COMMITTEE ON RULES
OF
PRACTICE AND PROCEDURE

PHOENIX, AZ
JANUARY 5-6, 2012

TABLE OF CONTENTS

TAB 1.	**Agenda**	**7**
TAB 1-B.	**Preliminary Report of Judicial Conference Actions (Sept. 13, 2011)**	**23**
TAB 2.	**Draft Minutes of June 2-3, 2011 Standing Committee Meeting**	**33**
TAB 3.	**Legislative Report**	**81**
	S. 533 Lawsuit Abuse Reduction Act	**85**
	H.R. 966 – Lawsuit Abuse Reduction Act	**89**
	March 14, 2011 Letter to Rep. Smith re H.R. 966 with attached FJC Survey	**97**
	S. 623 – Sunshine in Litigation Act of 2011	**133**
	H.R. 592 – Sunshine in Litigation Act of 2011	**147**
	May 2, 2011 Letter to Sen. Leahy re S. 623	**155**
	H.R. 3041 – Federal Consent Decree Fairness Act	**167**
	December 9, 2011 Letter to Rep. Franks re the "Costs and Burdens of Civil Discovery"	**177**
	S. 1637 Appeal Time Clarification Act	**185**
	H.R. 2192 – National Guard and Reservist Debt Relief Extension Act	**193**
TAB 4.	**Administrative Office Report**	**197**
TAB 5.	**Federal Judicial Center Report**	**201**
TAB 6.	**Report of the Advisory Committee on Civil Rules**	**213**
TAB 6-A.	**Draft Minutes of Nov. 7-8, 2011 Meeting of the Civil Rules Advisory Committee**	**231**
TAB 7.	**Panel on Class Actions**	**277**
TAB 7-1.	***AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740**	**281**
TAB 7-2.	***Wal-Mart Stores, Inc. v. Dukes* Excerpts – Commonality and *Wal-Mart Stores, Inc. v. Dukes* – 23(b)(2), 131 S.Ct. 2541**	**297**
TAB 7-3.	**"You Just Can't Get There From Here:" A Primer on *Wal-Mart v. Dukes* by John C. Coffee, Jr.**	**325**
TAB 7-4.	***Pilgrim v. Universal Health Card, LLC*, Nos. 10-3211/3475 (6th Cir. Nov. 10, 2011)**	**331**
TAB 7-5.	***In re Hydrogen Peroxide Litig.*, 552 F.3d 305 (3d Cir. 2008)**	**343**

TAB 7-6. "Ascertainability: Reading Between the Lines of Rule 23" by John H. Beisner, Jessica D. Miller and Jordan M. Schwartz 353

TAB 8. Report of the Advisory on Bankruptcy Rules 361

TAB 8-A. Appendix A - Proposed Amendments to Bankruptcy Rules 7008(b) and 7054 375

TAB 8-B. Appendix B – Part VIII. Bankruptcy Appeals 381

TAB 8-C. Rules and Forms Published for Public Comment 435

TAB 8-D. Draft Minutes of Sept. 26-27, 2011 Meeting of the Bankruptcy Rules Advisory Committee 439

TAB 9. Report of the Advisory Committee on Criminal Rules 461

TAB 9-A. Proposed Amendment to Rule 16 467

TAB 9-B. Draft Minutes of the Oct. 31, 2011 Meeting of the Criminal Rules Advisory Committee 471

TAB 10. Report of the Advisory Committee on Appellate Rules 483

TAB 10-A. Proposed Amendment to Rule 6 493

TAB 10-B. Draft Minutes of the Oct. 13-14, 2011 Meeting of the Advisory Committee on Appellate Rules 503

TAB 11. Report of the Advisory Committee on Evidence Rules 529

TAB 11-A. Request for Guidance Concerning the Privileges Project 537

TAB 11-B. Draft Minutes of the Oct. 28, 2011 Meeting of the Advisory Committee on Evidence Rules 543

TAB 12. Five-Year Review of Committee Jurisdiction and Structure 553

TAB 1

AGENDA
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
JANUARY 5-6, 2012

1. Welcome and Opening Remarks

   A. Welcome to new members

   B. Report on September 2011 Judicial Conference session

   C. Transmission of Judicial Conference-approved proposed rule amendments to Supreme Court

2. **ACTION** – Approving minutes of the June 2011 committee meeting

3. Legislative Report

4. Report of the Administrative Office

5. Report of the Federal Judicial Center

6. Report of the Civil Rules Committee

   A. Preservation and sanctions
   B. Rule 45 published for public comment
   C. Work relating to the 2010 Duke Conference
   D. Pleading
   E. Forms
   F. Formation of Rule 23 subcommittee
   G. Minutes and other informational items

7. Panel on Class Actions

8. Report of the Bankruptcy Rules Committee

   A. **ACTION** – Approving publishing for public comment proposed amendments to Bankruptcy Rules 7054 and 7008(b)
   B. Interim report on the revision of Part VIII of the Bankruptcy Rules, governing appeals
   C. Rules and forms published for public comment
   D. Minutes and other informational items

9. Report of the Criminal Rules Committee

   A. **ACTION** – Approving and transmitting to the Judicial Conference proposed

technical and conforming amendments to Criminal Rule 16

B. Minutes and other informational items

10. Report of the Appellate Rules Committee

A. Minutes and other informational items

11. Report of the Evidence Rules Committee

A. Minutes and other informational items

12. Five-Year Review of Committee Jurisdiction and Structure

13. Next Meeting: June 11–12, 2012

COMMITTEES ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS

Chair, Committee on Rules of Practice and Procedure ***(Standing Committee)***	**Honorable Mark R. Kravitz** United States District Court Richard C. Lee United States Courthouse 141 Church Street New Haven, CT 06510
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Committee on Rules of Practice and Procedure

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

Members	Position	District/Circuit	Start Date	End Date
Mark R. Kravitz Chair	D	Connecticut	2011	2014
James Cole*	DOJ	Washington, DC	----	Open
Dean C. Colson	ESQ	Florida	2009	2012
Roy T. Englert, Jr.	ESQ	Washington, DC	2010	2013
Gregory G. Garre	ESQ	Washington, DC	2011	2014
Neil M. Gorsuch	C	Tenth Circuit	2010	2013
Marilyn L. Huff	D	California (Southern)	2007	2013
Wallace B. Jefferson	CJUST	Texas	2010	2013
David F. Levi	ACAD	North Carolina	2009	2012
Patrick J. Schiltz	D	Minnesota	2010	2013
James A. Teilborg	D	Arizona	2006	2012
Richard C. Wesley	C	Second Circuit	2011	2014
Diane P. Wood	C	Seventh Circuit	2007	2013
Daniel Coquillette Reporter	ACAD	Massachusetts	1985	Open

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Principal Staff: Jonathan C. Rose 202-502-1820

* Ex-officio

Legend: **C**= circuit judge; **CFC**=Court of Federal Claims; **D** = district judge; **M** = magistrate judge; **B** = bankruptcy judge; **DIR, AO** = Director, Administrative Office of U.S. Courts; **JUST** = chief or associate justice, state supreme court (or equivalent presiding judge); **FPD** = Federal Public Defender; **ACAD** = academician; **ESQ** = private attorney; **DOJ** = Department of Justice; **DOS** = Department of State; **CIT** = Court of International Trade.

LIAISON MEMBERS

Liaison for the Advisory Committee on Appellate Rules	**Dean C. Colson**	***(Standing)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Judge James A. Teilborg**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Diane P. Wood**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Marilyn Huff**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Judith H. Wizmur**	***(Bankruptcy)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge John F. Keenan**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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TAB 1-B

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

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 13, 2011

****

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

****

At its September 13, 2011 session, the Judicial Conference of the United States —

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2011.

Approved a resolution in honor of outgoing Administrative Office Director James C. Duff.

Delegated to the Director of the Administrative Office, the Director of the Federal Judicial Center, and the Chair of the United States Sentencing Commission the authority to designate supervisors and managers of their respective agencies with regard to eligibility for professional liability insurance reimbursement. This authority may be re-delegated to executives or human resources officials of the respective judicial branch agencies.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

With regard to official duty stations for bankruptcy judges:

a. Authorized the designation of Los Angeles as the duty station for a vacant bankruptcy judgeship in the Central District of California; and

b. Authorized the designation of Charleston as the duty station for Chief Bankruptcy Judge John E. Waites in the District of South Carolina.

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2013, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

Approved the expansion of reprogramming authority so that local funds can be reprogrammed among court units (regardless of type, geographical location, or judicial district or circuit) for voluntary shared services arrangements. The new reprogramming authority is subject to the approval of the Administrative Office, and semi-annual reports will be provided to the Budget Committee.

COMMITTEE ON CODES OF CONDUCT

Approved proposed Model Forms for Waiver of Judicial Disqualification and delegated to the Committee on Codes of Conduct the authority to make technical, conforming, and non-controversial changes, as necessary.

Approved a revised Model Confidentiality Statement (Form AO-306) and delegated to the Committee on Codes of Conduct the authority to make technical, conforming, and non-controversial changes, as necessary.

Approved a revised Application for Approval of Compensated Teaching Activities (Form AO-304) and delegated to the Committee on Codes of Conduct the authority to make technical, conforming, and non-controversial changes, as necessary.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Took the following actions with regard to fees:

a. Amended the miscellaneous fee schedules for the courts of appeals, district courts, bankruptcy courts, U.S. Court of Federal Claims, and Judicial Panel on Multidistrict Litigation to increase certain fees for inflation, to be effective November 1, 2011; and

b. Amended the Electronic Public Access (EPA) Fee Schedule to—

   (1) Increase the EPA fee to $.10 per page;

   (2) Suspend for three years the increase for local, state, and federal government agencies; and

   (3) Provide that no fee be owed until an account holder accrues charges of more than $15 in a quarterly billing cycle.

Endorsed a courtroom sharing policy for bankruptcy judges in new courthouse and courtroom construction for inclusion in the *U.S. Courts Design Guide*.

Approved the removal of the three-year electronic record transfer reference from the records disposition schedules for civil and criminal case files.

Approved amending the district court records disposition schedule for criminal case files to designate non-trial cases pertaining to embezzlement, fraud, or bribery by a public official (nature of suit codes 4350 and 7100) as permanent records.

Approved an amended bankruptcy court records disposition schedule.

Approved an exception to the policy restricting PACER access to bankruptcy filings filed before December 1, 2003 in cases closed for more than one year, as follows:

> Access may be granted pursuant to a judicial finding that such access is necessary for determining class member certification, subject to the following limitations to be set forth in the judge's order:
>
> - Access limited to a particular identified list of cases or a specified universe of cases (e.g., lift stay motions filed by a specified lender in a limited period of time);
>
> - Time limitations on the period of access (corresponding to the scope and number of potential cases involved);
>
> - Inclusion of a verified statement of counsel that access would be solely for the purpose of determining class member status and that counsel is aware that unauthorized use is prohibited and may result in sanctions; and
>
> - Any other conditions, limitations, or direction that the judge deems necessary under the specific circumstances of the request.

Approved the following policy regarding the sealing of entire civil case files:

> An entire civil case file should only be sealed consistent with the following criteria:
>
> a. Sealing the entire civil case file is required by statute or rule or justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives (such as sealing discrete documents or redacting information), so that sealing an entire case file is a last resort;
>
> b. A judge makes or promptly reviews the decision to seal a civil case;

c. Any order sealing a civil case contains findings justifying the sealing of the entire case, unless the case is required to be sealed by statute or rule; and

d. The seal is lifted when the reason for sealing has ended.

COMMITTEE ON CRIMINAL LAW

Amended standard condition number two in national forms, including the judgment in a criminal case (AO forms 7A, 7A-S, 245, 245B-D, 245I and 246), to state that the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.

Authorized the Director of the Administrative Office to adopt regulations governing the disclosure of federal probation system data by the AO to entities outside the courts.

Agreed to seek legislation amending 18 U.S.C. § 3154 and § 3603 to specifically authorize probation and pretrial services officers to supervise sexually dangerous persons who have been conditionally released following a period of civil commitment pursuant to 18 U.S.C. § 4248.

COMMITTEE ON DEFENDER SERVICES

Approved revisions to chapters 2 and 3 of the *Guide to Judiciary Policy*, Volume 7A (Criminal Justice Act Guidelines), regarding the proration of claims by attorneys and other service providers and the billing of interpreting services.

COMMITTEE ON INFORMATION TECHNOLOGY

Approved the fiscal year 2012 update to the *Long Range Plan for Information Technology in the Federal Judiciary.*

COMMITTEE ON THE JUDICIAL BRANCH

Approved an amendment to section 220.30.10(g)(3)(B) of the Travel Regulations for United States Justices and Judges to provide that if a senior judge is commissioned to a court of national jurisdiction and the judge intends to travel a distance of more than 75 miles from his or her residence to hold court or to transact official business for that court and to claim reimbursement for any expenses associated with that travel, such travel must be authorized by the chief judge of the court.

Approved an amendment to section 220.30.10(g)(3)(A) of the Travel Regulations for United States Justices and Judges to require the authorization of the circuit judicial council rather than the chief circuit judge when a senior judge relocates his or her residence outside the district or circuit of the judge's original commission and intends to seek reimbursement for travel back to the court for official business.

Approved amendments to sections 250.20.20, 250.20.30, 250.20.50, 250.20.60, and 250.40.20 of the Travel Regulations for United States Justices and Judges to limit judges' actual expense reimbursement for meals in connection with official travel, and agreed that the limits will be subject to annual and automatic adjustment for inflation in the same manner as the judges' alternative maximum daily subsistence allowance.

COMMITTEE ON JUDICIAL RESOURCES

Approved a new executive grading process for determining the target grades for district and bankruptcy clerks of court and chief probation and pretrial services officers.

Eliminated the saved pay policy for the courts, but grandfathered for two years any employees currently in a saved pay status under the policy. After two years, the Administrative Office will place those employees who remain in a saved pay status at the top step of their respective grade or classification level.

Approved the following policy for Court Personnel System temporary pay adjustments:

> An appointing officer may provide a temporary pay adjustment in the full performance range to a Court Personnel System employee who is temporarily in charge of a work project with other employees. A temporary pay adjustment provides for a temporary pay increase within the employee's existing classification level at the lowest step which equals or exceeds the employee's existing rate of pay by anywhere from one to three percent, at the appointing officer's discretion. A temporary pay adjustment may not exceed 52 weeks without re-authorization.

Approved a clarification to the policy for granting awards to court employees to prohibit time-off awards for intermittent employees.

Approved a revision to the current telework policy for courts and federal public defender organizations to state that a court or federal public defender organization, at its discretion, may require eligible employees to telework as needed during a continuity of operations event, inclement weather, or similar situation.

Authorized a second fully funded JSP-16 Type II chief deputy clerk position for the District of Idaho. This position is subject to any budget-balancing reductions.

With regard to additional staff court interpreter positions:

a. Authorized one additional Spanish staff court interpreter position beginning in fiscal year 2013 for the District of Arizona based on the Spanish language interpreting workload in this court; and

b. Authorized accelerated funding in fiscal year 2012 for the additional Spanish staff court interpreter position for the District of Arizona.

Amended the maximum realtime transcript rate policy adopted in March 1999 to eliminate the requirement that a litigant who orders realtime services in the courtroom must purchase a certified transcript (original or copy) of the same pages of realtime unedited transcript at the regular rates, effective January 1, 2012.

COMMITTEE ON ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM

Approved recommendations regarding specific magistrate judge positions to (1) authorize three new full-time magistrate judge positions and make no other change in those three district courts; (2) make no change in one district court that had requested an additional magistrate judge position; (3) make no change in one part-time magistrate judge position in one district court; and (4) make no change in the magistrate judge positions in five other district courts reviewed by the Magistrate Judges Committee.

Designated the new full-time magistrate judge positions at Wilmington in the District of Delaware, Durham in the Middle District of North Carolina, and Orlando or Tampa in the Middle District of Florida for accelerated funding effective April 1, 2012.

Agreed not to authorize the Middle District of Louisiana to fill the magistrate judge position to be vacated in May 2012.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

With regard to bankruptcy rules:

a. Approved proposed amendments to Bankruptcy Rules 1007, 2015, 3001, 7054, and 7056, and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approved proposed revisions of Official Forms 1, 9A–9I, 10, and 25A and new Official Forms 10 (Attachment A), 10 (Supplement 1), and 10 (Supplement 2), to take effect on December 1, 2011.

Approved proposed amendments to Criminal Rules 5, 15, and 58, and new Rule 37, and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved revised "Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees."

COMMITTEE ON SPACE AND FACILITIES

Approved the *Five-Year Courthouse Project Plan for Fiscal Years 2013-2017* and granted the Committee authority to remove the Los Angeles project from that plan when appropriate.

Endorsed a General Services Administration feasibility study for the backfill of Moss Courthouse in Salt Lake City, Utah, contingent upon final court approval of the District of Utah long-range facilities plan.

Approved changes to the *U.S. Courts Design Guide* to take into account recent policy and planning methodology revisions.

Approved a new approach for planning the size of new courthouses and agreed that this approach will be incorporated into the *U.S. Courts Design Guide* and the asset management planning business rules.

TAB 2

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

TABLE OF CONTENTS

Attendance	1
Introductory Remarks	3
Approval of the Minutes of the Last Meeting	5
Reports of the Advisory Committees:	
Appellate Rules	5
Bankruptcy Rules	8
Civil Rules	24
Criminal Rules	32
Evidence Rules	40
Revision of Rules Committee Procedures	42
Strategic Planning	42
Next Committee Meeting	45

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
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. Simplification of the rule

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

TAB 3

Legislation and Legislative Activities
Affecting the Federal Rules of Practice and Procedure
(Oral Report)

S. 533
Lawsuit Abuse Reduction Act

112TH CONGRESS
1ST SESSION

S. 533

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 9, 2011

Mr. GRASSLEY (for himself and Mr. LEE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Lawsuit Abuse Reduction Act of 2011".

SEC. 2. ATTORNEY ACCOUNTABILITY.

(a) SANCTIONS UNDER RULE 11.—Rule 11(c) of the Federal Rules of Civil Procedure is amended—

(1) in paragraph (1), by striking "may" and inserting "shall";

(2) in paragraph (2), by striking "Rule 5" and all that follows through "motion." and inserting "Rule 5."; and

(3) in paragraph (4), by striking "situated" and all that follows through the end of the paragraph and inserting "situated, and to compensate the parties that were injured by such conduct. Subject to the limitations in paragraph (5), the sanction shall consist of an order to pay to the party or parties the amount of the reasonable expenses incurred as a direct result of the violation, including reasonable attorneys' fees and costs. The court may also impose additional appropriate sanctions, such as striking the pleadings, dismissing the suit, or other directives of a nonmonetary nature, or, if warranted for effective deterrence, an order directing payment of a penalty into the court".

(b) RULE OF CONSTRUCTION.—Nothing in this Act shall be construed to bar or impede the assertion or development of new claims, defenses, or remedies under Federal, State, or local laws, including civil rights laws.

○

H.R. 966
Lawsuit Abuse Reduction Act

Union Calendar No. 114

112TH CONGRESS
1ST SESSION

H. R. 966

[Report No. 112–174]

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 9, 2011

Mr. SMITH of Texas introduced the following bill; which was referred to the Committee on the Judiciary

JULY 21, 2011

Additional sponsors: Mr. CANSECO, Mr. GALLEGLY, Mr. CALVERT, and Mr. HERGER

JULY 21, 2011

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

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~~for effective deterrence, an order directing payment of a penalty into the court".~~

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(b) RULE OF CONSTRUCTION.—Nothing in this Act shall be construed to bar or impede the assertion or development of new claims, defenses, or remedies under Federal, State, or local laws, including civil rights laws, or under the Constitution.

Union Calendar No. 114

112TH CONGRESS
1ST SESSION

H. R. 966

[Report No. 112–174]

A BILL

To amend Rule 11 of the Federal Rules of Civil Procedure to improve attorney accountability, and for other purposes.

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Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

March 14, 2011 Letter to Rep. Smith re H.R. 966 with attached FJC Survey

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

March 14, 2011

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

Dear Mr. Chairman:

On behalf of the Judicial Conference's Committee on the Rules of Practice and Procedure (the "Standing Rules Committee") and the Advisory Committee on the Federal Rules of Civil Procedure (the "Advisory Committee"), we write to oppose H.R. 966, which seeks to reduce lawsuit abuse by amending Rule 11 of the Federal Rules of Civil Procedure. The bill would reinstate a mandatory sanctions provision of Rule 11 that was adopted in 1983 and eliminated in 1993. The bill would also eliminate a provision adopted in 1993 to allow a party to withdraw challenged pleadings on a voluntary basis, without the added costs and delay to the challenging party of seeking and obtaining a court order. The concerns we express are the same concerns expressed by the Judicial Conference in 2004 and 2005, when similar legislation was introduced.

We greatly appreciate, and share, your desire to improve the civil justice system in our federal courts, including by reducing frivolous filings. But legislation that would restore the 1983 version of Rule 11 by undoing the 1993 amendments would create a "cure" far worse than the problem it is meant to solve. Such legislation also contravenes the longstanding Judicial Conference policy

opposing direct amendment of the federal rules by legislation instead of through the careful, deliberate process Congress developed in the Rules Enabling Act, 28 U.S.C. §§ 2071–2077.

The 1993 changes followed years of examination and were made on the Judicial Conference's strong recommendation, with the Supreme Court's approval, and after congressional review. The 1983 provision for mandatory sanctions was eliminated because during the ten years it was in place, it did not provide meaningful relief from the litigation behavior it was meant to address. Instead, it generated wasteful satellite litigation that had little to do with the merits of cases and that added to the time and costs of litigation.

The 1983 version of Rule 11 required sanctions for every violation of the rule. The rule was abused by resourceful lawyers. An entire "cottage industry" developed that churned tremendously wasteful satellite litigation that had everything to do with strategic gamesmanship and little to do with underlying claims. Rule 11 motions came to be met with counter-motions that sought Rule 11 sanctions for making the original Rule 11 motion.

The 1983 version of Rule 11 spawned thousands of court decisions unrelated to the merits of the cases, sowed discord in the bar, and generated widespread criticism. As letters from the Judicial Conference commenting on prior similar bills pointed out, some of the serious problems caused by the 1983 amendments to Rule 11 included:

1. creating a significant incentive to file unmeritorious Rule 11 motions by providing a greater possibility of receiving money;

2. engendering potential conflicts of interest between clients and their lawyers, who advised withdrawal of particular claims despite the clients' preference;

3. exacerbating tensions between lawyers; and

4. providing a disincentive to abandon or withdraw a pleading or claim that lacked merit — and thereby admit error — after determining that it no longer was supportable in law or fact.

The 1993 amendments to Rule 11 were designed to remedy the major problems with the rule, strike a fair and equitable balance between competing interests, and allow courts to focus on the merits of the underlying cases rather than on Rule 11 motions. Since 1993, the rule has established a safe harbor, providing a party 21 days within which to withdraw a particular claim or defense before sanctions can be imposed. If the party fails to withdraw an allegedly frivolous claim or defense within the 21 days, a court may impose sanctions, including assessing reasonable attorney fees. The 1983 version of Rule 11 authorized a court to sanction discovery-related abuse under Rule 11, Rule 26(g), or Rule 37, which created confusion. Under the 1993 amendments to Rule 11, sanctioning of discovery-related abuse was limited to Rules 26 and 37, which provide for sanctions that include awards of reasonable attorney fees.

The 1993 amendments to Rule 11 culminated a long, critical examination of the rule begun four years earlier. The Advisory Committee reviewed a significant number of empirical examinations of the 1983 version of Rule 11, including three separate studies conducted by the Federal Judicial Center in 1985, 1988, and 1991, a Third Circuit Task Force report on Rule 11 in 1989, and a New York State Bar Committee report in 1987.

After reviewing the literature and empirical studies of problems caused by the 1983 amendments to Rule 11, the Advisory Committee issued in 1990 a preliminary call for general comment on the operation and effect of the rule. The response was substantial and clearly called for a change in the rule. The Advisory Committee concluded that the cost-shifting in Rule 11 created an incentive for too many unnecessary Rule 11 motions. Amendments to Rule 11 were drafted. The Supreme Court promulgated and transmitted the amendments to Congress in May 1993 after extensive scrutiny and debate by the bench, bar, and public in accordance with the Rules Enabling Act process.

Experience with the amended rule since 1993 has demonstrated a marked decline in Rule 11 satellite litigation without any noticeable increase in the number of frivolous filings. In June 1995, the Federal Judicial Center conducted a survey of 1,130 lawyers and 148 judges on the effects of the 1993 Rule 11 amendments. About 580 attorneys and 120 judges responded to the survey. The Center found general satisfaction with the amended rule. It also found that more than 75% of the judges and lawyers would oppose a provision that would require a court to impose a sanction when the rule is violated.

In 2005, the Federal Judicial Center surveyed the trial judges who apply the rules to get a clearer picture of how the revised Rule 11 was operating. A copy of the study is enclosed. The results of the Federal Judicial Center's study showed that judges strongly believed that the current Rule 11, which was carefully crafted to deter frivolous filings without unduly hampering the filing of legitimate claims or defenses, continues to work well. The study's findings include the following highlights:

- more than 80 percent of the 278 district judges surveyed indicated that "Rule 11 is needed and it is just right as it now stands";
- 87 percent prefer the existing Rule 11 to the 1983 version or the version proposed by legislation (e.g., H.R. 4571 (the Lawsuit Abuse Reduction Act of 2004) or H.R. 420 (the Lawsuit Abuse Reduction Act of 2005));
- 85 percent strongly or moderately support Rule 11's safe harbor provisions;
- 91 percent oppose the proposed requirement that sanctions be imposed for every Rule 11 violation;

- 84 percent disagree with the proposition that an award of attorney fees should be mandatory for every Rule 11 violation;

- 85 percent believe that the amount of groundless civil litigation has not grown since the promulgation of the 1993 rule, with 12 percent noting that such litigation has not been a problem, 19 percent noting that such litigation decreased during their tenure on the federal bench, and 54 percent noting that such litigation has remained relatively constant; and

- 72 percent believe that addressing sanctions for discovery abuse in Rules 26(g) and 37 is better than in Rule 11.

The findings of the Federal Judicial Center underscore the judiciary's united opposition to legislation amending Rule 11. Lawyers share this view. In 2005, the American Bar Association issued a resolution opposing an earlier, similar proposed bill.

Minimizing frivolous filings is, of course, vital. But there is no need to reinstate the 1983 version of Rule 11 to work toward this goal. Judges have many tools available to respond to, and deter, frivolous pleadings. Those tools include 28 U.S.C. § 1915e, which authorizes courts to dismiss, *sua sponte*, before an answer is filed, a lawsuit that is frivolous or malicious. Rule 12(b)(6) authorizes courts to dismiss pleadings that fail to state a claim on which relief can be granted. Section 1927 of Title 28 of the United States Code authorizes sanctions against lawyers for "unreasonably and vexatiously" multiplying the proceedings in any case. And the present version of Rule 11 itself provides an effective, balanced tool, without the problems and satellite litigation the 1983 version created.

In May 2010, the Advisory Committee on the Civil Rules held a major conference on civil litigation, examining the problems of costs and delay — which encompass frivolous filings — and potential ways to improve the system. The Conference encouraged, and generated, a broad spectrum of criticisms by lawyers, litigants (including businesses and governmental entities), judges, and academics of the current approaches to federal civil cases, including the rules, and proposals for change. Conspicuous in its absence was any criticism of Rule 11 or any proposal to restore the 1983 version of the rule.

Undoing the 1993 Rule 11 amendments, even though no serious problem has been brought to the Rules Committees' attention, would frustrate the purpose and intent of the Rules Enabling Act. There is no need to reinstate the 1983 version of Rule 11 that proved contentious and diverted so much time and energy of the bar and bench. Doing so would add to, not improve, the problems of costs and delay that we are working to address. I urge you on behalf of the Rules Committees to not support the proposed legislation amending Rule 11.

We greatly appreciate your consideration of the Rules Committees' views. We look forward to continuing to work together to ensure that our civil justice system is working well to fulfill its vital

role. If you or your staff have any questions, please contact Andrea Kuperman, Chief Counsel to the Rules Committees, at 713-250-5980.

Sincerely,

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

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

Enclosure

cc: Honorable Trent Franks

Identical letter sent to: Honorable John Conyers, Jr.

Report of a Survey of United States District Judges' Experiences and Views Concerning Rule 11, Federal Rules of Civil Procedure

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Federal Judicial Center
2005

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Contents

Introduction 1
Summary of Results 2
Results 3
Frequency of Groundless Litigation 3
"Safe Harbor" Provision and Rule 11 Activity 5
Rule 11 Sanctions 7
Three Strikes 9
Application of Rule 11 to Discovery 12
How to Control Groundless Litigation? 13
Conclusion 15
Appendix A: Method 16
Appendix B: Questionnaire 18

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Introduction

The Judicial Conference's Advisory Committee on Civil Rules asked the Federal Judicial Center to design and implement a survey of a representative national sample of federal district judges. The purpose of the survey was to gather information about the judges' experiences with Rule 11 of the Federal Rules of Civil Procedure as well as to elicit their opinions about recent proposals in Congress to amend Rule 11. The chair of the Advisory Committee and the committee's reporters helped develop the questionnaires. Center staff conducted the survey and analyzed the results during December 2004 and January 2005.

As currently written, Rule 11 expressly authorizes judges to impose sanctions on lawyers and parties who present to a district court a pleading, written motion, or other paper without reasonable support in fact or law or for an improper purpose, such as to cause unnecessary cost or delay. Rule 11 provides that sanctions for violations are within the judge's discretion; that a party should have a period of time, a "safe harbor," within which to withdraw or correct a filing alleged to violate Rule 11; and that Rule 11's primary purpose is to deter future violations and not necessarily to compensate the opposing party for losses, including attorney fees.

In the 108th Congress, the House of Representatives passed H.R. 4571, the Lawsuit Abuse Reduction Act of 2004,[1] which would have amended Rule 11. That bill would have provided for mandatory sanctions for violations, repealed the safe harbor, and required judges to order the offending lawyer or party to compensate the opposing party for attorney fees incurred as a direct result of a Rule 11 violation. The proposed legislation would have reversed three amendments to Rule 11 adopted through the rulemaking process in 1993: to convert mandatory sanctions to discretionary sanctions, to create a safe harbor, and to deemphasize attorney fee awards. The proposed legislation also would have introduced a requirement that a district court suspend an attorney's license to practice in that district for one year if the attorney was found to have violated Rule 11 three or more times in that district.

The survey was designed, in part, to elicit district judges' views based on their experience with the 1993 amendments. The Advisory Committee was particularly interested in having the survey identify any differences in the views of district judges concerning the current Rule 11, the legislative pro-

1. H.R. 4571, 108th Cong. 2d Sess. (2004). The House version was introduced in the Senate on Sept. 15, 2004, referred to the Committee on the Judiciary, and was not the subject of a vote.

posal, and the pre-1993 version of Rule 11. The pre-1993 version differs from the legislative proposal in significant ways, particularly in its treatment of attorney fees as a discretionary, not a mandatory, sanction for a violation of Rule 11.

On December 10, 2004, the Center E-mailed questionnaires to two random samples of 200 district judges each. District Judge Lee H. Rosenthal, chair of the Advisory Committee on Civil Rules, provided a cover letter for the E-mail. One sample comprised solely judges appointed to the bench before January 1, 1992, who would be expected to have had considerable experience with the pre-1993 version of Rule 11. The other sample comprised solely judges appointed to the bench after January 1, 1992, who would be expected to have had most of their judicial experience working with the 1993 amended version of Rule 11. Judge Rosenthal sent a follow-up E-mail on January 3, 2005. Of the 400 judges, 278 responded, a rate of 70%. Appendix A explains the methods used to select the samples. Appendix B contains a composite copy of the two questionnaires used in the survey.

Summary of Results

More than 80% of the 278 district judges indicated that "Rule 11 is needed and it is just right as it now stands." In evaluating the alternatives, 87% of the respondents preferred the current Rule 11, 5% preferred the version in effect between 1983 and 1993, and 4% preferred the version proposed in H.R. 4571.

Judges' opinions about specific provisions in Rule 11 and the proposed legislation followed a similar pattern. The results indicated that relatively large majorities of the judges who responded to our survey have the following views about Rule 11:

- 85% strongly or moderately support Rule 11's safe harbor provision;
- 91% oppose the proposed requirement that sanctions be imposed for every Rule 11 violation;
- 84% disagree with the proposition that an award of attorney fees should be mandatory for every Rule 11 violation; and
- 72% believe that having sanctions for discovery in Rules 26(g) and 37 is best.

A majority of the judges (55%) indicated that the purpose of Rule 11 should be both deterrence and compensation; almost all of the other judges (44%) indicated that deterrence should be the sole purpose of Rule 11.

The views of judges who responded to the survey are likely to be related to their estimation of the amount of groundless civil litigation they see in their own docket, especially when focusing on cases where the plaintiff is represented by counsel. Approximately 85% of the district judges view groundless litigation in such cases as no more than a small problem and another 12% see such litigation as a moderate problem. About 3% view groundless litigation brought by plaintiffs who are represented by counsel as a large or very large problem. For 54% of the judges who responded, the amount of groundless litigation has remained relatively constant during their tenure on the federal bench. Only 7% indicated that the problem is now larger. For 19%, the amount of groundless civil litigation has decreased during their tenure on the federal bench, and for 12% there has never been a problem.

Results

The Advisory Committee was especially interested in having a survey that was designed to inquire about district court judges' experience with Rule 11 as well as to solicit judges' opinions about the current Rule 11 relative to the proposed changes contained in the legislation. Those interests shaped the organization and content of the survey questionnaires. The survey results in this section of the report are presented in tables and text in the order in which the questions appeared on the survey instrument. The title of each table states the question asked of the judges, and the response categories are a shorthand version of the responses called for in the questionnaire. The preface of each questionnaire indicated in bold type that "This questionnaire is about the effects of Rule 11 in cases in which the plaintiff is represented by counsel." Many of the questions were modeled on questions asked of judges in a 1995 Center survey.[2] In order to facilitate comparisons between the findings of the 1995 survey and the current survey, we present applicable results of both surveys with appropriate references.

Frequency of Groundless Litigation

The questionnaire first asked judges about their perception of any problems with groundless litigation and whether such problems, if they exist, had

2. John Shapard et al., Report of a Survey Concerning Rule 11, Federal Rules of Civil Procedure (Federal Judicial Center 1995) [hereinafter FJC 1995 Rule 11 Survey].

changed since Rule 11 was last amended in 1993. Table 1 shows that 85% of the judges described any perceived problem with groundless litigation as being no more than a small one. Among judges commissioned before January 1, 1992, this figure was over 75%; the figure was almost 90% for judges commissioned after that date. In our 1995 study, 40% of the judges indicated that the problem with groundless litigation was moderate to very large;[3] only 15% believed this to be the case in the current study.

Table 1
Responses to Question 1.1, Is there a problem with groundless litigation in federal civil cases on your docket?

Possible Answer	All Judges (*N*=276)[4]	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=148)
No problem	15%	13%	16%
Very small problem	38%	31%	43%
Small problem	32%	34%	30%
Moderate problem	12%	16%	9%
Large problem	2%	2%	2%
Very large problem	1%	3%	0%
I can't say	0%	1%	0%

The questionnaire next asked whether such problems, if they exist, had changed since Rule 11 was last amended in 1993. Table 2 shows that about 7% said that the problem had increased. More than half said that the problem was the same, and 12% said that there has never been a problem. Judges commissioned after January 1, 1992, were more likely to say that there has never been a problem but, if there is a problem, it is about the same as it was during their first year on the bench.

3. *Id.* at 3.

4. *N* refers to the number of judges who answered the question. The value of *N* varies across tables because of differences in the number of judges who answered a particular question. Percentages in columns with results for all judges are weighted to reflect the fact that, by drawing two samples independently from two groups of judges, we have a stratified sample. In this case, weighted results for the entire sample are appropriate. Weighting is unnecessary for results reported separately by group. Finally, as a result of rounding, column percentages may not sum to 100.

Table 2
Responses to Question 1.2, Is the current problem (if any) with groundless litigation in civil cases on your docket smaller than, about the same as, or larger now than it was

before Rule 11 was amended? (asked of pre-1992 judges) *or*

during your first year as a federal district judge? (asked of post-1992 judges)

Possible Answer	All Judges (*N*=276)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=148)
There has never been a problem	12%	9%	14%
The problem is much smaller now than it was then	8%	11%	6%
The problem is slightly smaller now than it was then	11%	14%	9%
The problem is the same now as it was then	54%	48%	59%
The problem is slightly larger now than it was then	6%	5%	7%
The problem is much larger now than it was then	1%	2%	1%
I can't say	7%	11%	4%

"Safe Harbor" Provision and Rule 11 Activity

The questionnaire asked judges if they supported or opposed the Rule 11 "safe harbor" provision, which was added as part of the 1993 amendments. Table 3 shows that 86% of the judges said they supported it, with the majority of the judges expressing strong support. Table 3 also shows somewhat stronger support among judges commissioned after 1992. This subgroup has very little or no experience with the pre-1993 version of Rule 11, which did not include the safe harbor provision. Overall, the percentage of judges supporting the safe harbor has increased from 70% to 86% since 1995; judges showing strong support has increased from 32% to 60%. The percentage of judges opposing the safe harbor has decreased from 16% to 10%.[5]

5. FJC 1995 Rule 11 Survey, *supra* note 2, at 4.

Table 3
Responses to Question 2.1, Based on your experience and your assessment of what would be fairest to all parties, do you oppose or support Rule 11's "safe harbor" provision?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Strongly support	60%	53%	65%
Moderately support	26%	25%	26%
Moderately oppose	6%	9%	3%
Strongly oppose	4%	5%	2%
I find it difficult to choose	4%	6%	3%
I can't say	1%	1%	1%

The questionnaire contained a follow-up question for the pre-1992 judges about changes in Rule 11 activity as a result of the addition of the safe harbor provision. Judges commissioned prior to 1992 were asked how the safe harbor provision has affected the amount of Rule 11 activity since the provision went into effect in 1993. Table 4 shows that 45% of these judges reported that Rule 11 activity had decreased, either slightly or substantially, and 29% reported that activity was about the same. Only 5% reported increases in Rule 11 activity, and 21% indicated that they could not give a definitive answer to this question. Similarly, judges commissioned after 1992 were asked about Rule 11 activity since their first year on the bench. Table 4 shows that almost two-thirds of the post-1992 judges reported that Rule 11 activity had remained about the same, 22% reported decreases, and 7% reported increases.

Table 4
Responses to Question 2.2,

How has the safe harbor provision affected the amount of Rule 11 activity on your docket since it went into effect in 1993? (asked of pre-1992 judges) *or*

Since your first year as a district judge what, if any, changes have you observed in the amount of Rule 11 activity on your docket? (asked of post-1992 judges)

Possible Answer	Judges Commissioned Before 1/1/92 (*N*=127)	Judges Commissioned After 1/1/92 (*N*=148)
Increased substantially	1%	0%
Increased slightly	4%	7%
About the same	29%	65%
Decreased slightly	17%	12%
Decreased substantially	28%	10%
I can't say	21%	6%

Rule 11 Sanctions

The current version of Rule 11 allows a district judge to impose sanctions for violations of the rule, at his or her own discretion, with the purpose of deterring similar conduct in the future. H.R. 4571 would require sanctions for every violation, with the purpose of compensating the injured party for reasonable expenses and attorney fees as well as to deter repetitions of such conduct.

The judges were asked first whether sanctions, monetary or nonmonetary, should be required. Table 5 shows that 91% said that sanctions should not be required. Among judges commissioned before 1992, 86% said sanctions should not be required; for judges commissioned after 1992 the figure was 95%. In 1995, 22% of the judges thought that a sanction should be required for every Rule 11 violation, compared with 9% who think so now.[6]

6. *Id*. at 6.

Table 5
Responses to Question 3.1, Should the court be required to impose a monetary or nonmonetary sanction when a violation is found?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Yes	9%	13%	5%
No	91%	86%	95%
I can't say	0%	1%	0%

Judges were next asked whether an award of attorney fees, sufficient to compensate the injured party, should be mandatory when a sanction is imposed. Table 6 shows that 84% of the judges said no. The result is approximately the same whether the judges were commissioned before or after 1992. The percentage of judges favoring mandatory attorney fees for Rule 11 violations was 15% in both the 1995 and 2005 surveys.[7]

Table 6
Responses to Question 3.2, When a sanction is imposed, should it be mandatory that the sanction include an award of attorney fees sufficient to compensate the injured party?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Yes	15%	14%	16%
No	84%	85%	83%
I can't say	1%	1%	1%

Regarding the proposed legislation's inclusion of financial compensation as a general purpose for Rule 11, judges were asked what should be the purpose of Rule 11. Almost 100% of the judges said that a purpose of Rule 11 should be deterrence. Their views were split on the role of compensation. The results in Table 7 reveal that slightly more than half, 55%, said that the purpose should be deterrence *and* compensation; 44% said that the purpose should be deterrence, with compensation if needed for the sake of deterrence. Reading the Table 7 results in light of the opinions expressed in

7. *Id.*

Table 5 and 6, it appears that most judges who favor compensating the opposing party do not favor such compensation in all cases and do not necessarily favor compensation in the form of attorney fees. In the 1995 survey, 66% of the judges thought that Rule 11 should include both compensatory and deterrent purposes.[8]

Table 7
Responses to Question 3.3, What should the purpose of Rule 11 sanctions be?

Possible Answer	All Judges (*N*=275)	Judges Commissioned Before 1/1/92 (*N*=126)	Judges Commissioned After 1/1/92 (*N*=149)
Deterrence (& compensation if warranted)	44%	40%	46%
Compensation only	0%	1%	0%
Both deterrence & compensation	55%	58%	53%
Other	1%	1%	1%

Three Strikes

Under the proposed legislation, when an attorney violates Rule 11 the federal court would determine how many times that attorney had violated Rule 11 in that court during the attorney's career. If that attorney had committed three or more violations, the court would suspend for one year the attorney's license to practice in that court.

To gauge the frequency with which this portion of the proposed Rule 11 might be invoked, judges were asked whether they had encountered an attorney with three or more violations in their district. Table 8 shows that 77% of the judges reported that they had not. Of the remaining 23%, more than half were not sure if they had encountered an attorney with three or more violations. Judges commissioned before 1992 were more likely to say they had encountered such an attorney. This result may, of course, be largely the result of their longer time on the bench.

8. *Id.*

Table 8
Responses to Question 4.1, In your experience as a district judge, have you encountered an attorney who has violated Rule 11 three or more times in your district?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Yes	11%	15%	8%
No	77%	71%	81%
I can't say	12%	14%	11%

At present, the efforts and methods required to enable courts to track attorney violations, in order to apply the proposed legislation's "three strikes" provision, are unknown. Judges were asked for their views, which are reported in Table 9. The choices were not mutually exclusive: Judges could check more than one response and therefore the percentages do not sum to 100. The most frequent response, given by 48% of the judges, was that a new database would be required to track Rule 11 violations. Examination of prior docket records was the next most frequent response, given by 35% of the judges. Only 4% said that little or no additional effort would be required, and nearly one-third (32%) were unsure about what would be needed to apply the three strikes provision.

Table 9
Responses to Question 4.2, In your district, how much effort would be required to obtain information about the number of prior Rule 11 violations committed by an attorney during his or her career?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Little or no additional effort	4%	3%	5%
Examining prior docket records for past violations	35%	35%	34%
Creating a new database for Rule 11 violations	48%	53%	44%
An affidavit or declaration from each attorney	19%	17%	20%
Other court action	3%	2%	3%
I can't say	32%	29%	34%

Judges were next asked their views on the impact of the proposed three strikes provision in deterring groundless litigation relative to the cost of implementation and in light of their courts' existing procedures for disciplining attorneys. Table 10 shows that 40% felt that the cost of implementation would exceed the deterrent value, while 25% of the judges felt that the value of the deterrent effect would exceed the cost of implementation. However, 27% were unsure about the tradeoff between cost and deterrent effect. Judges commissioned after 1992, compared with those commissioned earlier, were more likely to view the cost as exceeding the value of the proposed legislation and were less likely to view the deterrent value as exceeding the cost. They were also more likely to express uncertainty over the tradeoff.

Table 10
Responses to Question 4.3, Which of the following statements best captures your expectations regarding the impact of the proposal in deterring groundless litigation in comparison to the cost of implementing the proposal in your district?

Possible Answer	All Judges (*N*=277)	Judges Commissioned Before 1/1/92 (*N*=128)	Judges Commissioned After 1/1/92 (*N*=149)
Value of the deterrent effect would greatly exceed its cost	16%	15%	16%
Value of the deterrent effect would somewhat exceed its cost	9%	11%	7%
Value of the deterrent effect would about equal its cost	9%	13%	7%
Cost of implementing the proposal would somewhat exceed the value of the deterrent effect	10%	6%	13%
Cost of implementing the proposal would greatly exceed the value of the deterrent effect	30%	32%	28%
I can't say	27%	23%	30%

Application of Rule 11 to Discovery

The proposed legislation would extend Rule 11's application to discovery-related activity. Standards and sanctions for discovery are currently covered by Federal Rules of Civil Procedure 26(g) and 37, and the proposed legislation would augment these rules with an expanded Rule 11. The sampled judges were asked their opinion on the best combination of rules and sanctions. Table 11 shows that 72% of the judges (compared with 48% in 1995)[9] feel that the best option is the current version of Rule 11; 14% favored the proposed legislation. Judges commissioned after 1992 were a little more likely to favor the current version of the rule than judges commissioned before 1992.

9. *Id.* at 7.

Table 11
Responses to Question 5, Based on your experience, which of the following options do you believe would be best?

Possible Answer	All Judges (*N*=276)	Judges Commissioned Before 1/1/92 (*N*=127)	Judges Commissioned After 1/1/92 (*N*=149)
Sanctions provisions contained only in Rules 26(g) and 37	72%	68%	75%
Sanctions provisions contained in Rules 26(g), 37, and 11	13%	15%	12%
Sanctions provisions consolidated in Rule 11	5%	7%	3%
No significant difference among the three options	5%	6%	4%
I can't say	5%	5%	5%

How to Control Groundless Litigation?

To gauge judges' overall views on the proposed legislation and on controlling groundless litigation, the judges were asked whether Rule 11 should be modified. Table 12 shows their responses to the given options. The great majority of judges (81%) said that Rule 11 is just right as currently written. In 1995, 52% of the judges indicated that the same version of Rule 11 was just right as written. In 2005, there were differences among judges depending on when they were commissioned: 71% of judges commissioned before 1992 agreed that the current Rule 11 is just right, compared with 89% of judges commissioned afterwards. There was almost no support for modifying Rule 11 to reduce the risk of deterring meritorious filings, and only some support, primarily among the longer-serving judges, to modify Rule 11 to more effectively deter groundless filings.

Table 12
Responses to Question 6, Based on your view of how effective or ineffective these other methods are, how, if at all, should Rule 11 be modified?

Possible Answer	All Judges (*N*=270)	Judges Commissioned Before 1/1/92 (*N*=124)	Judges Commissioned After 1/1/92 (*N*=146)
Modified to increase its effectiveness in deterring groundless filings	13%	21%	7%
Rule 11 is just right as it now stands	81%	71%	89%
Modified to reduce the risk of deterring meritorious filings	1%	2%	1%
Rule 11 is not needed	1%	2%	1%
I can't say	3%	4%	3%

Finally, the judges were asked which version of Rule 11 they would prefer to have if and when they have to deal with groundless litigation. Given the choice among the current version of Rule 11, the pre-1993 version, or the proposed legislation, 87% of the judges preferred the current version. The percentages for surveyed judges commissioned before and after 1992 are 83% and 91%, respectively. There was little support expressed for either the pre-1993 version or the version contained in H.R. 4571.

Table 13
Responses to Question 7, Proposed legislation would repeal the safe harbor provision in Rule 11 and require that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion, or other paper in violation of Rule 11 standards. Which approach would you prefer in dealing with groundless litigation?

Possible Answer	All Judges (*N*=271)	Judges Commissioned Before 1/1/92 (*N*=123)	Judges Commissioned After 1/1/92 (*N*=148)
The current Rule 11	87%	83%	91%
The 1983–1993 version of Rule 11	5%	7%	4%
The proposed legislation	4%	7%	2%
I can't say	4%	4%	3%

Conclusion

Based on their experiences in managing groundless civil litigation in their own courts, federal district judges find the current Rule 11 to be well suited to their needs. Almost all of the judges reported that, in their experience, groundless civil litigation is a small or at most a moderate problem. District judges' views on proposed changes to Rule 11 appear to be consistent with their experiences on the federal bench. Substantial majorities of the responding judges said, in effect, that none of the proposals for changing Rule 11—that is, proposals for mandatory sanctions, mandatory attorney fee awards, removal of the safe harbor, and application of Rule 11 to discovery disputes—would resolve problems that district judges are experiencing.

Appendix A
Method

Separate forms of the questionnaire were E-mailed by Center staff with a cover letter from the chair of the Advisory Committee to two samples of active and active-senior federal district court judges. The samples, each one of 200 judges, were separately and randomly selected from within two groups of judges defined by their commission date. Judges commissioned before January 1, 1992, formed one group; judges commissioned on or after that date formed the other. This date was selected in order that all judges in the first group would have had at least one year on the bench before the 1993 amendments to Rule 11 went into effect. This group of judges received a form of the questionnaire that, where necessary, asked them to use their pre-1993 period on the bench as a basis for comparison. The second group of judges received a questionnaire that instead asked them to use their first year on the bench as their basis for comparison. A composite of the two versions of the questionnaire is contained in Appendix B.

In order to quickly and easily convert the returned questionnaires into data files, Center research staff used special software to produce and read the questionnaires. Each of the two forms of the questionnaire was converted to Portable Document Format (PDF) and sent via E-mail to the 400 sampled judges. Each judge's file was named using a sequential, numbered ID that was used to track returned questionnaires for follow-up purposes. Upon receipt of the file, the judges were able to open the PDF file, answer the questions, save the file, and return it via E-mail. The software that produced the files was used to convert the returned questionnaires to a data file for analysis. Judges were also given the option of printing the PDF file, completing it, and faxing it to a fax server at the Center. Of the 280 responses received, 44 were returned via E-mail; the remainder were returned via fax. The questionnaires were sent on December 9, 2004, and a reminder was sent on January 3, 2005, to judges who had not yet responded. The response rates for the two samples were different. Post-1992 judges were more likely to return the questionnaire (74%) than were pre-1992 judges (64%).

The sample procedure described above produced a stratified sample in which the judges' commission dates defined the strata. In order to correctly interpret results for the sample of all judges, when reported, these data were weighted to reflect the fact that different sampling fractions were used for

the different strata. Results reported separately by strata do not require weighting.

Appendix B
Questionnaire

The questionnaire sent to judges commissioned before January 1, 1992 is reproduced below. Questions 1.2 and 2.2 differed in the version sent to judges commissioned on or after that date. The differences are indicated by bracketed text. Bold and underlined text was in that format in the original questionnaires.

RULE 11 SURVEY

PURPOSE AND INSTRUCTIONS. Federal Rule of Civil Procedure 11 (**Rule 11**) provides sanctions for presenting a pleading, written motion, or other paper without reasonable support in fact or law or for an improper purpose, such as to cause unnecessary cost or delay. This questionnaire seeks information from you about how Rule 11 is working and also seeks your evaluation of several issues concerning Rule 11 and current Congressional proposals to amend that rule. Rule 11 provides that sanctions for violations are within the judge's discretion; that a party should have a period of time, a "safe harbor," within which to withdraw or correct a filing alleged to violate Rule 11; and that Rule 11's primary purpose is to deter future violations and not necessarily to compensate the opposing party for losses, including attorney fees.

Proposed legislation (HR 4571, adopted by the House of Representatives on September 14, 2004) would amend Rule 11 to provide that sanctions for violations be mandatory, repeal the safe harbor, and require courts to order compensation to a party for attorney fees incurred as a direct result of a Rule 11 violation. The proposed legislation would reverse three changes made by **Rule11 amendments adopted in 1993**, namely to delete mandatory sanctions, to deemphasize attorney fee awards, and to create a safe harbor. The **proposed legislation** also requires a district court to suspend an attorney's license to practice in that district for one year if the attorney has violated Rule 11 three or more times in that district.

This questionnaire is about the effects of Rule 11 in cases in which the plaintiff is represented by counsel. Do not include in your evaluation of Rule 11 the effects it may or may not have had on cases in which the plaintiff is proceeding pro se.

Please respond to the questions on the basis of <u>your own</u> experience as a judge with cases on your docket, not the experiences of other judges or attorneys.

For convenience, throughout this questionnaire we refer to pleadings, written motions, and other papers that do not conform to the requirements of Rule 11 as *groundless litigation.*

Please respond by marking the box next to your answer.

1. FREQUENCY OF GROUNDLESS LITIGATION

1.1 Is there a problem with groundless litigation in federal civil cases on your docket? Please mark one.

a) There is no problem.
b) There is a very small problem.
c) There is a small problem.
d) There is a moderate problem.
e) There is a large problem.
f) There is a very large problem.
g) I can't say.

1.2 Is the current problem (if any) with groundless litigation in civil cases on your docket smaller, about the same as, or larger than it was before Rule 11 was amended in 1993? **[**Is the current problem (if any) with groundless litigation in civil cases on your docket smaller, about the same as, or larger than it was during your first year as a federal district judge?**]** Please mark one.

a) There has never been a problem.
b) The problem is much smaller now than it was then.
c) The problem is slightly smaller now than it was then.
d) The problem is the same now as it was then.
e) The problem is slightly larger now than it was then.
f) The problem is much larger now than it was then.
g) I can't say.

2. THE SAFE HARBOR PROVISION. **Rule 11** provides that a motion for sanctions shall not be filed with the court until 21 days after a copy is served on the opposing party. This provision creates a "safe harbor" by specifying that a party will not be subjected to sanctions on the basis of another party's motion unless, after receiving the motion, the party fails to withdraw or correct the challenged filing. **Proposed legislation** would eliminate the "safe harbor" provision.

Proponents of the safe harbor provision argue that it leads to the efficient resolution of both the Rule 11 issues and the underlying legal and factual issues with less court involvement; gives incentives to parties to withdraw or abandon questionable positions; decreases the number of sanctions motions that are filed for inappropriate reasons; and provides that abuses of the "safe harbor" can be dealt with by sua sponte sanctions. **Opponents** of the "safe harbor" provision argue that it allows filing of groundless papers without penalty and denies compensation to parties who have been subjected to groundless filings.

2.1 Based on your experience and your assessment of what would be fairest to all parties, do you oppose or support Rule 11's "safe harbor" provision? Please mark one.

a) I strongly support Rule 11's safe harbor provision.
b) I moderately support Rule 11's safe harbor provision.
c) I moderately oppose Rule 11's safe harbor provision.
d) I strongly oppose Rule 11's safe harbor provision.
e) I find it difficult to choose because the pros and cons of the safe harbor provision are about equally balanced.
f) I can't say.

2.2 How has the safe harbor provision affected the amount of Rule 11 activity on your docket since it went into effect in 1993? **[**Since your first year as a federal district judge what, if any, changes have you observed in the amount of Rule 11 activity on your docket?**]** Please mark one.

a) Rule 11 activity has increased substantially
b) Rule 11 activity has increased slightly
c) Rule 11 activity has remained about the same
d) Rule 11 activity has decreased slightly
e) Rule 11 activity has decreased substantially
f) I can't say

3. RULE 11 SANCTIONS. **Rule 11** provides that the court "may" impose a sanction when the rule has been violated, leaving the matter to the court's discretion. **Rule 11** also provides that the purpose of Rule 11 sanctions is to deter repetition of the offending conduct, rather than to compensate the parties injured by that conduct; that monetary sanctions, if imposed, should ordinarily be paid into court; and that awards of compensation to the injured party should be made only when necessary for effective deterrence.

Proposed legislation would alter these standards and require that a sanction be imposed for every violation. **Proposed legislation** would also provide that a purpose of sanctions is to compensate the injured party as well as to deter similar conduct and would require that any sanction be sufficient to compensate the injured party for the reasonable expenses and attorney fees that an injured party incurred as a direct result of a Rule 11 violation.

Please indicate for each of the three questions below what you think would be, on balance, the fairest form of Rule 11 for the types of cases you encounter on your docket.

3.1 Should the court be <u>required</u> to impose a monetary or nonmonetary sanction when a violation is found? Please mark one.

a) Yes
b) No
c) I can't say.

3.2 When a sanction is imposed, should it be mandatory that the sanction include an award of attorney fees sufficient to compensate the injured party? Please mark one.

a) Yes, an award of attorney fees should be mandatory if a sanction is imposed.
b) No, an award of attorney fees should not be mandatory.
c) I can't say.

3.3 What should the purpose of Rule 11 sanctions be? Please mark one.

a) deterrence (and compensation if warranted for effective deterrence)
b) compensation only
c) both compensation and deterrence
d) other (please specify in the answer space for question 8)

4. THREE STRIKES PROVISION. **Proposed** legislation would require a federal district court, after it has determined that an attorney violated Rule 11, to "determine the number of times that attorney has violated [Rule 11] in that Federal district court during that attorney's career. If an attorney has violated Rule 11 three or more times, the court must suspend that attorney's license to practice in that court for a period of one year."

4.1 In your experience as a district judge, have you encountered an attorney who has violated Rule 11 three or more times in your district? Please mark one:

a) Yes
b) No
c) I can't say

4.2 In your district, how much effort would be required to obtain information about the number of prior Rule 11 violations committed by an attorney during his or her career? Mark all that apply.

a) Obtaining such information would require little or no additional effort
b) Obtaining such information would require examining prior docket records for past violations
c) Obtaining such information would require creating a new database for Rule 11 violations
d) Obtaining such information would require an affidavit or declaration from each attorney
e) Obtaining such information would require other court action (specify) _____
f) I can't say

4.3 Which of the following statements best captures your expectations regarding the impact of the proposal in deterring groundless litigation in comparison to the cost of implementing the proposal in your district. In assessing the value of the proposal consider the effectiveness of existing procedures in your district for disciplining lawyers found to have engaged in misconduct of the type forbidden by Rule 11.Please mark one:

a) The value of the deterrent effect would greatly exceed its cost
b) The value of the deterrent effect would somewhat exceed its cost
c) The value of the deterrent effect would about equal its cost
d) The cost of implementing the proposal would somewhat exceed the value of the deterrent effect.
e) The cost of implementing the proposal would greatly exceed the value of the deterrent effect.
f) I can't say

5. APPLICATION TO DISCOVERY. Rule 11 does not apply to discovery-related activity because Federal Rules of Civil Procedure 26(g) and 37 establish standards and sanctions that apply to discovery disclosures, requests, responses, objections, and motions. **Proposed** legislation would amend Rule 11 to make it applicable to discovery-related activity.

Proponents of that legislative proposal argue that including discovery under Rule 11 or under Rule 11 together with Rules 26(g) and 37 is more effective in deterring groundless discovery-related activity than Rules 26(g) and 37 alone. **Opponents** of that proposal support the current version of Rule 11 and argue that discovery should not be covered by Rule 11 because the sanctions provisions of Rules 26(g) and 37 are stronger and are specifically designed for the discovery process.
Based on your experience, which of the following options do you believe would be best? Please mark one.

a) Sanctions provisions related to discovery contained only in Rules 26(g) and 37 (the current rule).
b) Sanctions provisions related to discovery contained in both Rules 26(g) and 37 and Rule 11.
c) Sanctions provisions related to discovery consolidated in Rule 11 and eliminated from Rules 26(g) and 37.
d) There is no significant difference among the three options.
e) I can't say.

6. RULE 11 AND OTHER METHODS OF CONTROLLING GROUNDLESS LITIGATION. Federal statutes, the Federal Rules of Civil Procedure, and inherent judicial authority provide judges with a number of opportunities and methods for deterring or minimizing the harmful effects of groundless claims, defenses, or legal arguments (e.g., informal admonitions, Rule 16 and Rule 26(f) conferences, 28 U.S.C. Section 1927, prompt dismissal of groundless claims, summary judgment). Based on your view of how effective or ineffective those other methods are, how, if at all, should Rule 11 be modified? Please mark one.

a) Rule 11 is needed, but it should be modified to increase its effectiveness in deterring groundless filings (even at the expense of deterring some meritorious filings).
b) Rule 11 is needed, and it is just right as it now stands.
c) Rule 11 is needed, but it should be modified to reduce the risk of deterring meritorious filings (even at the expense of failing to deter some groundless filings).
d) Rule 11 is not needed.
e) I can't say.

7. PREFERENCE FOR CURRENT OR PAST VERSIONS OF RULE 11 OR PROPOSED LEGISLATION.

The **version** of **Rule 11 in effect from 1983 to 1993** required that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The appropriate sanction may, but need not, have included an order to pay the opposing party's reasonable attorney fees.

Rule 11 now provides that a court may impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The appropriate sanction may, but need not, include an order to pay the opposing party's reasonable attorney fees. **Rule 11** also provides a safe harbor that permits withdrawal without penalty of a filing that allegedly violates Rule 11, as long as the withdrawal takes place within 21 days of notice that another party intends to file a motion for Rule 11 sanctions.

Proposed legislation would repeal the safe harbor provision in Rule 11 and require that the court shall impose an appropriate sanction on a party or attorney who signed a pleading, motion or other paper in violation of Rule 11 standards. The proposed legislation would also require that the appropriate sanction be sufficient to compensate the parties injured by the conduct, including reasonable expenses and attorney fees. Which of the above approaches would you prefer to use in dealing with groundless litigation? Please mark one.

a) I prefer the current Rule 11
b) I prefer the 1983-1993 version of Rule 11
c) I prefer the proposed legislation
d) I can't say

8. Please use the space provided for any additional comments or suggestions you may have about issues raised in this questionnaire or about Rule 11 in general.

The Federal Judicial Center

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About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training programs for judges and court staff, including satellite broadcasts, video programs, publications, curriculum packages for in-court training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The two divisions work closely with two units of the Director's Office—the Systems Innovations & Development Office and Communications Policy & Design Office—in using print, broadcast, and on-line media to deliver education and training and to disseminate the results of Center research. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and assesses how to inform federal judicial personnel of developments in international law and other court systems that may affect their work.

S. 623

Sunshine in Litigation Act of 2011

Calendar No. 64

112TH CONGRESS
1ST SESSION

S. 623

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 17, 2011

Mr. KOHL (for himself, Mr. GRAHAM, Mr. LEAHY, and Mrs. FEINSTEIN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

MAY 19, 2011

Reported by Mr. LEAHY, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine in Litigation Act of 2011".

SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEALING OF CASES AND SETTLEMENTS.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Restrictions on protective orders and sealing of cases and settlements

"(a)(1) In any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not enter, by stipulation or otherwise, an order otherwise authorized under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order approving a settlement agreement that would restrict the disclosure of such information, or an order restricting access to court records unless in connection with such order the court has first made independent findings of fact that—

"(A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or

"(B)(i) the public interest in the disclosure of past, present, or potential health or safety hazards

~~is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and~~

~~"(ii) the requested order is no broader than necessary to protect the confidentiality interest asserted.~~

~~"(2) No order entered as a result of the operation paragraph (1), other than an order approving a settlement agreement, may continue in effect after the entry of final judgment, unless at the time of, or after, such entry the court makes a separate finding of fact that the requirements of paragraph (1) continue to be met.~~

~~"(3) The party who is the proponent for the entry of an order, as provided under this section, shall have the burden of proof in obtaining such an order.~~

~~"(4) This section shall apply even if an order under paragraph (1) is requested—~~

~~"(A) by motion pursuant to rule 26(c) of the Federal Rules of Civil Procedure; or~~

~~"(B) by application pursuant to the stipulation of the parties.~~

~~"(5)(A) The provisions of this section shall not constitute grounds for the withholding of information in discovery that is otherwise discoverable under rule 26 of the Federal Rules of Civil Procedure.~~

~~"(B) A court shall not approve any party's stipulation or request to stipulate to an order that would violate this section.~~

~~"(b)(1) In any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not approve or enforce any provision of an agreement between or among parties, or approve or enforce an order entered as a result of the operation of subsection (a)(1), to the extent that such provision or such order prohibits or otherwise restricts a party from disclosing any information relevant to such civil action to any Federal or State agency with authority to enforce laws regulating an activity relating to such information.~~

~~"(2) Any such information disclosed to a Federal or State agency shall be confidential to the extent provided by law.~~

~~"(c)(1) Subject to paragraph (2), a court shall not enforce any provision of a settlement agreement described under subsection (a)(1) between or among parties that prohibits 1 or more parties from—~~

~~"(A) disclosing the fact that such settlement was reached or the terms of such settlement, other than the amount of money paid; or~~

"(B) discussing a civil action, or evidence produced in the civil action, that involves matters relevant to the protection of public health or safety.

"(2) Paragraph (1) applies unless the court has made independent findings of fact that—

"(A) the public interest in the disclosure of past, present, or potential public health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

"(B) the requested order is no broader than necessary to protect the confidentiality interest asserted.

"(d) When weighing the interest in maintaining confidentiality under this section, there shall be a rebuttable presumption that the interest in protecting personally identifiable information relating to financial, health or other similar information of an individual outweighs the public interest in disclosure.

"(e) Nothing in this section shall be construed to permit, require, or authorize the disclosure of classified information (as defined under section 1 of the Classified Information Procedures Act (18 U.S.C. App.)).".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 111 of title 28, United

~~States Code, is amended by adding after the item relating to section 1659 the following:~~

~~"1660. Restrictions on protective orders and sealing of cases and settlements.".~~

~~**SEC. 3. EFFECTIVE DATE.**~~

~~The amendments made by this Act shall—~~

~~(1) take effect 30 days after the date of enactment of this Act; and~~

~~(2) apply only to orders entered in civil actions or agreements entered into on or after such date.~~

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine in Litigation Act of 2011".

SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEALING OF CASES AND SETTLEMENTS.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Restrictions on protective orders and sealing of cases and settlements

"(a)(1) Except as provided under subsection (e), in any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not enter, by stipulation or otherwise, an order otherwise authorized under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order approving a settlement agreement that would restrict the disclosure of such infor-

mation, or an order restricting access to court records unless in connection with such order the court has first made independent findings of fact that—

"(A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or

"(B)(i) the public interest in the disclosure of past, present, or potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

"(ii) the requested order is no broader than necessary to protect the confidentiality interest asserted.

"(2) No order entered as a result of the operation paragraph (1), other than an order approving a settlement agreement, may continue in effect after the entry of final judgment, unless at the time of, or after, such entry the court makes a separate finding of fact that the requirements of paragraph (1) continue to be met.

"(3) The party who is the proponent for the entry of an order, as provided under this section, shall have the burden of proof in obtaining such an order.

"(4) This section shall apply even if an order under paragraph (1) is requested—

"(A) by motion pursuant to rule 26(c) of the Federal Rules of Civil Procedure; or

"(B) by application pursuant to the stipulation of the parties.

"(5)(A) The provisions of this section shall not constitute grounds for the withholding of information in discovery that is otherwise discoverable under rule 26 of the Federal Rules of Civil Procedure.

"(B) A court shall not approve any party's stipulation or request to stipulate to an order that would violate this section.

"(b)(1) In any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not approve or enforce any provision of an agreement between or among parties, or approve or enforce an order entered as a result of the operation of subsection (a)(1), to the extent that such provision or such order prohibits or otherwise restricts a party from disclosing any information relevant to such civil action to any Federal or State agency with authority to enforce laws regulating an activity relating to such information.

"(2) Any such information disclosed to a Federal or State agency shall be confidential to the extent provided by law.

"(c)(1) Subject to paragraph (2), a court shall not enforce any provision of a settlement agreement described under subsection (a)(1) between or among parties that prohibits 1 or more parties from—

"(A) disclosing the fact that such settlement was reached or the terms of such settlement, other than the amount of money paid; or

"(B) discussing a civil action, or evidence produced in the civil action, that involves matters relevant to the protection of public health or safety.

"(2) Paragraph (1) applies unless the court has made independent findings of fact that—

"(A) the public interest in the disclosure of past, present, or potential public health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

"(B) the requested order is no broader than necessary to protect the confidentiality interest asserted.

"(d) When weighing the interest in maintaining confidentiality under this section, there shall be a rebuttable presumption that the interest in protecting personally identifiable information relating to financial, health or other similar information of an individual outweighs the public interest in disclosure.

"(e) Nothing in this section—

"(1) shall prohibit a court from entering an order that would restrict the disclosure of information, or an order restricting access to court records, if in either instance such order is necessary to protect from public disclosure—

"(A) information classified under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy; or

"(B) intelligence sources and methods; or

"(2) shall be construed to permit, require, or authorize the disclosure of information that—

"(A) is classified under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy; or

"(B) reveals intelligence sources and methods.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 111 of title 28, United States Code, is amended by adding after the item relating to section 1659 the following:

"1660. Restrictions on protective orders and sealing of cases and settlements.".

SEC. 3. EFFECTIVE DATE AND APPLICATION.

The amendments made by this Act shall—

(1) take effect 30 days after the date of enactment of this Act;

(2) apply only to orders entered in civil actions or agreements entered into on or after the effective date of this Act; and

(3) not provide a basis for the—

(A) granting of a motion to reconsider, modify, amend or vacate a protective order or settlement order entered into before the effective date of this Act; or

(B) reversal on appeal of a protective order or settlement order entered into before the effective date of this Act.

Calendar No. 64

112TH CONGRESS
1ST SESSION

S. 623

A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

MAY 19, 2011

Reported with an amendment

H.R. 592

Sunshine in Litigation Act of 2011

I

112TH CONGRESS
1ST SESSION

H. R. 592

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 9, 2011

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

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A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine in Litigation Act of 2011".

SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEALING OF CASES AND SETTLEMENTS.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Restrictions on protective orders and sealing of cases and settlements

"(a)(1) In any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not enter, by stipulation or otherwise, an order otherwise authorized under rule 26(c) of the Federal Rules of Civil Procedure restricting the disclosure of information obtained through discovery, an order otherwise authorized approving a settlement agreement that would restrict the disclosure of such information, or an order otherwise authorized restricting access to court records unless in connection with such order the court has first made independent findings of fact that—

"(A) such order would not restrict the disclosure of information which is relevant to the protection of public health or safety; or

"(B)(i) the public interest in the disclosure of past, present, or potential public health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information or records in question; and

"(ii) the requested order is no broader than necessary to protect the confidentiality interest asserted.

"(2) No order entered as a result of the operation of paragraph (1), other than an order approving a settlement agreement, may continue in effect after the entry of final judgment, unless at the time of, or after, such entry the court makes a separate finding of fact that the requirements of paragraph (1) continue to be met.

"(b) In any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, a court shall not enforce any provision of an agreement between or among parties to a civil action, or enforce an order entered as a result of the operation of subsection (a)(1), to the extent that such provision or such order prohibits or otherwise restricts a party from disclosing any information relevant to such civil action to any Federal or State agency with authority to enforce laws regulating an activity relating to such information.

"(c)(1) Subject to paragraph (2), a court shall not enforce any provision of a settlement agreement in any civil action in which the pleadings state facts that are relevant to the protection of public health or safety, between or among parties that prohibits one or more parties from—

"(A) disclosing the fact that such settlement was reached or the terms of such settlement (excluding any money paid) that involve matters relevant to the protection of public health or safety; or

"(B) discussing matters relevant to the protection of public health or safety involved in such civil action.

"(2) Paragraph (1) applies unless the court has made independent findings of fact that—

"(A) the public interest in the disclosure of past, present, or potential public health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information in question; and

"(B) the requested order is no broader than necessary to protect the confidentiality interest asserted.

"(d) Notwithstanding subsections (a)(1)(B)(i) and (c)(2)(A), when weighing the interest in maintaining confidentiality under this section, there shall be a rebuttable presumption that the interest in protecting personally identifiable information of an individual outweighs the public interest in disclosure.

"(e) Nothing in this section shall be construed to permit, require, or authorize the disclosure of classified infor-

mation (as defined under section 1 of the Classified Information Procedures Act (18 U.S.C. App.)).".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 111 of title 28, United States Code, is amended by adding after the item relating to section 1659 the following:

"1660. Restrictions on protective orders and sealing of cases and settlements.".

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act shall—

(1) take effect 30 days after the date of enactment of this Act; and

(2) apply only to orders entered in civil actions or agreements entered into on or after such date.

○

May 2, 2011 Letter to Sen. Leahy re S. 623

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

May 2, 2011

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

Dear Mr. Chairman:

We write on behalf of the Judicial Conference Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure to oppose the Sunshine in Litigation Act of 2011 (S. 623), which was introduced on March 17, 2011. The Rules Committees have consistently opposed the similar protective-order bills regularly introduced since 1991. Our letters opposing such bills are available on request. Our opposition to S. 623, like the opposition to those earlier bills, is based in part on the fact that they are inconsistent with the Rules Enabling Act, 28 U.S.C. §§ 2071–2077. Our opposition is also based on the specific provisions of S. 623 and similar earlier bills.

Bills that would amend the Civil Rules to regulate the issuance of protective orders in discovery, similar to S. 623, have been introduced regularly since 1991. Like S. 623, these proposed bills would require courts to make particularized findings of fact that a discovery protective order would not restrict the disclosure of information relevant to the protection of public health and safety. Under the Rules Enabling Act, the Rules Committees studied Rule 26(c) to learn about the problems that these bills seek to solve and to bring the strengths of the Rules Enabling Act process to bear on any problems that might be found. Under that process, the Committees carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, and initiated and evaluated empirical research studies. The Committees' work led to the conclusions that: (1) there

was no evidence that discovery protective orders create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery will become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that adds conditions before any discovery protective order could be entered would impose significant burdens on the court system, resulting in increased delay and costs for litigants; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available.

1. Proposed Legislation Amending Rule 26(c) of the Federal Rules of Civil Procedure

As part of its careful study of the issues, the Rules Committees asked the Federal Judicial Center (FJC) to undertake an empirical study on whether discovery protective orders issued in federal courts were operating to keep information about public safety or health hazards from the public. The FJC examined 38,179 civil cases filed in the District of Columbia, the Eastern District of Michigan, and the Eastern District of Pennsylvania from 1990 to 1992. The study showed that discovery protective orders were requested in about 6% of civil cases; most requests were made by motion; courts carefully reviewed such motions and denied or modified a substantial proportion of them; about one-quarter of the requests were made by party stipulations that courts usually accept; and most protective orders restricting parties from disclosing discovery material were entered in cases other than personal injury cases, in which public health and safety issues are most likely to arise.

Since the FJC study, the need for protective orders to maintain the confidentiality of highly sensitive personal and commercial information has only increased. The explosive growth in electronically stored information and the fact that most discovery is electronic, as well as the federal courts' adoption of electronic court filing systems that permit public remote electronic access to court files, have increased the risks of unduly imposing on privacy interests. Protective orders to safeguard against dissemination of highly personal and sensitive information are critical to both plaintiffs and defendants. If protective orders are restricted, litigation burdens are increased and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal information. Section 1660(d) of the proposed legislation, which provides a rebuttable presumption that the interest in protecting certain personally identifiable information of an individual outweighs the public interest in disclosure, is inadequate reassurance. The proposed legislation would impose a cumbersome and time-consuming process that is much less likely to accurately identify and protect confidential and sensitive personal or proprietary information than current protective order practices. Litigants would be required to absorb the added costs and delays of the process and bear an increased risk of disclosure of sensitive information.

The need for protective orders for effective discovery management has also increased with the explosive growth in electronically stored information. Even relatively small cases often involve huge volumes of information. Relying on the ability to designate information as confidential, parties voluntarily produce much information without the need for extensive direct judicial supervision. If obtaining an enforceable protective order required item-by-item judicial consideration to

determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, that would create discovery disputes. Requiring courts to review information—which can often amount to thousands or even millions of pages—to make such determinations, and requiring parties to litigate and courts to resolve related discovery disputes, would impose significant costs, burdens, and delays on the discovery process. Such satellite litigation would increase the cost of litigation, lead to orders refusing to permit discovery into some information now disclosed under protective orders, add to the pressures that encourage litigants to pursue nonpublic means of dispute resolution, and force some parties to abandon the litigation.

The Committees' study revealed no significant problem of protective orders impeding access to information that affects the public health or safety. Close examination of the commonly cited illustrations has shown that in these cases, information sufficient to protect public health or safety was publicly available from other sources. And the case law shows that when parties file motions for protective orders, courts review them carefully and grant only the protection needed, recognizing the importance of public access to court filings. The case law also shows that courts reexamine protective orders if intervenors or third parties raise public health or safety concerns about them.

The Committees' careful study led to the conclusion that no change to the present protective-order practice is warranted. The Committees' conclusion is grounded in case law, studies, and analyses developed and reviewed over the past 15 years.

The Rules Committees also asked the FJC to do an extensive empirical study on court orders that limit the disclosure of settlement agreements filed in the federal courts. That study showed no need for legislation like S. 623. Both the discovery protective order and the settlement agreement studies have previously been provided to the Senate Judiciary Committee.[1]

2. Specific Concerns about S. 623

a. Section 1660(a)(1): The Scope of S. 623

S. 623 is narrower than some earlier protective-order bills because it is limited to cases in which the pleadings "state facts that are relevant to the protection of public health or safety." The language recognizes that most cases in the federal courts do not implicate public health or safety and should not be affected by the added requirements S. 623 would impose. But the provisions defining the scope of S. 623 are problematic. In many cases, it would not be possible for the court to determine by reviewing the pleadings whether S. 623 applies. The standard of "facts that are relevant to the protection of public health or safety" is so broad and indefinite that it will either sweep up many cases having little to do with public health or safety and impose on all these cases the costly and time-consuming requirements of S. 623, or require the parties and court to spend

[1] Additional copies can be obtained at:
http://www.fjc.gov/public/pdf.nsf/lookup/0029.pdf/$file/0029.pdf;
http://www.cklawreview.com/wp-content/uploads/vol81no2/Reagan.pdf;
http://www.fjc.gov/public/pdf.nsf/lookup/sealset3.pdf/$file/sealset3.pdf.

extensive time and resources litigating whether the statute applies.

