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

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MEMORANDUM

DATE: December 8, 2009

TO: Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure

FROM: Honorable Mark R. Kravitz, Chair, Advisory Committee on Federal Rules of Civil Procedure

RE: Report of the Civil Rules Advisory Committee

Introduction

The Civil Rules Advisory Committee met in Washington, D.C., on October 8 and 9, 2009. Draft Minutes of this meeting are attached.

The Committee presents no items for action at this meeting. Several matters on the Committee agenda are presented for information and possible discussion.

2010 Conference

Judge John Koeltl has led Committee planning for a major conference to be held on May 10 and 11 at Duke Law School. This Litigation Review Conference has come to be known as The 2010 Conference. The two days have been completely filled with new empirical research projects, papers, and panel discussions. Discovery, e-discovery, judicial management, settlement, summary judgment and pleading, perspectives from state procedure systems and from the users of federal courts, bar association proposals, and the observations of veterans of the rulemaking process will be explored. The Committee expects the Conference will provide valuable foundations for continuing work on improving the Civil Rules. A copy of the agenda is attached. The Administrative Office has established a limited-access web site for posting conference materials as they come in, http://civilconference.uscourts.gov Standing Committee members have access to the site, and can post and read comments.

Among several empirical projects planned for presentation at the Conference is a Federal Judicial Center survey of discovery practice. Preliminary results were presented at the Committee meeting. Although this survey was structured somewhat differently from the 1997 FJC study, the central conclusions are similar. Discovery does not impose heavy burdens in the vast majority of civil actions filed in federal court, even after excluding categories of cases that are not likely to generate much discovery.

All members of the Standing Committee are invited to attend the Conference. This event has become a "hot ticket" in the procedure world, reflecting widespread belief that it is an opportunity to be seized if at all possible.

Rule 6(d): Three Days Are Added

Prompted by questions raised during the recent Time Computation Project, the Committee addressed the question whether Rule 6(d) should continue to add three days to times to act after service when service is made by electronic means or by means consented to in writing. Hesitation was expressed on at least two grounds. The new time computation provisions took effect December 1, 2009. It may be better to give the bar a period to become familiar with the new rules before once again imposing new time-computation rules. And there continue to be signs that e-service is not invariably as instantaneous as might be wished.

The other Advisory Committees have been informed of the Committee's consideration of this question. Their reactions will be important in determining whether to take it up for immediate consideration.

Notice Pleading: Twombly and Iqbal

A year ago this Committee held a panel discussion of pleading in the wake of the 2007 decision in Bell Atlantic Corp. v. Twombly. The Supreme Court again addressed pleading practice a few months later, in Ashcroft v. Iqbal. These two decisions have become the mandatory citations in all decisions ruling on motions to dismiss for failure to state a claim. Lower courts are grappling with the possible implications of the Court's opinions. Andrea Kuperman, Judge Rosenthal's Rules Clerk, is maintaining a continuously expanding memorandum on many of the most thoughtful results. The most current version of this memorandum is attached.

Empirical work is also under way. John Rabiej is compiling statistics on the frequency of motions to dismiss, and the rate of granting these motions. The data are presented for a period before the Twombly decision, for the period between Twombly and the Iqbal decision, and for the period after Iqbal. They are broken down by various case types. The Administrative Office data base, however, does not permit distinctions between motions addressed to the pleadings and motions to dismiss based on other grounds. Neither do the data reveal what happens after a motion to dismiss is granted — whether defects are cured by amendment; this information may be supplied by the FJC study noted below. But with these limitations, the preliminary data suggest that things have not much changed — the monthly rate of granting motions to dismiss made on any ground was 13.15% of the monthly rate of filing cases during the 4 months before Twombly was decided, while the rate during the 4 months after Iqbal was decided was 13.78%. Although much more detailed and sophisticated work remains to be done, looking to a narrower sample of cases, these data suggest there is no reason to short-circuit ordinary careful study in a rush to propose some revision of the pleading rules.

The Federal Judicial Center has agreed to make its resources available for a more detailed examination of the docket data. It already has a foundation for comparison in data gathered for earlier years. The plan is to examine individual dockets, identifying any differential impacts of new pleading practices on different categories of cases. Individual docket studies also will show

whether granting a motion to dismiss ends the litigation, or leads to amendments that may enable the litigation to carry forward. This study should be launched soon if it proves possible to work with the database used for the Administrative Office study. If that is not possible, a new design must be developed.

