabling available judges and staff to assist heavily burdened courts on a temporary basis. Advances in technology have increased the ability to perform many tasks, such as handling certain proceedings in civil cases, without the need for travel. A third goal speaks to the critical need to maintain effective court operations when disaster strikes.

Goal: Take steps, including additional visiting, senior and recalled judge recruitment efforts, and the effective use of technology, to provide judicial resources to overburdened and congested courts.

Goal: Facilitate the sharing of administrative staff and services within courts and, where appropriate, across organizational boundaries.

Goal: Implement effective responses to natural disasters, terrorist attacks, pandemics and other physical threats.

The Judiciary Workforce for the Future

How can the judiciary continue to attract, develop and retain a highly competent and diverse complement of judges and staff, while meeting future workforce requirements and accommodating changes in career expectations?

The judiciary can only meet future workload demands if it can continue to attract, develop and retain highly skilled and competent judges and staff. Chief Justice Roberts has noted that judicial appointment should be the "capstone of a distinguished career" and not "a stepping stone to a lucrative position in private practice." Attracting and retaining highly capable judges and staff will require fair and competitive compensation and benefit packages. The judiciary also needs to plan for new methods of performing work, and continued volatility in workloads, as it develops its future workforce.

Strategy 3.1. Support a lifetime of service for federal judges.

This plan includes the goal of restoring judicial compensation as part of Strategy 1.3, securing sufficient resources to accomplish the judiciary's mission and preserve its core values. In addition to restoring judicial compensation, it is critical that judges are supported throughout their careers, as new judges, active judges, chief judges, senior and recalled judges, and retired judges. To identify practices that support development, retention and morale, judges' views should be solicited on a regular basis. In addition, education, training and orientation programs offered by the Federal Judicial Center and the Administrative Office will need to continue to evolve and adapt. Technology training, for example, is moving away from a focus on software applications toward an emphasis on the tasks and functions that judges perform. Training and education programs, and other services that enhance the well being of judges, need to be accessible in a variety of formats, and on an as-needed basis.

Strategy 3.2. Recruit, develop and retain highly competent staff while defining the judiciary's future workforce requirements.

The judiciary continues to be an attractive employer, and staff turnover is relatively low. Employees are committed to the judiciary's mission, and the judicial branch provides staff with many resources and services, including training and education programs. Nonetheless, much remains to be done as the work of the judiciary and those who do it undergo change on a continual basis. These changes include an increase in the amount of work performed away from the office, shifting career expectations, and changes in how staff communicate and interact.

The judiciary also needs to develop the next generation of executives. More than half of the existing senior executive leadership in the federal courts is currently eligible to retire or will become eligible to retire within the next five years. The federal courts have a management model that provides individual court executives with a high degree of decentralized authority over a wide range of administrative matters. The most qualified candidates often come from within the system since the judiciary's management model is not currently replicated in other government systems. To ensure that the judiciary has a sufficient internal supply of qualified candidates, a meaningful leadership development training program needs to be initiated along with creation of executive relocation programs to widen the pool of qualified internal applicants.

The following goals are intended to foster diversity, strengthen leadership, and provide rewarding careers for staff.

Goal: Identify future workforce challenges and develop programs and special initiatives that will allow the judiciary to remain as an employer of choice while enabling employees to strive to reach their full potential.

Goal: Deploy new and enhanced modern human resources programs and services that better assist judges, executives and supervisors in developing, assessing and leading staff.

Goal: Strengthen the judiciary's commitment to workforce diversity through expansion of diversity program recruitment, education and training.

Goal: Attract, recruit and develop the next generation of judiciary executives and senior leaders.

Harnessing Technology's Potential

How can the judiciary develop national technology systems while fostering the development of creative approaches and solutions at the local level?

Implementing innovative technology applications will help the judiciary to meet the changing needs of judges, staff and the public. Technology can increase productive time, and facilitate work processes. For the public, technology can improve access to courts, including information about cases, court facilities, and judicial processes. The judiciary will be challenged to build and maintain effective IT systems in a time of growing usage, and judicial and litigant reliance. Security of IT systems must be maintained, and a requisite level of privacy assured. A key challenge will be to balance the economies of scale that may be achieved through certain enterprise-wide approaches with the creative solutions that may result from allowing and fostering the development of local applications.

Strategy 4.1. Harness the potential of technology to identify and meet the needs of court users for information, service, and access to the courts.

The judiciary is fortunate to be supported by an advanced information technology infrastructure and services that continue to evolve. The functional requirements of next-generation case management systems are being defined, while existing systems are being updated and refined. Services for the public and other stakeholders are being enhanced, and systems have been strengthened to provide reliable service during growing usage and dependence. Collaboration and idea sharing among local courts, and between courts and the Administrative Office, foster continued innovation in the application of technology.