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

Once an action is identified as one that based on the pleadings falls under S. 623, the requirement that the court make independent findings of fact before issuing a protective order in discovery is triggered. This requirement is very similar to prior protective-order bills. The Committees have consistently opposed those bills because the procedure they require would delay discovery, increase motions practice, and impose significant and unworkable new burdens on lawyers, litigants, and judges. S. 623 raises the same concerns.

In many cases, parties are unwilling to begin exchanging information in discovery until an enforceable protective order is entered. The vital role protective orders play in effective discovery management is well recognized. The information the parties exchange in discovery often includes highly sensitive personal and private information or extremely valuable confidential information. Plaintiffs as well as defendants have discoverable information that must be protected from public dissemination. And discoverable private or confidential information is often not just in the parties' hands, but may also be held by nonparties such as witnesses, coworkers, patients, customers, and many others. The internet has made it much more difficult to protect private and confidential information and has increased the importance of protective orders.

Protective orders avoid delay and cost by allowing the parties to exchange information in discovery that they would not exchange otherwise without objection or motion, hearing, and court order. The requesting party's chief interest is to get discovery produced as quickly and with as little expense and burden as possible. Protective orders serve that interest by allowing the parties to exchange information—with electronic discovery, in volumes that are often huge—without time-consuming, costly, and burdensome pre-production motions and hearings. S. 623 would frustrate the role of protective orders and would make discovery even more burdensome, time-consuming, and expensive than it already is.

The language of the proposed legislation, as in similar prior bills, calls for a procedure under which no protective order can issue unless and until: (1) the party seeking the order designates all the information that would be produced in discovery subject to restrictions on disclosure; (2) the judge reviews all this information to determine whether any of it is relevant to the protection of public health or safety; (3) if any of the information is determined to be relevant to the protection of public health or safety, the judge determines whether any of that information is subject to a specific and substantial interest in maintaining its confidentiality; (4) the judge then determines whether the public interest in the disclosure of any information about public health or safety hazards is outweighed by that interest; and (5) the judge then decides whether the requested order is no broader than necessary to protect that confidentiality interest. The procedure in the proposed legislation would often require the judge's review to occur relatively early in the litigation, when the judge—who knows less about the case than the parties—is the least informed about the case. Information sought in discovery does not come with labels such as "impacts public health or safety"

or "raises specific and substantial interest in confidentiality." The judge will often simply be unable to tell whether the information she is reviewing is relevant to public health or safety. The judge also will not be able to tell whether there are "specific and substantial" privacy or confidentiality interests or how they should be weighed.

Even in cases in which the pleadings state facts relevant to public health or safety, much of the information sought and produced in discovery will not implicate public health or safety. Indeed, much of the information will not be important or even relevant to the case and will not be used by the parties in litigating the case. But there may be significant amounts of private or confidential information that should be protected from public disclosure. Under the procedure set out in S. 623, a lawyer representing a client—plaintiff or defendant—could not seek a protective order without first doing the expensive and time-consuming work of identifying specific information to be obtained through discovery that would be subject to disclosure restrictions. The judge could not issue a protective order to restrict the dissemination of any information obtained through discovery without making the independent findings of fact as to all that information. The effect would be delay, increased motions, and a reduction in timely, cost-effective access to justice.

In addition to causing delay and increased costs in the cases in which protective orders are sought, the procedure in S. 623 would cause delays in access to the federal court system in all cases. If judges have to look through every document produced in discovery in cases in which a protective order is sought in order to be able to make the findings required by the legislation, that will take time away from other pressing court business that litigants expect judges to take care of in a timely manner.

Comparing the procedure under S. 623 with the protective-order practice followed under current law in the federal courts further illustrates problems the legislation would create. Under current law, when the parties ask the court to enter a protective order before discovery begins, the language of Rule 26(c) and the case law require the court to find good cause for entering such an order, even if the parties agree on the terms. In most cases in which a discovery protective order is sought, the court makes the good-cause determination by examining the nature of the case and the types or categories of information that are likely to be exchanged in discovery. Neither the parties nor the court is required to conduct a time-consuming and burdensome pre-discovery review of all the information that will be produced. But such time-consuming and burdensome pre-discovery review is required by the language of S. 623, and will result in increased costs and delays.

The protective order typically sets up a procedure for the parties to designate documents exchanged in discovery—as opposed to filed with the court—as confidential, restricting their dissemination. Most protective orders include "challenge provisions" under which the receiving party or third parties may dispute the designation of a particular document or categories of documents as confidential. Even without such challenge provisions, the case law provides this right. Once the requesting party—who knows the case much better than the judge—gets the documents in discovery and can review them, that party may ask the court to permit the dissemination of documents designated as confidential, to modify the terms of the protective order, or to dissolve the protective order. Among the reasons for modification are the relevance of the documents to

protecting public health or safety and the need to bring them to the appropriate regulatory agency, and the desire to use the documents in related litigation. The court can effectively and efficiently consider such requests because they are focused on specific documents or information. With this focus, the court is able to resolve the requests by applying the factors the case law establishes, including the protection of public health or safety.

The procedures followed under current law meet the goals of S. 623, including in the relatively small number of cases filed in federal courts that implicate public health or safety, without the grave additional burdens, costs, and delays S. 623 would impose. In contrast, the procedure established under S. 623 is ineffective to meet its purpose and would create severe problems in discovery.

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

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

This distinction between the standard for protecting the confidentiality of information exchanged in discovery and the standard for filing under seal is critical. It reflects the longstanding recognition that while there is no right of public access to information exchanged between litigants in discovery, there is a presumptive right of public access to information that is filed in court and used in deciding cases. Courts require a much more stringent showing to seal documents filed in court than to limit dissemination of documents exchanged in discovery but never filed with the court.
Section 1660(a)(1) reduces the standard necessary to seal documents filed in court and collapses it into the standard necessary to restrict public dissemination of documents exchanged in discovery. As a result, S. 623 weakens the right of public access to court documents.

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

Section 1660(a)(2) would make a discovery protective order unenforceable after final judgment unless the judge makes separate findings of fact that each of the requirements of (a)(1)(A) and (B) are met. The burden of proof provision in (a)(3) requires that the need for continuing

protection be demonstrated as to all the information obtained in discovery subject to the protective order. Under current practice, the protective order often continues in effect, subject to requests made by either parties or nonparties to release documents or information. Once a party or third party identifies documents or information for which disclosure is sought, the burden of proof is much clearer and efficiently applied. The court is able to effectively and efficiently determine whether the protective order should be modified or lifted because the focus is on specifically identified documents or information. This current practice is adequate to meet the purposes of S. 623 without the added burdens, delays, and costs the bill would add.

Section 1660(a)(2) would greatly add to the costs and burdens of conducting discovery because parties could not be confident that even the most sensitive information they produced would remain subject to the protective order provisions when the case ended. The great importance of limiting access to such highly confidential private information is evidenced by the frequent use in protective orders of "attorneys' eyes only" provisions, which preclude a receiving attorney from sharing certain information received in discovery even with her clients. Such provisions are frequently used in litigation involving complex technology. The parties involved in such litigation often require the return or destruction of their highly confidential and proprietary materials at the conclusion of litigation, to ensure that materials so confidential that they could not even be shared with the receiving attorney's client during the litigation remain confidential when the litigation ends. Such provisions are also used in many other cases in which highly sensitive and private information about both parties and nonparties is obtained in discovery. It is essential to the effective and efficient operation of discovery that litigants be able to rely on the continuing confidentiality of information produced, including after the case ends, subject to the right of others to ask the court to permit broader dissemination of specific information for reasons that could include relevance to public health or safety. S. 623 destroys the reliability that makes protective orders effective, with no evidence that such a step is needed.

e. The Provisions Relating to Orders Approving Settlement Agreements

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

There are very few federal court orders approving settlement agreements. Settlements are generally a matter of private contract. Settlement agreements usually are only brought to a court for approval if the applicable law requires it, as in settlements on behalf of minors or absent class members. Similarly, federal courts are rarely called on to enforce settlement agreements. Unless the agreement specifically invokes a court's continuing jurisdiction or an independent basis for

jurisdiction applies, enforcement actions are generally brought in state courts. Because federal courts are rarely involved in approving or enforcing settlement agreements, the settlement provisions in S. 623 are an ineffective means of addressing the concerns behind the proposed legislation.

The extensive empirical study done by the FJC on court orders that limit the disclosure of settlement agreements filed in the federal courts and a follow-up study showed that in the few cases in which a potential public health or safety hazard might be involved and in which a settlement agreement was sealed by court order, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints identified the three most critical pieces of information about possible public health or safety risks: the risk itself, the source of that risk, and the harm that allegedly ensued. In many cases, the complaints went considerably further. The complaints, as well as other documents, provided the public with access to information about the alleged wrongdoers and wrongdoings, without the need to also examine the settlement agreement.

Based on the relatively small number of federal cases involving any sealed settlement agreement and the availability of other sources to inform the public of potential hazards in these few cases, the Rules Committees concluded that a statute restricting confidentiality provisions in settlement agreements is unnecessary and unlikely to be effective. S. 623 does not change these conclusions. Its primary effect is likely to be an added barrier to access to the federal courts by making it more difficult and cumbersome to resolve disputes, sending more disputes to private mediation or other avenues where there is no public access to information at all.

3. The Civil Rules Committee's Continued Work

In May 2010, the Civil Rules Committee sponsored an important conference on civil litigation at Duke University Law School. That conference addressed problems of costs, delays, and barriers to access at every stage ranging from pre-litigation to pleadings, motions, discovery, case-management, and trial. Many studies were conducted and many papers were prepared in conjunction with the conference.[2] It is worth noting that in all the studies conducted, the papers submitted, and the criticisms of and suggestions for improving the present system, no one raised problems with protective orders or orders limiting access to settlement agreements filed with the federal courts. This further underscores the lack of any need for legislation.

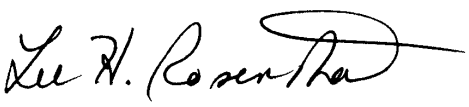
The Civil and Standing Rules Committees are deeply committed to identifying problems with the federal civil justice system that can be addressed by changes to the Federal Rules of Civil Procedure, and to making those changes through the process Congress established—the Rules Enabling Act. As part of that process, the Civil Rules Committee is continuing to monitor the case law under Rule 26(c) to ensure that it is not operating to prevent public access to important information about public health or safety. A memorandum has been prepared setting out the case law in every circuit on entering protective orders, modifying protective orders, and entering sealing

[2] The wide array of papers prepared for the conference are available on the conference's website at http://civilconference.uscourts.gov.

orders. The case law set out in the memo shows that courts are attuned to the public interest and have developed procedures for addressing the need to produce discovery materials to other litigants and agencies. The memo on protective order case law is available online.[3] The Advisory Committee continues to monitor the case law and protective order practice to ensure that rule amendments are not needed.

The Rules Committees very much appreciate the opportunity to express our views and share our concerns. If it would be useful, we are available to discuss these issues. Thank you for your consideration and for the continued dialogue on improving the system of justice in our federal courts.

Sincerely,



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

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

cc: Democratic Members, Judiciary Committee

Identical letter sent to: Honorable Charles E. Grassley

[3] The memo is available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Caselaw_Study_of_Discovery_Protective_Orders.pdf.

H.R. 3041

Federal Consent Decree Fairness Act

I

112TH CONGRESS
1ST SESSION

H. R. 3041

To amend chapter 111 of title 28, United States Code, to limit the duration of Federal consent decrees to which State and local governments are a party, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 23, 2011

Mr. COOPER (for himself, Mr. DAVIS of Kentucky, Mr. PAUL, and Mr. SMITH of Texas) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend chapter 111 of title 28, United States Code, to limit the duration of Federal consent decrees to which State and local governments are a party, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Federal Consent Decree Fairness Act".

SEC. 2. FINDINGS.

Congress finds that the United States Supreme Court, in its unanimous decision in Frew v. Hawkins, 540 U.S. 431 (2004), found the following:

(1) Consent decrees may "lead to federal court oversight of state programs for long periods of time even absent an ongoing violation of federal law,". 540 U.S. 431, 441.

(2) "If not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees involving state officeholders may improperly deprive future officials of their designated legislative and executive powers.". 540 U.S. 431, 441.

(3) "The federal court must exercise its equitable powers to ensure that when the objects of the decree have been attained, responsibility for discharging the State's obligations is returned promptly to the State and its officials.". 540 U.S. 431, 442.

(4) "As public servants, the officials of the State must be presumed to have a high degree of competence in deciding how best to discharge their governmental responsibilities.". 540 U.S. 431, 442.

(5) "A State, in the ordinary course, depends upon successor officials, both appointed and elected, to bring new insights and solutions to problems of

allocating revenues and resources. The basic obligations of federal law may remain the same, but the precise manner of their discharge may not.". 540 U.S. 431, 442.

SEC. 3. LIMITATION ON CONSENT DECREES.

(a) IN GENERAL.—Chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"§ 1660. Consent decrees

"(a) DEFINITION.—In this section, the term 'consent decree'—

"(1) means any order imposing injunctive or other prospective relief against a State or local government, or a State or local official against whom suit is brought, that is entered by a court of the United States and is based in whole or part upon the consent or acquiescence of the parties; and

"(2) does not include—

"(A) any private settlement agreement;

"(B) any order arising from an action filed against a government official that is unrelated to his or her official duties;

"(C) any order entered by a court of the United States to implement a plan to end segregation of students or faculty on the basis of

race, color, or national origin in elementary schools, secondary schools, or institutions of higher education; and

"(D) any order entered in any action in which one State is an adverse party to another State.

"(b) LIMITATION ON DURATION.—

"(1) IN GENERAL.—A State or local government, or a State or local official who is a party to a consent decree (or the successor to that individual) may file a motion under this section with the court that entered the consent decree to modify or terminate the consent decree upon the earliest of—

"(A) 4 years after the consent decree is originally entered by a court of the United States, regardless of whether the consent decree has been modified or reentered during that period;

"(B) in the case of a civil action in which a State or an elected State official is a party, the date of expiration of the term of office of the highest elected State official who is a party to the consent decree;

"(C) in the case of a civil action in which a local government or elected local government

official is a party, the date of expiration of the term of office of the highest elected local government official who is a party to the consent decree;

"(D) in the case of a civil action in which the consent to the consent decree was authorized by an appointed State or local official, the date of expiration of the term of office of the elected official who appointed that State or local official, or the highest elected official in that State or local government; or

"(E) the date otherwise provided by law.

"(2) BURDEN OF PROOF.—

"(A) IN GENERAL.—With respect to any motion filed under paragraph (1), the burden of proof shall be on the party who originally filed the civil action to demonstrate that the denial of the motion to modify or terminate the consent decree or any part of the consent decree is necessary to prevent the violation of a requirement of Federal law that—

"(i) was actionable by such party; and

"(ii) was addressed in the consent decree.

"(B) FAILURE TO MEET BURDEN OF PROOF.—If a party fails to meet the burden of proof described in subparagraph (A), the court shall terminate the consent decree.

"(C) SATISFACTION OF BURDEN OF PROOF.—If a party meets the burden of proof described in subparagraph (A), the court shall ensure that any remaining provisions of the consent decree represent the least restrictive means by which to prevent such a violation.

"(3) RULING ON MOTION.—

"(A) IN GENERAL.—The court shall rule expeditiously on a motion filed under this subsection.

"(B) SCHEDULING ORDER.—Not later than 30 days after the filing of a motion under this subsection, the court shall enter a scheduling order that—

"(i) limits the time of the parties to—

"(I) file motions; and

"(II) complete any required discovery; and

"(ii) sets the date or dates of any hearings determined necessary.

"(C) STAY OF INJUNCTIVE OR PROSPECTIVE RELIEF.—In addition to any other orders authorized by law, the court may stay the injunctive or prospective relief set forth in the consent decree in an action under this subsection if a party opposing the motion to modify or terminate the consent decree seeks any continuance or delay that prevents the court from entering a final ruling on the motion within 180 days after the date on which the motion is filed.

"(c) OTHER FEDERAL COURT REMEDIES.—The provisions of this section shall not be interpreted to prohibit a Federal court from entering a new order for injunctive or prospective relief to the extent that it is otherwise authorized by Federal law.

"(d) AVAILABLE STATE COURT REMEDIES.—The provisions of this section shall not prohibit the parties to a consent decree from seeking appropriate relief under State law.".

(b) CONFORMING AMENDMENT.—The table of sections for chapter 111 of title 28, United States Code, is amended by adding at the end the following:

"1660. Consent decrees.".

SEC. 4. GENERAL PRINCIPLES.

(a) NO EFFECT ON OTHER LAWS RELATING TO MODIFYING OR VACATING CONSENT DECREES.—Nothing

in the amendments made by section 3 shall be construed to preempt or modify any other provision of law providing for the modification or vacating of a consent decree.

(b) FURTHER PROCEEDINGS NOT REQUIRED.—Nothing in the amendments made by section 3 shall be construed to affect or require further judicial proceedings relating to prior adjudications of liability or class certifications.

SEC. 5. DEFINITION.

In this Act, the term "consent decree" has the meaning given that term in section 1660(a) of title 28, United States Code, as added by section 3 of this Act.

SEC. 6. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect on the date of the enactment of this Act and apply to any consent decree regardless of—

(1) the date on which the order of the consent decree is entered; or

(2) whether any relief has been obtained under the consent decree before such date of enactment.

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December 9, 2011 Letter to Rep. Franks re the “Costs and Burdens of Civil Discovery”

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

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REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

December 9, 2011

Honorable Trent Franks
Chairman
Subcommittee on the Constitution
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We understand that the Subcommittee on the Constitution is holding a hearing on December 13 to address "The Costs and Burdens of Civil Discovery." On behalf of the Judicial Conference's Committee on Rules of Practice and Procedure (the "Standing Rules Committee") and the Advisory Committee on Civil Rules (the "Advisory Committee"), we write to provide you an update on the Advisory Committee's work on reducing the costs, burdens, and delays of discovery in civil cases and request that it be made part of the record of your hearing. The Rules Committees understand that discovery is an important issue to all litigants, whether plaintiffs or defendants, and are closely examining ways to improve the current system. Thus, we understand the impetus for this hearing and look forward to learning additional facts it may develop on this important subject.

As the discussion below demonstrates, the Rules Enabling Act process for examining and addressing these concerns is already well underway. The Advisory Committee is taking a close look at discovery and other aspects of civil litigation to explore ways to reduce costs, burdens, and delays. We urge you to allow the Rules Committees to continue their consideration of these issues through the thorough, deliberate, and time-tested procedure Congress created in the Rules Enabling Act.

Preservation and Sanctions

The Advisory Committee is engaged in an extensive study of the difficulties facing litigants, courts, and third parties in dealing with issues related to preserving documents and information for litigation and the related issue of the sanctions imposed when preservation obligations are not met. In May 2010, the Committee hosted a conference on civil litigation at Duke University (the "2010 Conference") to examine ways to address costs and delays in the federal civil justice system. The Conference gathered over 200 judges, lawyers, in-house counsel, state judges, and nonprofit organizations to consider the state of the civil justice system. The Conference had numerous panels devoted to particular topics. The panelists, as well as many other organizations, submitted empirical data and papers on a variety of topics relating to the civil justice system.[1] A significant amount of the work of the 2010 Conference was devoted to electronic discovery. The Conference resulted in a strong recommendation that the Advisory Committee consider ways to provide more clarity and guidance on preservation obligations and spoliation sanctions through changes to the Federal Rules of Civil Procedure. As a result, the Committee and its Discovery Subcommittee have been closely examining potential rule amendments. The Discovery Subcommittee began work on preservation immediately after the 2010 Conference and has met repeatedly over the past year and a half to focus its work on this issue.

The Subcommittee commissioned research into how federal courts throughout the country are addressing triggers for the preservation of electronic information, the scope of the preservation obligation, and sanctions for the failure to preserve such information.[2] The Subcommittee asked the Federal Judicial Center ("FJC") to conduct empirical research on motions for federal court sanctions based on allegations of spoliation of evidence.[3] The Subcommittee also commissioned research on statutes, regulations, and rules requiring preservation at the national, state, and local level, to assist in its examination of how other preservation obligations might interact with obligations imposed by courts and potential rule amendments.[4]

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[1]The empirical data and papers submitted for the 2010 Conference are available at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DukeWebsiteMsg.aspx.

[2]The research is summarized in a long memorandum available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Case_Law_on_Potential_Preservation_2011-11.pdf.

[3]The results of the FJC study are available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/DallasMiniConf_Empirical_Data/Federal%20Judicial%20Center.pdf.

[4]The results of the research are summarized in a memorandum available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Laws%20Imposing%20Preservation%20Obligations.pdf.

In September of this year, the Subcommittee hosted a one-day conference in Dallas, Texas, to further examine possible rulemaking responses to preservation and spoliation sanction issues. The Subcommittee invited about 25 participants, including in-house counsel, plaintiff and defense lawyers, academics, judges, and technology experts, to provide their views on these issues. The Subcommittee circulated ideas for possible rule amendments in advance of the conference to focus the conversation on possible solutions to current preservation burdens. The Subcommittee received very valuable input at the Dallas conference. The Subcommittee also received, and continues to receive, written commentary and proposals from participants and other organizations interested in these issues.[5]

At the Advisory Committee's recent meeting on November 7 and 8, 2011, the Subcommittee solicited the views of the full Committee on whether and how to proceed with rulemaking efforts to address preservation issues. The agenda materials included a 31-page report from the Subcommittee, charts summarizing case law from around the country on relevant issues, minutes of the Dallas conference and discussions of the Subcommittee, and 13 submissions from corporations and organizations on the issues being addressed by the Subcommittee.[6] A large number of observers, including some congressional staff, attended the Committee meeting. The discussion was robust. The Subcommittee will continue to consider both providing detailed guidance on preservation obligations and providing more clarity on sanctions, as well as other rulemaking possibilities for addressing preservation concerns. The Subcommittee plans to present a recommendation on how to proceed at the next Advisory Committee meeting, scheduled for March 22 and 23, 2012.

Committee Work on Litigation Costs

Another subcommittee formed after the 2010 Duke Conference (the "2010 Conference Subcommittee") is addressing other proposals for reducing costs in civil litigation. This Subcommittee is considering possible rulemaking approaches, as well as other means for addressing costs and efficiency concerns, such as judicial education, lawyer education, revisions to the *Benchbook for U.S. District Court Judges*, and guides to "best practices." The FJC has already undertaken several projects to emphasize the advantages of active case management in reducing litigation time and expense.

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[5]All of the written materials that were prepared by the Subcommittee and considered at the September conference, as well as submissions received by the Advisory Committee, are posted on the federal rulemaking website at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx.

[6]The full agenda materials are available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf. The materials considered by the Committee in connection with its discussion of preservation issues can be found at pages 53–469 of the pdf file.

Empirical work also continues to be done to build on the work undertaken for the 2010 Conference. The FJC has concluded the first phase of work on the impact of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), on federal pleading practice,[7] and is continuing work on a second phase of that project.[8] The FJC is also examining the frequency and timing of initial case-management orders.[9] Another project on discovery conferences conducted under Civil Rule 26(f) is expected to begin early next year. Other organizations are also conducting empirical research on the costs of discovery, and the Subcommittee will be considering the results of their work.

The 2010 Conference Subcommittee, together with the FJC, is also gathering information on pilot projects being conducted in federal courts around the country. These include a pilot project in the Southern District of New York on managing complex cases more efficiently, a project in the Seventh Circuit on reducing the complexity of electronic discovery, and an expedited trial program adopted in the Northern District of California.

The 2010 Conference Subcommittee has worked with a group of plaintiffs' and defense lawyers to develop a set of standard discovery requests that should significantly streamline the discovery process in employment cases. Such cases are a significant part of federal district court dockets.[10] The protocols were presented at the Advisory Committee's meeting and will be offered as a model for adoption by individual judges around the country. Experience in those courts may encourage more general adoption and may inspire other groups to develop similar discovery protocols to simplify and reduce the cost of discovery in federal civil litigation.

The 2010 Conference Subcommittee is examining the possibility of several rulemaking responses to concerns about costs and delays in civil litigation. Many proposals are currently being considered, including reducing the amount of time before a scheduling order is entered; emphasizing cooperation among the parties in the rules; giving even greater emphasis to proportionality limits on discovery; implementing methods to avoid evasion in responding to discovery; setting presumptive limits on certain types of discovery; and implementing a pre-motion conference with the court before discovery motions are filed. The Subcommittee has

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[7]The FJC's first report on motions to dismiss after *Iqbal* is available at http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf.

[8]The FJC's report with an update on its study of motions to dismiss after *Iqbal* is available at http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal2.pdf/$file/motioniqbal2.pdf.

[9]The FJC's report on the timing of scheduling orders and discovery cut-off dates is available at http://www.fjc.gov/public/pdf.nsf/lookup/leetiming.pdf/$file/leetiming.pdf.

[10]*See* SEAN FARHANG, THE LITIGATION STATE 3 (2010) ("Next to petitions by prisoners to be set free, job discrimination lawsuits are the *single largest category* of litigation in federal courts.").

asked the Advisory Committee's reporters to draft rule language so the Subcommittee can consider concrete approaches. The Subcommittee continues to actively solicit suggestions for other innovative ways to make pretrial litigation more efficient and effective.

The Advisory Committee discussed these efforts at its recent meeting.[11]

Conclusion

The Advisory Committee is examining the issue of cost reduction in civil litigation in great detail. Any rulemaking proposals will go through the full Rules Enabling Act process, including publication for public comment and review by the Standing Rules Committee, the Judicial Conference, the Supreme Court, and Congress. This multi-layered process ensures the thorough evaluation of proposals to address problems in litigation, while reducing the possibility of unintended consequences.

We appreciate your consideration of the Rules Committees' current work in this area. We will continue to pursue the goal, as stated in Rule 1 of the Federal Rules of Civil Procedure, of securing the just, speedy, and inexpensive determination of every action in federal court. If you or your staff have any questions, please contact Jonathan Rose, Rules Committee Officer, Administrative Office of the United States Courts, at 202-502-1820.

Sincerely,

Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Committee on Rules
of Practice and Procedure

David G. Campbell
United States District Judge
District of Arizona
Chair, Advisory Committee
on Civil Rules

Identical letter sent to: Honorable Jerrold Nadler

[11]The portion of the November 2011 Committee agenda materials that relate to the 2010 Conference Subcommittee's work can be found at page 567–622 of the materials located at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/CV2011-11.pdf. An addendum to the materials is available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Civil/Tab%20VI%20Appendix%20F%20SDNY%20Pilot%20Project%20for%20Complex%20Litigation.pdf.

S. 1637
Appeal Time Clarification Act

Public Law 112–62
112th Congress

An Act

Nov. 29, 2011
[S. 1637]

To clarify appeal time limits in civil actions to which United States officers or employees are parties.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Appeal Time Clarification Act of 2011.
28 USC 1 note.

SECTION 1. SHORT TITLE.

This Act may be cited as the "Appeal Time Clarification Act of 2011".

28 USC 2107 note.

SEC. 2. FINDINGS.

Congress finds that—

(1) section 2107 of title 28, United States Code, and rule 4 of the Federal Rules of Appellate Procedure provide that the time to appeal for most civil actions is 30 days, but that the appeal time for all parties is 60 days when the parties in the civil action include the United States, a United States officer, or a United States agency;

(2) the 60-day period should apply if one of the parties is—

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States;

(3) section 2107 of title 28, United States Code, and rule 4 of the Federal Rules of Appellate Procedure (as amended to take effect on December 1, 2011, in accordance with section 2074 of that title) should uniformly apply the 60-day period to those civil actions relating to a Federal officer or employee sued in an individual capacity for an act or omission occurring in connection with Federal duties;

(4) the civil actions to which the 60-day periods should apply include all civil actions in which a legal officer of the United States represents the relevant officer or employee when the judgment or order is entered or in which the United States files the appeal for that officer or employee; and

(5) the application of the 60-day period in section 2107 of title 28, United States Code, and rule 4 of the Federal Rules of Appellate Procedure—

(A) is not limited to civil actions in which representation of the United States is provided by the Department of Justice; and

(B) includes all civil actions in which the representation of the United States is provided by a Federal legal officer acting in an official capacity, such as civil actions in which a Member, officer, or employee of the Senate or the House of Representatives is represented by the Office of Senate Legal Counsel or the Office of General Counsel of the House of Representatives.

SEC. 3. TIME FOR APPEALS TO COURT OF APPEALS.

Section 2107 of title 28, United States Code, is amended by striking subsection (b) and inserting the following:

"(b) In any such action, suit, or proceeding, the time as to all parties shall be 60 days from such entry if one of the parties is— Deadline.

"(1) the United States;

"(2) a United States agency;

"(3) a United States officer or employee sued in an official capacity; or

"(4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including all instances in which the United States represents that officer or employee when the judgment, order, or decree is entered or files the appeal for that officer or employee.".

SEC. 4. EFFECTIVE DATE. 28 USC 2107 note.

The amendment made by this Act shall take effect on December 1, 2011.

Approved November 29, 2011.

LEGISLATIVE HISTORY—S. 1637 (H.R. 2633):

HOUSE REPORTS: No. 112–199 (Comm. on the Judiciary) accompanying H.R. 2633.

CONGRESSIONAL RECORD, Vol. 157 (2011):
Oct. 31, considered and passed Senate.
Nov. 18, considered and passed House.

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

December 8, 2011

Honorable Amy Klobuchar
Chairman
Subcommitttee on Administrative
Oversight and the Courts
Committee on the Judiciary
United States Senate
302 Hart Senate Office Building
Washington, DC 20510

Dear Madam Chairwoman:

On behalf of the Judicial Conference's Committee on the Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Appellate Procedure, we write to thank you for your judicious handling of the amendments to the federal rules of procedure and evidence that became effective on December 1, 2011, and particularly for all your work to sponsor and secure the passage of S. 1637, the Appeal Time Clarification Act of 2011.

As you know, the legislation was crucial to align 28 U.S.C. § 2107 with amendments to the Federal Rules of Appellate Procedure that became effective on December 1, 2011. The rule and statutory amendments clarify the time to appeal in civil cases to which a United States officer or employee is a party. Because the time to appeal in a civil case is set both by rule and by statute, the change to the statute was critical to avoid confusion that could imperil appellate rights of federal officers and employees sued in civil cases. In addition, as you know, it was necessary to have the statutory and rule amendments take effect on the same day. We sincerely thank you for ensuring that the legislation was introduced and passed in time to allow the statute and the rules to continue to be aligned.

In addition, we wanted to express our sincere thanks to the Senate Judiciary Committee staffers, who were, as always, exceedingly helpful and courteous. Their able handling of the package of rules amendments and the necessary implementing legislation affecting the Appellate Rules is greatly appreciated.

Thank you again for your assistance in ensuring that the statutory change was made, and done in time to take effect at the same time as the rule amendments. We look forward to continuing to work together to ensure that our civil justice system is working well.

Sincerely,

Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Committee on Rules
of Practice and Procedure

Jeffrey S. Sutton
United States Circuit Judge
Sixth Circuit
Chair, Advisory Committee
on Appellate Rules

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

H.R. 2192

National Guard and Reservist Debt Relief Extension Act

H. R. 2192

One Hundred Twelfth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Wednesday, the fifth day of January, two thousand and eleven

An Act

To exempt for an additional 4-year period, from the application of the means-test presumption of abuse under chapter 7, qualifying members of reserve components of the Armed Forces and members of the National Guard who, after September 11, 2001, are called to active duty or to perform a homeland defense activity for not less than 90 days.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "National Guard and Reservist Debt Relief Extension Act of 2011".

SEC. 2. NATIONAL GUARD AND RESERVISTS DEBT RELIEF AMENDMENT.

Section 4(b) of the National Guard and Reservists Debt Relief Act of 2008 (Public Law 110–438; 122 Stat. 5000) is amended by striking "3-year" and inserting "7-year".

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

TAB 4

Oral Report by
Rules Committee Support Office

TAB 5

Federal Judicial Center Activities

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

I. Budget

As this report is written, the Center, like the rest of the judiciary, does not know what its fiscal year 2012 appropriation will be. Based on actions in the Senate and the House of Representatives in summer 2011, a reduction in the Center's appropriation for fiscal year 2012 of between one and three percent seems likely. Thanks to cost-containment measures instituted previously, even with reductions at these levels the Center would be able to execute all programs and projects that it has already announced for 2012. However, there will be little room for additional programs and projects at the appropriation levels currently projected.

II. Education

A. Update

This report covers the period from July 1, 2011 through December 31, 2011. By the end of the reporting period, the Center will have produced:

- 30 national travel-based programs for over 1,495 participants;
- 53 in-court programs for 2,124 participants; and
- 16 technology-based programs for 1,859 participants.

The Center also produced online and printed programs and resources. Detailed information on recent and upcoming Center programs, products, and resources can be found on FJC Online at http://cwn.fjc.dcn/.

B. Highlights

The Center conducted 17 national workshops, orientation programs, and special focus workshops for judges. These included a national symposium for courts of appeals judges, and national workshops for bankruptcy and magistrate judges. The Center also held orientations for new courts of appeals, district, bankruptcy, and magistrate judges. A workshop for Eighth Circuit appellate and district judges covered topics of particular interest to the judges of that circuit.

The Center also held five special focus programs for judges: Capital Habeas Corpus for United States District Judges; Environmental Law (co-sponsored with Lewis and Clark Law School), Mediation Skills for Magistrate Judges, Water Rights Litigation (co-sponsored with the National Judicial College), and Emerging Issues in Neuroscience (in cooperation with the American Association for the Advancement of Science, the National Center for State Courts, the American Bar Association Judicial Division, and the Dana Foundation).

The Center offers judicial in-court seminars to 15-20 districts each year, providing a menu of subjects from which districts may choose. During the reporting period, one Procedural Fairness and two Science and the Founders seminars were delivered to the requesting districts.

Team workshops delivered for judges and staff together included A Quality Improvement Workshop for Federal Reentry Courts (in cooperation with George Mason University's Center for Advancing Correctional Excellence); an Executive Institute for Chief Bankruptcy Judges and Clerks of Court; and a Facilitating Offender Reentry to Reduce Recidivism workshop (co-

sponsored with the Harvard Law School Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics).

The Center conducted two programs for federal defenders: an orientation seminar for new assistant federal defenders and a national seminar for federal defenders. The Center also held a workshop for circuit mediators.

Seven national and regional in-person programs were conducted for court staff. A national conference was held for bankruptcy clerks of court, bankruptcy appellate panel clerks, bankruptcy administrators, and bankruptcy chief deputy clerks of court. Leadership and management programs for clerk's office staff included workshops for experienced court managers and for new court managers and supervisors. Leadership and management programs for probation and pretrial services staff included a seminar for new deputy chiefs; a Building Outstanding Supervisors program; one strategic planning training-for-trainers workshop; and one strategic planning pilot.

The Center also provides a range of in-district programs for court staff. Out of the 50 programs delivered during the reporting period, the most frequently requested programs were Code of Conduct and Structured Writing. Sixteen technology-based training programs were held for clerks' and probation and pretrial services offices.

Center staff made presentations at ten conferences and educational programs held by the Administrative Office, individual courts, or associations of court employees.

In addition, the Center provided training and curriculum development in support of several Judicial Conference policies and Administrative Office programs.

Preventing Workplace Harassment is an in-district program consisting of two modules—one for managers and supervisors and one for all court staff. The workshop enables participants

to understand what constitutes workplace harassment, types of behaviors that may be interpreted as workplace harassment, how a workplace can become a hostile environment, and how to minimize the occurrence of workplace harassment. It also emphasizes how to respond to harassment if it arises, and how to proceed in the event staff is involved in a workplace harassment investigation. One training-for-trainers program was held in October 2011 to train 15 faculty to facilitate this new in-district program in 2012 and beyond.

The Judges Information Technology training-for-trainers was held in August 2011. The curriculum focused on training court staff to teach judges in their districts how to use information technology to perform judicial functions more efficiently.

Center staff assisted the Administrative Office with the instructional design of a new e-learning program for the Personnel Projection System. The program features a multi-module tutorial designed to teach users the features of the system's new software package, which manages personnel projections.

The Center provided support for on-site training requests for the Administrative Office's circuit-based in-person programs for court unit executives and staff with space and facilities responsibilities.

The Center developed a number of customized in-district performance management programs, and designed a new module for performance management titled Getting the Most from Your Performance Management System. The programs help court supervisors and managers build skills that support effective performance management under the court compensation policy developed by the Judicial Conference.

The Center completed the curriculum design for the Probation and Pretrial Services Monograph 111: Improving Outcomes; Improving Lives seminar, and delivered two seminars

designed to help districts prepare an action plan for implementing the new treatment services policy in Monograph 111, Supervision for Federal Defendants. The curriculum includes major changes to the policy, organizational readiness, coping with barriers to implementation, and an overview of evidence-based practices. Participation in discussions of scenarios in a Blackboard course was a prerequisite for attendance at the travel-based workshops.

The Judicial Resources Committee has expressed interest in educational opportunities for court unit executives. In addition to its existing programs for court unit executives, which include biennial conferences, executive institutes, and a program for new and experienced managers, the Center has begun planning for a more comprehensive educational program for experienced court unit executives, and suggestions have been solicited from some experienced court unit executives. The Center should be able to report more concrete steps at the meeting in June 2012.

C. Administrative Office and Federal Judicial Center Education and Training

Earlier this year, the Administrative Office and the Center began a comprehensive examination of curricula offered by the two agencies. In June 2011, the Administrative Office provided the Center with a list of education and training offerings, compiled by 13 different offices in the Administrative Office. This listing included almost 200 in-person, web-conference, and e-learning programs, as well as hundreds of instructional and informational videos. The Center has been comparing this list with its own offerings, which include roughly the same number of in-person, web-conference, and e-learning programs, along with hundreds more videos, publications, and web resources. A detailed analysis is not yet complete. However, an initial review reveals very few instances of overlap. Most of the programs produced by the Administrative Office address specific tasks or functions under the purview of

the various Administrative Office directorates (e.g., records management, use of the Financial Accounting System for Tomorrow, and Human Resources Management Information System training). Center programs fall into the categories of judicial training (in law, case management, and related adjudicatory tasks and techniques), and leadership and management generally. The Center will continue its review of these curricula and consult with the Administrative Office on any gaps or overlaps identified.

III. Research

Since the Center's last report to the Committee, the Center completed work on 12 major projects, commenced work on ten new major projects, and continued work on 40 others. Most are projects requested by Judicial Conference committees. A full listing of Center research projects and activities is available at FJC Online, http://cwn.fjc.dcn/fjconline/home.nsf/pages/967.01. Below are brief descriptions of projects that may be of special interest to the members of the Committee.

District Court Case Weighting: Follow-up Regarding the 2004 Case Weights. The Center continued its analysis of district court caseload data to determine whether some or all of the 2004 case weights should be updated. The Committee on Judicial Resources has asked the Center to have a study design prepared for consideration at its Spring 2012 meeting.

Study of Recalled Bankruptcy Judges Program. The Committee on the Administration of the Bankruptcy System asked the Center to collect objective data regarding the bankruptcy judges recall service to assist the committee with its efforts to maximize the effectiveness of the recall program as a priority in its strategic plan.

Dodd Frank Wall Street Reform and Consumer Protection Act of 2010: Assistance to Administrative Office with Congressionally mandated Study. The Center provided research

assistance to the Bankruptcy Committee's Dodd-Frank Act working group with the preparation of a July 2011 congressionally mandated report regarding financial institutions. A senior member of the Center's research staff continues to assist a working group convened by the Administrative Office with efforts in anticipation of a July 2012 report to Congress.

Survey of Bankruptcy Court Practices Regarding Applications for Administrative Costs. At the request of the Advisory Committee on Bankruptcy Rules, the Center conducted an online survey of bankruptcy clerks and attorneys regarding practices with applications by parties for case-related administrative costs.

Evaluation of Southern District of New York's Pilot Implementation of Pretrial Case Management Best Practices in Complex Civil Cases. The Center commenced an evaluation in support of work being done by a subcommittee of the Advisory Committee on Civil Rules. The goal is to assess various pretrial costs and delay reduction strategies that are being piloted by the Southern District of New York.

Patent Reform Act of 2011-mandated Pilot Study. The Center has been asked by the Committee on Court Administration and Case Management to conduct an evaluation of the congressionally mandated ten-year pilot program involving the assignment of patent cases in 14 district courts. The pilot formally commenced on September 19, 2011.

Digital Video Recording of Civil Proceedings in the District Court. The Center was also asked by the Court Administration and Case Management Committee to evaluate a three-year Judicial Conference-authorized pilot in 14 district courts, in which the parties in civil cases can jointly consent to digital video recording. The pilot commenced on July 18, 2011.

Survey of Courts Regarding Use of Social Media by Jurors While on Jury Duty. In response to a request by the Court Administration and Case Management Committee, the Center designed and conducted a survey of instances in which jurors were found to have improperly used social media while on active jury duty. The survey also identified districts that have adopted model jury instructions regarding the use of electronic technologies by jurors to research or communicate information about a case.

Issues Related to Motions for Preservation of Electronically Stored Information. The Center completed a report for the Advisory Committee on Civil Rules that contained the results of the analysis of a sample of motions filed in the districts courts for preservation of electronically stored information. The report has also been posted on FJC Online.

Update of the Center's 1997 Pocket Guide for eDiscovery in Civil Cases. This Center publication has been updated to incorporate judges' experiences with eDiscovery and advances in the law since the guide was first published in 1997.

Pocket Guide on Product Liability Cases for Multidistrict Litigation Transferee Judges. This newly published pocket guide is part of the Center's ongoing effort to develop multidistrict litigation resources for transferee judges. Other publications are being planned to assist multidistrict litigation transferee judges with the many unique problems and challenges that often arise in particular types of multidistrict litigation cases.

Third Edition of the Reference Manual on Scientific Evidence. The latest edition of the Center's reference manual was produced in cooperation with the National Academy of Sciences. Following its release in late September 2011, copies were provided to all appellate and district judges.

Evaluation of Prisoner Litigation Mediation Programs in the Eastern District of California. The Center was asked by the chair of a Ninth Circuit resource group to conduct an evaluation of the Eastern District of California's prisoner litigation mediation program. The Center will complete its report of the analysis of the data from more than 100 mediated prisoner cases in the district in early 2012.

Study of Scheduling Orders Under Rule 16 of the Federal Rules of Civil Procedure. At the request of the Advisory Committee on Civil Rules, the Center commenced an examination of the role and use of scheduling orders in civil pretrial case management by district and magistrate judges.

Pocket Guide on Protective Orders. The Center is preparing a guide on protective orders for judges that focuses on civil, criminal, and national security cases. This guide is a follow-up to previous Center research and publications on sealing practices in the district courts.

Survey of Districts' Efforts to Assist Pro Se Bankruptcy Debtors and Creditors. The Center, at the request of the Bankruptcy Committee and the Court Administration and Case Management Committee, conducted separate surveys of the district and bankruptcy clerks' offices regarding their efforts with pro se litigants. The information from both surveys is being made available to assist courts to address pro se litigant-related challenges.

Study of Judge-Involved Federal Offender Reentry Programs. The Center continued its multi-year evaluations of federal reentry programs as requested by the Committee on Criminal Law and as noted in earlier reports. In addition to continuing an experimental evaluation of programs in five districts, the Center commenced a process-descriptive study of the judge-involved reentry programs that were operational prior to December 2010.

IV. Federal Judicial History and International Rule of Law Functions

The Center provides assistance to federal courts and others in developing information and teaching about the history of the federal judiciary. The Center will publish the first two volumes of a projected three-volume documentary history of debates on the federal judiciary in early 2012. In addition, the Center continues to develop new reference materials for the online History of the Federal Judiciary, including information on the circuit allotments of Supreme Court Justices, appropriations for the judicial branch, and historical caseloads in the federal courts.

The Center's Office of International Judicial Relations coordinates its programs with the judiciaries of other nations. Center staff met with judges and court officials representing over 19 countries, including the Director of the Judicial Academy of Argentina, a judicial delegation from the Seychelles, and law students from China. The Center hosted a delegation of judges from Iraq, led by the Chief Justice and including the Director of the Iraqi Judicial Development Institute, for a week-long program on judicial education. The Center also conducted a week-long workshop on opinion writing for members of the judiciary of Georgia, including the Chief Justice and Director of Georgia's judicial training institute. The Center's visiting foreign judicial fellows program received fellows from Korea, Brazil, China, and Kosovo; their research projects included e-discovery and judicial independence.

TAB 6

MEMORANDUM

To: Honorable Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

From: Honorable David G. Campbell, Chair
Advisory Committee on Federal Rules of Civil Procedure

Date: December 2, 2011

Re: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on November 7 and 8, 2011. Draft Minutes of this meeting are attached. The minutes were prepared by the Committee's Reporter, Professor Edward H. Cooper, as was this report.

This Report presents several matters on the Committee agenda for information and possible discussion. In order, they include a possible rule regarding preservation of information for future litigation; initial responses to the proposal to amend Civil Rule 45 that was published for comment last summer; the activities of the Subcommittee that is pursuing issues raised during the conference held at Duke University School of Law in May, 2010, including a presentation on Civil Case Management Practices of the Eastern District of Virginia, Alexandria Division; pleading

standards; the role of Civil Rule 84 forms; class action issues; and action on accumulating agenda items.

Preservation for Litigation

A panel at the Duke Conference urged that there is a great and growing need for guidance on the obligation to preserve information that may be subject to future discovery requests. The primary source of concern seems to arise from electronically stored information. The panel presentation included a detailed list of issues that might be addressed by a preservation rule, and urged that the Committee should begin work toward developing a rule.

The panel invitation was accepted. The Discovery Subcommittee immediately set to work. Initial research by Andrea Kuperman showed that federal courts have a uniform approach to the events that trigger a duty to preserve — with only slight variations in expression, all agree that a duty to preserve can arise before litigation is actually filed. A reasonable expectation that litigation may be filed triggers the duty. There is no uniform case law on the scope, location, or age of information that must be preserved, and there are significant differences among the circuits on what conduct can lead to sanctions for failure to preserve. Some cases permit sanctions on a showing of mere negligence, while others require some form of willfulness or bad faith. One view, for example, is that failure to impose a "written" litigation hold constitutes gross negligence and warrants severe sanctions. Other decisions take different views. An adverse-inference instruction, for example, may be thought warranted only on showing intentional destruction of information for the purpose of preventing its use as evidence, reasoning that only intentional destruction supports a logical inference that the information was adverse to the party who destroyed it.

In addition to Ms. Kuperman's research, the Subcommittee arranged for an FJC study concerning the frequency of spoliation motions in federal court. That study, conducted by Emery Lee, found that spoliation motions were filed in 209 cases, less than one-half of one percent of the 131,992 civil cases filed in 19 districts between 2007 and 2008, and that barely more than half of these motions concerned electronically stored information.

The Subcommittee also conducted a survey of laws that already impose some kind of preservation obligation. The study found a wide array of federal and state statutes and regulations that require preservation of information in a variety of settings.

To aid in its evaluation of possible preservation rules, the Subcommittee developed initial drafts to illustrate three different possible approaches. The first, responding to the cues provided by the Duke panel, included detailed provisions describing the events that trigger a duty to preserve. This draft also describes the scope of the duty in time, backward from the time the trigger is

set, ongoing as information continues to accumulate, and terminating at some point after litigation is finished or the threat of litigation has passed. Scope is defined in other dimensions as well — how many "custodians" must be identified and told to preserve; what breadth of information must be preserved in relation to foreseeable discovery requests; what sources may be disregarded, such as deleted information or information that is difficult to access.

The second draft approach also addressed the duty to preserve directly, but in less detail. Trigger, scope, and duration were addressed, but the primary direction was only to behave reasonably in all dimensions.

The third draft did not directly impose a duty to preserve. Instead, it defined the limits on sanctions for failure to preserve discoverable information that reasonably should be preserved. It also sought to recognize a difference between "sanctions" and remedial measures designed to cure the consequences of a failure to preserve. The discovery sanctions listed in Rule 37(b) or adverse-inference instructions would be treated as sanctions. Allowing extra time for discovery, requiring the party who failed to preserve to pay the costs of seeking substitutes for the vanished information, and like steps would be treated as remedies rather than sanctions. The theory underlying this approach is that it speaks directly to the subject of greatest concern and greatest disagreement among federal cases — sanctions — and will indirectly relieve much uncertainty about the trigger and scope of the duty to preserve.

These drafts were sent to a diverse group of lawyers, technology experts, and e-discovery experts who then came together with the Subcommittee and other Committee members for a miniconference in Dallas on September 9. Many of the participants provided written submissions before the conference began. Other submissions have continued to flow after the conference concluded. The miniconference provided vigorous, wide-ranging, and richly valuable advice. In different ways, with different illustrations, many in-house counsel for large businesses — including one deeply engaged in software design — described present concerns and offered tentative solutions.

Many of the problems described at the miniconference involve costly over-preservation of potentially discoverable information. The participants recognize that the duty to preserve is triggered by a reasonable expectation of litigation. But they are very uncertain as to what it is they must preserve. They also described a great aversion to the risk of sanctions in whatever litigation might actually ensue. The risks feared go beyond the direct impact of sanctions in a particular action. There is great concern about the reputational effect of sanctions — reputable businesses do not want to be branded as evidence destroyers. One result is to preserve information for litigation that is never brought. One

anecdote described spending $5,000,000 to preserve information, with costs increasing by $100,000 a month, for litigation that had not yet been filed. Others, multiplied in different directions, described preserving far greater volumes of information than were ever sought in litigation that actually ensued. Part of the problem is that before an action is brought, there often is no opponent with whom to discuss the claims that may be made, what information should reasonably be preserved, and so on. Another part of the problem is that there is no court available to resolve pre-filing disputes: a letter demanding preservation, for example, may demand far more than is reasonable, and may not lead to an opportunity to work toward reasonable restrictions. It became clear that many highly responsible, sensible, and able lawyers believe that current uncertainties about the duty to preserve elicit costly and wasteful over-preservation.

There was an undercurrent of concern with costs apart from preservation costs. Although voiced indirectly, some participants were concerned that the cost of having preserved information is that it must be searched when discovery requests are made. More information available to search makes for greater search costs.

Participants also noted that preservation issues are not limited to large institutions that typically have massive volumes of information potentially subject to discovery. The obligations of individual parties as well will increasingly be recognized. A personal-injury plaintiff, for example, may talk of the event, injury, and aftermath in e-mail messages, social-network postings, and other media. Written or electronically stored records may be created. There may be no one to educate an individual about preservation obligations until a lawyer is consulted. Perhaps some account must be taken of this likely ignorance in crafting a rule. But it will be important that lawyers recognize the preservation obligation as soon as consulted, and instruct the client. The lawyer's failure may come to harm the client.

Discussion at the miniconference generated considerable disagreement about the steps that might be taken to address preservation problems, and even disagreement whether the time has come to begin to consider draft solutions. The Department of Justice, for an important example, believes that the law should be allowed to develop further, to provide a sounder foundation, before attempting to provide rule-based answers. There is a powerful tension between the desire to preserve information that will support the best possible basis for deciding an action on the merits and the great costs that flow from over-preservation. In addition, crafting a specific preservation rule must confront many specific difficulties. A few illustrations make the point.

Initial deliberations suggested that a preservation rule should begin with the present law that recognizes the duty when there is a reasonable expectation of litigation. But alternatives continue to be pressed, and must be considered. One alternative

would create a duty to preserve only when there is a "reasonable expectation of the certainty of litigation." Another, possessing the virtue of setting a bright line, would create a duty to preserve only on notice that an actual judicial or administrative complaint has been filed.

If a duty to preserve arises before litigation is actually filed, it becomes necessary to define the scope of preservation in relation to the scope of anticipated discovery. It seems natural to define preservation in terms of the Rule 26(b)(1) scope of discovery — not only information relevant to the claim or defense of any party, but also information relevant to the subject matter that becomes discoverable on showing good cause. Since there is no actual complaint as yet, there are no actual claims or defenses and it can be anticipated that anything that bears on the subject matter may become a claim. But that approach threatens to expand the scope of preservation beyond, perhaps far beyond, the claims that actually will be made (if any ever are made). A manufacturer learns that one of its automobiles has gone off the road: preserving all information relevant to the design, manufacture, and distribution of that make and model of automobile may go far beyond the scope of an eventual claim that a tire failed. And the question may arise in reverse. Rule 26(b)(2)(B) protects against discovery of electronically stored information from sources that are not reasonably accessible. But preserving that information may be relatively inexpensive, and events may show good cause for allowing discovery. The duty to preserve might reasonably extend to information not likely to be discoverable. (The same question could arise from communications between a lawyer and an expert that may become a trial witness: Rule 26(b)(4)(C) extends work-product protection to the communications, but work-product protection is defeasible.)

Consideration of specific triggers led to discussion of preservation-demand letters. There was concern that writing a rule that identifies a demand letter as a trigger for preservation obligations would encourage a proliferation of over-broad demands. Discussion wandered into the territory of possible claims for a tort of unreasonable preservation demands. The concern may be real; the possibility of finding effective remedies is less certain.

One last specific example from the conference: Discussion of the vexing question of culpability standards suggested the ambiguity of traditional phrases. A rule that requires a showing of gross negligence to support severe sanctions, for example, would have to confront the question whether it is grossly negligent to fail to create a written litigation hold, to identify the key players most likely to identify and direct preservation of important information, and to follow up to make sure suitable preservation measures are taken. Similarly, if the most severe sanctions could be imposed only for wilful behavior, may it be willful to fail to preserve obviously important information — if an

engine falls off an airplane, surely wilfulness could be found on post-event failure to preserve the engine, manufacturing and design records for engine and plane, service records, and the like. And even if there is no wilfulness — the manufacturer does not know about, and therefore fails to preserve, critical documents in the possession of a subcontractor — the severity of the prejudice to other parties might warrant some sanctions or remedial measures.

The Subcommittee met at the close of the miniconference and met again in two conference calls. In November, it reported to the Committee at length on the miniconference, described the three major alternatives it had been considering, and presented a draft of Rule 37 sanctions and remedial-measure provisions for consideration as a possible approach to developing a recommended rule for publication. Lengthy discussion by the Committee led to the conclusion that the Subcommittee should continue to consider all approaches. "This is a very important task. There is much yet to learn." It may be that approaching the problems through a sanctions rule is the best answer available, but the Subcommittee should assume that all issues remain open and report to the Committee again in March.

Discovery: Rule 45

Last June the Standing Committee approved publication for comment of a proposal to amend Civil Rule 45. The proposal simplifies the rule's structure, in large part by providing that discovery subpoenas issue from the court where the action is pending. The proposal, however, carries forward without substantial change the provisions that require the party serving the subpoena to go to the place where a nonparty witness is located to conduct a deposition or discover subpoenaed materials. Disposition of objections to the discovery begins in the court for the place of performance, but provision is made to transfer the motion to the court where the action is pending. Related provisions are made for enforcing a discovery order. The rule would also supersede a line of cases that interpret the present rule to authorize nationwide jurisdiction to enforce a trial subpoena against a party or a party's officer. At the same time, in deference to those cases and also to cases that seemed to regret the conclusion that present rule text does not support nationwide jurisdiction, the published materials asked for comment on an alternative that was explicitly not supported by the Committee but that would restore some measure of power to order a party to appear — or to produce an officer to appear — as a witness at trial. Finally, the rule relocates and clarifies the requirement that parties serving subpoenas give notice to other parties in the litigation.

Substantial debate was anticipated on at least three points: the "exceptional circumstances" test to transfer a discovery motion to the court where the action is pending may seem too restrictive, and indeed may not seem to describe the illustrations offered in

the Committee Note; the proposal does not include any requirement that the party who served a documents subpoena notify other parties as materials are received in response to the subpoena; and the determination to reject the decisions asserting nationwide authority to subpoena a party or its officer to appear as a witness at trial. Only a small number of written comments have been received. No one asked to testify at the first scheduled hearing in November; it was cancelled. But it is common experience that when there are extensive comments and requests to testify, they ordinarily begin to arrive late in the comment period.

Duke Conference Subcommittee

The Duke Conference Subcommittee was formed to respond to the welter of ideas produced by the Duke Conference sponsored by the Civil Rules Committee in May, 2010. Consideration of Civil Rules amendments is part of the Subcommittee's work, but several other paths have been followed as well.

One suggestion made repeatedly by Conference participants was that although present rules provide many opportunities for effective case management, there is a pressing need for more universal use of these rules. Early, continuing, hands-on case management is thought to solve many problems that linger and fester if left to the hope of responsible cooperation among the parties. The Subcommittee has worked with the Federal Judicial Center to improve judicial education programs and resources. Members also drafted portions of the new benchbook for judges, focusing particularly on Rule 16 conferences and the relationships between Rules 16 and 26.

Pilot projects testing new procedures will provide fertile sources of information for considering future rules amendments. The Subcommittee is working with the Federal Judicial Center to identify pilot projects in federal courts around the country and to encourage structuring the projects in ways that will support rigorous analysis of the results. The Seventh Circuit project on e-discovery, described at the Conference, is ongoing, and will be assessed by the FJC. The Northern District of California has adopted an expedited trial procedure. The Southern District of New York has launched a Pilot Project Regarding Case Management Techniques for Complex Civil Cases; the FJC is undertaking a survey to establish a base line of experience at the beginning of the project, establishing a foundation for evaluating experience at the end of the pilot period.

Another pilot project is just beginning. The Duke Conference inspired two employment lawyers who represent the National Employment Lawyers Association and the American College of Trial Lawyers at Civil Rules Committee meetings to undertake development of a protocol for initial discovery in employment cases. They formed a drafting group of experienced lawyers representing primarily plaintiffs and others representing primarily defendants.

After considerable hard work, and with the help of neutral brokers, they succeeded. The protocol will be made available to all federal courts, with encouragement to judges to adopt it for use in their employment cases. The district-judge members of the Committee have agreed to adopt the protocol in their cases and it is expected that many other judges will adopt it. If the protocol succeeds in its goals of speeding discovery, reducing costs, and supporting better early case evaluation by the parties, it may serve as an impetus for other groups to develop similar protocols for other types of litigation frequently encountered in federal courts. This work counts as an early and significant success for ideas advanced at the Conference.

In addition to pilot projects, the Subcommittee has also encouraged additional empirical work. The Committee is always eager to enlist the Federal Judicial Center in supporting Committee work, and the Subcommittee reflects that enthusiasm. The Center has begun an inquiry into actual practices at the outset of litigation, focusing on initial scheduling orders and Rule 16(b) conferences, and also on Rule 26(f) discovery-planning conferences. The work began with an extensive docket study focusing on scheduling orders, and will continue with a lawyer survey on Rule 26(f) practice.

A gentler form of empirical inquiry was arranged for the Committee meeting. The Subcommittee arranged for a panel presentation on Civil Case Management Practices of the Eastern District of Virginia, Alexandria Division. The panel, moderated by Committee member Peter Keisler, included Judge Leonie M. Brinkema, Judge Thomas Rawles Jones, Jr., and three practitioners — Dennis C. Barghaan, Jr., William D. Dolan, III, and Craig C. Reilly. The court prides itself on achieving times from filing to disposition that are consistently the shortest, or next to the shortest, in the country. The panelists emphasized that this accomplishment rests only in part on local rules governing the time for pretrial events. The judges share a common philosophy on case management, they work hard to implement it, and the bar has become skilled in working within it. The system has enough flexibility to recognize and account for the needs of specific cases that do not fit comfortably within general practices. Motions must be noticed for prompt hearing, responses are due shortly before the hearing, judges are prepared, and most rulings are made from the bench after argument. The former master docket system has been replaced by individual dockets without impeding the steady push toward final disposition. This experience provides a useful foundation for considering opportunities to guide other courts toward successful case management.

Of course possible rule amendments also have a place on the Subcommittee agenda. Consideration of the pleading rules has been placed on a separate track, noted briefly below. Many other suggestions at the Conference addressed discovery problems. The work undertaken by the Discovery Subcommittee to consider the

problems surrounding the duty to preserve electronically stored information is described above. Other discovery issues will be pursued by one subcommittee or the other depending on the interdependence between the issues and other discovery topics or nondiscovery topics. The time for the Rule 26(f) discovery conference of the parties is tied to the time for the Rule 16(b) scheduling conference and order. The two should be considered by a single subcommittee.

Several other discovery issues will be considered for possible proposed rules changes. It has been suggested that the Rule 26(d) moratorium should be revised to allow the parties to make discovery requests before the Rule 26(f) conference, delaying the time to respond to a point after the conference — the thought is that the conference could be better focused if the parties can consider actual initial discovery requests. When a discovery dispute arises after the Rule 26(f) conference, experience suggests that the dispute could be resolved more quickly, at less expense, by requiring a conference with the court before filing a formal motion. Present Rule 26(b)(2) provisions designed to hold discovery within limits proportional to the reasonable needs of the case have not had the impact that was hoped for. Some advantage might be found in adding a proportionality limit to the broad scope provisions in Rule 26(b)(1), superseding the codicil sentence of (b)(1) that simply cross-refers to (b)(2). It also might help to add explicit cost-shifting provisions to express the authority now implicit in the protective-order provisions of Rule 26(c) and in the "conditions" referred to in the (b)(2)(B) provisions for discovery of electronically stored information that is not reasonably accessible. Three interrelated proposals by a former Committee member are designed to reduce obstructive or confusing discovery responses.

Presumptive numerical limits on the numbers of discovery requests also have been suggested. The existing limits on depositions might be tightened — for example, to five depositions per side, with each deposition lasting no more than four hours. Limits could be added to rules that do not have them now, for example no more than 25 requests to produce or subpoenas under Rules 34 or 45, or 25 requests to admit under Rule 36.

Contention interrogatories also have become the subject of some contention. Although they may be useful at the outset of an action to focus the claims and issues more clearly than notice pleading often managed to do, there are arguments that ordinarily they should be allowed only after all other discovery concludes, subject to earlier use by agreement or on court order.

Other familiar discovery issues connect discovery to pleading. One asks whether discovery should be stayed, in whole or in part, pending disposition of a motion to dismiss for failure to state a claim. Renewed attention to pleading issues may bring this question up for consideration. For that matter, specific pleading

requirements have stirred concerns about potential plaintiffs who do not have access to information needed to frame a sustainable complaint. Enhanced opportunities for discovery before ruling on a motion to dismiss have been proposed as a possible solution.

Scheduling order practice is the subject of at least some suggestions. One is to expedite litigation by advancing the time for the order, perhaps to 60 days after any defendant is served (rather than the current 120 days). Experience in the Eastern District of Virginia suggests that this acceleration is feasible, at least for most cases. A related change might be to reduce the presumptive time for service in Rule 4(m) to 60 days after filing (rather than 120 days). The FJC study found that the median time for entry of a scheduling order is 106 days after filing. A second is to require an actual scheduling conference between court and parties, even if only by telephone, eliminating the "mail or other means" alternatives in Rule 16(b)(1). And a third is to add to the list of optional contents, Rule 16(b)(3), a provision for setting a date by which parties must abandon any claims or defenses that can no longer be asserted in good faith.

Cooperation of the parties and attorneys was a third strong concern of the Conference, along with strong case management and proportionality. Cooperation could be emphasized in the aspirational provisions of Rule 1, directing the parties to cooperate with the court and each other in seeking the just, speedy, and inexpensive determination of the action. It also could be added to Rule 16 pretrial conference provisions and at various places in the discovery rules.

The Subcommittee has reached the stage of drafting illustrative rule language to consider some of these possibilities. It does not expect to have concrete proposals ready to propose for publication by the time of the Committee's March meeting. It also holds open a continuing invitation for suggestions of other topics it should consider.

The Committee also is considering the possibility of holding a second Conference on the model of the 2010 conference, perhaps as early as spring 2013. One purpose would be to consider concrete rules proposals built on the 2010 conference. A second would be to renew opportunities like those offered at the 2010 conference, raising new and perhaps fundamental challenges for change.

Pleading Standards

Lower-court opinions deciphering and applying the *Twombly* and *Iqbal* decisions continue to command the Committee's attention. Two important avenues of investigation provide the primary focus of current discussions. Andrea Kuperman's survey of court opinions, focusing primarily on appellate decisions, has grown near the 700-page mark. Joe Cecil's empirical work at the Federal Judicial Center is well advanced, and includes careful study of empirical

studies undertaken by others. This work, and the experience of Committee members, suggest that pleading standards continue to present a vitally important subject for ongoing consideration. But the Committee does not believe that the time has come to begin deliberating the questions whether evolving practice should be entrenched, expanded, or restrained. There is no sign of widespread undesirable practices that might warrant hasty response. The subject is too important, and the target too indistinct, to move forward just yet.

The Kuperman survey provides an illuminating set of many pictures. Some stand out. Two were used as illustrations in Committee discussion. The first, reversing dismissal for failure to state a claim, described at length fact allegations detailed enough to seem a response to a motion for summary judgment. The other recognized that it was demanding that the plaintiff plead facts known only to the defendant, and that without discovery the plaintiff must fail, but concluded that language in the *Iqbal* opinion requires that a factually deficient complaint be dismissed without any opportunity for discovery. Each, in different ways, underscores the need to maintain a prominent place for pleading on the Committee agenda.

The FJC study has moved far into the second stage. The first stage found that motions to dismiss for failure to state a claim are being made more frequently in the aftermath of the *Twombly* and *Iqbal* decisions. It also concluded, after applying multinomial corrections to account for different types of cases, different practices in different courts, and the presence of an amended complaint, and apart from "financial instrument" cases, that there was no statistically significant increase in the rate of granting motions to dismiss. Because different sets of cases were used for the "before" and "after" periods, it was not possible to make a statistically valid assertion that more cases are dismissed on the pleadings simply because more motions to dismiss are made and the rate of granting the motions remains constant. The second phase explored the increase in the frequency of granting motions to dismiss with leave to amend by asking what happens next. Amended complaints were filed in many cases; renewed motions to dismiss were made in response to many, but not all amended complaints; and dismissal was again ordered on many, but not all, of the renewed motions. "Our conclusions remain the same. We found a statistically significant increase in motions granted only in cases involving financial instruments, and we found no statistically significant increase in plaintiffs excluded by such motions or in cases terminated by such motions." The work continues because the second stage uncovered anomalies in coding practices by court staff that, once identified, led to more orders resolving motions to dismiss. These orders will be included as the study is completed. There is some prospect that another study will be undertaken to explore practice on all motions to dismiss, not only motions addressed to failure to state a claim. This further work, if

undertaken, may provide important additional information for Committee study.

The FJC work has included review and appraisal of case studies done by others. Much of this work confirms the finding that the rate of filing motions to dismiss for failure to state a claim has increased. Much of it also suggests that the rate of granting these motions has increased. And much of it is subject to methodological challenge. All of it is important, and the FJC's help has proved important in this dimension as well.

This work suggests one fairly clear conclusion. An increase in the frequency of filing motions to dismiss means an increase in the frequency of responses. A plaintiff contemplating an action must count this prospect among the potential costs.

Another impact seems at least a fair surmise. Faced with new pleading opinions and more frequent motions to dismiss, complaints are likely to be longer, filled with greater fact detail, than formerly. This surmise is subject to the observation that before *Twombly* and *Iqbal* many good lawyers routinely pleaded far more detail than notice pleading required. "I have never seen a notice pleading" is a reasonable description of at least some areas of practice. And the increased detail, if provided, may reflect only the added work of including in the complaint more of the information that was gathered in deciding whether to file and in preparing for litigation after filing.

Beyond that point, counting the outcomes of motions to dismiss, while truly important, does not answer the central question. Suppose changed pleading standards lead to terminating more actions on the pleadings. Is that result good, bad, or neutral? The Supreme Court was manifestly concerned with the costs that may be imposed by allowing an action to move beyond the pleadings into discovery. On balance, across the universe of cases, what balance should be drawn between the different categories of error? Those who decry pleading dismissals focus on the costs of dismissing claims that, if admitted to the world of discovery and pretrial management, would have prevailed on the merits. Those who champion the need to maintain some measure of scrutiny on the pleadings focus on the costs inflicted by discovery and pretrial management in support of attempted claims that ultimately fail on summary judgment or at trial, or that succeed in settlement only because of the costs of litigation. These value judgments may be attempted in gross. They may be attempted instead as to particular categories of litigation. The eventual judgments, if they can be made at all, may be mixed: The Rule 8(a)(2) standard, or more specifically focused standards, may require different levels of fact specificity in pleading different kinds of claims.

The difficulty of the judgments that lie ahead is emphasized simply by articulating them in this way. It may be an exaggeration

to proclaim that heightened pleading standards threaten to undermine the role of private litigation in enforcing fundamental public policies. The structure created in 1938, moving responsibilities from the pleading stage into discovery and summary judgment, has developed over time. Further development need not portend disaster, even if it pulls back from more lenient pleading standards to substitute more demanding standards. But these are not idle concerns.

A responsible approach to Enabling Act responsibilities must be shaped by the importance of the issues. And it also is shaped by the responsibility of the courts to carry on the common-law process of ever-more nuanced interpretation of Rule 8(a)(2) as shaped by the *Twombly* and *Iqbal* decisions. The research that has been done shows that the courts generally are discharging their responsibility thoughtfully, with real care. Much remains to be learned from their work. The Committee will continue to study pleading standards carefully. Over the years it has studied many possible pleading rules, and related discovery rules, both before the Supreme Court spoke and since. But it is not likely to advance specific rules proposals for publication in 2012.

Pleading Forms

The *Twombly* and *Iqbal* decisions create serious tensions with the form pleadings included with the Civil Rules. Rule 84 says that these forms suffice under the rules. A footnote in the *Twombly* opinion observed that Form 11 is consistent with the Court's view of proper pleading. That footnote itself could be useful to illuminate one aspect of the full opinion. But it does not address the other forms. The Form 18 complaint for patent infringement has created particular difficulties for lower courts attempting to find some reconciliation with the Supreme Court's pronouncements.

Consideration of the pleading forms was initially deferred out of concern that it was too early to attempt to draft rule language to capture or revise whatever pleading standards emerge from the Supreme Court's opinions. The initial work, however, raised additional questions about the role of the Rule 84 forms. The forms cover an incomplete range of the rules. It is difficult to account for the selection of some subjects while others are excluded, although some forms have a clear history. Forms 5 and 6, the request to waive service and the waiver, were carefully drafted as part of creating the Rule 4(d) waiver provisions. Equal care has been taken with some other forms. But many forms have received scant attention, as witnessed by the prevalence of illustrative dates in 1936 that persisted until the forms were revised in the 2007 Style Rules.

The benign neglect that has attended most of the Rule 84 forms may rest in part on their general obscurity. But it also reflects implicit choices to devote Committee energies to more pressing

matters. It is fair to ask whether a choice must be made: Tend to the rules regularly and thoroughly, deploying the full resources of the Enabling Act, or demote them from official status as forms that suffice under the rules.

These questions led to formation of a Forms Subcommittee drawn from the Appellate, Bankruptcy, Civil, and Criminal Rules Committees. Early work by the Subcommittee has illuminated the differences between the treatment of forms in the different sets of rules. Differences appear in the process of adopting the rules. Only the Appellate and Civil Rules forms go through the full Enabling Act process. More importantly, the role played by forms differs greatly among the different sets of rules. Those differences may account in part for the choice whether to rely on the Enabling Act, but do not seem to provide a full explanation. For the moment, there does not appear to be a compelling reason to establish uniform practices across the advisory committees and sets of rules.

Work by the Subcommittee will continue, and the Civil Rules Committee will take account of it. It remains to determine whether any recommendations will be ready for action by the Standing Committee in 2012.

Class Actions

The Committee has opened the question whether class-action practice should claim a place on the agenda for consideration over the next few years. The most recent phase of class-action work began in 1991 and culminated with amendments that took effect in 1996 and 2003. It was a painstaking and lengthy process, undertaken after an interlude in which courts developed the 1966 Rule 23 amendments in many creative ways. Interpretations of Rule 23 have continued to evolve since 2003. The Class Action Fairness Act of 2005 has brought new and different kinds of class actions to the federal courts. And the Supreme Court has rendered a number of important class-action decisions in recent years. As difficult, protracted, and contentious as any project would be, it seems suitable to ask whether the Committee should prepare to make room for Rule 23 on its near-term agenda.

Brief initial discussion suggested several topics that might be raised if class actions are brought back to the agenda. One involves proof on the merits in determining whether to certify a class. In the most recent class-action work, the Committee recognized that measuring predominance and superiority for a (b)(3) class may justify consideration of a "trial plan" that predicts how the claims might be tried on the merits. Some preliminary sense of the merits is involved. This perception has been developed in different ways by different courts. Review may be appropriate to assess the depth of the preliminary consideration of the merits that may be suitable at the certification stage. Questions of preliminary discovery on the merits would be tied to this review.

Issues classes present a separate set of questions. Enthusiasm for issues classes rose and then diminished during the most recent work. Some observers fear that the predominance requirement for a (b)(3) class is being applied to defeat any use of class adjudication in circumstances that might benefit from at least class-wide resolution of important common issues.

The criteria for reviewing proposed class-action settlements vary among the circuits, at least in the length and content of the lists of factors to be considered. A list of factors was included in early drafts of the amendments finally made to Rule 23(e). The list grew to something like a dozen factors, several of them innovations on the case law. The Committee came to fear that the list would be treated as a simple check-off, perhaps encouraging rote application and discouraging serious case-specific review. The list was transferred to the draft Note. The same concerns led to dropping it even from the Note. Those judgments may have been wrong. Or, if right for the time, they may deserve further consideration now.

Cy pres settlement provisions have come in for substantial criticism, particularly to the extent that they provide remedies that the law would prohibit in an adjudicated judgment. It may prove tricky to draft a rule prohibiting cy pres provisions, but the effort could be launched.

The Supreme Court decision in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 130 S.Ct. 1431 (2010), authorizes use of Rule 23 to provide a class-action remedy for a state-law claim despite a specific state-law prohibition on enforcing the claim by class actions. It would be relatively easy to disclaim this role for Rule 23. The task may be worthy, if not as a stand-alone project then as part of any more general project that might be undertaken.

Another suggestion was that it might be useful to review the American Law Institute Principles of Aggregate Litigation to determine whether worthy subjects of reform can be found there.

The Committee has formed a subcommittee to begin initial consideration of these issues, and looks forward to the advice that will be generated by the panel discussion at this Standing Committee meeting.

Other Docket Items

The Committee reviewed a number of proposals based on suggestions made to the Committee by members of the public, bar, bench, and another Judicial Conference committee. The proposals and dispositions are reflected in the draft Minutes. One is that a rule should be adopted to allow appeal by permission from an order granting or denying discovery of materials claimed to be protected by attorney-client privilege. This proposal intersects

the responsibilities of at least the Appellate, Civil, and Evidence Rules Committees. The Bankruptcy Rules Committee might have an independent interest. The Criminal Rules Committee also would be interested if there is any thought that the proposal should reach criminal prosecutions as well as civil actions. The Civil Rules Committee will defer any work on this subject pending expressions of interest or a lack of interest in other committees.

TAB 6-A

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

NOVEMBER 7-8, 2011

The Civil Rules Advisory Committee met at the Administrative Office of the United States Courts on November 7 and 8, 2011. The meeting was attended by Judge David G. Campbell, Chair; Elizabeth Cabraser, Esq.; Judge Steven M. Colloton; Professor Steven S. Gensler; Judge Paul W. Grimm; Peter D. Keisler, Esq.; Dean Robert H. Klonoff; Judge John G. Koeltl; Judge Michael W. Mosman; Judge Solomon Oliver, Jr.; Judge Gene E.K. Pratter; Anton R. Valukas, Esq.; and Hon. Tony West. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Associate Reporter. Judge Mark R. Kravitz, Chair, Judge Lee H. Rosenthal, outgoing Chair, Judge Diane P. Wood, and Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Arthur I. Harris attended as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., was the court-clerk representative. Peter G. McCabe, Jonathan C. Rose, Benjamin Robinson, and Andrea Kuperman, Chief Counsel to the Rules Committees, represented the Administrative Office. Judge Jeremy Fogel, Joe Cecil, and Emery Lee represented the Federal Judicial Center. Ted Hirt, Esq., and Allison Stanton, Esq., Department of Justice, were present. Observers included Alfred W. Cortese, Jr., Esq.; Joseph Garrison, Esq. (National Employment Lawyers Association liaison); John Barkett, Esq. (ABA Litigation Section liaison); Chris Kitchel, Esq. (American College of Trial Lawyers liaison); Kenneth Lazarus, Esq.; John Vail, Esq. (American Association for Justice); Thomas Y. Allman, Esq.; Robert Levy, Esq.; Ariana J. Tadler, Esq.; William P. Butterfield, Esq.; Jonathan Redgrave, Esq.; John K. Rabiej, Esq. (Sedona Conference); Jerry Scanlon (EEOC liaison); Professor Lonny Hoffman; and Andrew Bradt, Esq.

Judge Campbell opened the meeting by greeting Committee members, committee support staff, and observers. The Committee appreciates the interest shown by the observers in the Committee's work, and welcomes the presence of several staff lawyers for the House Judiciary Committee.

Two new Committee members were also greeted. Dean Klonoff is a graduate of the University of California at Berkeley, and the Yale Law School. He clerked for the Chief Judge of the Fifth Circuit, practiced with Jones Day for many years, took a chair on the law faculty at the University of Missouri, was a Reporter for the ALI Principles of Complex Litigation, and is Dean of the Lewis and Clark Law School. Judge Oliver is a graduate of Worcester College and NYU Law School; he also has a masters degree. He clerked for Judge Hastie in the Third Circuit. As Assistant United States Attorney he served as chief of both civil and appellate divisions. He also was in private practice, and has taught at the

Cleveland-Marshall College of the Law. He has been a judge since 1994, and now is Chief Judge of the Northern District of Ohio.

