*Feb. 28, 2012*

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 5-6, 2012
Phoenix, Arizona
**Minutes**

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## ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 5 and 6, 2012. The following members were present:

Judge Mark R. Kravitz, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Judge Richard C. Wesley
Judge Diane P. Wood

Deputy Attorney General James M. Cole and Larry D. Thompson, Esquire were unable to attend, but Mr. Thompson participated by telephone. The Department of Justice was represented at the meeting by Elizabeth J. Shapiro, Esquire.

Also participating were the committee's former chair, Judge Lee H. Rosenthal, former lawyer members Douglas R. Cox and William J. Maledon, and the committee's style consultant, Professor R. Joseph Kimble.

Judge Rosenthal chaired a discussion on class action issues with the following panelists: Dean Robert H. Klonoff, a member of the Advisory Committee on Civil Rules; Daniel C. Girard, Esquire, a former member of the advisory committee; and John H. Beisner, Esquire.

Providing support to the committee were:

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| Professor Daniel R. Coquillette | The committee's reporter |
| Peter G. McCabe | The committee's secretary |
| Jonathan C. Rose | Rules Committee Officer |
| Andrea L. Kuperman | Rules law clerk to Judge Kravitz |
| Joe Cecil | Research Division, Federal Judicial Center |
| Bernida Evans | Rules Office Management Analyst |

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 Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

## INTRODUCTORY REMARKS

*Committee Membership Changes*

Judge Kravitz announced with regret that the terms of Messrs. Cox and Maledon had expired on October 1, 2011, and both were attending their last Standing Committee meeting. He thanked them for their distinguished service on the committee, described their many contributions to the committee's work and the rules program, and presented each with a plaque signed by Chief Justice John Roberts, Jr. and Judge Thomas F. Hogan, Director of the Administrative Office.

Judge Kravitz introduced the new committee members, Judge Wesley and Mr. Garre, and he summarized their impressive legal backgrounds. He reported that Mr. Thompson was also a newly appointed member of the committee, but was unable to attend the meeting.

*Meeting with Supreme Court Justices*

Judge Rosenthal reported on a recent meeting held at the Supreme Court that she had attended with Judge Kravitz, Dean Levi, Professor Coquillette, and former committee chair Judge Anthony J. Scirica. They had an extensive and candid exchange with the Chief Justice and other justices on the rules program. The discussion, she said, touched upon such matters as the openness of the rules process, the procedures followed by the rules committees, the effective use of empirical research to support proposed rule amendments, and the rules committees' ongoing relationships with Congress, the bar, and the academy. The meeting, she said, had been very beneficial and met all the committee's objectives. She added that it would make sense to pursue similar dialogues with the Court every five years or so.

*Judicial Conference Report*

Judge Kravitz reported that the Judicial Conference at its September 2011 session had approved all the proposed amendments to the rules and forms presented by the committee.

*Rules Taking Effect on December 1, 2011*

Judge Kravitz referred to the amendments to the appellate, criminal, and evidence rules and the bankruptcy rules and forms that took effect by operation of law on December 1, 2011.

*Pending Rule Amendments*

Judge Kravitz reported that proposed amendments to the appellate, bankruptcy, civil, criminal, and evidence rules had been published for comment in August 2011. Although public hearings had been scheduled, few requests had been submitted by bench and bar to date to testify on the proposals.

*Lawsuit Abuse Reduction Act*

Ms. Kuperman reported that the proposed Lawsuit Abuse Reduction Act of 2011 (H.R. 966) would restore the mandatory-sanctions provision of FED. R. CIV. P. 11 (sanctions). Adopted in 1983, she said, the provision simply did not work and was later repealed in 1993. In addition, she said, the proposed legislation would eliminate the beneficial safe-harbor provision of Rule 11(c)(2), added in 1993. It gives a party 21 days to withdraw challenged assertions on a voluntary basis.

She pointed out that Judges Rosenthal and Kravitz had written to the chair of the House Judiciary Committee to oppose the bill. Their letter emphasized that the Federal Judicial Center's empirical research had demonstrated that the 1983 version of Rule 11 had produced wasteful satellite litigation and increased the time and costs of civil litigation. She added that the American Bar Association and other organizations had also sent letters to Congress opposing the legislation.

She noted that the House Judiciary Committee had held a hearing on H.R. 966 in March 2011 and then reported out the bill. But there was no further action in the House, although a companion bill (S. 533) was introduced in the Senate.

*Sunshine in Litigation Act*

Ms. Kuperman reported that Judges Rosenthal and Kravitz had written to the chair of the Senate Judiciary Committee to oppose the proposed Sunshine in Litigation Act of 2011 (S. 623). The bill would prevent a court from issuing a discovery protective order unless it first makes particularized findings of fact that the order would not restrict the disclosure of information relevant to protecting public health or safety. She noted that the bill, similar to others introduced in past Congresses, had been favorably reported out of committee in May 2011, but there had been no further action on it.

*Pleading Standards*

Ms. Kuperman reported that no legislation was currently pending in Congress to address civil pleading standards in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

*Consent Decrees*

Ms. Kuperman noted that legislation (H.R. 3041) had been introduced to limit the duration of consent decrees issued by federal courts that impose injunctive or other prospective relief against state or local programs or officials. The bill, she said, was being monitored closely by the Judicial Conference's Federal-State Jurisdiction Committee. It would not amend the federal rules directly, but could impact the rules in procedural ways. The legislation, she said, had been referred to Congressional committee, but no further action had taken place on it.

*Costs and Burdens of Civil Discovery*

Ms. Kuperman reported that the House Judiciary Committee Subcommittee on the Constitution had held a hearing in December 2011 on "the costs and burdens of civil discovery." She noted that Judges Kravitz and Campbell had sent a letter to the subcommittee chair providing an update on the advisory committee's various efforts to reduce discovery costs, burdens, and delays. The letter, she said, urged Congress to allow the Advisory Committee on Civil Rules to continue pursuing these issues under the thorough and deliberate process that Congress created in the Rules Enabling Act. She added that Congressional staff had been invited to, and had attended, the advisory committee's recent meeting in Washington. The committee, she added, will continue to keep members and staff of Congress informed of pertinent developments.

*Time to File a Notice of Appeal When a Federal Officer or Employee is a Party*

Ms. Kuperman reported that the Congress had enacted legislation amending 28 U.S.C. § 2107 to conform it to the December 2011 change in FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case). The statute mirrors the amended rule and clarifies the time for parties to appeal in a civil case when a federal officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

*Bankruptcy Legislation*

Ms. Kuperman reported that legislation (Pub. L. No. 112-64) had been enacted in December 2011 to extend for another four years the exemption given to qualified reservists and members of the National Guard from application of the means-test presumption of abuse in Chapter 7 bankruptcy cases. She noted that a footnote in an interim bankruptcy rule would have to be updated to incorporate the number of the new public law. In addition, she said, legislation was pending to add some bankruptcy judgeships and increase the filing fee for chapter 11 cases. If enacted, it would require conforming changes to the bankruptcy forms to reflect the higher fee.

## REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rose reported that Judge Thomas F. Hogan had assumed his duties as the new Director of the Administrative Office.

## REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported that Judge Jeremy D. Fogel, the new Director of the Federal Judicial Center, had decided to undertake a comprehensive study of case-dispositive motions in civil cases. To that end, he said, the Center was seeking assistance from several law professors to participate in the study and provide law students to help in the research. The Center, he added, was conducting pilot efforts for the project and would present proposals for consideration by the Advisory Committee on Civil Rules at its March 2012 meeting. He suggested that the project would likely be ready to proceed at the start of the next academic year.

## APPROVAL OF THE MINUTES OF THE LAST MEETING

**The committee without objection by voice vote approved the minutes of the last meeting, held on June 2-3, 2011.**

## 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 December 7, 2011 (Agenda Item 10). Judge Sutton reported that the advisory committee had no action items to present.

*Informational Items*

Judge Sutton thanked the members, reporters, and committee staff for working with congressional staff on the amendment of 28 U.S.C. § 2107 to make it consistent with FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case). Even though it involved a relatively minor, technical change, he said, it had taken enormous effort and skill to accomplish the legislative action.

He reported that only one comment had been received to date on the advisory committee's proposed amendment to FED. R. APP. P. 28 (briefs) that would remove the requirement that a brief set forth separate statements of the case and of the facts. The comment, from a prominent appellate judge, opposed combining the two statements.

But, he said, the advisory committee believed that the current requirement of separate statements had generated confusion and redundancy. Combining them would provide lawyers with greater flexibility in making their presentations.

Judge Sutton reported that the advisory committee had not reached a consensus on whether to treat federally recognized Indian tribes the same as states for the purpose of filing amicus briefs under FED. R. APP. P. 29(a) (amicus briefs). The committee, though, did reach a consensus that municipalities should be included with Indian tribes if a Rule 29 amendment were pursued. Judge Sutton added that he had sent a letter to the chief judges of all the courts of appeals soliciting their views on the matter.

Judge Sutton reported that Professor Richard D. Freer of Emory Law School, a guest speaker at the advisory committee's recent meeting had complained about the frequency of federal rule changes. Professor Freer argued that frequent changes increase costs, add confusion for lawyers, complicate electronic searches, and may lead to unintended consequences. He suggested that if rule changes were made less often – such as once every several years – the bar would pay more attention to the rules and submit more and better comments. Judge Sutton noted that the advisory committee was taking the criticism to heart and generally supports deferring and bundling amendments where feasible.

A member endorsed the suggestion generally and added that lawyers often complain about the committees "tinkering" with the rules. Other participants pointed out that the advisory committees do in fact bundle rule amendments where possible. Nevertheless, many rule changes are required by legislation, case law developments, and other factors beyond the committees' control.

## REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of December 12, 2011 (Agenda Item 8).

*Amendments for Publication*

FED. R. BANKR. P. 7054(b) and 7008(b)

Judge Wedoff reported that the proposed amendments to FED. R. BANKR. P. 7054 (judgments and costs) and FED. R. BANKR. P. 7008(b) (attorney's fees) would clarify the procedure for seeking the award of attorney's fees in adversary proceedings. Bankruptcy procedures, he explained, are different from those in civil actions in the district courts.

