COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 2-3, 2011
Washington, D.C.
Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 2 and 3, 2011. The following members were present:

Judge Lee H. Rosenthal, Chair
Dean C. Colson, Esquire
Douglas R. Cox, Esquire
Roy Englert, Esquire
Judge Marilyn L. Huff
Chief Justice Wallace Jefferson
Dean David F. Levi
William J. Maledon, Esquire
Judge Reena Raggi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Judge Diane P. Wood

Deputy Attorney General James M. Cole participated in part of the meeting. In addition, the Department of Justice was represented by Kathleen Felton, Esquire; Elizabeth J. Shapiro, Esquire; Jessica Hertz, Esquire; and Ted Hirt, Esquire.

Judge Neil M. Gorsuch was unable to attend the meeting.

Judge Anthony J. Scirica, former chair of the committee, participated in much of the meeting, and Judge Barbara J. Rothstein, Director of the Federal Judicial Center, attended a portion of the meeting. Also participating were the committee's consultants: Joseph F. Spaniol, Jr.; Professor Geoffrey C. Hazard, Jr.; and Professor R. Joseph Kimble.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Andrea L. Kuperman	The committee's chief counsel
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Emery G. Lee	Research Division, Federal Judicial Center

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 Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Committee Changes

Judge Rosenthal reminded the committee that her term as chair will expire on October 1, 2011, and that Chief Justice Roberts had named Judge Kravitz as her successor. The Chief Justice also named Judge David Campbell to succeed Judge Kravitz as chair of the Advisory Committee on Civil Rules and Judge Raggi to succeed Judge Tallman as chair of the Advisory Committee on Criminal Rules. Judge Rosenthal said that these selections were truly extraordinary and will greatly benefit the rules program.

She pointed out that Judge Tallman was attending his last Standing Committee meeting and had been an enormously successful chair of the Advisory Committee on Criminal Rules. Among his many accomplishments, she noted, were the package of technology amendments scheduled to take effect on December 1, 2011, the pending amendments to Rule 12 (pretrial motions) and Rule 15 (depositions), and the comprehensive and meticulous review of prosecutors' obligations to disclose exculpatory and impeachment information to the defense. She emphasized that he had steered the committee carefully among major competing interests and considerations. In doing so, he had shown consistently great insight and was a delight to work with.

Judge Rosenthal pointed out that the terms of Mr. Cox and Mr. Maledon were also due to expire on October 1, 2011. She emphasized the importance of both members' contributions to the Standing Committee and noted that the committee will celebrate their distinguished service more formally at the next meeting.

Remembering Judge John M. Roll

Judge Tallman asked the committee to remember and honor the late Chief Judge John M. Roll, a beloved former member of the Advisory Committee on Criminal Rules. He pointed out that Judge Roll had contributed mightily to the federal rules process, had been a major force in restyling the Federal Rules of Criminal Procedure, and had worked tirelessly in the cause of justice until his untimely death.

Judicial Conference Report

Judge Rosenthal reported that no proposed rule amendments had been presented to the Judicial Conference at its March 2011 session. In January 2011, the Conference's Executive Committee approved the committee's report on the privacy rules, which was then submitted to Congress.

She noted that the Conference in March had been asked to approve a proposal from the Court Administration and Case Management Committee to revise the standard for senior judges to participate in en banc decisions. The Conference deferred the matter, however, to allow the rules committees time to collaborate with the Court Administration Committee on the matter. Judge Sutton affirmed that the Advisory Committee on Appellate Rules was currently in the process of considering the proposal, but would most likely not recommend a change in the rules.

Pending Rule Amendments

Judge Rosenthal reported that the Supreme Court had approved all the rule amendments approved by the Judicial Conference in September 2010, except for two minor language changes in the restyled evidence rules. She pointed out that it is clear that the Court reviews the proposed rules extremely closely, and it had raised specific concerns regarding the language of four of the restyled rules. Judge Rosenthal worked with the chair and reporter of the Advisory Committee on Evidence Rules to address those concerns. In the end, two of the rules were promulgated by the Court as originally presented to it, and minor changes were made in the text of the other two rules with the approval of the Judicial Conference's Executive Committee.

Judge Rosenthal noted that the amendments were now pending before Congress and scheduled to take effect on December 1, 2011. She added, though, that there may be some concerns in Congress over some of the bankruptcy rule amendments.

Professor Capra announced that the restyled evidence rules had won two prestigious legal-writing awards – the Clear Mark Award for clear legal writing and the Burton Reform in Law Award. He said that principal credit for this major achievement belonged to Professor Kimble and the style committee – Judge Teilborg, Judge Huff, and Mr. Maledon.

Legislative Report

Ms. Kuperman reported that the proposed Lawsuit Abuse Reduction Act of 2011 had been introduced in each house of Congress, and a hearing had been held before the House Judiciary Committee. The proposed legislation, she said, would restore the 1983 version of FED. R. CIV. P. 11 (sanctions), thereby eliminating the current safe harbor provision in the rule and making imposition of sanctions mandatory for rule violations. She noted that the committee had sent a letter to Congress opposing the legislation, noting, among other things, that an empirical study by the Federal Judicial Center had demonstrated that the 1983 version of the rule simply did not work, had led to strategic gamesmanship by lawyers, and had resulted in satellite litigation over imposition of sanctions. Nevertheless, the House bill was scheduled for markup within a week. The Senate bill, she added, was still pending before the Senate Judiciary Committee.

Ms. Kuperman reported that the proposed Sunshine in Litigation Act of 2011 was similar to other Sunshine Acts introduced in every Congress since the 1990s. It would prevent a court from issuing a discovery protective order without first making particularized findings of fact that the order would not restrict the disclosure of information relevant to protection of public health and safety. The latest version of the legislation, she noted, was limited to cases where the pleadings state facts relevant to protection of public health or safety. The committee, she said, had written to the Senate expressing its opposition to the bill on the grounds that it was inconsistent with the Rules Enabling Act and would make discovery more burdensome and costly. Nevertheless, she said, the Senate Judiciary Committee favorably reported a substitute version of the bill.

Ms. Kuperman reported that efforts were well underway to obtain legislation to conform 28 U.S.C. § 2107 to the pending amendment to FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case), scheduled to take effect on December 1, 2011. The amendment will clarify the time to appeal in civil cases in which one of the parties is a United States officer or employee sued in an individual capacity for acts or omissions in connection with official duties.

She added that no legislation was pending to deal with pleading standards in civil cases 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. ___, 129 S. Ct. 1937 (2009).

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 6-7, 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 May 2, 2011 (Agenda Item 6).

Amendments for Publication

FED. R. APP. P. 28 and 28.1

Judge Sutton reported that the proposed amendments to FED. R. APP. P. 28(a) (briefs) would remove the current requirement that an appellant's brief contain separate statements of the case and of the facts. The proposed changes in Rule 28(b) (appellee's brief) and Rule 28.1 (cross-appeals) complement those in Rule 28(a).

Rule 28(a) currently requires a brief to contain a statement of the case – including the nature of the case, the course of proceedings, and the disposition below – followed in order by a statement of the facts. The current rule, he said, has confused practitioners and led to redundancy of information in briefs. Moreover, it is not logical in most cases for an attorney to address the case before setting forth the underlying facts.

Judge Sutton noted that the revised rule would allow appellants to weave the two statements together and present the events to the court in a more logical order, such as in chronological order. The proposed rule would consolidate subdivisions (a)(6) and (a)(7) into a single new subdivision that requires a "concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review. . . ." That approach, he said, was very similar to the Supreme Court's Rule 24.1(g).

Judge Sutton noted that the advisory committee had discussed the proposed revisions with leading appellate lawyers and had received largely favorable reactions to them. A member added that the proposed rule would be very beneficial because it is open-ended and flexible, rather than prescriptive.

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

APPELLATE FORM 4

Judge Sutton reported that the advisory committee was proposing to modify APPELLATE FORM 4 (affidavit accompanying a motion for permission to appeal in forma pauperis). Questions 10 and 11 on the current form ask litigants to disclose: (1) the name of any attorney or other person (such as a paralegal or typist) whom they have paid, or will pay, for services in connection with the case; and (2) the amount of the payments. Critics have said that the questions are overly intrusive and unnecessary in making a determination of in forma pauperis status. They also assert that the questions may raise issues involving attorney-client privilege and work-product protection.

Judge Sutton explained that the advisory committee would replace the current two questions with a single new Question 10 that would read as follows: "Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit? If yes, how much?" In addition, some technical changes would be made in the form.

He also reported that the advisory committee believed that it may be time to separate the appellate forms from the full, three-year Rules Enabling Act process. That issue was also discussed during the presentation of the report of the Advisory Committee on Civil Rules. (See pages 30-31 of these minutes.)

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

Informational Items

FED. R. APP. P. 4(a)(1) and 28 U.S.C. § 2107

Judge Sutton reported that the advisory committee was continuing its efforts to secure legislation to amend 28 U.S.C. § 2107 to conform that statute to the amendment to FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case) that will take effect on December 1, 2011. The legislative change, he said, was necessary to buttress the rule amendment because the Supreme Court held in *Bowles v. Russell*, 551 U.S. 205 (2007), that appeal time limits set forth in statutes are jurisdictional in nature. The proposed statutory amendment, he said, mirrors the amended rule and will clarify the time to appeal in civil cases 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.

Judge Sutton noted that in pursuing the legislation, Congressional staff had expressed concern that the additional time provided by the rule and statute might not be applicable if they themselves were sued. The proposed statutory language gives all parties 60 days, rather than 30 days, to file a notice of appeal if one of the parties is "a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection [with official duties], including all instances in which the United States represents that [person] when the judgment, order, or decree is entered or files the appeal for that [person]."

Congressional staff appeared to have read the safe harbors in that text as applicable only to representation by the Department of Justice, and not to representation by congressional counsel. Judge Sutton argued, though, that the reference to representation by the "United States" clearly covers representation by congressional counsel, as all agree that the reference to a suit against "a United States officer" covers members of Congress and their staff.

It is likely, he said, that the legislation will proceed as planned. It is important to have it enacted in time to take effect along with the amended rule on December 1, 2011.

