

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
Meeting of January 12-13, 2009  
San Antonio, Texas  
**Minutes**

TABLE OF CONTENTS

Attendance.....	1
Introductory Remarks.....	3
Approval of the Minutes of the Last Meeting.....	4
Report of the Administrative Office.....	4
Reports of the Advisory Committees:	
Appellate Rules.....	7
Bankruptcy Rules.....	10
Civil Rules.....	15
Criminal Rules.....	25
Evidence Rules.....	28
Guidelines on Standing Orders.....	29
Sealed Cases.....	31
Panel Discussion on Civil Litigation Problems.....	32
Next Committee Meeting.....	42

**ATTENDANCE**

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held at St. Mary's Law School in San Antonio, Texas, on Monday and Tuesday, January 12 and 13, 2009. The following members were present:

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

Ronald J. Tenpas, Assistant Attorney General for the Environment and Natural Resources Division, represented the Department of Justice. Professor Daniel J. Meltzer was unable to attend the meeting.

Also participating in the meeting were: Judge Anthony J. Scirica, former chair of the committee; Professor Geoffrey C. Hazard, Jr., consultant to the committee; Judge Patrick E. Higginbotham, former chair of the Advisory Committee on Civil Rules; Judge Vaughn R. Walker, Professor Steven S. Gensler, and Daniel C. Girard, Esquire, current members of the Advisory Committee on Civil Rules; and Professor David A. Schlueter, former reporter to the Advisory Committee on Criminal Rules.

In addition, the committee conducted a panel discussion in which the following distinguished members of the bench and bar participated: Judge Rebecca Love Kourlis; Gregory P. Joseph, Esquire; Joseph D. Garrison, Esquire; Douglas Richards, Esquire; and Paul C. Saunders, Esquire. Dean Charles E. Cantu of St. Mary's Law School greeted the participants and welcomed them to the school.

Providing support to the committee were:

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

Representing the advisory committees were:

Advisory Committee on Appellate Rules —  
 Judge Carl E. Stewart, Chair  
 Professor Catherine T. Struve, Reporter

Advisory Committee on Bankruptcy Rules —  
 Judge Laura Taylor Swain, Chair  
 Professor S. Elizabeth Gibson, Reporter

Advisory Committee on Civil Rules —  
 Judge Mark R. Kravitz, Chair  
 Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules —  
 Judge Richard C. Tallman, Chair  
 Professor Sara Sun Beale, Reporter

Advisory Committee on Evidence Rules —  
 Judge Robert L. Hinkle, Chair

**INTRODUCTORY REMARKS**

Judge Rosenthal thanked Dean Cantu and St. Mary's Law School for hosting the committee meeting and Becky Adams, Coordinator to the Dean, for her help in planning the meeting, managing transportation, and providing meals and refreshments. She suggested that the committee consider holding more meetings at law schools in the future. She also recognized the outstanding contributions to the rules committees made by Judge Higginbotham and Professor Schlueter, both of whom currently teach at St. Mary's.

Judge Rosenthal thanked Mr. Tenpas for his active and productive involvement in the rules process over the last several years in representing the Department of Justice. She asked him to convey the committee's appreciation back to the many Department executives and career attorneys who have contributed professionally to the work of the rules committees. In particular, she asked the committee to recognize the important contributions in the last couple of years of James B. Comey, Paul J. McNulty, Robert D. McCallum, Jr., Paul D. Clement, John S. Davis, Alice S. Fisher, Greg Katsas, Benton J. Campbell, Deborah J. Rhodes, Douglas Letter, Ted Hirt, J. Christopher Kohn, Jonathan J. Wroblewski, Elizabeth Shapiro, Stefan Cassella, and Michael J. Elston.

Mr. Tenpas announced that the Department had arranged to have career attorneys support the work of the committees during the transition from the Bush Administration to the Obama Administration.

Judge Rosenthal welcomed Judge Scirica and thanked him for his distinguished leadership as the committee's chair. She also recognized Professor Gibson, professor of law at the University of North Carolina, as the new reporter of the Advisory Committee on Bankruptcy Rules. She noted that the advisory committee will have to move quickly to draft additional changes in the bankruptcy rules if pending legislation is enacted to provide bankruptcy judges with authority to modify home mortgages.

Judge Rosenthal reported that all the rules amendments sent by the committee to the Judicial Conference at its September 2008 session had been approved on the Conference's consent calendar and were pending before the Supreme Court. The majority of the changes, she said, were part of the comprehensive package of time-computation amendments. She pointed to the draft cover letter that will be sent to Congress conveying proposed legislation to amend 29 statutory provisions affecting court proceedings and deadlines. She noted that the Department of Justice and a number of bar associations had also written Congress to support the changes.

She added that the new Congress was largely preoccupied in getting organized, but she and others planned to visit members and their staff in February 2009 to discuss the proposed legislation. She noted that a good deal of background work for the proposal had already been initiated in the preceding Congress.

Judge Rosenthal explained that the purpose of the proposed legislation was to coordinate the time-computation rules changes with appropriate statutory changes and make them all effective on December 1, 2009. She reported, too, that the committee would initiate efforts to have the courts amend their local rules to take account of the changes in the national rules and statutes. To that end, it will send materials to the chief judges. She suggested that it should not be difficult for the courts to comply, but it will take coordinated efforts to make sure that the task is completed on a timely basis in each court. She added that the chief judges should also be advised of the matter at various judge workshops and meetings and in articles in the judiciary's publications.

Judge Scirica reported that Chief Justice Roberts had complimented Judge Rosenthal at the September 2008 Judicial Conference meeting for her extraordinary efforts in securing legislative approval of the new FED. R. EVID. 502. Unfortunately, he said, Judge Rosenthal had not been able to attend the Conference in person because of the hurricane in Houston. But, he noted, the honor from the Chief Justice was greatly deserved and remarked upon by many members of the Conference. Judge Scirica then presented Judge Rosenthal with a framed copy of the legislation enacting Rule 502 signed by the President and a personal note from the President.

Judge Rosenthal noted that the 75<sup>th</sup> anniversary of the Rules Enabling Act of 1934 will occur on June 19, 2009. She said that she planned to speak with the Chief Justice about holding an appropriate program later in the year to mark the event. One possibility, she said, would be to combine a celebration at the Supreme Court with education programs on the federal rules process featuring prominent law professors.

### **APPROVAL OF THE MINUTES OF THE LAST MEETING**

**The committee without objection by voice vote approved the minutes of the last meeting, held on June 9-10, 2008.**

### **REPORT OF THE ADMINISTRATIVE OFFICE**

#### *Legislative Report*

Mr. Rabiej reported that the 111<sup>th</sup> Congress was just getting organized. The first legislative task for the rules office staff, he said, had been to prepare the cover letters to be sent to Congressional leadership in support of legislation to amend the time deadlines in 29 statutes. The judiciary, he said, hopes that the legislation will take effect on December 1, 2009.

Mr. Rabiej reported that proposed legislation on gang crime would amend FED. R. EVID. 804(b)(6) (the hearsay exception for unavailable witnesses) to codify a decision of the Tenth Circuit and make it explicit that a statement made by a witness who is unavailable because of a party's wrongdoing may be introduced against that party if the party should have reasonably foreseen that its wrongdoing would make the witness unavailable. One version of the legislation would amend the rule directly by statute. But another would only direct the Standing and Evidence Committees to consider the necessity and desirability of amending the rule.

Mr. Rabiej noted that legislation was anticipated in the new Congress that would authorize bankruptcy judges to alter certain provisions of a debtor's personal-residence mortgage. If enacted, he said, the legislation would likely require amendments to the bankruptcy rules and forms.

On the criminal side, Mr. Rabiej reported that legislation likely would be introduced once again on behalf of the bail bond industry to prohibit judges from forfeiting bonds for any condition other than the defendant's failure to appear in court as ordered. In addition, legislation may be introduced in the new Congress to add more provisions to the rules to protect victims' rights.

On the civil side, Mr. Rabiej reported that the main legislative focus will be on Senator Kohl's bill that would amend FED. R. CIV. P. 26 to impose certain limitations on protective orders. He said that the legislation had been introduced in the last several Congresses and had been opposed consistently by the Judicial Conference on the grounds that it is unnecessary, impractical, and overly burdensome for both courts and litigants. He noted that Judge Kravitz had testified against the legislation in the 110<sup>th</sup> Congress, and his written statement had been included in the committee's agenda materials. He added that Senator Kohl was expected to introduce the bill again in the 111<sup>th</sup> Congress.

Judge Kravitz explained that the legislation had two primary provisions. First, it would prevent judges from entering sealed settlement orders. He pointed out, though, that empirical research conducted for the committee by the Federal Judicial Center had demonstrated that these orders are relatively rare in the federal courts. Thus, the provision would have little practical impact.

The second provision of the legislation, though, would be very troublesome. It would prevent a judge from entering a discovery protective order unless personally assured that the information to be protected by the order does not implicate public health or safety. He pointed out that a judge would have to make particularized findings attesting to that effect at an early stage in a case – when the judge knows very little about the case, the documents have not been identified, and little help can be expected from the parties.

He pointed out that he had been the only witness invited by the House Judiciary Committee to speak against the legislation. He explained in his testimony that the judiciary opposed the bill because empirical data demonstrates that protective orders typically allow parties to come back to the court to challenge the information produced or ask the judge to lift the order. In addition, protective orders have the beneficial effect of allowing lawyers to exchange information more readily and at much less expense to the parties. Many of the problems targeted by the legislation, he said, appear to have arisen in the state courts, rather than the federal courts. He also reported that he had emphasized at the hearing that Congress had established the Rules Enabling Act process explicitly to allow for an orderly and objective review of the rules. Accordingly, Congress should normally give substantial deference to that thoughtful and thorough process.

Judge Kravitz observed that the supporters of the proposed legislation clearly do not fully understand the rules process. Several members of Congress, he said, seemed surprised to discover that the Advisory Committee on Civil Rules had actually held hearings on the proposal, commissioned sound research from the Federal Judicial Center, and reached out to all interest groups. He suggested that the rules committees increase their outreach efforts to Congress. A participant added that the regular turnover of members and staff on Congressional committees results in little institutional memory. He suggested that several prominent law professors would be willing to help educate Congressional staff about the rules process by conducting special seminars for them. Judge Rosenthal added that the 75<sup>th</sup> anniversary celebration of the Rules Enabling Act might be a good time to have some prestigious academics conduct seminars staff on the rules process. The programs, she said, should emphasize that the work of the rules committees is transparent, thorough, and careful.

#### *Administrative Report*

Mr. Ishida reported that the rules staff has continued to improve and expand the federal rules page on [www.uscourts.gov](http://www.uscourts.gov). The digital recordings of the public hearings have now been posted on the site and are available as a podcast. He noted that the website had been attracting favorable attention among bloggers. Mr. McCabe added that the staff was continuing to search for historical records of the rules committees. They traveled recently to Hofstra and Michigan law schools to obtain copies of missing records of the Advisory Committee on Bankruptcy Rules from the 1970s and 1980s.

