

COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

San Francisco, CA
January 6-7, 2011

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 6-7, 2011

1. Opening Remarks of the Chair
 - A. Introduction; new members
 - B. Report on the September 2010 Judicial Conference session
 - C. Transmission of Judicial Conference-approved proposed rules amendments to Supreme Court
2. **ACTION** – Approving minutes of the June 2010 committee meeting
3. Report of the Administrative Office
4. Report of the Federal Judicial Center
5. Report of the Civil Rules Committee
 - A. Rule 45
 - B. Discovery
 - C. Pleading
 - D. Preservation and sanctions; panel presentation on proposals for rule amendments and other steps to provide better guidance on preservation obligations and more clarity on sanctions for spoliation
 - E. Other work relating to the 2010 Duke Conference
 - F. Minutes and other informational items
6. Report of the Appellate Rules Committee
 - A. **ACTION** – Approving publishing for public comment proposed amendments to Appellate Rules 13, 14, and 24
 - B. Minutes and other informational items
7. Report of the Criminal Rules Committee
 - A. **ACTION** – Approving publishing for public comment proposed amendments to Criminal Rules 11, 12, and 34
 - B. Minutes and other informational items

Standing Committee Agenda

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8. Report of the Evidence Rules Committee
 - A. Possible rules amendments in light of *Melendez-Diaz v. Massachusetts*
 - B. Minutes and other informational items

9. Report of the Bankruptcy Rules Committee
 - A. Minutes
 - B. Report on revisions to Part VIII of the Bankruptcy Rules and issues relating to those revisions

10. **ACTION** – Approving and transmitting to the Judicial Conference revised *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure*

11. **ACTION** – Approving recommendations proposed by the Subcommittee on Privacy (Appendices A-E below contained in separate volume II)
 - A. Administrative Office report on unredacted social security numbers identified by PublicResource.org
 - B. Federal Judicial Center report on frequency of unredacted social security numbers in federal court filings
 - C. Administrative Office report on redaction of personal-identifier information in local rules
 - D. Federal Judicial Center survey of judges, clerks, and practitioners on managing personal-identifier information in court filings
 - E. Fordham Law School Conference on the operation of the federal privacy rules

12. Long-Range Planning Report

13. Next Meeting: June 2-3, 2011

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

<p>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</p>	<p>Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459</p>
<p>Honorable Jeffrey S. Sutton United States Circuit Judge United States Court of Appeals 260 Joseph P. Kinneary United States Courthouse 85 Marconi Boulevard Columbus, OH 43215</p>	<p>Professor Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104</p>
<p>Honorable Eugene R. Wedoff United States Bankruptcy Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604</p>	<p>Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380</p>
<p>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</p>	<p>Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215</p>
<p>Honorable Richard C. Tallman United States Circuit Judge 902 William Kenzo Nakamura U.S. Courthouse – 1010 Fifth Avenue Seattle, WA 98104-1195</p>	<p>Professor Sara Sun Beale Duke University School of Law Science Drive & Towerview Road Box 90360 Durham, NC 27708-0360</p>
<p>Honorable Sidney A. Fitzwater Chief Judge United States District Court Earle Cabell Federal Building and United States Courthouse 1100 Commerce Street, Room 1528 Dallas, TX 75242-1310</p>	<p>Professor Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023</p>

Revised: December 10, 2010 (EFFECTIVE OCTOBER 1, 2010)

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of Practice & Procedure
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1766
<Peter_McCabe@ao.uscourts.gov>

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
(Standing Committee)

<p>Chair:</p> <p>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</p>	<p>Reporter:</p> <p>Professor Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459</p>
<p>Members:</p> <p>Dean C. Colson, Esquire Colson Hicks Eidson 255 Alhambra Circle Penthouse Coral Gables, FL 33134</p>	<p>Douglas R. Cox, Esquire Gibson, Dunn & Crutcher LLP 1050 Connecticut Avenue, N.W. Washington, DC 20036-5306</p>
<p>Roy Englert, Esquire Robbins Russell Englert Orseck Untereiner & Sauber, LLP 801 K Street, NW - Suite 411-L Washington, DC 20006</p>	<p>Honorable Gary G. Grindler Acting Deputy Attorney General (ex officio) U.S. Department of Justice 950 Pennsylvania Ave., N.W., Room 4111 Washington, DC 20530</p>
<p>Honorable Neil M. Gorsuch United States Court of Appeals Byron White United States Courthouse 1823 Stout Street, 4th Floor Denver, CO 80257-1823</p>	<p>Honorable Marilyn L. Huff United States District Court Edward J. Schwartz U. S. Courthouse Suite 5135 940 Front Street San Diego, CA 92101</p>
<p>Honorable Wallace Jefferson Supreme Court of Texas Supreme Court Building 201 W. 14th Street, Room 104 Austin, Texas 78701</p>	<p>David F. Levi Duke Law School Science Drive and Towerview Road Room 2012 Durham, NC 27708</p>
<p>William J. Maledon, Esquire Osborn Maledon, P.A. 2929 North Central Avenue, Suite 2100 Phoenix, AZ 85012-2794</p>	<p>Honorable Reena Raggi United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818</p>
<p>Honorable Patrick J. Schiltz United States District Court United States Courthouse 300 South Fourth Street – Suite 14E Minneapolis, MN 55415</p>	<p>Honorable James A. Teilborg United States District Court 523 Sandra Day O’Connor 401 West Washington Street Phoenix, AZ 85003-2146</p>

Revised: December 10, 2010 (EFFECTIVE OCTOBER 1, 2010)

<p>Honorable Diane P. Wood United States Court of Appeals 2688 Everett McKinley Dirksen – U.S. Courthouse 219 South Dearborn Street Chicago, IL 60604</p>	<p>Advisors and Consultants:</p> <p>Professor Geoffrey C. Hazard, Jr. Hastings College of the Law 200 McAllister Street San Francisco, CA 94102</p>
<p>Professor R. Joseph Kimble Thomas M. Cooley Law School 300 South Capitol Avenue Lansing, MI 48933</p>	<p>Joseph F. Spaniol, Jr., Esquire 5602 Ontario Circle Bethesda, MD 20816-2461</p>

LIAISON MEMBERS

Appellate:	
Dean C. Colson	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Diane P. Wood	(Bankruptcy Rules Committee) (Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Paul S. Diamond	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Committee)
Judge Marilyn Huff	(Standing Committee)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

John K. Rabiej
Senior Attorney-Advisor
Rules Committee Support Office
Administrative Office of the U.S. Courts
Washington, DC 20544

James N. Ishida
Senior 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

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

Ms. Gale B. Mitchell
Administrative Specialist
Rules Committee Support Office
Administrative Office of the U.S. Courts
Washington, DC 20544

Ms. Denise London
Administrative Officer
Rules Committee Support Office
Administrative Office of the U.S. Courts
Washington, DC 20544

Ms. Chianti D. Butler
Staff Assistant
Rules Committee Support Office
Administrative Office of the U.S. Courts
Washington, DC 20544

Rasheedah Henry
Program Assistant
Rules Committee Support Office
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
Molly T. Johnson (Bankruptcy Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Emery G. Lee (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	2011
Dean C. Colson	ESQ	Florida	2010	2013
Douglas R. Cox	ESQ	Washington, DC	2005	2011
Neil M. Gorsuch	D	Tenth Circuit	2010	2013
Marilyn L. Huff	D	California (Southern)	2007	2010
Patrick J. Schiltz	D	Eighth Circuit	2010	2013
Roy Englert	ESQ	Washington, DC	2010	2013
David F. Levi	ACAD	North Carolina	2009	2012
Wallace Jefferson	C JUST	Texas	2010	2013
William J. Maledon	ESQ	Arizona	2005	2011
Gary Grindler	DOJ	Washington, DC	2010	---
Acting				
Reena Raggi	C	Second Circuit	2007	2010
James A. Teilborg	D	Arizona	2006	2012
Diane Wood	C	Seventh Circuit	2007	2010
Daniel Coquillette, Reporter	ACAD	Massachusetts	1985	Open
Principal Staff:				
Peter G. McCabe		(202) 502-1800		

TAB
1-A-C



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 14, 2010

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.

At its September 14, 2010 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 2010.

Approved the *Strategic Plan for the Federal Judiciary*.

Approved the following with regard to a planning process for the Judicial Conference and its committees:

- a. The Executive Committee chair may designate for a two-year renewable term an active or senior judge, who will report to that Committee, to serve as the judiciary planning coordinator. The planning coordinator will have responsibility to facilitate and coordinate the strategic planning efforts of the Judicial Conference and its committees.
- b. With suggestions from Judicial Conference committees and others, and the input of the judiciary planning coordinator, the Executive Committee will identify issues, strategies, or goals to receive priority attention over the next two years.
- c. The committees of the Judicial Conference will integrate the *Strategic Plan for the Federal Judiciary* into committee planning and policy development activities.

- d. For every goal in the *Strategic Plan*, a mechanism to measure or assess the judiciary's progress will be developed.
- e. Any substantive changes to the *Strategic Plan* will require the approval of the Judicial Conference, but the Executive Committee will have the authority, as needed, to approve technical and non-controversial changes to the *Strategic Plan*. A review of the *Strategic Plan* will take place every five years.
- f. The new *Strategic Plan for the Federal Judiciary* will supersede the December 1995 *Long Range Plan for the Federal Courts* as a planning instrument to guide future policy-making and administrative actions within the scope of Conference authority. This action, however, should not be interpreted as an across-the-board rescission of the individual Conference policies articulated in the recommendations and implementation strategies of the earlier plan.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

With regard to continuing need for bankruptcy judgeships:

- a. Agreed to recommend to Congress that no existing bankruptcy judgeship be statutorily eliminated; and
- b. Agreed to advise the Eighth and Ninth Circuit Judicial Councils, respectively, to consider not filling vacancies in the District of South Dakota, the Northern District of Iowa, and the District of Alaska that currently exist or may occur by reason of resignation, retirement, removal, or death, until there is a demonstrated need to do so.

With regard to evaluating the need for bankruptcy judgeships:

- a. Approved a revised Judicial Conference policy statement that sets forth standards and factors for evaluating requests for additional bankruptcy judgeships and the conversion of temporary bankruptcy judgeships to permanent status, and for evaluating the continued need for existing bankruptcy judgeships; and
- b. Approved new case weights for determining bankruptcy judgeship weighted caseloads per authorized judgeship.

With regard to bankruptcy official duty stations:

- a. Authorized the designation of Santa Ana as the duty station in the Central District of California for two of the district's vacant bankruptcy judgeships and the designation of Riverside as the duty station for the four bankruptcy judges currently serving there; and

- b. Authorized the designation of Burlington as the duty station for the bankruptcy judgeship in the District of Vermont.

Approved revised Regulations of the Judicial Conference of the United States Governing the Bankruptcy Administrator Program.

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2012, 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

Authorized a pilot project to evaluate the effect of cameras in district court courtrooms, video recordings of proceedings therein, and publication of such video recordings. The pilot project will proceed in accordance with the tenets outlined below, and is subject to definition and review by the Court Administration and Case Management Committee. In addition, the Committee will request that a study of the pilot be conducted by the Federal Judicial Center.

- a. The pilot will be national in scope and consist of up to 150 individual judges from districts chosen to participate by the FJC, in consultation with the Court Administration and Case Management Committee. The pilot project should include a national survey of all district judges, whether or not they participate in the pilot, to determine their views on cameras in the courtroom.
- b. The pilot will last up to three years, with interim reports prepared by the Federal Judicial Center after the first and second years.
- c. The pilot will be limited to civil cases only.
- d. Courts participating in the pilot will record proceedings, and recordings by other entities or persons will not be allowed.
- e. Parties in a trial must consent to participating in the pilot.
- f. Recording of members of a jury will not be permitted at any time.
- g. Courts participating in the pilot should – if necessary – amend their local rules (providing adequate public notice and opportunity to comment) to provide an exception for judges participating in the Judicial Conference-authorized pilot project.

- h. The Court Administration and Case Management Committee is authorized to issue and amend guidelines to assist the pilot participants.
- i. The Administrative Office is authorized to provide funding to the courts with participating judges – if needed – for equipment and training necessary to participate in the pilot.

With regard to PACER filings in certain bankruptcy cases:

- a. Amended the policy on privacy and public access to electronic case files to restrict public access through PACER to documents in bankruptcy cases that were filed before December 1, 2003, and have been closed for more than one year, with the following conditions:
 - (1) The docket sheet and docket information will remain available to the general public via PACER.
 - (2) Any party who has filed a notice of appearance in an individual case will have CM/ECF or PACER access to all filings in that case.
 - (3) All filings in such cases will remain accessible at the clerks' offices, except those under seal.
 - (4) Access to documents in bankruptcy case appeals filed in the district courts, bankruptcy appellate panels, or courts of appeals, for bankruptcy cases filed before December 1, 2003, will be similarly restricted.
- b. Delegated to the Court Administration and Case Management Committee the authority to develop implementation guidance for the courts to effectuate this policy. This guidance will include encouraging courts to establish a method to accept requests for copies of documents in these cases.

Endorsed the approach of providing courts with redacted and unredacted versions of the Central Violations Bureau (CVB) violation notice, with participant access to the unredacted version, and public access through PACER to the redacted version.

Approved a revised district court records disposition schedule for civil case files.

Approved the establishment of a program involving the Government Printing Office, the American Association of Law Libraries, and the Administrative Office, that will provide training and education to the public about the PACER service and exempts from billing the first \$50 of quarterly usage by a library participating in the program.

Agreed to take the following actions with regard to library collections:

- a. Ask that the Court Administration and Case Management Committee establish guidelines to discourage maintaining subscriptions to regional reporters, state case law reporters, and specialty reporters in libraries. Advise circuit librarians to consider significantly reducing the number of subscriptions to the federal reporters in staffed libraries, especially West's Federal Supplement. If there is a concern that legal research services for the public/litigants or bar would be hindered if case law reporters are not available in the library, the local court(s) should consider using attorney admission funds to maintain the subscriptions.
- b. Request that the circuit librarians conduct and lead a comprehensive assessment of usage and need in the headquarters library and each satellite library or shared collection. The assessment should involve local judges, legal researchers, and any relevant circuit library committees; consider if infrequently used categories of materials identified by the library survey results could be eliminated; and include an analysis of duplication. A summary of the assessment should be reported to the Court Administration and Case Management Committee.
- c. Ask that the Court Administration and Case Management Committee establish guidelines discouraging subscriptions to case law reporters for newly appointed and existing judges.

Agreed to request the circuit judicial councils, working with circuit librarians, library committees, and relevant judges, to review satellite libraries to assess the continuing need for each library. In addition, they should review more closely libraries that serve fewer than 10 judges and report to the Court Administration and Case Management Committee whether those libraries will remain open or are targeted either for closure or reduction in size and collection. Consideration should be given to the circuit library program as a whole and the impact of closure of any satellite on the remaining libraries and the judges and others served.

Endorsed the concepts contained in the proposal by the Court of Federal Claims to amend the National Childhood Vaccine Injury Act except for concept two, which would rename vaccine special masters as vaccine judges.

Declined to approve a motion to recommit an information item regarding the translation of court forms for voluntary use by district courts in civil cases.

COMMITTEE ON CRIMINAL LAW

With regard to searches and seizures by probation officers:

- a. Agreed to adopt new Search and Seizure Guidelines for United States Probation Officers in the Supervision of Offenders on Supervised Release or Probation to replace the 1993 model search and seizure guidelines.

- b. Approved revisions to the use of force policy to allow officers to manage searches as permitted by the new search and seizure guidelines.

Approved revisions to Monograph 111, *The Supervision of Federal Defendants*.

COMMITTEE ON DEFENDER SERVICES

Approved (a) a Model Code of Conduct for Federal Community Defender Employees and a new paragraph to be added to the community defender organization (CDO) grant and conditions document requiring CDOs to adopt the code, absent an approved variance from the AO; and (b) a delegation to the Committee on Defender Services to make future adjustments to the Code that are substantially in accord with the Code of Conduct applicable to federal public defenders.

Approved revisions to the *Guide to Judiciary Policy*, Volume 7A (Criminal Justice Act Guidelines) § 320.70.40 (and the corresponding sample model order) regarding acquisition of computer hardware/software for use in Criminal Justice Act (CJA) representations by CJA panel attorneys.

COMMITTEE ON INFORMATION TECHNOLOGY

Approved the fiscal year 2011 update to the *Long Range Plan for Information Technology in the Federal Judiciary*.

COMMITTEE ON THE JUDICIAL BRANCH

Approved an amendment to section 220.30.10(g) of the Travel Regulations for United States Justices and Judges to provide that a chief district judge, with the concurrence of the circuit judicial council, may authorize a senior district judge who lives within the territorial boundaries of the court to which the judge was originally commissioned, reimbursement for enhanced transportation, lodging, and subsistence expenses (e.g., airfare, lodging, and three meals per day) when it is in the interest of the administration of justice (e.g., due to a shortage of judge power or case backlog).

COMMITTEE ON JUDICIAL RESOURCES

Affirmed the interpretation and application of the Judiciary Salary Plan (JSP) non-chambers pay-setting flexibility that would allow an applicant for a court unit executive or second-in-command (e.g., Type II chief deputy/deputy chief) JSP position to be appointed at step 1 or above in a grade lower than the highest grade for which the individual is qualified, subject to the following policy provisions:

- a. The salary for the higher step may not exceed the corresponding salary for step 1 of the higher grade for which the individual is qualified;

- b. If such an employee is subsequently promoted in less than one year from the individual's appointment date, the promotion may not result in the individual's salary exceeding the highest grade and step for which the individual was initially eligible;
- c. For individuals appointed using this flexibility, the two-step increase JSP promotion rule may not be applied until the employee has worked at the grade and step to which the individual is appointed for one year; and
- d. The position must be announced at all possible grades that the appointing officer is considering for the appointment.

Approved the addition of court reporter duties to the judicial assistant position in the chambers of Judge Roberto A. Lange in the District of South Dakota based on the circumstances presented by the court and that it is "in the public interest." Approval is limited to the present incumbent judicial assistant in Judge Lange's chambers. The judicial assistant-court reporter is required to follow all statutory requirements and Judicial Conference policies related to court reporting, as well as the Code of Conduct for Judicial Employees, when providing court reporting services to the court and the litigants.

With regard to additional staff court interpreter positions:

- a. Authorized one additional Spanish staff court interpreter position each for the Southern District of California and the District of New Mexico, and two additional Spanish staff court interpreter positions for the Western District of Texas, for fiscal year 2012, based on the Spanish language interpreting workload in these courts; and
- b. Authorized accelerated funding in fiscal year 2011 for the one additional Spanish staff court interpreter position recommended for the District of New Mexico and the two additional Spanish staff court interpreter positions recommended for the Western District of Texas.

Approved the following revisions to the current telework policy for courts and federal public defender organizations:

- a. Define "official duty station" as the telework site for an employee who is not required to report to the employing court or federal public defender organization at least twice each biweekly pay period on a regular and recurring basis (other than during temporary telework, e.g., during a medical recovery period), and as the site of the employing court or organization for any employee who reports to the court or organization at least twice each biweekly pay period on a regular and recurring basis;

- b. Provide that a court or federal public defender organization should establish in its telework policy generally and in each telework agreement specifically, what, if any, travel reimbursement is authorized when an employee travels to the employing court or organization; and
- c. Clarify that relocation expenses are not authorized when the official duty station changes as a result of the initiation of full-time telework, or modification or termination of a telework agreement.

Adopted the following policy statement with regard to a judge's role when presiding in an employment dispute resolution (EDR) proceeding:

- a. Employment dispute resolution proceedings are strictly administrative and are not "cases and controversies" under Article III of the Constitution;
- b. Judges presiding in EDR matters are functioning in an administrative rather than judicial capacity;
- c. Judges' decisions in EDR matters must be in conformance with all statutes and regulations that apply to the judiciary, and that judges in the EDR context have no authority to declare such statutes or regulations unconstitutional or invalid; and
- d. Judges presiding in EDR matters may not compel the participation of or impose remedies upon agencies or entities other than the employing office which is the respondent in such matters

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

Approved the recommendations regarding specific magistrate judge positions to authorize four new full-time magistrate judge positions.

Designated the new full-time magistrate judge positions at Indianapolis in the Southern District of Indiana; Minneapolis or St. Paul in the District of Minnesota; Santa Ana or Riverside in the Central District of California; and Las Vegas in the District of Nevada for accelerated funding effective April 1, 2011.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

With regard to appellate rules:

- a. Approved proposed amendments to Appellate Rules 4 and 40 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.

- b. Agreed to seek legislation amending 28 U.S.C. § 2107, consistent with the proposed amendments to Appellate Rule 4, to clarify the treatment of the time to appeal in a case in which a United States officer or employee is a party.

With regard to bankruptcy rules:

- a. Approved proposed amendments to Bankruptcy Rules 2003, 2019, 3001, 4004, and 6003, and new Rules 1004.2 and 3002.1, 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.
- b. Approved proposed revisions of Bankruptcy Official Forms 9A, 9C, 9I, 20A, 20B, 22A, 22B, and 22C, to take effect on December 1, 2010.

Approved proposed amendments to Criminal Rules 1, 3, 4, 6, 9, 32, 40, 41, 43, and 49, and new Rule 4.1, 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 Rules 101 through 1103 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.

COMMITTEE ON SPACE AND FACILITIES

Endorsed the concept of a Capital Security Program to assist courts at locations with security deficiencies.

Approved the *Five-Year Courthouse Project Plan for Fiscal Years 2012-2016*.

Approved feasibility studies for the following locations: Hartford, Connecticut; Winston-Salem/Greensboro, North Carolina; and Clarksburg, West Virginia.

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

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ATTENDANCE

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

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

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

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

Providing support to the committee were:

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

Representing the advisory committees were:

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

INTRODUCTORY REMARKS

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

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

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

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

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

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

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

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

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

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

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

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

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

APPROVAL OF THE MINUTES OF THE LAST MEETING

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

LEGISLATIVE REPORT

Civil Pleading

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

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

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

Sunshine in Litigation

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

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

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

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

Amendments for Final Approval

FED. R. APP. P. 4(a)(1) and 40(a)
and

PROPOSED STATUTORY AMENDMENT TO 28 U.S.C. § 2107

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

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

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

The advisory committee, he said, had considered dropping the proposed amendment to Rule 4 and proceeding with just the amendment to Rule 40 – which has no statutory counterpart. But the committee was uncomfortable with making the change in one rule but not the other because the two deal with similar issues and use identical language. Accordingly, after further discussion, the committee decided to pursue both the Rule 4 and Rule 40 amendments, together with a proposed statutory change to 28 U.S.C. § 2107. Amending all three will bring uniformity and clarity in all civil cases in which a federal officer or employee is a party.

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

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

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

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

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

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

Judge Sutton explained that the advisory committee had originally drafted the rule using the words, “including, but not limited to” The style subcommittee, however, did not accept that formulation because it was not consistent with general usage elsewhere in the rules. He suggested, therefore, that two options appeared appropriate: (1) returning to the original language proposed by the advisory committee, *i.e.*, “including but not limited to”; or (2) retaining the current language of the rule with two safe harbors, but adding language to the note referring to the third safe harbor as part of a non-exclusive list. Professor Struve offered to draft note language to accomplish the latter result.

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

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

Informational Items

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

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

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

among the circuits regarding the status of appeals filed prior to the entry of an appealable final judgment.

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

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

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

Amendments for Final Approval

FED. R. BANKR. P. 1004.2

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

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

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

FED. R. BANKR. P. 2003

Professor Gibson explained that under current law the officer presiding at the first meeting of creditors or equity security holders, normally the trustee, may defer completion of the meeting to a later date without further notice. The proposed amendment to Rule 2003 (meeting of creditors or equity security holders) would require the officer to file a statement specifying the date and time to which the meeting is

adjourned. This procedure will make it clear on the record for those parties not attending whether the meeting was actually concluded or adjourned to another day.

She noted that § 1308 of the Bankruptcy Code requires chapter 13 debtors to file their tax returns for the last four taxable periods before the scheduled date of the meeting. If, however, a debtor has not filed the returns by that date, § 1308(b)(1) permits the trustee to “hold open” the meeting for up to 120 days to allow the debtor additional time to file.

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

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

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

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

Professor Gibson reported that the only change made since publication was the addition of a sentence to the committee note stating that adjourning is the same as holding

open. The modification was made to address the concerns expressed by the Internal Revenue Service.

Ms. Claggett and Mr. Kohn stated that the Department of Justice appreciated the advisory committee's concerns for the Internal Revenue Service's position, but wanted to reiterate the position for the record. Mr. Kohn explained that making a distinction in the rule between adjourning a meeting for any possible reason and holding it open for the narrow purpose of § 1308 is fully consistent with § 1308. The meeting, he said, can be "held open" for only one purpose. Congress, he said, had used the term deliberately, and it should be carried over to the rule.

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

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

FED. R. BANKR. P. 2019

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

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

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

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

Three sets of objections were voiced to the proposal as published. First, distressed-debt buyers objected to the proposed requirement to divulge the date that each disclosable economic interest was acquired and the amount paid for it. That information, the industry said, would compromise critical business secrets, such as trading strategies, seriously damage their operations, and undercut the bankruptcy process. Second, objections were raised to applying the disclosure requirements to entities acting in certain institutional roles, such as entities acting in a purely fiduciary capacity. Third, there were objections to applying the rule to "groups" that are really composed of a single affiliated set of actors, or to law firms or other entities that are only passively involved in a case.

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

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

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

FED. R. BANKR. P. 3001

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

successfully complete their plan payments may be faced with deficiency or foreclosure notices soon after they emerge from bankruptcy with a discharge.

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

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

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

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

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

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

Professor Gibson pointed out that proposed new subparagraph (c)(2)(D) sets forth sanctions that a court may impose if a creditor fails to provide any of the information specified in Rule 3001(c). Modeled after FED. R. CIV. P. 37(c)(1), it specifies that if the holder of a claim fails to provide the required information, the court may preclude its use as evidence or award other appropriate relief.

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

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

FED. R. BANKR. P. 3002.1

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

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

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

Professor Gibson reported that subdivision (c) would require the creditor to provide notice to the debtor, debtor's counsel, and the trustee of any post-petition fees, expenses, and charges within 180 days after they are imposed. She explained that debtors are often unaware of the different kinds of charges that creditors assess, some of which may not be warranted or appropriate under the mortgage agreement or applicable non-bankruptcy law. The proposed amendments would give the debtor or trustee the chance to object to any claimed fee, expense, or charge within one year of service of the notice. She added that the advisory committee had worked hard to strike the right balance between providing fair notice to debtors and avoiding imposing unnecessary burdens on creditors.

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

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

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

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

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

FED. R. BANKR. P. 4004

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

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

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

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

FED. R. BANKR. P. 6003

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

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

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

OFFICIAL FORMS 22A, 22B, and 22C

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

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

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

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

Amendments for Final Approval, Without Publication

OFFICIAL FORMS 20A AND 20B

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

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

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

Amendments for Publication

FED. R. BANKR. P. 3001

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

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

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

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

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

FED. R. BANKR. P. 7054

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

in taxing costs would be extended from 5 to 7 days, consistent with the 2009 time-computation rules that changed most 5-day deadlines to 7 days.

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

FED. R. BANKR. P. 7056

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

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

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

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

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

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

To emphasize the duty of accuracy imposed on a party filing a proof of claim, the signature box would be amended to include a certification that the information submitted on the form meets the requirements of FED. R. BANKR. P. 9011(b) (representations to the

court), *i.e.*, that the claim is “true and correct to the best of the signer’s knowledge, information, and reasonable belief.” This is particularly important, she said, because a proof of claim is *prima facie* evidence of the validity of a claim. In addition, a new space would be provided on the form for optional use of a “uniform claim identifier,” a system implemented by some creditors and chapter 13 trustees to facilitate making and crediting plan payments by electronic funds transfer.

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

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

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

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

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

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

OFFICIAL FORM 25A

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

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

Informational Items

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

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

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

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

Informational Items

FED. R. CIV. P. 45

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

Judge Kravitz said that substantial progress had been made in addressing some of the problems most often cited with the current rule. The subcommittee’s efforts have included: (1) reworking the division of responsibility between the court where the main action is pending and the ancillary discovery court; (2) enhancing notice to all parties before serving document subpoenas; and (3) simplifying the overly complex rule. The

subcommittee, he noted, had drafted three models to illustrate different approaches to simplification, including one that would separate discovery subpoenas from trial subpoenas.

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

PLEADING

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

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

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

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

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

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

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

MAY 2010 CIVIL LITIGATION REVIEW CONFERENCE

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

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

Specific Suggestions Made at the Conference

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

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

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

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

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

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

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

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

reluctant to let their opponents see their clients' documents, even if the rule now gives them adequate legal protection.

Professor Cooper noted that plaintiffs' lawyers, on the other hand, argued that the emphasis that defendants place on their discovery burdens and costs is misplaced. They suggested, to the contrary, that the greatest problem with discovery is stonewalling on the part of defendants.

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

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

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

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

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

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

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

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

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

Perceptions of the Current System

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

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

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

The two approaches, he said, produce different results. For example, the responses from lawyers in a perception study showed that they believe that about 70% of litigation costs are associated with discovery. The empirical studies, on the other hand, demonstrate that discovery costs were actually much lower, ranging between 20% and 40%. By way of further example, a recent perception-study showed that 80% or 90% of lawyers agree that litigation is too expensive. Yet the Federal Judicial Center studies demonstrate empirically that costs in the average federal case were only about \$15,000 to \$20,000.

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

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

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

Future Committee Action

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

He noted that the advisory committee would address each of these issues, and it may also form a subcommittee to explore how judicial education and pilot projects might contribute to improvements, especially if the pilots are carefully crafted and channeled through the Federal Judicial Center to assure that they generate useful data to inform

future policy choices. The bottom line, he said, is that the advisory committee will be digesting and working on these issues for a long time.

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

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

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

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

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

magistrate judges have been assigned by the courts to other types of duties and do not focus on discovery.

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

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

RULE 26(C) PROTECTIVE ORDERS

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

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

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

OTHER MATTERS

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

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

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

Amendments for Final Approval

TECHNOLOGY AMENDMENTS

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

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

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

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

The amendments retain and emphasize the central constitutional safeguard that issuance of process must be made at the direction of a neutral and detached magistrate. They are designed to reduce the number of occasions when law enforcement officers must act without obtaining prior judicial authorization. Since a magistrate judge will normally be available to handle emergencies electronically, the amendments should eliminate most situations where an officer cannot appear before a federal judge for prompt process.

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

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

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

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

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

FED. R. CRIM. P. 1

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

A member asked whether the term “electronic” is appropriate since other kinds of non-electronic communications may become common in the future. Judge Rosenthal explained that the same issue had arisen with the 2006 “electronic discovery” amendments to the Federal Rules of Civil Procedure. She said that after considerable consultation with many experts, the civil advisory committee chose to adopt the term “electronically stored information.” She added that if new, non-electronic means of communication are developed, it may well be necessary to amend the rules in the future to include those alternatives, but at this point “electronic” appears to be the best term to use in the rule.

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

FED. R. CRIM. P. 3

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

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

FED. R. CRIM. P. 4

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

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

FED. R. CRIM. P. 4.1

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

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

written affidavit submitted electronically, the record will be limited to the officer's swearing to the accuracy of the documents before the judge. The judge will normally acknowledge the jurat on the face of the warrant. If, however, the judge takes additional testimony or exhibits, the testimony must be recorded verbatim, transcribed, and filed.

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

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

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

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

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

A member suggested that Rule 4.1 may be mandating more requirements than necessary. Judge Tallman pointed out, though, that the requirements had largely been

carried over from the current Rule 41. He said that the rule needs to be broadly drafted because there are so many different situations that may arise in the federal courts. An officer, he said, may be on the telephone speaking with the magistrate judge, writing out the application, and taking down what the judge is saying. More typically, though, an officer will call the U.S. attorney's office and have a prosecutor draft the application.

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

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

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

FED. R. CRIM. P. 6

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

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

FED. R. CRIM. P. 9

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

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

FED. R. CRIM. P. 40

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

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

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

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

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

FED. R. CRIM. P. 41

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

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

FED. R. CRIM. P. 43

Judge Tallman reported that, after considering the public comments, the advisory committee withdrew a proposed amendment to Rule 32.1 (revoking or modifying probation or supervised release) and a proposed conforming cross-reference to Rule 32.1 in Rule 43(a) (defendant's presence). The withdrawn provisions would have authorized a defendant, on consent, to participate in a revocation proceeding by video teleconference.

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

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

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

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

adapted for the Rule 43 note. After a break, the additional language was presented to the committee and approved.

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

FED. R. CRIM. P. 49

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

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

Technical Amendments for Final Approval without Publication

FED. R. CRIM. P. 32

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

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

FED. R. CRIM. P. 41

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

Judge Rosenthal suggested that when the rule is sent to the Judicial Conference for approval, the committee's communication should explain why as a matter of policy it

chose the shorter period of 10 days, rather than 14 days, since the 10-day periods in most other rules had been changed to 14 days as part of the time computation project.

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

Amendments for Publication

FED. R. CRIM. P. 37

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

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

FED. R. CRIM. P. 5 and 58

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

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

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

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

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

Informational Items

FED. R. CRIM. P. 16

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

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

FED. R. CRIM. P. 12

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

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

FED. R. CRIM. P. 11

Judge Tallman reported that the recent Supreme Court decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (March 31, 2010) had demonstrated the importance of informing an alien defendant of the immigration consequences of a guilty plea. As a result, he said, the advisory committee had appointed a subcommittee to examine whether immigration and citizenship consequences should be added to the list of matters that a judge must include in the courtroom colloquy with a defendant in taking a guilty plea under FED. R. CRIM. P. 11 (pleas).

CRIME VICTIMS' RIGHTS

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

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

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

Amendments for Final Approval

RESTYLED EVIDENCE RULES 101-1103

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

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

Judge Hinkle explained that the restyled appellate rules took effect in 1998, the restyled criminal rules in 2002, and the restyled civil rules in 2007. With each restyling effort, he said, there had been doubters who said that restyling was not worth the effort and that the potential disruption would outweigh the benefits. Each time, he said, the doubters had been proven wrong. He pointed out, for example, that a professor who had opposed restyling changes later wrote an article proclaiming that they were indeed an improvement.

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

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

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

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

the same time, even though they had been reviewed and approved for publication by the Standing Committee in three batches at three different meetings.

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

Judge Hinkle reported that the public comments had been very positive. The American College of Trial Lawyers, for example, assigned the rules to a special committee, which commented favorably many times on the product. The Litigation Section of the American Bar Association also praised the revised rules and stated that they are clearly better written than the current rules. The only doubt raised in the comments was whether the restyling was worth the potential disruption. Nevertheless, only one negative written public comment to that effect had been received.

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

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

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

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

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

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

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

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

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

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

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

Judge Teilborg added that it had been a joy to observe the intense interplay between Professors Capra and Kimble, truly experts in their respective fields. He pointed out that Professor Kimble had left his hospital bed after surgery to return quickly to the

project. He also thanked Jeffrey Barr of the Administrative Office for his great work as scribe in keeping the minutes and preparing the drafts. Finally, he thanked Dean Levi and Judges Raggi and Hartz for offering helpful changes in the final days of the project.

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

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

REPORT OF THE SEALING SUBCOMMITTEE

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

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

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

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

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

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

He noted that the subcommittee's report does not recommend any changes in the national rules. Its recommendations, rather, are addressed to the Judicial Conference's Court Administration and Case Management Committee. The report recommends consideration of a national policy statement on sealing that includes three criteria.

First, an entire case should be sealed only when authorized by statute or rule or justified by a showing of exceptional circumstances and when there is no lesser alternative to sealing the whole case, such as sealing only certain documents.

Second, the decision to seal should be made only by a judge. Instances arise when another person, such as the clerk of court, may seal initially, but that decision should be reviewed promptly by a judge.

Third, once the reason for sealing has passed, the sealing should be lifted. He noted that the most common problem identified during the study was that courts often neglect to unseal documents promptly.

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

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

- (7) administrative measures that the courts might take to improve handling requests for sealing.

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

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi, chair of the Privacy Subcommittee, reported that the subcommittee's assignment was to consider whether the current privacy rules are adequate to protect privacy interests. At the same time, she noted, it is also important to emphasize the need to protect the core value of providing maximum public access to court proceedings.

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

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

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

LONG RANGE PLANNING

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

NEXT MEETING

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

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB
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JAMES C. DUFF
Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JILL C. SAYENGA
Deputy Director

WASHINGTON, D.C. 20544

PETER G. McCABE
Assistant Director

Office of Judges Programs

December 8, 2010

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 office to improve its support service to the rules committees.

Federal Rulemaking Website

Earlier this year, the judiciary's Federal Rulemaking website was completely redesigned, making it easier to use, navigate, and search for rules-related records. The redesigned website also includes new content and new functionality. Some of the new content includes a section called "Quick Links," which collects in one place all of the most frequently used links. This makes searching for and retrieving information much simpler and easier.

We also posted on the web site comments and requests to testify submitted on the proposed rules amendments published for comment in August 2010. The information is posted at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/PublishedRules.aspx>

Committee and Subcommittee Meetings

For the period from June 2010 to December 2010, the office staffed numerous rules-related meetings, including one Standing Committee meeting, five advisory rules committee meetings, a mini-conference on Civil Rule 45, 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 Effective December 1, 2010. Congress took no action on the amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence, approved by the Supreme Court on April 28, 2010. Accordingly, the following amendments to the rules took effect on December 1, 2010:

- Appellate Rules 1, 4, and 29, and Appellate Form 4;
- Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, and new Rule 5012;
- Civil Rules 8, 26, and 56, and Illustrative Civil Form 52;
- Criminal Rules 12.3, 21, and 32.1; and
- Evidence Rule 804.

James N. Ishida

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

July 22, 2010

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

Honorable Steve Cohen
Chairman, Subcommittee on
Commercial and Administrative Law
United States House of Representatives
Washington, DC 20515

Re: The Proposed Amendments to Bankruptcy Rule 3001 and New Rule 3002.1

Dear Chairman Conyers and Representative Cohen:

This letter is to inform you of the actions taken by the Judicial Conference Advisory Committee on the Bankruptcy Rules with respect to proposed amendments to Bankruptcy Rule 3001(c) and proposed new Rule 3002.1. Your March 10, 2010, letter supported these proposals. As explained in the March 25, 2010, letter to you from Peter G. McCabe, Secretary to the Judicial Conference's Committee on Rules of Practice and Procedure (Standing Committee), your letter was sent to the Advisory Committee, which carefully considered your comments.

The Advisory Committee had before it the results of a six-month public comment period, during which the proposed rule changes were widely circulated pursuant to the Rules Enabling Act process. The Advisory Committee received over 150 written comments and held a public hearing at which individuals desiring to testify did so. The comments and testimony were from the broad range of interests potentially affected by the proposals, including creditors, debtors, and trustees. After a lengthy and careful examination, the Advisory Committee recommended that revised versions of the proposed amendments to Rule 3001(c) and of new Rule 3002.1 be approved and transmitted to the Standing Committee for its consideration. The revisions took into account the major themes of the comments submitted during the Rules Enabling Act process, retaining the main

components of the proposed amendments and new rule, with one exception.

All but one of these proposals will be forwarded to the Judicial Conference for consideration at its September 14, 2010, session. One modified proposal will be published for public comment in August 2010. A copy of the proposed revised rules is enclosed. The proposed revised rules are posted at the court's federal rulemaking website at <http://www.uscourts.gov/RulesAndPolicies.aspx>. For your convenience, the proposals and relevant revisions are summarized below, with an explanation of how the revisions address the comments that were submitted.

1. The Proposed Amendments to Rule 3001(c)

Existing Rule 3001 requires creditors filing a proof of claim to include the "original or duplicate" of a writing on which the claim is based. This requirement is essential to ensure the legitimacy of claims filed in bankruptcy. Under the Bankruptcy Code, a proof of claim is presumed valid unless a party objects. The system does not work unless debtors and trustees have the necessary information to evaluate, and challenge if appropriate, the validity of a claim. To challenge a claim, the debtor or trustee must file an objection and present information supporting the objection. During the lengthy rulemaking process, the Advisory Committee received extensive comments and testimony that the Code's reliance on debtors and trustees to police invalid claims has proven ineffective under the existing rule. Creditors often present bare proofs of claim, which make it virtually impossible for debtors and trustees to determine how the claims were calculated and whether they are valid. Debtors' lawyers have little incentive to expend time and resources to ascertain the validity of claims submitted with inadequate documentation. The lawyers generally receive no compensation for the effort and any money derived from such efforts is usually paid to other unsecured creditors. As a result, despite the lack of supporting documentation, many insufficient or invalid claims are simply not challenged.

To address this problem, the proposed amendments enhance the disclosure requirements and require – as the official form long has – that a creditor in an individual debtor case provide an itemized statement of the interest, fees, expenses and other charges assessed in connection with its claim before the petition is filed. The proposed amendments also include special disclosure requirements for claims secured by a security interest in the individual debtor's property. In such a case, a statement of the amount necessary to cure any prepetition default and, for home mortgages, a statement of any escrow account must be provided.

The initial proposed amendments to Rule 3001 also responded to a need to strengthen the consequences of failing to comply with the documentation requirements. The proposed amendments provided for mandatory sanctions, including prohibiting a creditor who failed to provide the required information with proofs of claim in an individual debtor case from presenting any of the omitted information as evidence in a subsequent proceeding in the case, unless the court determined that the failure was substantially justified or harmless. The public comments led the Advisory Committee to conclude that the proposed mandatory sanction provision was harsher than necessary to achieve

the purpose of the proposals. The Advisory Committee revised the proposed amendments to: authorize the exclusionary sanction only if the failure to provide the required information was not substantially justified or harmless; eliminate the mandatory nature of the sanction; and make it clear that notice and hearing is required before a sanction is imposed. The revised sanction provision is modeled on Civil Rule 37, which prohibits a party from using information “to supply evidence on a motion, at a hearing, or at trial” that it failed to disclose as part of its initial disclosure or discovery obligations. Both the Civil Rule and the Bankruptcy Rule are grounded in courts’ well-established authority to control the presentation of evidence used in court proceedings. The revised proposed amendments give effect to the Bankruptcy Code by continuing to place the burden on the debtor and the trustee to challenge an invalid claim while requiring the creditor to provide information essential to evaluate the claim. The Standing Committee approved the revised proposal for transmittal to the Judicial Conference at its September 2010 meeting.

The initial proposed amendments also required creditors with a claim based on an open-end or revolving consumer credit agreement to submit the last account statement sent to the debtor before the filing of the bankruptcy petition. During the public comment period, however, the Advisory Committee heard that copies of the last credit card statement are often unavailable or impractical to obtain. The Advisory Committee concluded that this proposal was an unnecessarily burdensome approach to the problem of inadequate information. The requirement that a creditor submit the last account statement was withdrawn. The Advisory Committee concluded that less burdensome means should be used to provide debtors and trustees with the necessary information to challenge invalid claims. The Advisory Committee recommended that the Standing Committee approve a modified proposed amendment to publish for public comment. This new proposal requires specific information from creditors relevant to the determination of the age, prior holder, and other salient features of the claim, but allows flexibility in how it is provided. The modified proposed rule also relieves claimants to which it applies from the general requirement that all documentation underlying the claim be filed in every instance, providing instead that such documentation regarding an open-end or revolving consumer credit claim is to be disclosed on request of a party in interest. The Standing Committee approved the recommendation and the proposal will be circulated for public comment in August 2010.

2. Proposed New Rule 3002.1

Proposed new Rule 3002.1 implements § 1322(b)(5) of the Bankruptcy Code, which permits a chapter 13 debtor to cure a default on a home mortgage by making certain payments during the bankruptcy. The proposed new rule requires the mortgage holder to provide a debtor with sufficient information to enable the debtor to determine the exact amount needed to cure the default, including all fees, charges, and other expenses. Absent this information, a debtor cannot know how much to pay to cure the default under the Code and cannot challenge the validity of the fees, charges, or expenses. The proposed new rule requires that the mortgage holder provide this information and give notice to the debtor, the debtor’s counsel, and the trustee of any postpetition changes in the mortgage payment amount. Both before and during the public comment period, the Advisory

Honorable John Conyers, Jr.
Honorable Steve Cohen

Page 4

Committee heard many complaints that debtors may learn only after completing their payment plan that they still owe fees, charges, or expenses to a mortgage lender and, despite a successful emergence from bankruptcy, still face foreclosure. The proposed new rule is intended to ameliorate this problem.

During the public comment period, the Advisory Committee also heard from creditors' organizations that it was unclear how the proposed rule provision requiring at least 30 days' notice of any postpetition changes in the mortgage payment amount would apply to loan payments that adjust frequently. The Advisory Committee revised the proposed rule. As revised, the proposed new rule requires a creditor to provide the required information no later than 21 days before the next payment is due. In addition, the sanctions provision was revised in the same manner as the sanctions provision of Rule 3001(c). The revised proposed new rule was approved by the Standing Committee for transmittal to the Judicial Conference.

The revised rules proposals that have been approved by the Standing Committee will be presented to the Judicial Conference at its September 2010 meeting. The proposal that the Standing Committee approved for publication for public comment will be circulated in August 2010. If you or your staff have any questions about these rules or other proposals, please feel free to call Lee Rosenthal, Chair of the Standing Committee, at (713) 250-5980 or John K. Rabiej, Chief, Rules Committee Support Office, at (202) 502-1820. As always, we appreciate your comments and the opportunity to work with you on improving the rules that are essential to our justice system.

Sincerely,



Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Committee on Rules
of Practice and Procedure



Laura Taylor Swain
United States District Judge
Southern District of New York
Chair, Advisory Committee
on Bankruptcy Rules

Enclosure

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2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951

<http://www.house.gov/judiciary>

March 10, 2010

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Dear Mr. McCabe:

We write to share our views regarding the amendments proposed by the Judicial Conference's Advisory Committee on Bankruptcy Rules to Federal Rule of Bankruptcy Procedure 3001, pertaining to proofs of claim, and the newly proposed Federal Rule of Bankruptcy Procedure 3002.1, pertaining to claims secured by a security interest in the debtor's principal residence.

As you are probably well-aware, the filing and documentation requirements exponentially increased for consumer debtors as a result of the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act.¹ Pursuant to these amendments, consumer debtors and their attorneys must file extensively detailed statements and provide supporting documentation, including payment advices and tax returns at the risk of having the bankruptcy case dismissed. At a hearing held before the Subcommittee on Commercial and Administrative Law on May 1, 2007, Henry J. Sommer, President of the National Association of Consumer Bankruptcy Attorneys, testified:

Bankruptcy has gone from being a relatively low-priced proceeding that can be handled quickly and efficiently to being an expensive minefield of new requirements, tricks and traps that can catch the innocent and unsuspecting debtor.

...

Every consumer debtor must obtain all payment advices for the 60 days before the bankruptcy is filed, a tax return or a tax transcript for the most recent year and sometimes additional years. They must provide an attorney with information detailing every penny

¹ Pub. L. 109-8 (2005).

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of their income for the 6 months before the petition is filed; they must provide bank statements to the trustee and evidence of current income. . . .

Attorneys must complete numerous additional forms, including a 6-page means test form that requires arcane calculations about which there are many different legal interpretations, and this is on top of the 20 or 30 pages of forms that were already required in every bankruptcy case. . . .

And if a consumer debtor is subject to an audit they have to provide even more, including 6 months worth of income documentation, 6 months of bank statements and an explanation of each and every deposit and withdrawal from any account over those 6 months.²

And, as observed both by the Judiciary³ and Appropriations⁴ Committees of the House of Representatives, the United States Trustee Program has enforced these requirements with particular exuberance.

With respect to policing creditor abuses in consumer bankruptcy cases, however, we believe there is a need for more enforcement tools. In the last Congress, the Subcommittee on Commercial and Administrative Law held a hearing at which it received testimony about creditor

²*Second Anniversary of the Enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Are Consumers Really Being Protected Under the Act?: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 110th Cong. 19-20 (2007) (prepared testimony of Henry Sommer, Pres., National Association of Consumer Bankruptcy Attorneys).*

³*See, e.g., United States Trustee Program: Watchdog or Attack Dog?: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 110th Cong. (2007).*

⁴*See, e.g., H. Rep. No. 110-240, at 49 (2008). The House Appropriations Committee observed:*

The Committee is concerned that excessive resources are being expended on efforts by the United States Trustee Program to dismiss cases for insignificant filing defects (thereby creating added burdens on the court and debtors associated with refilings); on the unnecessary use of U.S. Trustee personnel to participate in creditors' meetings that are already handled and conducted by private trustees; and on making burdensome requests of debtors to provide documentation that has no material effect on the outcome of bankruptcy cases. Such actions by the U.S. Trustee Program are making the bankruptcy process more costly and therefore less available for those who need it. The Committee directs the U.S. Trustees to immediately examine these problems and report back two months after enactment of this Act on efforts to remedy them as soon as possible.

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abuses in consumer bankruptcy cases.⁵ Specifically with respect to proofs of claim, a witness testified:

Courts have found creditors regularly filing false proofs of claim, and even bogus affidavits in connections [sic] with motions for relief from stay, types of fraud that have caused many families to lose their homes.⁶

Some courts have likewise expressed similar concerns about this problem particularly with respect to bulk debt purchasers.⁷ In addition, a recent academic study found substantial discrepancies between mortgage debt scheduled by debtors and creditors' proofs of claim.⁸

⁵*United States Trustee Program: Watchdog or Attack Dog?: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. 117 (2007) (prepared testimony of Paul Uyehara, Community Legal Services of Philadelphia)

⁶*Id.*

⁷*See, e.g., In re Hess*, 404 B.R. 747, 751 (Bankr. S.D.N.Y. 2009) (noting "a larger problem for this and other bankruptcy courts across the country" in that two of the three claims at issue in this case were filed by "LVNV, one of numerous bulk-claims purchasers that regularly file stale claims in bankruptcy courts"); *In re Andrews*, 394 B.R. 384, 387 (Bankr. E.D.N.C. 2008) ("The phenomena of bulk debt purchasing has proliferated and the uncontrolled practice of filing claims with minimal or no review is a new development that presents a challenge for the bankruptcy system.").

⁸Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121, 123-24 (2008). Based on data collected from 1,700 chapter 13 cases, the author concluded:

[M]ortgagees' behavior significantly threatens bankruptcy's purpose of helping families save their homes. Despite unambiguous federal rules designed to protect homeowners and ensure the integrity of the bankruptcy process, 4 mortgage companies frequently fail to comply with the laws that govern bankruptcy claims. A majority of mortgage companies' proofs of claim lack the documentation necessary to establish a valid debt. Fees and charges on bankruptcy claims often are identified poorly and sometimes do not appear to be legally permissible. On an aggregate level, mortgage creditors assert that bankrupt families owe them at least \$ 1 billion more than the families who file bankruptcy believe they owe. 5 Although infractions are frequent and irregularities are sometimes egregious, the bankruptcy system routinely processes mortgage claims that do not comply with legal procedures. Far from serving as a significant check against mistake or misbehavior, the bankruptcy system routinely processes mortgage claims that cannot be validated and are not, in fact, lawful.

Id. (footnotes omitted).

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In response to some of these concerns, we have sponsored legislation in the last Congress⁹ as well as in the present Congress¹⁰ that, in pertinent part, would require greater disclosure and court review of claims secured by a chapter 13 debtor's principal residence. H.R. 1106, "Helping Families Save Their Homes in Bankruptcy Act of 2009," which we introduced last year, provides that neither the debtor nor the debtor's house would be liable for a fee, cost, or charge incurred while the chapter 13 case is pending unless the holder of the claim complies with certain filing and disclosure requirements.¹¹

Section 502(a) of title 11 of the United States Code ("Code") provides that a proof of claim is "deemed allowed, unless a party in interest . . . objects." Federal Rule of Bankruptcy Procedure 3001(f) further provides that a proof of claim executed and filed in accordance with the bankruptcy rules "shall constitute prima facie evidence of the validity and the amount of the claim." Section 502(b), in turn, sets forth various grounds for which a claim may be disallowed. In pertinent part, section 502(b)(1) provides as a basis of objection that a claim may be disallowed if it "is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured."

In our view, the proposed amendments to Federal Rule of Bankruptcy Procedure 3001 and new Rule 3001.2 impose necessary and proper procedural requirements with respect to a creditor seeking payment from a bankruptcy estate. Indeed, the requirement that a proof of claim be supported by written documentation (or an explanation why such documentation does not exist) for a claim based on writing has long been an inherent part of bankruptcy procedure, antedating the enactment of the Bankruptcy Reform Act of 1978.¹² The proposed amendments appear to be intended to "secure the just, speedy, and inexpensive determination of every case and proceeding."¹³

⁹See, e.g., H.R. 3609, 110th Cong. § 2 (2007).

¹⁰See, e.g., H.R. 200, 111th Cong. § 5 (2009).

¹¹H. Rep. No. 111-19, 111th Cong., at 37 (2009).

¹²Alan N. Resnick & Henry J. Sommer, COLLIER ON BANKRUPTCY ¶3001.RH[1] n. 2 (15th ed. rev'd 2009) (noting that former Bankruptcy Rule 302[Ⓞ] "was substantially identical to the provisions of Rule 3001[Ⓞ]"); Fed. R. Bankr. P. 3001 Advisory Committee Note (1984) (noting that Fed. R. Bankr. P. 3001[Ⓞ] "is similar to former Bankruptcy Rule 302[Ⓞ] and continues the requirement for the filing of any written security agreement and provides that the filing of a duplicate of a writing underlying a claim authenticates the claim within the same effect as the filing of the original writing").

¹³Fed. R. Bankr. P. 1001.

Mr. Peter G. McCabe
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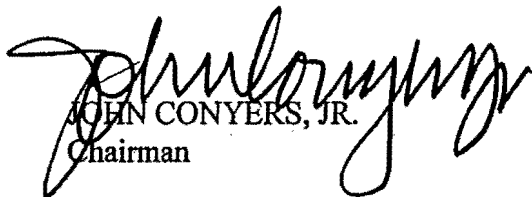
The proposed amendment to Rule 3001(c)(1) – requiring the last account statement sent to the debtor prior to the filing of the bankruptcy petition be filed with the proof of claim – appears to be a logical amplification of current Rule 3001. It is “intended to assist debtors and trustees in gauging whether such claims are untimely under an applicable statute of limitations.”¹⁴ As such, it would help facilitate analysis under Code section 502(b)(1).

Similarly, new Rule 3002.1 that, in pertinent part, requires an itemized statement of interest, fees, expenses and charges to be filed with the proof of claim. This requirement appears to be intended to ensure that the claim is appropriately documented, which is a goal that we support as evidenced by legislation that we have sponsored as described earlier in this letter.


In sum, we consider these proposed amendments to be intended to protect the integrity of the bankruptcy claims process and thereby support them generally.

We appreciate your attention to our comments.

Sincerely,



JOHN CONYERS, JR.
Chairman



STEVE COHEN
Chairman, Subcommittee on Commercial
and Administrative Law

cc: The Honorable Lamar Smith
The Honorable Trent Franks

¹⁴Eugene Wedoff, *Proposed New Bankruptcy Rules on Creditor Disclosure and Court Enforcement of the Disclosures – Open for Comment*, 83 AM. BANKR. L. J. 579, 583 (2009).

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

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ROBERT L. HINKLE
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July 22, 2010

Honorable Lamar S. Smith
Ranking Member
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Re: The Proposed Amendments to Bankruptcy Rule 3001 and New Rule 3002.1

Dear Representative Smith:

This letter is to inform you of the actions taken by the Judicial Conference Advisory Committee on Bankruptcy Rules with respect to proposed amendments to Bankruptcy Rule 3001(c) and proposed new Rule 3002.1. Your February 16, 2010, letter expressed concerns about these proposals. As explained in the February 24, 2010, letter to you from Peter G. McCabe, Secretary to the Judicial Conference's Committee on Rules of Practice and Procedure (Standing Committee), your letter was sent to the Advisory Committee, which carefully considered the concerns you expressed.

The Advisory Committee had before it the results of a six-month public comment period, during which the proposed rule changes were widely circulated pursuant to the Rules Enabling Act process. The Advisory Committee received over 150 written comments and held a public hearing at which individuals desiring to testify did so. The comments and testimony were from the broad range of interests potentially affected by the proposals, including creditors, debtors, and trustees. After a lengthy and careful examination, the Advisory Committee recommended that revised versions of the proposed amendments to Rule 3001(c) and of new Rule 3002.1 be approved and transmitted to the Standing Committee for its consideration. The proposed amendments and new rule were revised to address the major concerns raised by you and others during the Rules Enabling Act process. They include revisions that: (1) mitigate the proposed sanctions provisions under Rule 3001; (2) withdraw the proposed requirement under Rule 3001 that a creditor with a claim based on an open-end or revolving consumer credit agreement submit the last account statement sent to a

debtor; and (3) provide additional time to creditors to submit required information under new Rule 3002.1.

All but one of these proposals will be forwarded to the Judicial Conference for consideration at its September 14, 2010, session. One modified proposal will be published for public comment in August 2010. A copy of the proposed revised rules is enclosed. The proposed revised rules are posted at the court's federal rulemaking website at <http://www.uscourts.gov/RulesAndPolicies.aspx>. For your convenience, the proposals and relevant revisions are summarized below, with an explanation of how the revisions address the concerns expressed by you as well as by others who submitted comments.

1. The Proposed Amendments to Rule 3001(c)

Existing Rule 3001 requires creditors filing a proof of claim to include the "original or duplicate" of a writing on which the claim is based. This requirement is essential to ensure the legitimacy of claims filed in bankruptcy. Under the Bankruptcy Code, a proof of claim is presumed valid unless a party objects. The system does not work unless debtors and trustees have the necessary information to evaluate, and challenge if appropriate, the validity of a claim. To challenge a claim, the debtor or trustee must file an objection and present information supporting the objection. During the lengthy rulemaking process, the Advisory Committee received extensive comments and testimony that the Code's reliance on debtors and trustees to police invalid claims has proven ineffective under the existing rule. Creditors often present bare proofs of claim, which make it virtually impossible for debtors and trustees to determine how the claims were calculated and whether they are valid. Debtors' lawyers have little incentive to expend time and resources to ascertain the validity of claims submitted with inadequate documentation. The lawyers generally receive no compensation for the effort and any money derived from such efforts is usually paid to other unsecured creditors. As a result, despite the lack of supporting documentation, many insufficient or invalid claims are simply not challenged.

To address this problem, the proposed amendments enhance the disclosure requirements and require – as the official form long has – that a creditor in an individual debtor case provide an itemized statement of the interest, fees, expenses and other charges assessed in connection with its claim before the petition is filed. During the public comment period, representatives of bulk claims purchasers pointed out that some credit agreements provide for the consolidation of interest and fees with principal on an ongoing basis. The disclosure provision is not inconsistent with any such contractual provision; it simply requires disclosure of the amounts in the way they are classified under the agreement. The proposed amendments also include special disclosure requirements for claims secured by a security interest in the individual debtor's property. In such a case, a statement of the amount necessary to cure any prepetition default and, for home mortgages, a statement of any escrow account must be provided.

The initial proposed amendments to Rule 3001 also responded to a need to strengthen the consequences of failing to comply with the documentation requirements. The proposed amendment

provided for mandatory sanctions, including prohibiting a creditor who failed to provide the required information with proofs of claim in an individual debtor case from presenting any of the omitted information as evidence in a subsequent proceeding in the case, unless the court determined that the failure was substantially justified or harmless. The public comments, including your letter, led the Advisory Committee to conclude that the proposed mandatory sanction provision was too harsh. The Advisory Committee revised the proposed amendments to: authorize the exclusionary sanction only if the failure to provide the required information was not substantially justified or harmless; eliminate the mandatory nature of the sanction; and make it clear that notice and hearing is required before a sanction is imposed. The revised sanction provision is modeled on Civil Rule 37, which prohibits a party from using information “to supply evidence on a motion, at a hearing, or at trial” that it failed to disclose as part of its initial disclosure or discovery obligations. Both the Civil Rule and the Bankruptcy Rule are grounded in courts’ well-established authority to control the presentation of evidence used in court proceedings.

A creditor’s failure to provide the required information under the revised proposed amendments to Rule 3001(c) is not a basis for disallowance of the claim; a claim can be disallowed only if a party objects and proves a statutory ground for disallowance. The revised proposed amendments give effect to the Bankruptcy Code by continuing to place the burden on the debtor and the trustee to challenge an invalid claim while requiring the creditor to provide information essential to evaluate the claim. The Standing Committee approved the revised proposal for transmittal to the Judicial Conference at its September 2010 meeting.

The initial proposed amendments also required creditors with a claim based on an open-end or revolving consumer credit agreement to submit the last account statement sent to the debtor before the filing of the bankruptcy petition. During the public comment period, however, the Advisory Committee heard that copies of the last credit card statement are often unavailable or impractical to obtain. The Advisory Committee concluded that this proposal was an unnecessarily burdensome approach to the problem of inadequate information. The requirement that a creditor submit the last account statement was withdrawn. The Advisory Committee concluded that less burdensome means should be used to provide debtors and trustees with the necessary information to challenge invalid claims. The Advisory Committee recommended that the Standing Committee approve a modified proposed amendment to publish for public comment. This new proposal requires specific information from creditors relevant to the determination of the age, prior holder, and other salient features of the claim, but allows flexibility in how it is provided. The modified proposed rule also relieves claimants to which it applies from the general requirement that all documentation underlying the claim be filed in every instance, providing instead that such documentation regarding an open-end or revolving consumer credit claim is to be disclosed on request of a party in interest. The Standing Committee approved the recommendation and the proposal will be circulated for public comment in August 2010.

2. Proposed New Rule 3002.1

Proposed new Rule 3002.1 implements § 1322(b)(5) of the Bankruptcy Code, which permits a chapter 13 debtor to cure a default on a home mortgage by making certain payments during the bankruptcy. The proposed new rule requires the mortgage holder to provide a debtor with sufficient information to enable the debtor to determine the exact amount needed to cure the default, including all fees, charges, and other expenses. Absent this information, a debtor cannot know how much to pay to cure the default under the Code and cannot challenge the validity of the fees, charges, or expenses. The proposed new rule requires that the mortgage holder provide this information and give notice to the debtor, the debtor's counsel, and the trustee of any postpetition changes in the mortgage payment amount. Both before and during the public comment period, the Advisory Committee heard many complaints that debtors may learn only after completing their payment plan that they still owe fees, charges, or expenses to a mortgage lender and, despite a successful emergence from bankruptcy, still face foreclosure. The proposed new rule is intended to ameliorate this problem.


During the public comment period, the Advisory Committee also heard from creditors' organizations that it was unclear how the proposed rule provision requiring at least 30 days' notice of any postpetition changes in the mortgage payment amount would apply to loan payments that adjust frequently. The Advisory Committee revised the proposed rule. As revised, the proposed new rule requires a creditor to provide the required information no later than 21 days before the next payment is due. In addition, the sanctions provision was revised in the same manner as the sanctions provision of Rule 3001(c). The revised proposed new rule was approved by the Standing Committee for transmittal to the Judicial Conference.

The revised rules proposals that have been approved by the Standing Committee will be presented to the Judicial Conference at its September 2010 meeting. The proposal that the Standing Committee approved for publication for public comment will be circulated in August 2010. If you or your staff have any questions about these rules or other proposals, please feel free to call Lee Rosenthal, Chair of the Standing Committee, at (713) 250-5980 or John K. Rabiej, Chief, Rules Committee Support Office, at (202) 502-1820. As always, we appreciate the opportunity to work with you on improving the rules that are essential to our justice system.

Sincerely,



Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Committee on Rules
of Practice and Procedure



Laura Taylor Swain
United States District Judge
Southern District of New York
Chair, Advisory Committee
on Bankruptcy Rules

Enclosures

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2138 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6216

(202) 225-3951

<http://www.house.gov/judiciary>

February 16, 2010

Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544.

Re: Advisory Committee on Bankruptcy Rules – Proposed Amendments to the Federal Rules of Bankruptcy Procedure (3001 and 3002.1)

Dear Members of the Advisory Committee on Bankruptcy Rules,

I write to share my views about proposed amendments to the Federal Rules of Bankruptcy Procedure currently under the Advisory Committee's consideration (*Proposed Amendments to the Federal Rules of Bankruptcy Procedure* (August 2009) ("Proposed Amendments"). Specifically, I am concerned about proposed new provisions of Rule 3001 (Proposed Amendments at 16-18, ll. 1-40) and new Rule 3002.1 (Proposed Amendments at 20-24, ll. 1-80), which will govern proof of claims and their filing. I believe the proposed changes are likely to impose additional but unnecessary burdens on unsecured creditors in consumer bankruptcy cases. These added burdens may discourage or impair the ability of legitimate parties to participate in the claims process. In addition, the changes are likely to increase litigation and its attendant costs, imposing further burdens on bankruptcy judges and trustees at a time at which the bankruptcy system is already overtaxed.

The proposed amendments make several important changes to Rule 3001(c). First, they require creditors to attach the last billing statement sent to the debtor before the filing of the bankruptcy petition (3001(c)(1)). Second, they require creditors to include in their proof of claim a statement itemizing interest, expenses or charges if the debtor is an individual (3001(c)(2)(A)). Third, they permit a court to impose sanctions on a creditor who fails to provide the information these amendments require when the debtor is an individual. Finally, they bar creditors from using the omitted information in any adversary proceeding or other contested matter without court approval (3001(c)(2)(D)). The proposed new Rule 3002.1, meanwhile, adds additional hurdles to the proof of a chapter 13 claim based on a principal-residence mortgage and incorporates the same new sanctions regime proposed for Rule 3001.

I question whether there is any evidence, beyond a few anecdotes, to indicate that there is a widespread problem – inadequately addressed by existing rules and procedures – of creditors who file unsupported claims in consumer cases. To my knowledge, no substantial evidence of such a problem has been presented to Congress. In any case, creditors, like other parties, already are restrained by Rule 11 and are subject to Federal criminal penalties if they file fraudulent claims. Indeed, it was a case involving false bankruptcy claims that led Congress to make the 1996 revisions to 18 U.S.C. sec. 1001. It is my understanding that the proofs of claims filed in the overwhelming majority of cases are valid claims that substantially match the debtor's schedule of debts filed – under penalty of perjury – with the petition. The Rules of Procedure already allow for an orderly process by which a debtor can object to a particular proof of claim and thereby put the burden of proof on the creditor. Absent strong evidence of a widespread problem that the current rules and safeguards are ill-equipped to meet, the Advisory Committee should not adopt the proposed amendments to Rule 3001(c).

For similar reasons, the Advisory Committee should also evaluate the proposed amendments in light of the directive that bankruptcy rules be construed to secure the “just, speedy, and inexpensive determination of every case and proceeding.” The proposed amendments will impose new requirements for all unsecured claims and for claims based upon principal-residence mortgages. As a result, they will open up the potential for litigation over compliance and the imposition of new sanctions and attorney's fees for failure to abide by the requirements. To the extent that the new rules will affect valid claims or increase the time or cost of determining the validity of claims, they will work against the speedy and inexpensive determination of claims. They will also increase the burdens upon bankruptcy judges and trustees as they work with limited resources to administer increasingly high caseloads. The Committee should therefore carefully examine not only whether there is a need for the proposed amendments but also the effects those rules will have overall on the processing of unsecured claims.

Further, even were there a widespread problem of unsupported claims, the proposed amendments may still not represent the appropriate solution. The Rules Enabling Act provides that rules of procedure shall not be drafted in a manner that affects substantive rights. See 28 U.S.C. sec. 2075 (rules shall “not abridge, enlarge, or modify any substantive right”). Through Bankruptcy Code section 502(a), Congress has provided that a proof of claim shall be “deemed allowed” unless a party in interest objects. Further, in Code section 502(b), Congress has specifically delineated the substantive bases upon which a Bankruptcy Court may disallow a proof of claim. The effect of the proposed amendments, however, will be to permit courts to disallow claims for reasons stated in the Rules of Procedure but not listed in Section 502(b).

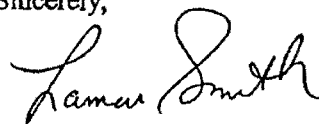
For these reasons, the question arises whether the proposed amendments exceed the Committee's authority under the Rules Enabling Act. I do not at this time take a position on this question. Were the amendments, in fact, to affect any substantive right, it would be an *ultra vires* act for the Judicial Conference to adopt them. The Committee should therefore evaluate with care the question of whether the proposed amendments fall within the ambit of the Rules Enabling Act.

Secretary of the Committee on Rules of Practice and Procedure
February 16, 2010
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Finally, I am concerned that the proposed amendments will intrude on consumers' privacy interests. To require that creditors always file debtors' billing statements, thereby making them publicly available, will unnecessarily expose the private details of each consumer's activities, such as purchases from a particular store, even if personally identifiable information such as home address information is removed. I hope that the Advisory Committee will consider this important issue as well.

Thank you again for your consideration.

Sincerely,

A handwritten signature in cursive script that reads "Lamar Smith". The signature is written in black ink and is positioned to the right of the typed name.

Lamar Smith
Ranking Member



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

JILL C. SAYENGA
Deputy Director

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

August 3, 2010

TO: ANDREW S. GINSBURG

FROM: JOHN K. RABIEJ

SUBJECT: H.R. 5419

On behalf of Judge Lee H. Rosenthal, chair of the Judicial Conference's Committee on Rules of Practice and Procedure ("Standing Rules Committee"), and Judge Mark R. Kravitz, chair of its Advisory Committee on Civil Rules ("Civil Rules Committee"), I want to thank you for the request for comments on the "Sunshine in Litigation Act of 2010," (H.R. 5419), which was introduced on May 26, 2010. The extensive work done to address in H.R. 5419 some of the concerns expressed in the past about similar bills is very much appreciated. However, H.R. 5419 continues to present difficult and unnecessary problems that would make civil litigation more expensive, more burdensome, and more time-consuming, and that would make it more difficult to protect important privacy interests. The proposed new language in H.R. 5419 will not avoid the many problems that lawyers, litigants, and judges would face in complying with the legislation and the resulting burdens on the administration of justice.

This memo addresses specific provisions of H.R. 5419, focusing on its differences from, and similarities to, prior bills. Judge Rosenthal, Judge Kravitz, and I would be pleased to meet in person or to set up a telephone call to discuss these issues further.

1. Overview

H.R. 5419 would change Rule 26(c) of the Federal Rules of Civil Procedure by requiring a judge presiding over a case who is asked to enter a protective order restricting the dissemination of information obtained in discovery to first make "independent findings of fact" that the order would not restrict the disclosure of information "which is 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 a specific and substantial interest in maintaining the confidentiality of the information" and that the protective order requested is "no broader than necessary to protect the confidentiality interest asserted." The same "independent findings of fact" must be made before a judge may issue an order approving a settlement agreement that would restrict the disclosure of information "which is relevant to the protection of public health or safety" or an order restricting

access to “court records.” As you know, we have consistently opposed the similar protective-order bills regularly introduced since 1991. One reason for the opposition has been that the legislation is inconsistent with the Rules Enabling Act, 28 U.S.C. §§ 2071–2077. H.R. 5419 is similar to the earlier bills in this respect.

2. Section 1660(a)(1): The Scope of H.R. 5419

H.R. 5419 is narrower than earlier protective-order bills because it is limited to cases in which the pleadings “state facts that are relevant to the protection of public health or safety.” The narrower application recognizes that most cases in the federal courts do not implicate public health or safety and should not be affected by the added requirements H.R. 5419 would impose. But the provisions defining the scope of H.R. 5419 are problematic. In many cases, it would not be possible for the court to determine by reviewing the pleadings whether H.R. 5419 applies. What does it mean to “state facts that are relevant to the protection of public health or safety”? Would an antitrust claim involving allegations that a drug patent owner had entered into agreements to suppress competition in the development of new drugs qualify? Would a discrimination claim alleging sexual harassment in the workplace qualify? What about a securities action involving a pharmaceutical manufacturer? Or a claim of sexual discrimination involving the refusal to promote highly qualified women working in a pharmaceutical company? These are but a few examples of how difficult it would be for a court to determine if a case was covered by H.R. 5419. The standard of “facts that are relevant to the protection of public health or safety” is so broad and indefinite that it will either sweep up many cases having little to do with public health or safety and impose on all these cases the costly and time-consuming requirements of H.R. 5419, or require the parties and court to spend extensive time and resources litigating whether the statute applies.

The criterion that the pleadings “state facts that are relevant to the protection of public health or safety” raises other concerns as well. How specifically must the facts be stated? Is it sufficient for a party simply to allege that a case involves public health or safety to invoke H.R. 5419 and thereby make it more difficult, time-consuming, and expensive for the opposing party to protect private information from public dissemination? If more specificity in pleading facts “relevant to the protection of public health or safety” is required, how much more? Does the bill require heightened pleading of such facts under Rule 9(b)? Or does the pleading standard of Rule 8 apply? If the answer is that Rule 8 applies but specific facts are required, that would make H.R. 5419 appear inconsistent with Rule 8, creating confusion and uncertainty.

3. Section 1660(a)(1)(A) and (B): The Procedure for Entering a Discovery Protective Order

Once an action is identified as one that based on the pleadings falls under H.R. 5419, the requirement that the court make independent findings of fact before issuing a protective order in discovery is triggered. This requirement is very similar to prior protective-order bills. The Committees have consistently opposed those bills because the procedure they require would delay

discovery, increase motions practice, and impose significant and unworkable new burdens on lawyers, litigants, and judges. H.R. 5419 raises the same concerns.

In many cases, parties are unwilling to begin exchanging information in discovery until an enforceable protective order is entered. The vital role protective orders play in effective discovery management is well recognized.¹ The information the parties exchange in discovery often includes

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See, e.g., SEC v. Merrill Scott & Assoc. Ltd., 600 F.3d 1262, 1272 (10th Cir. 2010) (“Protective orders serve the vital function of ‘secur[ing] the just, speedy, and inexpensive determination of civil disputes by encouraging full disclosure of all evidence that might conceivably be relevant.’” (alteration in original) (quoting *Martindell v. Int’l Tel. & Tel. Corp.*, 594 F.2d 291, 295 (2d Cir. 1979) (quotation and citation omitted))); *SEC v. TheStreet.com*, 273 F.3d 222, 229 (2d Cir. 2001) (“Without an ability to restrict public dissemination of certain discovery materials that are never introduced at trial, litigants would be subject to needless ‘annoyance, embarrassment, oppression, or undue burden or expense.’” (quoting FED. R. CIV. P. 26(c))); *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1316 (11th Cir. 2001) (Black, J., concurring) (“If it were otherwise and discovery information and discovery orders were readily available to the public and the press, the consequences to the smooth functioning of the discovery process would be severe. Not only would voluntary discovery be chilled, but whatever discovery and court encouragement that would take place would be oral, which is undesirable to the extent that it creates misunderstanding and surprise for the litigants and the trial judge.” (quoting *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986))); *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 535 (1st Cir. 1993) (“Judges have found in many cases that effective discovery, with a minimum of disputes, is achieved by affording relatively generous protection to discovery material. Impairing this process has immediate costs, including the delay of discovery and the cost to the parties and the court of resolving objections that would not be made if a protective order were allowed.”); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (“[P]rotective orders are becoming standard practice in complex cases. They allow the parties to make full disclosure in discovery without fear of public access to sensitive information and without the expense and delay of protracted disputes over every item of sensitive information, thereby promoting the overriding goal of the Federal Rules of Civil Procedure, ‘to secure the just, speedy, and inexpensive determination of every action.’” (internal citation omitted)); *In re Courier-Journal v. Marshall*, 828 F.2d 361, 364 (6th Cir. 1987) (“[T]he unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders’” (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984))); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 446 (1991) (“[T]he protective order is a tool particularly well-adapted to minimize discovery abuse. The dissemination of private or valuable information generated during discovery may produce serious harm, both to society and to litigants. A fear of that harm may chill a claimant’s willingness to resort to the courts or encourage either party to settle for reasons and on terms unrelated to the merits of the underlying claim. The protective order guards against these harms without impairing the flow of information to the litigants.” (footnote omitted)); *id.* at 483 (“If litigants know that compliance with a discovery request could lead to uncontrolled dissemination of private or commercially valuable information, many can be expected to contest discovery requests with increasing frequency and tenacity to prevent disclosure. The discretion courts currently have in granting protective orders has allowed them to develop one of the most significant management tools for guiding litigants through the pretrial process with a minimum of motion practice and needless friction.” (footnote omitted)).

highly sensitive personal and private information or extremely valuable confidential information. Plaintiffs as well as defendants have discoverable information that must be protected from public dissemination. And discoverable private or confidential information is often not just in the parties' hands, but may also be held by nonparties such as witnesses, coworkers, patients, customers, and many others. The internet has made it much more difficult to protect private and confidential information and has increased the importance of protective orders.

Protective orders avoid delay and cost by allowing the parties to exchange information in discovery that they would not exchange otherwise without objection or motion, hearing, and court order. The requesting party's chief interest is to get discovery produced as quickly and with as little expense and burden as possible. Protective orders serve that interest by allowing the parties to exchange information—with electronic discovery, in volumes that are often huge—without time-consuming, costly, and burdensome pre-production motions and hearings. H.R. 5419 would frustrate the role of protective orders and would make discovery more burdensome, time-consuming, and expensive than it already is.

Under H.R. 5419, as with similar prior bills, no protective order can issue unless and until: (1) the party seeking the order designates all the information that would be produced in discovery subject to restrictions on disclosure; (2) the judge reviews all this information to determine whether any of it is relevant to the protection of public health or safety; (3) if any of the information is determined to be relevant to the protection of public health or safety, the judge determines whether any of the information is subject to a specific and substantial interest in maintaining its confidentiality; (4) the judge then determines whether the public interest in the disclosure of any information about public health or safety hazards is outweighed by that interest; and (5) the judge then decides whether the requested order is no broader than necessary to protect that confidentiality interest. The judge's review would often occur relatively early in the litigation, when the judge—who knows less about the case than the parties—is the least informed about the case. Information sought in discovery does not come labeled “impacts public health or safety” or “raises specific and substantial interest in confidentiality.” The judge will often simply be unable to tell whether the information she is reviewing is relevant to public health or safety. The judge also will not be able to tell whether there are “specific and substantial” privacy or confidentiality interests or how they should be weighed.

Even in cases in which the pleadings state facts relevant to public health or safety, much of the information sought and produced in discovery will not implicate public health or safety. Indeed, much of the information will not be important or even relevant to the case and will not be used by the parties in litigating the case. But there may be significant amounts of private or confidential information that should be protected from public disclosure. Under H.R. 5419, a lawyer representing a client, plaintiff or defendant, could not seek a protective order without first doing the expensive and time-consuming work of identifying specific information to be obtained through discovery that would be subject to disclosure restrictions. The judge could not issue a protective order to restrict the dissemination of any information obtained through discovery without making the independent

findings of fact as to all that information. The effect would be delay, increased motions, and a reduction in timely, cost-effective access to justice.

In addition to causing delay and increased costs in the cases in which protective orders are sought, the procedure in H.R. 5419 would cause delays in access to the federal court system in all cases. If judges have to look through every document produced in discovery in cases in which a protective order is sought, that will take time away from other pressing court business that litigants expect judges to take care of in a timely manner.

Comparing the procedure under H.R. 5419 with the protective-order practice followed under current law in the federal courts further illustrates problems the legislation would create. Under current law, when the parties ask the court to enter a protective order before discovery begins, the language of Rule 26(c) and the case law require the court to find good cause for entering such an order, even if the parties agree on the terms. In most cases in which a discovery protective order is sought, the court makes the good-cause determination by examining the nature of the case and the types or categories of information that are likely to be exchanged in discovery. Neither the parties nor the court is required to conduct a time-consuming and burdensome pre-discovery review of all the information that will be produced.

The protective order typically sets up a procedure for the parties to designate documents exchanged in discovery—as opposed to filed with the court—as confidential, restricting their dissemination. Most protective orders include “challenge provisions” under which the receiving party or third parties may dispute the designation of a particular document or categories of documents as confidential. Even without such challenge provisions, the case law provides this right. Once the requesting party—who knows the case much better than the judge—gets the documents in discovery and can review them, that party may ask the court to permit the dissemination of documents designated as confidential, to modify the terms of the protective order, or to dissolve the protective order. Among the reasons for modification can be the relevance of the documents to protecting public health or safety and the need to bring them to the appropriate regulatory agency, or the desire to use the documents in related litigation. The court can effectively and efficiently consider such requests because they are focused on specific documents or information. With this focus, the court is able to resolve the requests by applying the factors the case law establishes, including the protection of public health or safety.

The procedures followed under current law meet the goals of H.R. 5419, including in the relatively small number of cases filed in federal courts that implicate public health or safety, without the grave additional burdens, costs, and delays H.R. 5419 would impose. In contrast, the procedure established under H.R. 5419 is ineffective to meet its purpose and would create severe problems in discovery.

4. Section 1660(a)(1): The Application to Orders Restricting Access to Court Records

Section 1660(a)(1) imposes the same requirements on court orders that would restrict public access to court records that apply to orders restricting public access to information exchanged in discovery. This provision weakens the standard federal courts apply under current law for ensuring public access to documents that are filed with the federal court. Under current law, if the parties want to take the material exchanged in discovery and file it with the court, either with a motion or in an evidentiary hearing or at trial, a standard different and higher than the discovery protective-order standard applies before a court can seal it from public view. Courts recognize a general right of public access to all materials filed with the court that bear on the merits of a dispute. This presumption of access usually can be overcome only for compelling reasons; access is granted without the need to show a threat to public health or safety or any other particular justification unless a powerful need for confidentiality is shown. A lower good-cause standard applies to an order restricting disclosure of information exchanged in discovery but not filed with the court.

This distinction between the standard for protecting the confidentiality of information exchanged in discovery and the standard for filing under seal is critical. It reflects the longstanding recognition that while there is no right of public access to information exchanged between litigants in discovery, there is a presumptive right of public access to information that is filed in court and used in deciding cases. Courts require a much more stringent showing to seal documents filed in court than to limit dissemination of documents exchanged in discovery but never filed with the court.

Section 1660(a)(1) reduces the standard necessary to seal documents filed in court and collapses it into the standard necessary to restrict public dissemination of documents exchanged in discovery. As a result, H.R. 5419 weakens the right of public access to court documents, a change in the law that is unnecessary and inconsistent with the bill's purpose. Indeed, § 1660(a)(1) directly conflicts with section (2)(c)(1) of H.R. 5419, which states that the bill may not be construed to "weaken or to limit—(1) existing common law or constitutional standards for information access"

5. Section 1660(a)(2): Discovery Protective Orders After the Entry of Final Judgment

Section 1660(a)(2) would make a discovery protective order unenforceable after final judgment unless the judge made separate findings of fact that each of the requirements of (a)(1)(A) and (B) were met. The burden of proof provision in (a)(3) requires that the need for continuing protection be demonstrated as to all the information obtained in discovery subject to the protective order. Under current practice, the protective order often continues in effect, subject to requests made by either parties or nonparties to release documents or information. Once a party or third party identifies documents or information for which disclosure is sought, the burden of proof is much clearer and efficiently applied. The court is able to effectively and efficiently determine whether the protective order should be modified or lifted because the focus is on specifically identified documents or information. This current practice is adequate to meet the purpose of H.R. 5419 without the added burdens, delays, and costs the bill would add.

Section 1660(a)(2) would greatly add to the costs and burdens of conducting discovery because parties could not be confident that even the most sensitive information they produced would remain subject to the protective order provisions when the case ended. The great importance of limiting access to such highly confidential private information is evidenced by the frequent use in protective orders of “attorneys’ eyes only” provisions, which preclude a receiving attorney from sharing certain information received in discovery even with her clients. Such provisions are frequently used in litigation involving complex technology. The parties involved in such litigation often require the return or destruction of their highly confidential and proprietary materials at the conclusion of litigation, to ensure that materials so confidential that they could not even be shared with the receiving attorney’s client during the litigation remain confidential when the litigation ends. Such provisions are also used in many other cases in which highly sensitive and private information about both parties and nonparties is obtained in discovery. It is essential to the effective and efficient operation of discovery that litigants be able to rely on the continuing confidentiality of information produced, including after the case ends, subject to the right of others to ask the court to permit broader dissemination of specific information for reasons that could include relevance to public health or safety. H.R. 5419 destroys the reliability that makes protective orders effective, with no evidence that such a step is needed.

6. Some Confusing Provisions in the Bill

Section 1660(a)(4)(A) states that “[t]his section” applies “even if an order under paragraph (1) is requested—(A) by motion pursuant to rule 26(c) of the Federal Rules of Civil Procedure” Yet section 1660(a)(1) states that a court “shall not enter an order under rule 26(c) of the Federal Rules of Civil Procedure” without complying with the requirements set forth. The result is confusion.

Section 1660(a)(5)(A) states that the “provisions of this section shall not constitute grounds for the withholding of information in discovery that is otherwise discoverable under rule 26 of the Federal Rules of Civil Procedure.” It is unclear what this section contributes or means. Does this mean that a protective order cannot protect a party against the burden of producing any information within the scope of Rule 26—that an order can only restrict the use of information once produced? That directly conflicts with Rule 26(b)(2) and (c), which authorize a court to limit discovery for important purposes. Under Rule 26(b)(2)(C)(iii), a court must limit discovery if “the burden or expense of the proposed discovery outweighs its likely benefit” This proportionality principle has been a vital part of the rules since 1983. How does the court reconcile the conflict between the language stating that H.R. 5419 precludes withholding information in discovery that is otherwise discoverable under Rule 26 and the proportionality provisions of Rule 26? H.R. 5419 would support arguments that it bestows a right to obtain marginally relevant information even if it is at a cost and burden that is disproportionate to the reasonable needs of the case.