FED. R. APP. P. 29

Judge Sutton reported that the advisory committee had not yet determined whether and how to proceed with a proposed amendment to FED. R. APP. P. 29 (amicus briefs) that would treat federally recognized Indian tribes the same as states for the purpose of filing amicus briefs. He noted that both the advisory committee and the Standing Committee had been divided on the merits of the proposal. Moreover, two of the three circuit courts that hear the bulk of the cases in which tribes file amicus briefs had shown little interest in changing the rule. But, he said, the Ninth Circuit – the court with the largest number of cases – had now informed the advisory committee that it favored adoption of a national rule permitting Indian tribes to file amicus briefs without party consent or court permission.

Judge Sutton pointed out that a recent study by the Federal Judicial Center had demonstrated that the courts of appeals deny very few applications from Indian tribes to file amicus briefs. Accordingly, the key issue at stake is the sovereignty and dignity of the tribes, not the actual denial of any rights.

JOINT MEETING WITH THE BANKRUPTCY ADVISORY COMMITTEE

Judge Sutton reported that the advisory committee had met jointly in April 2011 with the Advisory Committee on Bankruptcy Rules to discuss proposed, major revisions to Part VIII of the bankruptcy rules. Part VIII governs appeals from a bankruptcy judge to a district court or bankruptcy appellate panel. The meeting, he said, had been very productive.

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 May 6, 2011 (Agenda Item 9). He reported that the advisory committee had 22 action items to present, falling into three categories:

1. Eight matters published in August 2010 and ready for final approval by the Judicial Conference;
2. Five matters for final approval by the Conference without publication; and
3. Nine matters to be published for public comment.

To aid in presenting the 22 proposals, Judge Wedoff grouped them by subject matter, rather than by procedural status, and he discussed the subjects in the following order:

1. Procedures for creditor claims and claim objections;
2. Incorporating recent Supreme Court rulings;
3. Simplified procedure for filing a certificate of debtor financial education;
4. Adjusting time deadlines; and
5. Other corrections and adjustments.

1. Creditor Claims and Claim Objections

Background and Procedural Status

Judge Wedoff reported that several bankruptcy judges have voiced concern about the accuracy and adequacy of the information that creditors submit to support their claims, especially in cases where the original creditor has sold the debt to another entity before the bankruptcy case is filed. The problems arise most frequently with regard to home mortgages and credit-card debt. As a result, it is often unclear: (1) who the original holder of the debt was; (2) what the current balance on the debt is; and (3) what it will take to pay off the debt. Moreover, he added, there is often no way for a debtor or trustee to know from the documentation filed with the proof of claim whether the statute of limitations has passed.

To address these problems, he said, the advisory committee in 2009 published proposed amendments to FED. R. BANKR. P. 3001 (proof of claim) and proposed new FED. R. BANKR. P. 3002.1 (notice related to claims secured by a security interest in the debtor's principal residence).

Proposed Rule 3001(c)(2) – scheduled to take effect on December 1, 2011 – will require that additional supporting information accompany proofs of claim in all individual-debtor cases. The revised rule also prescribes the sanctions that may be imposed by the court against a creditor in an individual-debtor case that fails to provide that information.

Another proposed amendment in 2009, new subdivision 3001(c)(1), would have required creditors holding claims based on an open-end or revolving consumer-credit agreement to file with the proof of claim a copy of the last account statement sent to the debtor before the bankruptcy petition was filed. The advisory committee, however, withdrew the proposal because of adverse comments from representatives of bulk purchasers of credit-card debt asserting that often a copy of the last account statement simply cannot be produced.

Instead, the committee was now proposing a new subdivision 3001(c)(3) that would require the creditor of a claim based on an open-end or revolving consumer-credit agreement to provide with the proof of claim five specific pieces of information in support of the claim. That provision was published for further comment in August 2010 and is currently before the Standing Committee for final approval. (See pages 12-13 of these minutes.)

Mortgage Debt

OFFICIAL FORM 10

Judge Wedoff explained that the proposed changes to OFFICIAL FORM 10 (proof of claim) were minor and relatively technical. The form would ask claimants for additional information about the interest rate on secured claims, and some of the instructions would be clarified. The revised form also adds space for an optional uniform claim identifier number, which will assist creditors in facilitating electronic payment in chapter 13 cases. In addition, he said, stylistic and formatting changes would be made.

The committee unanimously by voice vote approved the amendments for final approval by the Judicial Conference, effective December 1, 2011.

OFFICIAL FORM 10 (ATTACHMENT A)
OFFICIAL FORM 10 (SUPPLEMENT 1)
OFFICIAL FORM 10 (SUPPLEMENT 2)

Judge Wedoff pointed out that the three new forms associated with OFFICIAL FORM 10 were designed to implement new Rule 3002.1. The new rule – scheduled to take effect on December 1, 2011 – will assist in implementing § 1322(b)(5) of the Bankruptcy Code. It permits a chapter 13 debtor to cure a default and maintain home mortgage payments over the course of the plan.

OFFICIAL FORM 10, ATTACHMENT A (mortgage proof of claim attachment) implements Rule 3002.1(c)(2). It will give the debtor and the trustee important information on the status of a claim secured by a security interest in the debtor's principal residence. The holder of the claim must specify the principal and interest due on the residence as of the date of filing the petition; itemize pre-petition interest, fees, expenses, and charges included in the claim; and specify the amount needed to cure any default.

OFFICIAL FORM 10, SUPPLEMENT 1 (notice of mortgage payment change) implements Rule 3002.1(b). It applies in chapter 13 cases where the debtor is maintaining current payments on the principal residence and attempting to cure any default. The debtor and trustee need to know whether there have been any changes in the installment payment amount. The new form provides the notification and requires the

holder of a home mortgage claim to provide 21 days' advance notice of any escrow account payment adjustment, interest payment change, or other mortgage payment change.

OFFICIAL FORM 10, SUPPLEMENT 2 (notice of post-petition mortgage fees, expenses, and charges) implements Rule 3002.1(c). It will be used in a chapter 13 case by the holder of a home mortgage claim to notify the debtor and trustee of the amount of all post-petition fees, expenses, and charges and the dates incurred.

Judge Wedoff noted that no opposition had been voiced to the forms during the public comment period, with one important exception regarding OFFICIAL FORM 10 (ATTACHMENT A). He explained that two bankruptcy judges had pointed out that the manner in which mortgage servicers treat mortgage payments varies considerably. The servicers commonly credit late-received payments to late charges and attorney fees before applying them to the principal. Therefore, fees and charges may pile up, and the debtor or trustee cannot tell how the payments have been allocated without a full mortgage history.

The judges proposed that home-mortgage claimants be required to submit a complete loan history with their proofs of claim reflecting all amounts received and credited by the lender. This would allow the debtor and trustee to compare and reconcile the claimed arrearages with their own payment records.

Judge Wedoff noted that the proposed new OFFICIAL FORM 10 (ATTACHMENT A) does not require a loan history because the advisory committee concluded that it is not necessary in most chapter 13 cases. It might also impose an undue burden on the mortgagee and overwhelm debtors with too much detail. Moreover, the additional loan history information that debtors or trustees need in a specific case may be obtained through discovery.

In addition, the advisory committee concluded as a practical matter that there was simply insufficient time to redraft the form to incorporate additional information and still meet the deadline of having the form take effect at the same time as new Rule 3002.1, on December 1, 2011. Amending the form to require a loan history, for example, would require republication and an additional year's delay in issuing the form. Therefore, he said, the committee had decided to approve the form as currently drafted, but to keep the matter on its docket and gather information about the experience of debtors and creditors with the new rule and forms after they go into effect. Informed by those experiences, the committee will be in a better position in the future to decide whether to require the holder of a claim secured by the debtor's principal residence to attach a complete loan history to the proof of claim.

A member noted that OFFICIAL FORM 10, ATTACHMENT A will likely be opposed by bankruptcy judges who have developed their own forms and do not want to switch to a new national form that gives them less information. Her own chief bankruptcy judge, for example, had expressed concern that the proposed new form may preclude continued use of his more detailed local form. Judge Wedoff and Professor Gibson responded that FED. R. BANKR. P. 9009 allows the official forms to be used "with alterations as may be appropriate." They also suggested that a district might consider using the national form, but also requiring a supplemental local form asking for additional information. A member favored the use of supplemental local forms and said that they would inform the advisory committee in fashioning any needed changes in the national form in the future.

The committee unanimously by voice vote approved the three new forms for final approval by the Judicial Conference, effective December 1, 2011.

Open-Ended Credit Card Debt

FED. R. BANKR. P. 3001(c)(3)

Judge Wedoff reported that the amendments to Rule 3001 (proof of claim) originally proposed by the advisory committee in 2009 would have required that a proof of claim based on open-end or revolving consumer-credit agreements be accompanied by a copy of the last account statement sent to the debtor before the bankruptcy filing. The additional documentation, he said, would merely provide needed definition to the basic requirement currently set forth in FED. R. BANKR. P. 3001(c) that "[w]hen a claim . . . is based on a writing, the original or a duplicate shall be filed with the proof of claim." The debtor, he said, needs the information to associate the claim with a known account and to ascertain whether the claim is timely.

The proposal, however, was opposed vigorously by the bulk purchasers of credit-card claims on two grounds. First, they asserted that buyers of credit-card debt receive only a computer print-out of basic information when they purchase the debt and do not have access to the last account statement. Second, they said that producing the statements would raise serious privacy issues because the debtor's full credit-card debts would be disclosed on the public record, including such sensitive matters as medical debts.

Judge Wedoff said that the advisory committee had redrafted the proposal in light of the comments from the credit industry, and it had published a substitute proposal in 2010 that would require creditors to provide certain specific information to the extent applicable – the name of the entity from which the creditor purchased the debt, the name of the entity to which the debt was owed at the time of the debtor's last transaction, the date of the last transaction on the account, the date of the last payment, and the charge-off date.

He reported that the advisory committee had received no objections to the revised proposal based either on the unavailability of the information or on privacy concerns. Nevertheless, he said, some creditors are still opposed on the grounds that the amendments are not needed and would place an unreasonable burden on consumer lenders and debt purchasers.