Judge Rosenthal thanked both the advisory committees and the members of the Standing Committee for their helpful comments on the appropriate use of subcommittees. She said that they will be incorporated in the committee's response to the Executive Committee of the Judicial Conference. Judge Scirica explained that the Executive Committee's request for comments had been motivated by about the supervision by some

committees over their subcommittees. He emphasized that the rules committees' use of subcommittees has always been appropriate and productive.

Judge Rosenthal reported that the newly re-established E-Government Subcommittee, which includes representatives from the Court Administration and Case Management Committee, will address a number of issues that have arisen since the new privacy rules took effect.

### **REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES**

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachments of December 11, 2008 (Agenda Item 6).

#### *Informational Items*

#### FED. R. APP. P. 40(a)(1)

Judge Stewart reported that the advisory committee had voted to give final approval to proposed amendments to Rule 40(a)(1) (time to file a petition for panel rehearing). The amendments would clarify applicability of the extended deadline for seeking panel rehearing to cases in which federal officers or employees are parties. At this time Judge Stewart presented the proposed amendments to the Standing Committee for discussion, rather than for final approval.

He explained that the proposal was one of two recommended by the Department of Justice and published for comment in 2007. The other would have amended FED. R. APP. P. 4(a)(1) to clarify applicability of the 30-day and 60-day appeal time limits in cases in which federal officers or employees are parties. The Department, however, later withdrew the second proposal because the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), indicated that statutory appeal time limits are jurisdictional. Amending Rule 4's time periods for filing a notice of appeal, he said, might raise questions under *Bowles* because those time limits also appear in 28 U.S.C. § 2107.

Judge Stewart reported that the advisory committee at its November 2008 meeting had voted to proceed with the proposed amendment to Rule 40 because it involved a purely rules-based deadline. But he noted that there was no need to proceed at the January 2009 Standing Committee meeting because the matter could be taken up more effectively at the June 2009 meeting. This would give the Department of Justice additional time to decide whether to pursue a legislative change of Rule 4's deadlines, rather than a rules amendment. He pointed out that there is no disadvantage in waiting

because the matter will not be presented to the Judicial Conference until its September 2009 session. The advisory committee, he said, hoped to receive additional input from the Department at its April 2009 meeting.

#### BOWLES V. RUSSELL

Judge Stewart noted that a number of issues are unresolved regarding the impact of *Bowles v. Russell* on appeal deadlines set by statute versus those set by rules. The Supreme Court, he said, has had other pertinent cases on its docket since *Bowles*, but has not provided additional guidance. Accordingly, the advisory committee decided to explore – in coordination with the civil, criminal, and bankruptcy advisory committees – whether a statutory change, rather than a rules amendment, might be appropriate to resolve these issues.

Professor Struve explained that although *Bowles* holds that appeal deadlines set by statute are jurisdictional, the implications of the decision for other types of deadlines are unclear. A consensus has developed, she said, that purely non-statutory deadlines are not jurisdictional. But there are also “hybrid deadlines,” such as those involving motions that toll the deadline for taking an appeal. A split in the case law already exists among the circuits on this matter, and there may even be instances in which one party in a case has a statutory deadline and the other does not.

Professor Struve reported that the advisory committee was considering developing a proposed statutory fix to rationalize the whole situation, and it had asked her to try drafting it. Obviously, she said, the advisory committee will consult with the other advisory committees and reporters, and it will appreciate any insights or guidance that members of the Standing Committee may have. She added that the Advisory Committee on Civil Rules had been particularly helpful in working with her on the matter.

#### COMPLIANCE WITH THE SEPARATE-DOCUMENT REQUIREMENT OF FED. R.CIV. P. 58

Judge Stewart reported that the advisory committee had voted to ask the Standing Committee to take appropriate steps to improve district-court awareness of, and compliance with, the separate-document requirement of FED. R. CIV. P. 58 (entering judgments), rather than to seek rules changes. In particular, jurisdictional problems arise between the district court and the court of appeals in cases where: (1) a separate judgment document is required but not provided by the court; (2) an appeal is filed; and (3) a party later files a tolling motion – which is timely because the court did not enter a separate judgment document – and the motion suspends the effect of the notice of appeal.

Judge Stewart emphasized that it is important for the bar to have the district courts comply with the rule. He reported that the advisory committee had asked the Federal Judicial Center to make informal inquiries regarding compliance. In addition, the advisory committee had asked its appellate clerk liaison, Charles Fulbruge, to canvass his clerk colleagues regarding the level of compliance that they have experienced in their respective circuits with the separate-document rule. Some clerks, he reported, had noted a fair degree of noncompliance, but others had not.

A member reported that a serious problem had existed in his circuit with district courts not entering separate documents, especially in prisoner cases. After judgment, prisoners who have already filed a notice of appeal file a document that can be construed as a Rule 59 motion for a new trial that tolls the deadline for filing a notice of appeal. The court of appeals then loses jurisdiction because a timely post-judgment motion has been filed in the district court, but the district court fails to act because it believes that the court of appeals has the case. He said that representatives of his circuit had spoken directly with the district court clerks in the circuit about the Rule 58 requirements, and compliance has now been much improved. He suggested that it would be productive for the rules committees also to work informally with the district courts on the matter. In addition, it would be advisable to place an automated prompt or other device in the CM/ECF electronic docket system to help ensure compliance with the separate-document requirement. Judge Rosenthal added that the committee should coordinate on the matter with the Committee on Court Administration and Case Management.

#### MANUFACTURED FINALITY

Judge Stewart reported that the advisory committee was collaborating with the other advisory committees on the issue of “manufactured finality” – a mechanism used in various circuits for parties to get a case to the court of appeals when a district court dismisses a plaintiff’s most important claims but other claims survive. To obtain the necessary finality for an appeal, he said, the plaintiff may seek to dismiss the peripheral claims in order to let the case proceed to the court of appeals on the central claims.

Whether or not these tactics work to create an appealable final judgment generally depends on the conditions of the voluntary dismissal. The circuits are split on whether there is a final judgment when the plaintiff has reserved the right to resume and revive its dismissed peripheral claims if it wins its appeal on its central claims. A member added that her circuit does not allow dismissals without prejudice to create an appealable final judgment. The circuit will permit the appellant to wait until oral argument to stipulate to a dismissal with prejudice, but the appellant must do so by that time. Another member pointed out that manufactured finality may arise in several ways. In his circuit, some parties simply take no action after an interlocutory decision, and the district court ultimately dismisses the peripheral claims for failure to prosecute. A participant suggested that the case law on finality and the application of 28 U.S.C. § 1292(b) varies

considerably among the circuits, and many district judges use a variety of devices to get cases to the courts of appeal.

Judge Stewart pointed out that there are cases in which everybody – the parties and the trial judge – wants to send a case up to the court of appeals quickly. He suggested that manufactured finality is a real problem, and the circuits have taken very different approaches to dealing with it. Therefore, he said, it may well be appropriate to have national uniformity. To that end, he said, the advisory committee will consider whether the federal rules should provide appropriate avenues for an appeal other than through the certification procedure of FED. R. CIV. P. 54(b) and the interlocutory appeal provisions of 28 U.S.C. § 1292(b).

#### OTHER MATTERS

Judge Stewart reported that the advisory committee had decided to remove from its active agenda a proposal to amend FED. R. APP. P. 7 (bond for costs on appeal in a civil case) to clarify the scope of the “costs” for which an appeal bond may be required. Professor Struve added that the advisory committee would collaborate with the Advisory Committee on Civil Rules on whether to amend FED. R. APP. P. 4(a)(4) (effect of a motion on a notice of appeal in a civil case) to refine the time and scope of notices of appeal with respect to challenges to the disposition of post-trial motions.

### **REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES**

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in Judge Swain’s memorandum and attachments of December 12, 2008 (Agenda Item 9).

#### *Amendments for Publication*

#### FED. R. BANKR. P. 6003

Professor Gibson reported that FED. R. BANKR. P. 6003 (relief immediately after commencement of a case) was adopted in 2007 to address problems typically arising in large chapter 11 cases when a bankruptcy judge is presented with a large stack of motions on the day of filing. The rule imposes a 21-day breathing period before the judge may actually rule on these first-day motions – largely applications to approve the employment of attorneys or other professionals and to sell property of the estate. The delay provides time for a creditors committee to be formed and for the U.S. trustee and the judge to get up to speed on the case.

Some judges and lawyers, she said, have read the rule to prohibit a debtor-in-possession from hiring an attorney during the first 21 days of the case. The current rule permits an exception on a showing of irreparable harm, but some parties resort to claiming irreparable harm in every case. The proposed amendment, she said, would make it clear that although the judge may not issue the order before the 21-day period is over, the judge may issue it later and make it effective retroactively, thereby ratifying the appointment of counsel sought in the motion.

Another, minor change to the rule, she said, would make it clear that even though a judge may not grant the specific kinds of relief enumerated in the rule – such as approving the sale of property – the judge may enter orders relating to that relief, such as establishing the bidding procedures to be used for selling the property.

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

#### *Informational Items*

Professor Gibson reported that several of the bankruptcy rules amendments published in August 2008 would implement chapter 15 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, dealing with cross-border cases. She noted that only two comments had been received, and the advisory committee had canceled the scheduled public hearings.

#### OFFICIAL FORMS 22A and 22C

Professor Gibson explained that Forms 22A and 22C implement the “means test” provisions of the 2005 Act. The statute, she said, defines “current monthly income” and establishes the means test to determine whether relief for the debtor under chapter 7 should be presumed abusive. Chapter 13 debtors must complete the means test to determine the applicable commitment period during which their projected disposable income must be paid to unsecured creditors.

Under the Act, debtors may subtract from their monthly income certain expenses for themselves and their dependents. In determining these allowances, the forms currently use the terms “household” and “household size.” The advisory committee believes, though, that “household” is not correct in light of the statute because it is both over-inclusive and under-inclusive. The Act allows deductions for food, clothing, and certain other items in amounts specified in IRS National Standards and deductions for housing and utilities in the amounts specified in IRS Local Standards. Both the national and local IRS standards are based on “numbers of persons” and “family,” rather than “household.” Moreover, the IRS bases these numbers on the number of dependents that

the debtor claims for federal income tax purposes. A person in the “household” may not necessarily be a “dependent.”

Judge Swain explained that the policy of the advisory committee, whenever there are possible conflicting interpretations of the Act, is to allow filers to present their claims as they interpret the statute – and not have them precluded from doing so by restrictive language in the forms. She added that the revised forms focus on dependency without specifically adopting the IRS standard. Thus, Form 22C refers to “exemptions . . . plus the number of any additional dependents.” This provides room for a litigant to argue that a member of the debtor’s household could be a “dependent” for bankruptcy purposes even without entitling the debtor to an exemption under IRS standards.