Jonathan Rose was welcomed as the new Rules Committee Support Officer; most recently he has been a partner at Jones Day, and has served in a variety of federal government positions. Benjamin Robinson is the Deputy Rules Officer and Counsel; he too comes to the Administrative Office from Jones Day.

This is the final meeting for Professor Gensler, who has completed serving his two terms. He has provided much wise counsel during his time as member, and can be expected to continue to help the Committee in other roles. Judge Kravitz will return to the Standing Committee, this time as Chair. The Civil Rules Committee gained immediate benefit from his earlier years on the Standing Committee, and will benefit from his wise guidance as Chair. Judge Rosenthal has been CEO, presiding judge, chief architect, and mother superior of the rules process. As difficult as it will be to succeed her, Judge Kravitz will carry forward the outstanding tradition of her work. Andrea Kuperman, who began as Rules law clerk for Judge Rosenthal, will transition to serving in the same role for Judge Kravitz.

Judge Fogel, of the Northern District of California, is the new head of the Federal Judicial Center. The Committee has depended on support by the FJC research staff for many important projects. Several ongoing research projects attest to the role the FJC has played; the Committee will continue to draw as heavily on the FJC as can be fit into the many competing demands for its work.

STANDING COMMITTEE REPORT

Judge Kravitz reported on the June Standing Committee meeting and the September Judicial Conference meeting. There were no rules items on the Judicial Conference calendar. The Standing Committee considered the current Rule 45 proposal, liked it, and approved publication for comment. The Standing Committee also discussed the activities of the Duke Conference Subcommittee and other Civil Rules projects.

Judge Kravitz added that while chair of this Committee he had achieved outstanding results by delegating the most important work. Judge Campbell did a great job in leading the Discovery Subcommittee through, among other things, the Rule 45 proposal and the initial stages of the work on preservation, spoliation, and sanctions. Judge Koeltl did a masterful job in orchestrating the Duke Conference, and has followed through with the Duke Conference Subcommittee. Other Subcommittee chairs have done as well, albeit with less onerous tasks. It is good to turn the reins of the Committee over to Judge Campbell.

APRIL 2011 MINUTES

The draft minutes of the April 2011 Committee meeting were approved without dissent, subject to correction of typographical and similar errors.

LEGISLATIVE ACTIVITY

Andrea Kuperman reported on legislative activity that bears on the Civil Rules.

The Law Abuse Reduction Act, introduced in both the House and the Senate, is the latest in a long string of bills that would restore the 1983 version of Civil Rule 11, superseding the changes made in 1993. Professor Hoffman testified against the bill at a House hearing in March. The FJC did extensive research on the 1983 version, finding it caused many problems. There is no indication that the 1993 version has called any problems. The American Bar Association Litigation Section and the American College of Trial Lawyers oppose the bills. The bill has been reported by the House Judiciary Committee. There has been no activity in the Senate.

The Sunshine in Litigation Act is similar to prior bills dating back through several Congresses. The common feature is to require specified findings of fact before entering a protective order, or approving a settlement, to ensure that the order does not prevent dissemination of information relevant to the public health and safety. The new version is different from earlier bills because it is limited to actions in which the pleadings show issues relevant to the public health and safety. The rules Committees have opposed these bills over the years. The Senate Judiciary Committee has favorably reported a bill, but it has not yet been taken up in the Senate. The House bill has not been taken up.

There is no legislation currently pending to address the *Twombly* and *Iqbal* decisions.

HR 3401, the Consent Decree Fairness Act, would establish term limits on injunctive relief against state and local officials. It would require scheduling order timing and content different from Civil Rule 16(b). It would apply in only a narrow set of cases.

DUKE CONFERENCE SUBCOMMITTEE

Judge Koeltl delivered the report of the Duke Conference Subcommittee. The Subcommittee was formed to deal with many of the questions addressed at the May, 2010 Conference at Duke Law School. Pleading issues have been left on a separate track, and issues relating to preservation and spoliation of discoverable information have been left with the Discovery Subcommittee. This Subcommittee deals with the "great other."

A wide variety of proposals have been advanced to serve the cause of greater speed, efficiency, and justice. These are the goals of Rule 1.

Many paths are open to pursue better results under present rules without need for any rules amendments. The Federal Judicial Center is developing several means of improving judicial education programs and resources by emphasizing the flexible and powerful management tools available today. Committee members, particularly Judges Kravitz and Rosenthal and Professor Gensler, drafted important portions of the new benchbook for judges, focusing particularly on Rule 16 conferences and the relationships between Rules 16 and 26. The Sedona Conference has added the advice that it is really important to encourage chief district judges to urge effective use of these rules.

Pilot programs also can be encouraged. They will work best when they are framed from the beginning in ways that will enable the Federal Judicial Center to provide rigorous evaluation of the results. The Seventh Circuit e-discovery pilot program was already under way, and was described at the Conference. Since then the Northern District of California has adopted an expedited Trial Procedure.

Another project has just been launched in the Southern District of New York, the Pilot Project Regarding Case Management Techniques for Complex Civil Cases. The Project had its genesis in the Duke Conference. Judge Scheindlin chaired the Judicial Improvements Committee that drafted the program, with the help of a very distinguished advisory committee that was widely representative of the bar and clients. The lawyers were really enthusiastic about the project. The full Board of Judges, including all active and all senior judges, adopted the program. Not every judge was enthusiastic — the program includes things that some had not been doing. But the board decided to adopt the project as a court project; all judges are participating. The procedures reflect the court's trust of the bar. The court respects the recommendations, and will attempt to do what the lawyers asked. The program will run for 18 months. The FJC is surveying lawyers in closed cases to provide a baseline for studying the project's impact. They are asking questions on such matters as whether there was a Rule 16 conference? A Rule 26(f) conference? Were they useful? The FJC will conduct another survey at the end of the project. The second survey will be facilitated by adopting a set of docket flags to be used by court clerks for cases handled under the project.

The Southern District procedures include shortening the time set by Rule 16(b) for the scheduling order from 120 days after service to 45 days after service. The court is to do more than "consult" with the lawyers; there must be an actual conference, although it can be accomplished by phone or other means short of a

physical meeting. There is a long list of subjects to discuss at the Rule 26(f) conference, and then at the Rule 16 conference. Discovery disputes are resolved by letter submissions, not motion; "we don't have discovery motions." A Rule 12(b)(6) motion stops all discovery other than Rule 34 discovery of documents and electronically stored information. The number of Rule 36 requests to admit is limited to 50. A lawyer who wishes to file a motion must have a pre-motion conference with the court. Attorneys were unhappy with the Local Rule 56.1 statement, thinking it too long and too expensive; if the parties request and the court approves, the statement need not be filed. If the court requires a statement, it must not exceed 20 pages per party.

A pretrial report by the lawyers is required after fact discovery, and before expert discovery.

It will be important to attempt to measure how effective these innovations are. The court has some reservations about the ability to achieve rigorous measurement.

The Committee has encouraged another endeavor, development of a discovery protocol for employment cases. The project was fostered by the bar. The drafting group included plaintiffs lawyers, headed by Joe Garrison, and defendant lawyers, headed by Chris Kitchel. They inspired wonderful work, despite initial obstacles: "with litigators, you know"? Many of the participants began by opposing elements favored by the other side: "never." But ultimately, after a series of meetings and conference calls, and with the help of the IAALS and Judge Courlis, they finished the job "in the best spirit of the bar." The resulting protocol is endorsed by the plaintiff lawyers and the defendant lawyers. It is an intelligent, thoughtful way to begin the litigation. It recognizes the information that reasonably will be produced, and aims to get it produced more directly than the usual discovery process, and early in the litigation. This will enable the parties to evaluate the case, and to move it ahead to the second wave of discovery if it is fit to move ahead. The second wave itself will be better focused.

Chris Kitchel noted that the protocol was developed through vigorous debate. Judge Koeltl and Judge Courlis were a great help. And it was a great committee. The work began with discussion by Judge Rosenthal with Kitchel and Garrison at the Duke Conference. The protocol itself identifies the information lawyers should really want at the beginning of the action, the information that will enable the case to go forward before formal discovery. The protocol will replace initial disclosures. The group worked hard to make sure the obligations are mutual.

Joe Garrison repeated the observation that Judge Courlis was a very good facilitator in resolving what seemed to be intractable disputes.

Further discussion described some aspects of the protocol. The information is to be exchanged 30 days after the first response to the complaint. The protocol will work better if there are no extensions. No objections are allowed, other than to preserve privilege. The ban on objections is the most important part; the protocol will not work if objections are allowed. The materials also include a proposed protective order, but it is a "check-the-box" form because the participants could not agree on a single uniform order. There is a difference of opinion on whether discovery can be stayed on filing a Rule 12(b)(6) motion, but it is accepted that a stay may be appropriate if the action seems frivolous on the face of the pleadings. The protocol applies to pro se parties as well as to represented parties.

Although the protocol does not address the Rule 26(f) conference, the conference will be important. It can help, for example, in forging agreement on a proposed protective order.

Joe Garrison stated that the effort now should be to implement the protocol. The work can begin by persuading the FJC and IAALS to post the protocol on their web sites. It also would be desirable to post a list of the judges who are using the protocol around the country. This information will make it much easier to adopt the protocol in other courts. Adoption can be accomplished by a standing order, entered by an individual judge. The order should be entered before the Rule 16 conference. It also will be good to encourage judges to comment on what is working, and on what can be improved. A volunteer committee of three judges was later formed to help Joe Garrison and Chris Kitchel with monitoring and implementing the protocol. They are Judges Koeltl, Mosman, and Rosenthal. Judge Fogel has agreed to send out a message from the FJC notifying chief district judges of the protocol, and urging adoption. The letter will note that all the district judges on the Civil Rules Committee are adopting the protocol. Those judges also will urge adoption by other judges in their districts.

New pilot projects in other courts will be encouraged. Emery Lee has agreed to be the clearing house for other projects. Judge Kravitz noted that Judge Fogel had sent a message to all chief district judges asking that they identify all pilot projects, and thanked Judge Fogel for doing that. All projects that are identified will be listed on the FJC web site.

Beyond judicial education, ongoing empirical work, and pilot projects, the Duke Subcommittee also has an agenda of possible rules amendments. The list has been whittled down over time, but additions also have been made and observers are invited to make suggestions. One of the relatively recent additions is a proposal to add new limits on the numbers of discovery events, adding numerical limits to Rule 34 and Rule 36, and perhaps reducing the limits in at least Rules 30 and 31. The limits could be set to reflect the median experience revealed in the FJC survey for the

Duke Conference, perhaps with a slight margin. For example, the limit to 10 depositions per side might be reduced to 5, better reflecting the fact that in a majority of cases the parties take only 2 or 3 per side.

The focus of rules proposals has been on the beginning of litigation. The time for the Rule 16(b) scheduling order could be accelerated, and an actual conference could be required. The need to actually hold a Rule 26(f) conference could be underscored. The Rule 26(d) discovery moratorium could be changed by providing that discovery requests can be made before the Rule 26(f) conference, although responses are not required until a time after the conference. The conference would then be better focused on at least the initial discovery requests actually made in the case. (It was noted that even good lawyers seem to forget the moratorium, as shown by requests to stay discovery before the 26(f) conference. And they may forget that in many cases the moratorium obviates any occasion to seek a stay of discovery pending disposition of a Rule 12(b)(6) motion because there has not yet been a Rule 26(f) conference.)

Emery Lee described ongoing and pending FJC research projects to support these efforts. A docket study aims at measuring the frequency of scheduling orders, the time entered, the typical length of discovery cut-offs, and the holding of Rule 26(f) conferences. They are surveying lawyers in the Southern District of New York as the foundation for measuring the effects of the complex case management pilot project. Next February a questionnaire will go out to lawyers seeking information about the second phase of the Northern District of Illinois e-discovery pilot project.

So far there have not been many responses to the FJC message asking about local experiments. It is not yet clear what should be done with the information as it accumulates.

The work on scheduling orders and Rule 26(f) conferences has progressed to the point of an initial report on scheduling orders and discovery cut-offs. It has proved difficult to identify scheduling orders in the CM/ECF system. Courts use different codes for scheduling orders. Some of the codes bury this information "deep in the docket leaves." Many can be found by searching for a discovery cut-off. But not all. The search has turned up more than 11,000 scheduling orders. The median date of entry is 106 days from filing the action; the mean is 120 days. The median discovery cut-off is 6.2 months, or approximately 10 months from filing to the first discovery cut-off. This initial search will be followed by a nationwide closed-case survey. A closed-case survey, however, encounters difficulties. Lawyers' memories often fade as to closed cases. Even identifying the attorneys who were involved in a case at the time for a scheduling order or Rule 26(f) conference may prove elusive because the lawyers who were on the

case when it concluded may not be the same as those who filed it, particularly in complex cases.

Judge Koeltl noted that the Duke Subcommittee agenda also includes three proposals by former Committee member Dan Girard to reduce evasion and stonewalling. One frequent problem is that a party objects to document requests in broad blanket terms at the outset, then produces documents "subject to the objections," but does not say whether some document have been withheld from production because of the objections. The Lawyers for Civil Justice group opposes the Girard proposals; he has responded to their objections. The proposals continue to command a place on the agenda.

Other rules topics include adding express provisions requiring cooperation among lawyers. Rule 1 could be amended to require the parties as well as the court to act to achieve the just, speedy, and inexpensive determination of every action or proceeding. Cooperation also could be built into Rule 16 or the discovery rules in various ways; all that exists now is a reference in the title of Rule 37, a remnant of an abandoned proposal to insert a duty to cooperate into rule text.

Proportionality continues to be an object of concern, particularly with respect to discovery. Proportionality is made an explicit requirement in Rule 26(b)(2), and Rule 26(b)(1) — as well as other rules — expressly invokes (b)(2). Proportionality also can be implemented through Rule 26(c) protective orders. And the FJC survey for the Duke Conference suggests that for a great many cases, discovery is held within appropriate limits proportional to the needs of the case. But it also seems clear that discovery can run beyond what is reasonable. When courts of appeals discuss the scope of discovery, they seldom mention proportionality. New rule provisions might yet provide some help, perhaps as part of Rule 26(b)(1) defining the scope of discovery.

Much of the Subcommittee's focus will be on the beginning of litigation. As already noted, Rule 16(b) might be revised to require an actual conference among the attorneys and a judicial officer, whether or not in person. The time for the scheduling order could be advanced. The scheduling order provisions might be expanded to include a date for explicitly abandoning claims or defenses that a party has decided not to press further. A provision might be added to address stays of discovery pending a motion to dismiss. And as also already noted the Rule 26(d) moratorium might be reconsidered, perhaps to allow discovery requests to be made — but not answered — before the Rule 26(f) conference.

Discovery cost-shifting also may be considered. And the time for serving contention interrogatories might be considered,

creating a presumption that they are appropriate only after fact discovery has closed.

Discussion began with an observation that the case law on cost taxation for discovery is growing. The amendment of 28 U.S.C. § 1920 to allow costs for "exemplification" has led some courts to expansive awards of costs for responding to discovery of electronically stored information. The conduct of e-discovery could be dramatically affected by a string of cost awards in the hundreds of thousands of dollars.

Judge Campbell noted that Arizona sets a presumptive 4-hour limit to depositions. About half the lawyers who appear before him stipulate to adopting this limit. The result is better-focused depositions. And his Rule 16 order limits the parties to 25 requests to produce under Rule 34 and 25 requests to admit under Rule 36. Requests to expand these limits are made in about 5% of his cases. They work.

Another observed that the Sedona Conference is discussing the interplay between Rule 16 and Rule 26, and will have some suggestions.

It also was noted that the panel discussion of the "rocket docket" practices in the Eastern District of Virginia to be held at this meeting is part of the Duke Conference Subcommittee program.

The possibility of holding a second "Duke" Conference in the spring of 2013 is being considered. At least one purpose would be to present concrete proposals for rule amendments for discussion and evaluation. To do that, concrete proposals must be developed. The goal would be to present a package of changes that work well together, and that will be acceptable to lawyers "on both sides of the v." There also should be room to hear "bigger picture" proposals. No final decision has been made whether, or when, to hold a second conference of this magnitude.

The final part of the Duke Conference Subcommittee report addressed a "mailbox" suggestion by Daniel J. DeWit proposing adoption of a new Rule 33(e). This rule would authorize a party who serves a request to admit under Rule 36 to serve with the request an interrogatory asking whether the response was an unqualified admission. If not an unqualified admission, the responding party should state all facts on which the response is based, identify each person who has knowledge of those facts, and identify all documents and tangible things that support the response. The Subcommittee recommends that this suggestion be dropped from the Committee agenda. The proposed provision would "add clutter" to the rules; it would generate disputes; and the described information can better be got by other means. The Committee unanimously approved a motion to drop this item from the agenda.

DISCOVERY: PRESERVATION AND SANCTIONS

Judge Campbell began the discussion of preservation and sanctions by observing that these questions were raised by a very distinguished panel at the Duke Conference. The panel presented a unanimous recommendation that the Committee do something to address these problems. The recommendation included a list of issues that might be addressed by rules provisions. The Discovery Subcommittee began work in the fall of 2010. It has had several meetings and conference calls. It held a miniconference in Dallas on September 9, 2011, hearing a wide range of views from many lawyers, technology experts, and others. Suggestions continue to arrive from many groups, down to a November 6 letter from Ariana J. Tadler and William P. Butterfield. The flow of additional information will continue, and is encouraged.

Judge Grimm introduced the Subcommittee report by praising the September 9 miniconference as tremendously educational for everyone involved. There were many submissions before the conference began. Some presented empirical work. Others were based on experience. There were formal papers and other submissions. This wealth of material is included in the agenda book for this meeting; along with a few pages of notes on Subcommittee discussions, the material runs from page 87 through page 516. The round-table discussion involved many people. The Subcommittee has held two conference calls after that.

One submission, by Robert Owen, a private practice attorney, presents 26 pages of specific recommendations for radical reform. The views expressed reflect the concerns of many. Current law is inconsistent and imprecise. There seems to be an assumption that there is a lot of destruction. Current rules on proportionality in discovery are not adequate to the need to protect against requiring preservation of disproportionately large volumes of information before litigation is even filed. The operating regime has changed from "do not destroy" to "preserve everything." The suggestions include these: (1) Carry forward the prohibition against intentional destruction. (2) The trigger for a duty to preserve should be actual notice of the filing of an action or a petition to a government agency. (3) Rule 27 should be amended to permit courts to enter a prefiling order to preserve information, on a showing of good cause. (4) The scope of preservation should be limited to the claims pleaded in the complaint. The duty should be confined to materials in the possession, custody, or control of a party and used in its regular affairs. (5) Punitive sanctions should be available only on a showing of bad faith.

The Lawyers for Civil Justice proposals made after the Dallas miniconference discuss the economic benefits that would be achieved by clear rules on preservation and sanctions. There should be a clear trigger for the duty to preserve: a reasonable expectation of the certainty of litigation. The duty should be defined by concise

scope and boundaries. It should be limited to information in a party's possession, custody, or control and used in the ordinary conduct of business or personal affairs. Non-active information need be preserved only on a showing of good cause. No more than 10 key custodians need be required to preserve, and preservation is required only for a period of two years preceding the preservation trigger. The information should be that relevant and material to a claim or defense. Sanctions should be awarded only for willful and prejudicial conduct intended to prevent use in litigation.

The Sedona Working Group 1 has devoted much time and energy to discussing the issues explored in Dallas. The Subcommittee is grateful for their work.

The materials for the Dallas miniconference sketched three different approaches to drafting a preservation rule. The first, taking many of its cues from the Duke panel suggestions, provided comprehensive and specific rules for triggering the duty to preserve, defining its scope and duration, and establishing sanctions. The miniconference discussion suggested several difficulties with the specifics, and the Subcommittee concluded that this approach would require a great deal of work to generate specific provisions that might soon be superseded by advancing technology. The second approach also addressed trigger, scope, duration, and sanctions, but only in general terms: reasonable scope, and so on. This approach offered so little guidance as to be of little apparent use. The third approach focused on sanctions, in part because the fear of sanctions is said to drive many companies to preserve far more information than reasonably should be preserved, and in part because of the wide differences among the circuits in setting the levels of culpability required for different sanctions. This approach would not directly define a duty to preserve, but limiting the definition of conduct that supports sanctions would provide implied directions about what preservation is required. It won the Subcommittee's tentative support as the most promising path to be pursued. But the Sedona group thinks it premature to attempt even this approach. They think it better to attempt to strengthen Rules 16 and 26(f), and to pursue further education of bench and bar.

Opponents of adopting any preservation rule argue that Enabling Act authority does not extend to a rule that would require preservation before an action is filed in a federal court. The Subcommittee decided to carry this question forward in a general way. It seems best to attempt to draft the best rule that can be crafted, and then to focus the Enabling Act inquiry on this specific model.

Professor Hubbard, at the University of Chicago, provided a thought-provoking article. He begins with the reflection that judges and lawyers evaluate preservation decisions in hindsight, while actual preservation decisions must be made ex ante.

Judgments should be based on what was reasonable in prospect, not on what seems reasonable with the benefit of hindsight. Proportionality cannot be measured by the judge, who often will not have the information needed to measure preservation in reasonable proportion to the needs of the case. It is better to place responsibility on the parties. And the responsibilities must be distinguished: not to spoliate; to preserve; to retain in light of the obligations imposed by law independent of preservation for litigation; to produce. A duty to preserve is not the same thing as a duty to not spoliate. When there is a duty to preserve, it should be defined by setting a presumptive limit on the number of custodians who must be directed to preserve. With even a generous limit such as 15 custodians, having a limit will provide a focal point for bargaining between the parties. Without giving at least this much presumptive protection to the party that has a disproportionate share of the information, the party who has little information has no incentive to bargain to a reasonable preservation regime. Sanctions should be imposed for loss of information only on showing a guilty state of mind. The rules should be amended.

The Tadler-Butterfield letter urges it is too early to adopt comprehensive rules changes. The 2006 amendments addressing discovery of electronically stored information are only 5 years old. Important questions have been raised, but there is no need for the level of change recommended in any of the models.

The Subcommittee now seeks direction from the Committee. What direction should be followed? Do nothing? Is it time to draft a proposed rule, or should more information be gathered? What should a proposed preservation rule look like? If not a preservation rule, would it be better to draft a sanctions rule that backs into preservation and indirectly reduces the fears of those who are over-preserving?

Professor Marcus carried the discussion on, stating that the basic message is one of caution "in dealing with things we do not fully appreciate or understand." The Committee first began thinking about these sorts of problems more than 15 years ago. From 1997 to 2003 it was uncertain what approach to take. Preservation was a concern then, as now. After a temporary impasse, the Committee moved ahead toward adoption of what now is Rule 37(e). "Facebook did not exist then." And new technologies continually appear that require consideration. One recent example is news of a program that sends and receives e-mail messages without leaving any record. But it may be that for the time and the problems that were addressed, "we got it about right." The letter from RAND in the materials argues that the law may be relatively stable vis-a-vis technology with respect to the part of the discovery cycle that involves actual production of information.

Preservation law and practice is not stable. The agenda book summarizes the many divergent thoughts that have been expressed to the Subcommittee. Fifteen years ago the Committee proceeded cautiously, with deliberation. How fast should we move now? Proliferating social media, smart phones, all sorts of hard- and software developments raise all sorts of questions. But there is a "very much enhanced concern" with preservation that may justify attempts to move toward rules changes.

Judge Campbell recounted the Dallas conference descriptions of the problems corporations face. A big corporation with 200,000 employees may lose or transfer 10,000 of them every year. We heard of a corporation that had 10,000 employees under a litigation hold. One company told of spending $5,000,000, increasing at a rate of $100,000 a month, preserving information against the prospect of litigation that had not yet even been filed. There is a great concern about differences in the standard of fault that supports sanctions. The consequence is that people over-preserve.

As serious as the problems are, there are many ongoing efforts to develop more information to support better-informed rules proposals. The problem is real. The risks in addressing it prematurely are real. Should the Subcommittee at least work toward developing a draft or drafts that might be considered for a recommendation for publication at the March meeting?

Discussion began with agreement that these are really tough questions. But does the prospect that technology will change continually justify a failure to do anything, ever? People are very concerned about the ex ante duty to preserve. "The trigger is very important." It is all very difficult. "But perhaps we should do something now."

A committee member expressed similar troubles about the trigger, but suggested that "sanctions is the area where we can do something now." Attempting to define a trigger would be hard. No reputable corporation will chance sanctions. The result is to preserve under the most severe view. "I would not defer a uniform rule on sanctions."

The Committee was reminded that these questions overlap the rules of conduct for lawyers. Professional obligations also will engender very conservative behavior. The Committee should proceed with great caution. This theme recurred. "Everything comes down to attorney conduct." Years ago, the Standing Committee worked on developing federal rules of attorney conduct. It held three major conferences, and then gave up. Although the Committee was concerned about Enabling Act limits, interested members of Congress thought the subject is within the Act. The result today is that most districts adopt a dynamic conformity to local state rules. Local rules usually are the ABA Model Rules, with some local adaptations. The rules forbid unlawfully obstructing another

party's access to evidence, and speak in other ways to issues that bear on preservation. Sanctions can be imposed under the state systems of attorney regulation. "This is very difficult. But that is not to argue we should do nothing." Responding to an observation that the attorney discipline rules do not command federal courts to impose Rule 37 sanctions, it was noted that lawyers do have to worry about state sanctions. But it was suggested that state sanctions may be a source of "angst that we cannot do anything about." The Code of Conduct for judges, indeed, obligates judges to notify disciplinary authorities of lawyers' violations of professional responsibility requirements.

Another member suggested that the attempt to focus on spoliation as the easier target cannot really succeed because preservation is so tightly tied to spoliation. And a rule on sanctions will lead to emergence of new specialists in how to litigate spoliation issues. Who will decide those issues? "We cannot escape" defining triggers for the duty to preserve.

A Subcommittee member noted that at the end of the September miniconference he had suggested the Committee should think hard about the advantages of doing nothing. But that probably is not the best answer. "At least a sanctions rule is necessary." And it may prove that a workable sanctions rule cannot be completely divorced from trigger and preservation issues. A rule must attempt to hit a rapidly moving target. The proposal that the obligation to preserve should be triggered by a "reasonable expectation of the certainty of litigation," for example, does not provide real certainty in the current landscape.

Another Committee member observed that although it is possible to think about a sanctions rule rather than an express preservation rule, the separation is difficult. If different courts have different concepts of trigger, scope, and duration, the outcomes will be different. "How do you plan to avoid sanctionable behavior"?

Yet another Committee member thought the submissions to the Subcommittee are impressive. Some urge that we do nothing, implementing the principle that the first thing is to do no harm. Others urge that attempting specific or general rules on trigger, scope, and duration is too risky, but that a sanctions rule may be feasible. There are variations on the level of detail that might wisely be incorporated in a sanctions-only approach. It is possible to craft a sanctions rule that incorporates an idea of reasonable conduct that should not be sanctioned. "The number of cases where this actually comes up is limited. People self-regulate for fear of extreme cases." At the end, it seems likely that an explicit preservation rule, whether one that expresses detailed obligations or one that simply directs reasonable behavior, will not repay the effort of creating it. But a creative

sanctions rule may be useful to protect against extreme behavior. "People will talk more and that will reduce problems."

Committee discussion continued with the view that a sanctions rule will provide only limited help with the preservation obligation. The guidance "will be hard to build on." "But a uniform rule on sanctions is important even if it does not address preservation." The rule is likely to come up short of the most demanding present standards, and in this way will provide some comfort. Preservation is important. The Committee should continue to work on it as a highly significant problem.

An observer suggested that there is a "big Erie problem." The source of the duty to preserve bears on the cure; is it state law? federal procedure? substantive law? There also is a nomenclature issue — what *is* a "sanction"? A curative order is not a sanction, and any rule must draw the distinction. An order directing additional discovery, or shifting costs, to compensate for the loss of information is not punitive. "Negligence is better fit for curative orders than for sanctions."

The diversity of present law was explained in part by looking to the charts breaking the questions down by circuit. Most of the decisions are district-court decisions. Courts of appeals do not often get these cases. That may provide added reason for adopting a rule, achieving greater national uniformity.

The value of working toward a sanctions rule was further underscored by urging that success would produce national harmony, "replacing present cacophony." It is not good to have many different standards in different courts. Negligence, for example, might support cost-shifting, but not adverse inferences. It may not ever be possible to create a satisfactory preservation rule, but it makes sense to move ahead on sanctions. In any event, the Standing Committee may incline toward a conservative approach, welcoming a uniform sanctions rule, recognizing a preservation rule as presenting an ongoing challenge that deserves continued attention but may not yield to early answers.

The Committee was reminded that the 2006 amendment of Rule 37 was narrow. It was conceived as a first step. "It was an essential first step because of the degree of anxiety that had already developed." It was an attempt to catch up with the fact that with automated information systems, "doing nothing can cause the destruction of information." It was understood that the Committee would continue to study the problem. Electronically stored information is different from paper information in these dimensions. Are more changes needed? Reducing the fear of sanctions may reduce the extent of over-preservation. "It can be good to do something, rather than risk never doing anything."

Turning to scope, it was suggested that the preservation obligation leads to discovery. Should the scope of the duty to preserve be tied to the scope of discovery? Or should it be something less than everything that can be anticipated to fall within the scope of discovery after litigation is filed? It might prove awkward to define a scope of preservation different than the scope of discovery. And it may be that the Duke Subcommittee will recommend that the scope of discovery be narrowed; that would bear on the scope of preservation, reducing the burdens.

All of this discussion, initially focused on whether to attempt anything, clearly moved in the direction of counsel about what to do. A transitional summary was offered. Defining the trigger for a preservation duty is the subject most likely to raise concerns about making changes to the common law. The notion of spoliation goes back a long way; it is anchored in an 1817 Supreme Court decision, which in turn has roots in the common law. But would it help to have a rule that identifies conduct that is sheltered? Is it possible to address proportionality in preservation, compare the present discovery rules? As Professor Hubbard's article points out, the parties have to make preservation decisions, and courts enforce proportionality. A sanctions rule can address reasonable care, proportionality, attempts at discussion among parties or intending parties to solve the problem (as compared to an over-reaching preservation demand letter). Is it indeed legitimate to build into a sanctions rule factors that will protect reasonable behavior?

The Committee was reminded of the recommendation that it will work best to devise the most attractive rule that can be drafted, and then to determine whether it can be squared with the Enabling Act. A sanctions rule could be more detailed than any of the drafts yet devised. And "Rule 37 sanctions in a case actually before the court seem to fall in the heartland of § 2072."

The Subcommittee began with the view that it should restate the generally accepted definition of the events that trigger a duty to preserve: a reasonable expectation of litigation. But recent discussion has suggested that the common and general rule should be changed, that it creates problems that should be addressed. The Department of Justice, on the other hand, disagrees.

Defining the scope of the duty to preserve also is a problem. Actual rulings on actual questions are not easy to predict. That makes it difficult to decide on what to preserve, particularly before litigation is filed. Specifics could be built into a sanctions rule, such as a presumptive upper limit on the number of custodians to be directed to preserve, but this approach might encounter difficulties. Or the limit could be built into "Rule 26." The number of custodians could be set, for example, at 15, requiring good cause to raise the number. The attorneys would be required to confer before making or opposing a motion to raise the

number. And the presumptive limits would tie back to measuring what it is reasonable to preserve. Still, it is not clear whether such a rule would make a difference. The proposal that became Rule 26(b)(2)(B) caused consternation when it was published; it is not clear whether it has made any difference in practice.

The concept that Rule 37 limits on sanctions may be appropriate was said to rest on the belief that inherent authority is what authorizes sanctions under present practice. If a sanctions rule gets it right on the level of culpability for different sanctions, the Chambers v. NASCO, Inc. [501 U.S. 32 (1991)] concept of inherent authority would likely not be a serious threat.

Concern was expressed that this discussion reinforces the fear that it is premature to begin drafting. The position of the Department of Justice has been described as "do nothing," but that is not accurate. Instead the Department believes it is important to work toward a careful approach. With pleading, the Committee has declined to rush into rule drafting. It is wise to wait to sense the scope of any problems, so as to draft a workable solution. What we have now is a snapshot. We need a better sense of the direction of the law, about effects on pro se litigants, about access to information, and about access to justice. "There is a lot to do. Drafting language is premature."

Another Committee member suggested that "there is a real problem." A sanctions rule would not get directly to preservation. Thought should be given to developing a preservation rule. "We should not give up on that, even if we do sanctions first."

The virtues of going slowly about the task were suggested from a different perspective. There are choices intermediate between creating a rule now and doing nothing. Education of bench and bar might accomplish something. "If huge numbers of litigants do not experience preservation as a big problem," immediate drafting efforts may not be justified. A similar thought was that there is room to go forward with drafting a rule, but it is unclear whether it is reasonable to aim to achieve a proposal for publication at the March meeting.

An observer said that "there is a vacuum. It is filled by judges deciding cases. A sanctions rule would be some help, but it would not help businesses to understand what they have to do. We need guidance."

Identifying the trigger for a duty to preserve came back for discussion. The first comment was that the RAND study discussed at the Dallas miniconference found that in-house people find the law clear. The Sedona Conference agrees. So does the chart of decisions prepared by Judge Grimm. A reasonable expectation of litigation triggers the duty to preserve. The differences arise in

evaluating the established trigger. Some think it works. Others think it too broad, urging scaling it back to a reasonable anticipation of the certainty of litigation. And yet others would narrow it further, to arise only on the filing of an action or service of a subpoena. There have been strong reservations about proceeding with a rule in the shape of the specific model that lists a number of specific triggers, such as receipt of a letter demanding preservation.

The next observation was that the common law "is causing the preservation of information far out of proportion to its value in litigation." If we have authority to do so, it would be good to limit the trigger. An observer challenged this view, opposing any change. Seizing on the "reasonable expectation of the certainty of litigation," this comment asked how this standard would work when a statute of limitations may extend for years into the future?

Examples given at the Dallas miniconference were recalled. A duty to preserve may properly arise "before there is a lawyer even in sight." "A patient dies in the operating room; an engine falls off an airplane." "We have to continue to work on preservation, even though we may never succeed in crafting a workable rule." Judge Scheindlin, who has dealt with these issues extensively, believes it would be sensible to adopt a rule.

A district judge offered several thoughts. Some companies now have specialists in e-discovery on staff. One case illustrates a special problem — it is a patent infringement action pending in Delaware and California; the different courts have different preservation standards. The resulting costs run in the tens of millions of dollars. Technology is changing rapidly; "you can store almost anything easily in the cloud." And the Supreme Court decision in the MedImmune case changes the trigger — it is not the certainty of litigation, but something much looser.

It was asked what policies should be followed in defining the trigger. Is it to save money? Protect access to information? A firm has many reasons to preserve information, including state and federal regulation and business reasons. What problems are we trying to solve in adopting an independent duty to preserve for litigation? In patent cases, for example, there will be a huge preservation endeavor independent of any rule-based duty to preserve. "We need a better sense of the reasons to move toward adopting a rule."

A Committee member responded that there *is* a class of corporations spending a lot of money on what they think is unnecessary preservation. "The value of uniform standards for sanctions is real. This is a significant problem. Can we address it"? Identifying the trigger is a problem. Most firms assume the common-law trigger. The disparate standards for sanctions also present problems.

Preservation duties and sanctions affect plaintiffs as well as defendants. The problem is important. Whether or not a publishable proposal can be drafted by March, it is important that work on a sanctions rule should go forward.

A broader conceptual approach was suggested. "Over-preservation is an error. So is under-preservation. We cannot build an error-free system. So how do we define success"? Is it an acceptable error rate for parties acting in good faith? Should we weight differently the costs of over- and under-preservation? The best we can achieve will be clarity. Certainty is not within reach.

The first response to this question was that it would be a success to reduce the consequences of under-preservation, to reduce the tendency to over-preserve. A rule change will not give certainty. But there is a chorus of people who request information — mostly plaintiffs — who fear that needed information will not be there. And those who are called upon to produce information fear sanctions, and the reputational effect of sanctions. Neither side can be fully protected by a rule.

So a Committee member agreed that it is good to conserve resources, to avoid wasting time and resources on litigation. But "it's not just about the parties, or the court system." There is also a public interest in deciding controversies on the merits. "We cannot easily monetize that." Preservation entails cost, but the cost is constantly diminishing. "The cost of error on the merits will not diminish." The goal of certain guidance to litigants should not be reached by creating a loophole for non-preservation. And the trigger for preserving information in anticipation of federal-court litigation should not be different from the rules and practices that guide real-world preservation of information in other ways.

The suggestion that the cost of preserving electronically stored information is small was met by observing that although the cost seems to fall continually per unit of information, there is an unending supply in the number of units. "We cannot say that the cost of preservation is de minimis." On the other hand, there is an independent reason to be wary of adopting a trigger based on the actual filing of an action — "we will have more cases filed."

Discussion of preservation obligations concluded by agreeing that this is a very important task. There is much yet to learn. The Committee and Subcommittee can expect to receive continuing submissions of new information and views; the submissions will be much appreciated. The Subcommittee will look for near-term solutions, such as sanctions. But "it should work as if all issues are still in play." The Subcommittee will report to the Committee at the March meeting.

RULE 45

Professor Marcus said that work on the proposed Rule 45 amendments that were published for comment in August could command an important part of the agenda for the March meeting. No one asked to testify at the hearing that was scheduled for this morning; it was cancelled. It remains to be seen how many people will appear for the two hearings scheduled in January.

The published proposal sought to simplify Rule 45; to revise the notice provisions and make them more prominent; to reject the Vioxx approach to commanding a party or its officer to appear at trial; and to establish authority to transfer a nonparty subpoena dispute to the court where the action is pending. The Vioxx proposal was accompanied by a request for comment on an alternative that was not endorsed by the Committee, granting the court authority to command a party to appear as a witness at trial.

Modification of the notice provision expanded it to include trial subpoenas as well as discovery subpoenas. But it did not include any requirement of subsequent notice as information is produced in response to the subpoena. The American Bar Association Litigation Section feels strongly that notice of production should be required. There are likely to be extensive comments on that subject.

The standard to transfer a discovery dispute was set at consent of all, or "exceptional circumstances." There have been two written comments so far, pointing in different directions.

Another comment has suggested that a provision akin to Rule 30(b)(6) be adopted for trial subpoenas, so that a party could subpoena a corporation or other entity with a direction that it provide witnesses to testify on designated subjects. The Subcommittee considered this possibility early on, and rejected it for a variety of reasons. But it has been brought back and will be considered further.

The relative paucity of early comments was not seen as a sign that there will be few comments overall. The rate of submitting comments commonly accelerates toward the deadline. Early hearings often are cancelled; they tend to be held, and to be useful, when a proposal stirs deep controversy. These issues are presented in some pending MDL proceedings, providing an added incentive to comment.

CASE MANAGEMENT PRACTICES, EASTERN DISTRICT OF VIRGINIA

Peter Keisler chaired a panel presentation on the "rocket docket" practices in the Eastern District of Virginia. Panel members included Judge Leonie M. Brinkema; Judge Thomas Rawles

Jones, Jr.; Dennis C. Barghaan, Jr., Assistant United States Attorney; William D. Dolan, III, Esq.; and Craig C. Reilly, Esq.

Judge Brinkema opened the presentation by summarizing: "The heart of the matter is not to waste time." The court has local rules and practices. But it also has "a shared judicial philosophy." The court takes pride in being one of the fastest courts in the country. That helps the court. There are no "renegade judges," an essential part of making it work. It also helps the bar. The bar have become accustomed to the practice.

The practice begins with an early scheduling order. The order is one page long. It provides the structural framework. There is an early date for a Rule 16 conference with a Magistrate Judge. There is an early discovery cut-off, set for the second Friday of the month — usually about 16 weeks. Most lawyers know that when you file a case, "you need to be ready to try it soon." Final pretrial conferences are set for the third Thursday of the month. Lawyers file plans for these conferences, and know that trial will be held approximately eight weeks after the conference.

The scheduling order sets the time for objecting to exhibits. This cuts out a lot of work. The order limits the number of nonparty, nonexpert depositions to five. It also limits the number of interrogatories. "We are extremely strict about enforcing the order. But there is some flexibility."

"We do not let lawyers dictate the schedule." They cannot agree to extend the discovery cut-off or the like. They can agree to submit a joint motion, but the court may deny it.

"Another technique is to rule from the bench as much as possible." With adequate briefs and bench memos, the court should be able to rule on most motions after brief argument. "I do it on about 85% of motions." This saves a lot of time as compared to writing opinions.

The court uses its magistrate judges very efficiently. It avoids referring matters that call for a report and recommendations; that procedure uses the time of two judges.

Friday is motions day. Criminal motions are scheduled for 9:00, civil motions for 10:00. Lawyers know to notice motions for a Friday.

Judge Jones began his presentation by noting that from the perspective of a magistrate judge, the district judges "have not given up their independence." They agree with the docket practices. Empirical evidence shows that these practices achieve efficiencies and economies in managing their own dockets.

The standard management of pretrial matters is left to the magistrate judges up to the close of discovery. "The predictability for the bar enables us to move at the pace we do."

At the end of the pretrial schedule, each district judge sets up his or her own calendar for dispositive motions, motions in limine, other matters, and trial dates.

Several aspects of magistrate-judge management were described.

All nondispositive motions automatically go to the magistrate judge, with few exceptions. This enables lawyers to keep things moving. "An attorney cannot slow things down."

The magistrate judges work closely with the district judges on what they expect, and know when to consult with the district judge. A consent motion to enlarge time, for example, comes to the magistrate judge — and often is not granted.

There is a quick Rule 16(b) conference in every case. It may be held by telephone conference when the attorneys are experienced. The conference leads to a more detailed Rule 16 order. An effort is made to resolve problems in advance of the Rule 16 conference, addressing such matters as the number of depositions, known privilege issues, and production of documents and electronically stored information. This drastically cuts down on motions practice.

The court does not allow general objections. This works so well that it would be good to amend Rules 33 and 34 to disallow them. Lawyers, if allowed, often file general objections at the beginning of their responses, and then, addressing specific requests, provide answers "without waiving objections." That leaves no idea whether anything is being withheld. The court allows only specific objections.

The court encourages streamlined privilege logs.

A judge is available by telephone to rule on problems at depositions.

Final expert witness depositions are frequently allowed after the final pretrial conference. This works, and does not interfere with the trial date. "The goal is to get the case packaged for trial."

Peter Keisler introduced the lawyer members of the panel. Judge Brinkema and Judge Jones had extensive experience practicing in the Eastern District before going on the bench. "The current practitioners are essential to make the docket work." A lawyer from outside the district immediately associates an experienced Eastern District practitioner. "It *is* a different culture."

"Justice Delayed Is Justice Denied" is carved over the courthouse door. Etchings inside the courthouse illustrate the fable of the tortoise and the hare — the court does not think of itself as the erratically speedy hare, but instead sees itself as moving at the steady, inexorable march of the tortoise.

At the beginning, there was some question whether to divide the presentation into two panels, lest practitioners be inhibited in speaking frankly to their experiences. But that proved unnecessary. The court has a tradition of open and robust candor between bench and bar. The practitioners do not hesitate to speak freely.

Craig Reilly began by saying that the court has a spare set of local rules. Its practice is rooted in judicial philosophy. Routine cases are governed by standard practices. Exceptions are made on a case-by-case basis, not by relying on complicated rules that attempt to provide guidance.

The benefit of these practices is immediate and sustained attention to the case. "30 days to answer Rule 33 interrogatories means 30 days." Less time is less expense, although you may need more lawyers and cost to bring them up to speed.

More discovery does not lead to more truth at trial. Often less.

Patent cases are brought to the Eastern District to avoid the costly wheel-spinning of preliminary-injunction practice in other districts. There is little reason to spend months arguing over a preliminary injunction when you can get to trial on the merits in six months. The joint discovery plan, prepared under Rule 26(f), works well; it is followed by the Rule 16(b) conference with the magistrate judge, leading to specific tasks with a time table that suits that case. Disclosure practices are like those in the Northern District of California — there is an early disclosure of detailed infringement and invalidity contentions; noninfringement contentions are put off until discovery is completed. A protective order is presented early; it can be complex; and information is exchanged on a "counsel-eyes-only" basis until the order is entered. The role of in-house counsel in the protective order is often disputed, particularly in litigation that involves source-code discovery, and implementation of the order may be difficult.

Discovery of electronically stored information often is addressed. The issues typically involve form of production; timing; volume and rolling production; and whether e-mail messages should be discovered at all — often discovery is sought, but there have been cases where discovery is bypassed.

Deposition disputes may extend to who counts as a party — how to count different witnesses designated under Rule 30(b)(6). The

resolution may be to measure deposition limits in the number of hours per side, perhaps 100 hours or 150 hours, and not to consider the number of depositions at all.

Expert discovery is often postponed. Parties reserve the right to supplement earlier responses to meet new expert opinions.

Motion practice is frequent and contentious.

Extensions of discovery cut-offs can be had on a case-specific basis.

Claim construction is done late, so the case is mature. It can be a few-week process.

Summary-judgment practice is done in one round, with one brief. There used to be a series of motions. The court is not shy; many defenses are stricken on summary judgment.

The court offers excellent mediation opportunities, including with magistrate judges, third parties, or sometimes a second district judge. The court does not engage in "head banging"; it does not seek to force bad settlements.

Securities fraud class actions are a second distinctive group. They do not arise that often. The PSLRA gets these cases off the ordinary track because of the discovery stay. But the delay is not great, because judges rule quickly on the motion to dismiss. These cases are subject to the discovery cutoff; usually discovery is all one way. The case might be stayed for mediation.

Securities fraud, patent cases, and class actions involve highly skilled and motivated counsel. That makes it easier to get things resolved despite the complex nature of the litigation.

Dennis Barghaan said that as a civil litigator on the United States Attorney's office he finds two big advantages in the rocket docket. Often he is the only attorney for the government in the case, as compared to the four or five lawyers Craig Reilly described. The docket practices allow him to move his cases forward: "I can say 'no' to my client." Beyond that, the government is a large repository of documents, giving adversaries an incentive to demand everything. The docket practices force them to cut back.

The docket practices also pose challenges for cases that typically involve the government. Administrative Procedure Act cases often are esoteric, and can be very complicated. They span the full range of subject matters confided to federal agencies. The government lawyer often comes into the case knowing nothing about the subject matter, confronting lawyers who specialize and know this particular subject inside-out. "There is an incentive to

file here to take advantage." But the judges are good at providing leeway. It works, but only if the judge is an active participant.

Bivens cases also present problems. There is no discovery until immunity questions are resolved. So the defendant's motion to dismiss is met by a Rule 16(b) order that discovery is to begin now — "We need a ruling from the bench on Friday morning," although judges often do a pre-screening Rule 16(b) order for *Bivens* and sovereign-immunity cases that stays discovery pending a ruling on the motion to dismiss.

William Dolan observed that in litigating in other districts around the country, some judges have a notion that speed means a lack of substantive attention to nuances of law and fact. Not so. The judges in the Eastern District of Virginia work hard. Not all judges do. In a case now pending in another district a 12(b)(6) motion to dismiss has been pending for 8 months. The cost is high; in retrospect, it would have been better not to file the motion.

The money spent on discovery "is scandalous." Speed in moving the case reduces the costs. On Friday morning the judge ruling on a motion knows what the case is about. The first question from the bench shows that the judge has read the motion and briefs; the arguments go quickly. The lawyer has the obligation to point out what is unusual to justify departure from the regular docket practices. "It is a paper court. They read first." They rule promptly, so the case can move on.

There are local rules. But there is also a culture. Lawyers look to the culture as what the judges really look to. This makes the lawyer's task easier; "you can explain to your client what's going to happen."

"Unless you've been there, you can't believe how it's going to happen." As local counsel, a lawyer has to be true co-counsel. "We have to argue the motion, or conduct the trial, if you're not there."

If you lose in this court, "you've got bad facts or a bad lawyer."

People are always calling for preliminary injunctions. Given the speed of the docket, preliminary injunctions are seldom necessary. It is better to get on to the merits. "I had an injunction motion in another court with a 4-day hearing; the court never ruled on it."

Lawyers want to persuade and please the judge. It is good to go to court on a Friday when you do not have a motion and listen. The judges will explain what they are doing: "The framework is A, B, C; B is missing. Motion denied. The judges distill it to the

essence." A good lawyer, like Craig Reilly, "goes straight for it."

"In-house lawyers are playing a more aggressive game. They insist I find the smoking gun. 'Argue this.' 'Approach it that way.' Younger lawyers are subject to this pressure. I can tell them to bug off" because the docket practices force more sensible behavior.

There is a risk that we will have a generation of lawyers and judges who do not know how to try cases. But courts are there for trials. "Trial is not a failure of administration."

Discussion began with a judge's observation that a lot of solo practitioners in his court cannot meet a 16-week schedule for discovery; they want to have other cases. Do solo practitioners in the Eastern District file in state courts to avoid the rocket docket? Judge Jones responded that this *is* a cultural phenomenon. Tell them they have to do it, they do it. "In private practice as a solo, I did it. And nothing says it has to be 16 weeks; it could work with equal effect in a longer period." Craig Reilly added that except for employment cases, there are few cases in federal court that can be handled by a solo lawyer. One federal case could take as much time as 20 in state courts. But the state courts are moving toward the federal practices. "Still, it does not prove easy for a solo." William Dolan added that a plaintiff waits to file the action until ready to go. Then the rocket docket can be an advantage.

The same question was asked about excessive force cases, where "discovery is all in the police department." Judge Jones said that "we do them, with solo practitioners for the plaintiffs." Dennis Barghaan added that "it does force you to think more carefully about how to narrow discovery, about what really is at issue in the case."

In response to a question about briefing practices on summary-judgment motions and about how many cases go to trial, Judge Brinkema said that most civil cases settle. The court has a great mediation program. For summary-judgment motions, the court limits the opening brief to 30 pages, including the statement of facts. The answering brief is also limited. The court strongly believes in these limits because they force lawyers to make the best arguments. But the court does get some really complex cases. The court has a 3- to 4-week lead time on Rule 56 motions. They are discussed in chambers. The briefs are read before the hearing, and so is the bench memo. "When I go to argument, 95% of the time I know how I'm going to rule and I rule from the bench."

Dennis Barghaan added that litigants have to think about summary judgment ahead of time, during discovery. This helps the

plaintiff to realize what information it needs, and helps the defendant to know what facts are troubling.

Craig Reilly pointed out that the number of trials per judge in the Eastern District is 32, compared to a national average of 20. The national average time from filing to trial is 24.7 months; in the Eastern District it is 11.5 months. "We're way faster." The national average case filings per judge is 428, in the Eastern District it is 312. But the national weighted average is 505, while it is 497 in the Eastern District.

A judge asked whether the benefits of the Eastern District practices can be transferred to other courts if the only common element is strong management? How far does it depend on the division of responsibilities between magistrate judges and district judges, on early and continued strong judicial control, on prompt rulings, on a collegial bar, on a bench that works to the same judicial philosophy? Judge Brinkema responded that there are interesting anecdotes about experiences when Eastern District judges sit in other districts — they impose Eastern District practices, the local lawyers yell and scream, and then they find out that it really works.

Another question asked whether lawyers will work together when the court imposes discipline. William Dolan said "absolutely. But if there is one judge who will give you relief, on a court where the other 15 judges will not, the lawyers will somehow wind up on the forgiving judge's doorstep."

A judge asked whether scheduling works better if the first conference has a real exchange with the lawyers — "can you do this on paper"? Judge Jones answered that the default is an in-person conference. "I do it in chambers." But if a participant is from out of town, it can be done by conference call. "Paper cases are normally those with agreement among lawyers I know. Everything that can be dealt with early has been. I'm not looking for excuses to do it on paper."

The question of "drive-by" Rule 26(f) conferences was raised by asking what is the culture in the Eastern District. Craig Reilly answered that knowing what judges are likely to do if a dispute arises means the conferences usually are not contentious. They are never a "drive-by." "Many of my cases have counsel eager to be involved in scheduling, not that we always agree." When agreement fails, competing proposals are submitted for resolution at the Rule 16(b) conference. Judge Jones added that the initial order requires a real Rule 26(f) conference, and a real plan at least 7 days before the 16(b) conference.

A judge observed that the discussion suggested that the real time saving comes between the close of discovery and trial. How is this accomplished? By setting trials a lot more quickly? By

ruling on dispositive motions? Judge Brinkema observed that motions are noticed for the next Friday, and that the reply brief comes in on Wednesday or Thursday. Judge Jones added that the time for filing a summary-judgment motion varies from judge to judge on the court, "but it's quick."

The question then turned to scheduling trials: if the time from the close of discovery to trial is compressed, does the court stack up trials for the same day? Judge Brinkema said that that does not often happen, but there is always a judge available. "I do set two trials for the same day. We set strict time limits for trial — no cumulative witnesses, or the like — so there is no problem that one trial lasts long enough to run into the time set for the next trial. Dennis Barghaan added that the time for the final pretrial conference means it is necessary to ask for some delay in the trial setting; "I don't have the deposition transcripts yet. Collegiality of the bench with the bar is necessary."

Another judge asked whether the Rule 56 timing means the parties have to prepare for trial before the ruling on summary judgment? The panel's common response was "yes." But if you can file the summary-judgment motion, you should be able to prepare an exhibit list for trial. "There is a window — the case should be ready for trial. It will not be a 6-week trial." There is no reason to think that the court gets fewer summary-judgment motions because of its speed. Craig Reilly said "I've never given up the chance to move for this reason."

The Committee thanked the panel warmly for a thoroughly prepared and fascinating presentation.

PLEADING

Judge Campbell noted that the continuing study of pleading practice has stemmed from the decisions in the *Twombly* and *Iqbal* cases. The subject continues to command close attention, including ongoing empirical work by the Federal Judicial Center.

Joe Cecil summarized the ongoing FJC study. The first phase found an increase in the rate of making motions to dismiss for failure to state a claim. The only measurable change in the rate of granting the motions occurred in financial instrument cases. And orders granting the motion more often grant leave to amend.

The second phase is looking into experience when a motion to dismiss is granted with leave to amend. An amended complaint is filed in two-thirds of these cases. The amended complaint often is followed by a renewed motion to amend. There is no significant increase in the rates of granting dismissal. Pro se cases and prisoner cases have been added to the study.

This second phase reveals that some data are missing. An effort is under way to find the missing data.

The first-phase report "was received less than warmly by some." Focused criticisms have been made in articles by Professor Lonny Hoffman and by Professor Hatamayr-Moore. A response to those criticisms is being prepared, and will be posted on the FJC site.

In other research, Professor Hubbard could not find a change in the rate at which motions are granted. Others find a shift in the way judges assess complaints — there is an increased focus on a demand for detailed fact pleading. Professor Dodson finds a small but significant shift in grant rates, based on much more reliance on the sufficiency of pleading facts.

The rate of granting dismissal for amended complaints was about the same as for original complaints. A supplemental report will be prepared to elaborate on these findings.

Professor Hoffman addressed the committee. He began by noting that he testified in a congressional hearing that the prospect of amending Rule 8(a) by legislation is a bad idea. But he has been concerned that readers of the FJC first-phase study would be confused into thinking there is no change in dismissal practices, or would be confused about the cause of changes. The findings as to filing rates are significant and interesting. A plaintiff is 50% more likely to face a motion to dismiss. There is a whole new class of cases in which defendants who would not have moved to dismiss before the *Twombly* and *Iqbal* decisions are now moving to dismiss. And the FJC data show that a motion to dismiss is more likely to be granted. But that does not show whether the Supreme Court decisions cause the increase. Except for financial instrument cases, the FJC reports that the increase is not statistically significant. "But the 'null hypothesis' is difficult to understand." To say that fact pattern is not significant at the 0.05 level is to say there is a greater than 5% chance the changes were random. It is better to ask whether we should demand so high a level of confidence. It is a two-edged sword. "We're not likely to be wrong in concluding that *Twombly* and *Iqbal* had an effect; we can be wrong in thinking they had no effect." It would be unwise to move too quickly. But we should remain concerned that they are having an effect. One study shows a 20% reduced chance a case will survive to discovery. Others are finding statistically significant increases in dismissal rates. "Results very much depend on the inputs." The two biggest case categories in the study are "other" and "civil rights." There is not a 95% level of confidence of changes in those categories, but the level is greater than 90%. "That's pretty good odds." But that does not say what should be done.

A judge noted that the circuit courts have taken a much harder look at pleading than the Supreme Court did. The message is

getting to the district courts — they cannot throw out claims willy-nilly. The Supreme Court "kind of made the same point" in this year's *Skinner* decision. It has been observed that the Court is cyclical in its approaches to pleading; there may be a pull-back. An exhaustive source of information about emerging approaches is provided by Andrea Kuperman's study.

Joe Cecil said that he and Professor Hoffman agree on more and more points. There are more motions to dismiss being filed. As to the grant rate, page 7 of the report shows the overall numbers, but that does not tell the whole story. Using multivariate analysis to account for other factors that affect the outcome, such as the type of case, the numbers of cases in different courts in the study, whether there has been an amended complaint, reduces any change in grant rate below a statistically significant level, apart from financial instrument cases. As to statistical significance, "we cannot prove no effect. We could never prove that. But the patterns of findings we see could easily have happened by chance." There is other research going on. Some of it assumes that there will be no amendment if dismissal is granted without leave to amend. "That is not always so."

So there are differences in patterns among the districts studied. The Southern District of New York has a low rate of filing motions to dismiss, but a high grant rate. But the patterns do not show identifiable differences among the circuits; there are differences between districts in the same circuit.

It was noted that the Second Circuit has established a program to decide quickly on appeals from pleadings dismissals. The records are compact, enabling prompt decision.

It was asked whether at a 90% level of confidence we can find an effect in civil rights cases? Joe Cecil said yes. But it is important to set the significance level before doing the research. The rate chosen will depend on whether you're exploring or whether you want to test a theory. To test a theory, there should be a higher level of significance. But the choice of the level of significance is for the Committee.

A judge noted that from a district judge's perspective, it is important to know the extent to which *Twombly* and *Iqbal* lead to ending cases without an opportunity to get the information needed to frame the complaint. Dismissal of only part of a complaint leaves open the opportunity for discovery, and the discovery may reveal information that enables the plaintiff to reinstate the parts that were initially dismissed. The bite is in the cases where the plaintiff cannot get the necessary information. There is important work left to be done, and it must be based on a wide foundation of information.

It was asked whether the high dismissal rates in financial instrument cases are linked to the mortgage foreclosure crisis. Joe Cecil responded that the pattern is in cases in areas where the crisis appeared to be particularly acute. The common pattern is that a case is filed in state court, removed to federal court, dismissed as to the federal claims, and survives to be remanded to state court on the state claims. That is especially common in the Northern and Eastern Districts of California.

Discussion then turned to the question whether the time has come to begin actively developing specific proposals to revise pleading practice or, perhaps, discovery practices integrated with pleading practice. A wide variety of illustrative proposals have been sketched during the years since the *Twombly* and *Iqbal* decisions turned the Committee's attention from the question whether heightened pleading standards should somehow be incorporated in the rules to the question whether pleading standards have been heightened in a desirable way — whether too high, about right, or not high enough. All of them have been carried forward as worthy possibilities. But none has yet generated confidence that the time has come for active advancement.

Familiar themes were recalled. The Supreme Court's opinions can easily be seen as a call for help from the lower courts. The Court is concerned that three decades of effort have not succeeded in sufficiently reducing the burdens that discovery imposes in an improperly high portion of federal cases. But it is not sure whether pleading standards can be developed to provide a sophisticated screen that dismisses unfounded claims before discovery, while letting worthy claims through to discovery. The opinions are multi-faceted, offering many different cues that can be selected to support substantial changes or relatively modest changes.

The common-law process opened by the Court is working thoroughly. Pleading questions can be raised across the entire spectrum of federal litigation, yielding many opportunities to confront and develop pleading standards. The great outpouring of decisions in the appellate courts may be working toward some degree of uniformity, but consensus has not yet been reached. Among the welter of opinions, two recent decisions singled out by Andrea Kuperman's work provide nice illustrations. One is a First Circuit decision reversing dismissal for failure to state a claim. What is remarkable about the opinion is the intense fact detail set out in the complaint; in many ways it is more extensive than the facts that likely would be singled out on a motion for summary judgment. The opinion, moreover, deals with claims of discharge from public service for political reasons; it may reflect the "judicial experience" component of the "judicial experience and common sense" formula in the *Iqbal* opinion, since the First Circuit has had frequent experience with cases of this sort. The other decision is a Sixth Circuit decision in a case urging an "indirect purchaser"

claim of price discrimination under the Robinson-Patman Act. The court affirmed dismissal for failure to plead sufficient facts to show the manufacturer-supplier's control of the prices charged by the plaintiff's competitor, a distributor who both sold in direct competition with the plaintiff and acted as the plaintiff's exclusive source of supply. The most notable part of the opinion responded to the plaintiff's argument that because the defendants controlled access to information about their pricing practices, discovery should be allowed before dismissing for failure to plead facts inaccessible to the plaintiff. The court invoked part IV C 3 of the *Iqbal* opinion, which discussed at length the need to protect public officials claiming official immunity against the burdens of discovery. The Supreme Court concluded: "Because [the] complaint is deficient under Rule 8, [the plaintiff] is not entitled to discovery, cabined or otherwise." Generalizing this observation, extending it from the special concerns that treat immunity as conferring a right not to be tried, is a ground for real concern. It may be that the Sixth Circuit was responding to a different kind of "judicial experience" — the common view of economists and many lawyers that the Robinson-Patman Act is an obsolete artifact of the 1930s that should be interpreted narrowly to prevent becoming a tool to suppress efficient competition. However that may be, the seemingly flat rule barring discovery to support an amended and sufficient complaint is cause for concern.

These observations led to the suggestion that matters remain in the stage of waiting to see what is happening and how practice will develop. Discussion agreed that pleading proposals should remain on the agenda, with continuing active study, but should not yet be brought to the point of developing proposals for publication and comment. A Committee member "did not disagree," but asked whether very modest changes could be made in the rules that would discourage "the inevitable tendency to cite *Twombly* and *Iqbal* in every case, whether or not on point." One useful practice might be to adopt a limit on the length of motions to dismiss.

A judge observed that motions to dismiss come in infinite variety. His own practice is to ask the plaintiff whether the plaintiff would like to amend. If the plaintiff accepts the invitation, the motion to dismiss is denied without prejudice. "Most times the amended complaint works — there is no renewed motion to dismiss."

The Committee agreed to keep pleading topics on the agenda for continuing active study and attention, but to continue to stay active development of specific proposals.

CIVIL-APPELLATE SUBCOMMITTEE

Judge Colloton delivered the report of the Civil-Appellate Subcommittee. The Subcommittee has carried two items on its agenda.

The first subject involved a question that could lead to amending Civil Rule 58 to complement an amendment of Appellate Rule 4(a). The question was stirred by considering hypothetical circumstances in which it could be argued that appeal time might expire before the period allowed by an order for remittitur, or to draft an injunction. The remittitur example, for instance, was an order granting a new trial unless the plaintiff would accept remittitur within 40 days. The Appellate Rules Committee has concluded that amending Rule 4(a) is not warranted. That means there is no need to consider Rule 58 amendments. These questions have been dropped from the Subcommittee agenda.

The other subject involves "manufactured finality." This tactic may prove attractive to a plaintiff who suffers dismissal of the principal claim while peripheral claims remain alive. A variety of means have been attempted to achieve a final judgment so as to win immediate appeal from dismissal of the principal claim. Dismissal of the remaining claims with prejudice works to establish finality. Most courts agree that dismissal of the remaining claims without prejudice does not establish finality, although a couple of circuits have accepted this strategy. The more interesting question is presented by dismissal with "conditional prejudice" — the remaining claims are dismissed with prejudice, but on the condition that they may be resurrected if dismissal of the principal claim is reversed. The Second Circuit has accepted this practice; it has been disallowed in two others. The Subcommittee could not reach any consensus as to the need to act on this subject. Barring renewed enthusiasm from an advisory committee, the Subcommittee is not likely to recommend action. A judge agreed that it is "good to do nothing."

The Subcommittee continues in existence as a vehicle should new questions arise — as has happened with some regularity — involving integration of the Civil Rules with the Appellate Rules.

RULE 23: CLASS ACTIONS

The Standing Committee has planned a panel on class-actions for the January meeting. The broad question is whether sufficient problems have emerged in practice to warrant beginning work toward amending Rule 23.

The Committee was reminded that Rule 23 was deliberately put off limits between the 1966 amendments and 1991. The 1991 report of the ad hoc Judicial Conference Committee on asbestos litigation suggested that perhaps Rule 23 might be amended to improve the disposition of asbestos claims. The Committee set to work. After considering a top-to-bottom restructuring of Rule 23, more modest proposals were published in 1996. The only one that survived to adoption was Rule 23(f), a provision for appeal from orders granting or denying class certification that has proved successful. Work continued, resulting in a variety of amendments that took

effect in 2003. That experience suggests that any class-action project will endure for many years. The only prospect for a relatively short-term project would be identification of one, or perhaps a few, small changes that command general consensus support. Any significant change is likely to stir deep controversy, and any package of significant changes surely will stir broad controversy. This prospect makes it important to weigh whatever needs for reform may be identified against the need to allocate Committee resources to the projects that most need attention. Discovery work continues apace. Pleading may come on for development of specific proposals. The Duke Conference Subcommittee is preparing a package of amendments. There is enough on the agenda to keep the Committee well occupied for some time.

The agenda materials presented a summary of recent Supreme Court decisions bearing on class actions, a reminder of past proposals that failed of adoption, and a general request for advice based on the continuing experience of Committee members. Have problems emerged with administration of Rule 23, perhaps influenced by experience with the kinds of cases being brought to the federal courts by the Class Action Fairness Act, that justify launching a class-action project?

The first response suggested four topics that deserve study.

One topic is the extent of considering evidence on the merits of class claims to inform the determination whether to certify a class. The Seventh Circuit decision in the *Szabo* case has been picked up in most circuits. The problem is that some courts are moving toward basing the certification decision on a determination whether there is enough evidence to go to the jury on the merits. There is a thread of a view that the district court has to choose which competing expert witness is correct in making a certification decision whether common questions predominate in the case as it will be tried. There are real variations among the circuits on these questions.

A second question relates to issues classes. Should predominance in the Rule 26(b)(3) inquiry be measured by the case as a whole? Or should it be measured by looking only to the issues that will be tried on a class basis? The Third Circuit has looked to a balancing test, considering a variety of factors.

The criteria for reviewing a proposed class settlement also vary. Courts establish different lists of factors, some longer, some shorter. (The Committee was reminded that the process that amended Rule 23(e) began with enumerating some 16 factors, some of them innovations over case law, in rule text. The Committee became concerned that the factors would become a mere check-list, a laundry list that would encourage rote recitals without actual thought. The list was moved to the Committee Note, and then

discarded entirely.) It also should be established whether there is a presumption in favor of a settlement supported by all parties.

Finally, there has been a lot of reconsideration of the value of cy pres settlements. This topic seems ripe for consideration.

Another Committee member agreed that these four issues are worthy of consideration. That does not mean that it will be easy to agree on the solutions. Consideration of the merits as part of the certification decision is addressed by many cases, but there is no clear path. There is a real tension with summary judgment and the right to jury trial, a risk that the court will decide jury issues in the guise of a certification decision.

A separate possibility is to study the American Law Institute Principles of Aggregate Litigation to see whether some of the principles should be incorporated in Rule 23.

An observer agreed that these topics deserve study, and added that consideration of the merits in the certification process intersects discovery. "We need to have discovery" to the extent that predictions about the merits influence certification.

These suggestions led to the question whether Rule 23 is working well enough as a whole. Class actions are so consequential, and so hard fought, that there will always be disagreements among the circuits. Amendments will produce new litigation. Has the time come to take on these consequences?

A Committee member suggested that it may be better not to tinker with Rule 23 at this point, although cy pres settlements have become a more prevalent issue. (It was later noted that legislation addressing cy pres settlements has been introduced; there is no sense whether it will be adopted.)

The Standing Committee panel in January will look at the proper time for the Committees to address Rule 23. It has not been considered since 2003. The Class Action Fairness Act may have had an impact on administration of Rule 23. And the change in overall litigation contexts affects class actions. "There is no predetermined answer."

It was asked whether the ALI Principles "have a gravitational pull"? An answer was that they do. And the "Hydrogen Peroxide" issue [In re Hydrogen Peroxide Antitrust Litigation, 552 F.3d 305 (3d Cir.2008)] has been percolating for years.

A more specific note was that the agenda materials include two alternative approaches that might be taken to overruling the ruling that federal courts can certify a class action to enforce a state-law claim even though state law specifically denies class-action

enforcement of the claim. This is a valid subject of consideration if a Rule 23 project moves forward.

There is a prospect that the Standing Committee will ask the Civil Rules Committee to consider some aspects of Rule 23. But the Civil Rules Committee will have to decide independently whether it has the capacity to tackle this work immediately.

It was decided that some clear issues have been identified, and there may be others that deserve study. A subcommittee will be formed to explore the issues.

RULE 84 FORMS

Judge Pratter reported on launching the Forms Subcommittee. The Subcommittee is composed of representatives from the advisory committees for the Appellate, Bankruptcy, Civil, and Criminal Rules, and the Standing Committee. The focus is on the way in which "official" forms are used in the contexts of the different sets of rules, and on the ways in which they are generated.

For the Civil Rules, a source of growing concern has been the pleading forms. Rule 84 says they suffice under the rules. But they were generated long ago. Many judges think they are inconsistent with the pleading standards directed by the *Twombly* and *Iqbal* decisions. Judge Hamilton's recent dissent in a Seventh Circuit case lists Forms 11, 15, and 21 as inadequate under present pleading doctrine.

The Subcommittee has met by phone conference. The Notes provide a good summary of the discussion.

The Subcommittee is collecting the history of the several advisory committees, looking to the ways in which forms have been developed and how they are used. It will move on to consider recommendations for possible revisions of Rule 84, to be shaped in part by exploring the desirability of revising and amending the forms through the full Enabling Act process. If the advisory committee cannot find time enough to ensure that the forms remain relevant and useful, it may prove wise to find new ways to develop suggested forms. And if resort is not had to the full Enabling Act process, it may be wise to back away from endorsing them by the Rule 84 statement that the forms suffice under the rules.

A further subject may be working toward features in the forms that will make it easier to track issues through FJC docket research.

OTHER AGENDA ITEMS

The agenda book includes brief descriptions of several proposals submitted by members of the public. As happens

periodically, it seems useful to determine whether any of them should be moved ahead for active consideration.

09-CV-D: This question arises from changes made by the Time Computation Project amendments that took effect in 2009. Rule 62(a) provided a 10-day automatic stay of execution on a judgment. Rule 62(b) provided that a court could stay execution "pending disposition of" motions under Rules 50, 52, 59, or 60. Those motions also must be made within 10 days after entry of judgment. Then the Time Computation Project changed the automatic stay under Rule 62(a) to 14 days, but extended the time to move under Rules 50, 52, or 59 to 28 days. The question is whether the court can stay execution more than 14 days after judgment is entered if there is no pending motion under Rule 50, 52, 59, or 60 but time remains to make such a motion.

Discussion began with the suggestion that the rule recognizes authority to grant a stay if a party seeks a stay before filing a motion under Rules 50, 52, 59, or 60, but represents that a timely motion will be filed. The time for Rule 50, 52, and 59 motions was extended to recognize that the former 10-day period was often inadequate to frame a motion, even as computed under the former rules that made a 10-day period equal to at least 14 calendar days. This opportunity should be preserved, without forcing an accelerated motion in order to avoid a gap after the automatic stay expires. This conclusion is easily supported by finding that a stay ordered before a promised motion is filed is one "pending disposition of" the motion. If there is concern about procedural maneuvering, the stay can readily be ordered to expire automatically if a timely motion is not filed under Rule 50, 52, 59, or 60.

Incidental discussion reflected the belief that it makes sense to have an automatic stay. The alternative of forcing an immediate motion could not always protect against immediate execution before the judgment debtor learns of the judgment and takes steps to seek a stay. There may be many good reasons for a stay, including both the prospect of post-judgment motions in the trial court and appeal. (Other provisions deal with stays once an appeal has been taken.) And forcing an immediate motion would generate hasty drafting and argument. On the other hand, there may be good reasons to deny a stay even when a post-judgment motion has been filed.

Committee members agreed that a court has authority to stay execution of its own judgment, and that judges will realize this power as an essential safeguard. Unless misunderstanding becomes common enough to show a real problem, there is no need to amend Rule 62. This proposal will be removed from the agenda.

09-CV-B: This proposal suggests adoption of detailed rule provisions for agreements governing e-service among counsel. They

would govern such matters as specific e-mail addresses, subject-line identifications, types of attachment formats, and so on.

Discussion began with recognition that details at this level are not commonly included in the national rules. But it was asked whether the proposal should be tracked in some way so that it will remain as a prompt when the general subjects of e-filing and e-notification come up for renewed study. The conclusion was that when those questions are taken up, the process will stimulate suggestions like this one, and likely many variations. This proposal will be removed from the agenda.

09-CV-A: This proposal provides alternative suggestions. One is that Rule 4(d)(2) sanctions for refusal to waive service should be made available as to foreign defendants, as they are now available as to domestic defendants. The suggestion rests on the perception that the opposition to sanctions emanated not so much from a genuine sense of affront to foreign sovereignty as from the desire of defendants to make it difficult and costly to drag a foreign defendant into a United States court. As an alternative, it was suggested that improvements might be made in the Rule 4(f) provisions for serving an individual in a foreign country.

Discussion began with the observation that foreign countries really do hold a serious view that service is a sovereign act. They take offense, much as they would take offense if a United States police officer attempted to make an arrest in a foreign country. And there are international conventions for service. These questions are very sensitive. At a minimum, these subjects would require careful study.

A Committee member noted that there is a particular cost problem that arises in complex litigation. The Hague convention requires translation of the documents. Translating a *Twombly-Iqbal* complaint can cost $50,000 to $100,000. In some cases counsel do waive service in an effort to be cooperative, but in other cases service is not waived. The court does not have authority to coerce waiver. A refusal to waive can be one tactic of attrition.

A similar observation was made: sending a letter is not likely to induce waiver.

Another member noted that the Department of State views these matters as sensitive. Foreign sovereigns would view service by mail as inconsistent with their sovereignty. Sanctions for refusing to waive service would come close to that.

The Committee determined to remove this proposal from the agenda.

10-CV-G: This proposal echoes the common lament that the Form 18 model of a complaint for patent infringement is woefully

inadequate. It proposes a more detailed substitute, tuned to the real needs of litigation. It will be held on the docket for consideration by the Rule 84 Subcommittee, and will be considered carefully if the Subcommittee concludes both that form complaints should be carried forward and that one of them should be a complaint for patent infringement.

10-CV-F, 10-CV-E: These suggestions, provided by the same person, address a question triggered by recent amendments of the Rule 15(a)(1) right to amend a pleading once as a matter of course. Before the amendments, the right was cut off immediately on service of a responsive pleading, but was unaffected by a motion to dismiss. The amendments establish a uniform approach to the effects of a responsive pleading or a motion under Rule 12(b), (e), or (f). The right to amend once survives for 21 days after service of either the responsive pleading or the motion, but no longer. The new question is what happens if the time to respond to a motion to dismiss is extended beyond 21 days. The Committee concluded that any problem can be addressed by requesting an extension of the time to amend once as a matter of course, and it is better to give the court control of the timing question.

A related proposal would amend Rule 12(f) so that a motion to strike can be used to challenge a motion as well as to challenge a pleading. The Committee concluded that there is no need to expand the motion to strike. These motions are overused as it is.

These proposals will be removed from the agenda.

10-CV-D: This proposal offers several changes in the offer-of-judgment provisions in Rule 68. One of them addresses an issue that has not been considered in earlier Committee deliberations on Rule 68. The suggestion is that a complaint may seek only nominal damages, perhaps $1. The offer of judgment is then for $1.01, or perhaps a more generous $10. The problem is that the purpose of the litigation is not to win a dollar, but to win the implicit declaratory value of a judgment on the merits. These problems are similar to those that arise when comparing an offer of judgment to the terms of injunctive or declaratory relief.

The Committee has undertaken two major efforts to reconsider Rule 68. The first generated a storm of critical comment on published proposals and was abandoned. The second led to ever-more-elaborate draft rules, and was abandoned before seeking public comment. Proposals for amendments continue to be made, most commonly to add "teeth" to the rule so that it will become a more powerful vehicle for promoting settlement. The Committee has not yet been willing to enter the fray once more.

This proposal will be removed from the agenda.

10-CV-C: This proposal would amend Rule 41(a)(1)(A) to expand the category of motions that would cut off a plaintiff's right to dismiss an action without prejudice. The expressed concern is that a motion to dismiss may become a de facto motion for summary judgment when the court considers materials outside the pleadings. Concern also is expressed about fairness to a defendant who has paid a filing fee to remove, and then is confronted by a dismissal without prejudice that leaves the plaintiff free to begin anew.

The proposal raises a broader question. Rule 15(a)(1) was amended to establish that a motion to dismiss cuts off the right to amend once as a matter of course. Would it be useful to adapt the same change to Rule 41(a)(1)(A), so that the plaintiff can dismiss without prejudice "before the opposing party files ~~either~~ an answer, a motion under Rule 12(b), (e), or (f), or a motion for summary judgment"? There is an abstract symmetry, but does it make sense?

Discussion suggested that it would be a bad idea to expand the category of events that terminate the right to dismiss without prejudice. There is an opportunity for gamesmanship that should not be expanded.

This proposal will be removed from the agenda.