Judge Wedoff noted, on the other hand, that the advisory committee had received several comments from debtors' representatives that the rule does not go far enough in making creditors document their claims, and it should require a complete chain of title. They assert that creditors regularly ignore the rule's current requirement of attaching to a proof of claim the writing on which it is based. As a result, they say, debtors do not receive sufficient information to pursue their interests effectively.

He explained that proposed FED. R. BANKR. P. 3001(c)(3)(B) would authorize a debtor or trustee to request a copy of the writing on which a credit-card claim is based, and the creditor would have a deadline of 30 days to comply with the request. That provision also received some opposition from the creditors, who recommended that the requesting party be required to make a threshold showing of need for the writing. The advisory committee decided, though, that a good cause showing is unnecessary and would lead to needless litigation. Realistically, he said, debtors will only seek a copy of the underlying contract if they have good reasons for doing so.

Judge Wedoff noted that a new objection raised by creditors relates to the provision in FED. R. BANKR. P. 3001(c)(2)(D) that lists sanctions that a court may impose when a creditor fails to provide required information. Under the rule, for example, a debtor or trustee could ask that certain papers not be allowed or that appropriate attorney fees be imposed. Creditors argue, he said, that the provision is overly harsh.

Judge Wedoff said that sanctions will rarely arise. The sanctions specified in Rule 3001(c)(2)(D), moreover, are the same as those available generally in every bankruptcy and civil case for violations of the rules. In addition, Rule 3001(c)(2)(D) actually serves as a limitation on actions that several bankruptcy judges have already been taking, such as ruling that a creditor's failure to produce needed information requires disallowance of a claim.

Judge Wedoff added that the sanction provision is not set forth in the proposed new Rule 3001(c)(3), but in Rule 3001(i), scheduled to take effect on December 1, 2011. That general provision, moreover, applies in all individual-debtor cases and is not limited to claims based on an open-end or revolving consumer-credit agreement.

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

Procedures for Objecting to Claims

FED. R. BANKR. P. 3007(a)

Judge Wedoff explained that there is confusion under the current rule about the proper procedure for filing an objection to a claim. The rule seems to require that every objection to a claim be noticed for a hearing, although many courts do not follow that procedure. The proposed amendments to Rule 3007(a) (objections to claim) would authorize a negative-notice procedure for filing objections and clarify the method for serving the objections.

The proposed amendments would allow a court to place the burden on a claimant to request a hearing after receiving notice of an objection. The change, he said, is consistent with § 502(b) of the Bankruptcy Code, which defines the phrase "after notice and a hearing" as allowing a court to act without a hearing if notice is properly given and a party in interest does not timely request a hearing.

With respect to the manner of serving objections to claims, Judge Wedoff explained that courts currently disagree on whether an objection to a claim must be served by one of the methods specified for service of a complaint in FED. R. BANKR. P. 7004 or whether it is sufficient to serve the objection by mail on the person designated on the proof of claim. The advisory committee concluded that the matter should be clarified, and it proposes that objections be served by first-class mail addressed to the person designated on the proof of claim to receive notices.

The committee, he said, also concluded that two types of claimants should be served in the manner prescribed by FED. R. BANKR. P. 7004 – insured depository institutions and officers and agencies of the United States. The service methods for depository institutions are statutorily mandated, and the size and dispersion of authority in the federal government necessitate service on the Attorney General and the appropriate U.S. attorney's office, as well as on the person designated on the proof of claim.

The committee unanimously by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 3001(c)(1)

Judge Wedoff reported that FED. R. BANKR. P. 3001(c)(1) (supporting information for a proof of claim) would be amended to delete the option of filing with a proof of claim the original of a writing on which the claim is based. The instructions to OFFICIAL FORM 10 (proof of claim) direct claimants not to "send original documents, as attachments may be destroyed after scanning." Those instructions reflect the current practice of filing copies, not originals, in the bankruptcy courts. The advisory committee

therefore would amend Rule 3001(c)(1) to conform it to the official form and current practice by replacing "the original or a duplicate" with "a copy of the writing" on which the claim is based.

The committee approved the proposed conforming amendment for final approval by the Judicial Conference without publication.

2. Responses to Recent Supreme Court Decisions

OFFICIAL FORM 6C

Judge Wedoff reported that the Supreme Court ruled in *Schwab v. Reilly*, 560 U.S. __, 130 S. Ct. 2652 (2010), that if a debtor claims property as exempt and enters a specific dollar amount on OFFICIAL FORM 6C, he or she is limited to that amount. If the full fair market value of the property is found to exceed that amount, the trustee may use the overage.

The Supreme Court suggested in *Schwab* that the debtor could claim the full amount of the property by stating so on the face of the form. But the current form does not provide a space for the debtor to exercise that option. So the advisory committee proposed rearranging the form and adding an additional column to give the debtor two options: (1) to claim a specific dollar amount; or (2) to claim the full fair market value of the exempted property.

The committee unanimously by voice vote approved the proposed amendments for publication.

OFFICIAL FORMS 22A and 22C

Judge Wedoff reported that OFFICIAL FORM 22C (chapter 13 statement of current monthly income and calculation of commitment period and disposable income) would be amended to reflect the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. ___, 130 S. Ct. 2464 (2010). The case dealt with calculating a chapter 13 debtor's "projected disposable income" under § 1325(b)(1) of the Bankruptcy Code. That income normally has to be devoted to paying unsecured claims.

The term "projected disposable income" is not defined in the Code, but "disposable income" is defined in § 1325(b)(2) as the debtor's "current monthly income" less reasonably necessary expenses. In turn, "current monthly income" is calculated under § 101(10A) of the Code by averaging the debtor's monthly income for the six months preceding the filing of the bankruptcy petition.

In *Lanning*, the debtor's financial situation had changed just before her chapter 13 filing, as she had received a one-time severance buyout from her former employer and had acquired a new job at a considerably lower salary. The buyout payment greatly inflated her gross income for the six-month period before she filed the bankruptcy petition.

The Supreme Court rejected the purely "mechanical" approach of considering only the debtor's average monthly income for the six months before the bankruptcy filing. Instead, it adopted a "forward looking" approach allowing courts to consider changes that have occurred, or are likely to occur, in a debtor's income and expenses after filing.

Judge Wedoff explained that OFFICIAL FORM 22C currently calculates disposable income based only on information about the debtor's pre-bankruptcy average monthly income and current expenses. In light of *Lanning*, though, the Advisory Committee decided to amend the form by adding a new paragraph 61. It will ask the debtor to specify any change in the income or expenses reported on the form that has occurred, or that is virtually certain to occur, during the 12-month period following filing of the bankruptcy petition.

Professor Gibson added that both OFFICIAL FORM 22C and OFFICIAL FORM 22A (Chapter 7 statement of current monthly income and means-test calculation) would also be amended to make a minor adjustment in the deduction for telecommunication expenses. The revision will allow deduction of telecommunication services, including business cell phone service, to the extent necessary for production of income, if not reimbursed by the debtor's employer.

The committee unanimously by voice vote approved the proposed amendments for publication.

3. Simplified Procedure for Filing a Certificate of Debtor Financial Education

FED. R. BANKR. P. 1007(b)(7)

Judge Wedoff explained that the Bankruptcy Code was amended in 2005 to require individual debtors in chapter 7, 11, and 13 cases to complete an instructional course on personal financial management approved by the local U.S. trustee or bankruptcy administrator before they may receive a discharge. The Code does not address what document must be filed to provide notice that the course has been completed, or who must file it. The procedure is set forth in FED. R. BANKR. P. 1007(b)(7) (schedules, statements, and other required documents), which requires the debtor to file a "statement of completion of a course concerning personal financial

management, prepared as prescribed by the appropriate Official Form" – OFFICIAL FORM 23 (debtor's certification of completion of instructional course concerning financial management).

Judge Wedoff noted that the rule imposes the burden of providing notice of completing the course on the debtor, not on the course provider. If the debtor fails to file the notice, the court must close the case without a discharge, even if the debtor has in fact completed the course.

He said that the judges and clerks designing the judiciary's Next Generation of CM/ECF system have recommended that approved providers of financial-management courses be authorized to file course-completion statements electronically and directly with the bankruptcy courts. That procedure will be more efficient, require less human involvement, and reduce the number of cases dismissed for failure to file the required certificate.

Judge Wedoff reported that the advisory committee had concluded that it would be inappropriate for a bankruptcy rule to impose a requirement directly on providers of personal financial-management courses. But Rule 1007(b)(7) should be amended to facilitate approved course providers filing the statements. The proposed amendments would eliminate the requirement that an individual debtor file Form 23 if a course provider has notified the court that the debtor has completed the course after filing the petition.

The committee unanimously by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 5009(b)

Judge Wedoff reported that the proposed amendment to FED. R. BANKR. P. 5009(b) (notice of failure to file Rule 1007(b)(7) statement) conforms to the proposed amendments to Rule 1007(b)(7). Rule 5009(b) requires the clerk to send an individual debtor who has not filed the certificate of completing a financial-management course a notice within 45 days after the first date set for the meeting of creditors that the case will be closed without entry of a discharge unless the required statement is timely filed. The proposed amendment recognizes that the clerk need not send the notice if the course provider has already notified the court that the debtor has completed the course.

The committee unanimously by voice vote approved the proposed amendment for publication.

4. Timing and Deadlines

FED. R. BANKR. P. 7054

Judge Wedoff noted that FED. R. BANKR. P. 7054 (judgment and costs) incorporates FED. R. CIV. P. 54(a)-(c) for adversary proceedings and provides for the award of costs. The proposed amendments would expand from one day to 14 days the time for a party to respond to the prevailing party's bill of costs and from five days to seven days the time for seeking court review of the costs taxed by the clerk. He noted that both time limits follow the general rule that time limits be expressed in multiples of seven days. He also pointed out that one public comment had suggested extending both time periods to 14 days, but the advisory committee decided that it was important to make Rule 7054(b) consistent with the civil rule, FED. R. CIV. P. 54(d)(1).

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

FED. R. BANKR. P. 7056

Judge Wedoff explained that FED. R. BANKR. P. 7056 (summary judgment) makes FED. R. CIV. P. 56 applicable in adversary proceedings. He added that it is also applicable in contested matters under FED. R. BANKR. P. 9014(c) unless the court directs otherwise. Civil Rule 56, as revised in 2009, sets a default deadline to file a summary judgment motion of 30 days after the close of all discovery. That deadline, however, is not appropriate in bankruptcy cases because hearings are frequently held very shortly after the close of discovery.