Judge Swain stated that the advisory committee had planned to present the revisions to the Standing Committee at the current meeting as an action item. But another technical problem had just been discovered with the forms, and the advisory committee would like to consider making another change and return with the forms for final approval in June 2009. Accordingly, she said, the matter should be considered as an informational item, rather than an action item.

#### NATIONAL GUARD AND RESERVISTS RELIEF ACT

Professor Gibson explained that after the advisory committee meeting, Congress had passed the National Guard and Reservists Relief Act, creating a temporary exemption from the means test for reservists and members of the Guard. The statute took effect on December 19, 2008, but it will expire in 2011. Thus, a permanent change to the rules is not advisable. But an amendment to Form 22A (the chapter 7 means test form) and a new Interim Rule 1007-I were approved on an emergency basis by email votes of the advisory committee, the Standing Committee, and the Executive Committee of the Judicial Conference. Thus, they were in place when the Act took effect in December 2008. She added that the interim rule had now been adopted as a local rule by all the courts.

She pointed out that the amendment to Form 22A had been particularly challenging to craft because the statute gives a reservist or member of the Guard a temporary exclusion from the means test only while on active duty or during the first 540 days after release from active duty. Thus, a temporarily excluded debtor may still have to file the means test form later in the case.

#### PART VIII OF THE BANKRUPTCY RULES

Professor Gibson said that the advisory committee was considering revising Part VIII of the bankruptcy rules governing appeals. Part VIII, she said, had been modeled on the Federal Rules of Appellate Procedure as they existed many years ago. The appellate

rules, though, have been revised several times since, and they have also been restyled as a body. Accordingly, the advisory committee concluded that it was time to take a fresh look at Part VIII and consider: (1) making it more consistent with the current appellate rules; (2) adopting restyling changes; and (3) reorganizing the chapter. She reported that the advisory committee at its October 2008 meeting had considered a comprehensive revision of Part VIII prepared by Eric Brunstad, a very knowledgeable appellate attorney whose term on the advisory committee had just expired.

She added that the committee had decided that it would be very helpful to conduct open subcommittee meetings on Part VIII with members of the bench and bar at its next two advisory committee meetings, in March and October 2009. The committee, she said, will invite practitioners, court personnel, and others to address any problems they have encountered with the existing rules and to discuss their practical experience with the two different sets of rules – one governing appeals from a bankruptcy judge to the district court or bankruptcy appellate panel and the other governing appeals to the court of appeals. She said that the dialog at the open subcommittee meetings will help inform the advisory committee as to the worth of proceeding with the project.

#### ZEDAN V. HABASH

Judge Swain reported that Judge Rosenthal had referred to the advisory committee the concurring opinion of Chief Judge Frank Easterbrook in *Zedan v. Habash*, 529 F.3rd 398 (7<sup>th</sup> Cir. 2008), a case that raised two bankruptcy rules issues. In particular, he questioned whether FED. R. BANKR. P. 7001 (list of adversary proceedings covered by Part VII of the rules) should continue to classify proceedings to object to or revoke a discharge as adversary proceedings, termination of which constitutes a final decision that permits appellate review.

*Zedan*, she said, was a very unusual case involving a potential objection to discharge brought after the objection to discharge deadline had lapsed, but before a discharge had been entered by the court. *Zedan*, a creditor, claimed fraud with respect to an asset sale, and he tried to object to or revoke the debtor's discharge. Under the literal language of the Bankruptcy Code and Rules, however, he was barred from either type of relief. An objection to discharge was untimely because the deadline had passed, and an attempt to revoke the discharge was premature because no discharge had been entered. Moreover, even if *Zedan* had waited until the discharge were entered, an attempt to seek revocation would not have been possible because § 727(d)(1) of the Code requires that the party seeking revocation “not know of such fraud until *after* the granting of such discharge.”

Judge Swain said that the advisory committee was considering the matter thoroughly and would consider a potential rules fix. It was also weighing whether the need for relief in this unusual situation outweighs the importance of finality in

bankruptcy cases. One possible amendment, she said, would be to permit an extension of the time for the creditor to file an objection based on newly discovered evidence.

Judge Swain explained that Judge Easterbrook in his concurring opinion had also asked whether objections to discharge should be treated as adversary proceedings or reclassified as contested matters because they are “core proceedings” under the Bankruptcy Code. She noted that the advisory committee had always considered objections to discharge as adversary proceedings, requiring application of the full panoply of the Federal Rules of Civil Procedure. She reported that the committee had conducted a lengthy discussion on the matter at its October 2008 meeting and concluded that it is appropriate to consider certain core proceedings as adversary proceedings, rather than contested matters. Moreover, a judge may deal with unusual problems, such as those arising in *Zedan*, by a variety of devices.

#### BANKRUPTCY FORMS MODERNIZATION

Judge Swain reported on the advisory committee’s project to analyze and modernize all the bankruptcy forms. She said that the committee was undertaking a holistic review of the forms both for substance and for practical usage in today’s electronic environment. Among other things, she said, courts and other participants in the bankruptcy system have requested an expanded capacity to manipulate electronically the individual data elements contained on the forms.

She pointed out that the advisory committee had established two subgroups to tackle the project. An analytical group is analyzing for substance all the information contained on all the forms, *i.e.*, what pieces of information are truly needed by each participant, whether any of it is duplicative, and whether the information could be solicited in a more effective manner. At the same time, a technical group is looking at various ways to gather and distribute the information contained on the forms. It is working closely with the special group of judges, clerks of court, and AO staff just convened to design the next generation electronic system to replace CM/ECF.

#### HOME-MORTGAGE LEGISLATION

Professor Gibson reported that legislation had been introduced in Congress to authorize a bankruptcy judge to modify the terms of a debtor’s home mortgage. (Since 1979, the Bankruptcy Code has prohibited modification.) As currently drafted, the legislation would allow a home mortgage to be treated in the same manner as other secured claims, and a bankruptcy judge would be able to “cram down” the mortgage to the current value of the house and allow repayment for up to 40 years. It would also let the judge reset the interest rate at the current market rate for conventional mortgages plus a premium for risk. Other provisions include dispensing with the credit counseling requirements, changing the calculation for chapter 13 eligibility, and requiring that home

owners be given notice of additional bank fees and charges. The legislation would be effective on enactment and would apply to mortgages originated before its effective date. The legislation would also require a number of changes to the bankruptcy rules and forms.

### **REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES**

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachments of December 9, 2008 (Agenda Item 5).

#### *Discussion Items*

Judge Kravitz reported that a great deal of interest had been expressed by the bench and bar in the published amendments to FED. R. CIV. P. 26 (expert witness disclosures and discovery) and FED. R. CIV. P. 56 (summary judgment). He noted that the public comments had been heavy, and many witnesses had signed up to testify at the three scheduled public hearings. He pointed out that the publication distributed to the bench and bar had asked for comments directed to the specific concerns voiced by Standing Committee members at the June 2008 meeting.

#### FED. R. CIV. P. 26

Judge Kravitz said that the proposed amendments to Rule 26 had been very well received on the whole, principally because they offer a practical solution to serious problems regarding discovery of expert witness draft reports and attorney-expert communications. The great majority of comments from practicing lawyers, he said, had stated that the amendments will help reduce the costs of discovery without sacrificing any information that litigants truly need. On that point, he emphasized, extending work-product protection to drafts prepared by experts and to certain communications between experts and attorneys will not deprive adversaries of critical information bearing on the merits of their case.

Judge Kravitz noted, though, that opposition to the proposed amendments had been voiced by a group of more than 30 law professors. He suggested that their principal concern was that the amendments would further ratify the role of experts as paid, partisan advocates, rather than independent, learned observers. By way of contrast, experts in other countries are often appointed by the court or selected jointly by the parties.

He noted that the professors argue that by limiting inquiry into discussions between lawyers and their experts, the rule will lead to concealment of huge amounts of relevant information contained in draft reports and communications with experts. But, he said, the practicing bar had told the committee repeatedly that it will not in fact do so

because the information they seek presently does not exist. Practitioners report that lawyers today avoid communications with their testifying experts and discourage draft reports. Therefore, the proposed amendments will not make unavailable information that is currently available. Experience in the New Jersey state courts, moreover, shows that few problems arise in the state systems that prohibit discovery of expert drafts and communications. The practicing lawyers say consistently that juries clearly understand that experts are paid by the parties, and they are not misled at trial.

Judge Kravitz said that the professors are concerned that the amendments would take the rules in a direction inconsistent with *Daubert* and the gate-keeping role that it imposes on the courts to protect the integrity of expert evidence. But, he said, the advisory committee had consulted regularly with judges and lawyers and had been informed that decisions applying *Daubert* really turn on the actual testimony of expert witnesses, not on their communications with attorneys.

Finally, Judge Kravitz noted that the professors claim that the amendments would create an evidentiary privilege that under the Rules Enabling Act must be enacted affirmatively by Congress. He pointed to an excellent memorandum in the agenda book on work-product protection prepared by Andrea Kuperman. The advisory committee, he reported, was convinced that the amendments deal only with work-product protection and do not create a privilege. Essentially, he said, they really only modify a change made by the 1993 amendments to Rule 26. He recommended, though, that it may be advisable to dispel any notion that a privilege is being created by eliminating any reference in the proposed committee note regarding the expectation that the work-product protections provided during pretrial discovery will ordinarily be honored at trial. He suggested that the current language of the note may allow opponents to argue, incorrectly, that a privilege is being created at trial.

Judge Kravitz said that the advisory committee very much appreciated the comments from the law professors, and it had taken all their concerns very seriously. But the committee concluded that it is vital to the legal process for lawyers to be able to interact freely with their experts without fear of having to disclose all their conversations and drafts to their adversaries. He noted, by way of example, that a law professor had informed the committee that the amendments will be very beneficial to him as an expert witness because he will now be able to take notes and have candid conversations with attorneys regarding the strengths and weakness of their cases.

A participant suggested that there is a wide gulf between practitioners and the professors on these issues. He attributed the difference to a lack of practical experience on the part of the latter and their focus on theory. He suggested that the professors tend to view experts under the current system as “hired guns.” The nub of their opposition is their policy preference for a “truth-seeking” model versus the current “adversary” model. He conceded, though, that there are some cases in the state courts where there is

insufficient monitoring of experts, but there are few problems in practice in the federal courts and in most state courts. Several other participants endorsed these observations.