10-CV-B: This proposal would amend Rule 23 to incorporate provisions similar to the parens patriae provisions that recognize the authority of state attorneys general to bring suit for pricefixing. The statute allows calculation of damages by statistical or sampling means or other reasonable systems. The discretion to calculate aggregate damages includes authority to dispense with proving the individual claims of persons on whose behalf the action is brought. The proposal is designed to counter decisions ruling that class certification is appropriate only if each and every member of a plaintiff class is harmed in the same way.

This proposal was advanced at the Duke Conference and was on the initial menu of proposals considered by the Duke Conference Subcommittee. It was not advanced for further discussion. It raises obvious questions of Enabling Act Authority.

Discussion asked whether the proposal is consistent with the decision in the Wal-Mart case dealing with the Rule 23(a)(2) prerequisite of common questions. This question would be debated vigorously, even though it remains possible to amend Rule 23 to supersede a Supreme Court interpretation. And it was noted that there is a big difference between authorizing an action in the public interest by a state attorney general and authorizing a similar action in a private form of group litigation. And it would be improper to adopt a rule provision limited to antitrust actions;

that would become too far entangled with a specific set of substantive rights.

The Committee concluded that this proposal should be considered by the Rule 23 Subcommittee.

10-CV-A: This proposal would create a rule allowing interlocutory appeal by permission from an order granting or denying discovery of materials claimed to be protected by attorney-client privilege. In refusing to allow collateral-order appeal from an order directing discovery on finding that the privilege had been waived, the Supreme Court suggested that the Enabling Act process is the appropriate forum for considering these questions.

It was noted that the courts of appeals would resist any effort to create a right to appeal whenever a district court grants permission. But the model contemplated by the proposal seems to be Rule 23(f), which requires permission only from the court of appeals.

The possible attraction of the proposal lies in the same pressures that led to several decisions allowing collateral-order appeal before the Supreme Court spoke. Once privileged information is disclosed, "the bell cannot be unrung." And the discovery order can become a pressure point that encourages a reluctant party to settle rather than disclose or chance the uncertain path of disobeying the order and hoping for a contempt sanction in a form that supports appeal. (A nonparty can appeal either civil or criminal contempt; a party can appeal only a criminal contempt order.)

This question clearly involves topics that involve the Appellate and Evidence Rules as well as the Civil Rules, even if the outcome might be adoption of a Civil Rule modeled more or less closely on Rule 23(f). The Committee voted to refer the question to the Appellate and Evidence Rules Committees without recommendation.

11-CV-C: This proposal would allow pro se litigants an extra 7 days to submit a Rule 26(f) report to the court. It may be that the Committee should go back to earlier efforts to devise alternative and simplified rules for some kinds of cases. Pro se cases might be included in those rules, either generally or as the subject of specific provisions. But until then, the Committee believes it inappropriate to depart from the long tradition that refuses to make specific exceptions for pro se litigants.

This proposal will be removed from the agenda.

11-CV-A: This proposal would amend Rule 55 to provide guidance for circumstances in which a default judgment is entered as to part of a case. It might be a judgment that leaves some claims pending

among all parties, or it might be a judgment that disposes of all claims against one party while leaving claims pending against others. Questions arise as to coordination between judge and court clerk when the clerk is authorized to enter default judgment as to one part, while action by the court is required as to another. Questions also arise as to execution on a money judgment, and as to default judgments on claims for declaratory or injunctive relief.

Discussion began by noting that Rule 54(b) provides that a judgment as to fewer than all claims among all parties becomes final only on express direction for entry of judgment. Absent entry of a partial final judgment, the order may be revised at any time before entry of a complete final judgment. Rule 55(c), which provides that a default judgment may be set aside under Rule 60(b), should be read in light of Rule 54(b). Rule 60(b) itself applies only to relief "from a final judgment, order, or proceeding." Until a default judgment becomes final under Rule 54(b), Rule 60(b) is inapposite.

The first reaction was that Rule 55 is administered by the court clerk as well as by the judge. Adding complexity would make it more difficult.

A judge added that he always tells the parties that a default judgment in a multiparty or multiclaim case is not a final judgment, unless made so under Rule 54(b). It cannot be enforced. The court retains authority to set it aside. One good reason for relief is illustrated by a claim against two defendants; one is subject to a default judgment, while the other wins on merits grounds that show the defaulted defendant also is not liable. Another judge agreed with these views.

There was a suggestion that there may be special problems in bankruptcy cases, perhaps tied to the special and expansive view of "finality" that applies on appeals to the court of appeals. There might be reasons of bankruptcy administration to establish forever-finality that do not apply in ordinary civil proceedings.

The Committee concluded that this proposal will be removed from the agenda unless further investigation shows special problems in bankruptcy proceedings that need to be addressed.

Failed Notice of Judgment: This question arises from the Judicial Conference work designing the next generation of the CM/ECF system. Rule 77(d)(1) directs the clerk to serve notice of entry of an order or judgment "as provided in Rule 5(b)." Most courts make service by electronic means under Rule 5(b)(2)(E). The problem arises when the notice bounces back to the court as undeliverable. Rule 5 provides that e-service "is not effective if the serving party learns that it did not reach the person to be served." The question is what features should be built into the CM/ECF system to address this problem.

A proposal under study would require a party agreeing to e-service to provide a secondary address. When notice to the primary address bounces back, the system would automatically send an "alert" to the secondary address. The alert would not include the text of the judgment or order, nor would it include a link. The attorney would be responsible to go to the docket to find out what had happened.

Laura Briggs expressed skepticism about the value of the "alert." In her court, at least, the original notice goes to both the primary address and the secondary address. Why send a second notice to the secondary address? And why only to that address, if there is to be duplication? Although some lawyers' systems automatically reject messages with big attachments, the Rule 77(d)(1) notice does not include an attachment. The first thing her office does when notice bounces back is to call the attorney. That works most of the time.

It was noted that the CM/ECF project has found that lawyers often have full e-mail boxes, causing messages to be rejected. Most courts follow up by postal mail.

In response to the question whether any member thought it would be useful to provide advice on these questions, a member thought not, but added a question about pro se cases. How many attempts at notice are required in pro se actions? Apparently some courts use e-notice in pro se actions, while others do not. And it may happen that repeated efforts fail. A conscientious judge may devote considerable time to writing an explanation to the litigant of how many attempts have been made. There should be a reasonable limit.

This discussion led to the question whether there should be some formalized system to ensure that rules proposals are considered from the perspective of pro se litigants. Emery Lee noted that the Committee on Court Administration and Case Management is thinking about pro se litigation. And the rules committees are working with that Committee to make sure that the new generation CM/ECF system is consistent with the Rules. And perhaps this could be tied to the simplified rules effort. It was also noted that docket item 11-CV-C provided a refreshing perspective on the ability of a pro se litigant to wade through the rules, a task made easier by the Style Project.

NEXT MEETING

The next meeting is scheduled for March 22-23, 2012, in Ann Arbor, Michigan, at the University of Michigan Law School.

Respectfully submitted,

Edward H. Cooper
Reporter

TAB 7

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

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EVIDENCE RULES

M E M O R A N D U M

Date: December 12, 2011

To: Standing Committee

From: Lee H. Rosenthal
Daniel C. Girard
Robert H. Klonoff
John H. Beisner

Re: Discussion on Class Actions

After years in which Rule 23 was a constant presence on the Civil Rules agenda, it has been conspicuous in its absence for the past nine years. It is the topic of today's panel discussion in part because of the unusual number of Supreme Court cases on class actions in the last two terms, and in part because almost a decade has passed since the Rules Committees last examined the issues. During that decade, there have been at least three major developments in addition to the Supreme Court cases. First, enough time has passed to begin to evaluate the effects of the 2003 Rule 23 changes. Second, CAFA became law and enough time has passed to evaluate some of its effects.

Third, one of the major recent developments affecting all litigation—electronic discovery— has had an impact on class actions as well. The panel will look at the impact of the recent cases (not on the jurisprudence itself but on the impact of the cases on how class actions are litigated) and these three areas. The discussion will focus on identifying problems and, most important, whether they can helpfully be addressed by amending the rules or if other approaches, ranging from statutes to better educational or supporting materials for judges and lawyers, are more useful.

The following background materials are included. The excerpts from the cases are provided for those who want the ready reference; many of you have no need for refresher reading. The materials are:

1. Excerpt from the Supreme Court's 2011 opinion in *AT&T v. Concepcion*.

2. Excerpts from the Court's 2011 opinion in *Wal-Mart v. Dukes*.

3. An article by John Coffee on *Dukes.*

4. A recent Sixth Circuit case illustrating motions to strike class allegations.

5. The Third Circuit opinion in *Hydrogen Peroxide* that addresses issues relating to merits v. certification discovery.

6. An article on ascertainability as an issue in class action certification.

We look forward to a good discussion.

L.H.R.

TAB 7-1

AT&T MOBILITY LLC v. CONCEPCION

Supreme Court of the United States, 2011.
131 S.Ct. 1740.

JUSTICE SCALIA delivered the opinion of the Court.

Section 2 of the Federal Arbitration Act (FAA) makes agreements to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. We consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.

I

In February 2002, Vincent and Liza Concepcion entered into an agreement for the sale and servicing of cellular telephones with AT&T Mobility LCC (AT&T). The contract provided for arbitration of all disputes between the parties, but required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." * * * The version at issue in this case reflects revisions made in December 2006, which the parties agree are controlling.

The revised agreement provides that customers may initiate dispute proceedings by completing a one-page Notice of Dispute form available on AT&T's Web site. AT&T may then offer to settle the claim; if it does not, or if the dispute is not resolved within 30 days, the customer may invoke arbitration by filing a separate Demand for Arbitration, also available on AT&T's Web site. In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT&T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT&T's last written settlement offer, requires AT&T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.

The Concepcions purchased AT&T service, which was advertised as including the provision of free phones; they were not charged for the phones, but they were charged $30.22 in sales tax based on the phones' retail value. In March 2006, the Concepcions filed a complaint against

AT&T in the United States District Court for the Southern District of California. The complaint was later consolidated with a putative class action alleging, among other things, that AT&T had engaged in false advertising and fraud by charging sales tax on phones it advertised as free.

In March 2008, AT&T moved to compel arbitration under the terms of its contract with the Concepcions. The Concepcions opposed the motion, contending that the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed classwide procedures. The District Court denied AT&T's motion. It described AT&T's arbitration agreement favorably noting, for example, that the informal dispute-resolution process was "quick, easy to use" and likely to "promp[t] full or TTT even excess payment to the customer *without* the need to arbitrate or litigate"; that the $7,500 premium functioned as "a substantial inducement for the consumer to pursue the claim in arbitration" if a dispute was not resolved informally; and that consumers who were members of a class would likely be worse off. Nevertheless, relying on the California Supreme Court's decision in *Discover Bank v. Superior Court,* 36 Cal.4th 148, 30 Cal.Rptr.3d 76, 113 P.3d 1100 (2005), the court found that the arbitration provision was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions.

The Ninth Circuit affirmed, also finding the provision unconscionable under California law as announced in *Discover Bank*. It also held that the *Discover Bank* rule was not preempted by the FAA because that rule was simply "a refinement of the unconscionability analysis applicable to contracts generally in California." In response to AT&T's argument that the Concepcions' interpretation of California law discriminated against arbitration, the Ninth Circuit rejected the contention that " 'class proceedings will reduce the efficiency and expeditiousness of arbitration' " and noted that " '*Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration.' " We granted *certiorari*.

II

The FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements. Section 2, the "primary substantive provision of the Act," reflect[s] both a "liberal federal policy favoring arbitration," and the "fundamental principle that arbitration is a matter of contract." In line with these principles, courts must place arbitration agreements on an equal footing with other contracts,

and enforce them according to their terms.

The final phrase of § 2, however, permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." This saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. The question in this case is whether § 2 preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable. We refer to this rule as the *Discover Bank* rule.

Under California law, courts may refuse to enforce any contract found "to have been unconscionable at the time it was made," or may "limit the application of any unconscionable clause." A finding of unconscionability requires "a 'procedural' and a 'substantive' element, the former focusing on 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results."

In *Discover Bank,* the California Supreme Court applied this framework to class-action waivers in arbitration agreements and held as follows:

> "[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then TTT the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced."

California courts have frequently applied this rule to find arbitration agreements unconscionable.

III

A

The Concepcions argue that the *Discover Bank* rule, given its origins in California's unconscionability doctrine and California's policy against exculpation, is a ground that "exist[s] at law or in equity for the revocation of any contract" under FAA § 2. Moreover, they argue that even if we construe the *Discover Bank* rule as a prohibition on collective-action waivers rather than simply an application of

unconscionability, the rule would still be applicable to all dispute-resolution contracts, since California prohibits waivers of class litigation as well.

When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration. * * *

An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery. The rationalizations for such a holding are neither difficult to imagine nor different in kind from those articulated in *Discover Bank*. A court might reason that no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing. Or the court might simply say that such agreements are exculpatory—restricting discovery would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. And, the reasoning would continue, because such a rule applies the general principle of unconscionability or public-policy disapproval of exculpatory agreements, it is applicable to "any" contract and thus preserved by § 2 of the FAA. In practice, of course, the rule would have a disproportionate impact on arbitration agreements; but it would presumably apply to contracts purporting to restrict discovery in litigation as well.

Other examples are easy to imagine. [The Court describes rules requiring adherence to the Federal Rules of Evidence or jury-like dispositions as examples of rules that would have a disproportionate impact on arbitration agreements, but presumably apply to litigation and arbitration alike.]

The Concepcions suggest that all this is just a parade of horribles, and no genuine worry. "Rules aimed at destroying arbitration" or "demanding procedures incompatible with arbitration," they concede, "would be preempted by the FAA because they cannot sensibly be reconciled with Section 2." The "grounds" available under § 2's saving clause, they admit, "should not be construed to include a State's mere preference for procedures that are incompatible with arbitration and 'would wholly eviscerate arbitration agreements.' "

* * *

We largely agree. Although § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent

to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives. * * *

We differ with the Concepcions only in the application of this analysis to the matter before us. We do not agree that rules requiring judicially monitored discovery or adherence to the Federal Rules of Evidence are "a far cry from this case." The overarching purpose of the FAA * * * is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

B

The "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms." This purpose is readily apparent from the FAA's text. * * * In light of these provisions, we have held that parties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit *with whom* a party will arbitrate its disputes.

The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. * * * And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution.

* * *

Contrary to the dissent's view, our cases place it beyond dispute that the FAA was designed to promote arbitration. They have repeatedly described the Act as "embod[ying] [a] national policy favoring arbitration," and "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Thus, in *Preston v. Ferrer,* 552 U.S. 346 (2008), holding preempted a statelaw rule requiring exhaustion of administrative remedies before arbitration, we said: "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results,' " which objective would be "frustrated" by requiring a dispute to be heard by an agency first. That rule, we said, would "at the least, hinder speedy resolution of the controversy."

California's *Discover Bank* rule similarly interferes with arbitration. Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post.* The [*Discover Bank*] rule is limited to adhesion contracts, but the times in which consumer contracts were anything other than adhesive are long

past. The rule also requires that damages be predictably small, and that the consumer allege a scheme to cheat consumers. The former requirement, however, is toothless and malleable * * *, and the latter has no limiting effect, as all that is required is an allegation. Consumers remain free to bring and resolve their disputes on a bilateral basis under *Discover Bank,* and some may well do so; but there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process. And faced with inevitable class arbitration, companies would have less incentive to continue resolving potentially duplicative claims on an individual basis.

Although we have had little occasion to examine classwide arbitration, our decision in *Stolt–Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758 (2010), is instructive. In that case we held * * * that the [arbitration] agreement at issue, which was silent on the question of class procedures, could not be interpreted to allow them because the "changes brought about by the shift from bilateral arbitration to class-action arbitration" are "fundamental." This is obvious as a structural matter: Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.

First, the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. "In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes." But before an arbitrator may decide the merits of a claim in classwide procedures, he must first decide, for example, whether the class itself may be certified, whether the named parties are sufficiently representative and typical, and how discovery for the class should be conducted. * * *

Second, class arbitration *requires* procedural formality. The AAA's rules governing class arbitrations mimic the Federal Rules of Civil Procedure for class litigation. And while parties can alter those procedures by contract, an alternative is not obvious. If procedures are

too informal, absent class members would not be bound by the arbitration. For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class. *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797, 811–12 (1985). At least this amount of process would presumably be required for absent parties to be bound by the results of arbitration.

We find it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator. Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925; as the California Supreme Court admitted in *Discover Bank,* class arbitration is a "relatively recent development." And it is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied.

Third, class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected. Defendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably outweighed by savings from avoiding the courts. But when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims. Other courts have noted the risk of "in terrorem" settlements that class actions entail, and class arbitration would be no different.

Arbitration is poorly suited to the higher stakes of class litigation. In litigation, a defendant may appeal a certification decision on an interlocutory basis and, if unsuccessful, may appeal from a final judgment as well. Questions of law are reviewed *de novo* and questions of fact for clear error. In contrast, 9 U.S.C. § 10 allows a court to vacate an arbitral award *only* where the award "was procured by corruption, fraud, or undue means"; "there was evident partiality or corruption in the arbitrators"; "the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy[,] or of any other misbehavior by which the rights of any party have been prejudiced"; or if the "arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award . . . was not made." The AAA rules do authorize judicial review of certification decisions, but this review is unlikely to have much effect

given these limitations; review under § 10 focuses on misconduct rather than mistake. And parties may not contractually expand the grounds or nature of judicial review. We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.

The Concepcions contend that because parties may and sometimes do agree to aggregation, class procedures are not necessarily incompatible with arbitration. But the same could be said about procedures that the Concepcions admit States may not superimpose on arbitration: Parties *could* agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation. Arbitration is a matter of contract, and the FAA requires courts to honor parties' expectations. But what the parties in the aforementioned examples would have agreed to is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law.

The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons. Moreover, the claim here was most unlikely to go unresolved. As noted earlier, the arbitration agreement provides that AT&T will pay claimants a minimum of $7,500 and twice their attorney's fees if they obtain an arbitration award greater than AT&T's last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be "essentially guarantee[d]" to be made whole. Indeed, the District Court concluded that the Concepcions were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action * * *.

Because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," California's *Discover Bank* rule is preempted by the FAA. The judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

* * *

JUSTICE THOMAS, concurring.

* * *

* * * As I would read it, the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress. 9 U.S.C. §§ 2, 4. Under this reading, I would reverse the Court of Appeals because a district court cannot follow both the FAA and the *Discover Bank* rule, which does not relate to defects in the making of an agreement.

This reading of the text, however, has not been fully developed by any party and could benefit from briefing and argument in an appropriate case. Moreover, I think that the Court's test will often lead to the same outcome as my textual interpretation and that, when possible, it is important in interpreting statutes to give lower courts guidance from a majority of the Court. *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 411 (2002) (O'Connor, J., concurring). Therefore, although I adhere to my views on purposes-and-objectives pre-emption, *see Wyeth v. Levine*, 129 S.Ct 1187 (2009) (opinion concurring in judgment), I reluctantly join the Court's opinion.

* * *

Under [Justice Thomas's] reading, the question here would be whether California's *Discover Bank* rule relates to the making of an agreement. I think it does not.

* * *

The court's analysis and conclusion that the arbitration agreement was exculpatory reveals that the *Discover Bank* rule does not concern the making of the arbitration agreement. Exculpatory contracts are a paradigmatic example of contracts that will not be enforced because of public policy. Refusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made.

Accordingly, the *Discover Bank* rule is not a "groun[d] . . . for the revocation of any contract" as I would read § 2 of the FAA in light of § 4. Under this reading, the FAA dictates that the arbitration agreement here be enforced and the *Discover Bank* rule is pre-empted.

JUSTICE BREYER, with whom JUSTICE GINSBURG, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

The Federal Arbitration Act says that an arbitration agreement "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract*." 9 U.S.C. § 2 (emphasis added). California law sets forth certain circumstances in which "class action waivers" in *any* contract are unenforceable. In my view, this rule of state law is consistent with the federal Act's language and primary objective. It does not "stan[d] as an obstacle" to the Act's "accomplishment and execution." And the Court is wrong to hold that the federal Act pre-empts the rule of state law.

I.

The California law in question consists of an authoritative state-court interpretation of two provisions of the California Civil Code. The first provision makes unlawful all contracts "which have for their object, directly or indirectly, to exempt anyone from responsibility for his own . . . violation of law." The second provision authorizes courts to "limit the application of any unconscionable clause" in a contract so "as to avoid any unconscionable result."

The specific rule of state law in question consists of the California Supreme Court's application of these principles to hold that "some" (but not "all") "class action waivers" in consumer contracts are exculpatory and unconscionable under California "law." In particular, in *Discover Bank* the California Supreme Court stated that, when a class-action waiver

> "is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' "

In such a circumstance, the "waivers are unconscionable under California law and should not be enforced."

The *Discover Bank* rule does not create a "blanket policy in California against class action waivers in the consumer context." Instead, it represents the "application of a more general [unconscionability] principle." Courts applying California law have enforced class action waivers where they satisfy general

unconscionability standards. And even when they fail, the parties remain free to devise other dispute mechanisms, including informal mechanisms, that, in context, will not prove unconscionable.

II

A

The *Discover Bank* rule is consistent with the federal Act's language. It "applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements." Linguistically speaking, it falls directly within the scope of the Act's exception permitting courts to refuse to enforce arbitration agreements on grounds that exist "for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). The majority agrees.

B

The *Discover Bank* rule is also consistent with the basic "purpose behind" the Act. We have described that purpose as one of "ensur[ing] judicial enforcement" of arbitration agreements. As is well known, prior to the federal Act, many courts expressed hostility to arbitration, for example by refusing to order specific performance of agreements to arbitrate. The Act sought to eliminate that hostility by placing agreements to arbitrate " '*upon the same footing as other contracts*.' "

Congress was fully aware that arbitration could provide procedural and cost advantages. The House Report emphasized the "appropriate[ness]" of making arbitration agreements enforceable "at this time when there is so much agitation against the costliness and delays of litigation." And this Court has acknowledged that parties may enter into arbitration agreements in order to expedite the resolution of disputes.

But we have also cautioned against thinking that Congress' primary objective was to guarantee these particular procedural advantages. Rather, that primary objective was to secure the "enforcement" of agreements to arbitrate. The relevant Senate Report points to the Act's basic purpose when it says "[t]he purpose of the [Act] is *clearly set forth in section 2*," namely, the section that says that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," 9 U.S.C. § 2.

Thus, insofar as we seek to implement Congress' intent, we should think more than twice before invalidating a state law that does

just what § 2 requires, namely, puts agreements to arbitrate and agreements to litigate "upon the same footing."

III

The majority's contrary view (that *Discover Bank* stands as an "obstacle" to the accomplishment of the federal law's objective) rests primarily upon its claims that the *Discover Bank* rule increases the complexity of arbitration procedures, thereby discouraging parties from entering into arbitration agreements, and to that extent discriminating in practice against arbitration. These claims are not well founded.

For one thing, a state rule of law that would sometimes set aside as unconscionable a contract term that forbids class arbitration is not (as the majority claims) like a rule that would require "ultimate disposition by a jury" or "judicially monitored discovery" or use of "the Federal Rules of Evidence." Unlike the majority's examples, class arbitration is consistent with the use of arbitration. It is a form of arbitration that is well known in California and followed elsewhere. Indeed, the AAA has told us [in its amicus brief] that it has found class arbitration to be "a fair, balanced, and efficient means of resolving class disputes." And unlike the majority's examples, the *Discover Bank* rule imposes equivalent limitations on litigation; hence it cannot fairly be characterized as a targeted attack on arbitration.

Where does the majority get its contrary idea—that individual, rather than class, arbitration is a "fundamental attribut[e]" of arbitration? The majority does not explain. And it is unlikely to be able to trace its present view to the history of the arbitration statute itself.

When Congress enacted the Act, arbitration procedures had not yet been fully developed. Insofar as Congress considered detailed forms of arbitration at all, it may well have thought that arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power. This last mentioned feature of the history—roughly equivalent bargaining power—suggests, if anything, that California's statute is consistent with, and indeed may help to further, the objectives that Congress had in mind.

Regardless, if neither the history nor present practice suggests that class arbitration is fundamentally incompatible with arbitration itself, then on what basis can the majority hold California's law pre-empted?

For another thing, the majority's argument that the *Discover*

Bank rule will discourage arbitration rests critically upon the wrong comparison. The majority compares the complexity of class arbitration with that of bilateral arbitration. And it finds the former more complex. But, if incentives are at issue, the *relevant* comparison is not "arbitration with arbitration" but a comparison between class arbitration and judicial class actions. After all, in respect to the relevant set of contracts, the *Discover Bank* rule similarly and equally sets aside clauses that forbid class procedures—whether arbitration procedures or ordinary judicial procedures are at issue.

Why would a typical defendant (say, a business) prefer a judicial class action to class arbitration? AAA statistics "suggest that class arbitration proceedings take more time than the average commercial arbitration, but may take *less time* than the average class action in court." Data from California courts confirm that class arbitrations can take considerably less time than in-court proceedings in which class certification is sought. And a single class proceeding is surely more efficient than thousands of separate proceedings for identical claims. Thus, if speedy resolution of disputes were all that mattered, then the *Discover Bank* rule would reinforce not obstruct, that objective of the Act.

The majority's related claim that the *Discover Bank* rule will discourage the use of arbitration because "[a]rbitration is poorly suited to . . . higher stakes" lacks empirical support. Indeed, the majority provides no convincing reason to believe that parties are unwilling to submit highstakes disputes to arbitration. And there are numerous counterexamples.

Further, even though contract defenses, *e.g.,* duress and unconscionability, slow down the dispute resolution process, federal arbitration law normally leaves such matters to the States. * * * California is free to define unconscionability as it sees fit, and its common law is of no federal concern so long as the State does not adopt a special rule that disfavors arbitration.

Because California applies the same legal principles to address the unconscionability of class arbitration waivers as it does to address the unconscionability of any other contractual provision, the merits of class proceedings should not factor into our decision. If California had applied its law of duress to void an arbitration agreement, would it matter if the procedures in the coerced agreement were efficient?

Regardless, the majority highlights the disadvantages of class arbitrations, as it sees them. But class proceedings have countervailing advantages. In general, agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate. I suspect that it is true even here,

for as the Court of Appeals recognized, AT&T can avoid the $7,500 payout (the payout that supposedly makes the Concepcions' arbitration worthwhile) simply by paying the claim's face value, such that "the maximum gain to a customer for the hassle of arbitrating a $30.22 dispute is still just $30.22."

What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim? In California's perfectly rational view, nonclass arbitration over such sums will also sometimes have the effect of depriving claimants of their claims (say, for example, where claiming the $30.22 were to involve filling out many forms that require technical legal knowledge or waiting at great length while a call is placed on hold). *Discover Bank* sets forth circumstances in which the California courts believe that the terms of consumer contracts can be manipulated to insulate an agreement's author from liability for its own frauds by "deliberately cheat[ing] large numbers of consumers out of individually small sums of money." Why is this kind of decision—weighing the pros and cons of all class proceedings alike—not California's to make?

Finally, the majority can find no meaningful support for its views in this Court's precedent. * * * [W]e have not, to my knowledge, applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings.

At the same time, we have repeatedly referred to the Act's basic objective as assuring that courts treat arbitration agreements "like all other contracts."

* * *

IV

By using the words "save upon such grounds as exist at law or in equity for the revocation of any contract," Congress retained for the States an important role incident to agreements to arbitrate. 9 U.S.C. § 2. * * * But federalism is as much a question of deeds as words. It often takes the form of a concrete decision by this Court that respects the legitimacy of a State's action in an individual case. Here, recognition of that federalist ideal, embodied in specific language in this particular statute, should lead us to uphold California's law, not to strike it down. We do not honor federalist principles in their breach.

With respect, I dissent.

TAB 7-2

WAL-MART STORES, INC. v. DUKES

Supreme Court of the United States, 2011.
131 S.Ct. 2541.

JUSTICE SCALIA delivered the opinion of the Court.

We are presented with one of the most expansive class actions ever. The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs, current and former female employees of petitioner Wal–Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women.

* * *

I

A

Petitioner Wal–Mart is the Nation's largest private employer. It operates four types of retail stores throughout the country: Discount Stores, Supercenters, Neighborhood Markets, and Sam's Clubs. Those stores are divided into seven nationwide divisions, which in turn comprise 41 regions of 80 to 85 stores apiece. Each store has between 40 and 53 separate departments and 80 to 500 staff positions. In all, Wal–Mart operates approximately 3,400 stores and employs more than one million people.

Pay and promotion decisions at Wal–Mart are generally committed to local managers' broad discretion, which is exercised "in a largely subjective manner." Local store managers may increase the wages of hourly employees (within limits) with only limited corporate oversight. As for salaried employees, such as store managers and their deputies, higher corporate authorities have discretion to set their pay within preestablished ranges.

Promotions work in a similar fashion. Wal–Mart permits store managers to apply their own subjective criteria when selecting candidates as "support managers," which is the first step on the path to management. Admission to Wal–Mart's management training program, however, does require that a candidate meet certain objective criteria, including an above–average performance rating, at least one year's tenure in the applicant's current position, and a willingness to relocate. But except for those requirements, regional and district managers have discretion to use their own judgment when selecting candidates for management training. Promotion to higher office—*e.g.*, assistant manager, co–manager, or store manager—is similarly at the discretion of the employee's superiors after prescribed objective factors are satisfied.

B

The named plaintiffs in this lawsuit, representing the 1.5 million members of the certified class, are three current or former Wal–Mart employees who allege that the company discriminated against them on the basis of their sex by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e–1 *et seq*.

Betty Dukes began working at a Pittsburgh, California, Wal–Mart in 1994. She started as a cashier, but later sought and received a promotion to customer service manager. After a series of disciplinary violations, however, Dukes was demoted back to cashier and then to greeter. Dukes concedes she violated company policy, but contends that the disciplinary actions were in fact retaliation for invoking internal complaint procedures and that male employees have not been disciplined for similar infractions. Dukes also claims two male greeters in the Pittsburgh store are paid more than she is.

Christine Kwapnoski has worked at Sam's Club stores in Missouri and California for most of her adult life. She has held a number of positions, including a supervisory position. She claims that a male manager yelled at her frequently and screamed at female employees, but not at men. The manager in question "told her to 'doll up,' to wear some makeup, and to dress a little better."

The final named plaintiff, Edith Arana, worked at a Wal–Mart store in Duarte, California, from 1995 to 2001. In 2000, she approached the store manager on more than one occasion about management training, but was brushed off. Arana concluded she was being denied opportunity for advancement because of her sex. She initiated internal complaint procedures, whereupon she was told to apply directly to the district manager if she thought her store manager was being unfair. Arana, however, decided against that and never applied for management training again. In 2001, she was fired for failure to comply with Wal–Mart's timekeeping policy.

These plaintiffs, respondents here, do not allege that Wal–Mart has any express corporate policy against the advancement of women. Rather, they claim that their local managers' discretion over pay and promotions is exercised disproportionately in favor of men, leading to an unlawful disparate impact on female employees, *see* 42 U.S.C. § 2000e–2(k). And, respondents say, because Wal–Mart is aware of this effect, its refusal to cabin its managers' authority amounts to disparate treatment, *see* § 2000e–2(a). * * *

Importantly for our purposes, respondents claim that the discrimination to which they have been subjected is common to *all*

Wal–Mart's female employees. The basic theory of their case is that a strong and uniform "corporate culture" permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal–Mart's thousands of managers—thereby making every woman at the company the victim of one common discriminatory practice. Respondents therefore wish to litigate the Title VII claims of all female employees at Wal–Mart's stores in a nationwide class action.

C

* * * Under Rule 23(a), the party seeking certification must demonstrate, first, that: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

* * *

* * * [R]espondents moved the District Court to certify a plaintiff class consisting of "[a]ll women employed at any Wal–Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal–Mart's challenged pay and management track promotions policies and practices." As evidence that there were * * * "questions of law or fact common to" all the women of Wal–Mart, as Rule 23(a)(2) requires, respondents relied chiefly on three forms of proof: statistical evidence about pay and promotion disparities between men and women at the company, anecdotal reports of discrimination from about 120 of Wal–Mart's female employees, and the testimony of a sociologist, Dr. William Bielby, who conducted a "social framework analysis" of Wal–Mart's "culture" and personnel practices, and concluded that the company was "vulnerable" to gender discrimination. * * *

Wal–Mart unsuccessfully moved to strike much of this evidence. It also offered its own countervailing statistical and other proof in an effort to defeat Rule 23(a)'s requirements of commonality, typicality, and adequate representation. * * *

* * *

[The district court certified a nationwide class of female Wal–Mart employees. On the (a)(2) issue, it noted that "Wal–Mart raised a number of challenges to Plaintiffs' evidence of commonality but concluded that, in fact, most of these objections related *not* to * * * commonality but to the ultimate merits of the case and 'thus should properly be addressed by a jury considering the merits' rather than a

judge considering class certification." 509 F.3d at 1168, 1177–78 (9th Cir. 2007) (quoting district court; emphasis in original). The Ninth Circuit panel endorsed this analysis. *Id.* The Court of Appeals, rehearing the case *en banc*, affirmed in substantial part. 603 F.3d 571 (9th Cir. 2010) (en banc). As to Rule 23(a)(2), it held that "Plaintiffs' factual evidence, expert opinions, statistical evidence, and anecdotal evidence provide sufficient support *to raise the common question* whether Wal–Mart's female employees nationwide were subjected to *a single set of corporate policies* (not merely a number of independent discriminatory acts) that may have worked to unlawfully discriminate against them in violation of Title VII." *Id.* at 612 (emphases in original). Judge Ikuta, joined by four other judges, dissented, reasoning that the class failed to meet, *inter alia*, the commonality requirement of 23(a)(2), because "[n]one of plaintiffs' evidence is probative of company–wide discrimination." *Id.* at 640 (Ikuta, J., dissenting). In the dissent's view, "[e]very piece of evidence merely purport[ed] to support another," and "the plaintiffs' circular presentation cannot conceal the fact that they have failed to offer any significant proof of a company-wide policy of discrimination * * *." *Id.* at 640–41. *See also id.* at 652 (Kozinski, C.J., dissenting) ("the half–million members of the majority's approved class * * * have little in common but their sex and this lawsuit.")]

* * *

II

* * *

A

The crux of this case is commonality—the rule requiring a plaintiff to show that "there are questions of law or fact common to the class." Rule 23(a)(2).[5] That language is easy to misread, since "[a]ny competently crafted class complaint literally raises common 'questions.' " Richard Nagareda, *Class Certification in the Age of*

[5] We have previously stated in this context that "[t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence. Those requirements therefore also tend to merge with the adequacy-of-representation requirement, although the latter requirement also raises concerns about the competency of class counsel and conflicts of interest." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157–58, n.13 (1982). In light of our disposition of the commonality question, however, it is unnecessary to resolve whether respondents have satisfied the typicality and adequate-representation requirements of Rule 23(a).

Aggregate Proof, 84 N.Y.U. L. Rev. 97, 131–132 (2009). For example: Do all of us plaintiffs indeed work for Wal–Mart? Do our managers have discretion over pay? Is that an unlawful employment practice? What remedies should we get? Reciting these questions is not sufficient to obtain class certification. Commonality requires the plaintiff to demonstrate that the class members "have suffered the same injury." This does not mean merely that they have all suffered a violation of the same provision of law. Title VII, for example, can be violated in many ways—by intentional discrimination, or by hiring and promotion criteria that result in disparate impact, and by the use of these practices on the part of many different superiors in a single company. Quite obviously, the mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

> "What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." Nagareda, *supra*, at 132.

Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc. We recognized in *Falcon*[, 457 U.S. 147 (1982),] that "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question," and that certification is proper only if "the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Frequently that "rigorous analysis" will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped. " '[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Id.* at 160.

In this case, proof of commonality necessarily overlaps with respondents' merits contention that Wal–Mart engages in a *pattern or*

practice of discrimination.[7] That is so because, in resolving an individual's Title VII claim, the crux of the inquiry is "the reason for a particular employment decision," *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984). Here respondents wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged reasons for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.

B

This Court's opinion in *Falcon* describes how the commonality issue must be approached. There an employee who claimed that he was deliberately denied a promotion on account of race obtained certification of a class comprising all employees wrongfully denied promotions and all applicants wrongfully denied jobs. We rejected that composite class for lack of commonality and typicality, explaining:

> "Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion [or higher pay] on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claim will share common questions of law or fact and that the individual's claim will be typical of the class claims." *Id*., at 157–58.

Falcon suggested two ways in which that conceptual gap might be bridged. First, if the employer "used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." Second, "[s]ignificant proof that an employer operated under a general policy of discrimination conceivably could justify a class of both applicants and employees if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective

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[7] In a pattern-or-practice case, the plaintiff tries to "establish by a preponderance of the evidence that . . . discrimination was the company's standard operating procedure[,] the regular rather than the unusual practice." *Teamsters v. United States*, 431 U.S. 324, 358 (1977); *see also Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772 (1976). If he succeeds, that showing will support a rebuttable inference that all class members were victims of the discriminatory practice, and will justify "an award of prospective relief," such as "an injunctive order against the continuation of the discriminatory practice."

decisionmaking processes." We think that statement precisely describes respondents' burden in this case. The first manner of bridging the gap obviously has no application here; Wal–Mart has no testing procedure or other companywide evaluation method that can be charged with bias. The whole point of permitting discretionary decisionmaking is to avoid evaluating employees under a common standard.

The second manner of bridging the gap requires "significant proof" that Wal–Mart "operated under a general policy of discrimination." That is entirely absent here. Wal–Mart's announced policy forbids sex discrimination, and * * * the company imposes penalties for denials of equal employment opportunity. The only evidence of a "general policy of discrimination" respondents produced was the testimony of Dr. William Bielby, their sociological expert. * * * Bielby testified that Wal–Mart has a "strong corporate culture," that makes it " 'vulnerable' " to "gender bias." He could not, however, "determine with any specificity how regularly stereotypes play a meaningful role in employment decisions at Wal–Mart. At his deposition . . . Dr. Bielby conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal–Mart might be determined by stereotyped thinking." The parties dispute whether Bielby's testimony even met the standards for the admission of expert testimony under Federal Rule of [Evidence] 702 and our *Daubert* case, *see Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The District Court concluded that *Daubert* did not apply to expert testimony at the certification stage of class-action proceedings. We doubt that is so, but even if properly considered, Bielby's testimony does nothing to advance respondents' case. "[W]hether 0.5 percent or 95 percent of the employment decisions at Wal–Mart might be determined by stereotyped thinking" is the essential question on which respondents' theory of commonality depends. If Bielby admittedly has no answer to that question, we can safely disregard what he has to say. It is worlds away from "significant proof" that Wal–Mart "operated under a general policy of discrimination."

C

The only corporate policy that the plaintiffs' evidence convincingly establishes is Wal–Mart's "policy" of *allowing discretion* by local supervisors over employment matters. On its face, of course, that is just the opposite of a uniform employment practice that would provide the commonality needed for a class action; it is a policy *against having* uniform employment practices. It is also a very common and presumptively reasonable way of doing business—one that we have

said "should itself raise no inference of discriminatory conduct," *Watson v. Fort Worth Bank & Trus*t, 487 U.S. 977, 990 (1988).

To be sure, we have recognized that, "in appropriate cases," giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since "an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination." But the recognition that this type of Title VII claim "can" exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. To the contrary, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance–based criteria for hiring and promotion that produce no actionable disparity at all. Others may choose to reward various attributes that produce disparate impact—such as scores on general aptitude tests or educational achievements. And still other managers may be guilty of intentional discrimination that produces a sex-based disparity. In such a company, demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's. A party seeking to certify a nationwide class will be unable to show that all the employees' Title VII claims will in fact depend on the answers to common questions.

Respondents have not identified a common mode of exercising discretion that pervades the entire company—aside from their reliance on Dr. Bielby's [testimony] that we have rejected. In a company of Wal–Mart's size and geographical scope, it is quite unbelievable that all managers would exercise their discretion in a common way without some common direction. Respondents attempt to make that showing by means of statistical and anecdotal evidence, but their evidence falls well short.

The statistical evidence consists primarily of regression analyses performed by Dr. Richard Drogin, a statistician, and Dr. Marc Bendick, a labor economist. Drogin conducted his analysis region-by-region, comparing the number of women promoted into management positions with the percentage of women in the available pool of hourly workers. After considering regional and national data, Drogin concluded that "there are statistically significant disparities between men and women at Wal–Mart . . . [and] these disparities . . . can be explained only by gender discrimination." Bendick compared work-force data from Wal–Mart and competitive retailers and concluded that Wal–Mart "promotes a lower percentage of women than its competitors."

Even if they are taken at face value, these studies are insufficient to establish that respondents' theory can be proved on a classwide basis. In *Falcon*, we held that one named plaintiff's experience of discrimination was insufficient to infer that "discriminatory treatment is typical of [the employer's employment] practices." 457 U.S. at 158. A similar failure of inference arises here. * * * A regional pay disparity, for example, may be attributable to only a small set of Wal–Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends.

There is another, more fundamental, respect in which respondents' statistical proof fails. Even if it established (as it does not) a pay or promotion pattern that differs from the nationwide figures or the regional figures in *all* of Wal–Mart's 3,400 stores, that would still not demonstrate that commonality of issue exists. Some managers will claim that the availability of women, or qualified women, or interested women, in their stores' area does not mirror the national or regional statistics. And almost all of them will claim to have been applying some sex-neutral, performance–based criteria—whose nature and effects will differ from store to store. In the landmark case of ours which held that giving discretion to lower–level supervisors can be the basis of Title VII liability under a disparate–impact theory, the plurality opinion *conditioned* that holding on the corollary that merely proving that the discretionary system has produced a racial or sexual disparity is *not enough*. "[T]he plaintiff must begin by identifying the specific employment practice that is challenged." *Watson*, 487 U.S., at 994. * * * That is all the more necessary when a class of plaintiffs is sought to be certified. Other than the bare existence of delegated discretion, respondents have identified no "specific employment practice"—much less one that ties all their 1.5 million claims together. Merely showing that Wal–Mart's policy of discretion has produced an overall sex–based disparity does not suffice.

Respondents' anecdotal evidence suffers from the same defects, and in addition is too weak to raise any inference that all the individual, discretionary personnel decisions are discriminatory. In *Teamsters v. United States*, 431 U.S. 324 (1977), in addition to substantial statistical evidence of company-wide discrimination, the Government (as plaintiff) produced about 40 specific accounts of racial discrimination from particular individuals. That number was significant because the company involved had only 6,472 employees, of whom 571 were minorities, and the class itself consisted of around 334 persons. The 40 anecdotes thus represented roughly one account for every eight members of the class. Moreover, the Court of Appeals

noted that the anecdotes came from individuals "spread throughout" the company who "for the most part" worked at the company's operational centers that employed the largest numbers of the class members. Here, by contrast, respondents filed some 120 affidavits reporting experiences of discrimination—about 1 for every 12,500 class members—relating to only some 235 out of Wal–Mart's 3,400 stores. More than half of these reports are concentrated in only six States (Alabama, California, Florida, Missouri, Texas, and Wisconsin); half of all States have only one or two anecdotes; and 14 States have no anecdotes about Wal–Mart's operations at all. Even if every single one of these accounts is true, that would not demonstrate that the entire company "operate[s] under a general policy of discrimination," which is what respondents must show to certify a companywide class.[9]

The dissent misunderstands the nature of the foregoing analysis. It criticizes our focus on the dissimilarities between the putative class members on the ground that we have "blend[ed]" Rule 23(a)(2)'s commonality requirement with Rule 23(b)(3)'s inquiry into whether common questions "predominate" over individual ones. That is not so. We quite agree that for purposes of Rule 23(a)(2) " '[e]ven a single [common] question' " will do. We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions predominate, but in order to determine (as Rule 23(a)(2) requires) whether there is "[e]ven a single [common] question." And there is not here. Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question.[10]

* * *

The judgment of the Court of Appeals is

Reversed.

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[9] The dissent says that we have adopted "a rule that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the class." That is not quite accurate. A discrimination claimant is free to supply as few anecdotes as he wishes. But when the claim is that a company operates under a general policy of discrimination, a few anecdotes selected from literally millions of employment decisions prove nothing at all.

[10] For this reason, there is no force to the dissent's attempt to distinguish *Falcon* on the ground that in that case there were " 'no common questions of law or fact' between the claims of the lead plaintiff and the applicant class." Here also there is nothing to unite all of the plaintiffs' claims, since (contrary to the dissent's contention) the same employment practices do not "touch and concern all members of the class."

JUSTICE GINSBURG, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, [dissenting in relevant part].

* * * Whether the class the plaintiffs describe meets the specific requirements of Rule 23(b)(3) is not before the Court, and I would reserve that matter for consideration and decision on remand. The Court, however, disqualifies the class at the starting gate, holding that the plaintiffs cannot cross the "commonality" line set by Rule 23(a)(2). In so ruling, the Court imports into the Rule 23(a) determination concerns properly addressed in a Rule 23(b)(3) assessment.

I

A

Rule 23(a)(2) establishes a preliminary requirement for maintaining a class action: "[T]here are questions of law or fact common to the class." The Rule "does not require that all questions of law or fact raised in the litigation be common;" indeed, "[e]ven a single question of law or fact common to the members of the class will satisfy the commonality requirement," Richard Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 176, n.110 (2003). A "question" is ordinarily understood to be "[a] subject or point open to controversy." American Heritage Dictionary 1483 (3d ed. 1992). Thus, a "question" "common to the class" must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members' claims.[3]

B

The District Court, recognizing that "one significant issue common to the class may be sufficient to warrant certification," found that the plaintiffs easily met that test. Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court's finding of commonality. The District Court certified a class of "[a]ll women employed at any Wal–Mart domestic retail store at any time since December 26, 1998." The named plaintiffs, led by Betty Dukes, propose to litigate, on behalf of the class, allegations that Wal–Mart discriminates on the basis of gender in pay and promotions. They allege that the company "[r]eli[es] on gender stereotypes in

[3] The Court suggests Rule 23(a)(2) must mean more than it says. If the word "questions" were taken literally, the majority asserts, plaintiffs could pass the Rule 23(a)(2) bar by "[r]eciting . . . questions" like "Do all of us plaintiffs indeed work for Wal–Mart?" Sensibly read, however, the word "questions" means disputed issues, not any utterance crafted in the grammatical form of a question.

making employment decisions such as . . . promotion[s] [and] pay." Wal–Mart permits those prejudices to infect personnel decisions, the plaintiffs contend, by leaving pay and promotions in the hands of "a nearly all male managerial workforce" using "arbitrary and subjective criteria." Further alleged barriers to the advancement of female employees include the company's requirement, "as a condition of promotion to management jobs, that employees be willing to relocate." Absent instruction otherwise, there is a risk that managers will act on the familiar assumption that women, because of their services to husband and children, are less mobile than men.

Women fill 70 percent of the hourly jobs in the retailer's stores but make up only "33 percent of management employees." "[T]he higher one looks in the organization the lower the percentage of women." The plaintiffs' "largely uncontested descriptive statistics" also show that women working in the company's stores "are paid less than men in every region" and "that the salary gap widens over time even for men and women hired into the same jobs at the same time."

The District Court identified "systems for . . . promoting in-store employees" that were "sufficiently similar across regions and stores" to conclude that "the manner in which these systems affect the class raises issues that are common to all class members." The selection of employees for promotion to in-store management "is fairly characterized as a 'tap on the shoulder' process," in which managers have discretion about whose shoulders to tap. Vacancies are not regularly posted; from among those employees satisfying minimum qualifications, managers choose whom to promote on the basis of their own subjective impressions.

Wal–Mart's compensation policies also operate uniformly across stores, the District Court found. The retailer leaves open a $2 band for every position's hourly pay rate. Wal–Mart provides no standards or criteria for setting wages within that band, and thus does nothing to counter unconscious bias on the part of supervisors.

Wal–Mart's supervisors do not make their discretionary decisions in a vacuum. The District Court reviewed means Wal–Mart used to maintain a "carefully constructed . . . corporate culture," such as frequent meetings to reinforce the common way of thinking, regular transfers of managers between stores to ensure uniformity throughout the company, monitoring of stores "on a close and constant basis," and "Wal–Mart TV," "broadcas[t] . . . into all stores."

The plaintiffs' evidence, including class members' tales of their own experiences,[4] suggests that gender bias suffused Wal–Mart's company culture. Among illustrations, senior management often refer to female associates as "little Janie Qs." One manager told an employee that "[m]en are here to make a career and women aren't." A committee of female Wal–Mart executives concluded that "[s]tereotypes limit the opportunities offered to women."

Finally, the plaintiffs presented an expert's appraisal to show that the pay and promotions disparities at Wal–Mart "can be explained only by gender discrimination and not by TTT neutral variables." Using regression analyses, their expert, Richard Drogin, controlled for factors including, inter alia, job performance, length of time with the company, and the store where an employee worked.[5] The results, the District Court found, were sufficient to raise an "inference of discrimination."

C

The District Court's identification of a common question, whether Wal–Mart's pay and promotions policies gave rise to unlawful discrimination, was hardly infirm. The practice of delegating to supervisors large discretion to make personnel decisions, uncontrolled by formal standards, has long been known to have the potential to produce disparate effects. Managers, like all humankind, may be prey to biases of which they are unaware.[6] The risk of discrimination is

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[4] The majority purports to derive from *Teamsters v. United States*, 431 U.S. 324 (1977), a rule that a discrimination claim, if accompanied by anecdotes, must supply them in numbers proportionate to the size of the class. *Teamsters*, the Court acknowledges, instructs that statistical evidence alone may suffice; that decision can hardly be said to establish a numerical floor before anecdotal evidence can be taken into account.

[5] The Court asserts that Drogin showed only average differences at the "regional and national level" between male and female employees. In fact, his regression analyses showed there were disparities within stores. The majority's contention to the contrary reflects only an arcane disagreement about statistical method—which the District Court resolved in the plaintiffs' favor. Appellate review is no occasion to disturb a trial court's handling of factual disputes of this order.

[6] An example vividly illustrates how subjective decisionmaking can be a vehicle for discrimination. Performing in symphony orchestras was long a male preserve. Goldin and Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians*, 90 Am. Econ. Rev. 715, 715–16 (2000). In the 1970's orchestras began hiring musicians through auditions open to all comers. Reviewers were to judge applicants solely on their musical abilities, yet subconscious bias led some reviewers to disfavor women. Orchestras that permitted reviewers to see the applicants hired far fewer female musicians than orchestras that conducted blind auditions, in which candidates played behind opaque screens.

heightened when those managers are predominantly of one sex, and are steeped in a corporate culture that perpetuates gender stereotypes.

* * *

We have held that "discretionary employment practices" can give rise to Title VII claims, not only when such practices are motivated by discriminatory intent but also when they produce discriminatory results. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 988, 991 (1988). In *Watson*, as here, an employer had given its managers large authority over promotions. An employee sued the bank under Title VII, alleging that the "discretionary promotion system" caused a discriminatory effect based on race. Four different supervisors had declined, on separate occasions, to promote the employee. Their reasons were subjective and unknown. The employer, we noted "had not developed precise and formal criteria for evaluating candidates"; "[i]t relied instead on the subjective judgment of supervisors."

Aware of "the problem of subconscious stereotypes and prejudices," we held that the employer's "undisciplined system of subjective decisionmaking" was an "employment practic[e]" that "may be analyzed under the disparate impact approach."

The plaintiffs' allegations state claims of gender discrimination in the form of biased decisionmaking in both pay and promotions. The evidence reviewed by the District Court adequately demonstrated that resolving those claims would necessitate examination of particular policies and practices alleged to affect, adversely and globally, women employed at Wal–Mart's stores. Rule 23(a)(2), setting a necessary but not a sufficient criterion for class–action certification, demands nothing further.

II

A

The Court gives no credence to the key dispute common to the class: whether Wal–Mart's discretionary pay and promotion policies are discriminatory. "What matters," the Court asserts, "is not the raising of common 'questions,' " but whether there are "[d]issimilarities within the proposed class" that "have the potential to impede the generation of common answers." (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)).

The Court blends Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3), and thereby elevates the

(a)(2) inquiry so that it is no longer "easily satisfied."[7] Rule 23(b)(3) certification requires, in addition to the four 23(a) findings, determinations that "questions of law or fact common to class members predominate over any questions affecting only individual members" and that "a class action is superior to other available methods for . . . adjudicating the controversy."

The Court's emphasis on differences between class members mimics the Rule 23(b)(3) inquiry into whether common questions "predominate" over individual issues. And by asking whether the individual differences "impede" common adjudication, the Court duplicates 23(b)(3)'s question whether "a class action is superior" to other modes of adjudication. Indeed, Professor Nagareda, whose "dissimilarities" inquiry the Court endorses, developed his position in the context of Rule 23(b)(3). * * * "The Rule 23(b)(3) predominance inquiry" is meant to "tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation." If courts must conduct a "dissimilarities" analysis at the Rule 23(a)(2) stage, no mission remains for Rule 23(b)(3).

Because Rule 23(a) is also a prerequisite for Rule 23(b)(1) and Rule 23(b)(2) classes, the Court's "dissimilarities" position is far reaching. Individual differences should not bar a Rule 23(b)(1) or Rule 23(b)(2) class, so long as the Rule 23(a) threshold is met. For example, in *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), a Rule 23(b)(2) class of African–American truck drivers complained that the defendant had discriminatorily refused to hire black applicants. We recognized that the "qualification[s] and performance" of individual class members might vary. "Generalizations concerning such individually applicable evidence," we cautioned, "cannot serve as a justification for the denial of [injunctive] relief to the entire class."

B

The "dissimilarities" approach leads the Court to train its attention on what distinguishes individual class members, rather than

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[7] The Court places considerable weight on *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). That case has little relevance to the question before the Court today. The lead plaintiff in *Falcon* alleged discrimination evidenced by the company's failure to promote him and other Mexican–American employees and failure to hire Mexican–American applicants. There were "no common questions of law or fact" between the claims of the lead plaintiff and the applicant class. The plaintiff-employee alleged that the defendant-employer had discriminated against him intentionally. The applicant class claims, by contrast, were "advanced under the 'adverse impact' theory," appropriate for facially neutral practices. "[T]he only commonality [wa]s that respondent is a Mexican–American and he seeks to represent a class of Mexican–Americans." Here the same practices touch and concern all members of the class.

on what unites them. Given the lack of standards for pay and promotions, the majority says, "demonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's."

Wal–Mart's delegation of discretion over pay and promotions is a policy uniform throughout all stores. The very nature of discretion is that people will exercise it in various ways. A system of delegated discretion, *Watson* held, is a practice actionable under Title VII when it produces discriminatory outcomes. A finding that Wal–Mart's pay and promotions practices in fact violate the law would be the first step in the usual order of proof for plaintiffs seeking individual remedies for company-wide discrimination. *Teamsters v. United States*, 431 U.S. 324, 359 (1977). That each individual employee's unique circumstances will ultimately determine whether she is entitled to backpay or damages, § 2000e–5(g)(2)(A) (barring backpay if a plaintiff "was refused . . . advancement . . . for any reason other than discrimination"), should not factor into the Rule 23(a)(2) determination.

* * *

The Court errs in importing a "dissimilarities" notion suited to Rule 23(b)(3) into the Rule 23(a) commonality inquiry. I therefore cannot join Part II of the Court's opinion.

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WAL-MART STORES, INC. v. DUKES

Supreme Court of the United States, 2011.
131 S.Ct. 2541.

JUSTICE SCALIA delivered the opinion of the Court.

* * * The District Court and the Court of Appeals approved the certification of a class comprising about one and a half million plaintiffs, current and former female employees of petitioner Wal–Mart who allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women. In addition to injunctive and declaratory relief, the plaintiffs seek an award of backpay. We consider whether the certification of the plaintiff class was consistent with * * * [Rule 23(b)(2)].

* * *

The named plaintiffs in this lawsuit, representing the 1.5 million members of the certified class, are three current or former Wal–Mart employees who allege that the company discriminated against them on the basis of their sex by denying them equal pay or promotions, in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e–1 *et seq*. * * * [Plaintiffs'] complaint seeks injunctive and declaratory relief, punitive damages, and backpay. It does not ask for compensatory damages.

* * *

[In addition to meeting the requirements of Rule 23(a)], the proposed class must satisfy at least one of the three requirements listed in Rule 23(b). Respondents rely on Rule 23(b)(2), which applies when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

Invoking these provisions, respondents moved the District Court to certify a plaintiff class consisting of " '[a]ll women employed at any Wal–Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal–Mart's challenged pay and management track promotions policies and practices.' " * * * Wal–Mart * * * contended that respondents' monetary claims for backpay could not be certified under Rule 23(b)(2), first because that Rule refers only to injunctive and declaratory relief, and second because the backpay claims could not be manageably tried as a class without depriving Wal–Mart of its right to present certain statutory defenses. With one limitation not relevant here, the District Court granted respondents' motion and certified their proposed class.

A divided en banc Court of Appeals substantially affirmed the

District Court's certification order. * * * With respect to the Rule 23(b)(2) question, the Ninth Circuit held that respondents' backpay claims could be certified as part of a (b)(2) class because they did not "predominat[e]" over the requests for declaratory and injunctive relief, meaning they were not "superior in strength, influence, or authority" to the nonmonetary claims.

* * *

III

We * * * conclude that respondents' claims for backpay were improperly certified under Federal Rule of Civil Procedure 23(b)(2). Our opinion in *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 121 (1994) (per curiam) expressed serious doubt about whether claims for monetary relief may be certified under that provision. We now hold that they may not, at least where (as here) the monetary relief is not incidental to the injunctive or declaratory relief.

A

Rule 23(b)(2) allows class treatment when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." One possible reading of this provision is that it applies *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all. We need not reach that broader question in this case, because we think that, at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule. The key to the (b)(2) class is "the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009). In other words, Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a *different* injunction or declaratory judgment against the defendant. Similarly, it does not authorize class certification when each class member would be entitled to an individualized award of monetary damages.

That interpretation accords with the history of the Rule. Because Rule 23 "stems from equity practice" that pre-dated its codification, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997), in determining its meaning we have previously looked to the

historical models on which the Rule was based, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 841–45 (1999). As we observed in *Amchem*, "[c]ivil rights cases against parties charged with unlawful, class–based discrimination are prime examples" of what (b)(2) is meant to capture. In particular, the Rule reflects a series of decisions involving challenges to racial segregation—conduct that was remedied by a single classwide order. In none of the cases cited by the Advisory Committee as examples of (b)(2)'s antecedents did the plaintiffs combine any claim for individualized relief with their classwide injunction. *See* Advisory Committee's Note, 39 F.R.D. 69, 102 (1966) (citing cases).

* * *

Permitting the combination of individualized and class–wide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b). Classes certified under (b)(1) and (b)(2) share the most traditional justifications for class treatment—that individual adjudications would be impossible or unworkable, as in a (b)(1) class, or that the relief sought must perforce affect the entire class at once, as in a (b)(2) class. For that reason these are also mandatory classes: The Rule provides no opportunity for (b)(1) or (b)(2) class members to opt out, and does not even oblige the District Court to afford them notice of the action. Rule 23(b)(3), by contrast, is an "adventuresome innovation" of the 1966 amendments, framed for situations "in which 'class–action treatment is not as clearly called for.' " It allows class certification in a much wider set of circumstances but with greater procedural protections. Its only prerequisites are that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." And unlike (b)(1) and (b)(2) classes, the (b)(3) class is not mandatory; class members are entitled to receive "the best notice that is practicable under the circumstances" and to withdraw from the class at their option.

Given that structure, we think it clear that individualized monetary claims belong in Rule 23(b)(3). The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*. When a class seeks an indivisible injunction benefitting all its members at once, there is no reason to undertake a case-specific inquiry into whether class issues predominate or whether class action is a superior method of adjudicating the dispute. Predominance and superiority are self–evident. But with respect to each class member's individualized claim

for money, that is not so—which is precisely why (b)(3) requires the judge to make findings about predominance and superiority before allowing the class. Similarly, (b)(2) does not require that class members be given notice and opt–out rights, presumably because it is thought (rightly or wrongly) that notice has no purpose when the class is mandatory, and that depriving people of their right to sue in this manner complies with the Due Process Clause. In the context of a class action predominantly for money damages we have held that absence of notice and opt-out violates due process. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985). While we have never held that to be so where the monetary claims do not predominate, the serious possibility that it may be so provides an additional reason not to read Rule 23(b)(2) to include the monetary claims here.

B

Against that conclusion, respondents argue that their claims for backpay were appropriately certified as part of a class under Rule 23(b)(2) because those claims do not "predominate" over their requests for injunctive and declaratory relief. They rely upon the Advisory Committee's statement that Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates *exclusively or predominantly* to money damages." The negative implication, they argue, is that it *does* extend to cases in which the appropriate final relief relates only partially and nonpredominantly to money damages. Of course it is the Rule itself, not the Advisory Committee's description of it, that governs. And a mere negative inference does not in our view suffice to establish a disposition that has no basis in the Rule's text, and that does obvious violence to the Rule's structural features. The mere "predominance" of a proper (b)(2) injunctive claim does nothing to justify elimination of Rule 23(b)(3)'s procedural protections: It neither establishes the superiority of *class* adjudication over *individual* adjudication nor cures the notice and opt–out problems. We fail to see why the Rule should be read to nullify these protections whenever a plaintiff class, at its option, combines its monetary claims with a request—even a "predominating request"—for an injunction.

Respondents' predominance test, moreover, creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief. In this case, for example, the named plaintiffs declined to include employees' claims for compensatory damages in their complaint. That strategy of including only backpay claims made it more likely that monetary relief would not "predominate." But it also created the possibility (if the predominance test were correct) that individual class members' compensatory-damages claims would be *precluded* by litigation they had no power to

hold themselves apart from. If it were determined, for example, that a particular class member is not entitled to backpay because her denial of increased pay or a promotion was *not* the product of discrimination, that employee might be collaterally estopped from independently seeking compensatory damages based on that same denial. That possibility underscores the need for plaintiffs with individual monetary claims to decide *for themselves* whether to tie their fates to the class representatives' or go it alone—a choice Rule 23(b)(2) does not ensure that they have.

The predominance test would also require the District Court to reevaluate the roster of class members continually. The Ninth Circuit recognized the necessity for this when it concluded that those plaintiffs no longer employed by Wal–Mart lack standing to seek injunctive or declaratory relief against its employment practices. The Court of Appeals' response to that difficulty, however, was not to eliminate *all* former employees from the certified class, but to eliminate only those who had left the company's employ by the date the complaint was filed. That solution has no logical connection to the problem, since those who have left their Wal–Mart jobs *since* the complaint was filed have no more need for prospective relief than those who left beforehand. As a consequence, even though the validity of a (b)(2) class depends on whether "final injunctive relief or corresponding declaratory relief is appropriate respecting the class *as a whole*," about half the members of the class approved by the Ninth Circuit have no claim for injunctive or declaratory relief at all. Of course, the alternative (and logical) solution of excising plaintiffs from the class as they leave their employment may have struck the Court of Appeals as wasteful of the District Court's time. Which indeed it is, since if a backpay action were properly certified for class treatment under *(b)(3)*, the ability to litigate a plaintiff's backpay claim as part of the class would not turn on the irrelevant question whether she is still employed at Wal–Mart. What follows from this, however, is not that some arbitrary limitation on class membership should be imposed but that the backpay claims should not be certified under Rule 23(b)(2) at all.

Finally, respondents argue that their backpay claims are appropriate for a (b)(2) class action because a backpay award is equitable in nature. The latter may be true, but it is irrelevant. The Rule does not speak of "equitable" remedies generally but of injunctions and declaratory judgments. As Title VII itself makes pellucidly clear, backpay is neither. *See* 42 U.S.C. § 2000e–5(g)(2)(B)(i) and (ii) (distinguishing between declaratory and injunctive relief and the payment of "backpay," see § 2000e– 5(g)(2)(A)).

C

In *Allison v. Citgo Petroleum Corp*., 151 F.3d 402, 415 (5th Cir. 1998), the Fifth Circuit held that a (b)(2) class would permit the certification of monetary relief that is "incidental to requested injunctive or declaratory relief," which it defined as "damages that flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief." In that court's view, such "incidental damage should not require additional hearings to resolve the disparate merits of each individual's case; it should neither introduce new substantial legal or factual issues, nor entail complex individualized determinations." We need not decide in this case whether there are any forms of "incidental" monetary relief that are consistent with the interpretation of Rule 23(b)(2) we have announced and that comply with the Due Process Clause. Respondents do not argue that they can satisfy this standard, and in any event they cannot. Contrary to the Ninth Circuit's view, Wal–Mart is entitled to individualized determinations of each employee's eligibility for backpay. Title VII includes a detailed remedial scheme. If a plaintiff prevails in showing that an employer has discriminated against him in violation of the statute, the court "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, [including] reinstatement or hiring of employees, with or without backpay . . . or any other equitable relief as the court deems appropriate." § 2000e–5(g)(1). But if the employer can show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order the "hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any backpay." § 2000e–5(g)(2)(A).

We have established a procedure for trying pattern–or–practice cases that gives effect to these statutory requirements. When the plaintiff seeks individual relief such as reinstatement or backpay after establishing a pattern or practice of discrimination, "a district court must usually conduct additional proceedings . . . to determine the scope of individual relief." *Teamsters*, [431 U.S. 324, 361 (1977)]. At this phase, the burden of proof will shift to the company, but it will have the right to raise any individual affirmative defenses it may have, and to "demonstrate that the individual applicant was denied an employment opportunity for lawful reasons."

The Court of Appeals believed that it was possible to replace such proceedings with Trial by Formula. A sample set of the class members would be selected, as to whom liability for sex discrimination and the backpay owing as a result would be determined in depositions supervised by a master. The percentage of claims determined to be

valid would then be applied to the entire remaining class, and the number of (presumptively) valid claims thus derived would be multiplied by the average backpay award in the sample set to arrive at the entire class recovery—without further individualized proceedings. We disapprove that novel project. Because the Rules Enabling Act forbids interpreting Rule 23 to "abridge, enlarge or modify any substantive right," 28 U.S.C.§ 2072(b), a class cannot be certified on the premise that Wal–Mart will not be entitled to litigate its statutory defenses to individual claims. And because the necessity of that litigation will prevent backpay from being "incidental" to the classwide injunction, respondents' class could not be certified even assuming, *arguendo*, that "incidental" monetary relief can be awarded to a 23(b)(2) class.

* * *

The judgment of the Court of Appeals is

Reversed.

TAB 7-3

BNA Insights

CLASS ACTIONS

Most of the journalistic commentary about the U.S. Supreme Court's decision in *Wal-Mart Stores Inc. v. Dukes*, 79 U.S.L.W. 4527 (U.S. June 20, 2011), (slip opinion No. 10-277 available at http://www.supremecourt.gov/opinions/10pdf/10-277.pdf), has missed the forest for the trees. The case is extremely significant and will close the courthouse doors to most employment discrimination litigation under Title VII of the 1964 Civil Rights Act—but not for the reasons most seem to think, according to the author, John C. Coffee Jr.

"You Just Can't Get There From Here": A Primer on *Wal-Mart v. Dukes*

BY JOHN C. COFFEE JR.

The problem is not the U.S. Supreme Court's 5-4 decision that Fed. R. Civ. P. 23(a)(2)'s "commonality" requirement was not satisfied (that outcome was widely expected), but rather the court's unanimous decision that back pay (and other forms of money damages) could not be awarded in a Rule 23(b)(2) class action.

Most commentary has focused on the issue on which the court split and ignored the greater significance of the issue on which they agreed. That the court's liberals went docilely along with the conservative majority on the Rule 23(b)(2) money damages issue seems surprising and raises a question: Did they really understand the impact of what they were doing?

The simple truth is that employment discrimination litigation cannot normally be certified under Rule 23(b)(3) because of the "predominance" requirement of that rule, which requires that the common questions of law and fact "predominate" over the individual ones. Even in a far simpler, more streamlined case than *Wal-Mart*, there will still typically be a host of individual issues that will make it difficult (and usually impossible) to satisfy that predominance standard.

Indeed, recognizing this problem a decade ago, the U.S. Court of Appeals for the Second Circuit crafted in response an "ad hoc balancing" approach in *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147 (2d Cir. 2001). Under this approach, in a Title VII class action, the class members could seek compensatory damages when "the positive weight or value to the plaintiffs of the injunctive or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed." *Robinson*'s test looked to whether "(1) even in the absence of a possible monetary recovery, reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief sought, and (2) the injunctive or declaratory relief sought would be both reasonably necessary and appropriate were the plaintiffs to succeed on the merits." *Id.* at 164.

Robinson's test was indeed ad hoc and arguably a jury-rigged judicial invention with little support in the text of the rule, but it worked. An invention born of necessity, the *Robinson* decision was adopted two years later by the Ninth Circuit, which reached the same assessment. See *Molski v. Gleich*, 318 F.3d 937 (9th Cir. 2003). Other circuits disagreed, and the resulting split in the circuits had long made a Supreme Court review of this issue seem inevitable, even without the overbroad, sprawling class that plaintiffs cobbled together in *Wal-Mart*. Although *Robinson* employed a narrower, more defensible standard than the Ninth Circuit adopted in its *Wal-Mart* decision to determine when monetary relief can be awarded under Rule 23(b)(2), both the Second and Ninth circuits' decisions have been clearly overruled by *Wal-Mart*. Yet curiously, nowhere in *Wal-Mart* is *Robinson* cited.

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This suggests that the liberal wing of the court may not have recognized how procedurally cut off and trapped employment discrimination victims are if back pay cannot be obtained as a form of "incidental" relief under Rule 23(b)(2). Reinforcing this sense is the casual assertion by Justice Ruth Bader Ginsburg in her *Wal-Mart* dissent that the case should be remanded to the district court for a determination as to whether it could be certified under Rule 23(b)(3). *Wal-Mart*, slip op. at 1-2 (Ginsburg, J., dissenting). That idea is a non-starter. In all circuits, the predominance standard has long been the Grim Reaper of putative class actions, and the sprawling character of the *Wal-Mart* class (with 1.5 million or more class members working in 3,500 stores in 50 states at a broad assortment of jobs) doomed it from the start—if the predominance standard applied.

So what are the issues that survive *Wal-Mart* or that *Wal-Mart* raises for the first time? They are numerous:

1. When Can Money Damages Be Awarded Under Rule 23(b)(2)?

Justice Antonin Scalia's majority decision stops short of holding that monetary relief can never be awarded under Rule 23(b)(2) (although he does acknowledge that is "one possible reading" of the text of the rule—*Wal-Mart*, slip op. at 20). Instead, his opinion holds that:

> [A]t a minimum, claims for individualized relief (like the backpay at issue here) do not satisfy the Rule. *Id.*

Emphasizing the non-opt-out character of Rule 23(b)(2) and its lack of mandatory notice, he then added:

> Permitting the combination of individualized and class wide relief in a (b)(2) class is also inconsistent with the structure of Rule 23(b)(2). *Id.* at 20-21.

When then can damages be obtained in a Rule 23(b)(2) class action? Some federal statutes provide for statutory penalties under which any victim receives an automatic, legislatively specified award. For example, the 1984 Cable Communications Policy Act, 47 U.S.C. § 521 et seq., provides for $1,000 damages per victim for certain privacy violations. Prior to *Wal-Mart*, the Second Circuit had questioned whether such damages could be awarded in a large class action. After all, $1,000 times 100,000 class members could produce an astronomical recovery, which the Second Circuit reasoned did not seem at all "incidental" to the injunctive relief. See *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13 (2d Cir. 2003). But after *Wal-Mart*, that "incidental" standard may not survive and the focus may shift to whether the damages are "individualized" or uniform.

Another decision that may survive *Wal-Mart* is *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004). There, in a case involving alleged discrimination against African-Americans in life insurance benefits, the Fifth Circuit found that the differential between the life insurance premiums charged to African-American policyholders and that charged to other policyholders could be calculated objectively from the face of the policy. Thus, the Fifth Circuit upheld class certification because the potential money damages award would not require judicial discretion and thus could be termed "incidental." After *Wal-Mart*, if the damages award can be determined under an objective formula (with little discretion in the court), it is possible that this will be seen as uniform and not "individualized" relief. But it is also possible that if there can be significant variations in awards among class members, this would lead to a characterization of the relief as "individualized." Moreover, even if the damages can be calculated objectively, at some point the damages formula may become sufficiently complicated that the relief also becomes "individualized" and hence unavailable. Time will tell.

2. Can Defenses Preclude Class Certification?

Let us suppose that a Rule 23(b)(3) class is proposed on behalf of the employees of a single plant and the basis for the claim of discrimination is an express rule requiring applicants to obtain a specified score on a standardized exam that cannot be shown to be job-related and whose use has a disparate (and adverse) impact on minorities. Here, there is a strong possibility that the common issues will predominate over the individual issues.

But still problems remain under *Wal-Mart*. As Justice Scalia noted, Title VII gives the employer an affirmative defense:

> [I]f the employer can show that it took an adverse employment action against an employee for any reason other than discrimination, the court cannot order the 'hiring, reinstatement, or promotion of an individual, as an employee, or the payment to him of any backpay.' *Id.* at 26.

Suppose then that the employer alleges that it either failed to promote or discharge minority employees because of poor attendance records, recurrent disputes with customers, or the misstatement or omission of information in their employment application. The defendant further asserts that these individualized defenses (as to which it bears the burden of proof) defeat predominance so that the putative class action may not be certified. Alternatively, this same argument can be stated in terms of the "superiority" requirement of Rule 23(b)(3) on the ground that a class action is not the "superior" means of resolving the dispute because the individual defenses must be heard.

The Ninth Circuit had attempted to sidestep this problem of individual defenses (which would have swamped any district court in a class numbering perhaps 1.5 million class members) by approving a sampling methodology. A statistically valid subset of the class would have been selected; a special master would then determine the validity of these defenses in these sample cases; and the court would project these results upon the class as a whole. Thus, if the defenses were determined to be valid in 10 percent of the cases in the sample, the total class action recovery after trial would be reduced by 10 percent. Calling this approach "Trial by Formula," Scalia rejected it on the grounds that, under the Rules Enabling Act, a federal rule of procedure, including Rule 23, may not "abridge, enlarge or modify any substantive right." (*Id.* at 27). Because of this limitation, he concluded that: "a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims." *Id.*

But if each claim can be challenged before any judgment can be awarded, a large class simply cannot be

LW ISSN 0148-8139

certified (indeed, even a class of 10,000 members would drain the time and energy of most district court judges, even if they had a deep supply of magistrates at their disposal). Once again, the result is that the class action cannot be tried (Scalia and the majority do not even address the issue of whether the jury has to hear these affirmative defense disputes or whether they can be handled in a supplemental proceeding). The bottom line appears to be that: "You just can't get there from here."

The implications of the Supreme Court's insistence that the employer's defenses be respected extends beyond employment litigation or the use of a sampling methodology. Suppose in a securities class action that the district court determines at class certification that the relevant market is efficient and thus that the corporate issuer is subject to the "fraud on the market" doctrine. But *Basic v. Levinson*, 485 U.S. 224 (1988), did say that its presumption of reliance was rebuttable. Assume further then that the defendant seeks at trial to introduce evidence of its claim that 20 percent of the class consists of "indexed" institutional investors who could not have relied on any financial information because they simply hold a diversified portfolio consisting of the stocks of all public companies. Today, the correct answer is that these investors could still say that, even if they did not study this information, they still relied on the market to price these stocks correctly. But, in the future, will the Supreme Court allow defendants to seek to rebut reliance at trial for those investors they think did not rely on the alleged misstatement? The result would be to make individual issues predominate over common issues (and also to make the action unmanageable for purposes of Rule 23(b)(3)). *Wal-Mart* does not suggest that the court will go this far. In a footnote, the court asserts that at trial in a securities class action the plaintiffs "will surely have to prove again at trial [that the market was efficient] in order to make out their case on the merits." (*Id.* at 10, n.6.) At trial, defendants will be able to attack both loss causation and market efficiency, but not individual reliance (at least unless the Court decides to re-consider *Basic v. Levinson*).

3. Can Sampling Methodology Be Used in Individual Mass Tort Cases?

Assume that several thousand asbestos (or similar mass tort cases involving exposure to a dangerous chemical) have been consolidated before a district court. Rather than try each case, it is seeking to use a sampling methodology under which outcomes reached in a subset of cases will be applied to the entire population. But Scalia denigrated this approach in *Wal-Mart*, calling it "Trial By Formula." No doubt that there are risks in using such a procedure in the future after *Wal-Mart*, but Scalia's rejection of sampling was based on the Rules Enabling Act ("REA"). The decision holds that because the REA forbids any interpretation of the federal rules that "abridge, enlarge or modify any substantive right," Rule 23 cannot be read to permit any eclipsing of defendant's ability to raise its statutory defenses. But consolidated individual mass tort cases are not governed by any special rule, and that consideration does not apply. Possibly, the court may in the future find due process problems in use of sampling problems, but that day has not yet arrived.

4. How Will the Commonality Requirement Be Read in Future Cases?

Traditionally, commonality was the easiest requirement to satisfy in Rule 23(a). In some contexts, it will remain easy to satisfy (for example, securities class actions where the common issue is typically whether the defendant made a material misstatement or omission in its public disclosures. But *Wal-Mart*'s basic holding on the commonality issue appears to be that plaintiffs must identify "a common mode of exercising discretion that pervades the entire company." (*Id.* at 15). This will probably force plaintiffs to reduce the size of proposed classes, limiting them to single plants or job classifications—or at the least to a common supervisor who arguably exercised discretion in a discriminatory fashion. That already was the tendency in most other circuits. See, e.g., *Andersen v. Westinghouse Savannah River Co.*, 406 F.3d 248 (4th Cir. 2005); *Cooper v. Southern Co.*, 390 F.3d 695 (11th Cir. 2004); *Bacon v. Honda of Am. Mfg. Inc.*, 370 F.3d 565, 571 (6th Cir. 2004). In general, these cases have disfavored classes that encompass both workers and supervisors or production line workers in different plants with different production capabilities.