Many courts remain puzzled about just what to make of the Twombly and Iqbal opinions. Uncertainty inevitably generates motions as bench and bar work together to hammer out new pleading standards. In the end, the new standards may hew close to practice as it stood immediately before the Twombly decision. Or there may be significant changes — the direction of changes that may be inferred from the Twombly and Iqbal opinions would be to raise the pleading threshold.

Uncertainty has combined with the fear of heightened pleading standards to cause serious concern in some areas of practice and outright distress in some parts of the legal academy. Pleading has suddenly become a popular subject of law-review discourse.

Concern is not limited to the bench, bar, and academy. Congress also has taken an interest. Bills have been introduced to supersede the effects of the Twombly and Iqbal decisions by restoring pleading practice as it had developed under the sway of Conley v. Gibson. The early bills recognize the role of the Enabling Act process by providing that the statutory standard will endure until an amendment of the Federal Rules of Civil Procedure that takes effect after the statute is enacted.

If this be turmoil, it is not clear that the proper response is an immediate attempt to revise Civil Rule 8(a)(2). Some of the reasons for caution are described in the draft Minutes for the October Committee meeting. The discussion was too long to summarize neatly. And events in the intervening three months add to the complexity. It seems best to provide only a modest elaboration here.

The reason for limiting present discussion may seem paradoxical. Pleading standards have become a matter of great moment. Excitement runs almost as high as uncertainty. The questions being stirred go to the very heart of the original 1938 design of the Civil Rules. Many had come to believe that the central purpose of barebones notice pleading is to establish a framework to guide discovery. Separating out claims premised on failing legal theories might be an occasional bonus. Assessing the cogency of fact assertions was not proper. Now the relationship between pleading and discovery has been cast in doubt. The Supreme Court is openly skeptical about the benefits of massive discovery, and even more skeptical about the practical ability of district judges to manage discovery to reduce disproportionate costs. Faith that the 1938 Committee got it exactly right — as elaborated by seven decades of decisions and multiple amendments of the discovery and pretrial conference rules — has been challenged. Faith challenged reacts vigorously.

The questions are simply too important and too difficult to be resolved by rapid response. More time is required for lower courts to come to even approximate understanding of whatever new pleading regime may emerge. Serious empirical assessment of the results will take more time. The best outcome cannot be predicted, indeed will be difficult to assess once some measure of stability is achieved. At first intermittently, and now continually, the Committee has considered possible pleading amendments for more than twenty years. The need for change has not been clear. The course of wise change has been elusive.

What is called for now is continual study. Pleading practice must be engaged by all of the means used in the Enabling Act process. Court opinions must be examined carefully and in depth. Lawyers and judges must be consulted. More rigorous empirical study must be launched. All of these approaches are being actively pursued now. The 2010 Conference will provide an important component. Subsequent conferences also may prove desirable — two "miniconferences" greatly improved the development of the current Rule 56 proposals, and pleading practice may require similar events in deciding whether, and if so how, to amend the pleading rules.

It is to be hoped that Congress will respect this deliberate, thorough approach. Actual restoration of pleading practices to whatever they were on May 20, 2007, is not possible. Practice was fluid, and has flowed in many directions under the Supreme Court's influence. Increased confusion could easily follow any attempt to restore something that never really was concrete, particularly as lower courts would properly attempt to anticipate the Supreme Court's application of any restored notice-pleading rhetoric. But if general pleading legislation is enacted, calm pursuit of regular Enabling Act procedures will remain imperative. The Advisory Committee is working to that end.

Pleading Forms

Rule 84 supports official forms: "The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."

The most elemental question is whether the Forms serve any purpose. Forms are available in great numbers and variety from many sources. The Rule 84 Forms cover only a small and perhaps eccentric range of the practices covered by the Civil Rules. But there may be some value in encouraging national uniformity on some topics. Illustrations might include Forms 1 and 2 governing caption and signature lines; Forms 3 and 4 for summonses; and Forms 5 and 6, for the request to waive service and the waiver, which the Committee developed in detail when it proposed the waiver rule. Apart from uniformity, there may be an occasional need for national perspectives. The Form 80 Notice of a Magistrate Judge's Availability is designed to protect against even slight pressure to consent to trial before a Magistrate Judge. Similar protection might not be uniformly achieved by resort to local forms.