Civil practice is governed by FED. R. CIV. P. 54(d)(2) (attorney's fees), which specifies that a claim for attorney fees be made by motion unless the substantive law requires proving the fees at trial as an element of damages. The bankruptcy rules, though, have no analog to FED. R. CIV. P. 54(d)(2). Instead, attorney's fees are governed by FED. R. BANKR. P. 7008(b), which specifies that a request for the award of attorney's fees be pleaded as a claim in a complaint or other pleading.

The difference between the civil and bankruptcy rules, he said, creates a trap for the unwary, especially for lawyers who practice regularly in the district courts. Moreover, the difference between bankruptcy practice and civil practice has led bankruptcy courts to adopt different, non-uniform approaches to handling fee applications. The largest bankruptcy court in the country, for example, has adopted the civil practice by local rule.

In a recent decision, the Ninth Circuit bankruptcy appellate panel pointed to a gap in the current bankruptcy rules. It noted that when a party follows FED. R. BANKR. P. 7008(b) and pleads its demand for attorney's fees in the complaint, the bankruptcy rules specify no procedure for awarding them. The panel's opinion expressly invited the advisory committee to close the gap by amending FED. R. BANKR. P. 7054. That rule currently incorporates FED. R. CIV. P. 54(a)-(c) and has its own provision governing recovery of costs by a prevailing party. But it has no provision like FED. R. CIV. P. 54(d)(2) governing recovery of attorney's fees.

Judge Wedoff explained that the advisory committee agreed with the bankruptcy appellate panel and decided to conform the bankruptcy rules to the civil rules – thus requiring that a claim for the award of attorney's fees in an adversary proceeding be made by motion. To do so, the proposed amendments incorporate much of FED. R. CIV. P. 54(d)(2) into a new FED. R. BANKR. P. 7054(b)(2) prescribing the procedure for seeking attorney fees. Current FED. R. BANKR. P. 7008(b), requiring that the demand be pleaded in a complaint or other pleading, would be deleted. Judge Wedoff added that FED. R. CIV. P. 54(d)(2)(D), dealing with referral of matters to a master or magistrate judge, would not be incorporated because it is not relevant to the bankruptcy courts.

Judge Wedoff reported that the advisory committee would also correct a long-standing grammatical error in the first sentence of FED. R. BANKR. P. 7054(b) by changing the verb "provides" to "provide."

**The committee without objection by voice vote approved publication of the proposed amendments to FED. R. BANKR. P. 7054(b) and the proposed deletion of FED. R. BANKR. P. 7008(b).**

*Information Items*

PART VIII – THE BANKRUPTCY APPELLATE RULES

Judge Wedoff reported that the advisory committee had been engaged for several years in a major project to revise the Part VIII rules. The principal objectives of the project, he said, are: (1) to align Part VIII more closely with the Federal Rules of Appellate Procedure; and (2) to adjust the rules to the reality that bankruptcy court records today are filed, stored, and transmitted electronically, rather than in paper form.

He explained that the advisory committee had made substantial progress and would return to the Standing Committee in June 2012 seeking permission to publish the revised Part VIII rules for public comment. At this point, the advisory committee just wanted to give the Standing Committee a preliminary look at the first half of the rules, explain the principal changes from the current rules, and address any concerns that members might have. He invited the members to bring any suggestions to the advisory committee's attention.

Professor Gibson noted that Part VIII deals primarily with appeals from a bankruptcy court to a district court or bankruptcy appellate panel. If a case proceeds from there to the court of appeals, the Federal Rules of Appellate Procedure take over. In addition, in 2005 Congress authorized direct appeals from a bankruptcy court to a court of appeals in limited circumstances. Accordingly, the new Part VIII rules also contain provisions dealing with permissive direct appeals.

She noted that Part VIII had largely been neglected since 1983, even though the Federal Rules of Appellate Procedure have since been amended on several occasions and completely restyled in 1998. She pointed out that Part VIII was difficult to follow and needs to be reorganized and rewritten for greater ease of use. In addition, it needs to be updated and made more consistent with the current Federal Rules of Appellate Procedure. She emphasized that the proposed revisions were comprehensive in nature. Some rules would be combined, some deleted, and some moved to new locations.

Professor Gibson explained that the advisory committee had conducted two mini-conferences on the proposed rules with members of the bench and bar. The participants, she said, expressed substantial support for the proposed revisions, but several recommended that additional changes be made to take account of the widespread use of technology in the federal courts. They urged the committee to revise the rules to recognize explicitly that court records in bankruptcy cases now are filed and maintained in electronic form.

Judge Wedoff and Professor Gibson noted that the proposed new Part VIII rules largely adopt the style conventions of the other, restyled federal rules. For example, they

consistently use the word "must" to denote an affirmative obligation to act, even though the other parts of the bankruptcy rules still use the word "shall." He pointed out that the Part VIII rules are largely distinct from the rest of the bankruptcy rules. As a result, there should be no problem with using the modern terminology only in Part VIII and not in other bankruptcy rules.

Professor Gibson noted that the advisory committee had revised and reorganized Part VIII so thoroughly that it would not be meaningful to produce a redlined or side-by-side version comparing the old and new rules. Rather, she said, the committee was using the committee notes to specify where particular provisions in the new rules are located in the current rules.

A participant suggested that it would be helpful to produce a chart showing readers where each provision in the current rules has been relocated. Professor Gibson agreed, but explained that some provisions had been broken up and relocated in several different places. Judge Wedoff agreed to work on producing a chart, but added that it might be of limited value because readers will need to examine the new rules as a whole.

FED. R. BANKR. P. 8001

Professor Gibson noted that proposed FED. R. BANKR. P. 8001 (scope and definitions) was new and had no counterpart in the existing rules. Similar to FED. R. APP. P. 1, it sets forth the scope of the Part VIII rules and contains three definitions: (1) "BAP" to mean a bankruptcy appellate panel; (2) "appellate court" to mean either the district court or the BAP to which an appeal is taken; and (3) "transmit" to mean sending documents electronically (unless a document is sent by or to a pro se litigant, or a local court rule requires a different means of delivering the document).

She explained that the advisory committee had deliberately selected the term "transmit" to highlight a specific process with a strong presumption in favor of electronic transfer of a document or record. A member suggested, though, that the proposed definition of "transmit" was not sufficiently forceful and suggested including a stronger affirmative statement that electronic transmission is to be the norm. Judge Wedoff agreed and added that electronic transmission was already universal in the bankruptcy courts except for pro se litigants. Another member cautioned that it is problematic to use a word like "transmit," which has a much broader common meaning, and ascribe to it an intentionally narrower meaning. Perhaps a unique new term could be devised, such as "e-transmit."

Some members questioned the proposed definition of "appellate court" because it contradicted the ordinary meaning of the term, which normally refers to the courts of appeals. Judge Wedoff and Professor Gibson agreed to have the advisory committee reconsider the definition.

FED. R. BANKR. P. 8002

Professor Gibson reported that proposed FED. R. BANKR. P. 8002 (time to file a notice of appeal) must remain in its current place because 28 U.S.C. § 158(c)(2) refers to it by number. She said that the committee had essentially restyled the existing rule and added a provision to cover inmates confined in institutions.

FED. R. BANKR. P. 8003 and 8004

Professor Gibson explained that proposed Rules 8003 (appeal as of right) and 8004 (appeal by leave) would set forth in two separate rules the provisions governing appeals as of right and appeals by leave. The two are combined in the current FED. R. BANKR. P. 8001 (manner of taking an appeal). The proposed revisions, she said, will conform Part VIII to the Federal Rules of Appellate Procedure.

She noted that under the current bankruptcy appellate rules, an appeal is not docketed in the appellate court until the record is complete and received from the bankruptcy clerk. Proposed FED. R. BANKR. P. 8003(d)(2), however, conforms to the Federal Rules of Appellate Procedure and requires the clerk of the appellate court to docket the appeal earlier, as soon as a notice of appeal is received. Proposed FED. R. BANKR. P. 8004 would continue the current bankruptcy practice of requiring an appellant to file both a notice of appeal and a motion for leave to appeal.

FED. R. BANKR. P. 8005

Professor Gibson explained that proposed FED. R. BANKR. P. 8005 (election to have an appeal heard by the district court) governs appeals in those circuits that have a BAP. Under 28 U.S.C. § 158(c)(1), an appeal in those circuits is heard by the BAP unless a party to the appeal elects to have it heard by the district court. The proposed rule provides the procedure for exercising that election, and it eliminates the current requirement that the election be made on a separate document. Instead, a new Official Form will be devised for the election. Proposed Rule 8005(c) specifies that a party seeking a determination of the validity of an election must file a motion in the court in which the appeal is then pending.

FED. R. BANKR. P. 8006

Professor Gibson noted that proposed FED. R. BANKR. P. 8006 (certification of a direct appeal to the court of appeals) overlaps substantially with the Federal Rules of Appellate Procedure. Under 28 U.S.C. § 158(d)(2), a case may be certified for direct appeal from a bankruptcy court in three ways. First, the bankruptcy court, the district court, or the BAP may make the certification itself based on one of the direct appeal criteria specified in 28 U.S.C. § 158(d)(2)(A). Second, the certification may be made by all the parties to the appeal. Third, the bankruptcy court, district court, or BAP must make the certification if a majority of the parties on both sides of the appeal ask the court to make it.

Judge Wedoff explained that the proposed rule provides the procedures for implementing each of the three options. Since the bankruptcy court is likely to have the most knowledge about a case, proposed Rule 8006(b) specifies that a case will remain pending in the bankruptcy court, for purposes of certification only, for 30 days after the effective date of the first notice of appeal. The 30-day hold gives the bankruptcy court time to make a certification. Once the certification has been made, the case is in the court of appeals, and the request for permission to take a direct appeal must be filed with the circuit clerk within 30 days. The court of appeals has discretion to take the direct appeal, and the procedure is similar to that under 28 U.S.C. § 1292(b).