Therefore, the proposed amendment would depart from the civil rule and establish a new default deadline of 30 days before the initial date set for an evidentiary hearing on any issue for which summary judgment is sought. That change would give the court at least 30 days to consider the motion before the hearing. Judge Wedoff emphasized that the deadlines under both FED. R. CIV. P. 56 and FED. R. BANKR. P. 7056 are default deadlines, applicable only if no local rule or court order sets a different date.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

OFFICIAL FORM 25A

Judge Wedoff explained that the proposed amendment to OFFICIAL FORM 25A (plan of reorganization in a small business chapter 11 case) would change the effective-date provision of a small business chapter 11 plan to conform to amendments to the bankruptcy rules that took effect in 2009. Those amendments increased from 10 days to 14 days the time periods for the duration of a stay of an order confirming a plan, FED. R. BANKR. P. 3020(e), and for filing a notice of appeal, FED. R. BANKR. P. 8002(a). Under

the proposed amendment to § 8.02 of the form, the effective date of the plan would generally be the first business day following the date that is 14 days after entry of the order of confirmation.

The committee unanimously by voice vote approved the proposed conforming amendment for final approval by the Judicial Conference without publication, effective December 1, 2011.

FED. R. BANKR. P. 1007(c)

Judge Wedoff reported that the proposed amendment to FED. R. BANKR. P. 1007(c) (time limits to file documents) was a technical and conforming change to remove an inconsistency in the current rule with FED. R. BANKR. P. 1007(a)(2) (filing documents in an involuntary case). Rule 1007(c) prescribes time limits for filing various lists, schedules, statements, and other documents. It specifies that in an involuntary case the debtor must file the list of creditors specified in Rule 1007(a)(2), as well as certain other documents, within 14 days of entry of the order for relief. In 2010, however, Rule 1007(a)(2) was amended to reduce to seven days the time for an involuntary debtor to file the list of creditors. As a result, the proposed amendment would delete from subdivision (c) the inconsistent reference to the time limit for filing the list of creditors in an involuntary case.

The committee unanimously by voice vote approved the proposed conforming amendment for final approval by the Judicial Conference without publication.

FED. R. BANKR. P. 9006(d)

Judge Wedoff explained that FED. R. BANKR. P. 9006(d) (time limit for serving motions and affidavits) would be amended to draw attention to the fact that it prescribes default deadlines for service of motions and written responses. A bankruptcy judge had suggested deleting the rule because most districts have their own local rules governing motion practice. Moreover, Rule 9006(d) may be overlooked by parties filing and responding to motions because motion practice and contested matters generally are covered by Rules 9013 (form and service of motions) and 9014 (contested matters).

The advisory committee concluded that Rule 9006(d) needed to be retained, but decided that it should be amended, highlighted, and made more like the civil rule on which is it based – FED. R. CIV. P. 6 (computing and extending time; time for motion papers). Unlike the civil rule, though, FED. R. BANKR. P. 9006 does not state in its title that it governs time periods for motion papers. Moreover, Bankruptcy Rule 9006 is not followed immediately by a rule that addresses the form of motions, as in the civil rules – FED. R. CIV. P. 7 (pleadings allowed; form of motions and other papers).

The advisory committee would amend the title of Rule 9006 to add a reference to the "time for motions papers." Subdivision (d) would be amended to govern the timing of service of any written response to a motion, not just opposing affidavits. The title of the subdivision would be changed from "For Motions–Affidavits" to "Motion Papers."

The committee unanimously by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 9013

Judge Wedoff reported that the proposed amendment to FED. R. BANKR. P. 9013 (form and service of motions) would provide a cross-reference to the time periods in FED. R. BANKR. P. 9006(d) to call greater attention to the default deadlines for motion practice. In addition, some stylistic changes would be made to provide greater clarity.

The committee unanimously by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 9014

Judge Wedoff reported that the proposed amendment to FED. R. BANKR. P. 9014 (contested matters) would add a cross-reference to the time limits for serving motions and responses in FED. R. BANKR. P. 9006(d).

The committee unanimously by voice vote approved the proposed amendment for publication.

5. Corrections and Adjustments

FED. R. BANKR. P. 2015(a)

Judge Wedoff reported that FED. R. BANKR. P. 2015(a) (duty to keep records, make reports, and give notice) would be amended with a technical change to correct its reference to § 704 of the Bankruptcy Code from § 704(8) to § 704(a)(8).

The committee unanimously by voice vote approved the proposed conforming amendment for final approval by the Judicial Conference without publication.

OFFICIAL FORM 1

Judge Wedoff said that OFFICIAL FORM 1 (voluntary petition) would be amended to include lines for a foreign representative filing a chapter 15 petition to state the

country of the debtor's center of main interests and the countries in which related proceedings are pending. The change merely implements the requirements of new FED. R. BANKR. P. 1004.2 (petition in a chapter 15 case), scheduled to take effect on December 1, 2011.

The committee unanimously by voice vote approved the proposed conforming amendment for final approval by the Judicial Conference without publication, effective December 1, 2011.

OFFICIAL FORM 7

Judge Wedoff reported that the proposed change to OFFICIAL FORM 7 (statement of financial affairs) would make the definition of an "insider" consistent with the Bankruptcy Code's definition of the term. The form currently defines an insider as one who holds more than a 5% voting interest in a corporate debtor – a bright-line test not found in the Code. The revised form, on the other hand, refers more generally to a person in a position to control the entity. He noted that the proposed change is substantive and needed to be published for public comment.

The committee unanimously by voice vote approved the proposed amendment for publication.

OFFICIAL FORMS 9A - 9I

Judge Wedoff explained that the proposed changes in OFFICIAL FORMS 9A - 9I (notice of meeting of creditors and deadlines) are technical and would conform the forms to an amendment to FED. R. BANKR. P. 2003(e), scheduled to take effect on December 1, 2011. Rule 2003(e) currently states that a meeting of creditors may be adjourned "by announcement at the meeting of the adjourned date and time without further notice." The 2011 amendment to the rule will require the presiding official to file a written statement for the record specifying the date and time to which the meeting is adjourned.

The revised forms would be amended to make the explanation of the meeting of creditors on the back of the form consistent with the amended rule. In addition, the revised forms correct a spelling error, correct a punctuation error, and call greater attention to the instructions.

The committee unanimously by voice vote approved the proposed conforming amendments for final approval by the Judicial Conference without publication, effective December 1, 2011.

Information Items

MODERNIZING THE BANKRUPTCY FORMS

Judge Wedoff reported that the advisory committee, working through a subcommittee chaired by Judge Elizabeth L. Perris, was making substantial progress on its major project to modernize the bankruptcy forms. The goals of the project are to avoid redundant information on the forms, make them more user-friendly, elicit more accurate information, and take advantage of technological developments, especially the judiciary's Next Generation of CM/ECF system, currently under development.

He said that the forms project was currently running ahead of the projected deployment of the Next Generation system. A package of forms for use by individual debtors may be ready for publication in August 2012, and the committee may decide to release the forms serially and implement them before the Next Generation system is in place.

He noted that the bankruptcy process relies heavily on forms and added that Judge Perris, chair of the advisory committee's forms modernization project, will serve as the committee's representative on the new inter-committee subcommittee on forms.

MODEL CHAPTER 13 PLAN

Judge Wedoff said that the advisory committee was considering developing a new model chapter 13 plan form. Under the pertinent case law, bankruptcy judges have an obligation to review proposed chapter 13 plans carefully and to deny any that include improper provisions. In *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. ___, 130 S. Ct. 1367 (2010), the Supreme Court upheld the enforceability of a chapter 13 plan that called for the discharge of a government-sponsored student loan. A loan of that sort, though, may only be discharged if the debtor brings an adversary proceeding and the bankruptcy court rules that failure to discharge the debt would impose an undue hardship on the debtor and the debtor's dependents.

In *Espinosa*, the discharge was never the subject of an adversary proceeding. But since the bankruptcy court confirmed the plan, even without the necessary finding of undue hardship, the Supreme Court ruled that it was a binding final judgment. The Court noted that bankruptcy judges have an obligation to review a chapter 13 plan carefully, to direct that debtors conform their plan to the requirements of the Bankruptcy Code, and to deny confirmation if the plan does not. But there are thousands of plans that busy judges must review and a great many variations among them. It would be very helpful, he said, to have a standard plan to aid in the review process.

REVISING THE BANKRUPTCY APPELLATE RULES

Judge Wedoff reported that the advisory committee was proceeding well with its comprehensive revision of the bankruptcy appellate rules (Part VIII of the Federal Rules of Bankruptcy Procedure). It had just conducted a very productive joint meeting with the Advisory Committee on Appellate Rules to discuss issues presented by the intersection of the bankruptcy appellate rules and the Federal Rules of Appellate Procedure.

Professor Gibson added that a working group of advisory committee members, plus the reporter and a member of the appellate advisory committee, would conduct further drafting sessions in July 2011. Professor Kimble, the Standing Committee's style consultant, will then review the draft later in the summer. At its fall 2011 meeting, the advisory committee may be able to approve half, or possibly all, the rules. She said that some rules may be presented to the Standing Committee as early as January 2012, and the full package of proposed rules should be ready for publication in August 2012.

ASBESTOS TRUSTS

Judge Wedoff reported that the Chamber of Commerce had suggested 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 court that detail each claimant's demand for payment from the trust and each amount paid. He noted that the matter had been referred to the advisory committee's business subcommittee. The subcommittee, he said, had expressed concern over whether the committee has jurisdiction under the Rules Enabling Act to issue a rule requiring a trust to file documents after the debtor's plan has been confirmed and the bankruptcy court has closed the case.

Judge Wedoff said that the committee was in the process of seeking additional information on the matter from interested organizations with relevant expertise. In the meantime, he added, the committee had received a letter from the chairman of the Judiciary Committee of the House of Representatives asking that the proposal move forward.