The effective use of advanced and intelligent applications and systems (calendaring systems that suggest optimal hearing dates, for example) will provide critical support for judges and other court users. This plan includes a goal supporting the continued building of the judiciary's technology infrastructure, and another encouraging a judiciary-wide perspective to the development of certain systems. Another goal in this section focuses on the security of electronic court records.

The effective use of technology is critical to furthering other strategies in this plan. Success in pursuing Strategy 2.1, concerning the effective and efficient management of resources, is closely linked to the use of technology. An effective technology program also supports training and remote access to courts (Strategies 3.1 and 3.2), and programs to improve the accessibility of the judiciary (Strategy 5.1).

Likewise, an effective technology program is also dependent upon the successful implementation of other strategies in this plan. In a rapidly changing field requiring the

support of highly trained people, is it critical that the judiciary succeed in recruiting, developing and retaining highly competent staff (Strategy 3.2). And, investments in technology also require adequate funding (Strategy 1.3).

Goal: Continue to build and maintain a robust and flexible technology infrastructure that fully meets and anticipates the judiciary's requirements for communications, record-keeping, electronic case filing, and effective case management.

Goal: Develop systemwide approaches to the utilization of technology to achieve enhanced performance and cost benefits while at the same time encouraging the development of local initiatives that can improve services.

Goal: Refine and update security practices to ensure the confidentiality, integrity and availability of court records and information.

Enhancing Access to the Judicial Process

How can courts remain comprehensible, accessible and affordable for people who participate in the judicial process while responding to demographic and socioeconomic changes?

Courts are obligated to be open and accessible to anyone who initiates or is drawn into federal litigation, including litigants, lawyers, jurors, and witnesses. Given the profound changes occurring in American society, the federal courts must consider carefully whether they are continuing to meet the litigation needs of court users. When people look to the federal courts to address problems that cannot be solved within the federal courts' limited jurisdiction, when claims are not properly raised, and when judicial processes are not well understood, the courts' tasks are made more difficult. This plan focuses on identifying unnecessary barriers to court access, and taking steps to eliminate them. The views of participants in the judicial process — including parties, lawyers and jurors — should be solicited as a first step in implementing these strategies.

Strategy 5.1. Ensure that the federal judiciary is meeting the needs of lawyers and litigants in the judicial process.

The accessibility of court processes to lawyers and litigants is a component of the judiciary's core value of equal justice, but making courts readily accessible is difficult. To improve access, civil, criminal, appellate and evidence rules of practice and procedure

were rewritten to simplify and clarify them, and make them more uniform. Rules changes have also been made to help reduce cost and delay in the civil discovery process, to address the growing role of electronic discovery, and to take widespread advantage of technology in court proceedings. Despite these and other efforts, some lawyers, litigants, and members of the public continue to find litigating in the federal courts challenging. To better meet the needs of lawyers and litigants in the judicial process, this plan includes the following goals:

Goal: Improve the accessibility of the judicial process for lawyers and litigants.

Goal: Adopt measures designed to provide flexibility in the handling of cases, while reducing cost, delay, and other unnecessary barriers to the adjudication of disputes.

Goal: Adopt measures that more efficiently and promptly dispose of claims that cannot be properly addressed or resolved in the federal judicial system.

Strategy 5.2. Ensure that the federal judiciary is meeting the needs of other participants in the judicial process.

As part of its commitment to the core value of equal justice, the federal judiciary has strived to assure that all who participate in federal court proceedings — including jurors, witnesses, and observers — are treated with dignity and respect and understand the process. The judiciary's national website and the websites of the individual courts all provide the public with substantial information about the courts themselves, court rules and procedures, judicial orders and decisions, and schedules of court proceedings. In addition, court dockets and case papers and files are posted on the internet through a judiciary-operated public access system. Court forms commonly used by the public have been rewritten to make them clearer and simpler to use, and they have also been posted on the websites. Many forms have been translated to assist persons with limited English proficiency. And in some districts, electronic tools have been created to assist pro se filers in generating civil complaints. In addition, the Judicial Conference has worked to reduce the burden of jury service, improve juror utilization, and improve citizen participation in juries. Continued efforts are needed, and this plan includes goals to make courts more accessible for jurors, witnesses, and others.

Goal: Provide jurors, witnesses, and court observers with comprehensive, readily accessible information about court cases and the work of the courts.

Goal: Reduce the hardships associated with jury service through appropriate per diem compensation, and improve the experiences of citizens serving as grand and petit jurors.

The Judiciary's Relationships with the Other Branches of Government

How can the judiciary develop and maintain effective relationships with Congress and the executive branch, yet preserve appropriate autonomy in judiciary governance, management and decision-making?