Judge Sutton reported that the Advisory Committee on Appellate Rules was working closely with the bankruptcy advisory committee on revising the Part VIII rules, with Professor Struve and Professor Amy Barrett serving as liaisons to the project. He noted that the appellate advisory committee had drafted corresponding changes in FED. R. APP. P. 6 (appeal in a bankruptcy case) by adding a new subdivision 6(c) to address permissive direct appeals from a bankruptcy court.

He reported that appellate advisory committee members had questioned the choice of the verb "transmit" in FED. R. APP. P. 6 and debated several other potential terms. In addition, he said, concern had been voiced over the wisdom of introducing a new term, such as "transmit,""provide," or "furnish," but only in FED. R. APP. P. 6. It would be inconsistent with the terminology used in the other appellate rules. The appellate courts, moreover, are not as far advanced with electronic filing as the bankruptcy courts and may not be ready to receive other types of appeals in the same manner as bankruptcy appeals. But, he added, it may well be acceptable as a practical matter to live with two different verbs in the rules for a while. A member suggested using the term "send," but Judge Sutton pointed out that in the electronic environment, the clerk of the bankruptcy court may merely provide the appellate court with links to the bankruptcy court record, rather than actually send or transmit the record to the appellate court.

Judge Sutton suggested convening an ad hoc subcommittee, comprised of at least one person from each advisory committee, to consider a uniform way of describing the transmission of records throughout the federal rules. Several participants endorsed the concept and emphasized the desirability of using the same language across all the rules. Others warned, though, that the project could be very complicated because many other provisions in the rules also need to be amended to take account of technology, and they cited several examples. A member cautioned that whatever terminology is selected must accommodate the continuing need for paper records and paper copies.

Professor Gibson said that the new bankruptcy appellate rules, scheduled to be published in August 2012, will be the test case for the new terminology. Judge Sutton added that eventually all the federal rules will have to be accommodated to the electronic world. But that project, he said, will take considerable time to accomplish. He emphasized that the immediate problem facing the advisory committees was to decide before publication on the right terminology for the proposed new Part VIII bankruptcy rules and the amendments to FED. R. APP. P. 6.

**Judge Kravitz appointed Judge Gorsuch to chair an ad hoc subcommittee to consider devising a standard way of describing electronic filing and transmission throughout the rules. He asked the chairs of the appellate, bankruptcy, civil, and criminal advisory committees to provide at least one representative each.**

FED. R. BANKR. P. 8007

Professor Gibson noted that proposed FED. R. BANKR. P. 8007 (stay pending appeal) would continue the practice of current FED. R. BANKR. P. 8005 that requires a party ordinarily to seek relief pending an appeal in the bankruptcy court first.

A member pointed out that proposed Rule 8007(b)(2) did not provide for the situation in which a bankruptcy court fails to issue a timely ruling. He said that the Federal Rules of Appellate Procedure in that circumstance authorize a party to ask the court of appeals for relief. Professor Gibson replied that the advisory committee will consider the matter.

FED. R. BANKR. P. 8008

Professor Gibson explained that proposed FED. R. BANKR. P. 8008 (indicative rulings) had been adapted from the new indicative ruling provisions in the civil and appellate rules. Proposed FED. R. BANKR. P. 8008(a) is parallel to FED. R. CIV. P. 62.1. It specifies what action a bankruptcy court may take on a motion for relief that it lacks authority to grant because an appeal has been docketed and is pending. The moving party must notify the appellate court if the bankruptcy court states either that it would grant the motion or the motion raises a substantial issue.

She pointed out that the rule is complicated because an appeal may be pending in the district court, the BAP, or the court of appeals. Proposed FED. R. BANKR. P. 8008(c) governs the indicative ruling procedure in the district court and the BAP, while FED. R. APP. P. 12.1 takes over if the appeal is pending in the court of appeals.

FED. R. BANKR. P. 8009 and 8010

Professor Gibson reported that proposed FED. R. BANKR. P. 8009 (record and issues on appeal) and FED. R. BANKR. P. 8010 (completing and transmitting the record) would govern the record on appeal. They apply to direct appeals to the court of appeals, as well as to appeals to the district court or BAP.

Rule 8009 differs from the Federal Rule of Appellate Procedure because it continues the current bankruptcy practice of requiring the parties to designate the record on appeal. That procedure is necessary because a bankruptcy case is a large umbrella that may cover thousands of documents, of which only a few may be at issue on appeal.

Proposed FED. R. BANKR. P. 8009(f) would govern sealed documents. If a party designates a sealed document as part of the record, it must identify the document without revealing secret information and file a motion with the appellate court to accept it under seal. If the motion is granted, the bankruptcy clerk transmits the sealed document to the appellate court.

Professor Gibson noted that the advisory committee was still refining proposed FED. R. BANKR. P. 8010 to specify a court reporter's duty to provide a transcript and file it with the appellate court. The majority of bankruptcy courts, she said, record proceedings by machine. A transcript is prepared by a transcription service when ordered through the clerk. She suggested that the court reporters may not always know in which court an appeal is pending and where they must file the transcript.

FED. R. BANKR. P. 8011

Professor Gibson reported that proposed FED. R. BANKR. P. 8011 (filing, service, and signature) had been derived from current FED. R. BANKR. P. 8008 (filing and service) and FED. R. APP. P. 25 (filing and service). She noted that it followed the format, style, and some of the detail of FED. R. APP. P. 25, but placed more emphasis on electronic filing and service.

FED. R. BANKR. P. 8012

Professor Gibson reported that proposed FED. R. BANKR. P. 8012 (corporate disclosure statement) was a new provision derived from FED. R. APP. P. 26.1.

RULES AND FORMS PUBLISHED FOR COMMENT IN AUGUST 2011

Judge Wedoff reported that the advisory committee had received 11 comments and one request to testify on the proposed rules and forms published in August 2011. The only significant area of concern reflected in the comments, he said, related to the proposed amendment to Official Form 6C, dealing with exemptions. Prompted by the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), the revised form would give debtors the option of stating the value of their claimed exemptions as "the full fair market value of the exempted property." Some trustees, he said, are concerned that the change will encourage people to claim the entire value of the property even though they are not entitled to it.

*STERN V. MARSHALL*

Judge Wedoff reported that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decision in *Stern v. Marshall,* 131 S. Ct. 2594 (2011). He pointed out that Professor McKenzie was leading the committee's efforts and had identified three concerns.

First, he said, the scope of the decision was unclear. The holding itself was narrow. It stated that even though that the Bankruptcy Code designates a counterclaim by a bankruptcy estate against a creditor as a "core" bankruptcy proceeding that a bankruptcy judge may decide with finality, that statutory grant of authority is inconsistent with Article III of the Constitution. A non-Article III bankruptcy judge cannot exercise the authority constitutionally because the counterclaim is really a non-bankruptcy matter.

It is not clear, he said, whether the constitutional prohibition will be held to apply to other matters designated by the statute as "core," especially fraudulent conveyance claims. The Supreme Court, he explained, has previously described fraudulent conveyance actions as essentially common law claims like those usually reserved to the Article III courts.

Second, there is uncertainty over the extent to which litigant consent may cure the defect and authorize a bankruptcy judge to hear and finally determine a proceeding that would otherwise fall beyond the judge's authority. The governing statute, 28 U.S.C. § 157(b) and (c), specifies that a bankruptcy judge may decide "core" bankruptcy proceedings with finality. If a matter is not a "core" proceeding, the bankruptcy judge

may only file proposed findings and conclusions for disposition by the district court, unless the parties consent to entry of a final order or judgment by the bankruptcy judge.

The bankruptcy rules, he explained, currently contain a mechanism for obtaining litigant consent, but only in "non-core" proceedings. FED. R. BANKR. P. 7008(a) (general pleading rules) provides that parties must specify in their pleadings whether an adversary proceeding is "core" or "non-core" and, if "non-core," whether the pleader consents to entry of final orders or judgment by the bankruptcy judge. The problem, he said, is that the term "core" now is ambiguous. As a result of *Stern v. Marshall*, he suggested, there are now statutory "core" proceedings, enumerated in 28 U.S.C. § 157(b), and constitutional "core" proceedings. The advisory committee, he said, was considering proposed rule amendments to resolve the ambiguity.

Third, there is a potential for reading *Stern v. Marshall* as having created a complete jurisdictional hole in which a bankruptcy court may not be able to do anything at all in some cases – either to enter a final order or to submit proposed findings and conclusions. He explained that 28 U.S.C. § 157(c) specifies that if a matter is not a "core" proceeding under 28 U.S.C. § 157(b), a bankruptcy judge may enter proposed findings of fact and conclusions of law for disposition by the district court. After *Stern v. Marshall*, some statutory "core" proceedings are now unconstitutional for the bankruptcy court to decide with finality. Therefore, there is a question as to whether 28 U.S.C. § 157(c), which specifically authorizes a bankruptcy judge to issue proposed findings and conclusions in "a matter that is not a core proceeding," refers only to matters that are not core under 28 U.S.C. § 157(b) or also includes matters that are not "core" under the Constitution.

If § 157(c) refers only to matters that are not "core" under the statute, bankruptcy judges would have no authority to issue proposed findings and conclusions of law in matters that the statute explicitly defines as "core" matters. And for some of these statutory "core" matters, the Constitution prevents bankruptcy judges from entering a final judgment. The potential void, he said, could arise relatively frequently. It would apply to all counterclaims by a bankruptcy estate against creditors filing claims against the estate, and it might also be held to include fraudulent conveyance cases.

## QUARTERLY REPORTING BY ASBESTOS TRUSTS

Judge Wedoff reported that the advisory committee had decided to take no action on a proposal for a new rule that would require asbestos trusts created in accordance with § 524(g) of the Bankruptcy Code to file quarterly reports with the bankruptcy courts. The committee, he said, had concerns over its authority to issue a rule to that effect under the Rules Enabling Act because the trusts are created at the conclusion of a chapter 11 case. He noted that the committee had obtained input on the proposal from various interested organizations, and the great majority stated that a rule was not appropriate.