RESTYLING THE BANKRUPTCY RULES

Judge Rosenthal pointed out that the committee needed to decide in the not-too-distant future whether the bankruptcy rules should be restyled. She noted that restyling would be a major and difficult project, complicated by the interface of the bankruptcy rules with the Bankruptcy Code. Nevertheless, she suggested, there are various ways in which the matter might be accomplished.

OFFICIAL SET OF BANKRUPTCY RULES

Judge Wedoff thanked Mr. Ishida for his dedicated and painstaking work in producing the first official version of the Federal Rules of Bankruptcy Procedure and in leading the successful efforts to have the rules printed for the first time in handy pamphlet form by the Government Printing Office.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set forth in Judge Kravitz's memorandum and attachments of May 2, 2011 (Agenda Item 5). Judge Kravitz reported that the advisory committee had conducted its April 2011 meeting at the University of Texas Law School in Austin. Chief Justice Jefferson of Texas participated in the meeting, and Justice Stephen Breyer spoke to the committee.

Amendments for Publication

FED. R. CIV. P. 45

Judge Kravitz pointed out that the advisory committee had received many letters from lawyers complaining about the current Rule 45 (subpoenas) and its complexity. In 2008, the committee formed a subcommittee, with Judge David G. Campbell as chair and Professor Richard L. Marcus as reporter, to conduct a comprehensive study of the rule. Most of the members of the subcommittee, he said, were practicing lawyers.

As part of its extensive study, the subcommittee sorted through about twenty different areas for potential amendments to Rule 45, and it eventually settled on four areas that it deemed in need of amendment:

1. Notice of service of a subpoena;
2. Transfer of subpoena-related motions;
3. Trial subpoenas for distant parties and party officers; and
4. Simplification of the rule.

The subcommittee worked with many judges and lawyers in fashioning appropriate amendments to the rule, and in October 2010 it conducted a productive mini-conference in Dallas to obtain feedback from lawyers on the proposed amendments.

1. Notice

Judge Kravitz reported that Rule 45(b)(1) requires that each party be given notice of subpoenas that require document production. The advisory committee was informed that many lawyers are unaware of the notice requirement and regularly fail to comply with it. Accordingly, the advisory committee proposed moving the notice requirement to a more prominent position as Rule 45(a)(4) and adding a new caption entitled "Notice to Other Parties." The amended rule also requires that the subpoena be attached to the notice, and include trial subpoenas.

Judge Kravitz noted that some attorneys had argued that the rule should go further and require additional notice each time that a subpoena is modified or updated. The American Bar Association had suggested that notice be provided not only of service of the subpoena, but also of compliance with it. Some lawyers wanted the rule to require a description of the materials produced and access to them. The advisory committee, however, unanimously rejected these proposals for two reasons.

First, the committee concluded that a national rule simply cannot prescribe every aspect of the lawyering process needed to obtain documents in a given case. As a practical matter, discovery materials are often produced on a rolling basis. Negotiations and production may occur over a considerable period of time, and lawyers need to communicate directly and periodically with their opponents and with the targets of subpoenas. They may also assert their need for additional notices and access in their Rule 26(f) plans or ask a court to include appropriate provisions in its scheduling order. These matters are too much dependent on context to be addressed by rule text

Second, the advisory committee wanted to avoid litigation over compliance issues. It was concerned that lawyers might be tempted to ask courts to preclude documents from evidence on the grounds that the other side's notices were inadequate.

2. Transfer

Judge Kravitz explained that the proposed amendments to Rule 45 do not change the direction in the current rule that motions to enforce or quash a subpoena be made in the district of compliance, even though the underlying civil action may be pending in a different district. Proposed Rule 45(f), however, would in very limited circumstances explicitly allow the court for the district of compliance to transfer subpoena-related motions to the court presiding over the main action. He added that the bar was very supportive of including a transfer provision in the rule.

He said that the advisory committee was concerned about the standard for transferring a subpoena dispute, and it wanted to avoid making a transfer so easy that judges might reflexively transfer subpoena disputes on a regular basis. But he pointed out that there are strong reasons in certain cases to have enforcement of the subpoena handled by the judge who presides over the underlying case. The presiding judge, for example, may have already ruled on the same issues raised by the subpoena. The subpoena dispute, moreover, might relate to the merits of the underlying action or impact the judge's management of the case. The committee, he said, had concluded that local production issues should be handled locally in the district of compliance, and only issues affecting the merits or case management should be transferred. To balance these considerations, he said, the committee had decided on a standard that requires "exceptional circumstances" to permit transfer.

A member argued that "exceptional circumstances" was too narrow a standard. He said that the kinds of situations described in the Committee Note, in which a subpoena dispute relates to the merits of the main case, occur quite regularly and are not at all "exceptional." He suggested that "good cause" might be better.

Judge Kravitz said that the advisory committee recognized the importance of allowing the subpoenaed party to litigate a dispute in its own, convenient forum. It wanted to discourage transfers and therefore had selected the narrower term "exceptional circumstances." He noted that the American Bar Association's Litigation Section also favored the narrower standard, as it was concerned that a looser standard might tempt judges to transfer cases to remove them from their dockets. Members added that it might also encourage gamesmanship by some lawyers.

Judge Kravitz explained that the committee was proposing to publish the tougher standard, and it may later relax it if the public comments indicate that the standard should be more permissive. He noted, too, that even if a subpoena dispute is not transferred, the judge in the district of compliance may seek informal advice from the judge presiding over the main case. A participant added that the proposed rule merely establishes a framework for handling enforcement issues, and it is simply not possible to address or resolve every potential problem in a rule. He suggested that the committee note emphasize that point.

Judge Kravitz pointed out that proposed Rule 45(f) would also allow the court in the district of compliance to transfer subpoena-related motions if the parties and the person subject to the subpoena consent to the transfer. A member suggested, though, that only the views of the subpoenaed party should prevail, and the parties should not be allowed to block a transfer. Judge Kravitz agreed to have the advisory committee consider the matter further.

A member pointed out that the proposed language in Rule 45(f) attempts to resolve the issue of legal representation when a case is transferred and the witness does not have a lawyer in the other state. To ease the burden on the witness, who would have to hire another lawyer, the rule creates something akin to an automatic *pro hac vice* admission. It would allow an attorney authorized to practice in the court where the motion is made to file papers and appear in the court in which the action is pending.

A member cautioned that this provision constitutes attorney regulation and would preempt local court rules, state rules, and local legal culture. In effect, he said, the rule would order a district court to accept an out-of-state lawyer to practice before it, even though the lawyer may not be subject to regulation by the state bar or meet other requirements traditionally imposed by the district court. He predicted that the committee will receive negative public comments on the issue. A participant agreed, but emphasized that the particular proposal is limited and restrained, and it is good policy.

Judge Kravitz noted that if enforcement is transferred to the court where the underlying action is pending, that court may have to deal with contempt orders if the subpoena is not obeyed. Therefore, the advisory committee added proposed Rule 45(g), giving the transferee court flexibility to transfer the contempt matter back to the court having jurisdiction over the disobedient party.

Professor Cooper explained that the committee note points out that in the event of a transfer, disobedience constitutes contempt of both the court where compliance is required and the court where the action is pending. Judge Kravitz noted that contempt matters will normally be transferred back to the court of compliance because it is difficult for a judge to hold a person in contempt who is not actually before the judge. He added that the rule raises potential choice-of-law issues, but the committee had decided that these issues were not appropriate for treatment in procedural rules and should be left to case-law development.

3. Trial subpoenas

Judge Kravitz explained that there was a split of authority in the case law over whether subpoenas for parties or party officers to testify at trial may compel them to travel more than 100 miles from outside the state. Most recent district court opinions, he said, have followed *In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664 (E.D.La. 2006). In *Vioxx*, an officer of the defendant corporation, who lived and worked in New Jersey, was required to testify at trial in New Orleans. The advisory committee, however, noted that there is a growing body of law rejecting *Vioxx*, as exemplified by *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. (E.D.La. 2008), holding that Rule 45 did not require attendance of plaintiffs at trial in New Orleans when they would have to travel more than 100 miles from outside the state.

The advisory committee concluded that Rule 45 was not intended to create the expanded subpoena power recognized in *Vioxx*, and the *Vioxx* decision should not be followed. The committee was also concerned that allowing subpoenas on an adverse party and its officers without regard to the traditional geographical limits would raise a real risk of lawyers using subpoenas tactically to apply inappropriate litigation pressure and undue burdens on their opponents.

In many cases, moreover, an adverse party's other employees, rather than its distant executives, are the best witnesses to testify about matters actually in dispute in a case. Judge Kravitz suggested that when a truly knowledgeable person chooses not to show up at trial, the jury notices the absence. In addition, he said, there are satisfactory alternatives to compelling personal attendance of distant witnesses at trial, such as audiovisual recording of deposition testimony and testimony at trial by contemporaneous transmission.

Judge Kravitz said that the advisory committee planned on publishing an appendix to the publication package setting out an alternative amendment that leans in the direction of *Vioxx* and permits a judge, for good cause, to order a party or its officer to attend trial and testify. The publication, however, will not indicate that the two choices are of equal value. Rather, it will state that the committee unanimously favors the *Big Lots* approach and rejects the *Vioxx* line of cases. But since there is a clear split of authority on the issue, an opposing approach is set forth in an appendix and comments are invited on both. He noted that at the committee's recent mini-conference, all the defense lawyers supported the *Big Lots* approach, while all the plaintiffs' lawyers, many of whom handle multi-district litigation, favored *Vioxx.*

A member strongly opposed publishing the appendix. Judge Kravitz responded that publication of both versions is advisable because the committee's approach is currently the minority view of the law. Publishing both versions, moreover, will avoid the need to republish the amendments if the public comments were to favor *Vioxx* and the advisory committee were to change its decision and adopt a *Vioxx*-inspired approach. A member added that another reason to publish an alternative text is to enhance the likelihood that the committee will receive thoughtful and focused comments on the issue.

A member observed that there are appropriate cases in which a judge should have authority to compel attendance of a particular executive or party at trial, despite the distance. It may be difficult, he said, to define those situations, but the courts should have discretion to bring in witnesses when they are really needed. Judge Kravitz added that lawyers at the recent mini-conference had said that if the person has meaningful knowledge and is really needed in a case, the court will normally make it clear to the parties that the witness should be brought in for the trial.