A similar problem is present in § 1660(a)(5)(B), which forbids a party from requesting a stipulation to an order that “would violate this section” as a condition for the production of

discovery. How does one know that at the time of the request? Can a party request a stipulation to an order that the party believes does not violate § 1660(a)(1), or to an order in a case that the party believes is not subject to the section because the pleadings do not allege the necessary facts? What is the enforcement mechanism for this provision? The purpose of prohibiting a request for a stipulation is unclear; the other party can refuse and the court may not enter a protective order unless it makes the required “independent findings of fact.” The impact will likely be collateral disputes over the propriety of the request, further contributing to the increase in the costs and delays of discovery.

Section 1660(d) creates a “rebuttable presumption” relating to personal privacy. What is necessary to rebut the presumption? What kind of personal information is included? The bill says that it is “information relating to financial, health, or other similar information.” Similar to what?

Section (2)(c) of the bill—which, confusingly, is not codified as part of section 1660—states that the bill may not be “construed to weaken or to limit . . . (2) confidentiality protections as a basis for a protective order.” The entire point of § 1660(a) is to weaken or limit confidentiality protections as a basis for a protective order.

These are only a few of the unclear and confusing provisions relating to discovery protective orders under H.R. 5419. The unclear meaning and impact of these and other provisions highlight the importance of the thorough, transparent, and careful Rules Enabling Act process in drafting language that would so directly affect the federal rules.

7. The Provisions Relating to Orders Approving Settlement Agreements

Section 1660(a)(1) would prohibit a court from entering an order approving a settlement agreement that restricts the disclosure of information obtained through discovery, in a case in which the pleadings state facts that are relevant to the protection of public health or safety, unless the court makes the specified independent findings of fact. Section 1660(c)(1) would preclude a court from enforcing any provision of a settlement agreement in a case with such pleadings that restricts a party from disclosing the fact of settlement or the terms of the settlement that involve matters relevant to the protection of public health or safety, other than the amount of money paid; or that restricts a party from “discussing the civil action, or evidence produced in the civil action, that involves matters relating to public health or safety,” unless the court makes the specified independent findings of fact.

There are very few federal court orders approving settlement agreements. Settlements are generally a matter of private contract. Settlement agreements usually are only brought to a court for approval if the applicable law requires it, as in settlements on behalf of minors, or of absent class members. Similarly, federal courts are rarely called on to enforce settlement agreements. Unless the agreement specifically invokes a court’s continuing jurisdiction or an independent basis for jurisdiction applies, enforcement actions are generally brought in state courts. The settlement provisions in H.R. 5419 will rarely apply and are therefore unlikely to be effective.

The Standing and Civil Rules Committees have previously provided the House Judiciary Committee with the extensive empirical study done by the Federal Judicial Center on court orders that limit the disclosure of settlement agreements filed in the federal courts. That study showed no need for legislation such as H.R. 5419. The FJC study and a follow-up study showed that in the few cases in which a potential public health or safety hazard might be involved and in which a settlement agreement was sealed by court order, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints identified the three most critical pieces of information about possible public health or safety risks: the risk itself, the source of that risk, and the harm that allegedly ensued. In many cases, the complaints went considerably further. The complaints, as well as other documents, provided the public with access to information about the alleged wrongdoers and wrongdoings, without the need to also examine the settlement agreement.

Based on the relatively small number of cases involving any sealed settlement agreement and the availability of other sources to inform the public of potential hazards in these few cases, the Rules Committees concluded that a statute restricting confidentiality provisions in settlement agreements is unnecessary and unlikely to be effective. The primary effect of H.R. 5419 is likely to be an added barrier to access to the federal courts by making it more difficult and cumbersome to resolve disputes. The result is to send more disputes to private mediation or other avenues where there is no public access to information at all.

8. The Civil Rules Committee's Continued Work

In May 2010, the Civil Rules Committee sponsored an important conference on civil litigation at Duke University Law School. That conference addressed problems of costs, delays, and barriers to access at every stage ranging from pre-litigation to pleadings, motions, discovery, case-management, and trial. It is worth noting that in all the studies conducted, the papers submitted, and the criticisms of and suggestions for improving the present system, no one raised problems with protective orders or orders limiting access to settlement agreements filed with the federal courts. This further underscores the lack of any need for legislation.

The Civil and Standing Rules Committees are deeply committed to identifying problems with the federal civil justice system that can be addressed by changes to the Federal Rules of Civil Procedure, and to making those changes through the process Congress established—the Rules Enabling Act. As part of that process, the Civil Rules Committee is continuing to monitor the case law under Rule 26(c) to ensure that it is not operating to prevent public access to important information about public health or safety. The Committee is examining revisions to Rule 26(c) to, among other things, incorporate express provisions on challenging, modifying, or dissolving protective orders. The Advisory Committee will certainly keep you apprised on this work.

Last year, the Committees provided the House Judiciary Committee with a memo on the case law in every circuit on entering protective orders, modifying protective orders, and entering sealing orders. The case law set out in the memo shows that courts are attuned to the public interest and that

Andrew S. Ginsburg
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courts have developed procedures for addressing the need to produce discovery materials to other litigants and agencies. The Advisory Committee continues to monitor the case law. The memo on protective order case law was recently updated and is publicly available online at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Caselaw_Study_of_Discovery_Protective_Orders.pdf. A copy is attached for your convenience.

Thank you again for the opportunity to comment on H.R. 5419. As I said, Judge Rosenthal, Judge Kravitz, and I are available to meet in person or to set up a telephone call to discuss these issues. I can be reached at 202-502-1820.

cc: Christal Sheppard, Esquire
Blaine Merritt, Esquire

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

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ROBERT L. HINKLE
EVIDENCE RULES

June 28, 2010

Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington, DC 20515

Dear Madam Speaker:

We write on behalf of the Judicial Conference Committee on the Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure to express our significant concerns about Section 6 of the proposed legislation relating to certain civil actions arising from maritime incidents, H.R. 5503. Section 6, entitled "Unenforceability of Certain Secrecy Agreements," as amended by the Maritime Liability/Secrecy Agreement Revision, would cause severe problems and is inconsistent with, and unnecessary to, the purpose of the legislation. We urge you to remove this section. This letter outlines some of our most pressing concerns.

Section 6 would make court orders restricting the dissemination of broad categories of information void and unenforceable in any legal proceeding, with a very limited exception. The only exception is for court (or government agency) orders that the party seeking enforcement proves by clear and convincing evidence are necessary to protect public health or safety, if the judge makes factual findings and conclusions of law relating to that enforcement. These provisions in effect rewrite Rule 26(c) of the Federal Rules of Civil Procedure for the cases covered by the legislation. Rule 26(c) explicitly authorizes courts to issue orders in pretrial discovery to protect important rights and interests. Not only does Section 6 circumvent the process for amending the Federal Rules of Civil Procedure that Congress established in the Rules Enabling Act, 28 U.S.C. §§ 2072-2077, it threatens litigants' rights and interests and creates an unworkable procedure for the cases covered by H.R. 5503.

The provisions in Section 6 would prohibit a court from enforcing a protective or confidentiality order that is necessary to protect vital privacy rights. For example, a court could not enforce an order limiting the dissemination of intimate health or other highly sensitive personal information about a plaintiff or any other person whose information is sought in discovery. Nor could a court enforce an order limiting the dissemination of highly sensitive trade secret information about proprietary technology or financial information about any party or other person or entity. Such a restriction is inconsistent with well-established case law in every circuit recognizing the importance of protective orders issued under Rule 26(c), based on a good-cause showing, to protect private and confidential information exchanged in pretrial discovery from being broadcast on the internet and otherwise made public. This section of H.R. 5503 is unnecessary to achieve the bill's purposes and has the potential to do great harm to those already struggling with the effects of the oil spill.

Section 6 of H.R. 5503 also provides an unworkable procedure that would delay and complicate discovery in the very cases that should be handled with expedition and efficiency to provide needed relief to those affected by the spill. The vital role protective orders play in enabling parties to exchange information in discovery efficiently, without the delay caused by requiring detailed involvement by a court, is well recognized. Section 6 would frustrate that role. Parties are usually unwilling to begin discovery unless there is an enforceable protective order in place. Under the provisions of H.R. 5503, a court could not enforce a protective order unless the proponent first proved by "clear and convincing evidence that such enforcement is permitted under subsection (c)," which in turn requires that the enforcement is necessary to public health or safety, and unless the court stated factual findings and conclusions of law relating to that enforcement on the record. Under this procedure, no discovery would occur until after the proponent of a protective order showed by clear and convincing evidence that the order was needed for the documents in question and the court made the findings and conclusions. This procedure would greatly delay discovery. It is also unworkable because it requires the court to rule on the adequacy of the showing and to make the findings and conclusions before the party seeking the documents has been able to obtain them. That means that the court is ruling without the benefit of informed input from all sides, which makes it more difficult for the court to rule efficiently and fairly, further complicating and delaying discovery and further delaying the litigation. Ordinarily, it is the party seeking the documents that is in the best position to inform the court whether the documents subject to the protective order are properly designated as subject to the order. Under Section 6, the court will not have that vital input.

In addition, this section of H.R. 5503 is unnecessary to prevent undue restrictions on documents and information that should be publicly available. Under Rule 26(c), federal courts enter a protective order for materials to be produced in pretrial discovery based on a good-cause showing. The case law makes it clear that courts consider a number of factors, including whether the information at issue is important to public health or safety, whether the litigation involves issues important to the public, the importance of a protective order to the fair and efficient conduct of discovery, and the confidentiality interests of the parties or nonparties. Once a protective order issues and discovery is able to proceed, there are recognized procedures for allowing parties, or third parties, to challenge the application of the protective order to particular documents or categories of documents, or to move to modify the order. In deciding such motions, courts consider whether the information at issue is important to public health or safety as well as other factors specific to each case. The procedure under Rule 26, with the case law in each circuit, allows discovery to be conducted subject to the court's oversight to ensure that protective orders do not improperly prevent the public from learning information that should be available to protect public health or safety. The protective order provisions in H.R. 5503 are unnecessary and would instead create severe problems.

The views in this letter are limited to the provisions in H.R. 5503 that affect the Federal Rules of Civil Procedure and do not address other parts of the legislation. We appreciate your consideration of these views and look forward to continuing to work with you on these vital matters.

Sincerely,



Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Standing Committee on Rules
of Practice and Procedure



Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Advisory Committee on the
Federal Rules of Civil Procedure

Identical letters sent to: Honorable Steny Hoyer
 Honorable John Boehner
 Honorable John Conyers
 Honorable Lamar Smith

cc: Members of the House Judiciary Committee

TAB

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SUBJECT: Federal Judicial Center Activities

The Federal Judicial Center is pleased to provide this report on education and research activities that may be of interest to the Committee on the Rules of Practice and Procedure.

I. Education

A. Update

From June through December 2010, the Center conducted the following programs for judges and court staff:

- 46 travel-based programs for 2,428 participants
- 65 in-court programs for 2,256 for participants
- 26 technology-based programs for 1,457 participants

In addition, the Center provided ongoing production of on-line and printed programs and resources. Detailed information on recent and upcoming Center programs, products, and resources can be found on FJC Online at <http://cwn.fjc.dcn/>.

B. Highlights

The Center is developing a new two-day program for prospective and new chief district judges on performing their management and leadership responsibilities, to be offered in April 2011. Other new seminars in 2011 will cover case management, handling capital habeas cases, and jury administration and utilization.

Since June 2010, the Center released three new e-learning courses for court staff. (1) The *Interactive Bankruptcy Online Tutorial*, which is a self-paced program on bankruptcy rules and procedures. (2) The *Interactive Orientation Seminar for Federal Judicial Law Clerks*

to help new law clerks understand their responsibilities and the resources available to them.

(3) *Understanding the Dynamics of Domestic Violence*, a self-paced course that teaches probation and pretrial services officers and managers how to work effectively with victims and offenders who encounter domestic violence issues.

The Center is involved in training efforts on the Implementation of Evidence-Based Practices (EBP), also noted in the Research update below. In November 2010, five research districts participating in the Center's experimental study of federal district reentry programs received training. Additional EBP programs will be offered in 2011.

Programs conducted in collaboration with the Administrative Office include: two Judges Information Technology training-for-trainers, to assist court staff in teaching judges how to use information technology to perform judicial functions more efficiently; 13 Performance Management workshops and webinars that are associated with the Court Compensation Study Implementation; training presentations at the District and Bankruptcy Court Operational Practices forums; and onsite support for Space and Security training requests for circuit-based in-person programs for unit executives and staff members with space and facilities responsibilities.

Center staff also made presentations on a range of topics at 48 conferences, associations and court events, attended by 3,400 judges and court staff. Of those 48 presentations, 28 were specifically requested on Judicial Security, Web 2.0, and Emerging Technology. These presentations heighten awareness regarding privacy and security risks associated with the use of social media such as social networking, blogs, and wikis.

II. Research

Since the Center's last report to the Committee, the Center completed work on nine major projects, commenced work on four new major projects, and continued work on 47 others. Most are projects requested by Judicial Conference committees. A full listing of Center research projects and activities is available at <http://cwn.fjc.dcn/fjconline/home.nsf/pages/967.01>. Below are brief descriptions of projects that may be of special interest to the members of the Committee.

Surveys Regarding Disclosure of Brady v. Maryland Material in the United States District Courts. At the request of the Advisory Committee on the Criminal Rules, the Center conducted a survey of all federal district and magistrate judges, as well as all United States Attorney offices, Federal Defenders, and more than 15,000 defense attorneys of record in a sample of recently closed federal criminal cases. The survey was conducted to help inform the Criminal Rules Committee's deliberations about the operation of Rule 16 of the Federal Rules of Criminal Procedure and about variations in pretrial disclosure practices in the federal district courts. Overall, the survey results indicate that there are sharp disagreements between prosecutors and defense counsel, with district judges more or less evenly divided on the need to amend Rule 16.

Case Budgeting Pilot Project Evaluation. At the request of the Committee on Defender Services, the Center evaluated the experiences of the three circuits (2nd, 6th, and 9th) that participated in a pilot of budgeting and case management procedures in capital and non-capital mega cases. The findings will be presented to this Committee at its upcoming

December 2010 meeting. The evaluation determined that pilot programs saved money and achieved high quality defense representation, while providing case budgeting advice to judges and attorneys.

Study of Rule 12 of the Federal Rules of Civil Procedure: Motions for More Definite Statement and Motions to Dismiss. The Advisory Committee on Civil Rules has asked the Center to study Rule 12(b)(6) activity in the district courts, in light of the Supreme Court's decision in *Ashcroft v. Iqbal* interpreting the pleading standards that were set out in *Bell Atlantic Corp. v. Twombly*. The Center is continuing its efforts to identify the outcome of orders responding to motions to dismiss for failure to state a claim under Rule 12(b)(6).

Federal Offender Reentry Programs. In earlier reports, the Center noted it was asked by the Committee on Criminal Law to conduct a multi-year study of federal reentry programs. Five districts have committed to participate in a three-year experimental study that aims to empirically assess the impact of a new policy governing federal reentry programs developed by the Administrative Office's Office of Probation and Pretrial Services. Center education staff and Administrative Office staff designed and conducted a rigorous training program for the study districts prior to the commencement of the study. The Center also conducted a follow-up to its 2008 survey of the 36 districts with already-established federal reentry programs.

Surveys of District and Bankruptcy Courts' Efforts to Assist Pro se Litigants. At the request of the chair of the Committee on the Administration of the Bankruptcy System and with the concurrence of the Bankruptcy Judges' Advisory Group of the Administrative Office, the Center developed and conducted a survey to identify programs and procedures used across the districts to manage filings that involve pro se debtors and creditors. The Center also conducted a

similar survey requested by the Committee on Court Administration and Case Management of the district courts regarding pro se litigants.

Circuit Practices with Awarding Costs Under FRAP Rule 39(a)(3). The Advisory Committee on the Appellate Rules has asked the FJC to conduct research into the current practices in the circuits for awarding costs under FRAP 39(a)(3). The Committee is especially interested in knowing how often Rule 39 costs have been assessed against an appellee under FRAP 39(a)(3) when the district court's judgment has been reversed, the typical or average cost awarded, and what items were included in the costs consist (i.e., copying costs). The study's findings will be presented at the Committee's spring 2011 meeting.

Bankruptcy Case Weighting Project. At its September 2010 meeting, the Judicial Conference approved new case weights developed by the Center for determining bankruptcy-weighted caseloads per authorized judgeship.

Bankruptcy Courtroom Use Study. As noted in previous reports, as a follow-on to the Center's research and report on the scheduling and use of courtrooms in the district courts, the Center was asked by Court Administration and Case Management Committee to undertake a similar study of courtroom use in the bankruptcy courts. The study is on schedule, with the final study report scheduled to be delivered to this Committee at its December 2010 meeting.

III. Federal Judicial History and International Rule of Law Functions

The Center provides assistance to federal courts and others in developing information, and teaching about, the history of the federal judiciary. The Center's website contains ten units of the Center's Teaching Judicial History project, with materials related to notable federal trials and great debates. The Center recently posted suggestions for judges who want to use the

materials in partnerships with teachers. The guide to research in federal judicial history will be published by the Center later this year.

The Center's Office of International Judicial Relations coordinates its exchanges with the judiciaries of other nations. From April 1 through October 15, 2010, Center staff met with judges and court officials representing over 50 countries, including the Chief Justices of Iraq, Malaysia, and Rwanda, the Minister of Justice from the United Arab Emirates, and a delegation of judicial officials from Libya. The Center also hosted Visiting Foreign Judicial Fellows from China, Korea, Laos, the Philippines, and Turkey.

TAB
5-A-B

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

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CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

Date: December 6, 2010.

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on November 15 and 16, 2010. 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 discussion. These projects raise many intriguing and at times difficult — even very difficult — questions. Advance discussion and guidance will help in working toward the best answers.

Discovery: Rule 45

The Discovery Subcommittee, prompted by a series of suggestions from bar groups and other lawyers, began two years ago to study the Rule 45 provisions for trial and discovery subpoenas. A list of seventeen possible revisions was prepared, and gradually winnowed down to the four that have come under the most intense scrutiny. The work has been developed through several conference calls, presentations to the full Advisory Committee, and a "miniconference" with lawyers and judges in Dallas on October 4, 2010. Earlier reports to this Committee have traced this development. The Subcommittee expects to present a draft in April looking toward a recommendation for publication. The four developing proposals address notice to all parties before a subpoena to produce documents is served; transfer of enforcement proceedings; compelling a party to appear as a trial witness; and simplification of Rule 45. A late-revived question asks whether the time allowed to object to a Rule 45 document subpoena should be extended. This question will be studied further, but it remains unclear whether any change will be recommended.

Notice to other parties: The last sentence of Rule 45(b)(1) directs that before a subpoena to produce documents is served, "notice must be served on each party." Advance notice enables the parties to object, to suggest that the subpoena be expanded, and to monitor compliance to ensure access to whatever is produced. The problem lies not in the rule but in the observance. Many lawyers, from many callings, complain that they often do not get notice.

The proposed amendment addresses this problem by moving the notice provision out of subdivision (b)(1) and into a new subdivision (a)(4). The hope is that making the requirement more prominent in the rule will enhance compliance. Those who lack the energy to read through to the end of (b)(1) may at least persist through to the end of (a).

In addition, the proposed amendment directs that a copy of the subpoena be served with the notice. That will advance the purposes of requiring notice and simplify the other parties' responses.

The Subcommittee also considered a further possible change. Notice could be required not only before the subpoena is served, but also after materials are produced in response. In the end, the Subcommittee has concluded that the potential advantages are outweighed by potential disadvantages. A second notice requirement provides one more opportunity to go astray, and to produce corresponding disputes. Nor need it be only one opportunity to go astray — responsive materials often may be produced sequentially, raising questions as to just when and how often notice is required. Disputes could multiply. Disputes lead to questions about sanctions. In the end, the Subcommittee concluded that it is better to leave the other parties with the responsibility for periodically following up to determine what has been produced.

Transferring enforcement proceedings. Rule 45 directs that a subpoena issue from the court where the witness is located. Often the subpoena issues from a court that is not the court where the action is pending. Questions about enforcement against a nonparty go to the court that issued the subpoena. But many circumstances arise in which it would be better to resolve enforcement disputes in the court where the action is pending. Although nothing in Rule 45 seems to authorize transfer, some issuing courts have managed to transfer the enforcement dispute. And there are hints that it is rather common for the issuing court to consult informally with the action court. This proposal would explicitly authorize transfer.

The transfer question relates in some part to the features that may make Rule 45 ripe for some simplification. Posit an action pending in the federal court in Seattle and a witness in Miami. A Seattle lawyer can issue a subpoena in the name of the federal court in Miami, directing a Miami nonparty witness to produce documents or testify at a deposition. If all goes well, the Miami court knows nothing of this event, or of the witness's compliance. But if the witness objects or simply fails to comply, enforcement must be sought in Miami. The Miami court may be, and often is, the better court to resolve the enforcement issues. Many issues are truly local, turning on the circumstances of the witness. Any transfer rule must account for these concerns.

Even issues that seem local, however, may be intertwined with overall management of the action pending in Seattle. The witness may object that the discovery is too burdensome. Whether the "burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case," and so on through the Rule 26(b)(2)(C)(iii) factors, requires close familiarity with the underlying action. (The Rule 45(c)(2)(B)(ii) direction to protect the nonparty against significant expense in responding to a document subpoena does not automatically resolve this question.) The Seattle court may have a case management plan that requires centralized disposition of this and many other discovery issues.

Other circumstances present still more compelling needs for disposition in the court where the action is pending. In a complex action, discovery subpoenas may be served through several different courts. The same question may be raised in two, three, or even more courts. Far better to have a single, consistent decision than to present the same question seriatim to several courts and perhaps to receive different answers.

A discovery issue, for another example, may be still more tightly tied to the merits of the underlying claim. A clear illustration is provided by a recent action brought in a federal court in California complaining of defamation by anonymous internet bloggers. The plaintiff sought to compel an internet service provider in Arizona to identify the bloggers. Similar subpoenas were served on other providers in other federal courts. The First Amendment is thought to provide a right to anonymous blogging, but the right of anonymity can be overcome by showing a prima facie claim. Disposition of the discovery question is bound up with the merits. Resolution by the court where the action is pending seems important.

A successful transfer provision must seek to express the balance between these concerns, mediated by an additional pragmatic concern. The disputes that are primarily local should be resolved by the local court. The disputes that tie to the merits of the action — and on some views, most disputes do — and those that bear on overall coherent case management, often should be transferred. And, for good measure, some observers believe that the rule should guard against the temptation some local courts will feel to use transfer to get rid of problems that do not seem their own.

The formula tentatively adopted to express the standard for transfer is "in the interest of justice." That formula is familiar — it is part of the formula for transferring venue under 28 U.S.C. § 1404(a): "for the convenience of parties and witnesses, in the interest of justice." One question is whether it is wise to adopt only part of the formula. There is always a risk that adopting verbatim a set of words used in another context will lead to a mistaken conclusion that the considerations for transferring a discovery dispute are the same as those for transferring venue. But the convenience of parties and witnesses does bear on the transfer decision. A variety of other possibilities have been suggested. The choice of words will turn in part on the choice whether to imply a preference for or against transfer. If it seems desirable to prefer local decision, "compelling reason" could be required. The familiar "good cause" would suggest a weaker preference. "[W]hen appropriate" might seem neutral.

An alternative to a general standard might be to identify specific factors in rule language. But no list could capture more than a few of the more obvious circumstances, much less express a formula for balancing competing concerns. This alternative is not likely to be pursued.

The Subcommittee also continues to consider the authority to adopt a rule giving a federal court in Seattle power to rule on questions raised by a nonparty witness in Miami. Can a court rule create this limited form of "jurisdiction"? Once the ruling is made in Seattle, how is it enforced? The Subcommittee believes that there is authority to adopt a transfer rule, and that enforcement of the Seattle court's ruling by the court in Miami is appropriate and efficient. It also believes that common sense will readily resolve any issues as to the right of the Miami lawyer for the nonparty Miami witness to address the court in Seattle, the logistics of filing and argument, and any other details that would cause difficulty only to an obstructionist.

Distant party as trial witness: This question was made prominent by the ruling in *In re Vioxx Products Liability Litigation*, 438 F.Supp.2d 664 (E.D.La.2006). The court found a negative implication in Rule 45(c)(3)(A)(ii) that a subpoena may compel a party or a party's officer to appear as a witness at trial without regard to the Rule 45(b)(2) limits on the place of service. Other district courts have responded to this ruling, some adopting it and others rejecting it. The issue is important, and it deserves a uniform rule. Strong arguments can be made both ways.

The Subcommittee intends to recommend a rule amendment that undoes the Vioxx ruling. Subcommittee members agree unanimously that the Vioxx court mistook the intent of the Rule 45 amendments made in 1991. That conclusion does not dictate a revision that restores the original intent. It remains to be decided whether a court should have power to compel a party to appear as a trial witness. The Subcommittee recognizes the strength of the arguments for recognizing some such power, and intends to present an alternative draft that embodies it. But its recommendation is

expected to restore the rule that a party can be required to attend trial by traveling only from any place where the party resides, is employed, or regularly transacts business in person within the state where trial is held.¹

The intended recommendation rests on the belief that in-person testimony ordinarily is not especially important in the trial process. Video depositions, or live testimony by contemporary transmission from a different place under Rule 43(a), provide satisfactory substitutes. It also rests on a fear that a broad power to drag party witnesses around the country may be — and has been — misused for strategic purposes. The danger is that top-level persons within a public or private organization will be subpoenaed, despite being less useful witnesses than other people within the organization, in order to impose burdens that conduce to settlement.

Work is well advanced on an alternative draft that would recognize and regulate authority to compel trial testimony by a party or party agents who are not present in the state. The central feature of the draft is that it requires a court order; a party-issued subpoena is not available. The party requesting the order must show a persuasive reason for compelling the testimony, including reasons why other witnesses will not do. (The initial formula expressing these factors borrows the "substantial need" and "undue hardship" terms from Rule 26(b)(3), but there is some concern that transporting the work-product formula to this quite different setting may engender confusion.) The court also must consider the alternatives of relying on a video deposition or testimony by transmission under Rule 43(a). Further work remains to be done to identify the persons within a party organization who, although not "officers," may be reached by the order. But in any event the order is directed to the party, not the officer or other agent, and sanctions for failure to produce the witness are imposed only on the party.

The question of authority to establish nationwide subpoena practice is similar to the questions raised by the transfer recommendation discussed above and the simplification recommendation discussed below. In all three settings, and most directly in the trial-witness setting, some comfort may be found in Criminal Rule 17(e)(1), which authorizes service "at any place within the United States" of a subpoena requiring a witness to attend a hearing or trial.

The most likely recommendation will be to publish the alternative draft for comment, but in a format and with a transmission letter that make clear the preference for restoring the state-limits reach of a trial subpoena. The ambition is to present an alternative draft so well polished that if public comment and testimony establish the superiority of the alternative approach, the draft may be so close to the mark that it can be recommended for adoption with no more changes than are consistent with adoption without a renewed round of public comment.

Simplifying Rule 45: Rule 45 is long. Some of its provisions are near-verbatim repetitions of provisions appearing in the core sequence of discovery rules, Rules 26 through 37. The failure to understand a provision so simple and so clear as the prior notice provision in Rule 45(b)(1), discussed above, illustrates a broader complaint: many lawyers, particularly those who do not often engage in federal litigation, get lost in attempting to navigate Rule 45's complexities. And a witness confronted with the task of unraveling subdivisions (c) and (d), which under Rule 45(a)(1)(A)(iv) must be included in every subpoena, generally must surrender or consult a lawyer. Even judges and lawyers who encounter Rule 45 problems with some regularity confess that they often have to reread the text carefully to recreate the hard-won understanding produced by earlier readings.

¹ The 1991 version includes a potential limit on even this reach. Rule 45(c)(3)(A)(iv) provides that on timely motion the court must quash or modify a subpoena that "subjects a person to undue burden." The 1991 Committee Note illustrates this provision: "[I]t might be unduly burdensome to compel an adversary to attend trial as a witness if the adversary is known to have no personal knowledge of matters in dispute, especially so if the adversary would be required to incur substantial travel burdens."

Several approaches to simplification have been considered. One would operate only on Rule 45 itself, dramatically shortening it by eliminating many of the detailed provisions and by governing many questions through simple cross-reference to Rules 26 through 37. This approach, although developed with care through several revisions, was found too risky. Many of the detailed provisions in Rule 45 were added to resolve specific problems that had arisen in practice and that had eluded consistent or satisfactory resolution. Eliminating those provisions would throw litigants and courts back into the same wells of uncertainty, requiring new attempts to emerge. And unadorned cross-reference to the rest of the discovery rules may prove confoundingly opaque. A different approach sought to transfer part or all of the discovery provisions in Rule 45 back to the discovery rules. The final version of this approach transferred the document-production provisions to Rule 34, adding a new subdivision to govern requests addressed to nonparties. The Rule 34 approach is consistent with carrying forward all of the provisions, and occasional obscurities, of present Rule 45. But it also invites revisions for such issues as the time to object or respond, the place of production, enforcement procedure, and the like. It can reduce the total volume of words in Rules 34 and 45 combined by a significant measure. But this approach also was put aside. Practicing lawyers at the miniconference thought the possible advantages would be outweighed by the problems of transition and the inevitable risk of unintended consequences.

The approach to simplification that has survived focuses on what the Subcommittee has come to identify as the "three-ring circus" aspect of Rule 45. Three problems have to be addressed: what is the reach of a subpoena, and what court issues it within those limits; where is performance required; and where what court enforces it. These problems can be simplified by providing that all subpoenas issue from the court where the action is pending. The places of performance provided in present Rule 45 can be carried forward unchanged, although the current draft does add a provision defining the place for producing electronically stored information. Designation of the court responsible for enforcing the subpoena also can remain unchanged, although it is expected that any recommended draft would integrate the transfer provisions described above.

Eliminating the formality that directs that the subpoena issue from the court in the place for performance raises again the questions about nationwide reach addressed with the proposed transfer provision. The Subcommittee believes these questions are not troubling, but continues its research.

Time to object: One of the questions the Subcommittee considered and put aside addresses the provision in Rule 45(c)(2)(B) that requires an objection to a document subpoena to be served "before the earlier of the time specified for compliance or 14 days after the subpoena is served." The question has been renewed, and will be considered further. The more obvious variations would be to set a minimum time allowed for compliance, although that might create separate problems; to allow an objection within the time set for compliance if that is longer than 14 days; or, at least for discovery subpoenas, to treat nonparties in the same way as parties are treated for Rule 34 document requests — the time to object or to respond by stating that production will occur is 30 days. Additional practical advice on these questions will be welcome.

Preservation and Spoliation

The 2006 amendments adding express provisions for discovering electronically stored information were adopted in fear that they might be made obsolete by evolving technology before they could even take effect, and in recognition that inevitably they must be revisited with continuing developments in the hard- and software of computer-based information. Four years after the effective date, the 2006 rules seem to be contributing to effective discovery practices, particularly when employed in a spirit of party cooperation and effective judicial management. That positive conclusion does not belie the need for continuing study and preparation for eventual general revision. For the moment, however, attention has focused on the problems raised by the duty to preserve information for discovery and trial and the penalty of spoliation sanctions for failing to preserve. Those duties existed, and exist still, in a world of paper documents. But destruction is the natural course of life for much electronically stored information. Programs are designed to discard unused

information. Dynamic data bases are irretrievably changed simply by using them. Temporary backup systems are scheduled for regular, often short-term recycling. Merely turning on a computer can write over information that was released from protection by a "delete" command but retained in storage subject to overwriting. Manifold other means of loss abound.

Uncertainties as to the duty to preserve and fear of spoliation sanctions have generated great concern in large organizations that process huge volumes of information. Some of these concerns are now reflected in the design of computer systems not only to meet the organization's operating needs but also to address the needs of litigation. However carefully the systems may be designed, human decisions still must be made to determine when a litigation-oriented duty to preserve arises and to respond by tailor-made preservation responses. Many voices have proclaimed that uncertainty leads to vastly expensive over-preservation. And occasionally a voice is heard observing that the same duties and uncertainties apply to individuals; the difference is that an ordinary personal injury victim, employment discrimination plaintiff, home mortgage foreclosure target, and others, have not the slightest idea of their potential obligations.

Of the many excellent panel presentations at the Duke Conference last May, the panel on preservation and spoliation was the only one to present a consensus recommendation. Although many details went beyond possible consensus, the panel presented a chart of the elements that might be incorporated in a preservation rule. They urged that adoption of a directing and protecting preservation and spoliation sanctions rule is the most important task the rules committees can undertake. Recognizing that the duty to preserve often arises before litigation is actually filed, and understanding the doubts whether a general rule of practice and procedure for the federal courts can properly address conduct before an action is filed in a federal court, they urged that the urgency of the need commands bold action. Their suggestion of elements for a rule is attached.

Additional information is needed. Andrea Kuperman, Judge Rosenthal's rules clerk, has researched the case law on preservation obligations in all the federal circuits. The law is consistent on some issues, particularly the abstract definition of the circumstances that raise a duty to preserve. It is inconsistent on other issues, particularly the degrees of culpability and prejudice appropriate to calibrating spoliation sanctions. Katherine David, rules clerk locum tenens, has worked on an outline of other laws that impose preservation requirements. Emery Lee has begun a project to determine the actual incidence of spoliation litigation and sanctions. The results are still preliminary, but strongly suggest that spoliation issues are actually litigated in only a tiny fraction of all federal actions, while sanctions are still rarer. The slides prepared for his presentation to the Advisory Committee in November are attached. Earlier FJC work done to support the Duke Conference suggests that spoliation issues arise rather more frequently, perhaps in 2% to 3% of all federal actions, but without often leading to motions and dispositions. Many other organizations are pursuing empirical work that should shed further light, not only on experience in litigation but on the all-important questions of pre-litigation behavior. It will be very difficult to separate out overall information preservation costs incurred by large organizations from the marginal costs incurred in redesigning information systems to anticipate the general needs of litigation and in implementing preservation programs when circumstances trigger a specific duty to preserve. But sophisticated efforts are under way, and there is reason to hope for valuable insights.

The Subcommittee has begun work on preservation and spoliation issues. It is not clear whether it will be possible to develop rules provisions that will be of any real use. Nor is it entirely clear whether there is authority to adopt a good rule if — as seems highly likely — a rule will be useful only if it addresses the duty to preserve before any action has been filed. The question of authority, however, may depend on the nature of the rules that are developed. As difficult as these questions are, the importance of the problems justifies intense effort. Reports abound that large organizations are terrified by litigation preservation obligations. The fear of case-altering sanctions is said to induce disproportionately extensive and expensive preservation efforts. Lawyers agree that fear of sanctions drives behavior, but may add that good behavior is much encouraged by reminding

clients that a good case can be destroyed by preservation missteps. Without knowing whether any rules can be crafted that will warrant a recommendation for publication, the effort will be made.

Faced with these difficulties, the most that can be done now is to sketch the most obvious issues that might be addressed. Many of the issues can be gathered in three main groups: what triggers an obligation to preserve? What is the scope of the obligation once it arises? And what sanctions are appropriate for what types of failure to preserve information that must be preserved?

The federal decisions are unanimous on one point. A duty to preserve information for litigation can arise before an action is filed. The general test is that the duty arises when there is a reasonable expectation of litigation, or probable litigation. One challenge will be to determine whether a rule could be any more specific than this general test. The best reason to address this issue may be as part of provisions on sanctions. Most particularly, it may be possible to frame expanded "safe harbor" provisions that, among other considerations, take account of an organization's overall compliance strategies. Good-faith implementation of a reasonably designed compliance program could be an important element in the sanctions calculus.

Identification of the circumstances that trigger a duty to preserve is closely tied to the scope of the ensuing preservation. The difficulties encountered by a large organization are noted below. But it is important also to remember the challenges that face individual litigants. One example suffices. A personal-injury victim may exchange e-mail messages, text messages, and social-network-site postings with a variety of friends and acquaintances about the events giving rise to the injury, the nature of the injuries, the progress of recovery, and so on. The thought of litigation may have been present during all of these exchanges. The thought of an obligation to preserve may not have occurred. One question is whether it is feasible or desirable to adopt rules that distinguish between more and less sophisticated parties, or at least between large-scale complex litigation and more routine actions.

The scope of the duty to preserve presents the most difficult questions during the period before an action is filed. After filing, ample tools exist for agreeing on preservation reasonably proportional to the needs of the action. The most direct provision appears in Rule 26(f)(2), directing the parties to "discuss any issues about preserving discoverable information." Additional provisions appear in addressing scheduling orders, Rule 16(b)(3)(B)(iii), pretrial conferences, Rule 16(c)(2), and protective orders, Rule 26(c). At this stage, the most important element may well be reasonable cooperation of the parties, encouraged by hands-on case management. Many participants in the Duke Conference repeatedly emphasized the importance of these elements, while lamenting that they are not always encountered.

Before an action is actually filed, the first uncertainty as to the scope of preservation arises from indefiniteness of the subject of whatever action — if any — is eventually filed. Suppose an automobile manufacturer receives a complaint that one of its automobiles left the road, rolled over, and caused injuries. What aspects of design, manufacture, distribution, marketing, and post-sale behavior might it reasonably expect to be involved? Whatever complaints may be made about the guidance provided by notice pleading once an action is filed, this sort of "notice" may be singularly unhelpful. And as an actual filing becomes more imminent, it may be that more precise information about the nature of the claims becomes available. Does the scope of the duty to preserve shift and perhaps expand?

A more general question would attempt to tie the scope of preservation duties to the scope of discovery. It is natural to begin by invoking the broad scope of discovery defined in Rule 26(b)(1), including the discovery relevant to the subject matter of the action that may be ordered for good cause. But the burdens of preservation may suggest that account also should be taken of the proportionality concerns reflected in Rule 26(b)(2). A narrow example would ask whether there is a duty to preserve electronically stored information that is not reasonably accessible because of

undue burden or cost, Rule 26(b)(2)(B). The more general question asks whether a party can safely rely on its own interpretation of the cost-benefit calculus mandated by rule 26(b)(2)(C)(iii).

Whatever the subject of the information that should be preserved, what sources should be investigated? Discussions often are framed in terms of identifying "key custodians," those people whose files and computer systems are most likely to contain relevant information. Pleas have been made for a rule that sets a specific number of key custodians that need be identified and directed to preserve, but the variety of circumstances weakens that hope dramatically.

Once the subject and sources are identified, how far back in time should the preservation obligation extend? The design of just one component of the automobile involved in an accident, such as the braking system, may have evolved over a long series of gradual changes. And for how long must the information be preserved — is it enough to make a guess as to the limitations periods that would govern the claims, as affected by the substantive theories and the choice of law as affected by the choice of court?

Sanctions for failing to preserve, whenever the duty arose and whatever its scope, are affected by the clarity of the duty, the intent and degree of care exercised, and the consequences for litigation by parties whose discovery and trial evidence have been thwarted. This interdependence is, perhaps paradoxically, the source of suggestions that perhaps the most promising prospect for adopting useful rules is to focus on sanctions. Defining the circumstances that warrant sanctions defines the duty to preserve by backward implication, and focuses directly on the fears that are so often expressed about preservation obligations.

The first step in thinking about sanctions is to remember the need for care in defining what is a "sanction." A failure to preserve may be met, for example, by an order extending the time for discovery. Or the order may award the costs incurred by the requesting party in attempting to reconstruct the lost information from other sources. Are these orders sanctions? Or are they simply remedies that should be available no matter how innocent the loss?

The next step is to address the central issues identified in the cases — the degree of fault in failing to preserve, and the extent of the prejudice caused to other parties. This is the area in which the cases show dramatic differences, primarily in determining what sanctions are appropriately imposed for what degrees of culpability.

The first step, identifying the degree of prejudice, is inevitably frustrating. Measuring the importance of information that is unknowable because it is unavailable is chancy. One indication may be the degree of fault — intentional destruction supports a relatively sturdy inference that the information was not only unfavorable but also important. But measuring the degree of care may be affected by obvious importance, even in the face of innocent intent. Suppose the automobile was owned by the driver, who allowed it to be compacted as junk. It cannot be known whether examination of the wreck would have provided valuable information as to the cause of the accident. But the need to preserve the opportunity to examine should be apparent. Sanctions might be measured accordingly — and distinctions drawn between the owner and a passenger.

The degree of fault may be approached almost separately, apart from the degree of prejudice. Intentional destruction may deserve severe sanctions. The most severe are "case terminating" by dismissal or default. Some form of spoliation instruction, either stating a presumption or permitting an inference of relevance and importance, seems less severe, but many lawyers view the effect as close to conclusive. There may be some uncertainty in drawing inferences of intent in some cases, but once intent is found severe sanctions seem warranted. There is little disagreement on that score.

Disagreement about sanctions arises at the next step. Suppose a party failed to exercise reasonable care in preservation? Or failed to exercise the level of care that a normally careless person would exercise — was grossly negligent? And what sort of conduct counts in these assessments — some case law finds that failure to initiate a prompt litigation hold is, without more, gross

negligence. Whether conduct is grossly negligent or only negligent, what sanctions are appropriate? Should that depend on the perhaps uncertain estimate of the degree of prejudice?

Sanctions could be addressed through Rule 37(e), and perhaps other rules. For example, a rule could provide that reasonable preservation conduct does not warrant sanctions even if discoverable information was lost, and that intentional destruction or failure to preserve does warrant sanctions. To be safe, it might also recognize the ambiguity of sanction decisions in the intermediate zones of negligence and serious negligence. A rule expressed in these terms would not directly establish rules of conduct for pre-filing preservation. It might be, however, that it would provide an important degree of comfort to those litigants who are sophisticated enough to worry about preservation obligations. Uniform federal standards might influence state-court standards, enhancing the benefits.

These questions will not soon become the subject of recommended rules. But progress toward determining whether to recommend new rule provisions, and what they might be, will be advanced by any suggestions that can be provided.

Rule 26(c)

The protective-order provisions of Rule 26(c) have been considered at periodic intervals since the conclusion of a years-long effort in the mid-1990s that included two rounds of public comment and concluded with a decision that no revisions were needed. Current research and reconsideration have led to a similar conclusion. The case law is remarkably uniform across the circuits, and seems to express proper rules on all of the subjects that have come up for consideration. It would be possible to express these rules more directly in the text of Rule 26(c). But the possible advantages are offset by the risk of unintended consequences, both in adopting new rule text and in the changes in rule text that might be made as a proposal passes through all stages of the Enabling Act process, concluding with action or inaction by Congress. Although continuing practice will be carefully monitored to ensure that practice is not veering toward excessive — or inadequate — protection, no proposals are anticipated in the near future.

Pleading

Beginning with the *Twombly* decision in 2007, and spurred further by the *Iqbal* decision in 2009, pleading standards have been moved from a continuing but inactive status on the agenda to active consideration. Active consideration does not imply a plan for imminent rules proposals. To the contrary, it is better to wait patiently while lower courts work through the ways in which pleading practice should be adjusted to meet the concerns expressed by the Supreme Court. Filtering through the fine sieve of thousands of pleading decisions may well produce better results than could be achieved by attempting to formulate and express revised standards in rule language. Absent some external shock, the Advisory Committee prefers to examine developing practice carefully for some time to come. If experience shows the value of new rules, the revisions will be better supported than any that could be achieved by immediately starting the process with specific proposals.

One sign that appellate courts will contribute to refining pleading standards at a steady pace is provided by revised Second Circuit Local Rule 31.2(b), taking effect on December 15, 2010. This rule provides an expedited appeals calendar for appeals from "threshold dismissals," including — among others — an order dismissing a complaint solely for failure to state a claim upon which relief can be granted. The appellant's brief is due 35 days from notification the case has been placed on the expedited calendar, the appellee's brief is due within 35 days after that, and a reply brief may be submitted within 14 days after that. It seems likely that expedited decision will often follow expedited briefing, expanding the lessons to be contributed to any effort to revise the rules.

The most important question is whether the preference for vigilant delay is well founded.

Two major bodies of work support the ongoing survey of developing practice. Andrea Kuperman continues to update her extensive review of evolving case law, focusing primarily on the

courts of appeals. The Federal Judicial Center is well along with a rigorous empirical evaluation of experience with Rule 12(b)(6) motions to dismiss for failure to state a claim. The project is designed to measure the frequency of motions to dismiss in periods immediately before the Twombly decision and shortly after the Iqbal decision. The rate of granting the motions is included, as well as the frequency of granting leave to amend, actual amendments, and — when the information is available — the fate of the amended pleadings. The work is painstaking, but will provide invaluable information when it is completed. It should be particularly useful in separating orders that dismiss an entire action on the pleadings from orders that dismiss only parts of an action. Dismissal of only some claims — or even some parties — leaves room to restore the parts that have been dismissed if further proceedings on the parts that remain support a sufficient complaint.

Whatever the outcome of the FJC project and other empirical projects, the critics of the Twombly and Iqbal decisions are not likely to be satisfied. Measuring the impact on actions actually filed does not reveal whether other potential and worthy actions were not filed for fear of dismissal on the pleadings. Nor, if there is any increase in the rate of dismissals, will the data speak to the value-laden questions whether the dismissed plaintiffs should have had access to discovery to garner information needed to plead what may be valid claims.

Champions of elevated pleading thresholds can frame similar challenges. If the data show that motions to dismiss are made more often and that a higher proportion of the motions are granted, that may be seen as only a beginning. It can be urged that too many actions still slip through into discovery, imposing unwarranted costs. Serious proposals have been made that at least as articulated, the Twombly and Iqbal decisions do not raise the threshold high enough.

The central question is not one of pleading etiquette alone. The intense debate focuses on how much information a plaintiff must have to be entitled to invoke a court's assistance. The only reflection on this question in the present rules appears in Rule 11(b)(3): the signature on a pleading certifies that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." Is this the right standard? How far can administration of this standard, or a revised standard, account for categories of cases in which defendants typically control access to critical information — cases often characterized by "information asymmetry"? Can the appropriate standard for initiating (or defending) litigation be better expressed in the rules that focus more directly on pleading standards, Rules 8 and 9?

Deliberations of these questions are reflected in several sketches created to illustrate some of the most obvious alternatives. A memorandum describing the sketches is attached.

Looking first to Rule 8(a)(2), the sketches recognize that all choices should remain under consideration. The range of possibilities is broad. At one end, a rule could be devised to express the literal meaning that never was given to the "no set of facts" dictum in *Conley v. Gibson*. At the other end, rules could be devised to require greater — even far greater — fact detail than seems to be required by the Twombly and Iqbal opinions or by the legions of cases interpreting them. Choosing among these alternatives, if a choice must be made, will affect the fundamental role of private adversary litigation in protecting individual rights and in enforcing public values that public enforcers may lack the resources to enforce fully. Expressing the choice in a revised Rule 8(a)(2) will be difficult, and inevitably would be followed by a period of renewed uncertainty.

An alternative to modifying the general standard expressed in Rule 8(a)(2) might be to expand the categories of substantive claims that are subject to specific pleading requirements. Most of the focus is on adding new categories of claims to Rule 9(b), which directs that "a party must state with particularity the circumstances constituting fraud or mistake." Prominent candidates include cases involving official immunity or conspiracy, the subjects of the Iqbal and Twombly decisions. The possibility of requiring "heightened pleading" in this fashion has been considered intermittently since the *Leatherman* decision rejected heightened pleading in 1993. The possibility remains under

consideration, but has encountered at two least two concerns. One concern is that singling out categories of claims by substantive theories strains the limits of a process that is not to abridge, enlarge, or modify substantive rights. The other concern is that it will be difficult to determine which substantive claims might be listed, and whether a single level of particularity is appropriate to each. The list, moreover, could grow long.

A contrary approach also might be considered, identifying categories of substantive claims that are favored by pleading standards less rigorous than ordinary standards. This approach is subject to the same difficulties as attend attempts to single out specific categories for heightened pleading obligations. It may be subject to additional objections. It has not yet received serious consideration.

A still different approach to particularized pleading might be to develop a rule depending on case-specific judicial control. The particularized statement procedure of Rule 12(e) could be expanded beyond its present narrow limits to become a tool that allows a judge to direct pleading in sufficient detail to enable effective case management. This approach was studied a few years ago and put aside for fear that ill-founded motions would become a routine practice. It may deserve further consideration.

Other approaches focus more directly on one of the animating concerns underlying the *Twombly* and *Iqbal* decisions, the integration of pleading with discovery. The Court was clearly concerned that lax pleading standards may enable plaintiffs to inflict disproportionate discovery burdens in pursuing unfounded claims. This concern must be weighed against the prospect that well-founded claims may rest on facts known only to the defendant. It may be possible to devise rules that support tightly focused discovery designed to support a relatively detailed complaint without imposing severe burdens on the intended defendant. Many variations are possible. Some states provide for discovery to aid in framing a complaint before an action is filed. This possibility was considered and rejected twice before the *Twombly* and *Iqbal* decisions, but may deserve renewed consideration. Or a plaintiff might be allowed to file an initial complaint that identifies facts it is unable to plead without discovery — access to discovery as to those facts might be available as a matter of right, or only with court permission. Or "pleading discovery" might be deferred until there is a motion to dismiss; discovery could be integrated with the motion either by directing the movant to specify what facts need to be pleaded in greater detail or by leaving it to the plaintiff to respond by listing facts it wants to discover in aid of an amended complaint. Yet other possibilities might be devised.

Pleading: Legislative Proposals

Twombly-Iqbal Bills: A year has passed since the last report that bills have been introduced in Congress to supersede the pleading decisions in the *Twombly* and *Iqbal* cases. Revisions and new bills have been introduced since then. The central features of the bills are similar. In one way or another, the purpose is to restore pleading practice to what it was on May 20, 2007, the day before the *Twombly* decision. And the role of the Enabling Act process is expressly recognized by providing that the reestablished pleading practice will terminate upon adoption of new pleading standards through the Enabling Act. The Rules Committees' response embraces the recognition of the Enabling Act process, but also urges that legislation appears unnecessary and very risky. The lower courts are working their way toward an understanding of what the *Twombly* and *Iqbal* decisions mean; there is little sign of problems that might warrant rushing to respond by means faster than the designedly deliberate pace of the Enabling Act. And the courts' progress toward the next thoughtful step would be disrupted by the doubts and uncertainties that must inevitably follow any available legislative formulation.

Other Pleading Bills: Other bills address pleading standards or closely related procedures in specific kinds of cases. Two recent bills are attached.

The first, S. 3728, 111th Cong. 2d Sess., amends the design-protection statute, 17 U.S.C. § 1301 et seq., primarily to establish protection for fashion designs. Section 2(g) amends § 1321 by

adding a new subsection (e) requiring a claimant in an action for infringement to "plead with particularity facts establishing" design protection, infringement, and availability of the design "in such location or locations, in such a manner, and for such duration that it can be reasonably inferred from the totality of the surrounding facts and circumstances that the defendant saw or otherwise had knowledge of the protected design." The court is directed to consider the totality of the circumstances in considering whether a claim for infringement has been adequately pleaded.

The second bill, S._____, is inspired by the "anti-SLAPP" statutes adopted in several states. "Strategic Lawsuits Against Public Participation" are the target. The fear is that litigation is brought to stifle the exercise of free-speech rights. Section 4 is broad and brief enough to be quoted in full: "Any act in furtherance of the constitutional right of petition or free speech shall be entitled to the procedural protections provided in this Act." Section 5 provides a "special motion to dismiss." The movant must make "a prima facie showing that the claim at issue arises from an act in furtherance of the constitutional right of petition or free speech." If the movant carries this burden, the responding party has the burden "to demonstrate that the claim is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment." Filing the special motion stays discovery proceedings unless the court orders specified discovery. The court is directed to provide an expedited hearing, and to issue a ruling as soon as practicable. Perhaps in an effort to clarify the "prima facie showing" language, this subsection provides that "[t]he parties may submit the pleadings and affidavits stating the facts upon which the liability or defense is based." Dismissal "shall be with prejudice." The movant has a right of immediate appeal from an order denying the special motion in whole or in part. (There is also a special motion to quash discovery, request, or subpoena for "personally identifying information" sought in connection with an action arising from an act in furtherance of the constitutional right of petition or free speech. One apparent application would be to deny discovery aimed at identifying an anonymous blogger.)

The pleading procedure provided by the fashion-design statute is substance-specific, as part of the original legislation creating the new right. The anti-SLAPP bill presents somewhat different questions, but again the tie between new procedures and substance is unmistakable. The special motion to dismiss includes elements that are familiar from other legislation, such as the automatic stay of discovery. Provisions that establish docket priorities and direct prompt decision are familiar from past bills and not a few laws. But there also are manifest ambiguities that would be ironed out — if at all — only after a considerable period of uncertainty. What is a "prima facie showing"? Just what blend of pleading and summary-judgment practice is contemplated? What is the standard of decision — the court is directed to explain the reasons for granting or denying the motion, but that does not explain what reasons are appropriate. Does the provision that dismissal shall be with prejudice imply that leave to amend cannot be granted?

These issues are similar to those presented by many bills. Most of them do not become law. Some do. The Rules Committees are often asked for comment. It may be useful for the Rules Committees to develop a general response that describes and gives examples of the problems created by legislatively imposed pleading standards, both in Rules 8 and 12 and in specific categories of cases, such as anti-SLAPP suits. It may not be satisfying to say continually that Congress should not enact rules of procedure, that it should honor its longstanding deferral to the resources and wisdom of the Enabling Act process. And even if Congress defers, what are the Rules Committees to do if they are uncertain whether specific substantive rights deserve or require departures from the "general rules of practice and procedure" contemplated by § 2072(a)? For that matter, how well will this approach work, for how long, if the Committees regularly conclude that it is better to stick with the general transsubstantive rules? And at what point in the legislative process should the Committees ask for deference — so they can consider every procedure proposed in every bill, no matter how uncertain the prospects for enactment? Only after enactment? At some indeterminate point in between?

An alternative to considering each proposal in the Enabling Act process would be to attempt to provide help to Congress in drafting the best possible legislation. But how is that to be done? It

would hardly do to pursue the complete process through consideration by the Supreme Court and submission to Congress, not as adopted rule but as legislative advice. At what point would the process be cut short? Is it even feasible, or desirable, to ask a full Advisory Committee to make recommendations? If not — and "not" seems the better answer — how is the advice to be framed? What are the means of offering or pressing it? How can the Committees be protected against political efforts to gain support by proclaiming Committee approval for provisions the Committees would never approve?

Clear-cut answers to these and a host of related questions may not be possible. But it may be useful to engage in an open discussion of these problems, now and into the future. Any guidance that can be provided, however general, will be useful.

Duke Conference Subcommittee

A Subcommittee chaired by Judge John Koeltl has been formed to carry through the impetus for further work developed at the Duke Conference last May. The welter of ideas generated at the Conference suggest four major paths to follow. Many ideas fit easily within present rules, and focus on the need for fostering best practices by education of the bench and bar, development of manuals and pocket guides, and similar efforts. Other ideas may provide a foundation for pilot projects. Others may provide a focus for further empirical research. And still others may provide an impetus for revising the Civil Rules.

The Subcommittee began its deliberations by asking whether the time has come to abandon the basic framework established when the Civil Rules were first created in 1938. Participants at the conference provided general and rather strong support for carrying forward the basic elements of notice pleading, searching discovery, and summary judgment. It is always important to ask whether general acceptance rests on familiarity, on the need to believe that what we do as lawyers and judges is worth doing and is done well, and on the difficulty of suggesting worthy alternatives. But it does not seem the time has yet come for the next major revolution in civil procedure.

The Federal Judicial Center is hard at work on education programs for judges. It is revising pocket guides to reflect developing best practices. And it has had a hand, in cooperation with the Committee on Court Administration and Case Management, in developing the newly released Second Edition of the Civil Litigation Management Manual. The Manual is maintained in an on-line version, and it may prove possible to incorporate some of the good ideas generated at the Duke Conference into the Manual on an ongoing basis. Initiatives are under way to determine how best to offer ideas to CACM for its consideration.

Pilot projects can be useful in testing new procedures before adopting them for general use. It is important that a pilot project be planned in ways that facilitate careful empirical evaluation of the results, so that evaluation does not depend on the general impressions of those most immediately involved. Here too the Federal Judicial Center can provide great support in aid of rigorous design and evaluation. The quest for possible subjects is under way.

Empirical projects are being pursued by independent groups. Several are sponsored by the Institute for the Advancement of the American Legal System, whose earlier projects provided support for many ideas presented at the Duke Conference. Their work in examining state-court procedures and comparing them with federal procedures has been an important source of information and will continue to provide important information. The RAND Institute and other groups also have contributed valuable information and will continue to do so. Still other groups, some of them bar groups, also will help.

The number of rules proposals is broad. Many of them focus on pleading and discovery. Some of the discovery questions are being considered by the Discovery Subcommittee chaired by Judge David Campbell, as described above. Others will be studied in the future. Many other proposals addressed pleading standards, presenting questions that in part are independent of

discovery practice but also are in part interdependent with the role of discovery. The modes of pursuing pleading questions and the variety of discovery questions will likely involve subcommittees, most obviously the Discovery Subcommittee and the Duke Conference Subcommittee.

Many other rules are touched by suggestions made at the Conference, beginning with Rule 1. A "menu" of the more workable suggestions is attached to illustrate the range of possibilities, including many of the more specific discovery proposals. The list is not complete; worthy candidates for inclusion will be welcome.

Pattern Discovery

One of the ideas presented at the Duke Conference was that discovery practices would benefit from development of standard interrogatories and document requests that are available for routine and presumptively proper use in specific categories of litigation. A team formed by the National Employment Lawyers Association, including strong representation of both plaintiff and defense lawyers, has begun work on drafting models for individual employment claims. If models acceptable to both sides can be developed — and they have high expectations of success — they may provide an occasion for a pilot project. Other means of implementation may be found. And success may well spur similar efforts by lawyers who specialize in other areas of litigation. It is not clear whether or when this work will lead to revisions in the Civil Rules, but the Advisory Committee is paying close attention to the work.

Civil-Appellate Rules Issues

The Appellate Rules Committee and the Civil Rules Committee have formed a joint subcommittee to study questions that overlap these sets of rules. Two proposals are under consideration.

The first proposal involves Appellate Rule 4, addressing possible uncertainties as to appeal time when a court enters an order granting a post-judgment motion that has suspended appeal time but the order contemplates action that may not be completed before appeal time has run out if the order granting the motion restarts appeal time. It may be that an eventual recommendation as to Rule 4 will suggest parallel revisions of Civil Rule 58. These questions may be resolved soon.

The other proposal addresses the question of "manufactured finality." A party may wish to appeal an important ruling that does not lead to a final judgment and that does not lead to appealability under such familiar means as a partial final judgment under Civil Rule 54(b) or interlocutory appeal by permission under 28 U.S.C. § 1292(b). It seems to be generally accepted that an appealable final judgment can be "manufactured" by securing dismissal with prejudice of every claim presented by every party to the action. Most courts refuse to allow a would-be appellant to manufacture finality by dismissing other claims without prejudice. The middle ground that remains under study involves the question of "conditional prejudice." Should a party be able to establish appealability by dismissing all claims with prejudice, so that affirmance will conclusively end the action, but on terms that allow the dismissed claims to be revived on reversal of the ruling that spurred the appeal? This question is intriguing and difficult. It is being actively pursued.

TAB
5-C

Pleading-Discovery Approaches

This memorandum provides an incomplete and preliminary overview of some of the approaches that might be considered in reacting to the continuing expressions of concern about the development of pleading practices in response to the Twombly and Iqbal decisions. Incomplete both for want of imagination and for fear of unseemly proliferation. Preliminary because practice continues to evolve, and more importantly because even the first rigorous efforts to evaluate practice are still under way.

The Federal Judicial Center remains hard at work on its project. Tentative evaluations may be available in time for the November meeting, but final analysis will require more time.

Andrea Kuperman's massive survey of lower-court decisions, focusing primarily on the courts of appeals, continues to grow. Many will find it — at least in large part — reassuring. But not even scores of appellate opinions can provide clear evidence of what is happening in law offices and in the district courts. It is easily possible that in the end the cases will seem to have done as good a job of integrating the Supreme Court's pronouncements into working practice as could be done by amending any Civil Rule. But it is important to continue to focus on these questions so as to be ready to propose rule amendments if the need appears.

PLEADING: CLAIM

An obvious place to begin is with Rule 8(a)(2). Even if some need appears to propose rule amendments, Rule 8 must be approached carefully. No matter what words might be chosen, the message would be ambiguous in ways that a Committee Note could not cure. Even if it were announced that the new language was intended to enshrine exactly the meaning of the Twombly and Iqbal opinions as elaborated by the lower courts, disputes would remain as to just what that meaning might be. If instead the purpose were to redirect in some way the paths taken by the lower courts, greater uncertainty — and likely some real confusion — would follow. The manifest vulnerabilities of almost any Rule 8 proposal would support cogent protests by any group that feared adverse effects, and there might be many such groups. Still, Rule 8 must hold a high place on any agenda for addressing pleading standards.

Restore What Never Was: Some of the reactions to the Twombly decision seem to ask for restoration of the dictum in *Conley v. Gibson* that a complaint may be dismissed for failure to state claim only if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” The plea for restoration in turn seems to ask that these words be taken literally. Most courts, at least, did not take the literal meaning. But Rule 8 might be redrafted in an attempt to restore a standard that never was: “a short and plain statement giving notice of the claim.”

Restore What Was: A more realistic approach might attempt to restore pleading practice as it was on May 20, 2007, the day before the Twombly decision. This approach is more realistic only if it is accepted that there can be no precise definition of the practice in place at the time Twombly was decided. The idea would be to “go back to doing whatever it was you were doing, and continue to develop pleading practice without regard to anything in the Twombly or Iqbal decisions that might point you in a different direction.” Even then it is difficult to believe that lower courts, recalling the Twombly and Iqbal opinions, could in fact recreate whatever they would have done had those cases never gone to the Supreme Court. But the attempt could be made. Two simple drafting possibilities are:

Republish present Rule 8(a)(2), with a Committee Note disavowing plausibility, context, judicial experience, and common sense. Explaining that it was messy, all those things counted, but it doesn't do to say so.

“a short and plain statement of the claim, showing that the pleader is may be entitled to relief.”

“Notice plus”: The ABA Section of Litigation paper, “Civil Procedure in the 21st Century” proposes this as a mid-ground between their perception of Twombly-Iqbal standards and the notice pleading practice that prevailed on May 20, 2007:

“A complaint shall allege facts based on knowledge or on information and belief that, along with reasonable inferences from those factual allegations, taken as true, set forth the elements necessary to sustain recovery.”

Twombly-Iqbal in Rule Speak: Another approach would reflect basic agreement that the time had come to raise pleading standards to some extent — that the Court was right to make the attempt, and also right to express the new approach in capacious language leaving the way open for lower-court improvisation on the way to hammering out new standards through a common-law process. Although the opinions are written as opinions, not in an attempt to mimic rule language, some of the key words could be absorbed into Rule 8. These are among the possibilities:

“a short and plain statement showing a plausible claim for relief.”

“a short and plain statement of facts and context showing the pleader is entitled to relief”

“a statement of non-conclusional facts, direct or inferential, showing the pleader is entitled to relief”

“a short and plain nonconclusory statement showing the pleader is entitled to relief”

“a short and plain statement of a transaction or occurrence showing * * *.”¹

“a short and plain statement of acts or events showing * * *”

“a short and plain nonconclusory statement of grounds sufficient to provide notice of (a) the claim and (b) the relief sought”²

“a short and plain statement, made with particularity, of all material facts known to the pleading party that support the claim creating a reasonable inference that the pleader is plausibly entitled to relief,” defining “material fact” as “one that is necessary to the claim and without which it could not be supported.”³

¹ An early draft of Rule 8(a)(2) required a “statement of the acts and occurrences upon which the plaintiff bases his claim or claims for relief.” Without “showing that the pleader is entitled to relief,” this would be quite relaxed.

² This is the proposal of the New York State Bar Association Special Committee on Pleading Standards in Federal Litigation; see letter of July 13, 2010, Samuel F. Abernethy, Esq., to Judge Mark R. Kravitz. Bringing “notice” into rule text is evocative, perhaps too evocative — it may imply a more general relaxation of pleading standards than actually existed before Twombly and Iqbal.

³ This is the proposal of Lawyers for Civil Justice, DRI, the Federation of Defense & Corporate Counsel, and the International Association of Defense Counsel.

More than Twombly-Iqbal: “The party that bears the burden of proof with respect to any claim or affirmative defense must plead with particularity all material facts that are known to that party that support that claim or affirmative defense and each remedy sought, including any known monetary damages. A material fact is one that is essential to the claim or defense and without which it could not be supported. As to facts that are pleaded on information and belief, the pleading party must set forth in detail the basis for the information and belief.”⁴

Variations on Facts: Although the label is likely to prove controversial, Rule 8 could be pushed in the direction of something that could be called “fact pleading.” The second of the three variations shown here approaches Code pleading; the first and third are designed to make it easier to disclaim any intent to revive indeterminate distinctions between “fact,” “ultimate fact,” and “evidence.”

“a short and plain statement of facts showing that the pleader is entitled to relief.”

“a short and plain statement of facts constituting the claim”

“a short and plain statement of the claim, including facts showing that the pleader is entitled to relief”

Elements Pleading: Occasionally it is suggested that a pleader should be required to plead the elements of the claim: “a short and plain statement of the elements of the claim.”

Pre-filing pleading: Alan Morrison’s Duke Conference paper proposes an approach to situations in which the defendant has control of fact information required to state a claim. Iqbal as would-be plaintiff, for example, could submit a letter or draft complaint to the defendant alleging that they ordered the challenged practices. If the defendants do not supply information in their control showing how the policies were established, they would be barred from challenging the complaint for failure to allege specifically facts connecting them to the orders. A mere blanket denial would not do, because there is likely to be a paper or e-mail trail. But if the defendants present evidence countering the claims, then the plaintiff must present “some basis * * * to avoid dismissal, rather like a mini summary judgment.”

Reverse Pleading Burdens: Professor Miller suggests that if the plaintiff alleges the inaccessibility of critical information and “articulates a reasonable basis for the information’s existence and the defendant’s control over it,” “it might be reasonable to reverse the pleading burden and require the defendant to make the needed material available to the plaintiff along with whatever explanation it thinks appropriate.” The court could allow further discovery. 60 Duke L.J. 1 at 110.

Appellate Review: Professor Miller asks whether the “subjective appraisals” that inhere in “judicial experience and common sense” will lead to diluted appellate review. Need the rules be amended to ensure continued de novo review of dismissals for failure to state a claim?

RULE 9(B)

From time to time thought has been given to adopting “heightened pleading” standards for specific kinds of claims, expanding the Rule 9(b) requirement that “fraud or mistake” be stated “with particularity.” (Rule 9(c) also requires that a party denying that “a condition precedent has occurred or been performed * * * must do so with particularity.”) One reason to hesitate has been concern that picking out specific claims might seem to imply substantive choices. Requiring greater fact information to allow a claim past the Rule 12(b)(6) threshold into the heavenly fields of discovery

⁴ This is ACTL/IAALS Pilot Project Rule 2.1.

might seem to reflect a judgment about the relative desirability of enforcing that kind of claim. Although this concern must be taken seriously, there are powerful arguments that the purpose is as much procedural as the purpose of original Rule 9(b). (The original procedural purpose of Rule 9(b) may not be entirely clear, but any obscurity may bolster the argument that some blend of real-world procedural concern with substantive concerns is proper under the Enabling Act.)

Greater difficulty might arise in deciding just which claims to embrace in heightened pleading standards. Broad informal consultation might establish a tentative list. Actual choices for development might be supported by miniconferences or a general request for public comment before any specific rule or set of rules is proposed.

Implementation by drafting would be influenced by the direction taken. If the revised rule simply expanded the categories of claims that must be stated “with particularity,” the main challenge would be finding a way to identify the claims. Would it suffice to list “antitrust” claims, or should a more specific list of statutes be adopted? Some categories might be relatively easy to specify — civil RICO would be an example. But what of “environmental” claims — statutory, common-law (e.g., nuisance), or perhaps administrative? “Institutional reform”? Even the familiar example of claims likely to encounter an immunity defense could prove tricky; qualified or absolute official immunity to federal-law claims might be clear enough, but what of parallel immunities to state-law claims? Sovereign immunity, domestic or foreign? More exotic immunities?

Finally, a quite different Rule 9(b) question may be found in the Iqbal opinion. Rule 9(b) provides that “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” The Court rejected the argument that this provision makes adequate a bare allegation of “intent.” “[G]enerally’ is a relative term. * * * It does not give * * * license to evade the less rigid — though still operative — strictures of Rule 8.” The task of pleading greater supporting detail for an allegation of intent is daunting, and is encountered frequently. Discrimination claims provide a common example. This question may deserve close attention.

REVERSE RULE 9(B): SPECIAL RELAXED PLEADING RULES

Rather than expand the categories of claims that must be pleaded with particularity, whether in Rule 9(b) or in new rules, a reverse approach might be taken. Pleading standards could be raised for most claims, retaining relaxed notice pleading for specified claims. Individual discrimination (at least in employment: what of “class-of-one” equal-protection claims?), intent to discriminate, “civil rights,” claims based on facts inferred from circumstance, and others could be listed. One problem will be finding categories that can be kept within meaningful bounds — “civil rights” is a pretty loose concept. It would be difficult to draft in terms that focus directly on information asymmetry, on “favored” claims, or “real people” claims. It would be possible to adopt an express pro se rule — but that might tempt lawyers to suggest a limited advising role at the beginning, to be followed by explicit representation later on. And past discussions have generally concluded that it is better to hold pro se parties to some semblance of the general pleading rules, perhaps with help from local forms and often with help from sympathetic judges.

OFFICIAL IMMUNITY

The recurring problem of official immunity pleading is difficult to address by focusing on the complaint. Perhaps the most feasible approach would be to require pleading with particularity whenever an individual-capacity claim is brought against a “public officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on a public employer’s behalf.”

An alternative approach would call for a reply, in the practice made famous by the Fifth Circuit. The rule might be framed as a Rule 9(b)(2), or as a Rule 7(a)(8), or something still different. The major difficulty with the Rule 7(a)(8) approach might be that plaintiffs would often overlook it. But it would be easy to draft if the reply is optional: “(8) a reply to an official immunity defense.” If the reply is mandatory, there would be a cross-reference in Rule 7(a)(7), and a new Rule 9(b)(2): “(2) *Reply to [Official] Immunity Defense*. If a defense of [official] immunity is made [to a claim], the claimant must respond by a reply that states with particularity the circumstances that defeat immunity.” “Official” is placed in brackets to indicate one of the drafting dilemmas — what sorts of immunity should be covered? Should the rule be framed explicitly in terms of an individual-capacity claim against a public officer or employee, etc.? “Official” itself would lead to such questions as Eleventh Amendment “immunity,” claims against foreign sovereigns, and various immunities under state law. Without “official,” all sorts of questions would arise: workers’ compensation immunity? Charitable immunity if it exists anywhere? Family immunities, if they exist anywhere? Even such things as immunity from attachment or the like?

RULE 12(D)

Rule 12(d) might serve better than Rule 56 as the location for a rule allowing a party opposing a claim to make what in effect is a preliminary motion for summary judgment. The motion would rely on matters outside the pleadings to challenge facts poorly pleaded, facts omitted, and perhaps facts “well pleaded.” The pleader would have an opportunity for discovery similar to that provided by Rule 56 before responding to the motion. A rough draft:

(d) Preliminary Summary Judgment. A party [opposing a claim] may combine a motion under Rule 12(b)(6) or 12(c) with a preliminary motion for summary judgment under Rule 56. The movant may show there is no genuine dispute as to material facts that are required to support the claim or that defeat the claim. The court must allow the nonmovant a reasonable opportunity for discovery on the facts asserted by the movant before ruling on the motion.

(It would be possible to carry forward some version of present Rule 12(d), which gives the court the choice between treating the pleadings motion as one for summary judgment by undertaking to consider the “matters outside the pleading.” Or discretion to refuse to allow a premature Rule 56 motion could be expressed directly. The advantage of treating it as a Rule 56 motion is to pick up the full Rule 56 procedure from the beginning. Less elliptical drafting also may be desirable, but might encounter the reluctance to refer directly to the Rule 56 moving burdens that shaped new Rule 56.)

RULE 12(E)

We might consider reviving earlier Rule 12(e) proposals. The rule could focus on directing a more definite statement for the purpose of facilitating pretrial management, including initially limited discovery to support more precise pleading. Professor Miller describes this as a “Motion to Particularize a Claim for Relief,” allowing a plaintiff to anticipate a motion to dismiss by moving for “plausibility discovery.” 60 *Duke L.J.* 1, 112-113.

RULE 12(B): TIED TO DISCOVERY

A great part of the dismay engendered by the Twombly and Iqbal decisions arises from concerns about “information asymmetry.” The concerns tend to focus on categories of claims — product liability, some forms of employment discrimination, and so on. Plaintiffs, it is argued, typically lack access to information controlled by defendants and necessary to satisfy higher pleading standards. The need to support adequate pleading by discovery to elicit information controlled by

the defendant might be built into Rule 12. The provision could focus only on 12(b)(6). Discovery may be needed to respond to other 12(b) motions, but it may be better to leave that to present practice. Discovery also may be needed to respond to a motion under Rule 12(c) or (f). The idea would be to allow — probably not require — the court to permit discovery for the purpose of improving the pleading before ruling on the motion.

Placing this approach in Rule 12 will prove awkward. The enumeration of Rule 12(b) motions as (1) through (7) is more a list than a sequence of paragraphs. The best approach might be to add a new subdivision after Rule 12(f) — subdivisions (g) and (h) do not have the same sacred identification as 12(b)(6) or even 12(c), and subdivision (i) was created in 2007 by the Style Project. So a new Rule 12(g) might look something like this: “(g) *Discovery in Aid of Pleading*. Before ruling on a motion under Rule 12(b),(c), or (f), the court may allow discovery [under Rules 26 through 37] to aid [more detailed pleading][amendment of the pleading].”

RULE 27.1 DISCOVERY IN AID OF PLEADING

Discovery in aid of pleading might be fit into Rule 26, but Rule 26 is already too long. It could be fit into present Rule 27, but perpetuation of testimony is a distinct problem and drafting would likely be more complicated. A new Rule 27.1 may be the simplest approach.

The first question will be whether to provide for discovery before filing an action. There are several state-law models. In addition, the ACTL/IAALS Pilot Project Rules include a detailed provision, set out in the Appendix, that provides a helpful illustration. The most persuasive reason to move in this direction may be the plaintiff who does not know the identity of the defendant — which officer in a large police department shot the plaintiff’s decedent? Which company made the exploding dynamite cap? Discovery could be limited by requiring showings that the plaintiff has exhausted reasonable alternatives for finding the information, the plaintiff can state all elements of a claim apart from identifying the defendant, and there are good reasons to impose the burdens of discovery on the person asked for the information. This possibility has been twice suggested during earlier rounds of discovery work, and was quickly rejected each time. It may not prove any more popular now, but reconsideration may be appropriate if elevated pleading requirements create a risk that valid claims will frequently be defeated for lack of access to information controlled by the defendant. (The ABA 21st Century Proposals would allow pre-complaint discovery only to determine the identify of the defendant.)

An alternative is to provide discovery in aid of framing a claim after an action is commenced by filing a complaint. Discovery might be made available by allowing the plaintiff to file an incomplete complaint, specifically designating items on which discovery will be sought to support better-informed pleading. The defendant could respond by providing information without waiting for discovery, by agreeing to discovery, or by opposing discovery for stated reasons. Or discovery might be provided only after a motion challenging the claim (or defense). This approach comes closest to something that might be fit into Rule 26, perhaps with a cross-reference in Rule 12: the point would be to emphasize the authority to limit discovery to specific matters needed to support “better” pleading.

The ABA proposals include: “The court may permit focused post-complaint discovery in those limited cases where, because of the nature of the case, the plaintiff does not have access to sufficient information to satisfy the” pleading standard.” Examples are antitrust cases and discrimination cases where intent is an element of the claim.

INITIAL DISCLOSURE

Pleading and discovery may overlap in a different way. Early disclosure of facts might be accomplished immediately after the papers that are called “pleadings,” by obligations of unilateral disclosure. This approach might address the concerns that underlie the Twombly and Iqbal decisions by providing a secure foundation for guiding or eliminating discovery, while reducing fears that evaluation of “plausibility” in light of “judicial experience and common sense” will devolve into poorly supported speculation about the “facts” that have been pleaded and the inferences that can be drawn from them.

PLEADING IN RESPONSE

It will be difficult to improve on the drafting of Rule 8(b) to meet the frequent complaints that defendants deny too much, too casually. Rule 8(b)(2) requires that a denial fairly respond to the substance of the allegation. (3) requires that a party that does not intend to deny all allegations “must either specifically deny designated allegations or generally deny all except those specifically admitted.” (4) requires that a party admit the part of an allegation that is true and deny the rest. If a true fact is pleaded with characterizations, adverbs, or adjectives, the answer must admit the fact even while denying the characterization, adverbs, or adjectives. Rule 11 enforces this duty; indeed the safe-harbor provision, 11(c)(2), specifically includes defenses and denials. The safe harbor may make it difficult to make much use of Rule 11 in this context, but amendment of Rule 11 may not be a satisfactory approach.

Defendants defend their practices by arguing that plaintiffs cause the problem by overpleading and by violating the separate-statement requirement of Rule 10(b). In effect, they assert it is unfair to impose on defendants the work of picking through the mess made by sloppy pleading. Again, it will be difficult to draft a satisfactory rule to promote clearer pleading. Anything done to perpetuate the Twombly and Iqbal decisions may actually make this problem more difficult.

So: Is there anything reasonable to be done? One comment in the ABA survey suggested whatever Rule 8(a) requires, good fact pleading could be useful as a request for admissions, and laments that defendants do not respond as Rule 8(b) requires. That sounds good. But is it possible to get there?

PLEADING AFFIRMATIVE DEFENSES

Plaintiffs complain that defendants thoughtlessly add long lists of affirmative defenses to their answers, providing nothing more than the words that identify the theory. Something more could be required.

Two examples from present Rule 8(c) illustrate the range of pleading possibilities. A defendant may plead comparative negligence — is there any reason to require greater detail than we require of a plaintiff pleading negligence? Or a defendant may plead laches — should it not have to plead something to support the elements of unreasonable delay and actual prejudice in defending?

The range of desirable pleading practices may not be as broad as it is for complaints, but it is not much narrower. If anything is to be done, it may be better to avoid any attempt to provide specific pleading directions for specific affirmative defenses. There are far too many affirmative defenses, most of them not listed in Rule 8(c).

One illustration can invoke all of the possible variations in [re]drafting Rule 8(a)(2): “In responding to a pleading, a party must affirmatively state in short and plain terms any avoidance or affirmative defense * * *.”

APPENDIX

ACTL/IAALS Pilot Project Rule

3.1 On motion by a proposed plaintiff with notice to the proposed defendant and opportunity to be heard, a proposed plaintiff may obtain precomplaint discovery upon the court's determination, after hearing, that: (a) the moving party cannot prepare a legally sufficient complaint in the absence of the information sought by discovery; (b) the moving party has probable cause to believe that the information sought by discovery will enable preparation of a legally sufficient complaint; (c) the moving party has probable cause to believe that the information sought is in the possession of the person or entity from which it is sought; (d) the proposed discovery is narrowly tailored to minimize expense and inconvenience; and (e) the moving party's need for the discovery outweighs the burden and expense on other persons and entities.

3.1 The court may grant a motion for precomplaint discovery directed to a nonparty pursuant to PPR

3.2 Advance notice to the nonparty is not required, but the nonparty's ability to file a motion to quash shall be preserved.

3.3 If the court grants a motion for precomplaint discovery, the court may impose limitations and conditions, including provisions for the allocation of costs and attorneys' fees, on the scope and other terms of discovery.

Pleading Standard
Section 5(b) of H.R. 4364

111TH CONGRESS
1ST SESSION

H. R. 4364

To protect first amendment rights of petition and free speech by preventing States and the United States from allowing meritless lawsuits arising from acts in furtherance of those rights, commonly called “SLAPPs”, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 16, 2009

Mr. COHEN introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To protect first amendment rights of petition and free speech by preventing States and the United States from allowing meritless lawsuits arising from acts in furtherance of those rights, commonly called “SLAPPs”, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Citizen Participation
5 Act of 2009”.

6 **SEC. 2. FINDINGS.**

7 The Congress finds and declares that—

1 (1) the framers of our Constitution, recognizing
2 participation in government and freedom of speech
3 as inalienable rights essential to the survival of de-
4 mocracy, secured their protection through the First
5 Amendment to the United States Constitution;

6 (2) the communications, information, opinions,
7 reports, testimony, claims and arguments that indi-
8 viduals, organizations and businesses provide to the
9 government are essential to wise government deci-
10 sions and public policy, the public health, safety, and
11 welfare, effective law enforcement, the efficient oper-
12 ation of government programs, the credibility and
13 trust afforded government, and the continuation of
14 America's representative democracy;

15 (3) civil lawsuits and counterclaims, often
16 claiming millions of dollars in damages, have been
17 and are being filed against thousands of individuals,
18 organizations, and businesses based upon their valid
19 exercise of the rights to petition or free speech, in-
20 cluding seeking relief, influencing action, informing,
21 communicating, and otherwise participating with
22 government, the electorate, or in matters of public
23 interest;

24 (4) such lawsuits, called Strategic Lawsuits
25 Against Public Participation or SLAPPs, are often

1 ultimately dismissed as groundless or unconstitu-
2 tional, but not before the defendants are put to
3 great expense, harassment, and interruption of their
4 productive activities;

5 (5) it is in the public interest for individuals,
6 organizations and businesses to participate in mat-
7 ters of public concern and provide information to
8 public entities and other citizens on public issues
9 that affect them without fear of reprisal through
10 abuse of the judicial process;

11 (6) the threat of financial liability, litigation
12 costs, destruction of one's business, loss of one's
13 home, and other personal losses from groundless
14 lawsuits seriously impacts government, interstate
15 commerce, and individual rights by significantly
16 chilling public participation in government, public
17 issues, and in voluntary service;

18 (7) SLAPPs are an abuse of the judicial proc-
19 ess that waste judicial resources and clog the al-
20 ready over-burdened court dockets;

21 (8) while some courts and State legislatures
22 have recognized and discouraged SLAPPs, protec-
23 tion against SLAPPs has not been uniform or com-
24 prehensive; and

1 (9) some SLAPP victims are deprived of the re-
2 lief to which they are entitled because the current
3 bankruptcy law allows for the discharge of fees,
4 costs and damages awarded against a party for
5 maintaining a SLAPP.

6 **SEC. 3. IMMUNITY FOR PETITION ACTIVITY.**

7 (a) IMMUNITY.—Any act of petitioning the govern-
8 ment made without knowledge of falsity or reckless dis-
9 regard of falsity shall be immune from civil liability.

10 (b) BURDEN AND STANDARD OF PROOF.—A plaintiff
11 must prove knowledge of falsity or reckless disregard of
12 falsity by clear and convincing evidence.

13 **SEC. 4. PROTECTION FOR PETITION AND SPEECH ACTIV-**
14 **ITY.**

15 Any act in furtherance of the constitutional right of
16 petition or free speech shall be entitled to the procedural
17 protections provided in this Act.

18 **SEC. 5. SPECIAL MOTION TO DISMISS.**

19 (a) IN GENERAL.—A party may file a special motion
20 to dismiss any claim arising from an act or alleged act
21 in furtherance of the constitutional right of petition or free
22 speech within 45 days after service of the claim if the
23 claim was filed in Federal court or, if the claim was re-
24 moved to Federal court pursuant to section 6 of this Act,
25 within 15 days after removal.

1 (b) BURDENS OF THE PARTIES.—A party filing a
2 special motion to dismiss under this Act has the initial
3 burden of making a prima facie showing that the claim
4 at issue arises from an act in furtherance of the constitu-
5 tional right of petition or free speech. If the moving party
6 meets this burden, the burden shifts to the responding
7 party to demonstrate that the claim is both legally suffi-
8 cient and supported by a sufficient prima facie showing
9 of facts to sustain a favorable judgment.

10 (c) STAY OF DISCOVERY.—Upon the filing of a spe-
11 cial motion to dismiss, discovery proceedings in the action
12 shall be stayed until notice of entry of an order disposing
13 of the motion, except that the court, on noticed motion
14 and for good cause shown, may order that specified dis-
15 covery be conducted.

16 (d) EXPEDITED HEARING.—The court shall hold an
17 expedited hearing on the special motion to dismiss, and
18 issue a ruling as soon as practicable after the hearing. The
19 parties may submit the pleadings and affidavits stating
20 the facts upon which the liability or defense is based. The
21 court shall explain the reasons for its grant or denial of
22 the motion in a statement for the record. If the special
23 motion to dismiss is granted, dismissal shall be with preju-
24 dice.

1 (e) IMMEDIATE APPEAL.—The defendant shall have
2 a right of immediate appeal from a district court order
3 denying a special motion to dismiss in whole or in part.

4 **SEC. 6. FEDERAL REMOVAL JURISDICTION.**

5 (a) IN GENERAL.—A civil action commenced in a
6 State court against any person who asserts as a defense
7 the immunity provided for in section 3 of this Act, or as-
8 serts that the action arises from an act in furtherance of
9 the constitutional right of petition or free speech, may be
10 removed by the defendant to the district court of the
11 United States for the district and division embracing the
12 place wherein it is pending.

13 (b) REMAND OF REMAINING CLAIMS.—A court exer-
14 cising jurisdiction under this section shall remand any
15 claims against which the special motion to dismiss has
16 been denied, as well as any remaining claims against
17 which a special motion to dismiss was not brought, to the
18 State court from which it was removed.

19 (c) TIMING.—A court exercising jurisdiction under
20 this section shall remand an action if a special motion to
21 dismiss is not filed within 15 days after removal.

22 **SEC. 7. SPECIAL MOTION TO QUASH.**

23 (a) IN GENERAL.—A person whose personally identi-
24 fying information is sought in connection with an action
25 pending in Federal court arising from an act in further-

1 ance of the constitutional right of petition or free speech
2 may make a special motion to quash the discovery order,
3 request or subpoena.

4 (b) BURDENS OF THE PARTIES.—The person bring-
5 ing a special motion to quash under this section must
6 make a prima facie showing that the underlying claim
7 arises from an act in furtherance of the constitutional
8 right of petition or free speech. If this burden is met, the
9 burden shifts to the plaintiff in the underlying action to
10 demonstrate that the underlying claim is both legally suffi-
11 cient and supported by a sufficient prima facie showing
12 of facts to sustain a favorable judgment. This standard
13 shall apply only to a special motion to quash brought
14 under this section.

15 **SEC. 8. FEES AND COSTS.**

16 (a) ATTORNEY'S FEES.—The court shall award a
17 moving party who prevails on a special motion to dismiss
18 or quash the costs of litigation, including a reasonable at-
19 torney's fee.

20 (b) FRIVOLOUS MOTIONS AND REMOVAL.—If the
21 court finds that a special motion to dismiss, special motion
22 to quash, or the removal of a claim under this Act is frivo-
23 lous or is solely intended to cause unnecessary delay, the
24 court may award a reasonable attorney's fees and costs
25 to the responding party.

1 (c) GOVERNMENT ENTITIES.—A government entity
2 may not recover fees pursuant to this section.

3 **SEC. 9. BANKRUPTCY NONDISCHARGABILITY OF FEES AND**
4 **COSTS.**

5 Fees or costs awarded against a party by a court for
6 the prosecution of any claim finally dismissed pursuant
7 to this Act, or any subpoena or discovery order quashed
8 pursuant to this Act, or any claim finally dismissed pursu-
9 ant to a State anti-SLAPP law, shall not be dischargeable
10 in bankruptcy under section 1328 or section 523 of title
11 11, United States Code.

12 **SEC. 10. EXEMPTIONS.**

13 (a) PUBLIC ENFORCEMENT.—Sections 4 through 8
14 of this Act shall not be available in any action brought
15 solely on behalf of the public or solely to enforce an impor-
16 tant right affecting the public interest.

17 (b) COMMERCIAL SPEECH.—This Act shall not apply
18 to any claim for relief brought against a person primarily
19 engaged in the business of selling or leasing goods or serv-
20 ices, if the statement or conduct from which the claim
21 arises is a representation of fact made for the purpose of
22 promoting, securing or completing sales or leases of, or
23 commercial transactions in, the person's goods or services,
24 and the intended audience is an actual or potential buyer
25 or customer.

1 (c) "SLAPP-BACK" SUITS.—This Act shall not be
2 available to dismiss any action or claim arising from a
3 claim that has been dismissed pursuant to this Act or to
4 a State anti-SLAPP law.

5 **SEC. 11. DEFINITIONS.**

6 In this Act:

7 (1) ACT IN FURTHERANCE OF THE RIGHT OF
8 FREE SPEECH.—The term "act in furtherance of the
9 right of free speech" includes but is not limited to—

10 (A) any written or oral statement made in
11 connection with an issue under consideration or
12 review by a legislative, executive, or judicial
13 body, or any other official proceeding author-
14 ized by law;

15 (B) any written or oral statement made in
16 a place open to the public or a public forum in
17 connection with an issue of public interest; or

18 (C) any other conduct in furtherance of
19 the exercise of the constitutional right of peti-
20 tion or the constitutional right of free speech in
21 connection with an issue of public interest.

22 (2) ACT OF PETITIONING THE GOVERNMENT.—
23 The term "act of petitioning the government" in-
24 cludes but is not limited to any written or oral state-
25 ment—

1 (A) made or submitted before a legislative,
2 executive, or judicial body, or any other official
3 proceeding authorized by law; or

4 (B) any written or oral statement encour-
5 aging a statement before a legislative, executive,
6 or judicial body, or any other official proceeding
7 authorized by law.

8 (3) CLAIM.—The term “claim” includes any
9 civil lawsuit, claim, complaint, cause of action, cross-
10 claim, counterclaim, or other judicial pleading or fil-
11 ing requesting relief.

12 (4) GOVERNMENT ENTITY.—The term “govern-
13 ment entity” includes the United States, a branch,
14 department, agency, State, or subdivision of a State,
15 or other public authority.

16 (5) ISSUE OF PUBLIC INTEREST.—The term
17 “issue of public interest” includes an issue related to
18 health or safety; environmental, economic or commu-
19 nity well-being; the government; a public figure; or
20 a good, product or service in the market place.
21 “Issue of public interest” shall not be construed to
22 include private interests, such as statements directed
23 primarily toward protecting the speaker’s business
24 interests rather than toward commenting on or shar-

1 ing information about a matter of public signifi-
2 cance.

3 (6) PERSONALLY IDENTIFYING INFORMA-
4 TION.—The term “personally identifying informa-
5 tion” means first and last name or last name only;
6 home or other physical address including temporary
7 shelter or housing and including a street name or
8 ZIP Code; full date of birth; email address or other
9 online contact information; telephone number; social
10 security number; Internet protocol address or host
11 name that identifies an individual, or any other in-
12 formation that would serve to identify an individual.

13 (7) STATE.—The term “State” means each of
14 the several States, the District of Columbia, and any
15 commonwealth, territory, or possession of the United
16 States.

17 **SEC. 12. CONSTRUCTION.**

18 This Act shall be liberally construed to effectuate its
19 findings and purposes fully, except that the exemptions
20 shall be construed narrowly.

21 **SEC. 13. RELATIONSHIP TO OTHER LAWS.**

22 Nothing in this Act shall preempt or supersede any
23 Federal, State, constitutional, case or common law that
24 provides the equivalent or greater protection for persons

1 engaging in activities in furtherance of the rights of peti-
2 tion or free speech.

3 **SEC. 14. SEVERABILITY.**

4 If any provision of this Act or the application of any
5 provision of this Act to any person or circumstance is held
6 invalid, the application of such provision to other persons
7 or circumstances and the remainder of this Act shall not
8 be affected thereby.

9 **SEC. 15. EFFECTIVE DATE.**

10 This Act shall become effective upon enactment.

○

Pleading Standard
Section 2(g)(2) of H.R. 3728, adding 17 U.S.C. § 1321(e)

111TH CONGRESS
2D SESSION

S. 3728

To amend title 17, United States Code, to extend protection to fashion design, and for other purposes.

IN THE SENATE OF THE UNITED STATES

AUGUST 5, 2010

Mr. SCHUMER (for himself, Mr. HATCH, Mr. GRAHAM, Mr. WHITEHOUSE, Mrs. GILLIBRAND, Ms. SNOWE, Mrs. BOXER, Mrs. FEINSTEIN, Mr. CARDIN, Mr. KOHL, and Mrs. HUTCHISON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 17, United States Code, to extend protection to fashion design, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Innovative Design Pro-
5 tection and Piracy Prevention Act”.

6 **SEC. 2. AMENDMENTS TO TITLE 17, UNITED STATES CODE.**

7 (a) **DESIGNS PROTECTED.**—Section 1301 of title 17,
8 United States Code, is amended—

1 (1) in subsection (a), by adding at the end the
2 following:

3 “(4) FASHION DESIGN.—A fashion design is
4 subject to protection under this chapter.”;

5 (2) in subsection (b)—

6 (A) in paragraph (2), by inserting “, or an
7 article of apparel,” after “plug or mold”; and

8 (B) by adding at the end the following:

9 “(7) A ‘fashion design’—

10 “(A) is the appearance as a whole of an
11 article of apparel, including its ornamentation;
12 and

13 “(B) includes original elements of the arti-
14 cle of apparel or the original arrangement or
15 placement of original or non-original elements
16 as incorporated in the overall appearance of the
17 article of apparel that—

18 “(i) are the result of a designer’s own
19 creative endeavor; and

20 “(ii) provide a unique, distinguishable,
21 non-trivial and non-utilitarian variation
22 over prior designs for similar types of arti-
23 cles.

1 “(8) The term ‘design’ includes fashion design,
2 except to the extent expressly limited to the design
3 of a vessel.

4 “(9) The term ‘apparel’ means—

5 “(A) an article of men’s, women’s, or chil-
6 dren’s clothing, including undergarments, outer-
7 wear, gloves, footwear, and headgear;

8 “(B) handbags, purses, wallets, duffel
9 bags, suitcases, tote bags, and belts; and

10 “(C) eyeglass frames.

11 “(10) In the case of a fashion design, the term
12 ‘substantially identical’ means an article of apparel
13 which is so similar in appearance as to be likely to
14 be mistaken for the protected design, and contains
15 only those differences in construction or design
16 which are merely trivial.”; and

17 (3) by adding at the end the following:

18 “(c) RULE OF CONSTRUCTION.—In the case of a
19 fashion design under this chapter, those differences or
20 variations which are considered non-trivial for the pur-
21 poses of establishing that a design is subject to protection
22 under subsection (b)(7) shall be considered non-trivial for
23 the purposes of establishing that a defendant’s design is
24 not substantially identical under subsection (b)(10) and
25 section 1309(e).”.

1 (b) DESIGNS NOT SUBJECT TO PROTECTION.—Sec-
2 tion 1302(5) of title 17, United States Code, is amend-
3 ed—

4 (1) by striking “(5)” and inserting “(5)(A) in
5 the case of a design of a vessel hull,”;

6 (2) by striking the period and inserting “; or”;
7 and

8 (3) by adding at the end the following:

9 “(B) in the case of a fashion design, embodied
10 in a useful article that was made public by the de-
11 signer or owner in the United States or a foreign
12 country before the date of enactment of this chapter
13 or more than 3 years before the date upon which
14 protection of the design is asserted under this chap-
15 ter.”.

16 (c) REVISIONS, ADAPTATIONS, AND REARRANGE-
17 MENTS.—Section 1303 of title 17, United States Code, is
18 amended by adding at the end the following: “The pres-
19 ence or absence of a particular color or colors or of a pic-
20 torial or graphic work imprinted on fabric shall not be con-
21 sidered in determining the protection of a fashion design
22 under section 1301 or 1302 or in determining infringe-
23 ment under section 1309.”.

24 (d) TERM OF PROTECTION.—Section 1305(a) of title
25 17, United States Code, is amended to read as follows:

1 “(a) IN GENERAL.—Subject to subsection (b), the
2 protection provided under this chapter—

3 “(1) for a design of a vessel hull, shall continue
4 for a term of 10 years beginning on the date of the
5 commencement of protection under section 1304;
6 and

7 “(2) for a fashion design, shall continue for a
8 term of 3 years beginning on the date of the com-
9 mencement of protection under section 1304.”.

10 (e) INFRINGEMENT.—Section 1309 of title 17,
11 United States Code, is amended—

12 (1) in subsection (c)—

13 (A) by inserting “offer for sale, advertise,”
14 after “sell,”; and

15 (B) by inserting “either actual or reason-
16 ably inferred from the totality of the cir-
17 cumstances,” after “created without knowl-
18 edge”;

19 (2) by amending subsection (e) to read as fol-
20 lows:

21 “(e) INFRINGING ARTICLE DEFINED.—

22 “(1) IN GENERAL.—As used in this section, an
23 ‘infringing article’ is any article the design of which
24 has been copied from a design protected under this
25 chapter, or from an image thereof, without the con-

1 sent of the owner of the protected design. An in-
 2 fringing article is not an illustration or picture of a
 3 protected design in an advertisement, book, peri-
 4 odical, newspaper, photograph, broadcast, motion
 5 picture, or similar medium.

6 “(2) VESSEL HULL DESIGN.—In the case of a
 7 design of a vessel hull, a design shall not be deemed
 8 to have been copied from a protected design if it is
 9 original and not substantially similar in appearance
 10 to a protected design.

11 “(3) FASHION DESIGN.—In the case of a fash-
 12 ion design, a design shall not be deemed to have
 13 been copied from a protected design if that design—

14 “(A) is not substantially identical in overall
 15 visual appearance to and as to the original ele-
 16 ments of a protected design; or

17 “(B) is the result of independent cre-
 18 ation.”; and

19 (3) by adding at the end the following:

20 “(h) SECONDARY LIABILITY.—The doctrines of sec-
 21 ondary infringement or secondary liability that are applied
 22 in actions under chapter 5 of this title apply to the same
 23 extent to actions under this chapter. Any person who is
 24 liable under either such doctrine under this chapter is sub-
 25 ject to all the remedies provided under this chapter, in-

1 cluding those attributable to any underlying or resulting
2 infringement.

3 “(i) HOME SEWING EXCEPTION.—

4 “(1) IN GENERAL.—It is not an infringement of
5 the exclusive rights of a design owner for a person
6 to produce a single copy of a protected design for
7 personal use or for the use of an immediate family
8 member, if that copy is not offered for sale or use
9 in trade during the period of protection.

10 “(2) RULE OF CONSTRUCTION.—Nothing in
11 this subsection shall be construed to permit the pub-
12 lication or distribution of instructions or patterns for
13 the copying of a protected design.”.

14 (f) APPLICATION FOR REGISTRATION.—Section
15 1310(a) of title 17, United States Code, is amended—

16 (1) by striking “Protection under this chapter”
17 and inserting “In the case of a design of a vessel
18 hull, protection under this chapter”; and

19 (2) by adding “Registration shall not apply to
20 fashion designs.” after “first made public.”.

21 (g) REMEDY FOR INFRINGEMENT.—Section 1321 of
22 title 17, United States Code, is amended—

23 (1) by striking subsection (a) and inserting the
24 following:

25 “(a) IN GENERAL.—

1 “(1) VESSEL HULL.—In the case of a vessel
2 hull, the owner of a design is entitled, after issuance
3 of a certificate of registration of the design under
4 this chapter, to institute an action for any infringe-
5 ment of the design.

6 “(2) FASHION DESIGN.—In the case of a fash-
7 ion design, the owner of a design is entitled to insti-
8 tute an action for any infringement of the design
9 after the design is made public under the terms of
10 section 1310(b) of this chapter.”; and

11 (2) by adding at the end the following:

12 “(e) PLEADING REQUIREMENT FOR FASHION DE-
13 SIGNS.—

14 “(1) IN GENERAL.—In the case of a fashion de-
15 sign, a claimant in an action for infringement shall
16 plead with particularity facts establishing that—

17 “(A) the design of the claimant is pro-
18 tected under this chapter;

19 “(B) the design of the defendant infringes
20 upon the protected design as described under
21 section 1309(e); and

22 “(C) the protected design or an image
23 thereof was available in such location or loca-
24 tions, in such a manner, and for such duration
25 that it can be reasonably inferred from the to-

1 tality of the surrounding facts and cir-
2 cumstances that the defendant saw or otherwise
3 had knowledge of the protected design.

4 “(2) CONSIDERATIONS.—In considering wheth-
5 er a claim for infringement has been adequately
6 pleaded, the court shall consider the totality of the
7 circumstances.”.

8 (h) PENALTY FOR FALSE REPRESENTATION.—Sec-
9 tion 1327 of title 17, United States Code, is amended—

10 (1) by inserting “or for purposes of obtaining
11 recovery based on a claim of infringement under this
12 chapter” after “registration of a design under this
13 chapter”;

14 (2) by striking “\$500” and inserting “5,000”;
15 and

16 (3) by striking “\$1,000” and inserting
17 “\$10,000”.

18 (i) NONAPPLICABILITY OF ENFORCEMENT BY
19 TREASURY AND POSTAL SERVICE.—Section 1328 of title
20 17, United States Code, is amended—

21 (1) in subsection (a), in the first sentence, by
22 striking “The Secretary” and inserting “In the case
23 of designs of vessel hulls protected under this chap-
24 ter, the Secretary”;

1 (2) in subsection (b), in the first sentence, by
2 striking “Articles” and inserting “In the case of de-
3 signs of vessel hulls protected under this chapter, ar-
4 ticles”; and

5 (3) by adding at the end the following:

6 “(c) NONAPPLICABILITY.—This section shall not
7 apply to fashion designs protected under this chapter.”.

8 (j) COMMON LAW AND OTHER RIGHTS UNAF-
9 FECTED.—Section 1330 of title 17, United States Code,
10 is amended—

11 (1) in paragraph (1), by striking “or” after the
12 semicolon;

13 (2) in paragraph (2), by striking the period and
14 inserting “; or”; and

15 (3) by adding at the end the following:

16 “(3) any rights that may exist under provisions
17 of this title other than this chapter.”.

18 **SEC. 3. EFFECTIVE DATE.**

19 This Act and the amendments made by this Act shall
20 take effect on the date of enactment of this Act.

○

TAB
5-D

ELEMENTS OF A PRESERVATION RULE

Introductory Note: The E-Discovery Panel, composed of Judges Scheindlin and Facciola, and Messrs. Allman, Barkett, Garrison, Joseph and Willoughby, holds the consensus view that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure. All members of the Panel agree that such a rule should apply once an action has been commenced. (Panel members disagree as to whether such a rule can or should apply, along the lines of Rule 27, prior to the commencement of an action.)

The Panel members also agree that the rules in general, and a preservation rule in particular, should treat differently huge cases, with enormous discovery, and all others.

While not every member of the Panel concurs in every word that follows, the Panel members are in general agreement that it would behoove the Advisory Committee on Civil Rules to draft a preservation rule that takes into account the following elements.

1. **Trigger.** The rule should specify the point in time when the obligation to preserve information, including electronically stored information, accrues. Potential triggers:
 - a. A general trigger restating the common law (pending or reasonably foreseeable litigation) standard and/or
 - b. Specific triggers (which could appear in the text or Advisory Committee Note):
 - i. Written request or notice to preserve delivered to that person (perhaps in a prescribed form).
 - ii. Service on, or delivery to, that person of a
 - A. Complaint or other pleading,
 - B. Notice of claim,
 - C. Subpoena, CID or similar instrument.
 - iii. Actual notice of complaint or other pleading, or a notice of claim, asserting a claim against, or defense involving that person or an affiliate of that person.
 - iv. Statutory, regulatory, contractual duty to preserve.
 - v. Steps taken in anticipation of asserting or defending a potential claim (e.g., preparation of incident report, hiring expert, drafting/filing claim with regulator, drafting/sending prelitigation notice, drafting complaint, hiring counsel, destructive testing).
2. **Scope.** The rule should specify with as much precision as possible the scope of the duty to preserve, including, e.g.:

- a. Subject matter of the information to be preserved.
 - b. Relevant time frame.
 - c. That a person whose duty has been triggered must act reasonably in the circumstances.
 - d. Types of data or tangible things to be preserved.
 - e. Sources on which data are stored or found.
 - f. Specify the form in which the information should be preserved (*e.g.*, native).
 - g. Consider whether to impose presumptive limits on the types of data or sources that must be searched.
 - h. Consider whether to impose presumptive limits on the number of key custodians whose information must be preserved.
 - i. Consider whether the duty should be different for parties (or prospective parties) and non-parties.
3. **Duration.** The rule should specify how long the information or tangible things must be preserved, but should explicitly provide that the rule does not supersede any statute or regulation.
4. **Ongoing Duty.** The rule should specify whether the duty to preserve extends to information generated after the duty has accrued.
5. **Litigation Hold.** The rule should provide that if an organization whose duty has been triggered prepares and disseminates a litigation hold notice, that is evidence of due care on the part of the organization. If the rule requires issuance of a litigation hold, it should include an out like that in Rule 37(c)(1) excusing (for sanctions purposes) a failure that was substantially justified or is harmless.
6. **Work Product.** The rule should specify whether, or to what extent, actions taken in furtherance of the preservation duty are protected by work product (or privilege).
7. **Consequences/Procedures.** The rule should set forth the consequences of failing to fulfill the responsibilities it mandates, and the obligations of the complainant/failing party.
- a. Sanctions for noncompliance resulting in prejudice to the requesting party should be specified (*e.g.*, Fed.R.Civ.P. 37).
 - i. The rule should apply different sanctions depending on the state of mind of the offender. (The state of mind necessary to warrant each identified sanction should be specified.)

- ii. **Certain conduct that presumptively satisfies the requisite state of mind should be specified (*e.g.*, failure to issue a litigation hold = negligence or gross negligence)**
 - b. **A model jury instruction for adverse inference or other jury-specific sanctions should be drafted.**
 - c. **Compliance with the rule should insulate a responding party from sanctions for failure to preserve.**
 - d. **The complainant should be obliged to raise the failure with a judicial officer promptly after it has learned of the alleged spoliation and has assessed the prejudice it has suffered as a result.**
 - e. **Identify the elements that the complainant must specify, such as:**
 - i. **The information or tangible things lost.**
 - ii. **Its relevance (specifying the standard (*e.g.*, 401, 26(b)(1), admissibility, discoverability)).**
 - iii. **The prejudice suffered.**
 - f. **The rule should address burden of proof issues.**
8. **Judicial Determination. It should provide access to a judicial officer, following a meet and confer, to**
- a. **Resolve disputes**
 - b. **Apply Rule 26(c)/proportionality**
 - c. **Consider the potential for cost allocation**
 - d. **Impose sanctions (*e.g.*, of the sort provided for by Rule 37).**

Spoliation Motions November 2010

Presentation by
FJC Research Division
Emery G. Lee III
Advisory Committee on Civil Rules
Washington, D.C.



Research Design

- Text based search of CM/ECF
- Cases filed in 2007 or 2008
- 19 study districts
- Focus on motions for sanctions
- Total of 209 “true positives”



How often is spoliation raised?



Comparison to civil cases 2007-2008

Sanctions cases

- N= 209
- Disposition time, 649 days (mean), or about 1.8 years
- Time to motion, 513 days (mean)
- 16.5% trial

Civil cases

- N=131,992
- Disposition time, 253 days (mean), or about 0.7 years
- 0.6% trial



$$209 / 131,992 = 0.0015$$



$$209 / 131,992 = 0.0015$$
$$0.0015 * 100 = 0.15\%$$



$$\begin{aligned}209 / 131,992 &= 0.0015 \\0.0015 * 100 &= 0.15\% \\0.15\% * 10 &= 1.5\%\end{aligned}$$



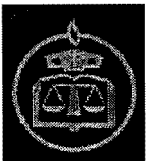
Frequency of spoliation motions compared to other motions

Type of motion (Source)	Frequency
Rule 12(b)(6) decided (FJC 2009)	11.0-13.2%
Rule 12 filed (IAALS 2008)	23.3%
Rule 12/MTD granted (AO 2010)	14% (?)
Rule 56 decided (FJC 2009)	25.1-27.7%
Rule 56 filed (FJC 2008)	17%
Rule 56 filed (IAALS 2008)	16.6%
Discovery motions filed (IAALS 2008)	26.7%
Motions to compel decided (FJC 2009)	13.4-15.9%
Motions for sanctions granted (FJC 2009)	2.3-2.2%
Motions for sanctions granted (IAALS 2008)	0.8%



IAALS Case Processing report (at 46):

“As a discrete category, discovery sanctions were sought rarely and granted even more rarely. The study recorded only 3.19 motions seeking discovery sanctions per 100 cases, with a high of 5.08 such motions per 100 cases in Western Wisconsin and a low of 0.49 such motions per 100 cases in Idaho. Slightly less than 26% of sanction motions were granted in all or part.”



FJC 2009 Closed-case report (p. 23)

“Did any of the following occur . . . One or more claims of spoliation of [ESI]?”

7.7% of plaintiff attorneys in ESI cases

5% of defendant attorneys in ESI cases



Frequency and importance

- No “hard” estimate of frequency
- No ability to account for trends
- FJC 2010: Disputes over ESI increase costs 10%, even after controlling for other costs (including stakes)
- Fear of sanctions may drive behavior, even if sanctions motions are relatively rare



Motions Findings Type of Evidence



Type of evidence

Type	N	%
Electronically stored information (ESI) only	83	40%
ESI plus another type	27	13%
<i>ESI plus ESI and other</i>	<i>110</i>	<i>53%</i>
Tangible	43	21%
Paper	38	18%
Could not determine	18	9%



Types of cases (all spoliation)

Nature of suit category	N	%
Torts	65	31%
Contracts (includes insurance)	62	30%
Civil rights	45	22%
Intellectual property	13	6%
Labor	9	4%
Other	15	7%



Types of cases (ESI cases)

Nature of suit category	N	%
Contracts (includes insurance)	40	36%
Civil rights	29	26%
Torts	15	14%
Intellectual property	12	11%
Labor	4	4%
Other	10	9%



Parties



Moving party

Moving party		N	%
Plaintiff		134	64%
Defendant		66	32%
Both sides		4	2%
Other		5	2%



Plaintiffs as moving parties

Plaintiff (by type)			N	%
Individual, including putative class representative	94	68%		
Business entity	43	31%		
Other (Municipality)	1	1%		
All	138	100%		



Plaintiffs as moving parties

Non-moving parties			N	%
Business entity		102	74%	
Governmental entity		29	21%	
Individual		5	4%	
Other (Private school)		2	1%	
All		138	100%	



Defendants as moving parties

Defendant by type			N	%
Business entity		62	89%	
Governmental entity		5	7%	
Other		3	4%	
All		70	100%	



Defendants as moving parties

Non-moving party			N	%
Individual, including putative class representative		39	56%	
Business entity		29	41%	
Other		2	3%	
All		70	100%	



Orders



Rulings on Motions (all)

Court action			N	%
Granted			27	18%
Denied			68	44%
Pending			12	8%
No action			46	30%
All			153	100%



Rulings on Motions (all)

Rulings only

Court action	N	%
Granted	27	28%
Denied	68	72%
All	95	100%



Rulings on Motions (ESI)

Court action			N	%
Granted		20	23%	
Denied		38	44%	
Pending		5	6%	
No action		24	28%	
All		87	100%	



Rulings on Motions (ESI) Rulings only

Court action	N	%
Granted	20	34%
Denied	38	66%
All	58	100%



Rulings on Motions (reported cases)

Court action	N	%
Granted	31	60%
Denied	21	40%
All	52	100%



Types of 'sanctions' (all)

Type	N	%
Adverse inference/instruction	14	44%
Precluded evidence/testimony	6	19%
Costs only (includes denial with costs)	6	19%
Reopening discovery	5	16%
Monetary only	2	6%
Strike part of answer	1	3%
Dismissal/default	1	3%



Types of 'sanctions' (ESI)

Type	N	%
Adverse inference/instruction	13	57%
Precluded evidence/testimony	3	13%
Costs only (includes denial with costs)	4	17%
Reopening discovery	4	17%
Monetary only	2	9%
Strike part of answer	1	4%



Types of 'sanctions' (reported cases)

Type	N	%
Adverse inference/instruction	14	45%
Precluded evidence/testimony	15	48%
Dismissal/default (includes permanent inj.)	7	23%
Civil contempt	1	3%



Not much to go on, but . . .

- Pre- or post-litigation spoliation sanctioned?
 - Mostly post (if you add in ‘both’)
 - Pre-litigation conduct only, about 1 in 4 sanctions cases
- Legal basis for imposing sanctions?
 - Often hard to tell
 - Inherent authority, Rule 37 raised about equally in sanctioned cases, often raised together, but “not clear” in many sanctions cases



TAB
5-E

SUBCOMMITTEE MENU: RULES PROPOSALS

INTRODUCTION

This memorandum compiles some of the suggestions made at the Duke Conference for amending the Civil Rules. Many of the suggestions addressed discovery and pleading. Most of those suggestions are omitted here. The Discovery Subcommittee is working on preservation and spoliation issues, and may take up other discovery issues. But some discovery issues are noted here because it may become useful for this Subcommittee to address them. Any allocation between the Discovery Subcommittee and this Subcommittee will turn on the overall volume of discovery issues taken on for prompt attention and on the severability of some issues from the ongoing work of the Discovery Subcommittee. Pleading issues are being addressed separately for the time being; this Subcommittee or some new Subcommittee may be asked to address them when the time for action comes close.

The mass of Conference materials is great. A few proposals have been omitted deliberately because they do not seem likely prospects for present consideration. Others may have been overlooked. Subcommittee members should add any proposal that seems to merit consideration, drawing not only from explicit Conference proposals but also from ideas inspired by the Conference.

Descriptions of the proposals are generally brief. The purpose is to identify topics that deserve prompt development, not to provide full-blown evaluation.

The proposals are organized roughly in the order of Rule number, recognizing that some proposals affect two or more Rules and that others do not fit well within any present rule.

Some proposals present issues that might be addressed by rules amendments, but also might be addressed by other means, often working within the framework of a present rule. These proposals are described separately, choosing those that seem plausible candidates for consideration in the rulemaking process.

I RULES PROPOSALS

The Duke Conference deliberately and successfully sought out participants representing the full spectrum of experience with, and perspectives on, contemporary practice under the Civil Rules. As hoped, they generated proposals that reflect the diversity of their experiences and perspectives. Conflicting proposals may indicate that present practice has it just about right, but must be evaluated to make that diagnosis. So too, the absence of conflict does not mean that a proposal is worthy of further consideration.

General

One ABA respondent thinks the Civil Rules “include too much detailed preparation and filing.”

Rule 1

Many participants drew support from the lofty goals of Rule 1 — the “just, speedy, and inexpensive determination of every action and proceeding.” Some of the discussion suggested, or at least implied, that Rule 1 might be revised to provide greater direction on better realizing these related aspirations.

The need to set reasonable time limits for processing an action, and for holding litigants to the time limits, might be expressed.

The need for proportionality, reasonably tailoring the level of litigation activity to the needs of each action, might be expressed in Rule 1, not merely in the discovery rules.

Lawyers, not only the courts, might be made responsible for working toward the Rule 1 goals.

Various arguments were made that tradeoffs must be made between the Rule 1 goals. Speedy and inexpensive determinations may in some sense reduce the total quality of justice produced by the system across all cases, but they are intrinsically important. This concern is in part another argument for expressing the need for proportionality. Essentially the same conclusion can be reached from an opposite direction: justice is not sacrificed but achieved by increasing speed and reducing expense in order to maintain a system that is reasonably available to determine disputes. Alan Morrison's paper observes: "The good news is that courts and parties rarely rely on Rule 1"; "to be accurate, Rule 1 should be recast to require the courts to provide a 'just determination of every action,' and to do so with 'appropriate speed and without undue expense' under the circumstances."

ACTL/IAALS pilot project rules would add these words to Rule 1: "just, timely, efficient, and cost-effective determination * * *." In addition, whether as part of Rule 1 or perhaps as a new Rule 1.1, the rules would direct the court and the parties to "assure that the process and the costs are proportionate to the amount in controversy and the complexity and importance of the issue. The factors to be considered by the court * * * include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation." The Center for Constitutional Litigation responds that "[m]andating cost/benefit analysis is neither desirable nor practical." The attempt in Rule 26(b)(2) to require proportionality in discovery "is difficult to apply, leads to inconsistent results, and has precluded discovery in meritorious cases." It should not be extended.

The most ambitious Rule 1 proposal is advanced in Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 *Denver U.L. Rev.* 287 (2010), presented as a conference paper. A brief summary would be misleading. Essentially he argues that Rule 1 reflects the values of 1938: procedure is separate from substance, it is instrumental, it works best when judges are free from any technical rules but can exercise discretion to proceed in ways that achieve the best result in each particular case. A different view is required today. "[T]he most sensible goal for procedure is distributional. * * * [A]n optimal error risk for a given case is that which results from distributing error risk optimally across different cases and litigants. * * * Adjudication has a public purpose," to enforce substantive law. "[O]utcome error should be measured in terms of how well litigation outcomes further these public goals, not in terms of how well they satisfy the preferences of parties to a suit." Different substantive rights invoke different levels of importance — "if the substantive law protects moral rights, the procedures offered to adjudicate lawsuits involving those rights should take account of their moral weight." There is more. Rethinking the purposes of procedure does not lead to specific rules proposals, but it could be a place to begin.

Rule 2: One Form of [Transsubstantive] Action

Skepticism about the attempt to squeeze all varieties of litigation into a single "transsubstantive" set of rules was expressed frequently. Much of the attention focused on pleading and discovery, but the questions are more general. Reform could be sought by different strategies. One would carry forward the general character of the rules, making special provision only for "complex" cases or categories of cases that in practice have proved to fare poorly in the general rules. Another would be to create a "simplified" system that reduces the opportunities for extensive litigation. Pleading and discovery are likely to hold center stage in exploring these matters. But the

purpose of the inquiry may be sufficiently separate from the base-line pleading and discovery questions to justify independent consideration.

The IAALS “areas of convergence” paper, p. 8, suggests adhering to transsubstantivity in general, but with flexibility to create different sets of rules for certain types of cases. It found “some support” for experimenting with simplified procedure.

The ABA 21st Century proposals were “open to the idea that different standard timelines might be applied depending on the nature or size of the matter,” pointing to a 4-track system in New Jersey. Don L. Davis pointed to the three-level Discovery Control Plans under Tex.R.Civ.P. 192.4.

Vice Chief Justice Hurwitz describes special Arizona procedures for medical malpractice actions, including three sets of uniform interrogatories — plaintiff to individual health-care provider, plaintiff to institutional provider, and defendants to plaintiff. There also is a complex case court project, governed by separate pretrial rules.

Professor Gensler writes at length on case management, exploring alternatives that include more particularized, less discretion-dependent rules for all cases; abandoning trans-substantivity, in whole or in part, by adopting substance-specific rules tailored to different categories of litigation; “track” systems more formalized than general case-management authority; and “simplified rules” for some — presumably simpler — types of cases.

One ABA respondent pointed to California Code of Civil Procedure §§ 90-100 as a model of Economic Litigation for Limited Civil Cases.

Rule 4

Professor Carrington urges that the Committee consider amending Rule 4(d) waiver-of-service provisions by extending the payment of expenses of service to defendants who are not located in the United States, see Rule 4(d)(2).

Rule 7

The ABA would require that every motion be accompanied by a certificate that counsel have conferred in good faith, or attempted to confer, to resolve or narrow the issues in dispute. Only stipulated motions and those for summary judgment would be excepted. Some ABA respondents, however, suggested that “meet and confer” is a waste of time — no one gives up anything anyway. A somewhat different criticism is that the requirement encourages unreasonable behavior: the lawyer can always back off before the court learns of it by a motion.

There was criticism of local rules read to require “permission” to file a motion. But several respondents in the NELA survey urged such a requirement for summary judgment, at least in employment cases.

Rule 8(b)

Quite apart from pleadings that state a claim, answers also came in for substantial criticism. The ABA proposals reflect a fear that “responsive pleading has become an expensive game.” “[A]n answer is often an opaque, uninformative document.” It would be cheaper to allow a simple general denial along with any affirmative defenses, but this alternative seems unattractive, particularly if pleading obligations are raised for claims. Plaintiffs could help themselves by making fact

allegations “in short factual sentences.” This is not a proposal to revise Rule 8(b). Earlier versions may suggest the reason — Rule 8(b) is just fine as written; the problem is widespread disregard.

Many NELA respondents expressed great dissatisfaction with answers that flout Rule 8(b) requirements.

Rule 11

Professor Miller suggests it might help to partially reinstate compensation and punishment as legitimate objectives “to promote efficiency and compliance.” In addition, it may be possible to “see if standards of lawyer behavior can be further articulated to produce a sophisticated and nuanced regime that will minimize litigation misconduct, whatever its form, but at the same time recognize the need to protect adversarial-system values.” 60 Duke L.J. 1, 126.

One ABA respondent suggested a deadline to abandon claims or defenses. If a claim or defense is not in fact pursued after the deadline, the adversary should be awarded the fees and expenses incurred in preparing to contest it.

Rule 12

The ABA suggests adding a requirement that except in complex cases, the court rule promptly on a motion to dismiss, and must rule within 60 days after full briefing.

Rule 16

Most of the proposals aimed at pretrial conferences recommend stronger case management by more vigorous use of present Rule 16. But the New York City Bar recommendation is this: “Strong and consistent judicial management will * * * be enhanced by requiring that the Rule 16(a) initial pre-trial conference be mandatory, rather than discretionary as it is now.” A defendant that intends to file a Rule 12(b) motion or a motion for summary adjudication should inform the court so that the initial pretrial conference can be scheduled before the motion is filed. ACTL/IAALS Rule 8.1 similarly requires a pretrial conference “as soon as practicable after appearance of all parties.” Rule 8.2 requires the judge to set a trial date as soon as possible after the initial conference. Rule 9.4 independently requires that a trial date be set at the earliest practicable time, and forbids change “absent extraordinary circumstances.”

In addressing case management, Professor Miller emphasizes the need for training, education, and other work outside the rules. But he adds: “It may be that recent thinking about management matters has been too static and that Rule 16 and the Manual are not yet sufficiently delineated and textured to meet the challenges of the more difficult aspects of contemporary litigation.” 60 Duke L.J. 1, 117-118.

Rule 23

The Center for Constitutional Litigation takes issue with “common impact” rulings by some courts that are described as allowing certification of a class only if each and every class member is harmed in the same way. The proposal would amend Rule 23(b)(3) so that the predominance of common questions is determined “solely based on issues presented at trial,” and so that the fact or quantity of individual injury “need not be proven at trial.” A new rule 23(c)(6) would support this provision by permitting an award of aggregate class damages, to be allocated after trial by statistical or sampling methods, or some other reasonable method.

Rule 48

Judge Higginbotham's paper reflects continuing interest in restoring the 12-person civil jury, adding a casual footnote suggesting a 10-2 majority verdict rule. (An effort to restore 12-person juries was defeated in the mid-1990s.) Paul Carrington's paper also focuses on the 12-person jury.

Rule 56: Summary Judgment

Summary adjudication: The New York City Bar proposes a new procedure that blends disposition on the pleadings with summary judgment as we know it. The proposal is well fleshed out, warranting description of the details. A defendant can make a conventional motion to dismiss for failure to state a claim, and is entitled to a stay of all discovery pending resolution of the motion. Instead, the defendant may answer — including any affirmative defenses and counterclaims — and move for summary adjudication. Summary adjudication requires enhanced initial disclosures that include 14 hours of deposition “of each side,” and other disclosures within a scope determined by the court. Decision is governed by the summary-judgment standard, but may not be deferred for further discovery. Any issue resolved by summary adjudication becomes the law of the case. A plaintiff may move for summary adjudication if the defendant moves for it, and also if the defendant unsuccessfully seeks a conventional Rule 12(b) dismissal or files an answer. The theory is that motions on the pleadings fail too often, in part because leave to replead is commonly given, while summary judgment is available only after costly discovery. Summary adjudication of some issues will control the scope of discovery, even if it does not resolve any claim, counterclaim, or other claim. Determination of the scope of the mandatory disclosure would be shaped by the issues that commonly prove important in the particular type of litigation, and often would be limited to easily available documents and the like.

The New York County Lawyers' Association explicitly disagrees with the City Bar. Issues that are properly decided without discovery can be resolved under Rule 12. Rule 56 can be used to focus summary judgment on specific issues, with authority to stage discovery as appropriate to those issues. The motion for summary adjudication may be used deliberately to delay discovery. And if summary adjudication is granted on some issues, the attempt to deny discovery on those issues might undesirably curtail discovery. And adhering to the summary adjudication would be unfair if subsequent discovery showed it was wrong. (Note: it is unclear how the “law of the case” phrase in the City Bar proposal is intended. Standard law-of-the-case doctrine permits a district court to depart from its own earlier rulings in a case when error appears.)

Stueve & Keenan propose to allow depositions of nonparties only by agreement or order. In part because of this limit they would allow parties to oppose summary judgment by a declaration, “based on substantial facts, of what they reasonably project that a non-party trial witness' testimony will demonstrate. This declaration should also show why receiving the witness's direct testimony through affidavit is not feasible.” Sanctions may be imposed for making a representation “that proves false at trial.”

Accelerated disposition: The ACTL/IAALS proposals include consideration of an “application” procedure adopted in some Provinces of Canada. The details are sketchy. But the idea is that a plaintiff may commence an action with what is in effect a motion for summary judgment, supplying supporting materials — documents and affidavits — at the outset. Depositions are limited to what is in the affidavits. The court may combine the procedure for decision on the record as it develops with a trial on some particular points.

(The 2010 version of Rule 56 allows a party to move for summary judgment at any time until 30 days after the close of all discovery. The Committee Note observes that a plaintiff can move for

summary judgment at the beginning of the action. This procedure may be useful in collection cases, bringing summary judgment back close to its origins. In addition, needs for prompt specific relief can often be addressed by injunction, see Rule 65. Declaratory relief may be suitable for expeditious handling in situations that do not call for much discovery. These opportunities, the newly emphasized availability of partial summary judgment, and the general authority to manage an action probably suffice.)

Prompt Ruling: Complaints heard during the hearings on Rule 56 amendments were repeated at the conference: some courts take too long to rule on summary-judgment motions, and at times fail to rule at all. The ABA advances an expectation that courts are expected to rule promptly, and always within 90 days after full briefing; it is not clear whether this is proposed as a rule amendment.

Permission to File: Several of the NELA respondents suggested that abuses of Rule 56 in employment cases justify imposing a requirement that a party get court permission to file the motion.

Inefficiency: During the Rule 56 review there were several suggestions that deciding a motion for summary judgment often is more work for the judge than a trial. One NELA respondent offered a similar thought: “[I]t has become less time consuming and costly to try a case to a jury than to go through the summary judgment process. So, the rules should do more to encourage trials and also more to discourage summary judgment.” Others voiced the same thought.

Self-Serving Self-Contradiction: An NELA respondent suggests: “Allow clients to change and clarify answers to depositions not only in the transcript verification but later in affidavits and at trial, subject to impeachment.” This addresses the common practice of refusing to consider self-serving, self-contradicting affidavits.

Disposition on an Administrative Record: Proceedings for review on an administrative record often are resolved without discovery. That is the reason why “an action for review on an administrative record” is excluded from initial disclosure by Rule 26(a)(1)(B)(i). The full routine of Rule 56 summary judgment may be more procedure than these cases need. For that matter, the standard for review is different from the summary-judgment standard. It would be possible to adopt a new and streamlined rule specifically for prompt disposition. But there is good reason to believe that courts generally manage to achieve disposition on the administrative record without undue complication or confusion of the parties. Little need appears to pursue this subject.

Rule 68: Settlement

Conference participants addressed settlement from a variety of perspectives. Professor Nagareda’s paper frames the question: “how to regulate the distortive effect that our modern civil process might exert upon the pricing of claims in a world dominated by settlement, not trial.” Current pretrial procedures focus on whether trial should occur, but trials rarely occur. And discovery imposes great costs in moving from motions on the pleadings to summary judgment. Perhaps procedures should be developed to help the parties price the settlement value of the claim. One possibility is a “preliminary judgment,” provided by the court at an early stage; the judgment could be rejected by any party, but would provide a valuable anchor for converging on settlement value.

Rule 68 has hovered somewhere in the back cupboards of the Committee agenda for several years. Informal suggestions, and occasional formal requests, would invigorate Rule 68 by various means. Stiffer sanctions — fee shifting — are the most common element. There has been considerable resistance to taking up this thorny topic in the wake of unsatisfactory attempts in the 1980s and 1990s. But the time may come again.

Initial Disclosures

Rule 26(a)(1) initial disclosures were questioned by many participants. The subject may be sufficiently distinctive to be considered independently of other discovery topics.

The questions were almost mutually offsetting. Some suggest that the initial disclosures are nearly useless because they do not do enough — all of the same materials will be sought again by discovery demands that embrace them within requests that seek all information relevant to the same issues, not merely the information the disclosing party may use to support its own positions. Others suggest that the initial disclosures are unnecessary because they do too much, forcing the parties to work to disclose materials that the other parties would not bother to seek in discovery.

There is a plausible argument that initial disclosures should either be broadened so as to support a meaningful reduction in subsequent discovery, replaced by some other form of automatic discovery, or abandoned.

Abandonment is easy to accomplish. The ABA proposes both to broaden and to narrow initial disclosures. Disclosure of witnesses would be broadened to cover “each individual likely to have significant discoverable information about facts alleged in the pleadings, identifying the subject of the information for each individual.” It would be narrowed by deleting any initial disclosure requirement as to documents. The parties would be expected to discuss and attempt to agree on exchange of documents before the initial pretrial conference.

Replacement might take a variety of forms of automatic discovery. Initial efforts to develop form interrogatories are under way. A relatively modest approach might amend Rule 33 to allow serving interrogatories, of a sort perhaps vaguely defined, with the complaint and with the answer. The interrogatories could address the topics now covered by Rule 26(a)(1), or go further. They might include a request to produce all documents identified in the response, or perhaps some subset of the identified documents.

Expanded disclosure obligations can be easily imagined. Arizona Rule 26.1 establishes sweeping disclosure obligations that could be used as a model. (The IAALS survey of Arizona lawyers paints a rather mixed picture on experience under Rule 26.1, but supports the conclusion that this approach merits consideration.) The Center for Constitutional Litigation would require that, in a civil equivalent of *Brady* requirements for prosecutors, defendants produce materials that support the plaintiff’s allegations. Judge Baylson suggests a “civil *Brady*” rule in broader terms: concepts of professional responsibility should oblige attorneys to disclose all materially unfavorable information (also rendered as information favorable to the other side), and parties should be likewise required to disclose; rules of professional confidentiality and privilege should not restrict this duty.

In addition to scope, timing also might be addressed. The ABA proposes that the plaintiff’s disclosures be made within 30 days from filing the complaint, and the defendant’s within 30 days from filing an answer.

There was one particular rule suggestion. An NELA respondent said that defendants almost always identify the address and phone number of witnesses as “c/o the attorney.” The rule should be clear that the actual address and phone number are required.

Discovery: Detailed Changes

Allocation of discovery work between this Subcommittee and the Discovery Subcommittee will be an ad hoc accommodation of the agendas and interests of each. Often enough it will make

sense to assign detailed proposals to the Discovery Subcommittee. But coordination requires initial consideration — it may be useful for this Subcommittee to open up proposals that seem worthy, whether the result is to develop them fully or instead is to commend them for full development by the Discovery Subcommittee.

Scope: The ABA 21st Century proposals reflect a division among Special Committee members — some would eliminate discovery on the “subject matter” of the action. The final ACTL/IAALS proposals suggest consideration of a narrower scope — perhaps by changing the definition of relevance.

Cost Shifting: A proposal by Lawyers for Civil Justice illustrates the kinds of topics that are so important as to be readily separated from more detailed discovery work. This proposal is captured in the first sentence of the suggested rule: “A party submitting a request for discovery is required to pay the reasonable costs incurred by a party responding to a discovery request propounded under these Rules.” (A similar protection for nonparties appears later.) The ACTL/IAALS final report suggests considering cost-shifting or co-pay rules.

Professor Nagareda suggests that a plaintiff should pay the defendant’s discovery costs if the defendant wins on summary judgment. How about partial summary judgment? Affecting the tactical uses of Rule 56 motions?

Controlled Access: Judge Higginbotham’s proposal is a good (and brief) example of a generic possibility: Require the parties to file statements of “likely controlling issues of fact and law.” The court then asserts early case control over access to discovery in two steps: First, a hearing on access; then a hearing on access with a “peek at the merits.” The latter being an effort to reinforce a determination that a claim has been stated and if there is a reasonable basis for accessing further discovery.”

Judge Baylson makes a related suggestion that might be cast in rule form: mid-way during discovery, each party files a statement of contentions “in limited, numbered paragraphs with record support, with the opposing party making a substantive response.” See the Manual for Complex Litigation (Fourth), § 11.473. This can help the parties adjust their discovery efforts.

Girard Proposals: Three specific proposals by Daniel Girard provide a good illustration of possible small-scale revisions that might accomplish quite a bit. They are advanced in Girard & Espinosa, “Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules,” 87 Denver U.L. Rev. ___ (2010):

(1) Evasive responses: This proposal draws from concern that discovery responses often are evasive, and the process often transforms from the intended “request-response” sequence to “an iterative, multi-step ordeal” in which the pre-motion conference requirement itself serves as an invitation to overbroad requests that anticipate over-narrow responses, negotiation, and eventual responses that may or may not be evasive. Rule 26(g) implicitly forbids evasive responses, but it should be made explicit by adding just two words to Rule 26(g)(1)(B)(i): signing a discovery request, response, or objection certifies that it is “not evasive, consistent with these rules and * * *.”

(2) Rule 34: Production added to Inspection: Rule 34(a)(1) refers to a request “to produce and permit the requesting party * * * to inspect, copy * * * “ documents. Rule 34(b)(1)(B) directs that the request “specify a reasonable time, place, and manner for the inspection and for performing the related acts.” 34(b)(2)(B) directs that for each item or category, the response must “state that inspection and related activities will be permitted as requested,” or object. “Producing” enters only in (b)(2)(D), referring to electronically stored information, and then again in (b)(2)(E), specifying

procedures for “producing documents or electronically stored information.” Rule 34(c) invokes Rule 45 as the means of compelling a nonparty to “produce documents and tangible things.” Girard observes that the common practice is simply to produce, rather than make documents available for inspection and copying. This leaves gaps in the language of the rules. Rule 37(a)(3)(B)(iv) should be amended to include “fails to produce documents” — a motion to compel may be made if “a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.” In addition, a new provision should be added to Rule 34(b)(2)(B): “If the responding party elects to produce copies of documents or electronically stored information in lieu of permitting inspection, the response must state that copies will be produced and the production must be completed no later than the date for inspection stated in the request.”

(3) Rule 34: General Objections: The underlying behavior is a tendency of responding parties to begin a response with a boilerplate list of general objections, and often to repeat the same objections in responding to each individual request, and at the same time to produce documents in a way that leaves the requesting party guessing whether responsive documents have been withheld under cover of the general objections. The proposed cure is to add this sentence to Rule 34(b)(2)(C): “Each objection to a request or part thereof must specify whether any responsive documents are being withheld on the basis of that objection.” (Judge Baylson makes a related suggestion, observing that “[s]ome parties serve objections routinely and maintain them * * *, preferencing every response as ‘subject to objections.’ This tactic delays discovery and may obfuscate the search for facts.” Absent party agreement otherwise, “objections not specifically sustained by the court in a certain time frame should be deemed overruled; the discovery shall be provided as if an objection had never been made.”)

Start Discovery Sooner: Delaying discovery until after the Rule 26(f) conference is a bad idea, or so it is argued by a respondent to the ABA survey.

Stay Discovery Pending Motions: Various suggestions were made about staying discovery pending disposition of a motion to dismiss. The ABA proposal is that the court has discretion whether to stay discovery, but adds that the court should promptly rule on the motion — the ruling should not take more than 60 days in cases that are not “complex.” The ACTL/IAALS Pilot Program Rule 6.1 similarly relies on discretion. The New York City Bar proposal would stay discovery pending disposition of a motion to dismiss or for summary adjudication, unless the court finds good cause to allow discovery. In order to deter strategic use of the motions, discovery should proceed on an expedited basis if a motion is made and denied. Lawyers for Civil Justice propose a stay unless the court finds that particularized discovery is necessary to preserve evidence or prevent undue prejudice.

Exchange Initial Discovery Requests: The New York City Bar recommends that parties be required to exchange actual discovery requests at the Rule 26(f) conference and a Rule 16(b) conference so that the reasonableness of the discovery can be discussed with the court.

Place of Depositions: More than one NELA respondent would require “corporate deponents” to travel to the district where litigation is conducted. Cf. present Rule 37(d)(1).

Word-Processing Format: A suggestion that pops up at intervals over the years is renewed: Rule 33, 34, and 36 discovery requests should be in an electronic form that allows responses directly in the form.

Number of Interrogatories: An NELA respondent suggests that the limit on the number of interrogatories should be deleted. A larger number of simpler, subject-specific interrogatories can be drafted and answered with less time and expense.

Contention Interrogatories: The ABA finds that contention interrogatories “have become a tool of oppression and undue cost”; they should be prohibited absent agreement of the parties or court order. The New York City Bar believes that contention interrogatories “to elicit contentions and narrow areas of disagreement can be effective, but typically not until later in the discovery process.”

Limit Rule 34: Lawyers for Civil Justice and allies propose limits to 25 requests, to 10 custodial or information sources, and to two years prior to the complaint. Others propose comparable limits; Arizona limits requests to 10 distinct items or categories of items.

Requests to Admit: The ABA again finds oppression, and recommends a limit of 35 requests. (The FJC survey, p. 10, found requests used in 25% to 30% of the closed cases; plaintiffs and defendants reported different medians and means, but the means were always well above the medians — indicating that means, mostly hovering just above 20, are influenced by numbers at least veering toward 35 in quite a few cases.) The ACTL/IAALS invokes the general principle of proportionality, interpreting it to mean that contention interrogatories and requests to admit should be used sparingly, if at all.

Other Limits: The ACTL/IAALS final proposals include limiting the persons from whom discovery can be sought (Arizona allows depositions of parties, expert witnesses, and document custodians; court permission or stipulation is required for others); limiting the time available for discovery; limits on the amount of money a party can spend, or force its opponent to spend on discovery; discovery budgets approved by the clients and the court. Stueve & Keenan would limit depositions to parties, requiring agreement or order to depose expert witnesses and nonparties; in return, they would establish nationwide subpoenas to compel trial testimony.

Sanctions: There are many laments that sanctions are rarely imposed, generating reflex refusals to provide discovery designed to provoke a motion to compel. One NELA respondent spoke to the other side: “[T]he presumption of sanctions in Rule 37 makes it too risky for many individual parties to challenge the discovery responses of well-financed adversaries.”

Definitions: An NELA respondent: “Add a definitions section to FRCP to reduce wrangling about, for example, whether questions containing ‘respecting,’ or ‘relevant to’ or ‘related to’ must be answered, and if so, what these words include.”

Expert Witnesses

The broader proposals for restricting expert-witness practice are better suited to the Evidence Rules than to the Civil Rules. The ACTL/IAALS pilot program rule 11 would require that a Rule 702 expert’s testimony be “strictly limited to the contents of the report” furnished in writing. That could be accomplished in Rule 26(a)(2)(B). In addition, the rule would allow only one expert witness per party to testify on “any given issue.” (Arizona allows only one witness per side on an issue; if coparties cannot agree, the court chooses.) Their final report suggests that depositions of experts be eliminated if the testimony is limited to the contents of the report.

II NONRULES PROPOSALS

As noted above, some suggestions for reform could be implemented either by rule amendments or by other means of encouraging best practices. In addition, some proposals may fit within the Rules Enabling Act framework without looking toward actual rule amendments. Only a few of these suggestions are noted here.

Enforce Rules

There were many comments, often in different contexts, that much could be accomplished by simply enforcing present rules. One example recurred through the NELA responses — many NELA members believe courts do not honor the discovery rules in ERISA litigation. Apparently the courts treat ERISA claims as review on an “administrative” record that is not to be supplemented..

Summary Judgment

The NELA respondents produced staggering numbers of responses bemoaning delay in ruling on summary judgment until the eve of trial. A related and also frequently expressed concern is the practice of holding a final pretrial conference before ruling on summary judgment. And there are requests for oral argument. A variation suggests oral argument before the nonmovant has to file a brief. None of these seems particularly amenable to rule text provisions.

Local Rules

“Local rules projects” have been pursued under the aegis of the Standing Committee. Continuing dissatisfaction with local rules was expressed in several of the surveys. There was widespread feeling that local rules are not always consistent with the national rules. In addition, implementation of the local rules themselves may not be consistent — some individual judges depart from both national and local rules.

Local rules also were praised by some of the ABA answers. One virtue is that they give notice of practices that will be followed whether or not expressed in a formal rule — better that all lawyers have access, not just the knowing insiders. Another is that they may be useful means of trying out ideas that may be proved to warrant general adoption. Yet another may be flexibility: generating sets of model local rules for specific types of litigation may be a way to respond to the shortcomings of transsubstantive procedure. Patent litigation rules are offered as an example.

The National Employment Lawyers Association found a consensus that local rules are not consistently applied within the district. It recommends that the judges of each district meet periodically to discuss their variations on local practice. (This does not seem a likely subject for Rule 83.)

Miscellaneous

Require attorneys to disclose to their own clients an expected budget of the costs of the case from beginning to end, including attorney fees; this should include aggregate data from other cases, and “how they are resolved, on average.”

Go Slow

One ABA response echoed a theme that sounds periodically in rules discussions: “Please stop monkeying with the Civil Rules every year or so. Stability and predictability are important * * *. Trying to fix every new problem with a new civil rule is making our system more complex, expensive, and Canonical.”



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

September 10, 2010

MEMORANDUM

To: The Chief Justice

From: James C. Duff *James C. Duff*

RE: RULES COMMITTEES' REPORT ON THE 2010 CONFERENCE ON CIVIL LITIGATION

On behalf of the Advisory Committee on Civil Rules and the Committee on Rules of Practice and Procedure, I am transmitting the attached report on the 2010 Conference on Civil Litigation held at Duke University School of Law on May 10-11, 2010.

Attachment

cc: Honorable Lee H. Rosenthal
Honorable Mark R. Kravitz
Jeffrey Minear, Esq.

Report to the Chief Justice of the United States
on the
2010 Conference on Civil Litigation

Submitted by the Judicial Conference Advisory Committee on Civil Rules and
the Committee on Rules of Practice and Procedure

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INTRODUCTION¹

The Civil Rules Advisory Committee hosted the 2010 Conference on Civil Litigation at the Duke University School of Law on May 10 and 11. The Conference was designed as a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil litigation. More than seventy judges, lawyers, and academics presented and discussed empirical information, analytical papers, pilot projects, and various approaches used by both federal and state judges, in considering ways to address the problems of costs and delays in the federal civil justice system. Over 200 invited participants selected to ensure diverse views, expertise, and experience filled all the space available at the Law School and engaged in two days of panel presentations followed by extensive audience discussion. The result is a large amount of empirical information and a rich array of possible approaches to improving how the federal courts serve civil litigants.

I. THE BACKGROUND AND PURPOSE OF THE CONFERENCE

For many years, the Judicial Conference Rules Committees have heard complaints about the costs, delays, and burdens of civil litigation in the federal courts. And for many years, the Rules Committees have worked to address these complaints. That work is reflected in the fact that the Civil Rules, particularly the discovery rules, have been amended more frequently than any others. The more recent changes have been preceded by efforts to obtain reliable empirical information to identify how the rules are operating and the likely effect of proposed changes. Despite these recent rule changes, complaints about costs, delays, and burdens in civil litigation have persisted. Many of the complaints are inconsistent and conflicting. The Rules Committees concluded that a more comprehensive and holistic approach was called for in its empirical work. The 2010 Conference was built on an unprecedented array of empirical studies and data, surveys of thousands of lawyers, data from corporations on the actual costs spent on discovery, and white papers issued by national organizations and groups and by prominent lawyers. In addition, the Conference relied on data gathered in earlier rules-related work.

In 1997, the Civil Rules Committee hosted a conference at the Boston College Law School to explore whether the persistent complaints should be the basis for changes to the Federal Rules of Civil Procedure governing discovery. That conference was also preceded by empirical studies conducted by the Federal Judicial Center (FJC). After that conference, changes were proposed to the discovery rules, including a narrowing of the definition of the scope of discovery in Rule 26(b)(1). That change was enacted in 2000. Since then, however, the litigation landscape has changed with astonishing rapidity, largely reflecting the revolution in information technology. The advent and wide use of electronic discovery renewed and amplified the complaints that the existing rules and practices are inadequate to achieve the promise of Rule 1: a just, speedy, and inexpensive resolution to every civil action in the federal courts.

The discovery rules were amended again in 2006 to recognize distinct features of electronic discovery and provide better tools for managing it. The 2007 style project simplified and clarified all the rules, the 2008 enactment of Federal Rule of Evidence 502 reduced the risks of inadvertent privilege waiver in discovery, and the 2009 time-computation project made the calculation of

¹ There are many people and entities to thank and acknowledge for their support of, and work on, the Conference. A complete list is beyond this report. Particular thanks, however, must be extended to the Duke University School of Law and Dean David F. Levi; the Federal Judicial Center and Judge Barbara Rothstein and Dr. Emery Lee; the Administrative Office and Director James Duff; the Judicial Conference of the United States; and each of the Conference panel moderators.

deadlines easier. With these internal changes in place, and with external changes continuing to occur, the Advisory Committee determined that it was time again to step back, to take a hard look at how well the Civil Rules are working, and to analyze feasible and effective ways to reduce costs and delays.

Some of the same information-technology changes that gave rise to electronic discovery also provided the promise of improved access to empirical information about the costs and burdens imposed in civil lawsuits in federal courts. A great amount of empirical data was assembled in preparation for the 2010 Conference. The Rules Committees asked the FJC to study federal civil cases that terminated in the last quarter of 2008, the most recent quarter that could be studied in time for the Conference. The study included detailed surveys of the lawyers about their experience in the cases. The FJC also administered surveys for the Litigation Section of the American Bar Association (ABA) and for the National Employment Lawyers Association (NELA). The Institute for the Advancement of the American Legal System (IAALS) conducted a detailed study of the members of the American College of Trial Lawyers (American College). The Searle Institute at Northwestern Law School and a consortium of large corporations also provided empirical information designed to measure in ways not previously available the actual costs of conducting electronic and other discovery. The rich and detailed data generated by all this work provided an important anchor for the Conference discussion and will be a basis for further assessment of the federal civil justice system for years to come.

The many judges, lawyers with diverse practices, consumers of legal services, and academic critics of legal institutions and processes provided an important range of perspectives. Lawyers representing plaintiffs, defendants, or both, and from big and small firms as well as public interest practice, were recruited. Clients were represented by corporate counsel for businesses ranging from very large multinational entities to much smaller companies, as well as by government lawyers. Empirical work was presented by FJC staff, private and public interest research entities, bar associations, and academics. The academic participants also provided historical and jurisprudential grounding. Experience with state-court practices was explored to show the range of possibilities working within the framework of the American adversary system. Different litigation bar groups were represented. The mix of these participants in the organized panels and in the subsequent discussions resulted in consensus on some issues and divergence on others. The diversity of views and experience helped identify the areas in which disagreements tracked the familiar plaintiff-defendant divide and areas in which both disagreements and consensus transcended that line.

Assembling the panels and commissioning, coordinating, and reviewing the empirical studies and papers occupied the planning committee, and particularly its chair, Judge John Koeltl, for a year. The empirical information, papers, and reports from the Conference are available at the following website: <http://civilconference.uscourts.gov>, and the Duke Law Review will publish many of the papers. The Conference was streamed live by the FJC. Attachments to this report include the agenda, which lists the panel topics and panelists; a separate list of the panelists, sorted by panel; and a list of the titles and authors of the papers, sorted by panel. While many of the empirical studies, pilot projects, and proposals for rule changes will continue and may be expanded, the materials presented and discussed at the Conference will provide the inspiration and foundation for years of future work.

II. PRELIMINARY RESULTS OF THE EMPIRICAL AND OTHER STUDIES

A full accounting of the empirical studies and findings is beyond the scope of this report. But a brief summary of some of the preliminary results demonstrates the important role they will play in determining the most promising avenues for improving federal civil litigation.

The FJC conducted a closed-case study of 3,550 cases drawn from the total of all cases that terminated in federal district courts for the last quarter of 2008. The sample was constructed to eliminate categories of cases in which discovery is seldom used and to insure the inclusion of cases likely to encounter the range of litigation issues. The study included every case that had lasted for at least four years and every case that was actually tried, a design likely to capture the cases involving significant discovery. The study showed that plaintiffs reported \$15,000 as the median total costs in cases that had at least some discovery. The figure for defendants was \$20,000. In the top 5% of this sample, however, the reported costs were much higher. The most expensive cases were those in which both the plaintiff and the defendant requested discovery of electronic information; the 95th percentile was \$850,000 for plaintiffs and \$991,900 for defendants.

The results closely parallel the findings of the 1997 closed-case survey the FJC did for the Advisory Committee in connection with the work that led to the Boston College Law School Discovery Conference. Both FJC studies showed that in many cases filed in the federal courts, the lawyers handling the cases viewed the discovery as reasonably proportional to the needs of the cases and the Civil Rules as working well. The FJC studies support the conclusion that the cases raising concerns are a relatively small percentage of those filed in the federal courts, but the numbers and the nature of these cases deserve close attention. It would be a mistake to equate the relatively small percentage of such cases with a lack of importance. The most costly cases tend to be the ones that are more complicated and difficult, in which the stakes for the parties, financial or otherwise, are large. One set of issues is whether the cases with the higher costs in the FJC studies are problematic, that is, whether the costs are disproportionate to the stakes. Higher costs may not be problematic if they are justified by the amounts or issues at stake in the litigation; lower costs may still be problematic if they are burdensome because they are the result of excessive discovery that is not justified by what is at stake in the litigation or if the costs are low only because, for example, a defendant agreed to settle a meritless case to avoid high discovery costs.

Several other surveys supplemented the FJC work. The IAALS worked with the American College on a survey that was sent to every Fellow of the American College. With some modifications, that survey was also administered by the FJC for the Litigation Section of the ABA and for NELA. The responses varied considerably among the different groups.² The American College respondents—who have more years of experience in the profession and are selected from a small fraction of the bar—reflected greater general dissatisfaction with current civil procedure than the other groups. The ABA Section of Litigation survey responses did not indicate the same degree of dissatisfaction with the rules' ability to meet the goals of Rule 1 as the American College responses, but still reflected a greater degree of dissatisfaction with the operation of the Civil Rules than the FJC survey results.

The survey responses by the members of the plaintiff-oriented NELA were generally that the Civil Rules are not conducive to securing a “just, speedy, and inexpensive determination of every action,” but most remained hopeful that current problems could be remedied by minimal reforms. Among the concerns raised by NELA respondents were that the rules are not applied as written and are applied inconsistently; that local rules often conflict with the Federal Rules; that initial disclosures are not useful in reducing discovery or saving money; that discovery is often abused but

² The 1997 and the 2009 FJC surveys asked lawyers about their actual experiences in litigating specific cases and followed up with additional questions for a sample of those cases. This study design has an important advantage over surveys asking for general impressions about how the system is working. Responses to such questions about general impressions tend to be less grounded in actual case experience. Indeed, there was sometimes a striking difference between lawyers' responses about the proportionality of discovery that they experienced in specific cases and general statements about excessive discovery.

sanctions are rarely used (although more than half of the respondents found that in the majority of cases, counsel agree on the scope and timing of discovery); that litigation is too costly; that discovery is too expensive; and that delays increase costs.

On the defense-oriented side, the Lawyers for Civil Justice, the Civil Justice Reform Group, and the U.S. Chamber Institute for Legal Reform surveyed corporate counsel of Fortune 200 companies and reported that the survey respondents viewed litigation costs as too high. The participating corporations reported that outside litigation costs account for about 1 in every 300 dollars of U.S. revenue for corporations not in insurance or health care. The respondents also reported that the average discovery costs per major case represent about 30% of the average outside legal fees. The report drafted by the groups conducting the survey concluded that litigation costs continue to rise and are consuming an increasing percentage of corporate revenue; that the U.S. litigation system imposes a much greater cost burden on companies than systems outside the United States; that inefficient and expensive discovery does not aid the fact finder; that companies spend a significant amount every year on litigation transaction costs; and that large organizations often face disproportionately burdensome discovery costs, particularly with respect to e-discovery.

The surveys showed as major perceived difficulties on the defense side that contested issues are not identified early enough to forestall needlessly extensive and expensive discovery; that discovery may impose disproportionate burdens on the parties and at times on nonparties, made worse by the difficulties of discovering electronically stored information; and that adversaries with little information to be discovered have the ability to impose enormous expense on large data producers—not only in legal fees but also in disruption of ongoing business—with no responsibility under the American Rule to reimburse the costs. The surveys showed as major perceived difficulties on the plaintiffs' side that much of the cost of discovery arises from efforts to evade and “stonewall” clear and legitimate requests, that motions are filed to impose costs rather than to advance the litigation, and that the existing rules are not as effective as they should be in controlling such tactics. One area of consensus in the various surveys, however, was that district or magistrate judges must be considerably more involved in managing each case from the outset, to tailor the motions practice and shape the discovery to the reasonable needs of that case. The challenge is to achieve this on a consistent, institutional basis without interfering with the independence and creativity of each judge and district responding to the specific mix of cases and docket conditions, and without interfering with the effective handling of many cases under existing rules and practices.

Another area of consensus was that making changes to the Federal Rules of Civil Procedure is not sufficient to make meaningful improvements. While there was disagreement over whether and to what extent specific rules should be changed, there was agreement that there is a limit to what rule changes alone can accomplish. Rule changes will be ineffective if they are not accompanied by judicial education, legal education, and support provided by the development of materials to facilitate implementing more efficient and effective procedures. What is needed can be described in two words—cooperation and proportionality—and one phrase—sustained, active, hands-on judicial case management. These goals can be advanced by several means, including improved formal ongoing education programs for lawyers and judges, the development and use of “best practices” guides and protocols, and other means of encouraging cost-effective litigation practices consistent with vigorous advocacy.

The Conference generated specific and general suggestions for changing both rules and litigation practices. The suggestions fall into the categories identified above: changes to the rules; changes to judicial and legal education; the development of protocols, guidelines, and projects to test and refine continued improvements; and the development of materials to support these efforts.

III. RULEMAKING

Two points of consensus on rulemaking emerged from the Conference. First, while rule changes alone cannot address the problems, there are opportunities for useful and important changes. Second, there is no general sense that the 1938 rules structure has failed. While there is need for improvement, the time has not come to abandon the system and start over.

One recurring question is the extent to which new or amended rules are needed as opposed to more frequent and effective use of the existing rules. Conference participants repeatedly observed that the existing rules provide many tools, clear authority, and ample flexibility for lawyers, litigants, and the courts to control cost and delay. Conference participants noted that many of the problems that exist could be substantially reduced by using the existing rules more often and more effectively. It is important to understand the reasons that existing rules are not invoked or enforced more reliably and the extent to which changes in judicial and lawyer education can respond to those reasons. It is also important to understand the extent to which the problems of costs, delays, and unfairness can be addressed by enforcing the procedural rules. Economic and other incentives that drive how lawyers and litigants conduct litigation are certainly important. One judge with many years of experience both in the district court and on the court of appeals put it succinctly: “what we’re seeing is the limits of rules.” And it is important to distinguish between costs, delays, and burdens created by such causes as strains placed on federal judges by competing demands on their time on the one hand, and difficulties that arise from any weakness of the existing Civil Rules on the other.

Although rule amendments are not the only answer, the Conference did identify some candidates for amendment that attracted strong support and others that deserve close analysis. Some of these suggestions are already the subject of the Advisory Committee’s work. Others draw on existing best practices, case law direction, state-court experience, or the results of pilot projects. Yet other ideas are less well-developed but may prove promising.

A general question is whether a basic premise of the existing rules, that each rule applies to all the cases in the federal system, should continue to govern. Over the years, there have been specific, well-identified departures from the so-called transubstantivity principle. Examples within the rules include Rule 9(b) and the categories of cases excluded from Rule 26(a)’s initial disclosure requirements. Although no one suggested a wholesale departure from transubstantivity, several Conference papers and participants raised the possibility of increasing the rule-based exceptions to it. Two general categories of exceptions were raised: exceptions by subject matter, such as a case raising official immunity issues; and exceptions by complexity or amount at issue in a case, such as a system that would channel cases into specific tracks.

Pleading and discovery dominated Conference suggestions for rule amendments. Some longstanding topics were conspicuous for lack of attention. Although there was substantial interest in exploring the phenomena of settlement and the “vanishing trial,” the Rule 68 provisions on offer of judgment received no more than a collateral glance. And the protective-order provisions of Rule 26(c) drew no comment or attention at all, other than suggestions for standardizing protective orders for categories of litigation, such as employment cases, to expedite their use.

A. Pleading

The 1938 Civil Rules diminished the role of pleadings and greatly expanded the role of discovery. Discovery has been continually on the Advisory Committee’s docket since the substantial revisions accomplished by the 1970 amendments. Pleading has been considered at intervals since 1993, when the decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), suggested that adoption of “heightened” pleading is a subject for the

Enabling Act process, not judicial decision. At that time, however, the Advisory Committee found no broad support or need for amendments to pleading rules.

The decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), brought pleading to the forefront of attention and debate. The academy in particular reacted in force to these decisions. A speaker at the Association of American Law Schools Civil Procedure Workshop in June 2010 counted eighty-seven law review articles on these cases, a count that continues to grow. Some members of Congress have proposed variations of bills intended to “roll back” the pleading standard, seeming to assume a fixed status quo of practice that did not exist. The lower courts have, over time, begun to provide the detail and nuance necessary to understand the specific impacts of these most recent Supreme Court interpretations of the familiar words of Rule 8. Well before the 2010 Conference, the Advisory Committee had begun a detailed study of the effects of *Twombly* and *Iqbal* on practice, to determine whether any rule amendments should be proposed and, if so, what direction they should take. That work continues, now informed by the addition of the materials and discussion presented at the Conference. As part of that work, the FJC was asked to provide data on the number and disposition of motions to dismiss in the wake of *Twombly* and *Iqbal*. That study is ongoing, but initial results are expected to be released this fall.

The Conference covered a full spectrum of pleading amendment possibilities, with disagreements that largely corresponded to the plaintiff-defendant divide over whether the current pleading standard provides timely and adequate identification of the issues to be decided and of those cases that cannot succeed and should be dismissed without further expenditure of time and resources. Some speakers presented the view that although the final answer should be adopted through the Enabling Act process, there is an emergency in pleading practice that should be cured by legislation enacted by Congress that would establish a rule that should endure until the Enabling Act process can work through its always deliberate procedures. Others expressed the view that the common-law process of case-law interpretation has smoothed out some of the statements in, and responded to the concerns raised by, *Twombly* and *Iqbal*, and will continue to do so. Yet others argued that although the Court only interpreted the language of Rule 8(a)(2), that rule should be amended to express more clearly the guidance provided by the *Twombly* and *Iqbal* opinions. Some recommended moving still further in the direction of “fact” pleading; these recommendations ranged from less factual detail than Code pleading, to “facts constituting the cause of action,” to “notice plus pleading” that explicitly requires a court to consider not only factual allegations but also reasonable inferences from those allegations.

Another set of possibilities, apart from the general Rule 8(a) pleading standard, is to expand on the categories of claims flagged for “heightened pleading” by Rule 9(b). Two of the categories often mentioned for distinctively demanding pleading standards are claims of conspiracy and actions that involve official immunity.

Yet another set of possibilities is to focus on the Rule 12(b)(6) motion to dismiss rather than on the Rule 8(a) standard for sufficient pleading. Much of the debate about pleading standards focuses on cases in which plaintiffs lack access to information necessary to plead sufficiently because that information is solely in the hands of the defendants and not available through public resources or informal investigation. “Information asymmetry” has become the descriptive phrase for cases in which only formal discovery is able to provide plaintiffs with information necessary to plead adequately. The Conference participants provided substantial encouragement for rule amendments that would explicitly integrate pleading with limited initial discovery in such cases. Various forms will be considered. A plaintiff might identify in the complaint fact matters as to which discovery is needed to support an amended complaint and seek focused discovery under judicial supervision. Or one response to a motion to dismiss under Rule 12(b)(6) might be for the plaintiff to make a preliminary showing of “information asymmetry” and to seek focused, supervised

discovery before a response to the motion is required. Another approach might be to require the court asked to decide a motion to dismiss to consider the need for discovery in light of probable differences in access to information. Alternatively, there might be some opportunity for prefiling discovery in aid of framing a complaint, drawing from models adopted in several states.

Yet other approaches to pleading have been explored in the past and continue to be open for further work. One would expand the Rule 12(e) motion for a more definite statement to focus on an order to plead in a way that will facilitate case management by the court and parties. Another would expand the use of replies, drawing on approaches used in official-immunity cases as one example.

Pleading problems are of course not limited to complaints. Plaintiffs' attorneys assert that defendants frequently fail to adhere to the response requirements built into Rule 8(b). The Conference, however, did not produce suggestions for revising this rule. The difficulty here seems to lie not in the rule but in its observance, another illustration of the limited capacity of rulemaking to achieve desirable ends. By contrast, a number of Conference participants did make the specific suggestion that the standard for pleading an affirmative defense should parallel the standard for pleading a claim. That question can be addressed by new rule text, and that possibility will be considered by the Advisory Committee.

B. Discovery

Empirical studies conducted over the course of more than forty years have shown that the discovery rules work well in most cases. But examining the cases in which discovery has been problematic because, for example, it was disproportionate or abusive, requires continuing work. Discovery disputes, the burdens discovery imposes, the time discovery consumes, and the costs associated with discovery increase with the stakes in the litigation, both financial and legal; with the complexity of the issues; and with the volume of materials involved in discovery. The Conference produced some specific areas of agreement on the need for some additional rule changes and better enforcement of existing rules, along with areas of disagreement on whether a more significant overhaul of the discovery rules is needed. This was also the area in which the recognition that rule changes alone are inadequate to produce meaningful improvements in litigation behavior or significantly reduce the costs and delays of discovery had the greatest force. Rules alone cannot educate lawyers (or their clients) in the distinction between zealous advocacy and hyper-advocacy.

The Conference discussions of discovery problems extended beyond the costs, delays, and abuses imposed by overbroad discovery demands to include those imposed by discovery responses that do not comply with reasonable obligations. While the defense-side lawyers reported routine use of overbroad and excessive discovery demands, plaintiff-side lawyers reported practices such as "stonewalling" and the paper and electronic versions of "document dumps," accompanied by long delays, overly narrow interpretations of discovery requests, and motions that require expensive responses from opposing parties and that create delay while the court rules.

Privilege logs were identified as both a cause of unnecessary expense and delay and a symptom of the dysfunction that can produce these problems. Privilege logs are expensive and time-consuming to generate, more so since electronic discovery increased the volume of materials that must be reviewed. Defense-side lawyers reported that after all the work and expense, the logs are rarely important in many cases. Plaintiff-side lawyers reported that many logs are designed to hide helpful documents behind privilege claims that, if tested, are shown to be implausible. While Rule 26(g) already addresses this abuse of privilege logs, it may be that Rule 26(g) is too obscure in its location or insufficiently forceful in its expression and should be improved. Or it may be that Rule 26(g) is an example of an existing rule that judges and lawyers can be shown ways to use more

effectively. Others suggested that the Civil Rules should explicitly permit more flexible approaches to presenting privilege logs and to testing their validity, combined with judicial and legal education about useful approaches. An example of such an approach would be to have a judge supervise sampling techniques that select log documents for a determination of whether the privilege claims are valid. Federal Rule of Evidence Rule 502, enacted in 2008, provides helpful support for further work in this area.

In 2000, the basic scope of discovery defined in Rule 26(b)(1) was amended to require a court order finding good cause for discovery going beyond the parties' claims or defenses to include the subject matter involved in the action. The extent of the actual change effected by this amendment continues to be debated. But there was no demand at the Conference for a change to the rule language; there is no clear case for present reform. There is continuing concern that the proportionality provisions of Rule 26(b)(2), added in 1983, have not accomplished what was intended. Again, however, there was no suggestion that this rule language should be changed. Rather, the discussion focused on proposals to make the proportionality limit more effective and at the same time to address the need to control both over-demanding discovery requests and under-inclusive discovery responses.

There was significant support across plaintiff and defense lines for more precise guidance in the rules on the obligation to preserve information relevant to litigation and the consequences of failing to do so. Large data producers, whether public or private, for profit or otherwise, made clear a sense of bewilderment about the scope of their obligations to preserve information for litigation and the importance of clear rules that will give assurance that compliance will avert severe sanctions for what in an electronic world are inevitable losses of information. The uncertainty leads to inefficient, wasteful, expensive, and time-consuming information management and discovery, which in turn adds to costs and delays in litigation. Clear guidance should be provided if it can be.

A Conference panel produced a proposal for "Elements of a Preservation Rule" that achieved a consensus on the panel. The proposal exemplifies many of the complexities that led the Advisory and Standing Rules Committees in developing the 2006 electronic discovery rules to at least defer enacting a rule to address them. One question is whether a rule can helpfully define the event that triggers a duty to preserve. Many cases find a duty to preserve before a lawsuit is filed, triggered by events that give "reasonable notice" that litigation is likely. It is unclear that a rule drafted in such general terms would provide the guidance asked for. Careful consideration must be given to whether it is proper to frame a rule addressing preservation before any federal action is filed. Careful consideration must also be given to whether a rule can specify the topics on which information must be preserved in terms more helpful than the open-ended scope of discovery allowed by Rule 26(b)(1), or can helpfully specify the categories of persons or data sources subject to preservation duties. While all acknowledge the challenge, preservation obligations are so important that the Advisory Committee is committed to exploring the possibilities for rulemaking. The Discovery Subcommittee is already at work on these issues.

Spoliation sanctions are directly related to preservation obligations, but the sanctions questions raised at the Conference are more easily defined. Sanctions cover a wide range, from those that directly terminate a case to those that simply award the costs of providing proof by alternative means. An instruction that adverse inferences may be drawn from the destruction of evidence is somewhere in the middle as a matter of formal description, but many lawyers view it as close to the "case-terminating" pole. The circuits divide on the degrees of culpability required for various sanctions. Some allow the most severe sanctions only on finding deliberate intent to suppress evidence. Others allow an adverse inference instruction on finding simple negligence. Conference participants asked for a rule establishing uniform standards of culpability for different sanctions. These issues are also important and will be explored. Depending on the direction taken, it may prove

desirable to enlist the Evidence Rules Advisory Committee in the effort. The Discovery Subcommittee is already at work on possible solutions to the lack of uniformity in sanctions decisions.

The initial disclosure obligations imposed by Rule 26(a)(1) were also the subject of Conference attention. The 1993 version of the initial disclosure rule required identification of witnesses and documents with favorable and unfavorable information relevant to disputed facts alleged with particularity in the pleadings. It also expressly allowed districts to opt out of the initial disclosure requirement by local rule. Many courts opted out. The rule was amended in 2000 to require national uniformity, but reduced the information that had to be disclosed to what was helpful to the disclosing party. A number of Conference participants argued that the result is a rule that is unnecessary for many cases, in which the parties already know much of the information and expect to do little or no discovery, and inappropriate or unhelpful for more heavily discovered cases, in which discovery will of necessity ask for identification of all witnesses and all documents. Some responded that a more robust disclosure obligation is the proper approach, pointing to the experience in the Arizona state courts. Others argued for entirely or largely abandoning the initial disclosure requirement.

Another category of discovery rule proposals continued the strategy of setting presumptive limits on the number of discovery events. This strategy has proven successful in limiting the length of depositions and the number of interrogatories. Many suggested limiting the number of document requests and the number of requests for admission. Other suggestions were to limit the use of requests for admission to authenticating documents, and to prohibit or defer contention interrogatories. Some of these suggestions build on state-court experience and should be studied carefully.

Other discovery proposals are more ambitious. One, building on the model of the Private Securities Litigation Reform Act, would require that discovery be suspended when a motion to dismiss is filed. Another, more sweeping still, would impose the costs of responding to discovery on the requesting party. More limited versions of a requester-pays rule would result in cost sharing at least when discovery demands prove overbroad and disproportionate or the requesting party loses on the merits. Such proposals are a greater departure from the existing system and would require careful study of their likely impact beyond the discovery process itself. An assessment of the need for such departures depends in part on whether the types of rule changes sketched above, together with other changes to provide more effective enforcement of the rules, will produce the desired improvements, or whether a more thorough shift is required.

C. Case Management

The empirical findings that the current rules work well in most cases bear on the question of whether “simplified rules” should be adopted to facilitate disposition of the many actions that involve relatively small amounts of money. A draft set of “simplified rules” designed to produce a shorter time to trial, with less discovery and fewer motions, for simpler cases with smaller stakes, was prepared several years ago. It was put aside for lack of support. One reason was the response—supported by the experience in federal courts that adopted “case-tracking” by local rule, and in some state courts using “case-tracking”—that few lawyers would opt for a simplified track and that many would seek to opt out if initially assigned to it. Another reason was that the existing case-management rules, including Rule 16, allow a court to tailor the extent of discovery and motions to the stakes and needs of each case. There was widespread support at the Conference for reinvigorating the case-management tools that already exist in the rules. The question is whether there should be changes in those rules or whether what is needed are changes in how judges and lawyers are educated and trained to invoke, implement, and enforce those rules.

Pleas for universalized and invigorated case management achieved strong consensus at the Conference. Many participants agreed that each case should be managed by a single judge. Others championed the use of magistrate judges to handle pretrial work. There was consensus that the first Rule 16 conference should be a serious exchange, requiring careful planning by the lawyers and often attended by the parties. Firm deadlines should be set, at least for all events other than trial; there was some disagreement over the plausibility of setting firm trial dates at the beginning of an action. Conference participants underscored that judicial case-management must be ongoing. A judge who is available for prompt resolution of pretrial disputes saves the parties time and money. Discovery management is often critical to achieving the proportionality limits of Rule 26. A judge who offers prompt assistance in resolving disputes without exchanges of motions and responses is much better able to keep a case on track, keep the discovery demands within the proportionality limits, and avoid overly narrow responses to proper discovery demands.

Several suggestions were made for rule changes that would make ongoing and detailed judicial case-management more often sought and more consistently provided. One suggestion was to require judges to hold in-person Rule 16 conferences in cases involving represented parties, to enable a meaningful and detailed discussion about tailoring discovery and motions to the specific cases. Other suggestions sought to reduce the delays encountered in judicial rulings on discovery disputes, which add to costs and overall delays, by making it easier and more efficient for judges to understand the substance of the dispute and to resolve it. One example would be having a rule-based system for a prompt hearing on a dispute—a pre-motion conference—before a district or magistrate judge, before the parties begin exchanging rounds of discovery motions and briefs, to try to avoid the need for such motions or at least narrow the issues they address.

Other Conference suggestions expressed wide frustration in overall delays by judges in ruling on motions. This problem extends to the amount and distribution of judicial resources, which are well beyond the scope of rule amendments. But some of these problems may be susceptible to improvement by changes in judicial and lawyer training.

IV. THE NEED FOR STRATEGIES IN ADDITION TO RULE AMENDMENTS

A. Judicial and Legal Education

The many possibilities for improving the administration of the present rules can be summarized in shorthand terms: cooperation; proportionality; and sustained, active, hands-on judicial case management. Many of the strategies for pursuing these possibilities lie outside the rulemaking process. The Rules Committees do not train judges or lawyers, write manuals, draft practice pointers, or develop “best practices” guides. But the Rules Committees are eager to work with those responsible for such efforts and to ensure that the rules, the training, and the supporting materials all reinforce each other.

The FJC was deeply involved in the Conference and has already begun planning for judicial education to implement some of the lessons learned about the additional work judges must do to work towards cooperation, proportionality, and effective case management. The FJC is exploring changes in how both newly appointed and experienced judges are trained in effective methods for managing electronic discovery and in how recent changes in the practice can best be met by corresponding changes in case management.

These efforts will be supported by the development of effective and readily available materials for lawyers, litigants, and judges to use in a variety of cases. Such materials can include pattern interrogatories and production requests for specific categories of litigation. Such pattern discovery requests would be presumptively unobjectionable and could save both sides time and

money, and spare the court some of the skirmishing that now occurs. Promising work developing pattern interrogatory requests for employment discrimination actions is already underway as a result of the Conference. This work involves both plaintiff and defense lawyers cooperating to ensure that the form discovery requests reflect the views of both sides. Other categories of litigation would benefit from similar efforts. Similarly, standard protective orders that have been tested in practice could be a more time- and cost-effective alternative to each firm or lawyer inventing different forms of orders that in turn can generate litigation.

Bar organizations and legal research groups have also expressed a willingness to work on educating and training lawyers and clients in methods to promote cooperation consistent with vigorous advocacy and changes in litigation practice and behavior necessary to achieve proportionality in discovery. The existing rules provide many opportunities and incentives to cooperate, including the Rule 26(f) party conference, the Rule 16 scheduling orders and pretrial conferences, and the “meet and confer” obligations for many motions. While many lawyers honor and seize these opportunities, others do not, whether because of mistaken notions of the duties of “zealous advocacy,” clients who dictate “scorched earth” practices, self-serving desires to expand their own work, or lack of training and experience. Professional bar organizations have tried to address these problems by adopting standards of cooperation. It will be important to encourage widespread recognition and implementation of these standards. In addition, groups such as the Sedona Conference, which was an early leader in identifying the need to adapt basic litigation strategies to manage electronic information, and the IAALS, are committed to continuing to develop and improve standards that are specifically responsive to continuing changes in technology and business that profoundly affect litigation.

The education and training must include not only lawyers, but also clients. In this respect, one area many have noted as important is the lack of preparation by even large and sophisticated data producers for electronic discovery, which has in turn contributed to the problems lawyers and judges have encountered. Bar and other organizations specifically representing clients will have an important role in such efforts.

B. Pilot Projects and Other Empirical Research

One form of empirical research will be pilot projects to test new ideas. An example of a promising project is the Seventh Circuit Electronic Discovery Pilot Program, which has convened large numbers of lawyers and judges to educate the bench and the bar on the problems of discovering electronically stored information and to devise improved practices. That pilot program developed and tested Principles Relating to the Discovery of Electronically Stored Information.³ The FJC will study this pilot program and the accompanying principles to identify successful strategies that can be adopted elsewhere, to develop useful materials for judges and lawyers, and to improve judicial and legal education on managing electronic discovery.

The state courts are an important source of information about experience with different rules and approaches. The Conference included detailed research on practices in Arizona and Oregon.

³ The committee overseeing the pilot program has released a report on phase one of the program, which explains the process and reasoning behind the development of the principles and provides preliminary results of information gathered on the application of the principles in cases during phase one of the pilot program. See SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM COMMITTEE, SEVENTH CIRCUIT ELECTRONIC DISCOVERY PILOT PROGRAM REPORT ON PHASE ONE (2010), available at <http://civilconference.uscourts.gov> (follow “Library” hyperlink; then follow “Seventh Circuit Electronic Discovery Pilot Program” hyperlink on page 4) (last visited September 1, 2010).

For example, Arizona goes far beyond federal practice by requiring highly detailed initial disclosures. Oregon continues to have fact pleading. Continued study of state practice will be important.

V. SPECIFIC IMPLEMENTATION STEPS

The 2010 Conference has provided more than could have been expected or even hoped for. The immediate task for the Rules Committees is to prioritize the many issues identified in the Conference for further study. The Conference highlighted two particular areas that merit the Rules Committees' prompt attention: (1) discovery in complex or highly contested cases, including preservation and spoliation of electronically stored information; and (2) review of pleading standards in light of the recent Supreme Court cases. The Advisory Committee has initiated work in these areas. The Discovery Subcommittee chaired by Judge David Campbell has begun considering rules to provide better guidance on preservation and spoliation of evidence, particularly with respect to electronically stored information. The Chair and Reporter of the Advisory Committee have begun exploring rule responses that might be developed as current pleading issues become better focused. On a broader basis, a new subcommittee chaired by Judge John Koeltl has begun to study the many different kinds of projects needed to capitalize on the insights gained from the Conference.

Some aspects of the work, such as judicial education, the development of supporting materials, and the development and implementation of pilot projects will be coordinated with the FJC. The FJC has also already begun working to implement some of the insights and lessons the Conference provided. Education programs, best practices guides, and different kinds of supporting materials for the bench and the bar will help achieve better use of present court rules. Research, empirical data, and pilot projects, such as the Seventh Circuit Electronic Discovery Pilot Program, will continue to provide the foundation for sound rule amendments and for changes in judicial education.

Bar and legal research organizations are already at work on developing their own training and supporting materials for lawyers and litigants to promote some of the lessons learned. As one example, NELA and the American College, with the IAALS, are working to develop pattern discovery requests for employment cases.

All of this will require continuing hard work by the Rules Committees to carry forward the momentum provided by the broad-based and carefully considered observations and proposals. The agenda for the Advisory Committee is demanding. But the goals are as old as the Federal Rules of Civil Procedure. They are the goals of Rule 1: to secure the just, speedy, and inexpensive determination of every civil action and proceeding in the federal courts.

Agenda
2010 Litigation Review Conference
Duke Law School
May 10-11, 2010

Monday, May 10, 2010

- 7:30-8:30 Continental Breakfast
- 8:30-8:45 **Welcome and Introduction:** Judges Lee Rosenthal, Mark Kravitz , and John Koeltl
- 8:45-10:15 **The Empirical Research: Overview of Satisfaction or Dissatisfaction with the Current System, and Suggestions for Change Raised by the Data**
- Moderator: Judge Barbara Rothstein
- A. The FJC Data: Judge Barbara Rothstein, Dr. Emery Lee, and Tom Willging
 - B. The Litigation Section Data: Lorna Schofield, Dr. Emery Lee, and Tom Willging
 - C. The NELA Data: Rebecca Hamburg
 - D. Follow Up Lawyer Interviews: Dr. Emery Lee, Tom Willging
- 10:15-10:30 BREAK
- 10:30-11:45 **The Empirical Research: Continued**
- Moderator: Justice Rebecca Kourlis
- E. Vanishing Jury Trial Data: Prof. Marc Galanter
 - F. The ACTL/IAALS Data: Justice Rebecca Kourlis, Paul Saunders
 - G. LJC Cost Data: Alexander Dimitrief
 - H. RAND Data: Nicholas Pace
 - I. Commentary on the Presented Research: Prof. Marc Galanter, Prof. Theodore Eisenberg, Jordan Singer

11:45-1:00 **Pleadings and Dispositive Motions: Fact Based Pleading, Twombly, Iqbal, Efforts to Decide Cases on the Papers Either at the Beginning of the Process or at the End of the Process**

Moderator: Prof. Arthur Miller

Participants: Judge Jon Newman, Prof. Adam Pritchard, Prof. Geoffrey Hazard, Daniel Girard, Sheila Birnbaum, Jocelyn Larkin

1:00-2:00 LUNCH

2:00-2:30 Speaker: Former Deputy Attorney General David Ogden

2:30-3:45 **Issues with the Current State of Discovery: Is There Really Excessive Discovery, and if so, What are the Possible Solutions?**

Moderator: Elizabeth Cabraser

Participants: Judge David Campbell, Magistrate Judge J. Paul Grimm, Jason Baron, Patrick Stueve, Stephen Susman, Prof. Catherine Struve

3:45-5:00 **Judicial Management of the Litigation Process: Is the Solution to Excessive Cost and Delay Greater Judicial Involvement?**

Moderator: Judge Patrick Higginbotham

Participants: Judge Michael Baylson, Magistrate Judge J. David Waxse, Jeffery Greenbaum, Prof. Judith Resnik, William Butterfield, Paul Bland

Tuesday, May 11, 2010

- 7:30-8:30 Continental Breakfast
- 8:30-9:45 **E-Discovery: Discussion of the Cost Benefit Analysis of E-Discovery and the Degree to Which the New Rules are Working or Not**
- Moderator: Gregory Joseph
- Participants: Judge Shira Scheindlin, Magistrate Judge J. James Bredar, John Barkett, Thomas Allman, Joseph Garrison, Daniel Willoughby, Jr.
- 9:45-10:30 **Settlement: Is the Litigation Process Structured for Settlement Rather than Trial and Should it Be? Should the Answers Depend on the Complexity of the Case including Whether the Action is a Class Action?**
- Moderator: Judge Brock Hornby
- Participants: Judge Paul Friedman, Prof. Richard Nagareda, Prof. Robert Bone, James Batson, Loren Kieve
- 10:30-10:45 BREAK
- 10:45-11:45 **Perspectives from the Users of the System: Corporate General Counsel, Outside Lawyers, Public, and Governmental Lawyers**
- Moderator: Judge John Koeltl
- Participants: Alan Morrison, Amy Schulman, Thomas Gottschalk, Ariana Tadler, Anthony West, Joseph Sellers
- 11:45-1:00 **Perspectives from the States: Different Solutions for Common Problems and their Relative Effectiveness; IAALS Pilot Results**
- Moderator: Justice Andrew Hurwitz
- Participants: Justice Kourlis, Paula Hannaford-Agor, Prof. Seymour Moskowitz, William, Judge Henry Kantor

- 1:00-1:30 LUNCH
- 1:30-2:00 Speaker: Chief Judge James Holderman
- 2:00- 3:15 **The Bar Association Proposals: ACTL, ABA Litigation Section, NYCBA, AAJ, LCJ, DRI**
- Moderator: Lorna Schofield
- Participants: Lorna Schofield, David Beck, Wendy Schwartz, Bruce Parker, John Vail
- 3:15-4:30 **Observations from Those Involved in the Rule Making Process over the Years**
- Moderator: Dean David Levi
- Participants: Judge Anthony Scirica, Judge Patrick Higginbotham, Prof. Paul Carrington, Prof. Daniel Coquillette, Prof. Arthur Miller
- 4:30-5:00 **Summary and Conclusions:** Judge Lee Rosenthal, Judge Mark Kravitz, Prof. Edward Cooper, Prof. Rick Marcus

Conference Panelists, By Panel
2010 Litigation Review Conference
Duke Law School
May 10-11, 2010

Welcome and Introduction:

- Judge Lee Rosenthal (United States District Court Judge from S.D. Tex.; Current Chair of the Committee on Rules of Practice and Procedure; Former Chair of the Advisory Committee on Civil Rules)
- Judge Mark Kravitz (United States District Court Judge from D. Conn.; Current Chair of the Advisory Committee on Civil Rules)
- Judge John Koeltl (United States District Court Judge from S.D.N.Y. ; Current member of the Advisory Committee on Civil Rules)

Empirical Research Panel #1:

- Judge Barbara Jacobs Rothstein (Director of the Federal Judicial Center; United States District Court Judge from W.D. Wash.)
- Dr. Emery Lee III (Senior researcher in the Federal Judicial Center)
- Tom Willging (Senior researcher in the Federal Judicial Center)
- Lorna Schofield (Partner at Debevoise & Plimpton; Current Chair of the ABA Litigation Section)
- Rebecca Hamburg (Program Director of the National Employment Lawyers Association)

Empirical Research Panel #2:

- Justice Rebecca Kourlis (Executive Director of the Institute for the Advancement of the American Legal System; Former Justice on the Colorado Supreme Court)
- Professor Marc Galanter (Professor of Law at University of Wisconsin-Madison and the London School of Economics and Political Science)
- Paul Saunders (Partner at Cravath, Swain & Moore LLP)
- Alexander Dimitrief (Vice President and Senior Counsel for Litigation and Legal Policy at General Electric)
- Nicholas Pace (Staff member of RAND Institute for Civil Justice)
- Professor Theodore Eisenberg (Professor of Law at Cornell Law School)
- Jordan Singer (Director of Research at the Institute for the Advancement of the American Legal System)

Pleadings and Dispositive Motions Panel:

- Professor Arthur Miller (Professor of Law at the New York University School of Law; Former Reporter to the Advisory Committee on Civil Rules)
- Judge Jon Newman (United States Court of Appeals Judge for the Second Circuit)
- Professor Adam Pritchard (Professor of Law at University of Michigan Law School)
- Professor Geoffrey Hazard (Professor of Law at Hastings College of Law)
- Daniel Girard (Managing partner of Girard Gibbs LLP; Current member of the Advisory Committee on Civil Rules)
- Sheila Birnbaum (Co-head of Skadden Arps Complex Tort and Insurance Group; Former member of the Advisory Committee on Civil Rules)
- Jocelyn Larkin (Deputy Executive Director of the Impact Fund)

Current State of Discovery Panel:

- Elizabeth Cabraser (Founding partner at Lieff, Cabraser, Heimann & Bernstein, LLP)
- Judge David Campbell (United States District Court Judge from D. Ariz.; Current member of the Advisory Committee on Civil Rules)
- Magistrate Judge J. Paul Grimm (United States Magistrate Judge from D. Md.; Current member of the Advisory Committee on Civil Rules)
- Jason Baron (Director of Litigation for the National Archives and Records Administration)
- Patrick Stueve (Founding partner of Stueve Siegel Hanson LLP)
- Stephen Susman (Founding partner of Susman Godfrey)
- Professor Catherine Struve (Professor of Law at University of Pennsylvania School of Law)

Judicial Management Panel:

- Judge Patrick Higginbotham (United States Court of Appeals Judge for the Fifth Circuit; Former Chair of the Advisory Committee on Civil Rules)
- Judge Michael Baylson (United States District Court Judge for E.D. Pa.; Current member of the Advisory Committee on Civil Rules)
- Magistrate Judge J. David Waxse (United States Magistrate Judge for D. Kan.)
- Jeffery Greenbaum (Partner at Sills Cummis & Gross P.C.)
- Professor Judith Resnik (Professor of Law at Yale Law School)
- William Butterfield (Partner at Hausfeld LLP)
- Paul Bland (Staff attorney at Public Justice)

E-Discovery Panel:

- Gregory Joseph (Principal of Greg P. Joseph Law Offices, LLC; President Elect of the American College of Trial Lawyers; Former member of the Advisory Committee on Evidence Rules)
- Judge Shira Scheindlin (United States District Court Judge from S.D.N.Y.; Former member of the Advisory Committee on Civil Rules)
- Magistrate Judge J. James Bredar (United States Magistrate Judge from D. Md.)
- John Barkett (Partner at Shook, Hardy & Bacon L.L.P.)
- Thomas Allman (Former General Counsel of BASF Corporation)
- Joseph Garrison (Founding partner of Garrison, Levin-Epstein, Chimes, Richardson & Fitzgerald, P.C.)
- Daniel Willoughby, Jr. (Partner at King & Spalding)

Settlement Panel:

- Judge Brock Hornby (United States District Court Judge from D. Me.)
- Judge Paul Friedman (United States District Court Judge from D.D.C.; Former member of the Advisory Committee on Criminal Rules)
- Professor Richard Nagareda (Professor of Law at Vanderbilt University School of Law)
- Professor Robert Bone (Professor of Law at the University of Texas School of Law)
- James Batson (Partner at Liddle & Robinson, L.L.P.)
- Loren Kieve (Founding partner of Kieve Law Offices)

Users of the System Panel:

- Alan Morrison (Dean for Public Interest & Public Service at the George Washington University Law School)
- Amy Schulman (Senior Vice President and General Counsel of Pfizer Corporation)
- Thomas Gottschalk (Of counsel to Kirkland & Ellis; Former General Counsel at General Motors Company)
- Ariana Tadler (Partner at Milberg LLP)
- Anthony West (Assistant Attorney General, Civil Division, Department of Justice)
- Joseph Sellers (Partner at Cohen Millstein Sellers & Toll PLLC)

Perspectives from the States Panel:

- Justice Andrew Hurwitz (Justice on the Arizona Supreme Court; Current member of the Advisory Committee on Evidence Rules)
- Justice Rebecca Kourlis (Executive Director of the Institute for the Advancement of the American Legal System; Former Justice on the Colorado Supreme Court)

- Paula Hannaford-Agor (Director of the Center for Jury Studies, National Center for State Courts)
- Professor Seymour Moskowitz (Professor of Law at Valparaiso University School of Law)
- William Maledon (Partner at Osborn Maledon, P.A.; Current member of the Committee on Rules of Practice and Procedure)
- Judge Henry Kantor (Judge of the Circuit Court of the State of Oregon)

Bar Association Proposals Panel:

- Lorna Schofield (Partner at Debevoise & Plimpton; Current Chair of the ABA Litigation Section)
- David Beck (Founding partner of Beck, Redden & Secret; Former member of the Committee on Rules of Practice and Procedure; Former President of the American College of Trial Lawyers)
- Wendy Schwartz (Partner at Reed Smith, LLP)
- Bruce Parker (Partner at Venable's Products Liability Practice Group)
- John Vail (Representative of American Association of Justice)

Rulemaking Panel:

- Dean David Levi (Dean of Duke University School of Law; Former United States District Judge from E.D. Cal.; Former Chair of the Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules)
- Judge Anthony Scirica (United States Court of Appeals Judge for the Third Circuit; Former Chair of the Committee on Rules of Practice)
- Judge Patrick Higginbotham (United States Court of Appeals Judge for the Fifth Circuit; Former Chair of the Advisory Committee on Civil Rules)
- Professor Paul Carrington (Professor of Law at Duke University School of Law; Former Reporter to the Advisory Committee on Civil Rules)
- Professor Daniel Coquillette (Professor of Law at Harvard Law School and Boston College of Law; Reporter to the Committee on Rules of Practice and Procedure)
- Professor Arthur Miller (Professor of Law at the New York University School of Law; Former Reporter to the Advisory Committee on Civil Rules)

Summary and Conclusions:

- Judge Lee Rosenthal (United States District Court Judge from S.D. Tex.; Current Chair of the Committee on Rules of Practice and Procedure; Former Chair of the Advisory Committee on Civil Rules)
- Judge Mark Kravitz (United States District Court Judge from D. Conn.; Current Chair of the Advisory Committee on Civil Rules)

- Professor Edward Cooper (Professor of Law at University of Michigan School of Law; Reporter to the Advisory Committee on Civil Rules)
- Professor Rick Marcus (Professor of Law at Hastings College of Law; Associate Reporter to the Advisory Committee on Civil Rules)

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DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
NOVEMBER 15-16, 2010

1 The Civil Rules Advisory Committee met at the Administrative Office of the United States
2 Courts on November 15 and 16, 2010. The meeting was attended by Judge Mark R. Kravitz, Chair;
3 Judge Michael M. Baylson; Judge David G. Campbell; Judge Steven M. Colloton; Professor Steven
4 S. Gensler; Judge Paul W. Grimm; Daniel C. Girard, Esq.; Peter D. Keisler, Esq.; Judge John G.
5 Koeltl; Judge Gene E.K. Pratter; Chief Justice Randall T. Shepard; Anton R. Valukas, Esq.; Judge
6 Vaughn R. Walker; and Hon. Tony West. Professor Edward H. Cooper was present as Reporter, and
7 Professor Richard L. Marcus was present as Associate Reporter. Judge Lee H. Rosenthal, Chair, and
8 Judge Diane P. Wood represented the Standing Committee, along with Professor Daniel R.
9 Coquillette, Reporter. Judge Eugene R. Wedoff attended as liaison from the Bankruptcy Rules
10 Committee. Laura A. Briggs, Esq., was the court-clerk representative. Peter G. McCabe, John K.
11 Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office. Judge Barbara
12 Rothstein, Emery Lee, and Joe Cecil represented the Federal Judicial Center. Ted Hirt, Esq., and
13 Allison Stanton, Esq., Department of Justice, were present. Katherine David, interim Rules Clerk
14 for Judge Rosenthal, attended. Observers included Alfred W. Cortese, Jr., Esq.; Joseph Garrison,
15 Esq. (National Employment Lawyers Association liaison); John Barkett, Esq. (ABA Litigation
16 Section liaison); Chris Kitchel, Esq. (American College of Trial Lawyers liaison); John Vail, Esq.
17 (American Association for Justice); Tom Allman, Esq.; Edward Pickle, Esq.; and Jonathan
18 Redgrave, Esq.

19 Judge Kravitz opened the meeting with a general welcome to all present. He congratulated
20 Andrea Kuperman, Judge Rosenthal's Rules Clerk, on the birth of Abigail Rose — "another job well
21 done." He noted that "the Chief Justice has been good to us" — Judge Colloton and Judge Koeltl
22 have been reappointed for second terms. And Judge Pratter has been appointed "to maintain our
23 Eastern District of Pennsylvania contingent."

24 Judge Baylson elaborated on the introduction of Judge Pratter, observing that she and he had
25 been partners in private practice before becoming colleagues on the bench. She is an outstanding
26 judge. Judge Kravitz noted that when the appointment was announced, Judge Baylson had sent an
27 e-mail message reporting that Judge Pratter is brilliant, creative, scholarly, and witty. All joined in
28 welcoming her to the Committee.

29 Judge Kravitz noted with sadness the death of Professor Richard Nagareda. Professor
30 Nagareda presented an excellent paper at the Duke Conference, suggesting that procedure should be
31 revised to focus in part on devices that will enable the parties to price the claims for settlement. He
32 was one of the most luminous of the rising stars in the procedure heavens. Beyond his prolific
33 writing, including service as one of the Reporters for the American Law Institute Principles of
34 Aggregate Litigation, he was an active innovator in developing new curricular offerings to combine
35 rigorous theory with the practical side of litigation.

36 Judge Kravitz also noted that Judge Baylson has concluded the allotted two terms as
37 Committee member. He was deeply involved in all aspects of Committee work, serving on a Style
38 Subcommittee and chairing Subcommittees on Rule 15, Rule 56, and time computation. He
39 displayed consummate leadership skills in steering the Rule 56 project to completion, achieving
40 success in a task that earlier efforts had left unfinished. He also collaborated actively in the Rule 45
41 work of the Discovery Subcommittee. He will be missed.

42 Two other Committee members also have completed their second terms. Chilton Varner and
43 Daniel Girard were enormously productive members. They worked tirelessly on discovery, including
44 Rule 26, e-discovery, and the quirks of Rule 45. They bring different perspectives to Committee
45 work, born of different practice backgrounds, but they have left their clients at the door and worked
46 harmoniously to forge the best rules that can be shaped for the benefit of litigants on all sides of an

47 action. They too will be missed. New practitioner members have not yet been designated to replace
48 them. They have generously agreed to continue to work with the Discovery Subcommittee as it
49 refines the Rule 45 proposals and plunges deeper into its work on preservation and spoliation. The
50 Committee is in their debt.

51 Judge Wedoff has contributed valuable insights on general procedural problems in his role
52 as liaison from the Bankruptcy Rules Committee. He has been designated chair of that Committee,
53 so will be succeeded by another liaison. His successor will have to work hard to take his place.

54 In a different direction, Judge Kravitz noted that Judge Walker has decided to retire from the
55 bench as of February 28, 2011. His most prominent recent work on the bench was his decision in
56 the case challenging California Proposition 8. Different observers react differently to the decision,
57 but it has garnered high praise in many quarters. He handled this momentous trial with all the skill
58 and imagination evidenced in his work with the Committee. One example of his Committee work
59 was his steadfast but good-humored position that the "point-counterpoint" proposal for summary-
60 judgment practice was a mistake. His court had adopted this procedure, followed it for a while, and
61 abandoned it. In the end, his view prevailed. It will be interesting to follow the paths his career
62 takes next.

63 *Standing Committee*

64 Judge Kravitz reported that the Duke Conference was discussed at the June meeting of the
65 Standing Committee. Several Standing Committee members attended the Conference and reported
66 highly favorable reactions. Other members had become familiar with the conference papers and
67 reports on the panel discussions. They too were very favorably impressed.

68 *Report to Chief Justice*

69 Judge Kravitz congratulated Judge Rosenthal on crafting an excellent report to Chief Justice
70 Roberts on the Duke Conference. The Report emphasizes the great value of the work done for the
71 Conference, and emphasizes above all the importance of carrying forward on many fronts to ensure
72 the work continues without losing momentum. The Duke Conference Subcommittee will report on
73 this work later during this meeting.

74 *Judicial Conference*

75 This Committee did not have any proposals requiring action at the September meeting of the
76 Judicial Conference.

77 *New Rules*

78 The expert trial-witness revisions of Rule 26 and the rewritten Rule 56 remain pending in
79 Congress. There is every reason to expect that Congress will, by inaction, allow them to become
80 effective as scheduled on December 1.

81 *March 2010 Minutes*

82 The draft minutes of the March 2010 Committee meeting were approved without dissent,
83 subject to correction of typographical and similar errors.

84 *Working Agenda*

85 Judge Kravitz noted that the agenda does not include any proposals for action. The purpose
86 of this meeting is to gather advice from the full Committee on the work being developed by
87 subcommittees or more informally. Some truly difficult problems are being addressed. Deliberate
88 action will be required to address them, often in multiple stages.

89 *Rule 45*

90 Judge Campbell, chair of the Discovery Subcommittee, introduced the Rule 45 work by
91 observing that the Subcommittee is working toward making recommendations next April for
92 publishing proposed Rule 45 amendments.

93 The Rule 45 work began two years ago by making a broad survey of Rule 45 issues in
94 response to a variety of suggestions for revision. An initial list of 17 possible issues was winnowed
95 down to the four issues still under consideration. The work was carried on through telephone
96 conference calls. A miniconference was held in Dallas at the beginning of October, bringing
97 together a good cross section of lawyers and judges. Their contributions were very helpful in
98 advancing the work.

99 One of the four proposals is easy to grasp. The last sentence of Rule 45(b)(1) explicitly states
100 that notice must be served on each party before a party serves a subpoena to produce documents.
101 Just as explicitly, lawyers complain that frequently they do not receive the required notice. When
102 the complaint is registered with a court, it is remarkable that the party who served the subpoena
103 frequently responds that notice is not required. This proposal seeks to give greater prominence to
104 the notice requirement by moving it up to become a new Rule 45(a)(4). In addition, the proposal
105 requires that a copy of the subpoena be served with the notice. The Subcommittee also considered
106 proposals that would require the party who served the subpoena to give notice to other parties when
107 documents are produced in response. The Subcommittee concluded that adding to the notice
108 requirements would generate additional fractious disputes. In addition, materials are often received
109 in batches — multiple notices often would be required. It seems better to rely on the initial notice
110 of service, leaving the other parties responsible to follow up by inquiry as to materials received.

111 The second proposal provides for transfer of enforcement disputes when a subpoena issues
112 from a court apart from the court where the action is pending. Participants in the miniconference
113 agreed that transfer to the court where the action is pending can be a good idea. At the same time,
114 it is important to set a standard that discourages routine transfer simply to get rid of the dispute.

115 The third proposal deals with a question made prominent by the ruling in *In re Vioxx*
116 *Products Liability Litigation*, 438 F.Supp.2d 664 (E.D.La.2006). The Vioxx court ruled that by
117 negative implication, Rule 45(c)(3)(A)(ii) authorizes nationwide subpoenas that direct a party or a
118 party's officer to appear as a trial witness. Other courts have disagreed; there is a "pretty even split
119 of authority" in the reported cases. It seems clear that the Vioxx ruling defies the intent of Rule 45
120 as revised in 1991. The Subcommittee expects to recommend that Vioxx be undone. Nonetheless,
121 powerful arguments have been made for recognizing some expanded power to compel appearance
122 of a party at trial. The Subcommittee expects to recommend publication of a version that will
123 incorporate its judgment on the best way to go beyond Vioxx, so as to prompt comments and
124 testimony on which approach is better.

125 Finally, the Subcommittee has studied multiple methods of restructuring Rule 45. Many
126 comments urge that Rule 45 is complex. If it is well understood by a few who work with it regularly,
127 it is difficult for others to work through it. One approach, suggested by Judge Baylson, would
128 dramatically shorten Rule 45, in part by relying on cross-reference to the body of discovery rules set
129 out from Rule 26 through Rule 37. This approach runs the risk of forcing courts to recreate answers
130 to questions that caused trouble in earlier days and were addressed by rule text to provide readily
131 available solutions. Another approach would move part or all of the discovery subpoena provisions
132 directly into the discovery rules. Subpoenas to produce documents, for example, could be
133 incorporated with the document-request provisions of Rule 34. This approach drew some support,
134 but many participants at the miniconference thought it would not reduce the overall complexity of
135 the rules. Unless there is a clear and strong advantage, further, it is better to avoid proposals that
136 inevitably generate a risk of unanticipated consequences. A more modest approach is being actively
137 pursued. This approach seeks to eliminate the "three-ring circus" aspect of present practice that
138 provides multiple definitions of the issuing court, of the place of service, and of the place of
139 performance. All subpoenas would issue from the court where the action is pending. The place of
140 performance can — and probably will — be kept as it is in the present rules. And enforcement can
141 be provided in the place of performance, subject to adding the transfer provisions that will be
142 proposed quite apart from the restructuring proposal.

143 Professor Marcus developed these themes.

144 Notice. The notice question has been extensively discussed at earlier meetings. Adding a
145 requirement that the notice include a copy of the subpoena serves the purpose of the notice
146 requirement. As obvious examples, it will provide other parties an opportunity to object or to
147 propose that the subpoena be expanded to include additional materials. A minor drafting issue also
148 is presented — "then" was added in restyling present Rule 45(b)(1), but it is not clear whether it
149 serves a desirable purpose. One issue is whether the Committee Note should say anything about the
150 consequences of failing to give the required notice. The Subcommittee concluded that it is better
151 not to add sanction provisions to rule text; it may be better to avoid the question in the Note as well.
152 And the prospect of requiring additional notices each time materials are produced in response to a
153 subpoena was abandoned as too complicated.

154 The notice proposal elicited brief discussion. Two judges voted in favor of retaining "then."
155 Two other judges agreed that complaints that notice has not been provided are made so frequently
156 that it will be good to see whether some gain may be achieved by moving the requirement to a more
157 prominent place in the rule.

158 Transfer. Transfer issues arise because a discovery subpoena ordinarily issues from the court for the
159 district where performance is required. The court may have no other connection to the action. For
160 that matter, it does not know that the subpoena has issued, even though nominally the subpoena is
161 issued in its name. Enforcement at the place of performance is nonetheless appropriate in many
162 circumstances because the performance issues bear only on local events. On the other hand,
163 performance issues may have important ramifications for the action. It may be that the issue has
164 already been ruled upon by the action court, and is tendered to the issuing court in hopes of winning
165 a conflicting ruling. Or a complex action may lead to issuance of similar subpoenas from several
166 different courts around the country, creating the opportunity for inconsistent rulings. Decision of
167 many performance issues may turn on a firm grasp of the substantive issues in the action, and in any
168 event may affect case management by the action court. These concerns have led some courts to
169 transfer enforcement issues to the action court, despite the apparent lack of authority in present rules.

170 Judge Campbell offered examples of the problems that can be ameliorated by transfer. In one
171 case expert witnesses testified at a TRO hearing in a court on the east coast. The plaintiff then
172 subpoenaed the experts in the courts where the experts were located, seeking their full reports and
173 all relevant materials. One of the experts was in the District of Arizona. The defendant moved to
174 quash the subpoena, arguing that it was not clear whether the expert would be a trial-witness expert
175 and that discovery must be barred until that was decided. A magistrate judge in the court where the
176 action was pending was considering the question whether the limits on consulting expert discovery
177 were waived by using the expert to testify at the TRO hearing. The same issue was raised in a
178 district court in Texas and in yet another court. It makes no sense to require all these courts to rule,
179 perhaps inconsistently, on the same question as presented in the same action.

180 Another case was brought by a Los Angeles plaintiff against "Doe defendants" for
181 anonymous on-line defamation. The plaintiff then subpoenaed an internet service provider in
182 Arizona to compel disclosure of the names of the bloggers who posted the challenged statements.
183 The First Amendment protection of anonymous blogging can be defeated by showing a prima facie
184 claim. The discovery ruling would be dispositive. And the same question would be presented to
185 other courts where other internet service providers are located. It would be much better to have the
186 ruling on the prima facie case issue made by the court where the action is pending.

187 In a third example, a tight schedule was established to move toward determination of a
188 motion for class certification. The parties subpoenaed records in two federal courts in the midwest.
189 Those courts still had not ruled after four months. The orderly management of the class-certification
190 issue would have been much advanced by enabling the class-action court to rule on the subpoena
191 issues. This example prompted an observation that ancillary discovery motions are treated as
192 miscellaneous motions that do not show up on the six-month list. There is no external pressure for
193 timely disposition. So the lawyers at the miniconference protested that it is difficult to "get the
194 attention" of the ancillary discovery court.

195 These persuasive examples are offset by the concern that some judges will have a reflexive
196 knee-jerk tendency to transfer all disputes in ancillary discovery proceedings to the court where the
197 action is pending. Nonparty witnesses may have a strong interest in achieving local resolution of the
198 issues.

199 The draft transfer provision invokes the "interest of justice" standard that is part of the
200 formula guiding venue-transfer decisions under 28 U.S.C. § 1404(a). It was suggested that these
201 words do not give much guidance. Should the rule at least add the "convenience of parties and
202 witnesses"? Or perhaps refer directly to the convenience of the person commanded to provide
203 discovery? Or require "compelling reason" to transfer? The draft Committee Note discusses these
204 issues. One variation may be that it is a party, not the witness, who wants a decision in the ancillary
205 court — perhaps because it fears an adverse ruling by the court where the action is pending.
206 Examples could be given -- resistance based on a witness's medical condition is a good reason to
207 resolve the issue where the witness is located.

208 The draft rule does not speak of a motion, whether to compel or for a protective order. It
209 addresses the court: "the issuing court may * * * transfer." The Note says the burden is on the party
210 seeking transfer to make the case for transfer, but often it may be the judge who initiates the transfer
211 question. Rather than refer to burdens on parties and witnesses, would it be better to frame a
212 presumption? And perhaps to include it in the rule text?

213 Another possible transfer standard would be "when appropriate." "Appropriate" does not
214 much provide much guidance; as the stylists observe, it is awkward to frame a rule that does no more
215 than guard against inappropriate rulings. But "appropriate" is used to express standards in some
216 rules. And it avoids the difficulty of articulating a useful standard.

217 "The interests of justice" standard was defended as "striking the right note. It is familiar from
218 § 1404(a). Judges behave responsibly." They take account of where issues were first raised, of who
219 it is that first seeks transfer or chooses a court by applying for an order. If anything, the presumption
220 should be for transfer to the action court. The issues are tied to the pending action — the importance
221 of the discovery must be weighed, and that must be measured by its place in the overall litigation.
222 The ancillary court should be asked to rule only on clearly local interests of a local witness, and even
223 then the interest in a local ruling may not be great. The burden of securing a ruling in the action
224 court may be no greater, given modern communications technology. Overall, it is important to add
225 a transfer provision to Rule 45. Ordinarily the parties agree to submit disputes to the action court,
226 but at times someone refuses.

227 One potential difficulty arises if an action court in Seattle directs a nonparty witness in Miami
228 to provide discovery. How is the order enforced? In the ancillary court in Miami? Suppose the
229 issue is contempt — do we want to drag the witness across the country?

230 An alternative may be to attempt to provide greater precision in the rule itself. For example,
231 it could provide for transfer to the action court if the dispute is between the parties, rather than one
232 initiated by the nonparty witness. Transfer also would be provided if the dispute substantially affects
233 the merits of the action, or if the same issues will arise in other courts, or if there are other
234 compelling reasons. As often happens, the desire for guiding detail fights with the desire to avoid
235 further complicating the rule text — Rule 45 is already complex, and the wish for specific guidance
236 confronts the value of supporting discretion to deal with circumstances that cannot be anticipated
237 in rule text. The basic idea may be one that is awkward to frame in rule-speak: "really good reason"
238 for transfer.

239 This discussion was summarized as leaving it still uncertain whether, "all else being equal,"
240 disputes should be resolved by the ancillary court. The draft Note seems to make this "the locus of
241 inertia." Perhaps it would be better to be completely neutral.

242 The suggestion that the rule should refer to the burden on the nonparty witness was repeated.
243 This was elaborated: transfer should be strongly discouraged if the nonparty witness can show that
244 transfer would impose an unfair burden. The problem that the ancillary court may take too long to

245 decide, interfering with progress in the action court, could be addressed by establishing a firm
246 deadline to decide — perhaps 30 days. But "I know this would be unpopular."

247 The time-to-ruling problem was addressed from a different perspective. Issue the subpoena.
248 Eventually you will get the documents. If you want to get them promptly by getting a ruling from
249 the action court, the party issuing the subpoena should be required to show why the dispute should
250 be transferred. The Committee Note can cover the problem. So for the case where the action is
251 pending in Seattle, the witness is in Miami, and the witness has no interest in the parties' dispute.
252 The burden should be on the party to justify dragging the nonparty before the distant action court.

253 A third member spoke in favor of focusing on the nature of the dispute. Transfer seems
254 appropriate when the issues are not peculiar to the nonparty witness, or when some form of forum
255 shopping is going on. Frequently the "nonparty" witness is related in interest to a party, and may be
256 raising issues at the party's behest rather than from any particular interest of its own. "Most issues
257 really belong in the action court." Questions of the scope of discovery often have been decided in
258 the action court before the issue arises in the ancillary court.

259 A judge observed that the lawyers' discussion was helpful. But it is also useful to think of
260 the impact on the judge in the ancillary court. Often an ancillary-court judge will pick up the phone
261 and talk with the judge presiding over the action. That opportunity should remain available even
262 when there is a rule providing for transfer. The judges can reflect on "what is really driving the
263 dispute," and their conversation may enable coordination that facilitates a sound ruling by the
264 ancillary court without the need to transfer.

265 Another judge agreed that when acting as the ancillary court, "I call the presiding judge."
266 Perhaps the rule could distinguish between "local" issues and those that are more tied to the merits.

267 Turning back to the draft rule and Note, it was observed that they seem to express a mild
268 weight in favor of retaining the dispute in the ancillary court. "But the range of circumstances is
269 broad." Often the nonparty local witness is aligned with a party who wants to defeat the discovery,
270 or to make it as difficult as possible. But it may be difficult to draft rule text that usefully
271 distinguishes between local disputes and those that tie more directly to the action court. And the
272 discussion has not produced any consensus as to the choice between transfer and no transfer "when
273 the arrow points 55/45." Some comments seem to prefer transfer to the action court, others to prefer
274 retaining the dispute in the ancillary court. And there is a risk that the longer the rule is — the
275 greater detail it provides to "guide" a transfer decision — the greater will be the tendency just to
276 decide the motion without wading through the elements of a transfer order.

277 The difficulty of framing detailed rule text led to another suggestion that the details should
278 be addressed in the Note. And it may be better to avoid any reference to a burden or presumption.
279 "Once the obvious cases are sorted out, perhaps there should not be a burden." In the same vein, it
280 was suggested that the balance will be different in different cases. Perhaps the Note could be limited
281 to making that point, without suggesting any presumption.

282 "Jurisdiction" over the nonparty witness came back for more detailed discussion. Referring
283 back to the example of an action pending in Seattle and a nonparty witness in Miami, it has been
284 protested that the court in Seattle does not have jurisdiction over the nonparty in Miami. Related
285 questions were raised at the miniconference. Can the Florida lawyer appear in the Seattle court?
286 Many courts, for example, allow e-filing only by a lawyer who is admitted to practice in that court.
287 The Subcommittee believes there is no real jurisdiction problem. And it believes that often transfer
288 will generate few practical problems or burdens. Briefing of the transfer motion in the ancillary
289 court often will address the merits of the dispute so thoroughly that there is no need for extensive
290 additional briefing in the action court after transfer. The briefs are easily transmitted. Argument can
291 be made by telephone. Enforcement of an action court's order against a distant witness "will be
292 worked out in practice."

293 Support for this view was voiced by suggesting that the judge in Seattle is not at all likely to
294 require the Florida lawyer to associate local counsel. "This should get worked out."

295 The jurisdiction question was further addressed by observing that Rule 45 now allows the
296 lawyer in Seattle to issue a subpoena in the name of the Florida court. Although the rules do not now
297 provide transfer authority, and many courts conclude that transfer is not possible, other courts have
298 made transfers without creating apparent issues of jurisdiction.

299 Time to object. The discussion of transfer orders led to discussion of the time allowed to object to
300 a subpoena. Rule 45(c)(2)(B), addressed only to document subpoenas, provides for an objection that
301 suspends operation of the subpoena until the serving party moves for an order compelling inspection
302 or production. The objection "must be served before the earlier of the time specified for compliance
303 or 14 days after the subpoena is served." It has been protested that this time is very short, and some
304 lawyers who consult Rule 45 only occasionally have been known to misread it as saying that 14 days
305 is always the outer limit. There is a reason for the 14-day limit. The requesting party may "be in a
306 hurry." But Rule 34 allows a party 30 days to object; why is a nonparty given less time? So it was
307 suggested that 14 days is a very short time for people truly not connected to the action. A witness
308 who knows nothing of the litigation needs to wade through the subpoena, consider whether to get
309 a lawyer, and prompt the lawyer into action. Why not set the limit at the time to comply, just as Rule
310 34 sets a single period to respond by stating that inspection and related activities will be permitted,
311 or by objecting?

312 It was noted that lower courts have divided on the question whether failure to object in 14
313 days results in waiver. And those that find a waiver then generally excuse the waiver.

314 So, it was asked, what happens if the witness gets a couple of extensions of the time to
315 comply without registering an objection, and then objects?

316 A judge observed that the problem is similar to the common encounters with motions to
317 extend the time to file a brief made on the day before the brief is due, or a similarly late motion to
318 file an over-long brief. "We need to be able to say no." "It's easier if there's a deadline."

319 It was agreed that these problems should be considered further. A nonparty subpoena can
320 be for simple things, easily identified and produced. An objection under Rule 45(c)(2)(B) is a potent
321 thing because it stops all compliance automatically. And it is better to avoid a situation in which
322 some material is produced promptly, while other material is held up.

323 The internal puzzle of Rule 45 was expanded. Rule 45(c)(3) addresses all subpoenas, not just
324 document subpoenas. Subparagraph (A) begins by stating that the court must quash or modify a
325 subpoena "on timely motion." Although arguments can be made either way, this seems to be
326 independent of the time to make an "objection" under (c)(2)(B) — remember that an objection is
327 made without a motion, and that the burden of making a motion is made on the party who seeks to
328 compel production. (c)(3)(B) says the court may quash in other circumstances "on motion," without
329 specifying that the motion must be timely. Nothing in (c)(2)(B) suggests waiver, unless it be by
330 implication that the peculiar right to suspend the effect of the subpoena can be claimed only by a
331 timely objection. Courts have not been able to figure out a uniform answer to the waiver question,
332 although those that find waiver generally excuse the waiver. This should be straightened out.

333 An observer noted that the ABA Litigation Section is considering the waiver problem. Most
334 courts do find waiver if the time to object is not met. But if the subpoena is really overbroad, "courts
335 cut a break." One recent case rejected objections made after 14 days, but when compliance was due.
336 This problem should be solved.

337 A Committee member agreed that as a practical matter, the 14-day limit does create a
338 problem. But this is balanced out by negotiating over protection against compliance costs. "There
339 is more balance in a practical sense." Another member agreed that there is little practical difficulty:
340 "I've never had a judge find a waiver. These things are negotiated. Objections typically are made
341 in a brief two-paragraph letter. Phone calls follow."

342 The Subcommittee included these questions in its initial list of 17 Rule 45 questions.
343 Lawyers said it is not a problem and it was dropped. But then it came up again in the miniconference.
344 The Subcommittee will consider it once more.

345 Party as trial witness. As noted in the introduction, the Vioxx decision has become famous,
346 attracting followers and also stimulating disagreement. The Subcommittee proposes to restore what
347 it believes was the intent of the 1991 amendments. Rule 45(b)(2) service requirements limit the
348 reach of all subpoenas. Neither a party nor a party's officer can be compelled to appear at trial unless
349 the trial is held at a place where service could be made under Rule 45(b)(2). The preface of (b)(2),
350 "[s]ubject to Rule 45(c)(3)(A)(ii)," is meant to incorporate the restrictions of (c)(3)(A)(ii), not to
351 expand the reach of (b)(2). The provision in (c)(3)(A)(ii) that directs the court to quash a subpoena
352 that requires a person who is neither a party nor a party's officer to travel more than 100 miles, but
353 allows the person to be commanded to attend trial by travel within the state where trial is held, does
354 not imply that a party or a party's officer may be commanded to attend trial no matter where the
355 subpoena is served.

356 Although the Subcommittee is clear on the original intent of these rule provisions, there are
357 plausible arguments that the rule should be changed. Some of the courts that disagree with the
358 Vioxx decision rest on faithful reading of the rule text, but reflect a wish that the court could
359 command a party and some persons identified with a party to appear as witnesses at trial no matter
360 where served. A number of lawyers at the miniconference thought this would be a good idea when
361 there are strong reasons to want trial testimony, not deposition testimony. Many lawyers agree that
362 when good reasons appear, judges often "jawbone" an agreement to produce the party as trial
363 witness.

364 An alternative that would expand authority to compel appearance as a trial witness is
365 presented in the agenda materials. The draft does not rely on a party-issued subpoena. Instead it
366 requires a court order based on showing "a substantial need that cannot otherwise be met without
367 undue hardship." The order is always directed to a party. The order may direct the party to appear
368 to testify at a trial or hearing, or may direct the party to produce a person employed by the party. The
369 direction to produce a party's employee is subject to further limitations. One version would require
370 that the employee be subject to the party's "legal control." An alternative version would be limited
371 to a person who is an officer, director, or managing agent of a party. The draft rule also directs the
372 court to consider substitutes for appearance at trial — audiovisual deposition under Rule 30, or
373 contemporaneous transmission of testimony from a different location under Rule 43(a). Reasonable
374 compensation may be ordered. Rule 37(b) sanctions may be imposed for disobedience, but only on
375 the party. This alternative is not the Subcommittee's recommendation, but it has seemed important
376 to develop a workable alternative if further work or public comment make the case that a trial court's
377 reach should be expanded.

378 The first question was why the draft refers to testimony at trial or hearing. Most cases seem
379 to involve appearance at trial. But Rule 45(a)(2) describes a subpoena for attendance at a hearing
380 or trial, issued by the court where the hearing or trial is to be held. Testimony may be important at
381 some hearings that are not yet trials. A Rule 65 hearing on a preliminary injunction is an illustration,
382 whenever the hearing is not combined with the trial on the merits.

383 The second question was whether courts actually have authority now to compel a party to
384 appear. Rule 16(c)(1) recognizes that a court may require that a party or its representative be present
385 or reasonably available by other means to consider possible settlement. More broadly, the court has
386 jurisdiction over the parties by virtue of their party status. But these analogies do not extend to a
387 person who is not a party, but only a party's officer — the witness in the Vioxx case was not a party.
388 Jurisdiction to enter an in personam judgment, further, need not automatically extend to authority
389 to compel appearance as a trial witness; even if the authority exists absent some limit, the
390 Subcommittee view of Rule 45 is that the rule is designed to limit this authority. And as for Rule
391 16, the authority to compel a party to be "present or reasonably available" — although not a limit on
392 inherent authority — emphasizes the need for flexibility. It seems better to determine what the trial
393 court's authority over a "party" witness should be and to express it in rule language.

394 Opposition to extending authority to compel a party's appearance as a trial witness commonly
395 rests on the fact that trial subpoenas may impose severe burdens on high-level officials within many
396 organizations. Often the best witnesses with the greatest knowledge of the issues in suit are lower-

397 level employees more directly involved with the underlying events. Some lawyers seem unable to
398 resist the temptation to subpoena higher-level officials for strategic advantage in settlement
399 negotiations.

400 Alongside the fear of strategic misuse lies the perception that the advantages of live trial
401 testimony are often exaggerated. Video depositions have become routine. No study has shown that
402 live trial testimony provides a better foundation for challenging the testimony and evaluating
403 credibility. Contemporary jurors are accustomed to receiving information "through a flat screen."
404 "It is a myth that you need the company president before the jury."

405 So too, it was observed that "these issues get worked out." If a particular officer or employee
406 is in fact an important witness, it is in the party's interest to produce that witness. Failure to produce
407 the witness may look bad.

408 A related thought was that the logic of identifying an organization as a party can be carried
409 too far when it extends to identifying the organization's agents as if parties. Officers and agents are
410 human beings. They deserve protection as individuals.

411 It was agreed that the Subcommittee should develop an alternative draft that in some way
412 adopts the Vioxx view that there should be a means to compel party witnesses to appear at trial when
413 that is important. That led to considering the means of presenting the alternative for public comment
414 and testimony. Different modes can be used to present alternatives for public comment. One is to
415 present them as equals, with the Committee undecided which seems better. Or one can be presented
416 as preferred, but asking for comments on the alternative. If the alternative is presented in fully
417 developed form, it may be possible to respond to the comments by recommending the alternative for
418 adoption without a second round of publication. It will be important that the alternative presentation
419 reflect the seriousness of the issue — rather than a lengthy footnote, it would be better to present it
420 in text form. The letter soliciting comments can explain the Committee's preference and explore
421 the most likely arguments on all sides.

422 A few detailed drafting issues were also discussed. The question whether the order to appear
423 should apply to a "hearing" as well as a trial was renewed. The discussion has repeatedly referred
424 to the value many lawyers place on presenting a live witness to a jury. Juries do not hold hearings.
425 This led to the suggestion that perhaps the authority should extend only to "a jury trial." But it may
426 be that a trial judge would prefer to see the witness in a bench trial. And it may be better to retain
427 the authority for a hearing as well. A judge is not likely to order an appearance unless there are
428 strong reasons.

429 It also was asked whether it is wise to track the "substantial need and undue hardship"
430 formula of Rule 26(b)(3) in this setting. Use of the same formula may imply to some courts that the
431 tests are the same. The questions are quite different, essentially unrelated. Perhaps some better
432 formula can be found to avoid confusion. "Cause," "substantial cause," or the like are familiar
433 alternatives. The direction to consider such alternatives as a video deposition or testimony by
434 contemporaneous transmission will help to give meaning and direction to whatever words are
435 chosen. The Note can explore these matters further.

436 The discussion concluded by reaffirming the Subcommittee recommendation that the Vioxx
437 rule be overruled. At the same time, an alternative that embodies some part of the Vioxx approach
438 will be prepared for publication. But the alternative will be clearly billed as a less-preferred
439 approach.

440 Simplifying Rule 45. The agenda materials include a draft that adopts the least "aggressive" of the
441 several approaches that have been considered for simplifying Rule 45. The idea is to reduce the
442 number of combinations of authority the present rule provides for action court, issuing court, and
443 place of performance. All subpoenas would issue from the court where the action is pending.
444 Among other advantages, this will eliminate the prospect of service "within" the state by tagging a
445 passenger in an airplane flying over the state. Separate provisions in Rule 45(c) would address the
446 place where performance is required. Some drafting accommodations will be required — references
447 to the "issuing court," for example, must be reconsidered. Transfer authority will be worked into the

448 draft. The result will not significantly reduce the word count of Rule 45, but it will simplify its
449 operation.

450 Judge Campbell underscored the value of simplification by stating that for years he has
451 regularly found it necessary to read through the rule to identify the place of compliance, visiting
452 subdivisions (a), (b), and (c) to identify the issuing court, the place of service, and limits on who is
453 required to do what, where. The complexity can be reduced even if there is no change at all in the
454 places where performance is required. And there is value in doing so. Quite recently a big Arizona
455 firm issued a subpoena for a nonparty in Los Angeles from the District of Arizona; it was necessary
456 to explain the ruling refusing to enforce the subpoena because it must issue from the district court
457 in California. Even the sophisticated firms may misread the present rule.

458 This proposal has met the same questions about "jurisdiction" as the transfer proposal. But
459 in a real sense we have the same jurisdiction now, albeit in indirect form. A lawyer who has an
460 action pending in Arizona can issue a subpoena from any federal court in the country. The court in
461 the Southern District of Florida, for example, does not even know that a subpoena has been issued
462 in its name. Filing in its name is a fiction. The functional question is where disputes about
463 performance should be resolved. That is the same question raised by transfer.

464 Criminal Rule 17(e)(1) provides for service of a subpoena anywhere in the United States.
465 It suggests that such provisions can be adopted under the Rules Enabling Act. Committee members
466 were uncertain, however, whether the Criminal Rule rests on statutory authorization. (Brief research
467 after the meeting showed that the advisory committee said that Rule 17 "continues existing law, 28
468 U.S.C. 654." Section 654 has since been repealed, and in any event Rule 17 went further than the
469 statute by disregarding limits on a subpoena issued at the request of an indigent defendant. See 2
470 Wright & Henning, Federal Practice & Procedure: Criminal 4th, § 277.) It will be desirable to
471 develop further the explanation of the reasons for finding Enabling Act authority to support
472 nationwide subpoenas. The draft Committee Note for the transfer provisions addresses the question,
473 and can be developed further. But it may prove better to set out this explanation in the letter
474 transmitting a final proposal for publication and comment, rather than enshrine it for posterity in the
475 Note.

476 The most significant reason to hesitate over simplification is the fear of unintended
477 consequences. There should be little risk on this score if the job is done carefully.

478 A Committee member suggested that this approach sounds like a style project. What is the
479 intended long-term benefit?

480 A court official immediately responded that there are many lawyers who do not practice
481 regularly in federal court and who simply do not understand Rule 45. A judge agreed. Many lawyers
482 in small bankruptcy cases, for example, are not sophisticated in federal practice. Revising Rule 45
483 can help them. Another judge observed that the draft is a real improvement. "Even a small dose of
484 simplification is welcome."

485 A countering suggestion was that sophisticated lawyers will rejoin: "We know how it works.
486 Why take a chance"?

487 The place of performance provisions, drawn from present Rule 45(c)(3), prompted a
488 suggestion that perhaps the idea of "substantial expense" should be incorporated as a limit on the
489 transfer provision.

490 A deeper question was whether the simplified rule should simply carry forward the present
491 limits on place of performance. Whatever the conclusion, it is assumed that the court for the place
492 where performance is required can quash or modify a subpoena. It also is assumed that an order
493 made by the court where the action is pending can be enforced by the court where performance is
494 required. The local court in the place of performance will, just as now, open a miscellaneous docket
495 number. And it seems fair to understand that a subpoena addressed to a nonparty in Los Angeles is
496 performed in Los Angeles, even if the subpoena directs that documents be mailed to Phoenix. The
497 present draft does make adjustments in the present rule by providing that a subpoena to produce

498 electronically stored information can direct production "at any location reasonably convenient for
499 the producing person." That may create some ambiguity about the place of performance. And it
500 raises the question whether it is desirable to allow the party serving the subpoena to determine the
501 place of performance. We do not want to enable manipulation.

502 A detailed question asked why draft Rule 45(c)(1)(B) provides only for a nonparty subpoena
503 to attend a trial, not also a hearing. The answer was that this provision simply carries forward the
504 provision of present Rule 45(c)(3)(B)(iii).

505 Judge Campbell concluded by observing that the discussion will greatly help the
506 Subcommittee in preparing a Rule 45 proposal for the April meeting.

507 *Preservation and Spoliation*

508 Judge Kravitz recalled the groundswell of ideas at the Duke Conference and the strong
509 support for undertaking rules amendments to deal with the duty to preserve evidence and with
510 corresponding sanctions for spoliation. The Discovery Subcommittee has agreed to consider these
511 questions, recognizing that it is not clear whether it will prove possible to craft useful rules. It has
512 begun work through telephone conferences and a meeting in Dallas on the eve of the Rule 45
513 miniconference.

514 The Subcommittee has put aside for the moment a nagging question about the authority to
515 make rules addressing conduct before an action is filed in a federal court. The federal courts clearly
516 recognize that the duty to preserve potential evidence arises when there is reason to anticipate
517 litigation that has not yet been filed. How far does the Rules Enabling Act authorize rules that
518 address preservation conduct before any action has been filed, and that will become relevant only
519 if an action is in fact filed and is filed in a federal court? There are strong reasons to believe that
520 there is authority to frame such rules, but the question of authority may depend in part on the nature
521 of the rule. It has seemed better to work at developing the best rule possible before confronting the
522 question of authority head-on.

523 Judge Campbell described the initial work. The Subcommittee has held four telephone
524 conferences and one meeting. That has sufficed to make it through the issues one time. The purpose
525 of reviewing the issues today is to gather reactions to the tentative beginnings, not to decide
526 anything.

527 The Duke Conference panel on these issues was very strong. It was the only panel at the
528 Conference to make a strong and unanimous recommendation. It even provided a detailed sketch
529 of the issues that should be addressed by a comprehensive set of rules. Spurred by this help, the
530 Subcommittee has decided that there should be rules to address these issues if good rules can be
531 drafted and put forward with confidence.

532 The setting is familiar. The volume of electronically stored information has exploded. Much
533 of it may be relevant in litigation. It is easily destroyed, and that leads to destruction. Business and
534 government systems often are designed to delete information automatically during routine ongoing
535 operations. Deletion also occurs as a matter of conscious choice. All of this leads to spoliation
536 problems. Many potential litigants are deeply concerned about the consequences. But it will be
537 difficult to draft an effective rule. The circumstances that arise across the spectrum of litigation are
538 too varied to be captured in precise guidelines. It may be that rules directing "reasonable" behavior
539 would provide little help or protection.

540 Despite these concerns, judges in many large districts report that they do not encounter these
541 issues very often. Adopting express rules may create more discovery disputes than they eliminate.

542 Case-by-case development of the law may prove wiser than an attempt to adopt explicit rules.
543 Nonetheless, the Subcommittee is committed to the attempt. Although the problems have been
544 expressed in relation to electronically stored information, it seems likely that any rules will be more
545 general. At least everything within the scope of Rule 34 and the corresponding provisions of Rule
546 45 is likely to be covered.

547 It is important to continue to gather information. Emery Lee is conducting an FJC study to
548 determine how often preservation and spoliation issues arise. Andrea Kuperman has searched the
549 case law for decisions on each element on the Duke Panel's list; the law seems to be consistent on
550 some issues, but inconsistent on others. Katherine David is helping to develop a general description
551 of other laws that impose duties to preserve information. A complete catalogue will not be possible,
552 but the general landscape can be sketched.

553 The question whether a rule can regulate conduct before an action is filed in federal court is
554 serious, but the Subcommittee has decided to undertake the drafting project without reaching a firm
555 conclusion. If in the end it seems possible to create a good rule, but significant doubts about
556 Enabling Act authority persist, it may be appropriate to ask Congress to clarify the Committees'
557 authority.

558 It also will be important to attempt to find out what happens in corporations and other
559 institutional litigants before litigation is filed. There are many complaints that vast amounts are
560 spent on preservation in the shadow of uncertainty. Some information has been available from
561 RAND, the Sedona Conference, and IAALS studies, but more information will be useful.

562 Emery Lee then presented the state of his research as of November 16. He emphasized
563 repeatedly that the work is still preliminary, and is in a stage that represents only his own efforts, not
564 anything the Federal Judicial Center can endorse. These cautions were expressed several times as
565 the presentation went on.

566 The study was based on a text search of CM/ECF records looking for specific words and rule
567 numbers. It extended to cases filed in 2007 or 2008 in 19 districts. The districts were chosen
568 primarily by looking for big districts; they do not constitute a representative sample. The focus is
569 on motions for spoliation sanctions. Of 131,992 cases, the issue was located in 209. That is 0.15%
570 of the total cases. The issue tended to come up late in the course of the litigation.

571 These are "very odd cases." Typically they are cases in which the parties had a hard time
572 agreeing on the price of the claims. For the cases that have reached disposition, the average
573 disposition time is 649 days — 1.8 years; that compares to 253 days for all cases in the districts. The
574 mean time to the motion for sanctions is 513 days. Of the cases that terminated, 16.5% went to trial;
575 that compares to 0.6% for all other cases in the sample, although it seems likely that as time goes on
576 the other cases that progress to a conclusion will rise to a trial rate somewhere in the typical range
577 of 1% to 2%.

578 Of the 209 cases, 153 rose on motions for sanctions. The others involved sanctions requests
579 in conjunction with motions for summary judgment, requests for jury instructions, or motions in
580 limine looking toward an impending trial.

581 Remembering again that the research is in a preliminary phase, a variety of things can be
582 counted. The slides summarizing the figures are attached to these Minutes as an appendix. Among
583 other things, they compare the frequency of spoliation motions to other types of motions as counted
584 by recent surveys. The IAALS surveys found that all types of discovery sanctions are rarely sought,
585 and are even more rarely granted. The FJC 2009 closed-case survey did not ask about motions. It
586 did ask whether spoliation claims were raised in cases that had any discovery. Plaintiffs said such
587 claims were raised in 8% of the cases, and defendants said 5%. Including cases in which there is no
588 discovery, spoliation claims would be made in 2% to 3% of all.

589 This snapshot study cannot account for trends, whether spoliation issues are arising more or
590 less often over the years. The Willoughby and Jones paper at the Duke Conference did find an
591 increase in reported decisions over time.

592 It may help to remember that the closed-case survey showed that each dispute about
593 discovery of electronically stored information, whatever the type of dispute, increased case costs by
594 10%.

595 And lawyers repeatedly report that fear of sanctions drives behavior even if sanctions are
596 rarely imposed.

597 Of litigated spoliation disputes, 40% involve only electronically stored information, 13%
598 involve electronically stored and other information, 21% — in many ways the most interesting —
599 involve tangible property, 18% involve paper documents only, and 9% involved materials that could
600 not be identified (inability to identify the materials arose from sealed motions, motions that did not
601 clearly identify the materials thought to have been lost, and the difficulty of categorizing such items
602 as photographs).

603 The cases can be broken down by case types for all types of materials; for electronically
604 stored materials only; by the moving party; by types of moving plaintiffs and nonmovants; by types
605 of moving defendants and nonmoving defendants; by grant, denial, pending, or no action or
606 mootness, and so on. For comparison, the dispositions in the reported cases gathered in Andrea
607 Kuperman's memorandum were counted — they showed a far higher rate of motions granted, at
608 60%; looking only to reported cases gives a distorted picture. The most common sanction was a
609 spoliation instruction; precluding evidence and cost awards came next; reopening discovery was
610 fourth.

611 Comparing claims of spoliation before an action was filed with spoliation after filing, 25%
612 of the cases surveyed involved only pre-filing claims.

613 Often the motions do not cite a legal basis for imposing sanctions, or cite only a decision in
614 another case. Rule 37 and inherent authority are invoked with nearly equal frequency.

615 The study could, with enough time, be expanded to count more courts, and to track the cases
616 over a longer period.

617 The preliminary data must be audited to see whether anything has been missed the first time
618 through.

619 The motions and files do not give any sense that local rules of attorney conduct were invoked.
620 Nor do they give any hint whether there were collateral state professional-conduct complaints.

621 Judge Campbell summarized the presentation as suggesting that sanctions motions are very
622 rare; that they are even more rare in cases involving electronically stored information; that sanctions
623 are still rarer. It is interesting that lawyers report so earnestly that the fear of sanctions drives
624 behavior. Perhaps that is because the selective basis for reporting decisions creates an impression
625 worse than the reality. And caution was expressed about reading too much into the reported cases.

626 Another Committee member responded that "the consequences are so horrific you don't want
627 to go even close." The fear may be important in deterring misconduct. It can help when talking to
628 clients to tell them that they can destroy a good case by spoliation.

629 It was observed that the category of spoliation instructions is itself variable. The court may
630 decide on an instruction that directs the jury to presume the lost information was harmful to the
631 spoliator or helpful to the would-be discoverer. Or it may leave it to the jury to make that
632 determination as an open-ended inference.

633 The Committee expressed great thanks to Dr. Lee for excellent work and a lively
634 presentation.

635 Discussion was opened on the general questions: is it desirable to attempt to draft a rule?
636 How many of the elements described by the Duke Conference Panel should be included? The
637 elements are described in the agenda materials beginning at page 147.

638 The first question, tied to the problem of reaching pre-litigation conduct, is how to identify
639 the "trigger" that starts the duty to preserve. Is it at all helpful to rely on "a reasonable expectation
640 of probable litigation," and if helpful is that an accurate formulation? Should the trigger, or
641 application of a general reasonable expectation standard, depend on whether the litigant is a
642 sophisticated business enterprise or an individual?

643 And what is the scope of the duty to preserve once it is triggered? How far back in time
644 should materials be preserved, and on what subjects when there is only a vague general idea of the
645 events giving rise to the expectation of litigation? How long must the material be preserved going
646 into the future? The variation in circumstances is as enormous as the range of topics that can be
647 litigated in federal court. Uncertainty can increase cost, perhaps enormously. The concept of
648 proportionality is difficult to apply at this stage. And there is no court to ask for guidance

649 The fear of sanctions for failing to comply with the indeterminate duty seems to be the source
650 of collective angst. But the questions in framing a rule begin with determining what counts as a
651 "sanction." Is an order allowing further discovery as a response to spoliation a sanction, or is it
652 simply wise administration of the rules guiding proportional and reasonable discovery? Or what of
653 an award of the expenses of attempting to recreate the lost information by other means? Any rule
654 that limits or bars sanctions must be carefully drawn to preserve remedies designed to offset the
655 inability to discover the lost materials. As to orders that really are sanctions, is it possible to
656 calibrate in general terms the severity of the sanction with the culpability of the conduct and the
657 importance of the loss? Loss and prejudice are regularly balanced against each other in determining
658 spoliation sanctions, but framing meaningful guides, much less anything like "guidelines," will be
659 difficult.

660 A first observation was that spoliation is an area where prevention can be important.
661 Businesses have compliance programs to protect against violation of substantive law. Antitrust
662 compliance programs are a familiar example. Perhaps no compliance program can be effective
663 against all possible violations, but establishing a good and generally effective program can reduce
664 the wrath of enforcement authorities when a violation does slip through. There is a thriving business
665 in helping design compliance programs. The same approach may prove valuable in addressing
666 spoliation problems. If businesses can be encouraged to design and implement good preservation
667 systems, the sanctions for occasional failures may be reduced. And good behavior may be
668 significantly advanced.

669 The need for a rule was raised by observing that the statistics tend to suggest there is no need.
670 But the perceptions of the bar, and of their clients, suggest that perhaps it would be good to develop
671 a rule. It might help to go back to the Duke panel for further input, perhaps asking them to draft their
672 proposed elements in rule language. It is not likely that any precise matrix can be developed to
673 measure out sanctions. But some guidance is possible, perhaps beginning with emphasis on
674 proportionality measured by the degrees of culpability and prejudice. The more specifics that can
675 be put into the rule, the better. It is unfortunate that judges have had to develop responses without
676 the help of a rule.

677 The consequences of having no rule were emphasized by noting that different circuits have
678 quite different standards for tailoring sanctions to misconduct. A nationwide organization —
679 business, government, or other — has to tailor its conduct to the most severe, which may be the
680 Second Circuit.

681 The Department of Justice is perhaps the leading example of a firm that litigates all around
682 the country, appearing both in the service of the government as plaintiff and the government as
683 defendant. But given the FJC findings as to the infrequent imposition of sanctions or even sanction
684 requests, it may be wondered whether a rule is needed. The problems seem to be case- and fact-
685 specific. Crafting a traditional one-size-fits-all rule will be difficult. Would education of the
686 judiciary work better? Even if there is to be a rule, education may be important in the interim.

687 The idea that compliance programs should count in favor of a spoliator was translated into
688 the suggestion that it would be good to provide safe harbors so that organizations sufficiently
689 sophisticated to take advantage of the programs would know what their obligations are. But that will
690 be difficult to accomplish in face of the fact-specific nature of the questions.

691 The Northern District of California is developing model protective orders. The bar has
692 accepted the templates, and they have greatly reduced attorney work and disputes. So it may be that
693 for spoliation, the best idea is a template rather than a rule. But the effort to develop a rule is worthy.

694 The model would not distinguish between the government and other entities — if the government
695 is constantly in a state of preparing for litigation, so are many other organizations.

696 This discussion prompted the reminder that education programs and support materials are
697 being worked on. The pocket guide on e-discovery is being revised, and the revised version will
698 discuss sanctions.

699 It was further observed that the case law is approaching the idea of safe harbors for those who
700 make careful and good-faith efforts to comply with preservation obligations, but the approach is
701 incomplete. The approach could be that there is a safe harbor for complying with an established set
702 of expectations, while failure to comply would not establish a presumption of bad faith. This result
703 would depart from the cases that seem to suggest there is a real exposure to sanctions for failing to
704 do what a judge says a litigant should be doing.

705 John Vail, speaking for the American Association of Justice, said that the plaintiffs' bar
706 agrees that these are serious issues. But in some cases sanctions, such as adverse inferences, are a
707 matter to be governed by state law in diversity cases. There may be real Enabling Act questions,
708 similar to those raised by Evidence Rule 502. He further observed that the duty to preserve may be
709 triggered by private contract obligations. Most commercial insurance contracts impose on the
710 insured a duty to report likely litigation to the insurer. The contract language is not likely to be
711 changed no matter what rule might be adopted. Finally, the plaintiffs' bar "is waking up to the idea
712 that plaintiffs too have preservation obligations." It will be important to ensure that proportionality
713 concepts are invoked to regulate the obligations.

714 Alfred Cortese, speaking for defense groups, suggested there are several issues a rule should
715 address. Among them are defining the triggering event, defining the scope of the duty to preserve
716 once it is triggered, and the standard for imposing sanctions. It will be important to have specific
717 data on the costs of preserving information in deciding on these issues. An effort is under way to
718 get better data; all that can be said confidently at the moment is that the cost of preservation is
719 enormous. The Searle Institute study will be followed up; the study itself gathered information from
720 36 or 37 companies, each of which devoted what must have been several hundred thousand dollars
721 just to gather data on their own experience with preservation costs. It is hoped to show why
722 preservation costs are so high, and also to show how they relate to total enterprise profits. The
723 figures in hand now suggest that litigation costs run from 16% to 20% of total profits. It seems likely
724 that most of these costs are preservation costs, and mostly internal costs.

725 It was suggested that the information on preservation costs will be more useful if it covers
726 the costs of all preservation activities, without regard to whether they are incurred for litigation. It
727 also will be important to know what preservation costs would be if much-improved preservation
728 systems were prepared. But the overall cost of American litigation may present problems that the
729 Committee cannot do much about, whether through preservation and spoliation rules or otherwise.

730 Returning to the trigger question, it was asked what the standard should be: a reasonable
731 expectation of litigation? Knowing that litigation will be filed — a certainty? Guidance is
732 importance.

733 As to scope, it is important to define the duty to preserve. Scope links to discovery, and can
734 be addressed even if the discovery rules are not changed. It is important to remember that business
735 records are ordinarily maintained for business purposes, not for litigation.

736 And it was urged that the standard for sanctions should be intent. Data are produced and
737 destroyed every second. Non-intentional destruction should not be the occasion for sanctions.

738 The intent test was met by asking whether the same test should apply to destruction of
739 tangible things. Some kinds of potential evidence may be so important as to require a duty of care.
740 One of the cases described in the materials imposed sanctions for destroying an automobile before
741 the defendant could have an opportunity to inspect the allegedly defective airbag system. Mr.
742 Cortese responded that he had not thought about the standard for such problems, but that is important

743 to distinguish the loss of data. As compared to the automobile, often it is impossible to know
744 whether the supposedly lost data ever existed.

745 It was agreed that purposeful destruction is different, and clearly an appropriate subject for
746 sanctions.

747 An observer noted that it will take time to develop a rule, if it is possible to create one at all.
748 It is important to develop education programs now. The Committee should push others to do so.
749 The standard of culpability "is chaotic." The same problems are answered differently by different
750 courts. Directly contradictory results are often found.

751 The same observer suggested that the trigger issue also will be difficult. One example is the
752 question whether common knowledge throughout an industry that litigation has been brought against
753 one member should put all other members on notice that they too may be sued — even when one
754 them first becomes a defendant after the original action was filed. One court found there was a duty
755 to preserve. That is inappropriate. Everyone has to work to the most demanding standard. But
756 unsophisticated lawyers, and even plaintiffs who know when they start to think about filing an
757 action, remain unaware of the duty to preserve.

758 Continuing, this observer illustrated the costs of preservation by describing a big company
759 that is storing 135,000 backup tapes because of a government investigation. The storage costs alone
760 are \$1,000,000 a year. "People preserve a lot because they're scared to death."

761 This discussion prompted a further question: should "big" cases — perhaps defined by the
762 volume of potentially preservable information — be addressed by adopting a two-part rule?

763 Thomas Allman, another observer, noted that Gregory Joseph did a wonderful job in leading
764 the Duke Conference panel to overall consensus on preservation issues. But differences remain on
765 what should be in a rule. The "front end" cannot be resolved by rule, but the "back end" can. The
766 standard of care for preservation should be good-faith, reasonable conduct proportional to the dispute
767 once litigation seems inevitable. The panel thought about developing processes that would define
768 the pre-litigation duty to preserve, but abandoned the effort in favor of relying on common sense.
769 Rule 37(e) is starting to come into its own; the cases are ruling that it means what it says. But Rule
770 37 should be amended to cover preservation as well as discovery — it is limited too narrowly by
771 applying only to "sanctions under these rules." The rules do not address preservation absent a prior
772 order. The question whether sanctions should be limited to cases of intentional destruction is
773 difficult; innocently destroying the wrecked automobile with the air bag presents a hard choice. The
774 rules in any case should be general, transsubstantive. The front-end problem, the trigger, will remain
775 a burden that attorneys and litigants have to carry. The Committee Note might explore the factors
776 that bear on defining the trigger.

777 A different observer said there is a huge difference between battles pitting large entities
778 against each other and battles that involve individuals. It has been asserted recently that tools are
779 now available to retrieve information from a backup tape for \$500; the cost is in reviewing the
780 information once it is retrieved. The key to preservation obligations should be good faith in the
781 normal course of operations, retaining whatever is retained in the course of business. But technology
782 continues to change rapidly; enterprises planning preservation programs should keep abreast of the
783 changes. The cost of preservation for litigation declines drastically if the defendant negotiates and
784 acts transparently. The parties should agree on search terms. But cooperative conduct is rare. A
785 plaintiff in a small-stakes case who does not know much about a defendant's system cannot afford
786 to hire an information technology consultant. The people who complain about the costs of e-
787 discovery focus on the top 5% of the cases that cause 50% of the problems. It would be a mistake
788 to draft general rules for 5% of the cases. There should be a separate rule for the problem cases. The
789 problem cases may be identified in part by the amount of damages sought. In the problem cases it
790 would be really helpful to have an IT master who can mediate or arbitrate the disputes. The parties
791 would behave better if subject to such control. Paying for it should not be an unreasonable burden
792 in cases that involve a lot of money.

793 A member asked whether part of the problem is diffusion of information within an
794 organization — the more diffuse, the greater the difficulty? It was agreed that this can be part of the
795 problem of complexity. Another observer suggested that the problems can be reduced by taking
796 seriously the Rule 26(f) conference and the general proportionality principles of Rule 26.

797 Another member suggested that "different realities" are reflected in different settings. But
798 most complex cases do not need a special master. The small fraction of cases that lead to demands
799 for sanctions are those in which the defendant fundamentally does not believe it should be in court,
800 does not respect the court's authority. A new sanctions rule will trigger strategic motions. Most
801 defendants, on the other hand, take preservation obligations seriously. That lends support to the idea
802 of a safe harbor. "We can leave the bad actors out." Still, it is surprising how often people refuse
803 Rule 26(f) obligations to describe what is preserved, how systems work, how to frame search terms.
804 There should be a rule that "gives comfort to parties that they have done what is required, without
805 encouraging motions."

806 Still another member agreed with these observations. "The corporations I represent are
807 looking for rules and guidelines. They want to comply. Reputable companies have compliance
808 programs." But creating a new rule is not necessarily the answer. Aside from the triggering
809 problem, the parties are willing to consult once litigation begins. "No one expects to get everything."
810 "The rogues are the problem, but they are rare" and the problems they create can be resolved.
811 Lawyers also want to do it right, but do not know what is right. Protective order templates may be
812 an answer. New rules may not.

813 An observer noted that the adverse-inference instruction can be considered an evidence
814 problem, not merely a discovery sanction.

815 A judge member noted that the case that caused the greatest difficulties in her experience
816 involved one plaintiff. The plaintiff's entire business involved computers that he changed
817 continually. It would be difficult to write a rule that captures cases like that.

818 It also is important to remember the differences between lawyer and client. Rule 37 does
819 refer to lawyers as well as parties. The obligation on lawyers must be borne in mind.

820 Judge Campbell asked what is the greatest source of anxiety: Is it the sanctions decisions?
821 The standards of conduct? The intent required to impose sanctions? The case law seems to be pretty
822 consistent on the events that trigger an obligation to preserve, and on the scope of the obligation.
823 Would it be wise to address only Rule 37(e), providing that reasonable conduct does not warrant
824 sanctions, intentional conduct does warrant sanctions, and recognizing the ambiguity of conduct that
825 is perhaps not reasonable but also is not intentional?

826 One observer suggested that prompt revision of Rule 37(e) along these lines would do more
827 good than a long drawn-out project to develop more elaborate rules.

828 Another observer suggested that we do need a rule that recognizes the duty to preserve, and
829 defines it as a reasonable duty. That could be lodged in Rule 26 or in Rule 34.

830 Returning to Rule 37(e), it was asked whether it could be framed to define preservation duties
831 in terms of sanctions, and should then be made all-inclusive so as to preempt deviations in the name
832 of inherent authority? A response was that inherent authority is invoked now only in cases of
833 intentional misconduct. It is not a real problem. There are some "loose expressions" in some of the
834 cases, but they "do not portend much." But rules sanctions do oust inherent authority. To that
835 extent, revising Rule 37(e) could help.

836 An observer agreed that *Chambers v. Nasco* can arguably be read to impose a bad-faith
837 threshold for invoking inherent power. California and at least one other state have omitted "under
838 these rules" from their equivalents to Rule 37(e) for this reason.

839 Another observer suggested that this approach would be comforting only if the Second
840 Circuit could be persuaded to fix its Residential Funding decision.

841 Another observer noted that the Duke Conference panel on preservation was unable to agree
842 whether the standard of culpability should be negligence or wilfulness.

843 The history of the 2006 work on Rule 37(e) was recalled. The Committee added "under these
844 rules" in part from concern about Enabling Act limits. It knew that the 2006 e-discovery rules were
845 not likely to be the last word. Instead, the basic hope was that they would survive over a few years
846 of continual changes in technology, recognizing an obligation to monitor practice and to revisit the
847 questions when useful changes might become possible. The present discussion is exactly the process
848 that was contemplated. "As we come to understand more, we might be able to do more." It was not
849 only the Advisory Committee that took this view. The Standing Committee also recognized that the
850 2006 amendments "were a start." If we can find appropriate language for uniform national rules
851 changes, "we can affect conduct."

852 Jonathan Redgrave, an observer, noted that "divergent standards are the bane of corporate
853 programs." Probably it is better to have a single rule for all litigation, not a separate rule for a
854 subclass of cases that are somehow described as complex or likely to generate problems. Defining
855 the subclass would be difficult. But real help can be had. Rule 37(e) could be elaborated to
856 distinguish between case-altering sanctions and other orders that involve only money or other less
857 severe consequences. But, it was asked, how would "case-altering" be defined? The list of sanctions
858 in Rule 37(b) suggests a hierarchy, but how would it be separated for this purpose? Suppose the
859 sanction is that an expert is not allowed to discuss something that is not in the report or a
860 supplemental report? A money sanction of \$10,000,000 — whether in a case involving
861 \$100,000,000 or a case involving \$1,000,000? Mr. Redgrave recognized the difficulty, but thought
862 a list of sanctions would do it: default, dismissal, adverse inferences would clearly be in the restricted
863 class. Some others also might be added. Part of the problem is that individual litigants often have
864 large amounts of information, and have no inkling of preservation obligations.

865 A Committee member observed that an adverse-inference instruction logically makes sense
866 only if there is intentional destruction. Would it help if a rule said that an adverse-inference
867 instruction is appropriate only if the spoliator was aware of, or appreciated, the harmful character
868 of the lost evidence? Mr. Redgrave said it would. The dialogue continued with the observation that
869 this ties to Rule 37(e)'s provision that routine good-faith operations are protected. There is no need
870 to change this language, but a Committee Note could give guidance on the limits of inherent
871 authority.

872 And perhaps some of this should be lodged in Rule 16, looking for discussion of the number
873 of custodians whose information must be preserved, and other elements of the time and scope of
874 preservation. The Rule 16 process forces courts to address these issues early. And Rule 26(c) also
875 can be used.

876 This discussion led back to Rule 26(f), which directs the parties to discuss preservation. Is
877 there a way to know whether that has made a difference? RAND found in a general way, before the
878 2006 amendments, that it could measure no difference from Rule 26(f). Mr. Redgrave said that
879 anecdotal evidence suggests that Rule 26(f) has made a difference when the conference is followed
880 by exchanging "day one" letters. There are no reported decisions, but parties who deal with the Rule
881 26(f) conference in good faith work it out. Too many parties, however, treat Rule 26(f) as a "drive-
882 by." "Judicial management to prevent parties from gaming the system is important."

883 So it was asked again whether a rule can deal with issues such as the number of custodians
884 whose information must be preserved, preserving backup tapes, types of sources — voicemail?
885 PDAs? And so on? The suggestion was that at least Rule 16 can give guidance as to the issues that
886 should be discussed: the types of media, numbers of custodians, and scope in subject and time. A
887 Note might observe that it is not really useful to make forensic images of hard drives. But beyond
888 that, it would be difficult to spell things out in the discovery rules themselves. Who and what is a
889 custodian? Technology can change even that. Real safe harbors in Rule 37(e) will help.

890 Emery Lee reported a statistically significant finding that parties are more likely to discuss
891 e-preservation since the 2006 revision of Rule 26(f).

892 Another observer noted that a large group of attorneys representing all sides of litigation,
893 house counsel and independent counsel, has found that Rule 26(f) conferences to discuss discovery
894 do help. There is much more discussion.

895 Judge Campbell concluded the discussion by observing that it had been very helpful.

896 Judge Kravitz concurred, adding that this is an ongoing process. It may be that the
897 Subcommittee can prepare some illustrative language on sanctions in time for the April meeting,
898 recognizing that sanctions provisions will affect conduct on the front end.

899 *Rule 26(c)*

900 The March meeting carried forward a perennial draft of Rule 26(c) protective-order revisions.
901 The draft has roots in the extensive work done in the mid-1990s. It is supported by continuing
902 revisions of the work Andrea Kuperman is doing on the law and practices in all of the circuits.

903 Consideration of Rule 26(c) has not been prompted by any sense that it is not working well.
904 The Committee has not found any significant problems, despite regular inquiries. Nothing at all was
905 said about Rule 26(c) in the Duke Conference studies of ways to improve the Civil Rules. The work
906 instead has been inspired by concerns reflected in bills that have been regularly introduced in
907 Congress since 1991. These bills reflect a fear that discovery protective orders are defeating
908 dissemination of information needed to protect public health and safety. Sealed settlements also are
909 included in the bills.

910 The Judicial Conference has continually opposed these bills, in part on the fundamental
911 ground that they are inconsistent with the Rules Enabling Act process that Congress created to
912 provide well-informed, disciplined, and painstakingly careful development of procedural reform.
913 One illustration of the advantages of the Enabling Act process is found in the FJC study of protective
914 orders undertaken at the Committee's request. The study found that most protective orders enter in
915 litigation that has no connection to concerns about public health or safety. Even when the litigation
916 does involve such issues — product liability actions are the examples most often cited by the
917 proponents of legislation — there is no basis to find that protective orders deprive the public of
918 information required to protect health or safety. Documents in the public court file, beginning with
919 the complaint, ordinarily include all the information needed for this purpose. And information can
920 be disseminated by many other means without violating a protective order. Beyond that concern,
921 the provisions of the bills also are inconsistent with a speedy and inexpensive discovery process.

922 Judge Kravitz testified against bills pending in 2009, and activity seemed to relax for awhile.
923 More recently a substitute bill has been introduced. The new bill is narrower than earlier versions.
924 It no longer applies to all civil actions, but only to actions with pleadings showing claims that impact
925 public health or safety. Product cases, environmental cases, and like cases would be familiar
926 examples. In these cases the court still would be required to find, before entering any protective
927 order, that the order would not affect the public health or safety, or that the order is the narrowest
928 order possible to protect interests in confidentiality that outweigh the possible impact on public
929 health or safety. Judge Kravitz and Judge Rosenthal have met with Congressional staff to discuss
930 the shortcomings in the revised bill. Representatives of the American Bar Association Section of
931 Litigation also have presented different but complementary negative reactions. They agree that there
932 is no problem that needs a solution, and that the proposed solution will create problems far worse
933 than the bill's proponents imagine.

934 The transparency of the world has increased greatly since 1991 when the bills were first
935 introduced. It is not clear that all information potentially affecting public health and safety is
936 available when every action that might involve such information is filed, but the means of
937 dissemination and the interest in dissemination are great. In many ways, the need to protect privacy
938 and confidentiality has increased.

939 Judge Kravitz noted that the staff member who talked with him and Judge Rosenthal asked
940 who has the burden of justifying protection if a confidentiality designation is challenged. The answer
941 was that the proponent of confidentiality has the burden, that this is well established in the cases, but

942 Rule 26(c) does not expressly say that. Another question was whether a nonparty can challenge the
943 order. The answer was that intervention is readily allowed, although that does not appear in Rule
944 26(c). Other good questions were asked, presenting a concern that although the case law may be
945 well established, it is case law, not part of the rule.

946 These staff concerns raise a familiar question. When should a rule be amended to incorporate
947 well-settled interpretations? Some parts of the rule, read in isolation, seem archaic. The enumerated
948 reasons for protection, for example, do not include the common and highly important need to protect
949 individual privacy. Protective orders are routinely entered to protect personal privacy in employment
950 litigation, in litigation involving physical or mental conditions, and so on. On the other hand, there
951 is a remarkable consistency in the law across all the circuits. There is no indication that important
952 interests are being ignored, whether they weigh for or against protection, and however they bear on
953 shaping protection that is granted.

954 Continued examination is warranted. Indeed, it is vital to continue monitoring the case law
955 and any signs that important interests are being slighted.

956 Discussion concluded with related observations. The importance of these problems will lead
957 the Committee to continue to pay careful attention to Congressional concerns and to monitor the case
958 law. Rule 26(c) will continue on the agenda.

959 *Pleading*

960 Judge Kravitz launched the discussion of pleading by observing that "All law professors
961 know what Twombly and Iqbal mean. Mere mortals do not." The agenda materials include three
962 recent appellate opinions that invoke the Twombly and Iqbal opinions. This small sample provides
963 some indication of what is going on as courts come to terms with the new pleading discourse. Two
964 of the opinions avoid the "plausibility" password that has figured so prominently in many opinions.
965 The Third Circuit has stated that the Court has not silently overruled its own decision in the
966 Swierkiewicz case. The general questions will continue to simmer in the lower courts. It is possible
967 that the Supreme Court will offer new guidance in the Al-Kidd case, but there is little point in
968 speculating about that possibility before the Court issues its decision.

969 Joe Cecil's research project is not finished. It would be unfair to ask for any premature
970 impressions. But the report should be ready in time for submission to the Standing Committee for
971 its January meeting; it will be sent to all Advisory Committee members at the same time. One of
972 the difficulties has been that it is difficult to track down what happens by way of amendments after
973 part or all of a complaint fails on a first motion to dismiss.

974 Andrea Kuperman continues to update her memorandum on the case law, focusing primarily
975 on the courts of appeals.

976 Joe Cecil spoke briefly of his ongoing project at the Federal Judicial Center. The plan is to
977 study all orders resolving orders to dismiss in 23 districts — for the most part, the districts are the
978 two largest districts in each circuit. The focus is on January 2010, a month when the district courts
979 had guidance from some post-Iqbal appellate decisions. The study includes orders that are not
980 published. If a motion to dismiss is granted, the first question is whether it dismissed only part of
981 a case or instead, standing alone, dismissed all of the case. Then it will be asked whether leave to
982 amend was granted. Preliminary study suggests that leave is very often granted. That makes it all
983 the more important to find out whether an amended complaint was allowed, whether it was met by
984 another motion to dismiss, and what happened after that.

985 Judge Kravitz noted that the Committee continues to reap great benefits from FJC research,
986 including the work done by Joe Cecil and Emery Lee.

987 The FJC focus, going beyond the reported docket descriptions, focuses on Rule 12(b)(6)
988 motions. To that extent the report will be more refined than the docket-based statistics being
989 collected by the Administrative Office. The Administrative Office figures include the rates of all
990 motions to dismiss. One common question is whether motions to dismiss are made more frequently

991 after the Twombly and Iqbal decisions. The sudden increase in the number of appellate opinions on
992 pleading is not of itself a good measure; it is to be expected that courts will write more opinions, and
993 longer opinions, as they work through the early years of teasing out the consequences of the Supreme
994 Court's new guidelines.

995 One specific appellate response to the prospect of more frequent pleadings appeals was
996 suggested by Judge Newman at the Duke Conference. Judge Newman has developed his suggestion
997 by drafting a Second Circuit rule for expedited disposition of appeals from case-ending rulings on
998 the pleadings. He also has asked the clerk's office to gather statistics. He believes that it is possible
999 — and desirable — to provide fast disposition of appeals that present only questions of law based
1000 on the pleadings alone.

1001 Beyond these general observations, the agenda materials sketch a number of possible
1002 approaches to pleading practice and related discovery practice. Surveying the field does not imply
1003 a suggestion that the time to act has come. To the contrary, it is important to allow time for lower
1004 courts to work through the Twombly and Iqbal invitation to reconsider pleading practices as they
1005 existed on May 20, 2007. These decisions have launched a common-law process of development
1006 that will mature only after some years yet. The end point may be little different than the rather
1007 uneven practices that prevailed before the Supreme Court expressed its uneasiness with the prospect
1008 that inadequate pleading thresholds make it too easy to impose heavy discovery burdens on
1009 defendants for little reason. Or it may be that pleading barriers are significantly raised. Whatever
1010 happens, it will be important to determine, as carefully as possible, whether the general run of
1011 decisions can be improved by amending the civil rules; whether amendments are desirable; and how
1012 to craft any amendments that may seem desirable.

1013 Looking first at pleading standards, the agenda sketches cover a wide range. At one end lie
1014 attempts to articulate "a standard that never was" — literal implementation of the "no set of facts"
1015 dictum in the Conley opinion that the Court retired in the Twombly opinion and that had not been
1016 taken literally by the lower courts. At the other end lie illustrations, several of them drawn from
1017 proposals by leading research and bar groups, that would raise the pleading threshold higher than
1018 anything that can fairly be found in the Twombly and Iqbal opinions. Many variations lie between
1019 these end points. Among them are proposals that, to the extent possible, would seek to restore
1020 pleading practice to whatever it was, with all its variability, as of May 20, 2007.

1021 Drafts focused on Rule 8(a)(2) are easily multiplied. But there are powerful reasons to
1022 hesitate before moving in this direction. The Twombly opinion is expressly framed as an
1023 interpretation of present Rule 8(a)(2), and the Iqbal opinion embraces Twombly. When Rule 8(a)(2)
1024 was written, the drafters understood the great difficulty of attempting to express in rule language the
1025 concept that, however accurately, has come to be labeled as "notice pleading." As Judge Clark put it,
1026 the Forms annexed to the Rules were provided in part to overcome this difficulty, providing
1027 "pictures" to express ideas that are not readily captured either in rule text or in Committee Note. Any
1028 revised language in a Committee Note, however carefully explained (and perhaps inadvertently
1029 expanded), would face comparable difficulties. Certainly new rule language would create a new
1030 period of uncertainty, even if the Note said the language was intended only to confirm whatever
1031 range of practices had emerged by the time the new rule was adopted. Lower courts, moreover,
1032 would know that the Supreme Court would be providing the ultimate and authoritative interpretation
1033 of the amended rule. The Twombly and Iqbal opinions would continue to influence their reactions.

1034 Apart from Rule 8, other pleading approaches are possible. From the time of the Leatherman
1035 decision, the Committee has considered — and shied away from — the prospect of adding particular
1036 categories of claims to the Rule 9(b) list of matters that must be pleaded with particularity. A
1037 converse approach would be to list particular categories of claims that, most likely because of
1038 difficulty in acquiring fact information, can be pleaded more generally than most claims. Proposals
1039 of this sort would be seen to reflect an intent to favor, or disfavor, the substantive law underlying the
1040 specified claims.

1041 Still other pleading approaches are possible. Again, they can be taken up as growing
1042 experience may suggest the need.

1043 Beyond pleading, a variety of approaches could be taken to integrate pleading motions with
1044 discovery opportunities. Discovery in aid of framing a complaint might be provided before an action
1045 is filed. Or a preliminary complaint might be authorized in a form that identifies matters that the
1046 pleader cannot plead adequately without an opportunity for sharply focused discovery. Or an
1047 opportunity for court-directed discovery might be integrated with Rule 12 procedures on a motion
1048 to dismiss. The integration with discovery might extend to recognizing or expanding the opportunity
1049 for an early summary-judgment ruling that moves beyond the difficulty of pleading to the difficulty
1050 of proving the critical facts. These possibilities too may be better postponed while the courts
1051 continue to reshape pleading practice.

1052 An observer suggested that the great concern with Twombly, and more particularly the
1053 "judicial experience and common sense" phrase in Iqbal, is that they free trial judges to dismiss cases
1054 based on subjective views. It will be important to learn how district judges come to understand these
1055 words, and the more general "plausibility" standard.

1056 It was agreed that "plausible" may seem to suggest a subjective standard. It should not be
1057 read that way. It would help to find a way to make it clear that these are objective standards.

1058 An apparently important foundation of the Twombly and Iqbal opinions, moreover, is the
1059 Court's concern about the costs of discovery. The FJC data in the closed-case study suggest that for
1060 most cases, discovery costs are not as dramatic as the Court may have supposed.

1061 A Committee member asked whether there are data on the time it takes to get from filing the
1062 complaint to discovery. His experience has been that a court may avoid dismissing on the pleadings,
1063 but ask the plaintiff to state more facts in deference to the perceived new standard. This approach
1064 is accompanied by a stay of discovery. The delay in beginning discovery is a reason to go to state
1065 court. And the situation is made worse as defendants have come to ask certification for a § 1292(b)
1066 appeal from denial of a motion to dismiss. Certifications are not being granted, but the process adds
1067 to the delay.

1068 A judge responded: "I don't stay discovery." But the concern was repeated that in complex
1069 cases, discovery is effectively stayed "until you get through the motion to dismiss." "Time is the
1070 ultimate killer for the plaintiff's side." This problem is so urgent that the Committee should take up
1071 pleading amendments sooner, not later.

1072 A different response was that any change in the rules will generate new uncertainty that in
1073 turn will augment delay. But it was rejoined that establishing an objective standard will help. "We
1074 need to get the motions decided."

1075 The distinction between complex cases and ordinary cases also bears on the problem. There
1076 are a lot of straight-forward cases that do not involve much discovery. Discovery often is allowed
1077 to go forward while a motion to dismiss remains pending in these cases. Frequently there is a strong
1078 prospect that although the motion may be granted in part, it will not support dismissal of the entire
1079 action. Some of the six defendants and eighteen claims will be dismissed, but not all.

1080 Another judge suggested that some members of the bar are asking that Twombly standards
1081 be imposed on pleading affirmative defenses. "Do we want this"? A judge responded that "I do
1082 make defendants spell out an 'error' defense in FD CPA cases."

1083 More general questions were raised after a reminder that there were no proposals for action
1084 presented by the pleading agenda. Should the Committee consider further the possibility of adding
1085 to the categories specified by Rule 9(b) for particularized pleading? Or develop a rule on discovery
1086 in aid of pleading? If a plaintiff is being strangled for inability to plead facts controlled by the
1087 defendant, should there be a provision for targeted discovery in a short time frame?

1088 Although discovery in aid of pleading may seem desirable, a supporter observed that in some
1089 cases it may be difficult to establish effective discovery limits. Imagine a vehicle rollover case
1090 asserting a design defect. In a recent case targeted discovery on this issue has taken nearly a year,
1091 and only in the closing months was evidence discovered to show that there well may be a claim.

1092 This caution was supported by the observation that the same problem will emerge in many complex
1093 cases. Shaping "targeted" discovery on the conspiracy issue presented by the Twombly case would
1094 be difficult. And a comparison was drawn to the attempts to distinguish between "class" discovery
1095 and "merits" discovery at the certification stage of a class action; the attempted distinction often is
1096 not helpful. Any scheme of targeted discovery will depend on judge control.

1097 As for adding to Rule 9(b), conspiracy cases (Twombly) and official immunity cases (Iqbal)
1098 may seem likely candidates. Some observers believe that most of the force of the Supreme Court
1099 decisions will be spent on cases like these. But doubt was expressed whether the answer lies in
1100 expanding Rule 9(b). "It will be very hard to select additional categories for Rule 9(b)," at least if
1101 the list is not to become very long. Discovery may be the key. The focus might be on what you have
1102 to show to be entitled to discovery that will help in fashioning a pleading. Parallel amendments to
1103 Rule 8(a)(2) might be in order. The central question is how much information a plaintiff must have
1104 to be able to invoke a court's assistance. Courts now have discretion to permit discovery while a
1105 motion to dismiss is pending. The discretion can be exercised by listening to what the parties have
1106 to say.

1107 A lawyer said his experience has been that courts generally do not stay discovery pending
1108 disposition of a Rule 12(b)(6) motion. Twombly is not much of a problem. The problem is the cost
1109 of discovery. Settlements are often reached in order to avoid discovery. Courts do order expedited
1110 discovery on a crucial point. But the concept of "targeted" discovery is difficult to manage. It will
1111 add to the problem.

1112 A judge responded that one example of focused discovery arises from limitations defenses.
1113 It is very difficult to be confident that a limitations defense can be resolved on the pleadings. It
1114 works to allow discovery on the limitations issues alone, to be followed by a motion for summary
1115 judgment if the defendant thinks it appropriate.

1116 Another judge noted that in Pennsylvania an action can be commenced by filing a "summons"
1117 without a complaint, and that discovery can be had on the basis of the summons. "Lawyers try very
1118 hard to remove" to federal court. In the Eastern District of Pennsylvania, Twombly and Iqbal have
1119 made no difference. Although the language of the opinions "can be very disturbing," the Eastern
1120 District judges are not reading the opinions in the ways that cause alarm.

1121 The discussion of pleading concluded with several reminders. The FJC study will be
1122 completed soon. Andrea Kuperman will continue to update her fabulous memorandum of the
1123 emerging cases. A look at the briefs in the Al-Kidd case may give some hint whether the Supreme
1124 Court is likely to confront issues that will drag it once again into the fray. Meanwhile, all Committee
1125 members are urged to think further about pleading issues and to send their thoughts to Judge Kravitz
1126 and the reporter.

1127 *Duke Conference Subcommittee*

1128 Judge Kravitz noted that after the Duke Conference concluded he asked Judge Campbell to
1129 lead the Discovery Subcommittee into a study of preserving documents and e-files, and related
1130 spoliation issues. Those issues were prominent in the discussions. Pleading proposals will continue
1131 to evolve as more information comes in. As for everything else, he asked Judge Koeltl to chair a
1132 subcommittee charged with ensuring that the momentum imparted by the Conference does not wane.
1133 The empirical work done for the Conference, and the hosts of ideas presented, should not be allowed
1134 to waste away.

1135 Judge Koeltl listed Subcommittee members as Gensler, Grimm, Keisler, and Pratter. Judge
1136 Rothstein and Judge Wood are also participating.

1137 The Subcommittee goal is to build on the energy generated by the Conference, and to
1138 advance its goals. Many of the most prominent issues involve pleading and discovery, and those are
1139 being addressed outside this Subcommittee.

1140 The Subcommittee has had two phone conferences, and will meet at breakfast before the start
1141 of the Committee meeting on November 16.

1142 Some of the ideas advanced at the Conference might be addressed by rules amendments. A
1143 lengthy but incomplete list of possible rules proposals is presented by the "menu" in the agenda
1144 materials. Suggestions for added rules changes will be welcomed. Among the discovery proposals
1145 are several outside those now being considered by the Discovery Subcommittee. Specific rules
1146 changes might help make discovery quicker, less expensive, and more efficient. It might help to
1147 make the concept of proportionality more prominent. Judge Grimm has suggested changes that
1148 would codify the importance of cooperation. Daniel Girard suggested specific changes to deter
1149 obstructive discovery responses of the generalized sort often encountered — "overbroad, not
1150 calculated to lead to admissible evidence, irrelevant, immaterial, and otherwise objectionable." The
1151 generalized responses are then often copied into the answer to each question, which is made "subject
1152 to these objections."

1153 Other discovery suggestions would impose specific numerical limits on rules that do not now
1154 have them. One proposal, for example, is to allow only ten Rule 34 requests to produce. Others
1155 would limit the number of requests for admissions. Compared to these proposals is the interesting
1156 FJC finding that there is little discovery in most cases, and that most lawyers think the level of
1157 discovery is appropriate to the circumstances of the particular cases in the closed-case survey. The
1158 problems tend to concentrate in high-stakes cases, where lawyers tend to be more assertive.

1159 Related suggestions would require a meet-and-confer before making any motion, or would
1160 require lawyers to meet and confer before a pretrial conference — and would require that a pretrial
1161 conference be held in every case.

1162 The rules possibilities are long-term work, but it is important to begin now and to capture the
1163 enthusiasm generated by the conference.

1164 Apart from rules changes, there may be many ways to identify and foster best practices that
1165 work better and faster than rules changes. Many of the Conference suggestions could be included
1166 in the Civil Litigation Management Manual. The Second Edition of the Manual has just appeared.
1167 The Subcommittee would be glad to work with the Committee on Court Administration and Case
1168 Management to incorporate ideas from the Conference if CACM would welcome the collaboration.
1169 The Manual does refer to the Boston College discovery conference; the Duke Conference could
1170 readily fit in. Professor Gensler and Judges Grimm, Rosenthal, and Rothstein are reviewing the
1171 Manual to identify opportunities to add Conference-inspired material.

1172 The FJC is working on revising pocket guides. New best practices can be incorporated,
1173 drawing from the Conference.

1174 Pilot projects also may prove useful. The IAALS continues several projects. The Seventh
1175 Circuit e-discovery project is continuing, and the FJC is collaborating in it. The possibility of other
1176 pilot projects is being pursued. The Southern District of New York is anxious to do a pilot project.
1177 A Judicial Improvements Committee brought lawyers together to talk about motions practice and
1178 complex litigation. If a project is undertaken, it would be undertaken in conjunction with the FJC.
1179 Judge Grimm and the Sedona Conference are thinking about pilot projects on e-discovery. The
1180 National Employment Lawyers Association has started work on a set of form interrogatories for
1181 employment cases that would be presumptively proper; when the work is completed, a pilot project
1182 might be a good way to test the idea.

1183 Opportunities thus are presented for rules amendments, education programs and materials,
1184 and pilot projects. Questions remain as to which subjects should be developed by which means, and
1185 which should be addressed first.

1186 Abel Matos of the Administrative Office noted that the Civil Litigation Management Manual
1187 is available online. CACM hopes to keep updating it for new rules and the like. A panel chaired by
1188 Judge Leighton is charged with keeping the Manual current. Judge Koeltl added that the Manual is
1189 indeed an excellent resource.

1190 Judge Rothstein said the Manual is good because of a lot of hard work by CACM and the
1191 FJC and the Administrative Office. It is important to get it to work in judges' hands. The FJC is
1192 looking for ways to present it more effectively. The FJC e-discovery pocket guide needs updating,
1193 and work is being done. As to pilot projects, many districts are trying things. The FJC can try to
1194 tune in, finding ways to be helpful in designing the projects and reviewing the results so there is
1195 rigorous evaluation and learning. Many of the Conference ideas are great; ways must be found to
1196 get them into wider circulation. Improving the way things are done now, under the present rule
1197 structure, will help forestall more drastic proposals for change.

1198 Judge Koeltl added that the Manual grew up under the Civil Justice Reform Act. It is
1199 directed to judges as guidance, disclaiming to be "authority" or "law." With this focus, it is not
1200 distributed in bound form to lawyers, and lawyers are not in a position to cite it to judges as a guide
1201 to good practices. The original Manual was available on WestLaw; it may be that the Second
1202 Edition also will be available on line. The FJC, moreover, is working with the circuits in an attempt
1203 to persuade them to present serious programs on case management. The Manual could be showcased
1204 in these conferences.

1205 More general discussion began with a question drawn from the notes on the Subcommittee's
1206 September 10 conference call. The Subcommittee concluded then that the time has not come to
1207 undertake a fundamental reconsideration of the basic rule structure embodied in the 1938 rules.
1208 Substantial improvements may be possible in the package of notice pleading, broad discovery, and
1209 summary judgment, but the package should survive. The question was whether this conclusion is
1210 premature. A lot of dissatisfaction was expressed at the Conference. Arizona, with searching
1211 disclosure requirements, thinks its system is a real improvement. Oregon, with fact pleading, is
1212 similarly proud of its system. Some participants urged adoption of "civil Brady" disclosure
1213 requirements. Perhaps fundamental rethinking should have a place on the agenda.

1214 This challenge was met by observing that the Conference generated a consensus that the
1215 general structure of the rules should survive. It is too early to run the risks of throwing it out and
1216 starting anew. Even the panel on discovery, an area of great concern, emphasized the opportunities
1217 to find solutions in vigorous exercise of the authority and discretion conferred by the present rules.
1218 There was a division of views on pleading standards in the wake of the Twombly and Iqbal
1219 decisions. That topic will continue to be studied vigorously — for now, the Committee chair and
1220 reporter constitute the working group. There is continuing concern about cost and delay, as always.
1221 Whether cost and delay can be reduced by rethinking the structure of the rules remains uncertain.
1222 Fundamental changes also might be required in the culture of the lawyers and judges who enforce
1223 the rules.

1224 Professor Gensler has provided some thoughtful responses, including a package of changes
1225 that would be acceptable across a broad spectrum of the bar. It is important to think about the
1226 possibilities for a package that would be realistic and would receive broad support. It was
1227 encouraging to find lawyers agreeing on some changes at the Conference, but it also seems clear that
1228 lawyers and judges have to do a better job.

1229 A related response was that a three-year debate on reformulating the Federal Rules of Civil
1230 Procedure may be a good idea, but it is not clear that this Committee is the best group to do it. The
1231 Committee can propose useful changes. Pleading is under active consideration. The discovery rules
1232 are continually reconsidered and regularly changed. Summary judgment has just been studied at
1233 length and a new rule is on the verge of taking effect. "It is better to focus on things that can be done
1234 in our life time."

1235 This observation was supplemented by noting that "there are people out there pursuing
1236 broader projects. We can keep following them and inviting them to speak with us."

1237 Another Committee member returned to the question of basic structural reform by recalling
1238 the results of the FJC closed-case survey. A large number of the lawyers said that the cost of the
1239 case actually involved in the survey was appropriate. At the same time, they suggested that overall
1240 the system is too expensive, that litigants are being priced out of federal court. Trials may be

1241 vanishing because of the cost of getting to trial. The conference materials on the local practice in
1242 the Eastern District of Virginia were impressive. Perhaps the "rocket docket" should be studied
1243 further, as well as the practices in various states that depart significantly from the federal model.

1244 This contrast between the evaluation of experience with a specific case and overall
1245 impressions was probed further by noting that the results of the ACTL/IAALS survey, the ABA
1246 Litigation Section survey, and other surveys also yield impressionistic responses that the system is
1247 "too expensive." The FJC survey itself found very expensive litigation "at the high end." The
1248 problems of the most expensive cases may well deserve study and attempts to find remedies. But
1249 attempted reforms "should not mess up things that people are satisfied with." If additional
1250 requirements are imposed, they should not be imposed on the simpler cases that work well now.

1251 The sense of simpler cases was examined from a different angle. The \$15,000 cost reported
1252 for median cases in the FJC survey seems relatively modest to many lawyers. But for many litigants
1253 it is prohibitive. Absent public subsidy, it does not seem possible to design procedures that will
1254 bring costs down to a level that can be managed by most potential litigants. It remains important to
1255 attempt to control costs as far as can be done.

1256 A different standard of evaluation is to compare costs in federal court with costs in state
1257 court. The survey asked about the relationship between these costs, on a scale that rated "4" as "just
1258 right." The majority — about three quarters — of the lawyers gave answers of 3, 4, or 5. "Too high"
1259 responses of 6 or 7 were limited to about 15% of the respondents, and those were in the cases with
1260 higher discovery costs.

1261 As to absolute costs, practitioners invariably report that litigation is too expensive. Arizona
1262 lawyers and Oregon lawyers, working in systems quite different from each other and also quite
1263 different from the federal model, say that litigation is too expensive. So we regularly hear that
1264 education is too expensive, health care is too expensive, national defense is too expensive, and so
1265 on. Responses at this level of generality are useful reminders that we have not achieved an ideal
1266 system and that reform work must continue.

1267 The surveys asked about the advantages of developing new limits on discovery. Both Arizona
1268 lawyers, with searching disclosure requirements, and Oregon lawyers, with fact pleading, say that
1269 their procedures limit the amount of discovery, and focus the discovery that does occur. But they
1270 split evenly on whether this reduces cost or delay, and even on whether their procedures reduce the
1271 pressure to settle.

1272 In a different direction, it was suggested that encouraging more basic research on what is
1273 really happening may be an important response to the Conference materials. One recent study sought
1274 to measure the effects of procedure on cost and delay by separating case factors from system factors.
1275 The conclusion found that case facts account for about 75% of the variations. Another study looks
1276 at factors that make settlement more likely; there is a lot of room to pursue these questions. We do
1277 not know much about the impacts of procedure on litigation of complex commercial transactions as
1278 compared to the cases that are priced out of court by costs of \$15,000. There is a lot we do not know
1279 about the operation of the rules, and a lot to be learned. All of the Duke surveys were directed at
1280 lawyers; clients were represented only by surveys that include corporate counsel. And the
1281 information that general counsel think litigation is too expensive is hardly news. "We're talking to
1282 ourselves, not to the consumers."

1283 These questions prompted the observation that it is one thing to say the system is too
1284 expensive and quite another thing to solve the problem. The complexity of the rules could be
1285 trimmed drastically. Or an attempt should be made to require all judges to be actively involved in
1286 planning discovery. One-size-fits-all discovery rules can be made to work with active case
1287 management, and this approach may be better than imposing strict and narrow limits. The
1288 Committee can think about these things.

1289 A different summary of the same proposition suggested that "everyone is right. We will
1290 never be in a position to declare our work done." The Committee must not forget that everything
1291 that affects the courts' business continues to change. The need for dramatic revision may arise, and

1292 if the lessons of history are any guide the need will arise. It is important to continue improving the
1293 disciplined, empirical information that will support continual evaluation of the system. The
1294 Committee is "the only group involved with reform that is involved without hope for advantage."
1295 If we often wind up talking to ourselves, the Conference went far beyond that.

1296 The impact of a \$15,000 cost figure came back with the observation that newspaper articles
1297 reporting that cost as a substantial barrier to access focus on the middle of the pyramid. Many people
1298 cannot afford an attorney at all. The Western District of Washington, as many courts, has a huge
1299 influx of foreclosure cases. The defendants cannot pay attorneys. "\$15,000 can make the difference
1300 in losing your home." Committee discussions, and lawyer dissatisfaction, regularly focus on the top
1301 of the pyramid. "Federal court will always be a luxury court to the ordinary citizen. Revising the
1302 rules will not affect that problem."

1303 Nonetheless, there is a connection between the cases at the apex of the pyramid and those at
1304 the lower levels. Only aggregate litigation will bring many ordinary people to court. General
1305 counsel surveys do not reflect this reality.

1306 State courts were brought back by noting that Massachusetts courts are experimenting at both
1307 the low and high ends. They are providing a speedy path to trial in complex cases that is drawing
1308 cases away from the federal court. We must pay constant attention to state-court developments.

1309 All of this discussion will provide support for the further work of the Duke Conference
1310 Subcommittee.

1311 *Civil-Appellate Issues*

1312 Judge Colloton reported that the Civil-Appellate Subcommittee has two active items on its
1313 agenda. Each item originated with the Appellate Rules Committee.

1314 One problem arises at the intersection of Appellate Rule 4 with Civil Rule 58. The potential
1315 problem with Appellate Rule 4 arises when a post-judgment motion is decided on terms that require
1316 entry of an amended judgment but the precise terms of the judgment are not yet fixed. The running
1317 example is an order granting remittitur and allowing the plaintiff 40 days to decide whether to accept.
1318 It is not clear whether the 30-day appeal period begins to run on entry of the order, or is deferred
1319 until the plaintiff makes the choice. If Rule 4 is amended, it may be useful to amend the Rule 58
1320 provisions on entry of judgment in parallel. These issues have been described at earlier Committee
1321 meetings and will be brought back once the Appellate Rules Committee has decided the Rule 4
1322 question.

1323 "Manufactured finality" is the other issue. The core example is a case with one plaintiff, one
1324 defendant, and two or more claims. The court dismisses one claim while the other claim remains
1325 alive. If the plaintiff believes that the dismissed claim is the principal claim, and perhaps that the
1326 remaining claim is not worth litigating in isolation, the plaintiff may seek to achieve finality so as
1327 to appeal. Rule 54(b) is the primary source of authority, but it depends on persuading the court to
1328 enter a partial final judgment. If the court is not willing, or if it is uncertain whether the two "claims"
1329 are actually separate for purposes of Rule 54(b), the plaintiff may prefer to dismiss the remaining
1330 claim. Three basic variations can be identified.

1331 First, it is reasonably well established that finality can be established by dismissing all
1332 remaining claims with prejudice. Still, it may be useful to confirm this practice by express rule
1333 provisions.

1334 Second, the plaintiff may prefer to dismiss the remaining claims without prejudice, hoping
1335 that "cumulative finality" will support an appeal. Most of the circuits reject this ploy, although it has
1336 occasionally succeeded. The Subcommittee is inclined to think this is not a proper means of
1337 achieving finality. It would be possible to adopt a rule making that point clear.

1338 Third, the plaintiff may seek to dismiss the remaining claims with prejudice, subject to
1339 revival if the order dismissing the main claim is reversed. The Subcommittee refers to this tactic as

1340 "conditional prejudice." The courts of appeals have divided on this tactic; the clearest acceptance
1341 is in the Second Circuit.

1342 The central question is whether it would be helpful to adopt a rule, or perhaps rules,
1343 regulating manufactured finality. The Rules Enabling Act, § 2072(c), authorizes rules that define
1344 finality. It can be done.

1345 The agenda materials include sketches of various approaches to these issues, confined to
1346 relatively simple situations. Even with the simpler situations, there are concerns about the prospect
1347 of multiple appeals. Still, a rule could be framed that reaches the simple cases without undertaking
1348 to address all of the problems that can arise in cases that involve multiple claims among multiple
1349 parties. The Subcommittee believes these questions should be explored further. It will be useful,
1350 for example, to find out what can be made of experience in the Second Circuit. There is a fair
1351 amount of case law to consider, although it is drawn out over a period of fifteen or twenty years.

1352 A member asked whether these questions tend to arise after a district court has entered a
1353 partial final judgment under Rule 54(b), only to have the certification rejected by the court of
1354 appeals. Judge Colloton answered that the cases generally have not come up in this posture.

1355 Another member observed that interlocutory appeals by permission under § 1292(b) do not
1356 respond to all needs. And it is harsh to require dismissal of living claims that may well be valuable
1357 claims as the price of appealing a dismissed claim that is still more important.

1358 A judge seconded this observation by noting that the Seventh Circuit does not grant many
1359 of the infrequent petitions for leave to appeal under § 1292(b). On the other hand, it does accept
1360 most "good" Rule 54(b) judgments. There has been pressure to increase the availability of
1361 interlocutory appeals. That can impose real burdens on the court of appeals. But the burdens can
1362 be reduced to some extent by assigning successive appeals to the panel that heard the first appeal.

1363 The limits of Rule 54(b) were noted again. A party may wish to manufacture finality after
1364 a ruling that does not dispose even of a single claim, but that has a drastic effect in limiting what
1365 remains. A major theory of damages may be rejected, for example, leaving only a relatively minor
1366 amount available. In other cases it may be uncertain whether there are two claims, or two theories
1367 offered to support a single claim. And even when the technical requirements are satisfied, the rule
1368 was designed to make the district court the "dispatcher" of appeals; refusal to certify defeats finality.
1369 In one way, the question of manufactured finality is which — if any — of the alternative
1370 manufacturing methods compensates for the unavailability of appeal under Rule 54(b).

1371 Another judge observed that instinctively, "manufactured" sounds fishy. If the trial judge has
1372 rejected all alternative regular paths to appeal, appeal should be unavailable. But further reflection
1373 shows this is an interesting question. There will be an appeal on the principal claim in any event;
1374 the question is when. Immediate appeal may be to the advantage of the trial court, sparing it the need
1375 to work through the rest of the case before there can be an appeal that may change the game and
1376 require that everything be redone. Further work may result in a manufactured finality rule that does
1377 good things.

1378 Still another judge noted that one problem arises when the parties have completely resolved
1379 their claims. The present situation puts the burden on the parties to decide what is peripheral: why
1380 not force them to make the choice?

1381 An attorney member found reasons to favor conditional prejudice dismissals. Nothing
1382 happens further unless the plaintiff wins an appellate ruling that dismissal of the principal claim was
1383 wrong. If the plaintiff then believes that the peripheral claims are worth litigating along with the
1384 principal claim on remand, the full trial should be available. The more complex cases, however,
1385 present a problem. One approach would be to recognize a dismissal with conditional prejudice only
1386 if all parties consent, thus recognizing that the final-judgment rule protects the parties as well as the
1387 court system. But a consent requirement could open the way to gamesmanship, in which parties who
1388 have no real interest in the appeal seek to trade consent for some other concession. And if the trial
1389 court's consent is required, the result will be little more than creation of a new opportunity for

1390 interlocutory appeal. "The desire for a single definition of finality for all federal courts may not be
1391 enough" to justify new rules.

1392 A judge from the Second Circuit suggested that if the district court thinks an appeal would
1393 be meritorious, the judge can send it up. "If not, the parties should have to make the hard choices."
1394 An appellate judge noted that this happens regularly in the Seventh Circuit, which recognizes
1395 manufactured finality only by way of unconditional dismissal with prejudice of all that remains in
1396 the action.

1397 The Subcommittee will continue to work on these issues.

1398 *Pattern Discovery*

1399 Judge Kravitz introduced the pattern discovery project undertaken by the National
1400 Employment Lawyers Association. The idea was presented at the Duke Conference. The hope is
1401 to develop sets of interrogatories and document requests that are presumptively valid and can be used
1402 without objection in every case that comes within the set. The idea is promising, but it will work
1403 only if plaintiffs and defendants can agree on what is acceptable.

1404 Joseph Garrison and Chris Kitchel have headed the effort, and have helped form an advisory
1405 committee composed of richly and impressively experienced plaintiffs' and defense lawyers.

1406 Joseph Garrison introduced the first drafts, observing that if consensus can be achieved on
1407 pattern discovery, the goals of Rule 1 will be advanced. The Institute for the Advancement of the
1408 American Legal System is available to help the project. The committee hopes to develop a set of
1409 pattern interrogatories within a year, and perhaps to reach agreement on some items by next April.
1410 The first draft, prepared by the plaintiffs' lawyers, is likely to be sorted into three categories: requests
1411 that are acceptable on all sides; those that seem sufficiently promising to warrant further drafting
1412 efforts; and "nonstarters." The management subcommittee is reviewing the plaintiffs' draft, and will
1413 prepare their own proposals within the next two months.

1414 The committee will need some help. It may prove important to consult with some judges to
1415 determine what works from the judicial perspective.

1416 Chris Kitchel said that the group has talked about an effort to find what should be acceptable
1417 in all cases. The work must aim to identify the kinds of information that professional specialists
1418 should be willing to give over without a fight.

1419 Once agreement is reached, it will be important to think about the best means of introducing
1420 the pattern discovery questions in practice. It may be that the way to begin will be with local rules
1421 or standing orders. Perhaps the exercise should become a pilot project, so that it can be designed to
1422 provide rigorous information and review. In the longer term, it may be useful to ask whether the
1423 national rules should reflect the use of pattern discovery. Serving interrogatories and document
1424 requests with the complaint seems to run counter to Rule 26(d), unless there is a court order. That
1425 question may become ripe, however, only when several sets of pattern discovery requests have been
1426 developed for different areas of practice.

1427 The effort for employment cases may well come to prompt similar efforts in other fields.

1428 *Adjournment*

1429 The meeting adjourned. The next meeting will be on April 4 and 5, 2011, in Austin, Texas,
at the University of Texas Law School.

Respectfully submitted

Edward H. Cooper
Reporter

TAB
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

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APPELLATE RULES

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BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: December 3, 2010

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 October 7 and 8, 2010, in Boston, Massachusetts. The Committee approved for publication proposed amendments to Rules 13, 14, and 24, removed one item from its study agenda, and discussed a number of other items.

Part II of this report discusses the proposals for which the Committee seeks publication for comment: proposed amendments to Rules 13, 14, and 24. Part III covers other matters.

The Committee has scheduled its next meeting for April 6 and 7, 2011, in San Francisco, California; the second day of the meeting will overlap with the meeting of the Bankruptcy Rules Committee. The Committee will hold its fall 2011 meeting on October 13 and 14 in Atlanta, Georgia.

Detailed information about the Committee's activities can be found in the Reporter's draft of the minutes of the October meeting¹ 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. Action Item

The Committee is seeking approval to publish for comment proposed amendments to Rules 13, 14, and 24. The proposed amendments to Rules 13 and 14 revise those rules to address permissive interlocutory appeals from the United States Tax Court under 26 U.S.C. § 7482(a)(2). The Committee developed these proposals in consultation with the Tax Court and with the Tax Division of the Department of Justice. The proposed amendment to Rule 24 grows out of a suggestion by the Tax Court that Rule 24(b)'s reference to the Tax Court be revised to remove a possible source of confusion concerning the Tax Court's legal status.

A. Rule 13

The Committee recommends that the Standing Committee approve for publication the proposed amendment to Rule 13 as set out in the enclosure to this report. The amendment will add a new subdivision (b) providing that permissive appeals from the Tax Court are governed by Rule 5, and will make certain other changes.

In 1980, the Second Circuit held in *Shapiro v. C.I.R.*, 632 F.2d 170 (2d Cir. 1980), that 28 U.S.C. § 1292(b) does not authorize permissive interlocutory appeals from an order of the Tax Court. In 1986, Congress responded to *Shapiro* by enacting 26 U.S.C. § 7482(a)(2), which adopts for interlocutory appeals from the Tax Court a system similar to Section 1292(b)'s system for interlocutory appeals from the district courts. Section 7482(a)(2) provides that “[w]hen any judge of the Tax Court includes in an interlocutory order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation,” the court of appeals “may, in its discretion, permit an appeal to be taken from such order, if application is made to it within 10 days after the entry of such order.” When applying Section 7482(a)(2), the Tax Court has looked to caselaw interpreting Section 1292(b).

The adoption of Section 7482(a)(2) did not lead to any amendments of the Appellate Rules; thus, it is not entirely clear what rules govern an interlocutory appeal by permission under Section 7482(a)(2). Tax Court Rule 193(a) states in part: “For appeals from interlocutory orders generally, see rules 5 and 14 of the Federal Rules of Appellate Procedure.” This reference is somewhat puzzling, because Rule 14 (with respect to appeals to which it applies) excludes the application of Rule 5.

The Committee proposes to add new Rule 13(b) to make clear that Appellate Rule 5 applies to interlocutory tax appeals under Section 7482(a)(2). The existing provisions of Rule 13 are placed in a renumbered Rule 13(a), are revised to make clear that they apply to appeals as of right, and are slightly restyled. The amendments delete current Rule 13(d)(1)'s definition of “district court” and “district clerk” to encompass the Tax Court and its clerk, because (as

discussed below) such a definition is placed in revised Rule 14. Current Rule 13(d)(1) becomes new Rule 13(a)(4)(A) and is revised to be consistent with the Tax Court's practice of obtaining a transcript for each proceeding and forwarding it to the court of appeals on request. The headings of Rules 13 and 14 and the heading of Title III are revised to reflect the new scope of Title III, which will encompass review of Tax Court orders as well as review of Tax Court decisions.

B. Rule 14

The Committee recommends that the Standing Committee approve for publication the proposed amendment to Rule 14 as set out in the enclosure to this report. The proposed amendment to Rule 14 complements the amendment to Rule 13.

Rule 14 is revised to delete its specific reference to Tax Court "decisions." Rule 14's list of Appellate Rules provisions that do not apply to appeals from the Tax Court is revised to omit Rule 5. A new global definition provides that references "in any applicable rule"² to the "district court" and "district clerk" encompass the Tax Court and its clerk. Omitted from this global definition is Rule 24(a), because that provision's treatment of applications to proceed in forma pauperis on appeal is not meant to apply to appeals from the Tax Court.

Assuming that the Standing Committee decides to approve this package of proposals for publication, it may be worthwhile to consider inviting specific comment on Appellate Rule 14's list of provisions that do not apply to appeals from the Tax Court. That list has not been amended since the adoption of the Appellate Rules, and it may be useful to obtain additional input on whether the list of exclusions accurately reflects the way in which the Appellate Rules provisions, as they stand today, should apply to appeals from the Tax Court.

C. Rule 24

The Committee recommends that the Standing Committee approve for publication the proposed amendment to Rule 24 as set out in the enclosure to this report. The proposed amendment to Rule 24 implements a proposal by the Tax Court that Rule 24(b) be revised to more accurately reflect the status of the Tax Court as a court.

² In style comments prior to the meeting, Professor Kimble suggested deleting "applicable." The Committee carefully discussed this suggestion. Members stated that they prefer to include the word "applicable" for clarity and to emphasize that not all of the Appellate Rules apply to appeals from the Tax Court. On the basis of this discussion, the Committee decided to retain the word "applicable."

III. Information Items

The Committee expects to discuss at its spring 2011 meeting a proposal to amend Rule 4(a)(4) to adjust its treatment of the time to appeal after the disposition of a tolling motion. The Civil / Appellate Subcommittee has been working on this proposal, and has also been discussing the possibility of a proposal to address the doctrine of “manufactured finality.” At the spring 2011 meeting, the Committee will also consider a proposal to streamline Questions 10 and 11 of Appellate Form 4 (concerning applications to proceed in forma pauperis on appeal); Questions 10 and 11, which request information concerning payments to attorneys and others in connection with the case, currently seek more information than seems necessary to the determination of i.f.p. applications.

The Committee is continuing to research issues relating to a proposal to treat federally recognized Native American tribes the same as states for the purpose of amicus filings. Under Rule 29(a), the federal and state governments can file amicus briefs as a matter of course, but tribal amici must seek party consent or court leave. (Moreover, absent contrary action by Congress, new Rule 29(c)(5) will take effect as of December 1, 2010. Rule 29(c)(5) will impose an authorship and funding disclosure requirement on amicus briefs but will exempt the federal and state government entities listed in Rule 29(a).) In addition to receiving input from the National Congress of American Indians and others, the Committee has considered empirical data gathered by the Federal Judicial Center, has considered the history of the Supreme Court’s amicus-filing rule, and has consulted the Chief Judges of the Eighth, Ninth, and Tenth Circuits (where relatively many tribal amicus filings occur).

The Committee is considering whether to modify Rule 28(a)(6)’s requirement that briefs contain a separate “statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below.” Preliminary discussions indicate substantial support for such a modification.

The Committee has begun to consider possible rulemaking responses to the Court’s decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), which held that a district court’s attorney-client privilege ruling did not qualify for an immediate appeal under the collateral order doctrine. Though some have proposed a relatively broad-ranging review of the collateral order doctrine, the Committee intends as an initial matter to focus its consideration on possible ways to provide for immediate appellate review of attorney-client privilege rulings, as well as possible mechanisms to control such appeals (such as certification requirements or expedited procedures). The Committee will coordinate its efforts with the Civil, Criminal, and Evidence Rules Committees.

The Committee has embarked on a review of the caselaw interpreting Rule 4(a)(2), which addresses premature notices of appeal in civil cases. Caselaw in this area addresses a range of different fact patterns, and the Committee plans to consider from a policy perspective whether

the Rule and the caselaw appropriately treat the common situations in which questions of prematurity tend to arise.

The Committee's upcoming joint spring meeting with the Bankruptcy Rules Committee will provide an opportunity for both Committees to discuss the proposed revisions to Part VIII of the Bankruptcy Rules (dealing with bankruptcy appeals).

The Committee has asked the Federal Judicial Center to research the amount of appellate costs that are typically awarded under Rule 39. This inquiry arises in response to concerns raised about the taxation of costs by the Fourth Circuit in the case of *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 130 S. Ct. 1737 (2010).

At the fall meeting, the Committee discussed issues raised by *Vanderwerf v. Smithkline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010), concerning the effect on appeal time of the withdrawal of a tolling motion. The Committee also discussed a suggestion that the Appellate Rules might usefully address the question of intervention on appeal. The Committee left these items on its agenda for the time being, though it is not clear that there is any consensus in favor of developing proposals on either topic. The Committee also considered issues raised by *Comer v. Murphy Oil USA*, 607 F.3d 1049 (5th Cir. 2010) (*en banc*), concerning the quorum requirement applicable to *en banc* courts; after discussion, the Committee removed this item from its study agenda.

Finally, the Committee discussed an inquiry from the Committee on Federal / State Jurisdiction concerning appellate review of remand orders. Members noted that this topic falls within the primary jurisdiction of the Federal / State Jurisdiction Committee, and expressed willingness to assist that Committee should it decide to move forward with a project on this topic.

TAB
6-A

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF APPELLATE PROCEDURE*

TITLE III. ~~REVIEW OF A DECISION OF~~ APPEALS FROM
THE UNITED STATES TAX COURT

Rule 13. ~~Review of a Decision of~~ Appeals from the Tax
Court

1 (a) ~~How Obtained; Time for Filing Notice of Appeal~~
2 Appeal as of Right.

3 (1) How Obtained; Time for Filing a Notice of
4 Appeal.

5 ~~(1) Review of a decision of (A)~~ An appeal as of
6 right from the United States Tax Court is
7 commenced by filing a notice of appeal with
8 the Tax Court clerk within 90 days after the
9 entry of the Tax Court's decision. At the time
10 of filing, the appellant must furnish the clerk
11 with enough copies of the notice to enable the
12 clerk to comply with Rule 3(d). If one party
13 files a timely notice of appeal, any other party
14 may file a notice of appeal within 120 days
15 after the Tax Court's decision is entered.

*New material is underlined; matter to be omitted is lined through.

2 FEDERAL RULES OF APPELLATE PROCEDURE

16 (2) (B) If, under Tax Court rules, a party makes
17 a timely motion to vacate or revise the Tax
18 Court's decision, the time to file a notice of
19 appeal runs from the entry of the order
20 disposing of the motion or from the entry of
21 a new decision, whichever is later.

22 **(b) (2) Notice of Appeal; How Filed.** The notice of
23 appeal may be filed either at the Tax Court
24 clerk's office in the District of Columbia or
25 by mail addressed to the clerk. If sent by mail
26 the notice is considered filed on the postmark
27 date, subject to § 7502 of the Internal
28 Revenue Code, as amended, and the
29 applicable regulations.

30 **(c) (3) Contents of the Notice of Appeal; Service;**
31 **Effect of Filing and Service.** Rule 3
32 prescribes the contents of a notice of appeal,
33 the manner of service, and the effect of its
34 filing and service. Form 2 in the Appendix of
35 Forms is a suggested form of a notice of
36 appeal.

37 (d) (4) **The Record on Appeal; Forwarding;**

38 **Filing.**

39 (1) (A) Except as otherwise provided under

40 Tax Court rules for the transcript of

41 proceedings, the ~~An appeal from the~~

42 ~~Tax Court~~ is governed by the parts of

43 Rules 10, 11, and 12 regarding the

44 record on appeal from a district court,

45 the time and manner of forwarding and

46 filing, and the docketing in the court of

47 appeals. ~~References in those rules and~~

48 ~~in Rule 3 to the district court and~~

49 ~~district clerk are to be read as referring~~

50 ~~to the Tax Court and its clerk.~~

51 (2) (B) ~~If an appeal from a Tax Court~~

52 ~~decision~~ is taken to more than one court

53 of appeals, the original record must be

54 sent to the court named in the first

55 notice of appeal filed. In an appeal to

56 any other court of appeals, the appellant

57 must apply to that other court to make

58 provision for the record.

59 **(b) Appeal by Permission.** An appeal by permission is
60 governed by Rule 5.

Committee Note

Rules 13 and 14 are amended to address the treatment of permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rules 13 and 14 do not currently address such appeals; instead, those Rules address only appeals as of right from the Tax Court. The existing Rule 13 – governing appeals as of right – is revised and becomes Rule 13(a). New subdivision (b) provides that Rule 5 governs appeals by permission. The definition of district court and district clerk in current subdivision (d)(1) is deleted; definitions are now addressed in Rule 14. The caption of Title III is amended to reflect the broadened application of this Title.

**Rule 14. Applicability of Other Rules to the Review of a
Appeals from the Tax Court Decision**

1 All provisions of these rules, except Rules ~~4-9~~ 4, 6-9,
2 15-20, and 22-23, apply to the review of a appeals from the
3 Tax Court decision. References in any applicable rule (other
4 than Rule 24(a)) to the district court and district clerk are to
be read as referring to the Tax Court and its clerk.

Committee Note

Rule 13 currently addresses appeals as of right from the Tax Court, and Rule 14 currently addresses the applicability of the Appellate Rules to such appeals. Rule 13 is amended to add a new subdivision (b) treating permissive interlocutory appeals from the Tax Court under 26 U.S.C. § 7482(a)(2). Rule 14 is amended to address the applicability of the Appellate Rules to both appeals as of right and appeals by permission. Because the latter are governed by Rule 5, that rule is deleted from Rule 14's list of inapplicable provisions. Rule 14 is amended to define the terms “district court” and “district clerk” in applicable rules (excluding Rule 24(a)) to include the Tax

Court and its clerk. Rule 24(a) is excluded from this definition because motions to appeal from the Tax Court in forma pauperis are governed by Rule 24(b), not Rule 24(a).

Rule 24. Proceeding in Forma Pauperis

1 **(a) Leave to Proceed in Forma Pauperis.**

2 (1) **Motion in the District Court.** Except as stated in
 3 Rule 24(a)(3), a party to a district-court action who
 4 desires to appeal in forma pauperis must file a
 5 motion in the district court. The party must attach
 6 an affidavit that:

7 (A) shows in the detail prescribed by Form 4 of
 8 the Appendix of Forms the party's inability to
 9 pay or to give security for fees and costs;

10 (B) claims an entitlement to redress; and

11 (C) states the issues that the party intends to
 12 present on appeal.

13 (2) **Action on the Motion.** If the district court grants
 14 the motion, the party may proceed on appeal
 15 without prepaying or giving security for fees and
 16 costs, unless a statute provides otherwise. If the
 17 district court denies the motion, it must state its
 18 reasons in writing.

6 FEDERAL RULES OF APPELLATE PROCEDURE

19 (3) **Prior Approval.** A party who was permitted to
20 proceed in forma pauperis in the district-court
21 action, or who was determined to be financially
22 unable to obtain an adequate defense in a criminal
23 case, may proceed on appeal in forma pauperis
24 without further authorization, unless:

25 (A) the district court--before or after the notice of
26 appeal is filed--certifies that the appeal is not
27 taken in good faith or finds that the party is
28 not otherwise entitled to proceed in forma
29 pauperis and states in writing its reasons for
30 the certification or finding; or

31 (B) a statute provides otherwise.

32 (4) **Notice of District Court's Denial.** The district
33 clerk must immediately notify the parties and the
34 court of appeals when the district court does any of
35 the following:

36 (A) denies a motion to proceed on appeal in
37 forma pauperis;

38 (B) certifies that the appeal is not taken in good
39 faith; or

40 (C) finds that the party is not otherwise entitled to
 41 proceed in forma pauperis.

42 (5) **Motion in the Court of Appeals.** A party may file
 43 a motion to proceed on appeal in forma pauperis in
 44 the court of appeals within 30 days after service of
 45 the notice prescribed in Rule 24(a)(4). The motion
 46 must include a copy of the affidavit filed in the
 47 district court and the district court's statement of
 48 reasons for its action. If no affidavit was filed in
 49 the district court, the party must include the
 50 affidavit prescribed by Rule 24(a)(1).

51 (b) **Leave to Proceed in Forma Pauperis on Appeal from**
 52 **the United States Tax Court or on Appeal or Review**
 53 **of an Administrative-Agency Proceeding.** ~~When an~~
 54 ~~appeal or review of a proceeding before an~~
 55 ~~administrative agency, board, commission, or officer~~
 56 ~~(including for the purpose of this rule the United States~~
 57 ~~Tax Court) proceeds directly in a court of appeals, a Δ~~
 58 party may file in the court of appeals a motion for leave
 59 to proceed on appeal in forma pauperis with an affidavit
 60 prescribed by Rule 24(a)(1);

61 (1) **in an appeal from the United States Tax Court; and**

62 (2) when an appeal or review of a proceeding before
63 an administrative agency, board, commission, or
64 officer proceeds directly in the court of appeals.

65 (c) **Leave to Use Original Record.** A party allowed to
66 proceed on appeal in forma pauperis may request that
67 the appeal be heard on the original record without
68 reproducing any part.

Committee Note

Rule 24(b) currently refers to review of proceedings “before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court).” Experience suggests that Rule 24(b) contributes to confusion by fostering the impression that the Tax Court is an executive branch agency rather than a court. (As a general example of that confusion, appellate courts have returned Tax Court records to the Internal Revenue Service, believing the Tax Court to be part of that agency.) To remove this possible source of confusion, the quoted parenthetical is deleted from subdivision (b) and appeals from the Tax Court are separately listed in subdivision (b)’s heading and in new subdivision (b)(1).

TAB
6-B

DRAFT

Minutes of Fall 2010 Meeting of Advisory Committee on Appellate Rules October 7 and 8, 2010 Boston, Massachusetts

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, October 7, 2010, at 8:30 a.m. at the Langham Hotel in Boston, Massachusetts. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Robert Michael Dow, Jr., Justice Allison Eid, Judge Peter T. Fay, Mr. James F. Bennett, Ms. Maureen E. Mahoney, and Mr. Richard G. Taranto. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice (“DOJ”), was present representing the Solicitor General. Former Committee members Justice Randy J. Holland¹ and Dean Stephen R. McAllister were present. Also present were Judge Lee H. Rosenthal, Chair of the Standing Committee; Professor Daniel R. Coquillette, Reporter for the Standing Committee;² Mr. Dean C. Colson, liaison from 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”); Ms. Holly Sellers, a Supreme Court Fellow assigned to the 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. He introduced two of the Committee’s three new members, Justice Eid and Judge Dow. Judge Dow, of the United States District Court for the Northern District of Illinois, replaces Judge T.S. Ellis III as the district judge representative on the Committee. Judge Dow was educated at Yale, Oxford and Harvard and clerked for Judge Flaum on the Seventh Circuit. Judge Sutton noted that Judge Dow’s experience with appellate work, prior to his appointment to the bench, would be an asset to the Committee. Justice Eid, a Justice on the Colorado Supreme Court, succeeds Justice Holland as the state high court representative on the Committee. Justice Eid attended Stanford and the University of Chicago and clerked for Judge Jerry Smith on the Fifth Circuit and then for Justice Thomas. She brings to the Committee not only her perspective as a member of Colorado’s highest court but also her experience as an appellate practitioner, a law professor and Colorado’s Solicitor General. Judge Sutton noted that the Committee’s third new member, Professor Amy

¹ Justice Holland joined the meeting after lunch on the 7th.

² Professor Coquillette was unable to attend the second day of the meeting.

Coney Barrett, replaces Dean McAllister. Professor Barrett was unable to be present in view of an impending due date and Judge Sutton stated that he looked forward to introducing her to the Committee at the spring 2011 meeting. Judge Sutton introduced Mr. Colson, who succeeds Judge Hartz as the liaison from the Standing Committee. Judge Sutton observed that Mr. Colson, whose law firm is located in Miami, graduated from Princeton and the University of Miami and clerked for Judge Fay and then-Justice Rehnquist. Judge Fay noted what a wonderful law clerk Mr. Colson had been.

During the meeting, Judge Sutton thanked Mr. McCabe, Mr. Rabiej, Mr. Ishida, Mr. Barr, and the AO staff for their expert work in preparing for the meeting. Judge Sutton also asked that the minutes reflect the warm toasts given – at the Committee’s dinner – by Ms. Mahoney in honor of Justice Holland and by Mr. Bennett in honor of Dean McAllister.

II. Approval of Minutes of April 2010 Meeting

A motion was made and seconded to approve the minutes of the Committee’s April 2010 meeting. The motion passed by voice vote without dissent.

III. Report on June 2010 Meeting of Standing Committee

Judge Sutton reported on the Standing Committee’s June 2010 meeting. The Standing Committee gave final approval to the proposed amendments to Rules 4 and 40 that clarify the time to appeal or seek rehearing in cases where a United States officer or employee is a party. The amendments include two “safe harbors” that provide the longer appeal or rehearing periods when the United States represents the officer or employee at the time the relevant judgment is entered or when the United States files the appeal or petition for the officer or employee. The Appellate Rules Committee had considered adding a third safe harbor – for cases in which the United States does not represent the officer or employee but pays for his or her representation – but decided not to add that provision. The Standing Committee, after discussion, revised the Committee Notes to the proposals to provide – as an example of cases that fall within neither safe harbor but that qualify for the longer periods – individual-capacity suits in which the United States pays for private counsel for the officer or employee. The Standing Committee’s approval of the proposed Rule 4 and 40 amendments is contingent on the coordinated adoption of a legislative amendment to 28 U.S.C. § 2107. Judge Rosenthal reported that the proposed amendment has been mentioned to legislators and staffers and was favorably received.

Judge Sutton noted that he also described to the Standing Committee the Appellate Rules Committee’s consideration of possibilities for amending Appellate Rule 28’s requirement that briefs contain a statement of the case. Members of the Standing Committee indicated that this issue is worth looking into.

IV. Other Information Items

Judge Sutton invited the Reporter to describe Chief Judge Rader's proposal, on behalf of the judges of the Federal Circuit, that 28 U.S.C. § 46(c) be amended. Chief Judge Rader has proposed that Section 46(c) be amended to include in an en banc court any senior circuit judge "who participated on the original panel, regardless of whether an opinion of the panel has formally issued." The statute currently provides that a senior judge may participate in an en banc court that is "reviewing a decision of a panel of which such judge was a member."

Section 46 was originally adopted as part of the 1948 Judicial Code. The original provision defined the en banc court to include "all active judges of the circuit." In 1963, Congress amended the statute to provide that a circuit judge who had retired could sit on the en banc court "in the rehearing of a case ... if he sat ... at the original hearing thereof." But in 1978 Congress struck this sentence from the statute. In 1982, Congress again amended the statute; the 1982 amendments provided for large circuits to choose to sit en banc with fewer than all their active judges, and also added the current language concerning participation of senior judges in the en banc court. The history of the 1982 legislation suggests that its drafters were concerned that the 1978 amendments had had the unintended effect of motivating some judges to delay taking senior status in order to be able to sit with the en banc court rehearing an appeal for which the judge participated in the panel decision.

Chief Judge Rader has identified a circuit split between circuits that permit a senior judge to participate in the en banc court when it rehears an appeal on which the judge participated in the initial panel hearing only if a panel decision actually issued, and other circuits that permit such participation on the en banc court even if no panel decision formally issued prior to the rehearing en banc. Chief Judge Rader's letter does not specify which circuits fall on which side of this split. Judging from relevant local rules, circuits requiring a decision to have issued might include the Third, Fourth, Fifth, Eighth, Ninth, Eleventh, and Federal Circuits, while circuits that apparently do not require a decision to have issued include the Second, Sixth, Seventh, Tenth and D.C. Circuits, and perhaps the First Circuit.

An attorney member queried whether the Federal Circuit's proposed language – "participated on the original panel" – would address instances when a case is assigned to a panel but then the court of appeals decides to hear the case en banc as an initial matter. An appellate judge member observed that the current statute's reference to the en banc court "reviewing a decision of a panel of which such judge was a member" is inaccurate because, technically, the en banc court rehears the appeal rather than reviewing the panel decision. An attorney member asked how the statute should treat instances when the senior judge sat (while still an active judge) on a motions panel that resolved a motion in an appeal that later was reheard en banc. An example would be an instance where the now-senior judge participated (as an active judge) on a motions panel that decided a motion to dismiss the appeal for lack of appellate jurisdiction. By consensus, the Committee agreed that it would share the minutes of its discussion of the Federal Circuit's proposal with the Judicial Conference Committee on Court Administration and Case

Management.

Judge Sutton invited the Reporter to describe to the Committee Judge Baylson's update concerning Item No. 08-AP-Q. This item concerns the possibility of allowing the use of digital audio recordings in place of written transcripts for purposes of the record on appeal. The Committee discussed this question at its April 2009 meeting, and decided by consensus to retain the suggestion on its study agenda. This summer, Judge Baylson forwarded to the Committee an opinion that he filed following a bench trial in a complex case concerning allegations of racial bias in school redistricting. The opinion points out that the post-trial briefing proceeded entirely on the basis of digital audiorecordings, without any written transcript. Further filings in the case underscore the cost savings that can result from such an approach. But Judge Baylson's opinion points out that in the event of an appeal, the Appellate Rules have no provision permitting the use of the digital audiorecordings instead of a transcript. An attorney member asked how one would cite the trial record if no transcript existed. The Reporter responded that one could cite particular times in the recordings.

Judge Sutton noted that the Committee is monitoring circuit splits concerning the Appellate Rules. He mentioned the excellent work done by Heather Williams in searching for such circuit splits in the recent caselaw. Although the Committee's role is not necessarily to resolve all circuit splits concerning the Appellate Rules, there sometimes are instances when the Committee can identify a simple fix – for example, an amendment that can remove ambiguity in a Rule.

After lunch on the 7th, Judge Sutton invited Professor Coquillette and the Reporter to make a presentation concerning the Rules Enabling Act and the rulemaking process. The Reporter briefly summarized the history of the Rules Enabling Act ("REA"). Professor Stephen Burbank, she noted, has described the history of that legislation in his seminal article on the topic. The REA was the product of years of work towards a system of uniform rules of procedure for the federal district courts. As enacted in 1934, the REA authorized rulemaking for civil actions in the federal district courts, and allowed for the merger of law and equity practice. The Civil Rules, which took effect in 1938, accomplished that merger. As Professor Stephen Subrin has argued, the Civil Rules can be seen as adopting many of the features of federal equity practice. The Reporter noted that the REA has evolved over time. The original REA identified only two decisionmakers – the Court (which had the task of promulgating the Rules) and Congress (which had the opportunity to prevent the Rules from taking effect). The original REA said little about the procedure for the Rules' promulgation, requiring only that the Rules be reported to Congress and that they not take effect until after the expiration of a waiting period. In 1958, Congress added another layer to the process; legislation enacted in that year required the Judicial Conference of the United States to carry on a continuous study of the Rules' operation and effect, and to recommend periodically amendments to "promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." In 1988, Congress amended the Enabling Act framework to formally mandate the roles of the Standing Committee and the Advisory Committees, and to increase the

transparency and accessibility of the Rules Committees' activities. As initially adopted, the Civil Rules included only a small set of provisions – former Rules 72 to 76 – dealing with the topic of appeals. Work on the Appellate Rules began in the early 1960s, and those Rules took effect in 1968.

Professor Coquillette provided an erudite and illuminating overview of the history of local rulemaking in the federal courts. The First Circuit, he observed, adopted the earliest published set of local appellate rules, in the early nineteenth century. At the time, the Harvard Law School's faculty included Joseph Story and Simon Greenleaf. The latter was a pioneer in rulemaking. Greenleaf's theory of rulemaking, Professor Coquillette suggested, underpins the current efforts of the Rules Committees. Instead of *ex post facto* lawmaking, Greenleaf advocated prospective rulemaking. In 1638, Francis Bacon had said that one should make law from the bottom up: that is, one should articulate prospective rules based on what the courts actually do, and then one should test the resulting rules to see how they work in practice. (Members noted that Professor Coquillette has authored a volume on Francis Bacon's legal philosophy.) The Rules Committees, Professor Coquillette observed, are doing what Bacon recommended in 1638 and Greenleaf did with local rules in the 1830s. Turning his attention to the 20th century, Professor Coquillette shared with the Committee a photograph taken of the Civil Rules Committee at a time when the Committee's Chair was Dean Acheson and its Reporter was Benjamin Kaplan. The work of the Committee received great deference in those days. The dynamics of the rulemaking process have changed since then. Congress is very interested in the rulemaking process, and sometimes it will act in ways that affect that process – either by delegating particular responsibilities to the rulemakers or by enacting legislation that circumvents the REA process. Judge Sutton expressed his appreciation of Professor Coquillette's and the Reporter's presentations.

V. Action Items

A. For publication

1. Item No. 08-AP-M (interlocutory appeals in tax cases)

Judge Sutton invited Ms. Mahoney to introduce this item, which concerns interlocutory appeals from the Tax Court. The goal of the proposal is to amend the Appellate Rules to address this topic. In 1986, Congress enacted a statute, 26 U.S.C. § 7482(a)(2), authorizing interlocutory appeals from the Tax Court by permission. The Appellate Rules, however, were never amended to take account of this statute. Appellate Rule 5 would be the obvious candidate to govern court of appeals procedure in connection with such appeals, but Appellate Rule 14 provides that Appellate Rule 5 does not apply to the review of a Tax Court decision. The proposed amendments would make clear that Appellate Rule 5 governs appeals taken under Section 7482(a)(2). The Committee obtained helpful guidance on the proposals from the Tax Court and the DOJ. The Tax Court, in addition, suggested stylistic amendments to Appellate Rule 24(b)

(concerning requests to proceed on appeal in forma pauperis) that would reflect more accurately the nature of the Tax Court as a court rather than an agency.

Ms. Mahoney noted that the Tax Court had reviewed the latest proposals and had suggested two changes to them. The first of those changes concerns proposed Rule 13(a)(4)(A)'s treatment of the procedures governing the record on appeal. The Tax Court points out that its practice is to obtain a transcript of each hearing and to forward that transcript to the court of appeals on request. Thus, the Appellate Rules' provisions concerning the ordering and preparation of the transcript do not seem like a perfect fit for appeals from the Tax Court. The Tax Court suggests commencing proposed Rule 13(a)(4)(A) "Except as otherwise provided under Tax Court rules for the transcript of proceedings, [etc.]." The Tax Court's second suggestion concerns the Committee Note to the proposed amendment to Appellate Rule 24(b); that Note refers to the Tax Court as a "legislative court." The Tax Court suggests deleting "legislative" and referring to the Tax Court simply as a "court." Ms. Mahoney proposed that the Committee adopt both these suggestions.

Judge Sutton noted that the Committee had obtained Professor Kimble's guidance on questions of style. Committee members agreed to adopt Professor Kimble's simplification of the language of proposed Appellate Rules 13(a)(4)(A) and (B) and proposed Appellate Rule 24(b). Committee members discussed carefully Professor Kimble's suggestion that the word "applicable" be deleted from Appellate Rule 14's phrase "References in any applicable rule." An attorney member stated that he favored retaining "applicable" in Rule 14, as a way of underscoring the point that not all of the Appellate Rules apply to appeals from the Tax Court. Two other attorney members and an appellate judge member agreed with this point, noting that the word "applicable" provides a useful alert for readers and that the Rule is clearer with "applicable" than without. For this reason, participants indicated, they viewed this choice as more than one of mere style.

A motion was made to approve for publication the proposed amendments to Appellate Rules 13, 14, and 24, with the Tax Court's changes to proposed Rule 13(a)(4)(A) and the Committee Note to proposed Rule 24, and with Professor Kimble's style changes to proposed Rules 13(a)(4)(A) and (B) and proposed Rule 24(b). The motion was seconded and passed by voice vote without opposition.

2. Item No. 08-AP-D (FRAP 4(a)(4) – postjudgment motions)

Judge Sutton invited the Reporter to introduce this item, which grows out of Peder Batalden's observation that under Appellate Rule 4(a)(4)(B) the time to appeal from an amended judgment runs from the entry of the order disposing of the last remaining tolling motion. Mr. Batalden notes that in some cases there might be a delay between entry of the order disposing of the tolling motion and entry of the amended judgment that results from that disposition. One example would be an instance where the district court grants a motion for remittitur and gives the

plaintiff a long period of time within which to decide whether to accept the remitted amount or to reject the remitted amount and proceed to a new trial. In such an instance, a would-be appellant would need to decide whether to file a protective notice of appeal within 30 days after entry of the order disposing of the tolling motion, or seek an extension of the appeal time from the district judge, or simply wait to file the notice of appeal until after the plaintiff accepts the remitted award. The attractiveness of this third option would depend on whether a separate document is required for the order granting the motion for remittitur.

The Civil / Appellate Subcommittee considered this conundrum and determined that the best way to address it would be to amend Rule 4(a)(4) so that the new appeal time runs from the latest of entry of the order disposing of the last remaining tolling motion or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment. The Civil / Appellate Subcommittee also considered a possible change to Civil Rule 58(a). Professor Kimble has provided style comments on the proposals. Judge Sutton suggested that the Committee should first discuss the merits of the Rule 4(a)(4) proposal's substance, before proceeding to discuss Professor Kimble's style comments and the Civil Rule 58 proposal.

An appellate judge member voiced support for the proposed amendment to Rule 4(a)(4). An attorney member questioned whether it would be desirable for the rule to use the phrase "if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment." He suggested that there might be instances when a would-be appellant expects the motion's disposition to result in an altered judgment but no such judgment is ever entered. In such a case, the proposed amended rule might provide such a litigant with a false sense of security, and appeal rights might be lost through reliance on the prospect of an amended judgment that never materializes. The attorney member wondered whether it might be better to use the phrase "provides for" rather than the phrase "results in." A judge member wondered whether it would work to say, simply, "alters." The Reporter suggested that some dispositions of tolling motions will not themselves alter the judgment because any ensuing alteration of the judgment would be contingent on the occurrence of a future event.

The attorney member wondered what other types of fact patterns – beyond the remittitur example – would be affected by the proposed amendment. The Reporter suggested that one example could arise in connection with a request for complex injunctive relief. Suppose that the district court enters a judgment that includes an injunction. Suppose further that, in response to a timely tolling motion, the district court enters an order which grants the motion and directs the parties to attempt to agree on a proposed amended judgment embodying a less extensive grant of injunctive relief. And further suppose that it takes the parties longer than 30 days after the entry of the order to agree on the wording of the proposed amended judgment. A participant noted that this example would implicate Civil Rule 65. Another attorney member stated that he had encountered an example relating to attorney fees. Judgment was entered after a jury trial; subsequently, the judge ruled that there was a statutory entitlement to attorney fees (against a non-party attorney), fixed the amount of the fees, and awarded costs, but did not enter a judgment on a separate document or amend the existing judgment to memorialize these rulings. One of the

litigants asked the court to set out the fee and cost rulings in a separate document; though more than 30 days elapsed since the issuance of the fee and cost opinion, the court did not act on the request for entry of a judgment on a separate document reflecting the fee and cost awards. The opposing party filed a notice of appeal from the fee and cost opinion, without awaiting the entry of a judgment on a separate document.

Turning to Professor Kimble's style suggestions, the Reporter noted her agreement with Professor Kimble's proposal that the phrase "or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment" be replaced with "or entry of any altered or amended judgment resulting from such a motion." Beyond this change, Professor Kimble has raised broader concerns with the structure of Rule 4(a)(4). Professor Kimble suggests that the Rule should be revised so that it first defines the term "motion," for purposes of Rule 4(a)(4), to refer to the motions currently listed in Rule 4(a)(4)(A)(i) - (vi). With that definition in place, the remainder of the rule can then refer simply to a "motion" rather than to a "motion listed in Rule 4(a)(4)(A)." Professor Kimble would also prefer to substitute bullet points for the small roman numerals (i) through (vi) in Rule 4(a)(4)(A). Professor Kimble notes that Rule 4(a)(4) is difficult to follow, and he proposes that the Committee consider the possibility of devising a flow chart to illustrate how the Rule works.

The Reporter stated that she sympathizes with Professor Kimble's concerns about Rule 4(a)(4). The basic structure of that Rule, though, remains the same as when it was re-styled in 1998. And the Reporter argued that defining "motion" for purposes of the Rule carries the risk that a pro se litigant or a less careful lawyer might overlook the definition and simply read the Rule to give tolling effect to all sorts of motions. An attorney member asked whether it would be possible to use a shorthand term other than "motion" – perhaps "tolling motion" – to flag the fact that the reference is not to all motions. The Reporter responded that some courts have criticized the use of the term "tolling motion" because Rule 4(a)(4) re-starts the appeal period from scratch. "Tolling," as used in connection with statutes of limitations, typically refers to stopping the period and then providing only the remaining balance of the period when the time begins to run again.

Professor Coquillette noted that to the extent that Committee members disagree with a suggestion by Professor Kimble, the question will be whether the matter is one of style (in which case the Style Subcommittee has authority) or substance (in which case the substantive concern trumps matters of style).

Committee members voiced a preference for keeping the small roman numerals (i) through (vi) rather than substituting bullet points. It was observed that keeping the numerals facilitates references during oral argument. Committee members did not express enthusiasm for the idea of creating a flow chart to accompany Rule 4(a)(4).

The Committee members by voice vote tentatively approved the proposed amendment to Rule 4(a)(4) as shown in the agenda book memo, with the following style change: The phrase

“or, if a motion’s disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment” was replaced with “or entry of any altered or amended judgment resulting from such a motion.” Some members expressed interest in pursuing further the question whether “resulting from such a motion” is the appropriate choice or whether that language would create a false sense of security in instances where an amended judgment might – but ultimately does not – result from a motion’s disposition. The Committee decided to re-visit the language of the proposed amendment the next morning.

The Reporter next summarized the genesis of the proposed amendment to Civil Rule 58(a). This proposal arose from the fact that certain Seventh Circuit cases have read “disposes” in Civil Rule 58(a) to mean “denies,” and from the observation that there can be orders that grant a tolling motion without leading to an amended judgment. The proposal would amend Civil Rule 58(a) to state (in substance) that a separate document is not required when an order – without altering or amending the judgment – disposes of one of the listed types of motions.

A judge member predicted that if the Rule 4(a)(4) amendment is adopted, it is likely to render the Civil Rule 58(a) issue less pressing. This member agreed, however, with the suggestion that it might make sense to consult the authors of the relevant Seventh Circuit opinions for their views on the Civil Rule 58(a) question. Judge Sutton undertook to raise this possibility with Judge Kravitz. The Committee concluded its discussion of the proposed amendments to Appellate Rule 4(a)(4) and Civil Rule 58(a) on the first day of the meeting by resolving to revisit these proposals on the following day.

The Committee took these proposals up again on the morning of the 8th. The Reporter distributed copies of the proposed amendment to Rule 4(a)(4) as it was tentatively approved by the Committee the day before, along with copies of a newer version of Professor Kimble’s restyling of the proposal. This newer version, the Reporter observed, helpfully addresses some of the objections raised to the earlier restyling proposal.

Returning to the concern that the proposed Rule’s reference to “resulting from such a motion” might create a false sense of security in instances where an amended judgment might – but ultimately does not – result from a motion’s disposition, an attorney member conceded that he had had difficulty thinking of an instance in which this uncertainty would actually arise. Another attorney member noted that the Committee is concerned about the possibility that there could be an order that would trigger the time for appeal before the litigants know whether there will be an amended judgment or not. But, this member said, in most of the hypotheticals that she could think of, one may question whether the order in question actually “disposes of” the tolling motion. Suppose, for example, that a party moves for a new trial on the ground that the district court improperly excluded the testimony of the party’s expert without holding a *Daubert* hearing, and the judge agrees to hold the *Daubert* hearing in order to determine whether the testimony was properly excluded and states that if it turns out that the testimony should have been admitted then a new trial will be granted. The member suggested that such an order would not really be an order *disposing of* the motion for a new trial because the grant of the new trial in that situation is

conditional. Another example is a motion for additional findings under Civil Rule 52(b); the court could grant the motion for additional findings without immediately making the additional findings. Until the court makes the additional findings, it may be unclear whether an amended judgment will result. The member suggested that such an order, standing alone, has not truly disposed of the motion. Participants also noted the habit of some judges of stating that a motion is granted and that an opinion will follow. Usually the opinion follows within days, but not always. If the rulemakers amend Rule 4(a)(4) to provide the entry of an amended judgment as a new starting point for the appeal time, might a litigant be lulled into awaiting an amended judgment that might not come?

The Reporter observed that the question of how to interpret the phrase “disposing of” is a question that also could arise under existing Appellate Rule 4(a)(4) and Civil Rule 58(a). But, participants noted, the question links to the concern about the proposed amendment to Rule 4(a)(4) because in the instances where the judge’s ruling on a tolling motion is conditional or tentative, it may be particularly likely that the parties will be unsure whether an amended judgment will result.

Participants considered the possibility of addressing these concerns by including language in the Committee Note to advise litigants that to the extent they have any doubt as to whether there will in future be an amended judgment, they should assume that there will not be such an amendment and they should assume that the earlier possible starting point for appeal time under the proposed Rule 4(a)(4) – namely, entry of the order disposing of the last remaining tolling motion – is the relevant starting point. A participant expressed support for adding such cautionary language. An attorney member wondered whether this advice in the Committee Note would adequately address the situation in which the district judge responds to a Civil Rule 52(b) motion by stating “motion granted, opinion to follow.” It might turn out that the judge makes additional findings but does not alter the judgment. Some participants suggested that the number of cases in which this question arises may be relatively small.

Another attorney member wondered whether the rule should peg the newly-started appeal time to the entry of a “newly entered judgment” resulting from a tolling motion rather than to the entry of “any altered or amended judgment” resulting from such a motion. Using the term “newly entered judgment,” he suggested, would permit the district judge to protect a party in the sort of Civil Rule 52(b) scenario noted above – where the district judge ultimately renders a new set of findings but does not alter the judgment – by re-entering the judgment. The Reporter observed that this approach would run counter to the caselaw holding that a district court cannot re-start appeal time by re-entering an unchanged judgment. A participant responded, though, that the proposed language would alter such caselaw only in the limited instance where the newly-entered judgment results from a timely tolling motion.

Judge Sutton observed that he had initially thought these questions might be addressed in the Committee Note without altering the text of the proposal. However, given that Committee members had expressed the wish to think more about both the text and the Note, he entertained a

motion to withdraw the Committee's tentative approval of the Rule 4(a)(4) proposal in order to provide an opportunity to consider the proposal further. The motion was made and seconded and passed by voice vote without opposition.

VI. Discussion Items

A. Item No. 08-AP-G (substantive and stylistic changes to Form 4)

Judge Sutton provided an update on his inquiries concerning this item, which concerns the information currently requested by Form 4 from applicants seeking to proceed in forma pauperis on appeal. The current Form asks, among other things, whether the applicant has paid or will pay an attorney or other person for services in connection with the case and, if so, how much. Because the Supreme Court employs Form 4 in connection with i.f.p. requests by litigants before the Court, Committee members had expressed interest in learning whether the Supreme Court finds this information about payments to attorneys and others useful in evaluating i.f.p. requests. Judge Sutton reported that the Supreme Court Clerk's Office has indicated that this information is not necessary. This input confirms that it is worthwhile to consider amending Form 4 to request less information on these topics. The Committee will have a concrete proposal to consider and vote on at the spring 2011 meeting.

B. Item No. 08-AP-H (manufactured finality)

Judge Sutton invited Mr. Letter to introduce this item, which concerns the doctrines that govern a litigant's attempt to "manufacture" a final judgment – in order to appeal the disposition of one or more claims – by dismissing the remaining claims in a case. Mr. Letter – along with Judge Bye and Ms. Mahoney – represents the Appellate Rules Committee on the Civil / Appellate Subcommittee, which has been considering this item. Mr. Letter observed that this area of law would benefit from clarification but he noted that it is proving challenging to draft a proposal that accomplishes that clarification. The reason is that there are policy choices that must be made in order to proceed with the drafting process. Mr. Letter reviewed the existing law on manufactured finality. There is general consensus that if the remaining claims are dismissed with prejudice, a final appealable judgment results. The litigant might instead try to employ a "conditional dismissal with prejudice" – dismissing the remaining ("peripheral") claims with prejudice, but reserving the right to revive those claims if the litigant's appeal results in reversal of the dismissal of the non-peripheral claims. Such a conditional dismissal with prejudice produces a final appealable judgment in the Second Circuit but not in the Third and Ninth Circuits. There are further variations in the circuit caselaw concerning the dismissal of the peripheral claims under circumstances that prevent their reassertion, and concerning the dismissal of the peripheral claims without prejudice.

Mr. Letter suggested that the consensus view on dismissals with prejudice is sound:

dismissal of the peripheral claims with prejudice should produce a final, appealable judgment. He observed that, conversely, it is hard to make the case for recognizing a final, appealable judgment when the peripheral claims are dismissed without prejudice. Conditional dismissal with prejudice, he suggested, is a closer question: there are good arguments in favor of providing that such dismissals produce an appealable judgment, but there are counter-arguments. For example, some might ask why this situation cannot be dealt with under current Civil Rule 54(b). Mr. Letter observed that judges may well take the view that Civil Rule 54(b) adequately addresses this issue, while practitioners may argue in favor of recognizing conditional dismissal with prejudice as an alternative path to appeal. Practice under Civil Rule 54(b), he observed, can vary by circuit. Mr. Letter noted that the Subcommittee has expressed interest in learning more about the Second Circuit's experience with conditional dismissals with prejudice. He will canvass lawyers in the offices of the United States Attorneys for districts within the Second Circuit to learn their views on how that procedure functions; the Subcommittee also intends to seek the views of judges and clerks from within the Second Circuit on this question.

Mr. Letter observed that in addition to making policy judgments concerning which of these scenarios should result in a final, appealable judgment, it would be necessary to consider whether and how to address additional complexities. For example, should the proposal address scenarios involving counterclaims, or scenarios involving multiple parties, and, if so, how? Another question – as the discussion of Civil Rule 54(b) illustrates – is whether district court approval should be required in order for the dismissal of the peripheral claims to produce an appealable judgment, or whether the joint agreement of the parties should suffice.

Ms. Mahoney noted that the Subcommittee members were in agreement that a dismissal of the peripheral claims with prejudice should produce an appealable judgment, but that beyond that determination, there was as yet no consensus. An appellate judge member noted that it is usually preferable for practices to be nationally uniform; he wondered whether the topic of manufactured finality is one on which judges' views are likely to differ from one locale to another. Judge Rosenthal observed that the Committee might consider asking the Federal Judicial Center to study the impact, within the Second Circuit, of the circuit caselaw providing that conditional dismissals with prejudice produce an appealable judgment. An attorney member noted that practitioners might not wish to rely on this Second Circuit doctrine when practicing in that circuit, given that the Supreme Court (or the Second Circuit itself, sitting en banc) could overrule the relevant precedent. Another attorney member asked whether the manufactured finality doctrine is salient in criminal as well as civil cases. It was noted that the question does arise in criminal cases, and that the doctrine on the criminal side may be evolving.

C. Item No. 09-AP-B (definition of “state” and Indian tribes)

Judge Sutton reviewed the history of this item, which concerns a proposal that federally recognized Native American tribes be treated the same as states for purposes of the Appellate Rules. The sense of the Committee, he observed, has been that the consideration of this proposal

should focus on the treatment of tribes in Appellate Rule 29, which concerns amicus briefs. Proponents argue that tribes should be accorded the same dignity as states and the federal government, which can file amicus briefs without party consent or leave of court.

Judge Sutton observed that the Supreme Court's rule concerning amicus filings – Rule 37 – does not include tribes among the government entities that are permitted to file amicus briefs without party consent or court permission. Dean McAllister's research concerning the history of the Supreme Court's amicus-filing rule indicates that the omission of tribes from that listing may be a byproduct of the rule's history (and specifically of the fact that the Supreme Court first developed this rule at a time when amicus filings by tribes were rare).

As the Committee had requested at its spring 2010 meeting, Judge Sutton consulted the Chief Judges of the Eighth, Ninth, and Tenth Circuits for their views on the amicus-filing question. He asked each Chief Judge for input on two questions – first, how the circuit reacts to the proposal in general, and second, whether the circuit would consider amending its local rules to permit tribes to file amicus briefs without party consent or court permission. Chief Judge Riley has reported that the letter's distribution to three relevant committees elicited only three responses – two that support amending either the Appellate Rules or the circuit's local rules, and one that supports only amending the latter if appropriate. Judge Sutton reported that the other two circuits are in the process of responding to the inquiry. Mr. Letter observed that Chief Judge Kozinski has asked the Ninth Circuit's rules advisory committee to consider the matter.

Judge Sutton noted that the agenda materials included a resolution from the National Congress of American Indians ("NCAI") urging that the Appellate Rules be amended "to treat Indian Tribes in the same manner as states and territories," and a resolution from the Coalition of Bar Associations of Color to the same effect.

Judge Sutton invited Dean McAllister to discuss his research. Dean McAllister noted that he has published the research as an article (see 13 Green Bag 2d 289 (2010)). He reported that he had discussed tribal amicus participation with Supreme Court Deputy Clerk Chris Vasil, who had conferred with the Clerk of the Court, William K. Suter; neither recalled any requests to include tribal amici in the Supreme Court's rule.

It was noted that the question of treating tribes the same as states and the federal government for purposes of Appellate Rule 29(a) will also have implications for the new authorship and funding disclosure requirement that will take effect on December 1, 2010 (absent contrary action by Congress). That requirement – which will be placed in a new subdivision of Appellate Rule 29(c) – exempts entities that can file amicus briefs without party consent or court leave under Appellate Rule 29(a).

A participant suggested that it would be good to include tribes in Appellate Rule 29(a) as a matter of political symbolism, unless there are arguments that would outweigh that benefit. He stated that the arguments he has heard so far relate to the fact that municipalities are also not

included in Appellate Rule 29(a) and that there is a great variation in the size and other characteristics of federally recognized tribes. Mr. Letter stated that even if the question is viewed as merely symbolic, the field of federal-tribal relations is an area where – due to the history – symbolism can be important.

Mr. Letter stressed that the DOJ believes it is important for the tribes themselves to be consulted. An appellate judge member asked why that process of consultation could not be accomplished by the federal executive branch, independent of the Rules Committees. Mr. Letter responded that the Rules Committees, too, are governmental bodies. A participant asked whether it would be appropriate to view the Rules Enabling Act's notice and comment process as providing the framework for such consultation. Mr. Letter argued that it would be good for consultation to occur before the Appellate Rules Committee makes a recommendation. A participant suggested that the question before the Committee is one of policy. Another participant observed that the resolution passed by the NCAI provides a sense of the views of the NCAI's tribal and individual members. Yet another participant noted that one benefit of the notice and comment process is its transparency and the opportunity it provides for all interested commenters to hear others' views as well as expressing their own. Judge Rosenthal noted that should a proposal on this item go out for notice and comment, it would be good to make sure to advise any groups that have written to the Rules Committees about this proposal of any relevant hearing dates and of the deadline for submitting comments.

Judge Sutton noted that federal litigation can involve questions of the validity of tribal laws – questions on which the relevant tribe would wish to be heard as an amicus if the tribe is not a party. An attorney member asked why Rule 29(a) should be amended to include Native American tribes but not municipalities or foreign governments; for example, why should that Rule include a small Native American tribe but not New York City or the British government? Judge Sutton responded that the point about challenges to a law's validity could have more general application; for example, perhaps a proposal could encompass both Native American tribes and municipalities. Dean McAllister argued that the federal government's relations with Indian tribes differ from its relations with municipalities. There are only 564 federally recognized Native American tribes, while the number of municipal governments is far greater.

An attorney member stated opposition to changing Appellate Rule 29(a). Another attorney member argued that if the Rule is to be changed, the amendment should encompass municipalities as well as Native American tribes; this member argued that tribes are not similar to states and that if the amicus-filing rules are to change, the Supreme Court should take the lead. An appellate judge member expressed strong support for amending Rule 29(a) to include Native American tribes. This member reported that two large Native American tribes within the state of Colorado believe the issue to be a very important one. Tribes, this member observed, are sovereign entities; including tribes within Rule 29(a) would not create a slippery slope and, the member suggested, there is no downside to including them. An attorney member asked the appellate judge member whether the Colorado state rules permit Native American tribes to file amicus briefs without party consent or court leave; the member responded that the Colorado rules

require all would-be amici – even the United States – to seek permission. Another appellate judge member asked whether it is burdensome to rule on such motions for leave to file amicus briefs; the appellate judge member from Colorado responded that it is not burdensome to rule on the motions and that she views the question as purely one of sovereignty and dignity. Another appellate judge member expressed agreement with this view; he noted that his home state – North Dakota – has a lot of Indian reservations, and he predicted that including tribes among the entities listed in Rule 29(a) would not create an added burden for the courts of appeals.

An attorney member stated that he had not been able to think of any consequences that would result from including tribes within Rule 29(a); this member asked whether any of the Rules committees have tribal court representatives. A participant responded that the tradition has been not to have designated seats on the Rules Committees, apart from having representatives from the DOJ and from state supreme courts.

An appellate judge member expressed some ambivalence concerning the proposal; but he observed that his circuit – the Eleventh – has cases involving tribal law, and that he leans toward including tribes in Rule 29(a). A district judge member stated that tribes do have a special status. But, he argued, it is important to ensure that the proposed Rule encompasses all entities that have a legitimate claim to special treatment based on sovereign status. He noted that often the relevant government entity would be allowed to intervene. And he observed that appellate judges' views vary concerning the desirability of amicus filings. Some judges on the Seventh Circuit, for example, disfavor amicus filings. An attorney member asked whether that disfavor extends to amicus filings by governmental units; this member suggested that the Committee consider amending Rule 29(a) to encompass all domestic governmental units.

Judge Rosenthal observed that to the extent there was a lack of consensus concerning the proposal, it could be useful for Judge Sutton to present the matter for discussion at the January 2011 meeting of the Standing Committee. Judge Sutton agreed to do so.

D. Item No. 09-AP-C (Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules), and Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)

Judge Sutton invited the Reporter to summarize the status of these items. The Bankruptcy Rules Committee is working on proposed amendments to Part VIII of the Bankruptcy Rules – governing appeals from the bankruptcy court – and currently plans to seek permission to publish those amendments for comment in summer 2011. The Part VIII project provides a good occasion to consider changes in the Appellate Rules' treatment of bankruptcy appeals. One possible set of amendments would revise Appellate Rule 6(b)(2) (concerning appeals from a district court or bankruptcy appellate panel exercising appellate jurisdiction in a bankruptcy case) to track recent and pending changes to Appellate Rule 4(a)(4). Another possible amendment would create a new Appellate Rule 6(c) to address direct appeals by

permission from a bankruptcy court to a court of appeals. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which created the direct-appeal mechanism, also provided interim procedures to govern until the promulgation of rules for such appeals. Since 2008 Bankruptcy Rule 8001(f) has set a 30-day time limit for seeking the court of appeals' permission to take a direct appeal. A new Appellate Rule 6(c) could cover other aspects of the appeal process. The sketch provided in the agenda materials addresses what Appellate Rules would apply to such direct appeals; provides that references to the district court in such rules include the bankruptcy court and bankruptcy appellate panel; includes special provisions for the record on appeal (borrowing from the proposed Part VIII Rules' treatment of that topic); and contemplates the possible transmission of the record in electronic form. Publishing such proposals for comment in tandem with the Part VIII project would provide an opportunity to secure comment from the bankruptcy bench and bar. These matters are the subject of ongoing discussions with the Bankruptcy Rules Committee and its Subcommittee on Privacy, Public Access, and Appeals, and will be topics for discussion at the joint meeting that the Bankruptcy Rules Committee and the Appellate Rules Committee will hold in spring 2011.

Judge Rosenthal reported on the discussion at the Bankruptcy Rules Committee's fall meeting. One topic raised at that meeting concerns a fundamental choice: Should the Part VIII rules be self-contained, or should they incorporate by reference relevant provisions of the Appellate Rules? Mr. McCabe noted that Part VII of the Bankruptcy Rules (governing adversary proceedings) incorporates by reference a number of provisions in the Civil Rules. A participant suggested that if it is deemed necessary to have the text of certain Appellate Rules within the Bankruptcy Rules pamphlet for convenient reference, those provisions could be quoted. The relevant portion of the minutes of the Bankruptcy Rules Committee meeting will be shared with the Appellate Rules Committee when available.

E. Item No. 09-AP-D (implications of *Mohawk Industries, Inc. v. Carpenter*)

Judge Sutton noted that this item concerns a project to consider adjustments in the availability of immediate appellate review for certain types of district-court rulings. The item, he observed, was prompted by the Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009). Judge Sutton stated that the Committee needs to decide the scope of this project. Judge Rosenthal asked whether the DOJ had a view on the question of scope. Mr. Letter suggested that it could be useful to think broadly about appealability, and to encompass topics such as appeals from denials of motions to dismiss founded on official immunity or sovereign immunity. Under current doctrine, an order denying a motion by the United States to dismiss a claim on sovereign immunity grounds is not immediately appealable – though orders denying similar motions by states and foreign governments are immediately appealable.

An attorney member advocated starting with the question of orders rejecting claims of attorney-client privilege. Mr. Letter suggested that the topic of privilege be broadened to

encompass the state secrets privilege. Another attorney member suggested that a district court's denial of a claim of state secrets privilege would likely be reviewable either via a permissive appeal under 28 U.S.C. § 1292(b) or via mandamus. An appellate judge member suggested that to the extent that the *Mohawk Industries* Court invited rulemaking attention to this topic, the invitation seems to focus on attorney-client privilege. Mr. Letter agreed that it makes sense to start with the question of the appealability of privilege rulings, leaving the question of appeals from immunity rulings for treatment in the longer term.

By consensus, the Committee decided to commence by focusing on the question of appeals from privilege rulings, and to seek input on this topic from the Civil, Criminal and Evidence Rules Committees.

F. Item No. 10-AP-A (premature notices of appeal)

Judge Sutton invited the Reporter to introduce this item, which concerns the application of Appellate Rule 4(a)(2)'s provision concerning premature notices of appeal. The Supreme Court's decision in *FirsTier* provides general guidance concerning the interpretation of Rule 4(a)(2), but the circuits vary somewhat in their application of the Rule to a range of different factual scenarios. At one end of the spectrum are cases in which the notice of appeal is filed after a decision is announced but before the submission of proposed findings in support of that decision; that was the situation in *FirsTier*, and the case makes clear that such a notice relates forward. Similar to that scenario are cases in which the court announces a disposition contingent on a future event, the notice of appeal is filed, and the contingency later occurs; various circuits have held that such a notice relates forward, but there is contrary precedent from the Seventh Circuit. Then there are the cases in which a court disposes of fewer than all claims or parties, the notice of appeal is filed, and a Civil Rule 54(b) certification is later obtained; some seven circuits have found relation forward in this scenario, but there is contrary precedent in the Eleventh Circuit. In a variation on this theme, there are the cases in which the court disposes of fewer than all claims or parties, the notice of appeal is filed, and the court then disposes of all remaining claims as to all parties; some eight or nine circuits have found relation forward in this scenario, but the Eighth Circuit disagrees. There are other common patterns as well; as to a number of those patterns, there is some degree of consensus among the circuits, but contrary positions also exist.

Judge Sutton observed that if it is possible for the rulemakers to design an elegant solution to this set of problems, it would be worth doing. An attorney member wondered whether the current Rule 4(a)(2)'s treatment of relation forward might instill false confidence among practitioners who lack familiarity with the cases applying Rule 4(a)(2). A district judge member agreed that the current rule might be a trap for the unwary; this member recalled a similar set of issues arising under Illinois Supreme Court Rules 303 and 304. An attorney member expressed support for considering revisions to Rule 4(a)(2), and wondered whether this topic should be considered in tandem with the proposed revisions to Rule 4(a)(4). Another

attorney member suggested that it might be useful to consider whether the solution employed with respect to the Illinois Supreme Court rules might be instructive. By consensus, the Committee retained this item on its agenda with a view to considering a more concrete set of proposals at the spring 2011 meeting.

G. Item No. 10-AP-B (statement of the case)

Judge Sutton introduced this item, which concerns the possibility of revising Appellate Rule 28(a)'s requirement that a brief include separate statements of the case and of the facts. Some members of the Committee have observed that these requirements have given rise to confusion among practitioners and redundancy in briefs. The Committee discussed this item at its spring 2010 meeting. Judge Sutton, on behalf of the Committee, contacted the ABA Council of Appellate Lawyers and the American Academy of Appellate Lawyers to seek their views on the matter. Judge Sutton circulated to Committee members the response he received from Jerrold Ganzfried and Steven Finell on behalf of the ABA Council of Appellate Lawyers. Judge Sutton observed that the Council has offered to survey appellate practitioners for their views, and he reported that he has spoken with Donald Ayer, the President of the American Academy of Appellate Lawyers, and Mr. Ayer has undertaken to survey the Academy's members.

Judge Sutton noted that the Committee should consider whether to move forward with this item, and, if so, how best to alter Appellate Rule 28's requirements. One option would be to model the revised Rule 28 on the Supreme Court rule (Rule 24(g)) which provides for a single statement in which the lawyer can set forth the facts and procedural history chronologically. Another possibility would be to reverse the order of current Appellate Rules 28(a)(6) and (a)(7) and to delete from current Rule 28(a)(6) the reference to the "course of proceedings."

An attorney member stated that Rule 28(a)(7)'s requirements are straightforward; Rule 28(a)(6), he suggested, would be clearer if it called for a statement identifying the rulings being appealed and the procedural history. It is useful, he argued, to identify the rulings at issue before stating the facts. That allows the reader to know the posture of the case before reading the facts. For example, such a statement could say that the appeal is from the grant of summary judgment in a Title VII case. Mr. Letter noted that even if the Appellate Rules did not require it, he would be likely to include such a statement in his brief. Justice Holland noted that Delaware Supreme Court Rule 14 simply requires "[a] statement of the nature of the proceeding and the judgment or order sought to be reviewed"; such statements, he said, are usually about a page long.

Mr. Letter expressed support for pursuing the project, and suggested that following the Supreme Court's approach might be best. But he stressed that the judges are the audience for briefs, so the key question is what judges prefer. An attorney member agreed that the Committee should pursue the project. This member observed that the trouble with the current Rule is that it specifies the order in which the statements must be set forth and there is no logical place to discuss the opinion below; the logical place for such a discussion, she suggested, would be at the

end of the discussion of the facts and procedural history. This member expressed support for modeling the revisions on the Supreme Court's rule, but she agreed with Mr. Letter that it is important to discern what judges would prefer. Another attorney member noted that one difference between Supreme Court briefs and briefs filed in the courts of appeals is that Supreme Court briefs state, up front, the question presented. The statement of issues in a court of appeals brief, he observed, is often not informative. This member reiterated the importance of identifying the ruling that is being appealed.

An appellate judge member agreed that it is useful for the brief to state succinctly what ruling is being appealed. This member observed that Colorado Appellate Rule 28 does not require the brief to divide the statement of the case from the statement of the facts, but in practice litigants often divide the two. Another appellate judge member wondered whether it might make sense to reverse the order of the items required by Rule 28(a)(5) (statement of the issues) and Rule 28(a)(7) (statement of the facts). Another appellate judge member observed that the U.S. Supreme Court requires the questions presented to be the first item in the brief.

An attorney member stated that he likes the Supreme Court's approach because it allows the lawyer to present a more integrated story. In the Eighth Circuit, he noted, Local Rule 28A(i) requires lawyers to include a one-page summary of the case, which forces the advocate to briefly encapsulate his or her whole case. A district judge member expressed a preference for the approach taken by the Illinois state rules, which spell out what the brief must contain and which provide illustrative examples. This member suggested that it would be useful to consider examples of state rules concerning briefs, to see if any states have arrived at a better approach.

An appellate judge member queried whether the clerk's office typically scrutinizes a brief's statement of the case, for example to discern the nature of the rulings under appeal. Mr. Green responded that his office ordinarily focuses on the information provided in response to Rule 28(a)(4) (the jurisdictional statement). Knowing the nature of the ruling being appealed, he suggested, would not make a difference to the clerk's office unless the office is tracking appeals that concern certain types of issues. Ms. Sellers reported that in the Connecticut appellate courts the staff attorney's office uses information from the statement of the case for final judgment screening and when setting cases for oral argument. It was observed that federal appellate courts may also engage in issues tracking; in this connection, it was noted that the Second Circuit has published for comment a proposed local rule that would expedite appeals from certain types of orders.

Mr. Letter noted that a number of United States Attorneys – for example, those in the Second and Ninth Circuits – always include an introduction in their briefs. Though he did not advocate amending Rule 28 to require such an introduction, he suggested that it might be amended to permit one. Justice Holland noted that briefs submitted to the Delaware Supreme Court often include a “preliminary statement.” An appellate judge member stated that judges might not want to make an introduction mandatory; an introduction written by a good lawyer would be useful, but one written by a poor lawyer would not. An attorney member noted that the

Rule could limit such an introductory statement to one page.

It was agreed that in preparation for the spring meeting, relevant local circuit rules and state briefing rules would be collected. The agenda materials for the spring meeting will offer a set of options for the Committee's consideration. One option would be modeled on the Supreme Court's rule. Another option would provide for an introductory statement capped at one page. Another approach would retain the requirement of a "statement" but require the brief to discuss within a single "statement" the facts, the proceedings below, and the ruling being appealed.

VII. Additional Old Business and New Business

A. Item No. 10-AP-D (taxing costs under FRAP 39)

Judge Sutton invited the Reporter to introduce this item, which concerns H.R. 5069, the "Fair Payment of Court Fees Act of 2010," a bill introduced by Representative Henry C. "Hank" Johnson, Jr. H.R. 5069 would amend Civil Rule 68 and Appellate Rule 39 in response to concerns raised about the taxation of costs by the Fourth Circuit in the case of *Snyder v. Phelps*. In September 2009, the court of appeals reversed a judgment in Albert Snyder's favor against the Westboro Baptist Church and its members. The judgment had awarded millions in damages on tort claims arising from, inter alia, the Church's "protest" near the funeral of Snyder's son Matthew (a Marine who died in Iraq). The court of appeals reversed the judgment on First Amendment grounds. The opinion and judgment stated nothing about costs; after a timely motion, the court of appeals awarded over \$16,000 in costs to the Church. The court of appeals denied Snyder's objections to the bill of costs. Snyder's annual income is \$ 43,000 and his counsel was working pro bono. H.R. 5069 would add a new Appellate Rule 39(f), which would provide that the court shall order a waiver of costs if the court determines that the interest of justice justifies such a waiver, and would provide that the "interest of justice" includes the establishment of constitutional or other important precedent. The Supreme Court granted certiorari in *Snyder v. Phelps*, and the case was argued on October 16, 2010.

The Reporter observed that Rule 39(a) sets default rules for the award of appellate costs, but that the court can order otherwise in a given case. The caselaw indicates that the courts of appeals have exercised this discretion, taking into account factors such as misconduct by the winner on appeal; the public importance of the case; the difficulty of the issues; and the limited means of the losing party. The Reporter stated her belief that the existing Rule afforded the court discretion to deny costs in a case such as *Snyder v. Phelps*.

An attorney member wondered whether the practice concerning costs varies by circuit. In the Federal Circuit, he noted, the court of appeals often denies appellate costs to the prevailing party. Another attorney member stated that he had never seen such a large bill for appellate costs. The Reporter responded that the apparent explanation for the size of the bill of costs in *Snyder* was the very large number of pages in the appendix.

By consensus, the Committee decided to study the matter further. It asked Ms. Leary to design a docket search that could provide data concerning the typical amount of appellate costs awarded under Appellate Rule 39.

B. Item No. 10-AP-E (effect of withdrawal of a timely-filed post-judgment motion on the time to appeal in a civil case)

Judge Sutton invited the Reporter to introduce this item, which arises from Howard Bashman’s suggestion that the Committee consider issues raised by *Vanderwerf v. Smithkline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010). In *Vanderwerf*, the district court granted summary judgment dismissing the Vanderwerfs’ claims. They timely filed a motion under Civil Rule 59(e). After almost seven months elapsed with no decision on the motion, the Vanderwerfs withdrew the motion and (on the same day) filed a notice of appeal. A divided panel of the court of appeals dismissed the appeal as untimely. The majority reasoned that Appellate Rule 4(a)(4) “requires entry of an ‘order disposing of [the Rule 59] motion’ to give the appealing party the benefit of Rule 4(a)(4)(A)(iv),” and that the Vanderwerfs’ withdrawal of their motion “leaves the record as if they had never filed the motion in the first place.” Judge Lucero dissented, arguing that “[b]ecause the district court did not rule on the motion to alter or amend the judgment, the thirty-day filing deadline has not begun to run.”

The Reporter observed that this is, as far as she could determine, the first decision to deny tolling effect to a motion because it was withdrawn. The Second, Seventh and Ninth Circuits have instead reasoned that a motion had tolling effect even though it was withdrawn – though in the Second and Ninth Circuit cases, the district court had in some way assented to the withdrawal of the motion. In an unpublished decision, the Sixth Circuit construed a tolling motion as denied on the date of its withdrawal; in that case, though, the motion was by the appellee rather than the appellant.

The Reporter suggested that if one takes the policy behind Rule 4(a)(4) to be promoting an efficient division of labor between the trial and appellate courts, then one might argue that, in hindsight, this policy is not at issue when a motion is withdrawn – because in hindsight it is clear that the appeal could have proceeded without any impediment from the ultimately-withdrawn motion. But such an argument could also be made as to a motion that is denied, and no one suggests that a motion lacks tolling effect as a result of being denied on its merits. The Reporter acknowledged the *Vanderwerf* majority’s concern with the possibility that an appellant might make and then withdraw a tolling motion simply to achieve a unilateral extension of appeal time. But she suggested that this concern could be addressed through means other than denying the motion tolling effect – such as recourse to Civil Rule 11 or to 28 U.S.C. § 1927. In addition, such a concern would suggest denying tolling effect to a withdrawn motion only when the motion was made by the would-be appellant, and not when the motion was made by the appellee – but the text of Rule 4(a)(4) does not indicate any basis for a distinction between motions based on the identity of the movant.

There is textual appeal, the Reporter suggested, to Judge Lucero's argument that under the text of Rule 4(a)(4) the Vanderwerfs' appeal time had not yet begun to run. However, such an interpretation of the Rule could present a different policy concern – namely, that in such instances the appeal time might never start to run. This concern is similar to that which arose prior to 2002 in instances where a judgment was required to be set forth in a separate document and the separate document was not provided. In 2002, the Rules were amended to set an outer limit at which the appeal time would begin to run even if the requisite separate document was never provided. One possible approach in the context of withdrawn motions is that taken by the Sixth Circuit's unpublished opinion – namely, deeming the motion denied as of the date it is withdrawn.

An attorney member stated that she agreed with the *Vanderwerf* majority's reading of Rule 4(a)(4). The Rule, she suggested, cannot reasonably be read to allow a party to give itself a unilateral extension; when the motion is withdrawn, there never is an "order disposing of" a tolling motion. The Reporter asked whether such a reading of Rule 4(a)(4) would also counsel denying tolling effect to a withdrawn motion when the would-be appellant is someone other than the movant. The member responded that in such a situation the would-be appellant could ask the court not to permit the movant to withdraw the motion. Another attorney member agreed that Rule 4(a)(4) might be read to imply the requirement that an order ultimately be entered with respect to a motion in order for the motion to have tolling effect; this member drew an analogy to the way the language of Civil Rule 50 has been read. An appellate judge member recalled a Georgia state statute that provided that an appeal not decided within six months was deemed denied; he suggested that an analogous approach might be considered for motions not ruled upon by the trial court. Possible formulations were noted – that a motion might be "deemed denied if withdrawn," or "deemed denied because disposed of." A member suggested the possibility of adopting a rule providing that no motion of the types described in Appellate Rule 4(a)(4) can be withdrawn without leave of court. It was noted that such a provision would be placed in the Civil Rules rather than the Appellate Rules.

An attorney member observed that cases raising this issue are likely to be rare. An appellate judge member agreed that there is no need for the Committee to take action with respect to this issue. Another attorney member agreed that there is no urgent need for Committee action, though he observed that under the *Vanderwerf* court's approach it is not clear what a non-movant should do if a movant withdraws a tolling motion. By consensus, the Committee decided to keep this item on the study agenda for the moment, in order to consider further how one might address the latter scenario in the light of the *Vanderwerf* decision.

C. Item No. 10-AP-F (*Comer v. Murphy Oil*, 607 F.3d 1049 (5th Cir. 2010) (en banc))

Judge Sutton invited Mr. Taranto to introduce this item, which concerns Mr. Taranto's suggestion that the Committee consider issues raised by *Comer v. Murphy Oil USA*, 607 F.3d

1049 (5th Cir. 2010) (en banc). Mr. Taranto described the matters at issue in this unusual case. 28 U.S.C. § 46(c) governs the number of votes needed for a court of appeals to decide to hear or rehear a case en banc. 28 U.S.C. § 46(d) governs the number of judges that constitute a quorum for the court of appeals to hear a case (including to hear or rehear a case en banc). In *Comer*, after the panel decision, a majority of the nonrecused active judges on the Fifth Circuit voted to rehear the case en banc, which – under the Circuit’s local rules – automatically vacated the panel decision. Subsequently, one of the previously nonrecused active judges recused herself, leading a majority of the remaining nonrecused active judges to conclude that there was no longer a quorum under Section 46(d). That majority concluded that the lack of a quorum left no choice but to dismiss the appeal. The dissenting judges described a number of alternative possibilities. Mr. Taranto suggested an additional possibility unmentioned by any of the judges in *Comer*: Once the en banc court had lost its quorum, why not treat the appeal as if it had just been filed, and assign it to a panel?

Mr. Taranto noted that Appellate Rule 35(a) adopts the “case majority” approach to determining the number of votes needed for a court of appeals to decide to hear or rehear a case en banc; under this approach, disqualified judges are omitted when calculating the number of votes needed to provide a majority. The 2005 Committee Note to Rule 35(a), however, explicitly disclaims any intent to foreclose the possibility that Section 46(d) could be read to require that a majority of the court’s active judges be nondisqualified in order for a quorum to exist for the en banc court.

Determining the best approach to a quorum requirement for the en banc court, Mr. Taranto observed, would require a policymaker to balance the risks of aberrant rulings for parties in a particular case against the risk of an aberrant en banc ruling (by an en banc court composed of only a small subset of the circuit’s active judges). One question for the Committee, he suggested, is whether there is any interest in addressing through rulemaking the issue of case assignment – and in particular, the procedure to be followed when a case has been taken en banc and then an event deprives the en banc court of a quorum. Another question is whether any changes should be made in Section 46(d), perhaps by means of a legislative proposal. Mr. Taranto noted the Federal Circuit’s proposal (discussed earlier in the meeting) for legislation amending Section 46(c).

The Reporter noted that as to the question of Section 46(d)’s quorum requirements, different sized circuits are likely to have differing views. A participant observed that some judges might be wary of any proposal for altering Section 46(d)’s quorum requirement. It was noted that in the Fifth Circuit, the frequency of ties to energy companies tends to lead to a lot of recusals. An attorney member asked whether judges could avoid some of those recusals by choosing to invest through mutual funds rather than directly in specific companies. A participant noted, however, that this expedient would not address all the possible reasons for such recusals.

By consensus, the Committee decided to remove this item from its agenda.

D. Item No. 10-AP-G (intervention on appeal)

Judge Sutton invited the Reporter to introduce this item, which arises from Mr. Letter's observation that the Appellate Rules lack a general provision governing intervention on appeal. As Mr. Letter has pointed out, Appellate Rule 15(d) addresses the topic of intervention in the context of court of appeals review of agency determinations, and Appellate Rule 44 addresses the topic in the context of constitutional challenges to federal or state statutes. But – apart from provisions setting the color of intervenors' briefs – the Appellate Rules contain no provision addressing intervention on appeal more generally. By contrast, Civil Rule 24 treats the question of intervention in the district court.

The Reporter observed that local circuit rules addressing the topic of intervention tend to govern the procedural incidents of intervention rather than providing guidance as to the circumstances under which a court will permit intervention on appeal. The caselaw concerning intervention on appeal tends to draw upon Civil Rule 24 and cases interpreting that Rule. The question of timeliness often looms large for those who seek to intervene on appeal, because a natural question is why the would-be intervenor did not seek intervention earlier when the matter was in the district court. Would-be intervenors must also be prepared to address why participation as an amicus would not suffice to protect their interests. The court of appeals is likely to consider whether existing parties would be prejudiced by intervention. And the court is likely to take care not to allow intervention to be used as an end-run around the time limits for taking an appeal or as a way of broadening the issues on appeal beyond those raised by existing parties. An Appellate Rule addressing intervention on appeal could cover a variety of topics, including the standards and timing requirements for permitting intervention (any such provision would need to be flexible); what entity (the clerk, a single judge or a panel) resolves requests to intervene; disclosure and briefing requirements for intervenors; argument time (if any) for intervenors; and the allocation of appellate costs. The Reporter noted that she had been unable to find any explanation for the Appellate Rules' omission of a general provision concerning intervention on appeal; she speculated that the omission might have arisen from a concern that treating the topic explicitly might encourage belated requests to intervene.

Mr. Letter reported that the question of intervention on appeal arises fairly often for the DOJ. For example, in the Intertanko litigation – which concerned the validity of Washington state tanker regulations – the United States did not intervene in the district court. That decision was typical for the United States: Often the government will decide not to intervene in the district court, although the case implicates federal interests, because the outcome in the district court may turn out to be satisfactory to the government even absent the government's intervention, and because the government has resource constraints. In the Intertanko case, after the district court upheld the state regulations, the United States intervened on appeal in order to argue that the district court's ruling gave insufficient consideration to the federal government's interest in foreign affairs. After the Ninth Circuit affirmed in large part, both Intertanko and the United States sought certiorari, and the Supreme Court granted review. Mr. Letter noted that in a more recent case, the United States moved to intervene both in the district court and in the court of

appeals.

An attorney member noted that a key question is where the would-be intervenor should seek permission to intervene – in the district court or the court of appeals? This member suggested that it might not make sense to have dual tracks for seeking intervention in both the district and appellate court. But she also stated that unless there are substantive variations among the circuits concerning the treatment of requests to intervene on appeal, the matter does not seem to require rulemaking.

A participant suggested that the United States is in a different position, with respect to intervention, than non-governmental parties are. Mr. Letter acknowledged this but also noted that private parties might not know about a case that is important to them until it reaches the appeal stage. An appellate judge member stated that if the Appellate Rules were amended to address intervention on appeal, the new rule should discourage belated intervention; he suggested that otherwise, judges might be concerned that the new rule would unduly increase the practice. Another appellate judge member suggested that the matter does not call for rulemaking. A third appellate judge member agreed that there is no need for rulemaking; he suggested that if a rule were to be adopted, he would favor one that directs the would-be intervenor to seek leave from the district court rather than the court of appeals. A district judge member observed that such a rule would capitalize on the district judge's knowledge of the case and the parties; but he also noted that when faced with similar sorts of requests concerning procedure for purposes of appeal, he always wonders what disposition the court of appeals would prefer.

The Committee's discussion did not produce any suggestions for moving forward with a rulemaking proposal on this item; on the other hand, the discussion did not explicitly result in the formal removal of the item from the Committee's agenda.

E. Item No. 10-AP-H (appellate review of remand orders)

Judge Sutton invited the Reporter to summarize this item, which arises from an inquiry by Karen Kremer of the AO on behalf of the Committee on Federal / State Jurisdiction. That Committee is interested to know whether any of the Rules Advisory Committees are looking at the issue of appealability of remand orders. The question of appellate review of remand orders falls within the primary jurisdiction of the Federal / State Jurisdiction Committee and is a matter concerning which Professor James Pfander (the Reporter for that Committee) is an expert. The question presents a number of doctrinal intricacies and could benefit from rationalization. Existing grants of rulemaking authority would provide authorization for addressing some, but not all, aspects of the problem. A comprehensive revision of this area of doctrine would entail legislation.

Participants expressed interest in reviewing any proposal that the Committee on Federal / State Jurisdiction generates on this topic and expressed willingness to help with such a project if

the Federal / State Jurisdiction Committee would be interested in such assistance.

VIII. Schedule Date and Location of Fall 2011 Meeting

The Committee had already scheduled its spring 2011 meeting for April 6 and 7, 2011, in San Francisco, California; the second day of the meeting will overlap with the meeting of the Bankruptcy Rules Committee. The Committee discussed possible dates for its fall 2011 meeting and decided to confer further about those possibilities by email.

IX. Adjournment

The Committee adjourned at 10:50 a.m. on October 8, 2010.

Respectfully submitted,

Catherine T. Struve
Reporter

Advisory Committee on Appellate Rules Table of Agenda Items — December 2010

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
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 Draft approved 05/10 for submission to Standing Committee Approved by Standing Committee 06/10 Approved by Judicial Conference 09/10
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 Approved by Supreme Court 04/10

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
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 Approved by Supreme Court 04/10
07-AP-E	Consider possible FRAP amendments in response to <i>Bowles v. Russell</i> (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 Discussed and retained on agenda 04/10
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 Approved by Supreme Court 04/10
07-AP-H	Consider issues raised by <u><i>Warren v. American Bankers Insurance of Florida</i></u> , 2007 WL 3151884 (10 th 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

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
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 Discussed and retained on agenda 10/10
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 Discussed and retained on agenda 10/10
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 Discussed and retained on agenda 10/10
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 Discussed and retained on agenda 10/10
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 Discussed and retained on agenda 04/10 Draft approved 10/10 for submission to Standing Committee
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 Discussed and retained on agenda 10/10

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
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
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 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
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 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
10-AP-A	Consider treatment of premature notices of appeal under FRAP 4(a)(2)	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
10-AP-B	Consider FRAP 28's treatment of statements of the case and of the facts	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
10-AP-D	Consider factors to be taken into account when taxing costs under FRAP 39	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/10
10-AP-E	Consider effect of withdrawal of a timely-filed post-judgment motion on the time to appeal in a civil case	Howard J. Bashman, Esq.	Discussed and retained on agenda 10/10
10-AP-G	Consider amending FRAP to address intervention on appeal	Douglas Letter, Esq.	Discussed and retained on agenda 10/10
10-AP-H	Consider issues relating to appellate review of remand orders	Committee on Federal-State Jurisdiction	Discussed and retained on agenda 10/10

TAB

7

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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CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: Hon. Richard C. Tallman, Chair
Advisory Committee on Federal Rules of Criminal Procedure

RE: Report of the Advisory Committee on Criminal Rules

DATE: December 8, 2010

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure (“the Committee”) met on September 27-28, 2010, in Boston, Massachusetts, and took action on a number of proposals. The Draft Minutes are attached.

Action items:

- (1) approval to publish a proposed amendment to Rule 11 (advice concerning immigration consequences of a guilty plea); and
- (2) approval to publish a proposed amendment to Rule 12 (motions which must be made before trial), and a conforming amendment to Rule 34.

II. Action Items—Recommendations to Publish Amendments to the Rules

1. ACTION ITEM—Rule 11

The Advisory Committee recommends publication of an amendment to expand the Rule 11 colloquy to advise a defendant who is pleading guilty or nolo contendere of possible immigration consequences.

As explained in the 1974 Committee Notes, the Rule 11 colloquy is designed to insure that a defendant who pleads guilty has made an informed plea. A criminal conviction can lead to a variety of other collateral consequences, and until now the rule did not require judges to discuss them with a defendant pleading guilty or nolo contendere. Despite the lack of a mandate in the rule, however, judges in many districts already include warnings about the collateral consequences of a criminal conviction as good practice.

In light of the Supreme Court’s ineffective assistance of counsel decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Advisory Committee concluded that a warning regarding possible immigration consequences ought to be required as a uniform practice. *Padilla* held that a defense attorney’s failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment. The Court stated that in light of changes in immigration law “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty.” 130 S.Ct. at 1480 (footnote omitted). It also noted that “because of its close connection to the criminal process,” deportation as a consequence of conviction is “uniquely difficult to classify as either a direct or a collateral consequence” of a plea. *Id.* at 1482. The Committee concluded that the Supreme Court’s decision provides an appropriate basis for adding advice concerning immigration consequences to the required colloquy under Rule 11, leaving the question whether to provide advice concerning other adverse collateral consequences to the discretion of the district courts.

Although the motion to adopt the language of the proposed amendment passed unanimously, the Committee was initially divided on the question whether to add further requirements to the already lengthy plea colloquy now required under Rule 11. *Padilla* was based solely on the constitutional duty of defense counsel, and it does not speak to the duty of judges. Members expressed concern that the list of matters that must be addressed in the plea colloquy is already lengthy, and adding immigration consequences would open the door to future amendments. This could eventually turn a plea colloquy into a minefield for a judge.

After discussion, the Committee concluded that deportation is qualitatively different than the other collateral consequences that may follow from a guilty plea, and it therefore warrants inclusion on the list of matters that must be discussed during a plea colloquy. Although *Padilla* speaks only to the duty of defense counsel to warn a defendant about immigration consequences, the Supreme Court’s logic also supports requiring a judge to issue a similar warning. Recognizing the distinctive nature of immigration consequences would be consistent with the practice of the Department of

Justice, which now singles out immigration consequences for special treatment and advises prosecutors to include a discussion of those consequences in plea agreements. Similarly judges should warn a defendant who pleads guilty that the plea could implicate his or her right to remain in the United States or to become a U.S. citizen.

The proposed amendment mandates a generic warning, and does not require the judge to provide specific advice concerning the defendant's individual situation. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without first attempting to determine the defendant's citizenship. In drafting its proposal, the Committee was cognizant of the complexity of immigration law, as well as the fact that there have been, and likely will be, legislative changes in the immigration laws. Accordingly, the Committee's proposal uses non-technical language that is designed to be understood by lay persons and will avoid the need to amend the rule if there are legislative changes altering more specific terms of art.

Following the meeting, the reporters prepared and circulated by e-mail a draft committee note and a proposed revision to the text of the rule as adopted at the meeting. Both were approved by an e-mail vote of the Advisory Committee. One member noted his dissent from the Committee's decision to recommend the amendment.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 11 be published for public comment.

TAB
7-A

21 (N) the terms of any plea-agreement
22 provision waiving the right to appeal
23 or to collaterally attack the sentence;
24 and:
25 (O) that, if convicted, a defendant who is
26 not a United States citizen may be
27 removed from the United States, denied
28 citizenship, and denied admission to
29 the United States in the future.

Committee Note

Subdivision (b)(1)(O). The amendment requires the court to include a general statement concerning the potential immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.

For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The amendment mandates a generic warning, and does not require the judge to provide specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without first attempting to determine the defendant's citizenship.

2. ACTION ITEM—Rule 12

The Advisory Committee recommends publication of an amendment to Rule 12. One element of the present proposal – the treatment of claims that the indictment or information fails to state an offense – was presented to the Standing Committee in 2009 and returned to the Advisory Committee for further study. Following the remand, the Advisory Committee broadened its deliberations to include the application of the “waiver” concept in Rule 12 and its relationship to Rule 52.

Background

Subdivision (b) of Criminal Rule 12 designates which claims and objections must be raised before trial. Subdivision (e) specifies that a party “waives” any claim that should have been raised prior to trial under subdivision (b), and requires “good cause” before a court may grant relief from the waiver.

Although Rule 12 has from its inception used the term “waiver” to describe the failure to raise on time those specific claims addressed in the rule and the term “good cause” to describe the standard for relief, these terms as used in the Rule have a specific meaning that differs from the meaning that has come to be associated with these terms in some other contexts. In Rule 12 the label “waiver” is given to *any* failure to raise a designated claim, even though “waiver” elsewhere suggests only knowing and voluntary abandonments. Rule 12, in other words, has used the term “waiver” to describe all defaults, inadvertent forfeitures as well as fully informed and deliberate relinquishments. Also, the “good cause” test for relief from waiver of claims listed in Rule 12 is different than the test for relief that courts apply under Rule 52(b) for other claims that are not raised on time. The Supreme Court has interpreted the phrase “good cause” in Rule 12 to require a showing of “cause” and “prejudice,” a standard well defined in the case law. *Davis v. United States*, 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963). By contrast, under Rule 52(b), relief for an untimely, forfeited claim is not conditioned upon “good cause.” Instead, under Rule 52(b), claims not raised on time are reviewed for plain error under the now familiar four-part test first articulated by the Supreme Court in its decision in *United States v. Olano*, 507 U.S. 725 (1993). *See also Puckett v. United States*, 129 S.Ct. 1423 (2009) (“First, there must be an error or defect – some sort of “[d]eviation from a legal rule” – that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. . . . Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. . . . Third, the error must have affected the appellant’s substantial rights, which in the ordinary case means he must demonstrate that it “affected the outcome of the district court proceedings.” . . . Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error—discretion which ought to be exercised only if the error “‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’”).

In 2009, the Advisory Committee recommended (with 4 dissenting votes) that the Standing Committee approve for publication an amendment to Rule 12. Rule 12(b) presently exempts from its timing requirements two specific claims: a claim that the charge fails to state an offense and a claim of lack of jurisdiction. These two claims may be raised at any time, even after conviction. In

2002, the Supreme Court made it clear that an indictment's failure to state an offense does not deprive the court of jurisdiction. *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction"). The Committee's 2009 proposal recommended adding to those claims "waived" under Rule 12(e) when not raised prior to trial the claim that a charge fails to state an offense. But rather than condition relief upon "good cause," as Rule 12(e) requires for other claims "waived" under the Rule, the Committee concluded that "cause" should not be required. Instead, the Committee's proposal recommended amended language providing that a judge could grant relief for the failure to state a claim either for good cause or when the error "prejudiced the substantial rights of the defendant." The proposal also included a conforming amendment to Rule 34.

In June of 2009, the Standing Committee remanded the proposed amendments to the Advisory Committee for further study of the relationship between the proposed "prejudice to substantial rights" standard, the "good cause" standard in Rule 12(e), and the standard for relief from forfeited claims under Rule 52. Additionally, the Standing Committee asked the Advisory Committee to consider whether some or all violations of Rule 12(b)(3) should be considered forfeited rather than waived.

The matter was once again considered by the Advisory Committee, which broadened its deliberations to include not only the appropriate treatment of a claim that the charge fails to state an offense, but also the application of the "waiver" concept in Rule 12 and its relationship to Rule 52. The result of these deliberations was a proposal that would make more extensive amendments to Rule 12, approved by the Advisory Committee at its September 2010 meeting by a vote of 8 to 4. Following the meeting, the reporters drafted a Committee Note, which was approved by an e-mail vote of the Advisory Committee.

The Proposed Amendment

The major features of the amendments to Rule 12 that the Committee now recommends the Standing Committee approve for publication are summarized in the paragraphs that follow. The most important changes are detailed in paragraphs 1, 4, and 6, below.

1. Requiring Pretrial Objection Based on Failure to State an Offense

Like the amendment recommended in 2009, the proposed amendment would eliminate the timing exemption for claims that the charge fails to state an offense and provide that this claim like other defects in the charge must be raised before trial.

2. Deleting Existing (b)(2)

Rule 12(b)(2) presently provides that "a party may raise by pretrial motion" "any defense, objection, or request that the court can determine without trial of the general issue." The 1944 Advisory Committee Note explains that the purpose of this provision was to make clear that pretrial motions could be used to raise matters previously raised "by demurrers, special pleas in bar and motions to quash." The use of motions is now so well established that it no longer requires explicit authorization. The language is not only unnecessary but also potentially misleading if read literally. As noted, (b)(2) says that any defense, objection, or request that is capable of being determined

before trial “may” be raised by pretrial motion. The permissive term “may” might be understood to indicate that each party has the option of bringing *or not bringing* all such motions before trial. This is in tension with (b)(3), which provides a list of motions that must be brought before trial. Since the language now found in (b)(2) is no longer needed and might create confusion, the Committee proposes that it should be deleted.

3. Relocating Provision on Jurisdictional Claim

The proposal would move to a separate subdivision the text that allows jurisdictional objections to be raised at “any time while the case is pending,” rather than leaving it as an exception to the list of various defenses and claims subject to the timing requirements of Rule 12(b)(3). The amendment places this new subdivision in Rule 12(b)(2), replacing current (b)(2), which would be deleted, as discussed above. This avoids renumbering and relettering the most frequently cited and researched provisions in the Rule.

4. Requiring that Basis for Claim Be Available and Determination Possible Before Trial

As a general rule, the types of claims subject to Rule 12(b)(3) will be available before trial and they can – and should – be resolved then. But if the basis for a belated motion was not available to a party before trial, courts currently consider whether the circumstances constitute “good cause” such that the party can be excused for the failure to raise the claim before trial. The Committee agreed that the failure to raise a claim one could not have raised should never be considered waiver and that it would be desirable to make this point explicit in the rule. Defenses, objections and claims “must” be raised before trial only where “the basis for the motion is then reasonably available....”

In addition, parties should not be encouraged to raise (or punished for not raising) claims that depend on factual development at trial. Presently (b)(2) addresses this concern by noting that issues depending on a trial “of the general issue” may not be raised prior to trial. If amended as proposed, the Rule would make this point clear through the introductory language of (b)(3), which provides that only those issues that can be determined “without a trial on the merits” “must be raised by motion before trial.” The Committee preferred the modern phrase “trial on the merits” over the more archaic phrase “trial of the general issue” now found in (b)(2). No change in meaning is intended.

Under the revised Rule, if a party raises an issue governed by Rule 12(b)(3) at any time after the trial has begun, the court would first determine whether (1) the basis for raising the issue was “reasonably available” before trial to the party who wishes to raise it, and, if so, (2) whether it would have been possible for the court to resolve the issue at that time, before trial. Only if both conditions are met would the court need to consider the consequences of the failure to raise the claim on time under subdivision (e).

5. Spelling Out Claims Required Before Trial

The proposal does not disturb the general approach followed in the current (b)(3) to describe those claims subject to waiver: it repeats the two general categories of claims (defects in “instituting the prosecution” and defects “in the indictment or information”), followed by the three specific categories of discovery, suppression, and severance. To add clarity and provide guidance to litigants,

however, the proposed revised Rule lists some of the more common claims that fall in each of the more general categories, while leaving in place the existing description of the general categories.

6. Consequences of Failure to Raise Claims or Defenses Before Trial

The proposal bifurcates subdivision (e). Subdivision (e)(1) applies to all but three of the claims that under (b) must be raised prior to trial, and it preserves the standards of the existing rule, providing that an untimely claim is “waived” and may not be considered unless there is a showing of both “cause and prejudice.” The substitution of “cause and prejudice” for “good cause” is intended to clarify rather than modify the standard for relief that is already applied under the current Rule.

Subdivision (e)(2) is new, and provides that a different standard of relief applies to three specific untimely claims: the failure to state an offense, double jeopardy, and a violation of the statute of limitations. These three claims are “forfeited” if not raised in a timely fashion, not “waived,” and if raised late are subject to review under Rule 52(b) for plain error. The Committee concluded that the “cause” showing required for excusing waiver of other sorts of claims is inappropriate for these claims. This new standard is also consistent with the Supreme Court’s holding in *Cotton*, that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet “the plain-error test of Federal Rule of Criminal Procedure 52(b).” *Cotton*, 535 U.S. at 631.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 12, and the conforming change to Rule 34, be published for public comment.

- 18 (i) improper venue;
- 19 (ii) preindictment delay;
- 20 (iii) a violation of the constitutional
- 21 right to a speedy trial;
- 22 (iv) double jeopardy;
- 23 (v) the statute of limitations;
- 24 (vi) selective or vindictive prosecution;
- 25 (vii) outrageous government conduct; and
- 26 (viii) an error in the grand jury proceeding or
- 27 preliminary hearing;
- 28 (B) a motion alleging a defect in the indictment
- 29 or information, including:
- 30 (i) joining two or more offenses in the
- 31 same count (duplicity);
- 32 (ii) charging the same offense in more than
- 33 one count (multiplicity);
- 34 (iii) lack of specificity;
- 35 (iv) improper joinder; and

36 (v) failure to state an offense;

37 ~~but at any time while the case is pending, the~~
38 ~~court may hear a claim that the indictment or~~
39 ~~information fails to invoke the court's jurisdiction~~
40 ~~or to state an offense;~~

41 (C) ~~a motion to suppression of~~ evidence;

42 (D) ~~a Rule 14 motion to severance of~~ charges or
43 defendants under Rule 14; and

44 (E) ~~a Rule 16 motion for discovery~~ under Rule
45 16.

46 (4) *Notice of the Government's Intent to Use*
47 *Evidence.*

48 (A) *At the Government's Discretion.* At the
49 arraignment or as soon afterward as
50 practicable, the government may notify the
51 defendant of its intent to use specified
52 evidence at trial in order to afford the
53 defendant an opportunity to object before trial
54 under Rule 12(b)(3)(C).

55 (B) *At the Defendant's Request.* At the
56 arraignment or as soon afterward as
57 practicable, the defendant may, in order to
58 have an opportunity to move to suppress
59 evidence under Rule 12(b)(3)(C), request
60 notice of the government's intent to use (in
61 its evidence-in-chief at trial) any evidence
62 that the defendant may be entitled to discover
63 under Rule 16.

64 (c) **Motion Deadline.** The court may, at the arraignment or
65 as soon afterward as practicable, set a deadline for the
66 parties to make pretrial motions and may also schedule
67 a motion hearing.

68 (d) **Ruling on a Motion.** The court must decide every
69 pretrial motion before trial unless it finds good cause to
70 defer a ruling. The court must not defer ruling on a
71 pretrial motion if the deferral will adversely affect a
72 party's right to appeal. When factual issues are involved
73 in deciding a motion, the court must state its essential
74 findings on the record.

75 (e) ~~Waiver of a Defense, Objection, or Request.~~

76 Consequence of Not Making a Motion Before Trial
77 as Required.

78 (1) Waiver. A party waives any Rule 12(b)(3)
79 defense, objection, or request – other than failure
80 to state an offense, double jeopardy, or the statute
81 of limitations – not raised by the deadline the
82 court sets under Rule 12(c) or by any extension the
83 court provides. ~~For good cause~~ Upon a showing of
84 cause and prejudice, the court may grant relief
85 from the waiver. Otherwise, a party may not raise
86 the waived claim.

87 (2) Forfeiture. A party forfeits any claim based on the
88 failure to state an offense, double jeopardy, or the
89 statute of limitations, if the claim was not raised by
90 the deadline the court sets under Rule 12(c) or by
91 any extension the court provides. A forfeited
92 claim is not waived. Rule 52(b) governs relief for
93 forfeited claims..

Committee Note

Subdivision (b)(2). The amendment deletes the provision providing that “any defense, objection, or request that the court can determine without trial of the general issue” may be raised by motion before trial. This language was added in 1944 to make sure that matters previously raised by demurrers, special pleas, and motions to quash could be raised by pretrial motion. The Committee concluded that the use of pretrial motions is so well established that it no longer requires explicit authorization. Moreover, the Committee was concerned that the permissive language might be misleading, since Rule 12(b)(3) does not permit the parties to wait until after the trial begins to make certain motions that can be determined without a trial on the merits.

As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Subdivision (b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is “available” and the motion must be one that the court can determine “without trial on the merits.” The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The “then reasonably available” language is intended to ensure that the failure to raise a claim a party could not have raised on time is not deemed to be “waiver” or “forfeiture” under the Rule. Cf. 28 U.S.C. § 1867(a) & (b) (requiring claims to be raised promptly after they were “discovered or could have been discovered by the exercise of due diligence”). Additionally, only those issues that can be determined “without a trial on the merits” need be raised by motion before trial. The more modern phrase “trial on the merits” is substituted for the more archaic phrase “trial of the general issue” that appeared in existing (now deleted) (b)(2). No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked.

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction").

Subdivision (e). Rule 12(e) has also been amended to clarify when a court may grant relief for untimely claims that should have been raised prior to trial under Rule 12(b)(3). Rule 12(e) has been subdivided into two sections, each specifying a different standard of review for untimely claims of error.

Subdivision (e)(1) carries over the "waiver" standard of the existing rule, applying it to all untimely claims except for those that allege a violation of double jeopardy or the statute of limitations or that the charge fails to state an offense. The rule retains the language that provides a party "waives" all other challenges by not raising them on time as required by Rule 12(b)(3), as well as the language that relief is available only if the defendant makes a certain showing, previously described as "good cause." "Good cause" for securing relief for an untimely claim "waived" under Rule 12 has been interpreted by the Supreme Court as well as most lower courts to require two showings: (1) "cause" for the failure to raise the claim on time, and (2) "prejudice" resulting from the error. *Davis v. United States*, 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963). Each concept – "cause" and "prejudice" – is well-developed in case law applying Rule 12. To clarify this standard, with no change in meaning intended, the words "for good cause" in the existing rule have been replaced by "upon a showing of cause and prejudice."

Subdivision (e)(2) provides a different standard for three specific claims, those that allege a violation of double jeopardy, a violation of the statute of limitations, or that the charge fails to state an offense. The Committee concluded that the “cause” showing required for excusing waiver of other sorts of claims is inappropriate for these claims. The new subdivision provides that a court may grant relief for such a claim whenever the error amounts to plain error under Rule 52(b). This new standard is also consistent with the Court’s holding in *Cotton*, that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet “the plain-error test of Federal Rule of Criminal Procedure 52(b).” *Cotton*, 535 U.S. at 631.

Rule 34. Arresting Judgment

(a) **In General.** Upon the defendant's motion or on its own, the court must arrest judgment if the court does not have jurisdiction of the charged offense. if:

~~(1) the indictment or information does not charge an offense; or~~

~~(2) the court does not have jurisdiction of the charged offense.~~

* * * * *

Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the “indictment or information fails . . . to state an offense.” The amended Rule 12 instead requires that such a defect be raised before trial.

TAB
7-B

III. Discussion Items

A. Rule 16 and Exculpatory Evidence

The Advisory Committee is continuing its consideration of the question whether Rule 16 should be amended to incorporate the government's constitutional obligation to provide exculpatory evidence to the defense or to create a broader pretrial disclosure obligation of potential impeachment information. To inform its deliberations, the Committee is gathering information on how the system is currently functioning and seeking wide input on the question whether an amendment to rules would be desirable.

The Committee received a presentation on the preliminary results of a Federal Judicial Center survey on Rule 16 conducted at the Committee's request. The survey was distributed to all district and magistrate judges and 14,000 defense attorneys (both federal public defenders and private defense attorneys). With the help of the Department of Justice, the survey was sent to all 94 U.S. Attorneys' Offices nationwide, but not to individual prosecutors. The response rate was very high for a survey of this type: 43% of the judges, 32% of the defense attorneys, and 91% of the U.S. Attorneys' Offices responded. In addition, respondents provided written comments that the Center estimated to be over 700 pages of text. In compiling the answers, the survey distinguished between districts that rely primarily on Rule 16 to guide discovery, and districts that supplement Rule 16 with local rules, standing orders, or other means, to impose broader disclosure requirements. The survey referred to the former districts as "traditional Rule 16 districts" and the latter districts as "broader disclosure districts."

The survey focused on the central issue whether Rule 16 should be amended to require pretrial disclosure of exculpatory and impeachment information. Since the minutes included in the Agenda Book provide a detailed description of these preliminary findings, this report highlights only a few key points. First, 51% of the judges and slightly more than 90% of the defense attorneys favor amending Rule 16, while the Department opposes any type of amendment. In the districts that already have local rules requiring broader disclosure 60% of the judges favor an amendment, but in traditional Rule 16 districts, only 45% favor an amendment.

Second, the survey provides information on the principal reasons for the support or opposition to an amendment. Judges most frequently cited two reasons for favoring an amendment: (1) to eliminate confusion surrounding the requirement of materiality as a measure of a prosecutor's pretrial disclosure obligations; and (2) to reduce variations that currently exist across circuits. Defense attorneys cited the first reason – eliminating confusion caused by the materiality requirement – as the primary justification for favoring an amendment. The reasons most commonly given by judges for opposing an amendment were that: (1) there is no demonstrated need for a change; and (2) the current remedies for prosecutorial misconduct are adequate. The Department added a third reason: recent reforms instituted by the Department will significantly reduce disclosure violations.

The survey provides information regarding the perceptions of judges, prosecutors, and defense lawyers regarding the frequency of (1) non-compliance with discovery obligations on the part of both prosecutors and defense lawyers; (2) threats or harm to witnesses due to disclosure of exculpatory or impeaching information; and (3) requests for protective orders. It also reports on their perceptions regarding the effect of the disclosure rules in the broader disclosure districts.

Since the survey gathered an enormous amount of data and the Federal Judicial Center has not yet completed its final report, the Committee's discussion was preliminary and general. In light of the sharp division of opinion regarding the need for an amendment, members expressed an interest in considering not only a possible amendment but also changes in the Federal Judicial Center's Judges' Benchbook that might serve either as an adjunct or an alternative to amending Rule 16. One option that might be included in either an amendment to Rule 16 or the Benchbook is a checklist that would focus the attention of both the prosecution and the defense on the kinds of information that should be disclosed. In addition, the Federal Judicial Center is considering publishing a guide to the "best practices" in criminal discovery. Some members expressed the view that supplementing the Benchbook or publishing such a guide could be effective and avoid the pitfalls of amending Rule 16.

The consideration of any proposed amendment was recommitted to the Rule 16 subcommittee, which Judge Tallman chairs.

B. Rule 15

Judge Rosenthal reported on the status of the proposed amendment to Rule 15, which would authorize the taking of depositions outside the presence of a defendant in special, limited circumstances, with the district judge's approval. The Judicial Conference had transmitted the proposed amendment to the Supreme Court, but the Court remanded it to the Committee for further consideration. One suggestion is to revise the proposed amended Rule 15 to emphasize that it does not predetermine whether depositions conducted outside the presence of the defendant are admissible at any subsequent trial. Rather, it is limited to providing assistance on pretrial discovery. Judge Tallman directed that the matter be recommitted to the Rule 15 subcommittee chaired by Judge John Keenan, which subsequently met by conference call to consider a proposal to amend the Committee Note.

ADVISORY COMMITTEE ON CRIMINAL RULES

DRAFT MINUTES

Sept. 27-28, 2010
Cambridge, Massachusetts

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the “Committee”) met in Cambridge, Massachusetts, on September 27-28, 2010. The following members participated:

Judge Richard C. Tallman, Chair
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Justice Robert H. Edmunds, Jr.
Judge Morrison C. England, Jr.
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Thomas P. McNamara, Esquire
Judge Donald W. Molloy
Judge Timothy R. Rice
Judge James B. Zagel
Professor Sara Sun Beale, Reporter
Professor Nancy King, Assistant Reporter
Hon. Lanny A. Breuer, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)

Representing the Standing Committee were its Chair, Judge Lee H. Rosenthal, and liaison member, Judge Reena Raggi. Supporting the Committee were:

Peter G. McCabe, Committee Secretary
John K. Rabiej, Rules Committee Support Office
Jeffrey N. Barr, Senior Attorney, Administrative Office
Henry Wigglesworth, Attorney Advisor, Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center
David Rauma, Senior Research Associate, Federal Judicial Center

Also participating from the Department of Justice were Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton, Deputy Chief of the Appellate Section.

A. Chair's Remarks, Introductions, and Administrative Announcements

Judge Tallman welcomed everyone, particularly Mr. Thomas P. McNamara, who had missed the April 2010 meeting due to illness. Judge Tallman also welcomed two distinguished visitors: the Honorable Emmet G. Sullivan, United States District Judge for the District of Columbia, and the Honorable Mark L. Wolf, Chief United States District Judge for the District of Massachusetts.

B. Review and Approval of the Minutes

A motion was made to approve the draft minutes of the April 2010 meeting.

The Committee unanimously approved the minutes.

C. Status of Criminal Rules: Report of the Rules Committee Support Office

Mr. Rabiej reported that the various proposed rules amendments recently approved by the Supreme Court (listed below in Section II.A) were on track to take effect on December 1, 2010, unless Congress were to act to the contrary. Based on his communications with Congressional staff, Mr. Rabiej reported that, at present, no changes were foreseen.

Mr. Rabiej further reported that the Judicial Conference had recently approved the Committee's proposed rules amendments, including technology-related amendments, listed below in Section II.B. The Administrative Office will transmit the amendments to the Supreme Court shortly. Finally, Mr. Rabiej reported that additional proposed amendments had been approved by the Standing Committee for publication (listed below in Section II.C) and had been posted on the rulemaking Web site in August 2010. He expects pamphlets of these amendments to be ready soon for distribution. Hearings on the proposed amendments have been scheduled for January 5, 2011, in San Francisco and January 25, 2011, in Atlanta. (The hearings will not be held if there is insufficient interest in presenting oral testimony.)

Judge Rosenthal reported on the status of the proposed amendment to Rule 15, which would authorize the taking of depositions outside the presence of a defendant in special, limited circumstances, with the district judge's approval. The Judicial Conference had transmitted the proposed amendment to the Supreme Court, but the Court remanded it to the Committee for further consideration. One suggestion is to revise the proposed amended Rule 15 to emphasize that it does not predetermine whether depositions conducted outside the presence of the defendant are admissible at any subsequent trial. Rather, it is limited to providing assistance on

pretrial discovery. Accordingly, Judge Tallman directed that the matter be recommitted to the Rule 15 subcommittee chaired by Judge Keenan.

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Supreme Court for Transmittal to Congress

Mr. Rabiej reported that the following proposed amendments had been approved by the Supreme Court for transmittal to Congress:

1. Rule 12.3. Notice of Public Authority Defense. The proposed amendment implements the Crime Victims' Rights Act.
2. Rule 21. Transfer for Trial. The proposed amendment implements the Crime Victims' Rights Act.
3. Rule 32.1. Revoking or Modifying Probation or Supervised Release. The proposed amendment clarifies the standard and burden of proof regarding the release or detention of a person on probation or supervised release.

B. Proposed Amendments Approved by the Judicial Conference for Transmittal to the Supreme Court

Mr. Rabiej further reported that the following proposed technology-related amendments had been approved by the Judicial Conference for transmittal to the Supreme Court:

1. Rule 1. Scope: Definitions. The proposed amendment broadens the definition of telephone.
2. Rule 3. The Complaint. The proposed amendment allows a 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. The proposed amendment adopts the concept of a "duplicate original" warrant from existing Rule 41 and allows returns to be transmitted by reliable electronic means, and authorizes 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. The proposed amendment provides a comprehensive

procedure for issuing complaints, warrants, or summons by telephone or other reliable electronic means.

5. Rule 6. The Grand Jury. The proposed amendment authorizes grand jury returns to be taken by video teleconference.
6. Rule 9. Arrest Warrant or Summons. The proposed amendment authorizes issuing a warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.
7. Rule 32.1. Revoking or Modifying Probation or Supervised Release. The proposed amendment permits a defendant to participate by video teleconference.
8. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. The proposed amendment authorizes the use of video teleconferencing.
9. Rule 41. Search and Seizure. The proposed amendment authorizes requests for warrants, the return of warrants, and inventories to be made by telephone or other reliable electronic means as provided by Rule 4.1, and makes a technical and conforming amendment deleting obsolete references to calendar days.
10. Rule 43. Defendant's Presence. The proposed amendment authorizes a defendant to participate in misdemeanor proceedings by video teleconference.
11. Rule 49. Serving and Filing Papers. The proposed amendment authorizes papers to be filed, signed, and verified by electronic means.

C. Proposed Amendments Approved By the Standing Committee for Publication

Mr. Rabiej further reported that the following proposed amendments had been approved by the Standing Committee for publication:

1. Rule 5. Initial Appearance. The proposed amendment provides that an initial appearance for an extradited defendant must take place in the district in which the defendant was charged. In addition, a non-citizen defendant in U.S. custody must be informed that a consular official from the defendant's country of nationality will be notified upon the defendant's request, and that the government will make any other consular notification required by its international obligations.

2. Rule 37. Indicative Rulings. The proposed amendment authorizes a district court to make indicative rulings when it lacks authority to grant relief because an appeal has been docketed.
3. Rule 58. Initial Appearance. The proposed amendment provides that in petty offense and misdemeanor cases non-citizen defendants in U.S. custody must be informed that a consular official from the defendant's country of nationality will be notified upon the defendant's request, and that the government will make any other consular notification required by its international obligations.

III. CONTINUING AGENDA ITEMS

A. Rule 16 (Discovery and Inspection)

Judge Tallman asked Laural Hooper and David Rauma to describe the preliminary results of a Federal Judicial Center survey on Rule 16 conducted at the Committee's request. Judge Tallman noted that the survey had already garnered many compliments, which were reflected in the high response rate that it had generated.

Ms. Hooper presented the preliminary survey results. She began by describing how the survey had been distributed to all district and magistrate judges and 14,000 defense attorneys (both federal public defenders and private defense attorneys). With the help of the Department of Justice, the survey was sent to all 94 U.S. Attorney's Offices nationwide, but not to individual prosecutors.

The response rate was very high for a survey of this type: 43% of the judges, 32% of the defense attorneys, and 91% of the U.S. Attorney's Offices responded. In addition, respondents provided written comments that Ms. Hooper estimated would amount to over 700 pages of text.

David Rauma described the survey methodology in more detail. He noted that the list of defense attorneys had been collected from all criminal cases terminated in federal courts in 2009. He pointed out that the responses were personal opinions and estimates, and they should not be confused with actual case-related data. He also cautioned that the responses from the U.S. Attorney's Offices were aggregate responses – one response was submitted for all the federal prosecutors in that particular district, as opposed to individual responses by the line prosecutors themselves.

Ms. Hooper reported that the survey focused on the central issue of whether Rule 16 should be amended to require pretrial disclosure of exculpatory and impeachment information. It also asked many subsidiary questions, such as whether federal prosecutors and defense attorneys understand their disclosure obligations, whether they fulfill those obligations, how violations of Rule 16 are addressed by the courts, and whether the 2007 proposal to amend Rule 16 should be

reconsidered. In compiling the answers, the survey distinguished between districts that rely primarily on Rule 16 to guide discovery, and districts that supplement Rule 16 with local rules, standing orders, or other means, to impose broader disclosure requirements. The survey referred to the former districts as “traditional Rule 16 districts” and the latter districts as “broader disclosure districts.”

Summarizing the survey results, Ms. Hooper reported that 51% of the judges and slightly more than 90% of the defense attorneys favor amending Rule 16, while the Department opposes any type of amendment. Breaking it down further, Ms. Hooper noted that in the broader disclosure districts, 60% of the judges favor an amendment while in the traditional Rule 16 districts, only 45% favor an amendment.

Regarding the frequency of non-compliance with discovery obligations, 61% of judges in the broader disclosure districts, and 74% of judges in the traditional districts, reported no violations by prosecutors within the past five years. Similarly, 64% of judges in the broader disclosure districts and 68% of judges in the traditional Rule 16 districts reported no violations by defense attorneys within the past five years.

Regarding overall satisfaction with prosecutors’ compliance with discovery obligations, 90% of judges in both the broader disclosure districts and the traditional districts said they were either “very satisfied” or “satisfied” with the prosecutors’ compliance. As to defense attorney compliance, almost 80% of judges in both types of districts expressed satisfaction.

Among the districts that have broader disclosure, some require prosecutors to disclose exculpatory or impeaching information without regard to the *Brady* “materiality” requirement. *See Strickler v. Greene*, 527 U.S. 281, 281-82 (1999) (defining “materiality” as creating a “reasonable probability that the suppressed evidence would have produced a different verdict.”) The survey asked respondents in these districts whether elimination of the materiality requirement reduced discovery problems. Seventy-one percent of defense attorneys believed that elimination of the requirement lessened problems, while 60% of U.S. Attorney’s Offices reported that removing the requirement made no difference.

Regarding harm to prosecution witnesses, 73% of judges reported no threats or harm to witnesses due to disclosure of exculpatory or impeaching information in the past five years. Approximately 40% of U.S. Attorney’s Offices reported that in the past five years no protective orders had been requested to address security concerns.

In both the broader disclosure districts and the traditional Rule 16 districts, judges most frequently cited two reasons for favoring an amendment: (1) to eliminate confusion surrounding the use of materiality as a measure of a prosecutor’s pretrial disclosure obligations; and (2) to reduce variations that currently exist across circuits. Defense attorneys cited the first reason –

eliminating confusion caused by the materiality requirement – as the primary justification for favoring an amendment.

The reasons most commonly given by judges for opposing an amendment were that: (1) there is no demonstrated need for a change; and (2) the current remedies for prosecutorial misconduct are adequate. The Department added a third reason: recent reforms instituted by the Department will significantly reduce disclosure violations.

The survey asked respondents for their view on the possible effects of a proposal to amend Rule 16 that the Committee advanced in 2007, which required the government to release all exculpatory and impeaching information no later than 14 days before trial. Overall, a majority of judges thought that such a proposal would have, or could have, negative consequences in witness security and privacy. Conversely, a majority of defense attorneys felt the opposite – that the 2007 amendment would have no adverse effect, or a minimal effect, on the safety and privacy of witnesses. The Department criticized the broad disclosure required by the 2007 amendment, arguing that it would in effect turn a witness’s life into “a virtual open book.”

Following Ms. Hooper and Mr. Rauma’s presentation, members asked a number of questions and made several comments. One member questioned how the U.S. Attorney’s Offices garnered information to respond to the survey. Mr. Wroblewski answered that the survey requested that the U.S. Attorney or a designee solicit the views of individual prosecutors in each district before responding on behalf of each U.S. Attorney’s Office.

Ms. Felton asked whether the 43% response rate by judges fell into any sort of distribution pattern, *e.g.*, whether the responses predominately come from urban or rural districts. Mr. Rauma replied that he did not recall either type of district being dominant, but acknowledged that determining whether the distribution of responses to a survey is sufficiently representative is always difficult. However, he reassured members that at least one judge had responded to the Rule 16 survey from every district and that he saw no anomalies in the overall distribution.

A member observed that the frequency of Rule 16 problems is difficult to assess because attorneys often work out problems themselves without involving a judge. A judge member pointed out that the dimensions of the problem are unknowable because “you don’t know what you don’t know.” Although he said that he does not see Rule 16 problems very often, the member added that when they do arise, they tend to be egregious.

Chief Judge Wolf thanked the chair for inviting him to the meeting and made several observations. He said he agreed that it is essentially impossible to measure the scope of discovery problems. Further, in his district, a broad disclosure district, problems continue to arise, even after the Department’s recent efforts to emphasize compliance with *Brady* obligations, and his most common remedy is to compel disclosure. Judge Wolf noted that Rule 16 does not currently require disclosure of even “core *Brady* material.”

Judge Sullivan also thanked the chair for inviting him and offered comments. He praised recent efforts by the Department to train prosecutors to better meet their discovery obligations. However, he worries that the strength of the Department's commitment relies too heavily on the support of certain officials, who may not be in charge in the future. Therefore, he favors the more permanent solution of amending Rule 16. He pointed out that a preponderance of judges favors an amendment and urged the Committee to act in the face of such strong support for change. He suggested that further study is not necessary because a well-crafted amendment would generate informative responses when published for comment. The Committee would subsequently have ample time to study the details of any proposal.

Assistant Attorney General Lanny Breuer offered his comments and an update on the Department's efforts. He said that even though statistics reveal that discovery violations by prosecutors are extremely rare, any misconduct by a federal prosecutor is unacceptable. The Department now requires training for all federal prosecutors and paralegals, and it recently hired a deputy to assist the National Coordinator for Criminal Discovery in these efforts. Furthermore, the Department is creating a discovery deskbook to provide guidance to prosecutors. General Breuer added that he is working with federal law enforcement agencies within the Department, including the Federal Bureau of Investigation and the Drug Enforcement Agency, and with key agencies outside the Department to address "data management problems" that currently complicate prosecutors' efforts to make sure they can meet their discovery obligations.

Responding to Judge Sullivan's comments, General Breuer submitted that the Department's current commitment to improving criminal discovery practices will be permanent. He added that the dangers of amending Rule 16 to broaden disclosure were great, particularly as to witnesses' security, and these dangers were most pronounced along the U.S. border with Mexico. He concluded by saying that the Department forcefully opposes any amendment to Rule 16.

Judge Tallman reminded the Committee that the Department's opposition to amending Rule 16 in 2007 had been a significant factor in the Standing Committee's decision not to approve the proposed amendment and to recommit the matter to the Criminal Rules Committee for further study. Essentially, the 2007 proposal was halted based on the Department's promise to address disclosure problems internally. The Department's reform efforts in 2007, Judge Tallman observed, were not nearly as extensive as its current efforts. Therefore, Judge Tallman said, the Department's continued opposition to changing Rule 16 is problematic for the future success of any proposed amendment.

Chief Judge Wolf said that amending Rule 16 would be in the Department's own best interest because an amendment would clarify a prosecutor's discovery obligations and make it easier to satisfy those obligations. Currently, he observed, Rule 16 does not even incorporate the constitutional mandates of *Brady* and *Giglio*. Further, Judge Wolf argued that dispensing with the *Brady* "materiality" requirement would benefit prosecutors because it would relieve them of

the impossible burden of trying to foresee all the defenses that might arise at trial. For these reasons, the Department should support amending Rule 16, and Judge Wolf said he hoped that the Committee would recommend an amendment for publication.

Professor Coquillette observed that any amendment to Rule 16 would be seeking to change attorney conduct, and he questioned whether modifying conduct can best be accomplished through a change in the rules.

A member questioned whether amending Rule 16 to broaden disclosure obligations might run afoul of the Jencks Act, 18 U.S.C. § 3500, which sets out strict parameters for disclosure of statements by government witnesses. Judge Tallman responded that in the event of a conflict between a rule and a statute, the supersession clause of the Rules Enabling Act, 28 U.S.C. § 2072, could resolve the conflict in favor of the rule. However, he pointed out that reliance on the supersession clause is a last resort and that it is Judicial Conference policy that such conflicts should be avoided if at all possible. Otherwise, Judge Tallman noted, Congress might focus on the conflict between a proposed change to Rule 16 and the Jencks Act, which could threaten the entire rulemaking process. These risks all underscore the importance of trying to get the Department to agree to support any amendment to Rule 16 that might ultimately be advanced by the Committee.

Judge Sullivan proposed that Rule 16 could be amended by adding a checklist, informing prosecutors of the type of material that must be disclosed. A member added that in addition to the checklist, a “safety valve” could be added that would allow prosecutors to refrain from disclosing certain material if disclosure posed a threat to a witness’s safety. Professor Beale noted that some local rules in the broader disclosure districts already employ similar checklists, which could serve as models for a national rule.

A member voiced the view that the Committee was attempting to solve a problem that might be attributable in part to the large size of the federal government. He pointed out that due to the sheer number of federal agents involved in a case, a prosecutor might not even know about the existence of some exculpatory information. The Committee should defer acting on an amendment until the Department has had a chance to address these information-sharing problems, the member argued. The problem is amplified if local, state, or foreign law enforcement officers are involved in a multi-agency investigation.

Judge Tallman observed that the checklist proposed by Judge Sullivan could be placed in the Federal Judicial Center’s Judges’ Benchbook, as opposed to becoming part of Rule 16. In addition, the Federal Judicial Center might be interested in publishing a guide to the “best practices” in criminal discovery. Supplementing the Benchbook or publishing such a guide could be effective measures that would avoid the pitfalls of amending Rule 16. Judge Rosenthal added that the recent Civil Litigation Conference at Duke Law School had highlighted the

limitations of the rules process and had underscored the usefulness of alternative approaches to solving problems.

Chief Judge Wolf urged the Committee not to be deterred by the nearly even split among judges who responded to the survey. Publication of a proposed amendment would prompt judges to reconsider their views, he predicted, and the resulting debate about the amendment's pros and cons could lead to further support for the amendment.

Ms. Hooper asked Judge Tallman for guidance on how to disseminate the extensive comments that had been submitted in response to the survey. After some discussion, Judge Tallman requested that Ms. Hooper and her colleagues continue to categorize the comments and also to redact any information identifying the authors of the comments. Judge Tallman and members agreed that because respondents had been told that their comments would be confidential, the redacted version should be available only to Committee members. Ms. Hooper will circulate redacted materials when they are ready to be released to the Committee for further study.

Judge Tallman concluded the discussion on Rule 16 by recommitting consideration of any proposed amendment to the Rule 16 subcommittee.

B. Rule 12 (Pleadings and Pretrial Motions)

Judge England, Chair of the Rule 12 subcommittee, briefly summarized the history of the Committee's consideration of whether to amend Rule 12. In April 2009, the Committee voted to send to the Standing Committee, with a recommendation that it be published for comment, an amendment attempting to change Rule 12 in light of *United States v. Cotton*, 535 U.S. 625 (2002). The proposed amendment would have required defendants to raise a claim that an indictment fails to state an offense *before* trial, and it would have provided relief for failure to raise the defense in certain narrow circumstances. However, the Standing Committee declined to publish the proposed amendment and remanded it to the Committee to consider the implications of using the term "forfeiture" instead of "waiver" in the relief provision.

In response, Judge England reported that the Rule 12 subcommittee had drafted a new amendment (located on page 120 of the Agenda Book) that was more expansive than the original. Despite having produced a draft, Judge England pointed out that a minority of members of the subcommittee were against the concept embodied in the amendment, *i.e.*, requiring defendants to raise this claim before trial.

A member amplified these comments, explaining that he was against amending Rule 12 because: (1) there is no demonstrated need for the amendment; (2) the amendment creates a trap for unwary defense attorneys; and (3) it might unintentionally lead to prosecutors becoming lax in crafting indictments.

Another attorney member agreed that the amendment is not needed and also expressed dismay that after trial begins, a defendant would not be able to challenge whether he is charged with a crime, without overcoming procedural hurdles such as those contained in the proposed amendment. A judge member agreed.

Mr. Wroblewski said that the original idea for amending Rule 12 had come from the late Judge Edward Becker, Chief Judge of the United States Court of Appeals for the Third Circuit. The basis for the suggestion was to create a more orderly process for handling pretrial motions. Judge Rosenthal added that an amendment might help sort out the confusion among the courts over how to interpret Rule 12. Ms. Felton agreed that the justification for amending the rule is to clarify for litigants which motions must be raised before trial.

In light of the debate over whether an amendment to Rule 12 was advisable, Judge Tallman called for a vote on whether the Committee should proceed with consideration of the proposed amendment.

The Committee voted 8-4 in favor of proceeding with consideration of the proposed amendment.

Following this vote, discussion centered on seeking a compromise to satisfy the concerns of some members that the proposed amendment would pose an unfair burden to defendants. Chief among these concerns was the procedural barrier that a defendant would face by missing the pretrial deadline for filing a motion. Under the proposed amendment, a defendant who missed the deadline would be deemed to have waived the claim and must show “cause and prejudice” in order to receive relief from the waiver and bring the motion. The change was intended to reflect existing law.

To provide more leeway to a defendant who misses the pretrial deadline, a member noted that there is usually a short period between the pretrial motion deadline and the start of trial and suggested that if the defendant seeks to raise the claim during this period, a district judge should be permitted to consider it without regard to “cause and prejudice.” A judge participant agreed, saying that a district judge’s discretion to consider such a motion should be unfettered if the motion is filed before jeopardy attaches.

To incorporate this concept into the proposed amendment, a member moved to modify the proposed amendment by deleting in subdivision 12(e)(1) the sentence that reads: “Upon a showing of cause and prejudice, the court may grant relief from the waiver.” (lines 91-93 on page 125 of Agenda Book), and inserting in its place the following language:

The district court, in its discretion, may grant relief from the waiver any time before jeopardy attaches. Thereafter, the court may grant relief from waiver upon a showing of cause and prejudice.

A judge member expressed concern that the proposed modification would be read liberally by attorneys as condoning last-minute motions. He said he preferred the current rule's strict deadlines. Another judge member countered that he thought the amendment captured the current practice in federal court.

Judge England voiced misgivings over crafting a rule that seems solicitous of attorneys who miss an important deadline. Another judge said that he favored the modification because a district judge should have maximum discretion to correct errors when a person's liberty is at stake. A member added that many defense attorneys are inexperienced and make mistakes. They deserve to be helped by the rules.

Professor King pointed out that the proposed amendment already contains new language intended to help defense attorneys: In Rule 12(b)(3), the phrase "if the basis for the motion is then available" (line 15 on page 120 of Agenda Book) was added to allow defense lawyers to raise motions after the pretrial deadline, without a showing of cause and prejudice, if the grounds for the motion were not previously available.

The Committee voted 6-5 against the proposed modification to the proposed amendment to Rule 12(e)(1).

A member moved to insert the word "reasonably" before "available" in subdivision Rule 12(b)(3) (line 15 on page 120 of Agenda Book).

The motion was approved with two dissents.

Discussion turned to proposed Rule 12(e)(2), which would create a different standard of review for a class of specified untimely claims. Instead of requiring a showing of "cause and prejudice," this provision would permit review for plain error, as defined by Rule 52. A member suggested that in addition to an untimely claim that a charge failed to state an offense, untimely motions raising double jeopardy and limitation errors should also receive this more generous standard of review, and moved to insert "double jeopardy" and "statute of limitations" in the bracketed part of subdivision Rule 12(e)(2) (lines 97-98 on page 125 of Agenda Book). Professor Beale noted that the precise wording of this amendment would be subject to revision by the style consultant.

The motion was approved unanimously.

It was moved that the Committee approve the entire proposed amendment to Rule 12 and a conforming amendment to Rule 34 and send both the amendments to the Standing Committee for publication.

The Committee voted 8-4 to approve the proposed amendment to Rule 12, as modified, and a conforming amendment to Rule 34, and send the amendments to the Standing Committee for publication.

C. Rule 11 (Pleas)

Judge Rice, Chair of the Rule 11 subcommittee, reported that the subcommittee had prepared a draft amendment to Rule 11 (page 129 of Agenda Book). It would add a new item to the list of notifications a judge must give a defendant when taking a guilty plea. In response to the recent Supreme Court decision in *Padilla v. Kentucky*, __U.S.__ (No. 08-651; March 31, 2010), which held that defense counsel has a duty to inform a defendant whether a guilty plea carries a risk of deportation (formally known as “removal”), the proposed amendment would require a judge to inform a defendant that a guilty plea may have significant immigration consequences.

Judge Rice also reported that the subcommittee recommended that the Federal Judicial Center amend the Judges’ Benchbook by adding the risk of deportation to the list of collateral consequences that a judge must address when taking a guilty plea from a defendant.

A judge member expressed his strong opposition to the proposed amendment. Adding to the list of matters that must be addressed during a plea colloquy was a “slippery slope,” that would open the door to future amendments and eventually turn a plea colloquy into a minefield for a judge. In addition, he noted that *Padilla* is based solely on the constitutional duty of defense counsel and does not speak to the duty of judges. Finally, the member said he had no objection to amending the Benchbook, but urged the Committee not to make the additional warning mandatory by incorporating it into Rule 11.

Another judge member echoed the concern about adding to the already long list of warnings that are compulsory under Rule 11. He mentioned that in his home state, pleading guilty to certain crimes may cause the defendant to forfeit a state pension. He asked whether that consequence should now also be included in the plea colloquy.

A member spoke out in strong support of the amendment, arguing that it is necessary because immigration cases now comprise a huge portion of the federal caseload and because *Padilla* emphasized the importance of immigration consequences.

Ms. Felton pointed out that the Department has advised prosecutors to include a discussion of immigration consequences in plea agreements because of the significance of those consequences. Similarly, she believes that judges should warn a defendant who pleads guilty that the plea could implicate his or her right to remain in the United States or to become a U.S. citizen.

Several other members spoke in favor of the proposed amendment. One agreed that *Padilla* was limited to the duty of defense counsel to warn a defendant about immigration consequences, but argued that the Supreme Court's logic also supported requiring a judge to issue a similar warning. Addressing the "slippery slope" argument, a member pointed out that the Committee is not a judicial body and if it approved the addition of this new warning to Rule 11, the addition would not create binding precedent that would force the Committee to add more warnings in the future. Deportation, the member continued, is qualitatively different than the loss of other rights triggered by a guilty plea and therefore warrants inclusion on the list of matters that must be discussed during a plea colloquy.

In light of the debate over whether an amendment to Rule 11 should be considered at all, Judge Tallman called for a vote on whether the Committee should proceed with consideration of the proposed amendment.

The Committee voted 7-5 in favor of proceeding with consideration of the proposed amendment.

Following this vote, Judge Rice moved to adopt the actual language of the proposed amendment, which adds a new subparagraph to the list contained in Rule 11(b)(1). (Text of the amendment is located on page 129 of Agenda Book.) Following a brief discussion, it was moved that the proposed amendment be modified by deleting it and substituting the following:

(O) that a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

The motion was approved unanimously.

The Committee acknowledged that the language would be subject to additional restyling by the style consultant.

Turning to the recommended amendment to the Judges' Benchbook (page 130 of Agenda Book), members debated whether it was advisable for a judge to ask a defendant directly if he or she is a United States citizen. Several suggested it was not advisable and recommended that a judge could preface any warning about immigration consequences with a phrase such as, "If you are not a U.S. citizen, then . . ." However, it was agreed that the publisher of the Benchbook, the Federal Judicial Center, should resolve the issue.

It was moved that the Judges' Benchbook be amended by adding the language on page 130 of the Agenda Book. Judge Rosenthal asked that the Federal Judicial Center keep the Committee informed of any changes to the Benchbook in order to ensure consistency with the Committee's proposed change to Rule 11.

The motion was approved unanimously.

In light of the previous discussion that highlighted the Committee's reluctance to impose greater burdens on judges to give additional warnings under Rule 11, Judge Rice withdrew the proposed amendment dealing with sex offenses (located on page 130 of Agenda Book). He recommended, however, that the Judges' Benchbook be amended by adding the warning (located on page 131 of Agenda Book).

Several members argued that the proposed warning should include broader language to avoid unintentionally omitting any important consequences of pleading guilty to a sex offense, such as the possibility of civil commitment. Judge Rice agreed and requested that Professors Beale and King revise the proposed language accordingly and circulate a draft to members for approval by e-mail. Judge Tallman added that he would also circulate a proposed letter to the Federal Judicial Center recommending the Committee's proposed changes to the Benchbook.

IV. 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 it appeared that Congress would not consider any rules-related legislation before adjourning in October for the mid-term elections.

Mr. Wroblewski noted that the Crime Victims' Rights Act ("CVRA") is due to be reauthorized next year and he anticipates that the law might be revised slightly. He added that in furtherance of the Department's outreach program under the CVRA, the Department has increased its efforts to contact victims' rights groups and solicit their views.

B. Update on Work of the Sealing Subcommittee

Judge Zagel reported that the Standing Committee's Sealing Subcommittee had issued its report to the Standing Committee. It surveyed sealing practices in federal court and made several recommendations. The full report is available on page 136 of the Agenda Book.

C. Update on Work of the Privacy Subcommittee

Judge Raggi reported that the Standing Committee's Privacy Subcommittee had concluded its work and would issue its report in January 2011. It will recommend continued study of several problematic areas but will not suggest any specific changes to the rules.

A judge member voiced his concern about protecting the privacy of jurors. He said that he had recently concluded a high-profile trial after which some jurors had been harassed by the

press. He related how one juror was afraid to go home because her house was being monitored from the air by a helicopter deployed by the media. According to the member, this treatment of jurors highlights the need for a rule that would require the media to honor a juror's request not to be contacted after a trial. It was suggested that failure to honor the request would result in sanctions.

Judge Raggi agreed that juror privacy was of paramount concern, as the jury's critical role in the administration of justice deserves special consideration. While the Privacy Subcommittee will not make specific proposals to address the matter, she said that the issue will be monitored as the federal courts grapple with how best to resolve it.

D. Administrative Office Forms Regarding Appearance Bonds

Mr. McCabe briefed the Committee on revision of a national form, AO Form 98 (Appearance Bond), designed to ensure the appearance of a criminal defendant in federal court. The AO Forms Working Group of judges and clerks had studied the form and a subcommittee chaired by Magistrate Judge Boyd Boland (D. Colorado) had produced a draft. In addition, other related forms were also revised. (Drafts of the forms are located on pages 155-160 of the Agenda Book). The principal substantive change is to transfer a defendant's agreement to appear from another form to the face of the appearance bond itself. As Judge Boland explained in his memorandum to the Forms Working Group, "the agreement to appear is so fundamental to the purpose of the appearance bond . . . that it should be contained in the Appearance Bond itself." (Agenda Book at 149).