Increasingly, the judicial branch's ability to deliver justice in a manner consistent with its core values is dependent upon its relationships with the other two branches of the federal government. An effective relationship with Congress is critical to success in securing adequate resources. In addition, the judiciary needs to provide Congress timely and accurate information about issues affecting the administration of justice, and demonstrate that the judiciary has a comprehensive system of oversight and review. The judiciary's relationships with the executive branch are also critical, particularly in areas where the executive branch has primary administrative or program responsibility, such as judicial security and facilities management. Ongoing communication about Judicial Conference goals, policies, and positions may help to develop the judiciary's overall relationship with Congress and the executive branch. By seeking opportunities to enhance communication among the three branches, the judiciary can strengthen its role as an equal branch of government while improving the administration of justice. At the same time, the judiciary must endeavor to preserve an appropriate degree of self-sufficiency and discretion in conducting its own affairs.

Strategy 6.1. Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress.

This strategy emphasizes the importance of building and maintaining relationships between judges and members of Congress, at the local level and in Washington. The intent is to enhance activities that are already underway, and to stress their importance in shaping a favorable future for the judiciary. Progress implementing other strategies in this plan can also help the judiciary to enhance its relationship with Congress. Goals relating to timeliness and accessibility directly affect members' constituents, and the ability to report measurable progress in meeting goals may bring dividends.

Goal: Improve the early identification of legislative issues in order to improve the judiciary's ability to respond and communicate with Congress on issues affecting the administration of justice.

Goal: Maintain and enhance effective ongoing relationships with congressional committees and their staffs.

Strategy 6.2. Strengthen the judiciary's relations with the executive branch.

The executive branch delivers critical services to the judiciary, including space, security, personnel and retirement services, and more. In addition, the executive branch develops and implements policies and procedures that affect the administration of justice. This strategy focuses on enhancing the ability of the judiciary to provide input to the Department of Justice and others regarding proposed actions and policies that affect the administration of justice.

Goal: Develop a systematic approach to communications with the executive branch on the development of policies and solutions to address systemwide issues affecting the judiciary.

Enhancing Public Understanding, Trust and Confidence

How should the judiciary promote public trust and confidence in the federal courts, in a manner consistent with its role?

The ability of courts to fulfill their mission and perform their functions is based on the public's trust and confidence in the system. However, misunderstandings about the federal courts—including their role and the limitations of their jurisdiction—often arise among members of the public. Decisions of federal courts often generate public discussion, but judges are limited in their ability to participate in that discussion. Advances in communications technology have increased the public's access to information, but much of it is not accurate. Communications advances also provide an opportunity for the judicial branch to expand its reach in appropriate ways and to do so at far less cost than previously possible. Efforts to build the public's understanding of the federal courts include education about the mission and role of the federal judiciary. These efforts also include communication about the judiciary's core values and the steps that the judiciary takes in order to preserve them. Educating the news media about the federal judiciary and its role, taking advantage of new methods of communication, and

improving the public's interaction with the courts can help to support the trust and confidence in the judiciary, as required in a democratic society.

Strategy 7.1. Assure high standards of conduct and integrity for judges and staff.

The judiciary earns public trust and confidence in part through maintaining effective internal systems of oversight and review. This strategy emphasizes the performance of critical internal controls, audit, investigation and discipline functions. Keeping policies current, and providing guidance is also a key aspect of this strategy. An emerging issue with implications for the protection of private information and other conduct-related issues is the conveyance of inappropriate information via electronic social networking. Ongoing activities include providing up-to-date and relevant guidance on judiciary policies to judges and staff. A comprehensive redesign of the *Guide to Judiciary Policy*, and regular *Guide* updates, will help judges and employees to access current, relevant information about judiciary policies.

Goal: Maintain strong internal controls and audit programs to ensure the integrity of funds, information, operations and programs.

Goal: Perform investigative, disciplinary and other critical self-governance responsibilities in a manner consistent with judiciary core values.

Strategy 7.2. Promote public awareness and understanding about the role of the judges, federal courts, and other judiciary responsibilities.

Over the past several years, the judiciary has engaged in many initiatives to improve the level of understanding about the federal courts, and retired Justices Sandra Day O'Connor and David Souter are among those who have championed civic education efforts. While civic education is critical, the vast majority of the work involved in improving public understanding is borne by individual judges and court officials in the course of their official duties or through individual outreach efforts. In addition, judges and court officials often treat public interest in noteworthy cases as opportunities to provide information and education about the role and functions of the federal judiciary. The effective implementation of Strategy 5.2 — ensuring that judicial processes are accessible and understandable to jurors, witnesses, and observers — will also help to promote public understanding of the courts.

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						U.S. Federal Holidays are in Red.

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