4. <u>Simplification of the rule</u>

Judge Kravitz pointed out that the current Rule 45 is very complex and needs to be simplified. The current rule, for example, requires independent determinations regarding the issuing court, the place of service, and the place of performance. To make those determinations, one has to consult ten different sections of the rule.

To simplify the rule, the proposed amendments adopt the approach of the corresponding criminal rule regarding service of a subpoena. Under FED. R. CRIM. P. 17 (subpoenas), a subpoena is issued by the court where the action is pending and may be served anywhere in the United States. But the proposed civil rule differs from the criminal rule by specifying that the court of compliance is the court for the district where the subpoenaed party is located.

A member said that the proposal was a remarkable piece of work that will greatly improve Rule 45, even though he did not agree with a couple of its provisions. He said that it had been very carefully drafted, enjoyed a broad consensus, and should be published essentially as is. He argued against publishing any alternative version.

Judge Kravitz reiterated that the advisory committee was planning to include in the publication a preface stating that the committee has rejected the *Vioxx* view of nationwide service of trial subpoenas, but recognizes that there is a split of authority and welcomes public comments on the matter. He added that the publication will state clearly that each provision in the proposed rule had been approved unanimously by the advisory committee.

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

FED. R. CIV. P. 37

Judge Kravitz noted that the advisory committee was recommending publication of a change in FED. R. CIV. P. 37(b)(1) as a conforming amendment to proposed Rule 45. It would add a second sentence to paragraph (b)(1) specifying that after a subpoena-related motion has been transferred, failure to obey a court order may be treated as contempt of either the court where the discovery is taken or the court where the action is pending.

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

Informational Items

PRESERVATION AND SPOLIATION

Judge Kravitz reported that the advisory committee was actively following up on the key issues raised by the bar at the May 2010 Duke Law School conference, especially those relating to discovery of electronically stored information. In particular, the committee was focusing on potential rule amendments addressing: (1) obligations to preserve information in anticipation of litigation; and (2) imposition of sanctions for failure to preserve. He added that in September 2011 the committee will convene a mini-conference with knowledgeable members of the bench and bar to consider these issues and potential rule amendments.

He said that the advisory committee will consider specific rule proposals on preservation and spoliation at its November 2011 and April 2012 meetings, and it may propose amendments for publication at the Standing Committee's June 2012 meeting.

PLEADING STANDARDS

Judge Kravitz reported that Dr. Cecil and his colleagues at the Federal Judicial Center had conducted an amazing empirical study to ascertain whether the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937 (2009), have had an appreciable effect on motions to dismiss for failure to state a claim under FED. R. CIV. P. 12(b)(6). He summarized the Center's report as concluding that there was a slight increase in the number of dismissal motions filed in the district courts from 2006 to 2010, but no increase in the percentage of motions granted by the court without leave to amend.

A key conclusion to be derived from the study so far, he suggested, is that civil cases are not being jettisoned out of the federal system in the way that some academic writers have claimed. He noted, though, that the Center's study could not capture whether plaintiffs are simply not filing cases in the federal courts that they might have filed before *Twombly* and *Iqbal*. He added that the committee had asked the Center to begin analyzing the cases in which the courts granted a motion to dismiss, but with leave to amend, to see what happened later in those cases. The Center will also attempt to ascertain whether any discovery preceded the amendments to the complaints and whether the amendments repaired the problems in the complaints.

FORMS

Judge Kravitz reported that the advisory committee was contemplating removing the illustrative civil forms from the full operation of the Rules Enabling Act process. He pointed out that some of the forms, such as the patent infringement complaint form, are

of questionable validity and have been subject to criticism. The committee, though, would probably continue to deal with forms in some way. One alternative would be to abrogate FED. R. CIV. P. 84 (forms) and have the forms handled like the bankruptcy forms, for which Judicial Conference approval is sufficient. Another approach would be to have the forms issued and maintained by the Administrative Office with committee approval.

Judge Rosenthal added that the advisory committees currently handle forms in a variety of different ways, and greater consistency among the different sets of rules might be in order. She said that she would appoint an inter-committee Forms Subcommittee, led by representatives of the Advisory Committee on Civil Rules and chaired by Judge Gene E. K. Pratter. The subcommittee will coordinate information among the advisory committees, but most of the work will be done by each advisory committee separately conducting a detailed examination of its own forms. The work, she said, will begin in the summer of 2011. Judge Kravitz added that the advisory committee may make a recommendation to the Standing Committee regarding FED. R. CIV. P. 84 in June 2012.

DUKE SUBCOMMITTEE

Judge Kravitz reported that the advisory committee had appointed an ad hoc subcommittee, chaired by Judge John G. Koeltl, to implement the recommendations made at the 2010 Duke Law School conference The subcommittee's work, he said, was proceeding hand-in-hand with that of the committee's discovery subcommittee. Its scope of inquiry includes not only potential changes to the Federal Rules of Civil Procedure, but also potential pilot projects and experiments conducted by the Federal Judicial Center and others and educational efforts to educate judges about what they can do to make better use of the many management tools provided by the present rules.

He reported that participants at the Duke conference had emphasized that more cooperation among parties and lawyers was needed in the discovery process to reduce unnecessary costs and delay. In addition, they stressed the importance of bringing greater proportionality to the discovery process, as contemplated in FED. R. CIV. P. 26(b)(2)(C). He added that proportionality is also a key concept in determining a party's need to preserve materials in anticipation of litigation.

Judge Kravitz said that the advisory committee was not proposing rule amendments addressing cooperation and proportionality at this time. But he reported that Judge Paul W. Grimm, a member of the committee, was developing a set of materials to provide detailed guidance on the importance of proportionality in civil discovery and to give practical examples for the bench and bar to work with.

FED. R. CIV. P. 6(d)

Judge Kravitz noted that Rule 6(d) (additional time after certain kinds of service) contains a glitch resulting from a 2005 amendment that established a uniform rule for calculating three added days. Until 2005, the rule had been clear that a party has three added days to act after service "upon the party" by certain designated means. The amended rule, though, merely provides three added days "after service." That revised language may be read as giving additional time to both the serving party and the party being served. To restore the rule to its intended meaning, the advisory committee would simply change the language of Rule 6(d) to state that: "When a party may or must act within a specified time after ~~service~~ being served . . . 3 days are added after the period would otherwise expire. . . ."

Judge Kravitz noted that there may be other places in the rules where changes have introduced unintentional errors. The question before the committee, therefore, concerns timing – whether the advisory committee should correct any errors as it uncovers them or accumulate the fixes and include them in a package of non-controversial, technical amendments. The glitch in Rule 6(d), he emphasized, had not caused any problems, and there has been no case law on it. That fact, he said, argues for deferring making a corrective amendment at this time. Moreover, the rule will likely need to be reconsidered in the near future to determine whether to eliminate electronic service as one of the service methods that trigger the extra three days for the receiving party to act.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of May 12, 2011 (Agenda Item 7).

Amendments for Final Approval

FED. R. CRIM. P. 5(c)(4)

Judge Tallman reported that the proposed amendment to FED. R. CRIM. P. 5(c)(4) (initial appearance for persons extradited to the United States) clarifies that the initial appearance for a defendant charged with a criminal offense in the United States, arrested outside the country, and surrendered to the United States following extradition must be held in the district where the defendant has been charged. He added that the rule applies even when a defendant arrives first in another district and has already been informed of his or her rights during the earlier stages of the extradition proceedings. The amendment,

he said, will avoid the delay in the extradited person's transportation resulting from an unneeded initial appearance in the district of initial arrival in the United States.

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

FED. R. CRIM. P. 5(d) and 58(b)(2)(H)

Judge Tallman explained that the United States has treaty obligations that require it to advise detained foreign nationals that they may have their home country's consulate notified of their arrest and detention. The executive branch, through the Department of Justice, is responsible for informing the defendants, and the Department has effective procedures and training programs in place to do so. Bilateral agreements with numerous countries also require consular notification whether or not the detained foreign national requests it.

The proposed amendment to FED. R. CRIM. P. 5(d) (initial appearance in a felony case) was designed as a back-up precaution to ensure that the government fulfills its international obligations to make the required consular notification. It will also produce a court record establishing that the defendant has been notified.

The proposed amendment to FED. R. CRIM. P. 58(b)(2)(H) (initial appearance in a misdemeanor case) would add the identical requirement in misdemeanor cases.

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

FED. R. CRIM. P. 15

Judge Tallman reported that the proposed amendments to Rule 15 (depositions) would establish a clear procedure for taking depositions outside the United States without the defendant's presence in certain limited circumstances if the district court makes a number of case-specific findings. The amendments had been presented before to the Supreme Court for approval, but the Court returned them without comment to the advisory committee in 2010 for further consideration.

The advisory committee, he said, believed that the Supreme Court's concern was over the ultimate admissibility of the deposition as evidence at trial. He pointed out that the committee note accompanying the rule had made it clear that a district judge's decision to permit a deposition to be taken under revised Rule 15 was an entirely separate matter from the later judicial determination of whether the deposition should be admitted into evidence at trial.

Judge Tallman reported that the advisory committee had voted to resubmit the proposed rule to the Judicial Conference and the Supreme Court. At first, it decided not to change the text of the rule, but to give greater prominence in a revised committee note to the difference between taking a deposition and admitting evidence. But after further consultation among the committee chairs and reporters of the criminal rules committee, the evidence rules committee, and the Standing Committee, a consensus was reached that it would be desirable to make that point explicitly in Rule 15(f) itself. Accordingly, in a handout distributed at the meeting, the advisory committee recommended that the Standing Committee add the following text to Rule 15(f): "An order authorizing a deposition to be taken under this rule does not determine its admissibility."

In addition, the advisory committee revised the committee note further to clarify the relationship between the authority to take a deposition under Rule 15(c)(3) and the admission of deposition testimony at trial. The revised note therefore states that although "a party invokes Rule 15 to preserve testimony for trial, the Rule does not determine whether the resulting deposition will be admissible in whole or in part."

He noted that the defense bar had understandably opposed the rule on Confrontation Clause grounds. That, he said, is further reason to clarify the bifurcated nature of the proceedings and emphasize the limited scope of the amendments.