One member, however, expressed sympathy with the views of the law professors and argued that the proposed amendments are unwise. She suggested that the committee think carefully about whether the amendments in fact would create a privilege, or at least a hybrid between a privilege and a protection. In particular, she objected to the language in the committee note stating that the limitations on discovery of experts' drafts and communications will ordinarily be honored at trial. She suggested that the note should state explicitly that judges have discretion in individual cases to require more disclosure, especially when they suspect sharp practices. She noted, too, that in addition to the law professors, opposition had been expressed to the proposed amendments by the bar of the Eastern District of New York, which had argued for more discovery of communications between experts and attorneys.

Judge Kravitz responded that proposed Rule 26(b)(4)(C) explicitly would allow discovery of communications between experts and attorneys if they: (1) relate to the expert's compensation; (2) identify facts or data that the attorney provided and the expert considered; and (3) identify assumptions that the attorney provided and the expert relied upon. He said that the advisory committee had concluded that these three exceptions to the work-product protection of the rule were sufficient.

A lawyer-member added that it is difficult for him to ask his expert to assess the weaknesses of his case because the expert's responses will be discoverable by the other side. For that reason, lawyers often hire two experts – one to testify and one to assess candidly. Other practitioners said that the rule will reduce costs and delays in many ways. Several participants added that juries know well that experts are advocates for the parties, but they believe an expert only if the expert is convincing on the stand.

Another lawyer pointed out that good lawyers regularly enter into stipulations to protect communications with their experts. He explained that experts are often unfamiliar with a case when they are hired. Therefore, they need a lawyer to give them information and directions. In fact, it is not unusual for experts to prepare reports that are not at all helpful – simply because they do not understand the case. This often leads to a sideshow during the discovery process, and potentially at trial. He said that it is important for the rules to specify that these preliminary communications between attorneys and experts are protected in order for experts to be educated at the outset of a case without having to risk sideshows from adversaries.

A judge-member stated that it is important for the rules to provide advice and direction to trial judges in this difficult area of discovery law. But, she suggested, the committee note should be amended to eliminate the controversial language on protecting information at trial. Another judge added that removing the note language would also be

advisable because issues at trial are much broader and also involve the rules of relevance. In short, she recommended, the committee should make it clear that discovery is discovery and trial is trial.

A member strongly supported the rule but suggested that the committee be very careful about the scope of its authority. It has clear authority, he said, to decide what information may be discovered, but no authority to create an evidentiary privilege governing what may be introduced at trial. He asked whether the states that have a similar rule, such as New Jersey and Massachusetts, have actually created an evidentiary privilege. Judge Kravitz responded that the advisory committee was convinced that the proposal was a discovery rule only, and it would not create a privilege.

A participant recommended that the committee note be revised to eliminate all language regarding information at trial. He also rejected the charge that experts are merely hired guns, noting that an expert's reputation and credibility are very important. Good experts, he said, value their reputation and are more than just advocates. Of course, they would not be called unless their testimony is helpful to the party calling them.

Another participant concurred and suggested that the concerns of the law professors appear to be less with the Rules Enabling Act than with their vision of experts as independent, learned truth-seekers, rather than paid advocates. He suggested that their opposition was based on theory and not real experience. He said that the best way for lawyers to challenge experts is by good cross-examination.

A member pointed out that there is a genuine risk for lawyers that the work-product protection that governs discovery will not continue to protect them at trial. As a result, he suggested, the amendments may not actually work in practice. Judge Kravitz responded, though, that his understanding was that practitioners believe that if the work-product information is protected during discovery, the remaining risk of disclosure at trial will not be significant enough for them to incur the costs of hiring two sets of experts or to resort to all the other artificial practices that the proposed amendments are designed to avoid. Several members agreed.

Another member suggested a parallel situation between the proposed amendments to Rule 26 and the recent development of FED. R. EVID. 502 (waiver of attorney-client privilege and work-product protection). The evidence rule, too, had been devised specifically to allay the fear of lawyers that protection given to documents during discovery in a given case would not carry over to future cases. With Rule 502, the bar argued forcefully that if the protection against waiver does not carry over to future proceedings in the state courts, the rule would be useless as a practical matter in achieving its goal of reducing discovery costs. With the Rule 26 amendments, however,

the bar has not suggested that confining the work-product protection to the discovery phase of litigation would undermine the practical value of the rule.

Judge Kravitz suggested that these problems should not occur very often at trial, and it may simply be necessary to let the rule play out in practice. He added that the amendments cannot provide 100% protection, but the bar has been telling the committee that they offer a practical solution to difficult and costly problems. Professor Cooper pointed out that the New Jersey state rule deals only with discovery, and the bar in that state has informed the advisory committee that it has caused no problems at trial. The rule's most important effect, they said unequivocally, has been to change the behavior and the very culture of the lawyers in dealing with experts' drafts and communications.

#### FED. R. CIV. P. 56

Judge Kravitz reported that public reaction to the proposed revision of Rule 56 (summary judgment) had been mixed. The great majority of comments, even those from judges and lawyers criticizing particular aspects of the rule, acknowledge that the revised rule is clearly organized and effectively addresses a number of problems arising in current practice. The objections to the rule, he said, fall into three categories.

First, many – but not all – plaintiff's lawyers and law professors criticizing the proposed rule appear to oppose summary judgment in general and are concerned that the revised rule may lead to additional grants of summary judgment. But, he said, research conducted by the Federal Judicial Center demonstrates that the amendments will not produce that result. Opponents also object to the rule's point-counterpoint procedure, claiming that it focuses exclusively on individual facts and obscures inferences, thereby preventing plaintiffs from telling their full story. Judge Kravitz suggested, though, that he – as a judge – looks first to the parties' briefs for a gestalt view of a case and to discover the lawyers' theory of the case. Later, he said, he consults the point-counterpoint to hone in on and confirm specific facts in the record.

Second, many – but not all – members of the defense bar support the point-counterpoint approach. They strongly urge, though, that proposed Rule 56(a) be revised to specify that a judge “must” – rather than “should” – grant summary judgment if there is no genuine dispute as to any material fact and a party is entitled to judgment as a matter of law. The great majority of comments from the defense bar support using “must.” In addition, the defense bar would like to have the rule provide sanctions for frivolous opposition to summary judgment.

A member said that the proposed rule will send an important reminder to the courts that they need to grant summary judgment when it is appropriate. Many cases have no material facts in dispute and should not go to a jury. Nevertheless, some judges announce that they will not decide summary-judgment motions until the moment of trial. So the lawyers have to prepare for trial, and their clients bear unnecessary and

unreasonable additional costs. A revised Rule 56 is needed, he said, if only to prod judges into acting on summary-judgment motions.

Third, many judges and some federal practitioners say that the point-counterpoint approach is not an effective procedural device. They recommend that the rule permit local discretion, rather than impose a national procedure. More importantly, many judges informed the committee that they have actually used the point-counterpoint procedure and have found it unsatisfactory for a variety of reasons. First, they say, it is not user-friendly and increases the cost of litigation. Second, they believe that it distracts from the merits of a case and encourages disputes over the statement of facts and motions to strike. Third, they say that the point-counterpoint process results in evasion of the page limitations on the briefs. Fourth, it lets moving parties dictate the facts, and it ignores inferences. Fifth, districts that have adopted the point-counterpoint procedure tend to have generated more paperwork, and the motions take longer to resolve.

Judge Kravitz noted that one lawyer had told the committee that the summary judgment papers in point-counterpoint districts are simply too long and require a good deal of unnecessary work by lawyers in dealing with immaterial facts and responses. Judge Kravitz explained that the advisory committee had struggled to confine the point-counterpoint procedure to essential, material facts and had heard from members of the bar that a numerical limitation should be imposed on the number of facts that a party may include in its statement.

Judge Kravitz said that these are substantial criticisms, especially because they come from people who have used point-counterpoint and have abandoned it. In defense of the proposal, though, he said that the rule allows a judge to opt out of it on a case-by-case basis. Nevertheless, he said, some judges do not want to use the point-counterpoint process in any cases.

Judge Kravitz reported that the advisory committee had initiated the project to revise Rule 56 for two reasons. First, summary-judgment practice around the country varies enormously, even within the same district. The committee concluded that there was substantial value in encouraging more national uniformity in the federal court system for a procedure as vital as summary judgment. Second, he said, summary judgment practice in the federal courts has deviated greatly from the text of the rule, and it is appropriate to update the rule to reflect the actual practice.

Judge Kravitz stated that the advisory committee would like to have the Standing Committee's input on the importance of national uniformity in summary judgment practice. He reported that several members of the bench and bar have told the committee that summary judgment today lies at the very heart of federal civil practice and should be relatively uniform across the federal system. Others, though, have said that local courts should be able to shape the procedure the way they want, in coordination with their local bars. Moreover, they say, it is relatively easy for lawyers to ascertain what the practice is

in each court and adapt to it. Therefore, procedural uniformity may not be very important.

Judge Kravitz said that some commentators have urged that Rule 56 not specify a particular procedural method for pinpointing material, undisputed facts. Judges or courts should be free to adopt the point-counterpoint procedure, but only if they wish. On the other hand, if national uniformity is an important, overriding value, the advisory committee must decide what the national default procedure should be. On that point, the advisory committee believes that the point-counterpoint procedure specified in the published rule is the best approach to take. The local rules of some 20 districts require both parties to prepare summary-judgment motions in a point-counterpoint format, while roughly another third only require the movant to list all undisputed facts in individual paragraphs. Thus, if the advisory committee were to choose another approach, there would still be opposition to the rule from courts that have a point-counterpoint system. Therefore, the threshold question is whether national uniformity is truly needed in Rule 56.

One member argued that uniformity is important, and the advisory committee should continue trying to draft a national rule. But, she said, allowing an opt-out from the national procedure by local rule of court would be a good idea and would make the rule much more acceptable to the courts. Even allowing a broad opt-out would still be a marked improvement over the current rule.

A lawyer-member said that national uniformity is indeed important, but the fact that there is such strong dissent from the proposal by many judges argues for including a broad opt-out provision. He suggested that it would be helpful to have a national procedure specified in the rule, but courts should be allowed to deviate from it broadly.

A judge-member agreed that uniformity is the key question to focus on. She said that the point-counterpoint system works well in her experience, but the committee needs to respect the view of judges and lawyers who claim that it increases costs and disputes. It is hard in the end to be optimistic about achieving national uniformity because each court has developed its own system over time and is comfortable with it.

Another member agreed that uniformity is the critical question, but argued that it simply may not be achievable. The comments and testimony have indicated that the proposed rule will not be as successful as expected. In reality, imposed uniformity is likely to be ephemeral because judges will add their own requirements to whatever any national rule specifies.

Professor Coquillette pointed out that Congress over the years has urged more national uniformity and has expressed concern over the proliferation of local court rules. The committee's local rules project, he said, had been successful in getting the courts to

eliminate local rules that are inconsistent with the national rules. Nevertheless, the project avoided treading in two areas where enormous differences persist among the courts – attorney conduct and summary judgment. Many local rules, he said, are clearly better than the current FED. R. CIV. P. 56, but the differences of opinion among the courts are so deep that it would be extremely difficult to achieve national uniformity.