FORMS MODERNIZATION PROJECT

Judge Wedoff reported that the advisory committee's forms modernization project was making substantial progress and was linked ultimately to the Administrative Office's development of the Next Generation electronic system to supersede CM/ECF. He said that the new forms produced by the committee had been designed in large measure to take advantage of electronic filing and reporting. They are clearer, easier to read, and have instructions integrated into the questions. As a result, though, some attorneys have complained that the new forms are appreciably longer than the current versions and will require more time to complete.

The advisory committee, he said, was very sensitive to these concerns and was trying to shorten the forms where possible, while still eliciting more accurate information. Moreover, he said, the length of the forms will be substantially reduced by not having separate instructions filed.

He added that the advisory committee would like to expedite implementation of the new forms, especially consumer forms that deal with debtor income and expenses. The committee, he said, was planning to bring some of the forms to the Standing Committee at its next meeting and seek authority to publish them for public comment.

## REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professor Cooper presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of December 2, 2011 (Agenda Item 6). Judge Campbell reported that the advisory committee had no action items to present.

*Information Items*

POTENTIAL RULE ON PRESERVATION FOR FUTURE LITIGATION

Judge Campbell reported that a panel at the May 2010 Duke Law School conference on civil litigation had urged the advisory committee to adopt a new national rule governing preservation of evidence in civil cases. The panel, he said, presented the outline of a proposed preservation rule, including eight specific elements that it said needed to be addressed in order to provide appropriate guidance to bench and bar. The proposal, he said, had been referred to the committee's discovery subcommittee, and Ms. Kuperman was asked to prepare a memorandum on the state of the law regarding preservation obligations and sanctions.

Judge Campbell pointed out that the committee's research revealed that federal case law is unanimous in holding that the duty to preserve discoverable information is triggered when a party reasonably anticipates being a party to litigation. But, he said, no consensus exists in the case law regarding: (1) when a party should reasonably anticipate being brought into litigation; and (2) the extent of the preservation duty. Rather, the law is fact-driven and left to resolution on a case-by-case basis.

As for the law on sanctions for failure to preserve, the courts of appeals are in disagreement. Some circuits hold that mere negligence is sufficient for a court to invoke sanctions, while others require some form of willfulness or bad faith before sanctions may be imposed. Some courts, moreover, have tried to specify what kinds of conduct may result in what kinds of sanctions.

Judge Campbell reported that the advisory committee wanted to ascertain the extent of preservation problems, and it asked the Federal Judicial Center to study the frequency of spoliation motions in the federal courts. That study, conducted by Emery Lee, reviewed over 131,000 cases filed in 19 district courts in 2007 and 2008. It found that spoliation motions had been filed in only 209 cases, or 0.15% of the total. About half those motions related to electronically stored information. The study revealed, moreover, that sanctions had been imposed against both plaintiffs and defendants.

In addition, the committee examined the existing laws that impose preservation obligations. It found that there is a substantial body of statutes that deal with preservation, covering many different subjects. But no coherent pattern emerges from them.

Judge Campbell reported that the discovery subcommittee had focused on what elements should be included in a proposed rule, and Professor Marcus produced initial discussion drafts to show three different possible approaches to a rule. The first was a very detailed rule, as proposed by the Duke panel. It included specific provisions giving examples of the types of events that constitute reasonable anticipation of litigation and trigger a duty to preserve. It addressed the scope of the duty to preserve, including the subject matter, the sources of information, the types of information, and the form of preservation. It also laid out time limits on the scope of the duty, such as how far back a custodian must retain information and how long the obligation to preserve continues. It contained a presumptive number of record custodians who must be identified and instructed to preserve information. The rule was also detailed on sanctions, specifying what kinds of conduct will lead to what kinds of sanctions.

The second proposed rule, he said, was substantially more general, addressing the trigger, scope, and duration of the duty to preserve and the selection of sanctions, but in less detail. Essentially, it directed parties to behave reasonably in all dimensions.

The third proposed rule addressed only sanctions and did not specify the trigger, scope, or duration of preservation obligations. Instead, it focused exclusively on the area of greatest concern to lawyers and their clients – the area, moreover, where there is the greatest disagreement and uncertainty in the law. The expectation was that by addressing the key problem of sanctions, the rule would give guidance to the people who make preservation decisions and relieve much of the uncertainty about the trigger and scope of the duty to preserve.

The third rule also distinguished between sanctions and curative measures. The latter consist of targeted actions designed to cure the consequences flowing from a failure to preserve information, such as allowing extra time for discovery or requiring the party who failed to preserve to pay the costs of seeking substitutes for the missing information. Under the proposed rule, remedial measures could be imposed if a preservation duty were not followed.

Imposition of more serious sanctions – such as an adverse inference instruction, claim preclusion, dismissal, or entry of judgment – would require something more than a mere failure to preserve. A showing would have to be made of some kind of knowing conduct, such as willfulness or bad faith. The rule also laid out the factors that a judge should consider in imposing sanctions, including the level of notice given the custodians, the reasonableness and proportionality of the efforts, whether there was good faith consultation, the sophistication of the parties, the actual demands made for preservation, and whether a party sought quick guidance from a judge.

Judge Campbell reported that the three rules had been discussed at a one-day mini-conference in Dallas in September with invited attorneys, judges, law professors, and technical experts. The committee, he said, heard very thoughtful, competing views from the participants. The discussions were very helpful, and several participants submitted papers elaborating on their positions.

In essence, he said, corporate representatives argued that the sheer cost of preserving information in anticipation of litigation is an urgent problem that calls for a strong, detailed rule providing clear guidance to record custodians. In particular, they complained about the uncertainty that corporations face in not knowing where and when a suit will be filed against them, what the claims will be, and what information may be relevant in each case. They are concerned about the heavy costs of over-preserving information. But, more importantly, they fear the harm to their reputation that may result from accusations of spoliation.

On the other hand, plaintiffs' lawyers argued that a detailed national rule would lead to greater destruction of information because of its negative implications. It would encourage custodians to destroy information not explicitly spelled out in the rule. They

emphasized that there will always be information that simply does not fit within the details of a rule, but must nevertheless be preserved.

Department of Justice representatives argued that case law should be allowed to continue running its course, and no preservation rule should be adopted at this time. They argued, in particular, that the first of the three proposed rules would lead to over-preservation by government agencies, as they would be forced to preserve records whenever there is a dispute over a claim with the government.

Judge Campbell noted that the discovery subcommittee met at the close of the mini-conference and later by telephone. It then reported in detail on the mini-conference at the full advisory committee's November 2011 meeting. After lengthy discussion, the committee decided that the subcommittee needed to continue to receive input and explore the three potential options. Under its new chair, Judge Paul W. Grimm, the subcommittee will continue to consider all the issues as open and report back at the advisory committee's March 2012 meeting.

Several members suggested that the first of the three proposed rules, the detailed option, would not be workable because of the endless variety of possible situations that may arise. A detailed new national rule, moreover, could lead to satellite litigation, as with the 1983 amendments to FED. R. CIV. P. 11 (sanctions). A sanctions-only rule, on the other hand, such as the third proposal, would resolve the serious split among the circuits on the law of sanctions, and it might well be effective in sending strong signals regarding pre-litigation conduct.

Judge Campbell suggested that even if the committee were to adopt a new federal rule on spoliation, a myriad of different rules will still exist in the state courts. Accordingly, there will not be national uniformity in any event. The problems of uncertainty will continue because state law often governs preservation obligations. A participant added that the rules on preservation are largely rules of attorney conduct, which lie within the traditional province of the states. Because of the relevance of state law, the federal courts would be on stronger jurisdictional grounds if the rule were limited to sanctions.

A member added that in most cases no federal proceeding is pending when the duty to preserve first attaches. It was suggested that the advisory committee take a limited focus because it may lack authority under the Rules Enabling Act to adopt pre-litigation preservation standards.

A participant pointed out that the scope of the obligation to preserve before trial is related to the scope of discovery under FED. R. CIV. P. 26(b)(1). Therefore, it may not be possible to have a rule that narrows the scope of what information must be preserved before a case is filed if that provision is at odds with what information must be produced

in discovery after a case is filed. Moreover, apart from the duty to preserve certain records and information, substantial additional cost is incurred in searching the information. Thus, even if it were inexpensive just to preserve information, it would still be expensive for the parties to search through it. Therefore, it might be necessary to reconsider the scope of discovery under Rule 26(b)(1).

FED. R. CIV. P. 45

Judge Campbell reported that the proposed amendments to Rule 45 (subpoena) had been published in August 2011. They make four basic changes: (1) simplifying the rule by having a subpoena issued in the name of the presiding court, authorizing nationwide service, and having local enforcement in the district where the witness is; (2) allowing the court where discovery is taken in appropriate instances to send disputes back to the court presiding over the case; (3) overruling the *Vioxx* line of cases that authorize subpoenas for out-of-state parties and a party's corporate officers to testify at trial from a distance of over 100 miles; and (4) clarifying the obligation of a serving party to provide notice.

He said that a public hearing had been scheduled for January 27, 2012, but the committee had received only two requests to testify. As a result, the hearing may be canceled and the requesting parties asked to put their views in writing or participate in a teleconference.

DUKE CONFERENCE SUBCOMMITTEE

Judge Campbell reported that a subcommittee chaired by Judge John G. Koeltl was studying the many recommendations for improvements in civil litigation made by participants at the May 2010 Duke Law School conference. He noted that the subcommittee was focusing on five categories of proposals to implement suggestions made at the conference.

First, one of the common themes voiced by lawyers at the conference was that judges need to be more active in case management. But merely promulgating additional rules will not produce better managers. Therefore, the subcommittee was coordinating with the Federal Judicial Center to improve judicial education programs and enhance informational resources. Among other things, a new civil case-management section of the *Benchbook for U.S. District Court Judges* had been drafted.

Second, Judge Campbell noted that efforts were being made to tap into local efforts around the country to test new procedures for managing litigation. A number of case-management pilot programs were underway, and the committee was working with the Federal Judicial Center to identify and monitor them. In addition, the committee

would ask chief judges around the country to keep it informed about pertinent local developments.