Judge Tallman explained that the amendments establish a two-step process: (1) court authorization to take a deposition; and (2) later, if an objection is made, a court ruling on admissibility of some or all of the deposition at trial. He noted that the party conducting the deposition may not in fact seek to introduce it at trial. Circumstances may change, for example, and it may become possible later to bring the witness to the United States to testify at trial.

The courts, he said, will determine admissibility on a case-by-case basis applying the Constitution and the Federal Rules of Evidence. A court, moreover, might not admit a deposition into evidence because of the Confrontation Clause or FED. R. EVID. 402. It might refuse to admit it because of unforeseen problems created by foreign law or foreign officials in taking the deposition, or because of problems with the technical equipment, communications, or recording.

He pointed out that courts will continue to be faced with ad hoc requests to take depositions outside the United States. International criminal investigations are increasing as the world grows smaller, and courts have been adapting and authorizing new evidence-gathering techniques on a case-by-case basis. The advisory committee, he said, was firmly convinced that the Department of Justice had made the case for the proposed procedure and had concluded that it was appropriate to establish a uniform, national procedure through Rule 15. The proposed amendments, he added, were modeled in large

part on procedures approved by the Fourth Circuit in *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S. Ct. 1312 (2009).

A member urged that the proposed amendments be given particularly careful reflection because the Supreme Court had returned the earlier version of the same proposal without approving it. The advisory committee, moreover, was now only making a small change in the rejected proposal, based on what it believes to have been the Court's concern over admissibility.

A member said that she had no problem with approving the revised proposal and sending it back to the Supreme Court with the recommended changes in the rule and the committee note. She added that it might be helpful to include information in the note stating that the rule applies only to the United States legal system and does not attempt to govern whatever laws there are in other countries. Many foreign countries, for example, require that any deposition be taken only in accordance with their own court procedures.

A member observed that the current Rule 15 could be construed as only permitting depositions to be taken if the defendant is physically present. Therefore, some judges may now deny authorization for any foreign deposition outside the defendant's presence. The proposed rule, therefore, is an improvement because it will remove that potential impediment and permit a judge to authorize a foreign deposition in the defendant's absence in limited, appropriate circumstances. The situations in which the revised rule will be used are very few, and courts have been handling them to date on an ad hoc basis.

The member asked whether it would be better for the proposed rule to make it clear that Rule 15 does not absolutely foreclose foreign depositions at which the defendant is not present, without detailing all the specific conditions that would have to be met. As drafted, the proposed amendments are very strict in setting forth all conditions that have to be met. Clearly, they are designed that way deliberately to maximize the likelihood of eventual admissibility of the testimony. But the revised rule later goes on to state that it does not govern admissibility. That seems strange because admissibility is the very reason for taking the deposition.

It is possible, she said, that the Supreme Court might eventually rule that no set of circumstances will permit a deposition to be taken in the defendant's absence. At that point, the courts will be left with a rule that imposes strict conditions, even in cases where the Confrontation Clause may not be implicated. But compliance with the conditions will never lead to admissible evidence. Moreover, by listing all the specific conditions, the revised rule may invite satellite litigation. It might well be more effective just to allow a deposition to be taken at the court's discretion and then admit if it satisfies the requirements of the Sixth Amendment and the Federal Rules of Evidence.

Deputy Attorney General Cole stated that the rule will rarely be used, but it is very much needed in certain cases. The potential occasions for its use cannot all be foreseen, but they are expanding every day with the gathering of evidence of international crimes that impact the United States. The proposed rule, he said, had been carefully crafted to achieve the right balance between admissibility of essential information in a few important criminal cases and protecting defendants' rights under the Confrontation Clause. It will be used only in situations where a deposition is truly important – in large part because of restrictions imposed by foreign countries and the amount of effort it takes for the Department of Justice to coordinate with the State Department and others in arranging for depositions overseas.

He said that the Department was comfortable with the strict criteria set out in the rule and did not find them onerous. The rule will, he said, provide welcome guidance to judges and help the Department establish a record that will assist it in obtaining admissibility.

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

FED. R. CRIM. P. 37

Judge Tallman reported that FED. R. APP. P. 12.1 and FED. R. CIV. P. 62.1, which took effect on December 1, 2009, established a uniform national procedure for obtaining indicative rulings. The proposed new FED. R. CRIM. P. 37, he said, is parallel to FED. R. CIV. P. 62.1 and would make the indicative ruling procedure applicable in criminal cases.

The proposed new rule would facilitate remand from the court of appeals when certain post-judgment motions are filed in the district court after an appeal has been docketed and the district court has stated that it would grant the motion if the court of appeals were to remand for that purpose or that the motion raises a substantial issue. The matter might arise, for example, if the district court were to state that it would grant a motion for a new trial on the basis of newly discovered evidence.

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

Amendments for Publication

FED. R. CRIM. P. 12

Judge Tallman explained that the Supreme Court in *Cotton v. United States,* 535 U.S. 625 (2002), changed what had previously been thought to be the law by holding that an indictment's failure to state an offense does not deprive the court of jurisdiction over

the case. But FED. R. CRIM. P. 12 (pleadings and pretrial motions) currently allows a claim that the indictment fails to state an offense to be raised at any time, even on appeal, because it had been thought to be jurisdictional.

Based on a request from the Department of Justice, the advisory committee decided to amend Rule 12, in light of *Cotton*, to require that a motion to dismiss an indictment for failure to state an offense be made before trial. The proposed change, however, opened up a number of difficult issues concerning the appropriate standard for relief when a claim is untimely filed. In addition, Standing Committee members expressed concern over whether the term "waiver" should continue to be used in the rule and whether other types of motions should also be revisited.

Judge Tallman reported that the advisory committee had been studying proposals to amend Rule 12 since 2006, and amendments were now before the Standing Committee for the third time. He pointed out that at the last Standing Committee meeting, in January 2011, members had offered comments that were enormously helpful in guiding the advisory committee's current proposal.

The advisory committee, he said, undertook an additional, comprehensive review and approved a more fundamental revision of Rule 12 at its April 2011 meeting. The current version, which the committee now seeks approval to publish, addresses all the members' concerns and makes some additional improvements in the rule.

Proposed Rule 12(b)(1), he said, specifies that a motion asserting that the court lacks jurisdiction may be made at any time while a case is pending. Proposed Rule 12(b)(3) then lists all the common defenses, objections, and requests that must be raised by motion before trial. For those motions, the revised rule introduces a new factor for determining whether a motion must be raised before trial – that the basis for the motion was "then reasonably available." The motion must also be able to be determined without a trial on the merits. The outdated reference in the current rule to "a trial of the general issue" would be deleted.

Proposed Rule 12(c) specifies the consequences for not timely raising those motions. Judge Tallman said that courts have struggled with the concepts of "waiver" and "forfeiture" and the respective consequences of each. They have also struggled with the tension between the standards of relief under the current Rule 12 and the plain error standard under Rule 52 (harmless and plain error).

Proposed Rule 12(c), he said, would resolve the current confusion and specify the consequences of not making a timely motion. Generally, it provides that untimely motions will be extinguished and not considered on the merits unless the party shows both good cause and prejudice – as the Supreme Court has held in interpreting the "good

cause" standard in the current Rule 12(e) in *Davis v. United States*, 371 U.S. 233, 242 (1973), and *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963).

The rule, however, makes two exceptions for late-filed motions that may be excused more readily. Under proposed Rule 12(c)(2)(B), a party need only show prejudice if the defense or objection is based either on failure of the indictment to state an offense or on double jeopardy.

Judge Tallman said that double jeopardy requires special treatment and a more lenient standard for relief. He noted, for example, that a defendant may raise the issue of double jeopardy even after having entered a guilty plea.

A member warned that some judges may object to the proposed rule change because they believe that double-jeopardy claims are no different from any other defense. Professor Beale said that there is a good deal of case law on the matter. Although the law is not uniform, most cases currently give double-jeopardy claims preferential treatment under Rule 12 and analyze a late-filed claim for "plain error." Rather than have three different standards in the rule – cause plus prejudice, prejudice only, and plain error – she explained that the advisory committee decided to abandon the "plain error" test and let double-jeopardy claims, like claims of failure to state an offense, be governed by the prejudice-only standard. The change would likely not affect the result of any case.

A member recommended that the rule be published as presented but that the issue of double jeopardy be highlighted for comment in the publication or transmittal letter. Judge Tallman agreed with the suggestion.

Judge Tallman said that the proposed rule will clarify a difficult area of the law, provide guidance to both bench and bar, and lead to more uniform, nationwide application of the rule. Moreover, by specifying that Rule 52 does not apply, the rule will clarify how cases should be handled on appeal. The standards set forth in Rule 12 will apply exclusively, both in the trial courts and on appeal.

A member noted that a district court currently may forgive a matter not timely raised before trial for good cause, and it should continue to have maximum flexibility before trial to forgive any matter not raised in a timely manner. The proposed rule, however, requires a showing of both cause and prejudice at any stage.

Professor Beale responded although the rule itself is strict, it gives the court considerable leeway to be lenient in appropriate circumstances. Rule 12(b)(3) states that motions must be made before trial, but Rule 12(c)(1) and (2) allow the court to set a deadline for making motions and to provide extensions of the deadline. Judge Tallman also pointed to the language in paragraph 12(b)(3) that the basis for the motion must have been "then reasonably available."

Several members praised the advisory committee for its accomplishment and noted that all their concerns from earlier meetings had been addressed. Some offered suggestions for specific changes in the language of the proposed rule and committee note. Judge Tallman agreed to make further edits before publication.

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

FED. R. CRIM. P. 34

Judge Tallman noted that the proposed amendment to Rule 34(b) (arresting judgment) conforms to the proposed amendments to FED. R. CRIM. P. 12(b). It would delete language from the current rule that the court "at any time while the case is pending . . . may hear a claim that the indictment or information fails to . . . state an offense." The revised rule will require that a defect in the indictment or information be raised before trial. He noted that the Standing Committee had previously approved the conforming amendment to Rule 34. Therefore, there was no need to seek further approval.