In this light, the majority's refusal in *Wal-Mart* to certify an extremely sprawling class action, covering 3,500 stores, 50 states and a broadly number of job classifications, was not surprising. Indeed, it is doubtful that even the Second Circuit (or any other circuit) would have certified *Wal-Mart* (and the Ninth Circuit did so only by one vote on en banc review).

But if the dissent may protest too much about the majority's failure to certify a class of *Wal-Mart*'s scope, they can object more convincingly to how the majority construes the commonality requirement. Scalia argues succinctly that:

> Without some glue holding the alleged reasons for all these decisions together, it will be impossible to say that examination of all of the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.* (*Id.* at 12).

The required "glue" here seems to be not only a similar identity on the part of the plaintiffs, but a similar motivation or purpose on the part of the defendant. Relying on *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), Scalia concludes that the plaintiffs must plead a "common answer" that will satisfy the commonality requirement, either by showing a "biased testing procedure," or "significant proof that an employer operated under a general policy of discrimination." *Id.* at 12. But that is what the plaintiffs' regression statistics arguably showed—not enough to prove the case at trial, but arguably enough to provide the requisite "glue."

In future cases in which plaintiffs assert a "general policy of discrimination," it appears likely that they will have to supply a substantial narrative, and a virtual mini-trial may ensue. As redefined, commonality necessarily overlaps with the merits, and *Wal-Mart* shows the majority unpersuaded by anecdotes, sociological models, or regression equations. But unconscious discrimination will seldom manifest itself in explicit statements, and employers have long ago learned not to rely on

standardized testing procedures (at least unless the test has been empirically validated as job related).

In the last analysis, the majority was probably justified in saying that the *Wal-Mart* class was too sprawling, but less so in requiring a "common answer" that knits together all the examples of discrimination with a common thread. Less damage would have been done if the court had rejected the proposed class on grounds of typicality or adequacy of representation (i.e., Rules 23(a)(3) or (a)(4)). After all, a shop floor employee on the West Coast really cannot adequately represent administrators on the East Coast (or vice versa), and subclasses might have been properly required. At some point, multiple subclasses might have made the class "unmanageable" under Rule 23(b)(3), but this would have only required multiple class actions to be filed.

Instead, for the future, class certification in cases where a "general policy of discrimination" is alleged will see a long debate over whether a "common answer" linking together all these episodes has been adequately alleged—which debate will then have to be repeated at trial before the jury. Even in a case involving a single plant, this will be a significant obstacle and may require a possible minitrial.

5. What Should Corrective Legislation Do?

If we recognize (as we must) that collective litigation for money damages for employment discrimination is now largely foreclosed, the next question becomes: What type of legislative reform would both work and be feasible? Polarized as the political system is today, the one reform that might pass over the intermediate future is a narrow revision of the procedures applicable to employment discrimination. Conceivably, Republican women might join their Democratic counterparts in supporting such a reform. In contrast, an attempt to rewrite Rule 23 generally to soften its "predominance" requirement would spur the entire business community into frenzied lobbying in opposition. Moreover, reforms addressed to the Supreme Court's revision of the "commonality" requirement are likely to be futile. In the next sprawling class action, the majority might instead seize on the "typicality" or "adequate representation" requirements or some other provision in Rule 23.

But Congress could establish a special collective litigation procedure for employment claims that did not rely on Rule 23. For example, consider a statute that reads:

Proposed Addition to Title VII

(a) One or more person may sue on behalf of themselves and other persons, without complying with Rule 23 of the Federal Rules of Civil Procedure, with respect to [an alleged violation of Title VII] for compensation (including back pay) and related money damages, injunctive, equitable, or declaratory relief if:

(1) the individual or individuals bringing suit and their counsel can adequately represent the other persons sought to be represented in the action;

(2) the persons sought to be so represented are reasonably similarly situated in terms of both (i) the allegations pleaded with specificity in the complaint and (ii) their job categories, employment positions and records, or applicant status; and

(3) pursuant to the court's direction, reasonable notice is given to the other persons sought to be represented and they do not decline such representation.

(b) In determining whether the [violation of Title VII] caused injury or loss to any person, the court may use a reasonable sampling methodology and adjust the total damage award in accordance therewith if, and to the extent that, it determines that individualized hearings with regard to defenses or related factual questions would sufficiently burden the court so as to make a collective proceeding infeasible.

Crude and imperfect as this language is, it seeks to restore an opt-out employment discrimination class action of intermediate scope. It also largely outflanks the limitations imposed by *Wal-Mart* on Rule 23. As long as Due Process standards are complied with, Congress need not drive all its square pegs into the round hole of Rule 23 (and then watch the current Supreme Court frustrate its legislative intent).

The proposed language confers considerable (but not unlimited) discretion upon the district court to determine which job categories or employment positions are "reasonably similarly situated in terms of the allegations pleaded" in order to be grouped within the same collective action. Thus, it does not authorize companywide sprawling class actions of the same breadth as *Wal-Mart* presented, but multi-jurisdictional and multiplant actions would still be possible. This language also allows money damages and injunctive relief to be combined within the functional equivalent of an opt-out class action. Finally, it specifically authorizes sampling procedures (although the Supreme Court may yet find a Due Process obstacle in their use).

Ultimately, it is time to recognize that the concept of a collective remedy need not be co-extensive with, or depend upon, the boundaries of Rule 23. This recognition is necessary because the current Supreme Court is shrinking Rule 23's boundaries and seems likely to continue to do so. At the same time, another sad lesson of *Wal-Mart* is that when plaintiffs seek to maximize their leverage by suing on a companywide, "mega" basis, they invite judicial reversal. Hubris leads to disaster, and *Wal-Mart* presents the paradigmatic case of such a train wreck—one that has been coming for several years and now has arrived.

LW ISSN 0148-8139

TAB 7-4

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 11a0289p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DANIEL PILGRIM and PATRICK KIRLIN,
Plaintiffs-Appellants,

v.

UNIVERSAL HEALTH CARD, LLC and
COVERDELL & COMPANY, INC.,
Defendants-Appellees.

Nos. 10-3211/3475

Appeal from the United States District Court
for the Northern District of Ohio at Akron.
No. 09-00879—John R. Adams, District Judge.

Argued: October 6, 2011

Decided and Filed: November 10, 2011

Before: KEITH, SUTTON and McKEAGUE, Circuit Judges.

COUNSEL

ARGUED: Peter N. Freiberg, MEISELMAN, DENLEA, PACKMAN, CARTON & EBERZ P.C., White Plains, New York, for Appellants. Robert N. Rapp, CALFEE, HALTER & GRISWOLD LLP, Cleveland, Ohio, Gary A. Corroto, TZANGAS, PLAKAS, MANNOS & RAIES, LTD., Canton, Ohio, for Appellees. **ON BRIEF:** Peter N. Freiberg, MEISELMAN, DENLEA, PACKMAN, CARTON & EBERZ P.C., White Plains, New York, for Appellants. Robert N. Rapp, Matthew J. Kucharson, Eric S. Zell, CALFEE, HALTER & GRISWOLD LLP, Cleveland, Ohio, Gary A. Corroto, Lee E. Plakas, Edmond J. Mack, TZANGAS, PLAKAS, MANNOS & RAIES, LTD., Canton, Ohio, for Appellees.

OPINION

SUTTON, Circuit Judge. Hoping to represent a nationwide class of consumers, Daniel Pilgrim and Patrick Kirlin sued two companies responsible for creating and marketing a healthcare discount program, alleging that the companies had used deceptive advertising to sell their product. The consumer-protection laws of many States, not just of Ohio, govern these claims and factual variations among the claims abound, making a class action in this setting neither efficient nor workable nor above all consistent with the requirements of Rule 23 of the Federal Rules of Civil Procedure. We affirm.

I.

In 2007, Universal Health Card and Coverdell & Company created a program designed to provide healthcare discounts to consumers. Membership in the program gave consumers access to a network of healthcare providers that had agreed to lower their prices for members. Universal placed ads in newspapers around the country encouraging customers to visit its website or call its toll-free hotline to learn more about the program and to sign up for a membership. Coverdell was responsible for maintaining the network of healthcare providers and for reviewing Universal's advertising materials.

Some people did not like the program. They discovered healthcare providers listed in the discount network that had never heard of the program, and complained that the newspaper advertisements, designed to look like news stories and dubbed "advertorials," were deceptive.

Two disenchanted consumers, Pilgrim and Kirlin, sued Universal and Coverdell in federal court, seeking to represent a nationwide class of all people who had joined the program. The opt-out class encompassed 30,850 people. The district court exercised jurisdiction under a provision of CAFA, the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), which grants jurisdiction over class actions in which the amount

in controversy exceeds $5 million and the parties are minimally diverse. The plaintiffs complained that the defendants advertised the program as "free" when it included a non-refundable registration fee and a monthly membership fee after the first thirty days. Even then, the program was worthless, they added, because the advertised providers in their area did not offer the featured discounts. Based on these and other allegedly deceptive practices, the plaintiffs claimed that the companies had violated the Ohio Consumer Sales Practices Act as well as Ohio's common law prohibition against unjust enrichment.

Coverdell filed a motion to dismiss the complaint under Rule 12(b)(6), which the district court granted. It reasoned that Universal, not Coverdell, peddled and sold the memberships, making Coverdell too far removed from the transactions to qualify as a "supplier" under Ohio law or to have to answer to an unjust-enrichment claim under Ohio law.

Of more pertinence to this appeal, Universal filed a motion to strike the class allegations, which the district court also granted. It reasoned that, under Ohio's choice-of-law rules, it would have to analyze each class member's claim under the law of his or her home State. "Such a task," the district court concluded, "would make this case unmanageable as a class action" and would dwarf any common issues of fact implicated by the lawsuit. Reasoning that the claims of the named plaintiffs did not exceed $75,000, the district court dismissed the lawsuit without prejudice for lack of subject matter jurisdiction.

II.

Rule 23 of the Federal Rules of Civil Procedure governs class actions in federal court. To obtain class certification, a claimant must satisfy two sets of requirements: (1) each of the four prerequisites under Rule 23(a), and (2) the prerequisites of one of the three types of class actions provided for by Rule 23(b). A failure on either front dooms the class. A district court's class-certification decision calls for an exercise of judgment; its use of the proper legal framework does not. So long as the district court applies the correct framework, we review its decision for an abuse of discretion.

In this instance, the district court opted to focus on a failure to meet the predominance requirement under Rule 23(b), more particularly under Rule 23(b)(3), the only conceivable vehicle for this claim. To demonstrate predominance, parties seeking class recognition must show that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The plaintiffs could not do that here, the district court held, because each class member's claim would be governed by the law of the State in which he made the challenged purchase, and the differences between the consumer-protection laws of the many affected States would cast a long shadow over any common issues of fact plaintiffs might establish. That judgment is sound and far from an abuse of discretion for three basic reasons.

Reason one: different laws would govern the class members' claims. As the parties agree (quite properly, we might add), Ohio's choice-of-law rules determine which consumer-protection laws cover these claims. *See Muncie Power Prod., Inc. v. United Techs. Automotive, Inc.*, 328 F.3d 870, 873 (6th Cir. 2003). Under those rules, "the law of the place of injury controls unless another jurisdiction has a more significant relationship to the lawsuit." *Morgan v. Biro Mfg. Co.*, 474 N.E.2d 286, 289 (Ohio 1984). In determining the State with the most significant relationship, Ohio courts consider: (1) "the place of the injury"; (2) the location "where the conduct causing the injury" took place; (3) "the domicile, residence, . . . place of incorporation, and place of business of the parties"; (4) "the place where the relationship between the parties . . . is located"; and (5) any of the factors listed in Section 6 of the Restatement (Second) of Conflict of Laws "which the court may deem relevant to the litigation." *Id.* The Section 6 factors include: "the relevant policies of the [State in which the suit is heard]," "the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue," "the basic policies underlying the particular field of law," "certainty, predictability and uniformity of result" and "ease in the determination and application of law to be applied." *Id.* at 289 n.6 (internal quotation omitted).

Gauged by these factors, the consumer-protection laws of the potential class members' home States will govern their claims. As with any claim arising from an interstate transaction, the location-based factors point in opposite directions: injury in one State, injury-causing conduct in another; residence in one State, principal place of business in another. Yet the other factors point firmly in the direction of applying the consumer-protection laws of the States where the protected consumers lived and where the injury occurred. No doubt, States have an independent interest in preventing deceptive or fraudulent practices by companies operating within their borders. But the State with the strongest interest in regulating such conduct is the State where the consumers—the residents protected by *its consumer*-protection laws—are harmed by it. That is especially true when the plaintiffs complain about the conduct of companies located in separate States (Universal in Ohio; Coverdell in Georgia), diluting the interest of any one State in regulating the source of the harm yet in no way minimizing the interest of each consumer's State in regulating the harm that occurred to its residents.

To conclude otherwise would frustrate the "basic policies underlying" consumer-protection laws. *Morgan*, 474 N.E.2d at 289 n.6. It would permit companies to "evade [local] consumer protection laws by locating themselves just across the [border] from the . . . citizens they seek as customers." *Williams v. First Gov't Mortg. & Investors Corp.*, 176 F.3d 497, 499 (D.C. Cir. 1999) (internal quotation marks omitted). And it would permit nationwide companies to choose the consumer-protection law they like best by locating in a State that demands the least. Does anyone think that, if State A opted to attract telemarketing companies to its borders by diluting or for that matter eliminating any regulation of them, the policy makers of State B would be comfortable with the application of the "consumer-protection" laws of State A to their residents—the denizens of State B? Highly doubtful: the idea that "one state's law would apply to claims by consumers throughout the country—not just those in Indiana, but also those in California, New Jersey, and Mississippi—is a novelty." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002); *see also id.* at 1018 ("We do not for a second suppose that Indiana would apply Michigan law to an auto sale if Michigan permitted auto companies to conceal defects from customers; nor do we think it likely that Indiana

would apply Korean law (no matter *what* Korean law on the subject may provide) to claims of deceit in the sale of Hyundai automobiles, in Indiana, to residents of Indiana . . . ."). Indeed, it is not even clear whether, under a proper interpretation of the Ohio Consumer Sales Practices Act, that law would apply to extraterritorial injuries. *See Chesnut v. Progressive Cas. Ins. Co.*, 850 N.E.2d 751, 756 (Ohio Ct. App. 2006). Under *Morgan*, the place of the injury controls in a consumer-protection lawsuit, requiring application of the home-state law of each potential class member.

Working to overcome this conclusion, plaintiffs offer up a pair of Ohio common pleas court decisions that applied the Ohio Consumer Sales Practices Act to out-of-state sales by Ohio suppliers. *See Parker v. Berkley Premium Nutraceuticals, Inc.*, 2005 Ohio Misc. LEXIS 605 (Montgomery County 2005); *Brown v. Market Dev., Inc.*, 322 N.E.2d 367 (Hamilton County 1974). Yet one case (*Brown*) was decided before the Ohio Supreme Court's decision in *Morgan* and understandably makes no mention of it. The other (*Parker*) was decided after *Morgan*, and less understandably makes no mention of it, and, worse, treats *Brown* as a decision by the Ohio Supreme Court. *See Parker*, 2005 Ohio Misc. LEXIS 605, at *44. These decisions shed no light on the proper application of *Morgan*—a decision of the Ohio Supreme Court—to this case.

In the final analysis, *Morgan*'s choice-of-law rules make clear that the consumer-protection laws of the State where each injury took place would govern these claims. In view of this reality and in view of plaintiffs' appropriate concession that the consumer-protection laws of the affected States vary in material ways, no common legal issues favor a class-action approach to resolving this dispute.

Reason two: any potential common issues of fact cannot overcome this problem. Even if a nationwide class covering claims governed by the laws of the various States could overcome this problem by demonstrating considerable factual overlap, a point we need not decide, this is not such a case. The defendants' program did not operate the same way in every State and the plaintiffs suffered distinct injuries as a result. A core part of the claim is that the program was worthless because the listed healthcare providers near the plaintiffs did not offer the promised discounts or because there were

no listed providers near them in the first place. But to establish the point, the plaintiffs would need to make particularized showings in different parts of the country, particularly since the program apparently satisfied some consumers, as confirmed by the unchallenged reality that fifteen percent of those who signed up remained enrolled months after the suit was filed. Where and when featured providers offered discounts is a prototypical factual issue that will vary from place to place and from region to region. *Cf. Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, 131 S. Ct. 2541, 2552 (2011).

On top of that, the advertisements varied to account for the different requirements of each State's consumer-protection laws, a point plaintiffs acknowledge but cannot overcome. "Other than variations to ensure compliance with consumer regulations of the different states," they say, "the advertisements that were published [in various local newspapers] were substantially the same." Plaintiffs' Br. at 12. The key words are "[o]ther than" and "substantially," and these qualifications show that the plaintiffs' claims are not even linked by a common advertisement. Variations designed to account for differences in the applicable laws not only might suggest that the defendants *were trying* to comply in different ways with their legal obligations in each State, but they also confirm the varied nature of the claims, injuries and defenses. Even if, as the plaintiffs claim, callers heard identical sales pitches, Internet visitors saw the same website and purchasers received the same fulfillment kit, these similarities establish only that there is *some* factual overlap, not a predominant factual overlap among the claims and surely not one sufficient to overcome the key defect that the claims must be resolved under different legal standards.

Reason three: this conclusion is consistent with decisions of this court and several others. In a case involving negligence claims against a prosthetics manufacturer, we refused to allow a nationwide class covered by the laws of different States. "If more than a few of the laws of the fifty states differ," we explained, "the district judge would face an impossible task of instructing a jury on the relevant law." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1995). So too here. Other circuits have come to similar conclusions. The Seventh Circuit reversed a district court's certification of a

nationwide class in a contract and consumer fraud suit involving allegedly defective tires, holding that such a class is rarely, if ever, appropriate where each plaintiff's claim will be governed by the law of his own State. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1015, 1018 (7th Cir. 2002). "Because these claims must be adjudicated under the law of so many jurisdictions," the Court reasoned, "a single nationwide class is not manageable." *Id.* at 1018. Likewise, in a negligence, products liability and medical monitoring lawsuit stemming from allegedly faulty pacemakers, the Ninth Circuit held that variations in state law greatly compounded the factual differences between claims, overwhelming any common issues related to causation and making national class resolution impractical. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189–90 (9th Cir. 2001); *see also Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674 (7th Cir. 2001) ("Differences of [state law] cut strongly against nationwide classes . . . ."); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance."); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996) ("[B]ecause we must apply an individualized choice of law analysis to each plaintiff's claims, the proliferation of disparate factual and legal issues is compounded exponentially." (citation omitted)), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). In each of these cases, there were many common issues of fact, but none of that dissuaded the courts from refusing to certify class claims that would be measured by the legal requirements of different state laws.

The plaintiffs' other objection to the district court's class-action ruling goes to the timing, not the substance, of it. Given more time and more discovery, they say, they would have been able to poke holes in the court's class-certification analysis. We think not.

That the motion to strike came before the plaintiffs had filed a motion to certify the class does not by itself make the court's decision reversibly premature. Rule 23(c)(1)(A) says that the district court should decide whether to certify a class "[a]t an early practicable time" in the litigation, and nothing in the rules says that the court must

await a motion by the plaintiffs. As a result, "[e]ither plaintiff or defendant may move for a determination of whether the action may be certified under Rule 23(c)(1)." 7AA Charles Allen Wright et al., *Federal Practice and Procedure* § 1785; *see also, e.g.*, *Vinole v. Countrywide Home Loans, Inc*., 571 F.3d 935, 941–44 (9th Cir. 2009); *Cook County College Teachers Union, Local 1600 v. Byrd*, 456 F.2d 882, 884–85 (7th Cir. 1972).

To say that a defendant may freely move for resolution of the class-certification question whenever it wishes does not free the district court from the duty of engaging in a "rigorous analysis" of the question, and "sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question." *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161, 160 (1982). The problem for the plaintiffs is that we cannot see how discovery or for that matter more time would have helped them. To this day, they do not explain what type of discovery or what type of factual development would alter the central defect in this class claim. The key reality remains: Their claims are governed by different States' laws, a largely legal determination, and no proffered or potential factual development offers any hope of altering that conclusion, one that generally will preclude class certification.

That leaves one final point. After the district court granted the motion to strike the class allegations, it dismissed the action without prejudice for lack of jurisdiction. The jurisdictional determination is mistaken. *See Metz v. Unizan Bank*, 649 F.3d 492, 500 (6th Cir. 2011); *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers' Int'l Union v. Shell Oil Co.*, 602 F.3d 1087, 1091–92 (9th Cir. 2010); *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 806 (7th Cir. 2010); *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 n.12 (11th Cir. 2009). This flaw, however, need not detain us or the parties. Even though parties may not establish subject matter jurisdiction in the federal courts by consenting to it, *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93 (1998), that does not mean they must *remain* in federal court even when they cannot do so on their own terms. The federal courts closely guard the entrance to jurisdiction but not the exit. If the plaintiffs do not wish to continue pursuing

relief in this court and in this context, nothing about Article III requires them to do so. That is what happened here: the plaintiffs declined to appeal the district court's holding that it lacked jurisdiction once it struck the class allegations, and the parties agreed at oral argument that an affirmance of the class issue as to Universal would apply with equal force to Coverdell.

III.

For these reasons, we affirm the district court's judgment striking the class allegations and dismissing this lawsuit without prejudice against both defendants.

TAB 7-5

IN RE HYDROGEN PEROXIDE ANTITRUST LITIGATION

United States Court of Appeals, Third Circuit, 2008.
552 F.3d 305.

Before SCIRICA, CHIEF JUDGE, AMBRO, and FISHER, CIRCUIT JUDGES.

SCIRICA, CHIEF JUDGE.

[A class of purchasers of hydrogen peroxide (a chemical used in the pulp and paper industry, and for other purposes, such as making cleaning chemicals, textiles, and electronics) brought suit against a group of chemical manufacturers, alleging that the manufacturers had conspired to keep the prices of their products artificially high, in violation of federal antitrust laws. The district court certified a class under Rule 23(b)(3) consisting of "[a]ll persons or entities * * * who purchased hydrogen peroxide, [and/or two related chemicals] in the United States * * * or from a facility located in the United States * * * directly from any of the defendants, or [entities affiliated with defendants] during the period from September 14, 1994 to January 5, 2005." *In re Hydrogen Peroxide Antitrust Litig.*, 240 F.R.D. 163, 178 (E.D.Pa. 2007). Although defendants challenged the appropriateness of class treatment on a number of grounds, the district court interpreted existing case law as "obliging [it] to limit [the certification] inquiry to the minimum necessary at this juncture." *Id.* at 170. The district court added that, "[s]o long as plaintiffs demonstrate their intention to prove a significant portion of their case though factual evidence and legal arguments common to all class members, that will now suffice." *Id.* The Third Circuit granted defendants' petition for interlocutory appeal under Rule 23(f).]

* * *

* * * In this appeal, we clarify three key aspects of class certification procedure. First, the decision to certify a class calls for findings by the court, not merely a "threshold showing" by a party, that each requirement of Rule 23 is met. Factual determinations supporting Rule 23 findings must be made by a preponderance of the evidence. Second, the court must resolve all factual or legal disputes relevant to class certification, even if they overlap with the merits—including disputes touching on elements of the cause of action. * * *

[The third issue addressed by the court, regarding evaluation of expert testimony at the class certification stage, is taken up in the following subsection. [Eds.]]

* * *

II.

Class certification is proper only "if the trial court is satisfied, after a rigorous analysis, that the prerequisites" of Rule 23 are met.[5] *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982): * * * "A class certification decision requires a thorough examination of the factual and legal allegations." *Newton* [*v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 166 (3d Cir. 2001)].

* * *

The trial court, well–positioned to decide which facts and legal arguments are most important to each Rule 23 requirement, possesses broad discretion to control proceedings and frame issues for consideration under Rule 23. But proper discretion does not soften the rule: a class may not be certified without a finding that each Rule 23 requirement is met. Careful application of Rule 23 accords with the pivotal status of class certification in large–scale litigation, because:

> denying or granting class certification is often the defining moment in class actions (for it may sound the "death knell" of the litigation on the part of plaintiffs, or create unwarranted pressure to settle nonmeritorious claims on the part of defendants) . . . .

Newton, 259 F.3d at 162. * * *

III.

Here, the District Court found the Rule 23(a) requirements were met, a determination defendants do not now challenge. Plaintiffs sought certification under Rule 23(b)(3) * * *.

Only the predominance requirement is disputed in this appeal. Predominance "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem* [*Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)] * * *. Because the "nature of the evidence that will suffice to resolve a question determines whether the question is common or individual," "a district court must formulate some prediction as

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[5] Although the Supreme Court in the quoted statement addressed Fed.R.Civ.P. 23(a), there is "no reason to doubt" that the language "applies with equal force to all Rule 23 requirements, including those set forth in Rule 23(b)(3)." *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 33 n.3 (2d Cir. 2006).

to how specific issues will play out in order to determine whether common or individual issues predominate in a given case." "If proof of the essential elements of the cause of action requires individual treatment, then class certification is unsuitable." Accordingly, we examine the elements of plaintiffs' claim "through the prism" of Rule 23 to determine whether the District Court properly certified the class.

A.

The elements of plaintiffs' claim are (1) a violation of the antitrust laws—here, § 1 of the Sherman Act, (2) individual injury resulting from that violation, and (3) measurable damages. Importantly, individual injury (also known as antitrust impact) is an element of the cause of action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation.

In antitrust cases, impact often is critically important for the purpose of evaluating Rule 23(b)(3)'s predominance requirement because it is an element of the claim that may call for individual, as opposed to common, proof. * * * Plaintiffs' burden at the class certification stage is not to prove the element of antitrust impact, although in order to prevail on the merits each class member must do so. Instead, the task for plaintiffs at class certification is to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members. Deciding this issue calls for the district court's rigorous assessment of the available evidence and the method or methods by which plaintiffs propose to use the evidence to prove impact at trial. * * *

[Plaintiffs' expert economist opined that the alleged conspiracy could be shown at trial by evidence common to the class. Defendants' expert economist opined to the contrary.]

* * * The District Court held that it was sufficient that [plaintiffs' expert] proposed reliable methods for proving impact and damages; it did not matter that [plaintiffs' expert] had not completed any benchmark or regression analyses, and the [district] court would not require plaintiffs to show at the certification stage that either method would work.

IV.

A.

Defendants contend the District Court applied too lenient a standard of proof with respect to the Rule 23 requirements by

(1) accepting only a "threshold showing" by plaintiffs rather than making its own determination, (2) requiring only that plaintiffs demonstrate their "intention" to prove impact on a class–wide basis, and (3) singling out antitrust actions as appropriate for class treatment even when compliance with Rule 23 is "in doubt."

Although it is clear that the party seeking certification must convince the district court that the requirements of Rule 23 are met, little guidance is available on the subject of the proper standard of "proof" for class certification. The Supreme Court has described the inquiry as a "rigorous analysis," *Falcon*, 457 U.S. at 161, and a "close look," *Amchem*, 521 U.S. at 615, but it has elaborated no further.

1.

The following principles guide a district court's class certification analysis. First, the requirements set out in Rule 23 are not mere pleading rules. *Szabo* [*v. Bridgeport Machines, Inc.*, 249 F.3d 672, 675–77 (7th Cir. 2001)]. The court may "delve beyond the pleadings to determine whether the requirements for class certification are satisfied." *Newton*, 259 F.3d at 167 (quoting 5 James Wm. Moore et al., Moore's Federal Practice § 23.61[5]) * * *.

An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met. Some uncertainty ensued when the Supreme Court declared in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974), that there is "nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." * * * As we explained in *Newton*, 259 F.3d at 166–69, *Eisen* is best understood to preclude only a merits inquiry that is not necessary to determine a Rule 23 requirement. Other courts of appeals have agreed. Because the decision whether to certify a class "requires a thorough examination of the factual and legal allegations," *Newton*, 259 F.3d at 166, the court's rigorous analysis may include a "preliminary inquiry into the merits," *id.* at 168, and the court may "consider the substantive elements of the plaintiffs' case in order to envision the form that a trial on those issues would take," *id.* at 166. A contested requirement is not forfeited in favor of the party seeking certification merely because it is similar or even identical to one normally decided by a trier of fact. Although the district court's

findings for the purpose of class certification are conclusive on that topic, they do not bind the fact–finder on the merits.

The evidence and arguments a district court considers in the class certification decision call for rigorous analysis. A party's assurance to the court that it intends or plans to meet the requirements is insufficient.

Support for our analysis is drawn from amendments to Rule 23 that took effect in 2003. First, amended Rule 23(c)(1)(A) altered the timing requirement for the class certification decision. The amended rule calls for a decision on class certification "[a]t an early practicable time after a person sues or is sued as a class representative," while the prior version had required that decision be made "as soon as practicable after commencement of an action." * * * Relatedly, in introducing the concept of a "trial plan," the Advisory Committee's 2003 note focuses attention on a rigorous evaluation of the likely shape of a trial on the issues:

> A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a "trial plan" that describes the issues likely to be presented at trial and tests whether they are susceptible of class–wide proof.

Fed.R.Civ.P. 23 advisory committee's note, 2003 Amendments.

Additionally, the 2003 amendments eliminated the language that had appeared in Rule 23(c)(1) providing that a class certification "may be conditional." The Advisory Committee's note explains: "A court that is not satisfied that the requirements of Rule 23 have been met should refuse certification until they have been met." * * *

While these amendments do not alter the substantive standards for class certification, they guide the trial court in its proper task—to consider carefully all relevant evidence and make a definitive determination that the requirements of Rule 23 have been met before certifying a class.

To summarize: because each requirement of Rule 23 must be met, a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements.

2.

Class certification requires a finding that each of the requirements of Rule 23 has been met. Factual determinations necessary to make Rule 23 findings must be made by a

preponderance of the evidence. In other words, to certify a class the district court must find that the evidence more likely than not establishes each fact necessary to meet the requirements of Rule 23.

In reviewing a district court's judgment on class certification, we apply the abuse of discretion standard. * * * Under these Rule 23 standards, a district court exercising proper discretion in deciding whether to certify a class will resolve factual disputes by a preponderance of the evidence and make findings that each Rule 23 requirement is met or is not met, having considered all relevant evidence and arguments presented by the parties. * * *

B.

Although the District Court properly described the class certification decision as requiring "rigorous analysis," some statements in its opinion depart from the standards we have articulated. The District Court stated, "So long as plaintiffs demonstrate their intention to prove a significant portion of their case through factual evidence and legal arguments common to all class members, that will now suffice. It will not do here to make judgments about whether plaintiffs have adduced enough evidence or whether their evidence is more or less credible than defendants'." With respect to predominance, the District Court stated that "[p]laintiffs need only make a threshold showing that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class." As we have explained, proper analysis under Rule 23 requires rigorous consideration of all the evidence and arguments offered by the parties. It is incorrect to state that a plaintiff need only demonstrate an "intention" to try the case in a manner that satisfies the predominance requirement. Similarly, invoking the phrase "threshold showing" risks misapplying Rule 23. A "threshold showing" could signify, incorrectly, that the burden on the party seeking certification is a lenient one (such as a prima facie showing or a burden of production) or that the party seeking certification receives deference or a presumption in its favor. So defined, "threshold showing" is an inadequate and improper standard. "[T]he requirements of Rule 23 must be met, not just supported by some evidence."

* * *

To the extent that the District Court's analysis reflects application of incorrect standards, remand is appropriate. We recognize that the able District Court did not have the benefit of the standards we have articulated. Faced with complex, fact–intensive disputes, trial courts have expended considerable effort to interpret and apply faithfully the requirements of Rule 23. * * *

* * * We do not question plaintiffs' general proposition, which the District Court accepted, that a conspiracy to maintain prices could, in theory, impact the entire class despite a decrease in prices for some customers in parts of the class period, and despite some divergence in the prices different plaintiffs paid. But the question at class certification stage is whether, if such impact is plausible in theory, it is also susceptible to proof at trial through available evidence common to the class. When the latter issue is genuinely disputed, the district court must resolve it after considering all relevant evidence. Here, the District Court apparently believed it was barred from resolving disputes between the plaintiffs' and defendants' experts. Rule 23 calls for consideration of all relevant evidence and arguments, including relevant expert testimony of the parties. * * *

* * *

For the foregoing reasons, we will vacate the class certification order and remand for proceedings consistent with this opinion.

TAB 7-6

BNA, INC.

CLASS ACTION LITIGATION

BNA Employee-Owned Since 1947

REPORT

CERTIFICATION

CLASS DEFINITIONS

Recent class certification rulings make clear that federal courts will generally not tolerate overbroad, vague, subjective or ''fail-safe'' class definitions, say attorneys John H. Beisner, Jessica D. Miller, and Jordan M. Schwartz in this BNA Insight.

The authors urge defendants facing a class action to carefully assess whether the proposed class satisfies the explicit requirements of Rule 23, and whether the class definition passes muster under recent ascertainability jurisprudence.

Ascertainability: Reading Between the Lines of Rule 23

BY JOHN H. BEISNER, JESSICA D. MILLER, AND JORDAN M. SCHWARTZ

While federal courts continue to consider the express prerequisites of Rule 23 in assessing class-certification proposals, more and more decisions are turning on an ''implied'' requirement of Rule 23: that a proposed class must be ascertainable. As the California Court of Appeal recently recognized, the ''require[ment that] a class definition [be] 'precise, objective and presently ascertainable' '' ''goes to the heart of the question of class certification.''[1] Moreover, because a court can generally determine whether a proposed class is ascertainable without resort to discovery, a growing number of courts are willing to dispose of class actions at the pleading stage if the class definition is improper on its face.[2]

[1] *Sevidal v. Target Corp.*, 189 Cal. App. 4th 905, 919 (Cal. Ct. App. 2010) (citation omitted); *see also, e.g., Cunningham Charter Corp. v. Learjet Inc.*, 2009 U.S. Dist. LEXIS 35184, at *12 (S.D. Ill. Apr. 27, 2009) (similar); *Lyell v. Farmers Group Inc. Employees' Pension Plan*, 2008 U.S. Dist. LEXIS 107332 (D. Ariz. Dec. 3, 2008) (''[I]n order to maintain a class action, the class must be adequately defined and *clearly ascertainable*.'') (emphasis added).

[2] *See, e.g., John v. National Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) (''where it is facially apparent from the pleadings that there is no ascertainable class, a district court

 ISSN 1529-0115

The California Court of Appeal recently articulated the parameters of the ascertainability requirement in *Sevidal v. Target Corp*.[3] There, the plaintiff asserted claims for, *inter alia*, consumer fraud and unjust enrichment under California law and sought to certify a class of California consumers who purchased certain items from the defendant seller that were misidentified as made in the United States.[4] The trial court found that the proposed class of California consumers was unascertainable and impermissibly overbroad because it would be too difficult to identify the class members. In affirming the trial court's ruling, the California Court of Appeal delineated the contours of the implied requirement of ascertainability. According to the court, ''[a]scertainability is achieved by defining the class in terms of objective characteristics and common transactional facts making the ultimate identification of class members possible.''[5] Therefore, ascertainability is satisfied when class members ''may be readily identified without unreasonable expense or time by reference to official [or business] records.''[6] The court went on to highlight the purpose of this requirement, which is ''to give adequate notice to class members'' and ''to determine after the litigation has concluded who is barred from relitigating.''[7]

Applying these principles, the appellate court affirmed the lower court's ruling that the proposed class was not ascertainable. The court determined that substantial evidence supported the trial court's finding that the putative class members ''could not be 'readily identified' because Target did not maintain, or have access to, records identifying the individuals who purchased a product with an erroneous country-of-origin designation.''[8]

Although plaintiff had argued that the proposed class was ascertainable because ''Target ha[d] already identified specific products which fall within this definition,'' and ''ascertaining the members that fit within the class definition'' would merely require ''identifying the consumers who purchased those products,'' the Court of Appeal rejected this argument, agreeing with the trial court that Target's records did not ''reflect only the items which were misidentified''—and more importantly—that the company could not determine ''***who*** purchased [the misidentified] products.''[9] The plaintiff also argued that the proposed class was ''specific enough such that purchasers could identify themselves.''

The court once again disagreed, reasoning that because the proposed class included consumers ''who were never exposed to the country-of-origin information'' many putative class members ''would, by definition, have no way of knowing whether [they] purchased an item *when* it was misidentified, and thus would have no way of knowing whether [they are] member[s] of the class.''[10] As the court explained, the fact that some class members may be easily identifiable ''does not mean that the class as a whole [is] ascertainable.''[11] Because the putative class members could not be easily and objectively identified, the Court of Appeal affirmed the trial court's denial of class certification.

Recent case law addressing ascertainability generally focuses on three problematic types of classes: (1) the overbroad class; (2) the difficult-to-identify class; and (3) the fail-safe class. Below, we discuss recent developments with respect to each of these three categories.

The Overbroad Class

Over the last several years, multiple courts have found that a proposed class that includes all users of a product or service—irrespective of whether the proposed class members suffered any injury or have any complaints about the product or service—is not ascertainable.[12] As some courts have explained, this is so because such a class encompasses a substantial number of class members who lack standing to recover on the asserted claims.[13]

The overbreadth principle was at play in *Sevidal*, because nearly 80 percent of the proposed class purchased an item without viewing the allegedly deceptive country-of-origin information.[14] As a result, the vast majority of the proposed class members were never ''deceived by the alleged false or misleading advertising.''[15] Accordingly, the Court of Appeal reasoned, even if Target's conduct was ''unlawful'' under California's Unfair Competition Law, the proposed class was overly broad—and therefore uncertifiable—because ''the essence of [plaintiff's] allegation [was] based on an alleged false misrepresentation to which the majority of class members were never exposed.''[16]

The California Court of Appeal says the requirement that a class definition be precise, objective, and presently ascertainable "goes to the heart" of the question of class certification.

A number of other federal and state court rulings are in accord, finding that a proposed class definition that

may dismiss the class allegation on the pleadings''); *Sanders v. Apple Inc.*, 2009 U.S. Dist. LEXIS 6676 (N.D. Cal. Jan. 21, 2009) (striking class allegations on ascertainability grounds); *Brazil v. Dell*, 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008) (same); *Barasich v. Shell Pipeline Co.*, 2008 U.S. Dist. LEXIS 47474, at *13-14 (E.D. La. June 19, 2008) (same); *In re Vioxx Prod. Liab. Litig.*, No. MDL 1657, 2008 WL 4681368, at *10 (E.D. La. Oct. 21, 2008) (lack of ascertainability ''alone is sufficient to warrant striking the Plaintiffs' class allegations on the pleadings'').

[3] 189 Cal. App. 4th 905 (Cal. Ct. App. 2010).

[4] *Id.* at 911.

[5] *Id.* at 918 (internal quotation marks and citation omitted).

[6] *Id.* at 919 (internal quotation marks and omitted, alteration in original).

[7] *Id.* (internal quotation marks and citation omitted).

[8] *Id.*

[9] *Id.* at 920 (emphasis added).

[10] *Id.* at 921.

[11] *Id.*

[12] *See Konik v. Time Warner Cable*, 2010 U.S. Dist. LEXIS 136923, at *33 (C.D. Cal. Nov. 24, 2010).

[13] *See McDonald v. Corr. Corp. of Am.*, 2010 U.S. Dist. LEXIS 122674, at *8 (D. Ariz. Nov. 4, 2010).

[14] 189 Cal. App. 4th at 921.

[15] *Id.* at 925 (internal quotation marks and citation omitted).

[16] *Id.* at 928.

  CLASS ISSN 1529-0115

includes uninjured members is overbroad and patently uncertifiable.[17] For example, in *Oshana v. Coca-Cola Co.*, the U.S. Court of Appeals for the Seventh Circuit upheld the district court's decision not to certify a proposed class of Illinois residents alleging consumer-fraud and unjust-enrichment claims based on their purchase of fountain Diet Coke. There, the named plaintiff alleged that Coca-Cola ''tricked consumers into believing that fountain diet coke'' did not contain artificial saccharin and sought to certify a class of all individuals in Illinois who had purchased the fountain soda.[18] The court denied class certification because ''[m]embership in [the] proposed class required only the purchase of a fountain Diet Coke.'' As such, the court found that the proposed class ''could include millions who were not deceived and thus h[ad] no grievance''[19] and the class was impermissibly overbroad.[20]

This principle was also illustrated in *Sanders v. Apple Inc.*,[21] where plaintiffs, who purchased Apple's 20-inch Aluminum iMac, brought a putative class action against the defendant manufacturer, asserting fraud and warranty claims. Plaintiffs sought to certify a class of ''[a]ll persons or entities located within the United States who own[ed] a 20-inch Aluminum iMac.''[22] Before addressing the explicit prerequisites to class certification, the court considered the question of ascertainability and determined that the proposed class was overly broad. Specifically, because the proposed class definition included individuals who did not actually purchase their iMac, individuals who were not subject to the allegedly deceptive advertisements and individuals who were not injured by defendant's conduct, the class was overbroad.[23] Accordingly, the court denied certification.[24]

An overly broad class definition also doomed the proposed class in *In re McDonald's French Fries Litigation*.[25] There, the plaintiffs commenced a putative class action against McDonald's for alleged violation of state consumer-protection statutes, breach of warranty, and unjust enrichment, alleging that they were deceived by representations regarding the potato products' ingredients.[26] Plaintiffs sought to certify a nationwide class of ''[a]ll persons residing in the United States . . . (i) who purchased Potato Products from McDonald's restaurants . . . and (ii) who at the time of purchase had been medically diagnosed with celiac disease . . . .''[27] Noting that the proposed class was not limited to persons who necessarily saw or knew of the alleged representations, the court declared that the class was ''overinclusive'' and denied class certification.[28]

Not all courts have embraced this argument, however.[29] In *In re Whirlpool*, for example, the court certified a class of Ohio residents who purchased allegedly defective front-loading washing machines.[30] Plaintiffs asserted claims for negligent design, negligent failure to warn, tortious breach of warranty and violation of the Ohio Consumer Sales Practice Act, based on the machine's alleged propensity to develop mold.[31] Whirlpool argued that the proposed class was overbroad because it consisted of ''many plaintiffs whose washers have not manifested any mold problems.''[32] But the court summarily rejected this argument, finding that ''[w]hether any particular plaintiff has suffered harm is a merits issue not relevant to class certification.''[33] The *Whirlpool* ruling is currently on appeal to the Sixth Circuit, which may provide further insight into the vitality of the ''overbreadth'' doctrine.

The Difficult-to-Identify Class

Another problematic group of cases involves the difficult-to-identify class. This problem arises where determining membership in the proposed class would be administratively burdensome. As one MDL court put it: a proposed class must be ''sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.''[34]

In *Solo v. Bausch & Lomb*, for example, the plaintiffs filed a class action suit against the defendant manufacturer of contact lens solution. Plaintiffs asserted claims for, *inter alia*, consumer fraud and unjust enrichment.[35] Plaintiffs alleged that they suffered economic losses by paying for a defective contact lens solution and discarding it per the defendant's directive after a recall, because defendant did not fully reimburse plaintiffs for the defective and discarded product.[36] Plaintiffs sought to certify classes of people who purchased the product ''between September 1, 2004, and April 10, 2006, and 'lack[ed] full reimbursement for any quantity discarded following [the] recall.' ''[37] The court refused to certify the proposed classes on the ground that it ''would have to make thousands of fact-intensive inquiries'' to determine who had been adequately reimbursed and who ''lack[ed] full reimbursement.''[38] Among other things, the court recognized, it would ''need to determine whether an individual purchased MoistureLoc between

[17] *See, e.g.*, *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513-14 (7th Cir. 2006); *Davenport v. Interactive Communs. Int'l*, 2010 Cal. App. Unpub. LEXIS 6364, at *19-22 (Cal. Ct. App. Aug. 9, 2010).
[18] 472 F.3d at 509.
[19] *Id.* at 513-14.
[20] *Id* at 514.
[21] 2009 U.S. Dist. LEXIS 6676 (N.D. Cal. Jan. 21, 2009).
[22] *Id.* at *25.
[23] *Id.* at *28.
[24] *Id.* at *28-30.
[25] 257 F.R.D. 669 (N.D. Ill. 2009).
[26] *Id.* at 670.
[27] *Id.* at 671.
[28] *Id.* at 671-72.
[29] *See, e.g.*, *Daffin v. Ford Motor Co.*, 458 F.3d 549, 553 (6th Cir. 2006) (rejecting overbreadth argument in putative class action involving alleged defect in vans because whether some class members did not experience any problems with their accelerator would constitute an improper ''inquiry into the merits of [the] suit''); *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 2010 U.S. Dist. LEXIS 69254, at *4-5 (N.D. Ohio July 12, 2010) (certifying class and finding that overbreadth argument implicates ''a merits issue not relevant to class certification'').
[30] 2010 U.S. Dist. LEXIS 69254, at *4.
[31] *Id.*
[32] *Id.* at *4-5.
[33] *Id.*
[34] *Solo v. Bausch & Lomb Inc.*, 2009 U.S. Dist. LEXIS 115029, at *13 (D.S.C. Sept. 25, 2009); *see also, e.g.*, *Oshana*, 472 F.3d at 513.
[35] 2009 U.S. Dist. LEXIS 115029, at *8-9.
[36] *Id.*
[37] *Id.* at *13-14.
[38] *Id.* at *18.

September 1, 2004, and April 10, 2006 . . . how much was purchased and at what price, whether the individual discarded the solution, when it was discarded, and how much was discarded.''[39] Given these significant administrative burdens to determining class membership, the court agreed with the defendant that the class was not ascertainable and therefore denied class certification.[40]

A similar problem resulted in the denial of class certification in *Cole*.[41] There, plaintiff residents and property owners filed a class action lawsuit against the defendant as a result of pollution that was allegedly caused by mining conducted by defendants. Plaintiffs asserted claims for nuisance and sought to certify a medical monitoring class and a property owner class.[42] While the court denied certification of both proposed classes, it found that the property owner class was particularly problematic with respect to ascertainability. The proposed property-owner class was defined as ''[a]ll individuals and entities who owned or had an interest in real property in the Class Area as of May 14, 2001.''[43]

Although plaintiffs conclusorily contended that class members could be identified ''through examination of deeds,'' the court found that reliance on these deeds was insufficient for purposes of ascertainability.[44] The court pointed to the example of one of the named plaintiffs, who sought to represent commercial property owners in the proposed class, but who did not live or own property in the affected area.[45] This plaintiff was an owner of a bank that owned property in the class area.[46] However, an examination of deeds would not have revealed this named plaintiff's membership in the class.[47] The court reasoned that ''[i]f examination of deeds does not pick up the interests claimed by even named plaintiffs, it could not be expected to suffice to identify the interests of other putative class members who 'owned or had an interest in real property' in the Class Area.''[48] Because it would be ''extremely difficult, applying plaintiffs' suggested [class definition], to identify the potential class members having any interest, recorded or unrecorded, in real property . . . identification of members of the proposed class would be administratively unfeasible.''[49] Accordingly, plaintiffs' class definition was inadequate, and the motion for class certification was denied.

Class definitions that turn on subjective criteria, such as a class member's mental state, also fall within the difficult-to-identify category because these definitions make it impractical and administratively burdensome to determine whether an individual is part of the class.[50] Courts have determined that these kinds of class definitions ''yield [too much] indeterminacy and imprecision'' to satisfy the ascertainability requirement.[51] As one court faced with a subjective class definition put it, merely determining who is in the class would be a ''Sisyphean task'' that ''would be a burden on the court and require a large expenditure of valuable court time.''[52]

For example, in *Biediger v. Quinnipiac Univ.*, plaintiffs sought to certify two groups of female athletes whose rights under Title IX were allegedly violated by Quinnipiac University.[53] Although both proposed class definitions contained subjective elements, the court focused on the second group, which was defined as ''women who have not and will not enroll at Quinnipiac because of Quinnipiac's allegedly discriminatory athletic programming.''[54] The court agreed with the defendant that this proposed class was not ascertainable given the subjective criteria by which class membership would have to be determined.[55] The court reasoned that ''[u]nlike the first subclass, which [was] composed of a definite and identifiable pool of possible members (at its broadest, all current, prospective, and future female athletes at Quinnipiac), the second subclass could conceivably be every person who decided, or who will decide, not to attend Quinnipiac.''[56] Because the court would have to determine each potential class members' motivations in deciding not to attend Quinnipiac, the proposed class was too ''amorphous and unwieldy'' to satisfy the requirement of ascertainability and certification was denied.[57]

Some courts have rejected arguments like those described above on the ground that ''[e]ach individual class member need not be identifiable at the class certification stage.''[58] These courts have held that a class is ascertainable as long as class members ''can be identified when judgment is rendered.''[59] In addition, other courts have taken it upon themselves to modify class definitions rather than deny motions for class certification.[60] For example, in *Chakejian*, the plaintiff alleged violations of the Fair Credit Reporting Act based on letters from the defendant that allegedly contained misstatements and misrepresentations regarding class

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[39] *Id.*
[40] *Id.* at *14.
[41] *Cole*, 256 F.R.D. at 693.
[42] *Id.*
[43] *Id.* at 696.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.* at 696-97.
[48] *Id.*
[49] *Id.*
[50] *See, e.g.*, *Oshana v. Coca-Cola Co.*, 255 F.R.D. 575, 580-81 (N.D. Ill. 2005), *aff'd*, 472 F.3d 506 (7th Cir. 2006); *Rios v. Marshall*, 100 F.R.D. 395, 404 (S.D.N.Y. 1983); *see also* Manual for Complex Litigation (4th) § 21.222, at 270 (while ''[a]n identifiable class exists if its members can be ascertained by reference to objective criteria,'' class definitions must ''avoid subjective standards (e.g., a plaintiff's state of mind) or terms that depend on resolution of the merits (e.g., persons who were discriminated against)'').
[51] *Conigliaro v. Norwegian Cruise Line*, No. 05-21584-CIV-ALTONAGA/Turnoff, 2006 U.S. Dist. LEXIS 95576, at *20 (S.D. Fla. Aug. 31, 2006).
[52] *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981).
[53] 2010 U.S. Dist. LEXIS 50044 (D. Conn. May 20, 2010).
[54] *Id.* at *10.
[55] *Id.* at *13.
[56] *Id.*
[57] *Id.* at *14.
[58] *Guadiana v. State Farm Fire & Cas. Co.*, 2010 U.S. Dist. LEXIS 129588, at *12 (D. Ariz. Dec. 7, 2010) (rejecting argument that ''class is not administratively feasible or ascertainable because of the unique characteristics of each leak'' in class action arising out of defendant insurance carrier's alleged breach of insurance contract); *Chana Friedman-Katz v. Lindt & Sprungli (USA) Inc.*, 270 F.R.D. 150, 154-55 (S.D.N.Y. Nov. 19, 2010) (''the Court views the small number of individualized factual determinations that must be made here in ascertaining membership in the class as entirely manageable'').
[59] *Guadiana*, 2010 U.S. Dist. LEXIS 129588, at *12.
[60] *See, e.g.*, *Chakejian v. Equifax Info. Servs.*, 256 F.R.D. 492, 497 (E.D. Pa. 2009).

   ISSN 1529-0115

members' credit data.[61] Plaintiff sought to certify a class of [a]ll consumers in . . . Pennsylvania to whom . . . Defendant sent a letter *substantially similar* to the Letter attached to the Amended Complaint.''[62] Although the court agreed that the proposed class definition was vague, it chose to modify the proposed class definition rather than deny class certification. According to the court, the letter at issue in the case was received in response to a dispute solely involving public records information. The allegations only pertained to information from public records such as bankruptcies, liens, and judgments.[63] Therefore, the court concluded that ''the defendant's objection that the class definition [was] vague because it d[id] not define 'substantially similar' c[ould] be ameliorated by amending the class definition as follows'':

> All consumers in the Commonwealth of Pennsylvania to whom, beginning two years prior to the filing of the Amended Complaint and continuing through the resolution of this action, in response to a dispute [over a public record (including, but not limited to a bankruptcy, lien, or judgment)], Defendant sent a letter substantially similar to the Letter attached to the Amended Complaint as Exhibit A.[64]

The Fail-Safe Class

A third category of ascertainability cases concerns fail-safe classes. Recent court decisions make it clear that a class is not ascertainable where the named plaintiffs propose a class definition that incorporated a legal conclusion (*e.g.*, all consumers who were wrongfully denied. . . .).[65] This is so because identification of class members would require the court to make legal determinations and conclusions that are closely intertwined with the claims of the class members.[66] In addition, fail-safe classes set up a situation in which class members are only bound by a judgment that finds the defendant liable.[67] After all, if the class is defined as everyone who was wronged by the defendant and the defendant prevails at trial, then it turns out that nobody was in the class to begin with—and thus nobody is bound by the ruling.[68] For these reasons, an increasing number of federal and state courts have rejected fail-safe definitions, recognizing that they ''turn [] Rule 23 on its head.''[69]

The challenges posed by a fail-safe class were at issue in *Kirts v. Green Bullion Financial Services LLC*.[70] There, the plaintiffs sought to certify a class of ''[a]ll individuals who submitted jewelry to [defendant] and were damaged because [defendant] broke its promise and advertised procedures to handle the jewelry with a high standard of care, or fairly appraise the jewelry, or provide an adequate return period.''[71] To ascertain membership in this proposed class, the court would have needed to ''determine with respect to each potential member (1) whether the individual owned the jewelry in question, (2) whether the individual sent jewelry to [defendant], and (3) whether [defendant] committed any of the misconduct described with respect to that individual's submitted jewelry.''[72] As the court explained, under this fail-safe class definition, ''the Court would essentially have to make a determination that [defendant] is liable to an individual before it could conclude that the individual is a member of the class.''[73] Because such a determination would impermissibly intertwine class certification with the merits of the case—thereby ''defeat[ing] the [very] purpose of conducting a class action''—the court held that the class was unascertainable and denied plaintiffs' motion for class certification.

Similarly, in *Brazil v. Dell*,[74] the plaintiff consumers filed a putative class action, alleging that the defendant advertised false discounts for its computer products. Plaintiffs sought to certify a class of California citizens who purchased products that ''Dell ***falsely*** advertised as discounted.''[75] According to the defendant, the plaintiffs proposed an impermissible ''fail-safe'' class because membership in the class was contingent on a finding that defendant was liable.[76] The court agreed and found that the proposed class could not be ''ascertained'' because the court would have to determine whether defendant ''falsely advertised,'' a legal question that implicated the merits of the underlying claims.[77] Because the proposed class was not ascertainable, the court granted defendant's motion to strike the class allegations.[78]

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[61] 256 F.R.D. at 494.

[62] *Id.* at 496 (emphasis added).

[63] *Id.* at 497.

[64] *Id.*

[65] *See Brazil v. Dell Inc.*, 585 F. Supp. 2d 1158, 1167 (N.D. Cal. 2008); *Agostino v. Quest Diagnostics Inc.*, 256 F.R.D. 437, 479 (D.N.J. 2009) (''A court must reject a proposed class or subclass definition that 'inextricably intertwines identification of class members with liability determinations.' ''); *In re Vioxx Prod. Liab. Litig.*, No. MDL 1657, 2008 WL 4681368, at *9 (E.D. La. Oct. 21, 2008) (highlighting that it is a '' 'basic tenet of class certification [that] a court may not inquire into the merits of the case at the class certification stage' '') (citation omitted).

[66] *See Demmick v. Cellco P'ship*, 2010 U.S. Dist. LEXIS 94041, at *17-18 (D.N.J. Sept. 8, 2010) (modifying proposed fail-safe definition, which turned on ''[w]hether proposed class members were charged more than what was agreed to in the contract[,] [thereby implicating] a central issue in this case'').

[67] *See, e.g.*, *Canez v. King Van & Storage*, 2010 Cal. App. Unpub. LEXIS 9687, at *7-8 n.8 (Cal. Ct. App. Dec. 7, 2010).

[68] *See Genenbacher v. CenturyTel Fiber Co. II*, 244 F.R.D. 485, 488 (C.D. Ill. 2007) (explaining that fail-safe classes are unfair because the result of resolution of membership question is that class members ''win or are not in the class'').

[69] *Heffelfinger v. Elec. Data Sys. Corp.*, 2008 U.S. Dist. LEXIS 5296, at *42 (C.D. Cal. Jan. 7, 2008); *see also, e.g.*, *Kirts v. Green Bullion Fin. Servs.*, LLC, 2010 U.S. Dist. LEXIS 92381 (S.D. Fla. Aug. 3, 2010); *Eversole v. EMC Mortgage Corp.*, No 05-124-KSF, 2007 U.S. Dist. LEXIS 38892, at *15 (E.D. Ky. May 29, 2007); *Bostick v. St. Jude Med. Inc.*, No 03-2626, 2004 WL 3313614, at *15-16 (W.D. Tenn. Aug. 17, 2004); *cf. Alvarez v. Hyatt Regency Long Beach*, 2010 U.S. Dist. LEXIS 99281, at *5 (C.D. Cal. Sept. 21, 2010) (explaining that definition that consists of ''all non-exempt employees of the Defendants' hotel . . . is not a prohibited 'fail safe' putative class'').

[70] 2010 U.S. Dist. LEXIS 92381.

[71] *Id.* at *20.

[72] *Id.* at *20-21.

[73] *Id.* at *21.

[74] 585 F. Supp. 2d at 1158.

[75] *Id.* at 1167.

[76] *Id.*

[77] *Id.*

[78] *Id.* Plaintiffs subsequently moved to certify a new class consisting of ''[a]ll persons or entities who are citizens of the State of California who on or after March 23, 2003, purchased via Dell's Web site Dell-branded products advertised with a

A similar result obtained in *Barasich v. Shell Pipeline Co.*[79] There, the plaintiffs, commercial fishermen, filed suit against the defendant oil companies, contending that defendants negligently failed to prevent oil from leaking from their tanks or pipelines during Hurricane Katrina. The plaintiffs claimed that defendants' alleged negligence resulted in a loss of income and other economic damages for commercial fishermen.[80] Plaintiffs sought to certify a class of ''[a]ll commercial fishermen whose oyster leases were contaminated by oil discharge during Hurricane Katrina ***due to the negligence of defendants***.''[81] Before addressing the explicit prerequisites to class certification, the court considered the question of ascertainability.[82] The court found the class definition inadequate for two reasons: (1) it had no geographic limits; and (2) identification of class members would require the court to inquire into the merits of each member's claim because of the phrase, ''due to the negligence of defendants.''[83] Based on plaintiffs' inadequate class definition and other Rule 23 deficiencies, the court refused to certify the proposed class.

At the same time, however, some courts have rejected ascertainability arguments challenging the ''fail-safe'' nature of a proposed class[84] or have chosen to modify a purported fail-safe class definition instead of denying a motion for class certification.[85] For example, in *Kamar v. Radio Shack Corp.*,[86] the Ninth Circuit affirmed the trial court's certification of a class of California employees who, for a certain period, worked a Saturday meeting as instructed or a split-shift without receiving the full amount of mandated premium pay. Radio Shack argued that the district court erroneously certified a fail-safe class.[87] The Ninth Circuit agreed with the trial court that the class definition was not defective, reasoning that the class was limited to ''employees within the reporting time and split-shift classifications,'' and did not ''actually distinguish[] between those who may and those who may not ultimately turn out to be entitled to premium pay.''[88] The court thus concluded that the proposed class was not defined in terms of defendant's liability—and moreover—that if a class member was not aggrieved by Radio Shack, the defendant would be shielded from liability to that person.[89]

Conclusion

In sum, recent class certification rulings have made it clear that federal courts will generally not tolerate overbroad, vague, subjective or ''fail-safe'' class definitions. Thus, defendants faced with a class action proposal should carefully assess not only whether the proposed class satisfies the explicit requirements of Rule 23, but also whether the class definition passes muster under recent ascertainability jurisprudence.

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represented former sales price (i.e., a ''Slash-Thru'' price or a ''Starting Price'') as indicated and set forth [in attached schedules, with limited exclusions].'' *Brazil v. Dell Inc.*, C-07-01700 RMW, 2010 WL 5387831, at *2 (N.D. Cal. Dec. 21, 2010). The court certified the class, determining that ''[u]nlike earlier proposed class definitions, th[e] [revised] class definition does not require a legal determination in order to ascertain class membership.'' *Id.*

[79] 2008 U.S. Dist. LEXIS 47474 (E.D. La. June 19, 2008).

[80] *Id.* at *4-5.

[81] *Id.*

[82] *Id.* at *13.

[83] *Id.* at *13-14.

[84] *See, e.g.*, *LaBerenz v. Am. Family Mut. Ins. Co.*, 181 P.3d 328, 336 (Colo. App. 2007) (holding that the '' 'fail-safe' concept is inapplicable here'' because ''the proposed class is not framed as a legal conclusion, but in more neutral terms as insureds whose non-PPO, PIP-related medical services were paid under Explanation Code 41 and health care providers whose medical bills were reduced under Explanation Code 41''); *Dale v. DaimlerChrysler Corp.*, 204 S.W.3d 151, 178-80 (Mo. Ct. App. 2006) (rejecting fail-safe argument because ''the class definitions do not make any merit determinations'').

[85] *See, e.g.*, *Perez v. First Am. Title Ins. Co.*, 2009 U.S. Dist. LEXIS 75353, at *25-26 (D. Ariz. Aug. 12, 2009) (rejecting defendant's argument that defining class in terms of liability necessitates denial of class certification because court has power to redefine class and the ''defect is . . . rather easily cured by recasting the definition in terms of Plaintiffs' liability theory'').

[86] 375 Fed. Appx. 734 (9th Cir. 2010).

[87] *Id.* at 736.

[88] *Id.*

[89] *Id.*

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TAB 8

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
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EVIDENCE RULES

MEMORANDUM

TO: Honorable Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 12, 2011

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 26 and 27, 2011, at Northwestern University School of Law in Chicago. The draft minutes of that meeting are attached to this report as Appendix C.

Among the matters the Committee considered at the fall meeting were several suggestions for amendments to existing rules and forms that were submitted by bankruptcy judges, organizations, and members of the bar. The Committee also discussed the potential impact on the Bankruptcy Rules and Official Forms of recent court decisions and legislation. Finally, the Committee continued its deliberations regarding two multi-year projects – the revision of Part VIII of the Bankruptcy Rules and the Forms Modernization Project.

The Committee brings to the Standing Committee one action item from the September meeting. As discussed in Part II of this report, the Committee considered and voted to recommend publishing for comment proposed amendments to Rules 7054 and 7008(b). These amendments are intended to clarify the procedure for seeking an award of attorney's fees in adversary proceedings.

Part III of the report presents for the Standing Committee's preliminary consideration the first half of the proposed comprehensive revision of Part VIII of the Bankruptcy Rules, which govern appeals from bankruptcy courts. The Committee does not seek approval for publication of any of the proposed rules at this meeting. Instead, the entire Part VIII revision package will be brought to the Standing Committee at the June meeting with a recommendation that they be published for comment in August 2012.

The remainder of the report discusses the rules and forms published for comment in August 2011 and the following additional information items:

- unanswered questions raised by *Stern v. Marshall* and courts' initial responses to the decision;
- the Committee's decision to take no further action on the suggestion of the Institute for Legal Reform for quarterly reporting of claims activity by trusts established under § 524(g) of the Bankruptcy Code; and
- the current status of the Forms Modernization Project and the Committee's timetable for seeking publication for comment of the revised forms.

II. Action Item—Rules 7054 and 7008(b)

The Committee unanimously recommends that amendments to Rules 7054 and 7008(a) be published for comment. Rule 7054 would be amended to make applicable in adversary proceedings most of the provisions regarding attorney's fees in Civil Rule 54(d)(2). Rule 7008(b), which requires pleading a claim for attorney's fees in the complaint or other appropriate pleading, would be deleted. The two rules, with the proposed amendments indicated, are set out in Appendix A.

In March 2011 the Ninth Circuit Bankruptcy Appellate Panel issued an opinion in which it "suggest[ed] that the Judicial Conference's Advisory Committee on Bankruptcy Rules may want to address th[e] apparent 'gap' in Rule 7054." *Charlie Y., Inc. v. Carey (In re Carey)*, 446 B.R. 384, 389 n.3 (2011). The gap to which the court referred is the absence of a provision in Rule 7054 concerning the procedure for obtaining an allowance of attorney's fees in adversary proceedings. Although Rule 7054(a) incorporates Civil Rule 54(a)-(c), it has its own provision – subdivision (b) – governing the recovery of costs by a prevailing party, and it does not have a provision that parallels Rule 54(d)(2), which governs the recovery of attorney's fees.

The reason that Bankruptcy Rule 7054 originally incorporated Civil Rule 54(a)-(c), but not (d), was that Rule 54(d) provided that "costs *shall be awarded as of course* to the prevailing party unless the court otherwise directs" (emphasis added). The Bankruptcy Rules Committee concluded that costs should not be routinely awarded to the prevailing party against a bankruptcy estate since the impact of the award would be borne by creditors.[1] Rule 7054(b), which was adopted instead of Rule 54(d), provides that "[t]he court *may allow costs* to the prevailing party except when a statute of the United States or these rules otherwise applies" (emphasis added).

[1] *See* Laura B. Bartell, *Award of Costs in Bankruptcy Courts*, 17 J. BANKR. L. & PRAC. 6 (Sept. 2008) (quoting Advisory Committee Note to Bankruptcy Rule 754, the predecessor of Rule 7054).

The 1993 amendment to Rule 54(d) substantially expanded the subdivision to expressly address attorney's fees as well as costs. The existing provision was renumbered (d)(1) and was re-titled "Costs Other Than Attorney's Fees." Paragraph (2), titled "Attorney's Fees," was added, and it requires a "claim for attorney's fees and related nontaxable expenses . . . [to] be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." Fed. R. Civ. P. 54(d)(2)(A). The rule governs the timing ("no later than 14 days after the entry of judgment") and content of the motion and the conduct of the proceedings in response to the motion, incorporating Rule 78, dealing with motion practice. It also authorizes local rules to adopt special procedures for resolving fee issues without extensive evidentiary hearings, and it permits the referral of fee issues to special masters and magistrate judges. The provision is not applicable to fees awarded as sanctions under the rules or under 28 U.S.C. § 1927.

Rule 7054 was never amended to incorporate any of the provisions of Rule 54(d)(2) or to otherwise address the procedure for claiming attorney's fees. Attorney's fees are addressed instead by Rule 7008(b). That provision, which has no counterpart in Civil Rule 8, provides that "[a] request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate."

Under existing Rules 7054 and 7008(b), there is a lack of uniformity in how bankruptcy courts handle awards of attorney's fees. The Central District of California, for example, has a local bankruptcy rule governing the taxation of costs and the award of attorney's fees. It generally requires filing a motion for attorney's fees within 30 days after the entry of judgment or other final order "[i]f not previously determined at trial or other hearing." Thus by local rule that district has adopted a bankruptcy rule similar to Civil Rule 54(d)(2)(A).[2] A recent decision of the Bankruptcy Court for the Southern District of New York, however, discussed the general inapplicability of Rule 54(d)(2) in bankruptcy proceedings, with the possible exception of class actions. *In re* Partsearch Techs., Inc., 2011 WL 2456227 (Bankr. S.D.N.Y. June 21, 2011), at *13.[3] Yet another court concluded that an award of attorney's fees in bankruptcy is generally governed by Rule 7008(b), but held in that case that, because the applicable Virgin Islands law defined attorney's fees as "costs," Rule 7054(b) applied. *In re* Kool, Mann, Coffee & Co., 2007 WL 1202888 (Bank. D.V.I. 2007). Finally, the Ninth Circuit BAP, in the *Carey* decision that led to the Committee's consideration of this issue, recognized that Rule 7008(b) requires the pleading of a claim for attorney's fees, but the court said that the rule "does not shed any light on whether such a claim must be proven at trial or left for determination on application or motion following the trial." Because there was no local bankruptcy rule that governed the procedure for pursuing an attorney's fees claim beyond the pleading stage, the court concluded that "no provision of the Rules proscribed the Appellant's request for an award of attorney's fees through the Fee Motion following the trial of the Adversary Proceeding." 446 B.R. at 390.

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[2] *See also In re* Branford Partners, 2008 WL 8444795, at * 4 (9th Cir. BAP 2008) ("A post trial motion for costs is the 'preferred method' for seeking attorneys' fees and costs.").

[3] The court noted that Rule 7023 fully incorporates Civil Rule 23 and that Rule 23(h)(1) provides that a claim for an award of attorney's fees must be made by motion under Rule 54(d)(2). The court cited the Collier treatise as stating that "'Rule 54(d)(2) is applicable in bankruptcy, but only with respect to class actions,'" but noted that another commentator questioned whether "'Rule 23(h) can override the procedures set forth in Rule 7008(b).'" 2011 WL 2456227 at * 13.

In order to clarify the procedure for seeking an award of attorney's fees and to promote uniformity, the Committee voted to propose amending Rule 7054 to include much of the substance of Civil Rule 54(d)(2) and to delete Rule 7008(b). By bringing the bankruptcy rules into closer alignment with the civil rules, this amendment would eliminate a potential trap for an attorney, particularly one familiar with the civil rules, who might overlook the Rule 7008(b) requirement to plead a request for attorney's fees as a claim in the complaint, answer, or other pleading. As under the civil rules, the procedure for seeking an award of attorney's fees would be governed exclusively by Rule 7054, unless the governing substantive law requires the fees to be proved at trial as an element of damages.

All of the provisions of Rule 54(d)(2), however, cannot be made applicable in bankruptcy proceedings. Subdivision (d)(2)(D) would not be incorporated in its entirety because bankruptcy courts may not refer matters to special masters, *see* Bankruptcy Rule 9031, or magistrate judges. *See* 28 U.S.C. § 636. The reference to Rule 78 in Civil Rule 54(d)(2)(C) would also not be incorporated because that rule is not applicable in bankruptcy proceedings.

III. Interim Report on the Revision of Part VIII of the Bankruptcy Rules

As reported at past meetings, the Committee has been engaged for several years in a project to revise the Part VIII Bankruptcy Rules, which govern appeals from bankruptcy courts, primarily to district courts and bankruptcy appellate panels. Among the goals of this project are to bring the bankruptcy appellate rules into closer alignment with the Federal Rules of Appellate Procedure and to incorporate into the rules greater use of electronic transmission, filing, and storage of court documents. At the outset of the project, the Committee hosted two mini-conferences on the subject of the bankruptcy appellate rules. In attendance were judges, lawyers, court personnel, and academics who had substantial experience with bankruptcy appeals.

The Committee has worked on this project in conjunction with the Advisory Committee on Appellate Rules and has been greatly assisted in its work by that committee's reporter. The two advisory committees held a joint meeting in April 2011, and last summer a meeting to review and edit the Part VIII draft and accompanying committee notes was conducted by a working group composed of several members of the Bankruptcy Rules Committee, its reporters, a member of the Appellate Rules Committee, and that committee's reporter. Half of the revised draft that resulted from this meeting was considered by the Committee at its September 2011 meeting. After a full discussion, the Committee approved for submission to the Standing Committee Rules 8001-8012, subject to the additional revision of a few rules and review by the style consultants. The other half of the revised Part VIII rules (Rules 8013-8028) will be presented to the Committee at its spring 2012 meeting.

The Committee does not seek any action by the Standing Committee on the Part VIII rules at this meeting. The first half of the revision, which is being presented for preliminary review, still needs to undergo style review and further consideration by the Committee of a few of its provisions. If the Committee approves the entire Part VIII revision, it will submit the revision to the Standing Committee at the June 2012 meeting with a recommendation that it be published for comment in August 2012. Under that schedule, the presumptive effective date of the new bankruptcy appellate rules would be December 1, 2014.

The revision of Part VIII is comprehensive. Existing rules have been reorganized and renumbered, some rules have been combined, and provisions of other rules have been moved to

several new locations. Much of the language of the existing rules has been restyled. Because of the comprehensive nature of the proposed revision, it is not possible to present the amendments in a redlined version pointing out changes to the existing rules. Nor can the proposed revision be presented in a comparative format like the one used for the restyled Evidence Rules.

Rather, to introduce the first half of the proposed revision of Part VIII to the Standing Committee and assist in its preliminary consideration of these rules, this part of the report will provide a brief discussion of each of the first twelve proposed rules. Significant changes from the existing Bankruptcy Rules, decisions to depart from the Appellate Rules, and any significant issues that have arisen are noted for each rule. The text of proposed Rules 8001-8012 and accompanying committee notes are attached to this report as Appendix B.

Rule 8001 (Scope of Part VIII Rules; Definitions) – This rule is new; it does not have a counterpart in the existing Part VIII rules, but it is similar to Appellate Rule 1. The rule explains the scope of Part VIII. It clarifies that these rules apply to appeals from a bankruptcy court to the district court or bankruptcy appellate panel and that some of the rules (specified in the Committee Note) apply to appeals from bankruptcy courts to courts of appeals.

Rule 8001 also provides definitions of three terms that are used in Part VIII – BAP, appellate court, and transmit. The definition of "transmit" includes a key feature of the revised Part VIII: there is a presumption that documents are to be sent electronically. This presumption does not apply to pro se parties and can be overridden by the governing rules of a court. Although use of the word "transmit" is generally avoided in federal rules, the Committee favors its use here to signal to the reader that it is a term with a special meaning.

Although the Committee is not embarking on a general restyling of the Bankruptcy Rules, in revising Part VIII it has adopted many of the style conventions of the Appellate Rules, including the use of "must" rather than "shall." The Committee believes that this part of the Bankruptcy Rules is sufficiently discrete that its use of restyled language and form will not cause confusion in the meaning of rules in the other parts.

Rule 8002 (Time for Filing Notice of Appeal) – This rule is largely a restyled version of current Rule 8002. Because 28 U.S.C. § 158(c)(2) refers to this rule by number, the provisions regarding the time for filing a notice of appeal must be retained in Rule 8002, rather than being placed after the rule governing the procedure for taking an appeal as of right, as the Appellate Rules are organized. The revised rule retains the 14-day period for filing a notice of appeal in bankruptcy cases.

Subdivision (c) regarding an appeal by an inmate confined in an institution is a new provision. It mirrors the provision in Appellate Rule 4(c)(1) and (2).

Rule 8003 (Appeal as of Right – How Taken; Docketing of Appeal) – This rule is based on Appellate Rule 3. It includes provisions of current Rule 8001(a) governing the taking of an appeal by right and Rule 8004 governing service of notice of the filing of a notice of appeal. The proposed rule includes new provisions, modeled on Appellate Rule 3(b), allowing joint and consolidated appeals.

In a significant change from current Rule 8007(b), an appeal would be docketed in the appellate court when the clerk of that court receives the notice of appeal, rather than, as under

current practice, when the complete record is transmitted to the appellate court. This change reflects the view expressed by some participants in the mini-conferences that docketing in the appellate court should occur earlier in order to eliminate most instances of a motion being filed in the appellate court with regard to a case not yet on its docket.

Rule 8004 (Appeal by Leave – How Taken; Docketing of Appeal) – This rule contains provisions that are currently set forth in Rules 8001(b) and 8003. It follows the format and style of Appellate Rule 5, but it retains the current bankruptcy practice of requiring the filing of a notice of appeal in addition to a motion for leave to appeal.

Consistent with proposed Rule 8003, this rule provides that docketing in the appellate court should occur promptly after the clerk of that court receives the notice of appeal and motion for leave to appeal. As a result of this change in the time of docketing, responses in opposition to motions for leave to appeal would be filed in the appellate court rather than in the bankruptcy court, a change from existing Rule 8003(a).

Rule 8005 (Election to Have Appeal Heard by District Court Instead of BAP) – This rule is a revision of current Rule 8001(e). Under 28 U.S.C. § 158(c)(1), if a bankruptcy appellate panel has been established to hear appeals from a bankruptcy court, an appellant may elect to have an appeal heard instead by a district court by making an election at the time of filing a notice of appeal, and an appellee may make such an election within 30 days after service of the notice of appeal. The proposed rule provides for the promulgation of an Official Form for making an election. The Committee believes that use of this form would make the election process more straightforward and less likely to give rise to challenges. Should a dispute about the validity of an election arise, the rule provides a procedure for resolution of the dispute. The court in which the appeal is pending when a determination of the validity of an election is sought would have authority to determine whether an election has been properly made according to the rule and statute.

Rule 8006 (Certification of Direct Appeal to Court of Appeals) – This rule, like current Rule 8001(f), implements 28 U.S.C. § 158(d)(2), which authorizes certification of bankruptcy appeals for direct review by a court of appeals under three circumstances: (1) if the court in which the case is pending, acting on its own motion or on the request of a party, makes the certification specified in § 158(d)(2)(A)(i), (ii), and (iii); (2) if all parties to the appeal make the certification; or (3) if a majority of appellants and a majority of appellees request the court to make the certification, in which case the court is required to do so. Because of the earlier time of docketing an appeal in the appellate court under the proposed rules, this rule provides that, for purposes of certification only, a case remains pending in the bankruptcy court for 30 days after the effective date of a notice of appeal. Once a certification is made, a request for permission to take a direct appeal to the court of appeals must be filed with the circuit clerk within 30 days after the certification. Appellate Rule 6 would be amended to provide in new subdivision (c) the procedures for requesting permission of the court of appeals and for any subsequent proceedings in that court.

Rule 8007 (Stay Pending Appeal; Bonds; Suspension of Proceedings) – This rule is derived from current Rule 8005 and Appellate Rule 8. In a change from the current rule, Rule 8007 would apply to appeals taken directly to the court of appeals, as well as to ones taken to the district court or the bankruptcy appellate panel. It retains a feature of current Rule 8005 that differs from Rule 8. If a bankruptcy court grants a stay or other relief authorized under

subdivision (a) of the rule, a party may seek to have that order vacated or modified by means of a motion filed in the reviewing court, rather than by filing a notice of appeal.