He noted that the 1993 amendments to FED. R. CIV. P. 26 allowed individual district courts to opt out of the national disclosure requirements by local rule. Many districts opted out, in whole or in part. There was no uniformity even within many districts. The only way to restore uniformity was to dilute the national rule, a change that itself required considerable effort. He suggested that it would be better to have the national rule not specify any particular procedures than to have one that sets forth national procedures but authorizes wholesale opt-outs. Allowing a broad opt-out by local rule, he said, will not promote uniformity.

Judge Kravitz explained that the problem with summary-judgment variations among the courts is not only that courts have a fondness for their own local rules and resist change, but it is also that many judges genuinely believe that the proposed national rule will add costs without making meaningful improvements.

Two members recommended that the committee proceed with the point-counterpoint proposal, but another suggested that the rule require that only the moving party state the material, undisputed facts in numbered paragraphs without burdening the opponent with having to respond to each fact in numbered paragraphs. Another member expressed support for the point-counterpoint process, but suggested that the committee impose a limit on the number of facts that may be stated and consider a different system for certain categories of cases.

A participant pointed out that his district had used the point-counterpoint system for more than a decade, but had abandoned it because it was not helpful to judges in resolving summary-judgment motions. They discovered that in reality there are not many disputed facts after discovery. Rather, cases turn largely on inferences drawn from the facts, rather than the facts themselves.

A member related that the point-counterpoint procedure is used currently in his district, and all the judges follow it. But a visiting judge from a district not using the procedure has criticized it strongly, and the district court is taking a fresh look at the matter.

Several participants said that they liked the point-counterpoint process because it adds structure to the rule and forces attorneys to focus on the facts, but they recognized that it may add costs. They emphasized that the briefs or memoranda of law, which argue the inferences drawn from the facts, are more important than the statements of facts

themselves. One lawyer-member said that he had practiced both in courts that have the process and those that do not have it, and he has no problem in adapting to the requirements of each court or allowing courts considerable latitude to structure their own process.

Judge Scirica pointed out that the proposed changes in Rule 56 will have to be approved by the Judicial Conference. It is a virtual certainty, he said, that they will be placed on the Conference's discussion calendar for a full debate.

Two other members suggested that the key problems are not so much with the mechanics of the procedure, but the fact that some district judges are simply not deciding summary-judgment motions. Judge Kravitz noted that the advisory committee had learned from the Federal Judicial Center's research that summary judgment motions remain undecided until trial in many districts. But that problem will not likely be cured by any rule.

Professor Cooper pointed out that the Federal Judicial Center's research had shown that there is more likelihood that summary-judgment motions will be decided in the point-counterpoint districts. The figures show that more motions are granted in these districts, but largely because a higher percentage of motions are actually ruled on. On the other hand, the courts' time to disposition is longer in these districts, in part because it may take more judicial time to resolve summary judgment motions presented in this detailed format. He noted, though, that the numbers may not be not reliable because there may be other reasons for delays in some districts, such as heavy caseloads.

Judge Kravitz mentioned that some sentiment had been expressed that the point-counterpoint system may favor defendants and the well-heeled. The advisory committee, he said, had tried to address that perception by allowing an opponent of a summary-judgment motion to concede a particular fact for purposes of the motion only. This provision would save the opponent the expense of having to respond in detail to each and every fact asserted to be undisputed.

Judge Kravitz emphasized that a fundamental principle for the advisory committee had been to produce a rule that does not favor either side. The committee, he said, had succeeded in that objective, despite certain criticisms from both sides. He suggested that the opposition from some plaintiffs' lawyers is largely a proxy for their opposition to summary judgment per se. He pointed out that other plaintiffs' lawyers support the proposal, though they favor a cap on the number of facts that may be stated.

A member added that the perception that the point-counterpoint process is favored by defendants and opposed by plaintiffs makes no sense. He suggested that defense counsel normally want to have as few disputed facts as possible when seeking summary judgment. Plaintiffs, on the other hand, want to raise as many facts as they can.

One participant pointed out that summary judgment is the key event in many federal civil cases, either because it disposes of a case or, if denied, leads to settlement. He emphasized that summary judgment must be seen as interconnected with several other procedural devices specified in the Federal Rules of Civil Procedure – such as Rule 8 (pleading), Rule 12 (defenses), Rule 16 (pretrial management), and Rules 26-37 (disclosures and discovery). The numbering and organization of the rules imply that these are separate stages of litigation, rather than essential components of an interconnected process. He suggested that the committee consider bringing those rules physically closer together, instead of having them spread out as they are now. He also suggested that the committee consider looking at all the rules as a whole and examining how all the parts work together.

He added that faux uniformity may not be a bad idea. There are clear differences among regions, judges, and types of cases. There are also great differences among the bar, both as to the culture of the bar and the quality of individual lawyers. There are differences, too, in the abilities and preferences of individual judges. And it must be recognized that judges have to work hard to grant a motion for summary judgment.

Judge Kravitz reported that the advisory committee had decided to conduct a two-day conference in 2010 at a law school to conduct a holistic review of all these interrelated provisions and how well they work in practice.

#### FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee was considering potential revisions to FED. R. CIV. P. 45 (subpoenas). The rule, he said, is long, complicated, and troubling to practitioners. Practical issues have been raised, for example, regarding: whether Rule 45 issues should be decided by the court where the action is pending or the court where a deposition is to be taken or production made; the use of the rule to conduct discovery outside the normal discovery process; the adequacy of the modes of service; use of the rule to force corporate officers to come to trial; and the continuing relevance of the territorial limits of subpoenas, such as the 100-mile radius that dates from 1789. He noted that Judge David G. Campbell's subcommittee will take the lead on this issue, and Professor Richard L. Marcus will serve as the principal Reporter.

Professor Cooper added that the Federal Rules of Appellate Procedure intersect with the Federal Rules of Civil Procedure in several ways, and the advisory committee is working on joint projects with the appellate advisory committee. He noted, for example, the suggestion that FED. R. APP. P. 7 (bond for costs on a civil appeal) include statutory attorney fees as costs on appeal. The civil advisory committee, he said, had been considering changes to FED. R. CIV. P. 23 (class actions) for several years, and the problem of objectors to class settlements is a long-standing and difficult one. The civil advisory committee would be interested, for example, in whether it is appropriate to

require a cost bond for objectors who appeal from approval of a class-action settlement, especially in fee-shifting cases. He added that some appeals by objectors rest on solid grounds, but some clearly are not.

## **REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES**

Judge Tallman presented the report of the advisory committee, as set forth in his memorandum and attachments of December 15, 2008 (Agenda Item 8).

### *Informational Items*

#### FED. R. CRIM. P. 32

Judge Tallman reported that the advisory committee was considering a possible revision to FED. R. CRIM. P. 32(h) (notice of possible departure from sentencing guidelines). Under the current rule, a sentencing court must notify the parties if it intends to depart from the sentencing guidelines range on a ground not identified in the pre-sentence report or the parties' submissions. There has been litigation, he said, over whether the rule also applies to variances from the guidelines under *United States v. Booker*, 543 U.S. 220 (2005). Recently, the Supreme Court held in *Irizarry v. United States*, 553 U.S. \_\_\_\_ (2008), that the rule does not apply to variances. So the committee may wish to amend the rule to cover both. Alternatively, though, it may also consider eliminating Rule 32(h) altogether.

Judge Tallman reported that the American Bar Association had approved a resolution to mandate disclosure to the parties of all information used by probation officers in preparing their pre-sentence reports. The proposal was designed to increase transparency, and both the defense and the government argue for greater openness in the sentencing process.

The advisory committee, he said, had discussed the proposal and was concerned that it could compromise sources who give confidential information to probation officers, including victims and cooperating witnesses. It would also impose additional burdens on probation offices and make the process of preparing reports more adversarial than it is now. He explained that the committee was relying heavily on the Federal Judicial Center and the Administrative Office to canvass those district courts currently following a regime similar to the ABA model to ascertain what their practical experience has been. In particular, the staff will explore with the courts whether there is merit to the concerns that sources will be compromised if all communications to probation officers must be disclosed.

Professor Beale added that there is a relationship between FED. R. CRIM. P. 32(h) and the ABA proposal to require disclosure of all materials presented to the probation officer. If more information were disclosed to the parties earlier, more would be on the record at the time of sentencing, and notice of planned departures or variances would not be needed. A member suggested that many judges are concerned that the ABA proposal would add another layer of litigation. Another pointed out that defendants in her district have asked for access to information given to probation officers regarding earlier cases in a defendant's criminal history. That information, though, may reveal information about victims, cooperating witnesses, and other sensitive matters.

#### FED. R. CRIM. P. 12(b)

Judge Tallman reported that the Supreme Court had held in *United States v. Cotton*, 535 U.S. 625 (2002), that omission of an essential element in the indictment does not deprive the court of jurisdiction. Under the current rule, a motion alleging a failure to state an offense can be made at any time. In light of *Cotton*, the advisory committee was exploring an amendment to FED. R. CRIM. P. 12(b) (motions that must be made before trial) to require that a challenge for failure to state an offense, like other defects in an indictment or information, be made before trial. Under FED. R. CRIM. P. 12(e), a party waives the defense or objection if not made on time, but the court may grant relief from the waiver for "good cause shown."

He explained that the proposal raises a number of difficult issues, particularly relating to the breadth of the "good cause" that the defendant must show to obtain relief. Some courts, for example, interpret the rule to require both "good cause" and "prejudice." The requirement to show "good cause" may result in a defendant forfeiting substantial rights merely because of an error of counsel in failing to raise the defect earlier. In addition, the committee is concerned about the relationship between the proposed amendment and cases holding that the Fifth Amendment precludes a court from constructively amending an indictment. He said that the advisory committee had voted 7 to 5 to continue working on the proposed amendment and will consider the issue again at its April 2009 meeting.

#### TECHNOLOGY

Judge Tallman reported that the advisory committee had formed a technology subcommittee, chaired by Judge Anthony J. Battaglia, to conduct a comprehensive review of all the criminal rules to assess whether amendments are desirable to sanction the use of new technologies. He pointed out that several rules already permit the use of technology, such as the use of video teleconferencing to conduct certain proceedings. But more amendments may be needed to let judges, lawyers, and law enforcement agents take full advantage of technology in performing their jobs. The subcommittee, he said, was expected to complete its report in time for the advisory committee's April 2009 meeting.

**AUTHORITY OF PROBATION OFFICERS TO SEEK AND EXECUTE SEARCH WARRANTS**

Judge Tallman reported that the advisory committee was considering a preliminary proposal referred by the Criminal Law Committee that would authorize probation officers (and pretrial services officers) to seek and execute search warrants. The proposal, he said, was controversial and would represent a major change of policy for the federal courts. Among other things, it raises questions of separation of powers because probation officers are part of the judiciary. In effect, judiciary employees could be asking a court for a search warrant to obtain evidence that might lead to criminal charges, a decision entrusted to the executive branch. Professor Beale added that the Department of Justice had expressed concern about the proposal because of the possibility of probation officers, who are not law enforcement officers, interfering with investigations and other prosecution efforts.

Judge Tallman pointed out that committee members had expressed concern that seeking and executing search warrants could interfere with the relationship between probation officers and their clients and impede the effectiveness of the officers. They were also concerned about the training and safety of probation officers if they will be placed in dangerous situations that may arise when conducting a search.

Judge Tallman reported that he had sent a letter to Judge Julie E. Carnes, chair of the Criminal Law Committee, advising her of the advisory committee's initial concerns and inviting her to participate in the April 2009 meeting. In response, he said, she advised that members of the Criminal Law Committee share some of the same concerns.

**VICTIMS' RIGHTS**

Judge Tallman reported that the advisory committee was continuing to monitor a number of issues arising under the Crime Victims' Rights Act. He noted that the General Accountability Office had just published a comprehensive report on implementation of the Act, which gave the judiciary a clean bill of health for its efforts. The report also noted that the Act's 72-hour limit on the time for a court of appeals to act on mandamus review appeared to be too short. Professor Beale added that the advisory committee did not pursue amending that particular statutory deadline as part of the judiciary's time-computation legislation because it raised significant policy issues and were not appropriate in a package of proposed technical, non-controversial changes.

Judge Tallman reported that the advisory committee had been receiving written reports of the regular meetings that the Department of Justice holds with victims' rights organizations. In addition, he said, the advisory committee anticipates that additional legislative proposals on victims' rights might be introduced in the new Congress.

Finally, Judge Tallman reported that the advisory committee had received a request from the Codes of Conduct Committee to consider an amendment to FED. R. CRIM. P. 12.4 (disclosure statement) to require additional disclosures to help courts screen for potential conflicts of interest. The proposal would assist courts in ascertaining whether an organization, including its subsidiary units or affiliates, that was a victim of a crime is one in which a judge holds an interest.

## **REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES**

Judge Hinkle presented the report of the advisory committee, as set forth in his memorandum and attachments of December 1, 2008 (Agenda Item 7).

### *Amendments for Publication*

#### RESTYLED FED. R. EVID. 501-706

Judge Hinkle reported that the advisory committee had now completed restyling two-thirds of the Federal Rules of Evidence. The final third of the rules, he said, will be more difficult to restyle because it includes the hearsay rules. He pointed out that, for the first time, the committee's reporter, Professor Daniel J. Capra, could not attend a Standing Committee meeting due to a conflict with essential teaching duties. He also regretted that Professor R. Joseph Kimble, the committee's style consultant, could not attend the meeting because of winter snows and transportation difficulties. He said that both will participate in the June 2009 meeting.

Judge Hinkle pointed out that Judge Hartz had discovered a glitch in the restyled draft of FED. R. EVID. 501 (privilege). It could be read to suggest that if testimony relates to both a federal and state claim, only state law will apply. Case law, however, suggests that federal law applies.

The advisory committee, he said, had intended no change in the law. Accordingly, it would recommend substituting the following language for the last sentence of FED. R. EVID. 501: "But in a civil case, with respect to a claim or defense for which state law supplies the rule of decision, state law governs the claim of privilege." A corresponding change will also be made in FED. R. EVID. 601 (competency to testify).

A member praised the work of the advisory committee, but expressed concern over some of the style conventions, including the use of bullets rather than numbers in some lists, the use of dashes rather than commas, and beginning sentences with "but," "and," or "or." A member pointed out, however, that these conventions are fully consistent with widely accepted contemporary style. Judge Hinkle promised to bring these concerns back to the advisory committee for consideration at its next meeting.

**The committee by a vote of 10 to 2 approved the restyled FED. R. EVID. 501-706 for publication, including the substitute language for FED. R. EVID. 501 and 601.** The dissenting members explained that their negative votes were motivated solely by what they regard as some inelegant and inappropriate English usage in the restyled rules. Judge Rosenthal added that the committee's action will be subject to an additional, final review of the entire body of restyled evidence rules at the June 2009 committee meeting.

### *Informational Items*

Judge Hinkle reported that only one public comment had been received in response to the proposed amendment to FED. R. EVID. 804(b)(3) (hearsay exception for a statement against interest), and the scheduled public hearing had been cancelled because there had been no requests to testify.

He added that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's holding in *Crawford v. Washington*, 541 U.S. 36 (2004), that admission of "testimonial" hearsay violates an accused's right to confrontation unless given an opportunity to cross-examine the declarant. He said that case law developments to date suggest that amendments to the hearsay exceptions in the rules may not be necessary.

## **GUIDELINES ON STANDING ORDERS**

Judge Rosenthal reported that Professor Capra had prepared an excellent report on the use of standing orders and general orders in the district courts and bankruptcy courts. In addition, a survey of the courts had been conducted asking judges for their advice in identifying matters that belong in local rules versus those that may be addressed appropriately in standing orders. The survey results, she said, had shown that the courts do not want federal rules to regulate standing order practices, but they do favor the committee distributing guidelines to help them decide what matters should be included in their local rules and standing orders.

To that end, she said, Professor Capra had prepared draft "Guidelines For Distinguishing Between Matters Appropriate For Standing Orders and Matters Appropriate for Local Rules and For Posting Standing Orders on a Court's Website." Judge Rosenthal emphasized that the proposed guidelines were not an attempt by the Standing Committee or the Judicial Conference to dictate particular binding rules that the courts must follow.

Several members endorsed the guidelines and said that they were very well-written and helpful. But one expressed reservations about the specific language of Guideline 4 on the grounds that it appeared to give too much encouragement to individual judges to

deviate from court-wide standing orders. He suggested that it may also be internally inconsistent with Guideline 8, specifying that individual-judge orders may not contravene a court's local rules.

Another member suggested, though, that Guideline 4 had an inappropriately negative tone because it appeared to fault district judges for having orders different from their own district court rules and standing orders. She said that it is perfectly appropriate to accommodate some individual-judge preferences, such as those dealing with courtesy copies of papers and courtroom etiquette. In fact, the committee may not have authority to address the orders of individual judges. She recommended that the guidelines focus on court-wide orders and say nothing about the orders of individual judges.

Judge Rosenthal agreed that the guidelines will be more successful if they are not openly negative as to the preferences of individual judges. But some members cautioned that individual-judge orders can pose a serious problem. Some are very beneficial, they said, but others are not. Some, in fact, are contrary to the national rules and may contain matters that should be addressed in local rules, rather than orders. Moreover, the orders of individual judges are not readily accessible, may not be posted on a court's website, and can create a trap for litigants. The point of the proposed guidelines, she said, was not to make judges change their procedures, but to make them aware of the effects of their actions.

Professor Coquillette pointed out that the current standing-orders project should be viewed in the context of the local-rules project and the 1995 amendments to FED. R. CIV. P. 83. As revised, the rule specifies that no sanction or other disadvantage may be imposed on a party for noncompliance with a procedural requirement unless the requirement has been set forth in a national or local rule or the party has received actual notice of it in the particular case.

Judge Rosenthal explained that there are two kinds of standing orders – court-wide standing orders and the standing orders of individual judges. The committee, she said, can address court-wide standing orders, but an individual judge's ability to include the judge's own preferences, particularly on such matters as courtroom practices, is a much more delicate matter. She said that she agreed with Professor Capra's view that it would be a more successful approach if the committee were to focus on court-wide standing orders.

Judge Rosenthal added that if an order affects lawyers and litigants on a district-wide basis, it should be set forth in a local rule of court. But it is appropriate to let individual judges continue to include variations and innovations in their own standing orders. In addition, she said, judges normally send specific orders and detailed written instructions to the parties at the outset of each case. The parties, thus, receive actual notice of what the judge expects from them. The committee, she said, should not attempt to police the orders of individual judges. Its goal should be simply to provide helpful

advice to the courts and urge them to make all orders readily accessible and easily searchable.

Members suggested some specific edits for the guidelines. Judge Rosenthal said that the document would be amended to take account of these concerns and re-circulated to the members after the meeting.

Judge Swain asked whether the committee would like comments from the Advisory Committee on Bankruptcy Rules. Judge Rosenthal responded that comments would be very welcome, and the advisory committee should explore whether any changes in the guidelines would be appropriate for the bankruptcy courts. At this point, though, the focus should be on sending the guidelines to the district courts.

### **SEALED CASES**

Judge Hartz, chair of the Ad Hoc Subcommittee on Sealed Cases, reported that the Federal Judicial Center was examining all cases filed in the federal courts since 2006 to ascertain for the subcommittee what types of cases are sealed. The Center's initial review has now been largely completed. The results show that many of the sealed cases on the civil docket are filed under the False Claims Act. By statute, they must be sealed until the government decides whether or not to proceed. It often takes a long time for the government to make its decision. Moreover, some of these cases are later dismissed, but not unsealed.

The largest number of sealed cases are on the districts' magistrate-judge dockets, and many of them involve the issuance of warrants. It appears that many were never formally unsealed after the warrants were executed, an indictment filed, and a district-court criminal case opened. Only one bankruptcy case has been identified among the sealed cases. The subcommittee learned later that the courts' CM/ECF case management system now provides an electronic reminder to unseal a filing after a certain period of time has elapsed.

Judge Hartz said that the initial research by the Center for the subcommittee seemed to reveal that there are few, if any, systemic problems with sealed cases in the courts. He noted that the procedure in his circuit has been for the court of appeals to carry over the status of a case from the district court. Thus, if a case has been sealed by a district court, it will remain sealed in the court of appeals, and sometimes the circuit judges are unaware of the sealing. Another judge reported that the court of appeals in her circuit effectively orders that all cases be unsealed at filing but asks the parties to petition the court if they wish to have the cases remain sealed.

**PANEL DISCUSSION ON PROBLEMS IN CIVIL LITIGATION**

Mr. Joseph chaired the panel discussion and announced that it would focus on the ideas set forth in the draft report on the civil justice system prepared by the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System. He pointed out that the report is not yet final, but would likely be endorsed by the College. It sets forth a series of broad principles and recommendations to improve civil litigation in the federal and state courts, addressing such areas as pleading, discovery, experts, dispositive motions, and judicial management.

Professor Cooper opened the discussion by referring to recent reform efforts by the Advisory Committee on Civil Rules. He noted that the committee had been looking at pleading for years. It has explored fact pleading or substance-specific pleading rules, but it has not been prepared to pursue that path. Recently, the committee considered reinvigorating motions for a more definite statement under FED. R. CIV. P. 12(e) to support the disposition of motions to dismiss, for judgment on the pleadings, and to strike under FED. R. CIV. P. 12(b), (c), and (f). More ambitiously, a more definite statement might promote more effective pretrial management. The concept was endorsed by the lawyer members of the advisory committee, but all the judges cautioned that it would result in the lawyers filing motions for a more definite statement in every case.

The advisory committee had also made some progress in drafting a set of simplified procedures that include fact pleading and much reduced discovery, but that project had been placed on indefinite hold. The committee's next effort will be to solicit ideas for improving the civil process at a major conference next year with members of the bench and bar.

Professor Cooper said that hope springs eternal for rulemakers in their efforts to make procedural rules "just, speedy, and inexpensive," in the words of FED. R. CIV. P. 1. He noted, for example, a new rule in New South Wales specifies that resolution of cases should be "just, quick, and cheap," parallel to FED. R. CIV. P. 1. The 1848 Field Code had a standard that a complaint should be a statement of the facts constituting a cause of action in ordinary and concise language, without repetition, in such a manner as to enable a person of common understanding to know what is intended. In 1916, Senator Root proclaimed that procedure ought to be based on common intelligence of the farmer, the merchant, and the laborer. There is no reason why a plain, honest man should not be permitted to go into court to tell his story and have the judge be permitted to do justice in that particular case. In 1922, Chief Justice Taft addressed the American Bar Association and argued that the plan should be to make procedure so simple that it requires no special knowledge to master it. Indeed, a plaintiff should be able to write a letter to the court to make his case.

Professor Cooper pointed out that good rules often do not work in practice, even though they may be sound in principle and expertly crafted. The 1970 amendments to the Federal Rules of Civil Procedure, for example, were good rules, but they do not function as anticipated. There may be a variety of reasons to explain the phenomenon. It may be because the rules are trans-substantive or govern the litigation of some topics that are just not well suited to resolution through our adversary dispute system. They may be focused too much on ordinary, traditional litigation. Or perhaps the system is no longer effective for the general run of claims.

The problem, in part, may lie with the lawyers. We may have developed a world of litigators and associates who understand discovery well, but few actual trial lawyers. The fault may be attributable in part to adversary zeal run amok, the structure of law firms, and the realities of hourly billings and law practice as a business. Judicial overload and the lack of judicial resources, too, may be part of the problem. Sound pretrial management is needed, and some pretrial and discovery problems need to be addressed quickly. But the judges may not be available or willing to oversee cases or resolve problems in a timely manner.

Professor Cooper suggested that inertia is a major obstacle to reform, as lawyers generally do not like change. He noted, by way of example, that a bar committee had objected recently to the proposed revision of FED. R. CIV. P. 56 (summary judgment) because the current Rule 56 has a long history of interpretation, and it would be impossible to predict the unintended consequences if the rule were changed. The fear of doing something different, he said, is prevalent.

In addition, the rules committees have been told to make no changes in the rules without first having sound empirical support behind them. As a result, the committees turn regularly to the Federal Judicial Center to provide them with excellent research support. The Center's resources, though, are limited. Its research can identify associations in the data between specific procedures and specific outcomes, but it cannot often prove actual causation. Therefore, it is difficult to predict with certainty the impact that proposed amendments will have.

Finally, Professor Cooper noted that a critical issue for reform of the civil justice system is which body should initiate it. The rules committee process, he said, unlike the legislative process, provides balance and careful discussion and deliberation. But sometimes there is political resistance to certain rules changes based on partisan or financial interests. Note, for example, the opposition to proposed changes in FED. R. CIV. P. 11 (sanctions) and FED. R. CIV. P. 68 (offer of judgment) in the past, and to certain aspects of proposed FED. R. CIV. P. 56 (summary judgment) now. Getting even modest changes through the system can be difficult if certain segments of the bar and their clients oppose them strongly. As a result, the advisory committee treads carefully and strives for consensus, when feasible.

Discovery, for example, has been on its agenda for over 30 years, and there appears to be no end in sight. Notice pleading, for example, has been brought back to the table by the Supreme Court's decision in *Bell Atlantic v. Twombly*, 550 U.S. 554 (2007). The package of notice pleading, discovery, and summary judgment, though, lies at the very heart of the revolutionary 1938 Federal Rules of Civil Procedure. It represents the very soul of the current civil justice system. Therefore, making significant changes in these basic components of the rules – as the proposals of the College and Institute appear to recommend – may have consequences that are profoundly political. As a result, it is natural to ask whether a change of this sort should be made through the Rules Enabling Act process.

Judge Kourlis suggested that the ideas and recommendations embodied in the report are not new. They respond to a pervasive belief that the civil justice system is just too costly and laden with procedures. In many ways, she said, the recommendations mirror the proposed Transnational Principles and Rules of Civil Procedure drafted, in part, by the American Law Institute, the new civil rules of the Arizona state courts, and the simplified rules developed a few years ago by the advisory committee.

For some time, she said, there has been a variety of opinions about whether the rules should be substantially revised, merely tweaked, or left untouched. But a great many observers, including legislators, have come to the conclusion that substantial changes in the civil justice system are needed.

She pointed out that the Federal Rules of Civil Procedure cast a long shadow over the civil justice system and set the standard for litigation throughout the nation. The federal rules committees occupy a unique leadership position. Among the states, 23 follow the federal rules closely, and 10 more apply them relatively closely. Eleven states rely on factual pleading, and 4 have hybrid systems.

Judge Kourlis said that lawyers and judges tend to cleave to consensus. But the search to achieve consensus can impede the sort of innovation that is needed. Therefore, the report declares that it is time to answer the growing voice for change. To that end, it is time for the federal system to lead the way. The federal rules committees can take advantage of the expertise of the Federal Judicial Center and the Administrative Office, and they enjoy a great electronic case management and data collection system that can provide the sorts of empirical data that the reform effort requires. State courts, unfortunately, just do not have those resources.

Judge Kourlis emphasized that the report does not advocate wholesale revision of the rules. Rather, it recommends carefully designed pilot projects that can provide critical empirical information on how to reduce costs, increase customer satisfaction, and perhaps increase the number of trials. She said that innovative pilot programs are easier to

establish in the state courts than in the federal courts, but the states are not good at collecting data from them.

She recognized that federal law does not readily accommodate pilot programs. Nevertheless, the committee might wish to reexamine FED. R. CIV. P. 83 (local rules) or seek legislation to establish appropriate pilot projects. Clearly, she said, the language and intent of the Rules Enabling Act would support the suggested reform efforts.

She recommended, though, that the courts proceed carefully. The civil justice system is tarnished in the eyes of the public, lawyers, and litigants alike. Some of the criticisms may be unjustified, but some are clearly justified. The plea to rulemakers is that they remember whom they are serving and that their charge is to provide a civil justice system that is as good as they can make it.

Mr. Saunders reported that the drafters of the American College-Institute report had not been constrained by the Rules Enabling Act or by precedent. The group, he said, was composed of trial lawyers and two judges, but no scholars. They were liberated to write on a blank slate. They started by considering the existing civil discovery system and examining a number of proposals for reform made since the federal rules were first adopted. But the group was not looking just at the federal system. Its proposals are meant to apply across the board to all systems, federal and state.

Mr. Saunders reported that the participants had read many articles and examined a great deal of data. After doing so, they reached the conclusion that much of the available data are simply counter-intuitive. The 1990 Rand study, for example, showed that there are few problems with civil discovery. But that conclusion clearly did not seem correct to the members of the group. So they asked for more data and administered a survey to all 3,000 fellows of the College and received a good response. One of the first conclusions they drew from the responses was that discovery cannot be considered in a vacuum. Several other parts of the civil rules, such as pleading, intersect with it.

The survey encompassed 13 different areas of civil litigation. In 12, there was widespread agreement among all segments of the bar. Only one area – summary judgment – produced any differences between the responses from lawyers representing plaintiffs and those representing defendants. For that reason, the group refrained from making recommendations regarding summary judgment.

The goal of the group, he said, was only to identify principles, not to write actual rules. It attempted to reach agreement on a set of basic principles that could be applied across the board to civil litigation. The principles set forth in the report were then adopted unanimously by all 20 members of the task force.

The first principle, he said, is that there should be different sets of rules for different kinds of cases. In essence, “one size does not fit all” in civil litigation. Judge Kourlis added that both the task force and the Institute agree that one set of rules cannot handle all kinds of civil cases effectively. Instead, there should be either be separate rules for different kinds of cases or separate protocols within the same set of rules for different kinds of cases.

Mr. Joseph pointed out that the federal rules already sanction deviations from the trans-substantive provisions of the rules. For example, FED. R. CIV. P. 26 exempts certain categories of civil cases from its mandatory disclosure requirements. FED. R. CIV. P. 9 (pleading special matters) imposes separate requirements of particularity for pleading fraud or mistake, and there is a separate set of supplemental rules for admiralty cases. In addition, certain kinds of civil cases, such as social security appeals, are handled very differently by the courts from other cases, even though they are governed by the same civil rules. The report recognizes these differences and recommends that rulemakers create different sets of rules for certain types of cases.

Mr. Richards agreed that it would be constructive to consider adopting specific procedures for different types of cases. He noted that he had argued *Twombly*, and he emphasized that antitrust cases are truly different from other kinds of cases. Nevertheless, the lawyers in that case cited securities cases and other types of cases to the Supreme Court as precedent, assuming – incorrectly – that the concerns and principles discussed in those cases must be applicable in antitrust cases.

Judge Kravitz pointed out that patent lawyers come to him in every case and suggest how they want to handle the case. He works together with them to craft specific procedures for each case. But they are the only category of lawyers to do so. He pointed out that mechanisms currently exist in the Federal Rules of Civil Procedure to have a court fashion special rules, at least on an individual-case basis.

Mr. Saunders reported that the study group agreed that if discovery is to be tailored in different kinds of cases, the specialty bars – such as the patent, admiralty, and employment discrimination bars – should be called upon to fashion the special discovery rules for those types of cases. In a patent case, for example, discovery should focus on the history of the patent and the patent holder’s notebooks. Other specialty bars could do the same for their cases. Mr. Garrison added that this concept would include standard document requests and standard interrogatories for the special categories of cases. He said, though, that it is very difficult to get judges to do this under the current rules.

Mr. Joseph pointed out that a defense lawyer’s focus is normally on two matters – dismissal and summary judgment. There is a fear of juries that causes many cases to settle if summary judgment is denied. Consideration might be given, he said, to conducting a

small mini-trial in appropriate cases to see whether it is worth going forward with the case.

A member suggested that the central concern being expressed by the panel appeared to be that judges are not taking sufficient charge of their cases, and lawyers are not working together with the court to fashion the direction of each case. Mr. Joseph responded that law firms are conservative by nature. No lawyer wants to try an alternative procedure and be second-guessed after the fact. Lawyers need to be assured that certain procedural alternatives are fully authorized and encouraged. Accordingly, it would be much easier for lawyers to get together and agree if there were specific alternatives set forth in the rules, or in recognized protocols, that they can rely on. Mr. Saunders added that the task force was unanimous in its conclusion that judges need to be more involved at the outset of each case – much earlier and much more directly than most judges are today.

A member suggested that model procedures could be devised by each specialty bar. Lawyers could then inform the court that they wish to follow the appropriate model in their case. Mr. Joseph agreed that the model procedures could well be developed by the bar itself, rather than through the rules. Mr. Richards added that the key point is that the specialized procedures need to be enshrined somewhere, either in the rules or in authorized models that can be considered by the lawyers and the judges. In either case, it would provide legitimacy for procedural options that should be considered in specific areas of the law.

Mr. Joseph concurred with a member that the task force was in effect asking the rules committees to formalize rules that would sanction different tracks for different kinds of cases. Judge Kourlis pointed out that recent reforms in the United Kingdom have led to protocols that govern disclosure requirements. Each segment of the bar was asked to develop a set of protocols, and if there are no protocols in a given area, the lawyers must follow the standard protocols.

Mr. Richards addressed the second principle in the draft report, which calls for fact-based pleading. He pointed out that there is now some sort of fact pleading in the federal courts as a result of *Bell Atlantic v. Twombly*, holding that a complaint must provide “enough facts to state a claim to relief that is plausible on its face.” He said that discovery clearly imposes excessive costs in certain cases, and some cases settle because of the high costs of discovery. The Federal Rules of Civil Procedure, he said, do not deal adequately with the problems of discovery.

But, he said, there is no showing that a systemic problem of that sort exists in antitrust cases. Nevertheless, the Supreme Court in *Twombly* threw out the traditional foundations of the civil rules system in an antitrust case on the theory that the cost of discovery forces settlement. He said that the underlying debate in *Twombly* was indeed

over the costs of discovery, but the Court had no data to support its view. He suggested that a whole myth has been developed by industry and the defense bar that defendants are forced to settle cases that have no merits just because it costs too much to defend them. Antitrust cases, he said, are inherently expensive, but there is no indication at all that frivolous antitrust cases are settled because of attorney fees.

Mr. Saunders reported that some Canadian provinces have developed a procedure in which the bar may ask a court for an “application” and obtain relief very quickly based on affidavits and without full discovery. Accordingly, he said, rather than apply the full panoply of the federal or state procedural rules to each case, exceptions to the federal rules could be carved out for certain types of cases to provide relief quickly.

Mr. Saunders reported that 80% of the respondents in the American College survey agreed that the civil justice system is too expensive, 68% said that civil cases take too long to decide, and 67% said that costs inhibit parties from filing cases. He added that the report states that pleadings should “set forth with particularity all of the material facts that are known to the pleading party to establish the pleading party’s claims or affirmative defenses.” Discovery would be limited to what is pleaded.

Mr. Garrison replied, however, that employment lawyers would take issue with the College’s recommendations. Mr. Richards added that in both antitrust and employment discrimination cases, the plaintiff simply does not know all the facts at the time of filing.

Mr. Saunders explained that the task force had spent a great deal of time discussing discovery, including electronic discovery, and it has two fundamental suggestions to offer to the rules committee. First, the federal rules should retain and slightly modify the existing initial disclosures by eliminating the option for a party merely to identify categories of documents. Rather, a party should be required to turn over all the actual documents reasonably available that support its case.

Second, he said, after the initial disclosures, only limited discovery should be allowed. The existing system of wide-open, unlimited discovery should be ended. Instead, the rules should provide an initial set of discovery limited to producing documents or information that enables a party to prove or disprove a claim or defense. After that, a party should not be entitled to additional discovery unless the parties agree to it or the court approves it on a showing of good cause and proportionality.

This fundamental recommendation of the report, he said, represents a major change from current civil practice. In essence, the task force wants to fundamentally change the current mind set of litigants, under which they seek as much discovery as possible and keep asking for documents and depositions until somebody stops them. The task force, he said, had concluded that the current default in favor of unlimited discovery increases discovery costs and delays without producing corresponding benefits. Instead,

parties should be entitled as a matter of right only to specified, limited disclosures. Additional discovery should be permitted only if there is an agreement among the parties or a court order authorizing it.

One way to achieve this result, he said, would be for the specialty bars, such as the patent and employment discrimination bars, to specify the kinds of discovery and documents that they need and typically receive in a typical case. In addition, the task force identified – without comment and for further consideration – several other ways in which discovery might be limited, such as by changing the definition of “relevance,” limiting the persons from whom discovery may be sought, and imposing discovery budgets approved by clients and the court.

Mr. Saunders added that he knew of no case in which a district judge has been reversed for allowing too much discovery. But judges may be reversed for allowing too little. Therefore, the safest course for a judge under the current regime is to allow discovery. That reality has created the mind set of entitlement that has led to the excessive costs and delays caused by discovery.

He reported that the College survey shows that electronic discovery is an extremely costly morass, and some fellows responded that it is killing the civil justice system. He said that it is essential for lawyers and litigants to work together with the court early in a case to decide how much discovery is truly needed and what the appropriate costs of it should be. To that end, perhaps the most important recommendation in the report, he said, is to change the default on discovery.

A member reported that the rules that now limit discovery in the Arizona state courts have worked very well. The required disclosures in Arizona are much more elaborate than those in the federal system. But additional discovery is much more limited. Third-party depositions, for example, are not allowed without court approval. Moreover, the state court system has an evaluation committee, and there are empirical data demonstrating the effectiveness of the Arizona regime. In general, cases move through the Arizona state court system quickly and at less cost. The state has also established a complex-case division that has its own discovery rules under which all discovery is stayed until the judge holds an initial conference and determines how much discovery to allow.

Mr. Saunders said that the data from the survey of College fellows show that the costs of litigation must be addressed. Those costs are causing cases to settle that should not be settled on the merits. He said that 83% of the respondents to the survey agreed with this observation, and 55% said that the primary cause of delay in civil cases is the time to complete discovery.

Mr. Garrison said that certain discovery costs can be reduced, but he argued that the College’s recommendations are too broad. He offered a range of other, alternative

suggestions to improve efficiency and reduce costs. Most importantly, he said, there is a need to improve early judicial case management under FED. R. CIV. P. 16(a) because lawyers simply will not take the initiative to do so on their own. In employment cases, for example, the court should enter a standard protective order at the Rule 16 conference. There could also be model protective orders that would apply in most civil cases. The courts could require the plaintiff and defendant bars, or a special task force appointed by the court, to craft standard interrogatories that, once adopted, would not be subject to objections. The process of developing the standards could follow that used by the bar to draft pattern jury instructions.

The court and the bar could also adopt standard discovery requests to produce documents early in a case. They, too, would not be subject to objection. He added that the initial disclosures currently required by FED. R. CIV. P. 26(a) do not work because plaintiffs simply do not obtain the disclosures they need from defendants. Therefore, they have to proceed straight to discovery. He suggested that the proposed standard documents should be an alternative to initial disclosure.

He also suggested that a court should conduct a second conference at the end of the initial round of discovery. At that point, no more discovery will be needed in many cases. But if more is required, the judge could refer the case to a magistrate judge to handle the second stage of discovery. Judges could also get rid of the voluminous and duplicative paper produced in discovery by just requiring final documents. Courts could also consider alternate ways to deal with discovery disputes, such as by asking for letters, rather than motions, and holding telephone conferences to resolve disputes.

Mr. Garrison said that electronic discovery is really not that much of an issue for him, as he obtains the electronic information that he needs without difficulty. He cautioned against drafting procedural rules based on the experience acquired in heavy commercial litigation. Discovery problems in those cases, he said, are completely different from what occurs in most other cases.

Mr. Richards said that there are indeed major problems with electronic discovery in antitrust cases and other big cases. The participants, he said, typically run search terms against electronic databases and come up with many hits. It then takes enormous attorney and paralegal time just to review all the hits. Nevertheless, he said, the College's proposal is not the right way to go. Rather, he said, courts should focus on the costs in each individual case and manage the discovery in reference to the anticipated costs of the discovery and the benefits it will produce in the case. That goal, he said, could be accomplished in three ways.

First, courts could require that discovery requests be more focused, directed, and limited to key areas. The broad requests seen today are very harmful. Discovery demands should be limited and based on specific details and events.

Second, courts should apply a triage system. Nothing, he said, focuses the mind of a plaintiff's lawyer more than costs. For example, the 7-hour limit on depositions has worked very well. Other kinds of limits, such as on interrogatories and discovery demands, would also work very well. Judges could ask lawyers at the outset of a case how many hits they expect to get on electronic discovery searches and then tailor the request to the anticipated results.

Third, courts could require phased discovery in many cases. At the outset of a case, the lawyers normally know that there really are only a handful of key issues. Resolution of those issues will determine the outcome of the case as a whole. In antitrust cases, for example, it may be whether there was or was not a conspiracy.

The plaintiffs should be made to focus on the issues they really care about. Unfortunately, though, simultaneous, unlimited discovery now occurs on all issues. Plaintiffs want to receive all the key information as quickly and as cheaply as possible, but they should be made to cut to the chase. To that end, phased discovery is the preferred way to go to narrow the scope of discovery. On the other hand, he said, throwing a case out because of defects in the pleadings makes no sense at all.

A participant stated that one problem with phased discovery is that parties are not willing to move quickly to engage in it. Instead of allowing nine months or so for all discovery in a case, they ask for nine months just to conduct the first phase of discovery. In addition, with phased discovery, key witnesses may get deposed three separate times, instead of only once. In reality, he said, one side often wants discovery, and the other does not. Mr. Richards agreed as to depositions, but said that documents are the main causes of unnecessary costs and delays.

Mr. Saunders pointed out that the obligation to preserve electronic information begins on the first day of a case. The parties, however, do not see a judge for some time after filing. During the hiatus between filing and issuance of a pretrial order, parties incur large costs just to preserve electronic information before the court relieves them of that responsibility. Therefore, judges should take immediate action at the outset of a case to address preservation obligations, and no sanctions should be imposed on the parties other than for bad faith. The current rules, he said, do not adequately address this point.

A member recommended that the advisory committee obtain more information from the state courts in Arizona and Massachusetts to see how well they are controlling discovery. Judge Kravitz agreed to pursue the matter.

**NEXT MEETING**

The committee agreed to hold the next meeting in Washington, D.C., in June 2009, with the exact date to be set after the members have had a chance to consult their calendars. By e-mail, the committee later decided to hold the meeting on Monday and Tuesday, June 1 and 2, 2009.

Respectfully submitted,

Peter G. McCabe  
Secretary