The Committee has tended to the Forms only at sporadic intervals. It was only the Style Project that, in 2007, eliminated the provisions in many Forms that used illustrative dates ranging from 1934 to 1936. And even in the Style Project, revision of the Forms was given much less attention than revision of the rules themselves. This benign neglect is readily understood: continual review and revision of the Forms could easily absorb Committee energy better devoted to other tasks. But if the Committee cannot spare the resources required for regular scheduled maintenance, it may be asked whether it would be better to devolve responsibility to some other body. At the same time, if final responsibility is shifted outside the full Enabling Act process, it should be asked whether Rule 84 should continue to confirm that the Forms suffice under the rules.

The prospect of resorting to a different process is not fanciful. The bankruptcy forms — and there are many of them — are approved by the Judicial Conference without review by the Supreme Court or submission to Congress. There are no forms attached to the Criminal Rules; the Administrative Office prepares forms, with advisory review by the Criminal Rules Committee. These processes seem to work well.

Reconsideration of the Forms enterprise is complicated by the role of the multiple pleading forms. The Twombly opinion seemed, in a footnote, to confirm the continuing vitality of the automobile negligence form complaint, now Form 11. But it is not clear whether the Court would continue to approve all of the pleading Forms. Perhaps they no longer suffice under the rules as now interpreted. However that may be, unintended messages might be read into any retraction of the pleading forms or demotion to unofficial status without warranting their sufficiency. Even repeated explicit statements that no inferences about pleading practice should be drawn in any direction could go unheeded.

The Committee will continue to study the Forms question, looking first to the question whether primary responsibility for the Forms should be placed elsewhere. It is not yet clear whether the Committee will move toward recommendations for consideration in 2010. The only part of the Forms that might lend some urgency to the task, the pleading Forms, may also be the only part that warrants careful and perhaps lengthy study.

Rule 26(c): Protective Orders

The Committee has decided that the time has come to take another serious look at discovery protective orders. This practice was carefully reviewed between 1992 and 1998 in response to proposed Sunshine in Litigation legislation. Work during that period included a study by the Federal Judicial Center, review of case law, and publication of two proposals for comment. At the conclusion of the process, the Committee ended where it began. It could find no general problems in protective-order practice. Protective orders were being used to facilitate discovery. Courts understood their responsibility to allow protection only for good cause. Protection for materials actually filed with the court was approached with special care, particularly when the materials were used for a substantive purpose such as supporting or opposing summary judgment. Requests to modify or dissolve protective orders were entertained and decided on appropriate grounds, particularly when discovery materials were sought for use in parallel litigation. And no information could be found to support the concerns reflected in the suggested legislation — that protective orders were defeating access to information needed to avert threats to the public interest, including public health and safety.

Sunshine in Litigation bills continue to be introduced. This evidence of Congressional concern is of itself good reason to take up the question again. The Committee cannot be satisfied that circumstances have not changed without undertaking further inquiry.

Initial efforts seem to reconfirm the conclusions drawn more than ten years ago. Andrea Kuperman has done a broad study of the case law that shows diligent application of the good-cause requirement, particular awareness of the need for public access to all materials filed with the court for substantive use in an action, and receptive understanding of the reasons for modifying or dissolving protective orders.

Still, reasons to inquire further persist. The language of Rule 26(c) seems somewhat antiquated, focusing more on commercially valuable information than on the common use of protective orders to shield personal privacy, medical records, mental health records, and like personal information. The rule does not expressly provide a procedure for modifying or dissolving protective orders — an omission that may be particularly perplexing when nonparties seek relief. And although continued hearings on proposed legislation have failed to produce even persuasive anecdotal evidence of protective orders that thwart access to information important to the public interest, reassurance should be sought on this score as well.

It will remain important to recognize the vital interests served by protective orders. Intrinsically, they provide necessary limits on the expansion of discovery beyond the needs of the litigation that supports it. Functionally, they enable discovery to proceed with more party control and less need for constant judicial supervision. It is not clear that any proposals to amend Rule 26(c) will emerge from renewed study. But the project will be pursued.

Rule 45: Subpoenas

The Discovery Subcommittee has been studying Rule 45 for some time. An outline of the current issues suffices to carry forward earlier reports to this Committee and to give a sense of probable future directions. The extensive discussion at the October Advisory Committee meeting is summarized in the draft minutes. Depending on decisions that remain open, it may be that proposals will be brought to this Committee in June with a recommendation to publish for comment.

Four main topics have advanced to the stage of drafting recommendations by the Subcommittee. The first three have been well developed by Subcommittee work and Committee discussion. The fourth is broader, and may present greater challenges.