Informational Items

FED. R. CRIM. P. 16

Judge Tallman reported that the advisory committee at its April 2011 meeting had decided not to proceed at this time with any proposed amendments to Rule 16 (discovery and inspection) dealing with the government's obligation to disclose exculpatory and impeaching information under *Brady v. Maryland*, 373 U.S. 83 (1963). He explained that the committee could not reach a consensus on rule language that would effectively solve the problems that proponents of the amendments had cited regarding the failure of certain prosecutors to turn over needed information. Moreover, the Federal Judicial Center's recent survey had shown that there is a lack of consensus within the judiciary as to whether an amendment to Rule 16 is needed. The committee also had not been convinced that a rule change would actually prevent or dissuade an unscrupulous prosecutor from knowingly withholding exculpatory or impeaching information.

Judge Tallman thanked the Department of Justice for its comprehensive efforts to address its disclosure obligations through various internal means, including revision of the Department's manuals, compulsory training programs for prosecutors and staff, district-wide disclosure plans, local points of contact, and appointment of a national disclosure coordinator. Deputy Attorney General Cole added that the Department was further institutionalizing its policies by making the national criminal discovery coordinator a permanent position.

Judge Tallman thanked the Federal Judicial Center for its excellent research efforts, including the massive survey soliciting the views of judges and lawyers on disclosure of exculpatory and impeaching information. He also noted that the advisory committee was working with the Center to improve training for judges regarding disclosure issues, to create a good-practices guide on criminal discovery, and to amend the *Bench Book for U.S. District Court Judges* to provide additional practical advice for judges on how to handle disclosure issues.

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 April 8, 2011 (Agenda Item 8).

Judge Fitzwater reported that the advisory committee had held its April 2011 meeting at the University of Pennsylvania Law School in Philadelphia and had one amendment to present for publication.

Amendment for Publication

FED. R. EVID. 803(10)

He explained that the proposed amendment to Rule 803(10) (hearsay exception for the absence of a public record) responds to the Supreme Court's decision in *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009). In that case, the Court held that certifications reporting the results of forensic tests conducted by analysts are "testimonial" under the Confrontation Clause, as construed in *Crawford v. Washington,* 541 U.S. 36 (2004).

Under *Melendez-Diaz,* admitting a certification in lieu of in-court testimony violates the accused's right of confrontation. Likewise, it would be constitutionally infirm to admit a certification under FED. R. EVID. 803(10) offering to prove the absence of a public record. In both cases, admission would allow the truth of a matter to be proven by a written certification without live testimony.

Judge Fitzwater said that the proposed amendment to Rule 803(10) was based on a notice-and-demand procedure used in Texas and sanctioned in the Supreme Court's decision in *Melendez-Diaz.* The amendments specify that a prosecutor who intends to offer a certification must provide the defendant advance written notice of that intent at least 14 days before trial. The defendant is then given seven days to object in writing to use of the certification, putting the prosecutor on notice to produce the official preparing the certification at trial. If the defendant does not timely object, the certification may be

admitted. Professor Capra added that the advisory committee had worked closely with the Department of Justice and the federal public defenders in preparing the language of the proposal.

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

Informational Items

SYMPOSIUM

Judge Fitzwater reported that the advisory committee will hold a symposium in October 2011 at William and Mary Law School to celebrate the restyled evidence rules – six weeks before the rules take effect. Several members of the Standing Committee will participate as panelists. One panel will look back at the decisions made during the restyling process. Another will explore the evidence issues likely to be considered in the future. The proceedings, he said, will eventually be printed in the *William and Mary Law Review*.

FED. R. EVID. 801

Judge Fitzwater said that the advisory committee at its April 2011 meeting had considered a proposed amendment to Rule 801(d)(1)(B) (hearsay exemption for certain prior statements) suggested initially by Judge Frank W. Bullock, Jr., a former member of the Standing Committee. He had proposed that the rule be amended to provide that all prior consistent statements be admissible under the hearsay exemption whenever they would be admissible to rehabilitate the witness's credibility. The amendment would eliminate the distinction between admission of a prior consistent statement solely for impeachment purposes and admission of the statement for its truth.

A member expressed strong support for the change and said that juries never understand the distinction and always use the prior consistent statement for all purposes, even though instructed that it may be used only for impeachment. Judge Fitzwater said that the advisory committee would take up a proposed amendment at its October 2011 meeting and was in the process of soliciting the views of interested parties and researching practices in state courts that have similar rules.

RULES COMMITTEE PROCEDURES

Ms. Kuperman reported that she, the committee reporters, and the rules staff had made additional changes in the draft revisions to *Procedures for the Conduct of Business*

by the Judicial Conference Committees on Rules of Practice and Procedure. An earlier draft had been presented to the committee at its January 2011 meeting.

She noted that the recent refinements defined such matters as: the appropriate standard for republishing proposed amendments, which documents comprise the official records of the committees, which records should be posted on the rules website, whether transcripts should be prepared of public hearings, and when hearings may be canceled because of insufficient public interest.

The committee unanimously by voice vote approved the proposed revisions in the committee procedures for approval by the Judicial Conference.

STRATEGIC PLANNING

Judiciary's Strategic Plan

Judge Rosenthal reported that Judge Charles R. Breyer, the Judiciary Planning Coordinator, had written to all Judicial Conference committees on May 5, 2011, seeking information on their efforts to implement the Judiciary's *Strategic Plan.* Specifically, he asked them to: (1) verify and update the information they had previously provided regarding the strategic initiatives they are pursuing; and (2) begin to consider how to measure progress in implementing the *Strategic Plan.* He also asked the committees at their June 2011 meetings to identify how they will assess whether each initiative's outcome has been met and the metrics they use to gauge progress.

Judge Rosenthal asked the committee to consider a draft committee response that she had prepared in response to Judge Breyer's requests.

The committee unanimously by voice vote approved sending the proposed response to the Judicial Conference's Advisory Committee on Judiciary Planning.

Status of the Rules Program

Judge Rosenthal said that the work of the rules committees was of a uniformly high standard and pointed out that the agenda book currently before the committee was excellent. She emphasized that a great deal of detailed work is needed on an ongoing basis to prepare a dozen committee agenda books each year, an annual package of proposed rule amendments for publication and comment, an annual package of rule amendments and supporting documents for the Supreme Court, and numerous letters and reports to Congress. All the work, moreover, has to be perfect.

She said that each committee has an excellent chair, reporters, and membership. She explained that the chair, with the help of others, makes recommendations to the Chief Justice on a regular basis of individuals who would be outstanding future members. She asked the members to help her and her successor, Judge Kravitz, in identifying people who would be candidates for the committees in the future.

She noted that one of the committees' overarching concerns is guaranteeing productive relations with Congress. She said that the committees currently have very good communications with the Hill and work hard to maintain them. It is essential, she added, that the rules committees continue to be viewed as truly professional and truly nonpartisan. She emphasized that the committees' work is subject to great public scrutiny, and it is becoming more common to receive last-minute calls from Congressional staff motivated by suggestions made by opponents of particular amendments. She predicted that those calls would likely continue, and the committees will have to be prepared to deal with them.

She noted that the committees had succeeded well in explaining the Rules Enabling Act process to Congressional staff and demonstrating how careful and meticulous the committees are in their work. But these educational efforts, she said, are complicated by the regular turnover in Congressional staff, as well as in members of Congress. The work of the rules committees, she said, is very different from the legislative process that Congress is used to. Moreover, unlike the Congressional process, the work of the rules committees, and the positions the committees take, defy partisan lines.

Judge Rosenthal reported that the committees' relations with the Supreme Court are very important. She noted that the Standing Committee chair and reporter meet every year with the chief justice to make sure that he is apprised of pending rules projects and proposed amendments. She added that both Chief Justice Roberts and Justice Alito are alumni of the rules committees. The other members of the Court, though, may not know in detail how the committees operate. She said that she was pursuing the idea of having an informal discussion with the full Court about how the committees do their work and what projects they are working on.

She pointed out that relations with the Department of Justice are also very important and have been very productive. Department officials serve on each of the committees, and Department staff have been extremely cooperative and helpful.

She noted that the committees need to be more effective in their relationships with other Judicial Conference committees and with other parts of the Administrative Office. She emphasized that the rules committees gain a great deal of useful information regarding court practices and procedures as part of their detailed work under the Rules

Enabling Act process. They also have an important interest in implementing the rules and educating judges and lawyers about them.

The committees, she said, need to be more consistent in following up on suggestions made to other committees. She urged closer coordination, in particular, with the Court Administration and Case Management Committee, mentioning the recent collaborative efforts with that committee on the privacy and sealing reports. She pointed out that the committees were also working closely with the Federal Judicial Center on revising the *Bench Book for U.S. District Judges*, suggesting educational programs for judges, and producing guidebooks and other supporting information.

She suggested that the committees' relationship with the academy is not where it needs to be. She noted that several law professors had expressed skepticism about the rules process during the recent debates on the impact of the Supreme Court's decisions in *Twombly* and *Iqbal*. She recommended that the committees meet more often at law schools and invite law professors to observe and participate in what the committees do and how they do it. In addition, it would be beneficial, both for the students and the professors, for committee members to go to law schools and teach classes explaining the rules process. It is also essential to continue inviting law professors to attend the various committee special programs and mini-conferences.

Judge Rosenthal pointed to the close and growing relations between the committees and the American Bar Association and other bar organizations. She said that the committees had encouraged ongoing working relations with the major bar associations, but more work was needed in the area of criminal rules. She noted that a meeting had been held with representatives of the National Association of Criminal Defense Lawyers, and the association had been invited to send a member as liaison to the rules meetings. She added that more outreach could also be done with the bankruptcy community. It is likely, she said, that there will be political opposition in Congress to some of the proposed bankruptcy rules.

She reported that all the rules committees have to deal with the twin issues of the impact of technology and the tension between making all records and proceedings widely available to the public and protecting valid privacy interests. She suggested that the committees need to examine all the rules to consider the impact of technology on the legal process.

Finally, Judge Rosenthal thanked the Administrative Office staff for their excellent work in supporting all the many functions of the rules committees and the Federal Judicial Center for its superb efforts on all the many research projects that the committees have asked it to undertake.

NEXT MEETING

The committee will hold its next meeting on Thursday and Friday, January 5 and 6, 2012, in Phoenix, Arizona.

Respectfully submitted,

Peter G. McCabe,
Secretary