Judge Campbell reported that one of the initiatives that the committee was encouraging was a project to develop a standard protocol for initial discovery in employment discrimination cases. Drafted jointly by lawyers representing both plaintiffs and defendants, the protocol identifies the information that each side must exchange at the outset of an employment case, without the need for depositions or interrogatories. No objections are allowed except for attorney-client privilege. The protocol, he said, will be made available to all federal courts, and all the judges on the advisory committee will adopt it and encourage their colleagues to do the same.

Third, the advisory committee had encouraged additional empirical work, especially by the Federal Judicial Center, on how federal courts are actually handling their cases on a daily basis. One study by the Center was focusing on the early stages of a civil case, including initial scheduling orders, Rule 26(f) planning conferences, and Rule 16(b) initial pretrial conferences. The study revealed that court dockets show that the initial scheduling orders required by FED. R. CIV. P. 16(b)(1) are issued in only about half the civil cases in the district courts. But, he cautioned, docket information may not be sufficiently reliable because there are no uniform ways of recording the pertinent data, and the absence of public records may be the result of inadequate docketing practices. In addition to reviewing the docket sheets, the Center will conduct a survey of lawyers to ascertain what events occurred early in their cases.

Fourth, Judge Campbell noted that the committee had invited judges and lawyers from the Alexandria Division of the Eastern District of Virginia to discuss their experiences with that court's "rocket docket." He added that all the judges on the court share a common philosophy that cases must be handled promptly, and the bar works very well within that court culture.

Fifth, Judge Campbell said that several specific rule amendments were being considered in light of the Duke Conference, including: reducing the time to hold an initial case management conference from 120 to 60 days; eliminating the moratorium on discovery until after the Rule 26(f) conference is held; requiring parties to talk to the court about discovery problems before filing motions; amending Rule 26 to emphasize the importance of proportionality; reducing obstructive objections; limiting the presumed number of depositions in a case to five and the presumptive maximum time of a deposition from seven hours to four; reducing the presumptive number of interrogatories below the current 25; postponing contention interrogatories until later in a case; reducing service time; mandating that judges hold a scheduling conference; and emphasizing in Rule 1 that lawyers must cooperate with each other. He added that rules language was being drafted to help in considering these various ideas.

Professor Cooper added that another area for potential rulemaking was the relationship between pleading motions and discovery. Two competing proposals had been offered. One would suspend discovery until the court rules on a motion to dismiss for failure to state a claim. The other would create a presumption in favor of ruling on a motion to dismiss only after some discovery has occurred.

Judge Campbell said that the central theme at the Duke conference had been that parties generally believe that civil litigation takes too long and costs too much. The advisory committee, he said, was contemplating conducting a "Duke II" conference, but had not yet made a decision on the matter.

## PLEADING STANDARDS

Professor Cooper reported that the advisory committee had no immediate plans to propose rule amendments dealing with pleading standards. The committee was actively reviewing the developing case law, and the Federal Judicial Center was continuing to conduct empirical research on the frequency of motions to dismiss and their disposition.

The Center's research had found a statistically significant increase in the number of motions filed, but not in the rate of granting motions. It was not possible to tell whether more cases were being dismissed out of the system because courts often grant motions to dismiss with leave to amend. A follow-up study by the Center had shown no statistically significant increase in plaintiffs excluded from the system by motions to dismiss or cases terminated by motions to dismiss, other than in financial instrument cases. On the other hand, some law professors have conducted their own research and claim that there has in fact been an increase in dismissals from the system.

Professor Cooper noted that the advisory committee had been presented with a large number of suggested changes in pleading standards and various suggestions for integrating pleading practice with discovery practice. He noted that there were many opportunities and possibilities for rule changes, but the committee was not contemplating proposing any rule for publication in the coming year.

## PLEADING FORMS

Professor Cooper pointed out that FED. R. CIV. P. 84 (forms) specifies that the illustrative civil forms in the appendix "suffice" under the rules. He noted specifically that the form for pleading negligence had been approved by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 565 n.10 (2007). But lower federal courts have found a tension between Supreme Court cases and the current pleading forms, especially Form 18 (complaint for patent infringement).

The larger question, he said, was why the committee was still in the forms business. There was a clear need for illustrative forms in 1938 to show the bar how the new federal rules would work in practice. That objective, however, may no longer be important. Moreover, the committee has generally not paid a great deal of attention to the forms over the years. Although some, such as Form 5 (notice of a lawsuit) and Form 6 (waiver of service of a summons) had been very carefully coordinated with FED. R. CIV. P. 4(d) (waiver of service), most forms do not receive much attention.

He noted that the advisory committees have adopted different approaches towards drafting forms, and the forms are used in different ways for different purposes. The civil and appellate forms, for example, are promulgated through the full Rules Enabling Act process. The official bankruptcy forms, on the other hand, follow the first several steps of that process, but are prescribed by the Judicial Conference. The criminal forms do not go through the Rules Enabling Act process at all. They are drafted by the Administrative Office with some consultation with the criminal advisory committee..

The Standing Committee, he said, had appointed an ad hoc subcommittee on forms, composed of members of the advisory committees, to consider the appropriate role of the committees in preparing forms. Among other things, the subcommittee will consider whether the current variety of approaches is appropriate or whether there is a need for more uniformity. There appears to be little support for adopting a uniform approach, as sufficient coordination may be achieved through the Standing Committee's review of the advisory committees' recommendations. The subcommittee will also consider whether it is advisable for any of the forms to continue to follow all the steps of the full Rules Enabling Act process. He added that there was no urgency in making those decisions.

## CLASS ACTIONS

Judge Campbell reported that the advisory committee had recently formed a subcommittee on class actions, chaired by Judge Michael W. Mosman, and it had begun to identify issues that might possibly warrant future rulemaking.

Professor Marcus provided background on the development of Rule 23. He explained that after the important 1966 amendments to FED. R. CIV. P. 23 (class actions), the advisory committee took no action on class actions for 25 years. In 1991, the Judicial Conference, on the recommendation of its ad hoc committee on asbestos litigation, directed the committee to study whether Rule 23 should be amended to improve the disposition of mass tort cases.

In response, the committee considered a wide range of different possible changes in the rule and sought extensive input from the bench and bar. In 1996, it published a limited number of significant amendments. They would have required a court to consider whether a class claim is sufficiently mature and whether the probable relief to individual class members justifies the costs and burdens of class litigation (commonly referred to as the "just ain't worth it" test). They would also have explicitly permitted certification of settlement classes and a discretionary interlocutory appeal from certification decisions.

During the publication period, the proposed amendments to revise the certification process proved to be very controversial. Moreover, the Supreme Court issued its decision in *Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997), dealing with settlement certification. As a result, the committee decided to proceed only with the proposed addition of Rule 23(f) authorizing a discretionary interlocutory appeal. That provision took effect in 1998 and has proved successful.

In 2000, the committee continued working on the rule. Its additional efforts resulted in several amendments that took effect in 2003, including improving the timing of the court's certification decision, strengthening the process for reviewing proposed class-action settlements, and authorizing a second opt-out opportunity for certain class members to seek exclusion from the settlement. It also added Rule 23(g) governing the appointment of class counsel, including interim class counsel, and Rule 23(h) governing the award of attorney's fees.

Judge Campbell pointed out that the amendments pursued by the advisory committee did not address the problems of overlapping classes, recurrent efforts to certify a class through judge-shopping, or recurrent efforts to approve a settlement. Professor Cooper, he noted, had devised creative ideas on addressing those issues by rule, but they attracted too much controversy.

Judge Campbell reported that the advisory committee was considering whether Rule 23 needs to be amended to take account of several recent developments, including enactment of the Class Action Fairness Act and recent class-action case law. The committee, he said, had compiled a list of potential issues that might be addressed and was considering whether the time was ripe to give further consideration to Rule 23. On the other hand, he said, any significant change in the rule would likely be controversial, and the committee has several other, more important projects on its agenda.

INTERLOCUTORY APPEAL FROM ATTORNEY-CLIENT PRIVILEGE DECISION

Professor Cooper reported that a suggestion had been referred to the advisory committee for a rule amendment that would allow appeal by permission from an order granting or denying discovery of materials claimed to be protected by attorney-client privilege. Although referred to the civil committee, he said, the matter should also be considered by the other advisory committees.

## REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum and attachments of December 12, 2011 (Agenda Item 9).

*Amendments for Final Approval*

FED. R. CRIM. P. 16(a)(2)

Judge Raggi reported that the advisory committee was proposing an amendment to FED. R. CRIM. P. 16(a)(2) (discovery and inspection) that would clarify an ambiguity introduced during the 2002 restyling of the criminal rules. The change would make it clear that the restyling of the rule had made no change in the protection given to government work product.

She explained that Rule 16(a) allows a defendant to inspect papers and materials held by the government. Before restyling, Rule 16(a)(1)(C) had contained enumerated exceptions to that access, including one for the government's work product. The restyled rule, however, eliminated the exceptions.

The district courts, she said, have rejected claims that the 2002 amendments had changed the substance of the rule, using the doctrine of a "scrivener's error" to deny access by the defendant to the government's work product. As a result, there appear to be no serious practical problems and no urgency to make a correction. Nevertheless, she said, the advisory committee agreed unanimously that it was inappropriate to have an ambiguous restyled rule and decided to pursue an amendment.

The committee, she pointed out, believed that the proposed change was technical and could be made without publication. Nevertheless, it recognized that the Standing Committee needed to make that policy decision.

**The committee without objection by voice vote approved the proposed technical and conforming amendment for final approval by the Judicial Conference without publication.**

*Information Items*

FED. R. CRIM. P. 6(e)

Judge Raggi reported that the advisory committee was considering the Attorney General's recommendation to amend FED. R. CRIM. P. 6(e) (recording and disclosing grand jury proceedings). The amendment would provide procedures for authorizing disclosure of historically significant grand jury materials after a suitable period of years.

The proposal, she said, was in response to a district court decision that ordered the release of grand jury materials dealing with President Nixon's testimony before the Watergate grand jury. The district court issued the release order relying on its inherent authority, even though FED. R. CRIM. P. 6(e) contains no provision expressly authorizing release of the materials.