Mr. McCabe reported that he was working on several stylistic changes to the proposed new forms to make them more readable. He added that a style consultant would also be reviewing and revising the forms. Once these changes are made, the final forms will be forwarded to the Criminal Law Committee, which will review them before the forms are posted on the J-Net, the judiciary's intranet, for review and comment.

As an initial matter, Judge Tallman asked whether the Committee had any authority to make suggestions to change the forms, given that a different committee, the Criminal Law Committee, is charged with overseeing them. Mr. McCabe responded that the Director of the Administrative Office has ultimate authority over the forms, and the Forms Working Group would welcome any suggestions by the Committee.

Members then offered several suggestions. One suggested that the various promises listed in the first sentence of the Appearance Bond Form would be easier to follow if they were broken out and listed separately. Professor King suggested that the condition of release listed on Form 199B (Additional Conditions of Release) as subsection "r" (page 160 of Agenda Book) might be more appropriately listed as a condition of release on Form 199A (Order Setting Conditions of Release). Judge Tallman noted that Form 199A appeared to be missing a signature

line for the judge issuing the Order Setting Conditions of Release. Finally, Judge Rosenthal suggested that the word “execute” be changed to “sign” on the bottom of Form 199A.

V. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman reminded members that the next meeting would take place in Portland, Oregon, on Monday and Tuesday, April 11-12, 2011. He thanked all the members and guests for attending and adjourned the meeting.

Respectfully submitted,

Henry Wigglesworth
Attorney Advisor

TAB
8-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

EUGENE R. WEDOFF
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: Sidney A. Fitzwater, Chair
Advisory Committee on Evidence Rules

DATE: November 3, 2010

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 12, 2010 in San Diego, California. Now that the restyled Evidence Rules has been approved by the Standing Committee and the Judicial Conference, the Committee is focusing primarily on possible rule changes necessitated by the Supreme Court's decision in *Crawford v. Washington* and its progeny, including the Court's decision in *Melendez-Diaz v. Massachusetts*. The Committee is not proposing any action items for the Standing Committee at its January 2011 meeting. But as explained below, the Committee may request approval at the June 2011 meeting of the Standing Committee to publish an amended Rule 803(10) for public comment.

II. Action Items

No action items.

III. Information Items

A. Possible Amendment to Evidence Rule 803(10) in Light of *Melendez-Diaz v. Massachusetts*

The Committee is considering whether, in light of the Supreme Court's June 2009 decision in *Melendez-Diaz v. Massachusetts*, Rule 803(10) should be amended. The Committee may request approval at the June 2011 meeting of the Standing Committee to publish a proposed amended Rule 803(10) for public comment.

The Court held in *Melendez-Diaz* that certificates reporting the results of forensic tests conducted by analysts are "testimonial" within the meaning of the Confrontation Clause, as construed in *Crawford v. Washington*. Consequently, admitting such certificates in lieu of in-court testimony violates the accused's right to confrontation. The Committee discussed whether *Melendez-Diaz* would also bar the admission of certificates offered to prove the absence of a public record under Rule 803(10). Like the certificates at issue in *Melendez-Diaz*, certificates proving the absence of public records are prepared with the sole motivation that they be used at trial as a substitute for live testimony. Lower courts after *Melendez-Diaz* have recognized that admitting certificates of the absence of public records under Rule 803(10) violates the accused's right to confrontation.

The Committee will consider at its April 2011 meeting whether to recommend that Rule 803(10) be amended and, if so, how it should be amended to eliminate any Confrontation Clause deficiencies. One option is to add a "notice-and-demand" procedure to the Rule. This would require that the person who prepared the certificate testify in person only if the defendant makes a pretrial demand for in-court testimony. In *Melendez-Diaz* the Court specifically approved a state version of a notice-and-demand procedure. The Committee has asked the Reporter to work with the Justice Department to review all the possible viable alternatives for a notice-and-demand procedure. The Committee has also requested that the Reporter consider an alternative draft that would prevent the use of Rule 803(10) when a record is offered by the government in a criminal case.

B. Evidence Rules That Do Not Appear to Require Amendment after *Melendez-Diaz v. Massachusetts*

The Committee also considered whether other Evidence Rules may require amending after *Melendez-Diaz*. It tentatively concluded (1) that records fitting within the business records exception are unlikely to be testimonial, and that any uncertainty about the admissibility of business records in certain unusual cases should await case law development; (2) records that are admissible under the public records exception are unlikely to be testimonial because, to be admissible under that exception, the record cannot be prepared with the primary motivation of use in a criminal prosecution; and (3) authenticating business and public records by certificate under various provisions in Rule 902 is unlikely to raise constitutional concerns because the Court in *Melendez-Diaz* held that certificates that merely authenticate documents are not testimonial, and addressing any uncertainty about the constitutionality of the Rule 902 provisions in criminal cases should await case law development.

C. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Committee reviewed a memorandum from the Reporter that contained a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The Committee concluded that there is nothing in the case law that mandates amending the Evidence Rules (except Rule 803(10)) at this time. The Committee will continue to monitor important developments, including (1) the Court's consideration of *Michigan v. Bryant*, which may impact the admissibility of excited utterances under Rule 803(2); (2) the Court's consideration of *Bullcoming v. New Mexico*, which concerns whether certificates can be introduced by a witness other than the person who prepared them, and which may have an effect on the application of Rule 703; and (3) the case law allowing testimonial statements to be admitted not for their truth but for "background" or "context."

D. Evidence Rules 803(6)-(8)

The restyling project uncovered an ambiguity in Rules 803(6)-(8), the hearsay exceptions for business records, absence of business records, and public records. Under the Rules, records that meet specified requirements are admissible "unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The Rules do not specify who has the burden of showing trustworthiness or untrustworthiness.

During the restyling project it was proposed that this ambiguity be eliminated by placing the burden on the opponent to show lack of trustworthiness. But the Committee did not adopt this proposal as part of restyling because it concluded that the change would be substantive. When the Standing Committee approved the Restyled Rules, several members suggested that the Committee consider changing Rules 803(6)-(8) to clarify that the opponent has the burden of showing untrustworthiness. At its October 2010 meeting, the Committee discussed this question. It then requested that the Reporter consult with representatives of the ABA Litigation Section, the American College of Trial Lawyers, and other interested parties to determine whether it would be helpful to propose such an amendment. At its April 2011 meeting, the Committee will revisit the possibility of amending these Rules.

E. Circuit Conflict on Rule 804(b)(1)

A circuit split has developed in applying Rule 804(b)(1), which provides a hearsay exception for testimony offered against a party who, at the time it was made, had a motive and opportunity to develop it that was "similar" to the motive and opportunity it would have if the declarant could be produced for trial. A split has developed regarding the admissibility of grand jury testimony that is favorable to the accused. Some circuits have held that such favorable testimony is generally inadmissible against the government at trial because the prosecutor's motive to develop such testimony is ordinarily not similar to what it would be at trial, given the differing operative standards of proof before the grand jury and at trial. Other circuits have held that such testimony is admissible, noting that the respective motives need only be "similar" and not identical or equally intense.

The Committee determined that attempting to amend the Rule would not be beneficial. Although the issue is important, it is narrow. And drafting a solution may be controversial and extremely difficult. The Committee also noted that the Supreme Court has previously shown an interest in interpreting Rule 804(b)(1) as it applies to grand jury testimony, so it is possible that the Court will resolve the current circuit split. The Committee will continue to monitor this matter, but it will not propose an amendment to Rule 804(b)(1) at this time.

F. Other Rules Comments Considered

The Committee considered a public comment suggesting a change to the designation of hearsay statements admissible under Rule 801(d) as “not hearsay.” Although statements that fall under Rule 801(d) — prior statements of testifying witnesses and statements of party-opponents — in fact fit the definition of hearsay, the Rule designates them as “not hearsay.” Analytically, it would be better to designate these provisions “hearsay exceptions.”

The Committee concluded that courts and litigants are familiar with Rule 801(d) as written and that it has not caused problems in practice. The disruption of amending the Rule would outweigh the marginal benefit of an amendment. The Committee will not propose an amendment to change the designation of Rule 801(d) statements.

During the restyling process, the American College of Trial Lawyers commented on the Restyled Rules. One set of comments addressed Rule 410. Because the comments were substantive, the Committee did not consider them until the restyling project was completed. The College proposes two basic changes: (1) clarify that the protections of Rule 410 apply only to a party in the case in which the evidence is offered, i.e., that a withdrawn guilty plea is admissible if the person who entered the plea is only a witness and not a party in the case; and (2) provide that the protection for “withdrawn” guilty pleas also extends to guilty pleas that are rejected or vacated by the court.

The Committee was advised that the case law, while sparse, uniformly holds that Rule 410 does not apply to withdrawn guilty pleas of testifying witnesses, and that all the major treatises conclude that Rule 410 does not apply to the withdrawn guilty pleas of testifying witnesses. Regarding vacated and rejected guilty pleas, the Committee was informed that the case law, while sparse, uniformly holds that Rule 410 does preclude admission of a vacated or rejected guilty plea of the defendant in the case. The DOJ and public defender committee members noted that they had surveyed others and found no problems in the operation of Rule 410. The Committee will not propose an amendment to Rule 410.

G. Privilege Project

Several years ago the Committee undertook a project to publish a pamphlet describing the federal common law on evidentiary privileges. The Committee determined that, although it would be inappropriate to propose to Congress a codification of the evidentiary privileges, it would be valuable to the Bench and Bar to set out in text and commentary the federal common law privileges. The Consultant to the Committee has prepared drafts of a number of privileges, but this project has been deferred until the restyling project was completed.

The Committee has asked the Consultant to resume the project and to report back with drafts and commentary at the April 2011 meeting.

IV. Minutes of the Fall 2010 Meeting

The Reporter's draft of the minutes of the Committee's October 2010 meeting is attached to this report. These minutes have not yet been approved by the Committee.

TAB
8-B

Advisory Committee on Evidence Rules

Minutes of the Meeting of October 12, 2010

San Diego, California

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the “Committee”) met on October 12, 2010 in San Diego, California.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Joseph F. Anderson, Jr.
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. Joan N. Ericksen.
Marjorie A. Meyers, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, 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. Robert L. Hinkle, former Chair of the Evidence Rules Committee
Hon. Paul S. Diamond, Liaison from the Civil Rules Committee
Hon. Karen Caldwell, Liaison from the Bankruptcy Rules Committee
William W. Taylor, III, Esq., former member of the Evidence Rules Committee
John K. Rabiej, Esq., Rules Committee Support Office
James N. Ishida, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Timothy Reagan, Esq., Federal Judicial Center
Jeffrey Barr, Esq., Rules Committee Support Office

I. Opening Business

Judge Fitzwater, the new chair of the Committee, welcomed the members and stated that he was honored to return to service on the Rules Committees.

The minutes of the Spring 2010 meeting were approved with two revisions.

Judge Fitzwater asked Judge Hinkle to speak about the departing members of the Committee. Judge Hinkle noted that Bill Taylor had provided stellar service to the Committee, most importantly from his perspective as a practitioner in high-level litigation. Bill Taylor then expressed his gratitude to the Committee members and praised the Committee's work. Judge Hinkle noted that Justice Hurwitz could not attend the meeting due to an accident. Committee members expressed their best wishes for Justice Hurwitz's quick recovery and noted that his brilliant contributions to the work of the Committee — especially in the effort to enact Rule 502 — would be sorely missed.

The Reporter then requested the opportunity to provide a tribute to Judge Hinkle. The Reporter noted that the recently completed restyling project could not have been accomplished without Judge Hinkle's brilliant efforts. Committee members lauded Judge Hinkle's wise counsel, his integrity, and his inspirational leadership.

The Chair then welcomed and introduced the new members of the Committee — Justice Brent Appel of the Iowa Supreme Court, and Paul Shechtman, a practicing lawyer and adjunct Evidence professor at Columbia Law School. The Chair also welcomed Judge Diamond as the new liaison from the Civil Rules Committee, and Judge Caldwell, who was substituting for Judge Wiznur, the Bankruptcy Rules Committee liaison.

At the Chair's request, Judge Hinkle reported on the June meeting of the Standing Committee. The Standing Committee unanimously approved the restyled Evidence Rules. That approval was the result of the hard work and cooperative efforts of the Style Subcommittee of the Standing Committee, the Evidence Committee, and Professor Kimble, the style consultant. The product was substantially improved by careful readings by three members of the Standing Committee before its June meeting — Judge Raggi, Judge Hartz, and Dean Levi. Judge Hinkle and the Reporter expressed their gratitude to Judges Raggi and Hartz and to Dean Levi for their time and outstanding effort.

Judge Rosenthal then reported on legislative developments. She noted that the Rules Committee had already contacted staff members of the House Judiciary Committee to provide background on the restyling project, and that staffers had responded affirmatively. The Rules Committee is continuing to monitor two pieces of proposed legislation: 1) a proposal to alter the *Twombly/Iqbal* construction of Civil Rule 8; and 2) the proposed Sunshine in Litigation Act, which if enacted would have an impact on orders issued under Evidence Rule 502. At this point, neither bill is near enactment, but the Rules Committee will continue to monitor developments.

II. Restyling Project

The Restyled Rules of Evidence have been approved by the Standing Committee and the Judicial Conference. After the Evidence Rules Committee completed its work on the project, some changes were made in response to comments and suggestions from Standing Committee members in advance of the Standing Committee's meeting. Those changes were approved by Judge Hinkle, the Reporter, Professor Kimble, and the members of the Style Subcommittee of the Standing Committee. At the Fall Committee meeting, the Reporter presented those changes for the Committee's information and review.

Examples of changes reviewed at the meeting included:

- 1) reinserting "wrongs" into Rule 404(b) to assure that all evidence currently covered by the Rule will remain so — the concern being that evidence of "crimes or other acts" as restyled might not cover a wrongful failure to act;
- 2) making a slight change to Restyled Rule 602 to clarify that when a witness testifies to both expert and lay matters, the witness must have personal knowledge as a foundation for the lay testimony;
- 3) reinserting the last sentence of Rule 704(b), to emphasize that the criminal defendant's mental state is a jury question; and
- 4) changing Rule 901(a) to clarify that authentication is a requirement for proffered evidence.

III. Possible Amendments to Federal Rules in Light of *Melendez-Diaz v. Massachusetts*

In *Melendez-Diaz v. Massachusetts*, the Supreme Court held that certificates reporting the results of forensic tests conducted by analysts were "testimonial" and therefore the admission of such a certificate (in lieu of testimony) violated the accused's right to confrontation. 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*.

The Reporter prepared a memorandum for the Committee on the effect of *Melendez-Diaz* on the constitutionality, as applied, of the hearsay exceptions that cover records in the Federal Rules of Evidence. The memorandum made the following tentative conclusions:

- 1) Records fitting within the business records exception are unlikely to be testimonial, and

addressing any uncertainty about the constitutional admissibility of business records in certain unusual cases should await more case law development.

2) Records admissible under the public records exception are unlikely to be testimonial, because to be admissible under that exception the record cannot be prepared with the primary motivation of use in a criminal prosecution.

3) Authenticating business and public records by certificate under various provisions in Rule 902 is unlikely to raise constitutional concerns, because the Court in *Melendez-Diaz* found an exception to testimoniality for certificates that did nothing but authenticate a document. Addressing any uncertainty about the constitutionality of the Rule 902 provisions in criminal cases should await more case law development.

4) *Melendez-Diaz* appears to bar the admission 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. Lower courts after *Melendez-Diaz* have recognized that admitting a certificate of absence of public record under Rule 803(10) violates the accused's right to confrontation after *Melendez-Diaz*.

In light of the above, the Committee discussed the possibility of an amendment to Rule 803(10) that would correct the constitutional problem raised by *Melendez-Diaz*. It was suggested that the problem arises mostly in cases involving a) illegal reentry, in which the government must prove that the defendant did not have permission to re-enter, and b) firearms prosecutions, in which the government has to prove that a firearm was not properly licensed.

The possible fix suggested in the Reporter's memo was to add a "notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if the defendant made a pretrial demand for that production. The Court in *Melendez-Diaz* specifically approved a state version of a notice-and-demand procedure, and the Reporter's draft added the language from that state version to the existing Rule 803(10).

Committee members were divided on whether to propose an amendment to Rule 803(10) that would add the basic notice-and-demand procedure used as an example in *Melendez-Diaz*. The public defender argued that *Melendez-Diaz* did not raise any substantial practical problems of compliance, because the parties could stipulate to the absence of a record, or the case agent could check for the record and then simply testify to its absence as part of that agent's overview testimony. She noted however that she had contacted other public defenders on the subject and found no objection to the addition of a notice-and-demand procedure to Rule 803(10).

Another member questioned whether a notice-and-demand procedure would be very helpful in alleviating the burden of producing a government witness. The member predicted that defendants would enter such demands pro forma, and then would simply stipulate to the record once the

government produced the witness. But others thought that a notice-and-demand procedure would be helpful for at least two reasons. First, not all defendants would engage in the gamesmanship of making the demand solely to impose a burden on the government. Second and more important, a notice-and-demand procedure would at least provide predictability, because a prosecutor would know that the witness must be produced. The alternative — a proffered stipulation to which the defendant may or may not respond — does not provide the same predictability.

Another member noted that whatever the value of a notice-and-demand procedure, the fundamental problem of Rule 803(10) is that it is unconstitutional as applied. And one of the primary goals of the Committee has been to propose amendments necessary to cure any constitutional defect in the Evidence Rules. While a notice-and-demand procedure may not have a profound practical impact, the fact is that it would cure the constitutional infirmity in Rule 803(10) after *Melendez-Diaz*.

The DOJ representative presented preliminary statistics indicating that *Melendez-Diaz* has imposed burdens on the government in presenting evidence of the absence of a public record. She stated that the Department would welcome a notice-and-demand provision, but wished to review the notice-and-demand procedures that do exist to determine which version might be optimal. The Department does not intend to propose the so-called “subpoena procedure,” which would impose the burden of producing the witness on the accused rather than the government. Committee members recognized that the constitutionality of a subpoena procedure was doubtful after *Melendez-Diaz*, where the Court declared that the right to confrontation could not be satisfied by providing a right of compulsory process.

At the end of the discussion, the Committee unanimously resolved to consider a proposed amendment to Rule 803(10) at its next meeting. The Reporter was directed to work with the Justice Department to review all the possible viable alternatives for a notice-and-demand procedure, including ones that add procedural details such as providing for continuances. The Reporter was also asked to consider an alternative draft that would prevent the use of Rule 803(10) when a record is offered by the government in a criminal case.

IV. Crawford Developments

The Reporter provided the Committee with a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The digest was grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Committee reviewed the memo and noted that — with the possible exception of Rule 803(10), discussed *supra* — nothing in the developing case law mandated an amendment to the Evidence Rules at this time. The Committee resolved to continue to monitor a number of important developments, including: 1) the Supreme Court’s consideration of *Michigan v. Bryant*, which may have an effect on the admissibility of excited utterances under Rule 803(2); 2) the Supreme Court’s

consideration of *Bullcoming v. New Mexico*, which concerns whether certificates can be introduced by a witness other than the person who prepared it, and which may have an effect on the application of Rule 703; and 3) the case law allowing testimonial statements to be admitted not for their truth but for “background” or “context.”

V. Proposed Amendment to Rule 410

During the restyling process, the American College of Trial Lawyers provided a number of detailed and helpful comments for improvement of the Restyled Rules as they were issued for public comment. One set of the College’s comments was addressed to Rule 410, but the College noted that those comments called for substantive changes to the Rule. Accordingly the Committee’s consideration of the suggested changes to Rule 410 was deferred until the restyling project was completed.

At the Fall 2010 meeting, the Committee considered a memorandum from Professor Broun and the Reporter that evaluated the changes proposed by the College. Two basic changes were proposed: 1) clarify that the protections of Rule 410 apply only to a party in the case in which the evidence is offered, i.e., that a withdrawn guilty plea is admissible if the person who entered the plea is only a witness and not a party in the case; and 2) provide that the protection for “withdrawn” guilty pleas also extends to guilty pleas that are rejected or vacated by the court. The most important suggestion was the one concerning guilty pleas of testifying witnesses — the College had suggested that many defense counsel do not ask for such information from the government because they do not believe the withdrawn guilty plea of a cooperating witness would be admissible under Rule 410.

The memorandum noted that there is some ambiguity in the text of Rule 410 as to whether it protects against admission of withdrawn guilty pleas of witnesses, as opposed to the defendant in the case. But the memorandum also noted that the case law, while sparse, has held uniformly that Rule 410 does not apply to withdrawn guilty pleas of testifying witnesses. Likewise, all of the major treatises state that Rule 410 does not apply to the withdrawn guilty pleas of testifying witnesses. As to vacated and rejected guilty pleas, the case law again is sparse, but it uniformly holds that Rule 410 does preclude admission of a vacated or rejected guilty plea of the defendant in the case. The reasoning is that the policy of protecting plea discussions is as applicable when the plea is rejected or vacated as it is when the plea is withdrawn.

In discussion, both the DOJ representative and the public defender noted that they had surveyed others in their respective departments and found no reports of any problem in the operation of Rule 410 — either in general or with respect to the two suggestions made by the College. Given the uniformity of case law and the lack of any problem in operation of the Rule, the Committee unanimously resolved not to propose any amendment to Rule 410.

VI. Proposed Amendment to Rules 803(6)-(8)

The restyling project uncovered an ambiguity in Rules 803(6)-(8), the hearsay exceptions for business records, absence of business records, and public records. Those exceptions in current form set forth admissibility requirements and then provide that a record meeting those requirements is admissible despite the fact it is hearsay “unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.” The rules do not specifically state which party has the burden of showing trustworthiness or untrustworthiness.

The restyling sought to clarify the ambiguity by providing that a record fitting the other admissibility requirements would satisfy the exception if “the opponent does not show that” the source of information, etc., indicate a lack of trustworthiness. But the Committee did not submit this proposal as part of restyling because research into the case law indicated that the change would be substantive. While most courts impose the burden of proving untrustworthiness on the opponent, a few courts require the proponent to prove that the record is trustworthy. Thus the proposal would have changed the law in at least one court, and so was substantive under the restyling protocol.

When the Standing Committee approved the Restyled Rules, several members suggested that the Evidence Rules Committee consider making the minor substantive change that would clarify what is implicit in Rules 803(6)-(8) — that the opponent has the burden of showing untrustworthiness. Those members believed that allocating the burden to the opponent made sense for a number of reasons, including: 1) the Rules’ reference to a “lack of trustworthiness” suggests strongly that the burden is on the opponent, as it is the opponent who would want to prove the lack of trustworthiness; 2) almost all the case law imposes the burden on the opponent; and 3) if the other admissibility requirements are met, the qualifying record is entitled to a presumption of trustworthiness, and adding an additional requirement of proving trustworthiness would unduly limit these records-based exceptions.

In discussion, some members suggested that it was better to leave the rule fuzzy on who has the burden as to untrustworthiness. They suggested that the determination of trustworthiness might be a process and a court may decide that a record is untrustworthy even if the opponent does not provide any evidence or argument on that subject. Others suggested that imposing the burden on the opponent might impose difficulties on opponents who may not have an opportunity to discover and present evidence of untrustworthiness — although whatever difficulty exists is in fact already imposed by the predominant case law. Another member noted that there has to be a burden allocation; that allocation is only relevant when the evidence is in equipoise; and therefore that a clarification allocating the burden to the opponent in a narrow band of cases is well-justified. The DOJ representative noted that the Department was in favor of the change as a helpful clarification.

After discussion, the Committee directed the Reporter to check with representatives of the ABA Litigation Section, the American College of Trial Lawyers, and other interested parties to determine whether it would be helpful to propose an amendment that would clarify that the burden of showing untrustworthiness is on the opponent. The Committee determined that it would revisit

the question of a possible amendment at the next meeting. The Committee also determined that if an amendment were to be proposed to allocate the burden to the opponent, a statement should be included in the Committee note that the opponent, in meeting that burden, is not necessarily required to introduce affirmative evidence of untrustworthiness.

VII. Proposal to Amend Rule 801(d) “Not Hearsay” Designation

The Committee considered a public comment from Professor Sam Stonefield, suggesting a change to the designation of hearsay statements admissible under Rule 801(d) as “not hearsay.” The problem is that the statements that fall under Rule 801(d) — prior statements of testifying witnesses and statements of party-opponents — do in fact fit the definition of hearsay and yet the Rule says that they are “not hearsay.” Analytically, it would be better to call these provisions “hearsay exceptions” because that is what they are. (The categories were designated “not hearsay” because admissibility was not grounded on the kinds of circumstantial guarantees of reliability that supported the traditional hearsay exceptions. But this attempt to alleviate confusion has in fact caused confusion because something that is hearsay is called “not hearsay.”).

The Reporter prepared a memo on the public comment, and set out the various drafting alternatives, from minimal to more radical reorganization of all the hearsay exceptions. In discussion, Committee members were unconvinced of the need for an amendment. They noted that there is no practical difference between a statement that is “not hearsay” under Rule 801(d) and one that is “hearsay but subject to an exception” under Rules 803, 804 and 807. When covered by any of these Rules, the statement is admissible for its truth despite the fact it is hearsay. Thus, the change would be a technical one. Committee members concluded that courts and litigants have become comfortable with referring to, e.g., statements of party-opponents as not hearsay, and therefore any marginal benefit in the proposed amendment would be outweighed by the disruption that such an amendment — that any amendment — would cause. The Committee determined unanimously that it would not propose an amendment to change the designation of Rule 801(d) statements.

VIII. Circuit Conflict on Rule 804(b)(1)

The Reporter provided a memo on a circuit split that has developed in the application of the hearsay exception for prior testimony, Rule 804(b)(1). That Rule provides a hearsay exception for testimony offered against a party who, at the time it was made, had a motive and opportunity to develop it that was “similar” to the motive and opportunity it would have if the declarant could be produced for trial. The split is over the admissibility of grand jury testimony that is favorable to the accused. Some circuits have held that such favorable testimony is generally inadmissible against the government at trial, because the prosecutor’s motive to develop such testimony is ordinarily not similar to what it would be at trial, given the differing operative standards of proof at grand jury and trial. Other circuits have held that such testimony is admissible, noting that the respective motives need only be “similar” and not identical or equally intense.

The Committee determined that any attempt to amend the Rule would probably cause more problems than it would solve. The conflict in the cases concerns an important question, but it is a narrow one in the context of Rule 804(b)(1). Any attempt to amend the Rule would also have to take into account the consequences for admissibility of preliminary hearing testimony against the accused. And most importantly, resolving the question of admissibility one way or the other would surely be controversial. For example, the DOJ would certainly oppose any rule that made exculpatory grand jury testimony automatically admissible against the government, as such a rule would of necessity change grand jury practice by turning the questioning of every grand jury witness into a trial-like event. And the defense bar would correspondingly oppose any rule change that would bar the admission of exculpatory grand jury testimony in the circuits where that is the law. Finally, drafting a solution that would cover all the nuances of when exculpatory testimony might fairly be admissible against the government under a “similar motive” test would be extremely difficult.

Committee members also noted that the Supreme Court has previously shown an interest in interpreting Rule 804(b)(1) as it applies to grand jury testimony, so it is at least possible that the current circuit conflict will be resolved by the Court.

After discussion, the Committee resolved that it would continue to monitor the circuit split, but that it would not propose an amendment to Rule 804(b)(1) at this time.

IX. Privilege Project

Several years ago the Committee voted to undertake a project to publish a pamphlet that would describe the federal common law on evidentiary privileges. The Committee determined that it would not be appropriate to propose an actual codification of all the evidentiary privileges to Congress. But it concluded that it could perform a valuable service to the Bench and Bar by setting forth in text and commentary the privileges that exist under federal common law. Professor Broun had prepared drafts of a number of privileges, but the project was put on hold given the time and resources required for the restyling project.

At the meeting, Professor Broun reported on the status of the project and the Committee resolved that he should again take up the project and report back to the Committee with drafts and commentary in Spring 2011.

X. Next Meeting

The Spring 2011 meeting of the Committee is tentatively scheduled for April 1 in Philadelphia.

Respectfully submitted,

Daniel J. Capra
Reporter

TAB
9

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

EUGENE R. WEDOFF
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

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

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 6, 2010

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 30 and October 1, 2010, in Santa Fe, New Mexico, to consider a number of proposed amendments to the Bankruptcy Rules and Official Forms. These proposals were suggested by members of the bench and bar or were responsive to recent Supreme Court decisions or to earlier rule changes. 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. At the Standing Committee's June meeting, the Advisory Committee anticipates submitting proposals for some rule and form amendments on which it is continuing to work, along with any rules and forms published for comment in August 2010 that the Advisory Committee approves at its spring meeting.

This report discusses several information items, including two continuing, multi-year projects of the Advisory Committee. These information items are the following:

- a. the proposed rule and form amendments published for comment in August 2010;
- b. a revision of the Part VIII (appellate) Bankruptcy Rules;
- c. the Forms Modernization Project;
- d. the impact of the Supreme Court's *Lanning* and *Schwab* decisions;
- e. conforming amendment of Interim Rule 1007-I; and
- f. communication to the courts about the reduction of a time limit in Rule 1007(a).

II. Information Items

A. Publication of Proposed Amendments to Bankruptcy Rules and Official Forms

At the June 2010 meeting, the Standing Committee authorized the publication of proposed amendments to Bankruptcy Rules 3001, 7054, and 7056, and amendments to Official Forms 10 and 25A. It also approved for publication three new Official Forms – Form 10 (Attachment A); Form 10 (Supplement 1); and Form 10 (Supplement 2) – which were proposed to implement pending rule amendments addressing home mortgage claims. The deadline for the submission of comments on these proposals is February 16, 2011. Thus far two comments have been submitted on the proposals. Public hearings on the proposals are scheduled for January 7, 2011, in San Francisco, and February 4, 2011, in Washington, D.C.

The Advisory Committee will consider all of the comments submitted on these proposals during its April 2011 meeting. The Advisory Committee anticipates that it will present these amendments, with any appropriate changes, to the Standing Committee at its June 2011 meeting for its approval and transmittal to the Judicial Conference.

B. Revision of the Bankruptcy Appellate Rules

At its fall meeting, the Advisory Committee reviewed a partial draft of a revision of Part VIII of the Bankruptcy Rules. This ongoing project seeks, among other things, to adopt a clearer and more accessible style for the bankruptcy appellate rules, bring them into closer alignment with the Federal Rules of Appellate Procedure (“FRAP”), and modernize them to take advantage of current and future technologies for filing, transmitting, and accessing court documents. The Advisory Committee discussed several issues presented by the current draft, including the following:

- a revision of the rules to require the prompt docketing of appeals in the appellate court upon its receipt of the notice of appeal, rather than, as under the current rules, upon its receipt of the completed record;
- the appropriate procedures for electing to have an appeal heard by a district court, rather than a bankruptcy appellate panel, and for resolving disputes over the validity of an election; and
- the advantages and disadvantages of having a self-contained set of bankruptcy appellate rules, as opposed to rules that incorporate by reference FRAP provisions (similar to Part VII’s incorporation of the Federal Rules of Civil Procedure).

Discussion of the last issue revealed support by many members of the Advisory Committee for drafting Part VIII as a self-contained set of rules. Some members noted the complexity of incorporating FRAP by reference into the bankruptcy rules, since – unlike appeals

from a district court – there are sometimes two or three appellate courts to which an appeal may be taken from a bankruptcy court (district court, bankruptcy appellate panel, court of appeals). Other differences between bankruptcy and district court cases – such as the existence within a single bankruptcy case of multiple adversary proceedings, the sometimes voluminous bankruptcy case docket, and the parties’ ability to elect an appellate forum in some cases – may also complicate the wholesale incorporation of FRAP provisions into the Bankruptcy Rules. Other Committee members expressed concern about requiring bankruptcy lawyers to consult, in addition to Part VIII, another set of rules with which many bankruptcy practitioners may be less familiar than with the Civil Rules that are incorporated by reference into Part VII. Finally, some members noted that one of the goals of the revision project, incorporating into the bankruptcy appellate process the use of electronic filing technology, necessitates a departure from the existing FRAP provisions.

Other Committee members voiced support for incorporating by reference in Part VIII existing FRAP provisions, with any necessary modifications stated. Among the other advantages of this approach that they pointed out are the reduction of the length and prolixity of Part VIII and the automatic revision of the bankruptcy appellate rules as FRAP is amended.

In order to illustrate both approaches, Appendix B contains two revisions of proposed Rule 8003. The first option is based on FRAP 3 and 12(a), and it restates in adapted form much of the content of the two appellate rules. The second option incorporates by reference most of FRAP 3 and 12(a) – subject to listed exceptions. Both versions rely on definitions of “appellate court” and “transmit” that are included in proposed Rule 8001.

In the spring the Advisory Committee will meet jointly with the Advisory Committee on Appellate Rules to obtain that committee’s input on the proposed revision of Part VIII and to ensure that the revised bankruptcy rules and FRAP are compatible. Given the scope of the project and the need for careful review of both style and substance by both the Advisory Committee and Standing Committee, the most likely date for publication for comment of the proposed Part VIII revision is August 2012.

C. Forms Modernization Project

The Advisory Committee continues its multi-year Forms Modernization Project (“FMP”), which was initiated to develop recommendations both for making the bankruptcy forms more user-friendly and less error-prone and for taking better advantage of modern information technology.

Next spring the FMP will begin testing with various groups a bankruptcy filing package for individual debtors. Initial drafts of most of the forms in the filing package have been completed or will be completed by the end of 2010. The project’s goal is to incorporate the feedback from the testing phase and to present parts of the filing package to the Advisory

Committee at its fall 2011 and spring 2012 meetings so that the package will be on track to be presented to the Standing Committee for its approval of an August 2012 publication date.

As part of the prepublication testing phase, the FMP will identify and solicit feedback from representatives of professional organizations, software providers, a group of career law clerks, a group of “occasional” attorney filers, and lay people. At the same time, the project will finish drafts of the remaining forms for individuals and will begin drafting forms for businesses so that a second group of forms may be considered for publication in August 2013.

The Advisory Committee’s Subcommittee on Forms leads the project with assistance from representatives from the Advisory Committee, the Bankruptcy Judges Advisory Group, the Bankruptcy Clerks Advisory Group, the CM/ECF NextGen Project, the Federal Judicial Center, the United States Trustee Program, and bankruptcy administrators.

D. Impact of the Supreme Court’s *Lanning* and *Schwab* Decisions

At its fall meeting, the Advisory Committee considered the impact of two Supreme Court decisions from last Term – *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), and *Schwab v. Reilly*, 130 S. Ct. 2652 (2010).

Lanning concerned the calculation of a chapter 13 debtor’s “projected disposable income,” which under § 1325(b)(1) of the Bankruptcy Code the debtor’s plan may be required to devote to payment of unsecured claims. The Court rejected a purely “mechanical” approach to the calculation that considers only the debtor’s average monthly income for the six months before bankruptcy. The Court instead adopted a “forward-looking” approach that allows consideration of changes in the debtor’s income and expenses that have occurred before confirmation or are virtually certain to occur afterward. Because Form 22C¹ calculates disposable income for above-median-income debtors – following the Code definition of “disposable income” – based only on information about the debtor’s prebankruptcy average income and current expenses, the Advisory Committee considered whether the form should be amended.

The Committee tentatively approved adding a question to Form 22C in which above-median-income chapter 13 debtors would list any changes in the income and expenses reported on the form that have already occurred or are virtually certain to occur during the 12 months following the filing of the petition. The same time frame for reporting anticipated changes is set out in § 521(a)(1)(vi) of the Code and is included in Schedules I and J (Current Income and Current Expenditures of Individual Debtor(s)).

¹ Official Form 22C is the Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income.

In *Schwab* the Supreme Court held that an objection under § 522(*l*) of the Bankruptcy Code and Rule 4003 is not required in order for a trustee to limit the value of a debtor's exemption claim to the amount of the exemption stated by the debtor, even when the debtor values the exempted property at the same amount as the exemption. The Court reasoned that the debtor's listing of the claimed exemption and the value of the property in the same amount did not put the trustee on notice that the debtor was claiming as exempt the full fair market value of the property, whatever that value turned out to be. The Committee considered whether Official Form 6, Schedule C (Property Claimed as Exempt) should be revised as a result of *Schwab*.

The Advisory Committee tentatively agreed to amend Schedule C to permit the debtor to state an intention to exempt "the full fair market value of the property" in a manner that would put the trustee on notice of the need to object if the trustee believes the value of the property exceeds the allowed exemption amount. Subsequent to the fall meeting, the Consumer and Forms Subcommittees have considered draft language for the amendment.

If approved by the Advisory Committee at its spring meeting, the Standing Committee will be asked to approve the amendments to Form 22C and Schedule C for publication for comment in August 2011.

E. Conforming Amendment of Interim Rule 1007-I

In a memorandum dated December 5, 2008, the Director of the Administrative Office transmitted to district and bankruptcy courts the recommendation of the Executive Committee of the Judicial Conference that these courts adopt by local rule or standing order Interim Bankruptcy Rule 1007-I, which implemented the National Guard and Reservists Debt Relief Act of 2008. The Act excludes certain members of the National Guard and Reserves from means testing in chapter 7 bankruptcy cases. Because the Act took effect 60 days after enactment and applies only to bankruptcy cases that are begun in the three-year period beginning December 19, 2008, it was implemented by an interim rule, rather than by an amendment of Rule 1007.

Interim Rule 1007-I includes time deadlines contained in Bankruptcy Rule 1007. One of those deadlines was amended effective December 1, 2010. The amendment to Rule 1007(c) extended the time to file the statement of completion of a course in personal financial management in a chapter 7 case filed by an individual debtor from 45 days after the first date set for the meeting of creditors to 60 days after the first date set for the meeting. In response to this amendment, the chairs of the Standing Committee and the Advisory Committee sent a memorandum on November 4, 2010, advising courts that had adopted Interim Rule 1007-I of the need to revise the interim rule's deadline for filing the statement of completion, consistent with the December 1, 2010, change to that time period in Rule 1007. The same procedure was recommended when other deadlines in Rule 1007 were revised in 2009.

F. Communication to Bankruptcy Courts About Reduction of a Time Limit in Rule 1007(a)

On December 1, 2010, Rule 1007(a)(2) was amended to reduce from 14 to 7 days the time for a debtor in an involuntary case to file a list of creditors' names and addresses. During review of the amendment by Congress, House Judiciary Committee staff members expressed concern that some involuntary debtors might be unaware of this change. Although involuntary bankruptcy cases are extremely rare, the Administrative Office, in consultation with the chairs of the Standing and Advisory Committees, agreed to take action in response to the expressed concern. A communication to bankruptcy courts from the Director of the Administrative Office about the amendments that took effect on December 1 highlighted this timing change and pointed out the court's authority to extend the deadline for cause. The memorandum noted that a failure to meet the new deadline due to a lack of knowledge about the amendment might be an especially appropriate ground for an extension during the first six months after the effective date of the shorter time limit.

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

LEE H. ROSENTHAL
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CHAIRS OF ADVISORY COMMITTEES

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RICHARD C. TALLMAN
CRIMINAL RULES


SIDNEY A. FITZWATER
EVIDENCE RULES

November 4, 2010

MEMORANDUM

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

From: Judge Lee H. Rosenthal 
Chair, Committee on Rules of Practice and Procedures

Judge Eugene R. Wedoff 
Chair, Advisory Committee on Bankruptcy Rules

RE: AMENDMENT TO INTERIM BANKRUPTCY RULE 1007-I EFFECTIVE
DECEMBER 1, 2010 (IMPORTANT INFORMATION)

In a memorandum dated December 5, 2008, the Director of the Administrative Office transmitted to you the recommendation of the Executive Committee, acting on behalf of the Judicial Conference, to adopt by local rule or standing order Interim Bankruptcy Rule 1007-I, which implemented the National Guard and Reservists Debt Relief Act of 2008. The Act excludes certain members of the National Guard and Reserves from means testing in chapter 7 bankruptcy cases that are begun in the three-year period beginning December 19, 2008.

Interim Rule 1007-I included time deadlines contained in Bankruptcy Rule 1007. One of those deadlines will be amended effective December 1, 2010 unless Congress acts to the contrary. The amendment will extend the time to file the statement of completion

of a course in personal financial management in a chapter 7 case filed by an individual debtor from 45 days after the first date set for the meeting of creditors to 60 days after the first date set for the meeting. If your district adopted Interim Rule 1007-I, the deadline for filing the statement of completion should be revised effective December 1, 2010, consistent with the change to the time in Rule 1007. The same procedure was recommended when other deadlines in Rule 1007 were revised last year.

A copy of revised Interim Rule 1007-I is distributed with this memorandum. Effective December 1, 2010, revised Interim Rule 1007-I will also be posted on the "Rules and Forms In Effect" page of the courts' public website at:
<http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulesAndForms.aspx>.

If you have any questions about these amendments, please call or e-mail either of us or call Peter G. McCabe, Assistant Director for the Office of Judges Programs, at 202-502-1800 or Scott Myers, Attorney, Bankruptcy Judges Division, at 202-502-1900.

Attachment

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

Interim Rule 1007-I.¹ Lists, Schedules, Statements, and Other Documents; Time Limits; Expiration of Temporary Means Testing Exclusion²

1

* * * * *

2

(b) SCHEDULES, STATEMENTS, AND OTHER DOCUMENTS

3

REQUIRED.

4

* * * * *

5

(4) Unless either: (A) § 707(b)(2)(D)(i) applies, or (B) §

6

707(b)(2)(D)(ii) applies and the exclusion from means testing granted therein extends

7

beyond the period specified by Rule 1017(e),

8

an individual debtor in a chapter 7 case shall file a statement of current monthly

9

income prepared as prescribed by the appropriate Official Form, and, if the current

10

monthly income exceeds the median family income for the applicable state and

11

household size, the information, including calculations, required by § 707(b),

12

prepared as prescribed by the appropriate Official Form.

13

* * * * *

¹Interim Rule 1007-I was adopted by the bankruptcy courts to implement the National Guard and Reservists Debt Relief Act of 2008, Public Law No: 110-438. The Act, which provides a temporary exclusion from the application of the means test for certain members of the National Guard and reserve components of the Armed Forces, applies to bankruptcy cases commenced in the three-year period beginning December 19, 2008.

² Incorporates (1) time amendments to Rule 1007 which took effect on December 1, 2009, and (2) an amendment, effective December 1, 2010, which extended the time to file the statement of completion of a course in personal financial management in a chapter 7 case filed by an individual debtor.

14 (c) TIME LIMITS. In a voluntary case, the schedules, statements, and other
15 documents required by subdivision (b)(1), (4), (5), and (6) shall be filed with the
16 petition or within 14 days thereafter, except as otherwise provided in subdivisions
17 (d), (e), (f), (h), and (n) of this rule. In an involuntary case, the list in subdivision
18 (a)(2), and the schedules, statements, and other documents required by subdivision
19 (b)(1) shall be filed by the debtor within 14 days of the entry of the order for relief.
20 In a voluntary case, the documents required by paragraphs (A), (C), and (D) of
21 subdivision (b)(3) shall be filed with the petition. Unless the court orders otherwise,
22 a debtor who has filed a statement under subdivision (b)(3)(B), shall file the
23 documents required by subdivision (b)(3)(A) within 14 days of the order for relief.
24 In a chapter 7 case, the debtor shall file the statement required by subdivision (b)(7)
25 within ~~45~~ 60 days after the first date set for the meeting of creditors under § 341 of
26 the Code, and in a chapter 11 or 13 case no later than the date when the last payment
27 was made by the debtor as required by the plan or the filing of a motion for a
28 discharge under § 1141(d)(5)(B) or § 1328(b) of the Code. The court may, at any
29 time and in its discretion, enlarge the time to file the statement required by
30 subdivision (b)(7). The debtor shall file the statement required by subdivision (b)(8)
31 no earlier than the date of the last payment made under the plan or the date of the
32 filing of a motion for a discharge under §§ 1141(d)(5)(B), 1228(b), or 1328(b) of the
33 Code. Lists, schedules, statements, and other documents filed prior to the conversion
34 of a case to another chapter shall be deemed filed in the converted case unless the
35 court directs otherwise. Except as provided in § 1116(3), any extension of time to

36 file schedules, statements, and other documents required under this rule may be
37 granted only on motion for cause shown and on notice to the United States trustee,
38 any committee elected under § 705 or appointed under § 1102 of the Code, trustee,
39 examiner, or other party as the court may direct. Notice of an extension shall be
40 given to the United States trustee and to any committee, trustee, or other party as the
41 court may direct.

42 * * * * *

43 (n) TIME LIMITS FOR, AND NOTICE TO, DEBTORS TEMPORARILY
44 EXCLUDED FROM MEANS TESTING.

45 (1) An individual debtor who is temporarily excluded from means testing
46 pursuant to § 707(b)(2)(D)(ii) of the Code shall file any statement and calculations
47 required by subdivision (b)(4) no later than 14 days after the expiration of the
48 temporary exclusion if the expiration occurs within the time specified by Rule
49 1017(e) for filing a motion pursuant to § 707(b)(2).

50 (2) If the temporary exclusion from means testing under § 707(b)(2)(D)(ii)
51 terminates due to the circumstances specified in subdivision (n)(1), and if the debtor
52 has not previously filed a statement and calculations required by subdivision (b)(4),
53 the clerk shall promptly notify the debtor that the required statement and calculations
54 must be filed within the time specified in subdivision (n)(1).

COMMITTEE NOTE

This rule is amended to take account of the enactment of the National Guard and Reservists Debt Relief Act of 2008, which amended § 707(b)(2)(D) of the Code to provide a temporary exclusion from the application of the means test for certain members of the National Guard and reserve components of the Armed Forces. This exclusion applies to qualifying debtors while they remain on active duty or are performing a homeland defense activity, and for a period of 540 days thereafter. For some debtors initially covered by the exclusion, the protection from means testing will expire while their chapter 7 cases are pending, and at a point when a timely motion to dismiss under § 707(b)(2) can still be filed. Under the amended rule, these debtors are required to file the statement and calculations required by subdivision (b)(4) no later than 14 days after the expiration of their exclusion.

Subdivisions (b)(4) and (c) are amended to relieve debtors qualifying for an exclusion under § 707(b)(2)(D)(ii) from the obligation to file a statement of current monthly income and required calculations within the time period specified in subdivision (c).

Subdivision (n)(1) is added to specify the time for filing of the information required by subdivision (b)(4) by a debtor who initially qualifies for the means test exclusion under § 707(b)(2)(D)(ii), but whose exclusion expires during the time that a motion to dismiss under § 707(b)(2) may still be made under Rule 1017(e). If, upon the expiration of the temporary exclusion, a debtor has not already filed the required statement and calculations, subdivision (n)(2) directs the clerk to provide prompt notice to the debtor of the time for filing as set forth in subdivision (n)(1).



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

November 29, 2010

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

A handwritten signature in black ink that reads "James C. Duff".

RE:

AMENDMENTS TO THE FEDERAL RULES OF PRACTICE AND PROCEDURE
(IMPORTANT INFORMATION)

Congress has taken no action on the amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and the Federal Rules of Evidence, approved by the Supreme Court on April 28, 2010. Under the Rules Enabling Act, 28 U.S.C. § 2072, the following amendments to the rules will take effect on December 1, 2010:

- Appellate Rules 1, 4, and 29, and Appellate Form 4;
- Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, and new Rule 5012;
- Civil Rules 8, 26, and 56, and Illustrative Civil Form 52;
- Criminal Rules 12.3, 21, and 32.1; and
- Evidence Rule 804.

Under 28 U.S.C. § 2074(a) and the April 28, 2010, Supreme Court orders, the amendments will govern all proceedings commenced on or after December 1, 2010, and all proceedings then pending “insofar as just and practicable.”

The text of the amended rules and extensive supporting documentation can be found on the Judiciary’s Federal Rulemaking website at: <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview.aspx>. The amendments were mailed to you earlier this year as part of House Documents 111-110, 111-111, 111-112, 111-113, and 111-114. In addition, pamphlets containing the rules as amended will be sent to you as soon as they become available from the Government Printing Office.

Please note that amendments to several Bankruptcy Rules affect filing time periods in ways unrelated to the 2009 time-computation amendments. These amended filing requirements appear in Rule 1007(c) (which adds time) and in Rules 1019(2)(B), 5009, and 5012 (which create new filing periods). Additionally, an amendment to Rule 1007(a)(2) reduces from 14 days to 7 days the time for a debtor in an involuntary case to file a list of creditors’ names and addresses. A court may extend the time to file the list if a debtor shows cause, which may include a failure to meet the new deadline from lack of knowledge about the amendment, especially within the first six months after the shorter period becomes effective.

If you have any questions about the status of any of the amendments, please contact Peter G. McCabe, Assistant Director for Judges Programs, or James Ishida, Senior Attorney, Office of Judges Programs, at (202) 502-1800.

TAB
9-A

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 30 – October 1, 2010
Santa Fe, New Mexico
(DRAFT MINUTES)

The following members attended the meeting:

District Judge Laura Taylor Swain, Chair
Circuit Judge Sandra Segal Ikuta
District Judge Karen Caldwell
District Judge David Coar
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Eugene R. Wedoff
Bankruptcy Judge Judith H. Wizmur
Professor Edward R. Morrison
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
District Judge Lee H. Rosenthal, chair of the Committee on Rules of Practice and Procedure (Standing Committee)
District Judge James A. Teilborg, liaison from the Standing Committee
District Judge Joan Humphrey Lefkow, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee)
Professor Daniel Coquillette, reporter 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
Molly Johnson, Federal Judicial Center
Elizabeth Wiggins, Federal Judicial Center
Philip 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/RulesAndPolicies/FederalRulemaking/ResearchingRules/Reports.aspx> Votes and other action taken by the Committee and assignments by the Chair appear in **bold**.

Introductory Items

1. Greetings and Introduction of new chair, Judge Wedoff, new committee member, Professor Morrison, and new liaison, Judge Lefkow; acknowledgment of the service of Judge Coar, and Dean Ponoroff.

The Chair welcomed Judge Wedoff as the incoming chair and Professor Morrison as the Committee's newest member. She also welcomed new liaisons from the Bankruptcy Committee, Judge Joan Humphrey Lefkow, and from the FJC, Ms. Molly Johnson. She thanked outgoing members Judge David Coar and Dean Lawrence Ponoroff for their service.

The Chair also asked for a moment of silence to honor Francis Szczebak, former chief of the Bankruptcy Judges Division, who unexpectedly passed away on Saturday, September 18, 2010.

2. Approval of minutes of New Orleans meeting of April 29-30, 2010.

The New Orleans minutes were approved with minor changes noted by Judge Wedoff and Mr. Kohn.

3. Oral reports on meetings of other committees.

- (A) June 2010 meeting of the Committee on Rules of Practice and Procedure.

The Reporter said that all recommendations from the Committee were accepted with a minor wording change to Rule 7056. The Chair added that so far only one comment has been received on the rules published for comment, and she noted that the hearing dates, if needed, would be January 7 in San Francisco and February 4 in Washington D.C.

- (B) June 2010 meeting of the Committee on the Administration of the Bankruptcy System.

The Chair gave the report. She said the primary topic of interest for this Committee was the Bankruptcy Committee's support of the current judgeship bill. Based on the results of the last additional needs survey conducted in 2008, the judiciary submitted a request to Congress for 13 additional bankruptcy judgeships, conversion of 22 existing temporary judgeships to

permanent status, and extension of two temporary judgeships. She said that one bill incorporating the bankruptcy judgeship requests has passed the House, and has been reported favorably by the Senate Judiciary Committee. She said another judgeship bill, which included an Article III judgeship request as well as the bankruptcy judgeship request, has also been reported favorably by the Senate Judiciary Committee. The Chair said both bills await Senate floor action.

(C) Upcoming Meeting of the Advisory Committee on Civil Rules.

Judge Wedoff said that although the Civil Rules Committee has not met since this Committee's last meeting, it did hold its conference on the civil rules and the cost of litigation at Duke Law School in May, and that it would discuss that conference at its meeting this fall.

(D) Upcoming October 2010 meeting of the Advisory Committee on Evidence.

Judge Caldwell said that at its next meeting, the Evidence Committee will consider changes to its restyled rules suggested by the Standing Committee.

(E) Upcoming October 2010 meeting of the Advisory Committee on Appellate Rules.

The Reporter said that at its next meeting the Appellate Rules Committee will be considering Rule 6 and direct bankruptcy appeals to circuit courts. She said that this Committee will work closely with the Appellate Rules Committee concerning the proposed revisions to Part VIII Rules, and that the two Committees will overlap their meetings this spring in San Francisco.

(F) Bankruptcy CM/ECF Working Group and the CM/ECF NextGen Project.

Judge Perris reported on the work of the CM/ECF Working Group and the CM/ECF NextGen Project in the context of her report on the work of the Forms Modernization Project at Agenda Item 11.

(G) Progress report from the Sealing Committee.

The Reporter said that the Sealing Committee has completed its work. She said that the Committee found very few instances where entire cases are sealed and it concluded that there is no need for new national rules regarding sealing.

(H) Progress report from the Privacy Committee.

The Reporter said that the Privacy Committee has concluded that existing rules seem to adequately protect privacy and it does not plan to recommend any rule changes. She said that it did recommend, however, that the FJC conduct random annual reviews of files to check for party compliance with the rules and to make sure privacy identifiers are being redacted. It will also

recommend more education about the redaction rules to make sure parties are not unnecessarily seeking information that will later need to be redacted, and it will ask the AO to monitor technology advances that will assist in identifying information that should be redacted.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendations concerning Suggestion (09-BK-H) by Judge Margaret Dee McGarity and Suggestion (09-BK-N) by Judge Michael E. Romero (both on behalf of the Bankruptcy Judges Advisory Group) to amend Rule 3007(a) to provide for disposition of objections to claims by negative notice and to clarify the proper method of serving objections to claims.

Judge Wedoff said that the Subcommittee supported Judge McGarity's suggestion to clarify that Rule 3007(a) allows a negative notice procedure for objections to proofs of claim. He said that the Subcommittee was prepared to recommend amending the rule (to allow for negative notice) at the last committee meeting, but withdrew its recommendation to consider Judge Romero's related observation that the rules are unclear as to whether Rule 3007 governs service of an objection to claim, or just notice of the objection and hearing date.

After discussing the suggestions, the Subcommittee recommended amending Rule 3007(a) as set forth in the materials to clarify that an objection may be granted after notice and an *opportunity* for a hearing (i.e., on negative notice). The Subcommittee also concluded that except for the federal government, service of an objection to claim should be allowed to be made on the name and address provided by the creditor on the proof of claim, and therefore recommended amending the rule as set forth in the materials to clarify that Rule 3007 governs both service and notice of objections to claim.

In discussing the Subcommittee's recommendation, one member pointed out that Rule 7004(h) contains detailed service requirements concerning insured depository institutions that are applicable in adversary proceedings and in contested matters. Because an objection to a claim is a contested matter, he thought either Rule 7004(h) would need a carve-out for claims objections, or that the proposed change to Rule 3007(a) would need a carve-out for objections to claims filed by insured depository institutions. The member said additional research might be needed before the Committee took a vote, however, because he thought that Rule 7004(h) was added by congress. Several members suggested that the Subcommittee research the issue to ensure that the proposed change would not make the rule inconsistent with any congressional enactment.

Two members questioned the Subcommittee's decision to shorten the response time from 30 to 21 days, and suggested that if a multiple of seven days is preferred that it be 28 days. Another member questioned why the rule allowed for local variation with respect to the shortened time period. Judge Wedoff responded that the Subcommittee thought that a default

period of 30 days (or 28) was longer than needed, but noted that the rule allowed for a longer period if necessary. He said that local variation was already widespread under the current rule and seemed to be working well. **After additional discussion, the Committee voted to approve the negative notice provision. It asked the Subcommittee to recommend in the spring whether a carve-out is needed for federal deposit institutions, and to consider further whether the response time period should be 21, 28 or 30 days.**

(B) Recommendation concerning Suggestion (09-BK-J) by Judge William F. Stone, Jr., to amend Rules 9013 and 9014 to require that the caption of a motion that initiates a contested matter set forth the name of every person whose interests would be directly affected by the relief sought.

Judge Wedoff said that the Subcommittee carefully considered Judge Stone's suggestion during its August 2 conference call, and that it recommends the Advisory Committee take no further action on the suggestion. He said that in the early 1980s many bankruptcy courts required (as Judge Stone suggests) that motions be captioned similar to Official Form 16B, requiring respondents' names as well as a motion number. The courts also organized the motions, responses, and subsequent papers in separate motions folders, rather than in the case file. The practice was largely abandoned as unnecessary and burdensome, however, after the courts' electronic docketing systems such as BANCAP and NIBS became sophisticated enough to link motions and related papers on the docket.

Given the widespread abandonment of this type of caption, the Subcommittee recommended that any decision to require naming the parties in the caption of certain motions be left to local courts. The Subcommittee also thought that Judge Stone's concerns were addressed in part by Official Form 20A, Notice of Motion or Objection. The form contains a clear warning in bold lettering that the recipient's rights are at risk and directs the recipient to talk with an attorney and file a response within a specified time period.

One member said that requiring the respondent's name in the caption could be helpful if that meant it would also be reflected in the docket. But Mr. Wannamaker said that the docket is not controlled by rule, and that motion captions are not necessarily reflected on the docket. He said there are standard dictionary events such as "objection to claim" but that it's up to the filing attorney to decide how much detail to add to the docket event. Another member said that the docket is meant to be transactional, and that too much detail would make the transactional information harder to find. **A motion to take no further action carried without objection.**

(C) Recommendation concerning Suggestion (09-BK-I) by Dana C. McWay (on behalf of the Next Generation Bankruptcy CM/ECF Clerk's Office Functional Requirements Group) to amend Rule 1007(b)(7) to allow providers of personal financial management courses to file statements of individual chapter 7 and chapter 13 debtors' completion of the course.

Judge Wedoff said that Dana McWay, the clerk of the Bankruptcy Court for the Eastern District of Missouri, submitted suggestion 09-BK-I on behalf of the NextGen Clerk's Office Functional Requirements Group ("FRG"). He said that the FRG proposes that approved providers of personal financial management courses be allowed to notify the court of the debtor's completion of the course, rather than requiring – as Rule 1007(b)(7) now does – the debtor to file Official Form 23. Judge Wedoff said that Subcommittee agreed with the suggestion for permissive filing by providers – so long as the debtor retained ultimate filing responsibility. The Subcommittee therefore recommended that Rule 1007(b)(7) and the preface and instructions to Form 23 be amended as set forth in the agenda materials.

In discussing the suggestion, one member recommended a change to the committee note, on page 103, so that the second sentence reads: "Course providers approved under § 111 of the Code may be permitted to file this notification ...". **The Committee approved the proposed change to Rule 1007(b)(7), as set forth on page 103 of the materials and with the proposed change to the committee note. It recommended that the rule change be published for comment in August 2011. It also approved the related changes to B23, to be published for comment in August 2012.**

(D) Recommendation concerning Comment (09-BK-032) by attorney William J. Neild that Official Forms 22A and 22C be revised to allow individual debtors to deduct expenses for telecommunication services to the extent they are necessary for the production of income and not reimbursed by the debtor's employer.

Judge Wedoff said that the Subcommittee agreed that the Forms 22A and 22C do not currently allow employed individuals to deduct business expenses. The Internal Revenue Manual, however, allows the deduction of extra telecommunication expenses if they are incurred for the production of income. The Subcommittee therefore recommends a change to line 32 of Form 22A and 37 of Form 22C, as shown on page 108 of the materials. Because the change is small, the Subcommittee recommends that the change be held in the bullpen until other changes to the forms are recommended. **The recommendation was approved without objection.** [Note, as a result of the recommendation at Agenda Item 5A below, the Committee recommended publishing the proposed telecommunication changes in August 2011].

5. Joint Report by the Subcommittee on Consumer Issues and the Subcommittee on Forms.

(A) Report on what changes, if any, should be made in Official Form 22C as a result of the Supreme Court's decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010), in which the Court rejected a purely "mechanical" approach to the calculation of a chapter 13 debtor's projected disposable income under 11 U.S.C. § 1325(b)(1)

The Reporter said that under *Lanning*, the debtor's Current Monthly Income ("CMI") is

the presumptive starting point of calculating “Projected Disposable Income” (PDI), but that in unusual cases, the bankruptcy court can taking into account known or virtually-certain-to-occur changes to income and expenses.

The Reporter said that in considering *Lanning* the main concern of the Consumer and Forms Subcommittees (the Joint Subcommittee) was whether to change Official Form 22C, and/or Schedules I and J, to require the debtor to report changes in income (and by analogy expenses) that were likely to occur during the applicable commitment period of the chapter 13 plan. She said that a majority of the Joint Subcommittee supported the recommendation at page 116 of the materials, which added a new line 61 to Form 22C.

The Joint Subcommittee’s recommended amendment to Form 22C would require above-median debtors to report any change in income that has occurred or is virtually certain to occur during the applicable commitment period (three to five years). The Reporter explained that in making its recommendation, the Joint Subcommittee had to resolve several issues that the *Lanning* decision does not clearly address: (1) whether all chapter 13 debtors, or just above-median debtors, should be required/allowed to report known or virtually-certain-to-occur changes to income; (2) whether a similar approach should be taken with respect to expenses; (3) given that above-median-income debtors report some expense deductions based on IRS standards rather than actual expenses, whether changes to actual expenses matter; (4) whether the form should provide some guidance regarding “known or virtually certain” changes by limiting requested disclosure to those changes likely to happen in limited time period after the form is completed, such as six months or a year; (5) if only above-median debtors – whose expenses are determined under IRS standards – are required to completed proposed line 61, should below-median debtors, whose actual income and expenses are used in computing disposable income, be required to provide similar information about projected changes on Schedules I and J.

(1) Should the proposed change to Form 22C be limited to above-median debtors?

Judge Wedoff explained that CMI has three roles in chapter 13: (i) determination of the applicable commitment period – five years for above median debtors and three years for below median debtors; (ii) how expenses are calculated – using IRS standards for above-median debtors, and judicially determined standards for below-median debtors; and (iii) to calculate disposable income for above-median debtors. He said the Joint Committee’s proposal was limited to above-median debtors because as currently designed Form 22C only calculates disposable income for above-median debtors (by subtracting IRS standards from CMI). Calculating expenses for below-median debtors would complicate Form 22C, and he recommended that if the Committee determined that *Lanning* required form changes for below-median debtors, such changes be made to Schedules I and J.

(2) Should changes in expenses be addressed?

The Reporter explained that because the issue in *Lanning* concerned changes in income,

that the opinion's discussion of changes in expenses was *dicta*. The Joint Committee concluded, however, that it doesn't make sense to address known or virtually certain changes in income without also addressing similar changes in expenses.

- (3) Given that IRS standards are used for many of the expenses reported by above-median debtors, how should reporting changes in actual expenses be handled?

The Subcommittee's recommended that the debtor list changes to the actual expenditures reported in Part IV that are virtually certain to occur during the applicable commitment period. With respect to the amounts reported in Part IV that are determined by the IRS national and local standards, only changed amounts that result from changed circumstances in the debtor's life – such as the addition of a family member or the surrender of a vehicle – should be reported.

- (4) Over what time period should the forms request changes?

Without elaboration, *Lanning* considers changes that have happened by the time of confirmation or are virtually certain to happen. The Joint Subcommittee's recommended amendment would require reporting any change that is virtually certain to change during the commitment period, which for above-median debtors is generally five years. Some members were in favor of a shorter time period, while others thought that the phrase "virtually certain" is inherently self-limiting, and that putting a time limit in the form doesn't add any clarity. One member suggested a one-year forward-looking time frame because 11 U.S.C. § 521(a)(1)(vi) already requires the debtor to report changes in income and expenses that are reasonably anticipated to occur a year after the petition is filed.

- (5) Should Schedules I and J be changed in addition to or instead of changing Form 22C to account for *Lanning*?

Some members thought changes to Form 22C could be avoided because Schedules I and J already require reporting actual income and expenses as of the petition date (which would pick up changes that "have occurred" as of the petition date), and also require the debtor to report any changes to income and expenses "reasonable anticipated to occur" within a year of the filing of the form. Other members said that even if anticipated changes are reported on Schedules I and J, that information would still need to be transferred to Form 22C to determine plan feasibility, because PDI for above-median debtors requires using IRS categories for some expenses. Also Form 22C does not include some categories of the debtor's income, such as social security income. **The Committee voted 6 to 4 in favor of addressing *Lanning* in Form 22C instead of Schedules I and J.**

After additional discussion, **the Committee voted without objection to require that only above-median debtors be required to disclose changes in income and expenses that have occurred or are "virtually certain to occur" within one year of the petition date. Thus the Committee voted to recommend publishing for comment in August 2011 the**

Subcommittee's proposed line 61, as set out at pages 114-15 of the materials, with the following change: the phrase "during your applicable commitment period" was replaced with "during the 12-month period following the date of the filing of your petition."

(B) Report on what changes, if any, should be made in Schedule C (Official Form 6C) as a result of the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), in which the Court dealt with the extent of a claimed exemption.

The Reporter explained that in *Schwab* the Supreme Court held that an objection under § 522(l) of the Bankruptcy Code and Fed. R. Bankr. P. 4003 is not required in order for a trustee to challenge the debtor's valuation of exempt property and thereby permit the estate to recover any value exceeding the claimed exemption amount. She said that the Joint Subcommittee considered several possible changes to Schedule C in response to *Schwab* but had not reached a consensus. Instead, it settled on three alternatives for the Committee to consider.

Alternative A. No change is needed because the *Schwab* court has explained how to complete the form if the debtor intends to exempt her entire interest (by claiming as exempt "full fair market value (FMV)" or "100% of FMV"). Supporters of this approach said that instructions to the form could provide a road map for exempting the debtor's entire interest. Joint Subcommittee members opposed to this approach were concerned that not all debtors read the instructions, and that the form is not currently designed to prompt filers to put anything other than a dollar amount in the valuation column.

Alternative B. Change header of "value of claimed exemption" column to "extent of claimed exemption" and give the debtor two checkbox options: "Debtor's interest in the property limited to \$___" or "Debtor's entire interest in the property, not limited in amount." Joint Subcommittee members opposed to this approach noted that it may create problems with capped exemptions and how wild card exemptions are being used.

Alternative C. Keep the valuation column, but add a column that indicates whether the debtor's entire interest is being exempted. Subcommittee members favoring this option thought it reflected the *Schwab* holding by giving the debtor an option to clearly exempt his entire interest in the property, while also requiring the listing of an exemption amount that would allow the trustee to understand how the debtor was attempting to allocate any wildcard exemption.

Joint Subcommittee members suggested that regardless of the alternative chosen, an instruction might be added informing the debtor that claiming the entire value is appropriate only if the exemption is not capped or claiming it is otherwise consistent with Rule 9011.

In discussing the alternatives, several members continued to support Alternative A (no change) because the Supreme Court has already explained how to fill out the existing version of the form. Supporters of this approach would, however, update the instructions to reflect the *Schwab* decision.

Several other members supported Alternatives B or C because those alternatives included – on the form – language making clear the debtor’s intent to exempt his entire interest in the property. There was some dispute, however, about whether the phrase “debtor’s entire interest in the property” would clearly convey the debtor’s intent to exempt the property itself, or if the phrasing in *Schwab*, “Full fair market value of the property” should be used instead. Some members favored Alternative B over Alternative C because it forced the debtor to either claim his entire interest in the property, or a specific amount.

Supporters of Alternative C favored adding a column to deal with whether the debtor intended to exempt her entire interest in the property. Alternative C supporters said retaining a separate “value of claimed exemption” column was necessary to make clear how the debtor intended to allocate wildcard exemptions. Those opposed to Alternative C said that, as in *Schwab*, a problem would arise when the debtor’s interest in property (i.e., the equity) turned out to be worth more than the dollar amount the debtor exempted in “value” column. The form doesn’t tell the court or the trustee whether the value column or the “entire interest” column should control.

After additional discussion, the Committee took two votes. In the first vote, **the Committee eliminated Alternative B. In the second vote, the Committee recommended Alternative C, 8-4. The Joint Subcommittee was directed to revise Alternative C to determine which column controls when the “entire interest” column is checked, and the debtor’s interest is greater than the dollar amount the debtor lists for the exemption.**

6. Report of the Subcommittee on Forms.

(A) Recommendation concerning amending Official Form 1 to implement proposed new Rule 1004.2 (Petition in Chapter 15 Cases).

Judge Perris said that new Rule 1004.2, scheduled to go into effect December 1, 2011, requires a chapter 15 petition to “state the country where the debtor has the center of its main interests ... [and] also identify each country in which a foreign proceeding by, regarding, or against the debtor is pending.” She said the Subcommittee recommended the proposed version of Official Form 1 in the materials (pages 131-34) to accomplish this new requirement. The Subcommittee recommended approval without publication. **The Committee recommended that the revised Form 1 be approved without publication with an effective date to coincide with the scheduled effective date of proposed Rule 1004.2: December 1, 2011.**

(B) Recommendation concerning amending Official Forms 9A-I to reflect the proposed amendment of Rule 2003(e) (effective December 2011) and stylistic changes.

Judge Perris said the Subcommittee recommends one substantive change and a number of

stylistic changes to all versions of Official Form 9. She said that a pending amendment to Rule 2003(e), scheduled to go into effect December 1, 2011, will require the presiding official at a meeting of creditors who wishes to complete the meeting at a later date to file a statement specifying the date and time to which such a meeting is adjourned. She said all versions of Form 9, however, incorporate the current wording of Rule 2003(e), which states the meeting “may be adjourned ... by announcement at the meeting of the adjourned date and time without further written notice.”

To conform Forms 9A – I to the pending change in Rule 2003(e), the Subcommittee recommends revising the explanation of “Meeting of Creditors” on the back of each form to state that the “meeting may be continued and concluded at a later date specified in a notice filed with the court.” Because the proposed revision would simply conform the forms to revised Rule 2003(e), the Subcommittee concluded that publication for comment was unnecessary. She said that because all versions of the form need to be revised, the Subcommittee also recommends several stylistic changes described in the agenda materials. **After a short discussion, the Committee approved the forms as set forth in the agenda materials and recommended that the changes go into effect without publication on December 1, 2011.**

(C) Report by Mr. Myers on revision of Director’s Form 200, to account for pending change to Bankruptcy Rule 1007(c). **(Oral addition to agenda)**

Mr. Myers said that on December 1, 2010, unless Congress acts to the contrary, a pending change to Bankruptcy Rule 1007(c) will increase the time a chapter 7 debtor has to file the statement of completion of financial management course (Official Form 23) from 45 to 60 days after the first day set for the meeting of creditors. He said this change requires an update to the last item on page one of Director’s Form B200. He explained that the change was ministerial and was illustrated in a one page handout distributed at the meeting, which shows the change from 45 to 60 days. He said that because the change applies to a director’s form, committee action is not required.

(D) Report by Mr. Wannamaker on need to update Interim Rule 1007-I to reflect the pending December changes to Rule 1007(c), and the need to correct a pending discrepancy between subparagraphs (a)(2) and (c). **(Oral addition to agenda)**

Mr. Wannamaker said that 45- to 60-day time period change in Rule 1007(c) described in Agenda Item 6(C), would also need to be incorporated into subsection (c) of Interim Rule 1007-I, a local rule adopted by courts to address temporary waivers of the presumption of abuse that apply to certain service members as a result of the National Guard and Reservists Debt Relief Act of 2008. He recommended informing the courts of the need to update Interim Rule 1007-I by memo, similar to what was done when the time-amendment changes in 2009 required changes Interim Rule 1007-I. **The Committee supported the recommendation.**

Mr. Wannamaker said that in reviewing Interim Rule 1007-I to conform it to Rule 1007, he discovered an unrelated oversight in the pending amendments to Rule 1007. In December, Rule 1007(a)(2) will shorten from 14 to seven days after the order for relief the time a debtor in an involuntary case has to file the mailing matrix (i.e., the list used by the clerk to provide notice of the Section 341 meeting of creditors and equity security holders). This 14-day deadline is repeated (but was not amended) in Rule 1007(c). Mr. Wannamaker said the discrepancy could be fixed by deleting the phrase “the list in subdivision (a)(2)” from subsection (c), but that the earliest this could occur through the regular rules process was December 2012. A temporary fix could be put into place immediately, however, by deleting the suggested language from subpart (c) of the interim rule.

The Committee approved removing the phrase “the list in subdivision (a)(2)” from subsection (c) as a technical amendment to Rule 1007, with a scheduled effective date of December 1, 2012. Initially, the Committee also approved removing the suggested language from subsection (c) of Interim Rule 1007-I, but that decision was reversed after the meeting because it would confuse the purpose of the interim rule, which is simply to provide a procedure to implement the National Guard and Reservists Debt Relief Act of 2008.

7. Report of the Subcommittee on Business Issues.

(A) Recommendation concerning Suggestion 09-BK-J by Judge William F. Stone, Jr., to provide rules and an Official Form to govern applications for the payment of administrative expenses.

Judge Wizmur said the Subcommittee considered Judge Stone’s request and agreed that the Code and Rules provide very little detail about how to seek payment of administrative expenses. Generally, section 503 of the Code provides only that an entity may “file a request for payment of an administrative expense...” and that the administrative expense shall be allowed “after notice and a hearing.” Although the legislative history for § 503(a) contemplates that the bankruptcy rules “will specify the time, the form, and the method of such a filing.” S. REP. NO. 95-989, at 66 (1978), there has never been a national form or rule for filing administrative expenses requests.

Judge Wizmur said that the Subcommittee does not have a recommendation at this time, but proposes instead to survey court clerks about existing local rules, practices, and forms, and the scope of procedures that currently exist at the local level for the payment of administrative expenses. After considering the results of the survey, the Subcommittee proposes to report its recommendation to the Committee at the spring 2011 meeting. **Motion for the Subcommittee to gather further information and report at the spring 2011 meeting carried without opposition.**

(B) Recommendation concerning Suggestion 10-BK-D by Judge Raymond T. Lyons to delete Bankruptcy Rule 9006(d).

Judge Wizmur explained that Judge Lyons believes that Rule 9006(d), which provides default rules for serving motions, is superfluous, misplaced, and likely to create confusion. Judge Lyons suggested that the rule is superfluous because local rules have been developed and replace the defaults in most courts, and he thinks that the provision is misplaced because Rules 9013 and 9014 generally address motion practice. He suggests that the scheduling of motions and responses should be left to local practice and deleted from the national rule.

The Subcommittee considered the suggestion and concluded that Rule 9006(d) should be retained as a default, even given the existence of local rules and procedures governing motion practice, because some districts do not have their own rules specifying the time for filing motions and supporting and opposing affidavits. The Subcommittee agreed with Judge Lyons, however, that Rule 9006(d) and Rules 9013 and 9014 should have better cross-references.

The Subcommittee also concluded that, to better serve as a default rule for motion practice, the coverage of subdivision (d) should be expanded to address the timing of the service of any written response to a motion, not just opposing affidavits. The Subcommittee recommends changes to Rule 9006(d) and Rules 9013 and 9014 as set forth in the agenda materials at pages 170-72. **Motion to approve the Subcommittee's recommendation, and to publish for comment the proposed amendments to Rule 9006(d), and Rules 9013 and Rules 9014 in August 2011, approved with the following stylistic changes:** Rule 9006(d) – insert a period after “motion” on line 8, delete the word “and,” and finish the sentence as “Except as otherwise provided in Rule 9023, opposing affidavits any written response may be served not later than one day before the hearing, unless the court ~~permits them to be served at some other time orders otherwise~~; Rule 9013 – change “by” to “under” on line 7; and Rule 9014 – change “by” to “under” on line 3, “opposition” to “response” on line 5, and “period prescribed by” to “determined under” on line 6.

(C) Recommendation concerning suggestion by Deputy Clerk Debbie Lewis, a legal management advisor in the Southern District of Florida, to provide an official form or rule for corporate and partnership debtors filing schedules of current income and expenditures.

Judge Wizmur said that Debbie Lewis, the legal management advisor for the Bankruptcy Court for the Southern District of Florida, contacted staff at the Administrative Office concerning the need for corporations and partnerships to file schedules of current income and expenses under the Bankruptcy Code and Rules, and the consequences of their failure to do so. She questioned whether the clerk's office could overlook the failure of a corporation to file income and expense schedules, and suggested that the failure would be less likely if official income and expense forms were developed for non-individuals.

Judge Wizmur said that the Subcommittee carefully considered the applicable Code and rule sections. It concluded that, like an individual, a partnership or corporation is required to file

a schedule of current income and expenses. The consequence of the failure to file those schedules is different, however. If the debtor is an individual, the case will automatically be dismissed in 45 days. If a corporation or a partnership fails to file the schedules, however, the case cannot be dismissed unless a party in interest (in a chapter 11 case) or the U.S. trustee (in a chapter 7 case) seeks that relief, and then only after notice and a hearing. The Subcommittee concluded that these different consequences, and the need for a motion in a partnership or corporation case before court action can occur, explain why the deficiency notice is needed in an individual case but not in a partnership or corporation case.

The Subcommittee considered whether a rule or form amendment is needed to encourage compliance with this filing requirement by non-individual debtors. Mr. Redmiles said that U.S. trustees do not perceive this matter to present a problem because they already receive the income and expense information they need from the monthly operating reports filed by non-individual debtors.

The Subcommittee concluded that there is no need to take any further action on this issue. Because compliance with § 521(a) and Rule 1007(b) by non-individual debtors has not been identified as a problem needing a rule or form solution by U.S. trustees or creditors, the Subcommittee concluded that implementation of the filing requirement can continue to be left to local rules and practices. **A motion to take no further action was approved.**

8. Report of the Subcommittee on Privacy, Public Access, and Appeals.

Judge Pauley gave a brief overview of the Part VIII revision project. He explained that former member Eric Brunstad proposed a complete rewrite of Part VIII rules at the spring 2008 meeting so that they would more closely track the style and changes that have been made to the Federal Rules of Appellate Procedure (FRAP) over the years. Mr. Brunstad submitted an initial draft of the revised Part VIII rules at the fall 2008 meeting in Denver. To encourage comment from the bench and bar, the Subcommittee held two open subcommittee meetings in conjunction with the spring and fall 2009 Committee meetings in San Diego and Boston. Judge Pauley said that many of the comments received at the open subcommittee meetings have been incorporated into the draft.

At the spring 2010 meeting in New Orleans, the Committee asked the Subcommittee to proceed with its consideration of a comprehensive revision of the bankruptcy appellate rules and endorsed the following goals for the revision:

- Make the bankruptcy appellate rules easier to read and understand by adopting the clearer and more accessible style of the Federal Rules of Appellate Procedure (FRAP).
- Incorporate into the Part VIII rules useful FRAP provisions that currently are unavailable for bankruptcy appeals.

- Retain distinctive features of the Part VIII rules that address unique aspects of bankruptcy appeals or that have proven to be useful in that context.
- Clarify existing Part VIII rules that have caused uncertainty for courts or practitioners that have produced differing judicial interpretations.
- Modernize the Part VIII rules to reflect technological changes – such as the electronic filing and storage of documents – while also allowing for future technological advancements.

The Reporter said that over the summer she and the Subcommittee updated the draft revision with the Committee's goals in mind, and they are now asking for feedback on some of the drafting issues that arose, and on some of the new practices in the proposed rules. A copy of revised Rules 8001 - 8012, with draft committee notes, was distributed at the meeting.

The Reporter said that the current draft incorporates some overarching stylistic choices. For example, the term "appellate court" is defined in Rule 8001 to mean either the BAP or district court depending on which court the appeal went to, which makes it easier to talk about appellate courts in later rules. Whenever "clerk" is mentioned, however, it is prefaced with the relevant court – bankruptcy, BAP, district, or court of appeals – to avoid confusion.

The Reporter noted that Rule 8002 continues to deal with timing because the statute refers to the rule by number.

She said that Rules 8003(d) and 8004(c) change current practice by "docketing" the appeal in the appellate court as soon the notice of appeal is transmitted (rather than after the record is complete). In reviewing Rules 8003 and 8004, one member commented that in some instances the clerk is directed to "transmit" the notice of appeal and in other places "transmit a copy" of the notice of appeal. The suggestion was to use just "transmit."

The Reporter said that proposed Rule 8005(c) provides a new procedure for resolving disputes about whether an election to have an appeal heard by the district court is valid. Under the proposal, a party challenging the election would have to file a motion in the district court. The Reporter said that the committee note included language clarifying that the rule does not prevent the bankruptcy court or BAP from determining the validity of the motion on its own motion. Several members supported this approach.

One member questioned the need for a separate document under proposed Rule 8005 to elect to have an appeal heard by the district court, and suggested that the district court election could simply be included in the notice of appeal. He thought that the separate-document requirement could be a trap for the unwary. Another member argued that the separate-document requirement was to prevent appellants from inadvertently appealing to the district court in circuits that have BAPs. There was some discussion of how a separate document is defined in the electronic-filing age, and a member suggested that the rule could refer to a document filed separately from the notice of appeal.

The Reporter asked the Committee for thoughts on whether the Subcommittee should make further attempts to incorporate the appellate rules by reference (similar to the Civil Rules' incorporation in part VII of the Bankruptcy Rules) or whether they should continue the present process restating relevant appellate rule provisions. She said that one practical consideration in favor of the present process of restating the appellate rules was to account for technological changes that have not yet been addressed in the appellate rules – one of the goals of the revision project.

Some members were in favor of incorporation to the extent possible because it would make it less likely that the two sets of rules would diverge in the future. Other members favored repetition simply because it allows for refinement of the rules in the bankruptcy context, and because it would spare users from having to consult two sets of rules in order to understand bankruptcy appellate procedure. The Committee recommended that the Reporter solicit feedback from the Standing Committee in January. The Committee also agreed that it would be helpful to illustrate the differences in approach by presenting a side-by-side comparison of a rule revised according to each method.

The Reporter said that the next step would be to complete the draft. She explained that the Committee's spring meeting in San Francisco will overlap with the appellate rules committee meeting and that the two committees will meet jointly for half a day. She said that originally the goal had been to gain approval of the Standing Committee for an August 2011 publication. Given the scope of the project, however, and the significant time that will be required for the styling process and the Standing Committee's consideration of the rules, it is probably more realistic to aim for a projected publication date in August 2012. She noted that these timing and process issues can be discussed with the Standing Committee at its January 2011 meeting.

9. Oral Report of the Subcommittee on Technology and Cross Border Insolvency.

The Chair said that there would be no report because that there was no activity by the Subcommittee over the past term.

10. Oral Report of the Subcommittee on Attorney Conduct and Health Care.

The Chair said that there would be no report because that there was no activity by the Subcommittee over the past term.

11. Oral report on status of the Bankruptcy Forms Modernization Project [Includes report on CM/ECF Working Group and CM/ECF NextGen Project].

Judge Perris said that the CM/ECF Working Group continues to meet and consider modification requests for the current generation of CM/ECF. She said that version 4.1 will be rolling out next and that it will include "e-orders" and new reports.

Judge Perris said the CM/ECF NextGen is still in the requirements stage of the process, but that the project is on target to complete this phase by February 2011. She said that the next phase will be to prioritize implementation, and to write code.

Judge Perris said that since the Committee's spring meeting the FMP has made significant progress in reformatting and rephrasing the questions in an initial filing package of forms to be used by individual debtors in bankruptcy, and has now completed initial drafts of most of those forms. She said that at its summer meeting, the FMP approved a tentative project time line for completing and testing the individual-debtor filing package, drafting forms for individuals that will be used later in the case, and for beginning the business filing package.

Beth Wiggins and Molly Johnson spoke about the project timeline, noting that it projects testing of the individual-debtor filing package next year and sets a goal for publishing the package for comment in the fall of 2012. Ms. Wiggins and Ms. Johnson explained that this process would include a prepublication testing phase next year that would include soliciting feedback from representatives of professional organizations, software providers, a group of career law clerks, a group of "occasional" attorney filers, and lay people. They said that prepublication versions of the individual filing package would likely be presented to the Committee at the fall 2011 and spring 2012 meetings, with a request to approve formal publication for comment in the fall of 2012.

Judge Perris added that concurrent with the prepublication phase of the individual-filing package, that the FMP would continue revising individual debtor forms and would also begin drafting the entity-filing package.

Judge Perris said that the FMP also continues to work with the NextGen CM/ECF Project to promote functional requirements it believes should be included in the future version of CM/ECF. Those functional requirements include the ability to store information in data form and retrieve the data in user-specified reports. Significant numbers of judicial users have identified court needs for such capabilities. The requirements also include capacity to control users' access to data, to ensure that CM/ECF will continue to operate in conformity with Judicial Conference privacy and access policies.

Discussion Items

12. Oral report on the new Strategic Plan for the Federal Judiciary approved by the Judicial Conference at its meeting in September.

The Chair briefly reviewed the Strategic Plan for the Federal Judiciary that was approved by the Judicial Conference at its September meeting. She said the Strategic Plan was organized around seven issues that affect the judiciary's mission and core values. She said the issues of most interest to the Committee were probably Issue 1: Providing Justice; Issue 4: Harnessing

Technology's Potential; and Issue 5: Enhancing Accesses to the Judicial Process. She encouraged members to review the plan and keep its goals and strategies in mind as the Committee develops its work in the future.

Information Items

13. Report on the status of bankruptcy-related legislation.

Mr. Wannamaker updated the Committee on pending and recently enacted bankruptcy-related legislation.

14. Oral update on opinions interpreting section 521(i).

The Reporter said that the bankruptcy courts are still divided on whether "automatic" means automatic, but that the trend at the circuit level (First and Ninth) and recently in the Sixth Circuit BAP is that the bankruptcy court has discretion to retain the case after the 45th day. She said that so long as the courts seemed to be breaking in favor of finding that that statute allows discretion, it would be hard to develop a rule to implement automatic dismissal.

15. ***Bull Pen.***

As a result of decisions at this meeting and prior meetings, the following proposed changes are in the bull pen: Proposed new Rule 8007.1 and the proposed amendment to Rule 9024 (indicative rulings), approved at September 2008 meeting. Until proposed publication in August, 2012, the Rule 1007-related changes to Form 23 discussed at Agenda Item 4C.

16. **Rules Docket.**

Mr. Wannamaker said the Rules Docket was in the materials and that it reflects that the Committee has been very busy. The Chair thanked Mr. Wannamaker for maintaining the Rules Docket so that it reflects the status of all the work the Committee has in play.

17. **Future meetings:**

Spring 2011 meeting, April 7-8, 2011, at the Fairmont Hotel in San Francisco, California. The Chair asked members to make suggestions for possible locations for the fall 2011 meeting to the incoming chair, Judge Wedoff.

18. **New business.**

Members thanked Judge Swain for her dedication, stewardship, and leadership as the Chair of this Committee over the past three years.

19. **Adjourn.**

Respectfully submitted,

Stephen "Scott" Myers

TAB
9-B

Appendix B

Option 1 – Self-contained Version

Rule 8003. Appeal as of Right – How Taken; Docketing of Appeal

1 (a) FILING THE NOTICE OF APPEAL.

2 (1) An appeal from a judgment, order, or decree of
3 a bankruptcy judge to a district court or a BAP as permitted by 28
4 U.S.C. § 158(a)(1) or (a)(2) may be taken only by filing a notice of
5 appeal with the bankruptcy clerk within the time allowed by Rule
6 8002.

7 (2) An appellant's failure to take any step other than
8 timely filing a notice of appeal does not affect the validity of the
9 appeal, but is ground for such action as the appellate court deems
10 appropriate, including dismissal of the appeal.

11 (3) The notice of appeal shall:

12 (A) conform substantially to the appropriate
13 Official Form;

14 (B) attach the judgment, order, or decree, or
15 part thereof, being appealed; and

16 (C) be accompanied by the prescribed fee.

17 (4) Upon request of the bankruptcy clerk, each
18 appellant shall file a sufficient number of copies of the notice of

19 appeal to enable the bankruptcy clerk to comply promptly with
20 Rule 8003(c).

21 (b) JOINT OR CONSOLIDATED APPEALS.

22 (1) When two or more parties are entitled to appeal
23 from a judgment, order, or decree of a bankruptcy judge and their
24 interests make joinder practicable, they may file a joint notice of
25 appeal. They may then proceed on appeal as a single appellant.

26 (2) When parties have separately filed timely
27 notices of appeal, the appeals may be joined or consolidated by the
28 appellate court.

29 (c) SERVING THE NOTICE OF APPEAL.

30 (1) The bankruptcy clerk shall serve the notice of
31 appeal by transmitting a copy to counsel of record for each party to
32 the appeal other than the appellant or, if a party is not represented
33 by counsel, to the party at its last known address.

34 (2) The bankruptcy clerk's failure to serve notice
35 does not affect the validity of the appeal.

36 (3) The bankruptcy clerk shall give to each party
37 served notice of the date of the filing of the notice of appeal and
38 shall note on the docket the names of the parties served and the
39 date and method of the transmission.

40 (4) The bankruptcy clerk shall promptly transmit to
41 the United States trustee a copy of the notice of appeal, but failure
42 to transmit notice to the United States trustee does not affect the
43 validity of the appeal.

44 (d) TRANSMITTING THE NOTICE OF APPEAL TO
45 THE BAP OR DISTRICT COURT; DOCKETING THE APPEAL.

46 (1) The bankruptcy clerk shall promptly transmit a
47 copy of the notice of appeal to the BAP clerk if a BAP has been
48 established for appeals from that district and the appellant has not
49 elected to have the appeal heard by the district court. Otherwise,
50 the bankruptcy clerk shall promptly transmit a copy of the notice of
51 appeal to the district clerk.

52 (2) Upon receiving the notice of appeal, the clerk of
53 the appellate court shall docket the appeal under the title of the
54 bankruptcy court action with the appellant identified – adding the
55 appellant’s name if necessary – and promptly give notice of the
56 date on which the appeal was docketed to all parties to the
57 appealed judgment, order, or decree.

Option 2 – Incorporation-by-Reference Version

Rule 8003. Appeal as of Right – How Taken; Docketing of Appeal

1 (a) APPLICABILITY OF APPELLATE RULES. Rules 3
2 and 12(a) F.R.App.P. apply to an appeal permitted by 28 U.S.C.
3 § 158(a)(1) or (a)(2), subject to the following exceptions:

4 (1) References in the rules to the “district court,”
5 the “court of appeals,” the “district clerk,” and the “circuit clerk”
6 shall be read as referring respectively to the bankruptcy court, the
7 appellate court, the bankruptcy clerk, and the clerk of the appellate
8 court.

9 (2) The reference in Appellate Rule 3(a)(1) to Rule
10 4 shall be read as a reference to Bankruptcy Rule 8002.

11 (3) Subdivisions (a)(3), (a)(4), (c) of Rule 3 and the
12 second sentence of (d)(1) do not apply.

13 (4) The requirement stated in the last sentence of
14 Rule 3(a)(1) applies only upon request of the bankruptcy clerk.

15 (5) In Rule 3(d), the term “mailing” means
16 transmitting, as defined in Bankruptcy Rule 8001(e). The clerk
17 shall serve the notice of appeal only on parties to the appeal. The
18 requirement in Rule 3(d)(1) for prompt transmittal of a copy of the
19 docket entries does not apply.

20 (6) The reference in Rule 12(a) to “and the docket
21 entries” does not apply.

22 (b) CONTENTS OF THE NOTICE OF APPEAL. The
23 notice of appeal shall:

24 (1) conform substantially to the appropriate Official
25 Form; and

26 (2) attach the judgment, order, or decree, or part
27 thereof, being appealed.

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TAB
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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

EUGENE R. WEDOFF
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

December 6, 2010

MEMORANDUM TO STANDING RULES COMMITTEE

SUBJECT: *Recommendation to Approve Revised Judicial Conference Procedures Governing Work of Rules Committees*

FROM: Judge Lee H. Rosenthal

The *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* govern the work of the rules committees. The *Procedures* are routinely included in the broadly circulated brochures containing the proposed rule changes for public comment. It is recommended that these *Procedures* be revised and the revisions sent to the Judicial Conference with a recommendation for approval.

The Judicial Conference first promulgated the *Procedures* in June 1983. The Conference approved revisions to the *Procedures* in 1989 to implement the 1988 amendments to the Rules Enabling Act. These amendments required an increase in notice to the public of proposed rule changes and prescribed open meetings. The *Procedures* were also revised to make provisions requiring a follow-up notice to every individual who commented on a proposed rule more flexible.

The rules committees have worked under the same set of *Procedures* since 1989. During this time, the work of the committees has been significantly affected by a number of changes, including using the internet for recordkeeping and for circulating information to the public about proposed rules. In addition, experience with the rulemaking process has revealed some recurring practical difficulties with the *Procedures*. It is time to revise them again.

The attached revised *Procedures* account for the impact of the internet, address the practical difficulties in ways that make the process more efficient, and follow the style protocols followed in drafting the rules. A redlined version comparing them to the present version is also attached. The Committee is asked to review the revised *Procedures* and consider whether to submit them to the Judicial Conference with a recommendation that they be approved.

PROPOSED REVISED PROCEDURES
“CLEAN” VERSION

§ 440 Procedures for the Conduct of Business by the Judicial Conference’s Committee On Rules of Practice and Procedure and its Advisory Rules Committees

§ 440.10 Overview

The Rules Enabling Act, 28 U.S.C. §§ 2071-2077, authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for cases in the federal courts and authorizes the Judicial Conference to appoint committees to recommend rules to be prescribed. Section 2073 requires the Judicial Conference to publish the procedures that govern the work of the Committee on Rules of Practice and Procedure (the Standing Committee) and its Advisory Committees on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and on the Evidence Rules in drafting and recommending rule changes. See: JCUS-SEP 83, pp. 65-67; 28 U.S.C. § 2073.

§ 440.20 Advisory Committees

§ 440.20.10 Functions

Each advisory committee is required to engage in “a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use” in its field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. See: 28 U.S.C. § 331.

§ 440.20.20 Suggestions and Recommendations

Suggestions and recommendations on the rules are submitted to the Secretary of the Committee on Rules of Practice and Procedure at the Administrative Office of the United States Courts, Washington, D.C. The secretary will acknowledge the suggestions or recommendations and refer them to the appropriate committee. If formal action on the suggestion or recommendation is taken, that action will be reflected in the minutes, which are posted on the judiciary’s rulemaking website.

§ 440.20.30 Drafting Rules Changes

- (a) Each advisory committee meets at the times and places that the chair designates. Advisory committee meetings are required to be open to the public, except when the committee – in open session and with a majority present – determines that it is in the public interest to have all or part of the meeting closed to the public and states the reason. Each meeting must be preceded by notice of the time and place, including publication in the Federal Register and on the judiciary’s rulemaking web site sufficiently in advance to permit interested persons to attend.
- (b) The reporter assigned to each advisory committee will prepare for the committee, under the direction of the committee or its chair, initial draft rule changes, committee notes explaining their purpose and intent, and copies or summaries of

written recommendations and suggestions received by the advisory committee.

- (c) The advisory committee meets to consider draft proposed new rules and rules amendments together with committee notes, whether revisions should be made, and whether they should be submitted to the Standing Committee with a recommendation for approval for publication. Submission to the Standing Committee must be accompanied by a written report to the Committee or its chair explaining the advisory committee's action and any minority or other separate views.

§ 440.20.40 Publication and Public Hearings

- (a) The Standing Committee must approve any publication. If publication is approved, the secretary arranges for printing and circulating the proposed rule changes to the bench, bar, and public. Publication should be as wide as practicable. The proposed rule changes must be published in the Federal Register and posted on the judiciary's rulemaking web site. The secretary must notify members of Congress, federal judges, and the chief justice of the highest court of each state of the proposed rule changes, with a link to the federal judiciary's rulemaking web site. Copies of the proposed changes are also provided to legal publishing firms with a request that the proposals be timely included in publications.
- (b) A public comment period on the proposed rule changes must extend for at least six months after notice is published in the Federal Register, unless a shorter period is approved under subparagraph (d) of this paragraph.
- (c) The advisory committee must conduct public hearings on proposed rule changes unless eliminating the hearings is approved under subparagraph (d) of this paragraph or fewer than five witnesses ask to testify. The hearings are held at the times and places that the advisory committee's chair determines. Notice of the time and place must be placed in the Federal Register and on the judiciary's rulemaking web site. The hearings must be recorded and the electronic record posted on the judiciary's rulemaking web site.
- (d) The Standing Committee may shorten the public comment period or grant an exception to the requirement of public hearings only if the Committee determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can be provided and public comment obtained within a shortened comment period and with limited or no public hearings. The Standing Committee may eliminate the public notice and comment requirement for a technical or conforming amendment if the Committee determines that notice and comment are unnecessary. Whenever an exception is made, the Standing Committee chair will advise the Judicial Conference and provide the reasons.

§ 440.20.50 Procedures After the Comment Period

- (a) When the public comment period ends, the reporter must prepare a summary of the written comments received and the testimony presented at public hearings. If the number of comments is very large, the reporter may aggregate similar individual comments in summary fashion, identifying the source of each comment. The advisory committee reviews the proposed rules changes in light of any comments and testimony. If the advisory committee makes extensive and substantial changes, the proposed rules are republished for an additional period of public comment unless the advisory committee determines that it would be neither necessary nor helpful.
- (b) The advisory committee will submit the proposed rule changes and committee notes that it approves to the Standing Committee. Each submission must be accompanied by a separate report of the comments received and must explain the changes made after the original publication. The submission must also include minority views of advisory committee members who wish to have separate views recorded.

§ 440.20.60 Records

- (a) The advisory committee's chair arranges the preparation of minutes of the committee meetings.
- (b) The advisory committee's records will consist of:
 - (i) written suggestions received from the public;
 - (ii) written comments received on drafts of proposed rules;
 - (iii) the committee's responses to the suggestions and comments;
 - (iv) electronic recordings of public hearings;
 - (v) summaries prepared by the reporter;
 - (vi) correspondence relating to proposed rule changes;
 - (vii) agenda books and materials prepared for committee meetings;
 - (viii) minutes of committee meetings;
 - (ix) approved drafts of rule changes; and
 - (x) reports to the Standing Committee.
- (c) The records must be posted on the judiciary's rulemaking web site, except for general correspondence relating to proposed rule changes. This correspondence is maintained by the Administrative Office of the United States Courts and is available for public inspection.
- (d) Minutes that relate to a closed meeting may be made available to the public but with deletions necessary to avoid frustrating the purposes of closing the meeting, as provided in § 440.20.30(a).

§ 440.30 Standing Committee

§ 440.30.10 Functions

The Standing Committee coordinates the work of the advisory committees, suggests proposals for them to study, considers proposals they recommend for publication for public comment, and, for proposed rule changes that have completed that process, transmits the proposals with its own recommendation to the Judicial Conference or recommits them to the appropriate advisory committee for further study and consideration.

§ 440.30.20 Procedures

- (a) The Standing Committee meets at the times and places that the chair authorizes. Committee meetings must be open to the public, except when the committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed to the public and states the reason. Each meeting must be preceded by notice of the time and place, published in the Federal Register and on the judiciary’s rulemaking web site sufficiently in advance to permit interested persons to attend.
- (b) The advisory committees’ chairs and reporters will attend the Standing Committee meetings to present their committee’s proposed rule changes and committee notes, to inform the Standing Committee on the status of ongoing work, and to participate in Standing Committee discussions.
- (c) The Standing Committee may accept, reject, or modify a proposed rule change or committee note, or may return the proposal to the advisory committee with instructions or recommendations.
- (d) The Standing Committee will transmit to the Judicial Conference the proposed rule changes and committee notes that it approves, together with the advisory committee report. The Standing Committee’s report to the Judicial Conference includes its own recommendations and explains any changes that it has made.

§ 440.30.30 Records

- (a) The secretary prepares minutes of Standing Committee meetings.
- (b) The Standing Committee’s records will consist of:
 - (i) the minutes of Standing and advisory committee meetings,
 - (ii) agenda books and materials prepared for Standing Committee meetings;
 - (iii) reports to the Judicial Conference, and
 - (iv) correspondence concerning rules changes including correspondence with advisory committee chairs.

- (c) The records must be posted on the judiciary's rulemaking web site, except for general correspondence relating to rule changes. This correspondence is maintained by the Administrative Office of United States Courts and is available for public inspection.

PROPOSED REVISED PROCEDURES
“REDLINE” VERSION

**~~PROCEDURES FOR THE CONDUCT OF BUSINESS BY
THE JUDICIAL CONFERENCE COMMITTEES ON
RULES OF PRACTICE AND PROCEDURE~~**

Scope

These procedures govern the operations of § 440 Procedures for the Conduct of Business by the Judicial Conference's Committee On Rules of Practice and Procedure and its Advisory Rules Committees

§ 440.10 Overview

The Rules Enabling Act, 28 U.S.C. §§ 2071-2077, authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for cases in the federal courts and authorizes the Judicial Conference Committee on Rules of Practice, Procedure, and Evidence (Standing Committee) and the various to appoint committees to recommend rules to be prescribed. Section 2073 requires the Judicial Conference Advisory to publish the procedures that govern the work of the Committees on Rules of Practice and Procedure (the Standing Committee) and its Advisory Committees on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and on the Evidence Rules in drafting and recommending new rules of practice, procedure, and evidence and amendments to existing rules.

~~Part I - rule changes. See: JCUS-SEP 83, pp. 65-67; 28 U.S.C. § 2073.~~

§ 440.20 Advisory Committees

1. Functions

~~Each Advisory Committee shall carry on "a~~

§ 440.20.10 Functions

Each advisory committee is required to engage in "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. See: 28 U.S.C. § 331.

§ 440.20.20 Suggestions and Recommendations

~~Suggestions and recommendations with respect to on the rules should be sent are~~
submitted to the Secretary of the Committee on Rules of Practice and Procedure, at the Administrative Office of the United States Courts, Washington, D.C. 20544, who shall, to the extent feasible, acknowledge in writing every written. The secretary will acknowledge the suggestions or recommendations and refer them to the appropriate committee. If formal action on the suggestion or recommendation so received and shall refer all suggestions and

~~_____~~ recommendations to the appropriate Advisory Committee. To the extent feasible, the Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. ~~_____~~ is taken, that action will be reflected in the minutes, which are posted on the judiciary's rulemaking website.

§ 440.20.30 **Drafting Rules Changes**

(a.) ~~An~~ Each advisory Committee shall meet ~~at such~~ the times and places ~~as that~~ the Chairman may authorize chair designates. All Advisory Committee meetings shall be required to be open to the public, except when the committee ~~so~~ meeting, in open session and with a majority present, ~~_____~~ determines that it is in the public interest ~~that to have all or part of the remainder of the meeting on that day shall be~~ closed to the public and states the reason for closing the meeting. ~~_____~~ Each meeting ~~shall~~ must be preceded by notice of the time and place of the meeting, including publication in the Federal Register, ~~sufficient~~ and on the judiciary's rulemaking web site sufficiently in advance to permit interested persons to attend.

(b.) The reporter assigned to each ~~Advisory Committee shall~~ will prepare for the committee, under the direction of the Committee or its Chairman chair, prepare initial draft rules changes, "Committee Notes" explaining their purpose and intent, and copies or summaries of all written recommendations and suggestions received by the Advisory Committee, and shall forward them to the Advisory Committee.

~~_____~~ c. ~~The Advisory Committee shall then meet to consider the~~ advisory committee.

(c) The advisory committee meets to consider draft proposed new rules and rules amendments; together with Committee Notes, make whether revisions therein; and submit them for approval of publications should be made, and whether they should be submitted to the Standing Committee with a recommendation for approval for publication. Submission to the Standing Committee, or its Chairman, with must be accompanied by a written report to the Committee or its chair explaining the Committee's advisory committee's action, including and any minority or other separate views.

4§ 440. ~~_____~~ 20.40 **Publication and Public Hearings**

(a.) ~~When~~ The Standing Committee must approve any publication. If publication is approved by the Standing Committee, the Secretary shall ~~arranges~~ for the printing and ~~circulation of~~ circulating the proposed rules changes to the bench and bar, and to the public generally. ~~_____~~ Publication ~~shall~~ should be as wide as practicable. ~~Notice of t~~ The proposed rule shall changes must be published in the

Federal Register and copies provided to appropriate legal publishing firms with a request that they be timely included in their publications. The Secretary shall also provide copies to posted on the judiciary's rulemaking web site. The secretary must notify members of Congress, federal judges, and the chief justice of the highest court of each state and, insofar as is practicable, to all individuals and organizations that request them:

- ~~b.~~ In order to provide full notice and opportunity for comment on of the proposed rule changes, a period of with a link to the federal judiciary's rulemaking web site. Copies of the proposed changes are also provided to legal publishing firms with a request that the proposals be timely included in publications.
- (b) A public comment period on the proposed rule changes must extend for at least six months from the time of publication of after notice is published in the Federal Register shall be permitted, unless a shorter period is approved under the provisions of subparagraph (d) of this paragraph.
- (c) An A The advisory C committee shall must conduct public hearings on all proposed rules changes unless elimination of such eliminating the hearings is approved under the provisions of subparagraph (d) of this paragraph or fewer than five witnesses ask to testify. The hearings shall be held at such the times and places as determined by the chairman of the Advisory Committee and shall be preceded by adequate notice, including publication that the advisory committee's chair determines. Notice of the time and place must be placed in the Federal Register and on the judiciary's rulemaking web site. Proceedings shall The hearings must be recorded and a transcript prepared. Subject to the provisions of paragraph six; such transcript shall be available for public inspection.
- ~~d.~~ Exceptions to the time period for public comment and the public hearing requirement may be granted by the the electronic record posted on the judiciary's rulemaking web site.
- (d) The Standing Committee or its chairman when the Standing Committee or its chairman may shorten the public comment period or grant an exception to the requirement of public hearings only if the Committee determines that the administration of justice requires that a proposed rule change should to be expedited and that appropriate notice to the public notice can be provided and public comment may be achieved by obtained within a shortened comment period; without and with limited or no public hearings, or both. The Standing Committee may eliminate the public notice and comment requirement if, in the case of for a technical or conforming amendment, it if the Committee determines that notice and comment are not appropriate or necessary unnecessary. Whenever such an exception is made, the Standing Committee shall chair will advise the Judicial Conference of the exception and the reasons for the exception.

5. Subsequent Procedures

~~_____ a. _____~~ At the conclusion of the and provide the reasons.

§ 440.20.50 Procedures After the Comment Period

(a) When the public comment period ends, the reporter ~~shall~~must prepare a summary of the written comments received and the testimony presented at public hearings. If the number of comments is very large, the reporter may aggregate similar individual comments in summary fashion, identifying the source of each comment. The ~~Advisory C~~ommittee shall~~reviews~~reviews the proposed rules changes in the light of the any comments and testimony. If the A~~advisory C~~ommittee makes extensive any~~d~~ substantial changes, the proposed rules are republished for an additional period for public notice and comment may be provided.

~~_____ b. _____~~ The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, of public comment unless the advisory committee determines that it would be neither necessary nor helpful.

(b) The advisory committee will submit the proposed rule changes and committee notes that it approves to the Standing Committee. Each submission ~~shall~~must be accompanied by a separate report of the comments received and ~~shall~~must explain any~~the~~ changes made subsequent to~~after~~ the original publication. The submission shall~~must~~ also include minority views of ~~A~~advisory Committee members who wish to have separate views recorded.

§ 440.20.6. — 0 Records

(a.) The ~~Chairman of the Advisory Committee shall~~ advisory committee's chair arrange ~~for s~~ the preparation of minutes of ~~all Advisory C~~the committee meetings.

(b.) The advisory committee's records of an Advisory Committee shall~~will~~ consist of the ;

- (i) written suggestions received from the public; the
- (ii) written comments received on drafts of proposed rules, responses thereto, transcripts;
- (iii) the committee's responses to the suggestions and comments;
- (iv) electronic recordings of public hearings, and;
- (v) summaries prepared by the reporter; all
- (vi) correspondence relating to proposed rule changes;
- (vii) agenda books and materials prepared for committee meetings;
- (viii) minutes of committee meetings;
- (ix) approved drafts of rule changes; and
- (x) reports to the Standing Committee.

(c) The records must be posted on the judiciary's rulemaking web site, except for

~~general~~ correspondence relating to proposed rules changes; ~~minutes of Advisory Committee meetings; approved drafts of rules changes, and reports to the Standing Committee. The records shall be maintained at. This correspondence is maintained by the Administrative Office of the United States Courts for a minimum of two years and shall be~~ available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

~~c. Any portion of minutes, relating,~~

~~(d) Minutes that relate to a closed meeting and may be made available to the public; may contain such but with deletions as may be necessary to avoid frustrating the purposes of closing the meeting, as provided in subparagraph 3a.~~

~~d. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.~~

~~Part H - § 440.20.30(a).~~

§ 440.30 Standing Committee

~~7§ 440.~~ 30.10 Functions

~~The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such advisory committees, suggests proposals for them to study, considers proposals they recommend for publication for public comment, and, for proposed rule changes that have completed that process, transmits the proposals with its own recommendation to the Judicial Conference; or recommit them to the appropriate A advisory C committee for further study and consideration.~~

~~8§ 440.~~ 30.20 Procedures

~~(a) The Standing Committee shall meet at such the times and places as that the Chairman may chair authorizes. All Committee meetings shall must be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that to have all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall must be preceded by notice of the time and place of the meeting, including publication published in the Federal Register, sufficient and on the judiciary's rulemaking web site sufficiently in advance to permit interested persons to attend.~~

~~b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall~~

(b) The advisory committees' chairs and reporters will attend the Standing Committee meetings to present their committee's proposed rules changes and Committee Notes.

_____ c. committee notes, to inform the Standing Committee on the status of ongoing work, and to participate in Standing Committee discussions.

(c) The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change, the proposal will be returned to the Advisory Committee with appropriate instructions.

_____ d. proposed rule change or committee note, or may return the proposal to the advisory committee with instructions or recommendations.

(d) The Standing Committee shall will transmit to the Judicial Conference the proposed rules changes and committee notes approved by it that it approves, together with the advisory committee report. The Standing Committee's report to the Judicial Conference shall includes its own recommendations and explains any changes that it has made.

9§ 440. _____ 30.30 Records

_____ (a.) The Secretary shall prepares minutes of all Standing Committee meetings.

_____ (b.) The records of the Standing Committee shall's records will consist of:

(i) the minutes of Standing and Advisory advisory committee meetings.

(ii) agenda books and materials prepared for Standing Committee meetings;

(iii) reports to the Judicial Conference, and

(iv) correspondence concerning rules changes including correspondence with Advisory Committee Chairmen chairs. .

(c) The records shall be maintained at must be posted on the judiciary's rulemaking web site, except for general correspondence relating to rule changes. This correspondence is maintained by the Administrative Office of the United States Courts for a minimum of two years and shall be is available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.

_____ e. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

PROCEDURES PRESENTLY IN EFFECT

**PROCEDURES FOR THE CONDUCT OF BUSINESS BY
THE JUDICIAL CONFERENCE COMMITTEES ON
RULES OF PRACTICE AND PROCEDURE**

Scope

These procedures govern the operations of the Judicial Conference Committee on Rules of Practice, Procedure, and Evidence (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new rules of practice, procedure, and evidence and amendments to existing rules.

Part I - Advisory Committees

1. Functions

Each Advisory Committee shall carry on "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary.

2. Suggestions and Recommendations

Suggestions and recommendations with respect to the rules should be sent to the Secretary, Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544, who shall, to the extent feasible, acknowledge in writing every written suggestion or recommendation so received and shall refer all suggestions and

recommendations to the appropriate Advisory Committee. To the extent feasible, the Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. Drafting Rules Changes

- a. An Advisory Committee shall meet at such times and places as the Chairman may authorize. All Advisory Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.
- b. The reporter assigned to each Advisory Committee shall, under the direction of the Committee or its Chairman, prepare initial draft rules changes, "Committee Notes" explaining their purpose and intent, copies or summaries of all written recommendations and suggestions received by the Advisory Committee, and shall forward them to the Advisory Committee.
- c. The Advisory Committee shall then meet to consider the draft proposed new rules and rules amendments, together with Committee Notes, make revisions therein, and submit them for approval of publication to the Standing Committee, or its Chairman, with a written report explaining the Committee's action, including any minority or other separate views.

4. Publication and Public Hearings

- a. When publication is approved by the Standing Committee, the Secretary shall arrange for the printing and circulation of the proposed rules changes to the bench and bar, and to the public generally. Publication shall be as wide as practicable. Notice of the proposed rule shall be published in the Federal Register and copies provided to appropriate legal publishing firms with a request that they be timely included in their publications. The Secretary shall also provide copies to the chief justice of the highest court of each state and, insofar as is practicable, to all individuals and organizations that request them.
- b. In order to provide full notice and opportunity for comment on proposed rule changes, a period of at least six months from the time of publication of notice in the Federal Register shall be permitted, unless a shorter period is approved under the provisions of subparagraph d of this paragraph.
- c. An Advisory Committee shall conduct public hearings on all proposed rules changes unless elimination of such hearings is approved under the provisions of subparagraph d of this paragraph. The hearings shall be held at such times and places as determined by the chairman of the Advisory Committee and shall be preceded by adequate notice, including publication in the Federal Register. Proceedings shall be recorded and a transcript prepared. Subject to the provisions of paragraph six, such transcript shall be available for public inspection.

- d. Exceptions to the time period for public comment and the public hearing requirement may be granted by the Standing Committee or its chairman when the Standing Committee or its chairman determines that the administration of justice requires that a proposed rule change should be expedited and that appropriate public notice and comment may be achieved by a shortened comment period, without public hearings, or both. The Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary. Whenever such an exception is made, the Standing Committee shall advise the Judicial Conference of the exception and the reasons for the exception.

5. Subsequent Procedures

- a. At the conclusion of the comment period the reporter shall prepare a summary of the written comments received and the testimony presented at public hearings. The Advisory Committee shall review the proposed rules changes in the light of the comments and testimony. If the Advisory Committee makes any substantial change, an additional period for public notice and comment may be provided.
- b. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, to the Standing Committee. Each submission shall be accompanied by a separate report of the comments received and shall explain any changes made subsequent to the original publication. The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.

6. Records

- a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee meetings.
- b. The records of an Advisory Committee shall consist of the written suggestions received from the public; the written comments received on drafts of proposed rules, responses thereto, transcripts of public hearings, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee meetings; approved drafts of rules changes; and reports to the Standing Committee. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.
- c. Any portion of minutes, relating to a closed meeting and made available to the public, may contain such deletions as may be necessary to avoid frustrating the purposes of closing the meeting as provided in subparagraph 3a.
- d. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

Part II - Standing Committee

7. Functions

The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Committee for further study and consideration.

8. Procedures

- a. The Standing Committee shall meet at such times and places as the Chairman may authorize. All Committee meetings shall be open to the public, except when the committee so meeting, in open session and with a majority present, determines that it is in the public interest that all or part of the remainder of the meeting on that day shall be closed to the public and states the reason for closing the meeting. Each meeting shall be preceded by notice of the time and place of the meeting, including publication in the Federal Register, sufficient to permit interested persons to attend.
- b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall attend the Standing Committee meeting to present the proposed rules changes and Committee Notes.
- c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial change,

the proposal will be returned to the Advisory Committee with appropriate instructions.

- d. The Standing Committee shall transmit to the Judicial Conference the proposed rules changes and Committee Notes approved by it, together with the Advisory Committee report. The Standing Committee's report to the Judicial Conference shall include its recommendations and explain any changes it has made.

9. Records

- a. The Secretary shall prepare minutes of all Standing Committee meetings.
- b. The records of the Standing Committee shall consist of the minutes of Standing and Advisory Committee meetings, reports to the Judicial Conference, and correspondence concerning rules changes including correspondence with Advisory Committee Chairmen. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of two years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.
- c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

TAB
11

Operation of the Federal Privacy Rules

A Report to the Judicial Conference Standing Committee on the Rules of Practice and Procedure by the Subcommittee on Privacy

1 **I. Introduction**

2 3 A. The 2007 Adoption of the Privacy Rules

4
5 The E-Government Act of 2002 required the federal judiciary to formulate rules “to
6 protect the privacy and security concerns relating to electronic filing of documents” in federal
7 courts.¹ In response to this mandate, the Judicial Conference Committee on the Rules of
8 Practice and Procedure (the “Standing Committee”) established a Privacy Subcommittee,
9 composed of a representative from each of the Advisory Rules Committees and
10 representatives from the Committee on Court Administration and Case Management
11 (CACM), to make rule recommendations. That Subcommittee’s proposals for amendments
12 to the Federal Rules of Civil Procedure,² Criminal Procedure,³ Bankruptcy Procedure⁴ and
13 Appellate Procedure⁵ (referred to collectively hereafter as “the “Privacy Rules”) were
14 adopted by the Standing Committee and went into effect on December 1, 2007. The
15 Standing Committee recognized a likely need to review the operation of the Privacy Rules
16 in the near future given the challenges of implementation, rapid technological advances, and
17 ongoing concerns about the proper balance between public access to court proceedings and
18 various claims to privacy.

19 20 B. Request for a Status Report on the Operation of the Privacy Rules

21
22 Since the Privacy Rules took effect, members of all three branches of government and
23 of the public have raised questions about implementation and operation. Meanwhile, courts
24 and litigants have gained practical experience in using the Privacy Rules in the context of
25 expanding electronic access to court proceedings under CM/ECF and PACER. Thus, when
26 in 2009, the Executive Committee of the Judicial Conference directed the Standing

¹ Pub. L. 107-347, § 205(c)(3).

² Fed.R. Civ. P. 5.2.

³ Fed.R. Crim. P. 49.1.

⁴ Fed.R. Bkrtcy. P. 9037.

⁵ Fed.R.App. P. 25(a)(5).

1 Committee to report on the operation of the Privacy Rules, the Standing Committee revived
2 its Privacy Subcommittee to conduct the necessary investigation. Once again, each Advisory
3 Committee designated a member to serve on the Privacy Subcommittee, with the Advisory
4 Committee Reporters serving as consultants. CACM also designated four members to serve
5 on the Subcommittee, with former CACM Chair, Judge John Tunheim, serving as a member-
6 at-large.

7
8 C. Principles Controlling Review
9

10 In undertaking its review, the Privacy Subcommittee recognized that its task was
11 discrete. It was not charged with developing new policy, but only with assessing how the
12 Privacy Rules operate consistent with existing policy established by the Judicial Conference
13 (largely on the basis of extensive research and consideration by CACM). This policy
14 generally favors making the same information that is available to the public at the courthouse
15 available to the public electronically.⁶
16

17 In urging this “public is public” policy, CACM was mindful of an irony: that a system
18 of public access that required a trip to the courthouse to see court filings, while outdated, may
19 have afforded litigants, witnesses, and jurors more privacy – “practical obscurity” – than a
20 system of easy electronic access. CACM further recognized that some persons availing
21 themselves of electronic access might have illegitimate motives: identity theft, harassment,
22 and even obstruction of justice. Nevertheless, CACM concluded that the judiciary’s access
23 policy should generally draw no distinction between materials available at the courthouse and
24 online. This policy not only promotes long-standing principles of judicial transparency; it
25 ensures against profiteering in information available only at the courthouse by entrepreneurs
26 who could gather such information and market it over the Internet. CACM determined that
27 privacy interests in electronically available information could be protected sufficiently by
28 imposing redaction obligations on parties filing documents containing private information,
29 specifically, social-security numbers, financial-account numbers, dates of birth, names of
30 minor children, and, in criminal cases, home addresses.
31

32 The Standing Committee implemented these policy determinations in drafting the
33 Privacy Rules. The Privacy Subcommittee’s review of the operation of these rules is

⁶ The Judicial Conference’s privacy policy incorporated several policies, including those adopted by the Conference in 2001 and 2003 regarding electronic public access to appellate, bankruptcy, civil, and criminal case files (JCUS-SEP/OCT 01, pp. 48-50; JCUS-SEP 03, pp. 15-16), as well as guidance with respect to criminal case files (JCUS-MAR 04, p. 10).

1 informed by the judiciary's continued adherence to the stated policy.⁷

2
3 **II. Organization and Work of the Privacy Subcommittee**

4
5 A. Subjects Addressed By Working Groups

6
7 The Privacy Subcommittee quickly identified four general subjects for consideration
8 and constituted itself into corresponding working groups to address each matter.

9
10 1. Implementation of the Privacy Rules

11
12 Members of Congress and of the public have questioned how effectively the courts
13 have implemented the Privacy Rules, with particular concern for the appearance of
14 unredacted social-security numbers in some court filings. The Privacy Subcommittee has
15 reviewed this matter. It has further reviewed the efforts of individual courts and the
16 Administrative Office to educate attorneys about their redaction responsibilities. The
17 Subcommittee has reviewed local court rules addressing privacy concerns to determine their
18 compliance with the national Privacy Rules. Finally, the Subcommittee has considered other
19 procedures that might be implemented better to protect private information in court files.

20
21 2. Privacy Concerns in Criminal Cases

22
23 In criminal cases, a particular privacy concern has arisen with respect to electronic
24 access to plea and cooperation agreements, aggravated by the emergence of various websites
25 publicizing such information, of which *whosarat.com* is simply one example. In response
26 to a Department of Justice request for a judicial policy denying any electronic access to plea
27 agreements, CACM issued a March 2008 report to the Judicial Conference recommending
28 against such a policy because it would deny public access to all plea agreements, including
29 those that did not disclose cooperation.⁸ In so reporting, CACM noted that the district courts
30 vary widely in affording public access to plea and cooperation agreements. Thus, the Privacy
31 Subcommittee has reviewed and evaluated these approaches with a view toward facilitating
32 any future consideration of a uniform policy or rule.

33

⁷ The Privacy Rules provide exceptions for Social Security cases and immigration cases. These cases are not subject to the redaction requirements, but non-parties can obtain access only at the courthouse. The Privacy Subcommittee reviewed the continuing viability of these exceptions, and its conclusions are stated later in this report.

⁸ See Report of CACM to Judicial Conference, March 2008 at 9.

1 3. Electronic Access to Court Transcripts
2

3 Consistent with the E-Government Act, clerks of court are responsible for placing
4 transcripts of court proceedings on PACER. The Judicial Conference has made clear that it
5 is the parties, not the clerks, who are responsible for making necessary redactions from such
6 transcripts. The Privacy Subcommittee has considered the operation of this division of labor
7 in practice as well as the efforts made by courts and parties to minimize references to private
8 information in records that will eventually be transcribed. Special attention has been given
9 to *voir dire* transcripts containing private information about jurors.
10

11 4. Possible Amendments to the Privacy Rules
12

13 The Privacy Subcommittee was asked to consider whether the redaction requirements
14 of the existing Privacy Rules needed to be expanded to include more information, such as
15 alien registration numbers, driver’s license numbers, mental health matters, etc. At the same
16 time, the Subcommittee was asked to consider whether the Privacy Rules should be
17 contracted to eliminate or modify two exceptions to the basic “public is public” policy for
18 social security and certain immigration cases.
19

20 B. Information Obtained by the Privacy Subcommittee
21

22 In conducting its review, the Privacy Subcommittee made extensive efforts to obtain
23 information about how the Privacy Rules were working and how they might be improved.
24 In addition to considering existing sources of information, the Subcommittee conducted its
25 own surveys of court filings and of persons experienced with the operation of the Privacy
26 Rules. Finally, the Subcommittee conducted a conference at which it heard from over thirty
27 persons – judges, court personnel, attorneys, legal scholars, and media representatives – who
28 expressed diverse views on the issues of public access to court filings and the need to protect
29 private information. The results of the Subcommittee’s efforts, which should assist in the
30 future development of policies and rules regulating access to private information in court
31 filings, are detailed in multiple attachments to this report. The Subcommittee here briefly
32 describes its research efforts.
33

34 1. Review of Existing Report on Court Filings by PublicResource.org
35

36 A report published at PublicResource.org indicates that social-security numbers
37 remain unredacted in a number of publicly available court files. With the assistance of Henry
38 Wigglesworth of the Administrative Office, the Subcommittee conducted an in-depth
39 analysis of the data contained in the PublicResource.org report. That analysis is attached to
40 this Report. As the attachment indicates, very few cases (relative to the large number of

1 court filings) in fact revealed unredacted social-security numbers. Most of the disclosures
2 cited by PublicResource.org related to filings made before the Privacy Rules were enacted,
3 while others reflected a common disclosure made multiple times in the same case.
4

5
6 2. Survey of Court Filings for Unredacted Social-Security Numbers
7

8 At the request of the Privacy Subcommittee, the Federal Judicial Center conducted its
9 own survey of court filings from a two-month period in 2010 to determine the frequency with
10 which unredacted social-security numbers appear in court filings. The FJC found roughly
11 2400 documents — out of 10 million documents searched — with unredacted social-security
12 numbers that did not appear to be subject to the exceptions to redaction provided by the
13 Privacy Rules. Joe Cecil, who conducted the principal research, concluded that while the
14 number of unredacted documents should not be ignored, it was proportionally minimal and
15 did not indicate a widespread failure in the implementation of the Privacy Rules.⁹
16

17
18 3. Review of Local Rules
19

20 With the assistance of Heather Williams of the Administrative Office, the Privacy
21 Subcommittee collected and reviewed all local rules governing redaction of private
22 information in court filings. The Subcommittee determined that most local rules are intended
23 to educate attorneys about their redaction obligations consistent with the Privacy Rules. The
24 Subcommittee identified only a few local rules that conflict with the Privacy Rules, generally
25 by requiring more redactions than the national rules. Such conflicts are easily addressed by
26 an appropriate communication from the Standing Committee to the district chief judge.
27

28 4. Survey of Practical Experience with Privacy Rules
29

30 The Subcommittee early determined a need to know how those who regularly work
31 with the Privacy Rules view their operation. With the assistance of Joe Cecil and Meghan
32 Dunn of the FJC, the Subcommittee prepared and sent out surveys to a large number of

⁹ Joe Cecil provides the following illustration:

If those 2,400 documents were the equivalent of one sheet of paper, and those papers were piled on top of each other, the stack of 2,400 sheets of paper would be just over nine and a half inches high. That sounds like a lot, but keep in mind that if we stack up 10 million sheets of paper to represent the almost 10 million documents that we searched, the stack of 10 million sheets of paper would be well over twice the height of the Empire State Building.

1 randomly selected district judges, clerks of court, and attorneys with electronic filing
2 experience. The survey sought experiential information and invited opinions on the need for
3 any rules changes. The results of this survey – including a description of methodology —
4 are attached to this report. The survey data indicates that the Privacy Rules are generally
5 working well and do not require amendment, but that continuing education efforts are
6 necessary to ensure compliance.

7 8 5. Fordham Conference 9

10 The Privacy Subcommittee asked its reporter, Fordham Professor Daniel Capra, to
11 identify persons with diverse views on the four areas of identified interest and to secure their
12 participation at an all-day conference at Fordham Law School on April 13, 2010. Thanks to
13 Professor Capra’s efforts and Fordham’s hospitality, the Subcommittee heard panel
14 discussions on

- 15
16 ● the broad question of transparency and privacy relating to court filings by a
17 judge and various legal scholars;
- 18
19 ● the exemption of immigration cases from electronic filing by private and
20 public attorneys, a legal scholar, a member of the media, and a court
21 representative;
- 22
23 ● the present implementation of the Privacy Rules by a judge, a legal scholar, a
24 member of the media, an AO representative, and a clerk of court;
- 25
26 ● electronic access to plea and cooperation agreements and the need for a
27 uniform rule on this subject by a prosecutor, criminal defense lawyers, a legal
28 scholar, and a Bureau of Prisons official;
- 29
30 ● the same subject by judges from districts affording different degrees of public
31 access to such information; and
- 32
33 ● electronic access to transcripts, including *voir dire* transcripts by a judge, two
34 United States Attorneys, a First Amendment lawyer, and a jury clerk.

35
36 A transcript of these proceedings is attached to this report and will be published in the
37 Fordham Law Review. Insights gained at the the Fordham Conference inform all aspects of
38 the findings and recommendations contained in this Subcommittee report.
39
40

1 **III. Findings**

2
3 **A. Implementation of the Privacy Rules**

4
5 **1. Overview**

6
7 The Privacy Subcommittee was charged with reviewing and reporting on the operation
8 of the existing Privacy Rules throughout the federal courts, with particular attention to
9 protection of the specified private identifier information in electronic filings available on
10 PACER. The Subcommittee reports considerable success in the implementation of these
11 Rules. At the same time, the Subcommittee identifies a continuing need for education
12 efforts, monitoring, and study to ensure continued effective implementation.

13
14 **2. Specific Findings**

15
16 **a. Administrative Office Efforts**

17
18 The Privacy Subcommittee reports that the Administrative Office has made significant
19 and effective efforts to implement the Privacy Rules' redaction requirements, while still
20 providing the public with remote electronic access to court filings. For example:

21
22 ● In 2003, the AO modified CM/ECF so that only the last four digits of a social
23 security-number can be seen on the docket report in PACER. In the same vein, in
24 May 2007 the AO's Forms Working Group, comprising judges and clerks of court,
25 reviewed over 500 national forms to ensure that they did not require
26 personal-identifier information. The Working Group identified only six forms that
27 required personal identifier information, and those forms were revised or modified to
28 delete those fields.

29
30 ● In August 2009, the AO asked the courts to implement a new release of
31 CM/ECF specifically designed to heighten a filer's awareness of redaction
32 requirements. The CM/ECF log-in screen now contains a banner notice of redaction
33 responsibility and provides links to the federal rules on privacy. CM/ECF users must
34 check a box acknowledging their obligation to comply with the Privacy Rules
35 redaction requirements in order to complete the log-in process. CM/ECF also
36 displays another reminder to redact each and every time a document is filed.

37
38 ● The Judicial Conference approval of a pilot project providing PACER access
39 to audio files of court hearings raised concerns about audio disclosure of personal
40 information. The eight courts participating in the pilot project employ various means

1 to discourage attorneys and litigants from introducing personal identifier information
2 except where absolutely necessary. Lawyers and litigants are also warned that they
3 could and should request that recorded proceedings containing information covered
4 by the Privacy Rules or other sensitive matters not be posted, with the final decision
5 made by the presiding judge. The AO has endeavored to ensure that courts and
6 litigants are mindful of their redaction obligations as they participate in this project.
7

8 b. Efforts by the Courts

9
10 (1) Generally

11
12 All aspects of the Subcommittee's review confirm that federal courts throughout the
13 country are undertaking vigorous and highly effective efforts to ensure compliance with the
14 Privacy Rules generally and with the requirement that personal identifier information be
15 redacted from or never included in court filings in particular. These efforts include:
16

- 17 ● ECF training programs for both lawyers and non-attorney staff at law firms.
18 The extension of training to staff is important because experience indicates that
19 redaction failures, while infrequent, are frequently the result of filings made by staff
20 who are unaware of the Rules requirements.
21
- 22 ● ECF newsletters containing reminders about the redaction requirements.
23
- 24 ● Making counsel aware of the Privacy Rules at the initial court conference and
25 at evidentiary hearings, and also specifically advising counsel against unnecessary use
26 of personal identifiers.
27
- 28 ● Discouraging counsel from asking questions that would elicit testimony that
29 would disclose private identifier information.
30
- 31 ● Requiring redaction of exhibits containing personal identifier information as
32 a condition of admissibility.
33
- 34 ● Providing notices at counsel's table that describe the Rules' redaction
35 requirements and that caution counsel not to put unredacted personal identifier
36 information into the record.
37
- 38 ● Reading a prepared statement to witnesses cautioning against disclosure of
39 private identifier information.
40

1 disclosures remains small.¹¹ This is a tribute to the court efforts described generally in the
2 preceding subsection, which include efforts by the bankruptcy courts.¹² The Subcommittee
3 is, therefore, confident that, as educational efforts continue and other initiatives are pursued,
4 the instances of errors in filing unredacted personal identifier information in bankruptcy
5 cases will be reduced even further.

6
7
8 (4) Use of Local Rules
9

10 The Privacy Subcommittee conducted a comprehensive review of local court rules
11 intended to implement the national Privacy Rules. The Subcommittee recognizes that local
12 rules can have some value in educating filers about their redaction obligations. But local
13 rules cannot impose obligations inconsistent with national rules. *See, e.g.*, Fed.R.Civ.P. 83(a).
14 The Privacy Subcommittee has identified a few local rules inconsistent with the national
15 Privacy Rules, notably, local rules demanding the redaction of *more* information than
16 required by the national rules. National rules are a product of a carefully considered policy
17 that calibrates the balance between the judiciary’s commitment to public access and its
18 protection of personal privacy. Local rules requiring more information to be redacted alter
19 that balance.

20
21 An attached report identifies local rules that the Privacy Subcommittee finds
22 inconsistent with the Privacy Rules. It recommends that the procedure employed in the last
23 local rules project be employed here: the Standing Committee should inform the chief judge
24 of a district with an inconsistent rule, and the Standing Committee should work together with
25 the chief judge to remedy the situation.

26
27
28

¹¹ Notably, Bankruptcy Rule 1005, as amended in 2003, now provides that the petitioner disclose only the last four digits of the petitioner’s social-security number. Other Bankruptcy Rules require disclosure of the full social-security number, but that information is not available to the public. *See, e.g.*, Bankruptcy Rule 1007(f), which requires an individual debtor to “submit” to the clerk, rather than “file” a verified statement containing an unredacted social-security number. At this point, in a bankruptcy case as in any other, unredacted social-security numbers are not accessible to the public unless permitted by one of the exceptions to the Privacy Rules.

¹²A paper prepared by Hon. Elizabeth Stong and submitted for the Fordham Privacy Conference provides a helpful description of how the Privacy Rules are implemented in the Eastern District of New York Bankruptcy Court. That paper is attached to this Report.

1 3. Possible Future Initiatives

2
3 Given inevitable advances in technology, the Subcommittee suggests that future
4 attention be given to two possible developments.

5
6 ● Current technology permits detection of unredacted social-security numbers
7 in court filings, as the Federal Judicial Center did in the attached report. Current
8 technology does not permit a comparable search for other unredacted personal
9 identifiers, such as names of minor children. Nevertheless, at the Fordham
10 Conference, Professor Edward Felten predicted that future technological
11 developments might well provide such capacity. The Privacy Subcommittee
12 recommends that the AO continue to monitor the state of search technology.

13
14 ● Technology might also make it easier for a filing party to search for material
15 to redact in a transcript or in a document that the party is going to file. For example,
16 a pdf document is obviously easier to search if it is in searchable format. More
17 broadly, as stated above, software might be developed in the future that would make
18 it easier to search exhibits, immigration records, or indeed any document. While it is
19 not the obligation of the courts to redact filings for litigants, to the extent the courts
20 are already engaged in extensive and highly effective educational efforts, they might
21 be encouraged to include relevant technological advances in the information
22 conveyed.

23
24 While such future initiatives should be pursued, the Privacy Subcommittee concludes
25 that the most important means of ensuring effective implementation of the Privacy Rules is
26 to continue the current efforts to educate filers and other court participants about the need (a)
27 to redact private identifiers from documents that must be filed, and (b) to avoid disclosure
28 of private identifiers except when absolutely necessary.

29
30 Finally, the Subcommittee suggests continued monitoring of the implementation of
31 the Privacy Rules. Specifically, a study of court filings for unredacted personal identifiers,
32 such as that conducted by the Federal Judicial Center for this report, should be conducted on
33 a regular basis, possibly every other year.

34
35 **B. Criminal Cases: Affording Electronic Access to Plea and Cooperation**
36 **Agreements**

37
38 1. Overview

39
40 The Privacy Subcommittee quickly identified electronic public access to plea and

1 cooperation agreements in criminal cases as an area warranting careful review. Survey
2 information and the Fordham Conference indicate that easy electronic access to such
3 information, coupled with Internet sites committed to its collection and dissemination, have
4 heightened concerns about retaliation against cooperators and prosecutors' ability to secure
5 cooperation.
6

7 The Privacy Subcommittee views the recruitment and protection of cooperators as
8 matters generally committed to the executive branch. At the same time, it recognizes judicial
9 responsibility to minimize opportunities for obstruction of justice. How to do so without
10 compromising public access to court proceedings – especially proceedings that may be of
11 particular public interest, including the treatment of defendants who cooperate with the
12 prosecution – admits no easy answer.
13

14 The Subcommittee has identified varied approaches by the district courts to the public
15 posting of plea and cooperation agreements and general court resistance to a uniform national
16 rule. To the extent the Department of Justice, some defense attorneys, and legal scholars
17 support a national rule, the Subcommittee has identified no consensus on what that rule
18 should be. Nor can it presently identify a “best practice.”
19

20 The Subcommittee suggests that CACM and the Standing Committee encourage
21 district courts to continue the discussion begun at the Fordham Conference about the relative
22 advantages of various practices in order to determine if a consensus emerges in favor of a
23 particular practice or rule. It further suggests that courts might consider methods, where
24 appropriate, to avoid permanent sealing of plea or cooperation agreements — possibly by
25 providing for such orders to expire at a fixed time subject to extension by the court upon
26 further review.
27

28 2. Specific Findings

29 a. Existing District Court Practices for Posting Plea and 30 Cooperation Agreements

31 The Privacy Subcommittee identified various approaches by the district courts in
32 publicly posting plea and cooperation agreements,¹³ which are summarized here in
33
34
35

¹³ A chart of the various approaches, prepared by Susan Del Monte of the Administrative Office, is attached to this Report.

1 descending order of accessibility:
2

- 3 ● Full electronic access to plea and cooperation agreements, except when sealed
4 on a case-by-case basis.
- 5
- 6 ● No remote electronic access to plea or cooperation agreements, but with such
7 agreements fully available at the courthouse unless sealed in an individual case.
- 8
- 9 ● Full electronic access to plea agreements, but with a separate sealed document
10 filed in every case indicating whether or not the defendant has entered into a
11 cooperation agreement.¹⁴
- 12
- 13 ● No public access to plea or cooperation agreements either electronically or at
14 the courthouse, because these documents are not made part of the case file.
- 15
- 16

17 b. Concerns with the Identified District Court Practices
18

19 At the Fordham Conference, prosecutors, defense counsel, and legal scholars
20 expressed concerns about the various district court approaches. Again, working from the
21 least to most restrictive approach, these concerns are summarized as follows:
22

- 23 ● Full remote access to plea agreements with sealing of cooperation information
24 in individual cases means a sealing order effectively raises a red flag signaling
25 cooperation.
- 26
- 27 ● Prohibiting electronic access to plea and cooperation agreements but allowing
28 courthouse access to such documents encourages the development of cottage
29 industries to acquire and post such information (often for sale), the very concern that
30 prompted the Judicial Conference to adopt the “public is public” policy.
- 31
- 32 ● Posting plea agreements that say nothing about any cooperation, or posting
33 documents that use the same boilerplate language whether a party is cooperating or
34 not, result in misleading court documents and preclude public scrutiny of how the
35 judicial system treats cooperating defendants.

¹⁴ This approach is intended to minimize the ability to identify a cooperating defendant from the presence on the public record of sealed document. The Subcommittee notes the possibility of such identification from other public record entries, such as delayed or frequently adjourned sentencing proceedings.

- 1 ● Not posting plea or cooperation agreements at all hampers public scrutiny
2 not only of the treatment of cooperators but of the process by which guilty pleas are
3 obtained.
4

5 Some Conference participants also raised a general concern: that as defendants from
6 different districts found themselves housed together in the federal prison system, some might
7 misconstrue records from districts with which they were not familiar. For example, a
8 prisoner from a district where individual sealing signaled likely cooperation might mistakenly
9 infer that every prisoner with a sealed record entry was a cooperator without realizing that
10 some districts made a sealed entry in every case to ensure no difference between the dockets
11 of cooperators and non-cooperators.
12

13
14 c. Support for a Uniform Rule
15

16 While prosecutors, most defense attorneys, and legal scholars urged a uniform rule
17 for posting plea and cooperation agreements, they did not agree as to the content of that rule.
18 Some urged few, if any, limits on public access to such agreements, while others supported
19 strict limitations.¹⁵
20

21 The Subcommittee has considered the uniform rule proposal recommended by
22 Professor Caren Myers in her article, *Privacy, Accountability, and the Cooperating*
23 *Defendant: Towards a new Role for Internet Access to Court Records*, 62 Vand. L. Rev. 921
24 (2009), a copy of which is attached to this Report. Professor Myers, a former federal
25 prosecutor, urges a rule that would (1) generally deny public access to individual plea and
26 cooperation agreements except where ordered by the court on a case-by-case basis; and (2)
27 provide public access to plea and cooperation information in the aggregate, without
28 identifying individual defendants. As Professor Myers explained at the Fordham
29 Conference, she thinks that in most cooperation cases, the risk to a defendant from public
30 disclosure of the defendant's cooperation far outweighs any public interest in knowing that
31 the defendant decided to cooperate. To the extent there is a public interest in knowing what
32 kinds of deals the government is making with cooperators and what kinds of benefits they
33 are receiving from the courts, Professor Myers submits that information can be provided
34 anonymously or in the aggregate.

¹⁵ Because the Department of Justice has historically supported a uniform rule with strict limitations, the Subcommittee, early in its work, invited DOJ to propose a draft rule as a basis for Subcommittee discussion. DOJ continues to work on the issue, including the viability of a national rule, but has not at this time submitted draft language.

1 Some participants at the Fordham Conference questioned the sweep of Professor
2 Myers’s proposal, which would severely limit public access to plea and cooperation
3 agreements in individual cases. They also questioned the effectiveness of such a rule in
4 protecting cooperators, given the ability to infer cooperation from delayed or adjourned
5 sentences or from the sealing of sentencing minutes, in whole or in part.
6
7

8 d. Judicial Opposition to a Uniform National Rule
9

10 At the Fordham Conference, the Subcommittee also heard the views of judges drawn
11 from districts pursuing each of the identified approaches. Their thoughtful responses to the
12 concerns and suggestions of lawyers and legal scholars and their explanations for how and
13 why their courts employed various approaches to posting plea and cooperation agreements
14 were particularly informative. This discussion revealed that the various practices employed
15 by courts with respect to plea and cooperation agreements were not casually developed.
16 Rather, district courts have carefully considered the question of public access to such
17 agreements, with individual courts soliciting the views of attorneys and other interested
18 parties and engaging in substantial internal discussion before settling on an approach. The
19 discussion further revealed that each district is strongly committed to its chosen approach,
20 convinced that the approach satisfactorily balances the twin concerns of public access and
21 cooperator safety, and resistant to the idea of a uniform national rule (particularly if it would
22 differ from its own practice).
23
24

25 e. Subcommittee Conclusions
26

27 The Subcommittee concludes that no best practice has yet emerged supporting a
28 uniform national rule with respect to granting public access to plea and cooperation
29 agreements. The Subcommittee suggests that CACM and the Standing Committee encourage
30 district courts to continue the discussion begun at the Fordham Conference as to the relative
31 benefits of various practices, with a view toward determining if a consensus emerges in the
32 coming years as to a best practice that might provide a basis for a uniform national rule.
33

34 At the same time, the Subcommittee is of the view that the rationale for limiting
35 public access to such agreements – cooperator safety – does not necessarily support the
36 permanent sealing of most cooperation agreements, much less plea agreements. Courts
37 limiting access to such agreements might consider whether it is appropriate to include a
38 “sunset” provision that allows sealing orders within a time prescribed either automatically
39 for every case or specifically in individual cases with further sealing dependent on a court
40 determination of a continued need.

1 C. Redacting Electronic Transcripts

2
3 1. Overview

4
5 Judicial Conference policy requires that court transcripts be posted on PACER within
6 90 days of delivery to the court clerk.¹⁶ The Privacy Subcommittee has considered the
7 judiciary’s ability to comply with this policy while ensuring the redaction of personal
8 identifier information as required by the Privacy Rules. The Subcommittee reports that the
9 redaction of private information from transcripts on PACER is still a work in progress.
10 Nevertheless, that work appears to be going well. Because the process relies on the vigilance
11 and sensitivity of lawyers, judges, and court staff, continuing education is important to ensure
12 these persons’ awareness of the need to minimize record references to private identifier
13 information and to redact such information when it appears in transcripts.
14

15 The Privacy Subcommittee has separately considered the privacy issues implicated by
16 the electronic posting of *voir dire* transcripts, which may reveal personal information about
17 potential jurors not required to be redacted by the Privacy Rules. Such information could be
18 used to retaliate against jurors and could compromise the identification of prospective jurors
19 able to serve without fear or favor. Because the Judicial Conference has recently provided
20 the courts with guidance as to how to balance the competing interests in public access to *voir*
21 *dire* and juror privacy, the Subcommittee suggests that the Standing Committee request
22 CACM to monitor the operation of these guidelines to determine the need for any further
23 policy action.
24

25
26 2. Specific Findings

27
28 a. The Redaction of Electronically Posted Transcripts

29
30 (1) Judicial Conference Policy for Electronic Filing

31
32 Consistent with the mandate of the E-Government Act to create a complete electronic
33 file in the CM/ECF systems for every federal case, in 2003, the Judicial Conference, as stated
34 above, adopted a policy requiring courts electronically to post transcripts of court
35 proceedings within 90 days of their receipt by the clerk of court. In the 90-day period
36 preceding electronic filing, each party’s attorney (or each *pro se* party) must work with the

¹⁶ See JCUS Sep. 07 at 7. Extensive guidance on the implementation of the transcripts policy is found in a letter to clerks from Robert Lowney of the AO, dated January 30, 2008. See also Report of CACM to the Judicial Conference on Electronic Transcripts, June 2008.

1 court reporter according to a prescribed schedule to ensure that any electronically filed
2 transcript is properly redacted of personal identifier information consistent with the
3 requirements of the Privacy Rules.
4

5
6 (2) Survey Results Indicate General Compliance with
7 Transcript Policy
8

9 The FJC survey reveals that, as of December 2009, all bankruptcy courts and all but
10 a few district courts are posting trial transcripts on PACER, though most courts do not
11 routinely post deposition transcripts. A majority of the surveyed courts have established
12 local rules or policies to address privacy concerns arising from the electronic posting of trial
13 transcripts. The number of clerks and judges who reported complaints about personal
14 identifier information appearing in electronically filed transcripts is small.
15

16 The survey further revealed that clerks of court, judges, and lawyers are actively
17 engaged in ensuring proper redaction of electronically filed transcripts. Specifically, a
18 significant number of clerks reported that their courts require that transcripts be filed as text-
19 searchable PDFs to facilitate redactions. Other clerks reported using software programs
20 specifically developed to identify personal identifier information. Still more clerks expressed
21 interest in the development of such programs.
22

23 The survey revealed that judges employ various means to educate counsel about their
24 redaction obligations with respect to electronically filed transcripts. A common practice is
25 to provide counsel with a card urging that personal identifier information not be elicited on
26 the record and that any such information that appears in transcripts be redacted. Similar
27 guidance is provided to counsel at the initial case conference, in formal written orders, and
28 through communication with chambers staff. Judges also intervene to cut off a line of
29 questions that appears to be eliciting personal identifier information. Judges report that they
30 also rely on chambers staff and docket clerks to alert them to the appearance of personal
31 identifier information in a transcript that will require redaction.
32

33 The survey confirms general attorney awareness of the Privacy Rules' redaction
34 requirements. Two-thirds of attorneys responding reported that they redacted personal
35 identifier information before transcripts were electronically filed. Half of attorneys surveyed
36 reported that they actively sought to avoid eliciting personal identifier information on the
37 record. Nevertheless, because 17% of responding attorneys reported that they made no effort
38 to redact transcript before electronic filing, there is plainly a need for continuing education
39 and monitoring in this area.
40

1 (3) The Fordham Conference

2
3 Participants at the Fordham Conference reinforced the conclusions drawn from the
4 survey: (a) that courts and attorneys are striving to avoid disclosure of personal identifying
5 information on the record, and (b) that the redaction procedure for electronic transcripts
6 adopted by the Judicial Conference is generally working as intended.
7

8 Two United States Attorneys stated that although the redaction requirements were
9 initially met with some displeasure by their Assistants, experience had shown that the
10 required procedures were workable and not unduly burdensome. One of the United States
11 Attorneys reported developing a standard form to facilitate the specification of pages and line
12 numbers where personal identifier information needed to be redacted.
13

14 Both government and private attorneys stated that they generally sought to avoid
15 eliciting personal identifier information in proceedings that could be transcribed. They
16 agreed that there was rarely a need for such information, and that attorneys could usually
17 avoid personal information coming into the record by applying some forethought to questions
18 asked and documents introduced into evidence. The lawyers discussed the value of reaching
19 advance agreements with opposing counsel to minimize the introduction of personal
20 identifier information.
21

22 Some Conference participants identified concern that parties in civil cases were urging
23 court reporters to redact from transcripts confidential information – such as proprietary
24 information – not falling within the categories specified in Fed. R. Civ. P. 5.2(a). Parties and
25 court reporters need to be made aware that redactions beyond those specified in Rule 5.2(a)
26 require a court order pursuant to Rule 5.2 (e) and its counterparts.
27

28
29 b. The Electronic Filing of *Voir Dire* Transcripts

30
31 (1) Concerns Attending *Voir Dire* Transcripts

32
33 Electronic filing of *voir dire* transcripts raises unique concerns and, thus, was
34 considered separately by the Privacy Subcommittee. *Voir dire* may elicit a range of personal,
35 sensitive, or embarrassing information from a juror that need not be redacted under the
36 Privacy Rules. The possibility of such information making its way from PACER access to
37 broad disclosure on the Internet poses real risks for juror harassment or even retaliation.
38 Many jurors may presently be unaware that *voir dire* transcripts will be electronically filed.
39 With such awareness, courts may find it more difficult to identify potential jurors able to
40 serve without fear or favor.

1 c. Subcommittee Conclusions

2
3 The Privacy Subcommittee concludes that the policies and practices for protecting
4 personal identifier information in electronically filed transcripts are in place and, on the
5 whole, being effectively applied by litigants and the courts. The Subcommittee suggests that
6 CACM regularly review these policies and practices in light of constant technological
7 advances. The Subcommittee also suggests continuing and expanding education efforts by
8 the courts to raise attorneys' awareness of their redaction obligations with respect to
9 electronically filed transcripts. Attorneys and court reporters also need to be made aware that
10 the redaction of material not specified in subsection (a) of the Privacy Rules requires a court
11 order.
12

13 With respect to *voir dire* transcripts, the Judicial Conference has recently provided
14 guidance for courts in balancing the right of public access – including electronic access – to
15 such transcripts with juror claims to privacy. The Subcommittee suggests that the Standing
16 Committee request CACM to monitor whether this guidance is adequate to ensure the
17 selection of fair and impartial jurors from a broad pool of persons and to safeguard against
18 retaliation and harassment.
19

20
21 **D. The Need For Rule Changes**

22
23 1. Overview

24
25 Upon careful review of the survey data and the information provided at the Fordham
26 Conference, the Privacy Subcommittee reports that, with the possible exception of the rules'
27 treatment of immigration cases, there is no significant call by the bench or bar for changes
28 to the Privacy Rules. Users of the rules generally agree that existing redaction requirements
29 are manageable and provide necessary protection against identity theft and other threats to
30 privacy presented by remote public access. Such complaints or suggestions as were heard
31 derive from the necessary learning curve involved in recent implementation of the Privacy
32 Rules. The Subcommittee thus concludes that the data collected do not support either
33 expansion or contraction of the types of information subject to redaction requirements.
34

35
36 2. Areas Specifically Considered for Changes to the Rules

37
38 a. Alien Registration Numbers

39
40 In considering possible amendments to the Privacy Rules, the Subcommittee gave

1 particular attention to the need to redact alien registration numbers insofar as they might be
2 analogized to social-security numbers. After extensive discussion and debate, including
3 consideration at the Fordham Conference, the Subcommittee concludes that redaction of
4 alien registration numbers is not warranted at this time.
5

6 Disclosure of an alien registration number, unlike a social-security number, poses no
7 significant risk of identity theft. Moreover, the Subcommittee heard from a number of court
8 clerks and Department of Justice officials, all of whom stressed that redacting alien
9 registration numbers would make it extremely difficult for the courts to distinguish among
10 large numbers of aliens with similar or identical names and to ensure that rulings were being
11 entered with respect to the correct person. Redaction would create a particularly acute
12 problem in the Second and Ninth Circuits, which have heavy immigration dockets. Given
13 the lack of any expressed support for the redaction of alien registration numbers, the Privacy
14 Subcommittee sees no reason to add them to the list of information subject to redaction under
15 subdivision (a) of the Privacy Rules.
16

17
18 b. The Exemption for Social Security Cases
19

20 The Privacy Subcommittee considered the continued need for exempting Social
21 Security cases from the redaction requirements of the Privacy Rules. The Subcommittee
22 reports no call for a change to that exemption. Further, the reason for the exemption
23 identified in 2007 pertains equally today: Social Security cases are rife with private
24 information, individual cases hold little public interest, and redaction would impose
25 unusually heavy burdens on filing parties.
26

27
28 c. The Exemption for Immigration Cases
29

30 The Privacy Subcommittee also considered the continued need for exempting
31 immigration cases from the redaction requirements of the Privacy Rules.¹⁹ Participants at the
32 Fordham Conference vigorously argued both sides of the question. The argument for
33 abrogating the exemption and affording remote public access to immigration case files was
34 that the current system gives “elite access” to those with resources to go to a courthouse that,

¹⁹ It should be noted that the Judicial Conference policy drafted by CACM provided an exemption from the redaction requirements for Social Security cases but not for immigration cases. During the process of drafting the Privacy Rules, the Department of Justice made arguments and provided data that persuaded the Privacy Subcommittee and eventually the Standing Committee that an exemption for immigration cases was warranted.

1 especially in transfer cases, might be hundreds of miles away from a party interested in the
2 information. It was argued that limiting access to the courthouse was particularly burdensome
3 for members of the media. Under the current rule, the media must often depend on the parties
4 to get information about habeas petitions and complaints in an immigration matter. It was
5 also suggested that the exemption is ineffectual in that certain information in immigration
6 cases *is* available over PACER — including the docket, identity of the litigants, and the
7 orders and decisions, which will frequently contain sensitive information about asylum
8 applicants. Thus, the media argues that the current system of access impairs First
9 Amendment interests without providing much privacy protection.

10
11 On the other hand, the Privacy Subcommittee also heard forceful arguments from
12 DOJ and court personnel in favor of the current system of limiting remote public access to
13 immigration cases. They note the explosion of immigration cases since 2002, particularly in
14 the Second and Ninth Circuits, and argue that immigration cases, especially asylum cases,
15 are replete with private information on a par with or greater than Social Security cases. That
16 personal and private information is necessary to the court's disposition, so there is no way
17 to keep it out of the record. Moreover, it is woven throughout the record, precluding easy
18 redaction.²⁰ Further, the burden of redaction would inevitably fall on the government because
19 many petitioners are unrepresented, and imposing redaction requirements on *pro bono*
20 counsel could discourage such representation. DOJ represents that there is no simple
21 technological means presently available to redact all personal information in all the
22 immigration cases. It urges that any change to current limitations on remote public access
23 be deferred until technological advances facilitate redaction.

24
25 A compromise solution emerged at the Fordham Conference: maintaining existing
26 limitations on remote public access for immigration cases most likely to include sensitive
27 information, such as cases seeking asylum or relief under Convention Against Torture, but
28 removing the exemption for immigration cases involving transfer, detention, or deportation.
29 The Privacy Subcommittee agrees that a more nuanced approach to exempting immigration
30 cases from remote public access warrants further consideration. One area for investigation
31 is the plausibility of segregating cases by subject. For example, removal cases often present
32 claims for asylum. Another factor to be considered is a possible decline in the volume of
33 immigration cases, or types of immigration cases, which could lessen the burdens of
34 redaction. A third factor — referred to earlier in other sections of this Report — is the
35 possibility that advances in technology will ease the burdens of redaction.

36
37 The Privacy Subcommittee urges further research and consultation with interested

²⁰ A DOJ official estimated that one FOIA officer would have to spend an entire work day with one case to get the average asylum case moved to the Court of Appeals in redacted form.

1 parties before any decision is made to abrogate the exemption for immigration cases. But,
2 mindful of the significant public interest in open access generally, and in immigration policy
3 in particular, the Subcommittee suggests that the current approach to immigration cases be
4 subject to future review and possible modification.
5

6 7 **III. Summary of Findings and Recommendations** 8

9 The Privacy Subcommittee summarizes its findings and recommendations as follows:
10

11 1. The Privacy Rules are in place and are generally being implemented effectively
12 by courts and parties.
13

14 2. To ensure continued effective implementation, every other year the FJC should
15 undertake a random review of court filings for unredacted personal identifier information.
16

17 3. Also to ensure continued effective implementation of the Privacy Rules, the
18 courts should continue to educate their own staffs and members of the bar about (a)
19 redaction obligations under the Privacy Rules, (b) steps that can be taken to minimize the
20 appearance of private identifier information in court filings and transcripts, and (c) the need
21 to secure a court order under Fed. R. Civ. P. 5.2(e) or its counterparts before redacting any
22 information beyond that specifically identified in the Privacy Rules.
23

24 4. The AO should monitor technological developments and make courts and litigants
25 aware of software that would make it easier to search documents, transcripts, and court
26 records for unredacted personal identifier information.
27

28 5. At present, no best practice can be identified to support a uniform national rule
29 with respect to making plea and cooperation agreements publicly available. District courts
30 should, however, be encouraged to continue discussing their different approaches, and the
31 Standing Committee might request CACM to monitor these approaches to see if, at some
32 future time, a best practice emerges warranting a uniform rule.
33

34 6. To the extent district courts seal plea or cooperation agreements, consideration
35 might be given, where appropriate, to a “sunset provision” providing for their expiration
36 unless sealing is extended after further review and order of the court.
37

38 7. There is no need to amend the Privacy Rules either to expand or to contract the
39 type of information subject to redaction.
40

1 8. The exemption for Social Security cases should be retained in its current form.

2

3 9. The exemption for immigration cases should be retained in its current form.
4 Nevertheless, this exemption should be subject to future review in light of possible changes
5 in technology and case volumes that could ease the burden of redaction. Such review should
6 also consider whether the exemption might be narrowed to particular types of immigration
7 cases.

8

9

10

11 December, 2010

1 **Judicial Conference Standing Committee on the Federal Rules**
2 **Subcommittee on Privacy**

3
4 Hon. Reena Raggi, Chair
5

6
7 Hon. Robert L. Hinkle (Chair of Working Group on Rules Changes)
8

9 Hon. John G. Koeltl (Chair of Working Group on Transcripts)
10

11 Hon. Ronald B. Leighton (Chair of Working Group on Implementation)
12

13 Hon. Steven D. Merryday (Chair of Working Group on Criminal Cases)
14

15 Hon. David H. Coar
16

17 Hon. James B. Haines, Jr.
18

19 Hon. John R. Tunheim
20

21 James F. Bennett, Esq.
22

23 Leo P. Cunningham, Esq.
24

25 Elizabeth J. Shapiro, Esq., Department of Justice
26

27 Jonathan Wroblewski, Esq., Department of Justice
28

29 Professor Sara Sun Beale
30

31 Professor Edward H. Cooper
32

33 Professor S. Elizabeth Gibson
34

35 Professor Catherine T. Struve
36

37 Professor Daniel J. Capra, Reporter

TAB
12

**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**

**EUGENE R. WEDOFF
BANKRUPTCY RULES**

**MARK R. KRAVITZ
CIVIL RULES**

**RICHARD C. TALLMAN
CRIMINAL RULES**

**SIDNEY A. FITZWATER
EVIDENCE RULES**

DRAFT

**MEMORANDUM TO: AD HOC ADVISORY COMMITTEE ON JUDICIARY
PLANNING**

The Ad Hoc Advisory Committee on Judiciary Planning has requested the Committee on Rules of Practice and Procedure (and all other Judicial Conference committees) (1) “to identify strategic initiatives it is pursuing,” indicating the anticipated completion date and whether the initiative is being conducted in partnership with other Judicial Conference committees, and (2) to “[r]eview the *Strategic Plan for the Federal Judiciary* . . . and suggest which of its issues, strategies, or goals the Executive Committee should consider to be high priorities over the next two years.” Although in a sense the work of the rules committees as contained in the Committee’s entire agenda book describes a general response to this request, the Long Range Planning Committee defines “strategic initiative” in a more limited way: “A project, study or effort that has the potential to make a significant contribution to the accomplishment of a strategy or goal set forth in the Strategic Plan for the Federal Judiciary. The completion of a strategic initiative should result in a completed study or analysis, a new capability or service, a new policy, or the accomplishment of a measurable goal or objective.” The following response is based on this definition.

Strategic Initiatives

A primary “strategic initiative” the Committee on Practice and Procedure is pursuing is to work with the Advisory Committee on Civil Rules in implementing the results of the May 2010 Conference held at the Duke University School of Law. At that Conference, more than seventy moderators, panelists, and speakers presented a wide array of views on litigation problems and

exploration of the most promising opportunities to improve federal civil litigation. The conference generated specific and general suggestions for changing both rules and litigation practices. The suggestions included changes to the federal rules, changes to judicial and legal education; the development of protocols, guidelines, and projects to test and refine continued improvements; and the development of materials to support these efforts. The advisory committee has formed subcommittees to consider the suggestions raised at the conference and the ways to implement them. Some aspects of the work, such as judicial education, the development of supporting materials, and the development and implementation of pilot projects will be coordinated with the Federal Judicial Center and other Judicial Conference committees, including the Committee on Court Administration and Case Management. The advisory committee is focusing its immediate attention on two issues: (1) discovery in complex or highly contested cases: and (2) review of pleading standards in light of recent Supreme Court cases. The completion date for the entire initiative is unknown.

Another primary strategic initiative is to work with the Criminal Rules Committee on its ongoing analysis of whether the present rules and related materials adequately support the disclosure obligations on prosecutors. The FJC has conducted a major study and the committee is studying not only the possibility of rules changes but also whether the District Judges' Bench Book should be revised to give judges greater guidance in protecting defendants' right to obtain exculpatory and impeaching information. The completion date is unknown.

Judiciary Priorities

The strategy or goal that the Committee on Rules of Practice and Procedure recommends that the Executive Committee consider to be a high priority over the next two years is the following.

1. Strategy 6.1, "Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress." Goal 6.1a, "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."

SUBJECT: Judiciary Planning (Action)

This item reviews the strategies and goals in the *Strategic Plan for the Federal Judiciary* that relate to the work of the Committee on Rules of Practice and Procedure, and requests that the Committee identify strategic initiatives that it may be conducting, overseeing, or participating in that support the implementation of the *Strategic Plan's* goals and strategies. The item also seeks Committee suggestions about which issues, strategies or goals the Executive Committee should consider to be judiciary-wide priorities.

Background

On September 14, 2010, the Judicial Conference approved the *Strategic Plan for the Federal Judiciary*, which includes 13 strategies and 39 goals to address seven strategic issues. The plan, which is included in the Committee's materials, is intended to be a catalyst for actions that improve the accessibility, timeliness and efficiency of the judiciary. The plan also addresses how the judiciary can continue to attract the finest legal talent to judicial service, be an employer of choice for highly qualified executives and support staff, work effectively with the other branches of government, and enjoy the people's trust and confidence.

The Judicial Conference also approved an approach to strategic planning in which Conference committees assume a great deal of responsibility for the implementation of the *Strategic Plan*.¹ With the assistance of a judge who serves as the judiciary planning coordinator, the Executive Committee will facilitate and coordinate the implementation of the plan. Chief Judge David Bryan Sentelle (D.C. Cir.), chair of the Executive Committee, has designated Judge Charles R. Breyer (N.D. Cal.) to serve as the judiciary planning coordinator for a two-year term. The Executive Committee's planning responsibilities also include the identification of priorities:

With suggestions from Judicial Conference committees and others, and the input of the judiciary planning coordinator, the Executive Committee will identify issues, strategies, or goals to receive priority attention over the next two years (JCUS-SEP 10, p.____).

¹See "Appendix: An Approach to Strategic Planning for the Judicial Conference of the United States and its Committees," *Strategic Plan for the Federal Judiciary*, September 14, 2010, p. 19.

At its June 2010 meeting, the Committee on the Committee on Rules of Practice and Procedure reviewed a draft of the *Strategic Plan*, including a list of strategies and goals that appeared to relate to its work. These strategies and goals are included as Attachment A.

Strategic Initiatives of the Committee on Rules of Practice and Procedure

Accomplishing the strategies and goals in the *Strategic Plan* will require substantial efforts from Conference committees. However, many committees are already engaged in efforts that have the potential to make great progress. A full compilation of these initiatives is needed in order to assess current efforts, ensure coordination, and determine next steps.

Each committee conducts critical business as part of its routine and ongoing work. The present effort, however, is limited to the compilation of *strategic initiatives* by the Committee on Rules of Practice and Procedure, based on the following definition:

Strategic Initiative. A project, study or effort that has the potential to make a significant contribution to the accomplishment of a strategy or goal set forth in the *Strategic Plan for the Federal Judiciary*. The completion of a strategic initiative should result in a completed study or analysis, a new capability or service, a new policy, or the accomplishment of a measurable goal or objective.

ACTION REQUESTED: The Committee on Rules of Practice and Procedure is asked to identify strategic initiatives it is pursuing. For each initiative, please describe its purpose, desired outcome, and anticipated completion date. In addition, please indicate whether the initiative is being conducted in partnership with other Judicial Conference committees.

Judiciary Priorities

At its February 2011 meeting, the Executive Committee will be asked to identify which issues, strategies or goals in the *Strategic Plan* should be considered priorities over the next two years.

A summary of suggestions from Judicial Conference committees will be provided to the Executive Committee. Attachment B includes draft elements that could be included in that summary, based on suggestions from some committees' summer 2010 meetings.

Attachments

- A. Strategies and Goals That May relate to the Work of the Committee on Rules of Practice and Procedure
- B. Draft Summary of Committee Suggestions on Judiciary Priorities

NOTE: The following are draft elements of a summary that could be provided to the Executive Committee for its consideration as it identifies judiciary-wide priorities. Ideas and suggestions from other Judicial Conference committees will be incorporated into this paper.

IDENTIFYING JUDICIARY PRIORITIES: A SUMMARY FOR EXECUTIVE COMMITTEE CONSIDERATION

This draft was prepared to assist the Executive Committee in the identification of issues, strategies, or goals from the *Strategic Plan for the Federal Judiciary* that should receive priority attention over the next two years. Judicial Conference committees are asked to make recommendations to the Executive Committee, with some having offered suggestions already. After including the ideas of the remaining Conference committees, a revised version of this paper will be provided to the Executive Committee for consideration at its February 2011 meeting.

NEED FOR PRIORITIES

The *Planning Handbook for the Federal Courts* states that the essence of planning is setting priorities.² At the same time, given the decentralized nature of judiciary governance, priority setting occurs most often within a single organization or committee. Identifying judiciary-wide priorities can be a challenge.

Those providing advice to the Ad Hoc Advisory Committee on Judiciary Planning recognized this challenge. In January 2010, the Committee on Audits and Administrative Office Accountability (AAOA) suggested that priority setting is critical:

Everything in the plan is important. But setting priorities among the numerous strategies and goals will enable the judiciary to focus near-term efforts on those issues that are the most vital to its future.

In addition, the AAOA Committee noted that priority setting is a function of leadership. Members of the Ad Hoc Advisory Committee agreed. During its deliberations, one member observed:

²Administrative Office of the United States Courts, *Planning Handbook for the Federal Courts*, (2d ed. 1997), p. 77.

A large organization cannot have too many priorities at once and succeed. If the Executive Committee does not limit the Judiciary to 3-4 priorities, [there won't be any] priorities. If they all get thrown into the mix, others will select their own priorities and there will be no power or success.

The Executive Committee also recognized the importance of priority-setting — and its role in identifying priorities — in developing an approach to strategic planning for the federal judiciary. Upon its recommendation, the Judicial Conference approved the following as part of the planning approach for the Conference and its committees:

With suggestions from Judicial Conference Committees and others, and the input of the judiciary planning coordinator, the Executive Committee will identify issues, strategies, or goals to receive priority attention over the next two years.

JCUS-SEP 10, p.____.

JUDICIAL CONFERENCE COMMITTEE SUGGESTIONS ON PRIORITIES

Committees routinely prioritize issues and initiatives within their own areas of responsibility. For their summer 2010 meetings, committees were also asked to identify judiciary-wide priorities. To date, four committees have offered suggestions about issues, strategies and goals that should receive priority attention. Other committees reported that they will recommend priorities after consulting with their planning subcommittees or deliberating further.

It should be noted that, to date, the ideas about judiciary-wide priorities are based on April and May 2010 drafts of the *Strategic Plan for the Federal Judiciary*. Since then, goals calling for increased education and training on security (Goal 1.2b), and ethical conduct, integrity and accountability (Goal 7.1a) have been added to the plan. In addition, an issue and several goals were revised between May 2010 and the approval of the plan in September.³

Of the four responding committees, so far all have identified Issue 1, or a strategy or goal within Issue 1, as a priority. Three of the four committees have identified Issue 2 or Strategy 2.1 as a priority.

³Issue 1 was changed from “Delivering Justice” to “Providing Justice,” and a goal about attracting and retaining the most qualified staff (Goal 3.2a) was substantially revised. Other clarifying changes were made to goals relating to support for senior and recalled judges (Goal 3.1a); the handling of improperly raised and pro se claims (Goals 5.1c and 5.2c); and communication and collaboration with organizations outside the judicial branch (Goal 7.2b).

Committee on Audits and Administrative Office Accountability

- Strategy 2.1:** Allocate and manage resources more efficiently and effectively.
- Strategy 1.3:** Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.
- Strategy 7.2:** Improve the accessibility of information about the judiciary in an appropriate manner that preserves the rights of participants in judicial proceedings.

Committee on Defender Services

- Goal 1.1c:** Ensure that persons represented by panel attorneys and federal defender organizations are afforded well qualified representation consistent with best practices for the representation of criminal defendants.
- 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.
- Strategy 6.1:** Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress.
- Goal 6.2a:** Develop ongoing communications with the executive branch about policies and solutions to address issues affecting the judiciary.

Committee on Judicial Resources

Issue 1. Providing Justice:

How can the judiciary provide justice in a more effective manner and meet new and increasing demands, while adhering to its core values? [NOTE: reflects current language.]

Issue 2. 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?

Issue 3. 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?

Committee on Space and Facilities

- Strategy 1.2:** Strengthen the protection of judges, court staff and the public at court facilities, and of judges and their families at other locations.
- Strategy 1.3:** Secure resources that are sufficient to enable the judiciary to accomplish its mission in a manner consistent with judiciary core values.
- Goal 1.3c:** Ensure that judiciary proceedings are conducted in court facilities that are secure, accessible, efficient, and properly equipped.
- Strategy 2.1:** Allocate and manage resources more efficiently and effectively.
- Strategy 6.1:** Develop and implement a comprehensive approach to enhancing relations between the judiciary and the Congress.

December 2011							February 2012							March 2012						
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January 2012																				
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												U.S. Federal Holidays are in Red.								
December 2011							Printfree.com Main Calendars Page							February 2012						

May 2012							July 2012							August 2012						
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June 2012

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17 Father's Day	18	19	20 Summer Begins	21	22	23
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						U.S. Federal Holidays are in Red.
May 2012	Printfree.com Main Calendars Page					July 2012