Rule 8008 (Indicative Rulings) – This rule would add to the Bankruptcy Rules a provision governing indicative rulings. Because it addresses procedures in both the trial and appellate courts, the proposed rule is a combination of Civil Rule 62.1 and Appellate Rule 12.1. Subdivision (a), which authorizes the bankruptcy court to issue an indicative ruling, and subdivision (b), which requires the movant to notify the "court in which the appeal is pending" of the bankruptcy court's ruling, would apply when a bankruptcy appeal is pending in the court of appeals, as well as when an appeal is pending in the district court or bankruptcy appellate panel. Subdivision (c), however, which authorizes the "appellate court" to remand for further proceedings, would apply only to district courts and bankruptcy appellate panels. Appellate Rule 12.1(b) would govern the actions of a court of appeals in response to an indicative ruling of a bankruptcy court. However, the procedures of proposed Rule 8008(c) and Appellate Rule 12.1(b) are identical.

Rule 8009 (Record and Issues on Appeal; Sealed Documents) – This rule is a revision of current Rule 8006. It borrows provisions from Appellate Rules 10 and 11(a) that would be new to the Bankruptcy Rules, including provisions regarding a statement of the record when no transcript is available, an agreed statement as the record on appeal, and correction or modification of the record. Rule 8009 would continue the current practice in bankruptcy appeals of having the parties designate items to be included in the record on appeal. It would include a new provision regarding the handling of documents under seal that are designated for inclusion in the record. That provision has no counterpart in the Appellate Rules. Rule 8009 would apply to direct appeals to the court of appeals, as well as to appeals to the district court and the bankruptcy appellate panel.

Rule 8010 (Completion and Transmission of the Record) – This rule is derived from current Rule 8007 and Appellate Rule 11. The Committee is still considering how best to draft the rule so that it will work smoothly in the majority of bankruptcy courts that record proceedings electronically without a court reporter present. The provision of current Rule 8007(b) regarding the docketing of an appeal upon the appellate clerk's receipt of the complete record has been deleted and, as noted above, replaced by provisions in Rules 8003 and 8004 requiring the appeal to be docketed when the appellate clerk receives the notice of appeal. In addition to applying to appeals from the bankruptcy court to the district court and to the bankruptcy appellate panel, Rule 8009 would apply to cases on direct appeal to the court of appeals under 28 U.S.C. §158(d)(2).

Rule 8011 (Filing and Service; Signature) – This rule is based on current Rule 8008 and Appellate Rule 25. It adopts the format, style, and some of the greater detail of Rule 25, and—consistent with the overall goals of the Part VIII revision project—it places a greater emphasis on the electronic filing and service of documents. Subdivision (e) is a new provision that would require an electronic signature of counsel or unrepresented parties for documents filed electronically in the appellate court.

Rule 8012 (Corporate Disclosure Statement) – This rule, new to the Part VIII rules, is based on Appellate Rule 26.1.

IV. Rules and Forms Published for Comment in August 2011

At the June 2011 meeting, the Standing Committee authorized the publication of proposed amendments to Bankruptcy Rules 1007, 3007, 5009, 9006, 9013, and 9014, and proposed amendments to Official Forms 6C, 7, 22A, and 22C. The deadline for submission of comments on these proposed amendments is February 15, 2012. Thus far eight comments have been submitted on the published amendments. Public hearings are tentatively scheduled for January 13, 2012, in Washington, D.C., and February 10, 2012, in Chicago, Illinois. No requests to testify at a hearing have yet been submitted.

The Committee will consider all of the comments submitted on the proposed amendments during its March 2012 meeting. The Committee will present the amendments approved at that meeting, with any appropriate changes, to the Standing Committee at its June 2012 meeting for its approval and transmittal to the Judicial Conference.

V. Other Information Items

A. *Stern v. Marshall*

The Committee continues to monitor case law developments following the Supreme Court's decision in *Stern v. Marshall*. In *Stern*, the Court considered whether a bankruptcy judge had the power, consistent with Article III, to hear and finally determine a debtor's state law counterclaim against a creditor who had filed a transactionally related claim against the estate. Although the governing statute, 28 U.S.C. § 157(b)(1) & (b)(2)(C), categorizes estate counterclaims as "core" proceedings that may be fully adjudicated by a bankruptcy judge, the Court held that the Constitution permits a bankruptcy judge to enter a final judgment, without consent of the parties, only when a counterclaim "stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." Finding that test to be unsatisfied, the Court ultimately concluded that the creditor's counterclaim was entitled to the Article III forum the creditor had demanded.

Because the case touches on the power of bankruptcy judges to enter final judgments in disputes before them, *Stern* has garnered a high level of interest among the bankruptcy courts and the Article III courts. It has already been cited in more than 180 federal court opinions. Many citations to *Stern* reflect relatively restrained applications by bankruptcy courts of the Supreme Court's test for when they may finally determine a dispute. *See, e.g.*, *In re Salander O'Reilly Galleries*, 453 B.R. 106, 118 (Bankr. S.D.N.Y. 2011) (concluding that the bankruptcy court could finally determine a dispute that "implicate[d] the adjudication of the [creditor's] proof of claim"). Others involve decisions by district courts contemplating (and usually rejecting) the argument that *Stern* requires withdrawal of a proceeding referred to the bankruptcy court. *See, e.g.*, *In re Mortgage Store, Inc.*, 2011 WL 5056990 (D. Hawaii Oct. 5, 2011) (denying withdrawal of the reference because the bankruptcy court could submit proposed findings and conclusions even if it could not enter a final judgment); *Kelley v. JPMorgan Chase & Co.*, 2011 WL 4403289 at *5-6 (D. Minn. Sept. 21, 2011) (same).

While the Supreme Court described its holding as "a 'narrow' one," *Stern* has generated three significant open questions percolating in the courts. The first is whether the Court's decision applies to fraudulent conveyance actions. The second is whether the consent of litigants is sufficient to permit a bankruptcy court to enter final judgment when doing so would otherwise

be beyond the court's powers under *Stern*. The third is whether there are some proceedings over which the bankruptcy court has no power at all to entertain because of the interplay between *Stern* and provisions of the Judicial Code and Bankruptcy Rules.

The application of *Stern* to fraudulent conveyance actions—a common feature of bankruptcy litigation—has created divergent views. The Judicial Code categorizes actions "to determine, avoid, or recover fraudulent conveyances" as core proceedings. 28 U.S.C. § 157(b)(2)(H). Nevertheless, a number of decisions have read that statutory provision to run afoul of *Stern* in light of the Supreme Court's previous description of fraudulent conveyance actions as essentially common law claims like those usually committed to the Article III courts. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 (1989). Other courts, however, have found fraudulent conveyance actions to be sufficiently entwined with the bankruptcy process to permit the bankruptcy court to enter final judgment. *Compare In re Canopy Fin. Inc.*, 2011 WL 3911082 (N.D. Ill. Sept. 1, 2011) (concluding that the bankruptcy court cannot enter a final judgment on a fraudulent conveyance action), and *In re Blixseth*, 2011 WL 3274042, at *11–12 (Bankr. D. Mont. Aug. 1, 2011) (same), with *In re Heller Ehrman LLP*, 2011 WL 4542512 at *5-6 (Bankr. N.D. Cal. Sept. 28, 2011) (finding that a fraudulent conveyance action may be finally determined by the bankruptcy court), *In re Am. Bus. Fin. Servs., Inc.*, 457 B.R. 314, 319-20 (Bankr. D. Del. 2011) (holding that a bankruptcy court may enter final judgment in a fraudulent conveyance action involving "matters integral to the bankruptcy case"), and *In re Refco*, 2011 WL 5974532 at *9 (Bankr. S.D.N.Y. Nov. 30, 2011) ("Article III of the Constitution does not prohibit the bankruptcy courts' determination of fraudulent transfer claims under 11 U.S.C. §§ 544 and 548 by final judgment."). At least one decision has drawn a distinction, for Article III purposes, between proceedings brought under the Bankruptcy Code's own fraudulent conveyance provisions, §§ 548 and 549, and those brought under state law but asserted in bankruptcy as permitted by Code § 544. *See In re Innovative Commc'n Corp.*, 2011 WL 3439291, at *3-4 (Bankr. D.V.I. Aug. 5, 2011) (concluding that a bankruptcy court may finally determine a fraudulent conveyance action brought under § 548 but not under § 544). Although no court of appeals so far has confronted the question, the Ninth Circuit recently invited briefing on whether *Stern* prohibits bankruptcy courts from entering final judgment in a fraudulent conveyance action. *In re Bellingham Insurance Agency, Inc.*, 661 F.3d 476 (9th Cir. 2011).

The second question prompted by *Stern* is whether and to what extent the consent of the litigants may authorize a bankruptcy judge to hear and finally determine a proceeding that would otherwise fall beyond a bankruptcy judge's powers. Every court to consider the matter has held (or assumed) that litigant consent is ordinarily sufficient to permit a bankruptcy judge to enter a final judgment. The consent question has arisen in a variety of contexts. Typically, bankruptcy courts have simply noted that the parties have consented to entry of a final judgment, and that their consent satisfies *Stern*. In some cases, however, the court has raised *sua sponte* a potential *Stern* issue and required the parties to file a formal consent or objection to the bankruptcy court's power to adjudicate. *See, e.g., In re Rancher Energy Corp.*, 2011 WL 5320971 at *3 (Bankr. D. Colo. Nov. 2, 2011) (ordering the litigants to enter a formal consent or objection to the bankruptcy court's power to enter final judgment). In other cases, the consent question has been raised in the district court on a motion to withdraw the reference. *See, e.g., Mercury Companies, Inc. v. FNF Sec. Acquisition, Inc.*, 2011 WL 5127613 (D. Colo. Oct. 31, 2011) (rejecting the argument by defendants in a fraudulent conveyance action that "one cannot consent to the Bankruptcy Court's jurisdiction where the Bankruptcy Court does not have the authority to

resolve claims before it").[4] What constitutes "consent" and the timing of that consent have presented additional wrinkles. *See In re Development Specialists, Inc.*, 2011 WL 5244463, at *11-13 (S.D.N.Y. Nov. 2, 2011) (finding no consent even though the objecting parties had previously admitted that the bankruptcy court had jurisdiction and requested that the bankruptcy court enter judgment in their favor).

A third post-*Stern* question is whether the decision creates a category of disputes that fall into an adjudicatory gap between core and noncore proceedings. Courts have addressed whether there are some proceedings that a bankruptcy court cannot, as a constitutional matter, hear and finally determine as core proceedings but that the court also cannot, as a statutory and Rules matter, dispose of by a report and recommendation as noncore proceedings. The difficulty comes from the interplay between the Judicial Code's list of core proceedings and the provisions for the treatment of noncore proceedings. Bankruptcy courts may hear without finally determining "a proceeding that is not a core proceeding." 28 U.S.C. § 157(c)(1); *see also* Fed. R. Bankr. P. 9033. No provision explicitly provides for that treatment in a core proceeding. Therefore, some litigants have argued, claims governed by *Stern* cannot be treated as noncore proceedings, because the statute categorizes them as "core." At the same time, the argument goes, they cannot be heard and finally decided by the bankruptcy court without violating Article III. To date, only one bankruptcy court has embraced this reasoning. *See In re Blixseth*, 2011 WL 3274042 at *10-12. Other courts that have considered the argument have rejected it. *See, e.g.*, *In re El-Atari*, 2011 WL 5828013, at *4-5 (E.D. Va. Nov. 18, 2011); *In re Mortgage Store, Inc.*, 2011 WL 5056990, at *5-6; *In re Canopy Fin., Inc.*, 2011 WL 3911082, at *4-5.

As this summary of decisions demonstrates, the post-*Stern* landscape is rapidly developing. The Committee will continue to assess whether there is a need for responsive rulemaking in light of continuing developments.

B. *Suggestion of Institute for Legal Reform for Quarterly Reporting by § 524(g) Trusts*

The Institute for Legal Reform ("ILR") submitted a suggestion to amend the Bankruptcy Rules to require "greater transparency in the operation of [asbestos] trusts established under 11 U.S.C. § 524(g)." In bankruptcy cases in which debtors face liability on asbestos-related personal injury or property damage claims, § 524(g) of the Bankruptcy Code permits the creation of a trust to pay those claimants, including future claimants, after confirmation of the debtor's plan of reorganization. Under ILR's proposal, asbestos trusts would file with bankruptcy courts quarterly reports describing in detail each demand for payment the trusts received during the reporting period. The proposal would also require trusts to disclose to third parties information regarding demands for payment presented to trusts by asbestos claimants if that information is relevant to litigation in any state or federal court. In explaining its suggestion, ILR stated that claimants may be making demands to asbestos trusts that are inaccurate or inconsistent with similar claims that the claimants brought in the tort system, thereby seeking overcompensation and depleting trusts to the detriment of future trust claimants. The proposal would represent a departure from the current practice among asbestos trusts, which typically make periodic reports

[4] Further guidance may come from a nonbankruptcy case pending in the Fifth Circuit, which has requested briefing on the question whether parties may consent to the entry of a final judgment by a magistrate judge in light of *Stern*. *See Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, No. 10-20640 (5th Cir. Sept. 9, 2011).

of aggregate claims-handling information but do not disclose detailed information about the treatment of individual demands for payment.

The Committee recognized that ILR's suggestion addressed an important matter deserving careful attention. Committee members, however, expressed concern about the proposal. Because it would apply to trust operations after the confirmation of a debtor's plan of reorganization, members noted that the proposal might exceed the limited scope of post-confirmation bankruptcy jurisdiction. Members also stated that the proposal, although perhaps beneficial to parties in nonbankruptcy tort litigation, was arguably of limited use to bankruptcy courts and might be beyond the proper reach of the Bankruptcy Rules.

In assessing these concerns, members referred to comments received from interested individuals and groups—including practicing lawyers, asbestos trusts, representatives of future asbestos claimants, bar organizations, and ILR—who responded to a request from the Chair of the Committee for input on ILR's suggestion. Although some of the detailed responses supported the proposal, the majority urged the Committee not to adopt it. Many comments questioned whether bankruptcy rulemaking of the kind proposed was the appropriate mechanism to address the issues raised by ILR.

In light of these concerns, the Committee adopted the recommendation of its Business Subcommittee that further action not be taken on ILR's suggestion.

C. *Forms Modernization Project ("FMP")*

Since 2008 the Committee's Subcommittee on Forms has led a project to revise the Official Forms. Among the goals of this project are obtaining more complete and accurate responses on the forms, making the questions easier to understand, giving end users of the information the ability to extract data needed for specific purposes, and coordinating with the next generation of CM/ECF ("NextGen"). In the early stages of its work, the FMP decided that particular forms should no longer apply to all types of debtors. Instead, there should be forms specifically designed for individual debtors and another set for debtors that are entities, such as corporations. The FMP began by drafting individual debtor forms. At the Committee's September 2011 meeting, Bankruptcy Judge Elizabeth Perris, chair of the FMP and the Subcommittee on Forms, reported that drafts of the initial official bankruptcy forms to be filed by individuals have been prepared and approved by the FMP. Those drafts were included in the Committee's agenda materials.

The FMP has sought feedback on the drafts from a number of external users, including the National Association of Chapter Thirteen Trustees, the National Association of Bankruptcy Trustees, the National Association of Consumer Bankruptcy Attorneys, a group of attorneys from the Executive Office for United States Trustees, and an organization of creditor attorneys. Comments from those organizations and other reviewers have been mixed. Most reviewers support the user-friendly language in the new forms, but some believe the language is less precise and will lead to more pro se filings. Others think that the length of the forms (including instructions not intended to be filed) will discourage pro se filings, but will require additional work for debtor's counsel and therefore increase fees. Reviewers were less concerned about the length of the forms once they were informed that the goal was to make the new forms effective in conjunction with NextGen, which will allow custom reports to be created from the data collected on the forms.

The FMP's goal had been to publish the individual filing package for comment in August 2012, which would mean that the new forms could be effective as early as December 1, 2013. In light of comments about length, the FMP believes that the acceptance and success of the individual filing package will depend to a large extent on whether NextGen is sufficiently operational to permit data to be extracted from the forms when they go into effect.

It is not clear that NextGen will be at that stage by the end of 2013. Accordingly, the Committee preliminarily approved the FMP's recommendation to seek to publish in 2012 a subset of the individual filing package, consisting of, the fee waiver and installment fee forms, the income and expense forms, and the means test forms. These particular forms involve only the debtors' income and expenses and are not significantly longer than the forms they replace. The FMP will work with NextGen to emphasize the need to extract data from these forms when they become effective. For the same reasons, the FMP will recommend that a revised proof of claim form be included in the initial group of forms for publication.

The Committee will review the forms and revisit its publication recommendation at the spring meeting, after the FMP considers all the pre-publication comments. While the first forms are being tested, the FMP is working on the business forms and additional forms for individuals.

TAB 8-A

Appendix A

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Publication for Public Comment

Rule 7008. General Rules of Pleading

~~(a) APPLICABILITY OF RULE 8 F.R.CIV. P.~~ Rule 8 F.R. Civ. P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.

~~(b) ATTORNEY'S FEES. A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate.~~

* New material is underlined; matter to be omitted is lined through.

COMMITTEE NOTE

This rule is amended to delete subdivision (b), which required a request for attorney's fees always to be pleaded as a claim in an allowed pleading. That requirement, which differed from the practice under the Federal Rules of Civil Procedure, had the potential to serve as a trap for the unwary.

The procedures for seeking an award of attorney's fees are now set out in Rule 7054(b)(2), which makes applicable most of the provisions of Rule 54(d)(2) F.R. Civ. P. As specified by Rule 54(d)(2)(A) and (B) F.R. Civ. P., a claim for attorney's fees must be made by a motion filed no later than 14 days after entry of the judgment unless the governing substantive law requires those fees to be proved at trial as an element of damages. When fees are an element of damages, such as when the terms of a contract provide for the recovery of fees incurred prior to the instant adversary proceeding, the general pleading requirements of this rule still apply.

Rule 7054. Judgments; Costs[**]

(a) JUDGMENTS. Rule 54(a)-(c) F.R. Civ. P. applies in adversary proceedings.

(b) COSTS; ATTORNEY'S FEES

(1) *Costs Other Than Attorney's Fees*. The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court.

[**] Incorporates amendments that are due to take effect on December 1, 2012, if approved by the Supreme Court and Congress takes no action otherwise.

(2) *Attorney's Fees.*

(A) Rule 54(d)(2)(A)-(C) and (E) F.R. Civ. P. applies in adversary proceedings except for the reference in Rule 54(d)(2)(C) to Rule 78.

(B) By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings.

COMMITTEE NOTE

Subdivision (b) is amended to prescribe the procedure for seeking an award of attorney's fees and related nontaxable expenses in adversary proceedings. It does so by adding new paragraph (2) that incorporates most of the provisions of Rule 54(d)(2) F.R. Civ. P. The title of subdivision (b) is amended to reflect the new content, and the previously existing provision governing costs is renumbered as paragraph (1) and re-titled.

As provided in Rule 54(d)(2)(A), new subsection (b)(2) does not apply to fees recoverable as an element of damages, as when sought under the terms of a contract providing for the recovery of fees incurred prior to the instant adversary proceeding. Such fees typically are required to be claimed in a pleading.

Rule 54(d)(2)(D) F.R. Civ. P. does not apply in adversary proceedings insofar as it authorizes the referral of fee matters to a master or a magistrate judge. The use of masters is not authorized in bankruptcy cases, *see* Rule 9031, and 28 U.S.C. § 636 does not authorize a magistrate judge to exercise jurisdiction upon referral by a bankruptcy judge. The remaining provision of Rule 54(d)(2)(D) is expressed in subdivision (b)(2)(B) of this rule.

Rule 54(d)(2)(C) refers to Rule 78 F.R. Civ. P., which is not applicable in adversary proceedings. Accordingly, that reference is not incorporated by this rule.

TAB 8-B

Appendix B

FEDERAL RULES OF BANKRUPTCY PROCEDURE

PART VIII. BANKRUPTCY APPEALS

Rule

8001. Scope of Part VIII Rules; Definitions

8002. Time for Filing Notice of Appeal

8003. Appeal as of Right – How Taken; Docketing of Appeal

8004. Appeal by Leave – How Taken; Docketing of Appeal

8005. Election to Have Appeal Heard by District Court Instead of BAP

8006. Certification of Direct Appeal to Court of Appeals

8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

8008. Indicative Rulings

8009. Record and Issues on Appeal; Sealed Documents

8010. Completion and Transmission of the Record

8011. Filing and Service

8012. Corporate Disclosure Statement

Rule 8001. Scope of Part VIII Rules; Definitions

(a) GENERAL SCOPE. These Part VIII rules govern the procedure in United States district courts and bankruptcy appellate panels for appeals taken from judgments, orders, and decrees of bankruptcy courts. They also govern certain procedures involving appeals to courts of appeals under 28 U.S.C. § 158(d).

(b) DEFINITIONS

(1) "BAP." As used in these Part VIII rules, "BAP" means a bankruptcy appellate panel established by the judicial council of a circuit and authorized to hear appeals from the bankruptcy court for the district in which an appeal is taken under 28 U.S.C. § 158.

(2) "APPELLATE COURT." As used in these Part VIII rules, "appellate court" means either the district court or the BAP – whichever is the court in which the bankruptcy appeal is pending or to which the appeal will be taken.

(3) "TRANSMIT." As used in these Part VIII rules, "transmit" means to send electronically unless the document is being sent by or to an individual who is not represented by counsel or the governing rules of the court permit or require mailing or other means of delivery of the document in question.

COMMITTEE NOTE

These Part VIII rules apply to appeals under 28 U.S.C. § 158(a) from bankruptcy courts to district courts and BAPs. As provided in subdivision (d) of this rule, the term "appellate court" is used in Part VIII to refer to the court – district court or BAP – to which a bankruptcy appeal is taken.

Subsequent appeals to courts of appeals are generally governed by the Federal Rules of Appellate Procedure. Seven of the Part VIII rules do, however, relate to appeals to courts of appeals. Rule 8004(e) provides that authorization by the court of appeals of a direct appeal of a bankruptcy court's interlocutory judgment, order, or decree constitutes a grant of leave to appeal. Rule 8006 governs the procedure for certification under 28 U.S.C. § 158(d)(2) of a direct appeal from a judgment, order, or decree of a bankruptcy court to a court of appeals. Rule 8007 addresses stays pending a direct appeal to a court of appeals. Rule 8008 authorizes a bankruptcy court to issue an indicative ruling while an appeal is pending in a court of appeals. Rules 8009 and 8010 govern the record on appeal in a direct appeal allowed under 28 U.S.C. § 158(d)(2). And Rule 8026 governs the granting of a stay of an appellate court judgment pending an appeal to the court of appeals.

These rules take account of the evolving technology in the federal courts for the electronic filing, storage, and transmission of documents. Any form of the term "transmit" is used to encompass the electronic conveyance of information. Except as applied to pro se parties, a requirement in the Part VIII rules to transmit a document means that it must be sent electronically unless applicable rules or orders require or permit another means of sending a particular document.

Rule 8002. Time for Filing Notice of Appeal

(a) FOURTEEN-DAY PERIOD.

(1) Except as provided in Rule 8002(b) and (c), the notice of appeal required by Rule 8003 or 8004 must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed.

(2) If one party files a timely notice of appeal, any other party may file a notice of appeal with the bankruptcy clerk within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise allowed by this rule, whichever period ends later.

(3) A notice of appeal filed after a bankruptcy court announces a decision or order, but before entry of the judgment, order, or decree, is treated as filed after entry of the judgment, order, or decree and on the date of entry.

(4) If a notice of appeal is mistakenly filed with the appellate court or the court of appeals, the clerk of that court must indicate on the notice the date on which it was received and transmit it to the bankruptcy clerk. The notice of appeal is then considered filed in the bankruptcy court on the date so indicated.

(b) EFFECT OF MOTION ON TIME FOR APPEAL.

(1) If a party timely files in the bankruptcy court

any of the following motions, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(A) to amend or make additional findings under Rule 7052, whether or not granting the motion would alter the judgment;

(B) to alter or amend the judgment under Rule 9023;

(C) for a new trial under Rule 9023; or

(D) for relief under Rule 9024 if the motion is filed no later than 14 days after entry of the judgment.

(2)(A) If a party files a notice of appeal after the court announces or enters a judgment, order, or decree – but before it disposes of any motion listed in Rule 8002(b)(1) – the notice becomes effective when the order disposing of the last such remaining motion is entered.

(B) A party intending to challenge on appeal an order disposing of any motion listed in Rule 8002(b)(1), or the alteration or amendment of a judgment, order, or decree upon such a motion, must file a notice of appeal or an amended notice of appeal. The notice of appeal or amended notice of appeal must be filed in compliance with Rule 8003 or 8004 and within the time

prescribed by this rule, measured from the entry of the order disposing of the last such remaining motion.

(3) No additional fee is required to file an amended notice of appeal.

(c) APPEAL BY AN INMATE CONFINED IN AN INSTITUTION.

(1) If an inmate confined in an institution files a notice of appeal from a judgment, order, or decree of a bankruptcy court to an appellate court, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files under Rule 8002(c) the first notice of appeal from a judgment, order, or decree of a bankruptcy court to an appellate court, the 14-day period provided in Rule 8002(a)(2) for another party to file a notice of appeal runs from the date when the bankruptcy court dockets the first notice.

(d) EXTENSION OF TIME FOR APPEAL.

(1) The bankruptcy court may extend the time for filing a notice of appeal by a party unless the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, 922, 1201, or 1301 of the Code;

(B) authorizes the sale or lease of property or the use of cash collateral under § 363 of the Code;

(C) authorizes the obtaining of credit under § 364 of the Code;

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365 of the Code;

(E) approves a disclosure statement under § 1125 of the Code; or

(F) confirms a plan under § 943, 1129, 1225, or 1325 of the Code.

(2) The bankruptcy court may extend the time to file a notice of appeal if:

(A) a motion for extension of time is filed with the bankruptcy clerk within the time prescribed by this rule; or

(B) a motion is filed with the bankruptcy

clerk no later than 21 days after the time prescribed by this rule expires and is accompanied by a demonstration of excusable neglect; but

(C) no extension of time for filing a notice of appeal may exceed 21 days after the time otherwise prescribed by this rule, or 14 days after the date the order granting the motion is entered, whichever is later.

COMMITTEE NOTE

This rule is derived from former Rule 8002 and F.R. App. P. 4(a) and (c). With the exception of subdivision (c), the changes to the former rule are stylistic. The rule retains the former rule's 14-day time period for filing a notice of appeal, as opposed to the longer periods permitted for appeals in civil cases under F.R. App. P. 4(a).

Subdivision (a) continues to allow any other party to file a notice of appeal within 14 days after the first notice of appeal is filed, or thereafter to the extent otherwise authorized by this rule. Subdivision (a) also retains provisions of the former rule that prescribe the date of filing of the notice of appeal if the appellant files it prematurely or in the wrong court.

Subdivision (b), like former Rule 8002(b) and F.R. App. P. 4(a), tolls the time for filing a notice of appeal when certain post-judgment motions are filed, and it prescribes the effective date of a notice of appeal that is filed before the court disposes of all of the specified motions. As under the former rule, a party that wants to appeal the court's disposition of such a motion or the alteration or amendment of a judgment, order, or decree in response to such a motion must file a notice of appeal or, if it has already filed one, an amended notice of appeal.

Although Rule 8003(a)(3)(C) requires a notice of appeal to be accompanied by the required fee, no additional fee is required for the filing of an amended notice of appeal.

Subdivision (c) mirrors the provisions of F.R. App. P. 4(c)(1) and (2), which specify timing rules for a notice of appeal filed by an inmate

confined in an institution.

Subdivision (d) continues to allow the court to grant an extension of time to file a notice of appeal, except with respect to certain specified judgments, orders, and decrees.

Rule 8003. Appeal as of Right – How Taken; Docketing of Appeal

(a) FILING THE NOTICE OF APPEAL.

(1) An appeal from a judgment, order, or decree of a bankruptcy court to an appellate court as permitted by 28 U.S.C. § 158(a)(1) or (a)(2) may be taken only by filing a notice of appeal with the bankruptcy clerk within the time allowed by Rule 8002.

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the appellate court to act as it considers appropriate, including dismissing the appeal.

(3) The notice of appeal must:

(A) conform substantially to the appropriate Official Form;

(B) be accompanied by the judgment, order, or decree, or part thereof, being appealed; and

(C) be accompanied by the prescribed fee.

(4) If requested by the bankruptcy clerk, each appellant must promptly file the number of copies of the notice of appeal that the bankruptcy clerk needs for compliance with Rule 8003(c).

(b) JOINT OR CONSOLIDATED APPEALS.

(1) When two or more parties are entitled to appeal

from a judgment, order, or decree of a bankruptcy court and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When parties have separately filed timely notices of appeal, the appellate court may join or consolidate the appeals.

(c) SERVING THE NOTICE OF APPEAL.

(1) The bankruptcy clerk must serve notice of the filing of a notice of appeal by transmitting it to counsel of record for each party to the appeal – excluding the appellant – or, if a party is proceeding pro se, sending it to the pro se party's service address.

(2) The bankruptcy clerk's failure to serve notice does not affect the validity of the appeal.

(3) The bankruptcy clerk must give each party served notice of the date on which the notice of appeal was filed and note on the docket the names of the parties served and the date and method of the service.

(4) The bankruptcy clerk must promptly transmit the notice of appeal to the United States trustee, but failure to transmit notice to the United States trustee does not affect the validity of the appeal.

(d) TRANSMITTING THE NOTICE OF APPEAL TO THE APPELLATE COURT; DOCKETING THE APPEAL.

(1) The bankruptcy clerk must promptly transmit the notice of appeal to the BAP clerk if a BAP has been established for appeals from that district and the appellant has not elected to have the appeal heard by the district court. Otherwise, the bankruptcy clerk must promptly transmit the notice of appeal to the district clerk.

(2) Upon receiving the notice of appeal, the clerk of the appellate court must docket the appeal under the title of the bankruptcy court action with the appellant identified – adding the appellant's name if necessary.

COMMITTEE NOTE

This rule is derived in part from former Rule 8001(a) and F.R. App. P. 3. It encompasses stylistic changes to the former provision governing appeals as of right. In addition it addresses joint and consolidated appeals and incorporates and modifies provisions of former Rule 8004 regarding service of the notice of appeal. The rule changes the timing of the docketing of an appeal in the district court or BAP.

Subdivision (a) incorporates much of the content of former Rule 8001(a) regarding the taking of an appeal as of right under 28 U.S.C. § 158(a)(1) or (2). The rule now requires that the judgment, order, or decree being appealed be attached to the notice of appeal.

Subdivision (b), which is an adaptation of F.R. App. P. 3(b), permits the filing of a joint notice of appeal by multiple appellants that have sufficiently similar interests that their joinder is practicable. It also provides for the appellate court's consolidation of appeals taken separately by two or more parties.

Subdivision (c) is derived from former Rule 8004 and F.R. App. P. 3(d). By using the term "transmitting," it modifies the former rule's requirement that service of the notice of appeal be accomplished by mailing and allows the bankruptcy clerk to serve counsel by electronic means. Service on pro se parties must be made by sending the notice to the address – whether street, post office box, or email – most recently provided to the court.

Subdivision (d) modifies the provision of former Rule 8007(b), which delayed the docketing of an appeal by the appellate court until the record was complete and transmitted by the bankruptcy clerk. The new provision, adapted from F.R. App. P. 3(d) and 12(a), requires the bankruptcy clerk to promptly transmit the notice of appeal to the clerk of the appellate court. Upon receipt of the notice of appeal, the clerk of the appellate court must docket the appeal. Under this procedure, motions filed in the appellate court prior to completion and transmission of the record can generally be placed on the docket of an already pending appeal.

Rule 8004. Appeal by Leave – How Taken; Docketing of Appeal

(a) NOTICE OF APPEAL AND MOTION FOR LEAVE TO APPEAL. An appeal from an interlocutory judgment, order, or decree of a bankruptcy court as permitted by 28 U.S.C. § 158(a)(3) may be taken only by filing with the bankruptcy clerk a notice of appeal as prescribed by Rule 8003(a) and within the time allowed by Rule 8002. The notice of appeal must be accompanied by a motion for leave to appeal prepared in accordance with Rule 8004(b) and, unless served electronically using the court's transmission equipment, with proof of service in accordance with Rule 8011(d).

(b) CONTENT OF MOTION; RESPONSE.

(1) A motion for leave to appeal under 28 U.S.C. § 158(a)(3) must include the following:

(A) the facts necessary to understand the questions presented;

(B) the questions themselves;

(C) the relief sought;

(D) the reasons why leave to appeal should be granted; and

(E) an attachment of the interlocutory judgment, order, or decree from which appeal is sought, and any

related opinions or memoranda.

(2) A party may file with the clerk of the appellate court a response in opposition or a cross-motion within 14 days after the motion is served.

(c) TRANSMITTING THE NOTICE OF APPEAL AND MOTION; DOCKETING THE APPEAL; DETERMINING THE MOTION.

(1) The bankruptcy clerk must promptly transmit the notice of appeal and the motion for leave to appeal, together with any statement of election under Rule 8005, to the clerk of the appellate court.

(2) Upon receiving the notice of appeal and motion for leave to appeal, the clerk of the appellate court must docket the appeal under the title of the bankruptcy court action with the movant-appellant identified – adding the movant-appellant's name if necessary.

(3) The motion and any response or cross-motion are submitted without oral argument unless the appellate court orders otherwise. If the motion for leave to appeal is denied, the appellate court must dismiss the appeal.

(d) FAILURE TO FILE A MOTION. If an appellant does not file a motion for leave to appeal an interlocutory judgment,

order, or decree, but timely files a notice of appeal, the appellate court may:

- direct the appellant to file a motion for leave to appeal; or
- treat the notice of appeal as a motion for leave to appeal and either grant or deny leave.

If the court directs that a motion for leave to appeal be filed, the appellant must file the motion within 14 days after the order directing the filing is entered, unless the order provides otherwise.

(e) DIRECT APPEAL TO COURT OF APPEALS. If leave to appeal an interlocutory judgment, order, or decree is required under 28 U.S.C. § 158(a)(3) and has not been granted by the appellate court, an authorization by the court of appeals of a direct appeal under 28 U.S.C. § 158(d)(2) satisfies the requirement for leave to appeal.

COMMITTEE NOTE

This rule is derived from former Rules 8001(b) and 8003 and F.R. App. P. 5. It retains the practice for interlocutory bankruptcy appeals of requiring a notice of appeal to be filed along with a motion for leave to appeal. Like current Rule 8003, it alters the timing of the docketing of the appeal in the appellate court.

Subdivision (a) requires a party seeking leave to appeal under 28 U.S.C. § 158(a)(3) to file with the bankruptcy clerk both a notice of appeal and a motion for leave to appeal.

Subdivision (b) prescribes the contents of the motion, retaining the

requirements of former Rule 8003(a). It also continues to allow another party to file a cross-motion or response to the appellant's motion. Because of the prompt docketing of the appeal under the current rule, the cross-motion or response must be filed in the appellate court, rather than in the bankruptcy court as the former rule required.

Subdivision (c) requires the bankruptcy clerk to transmit promptly the notice of appeal and the motion for leave to appeal to the appellate court. Upon receipt of the notice and the motion, the clerk of the appellate court must docket the appeal. Unless the appellate court orders otherwise, no oral argument will be held on the motion.

Subdivision (d) retains the provisions of former Rule 8003(c). It provides that if the appellant timely files a notice of appeal, but fails to file a motion for leave to appeal, the court can either direct that a motion be filed or treat the notice of appeal as the motion and either grant or deny leave.

Subdivision (e), like former Rule 8003(d), treats the authorization of a direct appeal by the court of appeals as a grant of leave to appeal under 28 U.S.C. § 158(a)(3) if the appellate court has not already granted leave to appeal. Thus a separate order granting leave to appeal is not required. If the court of appeals grants permission to appeal, the record must be assembled and transmitted in accordance with Rules 8009 and 8010.

Rule 8005. Election to Have Appeal Heard by District Court Instead of BAP

(a) FILING OF THE STATEMENT OF ELECTION. To elect under 28 U.S.C. § 158(c)(1) to have an appeal heard by the district court, a party must:

(1) submit a statement of election that conforms substantially to the appropriate Official Form; and

(2) file the statement within the time prescribed by 28 U.S.C. § 158(c)(1).

(b) TRANSFER OF THE APPEAL. Upon receiving an appellant's timely statement of election, the bankruptcy clerk must transmit all documents related to the appeal to the district court. Upon receiving a timely statement of election by a party other than the appellant, the BAP clerk must promptly transfer the appeal and any pending motions to the district court.

(c) DETERMINING THE VALIDITY OF AN ELECTION. No later than 14 days after the statement of election is filed, a party seeking a determination of the validity of an election must file a motion in the court in which the appeal is then pending.

(d) APPEAL BY LEAVE – TIMING OF ELECTION. If an appellant moves for leave to appeal under Rule 8004 and fails to file a separate notice of appeal concurrently with the filing of its

motion, the motion must be treated as if it were a notice of appeal for purposes of determining the timeliness of the filing of a statement of election.

COMMITTEE NOTE

This rule is derived from former Rule 8001(e), and it implements 28 U.S.C. § 158(c)(1).

As was required by the former rule, subdivision (a) requires an appellant that elects to have its appeal heard by a district court, rather than a BAP, to file with the bankruptcy clerk a statement of election when it files its notice of appeal. The statement must conform substantially to the appropriate Official Form. If a BAP has been established for appeals from the bankruptcy court and the appellant does not file a timely statement of election, any other party that elects to have the appeal heard by the district court must file a statement of election with the BAP clerk no later than 30 days after service of the notice of appeal.

Subdivision (b) requires the bankruptcy clerk to transmit all appeal documents to the district clerk if the appellant files a timely statement of election. If the appellant does not make that election, the bankruptcy clerk must transmit the appeal documents to the BAP clerk, and upon a timely election by any other party, the BAP clerk must promptly transfer the appeal to the district court.

Subdivision (c) provides a new procedure for the resolution of disputes regarding the validity of an election. A motion challenging the validity of an election must be filed no later than 14 days after the statement of election is filed. Nothing in this rule prevents a court from determining the validity of an election on its own motion.

Subdivision (d) provides that, in the case of an appeal by leave, if the appellant files a motion for leave to appeal but fails to file a notice of appeal, the filing and service of the motion will be treated for timing purposes under this rule as the filing and service of the notice of appeal.

Rule 8006. Certification of Direct Appeal to Court of Appeals

(a) EFFECTIVE DATE OF CERTIFICATION. Certification of a judgment, order, or decree of a bankruptcy court for direct review in a court of appeals under 28 U.S.C. § 158(d)(2) is effective when the following events have occurred:

(1) the certification has been filed;

(2) a timely appeal has been taken from the judgment, order, or decree in accordance with Rule 8003 or 8004; and

(3) the notice of appeal has become effective under Rule 8002.

(b) FILING OF CERTIFICATION. The certification required by 28 U.S.C. § 158(d)(2)(A) must be filed with the clerk of the court in which a matter is pending. For purposes of this rule, a matter is pending in the bankruptcy court for 30 days after the effective date of the first notice of appeal from the judgment, order, or decree for which direct review in the court of appeals is sought. A matter is pending in the appellate court thereafter.

(c) JOINT CERTIFICATION BY ALL APPELLANTS AND APPELLEES. A joint certification by all the appellants and appellees under 28 U.S.C. § 158(d)(2)(A) must be made by

executing the appropriate Official Form and filing it with the clerk of the court in which the matter is pending. The parties may supplement the certification with a short statement of the basis for the certification, which may include the information listed in Rule 8006(f)(3).

(d) COURT THAT MAY MAKE CERTIFICATION.

(1) Only the bankruptcy court may make a certification on request of parties or on its own motion while the matter is pending before it as provided in Rule 8006(b).

(2) Only the appellate court may make a certification on request of parties or on its own motion while the matter is pending before it as provided in Rule 8006(b).

(e) CERTIFICATION ON THE COURT'S OWN MOTION.

(1) A certification on the court's own motion under 28 U.S.C. § 158(d)(2)(A) must be set forth in a separate document. The clerk of the certifying court must serve this document on the parties in the manner required for service of a notice of appeal under Rule 8003(c)(1). The certification must be accompanied by an opinion or memorandum that contains the information required by Rule 8006(f)(3)(A)-(D).

(2) Within 14 days after the court's certification, a

party may file with the clerk of the certifying court a short supplemental statement regarding the merits of certification.

(f) CERTIFICATION BY THE COURT ON REQUEST.

(1) A request by a party for certification that a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists, or a request by a majority of the appellants and a majority of the appellees, must be filed with the clerk of the court in which the matter is pending within the time specified by 28 U.S.C. § 158(d)(2)(E).

(2) A request for certification must be served in the manner required for service of a notice of appeal under Rule 8003(c)(1).

(3) A request for certification must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the appeal should be allowed and is authorized by statute and rule, including why a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists; and

(E) a copy of the judgment, order, or decree that is the subject of the requested certification and any related opinion or memorandum.

(4) A party may file a response to a request for certification within 14 days after the request is served, or such other time as the court in which the matter is pending may allow. A party may file a cross-request for certification within 14 days after the request is served, or within 60 days after the entry of the judgment, order, or decree, whichever occurs first.

(5) The request, cross-request, and any response are not governed by Rule 9014 and are submitted without oral argument unless the court in which the matter is pending otherwise directs.

(6) A certification of an appeal under 28 U.S.C. § 158(d)(2) in response to a request must be made in a separate document served on the parties in the manner required for service of a notice of appeal under Rule 8003(c)(1).

(g) PROCEEDING IN THE COURT OF APPEALS FOLLOWING CERTIFICATION. A request for permission to take a direct appeal to the court of appeals under 28 U.S.C. § 158(d)(2) must be filed with the circuit clerk within 30 days after the date the certification becomes effective under subdivision (a).

COMMITTEE NOTE

This rule is derived from former Rule 8001(f), and it provides the procedures for the certification of a direct appeal of a judgment, order, or decree of a bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Once a case has been certified in the bankruptcy court or the appellate court for direct appeal and a request for permission to appeal has been timely filed, the Federal Rules of Appellate Procedure govern further proceedings in the court of appeals.

Subdivision (a), like the former rule, requires that an appeal be properly taken – now under Rule 8003 or 8004 – before a certification for direct review in the court of appeals takes effect. This rule requires the timely filing of a notice of appeal under Rule 8002 and accounts for the delayed effectiveness of a notice of appeal under the circumstances specified in Rule 8002. Normally a notice of appeal is effective when it is filed in the bankruptcy court. Rule 8002, however, delays the effectiveness of a notice of appeal when (1) it is filed after the announcement of a decision or order but prior to the entry of the judgment, order, or decree; or (2) it is filed after the announcement or entry of a judgment, order, or decree but before the bankruptcy court disposes of certain post-judgment motions.

When the bankruptcy court enters an interlocutory judgment, order, or decree that is appealable under 28 U.S.C. § 158(a)(3), certification for direct review in the court of appeals may take effect before the appellate court grants leave to appeal. The certification is effective when the actions specified in subdivision (a) have occurred. Rule 8004(e) provides that if the court of appeals grants permission to take a direct appeal before leave to appeal an interlocutory ruling has been granted, the authorization by the court of appeals is treated as the granting of leave to appeal.

Subdivision (b) provides that a certification must be filed in the court in which the matter is pending, as determined by this subdivision. This provision modifies the former rule. Because of the prompt docketing of appeals in the appellate court under Rules 8003 and 8004, a matter is deemed – for purposes of this rule only – to remain pending in the bankruptcy court for 30 days after the effective date of the notice of appeal. This provision will in appropriate cases give the bankruptcy judge, who will be familiar with the matter being appealed, an opportunity to decide whether certification for direct review is appropriate. Similarly, subdivision (d) provides that, when certification is made by the court, only the court in which the matter is then pending according to (b) may make the

certification.

Section 158(d)(2) provides three different ways in which an appeal may be certified for direct review. Implementing these options, the rule provides in subdivision (c) for the joint certification by all appellants and appellees, in subdivision (e) for the bankruptcy or appellate court's certification on its own motion, and in subdivision (f) for the bankruptcy or appellate court's certification on request of a party or of a majority of appellants and a majority of appellees.

Subdivision (g) requires that, once a certification for direct review has been made, a request to the court of appeals for permission to take a direct appeal to that court must be filed with the circuit clerk no later than 30 days after the effective date of the certification. Rule 6(c) of the Federal Rules of Appellate Procedure, which incorporates all of F.R. App. P. 5 except subdivision (a)(3), prescribes the procedure for requesting the permission of the court of appeals, and it governs proceedings that take place thereafter in that court.

Rule 8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

(a) INITIAL MOTION IN THE BANKRUPTCY COURT; TIME TO FILE.

(1) A party must ordinarily move first in the bankruptcy court for the following relief:

(A) a stay of a judgment, order, or decree of the bankruptcy court pending appeal;

(B) approval of a supersedeas bond;

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending; or

(D) the suspension or continuation of proceedings in a case or other relief permitted by Rule 8007(e).

(2) A motion for a type of relief specified in Rule 8007(a)(1) may be made in the bankruptcy court either before or after the filing of a notice of appeal of the judgment, order, or decree appealed from.

(b) MOTION IN THE APPELLATE COURT OR THE COURT OF APPEALS IN A DIRECT APPEAL; CONDITIONS ON RELIEF.

(1) A motion for a type of relief specified in Rule 8007(a)(1), or to vacate or modify an order of the bankruptcy court granting such relief, may be made in the appellate court or in the

court of appeals in a direct appeal to that court.

(2) The motion must:

(A) show that it would be impracticable to move first in the bankruptcy court if the moving party has not sought relief in the first instance in the bankruptcy court; or

(B) state the bankruptcy court's ruling and any reasons given by the bankruptcy court for its ruling.

(3) The motion must also include:

(A) the reasons for granting the relief requested and the pertinent facts;

(B) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(C) relevant parts of the record.

(4) The movant must give reasonable notice of the motion to all parties.

(c) FILING OF BOND OR OTHER SECURITY. The appellate court may condition relief under this rule on the filing of a bond or other appropriate security with the bankruptcy court.

(d) REQUIREMENT OF BOND FOR TRUSTEE OR THE UNITED STATES. When a trustee appeals, a bond or other appropriate security may be required. When an appeal is taken by the United States, its officer, or its agency or by direction of any

department of the federal government, a bond or other security is not required.

(e) CONTINUATION OF PROCEEDINGS IN THE BANKRUPTCY COURT. Notwithstanding Rule 7062 and subject to the authority of the appellate court or court of appeals, the bankruptcy court may:

(1) suspend or order the continuation of other proceedings in the case; or

(2) make any other appropriate orders during the pendency of an appeal on terms that protect the rights of all parties in interest.

COMMITTEE NOTE

This rule is derived from former Rule 8005 and F.R. App. P. 8. It now applies to direct appeals in courts of appeals.

Subdivision (a), like the former rule, requires a party ordinarily to seek relief pending an appeal in the bankruptcy court. Subdivision (a)(1) expands the list of relief enumerated in F.R. App. P. 8(a)(1) to reflect bankruptcy practice. It includes the suspension or continuation of other proceedings in the bankruptcy case, as authorized by subdivision (e). Subdivision (a)(2) clarifies that a motion for a stay pending appeal, approval of a supersedeas bond, or any other relief specified in paragraph (1) may be made in the bankruptcy court before or after the filing of a notice of appeal.

Subdivision (b) authorizes a party to seek the relief specified in (a)(1), or the vacation or modification of the granting of such relief, by means of a motion filed in the appellate court or the court of appeals. Accordingly, a notice of appeal need not be filed with respect to a bankruptcy court's order granting or denying such a motion. The motion for relief in the appellate court or court of appeals must state why it was impracticable to seek relief initially in the bankruptcy court, if a motion was

not filed there, or why the bankruptcy court denied the relief sought.

Subdivisions (c) and (d) retain the provisions of the former rule that permit the appellate court (and now the court of appeals) to condition the granting of relief on the posting of a bond by the appellant, except when that party is a federal government entity. Rule 9025 governs proceedings against sureties.

Rule 8008. Indicative Rulings

(a) RELIEF PENDING APPEAL. If a party files a timely motion in the bankruptcy court for relief that the bankruptcy court lacks authority to grant because of an appeal that has been docketed and is pending, the bankruptcy court may:

(1) defer consideration of the motion;

(2) deny the motion; or

(3) state that the court would grant the motion if the court in which the appeal is pending remands for that purpose, or state that the motion raises a substantial issue.

(b) NOTICE TO COURT IN WHICH THE APPEAL IS PENDING. If the bankruptcy court states that it would grant the motion, or that the motion raises a substantial issue, the movant must promptly notify the clerk of the court in which the appeal is pending.

(c) REMAND AFTER INDICATIVE RULING. If the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue and the appeal is pending in an appellate court, the appellate court may remand for further proceedings, but it retains jurisdiction unless it expressly dismisses the appeal. If the appellate court remands but retains jurisdiction, the parties must promptly notify the clerk of that court when the

bankruptcy court has decided the motion on remand.

COMMITTEE NOTE

This rule is an adaptation of F.R. Civ. P. 62.1 and F.R. App. P. 12.1. It provides a procedure for the issuance of an indicative ruling when a bankruptcy court determines that, because of a pending appeal, the court lacks jurisdiction to grant a request for relief that the court concludes is meritorious or raises a substantial issue. The rule, however, does not attempt to define the circumstances in which an appeal limits or defeats the bankruptcy court's authority to act in the face of a pending appeal. (Rule 8002(b) identifies motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before the last such motion is resolved. In these circumstances, the bankruptcy court has authority to resolve the motion without resorting to the indicative ruling procedure.)

Subdivision (b) requires the movant to notify the court in which an appeal is pending if the bankruptcy court states that it would grant the motion or that it raises a substantial issue. This provision applies to appeals pending in the district court, the BAP, or the court of appeals.

Federal Rules of Appellate Procedure 6 and 12.1 govern the procedure in the court of appeals following notification of the bankruptcy court's indicative ruling.

Subdivision (c) of this rule governs the procedure in the district court or BAP upon notification that the bankruptcy court has issued an indicative ruling. The appellate court may remand to the bankruptcy court for a ruling on the motion for relief. The appellate court may also remand all proceedings, thereby terminating the initial appeal, if it expressly states that it is dismissing the appeal. It should do so, however, only when the appellant has stated clearly its intention to abandon the appeal. Otherwise, the appellate court may remand for the purpose of ruling on the motion, while retaining jurisdiction to proceed with the appeal after the bankruptcy court rules, provided that the appeal is not then moot and any party wishes to proceed.

Rule 8009. Record and Issues on Appeal; Sealed Documents

(a) DESIGNATION AND COMPOSITION OF RECORD ON APPEAL; STATEMENT OF ISSUES ON APPEAL.

(1) *Appellant's Duties.* Within 14 days after:

- filing a notice of appeal as prescribed by Rule 8003(a);
- entry of an order granting leave to appeal; or
- entry of an order disposing of the last remaining motion of a kind listed in Rule 8002(b)(1);

whichever is later,

the appellant must file with the bankruptcy clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. A designation and statement served prematurely must be treated as served on the first day on which filing is timely under this paragraph.

(2) *Appellee's and Cross-Appellant's Duties.* Within 14 days after service of the appellant's designation and statement, the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross-appeal, the appellee as cross-appellant must file and serve a statement of the issues to be presented on the cross-appeal and a designation of additional items

to be included in the record.

(3) *Cross-Appellee's Duties*. Within 14 days after service of the cross-appellant's designation and statement, a cross-appellee may file and serve on the cross-appellant a designation of additional items to be included in the record.

(4) *Record on Appeal*. Subject to Rule 8009(d) and (e), the record on appeal must include the following:

- items designated by the parties as provided by paragraphs (1)-(3);
- the notice of appeal;
- the judgment, order, or decree being appealed;
- any order granting leave to appeal;
- any certification under 28 U.S.C. § 158(d)(2);
- any opinion, findings of fact, and conclusions of law of the court relating to the subject of the appeal, including transcripts of all oral rulings;
- any transcript ordered as prescribed by Rule 8009(b); and
- any statement required by Rule 8009(c).

Notwithstanding the parties' designations, the appellate court may order the inclusion of additional items from the record as part of the record on appeal.

(5) *Copies for the Bankruptcy Clerk.* If paper copies are needed, a party filing a designation of items to be included in the record must provide to the bankruptcy clerk a copy of any designated items that the bankruptcy clerk requests. If the party fails to provide the copy, the bankruptcy clerk must prepare the copy at the party's expense.

(b) TRANSCRIPT OF PROCEEDINGS.

(1) *Appellant's Duty*. Within the time period prescribed by Rule 8009(a)(1), the appellant must:

(A) order in writing from the reporter a transcript of any parts of the proceedings not already on file that the appellant considers necessary for the appeal, and file the order with the bankruptcy clerk; or

(B) file with the bankruptcy clerk a certificate stating that the appellant is not ordering a transcript.

(2) *Cross-Appellant's Duty*. Within 14 days after the appellant files with the bankruptcy clerk a copy of the transcript order or a certificate stating that appellant is not ordering a transcript, the appellee as cross-appellant must:

(A) order in writing from the reporter a transcript of any parts of the proceedings not ordered by appellant and not already on file that the cross-appellant considers necessary

for the appeal, and file a copy of the order with the bankruptcy clerk; or

(B) file with the bankruptcy clerk a certificate stating that the cross-appellant is not ordering a transcript.

(3) *Appellee's or Cross-Appellee's Right to Order*. Within 14 days after the appellant or cross-appellant files with the bankruptcy clerk a copy of a transcript order or certificate stating that a transcript will not be ordered, the appellee or cross-appellee may order in writing from the reporter a transcript of any parts of the proceedings not already ordered or on file that the appellee or cross-appellee considers necessary for the appeal. The order must be filed with the bankruptcy clerk.

(4) *Payment*. At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(5) *Unsupported Finding or Conclusion.* If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all testimony and copies of all exhibits relevant to that finding or conclusion.

(c) STATEMENT OF THE EVIDENCE WHEN A

TRANSCRIPT IS UNAVAILABLE. Within the time period prescribed by Rule 8009(a)(1), the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection, if a transcript of a hearing or trial is unavailable. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the bankruptcy court for settlement and approval. As settled and approved, the statement must be included by the bankruptcy clerk in the record on appeal.

(d) AGREED STATEMENT AS THE RECORD ON APPEAL. Instead of the record on appeal as defined in (a), the parties may prepare, sign, and submit to the bankruptcy court a statement of the case showing how the issues presented by the appeal arose and were decided in the bankruptcy court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is accurate, it, together with any additions that the bankruptcy court may consider necessary to a full presentation of the issues on appeal, must be approved by the bankruptcy court and certified to the appellate court as the record

on appeal. The bankruptcy clerk must then transmit it to the clerk of the appellate court within the time provided by Rule 8010. A copy of the agreed statement may be filed instead of the appendix required by Rule 8018(b).

(e) CORRECTION OR MODIFICATION OF THE RECORD.

(1) If any difference arises about whether the record truly discloses what occurred in the bankruptcy court, the difference must be submitted to and settled by that court and the record conformed accordingly. If an item has been improperly designated as part of the record on appeal, a party may move to strike the improperly designated item.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected, and a supplemental record may be certified and transmitted:

(A) on stipulation of the parties;

(B) by the bankruptcy court before or after the record has been forwarded; or

(C) by the appellate court.

(3) All other questions as to the form and content of the record must be presented to the appellate court.

(f) SEALED DOCUMENTS. A document placed under seal by the bankruptcy court may be designated as part of the record on appeal. In designating a sealed document, a party must identify it without revealing confidential or secret information. The bankruptcy clerk must not transmit a sealed document to the clerk of the appellate court as part of the transmission of the record. Instead, a party seeking to present a sealed document to the appellate court as part of the record on appeal must file a motion with the appellate court to accept the document under seal. If the motion is granted, the movant must notify the bankruptcy court of the ruling, and the bankruptcy clerk must promptly transmit the sealed document to the clerk of the appellate court.

(g) OTHER. All parties to an appeal must take any other action necessary to enable the bankruptcy clerk to assemble and transmit the record.

(h) DIRECT APPEALS TO COURT OF APPEALS. Rules 8009 and 8010 apply to appeals taken directly to the court of appeals under 28 U.S.C. § 158(d)(2). A reference in Rules 8009 and 8010 to the "appellate court" includes the court of appeals when it has authorized a direct appeal under 28 U.S.C. § 158(d)(2). In direct appeals to the court of appeals, the reference in Rule 8009(d) to Rule 8018(b) means F.R. App. P. 30.

COMMITTEE NOTE

This rule is derived from former Rule 8006 and F.R. App. P. 10 and 11(a). It retains the practice of former Rule 8006 of requiring the parties to designate items to be included in the record on appeal. In this respect the bankruptcy rule differs from the appellate rule. Among other things, F.R. App. P. 10(a) provides that the record on appeal consists of all the documents and exhibits filed in the case. This requirement would often be unworkable in a bankruptcy context because thousands of items might have been filed in the overall bankruptcy case.

Subdivision (a) provides the time period for the appellant's filing of a designation of items to be included in the record on appeal and a statement of the issues to be presented. It then provides for the designation of additional items by the appellee, cross-appellant, and cross-appellee, as well as for the cross-appellant's statement of the issues to be presented in its appeal. Subdivision (a)(4) prescribes the content of the record on appeal. Ordinarily, the bankruptcy clerk will not need to have paper copies of the designated items because the clerk will either transmit them to the appellate court electronically or otherwise make them available electronically. If the bankruptcy clerk requires a paper copy of some or all of the items designated as part of the record, the clerk may request the parties to provide the necessary copies, and the parties must comply with the request.

Subdivision (b) governs the process for ordering a complete or partial transcript of the bankruptcy court proceedings. In situations in which a transcript is unavailable, subdivision (c) allows for the parties' preparation of a statement of the evidence or proceedings, which must be approved by the bankruptcy court.

Subdivision (d) adopts the practice of F.R. App. P. 10(d) of permitting the parties to agree on a statement of the case in place of the record on appeal. The statement must show how the issues on appeal arose and were decided in the bankruptcy court. It must be approved by the bankruptcy court in order to be certified as the record on appeal.

Subdivision (e), modeled on F.R. App. P. 10(e), provides a procedure for correcting the record on appeal if an item is improperly designated, omitted, or misstated.

Subdivision (f) is a new provision that governs the handling of any document that remains sealed by the bankruptcy court and that a party wants to include in the record on appeal. The party must request the

appellate court to accept the document under seal, and that motion must be granted before the bankruptcy clerk may transmit the sealed document to the clerk of the appellate court.

Subdivision (g), which requires the parties' cooperation with the bankruptcy clerk in assembling and transmitting the record, retains the requirement of former Rule 8006, which was adapted from F.R. App. P. 11(a).

Subdivision (h) is new. It makes the provisions of this rule and Rule 8010 applicable to appeals taken directly to a court of appeals under 28 U.S.C. § 158(d)(2). See F.R. App. P. 6(c)(2)(A) and (B).

Rule 8010. Completion and Transmission of the Record

(a) DUTIES OF REPORTER TO PREPARE AND FILE TRANSCRIPT. The reporter must prepare and file a transcript as follows:

(1) Upon receiving an order for a transcript, the reporter must file in the bankruptcy court an acknowledgment of the request, the date it was received, and the date on which the reporter expects to have the transcript completed.

(2) Upon completing the transcript, the reporter must file it with the bankruptcy clerk, who will notify the clerk of the appellate court of the filing.

(3) If the transcript cannot be completed within 30 days of receipt of the order, the reporter must seek an extension of time from the bankruptcy clerk. The clerk must enter on the docket and notify the parties whether the extension is granted.

(4) If the reporter does not file the transcript within the time allowed, the bankruptcy clerk must notify the bankruptcy judge.

(b) DUTY OF BANKRUPTCY CLERK TO TRANSMIT RECORD.

(1) Subject to Rules 8009(f) and 8010(b)(5), when

the record is complete for purposes of appeal, the bankruptcy clerk must transmit to the clerk of the appellate court either the record or a notice of the availability of the record and the means of accessing it electronically.

(2) If there are multiple appeals from a judgment or order, the bankruptcy clerk must transmit a single record.

(3) Upon receiving the transmission of the record or notice of the availability of the record, the clerk of the appellate court must enter its receipt on the docket and give prompt notice to all parties to the appeal.

(4) If the appellate court directs that paper copies of the record be furnished, the clerk of that court must notify the appellant and, if the appellant fails to provide the copies, the bankruptcy clerk must prepare the copies at the appellant's expense.

(5) Subject to Rule 8010(c), if a motion for leave to appeal has been filed with the bankruptcy clerk under Rule 8004, the bankruptcy clerk must prepare and transmit the record only after the appellate court grants leave to appeal.

(c) RECORD FOR PRELIMINARY MOTION IN APPELLATE COURT. If, prior to the transmission of the record as prescribed by (b), a party moves in the appellate court for any of

the following relief:

- leave to appeal;
- dismissal;
- a stay pending appeal;
- approval of a supersedeas bond, or additional security on a bond or undertaking on appeal; or
- any other intermediate order –

the bankruptcy clerk, at the request of any party to the appeal, must transmit to the clerk of the appellate court any parts of the record designated by a party to the appeal or a notice of the availability of those parts and the means of accessing them electronically.

COMMITTEE NOTE

This rule is derived from former Rule 8007 and F.R. App. P 11.

Subdivision (a) generally retains the procedure of former Rule 8007(a) regarding the reporter's duty to prepare and file a transcript if one is requested by a party. It clarifies that the reporter must file with the bankruptcy court the acknowledgment of the request for a transcript and statement of the expected completion date, the completed transcript, and any request for an extension of time beyond 30 days for completion of the transcript. In courts that record courtroom proceedings electronically, the person who transcribes the recording of a proceeding is the reporter for purposes of this rule.

Subdivision (b) requires the bankruptcy clerk to transmit the record to the clerk of the appellate court when the record is complete and, in the case of appeals under 28 U.S.C. § 158(a)(3), leave to appeal has been granted. This transmission will be made electronically, either by sending the record itself or sending notice of how the record can be accessed

electronically. The appellate court may, however, require that a paper copy of some or all of the record be furnished, in which case the bankruptcy clerk will direct the appellant to provide the copies or will make the copies at the appellant's expense.

In a change from former Rule 8007(b), subdivision (b) of this rule no longer directs the clerk of the appellate court to docket the appeal upon receipt of the record from the bankruptcy clerk. Instead, under Rules 8003(d) and 8004(c), the clerk of the appellate court dockets the appeal upon receipt of the notice of appeal or, in the case of appeals under 28 U.S.C. § 158(a)(3), the notice of appeal and the motion for leave to appeal. Those documents are to be sent promptly to the appellate court by the bankruptcy clerk. Accordingly, by the time the clerk of the appellate court receives the record, the appeal will already be docketed in that court.

Subdivision (c) is derived from former Rule 8007(c) and F.R. App. P. 11(g) . It provides for the transmission of parts of the record designated by the parties for consideration by the appellate court in ruling on specified preliminary motions filed prior to the preparation and transmission of the record on appeal.

Rule 8009(h) makes this rule applicable to direct appeals to the court of appeals under 28 U.S.C. § 158(d)(2). It also provides that, for purposes of this rule and Rule 8009,"appellate court" includes the court of appeals when it has authorized a direct appeal under § 158(d)(2).

Rule 8011. Filing and Service; Signature

(a) FILING.

(1*) Filing with the Clerk.* A document required or permitted to be filed in the appellate court must be filed with the clerk of that court.

(2) *Filing: Method and Timeliness.*

(A) *In general*. Filing may be accomplished by transmission to the clerk of the appellate court. Except as provided in Rule 8011(a)(2)(B)(ii), (B)(iii), and (C), filing is timely only if the clerk receives the document within the time fixed for filing.

(B) *Brief or appendix*. A brief or appendix is timely filed if, on or before the last day for filing, it is:

(i) transmitted to the clerk of the appellate court in accordance with applicable electronic transmission procedures for the filing of documents in that court;

(ii) mailed to the clerk of the appellate court by first-class mail – or other class of mail that is at least as expeditious – postage prepaid, if the court's procedures permit or require a brief or appendix to be filed by mailing; or

(iii) dispatched to a third-party commercial carrier for delivery within three days to the clerk of the

appellate court, if the court's procedures permit or require a brief or appendix to be filed by commercial carrier.

(C) *Inmate filing*. A document filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(D) *Copies*. If a document is filed electronically in the appellate court, no paper copy is required. If a document is filed by mail or delivery to the appellate court, no additional copies are required The appellate court may, however, require by local rule or order in a particular case the filing or furnishing of a specified number of paper copies.

(3) *Filing a Motion with a Judge*. In appeals to the BAP, if a motion requests relief that may be granted by a single judge, any judge of that court may permit the motion to be filed with that judge. The judge must note the filing date on the motion and transmit it to the BAP clerk.

(4) *Clerk's Refusal of Documents*. The clerk of the appellate court must not refuse to accept for filing any document transmitted for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(b) SERVICE OF DOCUMENTS REQUIRED. Copies of all documents filed by any party and not required by these Part VIII rules to be served by the clerk of the appellate court must, at or before the time of filing, be served on all other parties to the appeal by the party making the filing or a person acting for that party. Service on a party represented by counsel must be made on counsel.

(c) MANNER OF SERVICE.

(1) Service must be made electronically if feasible and permitted by local procedure. If not, service may be made by any of the following methods:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) mail; or

(C) third-party commercial carrier for delivery within three days.

(2) When it is reasonable, considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the document with the appellate court.

(3) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service receives notice that the document was not transmitted successfully to the party attempted to be served.

(d) PROOF OF SERVICE.

(1) Documents presented for filing must contain either:

(A) an acknowledgment of service by the person served; or

(B) proof of service in the form of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) for each person served, the mail or electronic address, facsimile number, or the address of the place of delivery, as appropriate for the manner of service.

(2) The clerk of the appellate court may permit documents to be filed without acknowledgment or proof of service at the time of filing, but must require the acknowledgment or proof of service to be filed promptly thereafter.

(3) When a brief or appendix is filed by mailing, delivery, or electronic transmission in accordance with Rule 8011(a)(2)(B), the proof of service must also state the date and manner by which the document was filed.

(e) SIGNATURE. If filed electronically, every motion, response, reply, brief, or submission authorized by these Part VIII rules must include the electronic signature of the person filing the document or, if the person is represented, the electronic signature of counsel. The electronic signature must be provided by electronic means that are consistent with any technical standards that the Judicial Conference of the United States establishes. If filed in paper form, every motion, response, reply, brief, or submission authorized by these rules must be signed by the person filing the document or, if the person is represented, by counsel.

COMMITTEE NOTE

This rule is derived from former Rule 8008 and F.R. App. P. 25. It adopts some of the additional details of the appellate rule, and it provides greater recognition of the possibility of electronic filing and service.

Subdivision (a) governs the filing of documents in the appellate court. Consistent with other provisions of these Part VIII rules, subdivision (a)(2) requires electronic filing of documents, including briefs and appendices, unless the appellate court's procedures permit or require other methods of delivery to the court. An electronic filing is timely if it is received by the clerk of the appellate court within the time fixed for filing. No paper copies need be submitted when documents are filed electronically, unless the appellate court requires them.

Subdivision (a)(4) provides that the clerk of the appellate court may not refuse to accept a document for filing solely because its form does not comply with these rules or any local rule or practice. The appellate court may, however, direct the correction of any deficiency in any document that does not conform to the requirements of these rules or applicable local rule, and may prescribe such other relief as the court deems appropriate.

Subdivisions (b) and (c) address the service of documents in the appellate court. Except for documents that the clerk of the appellate court must serve, a party that makes a filing must serve copies of the document on all other parties to the appeal. Service on represented parties must be made on counsel. The methods of service are listed in subdivision (c). Electronic service is required when feasible and authorized by the appellate court.

Subdivision (d) retains the former rule's provisions regarding proof of service of a document filed in the appellate court. In addition it provides that, when service is made electronically, a certificate of service must state the mail or electronic address or facsimile number to which service was made.

Subdivision (e) is a new provision that requires an electronic signature of counsel or an unrepresented filer for documents that are filed electronically in the appellate court. The method of providing an electronic signature may be specified by a local court rule that is consistent with any standards established by the Judicial Conference of the United States. Paper copies of documents filed in the appellate court must bear an actual signature of counsel or the filer. By requiring a signature, subdivision (e) ensures that a readily identifiable attorney or party takes responsibility for every document that is filed.

Rule 8012. Corporate Disclosure Statement

(a) WHO MUST FILE. Any nongovernmental corporate party appearing in the appellate court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) TIME FOR FILING; SUPPLEMENTAL FILING. A party must file the statement prescribed by subdivision (a) with its principal brief or upon filing a motion, response, petition, or answer in the appellate court, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include a statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under subdivision (a) changes.

COMMITTEE NOTE

This rule is derived from F.R. App. P. 26.1. It requires the filing of corporate disclosure statements and supplemental statements in order to assist appellate court judges in determining whether they have interests that should cause recusal. If filed separately from a brief, motion, response, petition, or answer, the statement must be filed and served in accordance with Rule 8011. Under Rule 8015(a)(7)(B)(iii), the corporate disclosure statement is not included in calculating applicable word-count limitations.

TAB 8-C

Report on Rules and Forms Published for Public Comment (Oral Report)

TAB 8-D

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 26 - 27, 2011
Chicago, Illinois

(DRAFT MINUTES)

The following members attended the meeting:

Bankruptcy Judge Eugene R. Wedoff, Chair
Circuit Judge Sandra Segal Ikuta
District Judge Karen Caldwell
District Judge Robert James Jonker
District Judge Adalberto Jordan
District Judge William H. Pauley III
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Judith H. Wizmur
Professor Edward R. Morrison
Michael St. Patrick Baxter, Esquire
J. Christopher Kohn, Esquire
J. Michael Lamberth, Esquire
David A. Lander, Esquire

The following persons also attended the meeting:

District Judge Jean Hamilton (new member – term beginning 10/01/11)
Richardo I. Kilpatrick, Esquire (new member – term beginning 10/01/11)
Professor S. Elizabeth Gibson, reporter
Professor Troy McKenzie, assistant reporter
District Judge James A. Teilborg, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
District Judge Joan Humphrey Lefkow, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee)
Professor Daniel Coquillette, reporter of the Standing Committee
Peter G. McCabe, secretary of the Standing Committee
Patricia S. Ketchum, advisor to the Committee
Mark Redmiles, Deputy Director, Executive Office for U.S. Trustees (EOUST)
Nan Eitel, Associate General Counsel – Chapter 11, EOUST
Professor Douglas Baird (attended second day only)
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Jonathan Rose, Rules Committee Support Officer, Administrative Office of the U.S. Courts (Administrative Office)
Benjamin Robinson, Administrative Office
Jeffery Barr, Administrative Office
James H. Wannamaker, Administrative Office
Scott Myers, Administrative Office

Molly Johnson, Federal Judicial Center (FJC)
Beth Wiggins, FJC
Christopher Blickley, law clerk for the Hon. Eugene R. Wedoff
Kathy Byrne, Cooney & Conway
Joseph D. Frank, Frank/Gecker LLP

The following member was unable to attend the meeting:

John Rao, Esquire

Introductory Items

1. Greetings; Introduction of new committee members and Administrative Office staff, and acknowledgment of the service of outgoing committee members.

The Chair welcomed new members Judge Jean Hamilton (E.D. MO), and Richardo I. Kilpatrick, Esquire. He also introduced the Administrative Office's new Rules Committee Officer, Jonathon Rose, and its Deputy Rules Committee Officer, Benjamin Robinson.

The Chair thanked outgoing members Judge William Pauley and Michael Lamberth for their hard work and their many contributions to the Committee over the past six years.

2. Approval of minutes of San Francisco meeting of April 7 - 8, 2011.

The San Francisco minutes were approved with minor changes noted by Mr. Kohn.

3. Oral reports on meetings of other committees:

(A) June 2011 meeting of the Committee on Rules of Practice and Procedure.

The Chair said the Standing Committee approved all the Committee's action items.

(B) June 2010 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Lefkow reported that in light of current budget concerns, Congress is unlikely to approve the Judicial Conference's most recent request for over 50 additional bankruptcy judges. Consequently, the Bankruptcy Committee was focused on the need for extending the 28 temporary bankruptcy judgeship positions that were added in 2005 and are now set to expire. She explained that the expiration of a temporary bankruptcy judgeship position in a district means that the next retiring judge in that district cannot be replaced – unless the temporary position is extended. Because roughly two thirds of bankruptcy judges will be eligible for retirement in the next 10

years, a contraction of the total number of bankruptcy judges is likely if the temporary positions are not extended or made permanent.

Judge Lefkow said that the Bankruptcy Committee has approved a policy for courtroom sharing in new construction. She said the new policy would be triggered most often in larger courts, but would probably have no immediate effect because new construction is unlikely in the current budget environment.

(C) Meeting of the Advisory Committee on Civil Rules.

Judge Harris said that Civil Rules Committee will not meet until November, but that its Subcommittee on Discovery held a mini-conference on discovery preservation and sanctions issues in Dallas on September 9. He said no decisions were made at the mini-conference, but that much of the material discussed has been posted on the U.S. Courts' public website at: http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx.

(D) Meeting of the Advisory Committee on Evidence.

Judge Wizmur said the Evidence Committee will next meet in October and that there is nothing new to report since its last meeting. She said the restyled evidence rules have been approved and are in effect. She also noted that a proposed amendment to Evidence Rule 803(10) was out for publication. The amendment—to the hearsay exception for absence of public record or entry—is intended to address a constitutional infirmity in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009).

(E) Meeting of the Advisory Committee on Appellate Rules.

The Reporter said the Appellate Rules Committee will next meet in October. She noted that the Committee met jointly with the Appellate Rules Committee at its last meeting to discuss proposed changes to the bankruptcy appellate rules (the Part VIII Rules). She said that the Appellate Rules Committee was also proposing amendments to Appellate Rule 6 concerning bankruptcy appeals, including a new subdivision governing appeals taken directly to a court of appeals from a bankruptcy court. The proposed amendments are designed to coordinate with proposed changes to the Part VIII Rules.

(F) Bankruptcy CM/ECF Working Group and the CM/ECF NextGen Project.

Judge Perris reported on the work of the CM/ECF Working Group and the CM/ECF NextGen Project in the context of her report on the Forms Modernization Project at Agenda Item 7.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendation concerning Suggestion (11-BK-B) by Judge A. Benjamin Goldgar (Bankr. N.D. Ill.) to amend Rule 3002(a) to require secured creditors to file proofs of claim.

The Assistant Reporter said that Judge Goldgar suggests amending the Bankruptcy Rules to require secured creditors to file proofs of claim. According to Judge Goldgar, Rule 3002(a), which currently provides that "[a]n unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed . . . ," has led to confusion with respect to the need for secured creditors to file claims. Courts disagree on two related questions: (1) whether a secured creditor must file a proof of claim to participate in a chapter 13 plan, and (2) whether a nongovernmental secured creditor must file a proof of claim within 90 days of the meeting of creditors, as required by Rule 3002(c).

The Subcommittee discussed Judge Goldgar's suggestion and concluded that the issue deserves further study. Because the omission of secured creditors from Rule 3002(a) has the greatest impact in chapter 13 cases, the Subcommittee recommended that the Advisory Committee fold the suggestion into the ongoing project to draft a model chapter 13 plan and related amendments to the Bankruptcy Rules.

Although several members agreed that the failure of a secured creditor to file a proof of claims was most problematic in chapter 13, where the secured creditor may be barred from collecting anything during the course of the debtor's chapter 13 plan, others noted that there are issues in chapter 7 as well. And some members suggested a possible need for different approaches in chapters 7 and 13. **After additional discussion, the Chair asked the Subcommittee to consider a rule change that would apply to all chapters, allowing for the possibility that a model plan provision might be the best approach in chapter 13**

(B) Recommendation concerning Suggestion (10-BK-K) by Judge Paul Mannes to amend Rule 4004(c)(1)(J) to delay the entry of a discharge if a scheduled hearing on a reaffirmation agreement has not concluded.

Judge Harris said the Subcommittee concluded that the basis for the suggested amendment was the requirement that a hearing to disapprove a reaffirmation agreement based on undue hardship be concluded before the entry of the discharge. Judge Mannes would add explicit language to Rule 4004(c)(1) to permit the entry of the discharge to be delayed until after the conclusion of such a hearing.

The Subcommittee, however, did not see a need for the amendment. Rule 4004(c)(1)(K) already provides for a delay in the entry of a discharge if "a presumption has arisen under § 524(m)

that a reaffirmation agreement is an undue hardship." The exception is broader than the one proposed by Judge Mannes, and it encompasses the situation he apparently had in mind. If the court has scheduled a reaffirmation hearing that has to be concluded before the discharge is entered, it would be a situation in which a presumption of undue hardship has arisen. Thus under Rule 4004(c)(1)(K), the court could delay the entry of the discharge until after the conclusion of the hearing.

Although the Subcommittee did not recommend any changes to Rule 4004(c)(1) to address the issue raised by Judge Mannes, as described in the agenda materials, it did identify some wording problems that could be considered by the Advisory Committee at an appropriate time. It also identified a more immediate issue in Rule 4004(c)(1) concerning pending changes Rule 1007(b)(7).

The Committee has proposed an amendment to Rule 1007(b)(7) that would relieve the debtor of the obligation to file Official Form 23 if the course provider notifies the court directly that the debtor has completed the course. Subparagraph (H) of Rule 4004(c)(1), however, provides for delay in the entry of the discharge if "the debtor has not filed with the court a statement of completion of a course concerning personal financial management [Official Form 23] as required by Rule 1007(b)(7)." If the amendment to Rule 1007(b)(7) is adopted, Rule 4004(c)(1)(H) will need to be reworded so that it will not unnecessarily delay the discharge if the debtor's "failure" to file Official Form 23 is because the course provider has already notified the court that the debtor completed the required personal financial management course.