She noted that the Department of Justice did not agree that the court had inherent authority to order disclosure, but it did not appeal the decision. Instead, it asked the advisory committee to amend Rule 6 to allow disclosure after a specified period of years. The proposal, she said, was being studied by a subcommittee chaired by Judge John F. Keenan.

FED. R. CRIM. P. 16

Judge Raggi reported that the advisory committee – after extensive study and debate – had decided not to pursue amendments to FED. R. CRIM. P. 16 (discovery and inspection) to codify the duty of prosecutors to turn over exculpatory information to the defendant. The committee, however, agreed to address the matter in a "best practices" section of the *Benchbook for U.S. District Court Judges.* She said that she had met with Judge Paul L. Friedman, chairman of the Federal Judicial Center's Benchbook Committee, and a draft section had been prepared.

## REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of November 28, 2011 (Agenda Item 11). Judge Fitzwater noted that the advisory committee had no action items to present.

*Information Items*

SYMPOSIUM ON THE RESTYLED FEDERAL RULES OF EVIDENCE

Judge Fitzwater reported that the restyled Federal Rules of Evidence had taken effect on December 1, 2011. The advisory committee, he said, had held its October 2011 meeting in Williamsburg, Virginia, at the William and Mary Marshall-Wythe College of Law. The meeting was preceded by a symposium on the restyled rules, hosted by William and Mary at the committee's request.

FED. R. EVID. 801(d)(1)(B)

Judge Fitzwater noted that the advisory committee was considering a proposal to amend Rule 801(d)(1)(B) (hearsay exemption for certain prior consistent statements). It would make prior consistent statements admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The amendment, he said, was based on the premise that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements. The needed jury instruction, moreover, is almost impossible for jurors to understand.

He noted that there was a difference of opinion in the advisory committee on whether to pursue a change in the rule, and the members would appreciate receiving any further advice from the Standing Committee on the matter. He also noted that the committee, with the help of the Federal Judicial Center, was planning to send a questionnaire to all district judges soliciting their views on the advisability of the proposed amendment.

A member supported making the proposed change in Rule 801, but cautioned against sending out questionnaires to all judges on potential rule changes, especially where a proposed rule is not particularly significant. He said that it could set a bad precedent for other committees to send out surveys on a regular basis.

PRIVILEGES PROJECT

Judge Fitzwater reported that the advisory committee undertook a project several years ago to compile the federal common law on evidentiary privileges. The initiative, he said, was not intended to result in a codification of the evidentiary privileges or in new federal rules. Rather, it was expected to lead to a Federal Judicial Center monograph providing a restatement of the federal common law. Because of the potential sensitivity of the project, however, the committee decided not to proceed further without Standing Committee guidance and approval.

Professor Capra explained that the committee had undertaken similar types of projects in the past. For example, when Congress enacted the evidence rules in 1975, it made several changes in the rules proposed by the judiciary, but it did not change the accompanying committee notes. As a result, some of the notes are inconsistent with the text of the rules. At the committee's request, he compiled the inconsistencies and produced a Federal Judicial Center monograph under his own name. Later, the advisory committee authorized him to write a monograph on the discordance between some of the rules and the prevailing case law. Both publications were very helpful to the bar.

Professor Capra said that the law of privileges is very important, but it is not codified. The advisory committee began developing a set of privilege rules to reflect the federal common law. After initial efforts, the project, under the leadership of Professor Kenneth S. Broun, was deferred because of the committee's other priorities, such as restyling the rules. He added that the project was a low priority for the committee and would be put aside if other matters need attention. After having completed the restyling project, however, the committee now has a light pending agenda.

Members asked whether the advisory committee itself was planning to approve the work and whether the project was the best use of the committee's time and the judiciary's limited resources. Several agreed that it would be a beneficial project, but it should have a relatively low priority. Judge Kravitz added that it was fine to produce the paper, but he would not recommend giving it official advisory committee approval.

A participant recommended that the project continue because there has been recurring interest by Congress over the years in enacting privileges by law. Professor Capra added that since 1996, the advisory committee had been asked to comment on six different proposals dealing with privileges.

A member said that the Standing Committee should defer to the advisory committee's best judgment on the matter. If the advisory committee finds the project useful, especially since Congress may ask for input on privileges, it should continue.

Judge Fitzwater and Professor Capra suggested allowing Professor Broun to continue on the work on the matter and report to the advisory committee as needed at its meetings. A committee consensus developed to adopt their suggestion.

## COMMITTEE JURISDICTIONAL REVIEW

The committee authorized Judge Kravitz and Professor Coquillette to complete for the committee a self-evaluation questionnaire for the Judicial Conference's Executive Committee on the need for the committee's continued existence, the scope of its jurisdiction, and its workload, composition, and operating processes.

## PANEL DISCUSSION ON CLASS ACTIONS

Judge Rosenthal presided over a panel discussion on class actions with Dean Robert H. Klonoff, a member of the Advisory Committee on Civil Rules, Daniel C. Girard, Esquire, a former member of the advisory committee, and John H. Beisner, Esquire.

Judge Rosenthal noted that the discussion was in accord with the committee's tradition of spending time at its January meetings in examining long-term trends and issues that may affect the rules process in the future, but do not require immediate changes in the rules. She explained that the Class Action Fairness Act of 2005 (CAFA) had now been in place for seven years and the courts have issued several important class-action decisions in the last few years. In light of the committee's statutory obligation to monitor the continuing operation and effect of the federal rules, she said, it was an opportune time to start thinking about whether any changes in FED. R. CIV. P. 23 might be needed in the future. Class actions, she added, are a high profile area of the law and involve a great deal of money and interest.

The panel, she pointed out, consisted of an attorney who primarily represents plaintiffs and a lawyer and a law professor who normally have represented defendants. She asked them to focus on the impact of the recent cases on class-action practice and to identify any potential rule changes that might have a beneficial impact on class-action litigation.

The panel discussed a wide range of issues, but the exchange can be categorized as falling into the following four broad topics:

1. Front-loading of cases;
2. Class definition;
3. Settlement classes; and
4. Competing classes and counsel.

### 1. FRONT-LOADING OF CASES

*In re Hydrogen Peroxide*

The panel discussed the impact of *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir. 2009). In the case, the Third Circuit held that the district court was obligated at the certification phase of a class action to apply a rigorous analysis of the available evidence and make findings supported by a preponderance of the evidence (rather than a mere threshold showing) that each element of Rule 23 has been met.

The district court was required to resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits. Specifically, it should have resolved the battle of the experts over whether the alleged injury could be demonstrated by proof common to the class, rather than individual to its members. The decision, moreover, expressed concern that the district court's order certifying the class would place unwarranted pressure on the defendant to settle non-meritorious claims – elevating that concern, in effect, into a policy factor to consider in the certification process.

Although not all courts follow *Hydrogen Peroxide*, it was suggested that the practical impact of the case has been that plaintiffs are now confronted with an early merits-screening test. They must present their evidence at the certification stage or risk losing the case if the court denies certification. That conclusion, moreover, was seen as bolstered by several other cases, including the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

In *Wal-Mart*, the Supreme Court ruled that if the plaintiffs had evidence of company-wide employment discrimination, they had to present it by the time of the certification hearing. A key question, therefore, is whether the courts will now impose a higher standard of "commonality," as in *Wal-Mart*, which would necessitate more expansive discovery, or whether they will read *Wal-Mart* as limited to the unique employment setting and continue the traditional concept of commonality.

*Discovery at certification*

A panelist argued that *Hydrogen Peroxide* has created a much more expensive class-certification process, particularly in complex cases. He said that there is considerable uncertainty for the lawyers on how discovery is to take place after the pleading stage. Discovery may have to be conducted before certification is heard and expert witnesses may be subjected to a full *Daubert* analysis.

It was noted that expert testimony now is often a central feature at the certification stage, and extensive case law is developing on the subject, including whether *Daubert* applies at the class-certification stage. In *Wal-Mart*, the treatment of expert witnesses at certification was an important factor in the majority opinion, and *Hydrogen Peroxide* was largely a battle of the experts.

It was suggested that plaintiffs' lawyers often feel disadvantaged by the front-loading of discovery. At the same time, defendants traditionally have preferred to bifurcate discovery and avoid excessive costs by limiting discovery at certification and deferring full-blown discovery on the merits until later.

In front-loading the discovery, though, the recent decisions have raised questions about how much merits discovery is actually required up front and whether the discovery

can continue to be bifurcated if plaintiffs are now required to prove the merits of the certification issues. The discovery problems are complicated, moreover, because discovery is now largely electronic and does not lend itself very well to phasing.

A panelist said that the recent decisions have caused additional work and difficulties for the parties but have not created a crisis situation. It appears, for example, that meritorious class actions are not being killed in the cradle, as plaintiffs are afforded a fair chance to explain to the court why they believe that their class can be certified.

One panelist argued that what information both sides should put forward in class certification briefing is becoming much clearer. The information necessarily will vary from case to case, but much of the discovery is simply not relevant for certification purposes. The judges, he said, are closely managing the cases and overseeing the discovery.

The focus now for the parties, he said, is on providing useful information that a court needs to make the certification decision. Judges, for example, often ask the lawyers whether particular discovery is really needed for certification or can be deferred until later in order to meet the schedule for class certification. Some judges also indicate to the parties what sort of discovery will be needed for certification and set a time for certification briefing, leaving it up to the lawyers to figure out the details of what discovery must be exchanged for certification.

A panelist noted that *Hydrogen Peroxide* cited the advisory committee note to the 2003 amendments to Rule 23, which sets forth the concept of a "trial plan that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof." The recent cases, he said, have been sending a uniform message that the district court should instruct the parties to gather their available information and figure out what a class trial would look like. The court, thus, exercises the gateway function of deciding whether the jury will have the evidence it needs to make a decision that the entire class is entitled to relief. The key issue is whether the evidence varies so much among the individual plaintiffs that the jury is unable to decide that the defendant is liable to all members of the class.