Notice of document discovery subpoenas is one topic. The last sentence of Rule 45(b)(1) directs that notice must be served on each party before serving a subpoena demanding the production of documents and similar materials. The direction is clear, but there are indications that the location is not — that some lawyers fail to give notice because they simply overlook this

provision. That problem might be remedied by moving the notice requirement to a more prominent place in Rule 45(a). A related question asks whether some minimum advance notice period should be set — perhaps three days, or seven days — to support the opportunity of other parties to object, to request broadening the subpoena to include additional materials, and to monitor compliance. Beyond this initial notice, it also may be desirable to direct the party who served the subpoena to notify other parties when materials are produced. The notice might be a simple statement that materials have been produced, or it might be required to provide some description of what has been produced. Finally, thought should be given to the question of sanctions for failing to provide notice. It is not clear that the rule should address sanctions at all, nor what sanctions might be provided, on what terms.

Rule 45(c)(3)(A)(ii) says that a court must quash or modify a subpoena that "requires a person who is neither a party nor a party's officer to travel more than 100 miles," except that a subpoena to attend a trial may command travel from a place within the state. Some courts have found a negative implication that a party or a party's officer may be commanded to travel to a trial from anywhere in the United States. Other courts have rejected this interpretation, relying on the provisions of Rule 45(b)(2) describing the places where a subpoena may be served. The competing interpretations of the present rule provide strong reason to draft a clear rule. But it remains to decide what the clear rule should be — a party or party's officer is routinely subject to a nationwide trial subpoena; such subpoenas are never authorized; or such subpoenas may be authorized in the trial court's discretion — perhaps as informed by criteria listed in the rule.

A third common problem arises when ancillary discovery proceedings are initiated in a court other than the court where the action is pending. Disputes about the discovery may be better resolved by the court in charge of the main action — it is familiar with the issues and many of the factors that may inform the discovery ruling; it can establish uniform disposition of issues that may arise in several courts supervising discovery in a single case; it alone can integrate the problems into an effective case management plan. The ancillary discovery court, moreover, may be faced with heavy burdens in acquiring a duplicate familiarity with the action and in learning enough about ongoing case management to integrate its rulings with overall progress in the case. It may be understandably reluctant to invest much time in an action that is not its own. At the same time, there may be strong reasons to keep some disputes in the ancillary discovery court. A nonparty subject to a subpoena may have little inclination and scant resources for travel to a distant court. Some grounds for protecting the nonparty may be better resolved in the ancillary court, the scene of the contended discovery. The Subcommittee is working on a discretionary model that permits the ancillary court to transfer or "remit" the dispute to the main-action court, but establishes constraints sufficient to protect against routine dumping of bothersome disputes.

The fourth question is more difficult. Many observers believe that Rule 45 is unnecessarily complex. They point to such features as the direction in Rule 45(a)(1)(A)(iv) that the subpoena set out the text of Rule 45(c) and (d). Even lawyers find challenges in reading those subdivisions, and it is unrealistic to believe that an ordinary person served with a subpoena would be able to unravel the protections and obligations they provide. The rule might be improved by rebuilding it around three functions: identify the court where the action is pending as the court that issues the subpoena; identify the place where performance of subpoena obligations should occur; and identify the court that enforces compliance. Completely rebuilding Rule 45 will be a complex task, but there is sufficient interest that the Subcommittee will consider this possibility.

Two other questions may be put aside unless further inquiry shows there are persistent problems in practice. One is whether something more should be done about allocating the costs of complying with a subpoena. Rule 45(c)(2)(B)(ii) provides that if there is an objection, an order to produce documents must protect a person who is neither a party nor a party's officer from significant expense. Some issues recur: does the expense of compliance include fees for attorney review? Should the party who served the subpoena be protected against high and unexpected demands for reimbursement? The other is whether to authorize additional means of serving subpoenas. Rule 45(b)(1) directs that service "requires delivering a copy to the named

person." Most courts read this to require in-hand service. It is occasionally suggested that any of the Rule 4 methods of serving a summons and complaint should be available to serve a subpoena. Although these questions are interesting, they seem to be worked out by the parties in most cases. The Subcommittee has not abandoned further consideration, but does not seem likely to advance any recommendations for change.

Appellate-Civil Rules Interaction

The Appellate and Civil Rules Committees have formed a joint subcommittee to consider issues that intersect both sets of rules. The Committee considered a proposal to amend Civil Rule 58 to clarify the circumstances that require entry of a new judgment by a separate document on disposing of a motion that, under Appellate Rule 4, suspends appeal time. The Committee decided to defer final action pending formulation of parallel revisions of Rule 4. The Committee also agreed to entertain future recommendations of the subcommittee, which will soon take up the problems of "manufactured finality."