The Committee agreed that no amendment to Rule 4004(c) is needed to address Judge Mannes' suggestion, and asked the Subcommittee to report at the spring meeting on any needed changes to Subparagraph (c)(1)(H) to conform to the pending Rule 1007(b)(7) changes.

5. Joint Report by the Subcommittees on Business Issues and Consumer Issues.

> Recommendation concerning the opinion issued by the Ninth Circuit BAP in *Charlie Y., Inc. v. Carey* concerning the procedure for obtaining an allowance of attorney's fees in adversary proceedings.

Judge Harris explained that in March 2011 the Ninth Circuit Bankruptcy Appellate Panel issued an opinion—*Charlie Y., Inc. v. Carey (In re Carey),* 446 B.R. 384, 389 n.3 (2011)—in which it suggested that the Advisory Committee might want to address the absence of a provision in Rule 7054 concerning the procedure for obtaining an allowance of attorney's fees in adversary proceedings. Although Rule 7054(a) incorporates Civil Rule 54(a)-(c), it does not have a provision that parallels Civil Rule 54(d)(2), which governs the recovery of attorney's fees. Instead Rule 7008(b) provides that attorney fees must be pled as a claim in the complaint.

The Subcommittee recommended that Rule 7054 be amended to include much of the substance of Civil Rule 54(d)(2) and that the provision on attorney's fees in Rule 7008 be deleted. The amendments would clarify the procedure for seeking an award of attorney's fees and provide a nationally uniform procedure for doing so. They also would bring the bankruptcy rules into closer alignment with the civil rules and eliminate a trap for the unwary. Proposed language amending Rules 7054 and 7008 was included in the agenda materials.

A motion to recommend publication of amendments to Rules 7008 and 7054 as set forth in the agenda book, subject to review by the Style Subcommittee, was approved without objection.

6. Joint Reports by the Subcommittees on Consumer Issues and Forms.

(A) Recommendation on how and when to gather input on the new mortgage forms and the desirability of including a complete loan history on Form 10-A

Judge Harris gave the report. He said that in light of comments and testimony about the need for a full loan history as an attachment to the proof of claim, the Subcommittees considered how best to get feedback on the loan summary contained the newly approved attachment to the proof of claim form, B10 (Attachment A), as well as the two new proof of claim supplement forms, B10 (Supplement 1) and B10 (Supplement 2), that will be used in chapter 13 cases.

Because B10 (Attachment A), B10 (Supplement 1) and B10 (Supplement 2) will not be used until December 1, 2011, the Subcommittees suggested waiting to solicit feedback until parties have developed some experience with the new forms. They recommended, therefore, holding a mini-conference next fall, possibly in conjunction with the fall 2012 Committee meeting. The Subcommittees favored a mini-conference as the best option for promoting a back-and-forth exchange of ideas and concerns about the new forms from interested parties, but recognized that in the current budget environment cost may be a factor.

The Committee agreed that a mini-conference would provide the most effective feedback on the new proof of claim attachment and supplements and recommended such a conference in the fall, with targeted conference calls as a fallback position if funding is not available for the mini-conference. As a cost-saving measure, members agreed that the proposed mini-conference should overlap if possible with the fall Committee meeting.

(B) Oral report on consideration of a form or model chapter 13 plan.

Judge Perris reported that the working group has reviewed many of the model plans in existence, and it has requested information from judges around the country about the idea of a national model plan. The Assistant Reporter said there have been 40-50 responses – mostly in support of the project (though many supporters anticipate negative responses once a detailed plan is produced for comment). Some responses objected to the idea of a national plan, arguing that it is

more important that chapter 13 plans be flexible and allow for local practice, but that was a minority position.

Judge Perris said that the working group has gone through common plan provisions and has preliminary ideas on what should be in the plan. Many choices remain, however, such as whether claims dealt with in the plan must also be addressed through the claims allowance process, whether payments can or should be made outside the plan, and whether payments are made from a pot, or by percentage. The working group will also consider whether changes in the rules are needed to make a national chapter 13 plan easier to implement. For example, a change to Rule 3001 that requires secured creditors to file a proof of claim could also explain when and how to resolve differences (if any) in the amount listed on the proof of claim and the amount listed in the debtor's plan.

Judge Perris said that now that the working group has considered what should be in a plan, the next step will be to draft a model plan and consider possible rule changes. She said that in the spring the group may recommend rule changes and talk about seeking pre-publication comment from interested groups.

(C) Recommendation concerning the amendment of section 109(h)(1) of the Bankruptcy Code by the Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, regarding the timing of credit counseling for individual debtors.

The Assistant Reporter said the Subcommittees discussed a technical change to 11 U.S.C. § 109(h)(1) that, read literally, could allow an individual debtor to complete the "pre-petition" credit counseling briefing after the petition is filed, so long as it is completed on the same day the petition is filed. The Subcommittees considered whether the rules and forms should be revised to account for this possibility.

The Assistant Reporter said that prior to this technical change, many courts concluded that statutory requirement to complete credit counseling briefing during the 180-day period "preceding the date of filing" meant that the requirement could not be satisfied on the same calendar day the petition is filed. Other courts concluded that same-day completion satisfied the statutory language so long as the course is completed before the petition is filed. The Assistant Reporter said that the purpose of the technical change was presumably to address the statutory ambiguity that led to the split in the case law, but that the "fix" seems to have introduced a new ambiguity. Because there is no case law on the new language, the Subcommittees recommended waiting before revising the rules or forms.

Committee members agreed that, because the forms and rules anticipate that the credit counseling course will be taken before the petition is filed, no change is needed unless case law develops that allows debtors to take the course post-petition but on the day of filing. **Members agreed to await further developments in the case law.**

(D) Oral report on revising Official Form 22A and advising the courts to rescind Interim Rule 1007-I if the temporary exclusion from the means test for Reservists and National Guard members provided in Public Law No. 110-438 is no longer available after December 18, 2011.

The Chair explained that the temporary exclusion from the means test for Reservists and National Guard members provided in Public Law No. 110-438 is scheduled to expire on December 18, 2011. Mr. Wannamaker reported, however, that a four-year extension of the exclusion has just been voted out of the House of Representative's Judiciary Committee, and that an extension seems uncontroversial. The Chair added that no action was necessary at this time, but if the proposed extension fails to pass before December 18, the Committee will have to consider whether to revise Official Form 22A to remove the exclusion as an option. If Congress seems likely to extend the exclusion but has not done so by December 18, one possible option will be to leave the form unchanged, but notify courts, the public, and the EOUST that the option may be temporarily unavailable.

7. Report of the Subcommittee on Forms.

Review of the draft individual forms developed by the Bankruptcy Forms Modernization Project and the question whether the rules should be amended to establish standards regarding signatures by parties in the electronic context in which the courts currently operate.

Judge Perris reported on the most recent updates to CM/ECF, including program changes needed to implement the new amendment and supplements to the proof of claim (B10-A, B10-S1, and B10-S2) that are scheduled to go into effect December 1, 2011.

She said that functional requirements phase of CM/ECF NextGen should be complete by February 12, 2012. The next step (Phase 2) will be to take all of the requirements, code them and put them into effect. Rollout will probably be in iterations and modules, with the first module coming out as early as the end of 2013. She said the plan was to use as much code as possible from existing CM/ECF and not lose any existing functionality. It will probably take four to six years to fully implement.

Mr. Waldron spoke briefly on the pro se pathfinder project. He said the pro se pathfinder was an electronic filing module for unrepresented debtors being developed by NextGen and tested in current CM/ECF pilot courts. Mr. Waldron and Judge Perris noted that one obstacle being examined in the pro se pathfinder that has also come up in the Forms Modernization Project was whether electronic signatures are enforceable under the bankruptcy code and existing rules. Mr. Waldron said for the initial testing phases, the pro se pathfinder will require users to submit a hard copy signature page that incorporates by reference the debtor's signature from the various official forms. He believes, however, that standards establishing the acceptability of electronic signatures in some form would greatly facilitate electronic filings. **The Chair referred the electronic**

signature issue to the Technology and Cross Boarder Subcommittee for consideration of any needed rule changes.

For the benefit of new members, Judge Perris gave an overview of the Forms Modernization Project (FMP). She explained that the FMP was an undertaking by the Forms Subcommittee to systematically revise all official bankruptcy forms to make them more understandable and thereby improve the accuracy of the data collected and to improve the interface between the forms and technology. She said the FMP surveyed judges, clerks, case trustees, United States trustees, law professors and members of the bankruptcy bar for comments on what does and does not work in the current forms. Armed with that information and drafting help from a contractor with experience in revising tax forms, census forms and other government and corporate forms, the FMP began the drafting process.

The guiding principles behind redrafting the forms were to help debtors understand the bankruptcy process and what they are being asked by using conversational language, instructions, and context to explain the process and show the timing of the case. In general, the idea was to improve the accuracy of the information provided by the debtors, and help them better understand what they are attesting to under penalty of perjury. Judge Perris said that the FMP has solicited and is reviewing pre-publication comments from a number of external users, including the National Association of Chapter Thirteen Trustees, the National Association of Bankruptcy Trustees, the National Association of Consumer Bankruptcy Attorneys and a group of attorneys from the Executive Office for United States trustees.

Judge Perris said that the conversational language and length of the forms has led to negative feedback from some reviewers. Some criticized the FMP forms as making bankruptcy look too easy, and thereby encouraging pro se filings. Others thought the length of the forms would make them harder for regular users to sort through and would increase attorney costs because it would take longer for counsel to review the forms. Conversely, some thought the project was a laudable achievement and while the conversational tone might seem more inviting, it was also more understandable. Moreover, the many warnings and amount of detail requested would make the need for counsel plainer, which would tend to lower the likelihood of pro se filings.

One important concept that emerged throughout the drafting process and through comments received on early drafts of the FMP forms is that input (what debtors see and sign) and output (what judges, clerks, trustees, creditors, and others need to review) are different things. Judge Perris said that because the FMP forms were designed to maximize the accuracy of input, they were not necessarily great for output and the comments reflected that fact. She said the issue was particularly complicated because different users are interested in different output. Judges, for example, often want to compare income and expense information on the schedules and means test forms in the context of requests for fee waivers. Case trustees, on the other hand, might be most interested in comparing exemptions and any security interests as they pertain to particular properties.

Judge Perris said the need for customized output is where NextGen and the FMP intersect. Reviewers were generally excited about the prospect that NextGen would collect the data contained in the forms and that user-created reports could be generated from the form data. If the Judicial Conference allowed non-judiciary users, such as case trustees and other parties in the case, to generate reports, the length of the new forms would much less of an issue to those users.

Judge Perris asked the Advisory Committee for guidance on a number of issues going forward. She asked whether members agreed that the conversational language would lead to more pro se filings, and, if so, whether more formal language should be reintroduced. No member favored reintroducing more formal language, and several members questioned the assumption that conversational language would lead to more pro se filings. With respect to increased costs, one member thought that if the length of the forms required more attorney time to review debtor responses, it was probably time well spent and could eliminate problems that would otherwise come up later in the case.

Next, Judge Perris asked for comments on the increased length of the FMP forms, which she said is generally attributable to the increased use of close-ended questions and integrated instructions. She said that the current forms, which consist of mostly open-ended questions and separate instructions, provide a model for shortening, but that comments solicited at the beginning of the Forms Modernization Project were that debtors don't seem to read separate instructions and often don't answer open-ended questions. Several members voiced support of the increased use of integrated instructions and close-ended questions, and they suggested that the issue of length would recede after the forms are used for a while.

Judge Perris suggested three approaches to publication of the new forms: (1) publish the whole individual filing package at once; (2) publish a subset of the individual package – the fee waiver and installment payment forms, and the income, expense and means test forms; or (3) radically change the current direction.

She said the FMP leadership favored publishing only the subset in 2012 for at least two reasons. First, under the normal publication process, any forms published in 2012 will be ready to go into effect on December 1, 2013. Although parts of CM/ECF NextGen may be operational by December 2013, no computer code has been written yet, and different constituents will have their own ideas of what should be implemented first. Second, given that the appellate rules package is also on track to be published in 2012, publishing just a subset of the forms would be less of a shock to the bankruptcy community and may allow for more constructive feedback.

The Chair supported an incremental approach, and said he thought the Committee already began that approach when it published the mortgage-related attachment and supplements to the proof of claim form last year, as all three of the new forms followed the formatting and some of the plain language style of FMP forms. Several other members agreed with the Chair, and **the Committee voted in favor of an incremental approach and recommended working with NextGen to get it implemented as soon as possible.**

8. Report of the Subcommittee on Business Issues.

(A) Consideration of Suggestion 10-BK-H by the Institute for Legal Reform for a rule and form to promote greater transparency in the operation of trusts established under section 524(g) of the Bankruptcy Code.

The Assistant Reporter explained that the Institute for Legal Reform ("ILR") proposed an amendment to the Bankruptcy Rules to require "greater transparency in the operation of [asbestos] trusts established under 11 U.S.C. § 524(g)." Under the ILR proposal, asbestos trusts would file with bankruptcy courts quarterly reports describing in detail each demand for payment received during the reporting period. The proposal would also require trusts to disclose to third parties information regarding demands for payment by asbestos claimants if that information is relevant to litigation in any state or federal court.

Committee members recognized that the ILR suggestion addressed an important matter deserving careful attention, but members also expressed concern that the proposal presented difficult jurisdictional questions and would not serve a sufficiently bankruptcy-specific purpose. Because it would apply to trust operations after confirmation of a plan, members noted that the proposal might exceed the limited scope of post-confirmation bankruptcy jurisdiction. Members also stated that the proposal, although possibly beneficial to parties in nonbankruptcy tort litigation, was of limited use in administering bankruptcy cases and therefore might be beyond the proper reach of the Bankruptcy Rules.

Members discussed comments received from interested individuals and groups (practicing lawyers, asbestos trusts, representatives of future asbestos claimants, bar organizations, and the ILR) who responded to a request from the Chair for input on the ILR suggestion. As detailed in the agenda materials, some responses supported the proposal, but most urged the Committee not to adopt it, and many questioned whether the bankruptcy rules are the appropriate mechanism to address the concerns raised by the ILR.

After discussing the ILR suggestion and considering all the responses, the Committee adopted the recommendation of the Business Subcommittee that further action not be taken on ILR's suggestion.

(B) Recommendation concerning Suggestion (10-BK-J) by Judge Linda Riegle to amend Rule 1014(b).

The Reporter described Judge Reigle's suggestion. Bankruptcy Rule 1014(b) governs the procedure for determining where cases will proceed if petitions are filed in different districts by, against, or regarding the same debtor or related debtors. The rule provides that, upon motion, the court in which the first-filed petition is pending may determine – in the interest of justice or for the convenience of the parties – the district or districts in which the cases will proceed. Except as

otherwise ordered by that court, proceedings in the cases in the other districts "shall be stayed by the courts in which they have been filed" until the first court makes its determination.

Judge Riegle expressed concern that there is no mechanism for alerting the first court that a subsequent case has been filed. She also said that the rule seems to prevent the second court from transferring venue on its own motion, and she offered suggested amendments that would address the problems.

For reasons detailed in the agenda materials, the Subcommittee concluded that the amendments suggested by Judge Riegle are unnecessary. As currently drafted, the rule provides a solution for a problem the venue statute leaves open: which of the judges of the different districts has authority to transfer venue. The rule avoids possible conflicting rulings by giving the authority to decide venue to the judge in the first filed case. The Subcommittee was not concerned that the judge in the first case would not become aware of the second case because generally some party in the second case will have an interest in bringing that case to the attention of the judge in the first case.

The Subcommittee did conclude, however, that Rule 1014(b) should be amended to state clearly when the stay of any subsequently filed case goes into effect. Rather than selecting either the filing of a subsequent petition or the filing of a motion under the rule as the event that commences the stay, the Subcommittee recommended that an order by the first court be required. That requirement would eliminate any uncertainty about whether a stay was in effect. It would also permit a judicial determination – not just a party's assertion – that the rule applied and that a stay of other proceedings was needed. The Subcommittee also recommended a number of stylistic changes that could be made to the rule if the Committee decided to recommend a change clarifying when the stay in the second case goes into effect. **After a short discussion, the Committee agreed with the Subcommittee, and recommended publishing for comment the proposed changes, as set forth in the agenda materials, in the summer of 2012.**

(C) Recommendation concerning Suggestion 09-BK-J by Judge William F. Stone, Jr., for rules and an Official Form to govern applications for the payment of administrative expenses.

Judge Wizmur gave the report. She said that Judge Stone's suggestion was referred to the Subcommittee at the spring 2010 Committee meeting. The Subcommittee recommended at the fall 2010 meeting that additional information be gathered to determine whether there is a need for a national rule or official form for the allowance of administrative expenses. Accepting that recommendation, the Committee asked Molly Johnson and Beth Wiggins of the Federal Judicial Center ("FJC") to survey bankruptcy clerks and business bankruptcy attorneys regarding local rules and practices currently governing applications for administrative expenses, whether there have been problems with existing practices, and whether a national rule and form is needed.

Ms. Johnson reported on the survey results at the spring 2011 Advisory Committee meeting. After disucssing the results, the Committee asked the Subcommittee to consider the range of possible responses to Judge Stone's suggestion and to recommend whether one or more national rules and/or forms for the allowance of administrative expenses should be developed.

During a conference call on June 15, the Subcommittee reviewed the survey results and noted that there did not seem to be a major outcry for a rule or national form. Clerks saw virtually no problem at all, and, of over 2000 ABA business bankruptcy committee attorneys surveyed, only about five percent responded. Although approximately two-thirds of the 94 business attorney respondents thought a national rule could be helpful, few thought there was a problem with the local procedures that have developed over the past thirty years. Because the lack of a national rule for paying administrative expenses did not seem to be a problem, the Subcommittee recommended that Judge Stone's suggestion not be pursued further.

After a short discussion, the Committee accepted the Subcommittee's recommendation that there is no need for a national rule or form governing the payment of administrative expenses.

9. Report of the Subcommittee on Privacy, Public Access, and Appeals.

Oral report on the revision of the Part VIII rules.

For the benefit of the new members, Judge Pauley and the Reporter recapped the progress of the of the Subcommittee's efforts over the past several years to review Part VIII of the Bankruptcy Rules, which govern appeals from bankruptcy courts to district courts and bankruptcy appellate panels. They explained that an early goal of the revision project was to bring the bankruptcy appellate rules more in line the Federal Rules of Appellate Procedure (FRAP) and that comment on early drafts emphasized the need to incorporate into the rules greater use of the electronic transmission, filing, and storage of electronic documents.

Over the summer, a working group composed of several members of the Advisory Committee, its reporters, a member of the Appellate Rules Advisory Committee, and that committee's reporter met to thoroughly review and edit the Part VIII draft and accompanying committee notes. The Reporter explained that the working group recommended a number of changes and that during this meeting she would go through approximately one half of the package, explain drafting choices, and ask for comments. She said the Subcommittee would present the second half of the draft at the spring 2012 meeting, with a recommendation that the entire package be published for public comment in August 2012.

The Reporter said that a number of general drafting decisions reflected reoccurring issues throughout the Part VIII draft. For example, the working group concluded that references to appellate "court" are more common than appellate "judge" and therefor adopted an "appellate court" convention. And, although the bankruptcy rules historically favor "shall" over "must," the

working group concluded that using "must" would make the Part VIII rules more consistent with FRAP. The working group also decided that internal references to "this rule" should be avoided if possible, and instead chose to restate the entire rule or refer to the rule subsection. **The Committee supported the working group's drafting conventions.**

The Committee reviewed Rules 8001 – 8012, and recommended publishing them for public comment in August 2012, with changes described below and subject to the additional revision of a few rules and review by the style consultant.

Rule 8001: Subsection (b) deleted; new (b) "Definitions" added with BAP and Appellate Court as (b)(1) and (b)(2) respectively; "Transmit" changed from subsection (e) to (b)(3) and the Subcommittee was asked to add language clarifying that the court must allow reasonable exceptions to the preference for electronic filing.

Rule 8002: no amendments suggested.

Rule 8003: changed "district court or a BAP" references to "appellate court;" at line 34, added "*sending it* to the pro se party's last known address;" made several other stylistic changes.

Rule 8004: changed "district court or a BAP" references to "appellate court" and the Reporter said she would search the draft and replace similar instances; Judge Pauley suggested changes to the committee note describing subsection (d) to be added after the meeting.

Rule 8005: one member suggested changing "the BAP clerk" at line 16 to "a BAP clerk."

Rule 8006: several changes to the committee note to explain the effective date of the certification and to deal with interlocutory judgments (interlocutory judgment language to come from strike-out material at lines 13-20 of Rule 8004).

Rule 8007: revisions to paragraph one of the committee note.

Rule 8008: no changes.

Rule 8009: bullet points added to 8009(a)(1); line 103, change "judge" to "court"; line 106, change "truthful" to "accurate."

Rule 8010: one member noted that requiring the court reporter to file a transcript in the BAP or district court would be problematic in practice because bankruptcy court reporters typically do not have authority to file electronically in those courts. District courts and BAPs generally can, however, view the lower court's docket, so it probably makes more sense to allow all filings to occur on the bankruptcy court's docket. **A motion to allow all filings by the reporter on the bankruptcy court docket passed and the Subcommittee agreed to revise Rule 8010 accordingly for consideration in the spring. Other stylistic changes also approved.**

Rule 8011: Subsection (2)(D) deleted, other stylistic changes made and **a motion to strike the reference to Rule 9037 and consider at the next meeting which 9000 rules apply carried without objection**.

Rule 8012: stylistic changes.

10. Report of the Subcommittee on Attorney Conduct and Health Care.

(A) Recommendation on Suggestion 10-BK-M by the States' Association of Bankruptcy Attorneys for a uniform rule for national admissions and local counsel requirements for governmental entities.

The Reporter said that the States' Association of Bankruptcy Attorneys ("SABA") has proposed a rule that would allow attorneys admitted to practice in any U.S. bankruptcy court, and in good standing in all jurisdictions in which they are a members of the bar, to practice in one or more cases in any other bankruptcy court, subject to certain conditions. Under the proposal, eligible attorneys would not be required to associate with local counsel for these representations.

Although the suggestion proposed a national admission rule applicable to all attorneys, the Subcommittee focused primarily on an alternative proposal limited to government attorneys. The Reporter said that subcommittee members recognized the difficulties that strict admission and local counsel requirements pose for state and local government attorneys who are required to participate in an out-of-state bankruptcy cases, but they questioned whether the matters raised by SABA are ones appropriately addressed by the Advisory Committee. Many bankruptcy court admission rules are governed by the district court, and the idea of a national federal bar or national admission standards to federal courts has been advocated for many years without success because both the Advisory Committee and the Standing Committee have been reluctant to override local admission requirements.

After discussing the suggestion, the Committee accepted the recommendation by the Subcommittee to take no further action.

(B) Recommendation on Suggestion 10-BK-N by Judge Thomas Waldrep concerning a new rule to provide greater transparency in the process for retaining counsel to creditors' committees.

The Assistant Reporter said that the issue arose in the context of *In re United Building Products*, 2010 WL 4642046 (Bankr. D. Del. Nov. 4, 2010). In that case the court denied the application to retain a law firm as committee counsel because it had engaged in solicitation for that position through the use of a surrogate to obtain the proxies of creditors. He said the Subcommittee was aware of EOUST interest in *United Building Products*, and suggested awaiting responsive action from the EOUST.

Mr. Redmiles said that the formation of committees was under review by the EOUST well before the *United Building Products* came out, and Ms. Eitel said that the EOUST has developed new internal guidance and template forms for U.S. trustees that explain how to form committees. She said the biggest problem with respect to committee formation was getting creditors to serve at all, and the new guidelines address that, but they will also reveal proxy votes and should address the concerns raised in *United Building Products.*

In response to a question from the Chair, Ms. Eitel said the EOUST does not think any amendments to the Bankruptcy Rules are needed to address the *United Building Products* situation, and that Bankruptcy Rule 2014 is sufficiently broad to do its job. **After further discussion, the Committee decided to take no action on Judge Waldrep's suggestion at this time.**

11. Oral Report of the Subcommittee on Technology and Cross Border Insolvency.

No report.

Discussion Items

12. Oral report on the impact of the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

The Assistant Reporter gave a brief overview of *Stern* and then explained that there appear to be two immediate practical considerations. He said that in light of some of the language in *Stern* there was concern about whether parties can consent to entry of a final judgment by a bankruptcy judge in matters that are not "constitutionally" core matters. In his opinion, consent is still valid in part because the court made a point of demonstrating that there was no consent with respect to the issue before it, the counterclaim. On the other hand, the court found that consent to final judgment on the proof of claim itself was explicit, and it had no concerns with bankruptcy judge entering a final judgment on that matter. In addition, the Court made clear that its ruling was a narrow one. The Assistant Reporter said the consent issue is a concern to many commentors, however, and a panel of the Fifth Circuit is already seeking briefing on whether *Stern* upsets long-standing case law that consent to a final judgment by a magistrate judge is valid.

A second issue raised by *Stern* is how best to deal with the apparent statutory gap that now exists in 28 U.S.C. § 157. Although *Stern*-like counterclaims were found to be "core" in sense of the statute, the Court made clear that the bankruptcy court could not enter a final judgment on that matter constitutionally, at least not without the consent of the parties. Section 157 has no guidance, however, on a bankruptcy court's power to decide a matter that is core under the statute, but is not core under the Constitution. The Assistant Reporter said it makes sense to treat the *Stern*-like matters as if they are non-core but otherwise related to the bankruptcy case under Section 157(c),

such that the bankruptcy judge can enter a final judgment if consent is given by both parties; otherwise, the court can enter a report and recommendation.

The Assistant Reporter said he did not think there was anything the Committee could do at this point but see how courts interpret the opinion. **A motion to take no action at this time, and to monitor case law, passed without opposition.**

13. Oral report on the change in how the IRS allocates internet services in its "National Standards and Local Standards," which are used by debtors to complete Official Forms 22A and 22C.

The Chair said that effective October 3, 2011, the IRS will remove internet service expenses from its "Other Necessary Expense" category, and incorporate that expense into its Local Standards for Housing and Utilities. He said the change will affect Official Forms 22A and 22C. Both forms currently direct the debtor to deduct as an expense the actual amount paid for telecommunication services, including "internet service." OF 22A, Line 32; OF 22C, Line 37. Because of the IRS change, the forms will double count internet expenses if any are reported on telecommunication lines of the forms.

Mr. Redmiles gave members some background information about how the IRS change came about and why the notice to the EOUST and the Committee was too short to revise the forms this year. Members agreed that any needed revisions to the forms would be technical and would not require publication, so that once revised they could go into effect in December 2012. **The Chair asked the Consumer Subcommittee to suggest changes for December 1, 2012 that the Committee could consider at its spring meeting.**

14. Suggestion 11-BK-C by Wendell J. Sherk to amend Official Forms 22A and 22C to allow debtors with a below-median income to file shortened versions of the forms.

The Chair said that the FMP had incorporated the suggestion into its proposed drafts of 22A and 22C, which the Committee will consider at its spring meeting.

15. Suggestion 11-BK-D by Sabrina L. McKinney to amend Official Form B10 to provide a space for designating the amount of a general unsecured claim.

Afer the meeing the suggestion was referred to the Consumer and Forms Subcommittees, along with a suggestion by Mr. Kilpatrick that B10 also address leases and executory contracts.

16. Suggestion 11-BK-E by Judge A. Thomas Small to amend Rules 7016 and 8001 to permit parties to agree that their appellate options will be limited to no more than one appeal or to no appeal at all.

Some members expressed concerns about how knowledge of the waiver might affect the bankruptcy judge's consideration. **Referred to the Appellate Rules Subcommittee.**

17. Suggestion 11-BK-F by Chief Judge Peter W. Bowie to amend Rules 7012, 7004(e), and 9006(f) to provide that the deadline for responding runs from the date of service of a summons, rather than the date of issuance.

Referred to the Business and Consumer Subcommittees.

Information Items

18. Oral report on the status of bankruptcy-related legislation.

Mr. Wannamaker reported on pending bankruptcy legislation. He said HR 2192, introduced on 6-15-11 by Representative Steve Cohen, was of particular interest because it would extend the temporary exclusion from the means-test in Public Law No. 110-438 for certain Reservists and National Guard members for an additional four years. Mr. Wannamaker said the bill was referred to the Judiciary Committee on June 15, 2011, and was voted out of committee last week. [See also, Agenda Item 6-D].

19. Oral update on opinions interpreting section 521(i) of the Bankruptcy Code.

The Reporter said that courts continue to say that despite the automatic dismissal language in 11 U.S.C. § 521(i), a bankruptcy court retains discretion not to dismiss, at least if it appears that the debtor is trying to use the provision to avoid court scrutiny.

20. *Bull Pen*:

A. Proposed new Rule 8007.1 and the proposed amendment to Rule 9024 (indicative rulings), approved at September 2008 meeting.

B. Amendment to Official Form 23 to implement the proposed amendment to Rule 1007(b)(7), which would authorize providers of postpetition personal financial courses to notify the court directly of a debtor's completion of the course, approved at September 2010 meeting.

C. Amendment to Box 7 on Official Form 10 to add a reminder to attach the new mortgage attachment form under proposed Rule 3001(c), (Official Form 10 (Attachment A)), and the statement concerning open-end or revolving consumer credit agreements under proposed Rule 3001(c)(3)(A), approved at April 2011 meeting.

No comments were made on matters in the bull pen.

21. Rules Docket.

Mr. Wannamaker said the rules docket was meant to help the Advisory Committee keep track of its work, and that he would appreciate any comments.

22. Future meetings:

Spring 2012 meeting, March 29 - 30, 2012, at the Arizona Biltmore http://www.arizonabiltmore.com in Phoenix, Arizona. Possible locations for the fall 2012 meeting.

The Chair said he was considering Portland, Oregon for the fall, 2012 meeting, but that he was open to suggestions.

23. New business.

No new business.

24. Adjourn.

Respectfully submitted,

Scott Myers

TAB 9

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

To: **Hon. Mark R. Kravitz, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Reena Raggi, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Report of the Advisory Committee on Criminal Rules**

Date: **December 12, 2011**

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Committee") met on October 31, 2011, in St. Louis, Missouri, and took action on a number of proposals. The Draft Minutes are attached.

This report presents one action item: the Committee's recommendation that a proposed amendment to Rule 16 (discovery and inspection) be approved and transmitted to the Judicial Conference as a technical and conforming amendment. The report also discusses several information items, including the formation of a subcommittee to study a proposal to amend Rule 6(e) to provide for the disclosure of grand jury materials of historical interest.

II. Action Item—Rule 16

Earlier this year, Judge Lee Rosenthal brought the decision in *United States v. Rudolph*, 224 F.R.D. 503 (N.D. Ala. 2004), to the Committee's attention. The *Rudolph* court identified what it characterized as a "scrivener's error" in the restyling of Rule 16 concerning the protection afforded to government work product. The purpose of the proposed amendment is to clarify that the 2002 restyling of the rule made no change in the protection afforded to government work product.

Prior to restyling in 2002, Rule 16(a)(1)(C) required the government to allow the defendant to inspect and copy "books, papers, [and] documents" material to his defense. Rule 16(a)(2), however, stated that except as provided by certain enumerated subparagraphs–not including Rule 16(a)(1)(C)–Rule 16(a) did not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government. Reading these two provisions together, the Supreme Court concluded that "a defendant may examine documents material to his defense, but, under Rule 16(a)(2), he may not examine Government work product." *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

With one exception not relevant here, the 2002 restyling of Rule 16 was intended to work no substantive change. Nevertheless, because restyled Rule 16(a)(2) eliminated the enumerated subparagraphs of its successor and contained no express exception for the materials previously covered by Rule 16(a)(1)(C) (redesignated as subparagraph (a)(1)(E)), some courts have been urged to construe the restyled rule as eliminating protection for government work product.

Courts have uniformly declined to construe the restyling changes to Rule 16(a)(2) to effect a substantive alteration in the scope of protection previously afforded to government work product by that Rule. Correctly recognizing that restyling was intended to effect no substantive change, courts have invoked the doctrine of the scrivener's error to excuse confusion caused by the elimination of the enumerated subparagraphs from the restyled rules. *See, e.g.*, *United States v. Rudolph*, 224 F.R.D. 503, 504-11 (N.D. Ala. 2004), and *United States v. Fort*, 472 F.3d 1106 (9th Cir. 2007) (adopting the *Rudolph* court's analysis).

Although the courts have employed the doctrine of the scrivener's error to read Rule 16 to avoid an unintended change in the protection afforded to work product, the Advisory Committee concluded that the Rule itself should be amended so that courts do not have to resort to a doctrine that is invoked only to correct drafting errors. By restoring the enumerated subparagraphs, the amendment makes it clear that a defendant's pretrial access to books, papers, and documents under Rule 16(a)(1)(E) remains subject to the limitations imposed by Rule 16(a)(2).

The Committee voted unanimously to approve the proposed amendment,[1] and agreed to review and vote on proposed note language by email. Note language proposed by the chair and reporters was subsequently approved by the Committee in an email vote.

The Committee discussed the question whether the proposed amendment could be treated as a technical and conforming change, which would not require publication for public comment. Members generally agreed that the expedited procedure for technical amendments would be appropriate because the change was of a technical nature, merely correcting what courts have correctly treated as a "scrivener's error." But one member expressed concern that without the opportunity for a full notice and comment period there might be a mistaken view that the change was depriving defendants of a right to disclosure under the present rule. Finally, members acknowledged that whether a rule change is technical and conforming, or sufficiently substantive to require a full public comment period, would be determined by the Standing Committee.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 16 be approved as a technical and conforming amendment and submitted to the Judicial Conference.

III. Information Items

The Committee acknowledged the service of and said farewell to its former chair, Judge Richard C. Tallman, and it welcomed new member Carol Brook, Executive Director of the Illinois Federal Defender Program, new Standing Committee Liaison Judge Marilyn L. Huff, and new Clerk of Court Representative James N. Hatten of the Northern District of Georgia.

The Committee discussed a proposal from Attorney General Eric H. Holder, Jr. to amend Rule 6(e)'s provisions regarding grand jury secrecy to authorize the disclosure of historically significant grand jury materials after a suitable period of years, subject to various limitations and procedural protections. The Attorney General's letter called the Committee's attention to the recent decision granting access to President Richard Nixon's testimony before the Watergate grand jury, *In re Petition of Kutler*, No. 10-547, 2011 WL 3211516 (D. D.C. July 29, 2011), and to earlier decisions that granted access to grand jury materials in cases involving the espionage investigation of Alger Hiss, the espionage indictment of Julius and Ethel Rosenberg, and the jury-tampering indictment of Jimmy Hoffa. These decisions relied on the courts' inherent authority, rather than Rule 6(e), to authorize disclosure in special circumstances. In the Attorney General's view, however, the courts have no inherent authority to authorize disclosures not provided for under Rule 6. The proposed amendment is intended to recognize the public's interest in gaining access to records casting light on important historical events while continuing to protect grand jury secrecy.

[1]Following the meeting, at the suggestion of the Advisory Committee's style consultant, Professor Kimble, the cross reference to "Rule 16(2)(1)(A), (B), (C), (D), (F), and (G)" was revised to read "Rule 16(2)(1)(A)-(D), (F), and (G)."

After discussion, the Committee concluded that the proposal warranted in depth consideration. Accordingly, Judge Raggi appointed a subcommittee, chaired by Judge John Keenan, to study the proposal and report at the April meeting.

The Advisory Committee also considered four proposals for amendments received from judges and members of the public. After discussion, the Committee decided not to move forward to full consideration of these proposals.

The Committee discussed a suggestion from Judge Robert Jones (D. Or.) to eliminate or reduce the number of peremptory challenges afforded by Rule 24(b). The number of peremptory challenges has remained unchanged for more than sixty-five years, and two previous efforts to reduce the number of peremptory challenges were controversial and ultimately unsuccessful. Committee members expressed the view that it was not clear that reducing the number of peremptory challenges would yield significant cost savings, and all agreed that any change would generate substantial controversy. In light of these concerns, the Committee voted unanimously to take no further action to pursue this suggestion.

The Committee also discussed a suggestion forwarded by the Administrative Office on behalf of the Forms Working Group, which is composed of judges and clerks of court. The Working Group suggested that the Advisory Committee consider amending Rule 17 to eliminate the requirement that criminal subpoenas include the seal of the court. Several committee members expressed the view that the presence of the seal on criminal subpoenas was very helpful, causing subpoenas to be taken more seriously and increasing the likelihood of compliance . Mr. Hatten, the Committee's clerk of court representative, stated that imposing the court's seal was neither time consuming nor costly. The Committee voted unanimously not to pursue the suggestion that the rule be amended to eliminate the court's seal.

The Committee also received, and decided not to pursue, two suggested amendments proposed by members of the public. Professor Carrie Leonetti proposed an amendment to allow the district courts to grant pretrial judgments of acquittal. Mr. Eric Deleon suggested that Rule 6 be amended to spell out the precise wording of the oath or affirmation to be administered by the grand jury foreperson. Neither of these proposals garnered support, and the Committee voted unanimously not to pursue them.

Judge Raggi informed the Committee that she had met with Judge Paul Friedman, Chair of the Judicial Conference's Benchbook Committee, to follow up on the Committee's suggestion that the *Brady*/*Giglio* decisions be addressed in some form of a "best practices section" of the benchbook. The meeting was constructive, and Judge Raggi has been invited to participate in additional conference calls and discussions.

TAB 9-A

Rule 16. Discovery and Inspection

(a) Government's Disclosure.

* * * * *

(2) Information Not Subject to Disclosure. Except as permitted by Rule 16(a)(1)(A)-(D), (F), and (G) ~~Except as Rule 16(a)(1) provides otherwise~~, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prospective government witnesses except as provided in 18 U.S.C. § 3500.

Committee Note

Subdivision (a). Paragraph (a)(2) is amended to clarify that the 2002 restyling of Rule 16 did not change the protection afforded to government work product.

Prior to restyling in 2002, Rule 16(a)(1)(C) required the government to allow the defendant to inspect and copy "books, papers, [and] documents" material to his defense. Rule 16(a)(2), however, stated that except as provided by certain enumerated subparagraphs–not including Rule 16(a)(1)(C)–Rule 16(a) did not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government. Reading these two provisions together, the Supreme Court concluded that "a defendant may examine documents material

to his defense, but, under Rule 16(a)(2), he may not examine Government work product." *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

With one exception not relevant here, the 2002 restyling of Rule 16 was intended to work no substantive change. Nevertheless, because restyled Rule 16(a)(2) eliminated the enumerated subparagraphs of its successor and contained no express exception for the materials previously covered by Rule 16(a)(1)(C) (redesignated as subparagraph (a)(1)(E)), some courts have been urged to construe the restyled rule as eliminating protection for government work product.

Courts have uniformly declined to construe the restyling changes to Rule 16(a)(2) to effect a substantive alteration in the scope of protection previously afforded to government work product by that Rule. Correctly recognizing that restyling was intended to effect no substantive change, courts have invoked the doctrine of the scrivener's error to excuse confusion caused by the elimination of the enumerated subparagraphs from the restyled rules. *See, e.g.*, *United States v. Rudolph*, 224 F.R.D. 503, 504-11 (N.D. Ala. 2004), and *United States v. Fort*, 472 F.3d 1106, 1110 n. 2 (9th Cir. 2007) (adopting the *Rudolph* court's analysis).

By restoring the enumerated subparagraphs, the amendment makes it clear that a defendant's pretrial access to books, papers, and documents under Rule 16(a)(1)(E) remains subject to the limitations imposed by Rule 16(a)(2).

TAB 9-B

ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
October 31, 2011, St. Louis, Missouri

I. ATTENDANCE AND PRELIMINARY MATTERS

The Criminal Rules Advisory Committee ("Committee") met in St. Louis, Missouri on October 31, 2011. The following persons were in attendance:

Judge Reena Raggi, Chair
Judge Richard C. Tallman, Outgoing Chair
Rachel Brill, Esq.
Carol A. Brook, Esq.
Leo P. Cunningham, Esq.
Kathleen Felton, Esq.
Chief Justice David E. Gilbertson
James N. Hatten, Esq.
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Judge Donald W. Molloy
Jonathan Wroblewski, Esq.
Judge James B. Zagel
Professor Sara Sun Beale, Reporter
Professor Nancy King, Reporter

Judge Mark R. Kravitz, Standing Committee Incoming Chair (by telephone)
Judge Marilyn L. Huff, Standing Committee Liaison

The following persons were absent:

Judge Morrison C. England, Jr.
Judge Timothy R. Rice
Assistant Attorney General Lanny A. Breuer

The following persons were present to support the Committee:

Andrea L. Kuperman, Esq. (by telephone)
Laural L. Hooper, Esq.
Peter G. McCabe, Esq.
Jonathan C. Rose, Esq.
Benjamin J. Robinson, Esq.

The following invited observer was present:

Peter Goldberger, Esq.
(on behalf of the National Association of Criminal Defense Lawyers).

II. REVIEW AND APPROVAL OF MINUTES OF APRIL 2011 MEETING

A motion to approve the minutes of the April 2011 Committee meeting in Portland, Oregon, having been moved and seconded,

The Committee unanimously approved the April 2011 meeting minutes by voice vote.

III. CHAIR'S REMARKS

Judge Raggi introduced (1) new member Carol Brook, the Executive Director of the Federal Defender Program for the Northern District of Illinois; (2) new Standing Committee liaison, Judge Marilyn Huff, of the Southern District of California; (3) new clerk representative, James Hatten, Clerk of Court for the Northern District of Georgia; and (4) invited observer Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers. Judge Raggi noted that, at the suggestion of Standing Committee Chair, Judge Lee Rosenthal, and following the practice of the Civil Rules Committee, the Committee had extended invitations to various criminal defense organizations to send observers to Committee meetings.

On behalf of the entire Committee, Judge Raggi thanked Judge Richard C. Tallman, the outgoing Chair, for his outstanding leadership over four years that had brought many challenging issues before the Committee requiring a number of amendments to the Criminal Rules.

Judge Raggi noted that Committee member, Judge Keenan, had recently been honored by the New York County Lawyers Association with the Edward Weinfeld Award for his outstanding service on the bench.

Judge Raggi reported on cost containment efforts by the Judicial Conference of the United States, noting that few affected the Committee, whose mandate did not involve making decisions about the expenditure of public monies.

Judge Raggi also reported on her communications with members of the Federal Judicial Center's Benchbook Committee, and particularly with Benchbook Committee Chair Judge Irma Gonzalez, and member, Judge Paul Friedman, regarding the Criminal Rules Committee's referral to the Benchbook Committee of the question of "best practices" regarding the government's *Brady/Giglio* disclosure obligations. Judge Raggi advised that the Benchbook Committee has invited her continued participation as it pursues the matter.

IV. CRIMINAL RULES ACTIONS

A. Proposed Amendments Approved by the Supreme Court for Transmittal to Congress

Judge Raggi reported that the following proposed amendments, approved by the Supreme Court and transmitted to Congress, will take effect on December 1, 2011, unless Congress acts to the contrary:

1. Rule 1. Scope: Definitions. Proposed amendment broadens the definition of telephone.

2. Rule 3. The Complaint. Proposed amendment allows complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1.

3. Rule 4. Arrest Warrant or Summons on a Complaint. Proposed amendment adopting concept of "duplicate original," allowing submission of return by reliable electronic means, and authorizing issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.

4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. Proposed amendment provides comprehensive procedure for issuance of complaints, warrants, or summons.

5. Rule 6. The Grand Jury. Proposed amendment authorizing grand jury return to be taken by video teleconference.

6. Rule 9. Arrest Warrant or Summons. Proposed amendment authorizing issuance of warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.

7. Rule 32. Sentencing and Judgment. Proposed technical and conforming amendment concerning information in presentence report.

8. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. Proposed amendment authorizing use of video teleconferencing.

9. Rule 41. Search and Seizure. Proposed amendment authorizing request for warrants to be made by telephone or other reliable electronic means as provided by Rule 4.1 and return of warrant and inventory by reliable electronic means, and proposed technical and conforming amendment deleting obsolescent references to calendar days.

10. Rule 43. Defendant's Presence. Proposed amendment authorizing defendant to participate in misdemeanor proceedings by video teleconference.

11. Rule 49. Serving and Filing Papers. Proposed amendment authorizing papers to be filed, signed, and verified by electronic means.

B. Proposed Amendments Approved by the Judicial Conference

Judge Raggi reported that the following amendments were approved by the Judicial Conference at its September 2011 meeting, and will be transmitted to the Supreme Court for review:

1. Rule 5. Initial Appearance. Proposed amendment providing that initial appearance for extradited defendants shall take place in the district in which defendant was charged, and that non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

2. Rule 58. Initial Appearance. Proposed amendment providing that in petty offense and misdemeanor cases non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

3. Rule 15. Depositions. Proposed amendment authorizing deposition in foreign countries when the defendant is not physically present if court makes case-specific findings regarding (1) the importance of the witness's testimony, (2) the likelihood that the witness's attendance at trial cannot be obtained, and (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States.

4. Rule 37, Indicative Rulings: Proposed amendment authorizing district court to make indicative rulings when it lacks authority to grant belief because appeal has been docketed.

With respect to Rule 15, Professor Beale reminded the Committee that, to the extent the Supreme Court's return of an earlier version of the amended rule without comment signaled possible Sixth Amendment concerns about the admissibility of evidence obtained under the rule, the amendment had been revised so that Subsection (f) now stated explicitly that an order authorizing a deposition to be taken under the rule does not determine its admissibility.

C. Proposed Amendments Approved by the Standing Committee for Publication in August 2011

Judge Raggi reported that the following proposed amendments had been approved by the Standing Committee for publication:

1. Rule 11. Advice re Immigration Consequences of Guilty Plea; Advice re Sex Offender Registration and Notification Consequences of Guilty Plea.

2. Rule 12(b). Clarifying Motions that Must Be Made Before Trial; Addresses Consequences of Motion; Provides Rule 52 Does Not Apply To Consideration Of Untimely Motion.

3. Rule 34, Arresting Judgment: Conforming Changes To Implement Amendment to Rule 12.

With respect to Rule 12(b), Judge Raggi advised that questions had been raised in the Standing Committee regarding the rule's treatment of double jeopardy claims and its possible diminution of district court discretion to entertain late motions before trial. The Standing Committee approved publication, concluding that it would be useful to learn whether such concerns were expressed in public comments.

V. NEW PROPOSALS FOR DISCUSSION

A. Rule 16(a)(2), Pretrial Disclosure of Government Work Product

Judge Raggi reported that Standing Committee Chair, Judge Lee Rosenthal, had called attention to *United States v. Rudolph*, 224 F.R.D. 503 (N.D. Ala. 2004), which identified "scrivener's error" in Rule 16(a)(2), in that restyled language could be construed to eliminate protection from discovery expressly provided to government work product under the predecessor rule. A report prepared by Professors Beale and King agreed with *Rudolph*'s assessment and noted that a total of four courts had now concluded that the revised rule contained a scrivener's error. The reporters provided the Committee with language for a possible amendment.

Judge Raggi invited discussion, noting that the matter did not require subcommittee consideration but could be addressed by the Committee as a whole. There was general agreement with one member's observation that the error "is an embarrassment to the Committee" and warranted prompt correction. A motion being made and seconded to correct the scrivener's error by amending the rule as recommended by the reporters,

The Committee unanimously voted to amend Rule 16(a)(2) by adopting the language suggested by the reporters and to transmit the matter to the Standing Committee.

Judge Raggi asked Professors Beale and King to draft a Committee Note to accompany the rule amendment, which Committee members would review by email. Mr. McCabe observed that because the proposed amendment only corrected scrivener's error, it could probably be reviewed under the Standing Committee's expedited procedures, which permit technical and conforming changes to rules to be adopted without a hearing period and public comment.

B. Rule 17, Seal of Court on Subpoenas

The Administrative Office's "Forms Working Group" asked the Committee to consider amending Rule 17(a) to eliminate the requirement that criminal subpoenas bear the seal of the issuing court. The Working Group noted the elimination of a parallel sealing requirement in the civil rules.

Judge Raggi and Judge Kravitz observed that there may be reasons for treating civil and criminal subpoenas differently to ensure compliance with the latter.

Judge Raggi asked Mr. Hatten to comment on the burden for clerks' offices in having to place seals on criminal subpoenas. Mr. Hatten stated that the seal requirement imposes no burden.

Discussion revealed the Committee's agreement that the seal of the court on a criminal subpoena served the useful purpose of ensuring compliance.

A motion having been made and seconded,

The Committee unanimously decided by voice vote not to amend Rule 17(a).

C. Rule 6, Grand Jury Oaths

A citizen request from Eric DeLeon asked the Committee to amend Rule 6(c) to state the oath required in grand jury proceedings or to provide a cross-reference to the text of that oath. Judge Raggi and the Committee reporters recommended no action but invited discussion. The Committee agreed that there was no problem requiring rule amendment. A motion having been made and seconded,

The Committee unanimously decided by voice vote not to pursue an amendment to Rule 6(c).

D. Rule 24(b), Peremptory Challenges

Judge Raggi reported that Judge Robert E. Jones of the District of Oregon suggested that an amendment to Rule 24(b) to eliminate or reduce peremptory challenges would reduce costs for the judiciary. Members generally agreed that any cost reduction from such an amendment would be minimal. Such a significant change in the jury selection process would, however, undoubtedly prompt strong opposition from the bar. No member of the Committee voicing support for the proposal, and a motion having been made and seconded,

The Committee unanimously decided by voice vote not to amend Rule 24(b).

E. Rule 29, Summary Judgment Prior to Trial

The Committee considered a proposal from Assistant Professor Carrie Leonetti of the University of Oregon School of Law to amend the criminal rules to authorize pre-trial awards of summary judgment to the defense. Upon review of a report prepared by Professor King that recommended against the proposal, no member of the Committee voiced support for an amendment. A motion having been made and seconded,

The Committee unanimously decided by voice vote not to amend Rule 29.

F. Rule 6(e), Historically Significant Grand Jury Materials

After the October agenda materials were distributed, the Committee received a proposal from Attorney General Eric H. Holder, Jr. to amend Rule 6(e) to establish procedures for the disclosure of historically significant grand jury materials, which some courts have done by invoking "inherent authority." At Judge Raggi's request, Kathleen Felton summarized the views expressed in the Attorney General's letter.

Judge Raggi formed a subcommittee to study the matter and report to the full Committee at its April meeting. Judge Keenan agreed to chair the subcommittee. Judges Malloy and Zagel, Professor Leipold, Ms. Brook, Ms. Felton, Mr. Wroblewski and Mr. Hatten will also serve, with Professors Beale and King providing legal support.

G. Rule 17.1, Pretrial Procedures

Judge Lawson noted that, at the Portland meeting, he had suggested that Rule 17.1 be amended to provide for certain matters, notably *Brady/Giglio* compliance, to be discussed at a pre-trial conference. He indicated that he had sent a draft proposal to Judge Tallman and wished to have the matter put on the next meeting agenda. In response to Judge Raggi's inquiry as to whether the content of pre-trial conferences should really be the subject of a rule (rather than best practices), Judge Lawson indicated that the Committee's recent *Brady/Giglio* discussions persuaded him that the matter was important enough to deserve a rule. Judge Raggi asked Professors Beale and King to secure a copy of Judge Lawson's proposal and to prepare a report for the Committee so that the matter could be discussed at the next meeting.

VI. INFORMATION ITEMS

A. Status Report on Legislation Affecting Criminal Rules

Mr. Rose reported that no legislation was anticipated that would affect the Criminal Rules.

B. Electronic Discovery

Judge Raggi observed that district courts were increasingly confronting questions about electronic discovery in criminal cases, a matter that might merit future Committee consideration. Because the Civil Rules Committee has already done considerable work in the area, Judge Raggi stated that she would discuss the subject with Judge Kravitz and Ed Cooper, the Civil Rules Committee reporter, to benefit from their experience.

Mr. Wroblewski advised that the Justice Department was working with Federal Defenders, the Administrative Office, and the Federal Judicial Center to develop protocols for discovery of electronically stored information and drafts were expected in six to eight months. Judge Raggi asked if these protocols might be shared with the Committee for possible discussion as an information item.

C. Inter-Committee Forms Subcommittee

Judge Lawson and Professor King, the Committee's representatives to the Inter-Committee Forms Subcommittee, reported that the Subcommittee was exploring the possibility of a unified approach to forms among the five advisory rules committees and, thus, sought information as to each advisory committee's practices.

Professor King advised that until 1983, Criminal Rule 58 encouraged the use of some 27 appended forms pertaining to complaints, indictments, informations, etc. In 1983, Rule 58 and the appended forms were abrogated, so that no mention of forms is made in the criminal rules. (There are, however, forms appended to the rules governing habeas procedures under 28 U.S.C. §§ 2254 and 2255.) Rather, a Forms Working Group in the Administrative Office develops forms for use in criminal proceedings. Judge Lawson asked whether this Forms Working Group should be added to the Inter-Committee Forms Subcommittee. Judge Raggi stated that, because there have been no complaints about forms produced by the AO's Forms Working Group, there appeared to be no reason for the Committee to seek to reassume a role in that area. Accordingly, Judge Lawson and Professor King will report to the Forms Subcommittee that the Criminal Rules Committee, in contrast to other advisory committees, has played little role in the process of developing and revising criminal forms and that the assignment of that responsibility to the AO Forms Working Group seems satisfactory.

VII. SUBCOMMITTEE ASSIGNMENTS

Judge Raggi identified the Committee's active subcommittees as follows:

A. Rule 12 Subcommittee

Judge England, Chair
Judge Lawson
Professor Leipold
Ms. Brook
Ms. Felton
Mr. Wroblewski

B. Rule 11 Subcommittee

Judge Rice, Chair
Judge Lawson
Judge Malloy
Professor Leipold
Mr. Cunningham
Ms. Felton
Mr. Wroblewski

C. Rule 6(e) Subcommittee

Judge Keenan, Chair
Judge Malloy

Judge Zagel
Professor Leipold
Ms. Brook
Ms. Felton
Mr. Wroblewski
Mr. Hatten

All other subcommittees having completed their work, Judge Raggi declared them dissolved.

VIII. FUTURE MEETINGS AND HEARINGS

Judge Raggi announced that the Committee will next meet on Monday and Tuesday, April 23-24, 2012, at the Federal Courthouse in San Francisco, California. The autumn 2012 meeting will be held on Thursday and Friday, October 18-19, 2012, at the Administrative Office in Washington, D.C.

Hearing dates on criminal rules published for public comment are scheduled for January 6, 2012, in Phoenix, Arizona, in conjunction with the Standing Committee meeting; and February 12, 2012, in Washington, D.C. Members will be advised in advance as to whether public comments are received necessitating one or both of these hearings.

Before the Committee adjourned, Judge Tallman expressed his thanks to all members and staff for the honor of serving as chair, congratulated Judge Raggi on her appointment, and promised his continued support for the work of the Committee.

All business being concluded, Judge Raggi adjourned the meeting.

TAB 10

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

DATE: December 7, 2011

TO: Judge Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

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

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on October 13 and 14, 2011, in Atlanta, Georgia. The Committee discussed a number of existing items, including a proposal to amend Appellate Rule 6 in tandem with proposed amendments to Part VIII of the Bankruptcy Rules. It considered the possibility of a future project to amend the Appellate Rules in the light of electronic filing. And it removed two items from its agenda.

This report does not present any action items for consideration at the Standing Committee's January meeting. In particular, the proposed amendment to Appellate Rule 6 is not yet ready to be presented for approval for publication; rather, the Committee's goal is to finalize that proposal at its April 2012 meeting. But the Committee would welcome the opportunity to obtain the Standing Committee's views on the Rule 6 proposal at the January meeting.

Accordingly, Part II of this report discusses that proposal. Part III describes the Committee's initial discussion of possible amendments to the Appellate Rules in the light of electronic filing. Part IV covers other matters.

The Committee has scheduled its next meeting for April 12 and 13, 2012, in Washington, DC.

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

II. The proposal to amend Appellate Rule 6

As discussed in the report of the Bankruptcy Rules Committee, that Committee is working on a proposal to amend Part VIII of the Bankruptcy Rules – the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel ("BAP"). In connection with that project, the Bankruptcy and Appellate Rules Committees have been working together on a proposal to amend Appellate Rule 6 in order to ensure that Rule 6 dovetails with the amended Part VIII Rules. The Appellate Rules Committee is indebted to the Bankruptcy Rules Committee for its expert input on the Rule 6 proposal. The proposed amendments to Rule 6 would update that Rule's cross-references to the Bankruptcy Part VIII Rules; would amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling; would add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2); and would revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal.[2] The first and second of these changes are straightforward, and for that reason are not discussed in this report. The third and fourth of these changes pose drafting challenges; these changes are discussed in Parts II.A and II.B below. II.C sums up by considering whether, despite the challenges discussed in II.A and II.B, it is still worthwhile to proceed with the Rule 6 proposal during the current rulemaking cycle.

A. Proposed new Rule 6(c) concerning direct bankruptcy appeals

The Appellate Rules do not currently address in explicit terms the topic of permissive direct appeals from a bankruptcy court to a court of appeals under 28 U.S.C. § 158(d)(2). At the time that Section 158(d)(2) came into being as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), the Appellate Rules Committee decided that no immediate action was necessary with respect to the Appellate Rules, because BAPCPA put in place interim procedures for administering the new direct appeals mechanism. Some of those interim procedures were subsequently displaced by the 2008 addition of subdivision (f) in

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

[2] A sketch of the proposed amendments to Appellate Rule 6 is enclosed with this report.

Bankruptcy Rule 8001. The Committee now considers it worthwhile to specify in more detail the way in which the Appellate Rules apply to direct appeals under Section 158(d)(2), and the Bankruptcy Rules Committee's Part VIII project provides an opportune context in which to obtain input and guidance on this question.

Proposed Appellate Rule 6(c) would treat the record on direct appeals differently than existing Rule 6(b) treats the record on bankruptcy appeals from a district court or BAP. Rule 6(b) contains a streamlined procedure for redesignating and forwarding the record on appeal, because in the appeals covered by Rule 6(b) the appellate record will already have been compiled for purposes of the appeal to the district court or the BAP. In the context of a direct appeal, the record will generally require compilation from scratch. The closest model for the compilation and transmission of the bankruptcy court record would appear to be the rules chosen by the Part VIII project for appeals from the bankruptcy court to the district court or the BAP. Thus, Rule 6(c) in the sketch enclosed with this report incorporates the relevant Part VIII rules by reference[3] while making some adjustments to account for the particularities of direct appeals to the court of appeals.

B. Methods for dealing with the record on appeal

Both the Bankruptcy Rules Part VIII project and the project to revise Appellate Rule 6 have highlighted changes in the treatment of the record. The Appellate Rules as they currently exist were drafted on the assumption that the record on appeal would be available only in paper form. Reflecting the fact that the bankruptcy courts were ahead of other federal courts in making the transition to electronic filing, the proposed Part VIII Rules are drafted with a contrary presumption in mind: The default principle under those Rules is that the record will be made available in electronic form. In revising Rule 6(b) and in drafting new Rule 6(c), the Appellate Rules Committee's goal is to adopt language that can accommodate the various ways in which the lower-court record could be made available to the court of appeals – e.g., in paper form; or in electronic files that can be sent to the court of appeals; or by means of electronic links.[4] It is this endeavor that has proven most challenging, and on which the Appellate Rules Committee would particularly welcome input from the Standing Committee.

A description of the Committee's consideration of these challenges can be found in the minutes of the October 2011 meeting. Since the time of that meeting, participants have continued to try to reach consensus on appropriate language. Instead of referring to "forwarding" the record, the enclosed sketch refers to "furnishing" or "providing" the record. That choice among terms is one of the questions the Committee has not yet resolved. An

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[3] The latest drafts of the relevant Bankruptcy Rules are included in Appendix B to the report of the Bankruptcy Rules Committee.

[4] Adopting such language seems generally advisable in the light of the shift to electronic filing; and such language seems particularly salient in the case of proposed Rule 6(c) because – as noted in Part II.A – that Rule will incorporate by reference the Part VIII Rules that deal with the record on appeal.

additional question is whether the text of the Rule should make explicit the range of methods that can constitute "furnishing" or "providing" or whether that level of detail should be left to the Committee Note. Bracketed sentences in proposed Rules 6(b)(2)(C) and 6(c)(2)(B) illustrate ways of addressing this issue in the text of the Rule.

C. Timing of the Rule 6 revision

As noted above, the proposed changes to Rule 6 would adjust that Rule to reflect the ongoing shift to electronic filing. The amended Rule 6 would then differ from the rest of the Appellate Rules (which have not yet been adjusted to take account of electronic filing), and the approach adopted for Rule 6 would have implications for future amendments to the other Appellate Rules. This raises the question whether it is worthwhile to proceed with the Rule 6 amendments without (yet) amending the rest of the Appellate Rules to address electronic filing.

If Rule 6 is revised to refer to "furnishing" or "providing" the record, Rule 6 will stand in contrast to other aspects of the Appellate Rules (which were drafted against a background assumption that the record would be compiled and sent in paper form). Broader terms such as "furnish" or "provide" may eventually become appropriate for use in the context of non-bankruptcy appeals. Part III below discusses the possibility of a broader project to review and revise the Appellate Rules in the light of electronic filing and service. In that broader project, the rules that speak of "retaining," "forwarding," "sending," and "filing" the record or other court documents would warrant review.

Even if the Committee later concludes that it is appropriate to adopt for the other Appellate Rules the new terminology selected for Rule 6, there will presumably be a time lag between the effective date of the Rule 6 revisions and the effective date of the broader electronic-filing-related revisions. That time lag would not be ideal, but it is not a reason to hold back the Rule 6 project. The Appellate Rules already provide a distinctive set of procedures for the treatment of the record in the context of bankruptcy appeals, so one additional difference in terminology does not seem likely to add a great deal more to the confusion that any generalist litigator would experience when encountering a bankruptcy appeal.

There is also a chance that the Committee will later conclude that the terminology adopted for Rule 6 is not suitable for non-bankruptcy appeals. Once again, though such an outcome would not be optimal, the risk does not seem to justify delaying the Rule 6 proposal. In fact, experience with an amended Rule 6 may help to inform the Committee's consideration of broader questions relating to the Appellate Rules' treatment of electronic filing. And the Part VIII project provides an opportunity to obtain comments from the bankruptcy appeals bar in the context of their review of the Part VIII project.

It will, of course, be very important to ensure that the language selected for Appellate Rule 6 will fit with the language employed in the revised Part VIII Rules. The two Committees will continue to work together toward this end. The Standing Committee's guidance on the questions raised here will be of great assistance in the drafting effort.

III. A possible project to amend the Appellate Rules in the light of electronic filing

At its October 2011 meeting, the Committee discussed the possibility of amending the Appellate Rules to take account of the shift to electronic filing and service. Now that almost all circuits accept electronic filings, it seems worthwhile to consider taking up such a project. Moreover, the proposed amendments to Part VIII of the Bankruptcy Rules provide a potential model for the treatment of some of the issues raised by electronic filing and service.

There are a significant number of Appellate Rules that could be affected by such a project. As to some of those Rules, one approach might be to add language stating that circuits that permit or require certain filings to be electronic may promulgate local rules prescribing particular technical requirements governing the manner of filing. Of course, such amendments would implicate the usual policy choices concerning when and how to permit or encourage the promulgation of local rules.

In terms of topic areas that might form the focus of an electronic-filing project, several obvious examples come to mind. Provisions that require service by the clerk might no longer be necessary in cases where all parties participate in (and will receive notice through) CM/ECF. The project might also include review of Rule 25's provisions for electronic service and filing as well as Rule 26(c)'s treatment of the three-day rule. As noted in Part II above, one of the most significant changes that CM/ECF may bring to appellate practice concerns the treatment of the record; if the appellate judges and clerks can access the district court record by means of links in the electronic docket, then the need for a paper record may eventually dissipate. In turn, changes in the handling of the record might – but will not necessarily – lead to changes in the nature of any appendix. And some of the Appellate Rules' detailed instructions concerning the format of briefs and other papers may be unnecessary for electronic filings.

Not all of these issues will necessitate Rule amendments. In some instances, a practice may not yet be sufficiently widespread to warrant treatment in the Rules. In other instances, the existing Rules may be flexible enough to permit new practices relating to electronic service and filing. In drafting any amendments to the Rules, it will be important to provide the capacity to accommodate future technological advances.

Even this brief overview demonstrates that these issues are unlikely to be unique to the Appellate Rules Committee. The Committee believes that it would be beneficial to coordinate its efforts – on such a project – with those of the other Advisory Committees.

IV. Other information Items

At the October 2011 meeting, the Committee discussed the proposal to amend Rule 29(a) to treat federally recognized Native American tribes the same as states for purposes of amicus filings. Such an amendment would authorize tribes to file amicus briefs without party consent or court leave and (under the structure employed by the current Rule 29) would also exempt tribes from the authorship-and-funding disclosure requirement set by Rule 29(c)(5). The Committee noted that the Eighth, Ninth, and Tenth Circuits have expressed varying views on the desirability of adopting such a provision either in the Appellate Rules or in a local rule. Members also

discussed whether parity of treatment (under Rule 29) should be extended not only to Native American tribes but also to municipalities. Members indicated that it would be helpful to obtain the views of all the circuits on these questions; accordingly, I have written to the Chief Judge of each circuit to seek that input.

The Committee also discussed a proposal to address the sealing or redaction of briefs or record materials on appeal. Although the comment giving rise to this item focused on the difficulties that redacted briefs create for would-be amicus filers, the possible issues concerning sealing on appeal extend more broadly. These issues intersect with the treatment of similar issues in the district court, and with questions considered by other Judicial Conference committees. Thus, any rulemaking response to such questions would require coordination with all affected committees. The circuits currently take a range of approaches to sealing on appeal. The D.C. Circuit and Federal Circuits direct the litigants – at the outset of the appeal – to review the record, reach agreement on whether some or all sealed portions can be unsealed, and present that agreement to the district court. In some other circuits, materials that were sealed in the district court presumptively remain sealed on appeal. By contrast, the Seventh Circuit requires a timely motion to maintain sealing for purposes of appeal. In the light of the diversity of approaches among the circuits, one central question will be whether there is a need for a uniform national rule. An alternative to rulemaking might be an informational project that gathers and shares the current circuit approaches so that each circuit can evaluate its own approach in light of possible alternatives.

The Committee discussed a proposal to amend Rule 28 to authorize the inclusion of introductions in briefs. Members noted that experienced appellate lawyers often include introductions and that such introductions can be useful. Amending Rule 28 to mention the possibility would reflect existing practice and would make that practice more accessible to less sophisticated lawyers. But members also noted possible downsides, such as the possibility that some of the newly-encouraged introductions would be inartful and unhelpful. The Committee plans to discuss this proposal further at its spring meeting. At that point the Committee will also have the benefit of any comments submitted on the related proposal (currently out for comment) to amend Rule 28(a) to consolidate the statements of the case and of the facts.

The Committee removed from its agenda a proposal to amend Rule 4(a)(4) to address potential problems arising from the possibility of a time lag between entry of the order disposing of a tolling motion and entry of any resulting amended judgment. The Committee's consideration of this proposal was informed by the efforts of the Civil/Appellate Subcommittee, which worked hard to find a way to address this issue without creating unintended problems. In the end, each possible approach had costs that appeared to outweigh its benefits. Most recently, the Committee considered the possibility of recommending to the Civil Rules Committee that Civil Rule 58(a)'s separate document requirement be extended to encompass orders disposing of tolling motions. Serious concerns, however, were raised about such a proposal; in particular, a number of participants worried that the existing levels of district court noncompliance with the separate document requirement would worsen if the requirement were to be expanded. Members questioned the wisdom of amending the Rules to address this issue in the absence of evidence of actual problems caused by the current Rules.

The Committee also removed from its agenda a proposal to amend Rule 4(a)(2) – which concerns relation forward of premature notices of appeal – in response to issues raised by the petition in *CHF Industries, Inc. v. Park B. Smith, Inc.*, 130 S. Ct. 622 (2009). The caselaw on premature notices of appeal includes some circuit splits, but the most notable of those circuit splits are lopsided splits and most of those splits appear likely to resolve themselves without rulemaking action. It proved challenging to draft an amendment that would improve on the status quo, and some members were concerned that if Rule 4(a)(2) were amended to list the scenarios in which current law permits relation forward, it would encourage less careful practices among would-be appellants. Members believed that leaving the practice unspecified in the Rule would allow courts to continue to rescue appeals where relation forward is currently permitted but would not encourage litigants to rely on the availability of such rescues.

The Committee discussed briefly the fact that the Federal Judicial Center's report on appellate cost awards has generated positive changes in some local circuit practices. The Committee reviewed recent certiorari petitions concerning the Appellate Rules, but did not identify any new items that should be added to its agenda at this time.

TAB 10-A

Rule 6. Appeal in a Bankruptcy Case ~~From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel~~

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) Applicability of Other Rules. These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b). ~~But there are 3 exceptions~~, but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, ~~12(b)~~ 12(c), 13-20, 22-23, and 24(b) do not apply;

[*****]New material is underlined; matter to be omitted is lined through.

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; ~~and~~

(C) when the appeal is from a bankruptcy appellate panel, ~~the term~~ "district court," as used in any applicable rule, means "appellate panel~~.~~"; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

(2) Additional Rules. In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) Motion for r~~R~~ehearing.

(i) If a timely motion for rehearing under Bankruptcy Rule ~~8015~~ 8023 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree – but before disposition of the motion for rehearing – becomes effective when the order disposing of the motion for rehearing is entered.

(ii) ~~Appellate review of~~ If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order,

or decree upon the motion – then ~~requires~~ the party, in compliance with Rules 3(c) and 6(b)(1)(B), ~~to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) The r~~R~~ecord on a~~A~~ppeal.

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule ~~8006~~ 8009 – and serve on the appellee – a statement of the issues to be presented on appeal and a designation of the record to be certified and ~~sent~~ [furnished] [provided] to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days

after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

• the redesignated record as provided above;

• the proceedings in the district court or bankruptcy appellate panel; and

• a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) ~~Forwarding~~ [Furnishing] [Providing] the r~~R~~ecord.

(i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and ~~send~~ promptly [furnish] [provide] them ~~them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified~~ to the circuit clerk. [For this purpose, a document may be [furnished] [provided] to the circuit clerk either by transferring it (or a copy of it) in paper or electronic form or by supplying the circuit clerk means of electronic

access to it.] [The court of appeals may adopt a local rule defining the acceptable methods for [furnishing] [providing] those documents to the circuit clerk.] ~~Unless directed to do so by a party or the circuit clerk~~ If the record is [furnished] [provided] in paper form, the clerk will not send ~~to the court of appeals~~ documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If ~~the exhibits are~~ unusually bulky or heavy exhibits are to be sent in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and ~~forward~~ [furnish] [provide] the record. When the record is [furnished] [provided] in paper form, t~~T~~he court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record~~, b~~. But any party may request at any time during the pendency of the appeal that the redesignated record be sent.

(D) Filing the rRecord. ~~Upon receiving the record = or a certified copy of the docket entries sent in place of the redesignated record = the circuit clerk must file it and immediately notify all parties of the filing date~~ When the district clerk or bankruptcy appellate panel clerk has [furnished] [provided] the record, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record for purposes of [these Rules] [Rules 28.1(f), 30(b)(1), 31(a)(1), and 44]. The circuit clerk must immediately notify all parties of the filing date.

(c) Direct Review by Permission Under 28 U.S.C. § 158(d)(2).

(1) Applicability of Other Rules. These rules apply to a direct appeal by permission under 28 U.S.C. § 158(d)(2), but with these qualifications:

(A) Rules 3-4, 5(a)(3), 6(a), 6(b), 8(a), 8(c), 9-12, 13-20, 22-23, and 24(b) do not apply;

(B) the last sentence in Rule 5(d)(3) does not apply; and

(C) as used in any applicable rule, "district court" or "district clerk" includes – to the extent

appropriate – a bankruptcy court or bankruptcy appellate panel or its clerk.

(2) Additional Rules. In addition to the rules made applicable by Rule 6(c)(1), the following rules apply:

(A) **The Record on Appeal.** Bankruptcy Rule 8009 governs the record on appeal.

(B) **[Furnishing] [Providing] the Record.** Bankruptcy Rule 8010 governs completing and [furnishing] [providing] the record. [But the court of appeals may adopt a local rule defining the acceptable methods for [furnishing] [providing] the record to the circuit clerk.]

(C) **Stays Pending Appeal.** Bankruptcy Rule 8007 applies to stays pending appeal.

(D) **Duties of the Circuit Clerk.** When the bankruptcy clerk has [furnished] [provided] the record, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record for purposes of [these Rules] [Rules 28.1(f), 30(b)(1), 31(a)(1), and 44]. The circuit clerk must immediately notify all parties of the filing date.

(E) **Filing a Representation Statement**. Unless the court of appeals designates another time, within 14 days after entry of the order granting permission to appeal, the attorney who sought permission to appeal must file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

* * *

TAB 10-B

DRAFT

Minutes of Fall 2011 Meeting of
Advisory Committee on Appellate Rules
October 13 and 14, 2011
Atlanta, Georgia

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, October 13, 2011, at 8:30 a.m. at the Ritz-Carlton Hotel in Atlanta, Georgia. The following Advisory Committee members were present: Judge Michael A. Chagares, Judge Robert Michael Dow, Jr., Justice Allison H. Eid, Judge Peter T. Fay, Professor Amy Coney Barrett, Mr. Kevin C. Newsom, and Mr. Richard G. Taranto. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were former Committee members Judge Kermit E. Bye, Mr. James F. Bennett, and Ms. Maureen E. Mahoney; Mr. Dean C. Colson, liaison from the Standing Committee; Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Jonathan C. Rose, Rules Committee Officer in the Administrative Office ("AO"); Benjamin Robinson, deputy in the Rules Committee Support Office; Mr. Leonard Green, liaison from the appellate clerks; and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Also attending the meeting's opening session were Dean Robert Schapiro and Professor Richard D. Freer of Emory Law School.

Judge Sutton welcomed the meeting participants. He introduced two of the Committee's new members, Judge Chagares and Mr. Newsom. He observed that Judge Chagares was replacing Judge Bye, and that Judge Chagares's chambers were formerly those of another Appellate Rules Committee Chair, Justice Alito. Judge Sutton noted that Mr. Newsom had clerked for Judge O'Scannlain and for Justice Souter, that he had served as Alabama's Solicitor General, and that he chairs the appellate litigation group at Bradley Arant Boult Cummings in Birmingham, Alabama. Judge Sutton reported that the third new member of the Committee – Neal Katyal, former Acting Solicitor General of the United States – was unable to attend the meeting. Judge Sutton also welcomed Mr. Rose and Mr. Robinson and noted that they both came to the AO from Jones Day, where Mr. Rose was a partner and Mr. Robinson an associate. Professor Coquillette observed that Mr. Rose and Mr. Robinson are doing a wonderful job in their new positions. Judge Sutton thanked the three departing Committee members – Judge Bye, Mr. Bennett, and Ms. Mahoney – for their superb service to the Committee. Judge Bye stated what a pleasure it had been to work with the Committee. During the meeting, Judge Sutton thanked Mr. McCabe, Mr. Rose, Mr. Robinson, and the AO staff for their preparations for and participation in the meeting.

Dean Schapiro welcomed the Committee to Atlanta and introduced Professor Freer, whom Judge Sutton had invited to address the Committee on the topic of rulemaking. Professor Freer presented an assessment and critique of the rulemaking process, with a focus on the Civil Rules. Professor Freer asserted that there have been two big problems with the rulemaking process over the past 15 to 20 years: first, that the rulemakers have been too active, and second, that some of the rules amendments were directed toward nonexistent problems. During the roughly three-quarters of a century of federal rulemaking under the Rules Enabling Act there have been more than 30 sets of amendments – 14 of which took effect within the last 15 years. The increased frequency of rule amendments creates fatigue among judges, practitioners, and academics, with the result that people no longer pay attention to pending rule amendments and when amendments take effect there is no "buy-in" among those who must read and apply the Rules.

Professor Freer gave two examples of the public's lack of engagement with the rulemaking process. One was a case in which the court was unaware that the 2000 amendment to Civil Rule 26(b)(1) had changed the presumptive scope of discovery from nonprivileged matter relevant to "the subject matter" of the action to nonprivileged matter relevant to any party's "claim or defense." In fact, Professor Freer stated, a recent study has suggested that this change in Rule 26(b)(1) has had no actual impact. Another example was the 2007 restyling of the Civil Rules; Professor Freer reported that when he had mentioned the upcoming restyling to practitioners, none of them knew about it. The Civil Rules, Professor Freer asserted, are not read by lay people; they are read by lawyers who are familiar with the pre-restyling language. Professor Freer pointed out that changes in well-established terminology impose costs. For instance, changing the term "directed verdict" in Civil Rule 50 to "judgment as a matter of law" means that Civil Rule 50's language now differs from the language in many cognate state procedure rules. The restyling of the Civil Rules has required law firms to revise many standard forms, and has required new editions of many treatises and casebooks.

Professor Freer suggested that the rulemaking process is dominated by a small group of people who set the rulemaking agenda. One cannot, he suggested, impose changes from the top; rather, buy-in is needed from those who use the Rules. Rule amendments, Professor Freer concluded, should be like faculty meetings: rare and purposeful. A participant asked Professor Freer for his thoughts on the reasons for the increase in rulemaking activity. He responded that he does not have an explanation for the increase, but he suggested that perhaps members of the Rules Committees feel that they should work on rules changes every year. Professor Freer argued that the rulemakers' activities used to be more focused; for example, in the 1966 amendments to the Civil Rules the rulemakers overhauled party joinder.

An attorney member noted that it is expensive for firms to buy the new editions of treatises and rule books; this member also agreed that there are a lot of differences between federal and state procedural rules that do not make much sense. Professor Freer observed that states are less likely to have the resources to engage in continual updates to their rules. He posited that the Rules Committees' focus on issues such as restyling had distracted the committees from focusing on larger issues. He stated that the Rules Committees had done a

good job with the Civil Rules amendments relating to electronic discovery but he argued that they had not done as well in responding to concerns about pleading.

Professor Coquillette observed that Professor Freer is a valued coauthor of the Moore's Federal Practice treatise. Professor Coquillette pointed out that from the perspective of the Rules Committees, three factors have contributed to the frequency of rule amendments. First, the Committees often must respond to legislative initiatives to change the Rules. Second, the Supreme Court has taken an active role, in recent decisions, in interpreting the Rules. Third, changes in technology have required changes in the Rules – for example, with respect to electronic filing and electronic discovery.

Judge Sutton asked Professor Freer whether he would prefer a system in which each set of Rules were revised only every five years. Professor Freer responded that such a system would be beneficial; whether the interval were five years or three years, such a system would provide users of the Rules with some predictability. An appellate judge member asked Professor Freer for his views on local rules. Professor Freer observed that local rules are very important in everyday practice; commentators often discuss the issue of disuniformity arising from local rules, but he stated that he does not have a sense of whether that is a serious problem. Another appellate judge member voiced the view that there should be no local rules, and that federal practice should be entirely uniform throughout the country. An attorney member asked whether the time lag between a rule amendment's initial introduction and its effective date risks rendering rule amendments obsolete before they even take effect. Professor Freer added that part of the time lag is due to the layers of public participation built into the rulemaking process, and he argued that this is ironic given that many interested parties do not participate in that process. An attorney participant voiced doubt that reducing the frequency of rule amendments would increase participation by lawyers.

An attorney member asked whether the restyling of the Rules had made the Rules more accessible to new lawyers. Professor Freer conceded that it had, but argued that older lawyers had invested a lot of effort in becoming familiar with the pre-restyling version of the Rules. A member noted that law students may find the restyled Rules more accessible, but they will still need to contend with the pre-restyling version of the Rules when they research older cases. Professor Coquillette noted that the Bankruptcy Rules have not yet been restyled, and that many litigants in bankruptcy court are pro se.

Judge Sutton asked Professor Freer whether he feels that it would be useful to amend a Rule where the Rule's text does not currently reflect actual practice. For example, Appellate Rule 4(a)(2)'s text provides little guidance as to the circumstances when a premature notice of appeal will relate forward. Is it helpful to the bench and bar for the Rules to codify what the courts are doing in caselaw? Professor Freer responded that it would be useful to amend the Rule to reflect current practice, particularly if a majority view can be identified.

Judge Sutton thanked Professor Freer for his thought-provoking presentation. It is always important, he noted, to keep in mind the costs as well as the benefits of amending the Rules.

II. Approval of Minutes of April 2011 Meeting

A motion was made and seconded to approve the minutes of the Committee's April 2011 meeting. The motion passed by voice vote without dissent.

III. Report on June 2011 Meeting of Standing Committee

Judge Sutton summarized relevant events at the Standing Committee's June 2011 meeting. The Standing Committee approved for publication proposed amendments to Rules 28 and 28.1 concerning the statement of the case, and proposed amendments to Form 4 concerning applications to appeal in forma pauperis. Those proposals, along with previously-approved proposals to amend Rules 13, 14, and 24, are currently out for public comment. Judge Sutton noted that the Standing Committee has created a Forms Subcommittee to coordinate the efforts of the Advisory Committees to review their forms and the process for amending them.

Judge Sutton reported that the proposed amendments to Appellate Rules 4 and 40 (which will clarify the treatment of the time to appeal or to seek rehearing in civil cases to which a United States officer or employee is a party) are currently on track to take effect on December 1, 2011 (absent contrary action by Congress). Because the time to appeal in a civil case is set not only by Appellate Rule 4 but also by 28 U.S.C. § 2107, legislation has been introduced that will make the same clarifying change to Section 2107. Such a change is very important in order to avoid creating a trap for unsophisticated litigants. The goal is for the amendment to Section 2107 to take effect simultaneously with the amendments to Rules 4 and 40.

IV. Action Items

A. For publication

1. Item No. 09-AP-C (FRAP 6 / direct bankruptcy appeals) and Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)

Judge Sutton invited Professor Barrett to introduce these items, which relate to proposals to amend the Appellate Rules' treatment of appeals in bankruptcy matters. Professor Barrett observed that the context for these items is the Bankruptcy Rules Committee's project to amend Part VIII of the Bankruptcy Rules (dealing with appellate procedure in bankruptcy). She reminded members that the two Committees had held a joint meeting in spring 2011 to discuss the Part VIII project and related proposals concerning Appellate Rule 6. During summer 2011, Professor Barrett attended (and the Reporter participated telephonically in) a meeting to further discuss these issues.

Professor Barrett provided an overview of the proposals to amend Appellate Rule 6. Rule 6(a) addresses appeals from a district court exercising original jurisdiction in a bankruptcy case. Rule 6(b) governs appeals from a district court or a bankruptcy appellate panel (BAP) exercising appellate jurisdiction in a bankruptcy case. Rule 6 does not currently address the procedure for taking a permissive appeal directly from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Since Section 158(d)(2)'s enactment in 2005, direct appeals under that provision have been governed by interim statutory provisions that referenced Appellate Rule 5. The proposed amendments would add a new subdivision (c) to Rule 6 that would govern such direct appeals. The proposals would also make several amendments to Rule 6(b)'s treatment of appeals from district courts or BAPs exercising appellate jurisdiction.

The Reporter observed that Rule 6's title would be amended to reflect an expanded breadth of application. Various portions of the Rule's text would be restyled. Cross-references to statutory and rules provisions would be updated. Under Rules 6(b) and 6(c), Rule 12.1's indicative-ruling procedure would apply to appeals in bankruptcy cases, with references to the "district court" read to include a bankruptcy court or BAP.

Rule 6(b)(2) would be revised to remove an ambiguity that had resulted from the 1998 restyling: Instead of referring to challenges to "an altered or amended judgment, order, or decree," the Rule would refer to challenges to "the alteration or amendment of a judgment, order, or decree." (The 2009 amendments to Rule 4(a)(4) removed a similar ambiguity from that Rule.) The amended provision would read: "If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion." In the second of these sentences, Professor Kimble has suggested replacing "The notice or amended notice" with "It." The Reporter stated that she disagrees with this suggestion; the longer option is clearer, and given the importance of this filing requirement, clarity is key. Mr. Letter stated that "The notice or amended notice" is clearer; two appellate judge members and an attorney participant expressed agreement with this view.

The Reporter pointed out that a number of the proposed changes to Rule 6(b)(2)(C) and (D) – and a number of aspects of proposed Rule 6(c) – are designed to reflect the ongoing shift to electronic filing. This shift is changing the way in which the record is assembled and transmitted to the court of appeals. The proposed amendments use the term "transmit" to denote both transmission of a paper record and transmission of an electronic record; they use the term "send" to denote transmission of a paper record. An appellate judge suggested that the proposals' use of the term "transmit" is clear when read in context. Professor Barrett pointed out that the Part VIII proposals also use the term "transmit." Mr. McCabe reported that the Bankruptcy Rules Committee had discussed this term at length during its fall 2011 meeting, and had decided to include a definition of "transmit" for the purposes of the Part VIII rules. An appellate judge member asked how the Civil Rules and the other Appellate Rules treat the topic of electronic

filing and transmission; this member also asked whether the proposed Part VIII rules will define "transmit."

An attorney member asked whether the language proposed for Rule 6 would encompass all the possible modes of furnishing the record; for example, he noted that a record could be sent in paper form, or could be transmitted as an electronic document, or could be made available in the form of a set of links to portions of the electronic record. Mr. Green observed that when the record is transmitted electronically this is usually accomplished by transmitting a list of the record's components, which can then be accessed by document number. In the Sixth Circuit, he reported, the court directly accesses any desired portions of the record. Mr. Green concluded that there are a variety of ways in which the record can be furnished to the court of appeals and that the various methods are changing over time. The attorney member suggested that the term "transmit" does not seem to encompass instances where the court below sends a list or index as opposed to the documents themselves; he proposed that better terms might be "furnish" or "provide." He noted that such a change in terminology could also affect any cross-references to the transmission of the record. A district judge member agreed that a broader term like "furnish" or "provide" seems preferable. Mr. Robinson observed that the Committee Note to the original adoption of Appellate Rule 11 uses the term "transmit." An attorney participant pointed out that the term "send" could be read to encompass electronic transmission, and that using "send" specifically to denote paper transmission would not be clear.

Judge Sutton noted that it will be important to discuss this issue with the Bankruptcy Rules Committee and to coordinate with that Committee in preparing proposals for consideration at the Committees' spring meetings. Professor Coquillette predicted that the Standing Committee will have a heavy agenda at the June 2012 meeting, and he suggested that it would be advisable to discuss the Appellate Rule 6 proposal at the Standing Committee's January 2012 meeting. Judge Sutton proposed that the Committee should try to settle on appropriate terminology for the Rule 6 draft in advance of the January 2012 Standing Committee meeting.

Mr. Green noted that these questions about electronic transmission relate to more general issues about the need to consider updating the Appellate Rules to address electronic filing. (The Committee discussed those broader issues later in the meeting.) The Committee briefly discussed other features of the Rule 6 proposal, including the treatment of stay requests and the treatment of materials that had been sealed in the lower court. Professor Barrett suggested that it would promote clarity to state in Rule 6(c)(2)(C) that Rule 8(b) (in addition to Bankruptcy Rule 8007) applies to requests for stays pending appeal.

The Committee determined by consensus to work further on the drafting of the Rule 6 proposal in advance of the January 2012 Standing Committee meeting.

V. Discussion Items

A. Item No. 08-AP-D (FRAP 4(a)(4))

Judge Sutton invited Mr. Taranto to introduce Item No. 08-AP-D, which concerns Peder Batalden's suggestion that the Committee amend Appellate Rule 4(a)(4) to address potential problems arising from the possibility of a time lag between entry of the order disposing of a tolling motion and entry of any resulting amended judgment. Mr. Taranto began by suggesting that this is an issue that started small; then it got bigger; and now it seems that perhaps the balloon has burst. He noted that sometimes it is not clear whether an order has "disposed of" a postjudgment motion. Moreover, he noted, in some instances the time lag between entry of such an order and entry of a resulting amended judgment might be longer than the 30-day time limit for taking an appeal. The Committee considered various ways to address this issue, but found that each possibility carried a risk of creating other problems. Mr. Taranto recalled that he had suggested that the Committee consider proposing to the Civil Rules Committee that it broaden Civil Rule 58(a)'s separate document requirement. Mr. Taranto observed that a number of participants had expressed concern about such a proposal – notably the participants in the Appellate Rules Committee's joint discussion with the Bankruptcy Rules Committee, and also Professor Cooper. A central concern, Mr. Taranto noted, is that district courts already neglect to comply with the existing separate document requirement. Mr. Taranto closed his introductory remarks by wondering whether this item presented an example of the occasions that Professor Freer had posited, when rulemaking changes are not warranted.

Judge Sutton thanked Mr. Taranto for his work on this item, and noted that Ms. Mahoney had also participated in the efforts to find a solution. Judge Sutton observed that Mr. Batalden had identified a potential problem. It is not clear, however, how frequently this problem arises in practice. Any changes in the mechanics of Rule 4(a) are delicate in light of the fact that statutory appeal deadlines (such as those set in 28 U.S.C. § 2107) are jurisdictional. Improving the clarity of Rule 4 is an important goal, and the Committee tried diligently to find a way to address Mr. Batalden's concerns, but each possibility that the Committee discussed raised potential problems. Judge Sutton suggested that it was time for the Committee to determine what to do with this item.

An appellate judge participant stated that it would be worthwhile to explore the question further. An attorney participant suggested that, if this issue comes up in practice, courts are likely to interpret the term "disposing of" in Rule 4(a)(4) in a way that preserves appeal rights; it might be better, this participant posited, to leave the issue to the courts. An attorney member stated that, although he had not recently reviewed the prior options considered by the Committee, he recalled that each presented difficult issues; one should not, this member suggested, amend the Rule absent a real need to do so. A participant asked the Reporter what she thought; she responded that the concerns about district-court noncompliance with the separate document requirement seem well-founded, and she wondered whether the costs of amending Rule 4(a)(4) might outweigh the benefits.

A member moved that the Committee remove this item from its agenda until a case raising this problem is brought to the Committee's attention. The motion was seconded and passed by voice vote without dissent. Judge Sutton undertook to write to Mr. Batalden and thank him for his helpful suggestion.

B. Item No. 09-AP-B (definition of "state" and Indian tribes)

Judge Sutton invited Justice Eid to introduce this item, which concerns Daniel Rey-Bear's proposal that federally recognized Native American tribes be treated the same as states for purposes of amicus filings. Justice Eid described Mr. Rey-Bear's proposal and noted that the Committee had received resolutions in support of the proposal from the National Congress of American Indians and the Coalition of Bar Associations of Color. She reminded the Committee that it had asked Ms. Leary and the FJC to research the treatment of tribal amicus filings in the courts of appeals. Ms. Leary found that motions to make such filings are ordinarily granted, and that the filings are largely concentrated in the Eighth, Ninth, and Tenth Circuits. At the Committee's request, Judge Sutton wrote to the Chief Judges of those three circuits to ask for their circuits' views on the proposal to amend Appellate Rule 29 to treat tribes the same as states and also for their views on the possibility of adopting a local rule on the subject. Chief Judge Riley subsequently reported that he had circulated the inquiry to three relevant Eighth Circuit committees and had received only three responses, of which two favored either a national or a local rule amendment and one favored only a local rule amendment if appropriate. Circuit Clerk Molly Dwyer reported that the Ninth Circuit supported the proposal to amend Rule 29 and offered some drafting suggestions for such an amendment. The Reporter added that, since receiving those responses, the Committee had also received a response from Chief Judge Briscoe, who reported that the Tenth Circuit judges had considered Judge Sutton's inquiry and that a majority of the judges saw no need to amend Rule 29. Chief Judge Briscoe reported that the discussion was lively but that the majority view was clear that Native American tribes should not be treated differently from other litigants.

Justice Eid summarized the Committee's prior discussions, noting that those discussions had focused on the value of treating Native American tribes with dignity and also on the question of whether municipalities should also be accorded the right to file amicus briefs without party consent or court leave. Judge Sutton observed that there are strong arguments both for and against amending Rule 29. As to the dignity issue, he noted that tribes share qualities with both states and the federal government. He observed that, if anything, Supreme Court Rule 37.4 is harder to explain, from this perspective, because Rule 37.4 permits municipal governments, but not Native American tribes, to file amicus briefs without party consent or court leave. Often, he noted, when the Appellate Rules are amended the Supreme Court also amends its own rules in a similar fashion. One possible course of action would be to amend Rule 29 to treat both tribes and municipalities the same as states. Although one Committee member had earlier asked why those types of entities should be treated better – for purposes of amicus filings – than foreign governments are, one could argue that it is possible to draw the line at the United States' border. On the other side of the argument, Judge Sutton noted that the Eighth, Ninth, and Tenth Circuits have voiced a spectrum of views on this proposal – as have the members of the Standing

Committee. There are no local rules in any circuit that currently take the approach that is proposed for Rule 29.

Judge Sutton suggested that one possible course of action would be to write to the Chief Judges of all the circuits to share with them the Committee's discussions and research, and to state that although the Committee is not moving ahead with a national rule change at this point, it is open to each circuit to adopt a local rule authorizing Native American tribes to file amicus briefs without party consent or court leave. The letter could report that a number of Committee members favor such a rule but that the Committee is not prepared at this point to adopt it as an amendment to Rule 29. The responses to such a letter, he suggested, could help the Committee discern whether it makes sense to amend Rule 29. On the other hand, though a circuit could adopt a local rule permitting amicus filings as of right by Native American tribes, it does not appear that a circuit would have authority to adopt a local rule exempting Native American tribes from Rule 29(c)(5)'s authorship-and-funding disclosure requirement. Professor Coquillette cautioned against sending a letter that would encourage the proliferation of local rules.

Alternatively, Judge Sutton suggested, he could write to the Chief Judges of all the circuits to solicit their views concerning the proposal to amend Rule 29. A district judge member stated that it would be useful to do so. This member stated that he finds the dignity argument compelling, but that if there were resistance from the courts of appeals, that would give him pause. One participant suggested that although the dignity argument is appealing, not everyone is persuaded by it and the issue is one with political overtones. An attorney participant argued that it would be preferable for the Committee to follow the Supreme Court's lead concerning the question of tribal amicus filings. Mr. Letter stated that he supported the idea of soliciting the views of the rest of the circuits; he also reiterated the DOJ's position that Native American tribes should be consulted and he offered the DOJ's help in arranging that consultation. It was suggested that it would be helpful if the DOJ could explain in writing its views concerning consultation.

An attorney member asked whether anyone had asserted that Native American tribes have been deterred from proffering amicus briefs due to the requirement of seeking court leave to file them. Judge Sutton responded that such a concern does not seem to be the motivating factor in Mr. Rey-Bear's proposal. The attorney member also observed that the overall issue of tribal amicus filings includes not only Rule 29(a)'s provision concerning filing without court leave or party consent but also Rule 29(c)(5)'s requirement of the authorship-and-funding disclosure.

A committee member asked whether soliciting the views of the other circuits would provide the Committee with useful information; this member noted that the Committee is already aware that the Tenth Circuit strongly opposes amending Rule 29. Judge Sutton responded that if it turns out that there is a lopsided division in views among the circuits – for example, if no circuits other than the Tenth Circuit oppose amending Rule 29 – then some members might find that information to be relevant. A district judge member agreed and suggested that if that were to turn out to be the case, that information might even persuade the Tenth Circuit to reconsider

its own view of the matter.

An appellate judge member offered a differing view, arguing that the Committee has the information it needs and that it should decide whether to amend Rule 29. This member argued in support of treating tribes the same as states for purposes of amicus filings; the member stated that such an approach would have no downside and that the rule amendment could also encompass municipalities and could be justified on the grounds that all large, important, sovereign entities should be treated similarly under Rule 29. The Reporter stated that although the extent of tribal government authority is much debated and has been altered in Supreme Court decisions since 1978, the doctrine is still clear that Native American tribes retain their sovereignty except to the extent that it has been removed by a federal treaty, by a federal statute, or by implication of the tribes' status as "domestic dependent nations." An attorney member observed that the term "state" is now defined by Appellate Rule 1(b) to include United States territories, which are not sovereign entities; under Rules 1(b) and 29(a), those non-sovereign entities are permitted to file amicus briefs without party consent or court leave. This member asked whether amending Rule 29(a) to treat tribes the same as states would be perceived as having broader implications for legal doctrines concerning tribal authority. A participant responded that the answer to that question is unclear. In any event, this participant observed, those who oppose treating tribes the same as states for purposes of Rule 29(a) may do so for reasons unrelated to their views of tribal sovereignty; such opponents may have a general aversion to amicus filings and may view the requirement of a motion for leave to file an amicus brief as a useful hurdle.

An attorney member asked whether the Committee knows how frequently municipalities seek leave to file amicus briefs in the courts of appeals. A district judge member noted that a letter soliciting the views of the circuits concerning tribal amicus filings could also solicit their views concerning municipal amicus filings. Mr. Letter argued that, given the range of views expressed by the three circuits the Committee consulted to date, the Committee should not move forward without consulting the remaining circuits. The attorney member expressed support for asking the circuits about both tribal amicus filings and municipal amicus filings, in order to get a sense of how a rule change would affect the courts' functioning. An appellate judge member observed that such information would not change the assessment of the dignity argument. But the attorney member responded that this information would illuminate the likely impact of a rule change. Another attorney participant stated that it would be useful to learn the views of the other circuits. An appellate judge member stated that the inquiry to the circuits should ask about both tribal and municipal amicus filers.

An attorney member – turning to the question of the disclosure requirement – observed that as one moves along the spectrum from the federal government to other government entities the likelihood of ghostwritten briefs increases (though it is still low). States with well-developed appellate operations write their own amicus briefs, but that might not always be true of states with less-developed appellate litigation functions. When a brief is circulated among the members of the National Association of Attorneys General, those reviewing the brief want to know who wrote it. An appellate judge member agreed that states' practices vary. Another

attorney member asked whether one could amend Rule 29(c)(5) to apply the authorship-and-funding disclosure requirement to all amici, including government amici. Such an approach would differ from that taken in Supreme Court Rule 37.6, but, he argued, the practicalities of amicus briefs differ as between filings in the courts of appeals and filings in the Supreme Court. Mr. Letter noted that if the disclosure requirement extended to the United States' amicus filings, the United States' answers to all the questions would always be "No." A participant asked whether extending the disclosure requirement to the United States would raise separation of powers issues. An attorney participant asked whether such an amendment to Rule 29(c)(5) would run counter to the presumption that one should not amend a rule that is functioning well.

By consensus, the Committee resolved to return to this item at its spring 2012 meeting.

C. Item No. 10-AP-A (premature notices of appeal)

Judge Sutton introduced this item, which concerns the possibility of amending Appellate Rule 4(a)(2) to reflect the treatment of premature notices of appeal. He noted that it would be hard to guess, from the current language of Rule 4(a)(2), the way that the caselaw treats the various situations in which a premature notice of appeal might be filed. The caselaw itself appears to be developing in a way that shows a convergence of approaches among the circuits. The exception is the treatment of instances when an order disposing of fewer than all claims or parties is followed by disposition as to all remaining claims or parties; the majority view allows relation forward in that circumstance but the Eighth Circuit takes the opposite view.

Judge Sutton noted three possible approaches that the Committee could take. It could amend Rule 4(a)(2) to codify the majority approach to common scenarios; this would provide information that the average litigant could not infer from current Rule 4(a)(2). Or the Committee could choose not to amend the rule and to allow the caselaw to continue to develop. Or the Committee could amend Rule 4(a)(2) to narrow the range of circumstances in which relation forward is permitted; although such an amendment could provide a bright line rule, it would overrule a good deal of precedent and could lead to the loss of appeal rights. Judge Sutton asked whether Committee members would support the latter approach; no members indicated support for it. He then asked whether the Committee was interested in amending the Rule to codify existing practices.

Mr. Letter suggested that it would be useful to provide clarity and to diminish the need to research the law. A district judge member asked whether it would be possible to amend the Committee Note to provide this clarification. Mr. McCabe explained that it is not an option to amend the Notes without amending the Rule text. Professor Coquillette recalled that Professor Capra had published (through the FJC) a pamphlet discussing aspects of the original Committee Notes to the Federal Rules of Evidence that warranted clarification (in some instances, because the rule discussed in the relevant Note was later altered by Congress). Professor Coquillette pointed out that there is a preference for not citing caselaw in Committee Notes because the cases might later be overruled.

Judge Sutton asked how often rules have been amended in order to codify existing practices. The Reporter noted the example of Civil Rule 62.1 and Appellate Rule 12.1, concerning indicative rulings. However, Professor Coquillette observed that such codification is not the norm. An attorney participant suggested that making the law more accessible provides a good reason for rulemaking. But an appellate judge member noted that, on the other hand, it might be argued that specifying in the rule the instances in which a premature notice of appeal relates forward might encourage imprecise practice concerning notices of appeal.

An attorney member asked whether it would be possible to amend Rule 4(a)(2) merely by substituting "an appealable" for "the," so that the Rule would read: "A notice of appeal filed after the court announces a decision or order – but before the entry of an appealable judgment or order – is treated as filed on the date of and after the entry." That amendment could be accompanied by an explanatory Committee Note. However, one problem with that language might be its potential breadth; it could be read to cover, for example, a notice of appeal filed after entry of a clearly interlocutory order and well before entry of final judgment.

An attorney participant turned the Committee's attention to another possible amendment illustrated in the materials. This proposal would leave the existing language of Rule 4(a)(2) as it stands and then add: "Instances in which a notice of appeal relates forward under the first sentence of this provision include, but are not limited to, those in which a notice is filed" (followed by a list of instances in which relation forward is permitted under current law). The attorney pointed out that this proposal was incoherent because the examples in which current law permits relation forward do not actually fit within the language of Rule 4(a)(2)'s current text. An attorney member pointed out that this inconsistency would not arise if "an appealable" were substituted for "the" in the current text of Rule 4(a)(2). But the attorney participant responded that such a change could broaden the application of relation forward beyond that permitted by current doctrine.

An appellate judge member agreed with the concern – voiced earlier in the discussion – that such an amendment to Rule 4(a)(2) could unduly encourage parties to file notices of appeal early. This member suggested that it might be better not to amend the rule. He moved to remove this item from the Committee's agenda. The motion was seconded and passed by voice vote without opposition.

D. Item No. 10-AP-I (consider issues raised by redactions in appellate briefs)

Judge Sutton invited Judge Dow to introduce Item No. 10-AP-I, which concerns questions raised by sealing or redaction of appellate filings. Judge Dow observed that this item arose from a suggestion by Paul Alan Levy – an attorney at Public Citizen Litigation Group – that redaction of appellate briefs creates problems for would-be filers of amicus briefs. Sealing on appeal, Judge Dow noted, raises questions beyond those that concern amici. He noted a number of related but distinct issues, such as issues raised by protective orders in the district court that seal discovery materials, and issues concerning redactions pursuant to the recently-adopted privacy rules. In contrast to questions relating to protective orders governing discovery,

the question of sealing on appeal solely concerns materials filed with the court.

Judge Dow observed that there are a number of different possible approaches to sealing on appeal. One approach is that taken by the D.C. Circuit and Federal Circuit; these circuits require the litigants – at the outset of the appeal – to review the record, mutually agree on whether some or all sealed portions can be unsealed, and present that agreement to the court or agency below. Some other circuits appear to operate on the assumption that materials that were sealed in the district court presumptively remain sealed on appeal. A third approach is that taken by the Seventh Circuit (and in some instances by the Third Circuit); this approach provides a grace period during which matters sealed below remain sealed on appeal, but mandates that those matters are unsealed (to the extent they appear in the record on appeal) if no motion is made within the grace period to maintain the seal on appeal.

Judge Dow suggested several questions for the Committee to consider. An initial question is whether there should be a national rule governing sealing on appeal. A national rule, he observed, would create a uniform approach. He noted the underlying principle that court business should be public. An appeal, he pointed out, comes later in the court process and the original reason for sealing an item in the court below may have dissipated by the time of the appeal. Another question is who should review the question of sealing at the time of the appeal. One possibility is to put the onus on the parties to review the continued appropriateness of any sealing orders. Another possibility would be to place this burden on the lower court. One advantage of that approach is that the district judge is familiar with the record. But requiring the district judge to review sealing orders at the conclusion of every case would be overbroad, because not all judgments are appealed; a narrower approach would provide that the judge's duty to review any sealing orders would be triggered by the filing of a notice of appeal. A third possibility would be to adopt the Seventh Circuit approach and require the parties to an appeal to make a motion if they desire the sealing to continue on appeal.

Judge Dow pointed out that this set of issues is complex, and that a number of areas require further study – for instance, concerning the question of sealing in criminal appeals. He observed that it will be important to consider how the CM/ECF systems are working. For example, in the Seventh Circuit, the CM/ECF system has sealed functionality (so that the district judge assigned to the case can view sealed filings through CM/ECF). Courts are in different places on these questions.

The Reporter posited that the question of sealing on appeal is distinct from the question of protective orders concerning discovery materials under Civil Rule 26(c). In the latter context, many or all of the sealed materials may never be filed with the court; by contrast, sealing on appeal by definition concerns materials filed by a party in support of or in opposition to a request for action by the court. Judge Sutton, noting the variation among the circuits' approaches to sealing on appeal, suggested that the Committee discuss the significance of that variation. Professor Coquillette responded that one approach would be to wait for the Supreme Court to resolve these questions; another approach would be to pursue uniformity through the promulgation of a national rule. Mr. McCabe pointed out the salience of the Judicial Conference

Committee on Court Administration and Case Management ("CACM"). CACM's jurisdiction, he noted, encompasses questions of privacy and sealing. He observed that those planning the Next Generation of CM/ECF have approved two requirements for the next iteration of the CM/ECF system: First, the system must accommodate a sealed as well as a non-sealed level of filing; and second, there should be a system for "lodging" submissions with the court without actually filing them. An attorney participant asked how frequently non-parties make motions to unseal a sealed filing.

Judge Sutton suggested that it might be useful to form a working group to consider these issues further; the group could consider not only the possibility of a rule change but also alternatives to rulemaking. Mr. Letter agreed to work with Judge Dow and the Reporter on this topic. Judge Sutton invited any other member who is interested to participate in this effort. By consensus, the Committee retained this item on its study agenda.

VI. Additional Old Business and New Business

A. Item No. 11-AP-B (FRAP 28 / introductions in briefs)

Judge Sutton invited the Reporter to introduce Item No. 11-AP-B, which concerns the possibility of amending Rule 28 to discuss the inclusion of introductions in briefs. The Reporter stated that this topic grows out of Committee discussions concerning the proposal – currently out for comment – that would amend Rule 28 to combine the statement of the case and of the facts. Some participants in those discussions had suggested that it would be useful for Rule 28 to alert lawyers to the possibility of including an introduction in their brief. Participants had also discussed a related idea of moving the statement of issues (currently provided for in Rule 28(a)(5)) so that it would follow rather than precede the statement of the case. Rather than attempt to address these issues in the context of the proposal concerning the statement of the case, the Committee had added these questions to its agenda as a separate item.

Few rules currently address the question of introductions in briefs, though experienced appellate litigators often include them. Eighth Circuit Rule 28A(i)(1) requires appellants to include an up-to-one-page statement that includes a summary of the case and a statement of whether oral argument should be heard; appellees may include a responsive statement. Mr. Letter has mentioned to the Committee that the Ninth Circuit is considering adopting a local rule on introductions in briefs. Apart from that, there do not appear to be local circuit rules on point. The Supreme Court rules do not address introductions; the first item in a Supreme Court brief is the Questions Presented (in which experienced litigators may include a few sentences that serve the role of an introduction). Thanks to helpful research by Holly Sellers, the Committee is aware that three states have relevant provisions. Kentucky requires a very brief introduction (one or two sentences concerning the nature of the case). New Jersey permits a "preliminary statement" of up to three pages. Washington permits the inclusion of an introduction.

Amending Rule 28 to discuss introductions would codify current practice and might simplify the lawyer's task by making clear that an introduction is permissible. Promoting the

inclusion of introductions would be helpful to the extent that those introductions are well-written. But such an amendment might also have costs. Not all introductions would be skillfully drafted. Some might include factual assertions that are not tied to the record. Some might try to present too many ideas "up front." Given those possible costs, perhaps this is something that should be dealt with, if at all, by local rule. If a national rule were to be drafted, it presumably would permit but not require an introduction. Other things that the rule might address could include the introduction's length (presumably the introduction would count toward the overall length limit for the brief); guidance concerning the introduction's contents; the introduction's placement in the brief (a necessary topic given that Rule 28(a) directs that the listed items appear in the order stated in the rule); and the respective roles of the introduction and the summary of argument.

Judge Sutton suggested that a central question is whether Rule 28 should be amended to reflect current practice concerning introductions. An attorney participant suggested that such an amendment is unnecessary because the proposed amendments to Rules 28 and 28.1 that are currently out for comment give lawyers flexibility to include an introduction as part of the statement of the case. An attorney member agreed that this item is "a solution in search of a problem"; he currently includes introductions in his briefs. Mr. Letter disagreed, arguing that although experienced appellate lawyers include introductions, the rest of the bar may not be aware that they can do so under the current Rule. He noted that when he advises young lawyers to add an introduction in a brief, they often come back to him, after reading Rule 28, to ask whether it is permissible to do so.

Judge Sutton observed that if the currently published proposals are adopted, Rule 28(a)(6) would require "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." The attorney participant suggested that it would be possible to amend this provision to mention "an optional introduction." But even without such a modification, she argued, the published language would permit the inclusion of an introduction as part of the statement of the case.

An attorney member asked how one would describe the appropriate contents of an introduction. Mr. Letter stated that an introduction can usefully state what the case is about and identify the basic arguments. The attorney member responded that it seems difficult to formulate just what an introduction should contain. An attorney participant suggested that it would be counter-productive to specify the contents of the introduction because flexibility is important; the best approach if one is mentioning an introduction, she argued, would be a simple reference to "an optional introduction." An appellate judge member asked whether mentioning an "optional introduction" would suggest by implication that no other optional components can be included in the brief. By way of comparison, it was noted that Rule 28(a)(10) currently requires "a short conclusion stating the precise relief sought." The attorney participant stated her understanding that this provision requires the brief to state what the appellant is asking the court of appeals to do with the judgment below (reverse, vacate, or the like).

A member, noting that the proposal concerning the statement of the case is currently out for comment, asked whether it would be wise to amend Rule 28 twice in a row. Judge Sutton responded that if the Committee were to decide that the rule should discuss introductions, it would be possible to hold the currently published amendment and bundle it with the proposal concerning introductions. Mr. McCabe observed that the Committee Note of the currently published proposal could be revised after the comment period.

A member suggested that it did not make sense to amend Rule 28 to discuss introductions. Two attorney members agreed with this view, as did two other participants. A district judge member suggested that it could be useful to provide guidance concerning introductions in the Committee Note. Two appellate judge members agreed with this idea, as did two other participants (one of those participants reiterated her alternative suggestion that the rule text could be revised to refer to an "optional introduction"). Mr. Letter advocated adding a discussion of introductions either to the rule text or to the Committee Note in order to raise awareness concerning the possibility of including introductions; he argued that it would be better to address this topic in the rule text than in the Note. Professor Coquillette advised against including in the Committee Note something that should be addressed in the rule text. An appellate judge member stated that junior lawyers need guidance, and advocated addressing introductions either in the rule text or in the Note.

Judge Sutton suggested that – because it was time for the Committee to break for the day – Mr. Letter could formulate proposed language for a rule amendment that the Committee could then consider the next day. The following morning (after discussing the other matters noted below) the Committee resumed its discussion of this topic.

Mr. Letter offered some possible language to describe what should be included in the introduction. An appellate judge member asked whether an introduction differs from the summary of argument. Mr. Letter answered in the affirmative: An introduction says what the case is about and summarizes one or two key arguments. The Reporter asked whether one would ever omit the summary of argument because an introduction took its place. Mr. Letter suggested that judges' views on this point would differ. Another appellate judge member predicted that adding a new section to the brief would tend to make briefs longer (because, currently, not all briefs are as long as they could be under the length limits). And in the case of unsophisticated litigants, this member suggested, authorizing the inclusion of an introduction could dilute the usefulness of the summary of the argument. Mr. Letter predicted that, without a rule that mentions introductions, experienced litigators will continue to include them and inexperienced lawyers will continue not including them. An appellate judge member predicted that most judges would not wish to encourage the inclusion of another section in briefs, and that judges certainly would not wish to render the summary of argument optional. This member stated that it seems difficult to draft rule language that would explain the difference between the introduction and the summary of argument. The difference, he observed, is that the summary of argument is legalistic and the introduction is not, but it is hard to know how to say that in a rule without confusing the reader. Mr. Letter observed that circuits could address the matter by local rule. He asked whether Assistant United States Attorneys in the Third Circuit include

introductions. An appellate judge member stated that they usually do not.

By consensus, the Committee decided to keep this item on its agenda and discuss it again at the Spring 2012 meeting.

B. Item Nos. 11-AP-D (changes to FRAP in light of CM/ECF), 08-AP-A (changes to FRAP 3(d) in light of CM/ECF), and 11-AP-C (same)

Judge Sutton introduced this topic, which concerns a couple of specific proposals for amending Appellate Rule 3(d), as well as a broader proposal for reviewing all of the Appellate Rules' functioning, in the light of electronic filing and service. He observed that there will always be some litigants who submit paper filings; the question is when and how to amend the rules to address the growing prevalence of electronic filings. He invited Mr. Green to provide a further introduction to this topic.

Mr. Green noted that all but two circuits have moved to the electronic world. (The Eleventh Circuit will come online within a year or so; the Federal Circuit has yet to come online.) The systems in a number of circuits are mature. Local practices have developed side by side with the Appellate Rules. A key question concerns the treatment of the record and appendix. An attorney member asked whether the Sixth Circuit's CM/ECF system is coordinated with those of the district courts within the Sixth Circuit. Mr. Green reported that the systems are coordinated. The bankruptcy courts were the first to come online, then the district courts, and now the court of appeals. The courts are now at the stage of developing the Next Generation of CM/ECF. There are some areas where the Appellate Rules are silent concerning electronic filings. There is no urgent need to revise the Rules, but over the next couple of years it would make sense to consider amending them.

Judge Sutton asked whether any meeting participants were aware of Appellate Rules that urgently need revision in light of the shift to electronic filing. An appellate judge said that he was not aware of any such rules; the big advantage of the advent of electronic filing, he noted, is that the court is always open to receive such filings. Mr. Letter stated that although there is no urgent need for a rule amendment, it would make sense to consider whether to change Appellate Rule 26(c)'s "three-day rule" (which adds three days to a given period if that period is measured after service and service is accomplished electronically or by a non-electronic means that does not result in delivery on the date of service). Mr. Letter reported that lawyers constantly ask why the three-day rule encompasses electronic service. The problems with electronic service, he noted, are decreasing. Mr. Green agreed that including electronic service within the three-day rule seems like an anachronism.

Mr. Letter noted the possibility that a judge who receives an electronic brief might print it in a format that yields page numbers that differ from those referred to in the briefs. Mr. Green observed that electronic briefs are always required to be filed in PDF format. Mr. Letter responded that PDF briefs can be manipulated to yield different fonts. An appellate judge member stated that he does not change the appearance of briefs in this manner. Mr. Letter asked

whether it would make sense for cross-references in briefs to refer to something other than page numbers. An attorney member responded that numbering the paragraphs in a brief would be an unappealing prospect. Another member suggested that even if a judge prints a brief in another format, he or she could return to the originally-filed version when determining what to refer to in the course of an oral argument. Another appellate judge observed that he had not heard of this phenomenon causing problems.

Judge Sutton suggested that changes relating to electronic filing and service might be addressed over the next few years through a joint project with the other Advisory Committees. Professor Coquillette stated that he would raise this possibility with Judge Kravitz (the Chair of the Standing Committee). Mr. McCabe observed that questions like the proper definition of "transmit" present global issues. A member noted that on that particular question, the Committee's choice of wording for Appellate Rule 6 (in the context of the project to revise that Rule and Part VIII of the Bankruptcy Rules) could end up affecting the overall approach to terminology throughout the Appellate Rules. An appellate judge member asked whether those working on a joint project on electronic filing and service should include court employees who work with the relevant technology. Judge Sutton responded that if the Appellate Rules Committee forms a working group on this topic it could include not only Mr. Green but perhaps also another court employee with technical knowledge. Mr. McCabe noted that such a project would also involve CACM, and that the Next Generation of CM/ECF would presume the use of an all-electronic system. An attorney member agreed that it would be important to involve people with technical knowledge; he observed that in this fast-changing area the time lag between consideration and adoption of rule amendments would pose particular challenges.

VII. Other Information Items

A. Item No. 10-AP-D (taxing costs under FRAP 39)

Judge Sutton invited the Reporter to update the Committee concerning Item No. 10-AP-D. This item relates to the proposed "Fair Payment of Court Fees Act of 2011," which would have amended Civil Rule 68 and Appellate Rule 39 in response to concerns raised about the taxation of costs in *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). The bill would have added a new subdivision (f) to Rule 39; that provision would require the court to order a waiver of appellate costs if the court determined that the interest of justice so required, and would define the "interest of justice" to include the establishment of constitutional or other precedent.

As the Committee has previously discussed, current Rule 39 already provides the courts of appeals with discretion to deny costs in a case such as *Snyder*. On the other hand, the circuits have varied in their application of Rule 39's cost provisions. Pursuant to a request from the Committee, Ms. Leary and the FJC completed a very informative study of circuit practices concerning appellate costs. Ms. Leary found that the circuit practices vary due to differences with respect to factors such as the ceilings on the reimbursable cost per page of copying and the

number of copies. In *Snyder*, the great bulk of the cost award was due to the cost of copying the briefs and extensive appendices.

At the Committee's request, Judge Sutton sent Ms. Leary's report to the Chief Judges of each circuit; and the circuits are responding to the study. Thus, for example, the Fourth Circuit has amended Fourth Circuit Rule 39(a) to lower the ceiling on reimbursable costs from $ 4.00 per page to 15 cents per page. Chief Judge Easterbrook has commented that there seems to be no need to amend the Seventh Circuit's local rules, but that the Appellate Rules should be amended to set the maximum reimbursement per page, to provide that only actual costs are reimbursable, and to clarify that reimbursement can be claimed only for the number of copies that are required by local rule. Chief Judge Lynch has disseminated the FJC study to the judges in the First Circuit for their review. In July 2011, the Rules Committees submitted a memo to argue that the proposed bill to amend Civil Rule 68 and Appellate Rule 39
would be unnecessary in light of, inter alia, the circuits' responses to the FJC study and the growing prevalence of electronic filing (which will decrease copying costs). The bill has not been reintroduced in the 112th Congress.

Judge Sutton thanked Ms. Leary for her informative and timely research, which was key to these positive developments.

B. FRAP-related circuit splits and certiorari petitions

Judge Sutton observed that the ongoing projects to review circuit splits and certiorari petitions relating to the Appellate Rules are designed to help the Committee investigate proactively how the Appellate Rules are functioning. He invited members to comment on these projects, and he invited the Reporter to highlight aspects of the memos concerning them.

The Reporter noted that the certiorari petitions had raised a number of interesting issues concerning appellate practice. For example, the petition in *In re Text Messaging Antitrust Litigation* (No. 10-1172), had challenged the practice of simultaneously granting permission to take a discretionary appeal and deciding the merits of that appeal. The petition for certiorari in *United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1813 (2011), presented a case in which the court of appeals' judgment was entered at the end of March; there was no petition for rehearing, but the mandate did not issue; and the court of appeals in mid-August granted rehearing en banc and vacated the panel opinion. The Eleventh Circuit has now adopted an internal operating procedure under which – if no rehearing petition has been filed by the time the mandate would otherwise issue – the clerk will make a docket entry to advise the parties when a judge has notified the clerk to withhold the mandate.

Judge Sutton asked whether Committee members wished to discuss any of the other cases addressed in the memos. An appellate judge member noted that he had been struck by the procedure employed by the court of appeals in *Karls v. Goldman Sachs Group, Inc.*, 131 S. Ct. 180 (2010). The practice followed in the Ninth Circuit appears to be that if an appeal meets the test for summary affirmance (in the Ninth Circuit, "appeals obviously controlled by

precedent and cases in which the insubstantiality is manifest from the face of appellant's brief"), then the panel that summarily affirmed can, if it chooses, reject any petition for rehearing en banc without circulating it to the other active judges. The member noted that when an appeal is controlled by circuit precedent, rehearing en banc would be a particularly important avenue for the litigant seeking to overturn that precedent. A member suggested that the Ninth Circuit's use of this procedure may stem from the docket pressures in that circuit. Another member observed that this procedure ceded authority (over whether to vote to rehear a case en banc) to the judges on the panel.

VIII. Date and Location of Spring 2012 Meeting

Judge Sutton noted that the Committee's Spring 2012 meeting is scheduled for April 12 and 13 in Washington, D.C.

IX. Adjournment

The Committee adjourned at 9:40 a.m. on October 14, 2011.

Respectfully submitted,

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Catherine T. Struve
Reporter

Advisory Committee on Appellate Rules
Table of Agenda Items — December 2011

FRAP Item	Proposal	Source	Current Status
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11
07-AP-H	Consider issues raised by Warren v. American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11

FRAP Item	Proposal	Source	Current Status
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Draft approved 10/10 for submission to Standing Committee Approved for publication by Standing Committee 01/11 Published for comment 08/11
08-AP-N	Amend FRAP 5 to allow parties to submit an appendix of key documents from the record along with petitions and answers	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1.5 line-spacing for briefs	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-Q	Consider amending FRAP 10(b) to permit the use of digital audio recordings in place of written transcripts	Hon. Michael M. Baylson	Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09

FRAP Item	Proposal	Source	Current Status
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10
10-AP-B	Consider FRAP 28's treatment of statements of the case and of the facts	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11
10-AP-D	Consider factors to be taken into account when taxing costs under FRAP 39	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 10/11
10-AP-H	Consider issues relating to appellate review of remand orders	Committee on Federal-State Jurisdiction	Discussed and retained on agenda 10/10
10-AP-I	Consider issues raised by redactions in appellate briefs	Paul Alan Levy, Esq.	Discussed and retained on agenda 04/11 Discussed and retained on agenda 10/11
11-AP-B	Consider amending FRAP 28 to provide for introductions in briefs	Appellate Rules Committee	Discussed and retained on agenda 10/11
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Awaiting initial discussion
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11
11-AP-E	Consider amendment to FRAP 4(b)	Roger I. Roots, Esq.	Awaiting initial discussion

FRAP Item	Proposal	Source	Current Status
11-AP-F	Consider amendment authorizing discretionary interlocutory appeals from attorney-client privilege rulings	Amy M. Smith, Esq.	Awaiting initial discussion

TAB 11

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: **Honorable Mark R. Kravitz, Chair**
Standing Committee on Rules of Practice and Procedure

FROM: **Honorable Sidney A. Fitzwater, Chair**
Advisory Committee on Evidence Rules

DATE: **November 28, 2011**

RE: **Report of the Advisory Committee on Evidence Rules**

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on October 28, 2011 in Williamsburg, Virginia at the William and Mary Marshall-Wythe College of Law. The meeting was preceded by a Symposium on the Restyled Rules of Evidence that William and Mary hosted at the Committee's request. The Committee is not proposing any action items for the Standing Committee at its January 2012 meeting. It continues to monitor the need for rule changes necessitated by the Supreme Court's decision in *Crawford v. Washington* and its progeny. The Committee's work also includes considering whether Rule 801(d)(1)(B) should be amended, a privileges project (which is the subject of a separate memorandum to the Standing Committee), and a continuous study of the Evidence Rules.

II. Action Items

No action items.

III. Information Items

A. Symposium on the Restyled Rules of Evidence

Prior to commencement of the fall meeting, at the request of the Committee, the William and Mary Marshall-Wythe College of Law hosted a Symposium on the Restyled Rules of Evidence. The Committee was particularly pleased that members of the Standing Committee were able to attend.

The Symposium consisted primarily of presentations made by two panels that included key participants in the restyling project. One panel—moderated by Committee Reporter Professor Daniel J. Capra (Fordham Law School)—examined the restyled rules retrospectively, sharing critical insights into how this complicated project was completed. The other panel—moderated by Committee Consultant Professor Kenneth S. Broun (University of North Carolina School of Law)—considered the future of the Federal Rules of Evidence, including the restyled rules, examining issues that remain for further consideration.

The members of the "Looking Back" panel were Judge Robert L. Hinkle (Northern District of Florida), the immediate past chair of the Committee; Judge Joan N. Ericksen (District of Minnesota), a Committee member; Judge Marilyn L. Huff (Southern District of California), the Standing Committee liaison to the Committee and a member of the Standing Committee Style Subcommittee; Judge Reena A. Raggi (Second Circuit), a member of the Standing Committee Style Subcommittee; Judge Geraldine Soat Brown (Northern District of Illinois), representing the Federal Magistrate Judges Association; Professor Joseph Kimble (Thomas Cooley Law School), Style Consultant to the Restyling Project; Professor Edward H. Cooper (University of Michigan Law School), Reporter to the Advisory Committee on Civil Rules; and Professor Stephen A. Saltzburg (George Washington University Law School), ABA Consultant to the Restyling Project (who submitted a written statement).

The "Looking Forward" panelists were Judge Harris L. Hartz (Tenth Circuit), a member of the Standing Committee during the Restyling Project; Justice Andrew D. Hurwitz (Arizona Supreme Court), former Committee member; Professor Roger C. Park (University of California Hastings College of the Law); Professor Deborah J. Merritt (Ohio State University Michael E. Moritz College of Law); Professor Kathryn Traylor Schaffzin (University of Memphis Cecil C. Humphreys School of Law); Professor Jeremy Counsellor (Baylor Law School); and attorney Paul Hannaford-Agor, Director, Center for Jury Studies, National Center for State Courts (Williamsburg, Virginia).

The Symposium proceedings will be published in the *William and Mary Law Review* on an expedited schedule, with publication expected in late March 2012.

B. Proposed Amendment to Rule 803(10)

The amendment to Rule 803(10) that the Standing Committee approved for release for public comment at its June 2011 meeting is out for public comment.

Rule 803(10) currently allows the government to prove in a criminal case, through the introduction of a certificate, that a public record does not exist. Under *Melendez-Diaz v. Massachusetts* such a certificate would be "testimonial" within the meaning of the Confrontation Clause, as construed by *Crawford v. Washington*. Therefore, the admission of such certificates (in lieu of testimony) violates the accused's right to confrontation. The proposed amendment to Rule 803(10) addresses the confrontation clause problem in the current rule by adding a "notice-and-demand" procedure. This procedure requires that the government produce the person who prepared the certificate only if, after receiving notice from the government of its intent to introduce a certificate, the defendant makes a timely pretrial demand for production of the witness. In *Melendez-Diaz* the Court stated that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates

As of the Committee's fall meeting, no comments had been received. Hearings on the proposed rule are currently scheduled for January 7, 2012 in Phoenix, Arizona and January 17, 2012 in Washington, D.C. The Committee will consider at its spring 2012 meeting any comments received.

C. Possible Amendment to Rule 801(d)(1)(B)

As it did at its spring 2011 meeting, the Committee considered at its fall 2011 meeting a proposal to amend Rule 801(d)(1)(B), the hearsay exemption for certain prior consistent statements. Although not listed as an action item, the Committee intends at the January 2012 meeting of the Standing Committee to seek its guidance regarding whether the proposal should be considered further. Subject to that guidance, the Committee intends to take up this proposal again at its spring 2012 meeting.

Under the proposal, Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness' credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements. Under the current rule, some prior consistent statements offered to rehabilitate a witness' credibility—specifically, those that rebut a charge of recent fabrication or improper influence or motive—are also admissible substantively under the hearsay exemption. In contrast, other rehabilitative statements—such as those that explain a prior inconsistency or rebut a charge of faulty recollection—are admissible only for rehabilitation but not substantively.

Proponents of a rule change maintain that there are two basic problems under the present rule. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness' trial testimony, so the prior consistent statement adds no real substantive effect to the proponent's case.

Concerns, however, have been expressed about this proposal. One concern is that any expansion of the hearsay exemption to cover all prior consistent statements admissible for rehabilitation might be viewed as a signal that the Rules are taking a more liberal attitude toward admitting prior consistent statements generally. Under an amended version of Rule 801(d)(1)(B), parties might seek to use the exemption as a means to bolster the credibility of their witnesses, and courts might admit more prior consistent statements, leading to impermissible bolstering.

Prior its spring meeting, the Committee, with the assistance of the Federal Judicial Center, intends to survey all district judges to obtain their views on whether the proposal is needed and has merit. The Committee will also solicit the views of the American Bar Association, the American College of Trial Lawyers, the National Association of Criminal Defense Lawyers, and other interested groups.

D. Privileges Project

Several years ago, the Committee undertook a project to publish a pamphlet describing the federal common law on evidentiary privileges. The Committee determined that, although it would be inappropriate to propose to Congress a codification of the evidentiary privileges, it would be valuable to the Bench and Bar to set out in text and commentary the federal common law privileges. The Consultant to the Committee has prepared drafts of several privileges.

Although not listed as an action item, as explained more fully in a separate memorandum, the Committee is requesting the guidance of the Standing Committee regarding whether and how this project should proceed.

E. "Continuous Study" of the Evidence Rules

The Committee is responsible for engaging in a "continuous study" of the need for any amendment to the Federal Rules of Evidence. The grounds for a possible amendment include (1) a split in authority about the meaning of a rule; (2) a disparity between the text of a rule and the way that the Rule is actually being applied in courts; and (3) difficulties in applying a rule, as experienced by courts, practitioners, and academic commentators.

Under this standard, the Reporter has raised the following possible amendments for the Committee's consideration: (1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; (2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; (3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; (4) clarifying the business duty requirement in Rule 803(6); and (5) resolving a dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given.

The Committee will consider at its spring 2012 meeting the possible amendments that the Reporter has identified.

F. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to confront and cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

With the exception of Rule 803(10), nothing in the developing case law appears to mandate an amendment to the Evidence Rules at this time. The Supreme Court is currently considering the case of *Williams v. Illinois*, in which it will address whether an expert witness can testify to the results of a laboratory test where the certificate of the test is not itself admitted at trial. The Court's decision in *Williams* may have an effect on the application of Rule 703. The Committee will monitor developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

IV. Minutes of the Fall 2011 Meeting

The Reporter's draft of the minutes of the Committee's October 2011 meeting is attached to this report. These minutes have not yet been approved by the Committee.

TAB 11-A

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
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WASHINGTON, D.C. 20544

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: **Honorable Mark R. Kravitz, Chair, and the Members of the Standing Committee on Rules of Practice and Procedure**

FROM: **Honorable Sidney A. Fitzwater, Chair Advisory Committee on Evidence Rules**

DATE: **November 28, 2011**

RE: **Request of the Advisory Committee on Evidence Rules for Guidance Concerning its Privileges Project**

I Background

Congress has excluded rules governing privilege from the Rules Enabling Act process. Any new rule concerning privilege must be directly enacted by Congress. *See* 28 U.S.C. § 2074(b). Accordingly, with one exception, the Advisory Committee on Evidence Rules ("Committee") has not dealt with the possibility of new rules governing privilege. The exception is Rule 502, which governs inadvertent waiver and scope of waiver. But even that Rule, although initially drafted by the Committee, went through the usual legislative process.

Ten years ago, the Committee decided that, in lieu of rules governing privilege, it would attempt to survey the federal law of privilege. Professor Kenneth S. Broun of the University of North Carolina School of Law was hired as a consultant to work with the Committee Reporter, Professor Dan Capra, in a project to draft survey rules governing the most important privileges. It was intended that the survey rules be published either in a monograph or in a legal journal. The Committee has sponsored two other projects that were not intended to result in rule amendments. The first was an article discussing original Advisory Committee Notes that were superseded in whole or part by Congressional changes to the Committee draft. The second was an article about case law that diverged from the explicit text of an applicable Federal Rule of Evidence. Both articles were published under the name of the Reporter, who wrote them. In the text of the articles, the

Reporter referred to the Committee's interest in and review of the project, but made clear that the Committee was not proposing any change to any existing Rules of Evidence. Similarly, Professor Broun's work under the auspices of the privileges project is not intended to have any binding effect; instead, it would constitute a guide for the courts, in much the same way as does a Restatement. The Committee does not intend through this project to make new law or to change existing case law. Points of uncertainty or conflict would be noted but not resolved.

Professor Broun initially prepared two survey rules: psychotherapist-patient privilege and attorney-client privilege. As the Committee had directed, the survey rules attempted only to restate federal case law. Where there was no federal case law directly on point, the survey rules borrowed from the prevailing state law or sources such as the Uniform Rules of Evidence or the Restatement of the Law Governing Lawyers. There was considerable discussion of both survey rules in a subcommittee appointed to review the Rules and in the Committee itself. Amendments and additional research were prepared in response to the comments made in those discussions.

The project was placed on an undeclared hold from 2006-2010. During this period, the Committee was occupied primarily with Rule 502 or with the extensive work of restyling. Professor Broun's time was spent assisting with these projects.

At its fall 2010 meeting, the Committee asked Professor Broun to renew his work. He updated his drafts of the psychotherapist-patient and attorney-client privileges and prepared a new survey rule dealing with the marital communications privilege. These survey rules were presented to the Committee, first at its spring 2011 meeting and again at its fall 2011 meeting.

At the fall 2011 meeting, a few Committee members raised questions about the project. Some concern was expressed that a survey rule published under the auspices of the Committee would be given weight similar to the Rules of Evidence promulgated through the Rules Enabling Act process. Concern was also expressed that law might be created where, in the absence of federal case law, a survey rule borrowed from state law or other sources. The Committee decided that the working name of the project would be changed from "survey rules" to "compendium of the federal law on privileges" to avoid any inference that the Committee was trying to establish new rules of evidence.

II. Request for Guidance

The Committee has concluded that it is prudent to seek the Standing Committee's guidance on this project. Guidance regarding the following questions would be helpful.

- Should the Committee continue the project as it is now intended, i.e., review by the Committee of a compendium of privileges law drafted by Professor Broun in consultation with the Committee Reporter?

- If the project continues in its present form, should the Committee review any of the work on privileges with the same rigor as it would review a rule that was going through the Rules Enabling Act process?

- If the privileges project continues in its present form, should it exclude rules or aspects of rules as to which there is no federal case law or where the federal case law is in conflict?

- Assuming that Professor Broun and the Reporter publish their work, should the publication indicate that the work was done at the request, or under the auspices, of the Committee, or should it disclaim Committee approval and/or involvement?

The Committee is grateful for any guidance the Standing Committee deems it appropriate to provide.

TAB 11-B

Advisory Committee on Evidence Rules

Minutes of the Meeting of October 28, 2011

Williamsburg, Virginia

The Judicial Conference Advisory Committee on the Federal Rules of Evidence (the "Advisory Committee") met on October 28, 2011 in Williamsburg, Virginia.

The following members of the Committee were present:

Hon. Sidney A. Fitzwater, Chair
Hon. Brent R. Appel
Hon. Anita B. Brody
Hon. John A. Woodcock, Jr.
Hon. William K. Sessions III
William T. Hangley, Esq.
Marjorie A. Meyers, Esq.
Paul Shechtman, Esq.
Elizabeth J. Shapiro, Esq., Department of Justice

Also present were:

Hon. Marilyn L. Huff, Liaison from the Committee on Rules of Practice and Procedure and member of the Standing Committee's Style Subcommittee
Hon. Wallace Jefferson, member of the Standing Committee
Hon. Joan N. Ericksen., former member of the Evidence Rules Committee
Hon. Judith H. Wizmur, Liaison from the Bankruptcy Rules Committee
Hon. Andrew Hurwitz, former member of the Evidence Rules Committee
Jonathan Rose, Chief, Rules Committee Support Office
Benjamin Robinson, Esq., Rules Committee Support Office
Peter McCabe, Esq., Secretary to the Standing Committee
Professor Daniel J. Capra, Reporter to the Evidence Rules Committee
Professor Kenneth S. Broun, Consultant to the Evidence Rules Committee
Timothy Reagan, Esq., Federal Judicial Center
Professor Laird Kirkpatrick, George Washington University Law School
Professor Frederic Lederer, William and Mary Law School
Professor Roger Park, Hastings Law School
Professor Katherine Schaffzin, University of Memphis School of Law

I. Opening Business

Introductory Matters

Judge Fitzwater, the Chair of the Committee, welcomed the members, liaisons, other members of the Standing Committee, and members of the public. The minutes of the Spring 2011 Committee meeting were approved.

Judge Fitzwater noted that the Restyled Rules of Evidence will go into effect on December 1, 2011. The Restyled Rules have won two important awards for excellence in legal writing — the Burton Award and the Clearmark Award. In honor of the Restyled Rules going into effect, the Advisory Committee sponsored a Symposium on the Restyled Rules of Evidence, which took place on the morning of the Advisory Committee meeting. Judge Fitzwater stated that the Symposium was a great success. He observed that the ideas exchanged by the panel members will provide an important historical record on the meaning of the Restyled Rules, and will also assist the Advisory Committee going forward. Judge Fitzwater thanked the Reporter for putting together the Symposium; William and Mary Law School for hosting the event; Professor Frederic Lederer for all his help in hosting the Symposium; the William and Mary Law Review for publishing the proceedings; and all the panelists and moderators who made such outstanding presentations.

Judge Fitzwater then welcomed and introduced the two new members of the Advisory Committee, Judge Sessions and Judge Woodcock.

Judge Fitzwater and the Reporter then provided heartfelt thanks to two former members — Justice Hurwitz and Judge Ericksen — who both provided excellent service to the Committee. Each has been and will be sorely missed.

II. Proposed Amendment to Rule 803(10)

In *Melendez-Diaz v. Massachusetts*, the Supreme Court held that certificates reporting the results of forensic tests conducted by analysts were "testimonial" and therefore the admission of such certificates (in lieu of testimony) violated the accused's right to confrontation. The Court reasoned that the certificates were prepared exclusively for use in a criminal trial, as substitutes for trial testimony, and so were testimonial within the meaning of the Confrontation Clause as construed by *Crawford v. Washington.*

The Advisory Committee at its Spring 2011 meeting proposed an amendment to Rule 803(10), which currently allows the government to introduce a certificate to prove that a public record does not exist. A certificate of the absence of public record is ordinarily prepared for use in a criminal case, and so under *Melendez-Diaz*, such a certificate would be testimonial. The proposed amendment to Rule 803(10) adds a "notice-and-demand" procedure to the Rule: requiring production of the person who prepared the certificate only if after receiving notice from the

government of intent to introduce a certificate, the defendant makes a timely pretrial demand for production of the witness. In *Melendez-Diaz* the Court declared that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates. The Advisory Committee's proposed amendment was approved for release for public comment.

The Reporter reported to the Advisory Committee that no public comments had yet been received on the proposed amendment to Rule 803(10). Any comments that are received will, of course, be reviewed by the Committee at its Spring 2012 meeting.

III. Possible Amendment to Rule 801(d)(1)(B)

At the Spring 2011 meeting the Committee considered a proposal to amend Evidence Rule 801(d)(1)(B), the hearsay exemption for certain prior consistent statements. Under the proposal, Rule 801(d)(1)(B) would be amended to provide that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The justification for the amendment is that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements.

Under the current rule, some prior consistent statements offered to rehabilitate a witness's credibility — specifically those that rebut a charge of recent fabrication or improper motive — are also admissible substantively under the hearsay exemption. In contrast, other rehabilitative statements — such as those which explain a prior inconsistency or rebut a charge of faulty recollection — are not admissible under the hearsay exception but only for rehabilitation. There are two basic practical problems in the distinction between substantive and credibility use as applied to prior consistent statements. First, the necessary jury instruction is almost impossible for jurors to follow. The prior consistent statement is of little or no use for credibility unless the jury believes it to be true. Second, and for similar reasons, the distinction between substantive and impeachment use of prior consistent statements has little, if any, practical effect. The proponent has already presented the witness's trial testimony, so the prior consistent statement adds no real substantive effect to the proponent's case.

At the Spring 2011 meeting the Committee unanimously agreed that the current distinction between substantive and impeachment use of prior consistent statements is impossible for jurors to follow. But some members were concerned that any expansion of the hearsay exemption to cover all prior consistent statements admissible for rehabilitation might be taken as a signal that the Rules were taking a more liberal attitude toward admitting prior consistent statements generally. Parties might seek to use the exemption as a means to bolster the credibility of their witnesses. The Committee at the Spring meeting resolved to consider the amendment further, and also to seek the input of public defenders, the Department of Justice, and state court judges on the merits of amending Rule 801(d)(1)(B). Before the Fall meeting, the Department of Justice submitted a letter in favor of the amendment and the Public Defender submitted a letter opposed to the amendment. Justice Appel contacted courts in three states and reported that there was recognition that the current

distinction between rehabilitation and substantive use was confusing and not meaningful — but that there was no sense of urgency to amend the rule in those three states.

At the Fall meeting, the Public Defender expressed concern that courts would end up admitting more prior consistent statements under the amendment, leading to impermissible bolstering of witnesses. The Reporter responded that the amendment by its terms would admit no statements that are not already admitted for rehabilitation — and any possible risk of abuse would be tempered by the court's judicious use of Rule 403, as emphasized in the proposed Advisory Committee Note. The Reporter also noted that in Minnesota, where the Rule is similar to the proposed amendment, there does not appear to be any indication in the case law that prior consistent statements had been more liberally admitted.

The Public Defender also expressed concern that if a witness had made both consistent and inconsistent statements, all of them admissible for impeachment or rehabilitation, then under the amendment all of the consistent statements would be admissible for their truth while the prior inconsistent statements — if not made under oath — would be admissible only for impeachment and not for their truth. The Public Defender argued that in this situation the judge would completely confuse the jury by giving different instructions for consistent and inconsistent statements. (But in fact the judge in such a situation would not give any instruction about the consistent statements because, under the amendment, the consistent statements would be admissible for both rehabilitation and substantive use — this means that under the amendment there will be fewer, not more, instructions).

A member of the Committee noted that the rule as it exists is logically inconsistent and intellectually dishonest; as such the Committee should approve the amendment to further its goal of providing consistent and logical rules. Another member observed that prior consistent statements often had value as corroboration. He also noted that the clearer the judge can be to the jury, the better for the system — and the instruction required as to certain prior consistent statements under current law is incomprehensible to jurors and accordingly brings disrespect to the system. The Reporter and the Chair noted that the proposed amendment had been greeted with enthusiasm by some of the district court judges on the Standing Committee when it was raised as an information item at the Spring 2011 meeting. Those judges remarked that in their experience, an instruction that a prior consistent statement was admissible for rehabilitation and not for its truth is one that jurors find impossible to follow.

One Committee member suggested that the instruction currently given for consistent statements admissible only for rehabilitation might in fact have some value for counsel in argument to the jury.

Other members of the Committee were undecided about the amendment and suggested the Committee seek more input from judges and interested groups to determine whether it would be worthwhile to proceed with an amendment.

The Committee ultimately voted to table the proposal and conduct further research so that it could be considered on the merits at the Spring 2012 meeting. The Reporter stated that he would work with Dr. Reagan, the FJC representative, to send out a survey to district judges to seek their views on the need for and merits of the proposed amendment. The Reporter stated that he would also send the proposal to the ABA, the American College of Trial Lawyers, the NACDL, and other interested groups for their views on the proposal. The Chair also stated that he would raise the proposal as an information item at the next Standing Committee, in order to seek guidance on whether the amendment was worth pursuing.

The working language for the proposed amendment, to be considered at the next meeting, is as follows:

> **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
>
> > **(1)** ***A Declarant-Witness's Prior Statement.*** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
> >
> > * * *
> >
> > **(B)** is consistent with the declarant's testimony and ~~is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying~~ rehabilitates [is otherwise admissible to rehabilitate] [supports] the declarant's credibility as a witness;

IV. *Crawford* Developments

The Reporter provided the Committee with a case digest of all federal circuit cases discussing *Crawford v. Washington* and its progeny. The digest was grouped by subject matter. The goal of the digest is to allow the Committee to keep apprised of developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions.

The Committee reviewed the memo and the Reporter noted that — with the exception of Rule 803(10), the proposed amendment currently out for public comment — nothing in the developing case law mandated an amendment to the Evidence Rules at this time. The Reporter observed that the Supreme Court is currently considering the case of *Williams v. Illinois*, in which it will address whether an expert witness can testify to the results of a lab test where the certificate of the test is not itself admitted at trial. The Court's decision in *Williams* may have an effect on the application of Rule 703. The Committee resolved to continue monitoring developments on the relationship between the Federal Rules of Evidence and the accused's right to confrontation.

V. Privilege Project

Several years ago the Committee voted to undertake a project to publish a pamphlet that would describe the federal common law on evidentiary privileges. The Committee determined that it would not be advisable to propose an actual codification of all the evidentiary privileges to Congress, or even to opine on what model rules of privilege would look like. But it concluded that it could perform a valuable service to the bench and bar by setting forth, in text and commentary, the privileges that exist under federal common law. Professor Broun had prepared drafts of a number of privileges, but the project was put on hold given the time and resources required for Rule 502 and the restyling project.

At the Fall meeting, Professor Broun submitted materials on the attorney-client privilege and the marital privileges. Committee members stated for the record that the project was intended only as a description of the federal common law of privilege, and would result in a published product that would assist the bench and bar. Members emphasized that the Committee has no intent to propose codification of privileges or to intrude on Congress's role in enacting privilege rules.

But some members expressed concern that the project might be read as the Committee's statement about what privileges *ought* to look like or which side of a dispute about the meaning or extent of a privilege should be adopted. There was also a concern that by even stating what the law was, the Committee might put its imprimatur on bad or disputed law. Other members suggested that calling the project a "survey" or a "restatement" might be misinterpreted as the Committee's attempt to establish the law of privileges.

Professor Broun and the Reporter emphasized that the project was not intended to provide the Committee's imprimatur on any question of privilege law. Committee members suggested that the title of the project should be changed to indicate the limited intent. After discussion, the working title of the project was changed from "privilege survey" to "compendium" on the federal common law of privilege.

The Committee also determined that the ultimate work product should not be published under the name of the Committee. The Reporter noted that he had, at the Committee's direction, written two articles about the Federal Rules. Those articles were reviewed and approved by the Committee, but they were published under the Reporter's name in pamphlets published by the Federal Judicial Center. Those pamphlets thus were not sent out under the Advisory Committee's auspices, and accordingly their publication was outside the rules process. They were not sent out for a period of public comment and they were not approved by a vote of the Standing Committee. Committee members generally agreed that the same or a similar process should be employed if and when the work on privileges is ready for publication.

Judge Fitzwater stated that he would raise the privilege project at the next Standing Committee meeting and seek advice on how and whether the project should be published. Professor

Broun and the Reporter stated that they would prepare a memorandum for the Committee's next meeting on the process questions involved in preparing and publishing a work on privileges.

VI. "Continuous Study" of the Evidence Rules

The Procedures for the Standing Committee require the Evidence Rules Committee to engage in a "continuous study" of the need for any amendment to the Rules. At the Chair's request, the Reporter prepared a memorandum setting forth the history of the studies that have already been undertaken by the Advisory Committee, and providing some suggestions of possible amendments for consideration by the Committee. The grounds for a possible amendment included: 1) a split in authority about the meaning of an Evidence Rule; 2) a disparity between the text of a rule and the way that the rule is actually being applied in courts; 3) difficulties in applying a rule, as experienced by courts, practitioners, and academic commentators.

Possible amendments raised by the Reporter included: 1) amending Rule 106 to provide that statements may be used for completion even if they are hearsay; 2) clarifying that Rule 607 does not permit a party to impeach its own witness if the only reason for calling the witness is to present otherwise inadmissible evidence to the jury; 3) clarifying that Rule 803(5) can be used to admit statements made by one person and recorded by another; 4) clarifying the business duty requirement in Rule 803(6); and 5) resolving the dispute in the courts over whether prior testimony in a civil case may be admitted against one who was not a party at the time the testimony was given.

At the meeting, after a brief discussion, Judge Fitzwater noted that the Committee was just coming off a number of difficult and time-consuming projects and could use more time to consider the possible amendments set out by the Reporter. Accordingly, the Committee resolved to place the Reporter's memorandum on the Spring agenda. One member stated for the record that he was in favor of the proposal to amend Rule 607 to prevent parties from abusing the rule by calling a witness solely to introduce otherwise inadmissible evidence.

VII. Next Meeting

The Spring 2012 meeting of the Committee is scheduled for Tuesday April 3 in Dallas.

Respectfully submitted,

Daniel J. Capra
Reporter

TAB 12

COMMITTEE FIVE-YEAR JURISDICTIONAL REVIEW

Each Judicial Conference committee has been asked to complete a periodic review of its jurisdiction and functions. As the attached questionnaire explains, in September 1987, when the Judicial Conference committee structure was last substantially revised, the Conference determined that each committee should perform a self-evaluation every five years and recommend to the Executive Committee, with justification, whether the committee should be abolished or maintained. At each five-year review of its jurisdiction and functions since that time, the Standing Rules Committee–and each of its five Advisory Rules Committees–has recommended that the Committees be maintained.

As part of this evaluation, the Committees have been asked to complete a questionnaire. Draft responses to the questionnaire will be distributed for the Committee's consideration. A copy of the Standing Rules Committee's jurisdictional statement is provided further below. There are no proposals or recommendations to modify the Standing Rules Committee's jurisdictional statement.

> **Recommendation:** It is recommended that the Committee advise the Executive Committee of the Judicial Conference that, upon review of its jurisdiction and functions, the Committee on Rules of Practice and Procedure, in coordination with the Advisory Rules Committees, recommends that the Committees be maintained and that the Committee on Rules of Practice and Procedure's jurisdictional statement remain unchanged.

Jurisdictional Statement of the
Committee on Rules of Practice and Procedure

Committee on Rules of Practice and Procedure: To carry on a continuous study of the operation and effect of the general rules of practice and procedure.

Review reports and recommendations submitted by the five Advisory Committees and approve, modify, disapprove or return those recommendations to the Advisory Committees, as appropriate.

Transmit to the Judicial Conference proposed rules changes, together with Committee Notes relating thereto, and a summary indicating which proposed changes were the subject of substantial controversy.

Review and make recommendations to the Judicial Conference with regard to legislation affecting rules of practice and procedure.

Coordinate the work of the Advisory Committees, and make suggestions of proposals to be studied by them.

Rules Advisory Committees: To study the rules of practice and procedure in each Advisory Committee's field.

Consider suggestions and recommendations from bench and bar for changes in the rules.

Draft and publish proposed rules changes and Committee Notes and, when necessary, conduct public hearings thereon.

Submit to the Rules Committee those rule changes and Committee Notes finally agreed upon, a summary indicating which proposed rules changes were the subject of substantial controversy, the reports of the comments received in writing or during public hearings, and an explanation of any changes made subsequent to the original publication.

Excerpted from *JCUS - Jurisdiction of Committees,* September 2009, available at http://jnet.ao.dcn/Judicial_Conference/Jurisdictional_Statements.html.

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE THOMAS F. HOGAN
Secretary

October 25, 2011

MEMORANDUM

To: Judicial Conference Committee Chairs

From: Judge Thomas F. Hogan

RE: QUESTIONNAIRE ON THE FIVE-YEAR REVIEW OF COMMITTEE JURISDICTION AND STRUCTURE

A number of procedures were put into place as part of the last major restructuring of the Judicial Conference and its committees in 1987. Among them was a requirement that "[e]very five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished." This review is scheduled to occur again in 2012, and attached you will find a questionnaire that will assist your committee in conducting this review. I am asking you to place this issue on the agendas for your committees' winter 2011-2012 meetings so that the Executive Committee can consider your responses at its February 2012 meeting.

As with past five-year reviews, this is an opportunity for committees to reexamine their structure and functions and to discuss possible modifications to their jurisdictional statements and composition that might enhance their operations. Committees should pay particular attention to the process involved in instances where committees must work together on cross-cutting issues. Each committee staff has received this memorandum and will include the attached questionnaire, your committee's current jurisdictional statement, and any other relevant information in the committee's agenda materials for its winter meeting.

When completed, the questionnaires should be emailed to Laura C. Minor, Assistant Director, Office of Judicial Conference Executive Secretariat at OJCES@ao.uscourts.gov. To permit timely consideration by the Executive Committee, the questionnaires should be received no later than **January 18, 2012**.

Attachment

cc: Committee staffers

2012 JUDICIAL CONFERENCE COMMITTEES' SELF-EVALUATION QUESTIONNAIRE

Committee Name: _____

Background

In 1987, as part of the last major restructuring of the Judicial Conference and its committees, the Conference established a policy that "[e]very five years, each committee must recommend to the Executive Committee, with a justification for the recommendation, either that the committee be maintained or that it be abolished." This review examines not only the need for a committee's continued existence but also the scope of its jurisdiction and its workload, composition, and operating processes, as well as aspects of the committee structure that might be reevaluated in the future. All committees have been asked to include it on their agendas for the winter 2011-12 meetings, and the following questionnaire is intended to facilitate the review process. The Executive Committee will consider the committees' responses at its February 2012 meeting.

Jurisdiction

1. Is the work of the Committee consistent with its jurisdictional statement?
   _____ yes _____ no

   If no, please explain:

2. Are there areas in which the Committee's work currently overlaps with the work of other committees? _____ yes _____ no

   If yes, please explain:

3. Are there areas currently within the jurisdiction of this Committee that might be handled by another committee? _____ yes _____ no

   If yes, please explain:

Committee Name: _____

4. Are there areas currently within the jurisdiction of other committees that might be handled by this Committee? _____ yes _____ no

   If yes, please explain:

5. Are issues that cut across committee jurisdictional lines adequately identified and addressed? _____ yes _____ no

   If no, what more can be done to facilitate the handling of cross-cutting issues?

Size/Composition

6. Is the size of the Committee—

_____ too big? _____ too small? _____ appropriate?

   If too big or too small, please explain:

7. Is the Committee membership appropriately representative? _____ yes _____ no

   If no, please explain:

Committee Name: _____

8. Do non-committee members regularly attend your meetings? _____ yes _____ no

   If yes, on average how many non-committee members attend and, generally, for what purpose?

Amount of Work

9. Overall, the Committee has—

_____ too much to do.	_____ too little to do.	_____ the appropriate amount of work.

   If too much or too little, please explain:

Operating Processes

10. How often and on what types of issues is Committee business conducted by means other than face-to-face meetings?

11. Does the Committee use subcommittees to conduct its business? _____ yes _____ no

    If yes, have the 2009 guidelines on the use of subcommittees[1] had an impact on your use and management of subcommittees?

[1] For access to these guidelines, committee chairs please click here, and committee staffers please click here.

Committee Name: _____

12. How, if at all, has technology facilitated the work of your committee? Are there additional technology needs that would further facilitate your work?

13. Are the materials you receive in preparation for committee meetings appropriate in terms of content and quantity? _____ yes _____ no

    If no, please explain:

Conclusion

14. This Committee should—

    _____ continue to exist.

    _____ be divided into two or more committees.

    _____ be combined with one or more committees.

    _____ be abolished.

    Please explain why:

14. Would you suggest any other changes related to this Committee?

Committee Name: _____

15. Would you suggest any near-term changes related to the committee structure as a whole? For example, should the number of committees be enlarged or reduced? Should other committees be combined, eliminated or divided?

16. For the longer term, what issues or possible changes to committee structure should be considered? Please think broadly.

* * * * * *

Please return by email to OJCES@ao.uscourts.gov.