*Early practicable time for making the certification decision*

In light of the additional information that now has to be gathered for certification, the panel discussed whether courts are being more flexible in applying Rule 23(c)(1)(A)'s requirement that certification occur at "an early practicable time." There appears to be little uniformity among the courts, however, as courts cite the language of the rule to support every conceivable outcome. Some make the certification decision very early in the case, while others defer it until much later. A few districts specify

categorically that a class certification motion be made within 90 days, while in others, the certification process occurs at the close of discovery.

*Early dispositive motions*

It was reported that the trend towards front-loading of class-action litigation has led to an increasing tendency to find ways to dispose of cases at an early stage. As a matter of good practice, therefore, a defendant who believes that a national class action cannot be certified under any circumstances should force the plaintiffs to come forward at an early stage and move for class certification.

Since CAFA, many more class-action cases are being brought in the federal courts that involve state laws, and more motions are being filed that challenge jurisdiction. Some state laws, moreover, appear to grant relief for class members in circumstances that may not meet the criteria for standing in the Article III federal courts.

It was suggested that there has been some drift away from analyzing class membership questions under the criteria specified in Rule 23(a) and (b) and framing them instead as matters of standing. A defendant, thus, moves to strike class allegations at the pleading stage, challenging the definition of the class through a dispositive motion, claiming that the class includes members who do not have standing. The trend may be a reaction to the sheer complexity of the issues in a multi-state post-CAFA class action, the high costs of conducting discovery, and a lack of clear guidance. In essence, the dispositive motions assert that there is some fundamental flaw in a particular class and, therefore, no need to go through the expense of discovery and the certification process.

In addition, there is some confusion over the ability of an individual plaintiff to act in a representative capacity. Some defendants claim that unless a plaintiff's claim is a mirror image of the claim of every other person in the class, in ways that do not necessarily relate to the presentation of common proof, the plaintiff does not have standing to act on behalf of others in a representative capacity.

2. CLASS DEFINITION

*Preponderance and Commonality*

It was suggested that there is uncertainty over what is meant by "preponderance" in Rule 23(b)(3). Under the current language of the rule, it was argued, plaintiffs are faced with a "winner take all" proposition. The court has to decide whether common issues of law and fact predominate. If they do, the court will certify the class. If they do not, certification will be denied.

It was noted that if common issues of law and fact do not predominate under Rule 23(b)(3), a court may still certify a class action under Rule 23(c)(4) for particular common issues. There is, however, very little guidance as to when a court may certify an issues class. Although a body of case law is developing on issues classes, it varies from circuit to circuit.

Recent cases show that the courts are sharply divided on Rule 23(c)(4). One circuit has ruled that an issues class is a housekeeping remedy, and predominance still must be shown. Another has held that predominance need not be shown, and a court only has to consider whether resolution of the issue will materially advance the case.

A panelist said that issues classes are not commonly invoked by counsel because lawyers prefer a more complete outcome to their litigation. They are not normally interested in litigating on a piece-meal basis. As a practical matter, there are too many complications in issues-class litigation, and it is generally not worth it for them. Another panelist disagreed, however, and suggested that issues classes are quite important and have been used effectively in environmental tort cases and employment cases.

It was recommended that the Advisory Committee on Civil Rules monitor the developing case law and ultimately evaluate whether to consider a rule amendment that adjusts the standards of Rule 23(c)(4) to give the courts greater guidance on when a class may be certified that has both common issues and individual issues. The panelists pointed out that courts that have wrestled with the rule have said that the matter is unclear. It was also noted that the ALI had spent a great deal of time on issues classes as part of its recent restatement project. If properly defined, it was argued, an amended federal rule on issues classes could be beneficial to the mass adjudication of cases.

It was pointed out that there is a mechanism for dealing with predominance issues arising from state-law variations, especially in post-CAFA cases involving consumer claims arising under the laws of multiple states. In these cases, defendants generally argue that the claims have to be considered individually under different state consumer protection laws. Although a national class action may still be maintained, as in the *De Beers* litigation in the Third Circuit, a case may effectively be divided into sub-classes on a state-by-state basis for litigation purposes. In the settlement context, the analysis of state law variations historically was an issue of "manageability." Defense counsel would argue that the court cannot litigate the case on a manageable basis because the jury would have to be charged on the law of 50 states.

It was pointed out that one factor that has increased the number of class-action cases in the federal courts is the strategy of plaintiffs – reinforced by a general skepticism of federal courts towards nationwide classes – to break down a class into several subclasses, such as a separate class action for each state. That tendency will continue to occur in employment cases, as classes are broken down into smaller class actions,

especially after *Wal-Mart v. Dukes*. The trend will result in more class actions, and multiple class actions on the same subject. The Judicial Panel on Multidistrict Litigation will routinely draw the federal cases together to conduct the discovery on a common basis. In the end, though, separate certification determinations will have to be made in each class action.

In the past, commonality was not an important issue and was often stipulated. The real issue, rather, was predominance. But the Supreme Court has now said that the common issue has to be central to the validity of each of the claims. It has to be a central, dispositive issue to class certification. Commonality, moreover, is used in other rules, such as Rule 20 (joinder), which contains the exact same language. So one issue for the future will be whether *Wal-Mart* will have an impact on joinder.

*Rule 23(b)(2) classes*

It was suggested that *Wal-Mart v. Dukes* represents a potential sea change, not only regarding "commonality" under Rule 23(a), but also for classes under Rule 23(b)(2). A panelist said that the most remarkable aspect of the *Wal-Mart* decision, and potentially the most important aspect, was the section dealing with Rule 23(b)(2). The Court's statements that back pay could not be brought as part of a (b)(2) action because it was not "incidental" were a major departure from the decisions of the courts of appeals. Moreover, the Supreme Court suggested that there may be a due process problem with any monetary claim in a (b)(2) action, even a claim for statutory damages or incidental damages.

Accordingly, many difficult questions arise as to the scope of Rule 23(b)(2) after *Wal-Mart*, and there will be a great deal of analysis of the decision and the ensuing case law. Questions will arise, for example, on whether some problems can be dealt with by allowing opt-out classes under (b)(2) or hybrid classes under (b)(2) and (b)(3).

*Arbitration Clause Cases*

It was argued that *AT&T Mobility v. Concepcion,* 131 S. Ct. 1740 (2011), may have the most important impact of any of the recent class-action cases, for it has been seen as effectively eviscerating many small claims cases. Although the Supreme Court noted in *Amchem* (which dealt with mass torts) that class actions are really about small claims cases, rather than mass torts, it later dealt a virtual death knell to many small claims cases in *Concepcion.*

It was suggested that one of the issues that plaintiffs thought was left open in *Concepcion* was whether a "no class-arbitration" clause may be invalidated if the plaintiffs can show that it is impossible to vindicate their rights other than through class

arbitration. One court of appeals ruled recently, however, that the argument could not survive after *Concepcion*.

### 3. SETTLEMENT CLASSES

*The need for a Rule 23 amendment on settlement classes*

A panelist said that many of the court decisions since *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), have wrestled with what must be shown in the context of certifying a settlement class. Although *Amchem* said that the district court does not have to worry about "manageability" in a settlement case under Rule 23(b)(3), the class must still meet the tests of preponderance, commonality, and adequacy, and the case has to be treated as if it were going to trial. In the Third Circuit's *De Beers* litigation, for example, the court's opinion noted that "(e)ver since the Supreme Court's landmark decisions in *Amchem Products Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), one of the most vexing questions in modern class action practice has been the proper treatment of settlement classes, especially in cases national in scope that may also implicate state law."

Judge Kravitz asked the panel whether FED. R. CIV. P. 23 should be amended to deal specifically with settlement classes.

The panelists agreed that the absence of a settlement-class provision has created problems and has tended to push settlements, especially in mass-tort cases, outside the court system. Since *Amchem*, the parties in these cases have had to construct work-around solutions to achieve settlements, often a settlement that lies outside judicial supervision under Rule 23(e).

The absence of a workable settlement-class device is seen as a major problem in mass torts because there is no supervision of the parties' actions or the attorney's fees. Defendants, moreover, are concerned about engaging in settlements outside the courts because they are left to their own devices. They must hope that the terms of the settlement stick because they have not been sanctioned by a court.

A panelist summarized three specific impacts of *Amchem*. First, he said, more cases are now proceeding to non-class settlements, where there are no criteria and no supervision. Second, several cases have struck down non-judicial settlements, forcing the parties to go back to the court and try cases that all the parties wanted to settle. Third, the requirements for a litigation class place defendants in an awkward position. If they claim under *Amchem* that the case is suitable for class certification and trial, and then fail to settle, they may have stipulated to something that will harm them for litigation purposes. The internal problem for the defendants is what they must do to support and

enforce a settlement after they have asserted to the court that the case is suitable for certification as a litigation class.

A panelist added that the absence of a clearly defined standard for certification of a settlement class is exploited by tactical, professional objectors. In essence, they want a financial reward in return for dropping their objections. Greater clarity in the rule, he said, would not solve the problem of non-meritorious objections entirely, but it would take an argument away from nuisance objectors.

*Approval of Settlements*

Judge Rosenthal reported that the rules committees retreated in the 1990s from the decision to seek approval of a separate provision for settlement classes because *Amchem* and *Ortiz* were pending in the Supreme Court. But there was also strong and negative reaction to the committee's published rule, especially from law professors who argued that it would unleash the forces of collusion and lead to rampant reverse auctions.

At the same time, defendants feared that loosening the standards for certification of settlement classes would bleed over inevitably to loosen the standards for litigation class actions. They warned that the proposal would invite more class actions because it would be easier for potential plaintiffs to obtain settlement awards. In light of these concerns, she said, there was no consensus for the committee to proceed with the proposal.

She added that the 2003 amendments to Rule 23 were designed to put rigor into the evaluation of a settlement's fairness, reasonableness and adequacy and to strengthen the oversight of attorney's fees. The amendments, though, deliberately did not address whether the standards for certifying a settlement class should be different from those for certifying a trial class. She asked whether conditions have changed since 2003 and whether the absence of a settlement class certification standard in Rule 23, coupled with other concerns raised by the panelists, are sufficiently acute to warrant pursuing rule amendments.

A panelist explained that effective brakes are currently in place to deal with abusive settlements. Most class actions, moreover, are litigated in a relatively small number of district courts. The judges are sophisticated and experienced and know how to deal with issues of fairness and compensation.

A panelist urged pursuing a distinct rule addressing settlement classes. He noted that the current requirements for certification are clear, perhaps too clear, and are inconsistent with the realities of the settlement process. The defendants, in reality, are waiving their defenses and do not have a trial plan because their objective is a settlement without a trial. Nevertheless, *Amchem* requires them to go through a certification process

that does not make a lot of sense for them. Another panelist did not see a pressing need for a settlement-class rule in anti-trust, securities, and financial services cases, but agreed that it could be helpful in mass-tort cases.

A panelist argued that the primary focus of a proposed settlement-class rule should not be on the class-certification process. He pointed out that settlements in mass-tort cases do not reach the stage of court approval under Rule 23(e)(2) because the plaintiffs cannot meet the certification requirements of Rule 23(a) and (b).

Rather, an amended rule should build on Rule 23(e)(2), which specifies that a settlement must be "fair, reasonable, and adequate." The rule would alter *AmChem's* statement that Rule 23(e) is not a substitute for Rule 23(a) and (b). Instead, the inquiry in a settlement-class case would proceed directly to Rule 23(e), essentially skipping over Rule 23(a) and (b).

The amendment could augment the court's inquiry under Rule 23(e)(2) by requiring it to examine the fairness of compensation among the different members of the class and determine whether variations in individual entitlement are adequately reflected in the proposed settlement. Injuries of class members, for example, may well range from mere fear of injury to permanent disability. It was pointed out that most mass-tort settlements do in fact consider those distinctions and typically provide a grid of different compensation levels for different levels of injury. They also establish some sort of due process arrangements for making the awards.

The recent ALI principles of aggregate litigation deal with certification of a settlement class and provide that a settlement class does not have to meet the standards for a litigation class. They specify the various fairness factors that must be applied to settlements and address second opt-outs and objectors. It was recommended that the civil advisory rules committee review the ALI deliberations to see whether any of the proposals it considered would be suitable for a federal rule change.

It was reported that the ALI also had taken a hard look at cy-près cases. Its principles of aggregate litigation create a presumption that undistributed money is given to the class. If there is a cy-près issue, it is normally because it is difficult to distribute the money, and a recipient or recipients must be selected that mirrors the purpose of the class.

Although just one part of the larger ALI project to address settlement classes, the cy-près portion of the new principles has been cited more often than all other provisions of the principles combined. It has recently been adopted as the law of a federal circuit and cited by two other circuits. A panelist recommended that if the advisory committee decides to proceed with amendments to address settlement classes, cy-près should be an important component of them.

*Role of the state attorneys general in class settlements*

It was pointed out that the attorneys general of the states review class-action settlements carefully and play a useful and appropriate role. The attorneys general have a sharing arrangement and work well together in reviewing settlements and taking action where appropriate.

Under CAFA a defendant has to give notice of a settlement to the attorneys general of the affected states within 90 days. After the notice, the lawyers may receive calls from a group of attorneys general inquiring into the facts and details of the case and the settlement. They are also often asked to present supporting information to justify their fees. In addition, when a truly abusive settlement is announced, law professors, concerned lawyers who may have had competing cases, as well as the attorneys general, normally come forward to object.

It was agreed that the impact of the efforts of the attorneys general has been to raise the bar generally for negotiating and presenting settlements. Courts, moreover, are very conscious in overseeing how much money is distributed to the class, how soon it is distributed, and how much the lawyers receive in fees.

In light of the effectiveness of the review of settlements by the attorneys general, the panel was asked whether there is still a need for Rule 23(e)'s requirement that the presiding judge review and approve all settlements. The panelists replied that judicial supervision is still appropriate and pointed out that the attorneys general do not intervene in every case.

4. COMPETING CLASSES AND COUNSEL

*Duplication of efforts*

A panelist pointed to the problems arising when many different counsel file similar class actions, as often occurs under the federal anti-trust laws. Historically, the cases have been coordinated by having the Multidistrict Litigation Panel sweep them into a single proceeding for pretrial purposes. Recently, though, lawyers for both plaintiffs and defendants have been invoking the "first-filed" rule. Thus, if the defendants have no objection to the location of the first-filed case, their lawyers file motions to stay or dismiss all other class actions, and the matter never reaches the MDL panel. Likewise, plaintiffs who file the first case defend their turf by filing motions to stay or dismiss all later cases.

It was reported that law firms filing class-action cases have a significant problem in controlling the work of other, competing lawyers. When a law firm representing a class of plaintiffs reaches the point of resolving the case with the defendants, it is often

confronted with other lawyers seeking fees for having performed unnecessary or counter-productive services. The lawyers were not asked to perform the work for the class, and their intervention may in fact be an impediment to resolution of the case. Defendants should not have to pay for the unnecessary services, nor should fees be diverted from the lawyers who actually handled the important work on the case.

It was pointed out that the Southern District of New York has developed a body of case law specifying that before class counsel is appointed, services that duplicate the work rendered by other counsel are not compensable. And after the appointment of counsel, only services performed at the direction of lead counsel are compensable. That process was said to be working effectively and might be considered for inclusion in an amended rule.

*Appointment of Counsel*

It was reported that Rule 23(g), part of the 2003 rule amendments, has worked very well and is beneficial for practitioners. It allows the court to appoint interim class counsel after a case has been filed to represent the class up through certification. Then at certification the court decides whom to appoint as class counsel. There is some question, though, as to whether the rule applies when there is just one case.

A panelist said that Rule 23(g) should be applied early and often, for it is essential for the courts to control the appointment of counsel and the payment of attorney fees. In many CAFA cases, for example, a lawyer must negotiate with other lawyers who have filed duplicative cases in order to reach agreement on the hard policy decisions on how best to frame the case to achieve court certification. It leads to a good deal of tactical behavior among counsel that has little to do with the presentation of the case for certification. To make those hard policy decisions, he said, it is important to have only one lead lawyer, or maybe two lawyers, in charge of the case. Better outcomes are reached when a court asserts strong control at the front end of a case, and Rule 23(g) is the perfect vehicle to achieve that control.

A panelist said that when there is an MDL proceeding, which brings many class actions together, some courts forgo Rule 23(g) and rely on their inherent authority and do one of two things. On the one hand, they may instruct the counsel of all the many overlapping cases that they should get together and file a consolidated complaint that is, in effect, an amalgam of all the actions. Usually, as a part of that process, a management team emerges to take responsibility for the new complaint, which essentially initiates a new action. On the other hand, where there are many single-state actions in the MDL proceeding, the cases will not be combined because each state wants to stand on its own. Typically a liaison counsel is appointed by the court to bring all the counsel together. He added that counsel are not usually brought together for fee-sharing purposes, although they generally have made some arrangements on their own.

*Federal-State coordination*

Judge Rosenthal noted that CAFA has increased the number of federal class actions and affected the nature and extent of federal-state issues. She asked whether the pre-CAFA problems have abated and whether Rule 23 is adequate in dealing with current federal-state coordination issues.

It was agreed that CAFA is working much as its proponents intended. Cases with interstate implications are migrating to the federal courts, while those involving local controversies remain in the state courts.

A panelist said that the remaining coordination problems arise mostly in one state. When there is a multi-state controversy after CAFA, most class actions will be filed in the federal courts. But if a group of plaintiffs live in the same state as the defendant, their class action will be heard in the state courts. He said that it is common to have a national MDL proceeding that consolidates class actions proceedings for all the federal cases, except those in one state. In that state, there will be a parallel class action in the state courts for local residents. Despite the separate proceedings, coordination normally occurs among counsel and the courts.

The panelists noted that the federal MDL judges have become very proficient in handling MDL proceedings and in reaching out to work cooperatively with the state courts in mass-tort cases. They added that state court judges have their own difficult issues to resolve, and coordination with their federal colleagues has been very beneficial.

CONCLUSIONS

Judge Rosenthal summarized the various concerns voiced by the panelists and asked each to pick the single most promising potential rule amendment that would have a beneficial impact on class-action practice.

*Front-loading of cases*

One panelist cited the front-loading of cases after *Hydrogen Peroxide* as an important issue that needs to be addressed. He suggested drafting a rule to give the parties and the courts more guidance on exactly what information a plaintiff must produce for class certification. The parties, he said, are uncertain about the impact of all the recent cases. They want an early ruling on class certification, but they also want to avoid discovery costs and prefer to continue with some form of bifurcated discovery.

*Class definition*

Another panelist suggested a rule that revisits the issue of predominance and acknowledges that most cases appropriate for class adjudication in fact have individual issues. To pretend that such is not the case, he said, results in a waste of time and much unproductive behavior. There is, moreover, a difficult intersection among several class-definition issues, including the current ambiguity over issues classes under Rule 23(c)(4), the use of (b)(2)-(b)(3) hybrid classes, certification of settlement-only classes, and handling (b)(3) classes that have some individual issues with bifurcated liability and damages.

Rather than having an "all or nothing" approach to certification based on whether common issues predominate or not, the committee might prepare a rule that gives the courts direction and discretion in class-actions that have individual issues. As a starting point, he suggested examining the case law on issues-classes under Rule 23(c)(4). A wide variety of cases, he said, can be adjudicated very effectively on a class basis. But many of the most important – those where group adjudication will confer the most social benefit – will likely have individual issues as well as common issues. He also suggested developing a rule that is flexible enough to accommodate a lower bar for certification of classes for settlement purposes.

*Settlement classes*

Another panelist's choice was for a distinct settlement-class rule. It might be similar to the advisory committee's proposed amendments to Rule 23(b)(4) in the 1990s. Regardless of the details of the rule, though, it should contain a specific provision that creates a clear basis for a district court to approve and supervise mass-tort settlements under Rule 23.

## NEXT MEETING

The committee will hold its next meeting on Monday and Tuesday, June 11 and 12, 2012, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary